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## The Emerging Federal Class Actions Brand

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# THE EMERGING FEDERAL CLASS ACTION BRAND

JOHN C. MASSARO\*

*Class actions raise a fundamental question about our judicial system. Is the purpose first and foremost to achieve a societally-desired level of law enforcement and deterrence, or is the primary goal to foster citizen participation in the resolution of private disputes? This Article provides the first extended analysis of this question in light of five recent Supreme Court decisions regarding class actions, the evolution of legislative initiatives in the area, and the docket activity in sixteen of the largest recent federal securities class actions. A single conclusion follows: we are witnessing the emergence of a new national “brand” of class action litigation grounded in the protection and growth of individual participatory rights.*

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The brand displaces decades of state and lower court experimentation in favor of a uniform national standard emphasizing factual specificity, informed choice, and citizen participation. Absent class members will be absent no more with courts more often permitting discovery of their circumstances and implementing procedures to respect and encourage their informed participation in litigation decisions. This Article explores these and other ways in which the emergence of the federal brand has important and previously unexplored implications for the day-to-day conduct of class action litigation.

#### I. INTRODUCTION

Born of the 1966 amendments to Rule 23, the modern class action is now in middle age. For four decades state and lower federal courts grappled with competing visions of what a class action is, what purposes it serves, and how it will interact with its older and more established relatives in the rules of civil procedure. That era of unbounded experimentation is over. In recent years, Congress and the Supreme Court have begun to build a national “brand” for class action litigation. The foundational values of this structure are the protection and enhancement of individual participatory rights. In the longstanding debate between those who view the class action as a means for amalgamating and then resolving many individual claims and those who view the device as serving societal purposes that transcend the interests of the particular individuals within the class, we at last have a winner.

While class actions remain an area of national focus and controversy, the victory for the forces of individual participatory rights has gone largely unnoticed. This is because the victory has come to us in the disguised form of two large trends marking the class action field in recent years. The first is nationalization. Building on the model developed in the late 1990’s in the context of securities class actions, Congress through the 2005 enactment of the Class Action Fairness Act (“CAFA”) and the courts in more recent decisions have moved dramatically toward removal of class action practice from the state laboratories of experimentation into the more uniform system of the federal courts. In Part II, after briefly discussing Rule 23, I trace the contours of this trend.

Potentially in tension with this trend is what happens once the cases are in their federal fora. At the district court level, we do not overwhelmingly see so-called “activist” judges using Rule 23 to mold society to meet their vision; rather the norm is more passive proceedings in which federal judges appear to leave litigants alone to reach a consensual result that is presumably in the narrow interests of the private parties. Meanwhile, at the appellate level recent cases arguably have the effect of curtailing the circumstances under which Rule 23 can be used as a simple solution to national litigation problems. In Part III, I examine a sample of federal court dockets and discuss three cases from the Supreme Court’s 2010-2011 term. My conclusion is that the trend toward nationalization discussed in Part II is coupled with a pattern that some might describe as neglecting Rule 23’s potential once the cases are in the federal system.

What does this mean? In Part IV, I drill down to the foundational principles that underlie these two trends. My conclusion is that the two trends grow out of one fundamental vision of what class actions are and are meant to be—the individual participatory rights vision. Once one accepts this, the facts comprising the two trends take on a new light, and we can see what they are really telling us about the contours of the developing federal brand of class actions. The most extreme forms of aggregate proof are now foreclosed and other approaches such as the use of statistics, presumptions, and expert testimony will require supplementation with more fact-bound inquiries. Absent class members will participate more in the litigation and its resolution. Expect judges to be more involved in setting the litigation table by determining at an early stage whether claims have substance independent of the rules, selecting class counsel and representatives, and determining whether certification is called for and, if so, the specific contours of the class.

Implementing this national branding project will not be easy. Fostering individual participation never is. Elections can seem crass, time consuming, and expensive. Many do not vote and some that do are uninformed or make choices we consider unwise. It would be easier to choose our officials based on statistically valid polls or the advice of experts who are familiar with the issues and the strengths and weaknesses of each candidate. But we do not. For the elected branches of our government, we believe that individual participation produces better substantive outcomes and that the participation is valuable, indeed critical, as an end in itself. That same participation has historically marked the proceedings in our third branch of government where individual litigants are the real players and unelected judges play an umpireal role. After a period of experimentation in which the relative role of individual participatory rights was open to question in the class action context, Rule 23 is now ready to play an important role in fostering individual participation in the resolution of large-scale disputes.

## II. NATIONALIZATION

### A. *Rule 23*

A brief discussion of Rule 23, the federal class action rule, is in order. While originally adopted in 1938, the Rule acquired the essence of its modern form with the 1966 Amendments to the Federal Rules of Civil Procedure.<sup>1</sup> In its current incarnation, Rule 23 contains two subparts addressing the standards for class certification. All classes must meet the requirements of Rule 23(a). Rule 23(b) then identifies several different kinds of potential classes and elucidates additional prerequisites to certification for each different kind of class.

The general requirements set forth in Rule 23(a) are that: members of the class be sufficiently numerous to render joinder impracticable (the “numerosity” requirement); questions of law or fact be common to the class (the “commonality” requirement); claims or defenses of the representative parties be typical of those of

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<sup>1</sup> See FED. R. CIV. P. 23. The general concept of class actions was first codified in 1849 when several states adopted the Field Code. See S. REP. NO. 109-14 at 5; CAFA Legislative History at 5. For discussion of the common law origins of the class action see Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

the class as a whole (the “typicality” requirement); and the class representatives will fairly and adequately protect the interests of the class (the “adequacy” requirement).

Under Rule 23(b) there are at least four different kinds of class actions. Rule 23(b)(1)(A) class actions occur where prosecuting separate actions would create a risk of inconsistent adjudications with respect to individual class members and would establish incompatible standards of conduct for the party opposing the class. Rule 23(b)(1)(B) class actions occur where adjudications as to one class member may be dispositive of claims of other class members—so-called “limited fund” cases are the paradigmatic example. Rule 23(b)(2) class actions occur where the defendant has acted in a manner that applies generally to the class so that declaratory or injunctive relief for the whole class is sought. And Rule 23(b)(3) class actions—usually for money damages – occur where question of law or fact common to the class members predominate over any questions affecting only individual members. Rule 23 also contains details about the process of certification, selection of lead counsel and class representatives, the conduct of the action more generally, and the evaluation of settlement by the district judge.

At least two other frequently-used categorizations of class actions are worthy of mention. First, class actions certified under Rule 23(b)(1) or (b)(2) are frequently referred to as “mandatory” classes because the Rule does not afford class members the opportunity to opt out of such classes; class actions certified under Rule 23(b)(3), by contrast, are “voluntary” in the sense that class members may opt out of the class and direct their individual claims in whatever manner they choose. Second, voluntary class actions are sometimes themselves sliced into two varieties. “Negative value” class actions are those for which the costs of pursuing the typical individual claim exceed the expected benefits of the claim – rendering it more unlikely that such claims would occur in the absence of class status. “Positive value” class actions, by contrast, are those in which the expected reward from individual claims exceeds the expected costs, rendering pursuit of claims on an individual basis more likely.

#### *B. National Experiment For Securities Class Actions*

One substantial and longstanding area of class action practice is securities law. The federal securities laws have been interpreted as contemplating a private right of action in a variety of contexts including, for example, when a defendant knowingly makes a false or misleading statement which the market relies upon in setting a price for secondary transactions between shareholders.<sup>2</sup> Because there can be millions of shares damaged by the alleged misstatements, each with a damage of only a few dollars, many securities actions could not economically be brought at all on an individual basis. Use of Rule 23 solved this problem.

But it also created problems of its own. In at least some cases, securities class action lawsuits would be filed instantly upon the drop in the price of a company’s stock.<sup>3</sup> The philosophy was to make the accusation first and then use the discovery process to develop any evidence that might exist.<sup>4</sup> Counsel who proceeded furthest

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<sup>2</sup> See, e.g., *Basic v. Levinson*, 485 U.S. 224, 230-31 (1985).

<sup>3</sup> See S. REP. NO. 104-98, 104<sup>th</sup> Congress, 1<sup>st</sup> Sess. 1995, *reprinted in* 1995 U.S.C.C.A.N. 679, 683.

<sup>4</sup> *Id.* at 693.

with his case stood the greatest chance of having a claim to any settlement proceeds. Class actions, as expected, produced an incentive to litigate; the fear by some, however, was that the incentive was too great and that Rule 23 itself did not provide sufficient controls on the conduct of the litigation.<sup>5</sup>

In response to certain of these concerns, in 1995 Congress passed, and subsequently overrode President Clinton's veto of, the Private Securities Litigation Reform Act ("PSLRA").<sup>6</sup> The PSLRA reflected an effort to systematize and homogenize the experience of federal securities class actions. Replacing races to the courthouse and separate proceedings in multiple jurisdictions, the PSLRA provided for a more structured beginning to the litigation. Following filing of the complaint, the plaintiff must publish a "widely circulated" notice and description of the action, and solicit interested class members to apply for appointment as lead plaintiff within sixty days of the notice.<sup>7</sup> The Court must make an early determination regarding consolidation of any separately-filed actions and, thereafter, appoint lead plaintiff and lead counsel, using statutorily-specified criteria to guide its determination.<sup>8</sup> A dominant factor in the analysis is the degree of economic interest of the competing parties; the greater a plaintiff's economic interest in the litigation, the more likely that plaintiff will be selected as lead plaintiff.<sup>9</sup> Rather than individuals, who were thought by some to be within the control of the lawyers in the initiation and prosecution of the litigation, large institutions such as pension funds are now frequently selected as lead plaintiff.

As a matter of practice, this means that following its appointment, lead plaintiff files a consolidated amended complaint which is the true initiation of the litigation. The PSLRA made this job more difficult for lead plaintiff. Notice pleading is ruled out; the complaint is subject to dismissal unless it meets a heightened pleading standard. Specifically, the complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation ... is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed."<sup>10</sup> In any action where knowledge or intent is an element, the complaint must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."<sup>11</sup> Effectively giving this standard real teeth, the PSLRA also imposes a discovery stay; in most instances, no discovery is permitted until the court has determined on a motion to dismiss that plaintiff's complaint meets these pleading requirements.<sup>12</sup>

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<sup>5</sup> See generally *id.*; see also H.R. REP. NO. 104-369 (1995) (Conf. Rep.), reprinted in 1995 U.S.C.C.A.N. 730.

<sup>6</sup> 15 U.S.C. § 78u-4 (2011).

<sup>7</sup> *Id.* at (a)(3)(A)(i)(II).

<sup>8</sup> *Id.* at (a)(3)(B).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at (b)(1).

<sup>11</sup> *Id.* at (b)(2).

<sup>12</sup> *Id.* at (b)(3)(B).

The PSLRA centralized federal securities class actions in a single forum and brought more order to the conduct of the litigation. Many plaintiffs responded by filing actions in state court alleging violations of state securities laws.<sup>13</sup> In 1998 Congress responded by passing the Securities Litigation Uniform Standards Act (“SLUSA”).<sup>14</sup> SLUSA effectively preempts state securities laws when it comes to “covered class actions.”<sup>15</sup> For many securities class actions or other devices approximating class actions, federal claims are now the only claims a private party has. Relatedly, SLUSA provides for removal from state court to federal court of covered class actions alleging violations of federal law.<sup>16</sup> This does not entirely remove state courts from the business of adjudicating securities class actions but it goes a long way toward that result.

The before and after comparison is stark. Before the PSLRA in 1995, for any given set of facts allegedly constituting a violation of federal and state securities laws, class actions might be filed and proceed for at least some time in multiple federal district courts and multiple state courts at once. Guiding these courts were their own individual interpretations of the relevant substantive securities law as well as their individual interpretations of Rule 23 or its state analogue. After SLUSA was passed in 1998, we have a centralized system in which state law has been preempted for purposes of most securities class actions, and in which all class action litigation arising out of any particular alleged violation of the securities laws is conducted before a single federal judge, effectively applying a modified version of the federal rules of civil procedure governing pleading standards, motions to dismiss, discovery, and, of course, the conduct of class litigation. The practice has been nationalized and centralized.

### C. Broadening The National Experiment

Soon after passage of the PSLRA, efforts began to enact comparable provisions applicable to all class actions.<sup>17</sup> After years of wrangling, Congress passed and the President signed into law the Class Action Fairness Act of 2005 (“CAFA”).<sup>18</sup> CAFA contains a class action bill of rights with multiple components including restrictions on coupon settlements, guidance regarding the award of fees to class counsel, and a requirement that state and federal officials be informed of any proposed class action

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<sup>13</sup> See S. REP. NO. 105-803 (1998) (Conf. Rep.) (accompanying S. 1260, Securities Litigation Uniform Standards Act of 1998, and discussing Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995, U.S. Securities and Exchange Commission, Office of the General Counsel, April 1997 at 61 and related materials).

<sup>14</sup> See Securities Litigation Uniform Standards Act of 1998, PUB. L. NO. 105-353 § 2(2)-(3), 112 Stat. 3227, 3227, Findings.

<sup>15</sup> See *id.* § 101, 3227-3228.

<sup>16</sup> *Id.*

<sup>17</sup> As early as October 30, 1997, a Senate Committee convened a hearing on what was later introduced as “The Class Action Fairness Act of 1997.” S. REP. NO. 109-14, at 1-2 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 3-4; Arnold & Porter LLP Legislative History P.L. 109-2 at 1.

<sup>18</sup> Class Action Fairness Act of 2005, PUB. L. NO. 109-2, 119 Stat. 4; codified at 28 U.S.C. § 1332(d); 28 U.S.C. § 1711; 28 U.S.C. § 1446(b); 28 U.S.C. § 1453; 28 U.S.C. § 1453.

settlement prior to final approval in case they wish to weigh-in regarding the settlement.<sup>19</sup> Congress also directed the Judicial Conference of the United States to conduct reviews of class action settlements and attorneys' fees and present Congress with recommendations regarding methods of ensuring that fees are appropriate.<sup>20</sup>

The most notable aspect of CAFA involves its expansion of federal court jurisdiction. In the absence of CAFA, a state-law class action generally cannot be filed in or removed to federal court unless at least one member of the class has a claim exceeding the \$75,000 jurisdictional amount requirement and there is complete diversity between all named plaintiffs and all defendants.<sup>21</sup> Removal requires additionally that all defendants consent to removal, that no defendant be a citizen of the state in which the action is pending, and that the removing party comply with a one year time limitation on removal.<sup>22</sup>

For most private party class actions, CAFA changes this. The amount in controversy requirement is now met if the total aggregated amount of all claims exceeds \$5 million, and minimal diversity—rather than complete diversity—of the parties is all that is needed.<sup>23</sup> In addition, the requirement that all defendants consent to removal has been eliminated as has the prohibition on removal for in-state defendants and the absolute one year limitation period.<sup>24</sup> In order to ensure that the law is implemented regularly and uniformly, CAFA also provides – contrary to prior practice – for discretionary appeals within the federal system for orders granting or denying remand to state court.<sup>25</sup>

The long and short is that CAFA ensures that a large part of the nation's class action practice occurs in federal courts. CAFA deals purely with the "procedural" subject of class actions. Unlike the PSLRA and SLUSA, it is not limited to any particular area of federal law. Indeed, it is not limited to—or even really about—federal substantive law at all. For actions under federal law there was already original and removal jurisdiction; CAFA effectively deals with diversity jurisdiction and, more bluntly, state law. It reflects a determination by Congress that private class actions seeking damages under state law should in general proceed in the federal courts if any party to the litigation would prefer that result.

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<sup>19</sup> 28 U.S.C. § 1711(2011).

<sup>20</sup> *Id.*

<sup>21</sup> 28 U.S.C. § 1332 (2011); 28 U.S.C. § 1446 (2011). Shortly after enactment of CAFA, the Supreme Court fixed the law on the former point by confirming that supplemental jurisdiction existed over other class members' claims if a single class member satisfied the amount in controversy requirement, but only if there is complete diversity. *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 559 (2005).

<sup>22</sup> 28 U.S.C. § 1446 (2011).

<sup>23</sup> 28 U.S.C. § 1332(d) (2011).

<sup>24</sup> 28 U.S.C. §§ 1332(d) (providing original jurisdiction and thereby rendering the in-state requirement of 28 U.S.C. § 1441(b) inapplicable); 1446(b) (making clear that prohibition on removal more than one year after filing does not apply to class actions); 1453 (consent of all defendants not required).

<sup>25</sup> 28 U.S.C. § 1453(c) (replacing, in the class action context, the general prohibition on appellate review within the federal system of remand orders as set forth in 28 U.S.C. § 1447(d)).

*D. Supreme Court Decisions Further Nationalizing Rule 23*

1. *Shady Grove*

Recent court decisions further reflect this nationalizing trend. In *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*,<sup>26</sup> the Supreme Court confronted a New York statute providing that actions for penalties or statutory damages “may not be maintained as a class action.”<sup>27</sup> There, Shady Grove filed a punitive class action under New York state law alleging that Allstate routinely failed to pay statutory interest penalties on overdue amounts insurance benefits.<sup>28</sup> The action was a diversity suit in federal court. The district court dismissed because the individual claim did not meet the amount-in-controversy requirement and no class could be maintained due to the New York statutory prohibition on class actions for penalties and statutory damages. The Second Circuit affirmed.

In reversing, the Supreme Court spoke broadly about the scope of both Rule 23 and the Rules Enabling Act (“REA”)<sup>29</sup> from which that Rule sprang. According to the majority, Rule 23 “creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.”<sup>30</sup> Reasoned the Court:

There is no reason . . . to read Rule 23 as addressing only whether claims made eligible for class treatment by some other law should be certified as class actions. Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court to certify a class in each and every case where the Rule’s criteria are met. But that is exactly what Rule 23 does . . .<sup>31</sup>

A majority of the Court recognized that this broad interpretation of Rule 23 placed the Rule squarely in conflict with New York’s statute limiting the availability of class actions in certain contexts and therefore required an analysis of whether Rule 23 was properly authorized under the REA.<sup>32</sup> The REA, which authorizes the Supreme Court to promulgate rules of procedure subject to Congressional review, admonishes that any such rules “shall not abridge, enlarge or modify any existing substantive right.”<sup>33</sup> Five justices found that Rule 23, broadly interpreted as described above, as applied to the New York statute did not abridge, enlarge or modify any existing substantive right.<sup>34</sup> Noting that “we have rejected every

<sup>26</sup> *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

<sup>27</sup> The act provides that, with certain exceptions, “an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.” *Id.* at 1431 (quoting N.Y. CIV. PRAC. LAW ANN. § 901(b) (West 2006)).

<sup>28</sup> *Shady Grove*, 130 S. Ct. at 1436.

<sup>29</sup> 28 U.S.C. § 2072(a).

<sup>30</sup> *Shady Grove*, 130 S. Ct. at 1437; *see also id.* at 1443 (“Rule 23 unambiguously authorizes any plaintiff, in any federal civil proceeding, to maintain a class action if the Rule’s prerequisites are met.”) (plurality opinion).

<sup>31</sup> *Id.* at 1438 (citations and internal quotation marks omitted).

<sup>32</sup> *Id.* at 1443.

<sup>33</sup> 28 U.S.C. § 2072(b).

<sup>34</sup> *Shady Grove*, 130 S.Ct. at 1442 (Scalia, J.); *accord* at 1448 (Stevens, J., concurring).

statutory challenge to a Federal Rule that has come before us,”<sup>35</sup> Justice Scalia put it this way for himself and three of his colleagues:

A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged.<sup>36</sup>

To be sure, the *Shady Grove* court limited its holding in a number of important ways.<sup>37</sup> However, both the result and the reasoning used to reach that result speak volumes about how muscular Rule 23 has become. The cause of action in *Shady Grove* was state-created, and the remedies in question were products of New York statutory law. Effectively striking a balance between concerns about over-deterrence and under-deterrence, the state of New York concluded that these remedies of its own creation were properly enforced only in the specific context of individual actions and not in the context of class actions.<sup>38</sup> Notwithstanding this, New York’s determination with regard to the proper scope of its own legislatively-created remedies was effectively nullified by Rule 23—a supposedly procedural rule adopted by the Supreme Court on the recommendation of an Advisory Committee.<sup>39</sup>

The significance of this outcome is further magnified when one considers its interplay with CAFA. Virtually all plaintiffs seeking remedies under the New York statute will have the ability to plead their cause of action in such a way as to invoke federal jurisdiction under CAFA. Having done so, those plaintiffs now have the power under *Shady Grove* to avoid New York’s prohibition on class action proceedings seeking statutory or punitive remedies.<sup>40</sup>

Nor is there any reason to believe that the prerequisites for class action status currently contained within Rule 23 play any necessary limiting role. Based on the logic and language of *Shady Grove*, if the Advisory Committee were to recommend

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<sup>35</sup> *Id.* at 1442.

<sup>36</sup> *Id.* at 1443. The fifth member of the *Shady Grove* majority, Justice Stevens, did not join in this section of the opinion but reached the same conclusion based on differently worded reasoning. *See id.* at 1448 (Stevens, J., concurring). In essence, rather than viewing the beginning and end of the inquiry to be whether Rule 23 really governs procedure, Justice Stevens advocated looking to the state law in question to determine whether it, in context, “actually is part of a State’s framework of substantive rights or remedies.” *Id.* at 1449.

<sup>37</sup> For example, the Court expressly reserved for another day the permissibility of state laws that, while allowing an action to proceed as a class action, set a ceiling on damages recoverable in a single suit. *Id.* at 1439 n.4.

<sup>38</sup> *See id.* at 1440 (discussing legislative history and purpose of the New York statute).

<sup>39</sup> *See, e.g.,* Jeffrey L. Rensberger, *Hanna’s Unruly Family: An Opinion for Shady Grove Orthopedic Associates v. Allstate Insurance*, 44 CREIGHTON L. REV. 89, 104 (2010) (“The federal interest in substantive claim vindication does not extend to causes of action created by state law. . . . New York has spoken to limit the ability of plaintiffs to vindicate the rights to statutory remedies. Federal courts sitting in diversity should not be more New Yorker than New York.”).

<sup>40</sup> *See* Patrick Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 32, 41 (2010).

and the Supreme Court were to adopt changes to Rule 23 to eliminate the prerequisites to class certification and permit certification in literally every case, the New York legislature would still be without power to restrict that outcome in cases involving New York statutory remedies. Indeed, the plurality of four justices whose views were voiced by Justice Scalia would seemingly go further and allow Rule 23 to be amended, in seeming contravention of the REA, so as to abridge, enlarge, or modify an existing substantive right so long as the Rule continues to “really regulate procedure—the judicial process for enforcing rights and duties recognized by substantive law.”<sup>41</sup>

*Shady Grove* establishes three propositions: (1) Rule 23 “creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action”; (2) Rule 23 does not “abridge, enlarge or modify any existing substantive right”; and (3) as a result of the foregoing, states have limited power to regulate the degree of enforcement of their own state-created causes of action and remedies through the federal class action mechanism.<sup>42</sup> Each of these three propositions is in fact subject to serious question.

As to the first, there is nothing about the text or history of Rule 23 which decrees that all causes of action are, by definition, within its ambit in some unalterable way. The Rule states that a class action “may” be maintained if criteria are met—not that it “shall” be.<sup>43</sup> And, as Allstate pointed out, Congress has taken actions similar to those taken by the New York legislature without indicating that it believed it was altering Rule 23 itself.<sup>44</sup> Similarly, with respect to the second proposition established by *Shady Grove*, any outside observer comparing a world with class actions to one without them would likely reach the conclusion that the introduction of Rule 23 did abridge, enlarge or modify existing substantive rights. Some of Rule 23’s greatest supporters cite this as the very reason for their support. Even the plurality opinion effectively agreed that its analysis likely “gives short shrift to th[is] statutory text” contained in the REA.<sup>45</sup> But that statutory barrier was ignored in

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<sup>41</sup> *Shady Grove*, 130 S.Ct. at 1442.

<sup>42</sup> To be sure, lawyers continue to argue about the extent of that state power. For one thing, the question the court reserved, *see Shady Grove*, *supra* n. 37, remains one potential indirect avenue for attempting to curtail Rule 23. And, lawyers eager to uphold and rely upon the truly extensive patchwork of state laws akin to that involved in *Shady Grove* have used the difference between the approach taken by Justice Stevens in his concurrence, *see Shady Grove*, *supra* n. 36, and that taken by the plurality to argue that the narrower approach (Justice Stevens’ approach) should govern. Where lower courts have been persuaded on this point, they have adopted an interpretation of Rule 23 that does not preempt the state law in question. *See* Jack E. Pace III and Rachel J. Feldman, *From Shady to Dark: One Year Later, Shady Grove’s Meaning Remains Unclear*, 25 SPG ANTITRUST 75, 75-77 (2011). The long-term compatibility of this approach with *Shady Grove* remains an open question however, in part because it likely involves determining that Rule 23 as applied in specific circumstances violates the REA, something that, as Justice Scalia pointed out, is unprecedented in Supreme Court jurisprudence. *See* Burbank and Wolff, *infra* n. 47, (arguing for an approach similar to Justice Stevens’ but implicitly acknowledging that the approach is in conflict with the direction the Court is taking).

<sup>43</sup> FED. R. CIV. P. 23.

<sup>44</sup> *Shady Grove*, S.Ct. at 1438; *accord* at 1460 (Ginsburg, J., dissenting).

<sup>45</sup> *Id.* at 1446.

favor of “decades-old” practice and decisions upholding the validity of the Federal Rules of Civil Procedure.<sup>46</sup> Finally, as to the third proposition, as discussed below in Section II.E, the federalism concerns are worthy of serious consideration at the very least.<sup>47</sup>

The point here is not to argue against the result or reasoning of *Shady Grove*. But the decision locked in propositions that should have been controversial at best. And the propositions, each in their own right and certainly in combination with each other, yield a significantly different legal landscape than would be the case if the propositions were qualified or rejected in their entirety.<sup>48</sup> The case matters. Yet, the decision produced a limited dissent and minimal outcry.<sup>49</sup> Federal class actions have become so deeply entrenched in the psyche of American lawyers and citizens that it is those who seek to stem the increasing use of the device, as the New York legislature attempted to do, that bear the burden of persuasion and when, as in *Shady Grove*, their reach is expanded or solidified the event passes largely without remark.

The bottom line: it is still the case, presumably, that states can choose to eliminate causes of action in their entirety or not to create them in the first place; but, once a state chooses to create a cause of action or a remedy, it has limited, if any, power to restrict any party’s ability to litigate that matter in a federal class action. Rule 23—and by extension its creators on the Advisory Committee and United States Supreme Court—is firmly in charge of that question.

## 2. *Halliburton*

While the muted nature of the disagreement inspired by *Shady Grove*’s seemingly expansive conclusions and reasoning is telling, perhaps more telling still was the lack of any discernable reaction to one aspect of the unanimous Court’s reasoning this term in *Erica P. John Fund, Inc. v. Halliburton Co.*<sup>50</sup> The issue before the Court was whether or not plaintiffs in a federal securities fraud action must establish loss causation—the revelation of the fraud causing a drop in the price of the securities held by plaintiffs—in order to secure class certification. Nine

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<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., Stephen B. Burbank and Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 67 (2010).

<sup>48</sup> See, e.g., John B. Oakley, *Illuminating Shady Grove: A General Approach to Resolving Erie Problems*, 44 CREIGHTON L. REV. 79, 84-85 (2010) (adopting the more qualified approach of permitting states to regulate the degree to which state-created causes of action can be brought as class actions where “state practice—the way things are done in state court when adjudicating a particular issue—is ‘bound up with’ or ‘an integral part of’ the way in which ‘state-created rights and obligations’ were defined by state courts. . . .”) (citing *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525, 535-36 (1958)); Ralph Whitten, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: Justice Whitten, Nagging in Part and Declaring a Pox on All Houses*, 44 CREIGHTON L. REV. 115, 137-39 (2010) (also adopting an approach based on *Byrd* and *Burlington Northern*).

<sup>49</sup> See Linda Mullenix, *Federal Class Actions: A Near-Death Experience in a Shady Grove*, 79 GEO. WASH. L. REV. 448, 479, 481 (2011) (describing *Shady Grove* as “a classic sleeper case that failed to command the attention of the media and the broader public” but that has “provid[ed] law professors with a great teaching case and new generations of law students with continued Erie angst.”).

<sup>50</sup> *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179 (2011).

justices agreed that Rule 23 and the federal securities laws impose no such requirement. This result should have surprised no one who practices regularly in the area. The chosen path to this relatively non-controversial result, however, passed through treacherous terrain.

Essential to the reasoning chosen by the Court was a discussion of the so-called “fraud-on-the-market” presumption. That rule—blessed by the Supreme Court for the first time in *Basic Inc. v. Levinson*<sup>51</sup> holds that plaintiffs in a securities fraud case do not bear the burden of proving their own individual reliance on the misstatement allegedly made by the defendant.<sup>52</sup> Rather, reliance is presumed on the basis of two other presumptions: (a) that plaintiffs relied upon the validity of the market price for a security; and (b) that the market price reflected the broader market’s awareness of and reliance upon the defendant’s misstatement.<sup>53</sup> According to *Halliburton*, the basis of *Basic* was the observation that “requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would prevent such plaintiffs from proceeding with a class action, since individual issues would overwhelm the common ones.”<sup>54</sup> The *Basic* Court, according to *Halliburton*, was motivated by an effort to alleviate that concern.<sup>55</sup> This characterization of *Basic* provided unspoken support for the outcome in *Halliburton* – if the entire premise of *Basic* was to vindicate the supposed purposes of Rule 23 by ensuring that securities class actions are certified more frequently, then requiring plaintiffs to prove loss causation in order to secure class certification is in obvious tension with that thrust. A more permissive approach toward class certification – such as that adopted by the Court in *Halliburton*—is more consistent with this policy rationale.

But the policy rationale is persuasive only to one who accepts a particular vision of Rule 23. In both *Basic* and *Halliburton*, all parties agreed that the Congressional statute and related SEC rule in question require plaintiffs to establish reliance as one of the elements of their cause of action.<sup>56</sup> Under the policy rationale, however, requiring plaintiffs to prove this fact in individual cases would interpose a severe impediment to class certification. According to *Halliburton*’s own brazen admission, the otherwise-applicable requirements for proving an element of the cause of action were therefore altered so as to make class actions under Rule 23 more feasible. In other words, under this approach, Rule 23 is deemed to stand on almost equal footing with the Securities and Exchange Act enacted by Congress and the rules implementing that act. Each informs the other and needs to co-exist with the other. If rigid insistence on adherence to the elements required by Congress would tread too heavily into the territory of Rule 23, a compromise must be reached and, in this case, perhaps the very elements of the underlying cause of action itself must be harmonized with the strictures of Rule 23.

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<sup>51</sup> *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

<sup>52</sup> *Id.* at 250.

<sup>53</sup> *Id.* at 243-44.

<sup>54</sup> *Halliburton*, 131 S. Ct. at 243 (citations and internal quotation marks omitted).

<sup>55</sup> *Id.*

<sup>56</sup> *Basic*, 485 U.S. at 243; *Halliburton*, No. 09-1403, at slip op. 4.

To be sure, there is good reason to believe that a unanimous Supreme Court would not apply the proposition to every case of potential conflict between Rule 23 and federal or state statutes.<sup>57</sup> Yet a unanimous Supreme Court did go out of its way to characterize—and then endorse—*Basic* as establishing essentially that vision of Rule 23. And the Court did so, presumably, because it believed that this policy argument enhanced the persuasiveness of its opinion.

#### E. Constitutional Issues

Nationalization of class action practice raises constitutional concerns. The trendline from the PSLRA to CAFA to *Shady Grove* and *Halliburton* illustrates several of these concerns.

First, there is federalism. What began with the PSLRA as a change in the pleading standards and Rule 23 standards as applied to a specific kind of class action filed under federal law evolved into SLUSA's preemption of state law in that same substantive area and then, with CAFA, into a provision for federal jurisdiction whenever a plaintiff invokes a particular procedural rule—regardless of what substantive area of the law is involved. That Congress would provide federal court jurisdiction, and even exclusive federal court jurisdiction, as a way of “protecting” its federal legislative schemes in particular areas is a non-controversial core area of federal courts practice.<sup>58</sup> By contrast, provision of federal jurisdiction whenever a party chooses to invoke joinder, for example, or if a party seeks to take more than twenty depositions in a case, is more novel.<sup>59</sup> Just as federal courts under *Erie*<sup>60</sup> and the REA are generally permitted to develop their own procedural rules but must observe state substantive law, states have traditionally been given latitude to develop their own state court rules of procedure so long as those rules do not impede substantive federal rights. CAFA explicitly threatens this compromise, at least in the realm of Rule 23, by curtailing the ability of states to develop their own analogues to Rule 23.

Separate and apart from the presumption that states should be able to develop their own procedural law absent some reason to the contrary, there is the limitation on federal court adjudication of state substantive law. Many believe that the diversity head of jurisdiction in Article III Section 2 is the most questionable and least muscular of the nine heads of jurisdiction.<sup>61</sup> A case can be made that, at the very least, any granting of jurisdiction under this head must be “necessary and proper” to the specific objectives which motivated the inclusion of diversity

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<sup>57</sup> See discussion of *Dukes* *infra* at Part III.B.

<sup>58</sup> Federal question jurisdiction under 28 U.S.C. § 1331 is one clear example, but by no means the only one. See also 28 U.S.C. § 1338 (providing for exclusive jurisdiction with respect to certain patent matters).

<sup>59</sup> See, e.g., David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1311 (2007); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1516-40 (2008).

<sup>60</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>61</sup> See, e.g., Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 966 (1979).

jurisdiction in the first place and not to some other Article I objective of Congress.<sup>62</sup> In other words, there must be at least some factual findings made by Congress of the inability of state courts adequately and fairly to dispose of class action litigation before invoking the diversity jurisdiction to create federal jurisdiction over such actions based on state law. It has been suggested that Congress failed to make any such finding and that the grounds it did articulate for CAFA were not constitutionally adequate.<sup>63</sup>

In addition, there must be at least some limit to the extent of diversity jurisdiction. The jurisdictional amount requirement contained in the original Judiciary Act of 1789 was in some sense a reflection of the framer's intent in this regard.<sup>64</sup> Indeed, the Massachusetts Ratifying Convention determined to ratify the Constitution only with the understanding that several additional protections would be put in place and among those was a jurisdictional amount requirement for federal diversity jurisdiction.<sup>65</sup> By essentially doing away with the pre-existing limit, as it was interpreted by the Supreme Court in *Snyder*<sup>66</sup> and *Zahn*<sup>67</sup> and replacing it with an aggregated one, Congress was at least pushing the boundaries of the diversity head of jurisdiction.

*Shady Grove* and *Halliburton* reflect a different kind of constitutional concern. In each case the Court determined that legislative decisions about the proper enforcement level of the law were to be set aside, or at least calibrated, in light of the countervailing requirements of Rule 23. To the degree that Rule 23 is itself a legislative enactment, this harmonizing makes good constitutional sense. But the Rule is in fact the product of the REA, which provides for a mechanism whereby an Advisory Committee proposes and the Supreme Court adopts the Rules of Civil Procedure. There is no affirmative legislative vote and Presidential signature of the Rules; they become law unless Congress and the President vote to overturn them. This mechanism is likely saved from unconstitutionality by the fact that the REA itself was properly enacted and by the fact that the REA expressly forbids the Rules from impeding or affecting any substantive rights. But what this means is that any attempt to muscularize Rule 23, particularly in the context where the Rule itself is then used as a reason why other substantive laws enacted by state legislatures or

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<sup>62</sup> See generally C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613 (2004).

<sup>63</sup> See generally C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487 (2006). But see Judith Resnick, *Lessons in Federalism from the 1960's Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocation*, 156 U. PA. L. REV. 1929, 1946 (2008).

<sup>64</sup> Judiciary Act of 1789, 1 Stat. 79, § 11 (1789).

<sup>65</sup> See In Convention of the Delegates of the People of the Commonwealth of Massachusetts, 1788 (Feb. 6, 1788), in Jonathan Elliot, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION (1827).

<sup>66</sup> *Snyder v. Harris*, 394 U.S. 332 (1969).

<sup>67</sup> *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973).

Congress must bend, is pushing a constitutional separation-of-powers boundary in addition to, in the case of *Shady Grove*, a federalism boundary.<sup>68</sup>

Finally, separate and apart from concerns rooted in federalism and separation of powers, there are concerns implicit in class actions themselves. For example, Martin Redish has powerfully made the case that by forcing plaintiffs who may not agree with the “cause” to be members of a mandatory class, Rule 23(b)(2) may in some cases be forced speech or a violation of associational rights under the First Amendment.<sup>69</sup> There are potential “case or controversy” issues associated with settlement classes.<sup>70</sup> And there are all the due process issues with which we are familiar including issues associated with using aggregate proof against defendants and issues associated with binding absent class members to a result in which they may not have fully participated.<sup>71</sup> The more that class actions are federalized, the more federal courts will have to grapple with these concerns. The nationalization trend therefore exacerbates some of the constitutional problems associated with class actions in general.

None of this is to say that CAFA, *Shady Grove*, or *Halliburton* are unconstitutional. Rather, I have in mind the more humble proposition that we should recognize that nationalization comes at a price. These decisions push the federal courts closer to the outer edges of their constitutional authority and take authority from other branches of the federal government, state governments, and individuals.

### III. “NEGLECT”

The fact that there are constitutional costs associated with nationalization raises two obvious questions: what benefits flow from nationalization, and do they exceed the costs? To begin to answer these questions we must examine what is actually happening in practice when class actions arrive in the federal courts.

#### A. Practice In U.S. District Courts

If our story begins with Congress and the Supreme Court moving aggressively to nationalize significant portions of class action practice and increase the reach of Rule 23, there is a plot twist when it comes to United States district courts—the reality on the ground appears to reflect a far less aggressive posture toward the expansion of Rule 23. A review of major federal securities class actions supports this general impression. In many ways, Congressional efforts to reform and federalize securities litigation in the mid-1990’s served as an experimental precursor to recent federalization of class action practice more generally as seen in statutes such as CAFA and decisions such as *Shady Grove*. It makes sense, then, to check in on federal securities class actions and see what the federalization there has produced.

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<sup>68</sup> See, e.g., Burbank and Wolff, *supra* note 47, at 67 (proposing a framework in which federal courts sitting in diversity must attempt to divine the intent of state’s with regard to the advisability of aggregate litigation in any particular context).

<sup>69</sup> MARTIN REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 159-62 (2009).

<sup>70</sup> *Id.* at 206.

<sup>71</sup> The Supreme Court has addressed some of these issues in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

I identified the twenty largest securities class action settlements of 2010.<sup>72</sup> The smallest of these settlements involved payment of \$29 million in discharge of “plaintiffs’ style” damages claims of more than \$7.3 billion.<sup>73</sup> The largest involved a settlement of \$624 million and plaintiffs’ style damages claims of more than \$19.3 billion.<sup>74</sup> The total settlement dollars in all twenty cases were just below \$2.5 billion and the total plaintiffs style damages sought was roughly \$167 billion.<sup>75</sup> On average, the settlements across these twenty cases were \$124 million per case. If the federal courts are actively pushing for expansion of Rule 23, one would expect to see at least some evidence of that in the actions producing the largest plaintiffs payouts and involving the highest stakes.

A review of dockets associated with sixteen of these cases<sup>76</sup> provides some insight into how the cases proceeded and the role played by the various participants.<sup>77</sup> These are all cases with final settlement approval occurring in 2010. The median filing date for the claims falls in the third quarter of 2006, reflecting a median case length of approximately four years.<sup>78</sup> During that time, there were a

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<sup>72</sup> John C. Massaro, Top 20 Post-Reform Act Securities Class Action Settlements With Settlement Hearing Dates in 2010 (2011) (unpublished listing and calculation of plaintiffs’ style damages) (on file with author). The list includes the largest reported dollar amount of settlements for cases in which a settlement approval hearing date occurred during 2010. The cases involved, in descending order, are the securities of: (1) Countrywide Financial Corp.; (2) Refco, Inc.; (3) Converse Technology, Inc.; (4) Maxim Integrated Products, Inc.; (5) Juniper Networks, Inc.; (6) Broadcom Corp.; (7) New Century Financial Corp.; (8) American International Group, Inc.; (9) International Rectifier Corp.; (10) MoneyGram International, Inc.; (11) TyCom, Ltd.; (12) Flowserve Corp.; (13) Calpine Corporation; (14) Sequenom, Inc.; (15) Dell, Inc.; (16) American Home Mortgage Investment Corp.; (17) The PMI Group, Inc.; (18) UTStarcom, Inc.; (19) Question Software, Inc.; and (20) Goldman Sachs Group, Inc. I am indebted to Cornerstone Research for its assistance.

<sup>73</sup> *Id.* (Goldman Sachs Group, Inc. litigation).

<sup>74</sup> *Id.* (Countrywide Financial Corp. litigation).

<sup>75</sup> *See id.*

<sup>76</sup> *See id.* For purposes of the remaining discussion, I omitted 4 of the 20 cases – Countrywide Financial Corp., Refco, Inc., Broadcom Corp., and Calpine Corporation. I omitted the first two because of their disproportionate size and, in the case of Refco relatively rapid timing. I omitted Broadcom because it combined both a federal securities action and a state-law-based derivative action and, in the unique situation of that case, the derivative action appeared to occupy a substantial portion of the judicial attention on the matter. I omitted Calpine because it was a federal securities action proceeding in state court.

<sup>77</sup> It is not always the case that all judicial activity is reflected on the docket but most is. In addition, I note by way of caveat that my review consisted of one docket per case. Where multiple actions are filed and then consolidated, there may be multiple dockets for some part or all of the case and my review focused on the docket for the case that appeared to have produced the settlement figure.

<sup>78</sup> The dockets reflect that five cases were filed in 2003 or 2004; seven in 2006 or 2007; and four in 2008 or 2009. In one instance, TyCom, Ltd., the case was filed in July 2003 but transferred by the Judicial Panel on Multi-District Litigation (“JPMDL”) to a United States district court in New Hampshire for five years before returning. In another occurrence, American Home Mortgage Investment Corp., the case was received in the docket court in December 2007 following referral from the JPMDL.

limited number of decisions on contested discovery motions in each case and, of those decisions, the vast majority involved a magistrate or special master and not an Article III federal judge.

When it comes to what some would characterize as more important decisions about the overall direction of the litigation, the story is similar. Over the sixteen cases, there were forty-eight such decisions or an average of three per case. The distribution reveals that four of the cases had four or more such decisions; nine had two or three such decisions; and the remaining three reflect either zero or one such decision.

The specific topics of the decisions are of some interest. In the bulk of the cases there was a contested motion to dismiss and, sometimes following partial success on the motion and filing of an amended complaint, a second or even third motion to dismiss. Of the forty-eight decisions identified, twenty address motions to dismiss.<sup>79</sup> The next highest category of decision—with twelve instances—is the related topics of lead plaintiffs, lead counsel, and consolidation.<sup>80</sup> The remaining categories included class certification (six); summary judgment (two); intervention (two); and, with one occasion each, requests involving amendment of the complaint, striking allegations in the answer, lifting of the discovery stay, imposing a stay on the case, approving the settlement approval.

Each case of course has its own storyline beneath what the docket indicates. But review of the dockets is striking in what it reveals about the commonality among cases. With small variations, they follow a consistent pattern of judicial decisions on contested motions: selection of lead plaintiff and approval of its chosen counsel, ruling on motions to dismiss, approval of the proposed class, and approval of settlement. To be sure, there is ample additional judicial activity, but much of this consists of making the trains run on time—approving stipulations among the parties regarding schedule, holding status hearings, and the like. We do not see in these class action dockets federal judges leaping into the limelight as the star of the show in the way that the legendary activist judge is said to have done.

What does this tell us about the effect of nationalization on this area of class action practice? For one thing, the common and regular pattern that the cases follow is in fact one of the intended effects of the nationalization. Rather than a frenzy of multiple counsel pushing forward cases in multiple fora, presenting federal judges with decisions to make on both the merits and the procedure of the cases, we see a situation in which order prevails. The cases are not in fact proceeding to the merits until after a somewhat lengthy period comprised of notice of the action, application for lead plaintiff and lead counsel status, and consolidation of all pending federal

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<sup>79</sup> Frequently, different defendants raise the same or similar grounds in multiple motions to dismiss, but the decision as to those motions is usually reflected in a single order. I have counted multiple motions to dismiss as a single motion for these purposes. The litigation in UTStarcom, Inc. produced the largest number of motions to dismiss: three. In New Century Financial Corp., International Rectifier Corp., the PMI Group, Quest Software, Inc., and Goldman Sachs Group, Inc., two motions to dismiss were filed for each case, respectively. However, in Comverse Technology, Inc., Maxim Integrated Products, Inc., Juniper Networks, Inc., American International Group, Inc., MoneyGram International, Inc., Flowerserve Corp., and Dell, Inc. there was only one motion to dismiss to be had.

<sup>80</sup> Courts frequently resolve each of these related items in a single decision or order and I have counted these as a single decision regardless of whether they are reflected in multiple related docket entries.

securities proceedings. All parties know ahead of time that this process will occur and the result is fewer attempts by the parties to gain an advantage by inviting federal judges to wade into the merits or permit discovery at an earlier stage.

Relatedly, we also see that the bulk of the judge's substantive decision-making on contested motions occurs at the very outset of the case. Thirty-three of the forty-eight decisions occurred with respect to either the lead counsel/lead plaintiff/consolidation issue or on motions to dismiss. This is no accident; as we have seen, the PSLRA expressly provided that cases generally would not proceed further until these issues were ruled upon—injecting the judge into the process early on to set the tone for the case. Even in cases that survive a motion to dismiss, this investment of judicial resources at the front end is by far the largest role that the judge plays.

What's more, the nature and extent of that investment is constrained by the statutory scheme and the resulting choices of the parties. For example, federal judges are less involved in selection of lead plaintiff and lead counsel than might have been suspected. To a certain extent, the provisions of the PSLRA have been interpreted as dictating in most instances that the plaintiff with the largest financial interest should be lead plaintiff.<sup>81</sup> This means that many class members "self censor" and do not even attempt to be lead plaintiff. Others file motions but withdraw them once it is apparent that motions filed by other potential lead plaintiffs reveal a greater economic interest. Less frequently than we might have expected to we see federal judges deciding competing motions for lead plaintiff status and, even then, the choice the judge faces is frequently limited to two or three potential candidates. The choice becomes more limited still when it comes to lead counsel. In only one of the cases identified did the judge deny to a lead plaintiff its choice of lead counsel.<sup>82</sup> For the most part, if a plaintiff's firm can bring the largest plaintiff to the courthouse, that plaintiff will be chosen as lead plaintiff and the counsel will be selected as lead counsel.

Notably, few of these litigants were prepared to undertake the risks associated with greater judicial involvement. Take the class certification decision—commentators and appellate judicial decisions properly focus on this issue as controversial, important, and fraught with meaning for the litigants and society at large. But, in the sixteen cases, contested class certification decisions occurred only half a dozen times; in the other ten cases, the class was ultimately certified as a settlement class presented to the court by consent of the parties.<sup>83</sup> What's more, in the six matters where class certification was contested, there was no significant

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<sup>81</sup> The reasons for this are many and have been collected well in a pre-PSLRA paper by Elliot Weiss and Professor John Beckerman. *See generally* Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995).

<sup>82</sup> This occurred in the Broadcom Corp. case, *supra* note 72.

<sup>83</sup> According to the dockets reviewed, a ruling on a contested class certification motion occurred in the cases involving Juniper Networks, Inc., Flowserve Corp., UTStarcom, Inc., Goldman Sachs Group, Inc., American International Group, Inc., and Quest, *supra* note 72. No such ruling occurred in the cases involving Converse Technology, Inc., American Home Mortgage Investment Corp., MoneyGram International, Inc., the PMI Group, Inc., Dell, Inc., Sequenom, Inc., International Rectifier Corp., Tycom Ltd., New Century Financial Corp., and Maxim Integrated Products Inc., *supra* note 72.

parsing of the choices presented by the parties but instead adoption of the class as proposed.

Even more extreme is the situation with respect to summary judgment. This is the moment when society—in the person of the judge—steps into the case to make sure that there really is factual support for the allegations made by the parties. The case is stripped down or molded to reflect only those issues as to which genuine factual dispute exists. But this theoretical possibility is not always met with a true moment in the limelight for the judge. In our set of sixteen cases, for example, only two parties—one defendant and one plaintiff—were bold enough to file and await decision on a motion for summary judgment.<sup>84</sup>

The final phase of the case is settlement. Here too, the dockets reveal less judicial involvement than non-practitioners might expect. The dockets reveal few objectors and experience suggests that the practical remedy for objectors turns out to be the ability to opt out rather than to de-rail or alter the settlement. There is a fairness hearing with regard to the settlement, but the parties cooperate closely together in the submission of materials relating to that hearing. In only two cases of the sixteen reviewed did the judge take a procedural path different from that suggested by the parties—in the first, the judge requested additional assurance from the parties regarding the fairness and non-collusive nature of the settlement before ultimately approving it; in the second the judge insisted upon deciding the previously-contested litigation class certification motion rather than the then-uncontested request for certification of a settlement class.<sup>85</sup>

In sum, the docket study of the most significant federal securities class actions reveals federal judges playing a less aggressive role than might be suggested by consideration of the nationalization trend alone. Judges make early “table setting” decisions regarding case consolidation, lead plaintiff status, and lead counsel status, and they serve a gatekeeping role by evaluating motions to dismiss at an early stage, but less often is there occasion for them to rule upon contested motions for class certification, summary judgment, or settlement.

### B. *Trilogy Of Recent Class Action Decisions*

The complications to the nationalization model continue when one takes into account some of the other decisions by the Supreme Court last term. According to the popular press, many informed commentators, and selected members of Congress, the Court in 2011 dramatically curtailed the reach of Rule 23, seemingly in contradiction to the steady increase in its applicability as described in Section II.<sup>86</sup> Thus, for example, in its highly-anticipated *Wal-Mart v. Dukes* opinion, the Supreme Court reversed certification under Rule 23(b)(2) of a class of roughly 1.5 million current and former female Wal-Mart employees who alleged employment discrimination and sought injunctive and declaratory relief as well as backpay.<sup>87</sup> Nine justices agreed that a claim for individualized monetary relief such as the backpay request could not be certified under Rule 23(b)(2), which deals on its face

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<sup>84</sup> Notably, the defendant won but settled on appeal in the *Flowserve* case.

<sup>85</sup> The former case involved Goldman Sachs Group, Inc. The latter involved *American International Group, Inc.* See *supra* note 72.

<sup>86</sup> See, e.g., 80 U.S.L.W. 1 at 27-29.

<sup>87</sup> *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2547-49 (2011).

only with injunctions and declaratory relief.<sup>88</sup> A majority of the Court went further—holding that certification under any portion of Rule 23 would not be appropriate because plaintiffs failed to meet Rule 23(a)(2)'s commonality requirement applicable as a threshold matter to all purported class actions.<sup>89</sup> While many courts had previously applied the commonality requirement in a pro forma manner—deeming it satisfied if there was any issue common to the class, no matter how trivial that issue might be—the Court determined that the test has real muscle and requires that the common issue “must be of such a nature that . . . determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”<sup>90</sup> Applying that test, the Court found the class claims lacking in numerous respects. In both its articulation of the test and its application, the Court sent a signal that class actions of all kinds—not simply those under Rule 23(b)(3) with its predominance requirement—must meet a standard akin to the predominance requirement if they are to proceed. Class certification will likely be more difficult to obtain as a result of *Dukes*, and certification of large, statistics-driven classes will likely face more of an uphill battle.

Consider too the controversial decision in *AT&T v. Concepcion*.<sup>91</sup> There AT&T's contracts with its cell-phone customers required arbitration of all disputes and also provided that any claims be brought in the parties' “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”<sup>92</sup> The lower court struck down the class-action waiver as unconscionable under clearly-established California law. A 5-4 majority of the Supreme Court reversed, holding that the Federal Arbitration Act (“FAA”) preempted California's unconscionability doctrine to the extent that that doctrine interfered with private parties' ability to agree to rules governing the fundamental nature of their arbitration.<sup>93</sup> In reaching this conclusion, the Court relied not only on the language and history of the FAA but also extensively relied upon what it saw as a mismatch between the informal and efficiency-driven attributes of arbitration as compared to the formality required in the high-stakes world of class actions.<sup>94</sup> The practical result, then, is that parties may, at least in some circumstances, “contract out” of class actions. Some predict that the decision—by making arbitration more attractive to the corporate defendants who draft contracts of the sort involved in *Concepcion*—will result in far fewer federal class actions as disputes which would otherwise have been resolved in that manner move to individual arbitration or are not litigated at all. According to this view, another retreat by the federal courts from vindicating the values underlying Rule 23.

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<sup>88</sup> *Id.* at 2555-60. The dissenters agreed with this portion of the Court's opinion but would have remanded for the Ninth Circuit to address whether the class could properly be certified under Rule 23(b)(3). *Id.* at 2561 (Ginsburg, J., dissenting).

<sup>89</sup> *Id.* at 2553-54.

<sup>90</sup> *Id.* at 2551.

<sup>91</sup> *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>92</sup> *Id.* at 1746.

<sup>93</sup> *Id.* at 1748.

<sup>94</sup> *Id.* at 1751-52.

Finally, there was the far-less-noticed decision in *Smith v. Bayer Corp.*<sup>95</sup> There a federal district court overseeing multi-district litigation had denied certification of a class of West Virginia residents bringing product liability and other claims under West Virginia law in connection with Bayer's sale of an allegedly hazardous prescription drug. A different plaintiff sought certification in West Virginia state court of essentially the same class relating to essentially the same claims. Bayer sought and obtained from the federal district court an order enjoining the parties from proceeding with the state court action in light of the prior ruling of the federal court. The question was whether that order passed muster under the re-litigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, which permits a federal court to enjoin state court litigation of a claim or issue "that previously was presented to and decided by the federal court."<sup>96</sup> The Supreme Court unanimously held that the Anti-Injunction Act and the considerations of federalism which underlay it barred the federal court from enjoining litigation in the state court.<sup>97</sup> The Court found that West Virginia had previously expressly declared that the "predominance" requirement in its equivalent to federal Rule 23(b)(3) is to be interpreted differently than the federal rule—making the issue in the two proceedings different and rendering the re-litigation exception of the Anti-Injunction Act inapplicable.<sup>98</sup> In an alternative holding endorsed by all justices except Justice Thomas, the Court concluded that the injunction also could not stand because the plaintiff in West Virginia state court was not a party to the federal proceeding—after all, no class had ever been certified—and could not therefore be bound by results reached in that proceeding.<sup>99</sup>

Both holdings are significant. In the first, the Court blessed state courts' development of their own interpretations of state analogues to Rule 23 and made clear that, even where a federal court denies class certification in a given case, a state court may grant it. This holding has the potential to counteract the homogenization of class action law associated with nationalization. In the second holding, the Court suggested that denials of class certification may not have preclusive effect on other members of the putative class in all cases, creating the possibility of different class members continually re-litigating the class decision until a favorable result is achieved. The practical impact of both holdings is diminished by CAFA, which had not been enacted as of the time of the state-law filing in *Smith*.<sup>100</sup> Nonetheless in a possible future world without CAFA, and in the areas of state class action practice untouched by CAFA, *Smith* is important.

The decisions in *Dukes*, *Concepcion*, and *Smith* in some ways push against the trend toward strengthening Rule 23 and the nationalization of class action practice. Each decision effectively diminishes the circumstances in which matters will be resolved on a class-wide basis under Rule 23, leaving more opportunity for litigation

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<sup>95</sup> *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).

<sup>96</sup> *Id.* at 2375 (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140,147 (1988)) (citations and internal quotation marks omitted).

<sup>97</sup> 131 S. Ct. at 2368.

<sup>98</sup> *Id.* at 2374-79.

<sup>99</sup> *Id.* at 2379-83.

<sup>100</sup> *Id.* at 2382.

in other non-federal fora. If *Dukes* results in fewer large nationwide class-actions, the result may well be more classes comprised purely of the citizens of one state—an exception to CAFA if other conditions are met—and, as a result, more class actions in state court. If *Concepcion* means more class action waivers will be effective as part of arbitration agreements, the result may well be more frequent resolution in arbitration proceedings of issues that would have previously been resolved in a federal class action. If *Smith* blesses continued state experimentation in the class action context, the result will be plaintiffs (as in *Smith*) and defendants alike adopting class action litigation strategies designed to take advantage of those state fora where perceived to be advantageous. In short, the nationalization trend appears to be counterbalanced at least in part by a trend some might label as “neglect.”

#### IV. THE FEDERAL BRAND

At a superficial level what appears to be happening is some form of nationalization and neglect. Congress and the Court have aggressively federalized class action practice—at the expense of states’ rights and individual choice—in a way that risks stepping across Constitutional lines. In so doing they are acting on a vision of Rule 23 that is quite muscular. But this situation changes once the cases are in the federal courts. The role of federal judges in managing class actions appears passive and the developing law of class actions involves a vision of Rule 23 as a device that is weaker and less able to resolve real world problems than some might have hoped. Given this seeming ambivalence, one is tempted to ask what benefits there are of nationalization that offset the costs. Why nationalize and then, for want of a better word, neglect?

The answer lies in the longstanding debate between individual rights theorists and utilitarians about the fundamental vision underlying class actions. In essence, we have a winner in those debates—the individual rights theory. There will be more tossing about the margin of victory. But Congress and the Court have chosen sides and are moving to put behind us some of the issues that have bedeviled class action scholarship and jurisprudence for decades.

After briefly describing in Section IV.A the nature of the debate in the class action context between individual rights advocates and those more focused on society-wide benefits, I assess in Sections IV.B-E the facts that comprise the two recent trends we have been discussing in light of this longstanding debate. As noted, a clear pattern emerges. All of the occurrences that comprise the nationalization and neglect trends—Congressional enactments such as the PSLRA, SLUSA and CAFA; recent Supreme Court decisions such as *Halliburton*, *Shady Grove*, *Dukes*, *Concepcion*, and *Smith*; and the docket activity in securities cases—square up well with the individual rights theory and not as well with the competing vision of class actions. Put another way, each of the occurrences that comprise the nationalization and neglect trends is a girder in an overall structure designed to protect individual participatory rights.

In addition to telling us something about the individual-rights-based foundation of the overall structure, these girders also help outline what the more concrete details of the finished structure will look like. There are four main takeaways at this greater level of specificity.

First, the days of unbounded state experimentation in the class action field are over. As discussed in Section IV.B, the nationalization trend means not simply a set of concurrent federal procedural rules but likely a system that replaces state diversity with federal uniformity in many important respects. The federal courts intend to rely

upon Rule 23—with the Constitution waiting in the wings as backup—to develop a federal common law of class actions that will govern what occurs in federal class actions and, likely, will ultimately govern what occurs in class actions in state courts as well. We are headed for a uniform federally-driven brand of class actions, and the expressly-stated purpose of this change is heightened protection of individual participatory rights.

Second, as discussed in Section IV.C, the federal brand will generally require more individualized discovery and evidence than has been allowed by some courts in prior years. Statistical extrapolation of results from sample trials to the class as a whole are out. To be treated with greater skepticism are presumptions and other forms of displacing individualized proof. Put another way, the most extreme form of aggregate proof has been removed from the judicial toolkit and some other forms of proof require supplementation with safeguards before they can be employed. Factual specificity is the theme of the day.

Third, we should expect to see procedural and substantive rulings designed to ensure greater protection of, and participation in the litigation by, absent class members. This means adopting in the overall class action context some of the reforms that the PSLRA implemented in the specific area of federal securities class actions. These include publication of the opportunity to be lead plaintiff, front-loading of the lead counsel and lead plaintiff determination, and heightened class communication particularly with respect to the topic of class membership. I discuss these points in Section IV.D.

Finally, in Section IV.E, I address the implications of these changes for the roles of the parties and the judge. In short, these changes will require more work as parties are forced away from litigation based on theories and “checking the box” toward the resolution of disputes by more informed and knowing participants based on actual facts. The results of this work will be a third branch of government that is infused with more citizen participation and that operates closer to its constitutionally-envisioned function of resolving inter-party disputes as opposed to broader societal problems. As our moms might say, the extra work will be good for all of us, litigants and courts alike.

#### A. *Two Models*

A key debate in political philosophy is between advocates of individual rights and utilitarians.<sup>101</sup> In the class action context this battle takes many forms, but the fundamental dichotomy is between those who view the class action as a means for amalgamating and then resolving scores of individual claims and those who view the device as serving societal purposes that transcend the interests of any given individual within the class. Is the class action an example of super joinder of many private claims or is it public litigation with a quasi-legislative character?

There are compelling reasons to adopt either view. Relatedly, there is a sense in which this characterization of the debate is over-simplified—we may choose to integrate both kinds of concerns into class action practice in greater or lesser degrees.<sup>102</sup> But at a fundamental level the class action must be one or the other—

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<sup>101</sup> I have chosen to use these two labels as a very rough approximation. Many other labels could be chosen in their stead.

<sup>102</sup> In brilliantly arguing that the individual participatory rights model should prevail, Professor Martin Redish catalogues a variety of possible viewpoints along the spectrum from

either the class is an entity with vitality independent of its individual participants or it is a convenient way of dealing with multiple individual claims. And that choice has consequences.

Take the subject of opt out rights. Mandatory class actions under Rule 23(b)(1) and (b)(2) do not currently provide for such rights. The utilitarian views these types of class actions as designed to solve a societal problem—how should a particular asset be divided or how should a particular defendant be ordered to act in the future.<sup>103</sup> If individuals are permitted to opt out and pursue individual claims, they could scuttle the whole enterprise—obtaining results that require a division of the assets that is inconsistent with the class result or obtaining an injunction requiring a defendant to act in a way that contradicts what the class injunction provides. There is no reason for such individual rights to be respected in the utilitarian view, and there is good reason to disregard them.

The same holds in the context of Rule 23(b)(3). If one adopts the utilitarian view, there is no reason to give individual plaintiffs any rights in a negative value class action under Rule 23(b)(3). Because the claims have negative value, they would not exist at all in an individual form. It is only by virtue of the class action device that they exist at all. And, presumably therefore, it is only in order to serve broader societal purposes that they exist.<sup>104</sup> Notice to absent class members and opportunity for them to opt out would be of little value to those with this view. At best, these two steps are costly distractions; at worst they risk permitting essentially disinterested parties to hold-out and obtain for themselves a windfall at the cost of potentially de-railing the result that is best for society.

Even in the context of positive value class actions under Rule 23(b)(3), the utilitarian sees little benefit in opt-out rights. For the most part, all litigation will be lawyer driven and the opt-out right is largely symbolic as a practical matter. To the extent that opt outs become significant, they reflect irrational behavior. It is undeniable that by sticking together plaintiffs will achieve for themselves the greatest leverage and, thereby, the best overall results.<sup>105</sup> Trying to fight better-resourced defendants on an individual basis simply cedes the advantage to defendants. It also may destroy a plaintiff's claim. For example, where a defendant is one of three manufacturers of a chemical that is known to have caused the plaintiff's injuries, it may be impossible to prove by a preponderance of the evidence

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pure utilitarianism to unadorned natural rights. These include communitarianism, civic republicanism, and what he labels the public action model, all of which I have effectively treated under the label "utilitarian" for the limited purposes of this Article. See MARTIN REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 86-134 (2009). The discussion in this Section IV.A relies upon Professor Redish's work and oversimplifies it for purposes of framing the discussion that follows in the remainder of Section IV.

<sup>103</sup> See generally David Rosenberg, *Response: Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 857-61 (2002).

<sup>104</sup> See David Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 924 (1998).

<sup>105</sup> See David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 415-21 (2000); David 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 at Section III.A. (2011).

that any given defendant caused the injury in any given case; the class action solves this problem by permitting statistical methods of proof.<sup>106</sup> Given this context, opting out is irrational at best and detrimental to society at worst.

For one with an individual rights approach, however, opt outs are fundamental. As a matter of both process and substance, one should not be compelled to be a plaintiff in a litigation when one does not want to be. On the process side, the right to participate in the judicial process at the time and in the manner one chooses—just like the right to vote or to make one's views known in the legislative process—is a fundamental part of our democratic system and the very premise underlying its legitimacy. On the substance side, it is for the individual to decide what outcome he or she wants from the litigation. To say that a person's choice is "irrational," as the utilitarian does, is really to say one of two things, each of which is unacceptable to the believer in individual autonomy: either the "irrational" person is consciously valuing certain variables more highly than the other individuals do, or the "irrational" person is incapable of valuing the relevant variables and in need of paternalistic protection. To the individual rights theorist, the first is an example of an individual appropriately exercising autonomy and the latter is a premise that is inconsistent with autonomy and therefore unacceptable.

In many ways, this analysis makes the particular kind of class action involved irrelevant. Certainly the full force of this argument applies to all classes under Rule 23(b)(3)—both positive value and negative value. It also applies to many classes under Rule 23(b)(2). For example, it may be that a particular individual does not believe in the "cause" that motivates a civil rights action under this provision. Should that individual, even if a member of the class benefitted by the action, be forced to participate in an action with which they do not agree? The individual rights theorist says no. Rule 23(b)(1) classes are different story. The individual rights theorist would agree that opt-out rights are not appropriate in that case—but not because of societal concerns. Rather, 23(b)(1) classes involve situations where the vindication by one individual of her individual rights will have a potentially deleterious effect on the vindication of individual rights by other class members. In such a context, a class resolution is appropriate as a way of protecting individual rights—not subsuming them.

This debate between an individual rights vision and a utilitarian one helps bring into focus the two broad trends with regard to class actions. Viewed through this prism, recent events point toward a clear winner, as of now, in that age-old debate.<sup>107</sup>

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<sup>106</sup> Shapiro, *supra* note 104, at 930.

<sup>107</sup> Another approach not lying on the spectrum between utilitarianism and individual rights is legal realism. A number of commentators have suggested that recent activity in the class action realm can be explained as an effort to benefit corporate interests at the expense of the less fortunate in society. Examination of the specific facts comprising the two trends, however, belies this explanation. To pick just three examples: *Shady Grove* had an immediate and obvious benefit to plaintiffs and placed into jeopardy numerous states' laws limiting the power of class actions to harm corporate interests; *Smith* has obvious disadvantages to defendants; and even CAFA provided not only for removal jurisdiction (a defendant-friendly provision) but also original jurisdiction (a plaintiff-friendly provision).

*B. Protecting Against State Intrusion*

If we examine the specific data points making up the pattern we have seen in recent years, they first and foremost reflect an effort to create a federal brand for litigation of class actions—a brand that focuses on the protection of individual participatory rights. Congressionally-enacted statutes have played a direct role, and so too have the courts through the use of Rule 23 to develop what is essentially a federal common law of class actions. At this time the federal brand is available to litigants if chosen; but the brand may ultimately become mandatory either because it is ruled to be constitutionally-grounded or because state courts effectively adopt it as their own. Either way, the hallmark of the brand is protection of individual participatory rights against encroachment by the states—specifically, state efforts to achieve their desired level of deterrence through tinkering with the established rules governing class actions.

SLUSA and CAFA are obvious examples. Congress enacted SLUSA because it believed that state courts and state law were interfering with the full realization of the individual-oriented procedural reforms it had enacted in the PSLRA.<sup>108</sup> And one of the expressly-stated premises of CAFA was that federal courts would be more inclined than state courts to protect individual participatory rights of absent class members and defendants.<sup>109</sup>

*Shady Grove* puts meat on these bones. The explicit premise of the decision is that Rule 23 gives an absolute right to all plaintiffs to bring any action in the form of a class action if the criteria of Rule 23 are met.<sup>110</sup> Even the state legislature that created the substantive cause of action in question is powerless to interfere with that right of plaintiffs. The state legislature may be able to affect the level of deterrence by changing the remedies available to class action litigants—*Shady Grove* left this question unresolved – and it can surely still affect the level of deterrence through other means such as by revising its substantive law so as to explicitly alter the generally applicable elements of the cause of action or by changing the level of governmental enforcement. But the states cannot affect the level of deterrence by stripping plaintiffs of their ability to bring a class action in federal court.

While protecting this “categorical” right found to exist in the express terms of Rule 23 is the headline, there is also a related rights-based issue that is of greater subtlety and importance. In complex class actions the parties on both sides are sophisticated and the choices they present to the judges are increasingly difficult. To pick one example, in the “olden” days at the turn of the century the battle would frequently be fought over whether a state consumer protection statute contained a reliance requirement or not. If it did contain a reliance requirement, this would generally redound to the benefit of the party opposing class certification because reliance is traditionally viewed as an individualized issue which will differ from case to case. In the face of uncertainty over whether the state statute contained such a requirement as one of its elements, federal courts would engage in an extensive analysis of state law designed to ferret out how the state’s highest court would answer the question if asked or they might even certify the question to the state court.

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<sup>108</sup> See *supra* Section II.

<sup>109</sup> See *supra* Section II.

<sup>110</sup> See *supra* Section II.

Today, while these blackletter law questions continue to arise, more likely the court confronts a much more nuanced issue. For example, the issue will not be the relatively simple one of whether reliance is an element but rather complex ones such as whether plaintiffs' extensive statistical proof in the form of expert testimony is sufficient to establish reliance as a presumptive matter on a class wide basis and, if so, whether defendants will have a right to rebut that presumption through means of individualized proof. How does a court answer such a question? In many ways, such questions get to the heart of what the "substantive" state law really means when it requires reliance as an element and, in that sense, the question could be said to be governed by state law. Under this vision, the answer to the question of certification will essentially be driven by state legislative intent and state common law.<sup>111</sup> And, those state decisions will frequently have been made by state courts in the context of class action litigation filed in state court under state analogues to Rule 23. We can see where this trend line is heading – as a practical matter state court interpretations of state law in the context of state analogues to Rule 23 dictate the evolution of federal Rule 23 law. Even with the enactment of CAFA, then, federal courts would end up acting essentially like state courts when adjudicating class actions based on state law.

Unlike the factual backdrop of *Shady Grove*—which involved abolishment of a plaintiff's right to sue on a class-wide basis for certain kinds of statutory violations—there is no systematic benefit to either side of "v" in this more subtle issue. It may be that some state courts adopt a view of reliance that is more hostile than that of federal courts to statistical proof while others adopt one that is more favorable. It may be, indeed, that state courts experiment with other alternatives—presumptions and the like—that cannot be said to be categorically more or less hostile, but just different. And that is the point: there will be differences sprinkled throughout the federal system. Some federal trials will look one way and others will look entirely different, and that question will depend not upon the differing factual circumstances of the case and not upon the differing philosophies of different circuits but upon the differing philosophies of state courts.

The *Shady Grove* plurality plants a flag on the opposite terrain. The decision declares Rule 23 to be essentially procedural and therefore within the domain of the federal courts under the compromise reflected in *Erie* and subsequent rules and decisions. By placing Rule 23 beyond the reach of state legislatures and, presumably, state courts, *Shady Grove* attempts to ensure that federal courts will more frequently look to federal class action law when determining the sorts of questions discussed above—questions that can radically alter the course of the litigation and the participatory rights of the parties. This says scores about how the federal courts should confront the critical decisions that must be made in every seriously contested class action. Take our example regarding a plaintiff's attempt to prove reliance based on statistical proof and a defendants' request for individualized discovery in response to that proof. Rather than attempt to discern what the state legislature intended with respect to this specific question when it enacted the consumer protection statute or what a state court might do when confronted with this question in a case invoking a state analogue to Rule 23, the federal judge is charged with answering this question under federal law. The question boils down to whether

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<sup>111</sup> The Second Circuit adopted this approach in *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 228 n.13 (2d. Cir. 2003).

Rule 23—not the substantive law in question and not the state analogue to Rule 23—contemplates this form of proof in this sort of context. If taken seriously, this approach could result in CAFA playing a role much more similar to SLUSA and the PSLRA – state law has in some sense been preempted in favor of a uniform federal approach.

And why does *Shady Grove* do this? Herein lies a broader lesson. The fact that the question will be governed by Rule 23 does not mean that anything goes. Rather, the court's construction of Rule 23 must itself be constrained by the REA and the Constitution.<sup>112</sup> Among other things, Rule 23 cannot be deemed to permit a form of proof or foreclose a form of proof where doing so would impede a party's constitutional rights. The shift to having Rule 23 govern the determination of such issues, in other words, is also accompanied by a reminder of the limits on Rule 23 imposed by other sources of federal law—specifically the REA and the Constitution. We can see this at work in *Shady Grove*. Keeping intact the individual participatory rights that would exist in the context of bi-lateral litigation was the theme of the day. Indeed, Justice Scalia's plurality opinion went so far as to explicitly set forth the views of four justices concerning what a class action is (and is not). In their view:

A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.<sup>113</sup>

There could be no clearer case for the individual rights thesis than this.

There is a sense in which the logic of *Shady Grove* is counter-experiential. Over the past decades we have all experienced the truly substantive impact that class actions have and we experience them as in many ways transforming the substantive rights of the parties. Insofar as it is read as an explanation of what has in fact occurred with respect to class actions in the past, Justice Scalia's logic would seem therefore to rest on an inaccurate premise.

This is not the way to read the statement, however. Rather than an empirical statement regarding what class actions have been, the statement is likely best read as a forward-looking statement about what class actions should be. Put another way, the logic of the plurality opinion is perhaps best read as a reminder of the premises which should guide the development of class action law rather than as a statement regarding what has in fact occurred up to this point. In this sense, the statement and logic are entirely sound. It is beyond dispute based on the express terms of the REA that Rule 23 passes REA muster—and indeed may pass constitutional muster—only to the extent that it is non-substantive and merely procedural. If the very premise of the Rule's existence is its non-substantive nature, then we must hew to that same line in other contexts as well. We cannot treat the Rule as merely procedural when its very existence is assailed as violative of the REA but then insist that the courts “bow to reality” and view the Rule as essentially substantive when it comes time for

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<sup>112</sup> See, e.g., *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1014 (2d Cir. 1973) (construction of Rule 23 to permit use of aggregate proof in the context of Clayton Act claim involved there would violate REA), vacated on other grounds, 417 U.S. 156 (1974); *Broussard v. Mieneke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4<sup>th</sup> Cir. 1998) (similar).

<sup>113</sup> *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010).

determining who it is—state courts or federal courts—that will determine its scope. More to the point, this demand for a consistent vision of what the Rule is says something about how the Rule’s scope will be interpreted as well. If the Rule is to be viewed as merely aggregating together multiple claims and not transforming any substantive rights, that will in many cases dictate the answer to the question of under what circumstances and to what degree aggregate proof can be used and, by implication, whether certification can occur at all. The methods of proof and scope of discovery in aggregate litigation can change as compared to bilateral litigation, but they cannot change so fundamentally that Rule 23 is said to be impacting the parties’ substantive rights.

In the end, then, *Shady Grove* reflects three things: (1) an express protection of plaintiff’s participatory rights against explicit encroachment by the states; (2) an implicit declaration that the federal courts will be available, and will develop a nationally-applied framework, for the protection of all parties’ participatory rights in the class action context; and (3) a reminder that the class action device should not generally be used to diminish or alter the rights that the parties would have had in the context of bilateral litigation. Put more simply, *Shady Grove* and the other recent developments reflect the federal courts developing a unified national brand for class action litigation grounded in the individual rights tradition.

### C. Factual Specificity

Find the facts. That is the first rule of the litigator. Arguments that have an appeal in the conference room tend to take on a new light in the deposition room. Our entire discovery system and our rules of evidence are premised on the notion that cases will proceed based on factual specificity. But these rules have sometimes bent when confronted by Rule 23. Unlike their counterparts in the rest of the litigation world, often class actions proceed based entirely on expert testimony or other forms of aggregate evidence. One characteristic of the federal brand is an increased emphasis on factual specificity in the class action realm.

#### 1. Rejecting Unadulterated Extrapolation

There is a spectrum of possible proof in class actions. At the purely utilitarian end is a quasi-legislative approach in which the only evidence the trier of fact hears is evidence from statistical and other experts and no effort is made to test the applicability of the parties’ arguments to any given individual claim. At the extreme other end is a requirement that each claim be proven at exactly the level of specificity that it would be if it were a stand-alone claim. In between are a number of possibilities such as: (1) full-blown individualized trials of the class representative’s claims with the results of that trial dictating the results of those of the remainder of the class; (2) full-blown individualized trials of some statistically significant sample set of claims and extrapolation of the results of those trials to the class as a whole on a *pro rata* basis; or (3) permitting plaintiff to satisfy its burden with respect to the class as a whole through some aggregate means such as statistics or presumptions but allowing defendant to offer individualized evidence in rebuttal. Many other possibilities exist of course but these give some granularity to the discussion for present purposes.

In *Dukes* the Court confronted one approach to this issue. Rather than certify a class under Rule 23(b)(3), where the predominance of individualized damages and liability determinations might defeat certification, the lower court granted certification under Rule (b)(2), which does not contain a predominance requirement.

In essence, plaintiffs' request for injunctive relief was treated as the main event and their request for monetary relief in the form of backpay was treated as a mere add-on which could be handled by means of full-fledged trials of a sample set of class members and extrapolation of the liability determinations and monetary results from those trials to the class as a whole, with each class member receiving the "average" outcome achieved in the sample trials.<sup>114</sup> This procedure had previously been blessed by the Ninth Circuit.<sup>115</sup>

The Court's unanimous view of this approach was negative. Even if a statistically significant sample of class members could be used to determine the total liability of the defendant and thereby achieve the correct level of societal deterrence, the averaging of results across class members and the process used to obtain the average trampled too heavily on the individual participatory rights of both plaintiffs and defendants alike. Thus, the Court expressed grave concerns, rooted ultimately in the constitutional guarantee of due process, that individual plaintiffs would be disserved by certification of a mandatory class under Rule 23(b)(2) where individualized monetary relief was involved:

[I]ndividualized monetary claims belong in 23(b)(3). The procedural protections attending the (b)(3) class – predominance, superiority, mandatory notice and the right to opt out – are missing from (b)(2) . . . . When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. . . . But with respect to each class member's individualized claim for money, that is not so . . . . Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. . . . while we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.<sup>116</sup>

The Court expressed an additional concern that resolution of the backpay issue in connection with a Rule 23(b)(2) class might have preclusive effects on a plaintiff's ability later to seek compensatory or other forms of damages. "That possibility underscores the need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representatives' or go it alone – a choice Rule 23(b)(2) does not ensure that they have."<sup>117</sup>

Equally troubling to the unanimous Court was the impact on defendant's rights. Observing that a defendant in a backpay proceeding has the right to present a

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<sup>114</sup> See *Wal-Mart Stores, Inc. v. Dukes*, No. 10-227, slip op. at 27 (2011) (citing lower court opinion).

<sup>115</sup> See *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

<sup>116</sup> *Wal-Mart Stores, Inc. v. Dukes*, No. 10-227, slip op. at 22-23 (2011).

<sup>117</sup> *Id.* at 24.

statutory defense explaining a non-discriminatory reason for its employment decision, the Court found class certification more generally—and the specific method of proof that was contemplated to flow from that certification—to be in tension with such a right:

The Court of Appeals believed that it was possible to replace such proceedings [relating to Wal-Mart's statutory defense] with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery – without further individualized proceedings. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to “abridge, enlarge or modify any substantive right”, a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.<sup>118</sup>

By its terms, this concern seemingly applies to all class proceedings—not just those under Rule 23(b)(2).

There has been much hue and cry concerning the differing approaches to employment discrimination litigation reflected in the Court's majority opinion and dissent, and the differences are indeed important. As compared to the dissent, the majority's approach to the commonality requirement of Rule 23(a) should lead to less frequent use of statistical analysis and will push class action litigation incrementally further in the direction of smaller classes and greater emphasis on fact-specific inquiries.<sup>119</sup> That incremental difference between the majority and the dissent is an important part of *Dukes* and a part that is fully consistent with the federal brand. But less observed—and arguably more important still—is the holding agreed to by all justices and the unanimously-endorsed grounds articulated for that holding. These include the express holding that Rule 23 requires notice and opt out rights for absent class members whenever individualized damages are sought; the “serious possibility” that the due process clause confers these rights when individualized issues of any kind exist; the fact that Rule 23 may not deprive defendants of their right to individualized determination of any defenses they may have because to do so would move Rule 23 into territory forbidden by the REA; and the condemnation of Trial by Formula.

The problem raised by the lower court's embrace of Trial By Formula in *Dukes* differs only in degree from that in any class action. On the plaintiffs' side, virtually every decision class counsel makes will benefit some part of the class at the expense of another. An example seemingly less extreme than the averaging approach in *Dukes* is a damages theory in a conventional securities case. The fundamental thrust of the case is an allegation that defendant was aware of, but omitted to disclose, information about the company's risk profile until the truth came to light, causing a

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<sup>118</sup> *Id.* at 27.

<sup>119</sup> Compare *Wal-Mart Stores, Inc. v. Dukes*, No. 10-227, slip op. at 8-19 with slip op at 1-11 (Ginsburg J., dissenting).

drop in the stock price. Assume a fixed overall damages number derived by multiplying the residual decline in the company's share price following the revelation of the truth by the number of shares estimated to be damaged. The question then becomes how to divide up that pie among the class. There are at least two axes to consider: the knowledge of the defendant who withheld the information, and the knowledge of the market which failed to reflect the information in the price of the security to the degree it was unaware of the information. As to the first, there will rarely be a specific piece of information that was known by the company but withheld as of a specific date; rather, the information will relate to a risk which became increasingly great and more apparent to different levels of the company over time. On the other axis is the investment community's knowledge as reflected in the stock price—that community's awareness of the risk will change over time. The damage for each individual class member, therefore, will differ depending upon the degree of mismatch between company information and publicly-reflected information at the particular moment that individual purchased the shares.

With this background, it becomes obvious that whatever theory of the case plaintiffs' counsel chooses, there will be great impacts on the distribution of share price inflation throughout the class period. The more counsel chooses to emphasize one piece of evidence at one particular time as an important fact, presumably heightening the gap between company knowledge and public knowledge as of that moment, the more other moments in time recede in their importance, thereby diminishing the damages claim of those who purchased shares at that time. When class counsel chooses to fight about production of some documents and not others, to pursue some avenues of inquiry and not others, and to emphasize some pieces of evidence and not others, counsel is making choices about what that damages model will ultimately look like and how class counsel will distribute the aggregate damages claim among counsel's many different clients. This is just one example and an oversimplified one at that. Literally every day, class counsel must make strategic decisions that will serve some members of the class and, on a relative basis, disserve others.

To be clear, this problem is not unique to class counsel in aggregate litigation. The defense counsel in that same litigation will have decisions to make about what serves the interests of the corporation and what does not. And, indeed, lawyers on both sides in bilateral litigation confront these difficulties as well. Simply put, in the litigation environment, it is difficult to know what is in the interests of even one client; that is what makes the practice of law an art and not a science. But making the lawyer serve the interests of thousands, or millions, of clients unquestionably renders this job more daunting. If one adds to that problem a method of litigating the class action that involves purely statistical forms of proof and in which no individualized evidence is uncovered, it becomes virtually impossible to imagine that the interests of particular clients can be best served by the class lawyer. The claims of some individuals will never be heard by the factfinder and the evidence that is heard by the factfinder will be adverse to those claims in the sense that it favors the claims of some other individual at the expense of those claims.

Any form of aggregate proof—not just the Trial By Formula involved in *Dukes*—creates the potential for threats to defendants' rights as well. The elaborate set of discovery and evidentiary rules under which the American system operates is premised on the idea that each side will develop its case against the other side through the uncovering of specifics. Discovery exists both to test the other sides' assertions in the crucible of the real world facts (which always turn out to be a little

more nuanced than the assertions would imply) and to develop and reveal lines of argumentation that are independent of the assertions made by the other side. Aggregate litigation does not in any way diminish plaintiffs' ability to do these things. But it can threaten the ability of defendants to do so. The degree to which the factual assertions in the class complaint truly apply to each specific individual in the class will rarely be known. Nor will defendants often have an opportunity to develop through discovery idiosyncratic defenses arising from the specific circumstances of each plaintiff's situation.<sup>120</sup> As a result, left unguarded, the class action device can turn into a mechanism for putting a defendant under a microscope and then putting that defendant on trial, rather than testing whether a particular plaintiff meets the elements of a cause of action and whether defenses to that cause of action exist in the context of a particular occurrence.

A unanimous Supreme Court in *Dukes* made clear that one particular form of aggregate proof presents unacceptable risks to both plaintiffs' and defendants' participatory rights. But the logic of *Dukes* applies to all situations in which individualized proof is completely foreclosed. Indeed, in its punitive damages decisions predating *Dukes*, the Court has grappled with similar issues and generally laid down the principle that traditionally-existent procedural rights of individual parties—rights such as the right to discover the facts and present them to the factfinder—if altered, can constitute a deprivation of due process.

As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis. Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution. Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure. When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.<sup>121</sup>

In *Williams* the Court applied this same principle to hold that the due process clause forbids imposing punitive damages on the basis of a defendant's conduct with respect to third parties whose particular factual situation was not presented to the factfinder and subject to exploration and cross examination.<sup>122</sup> Even before *Dukes*, we were beginning to see the lower courts get the message and apply this same logic in the specific context of individualized proof with respect to absent class members. Thus, statistical models showing that off-label prescriptions increased in significant ways that corresponded to the timing of a defendant's allegedly improper off-label

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<sup>120</sup> Again, this is a matter of degree: in all litigations parties will not have the opportunity to explore every avenue that they wish to pursue. But the change from bi-lateral to aggregate litigation has the potential to dramatically, and lopsidedly, change the ability of one party to develop and try its case.

<sup>121</sup> *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (citations omitted).

<sup>122</sup> *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

promotions have been held insufficient proof to establish liability for off-label drug promotion; evidence of the specific motivations of particular class members was required as well.<sup>123</sup> Statistical models could not be a substitute for individualized proof from each absent class member in the case of a class action on behalf of alleged victims of human rights abuses<sup>124</sup> or individuals allegedly suffering increased medical costs as a result of alleged misrepresentations by tobacco companies.<sup>125</sup> And, even where statistical proof is deemed sufficient to meet plaintiff's burden, defendants are more frequently being held to be entitled to explore individualized defenses with at least a statistically significant set of absent class members.<sup>126</sup>

*Dukes* and other recent decisions and trends teach that class certification may proceed but it has to proceed in a way that continues to respect the individual participatory rights of class members and defendants. Aggregate proof may be helpful but it cannot be the whole kit and caboodle. For the benefit of both plaintiffs and defendants alike, the federal brand requires some individualized evidence in class action litigation.

## 2. Approaching Presumptions With Caution

The federal brand means the death of Trial By Formula. And the logic and reasoning of *Dukes* and other cases also suggests that some form of individualized discovery and evidence is necessary to protect the rights of plaintiffs and defendants alike. How does this latter proposition square with use of presumptions? A number of lower courts have rejected the use of presumptions; others have permitted them but given defendants the right to rebut those presumptions with individualized proof if they so choose; and some have permitted presumptions while insisting that any rebuttal of them occur through aggregate, rather than individualized, proof. It would seem clear that this last category is inconsistent with the new federal brand. But what about the first two?

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<sup>123</sup> *In re Neurontin*, 257 F.R.D. 315, 326 (D. Mass. 2009) (rejecting a proposed proceeding that would have foreclosed the defendants from exploring whether their alleged fraud caused damage to each individual plaintiff in the class); *In re Neurontin*, 677 F. Supp. 2d 479 (D. Mass. 2010); *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, No. 2:05-cv-5774, WL 2043604 (D.N.J. July 10, 2009).

<sup>124</sup> *Kpadeh v. Emmanuel*, 261 F.R.D. 687 (S.D. Fla. 2009).

<sup>125</sup> *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 217-18 (2d Cir. 2003).

<sup>126</sup> *Blue Cross*, 199 F.R.D. 487, 488 (E.D.N.Y. 2001) (authorizing depositions of 156 Blue Cross subscribers), *rev'd*, 344 F.3d 211 (2d Cir. 2003); *Aspinall v. Philip Morris Cos. Inc.*, No. 98-6002-H, 2005 WL 3629358 at \*3 (Mass. Super. Ct. Nov. 22, 2005); *Hale v. Wal-Mart Stores, Inc.*, 231 S.W. 3d 215, 228 (Mo. App. W.D. 2007); *Long v. T.W.A.*, 761 F. Supp. 1320, 1329-30 (N.D. Ill. 1991). *In re Fibreboard Corp.*, 893 F.2d 706, 710-12 (5th Cir. 1990) (rejecting a move away from "one-on-one 'traditional' modes of proof" as violative of due process and as disregarding "the very culture of the jury trial and the case and controversy requirement of Article III"); *Osuna v. Wal-Mart Stores, Inc.*, No. C20014319, 2004 WL 3255430, at \*8 (Ariz. Super. Dec. 23, 2004) (holding that due process clause requires defendants to have the ability to examine individual class members); *In re Chevron U.S.A. Inc.*, 109 F.3d 1016 (5th Cir. 1997) (holding that a sample had to be random and representative); Manual for Complex Litigation Sec. 22.315.

It is tempting to turn to *Halliburton* for an answer but, if we do, we must turn with care. *Halliburton* reaffirmed the permissibility of using the fraud on the market presumption to meet the reliance requirement for most federal securities fraud class actions under Rule 10(b). By its terms, it did so on the basis that it would be difficult to achieve class action status if this element of the cause of action were strictly enforced. It would appear that in the context of securities actions Rule 23 does not simply amalgamate individual claims, in which reliance was previously thought to have been a required element, and permit aggregate proof but it may do something more “substantive” to the very elements of the claims themselves. Is this an example of societal interest in the proper level of enforcement of the securities laws coming into play to diminish or eliminate individual rights? If so, what are the implications of this outside of the securities context for the role of the courts in using Rule 23 to obtain societal objectives *vis-à-vis* the role of the legislature in its enactment of substantive law? In short, *Halliburton* is consistent with the idea of a federal brand, but it would seem at first glance to be endorsing a federal brand based on a utilitarian conception rather than an individual rights framework.

Some deeper digging is required. A review of the *Basic* opinion itself, which was the topic under discussion in *Halliburton*, reveals that that ruling was relatively humble: it did not require the fraud-on-the-market presumption but merely stated that a lower court’s discretionary decision to adopt the presumption in a particular case “is not inappropriate.”<sup>127</sup> The Court identified two reasons why such a presumption was “not inappropriate”—first, legislative history suggested that “in drafting the Act [in question] Congress expressly relied on” the premises underlying the fraud-on-the-market presumption; second, the facts—as evidenced by “common sense,” “probability,” “recent empirical studies” and the expert opinions of “market professionals” and “commentators”—supported the presumption.<sup>128</sup> What’s more, the decision was at pains to point out that defendants would have some opportunity to rebut the presumption. In this sense, the presumption did not amount to a direct morphing of the elements of the cause of action but was more akin to an evidentiary ruling, which is of course a more “procedural” determination that is well within the province of the courts.

In practice, of course, the nuanced origins of *Basic* have not always been respected. If a statement is in fact deemed material in the sense that a reasonable investor would want to know the information, there is rarely any effort by defendants to demonstrate in a systematic way that—notwithstanding that fact—the reliance element is not met as to the class as a whole. The presumption that material information will be relied upon by the market and reflected in the price, which in turn is relied upon by the individual investors that comprise the class, frequently becomes for all intents and purposes the final word on the matter. But there is a reason for this. The truth is that the purchase of securities is in fact in most cases a purely financial act. Sophisticated investors drive the market and those investors purchase one stock as compared to another because they believe that that stock will make them money. For the most part, they do not make purchases based on emotional or individualized anecdotal information. The evidence suggests that this is true and, equally important, the *Basic* Court concluded that Congress believed this to be true when it enacted Rule 10(b). What this means is that the very element of

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<sup>127</sup> *Basic Inc., v. Levinson*, 485 U.S. 224, 250 (1988).

<sup>128</sup> *Id.* at 246.

the claim—reliance—has a different meaning in the context of a Rule 10(b) action than it does in, say, a consumer class action. Congress believed—and it is in fact generally true—that if a company’s statement carries with it certain financial implications, those financial implications will be relied upon in the sense that they will be reflected in the price of the company’s stock.

A number of courts have taken the wrong lesson from *Basic* and its progeny. Thus, there have been courts which have attempted to apply the fraud on the market presumption to other contexts such as consumer class actions involving alleged misstatements in connection with the sale of prescription drugs.<sup>129</sup> While it is not always clear, presumably these courts are acting based on premises similar to those which seem at first glance to have been articulated in *Halliburton*—that the practical necessity of making a class action workable should trump the insistence on rigid adherence to proving the elements of the cause of action. But consumers do not “rely” on the market in the same way that investors do. While it is generally fair to assume that investors purchase shares based purely on an assessment of the monetary value of those shares and that therefore in an efficient market any misstatement as to the value impacts the share’s price, it is not as clearly the case that consumers purchase products based on a uniformly-applicable financial assessment of the product’s worth. Products may be worth one thing to one person and something different to another person. They may be purchased for emotional reasons or for multiple different “logical” reasons and uses. A representation relating to one aspect of the product, then, does not automatically affect the price. More important, if it does affect the price, it does not necessarily do so as a result of reliance by individual market participants that is uniform across the class. To prove reliance, in short, there is an argument to be made that it is not enough to prove that some purchaser of the product would want to know the information because it is relevant to the inherent value of the product; one must instead establish that consumers were in fact exposed to the statement and did in fact make their purchases based on that statement.

The point is not to argue for or against expansion of the *Basic* presumption in particular cases. It is rather to emphasize that there is a difference between the two situations. Congress’ judgment, as reflected in the legislative history relied upon by *Basic*, that there was factual cause for a presumption of reliance in the case of the securities laws does not automatically mean that every time the element of reliance is used in a statute or by a court that it has that same meaning. Not all reliance elements are equal. And it is up to the federal courts, using the traditional tools of statutory interpretation and common law exposition, to figure out what form of reliance was intended to be an element of the particular claims before them. The lesson of *Basic* is not that courts are free to ignore a defendant’s right to insist upon proof of all elements of a cause of action if doing so would be inconvenient or would frustrate the ability to certify a class. Rather, the lesson is that for federal causes of action courts must look to what the actual elements of the cause of action are because the elements may be more nuanced than they appear at first glance.

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<sup>129</sup> See *In re Zyprexa Products Liability Litig.*, 253 F.R.D. 69, 194 (E.D. N.Y. 2008). *But see* *Southwest Laborers Health and Welfare Fund v. Bayer Corp.*, No. 08-1928-MD, 2009 WL 2355747, at \*11 (S.D. Fla. July 30, 2009) (rejecting the *Zyprexa* approach); *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1337 (S.D. Fla. 2007) (rejecting such an approach).

As I have suggested, courts seeking to expand the *Basic* presumption outside of the securities context are not the only ones to have potentially misread *Basic*. Eschewing any reference to Congressional intent or the factual basis for the fraud-on-the-market presumption, the *Halliburton* Court characterized the *Basic* presumption as a practical outgrowth of the requirements of Rule 23. According to *Halliburton*, the basis of *Basic* was the observation that “requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would prevent such plaintiffs from proceeding with a class action, since individual issues would overwhelm the common ones.”<sup>130</sup> The *Basic* Court, according to *Halliburton*, was motivated by an effort to alleviate that concern.<sup>131</sup> This characterization of *Basic* is largely incorrect. The lower court in *Basic* did recognize the practical issues identified by *Halliburton* and, in discussing the lower court’s decision, the Supreme Court identified the concerns.<sup>132</sup> But the Court pointedly did not rely upon those concerns when reaching its decision. As noted above, different considerations—considerations relating to Congressional intent and the facts—drove the decision. The language in *Halliburton* is unfortunate, but—given the unique context of the securities laws and given the actual language of *Basic*, which *Halliburton* was purporting to elucidate—it is fair to proceed on the assumption that the language did not signal a wholesale departure by the Court from the otherwise-consistent approach it has taken in recent years to the role of Rule 23 *vis-à-vis* “substantive” law. Indeed, following the unfortunate language, *Halliburton* went on to emphasize once again that the topic in question was merely a presumption and not a substantive determination—suggesting that the Court viewed the issue as essentially an evidentiary one.

Once one focuses upon the issue of presumptions as evidentiary matters, this language in *Halliburton* might be said to be something other than just unfortunate. Arguably the language reflects the Court’s view of *Halliburton* as the federal analogue to *Shady Grove*’s protection of plaintiff’s rights. As *Shady Grove* made clear, Congress can and does do what the state legislature in *Shady Grove* was barred from doing: alter Rule 23 by making certain actions exempt from class treatment. But, in the absence of Congress having done so, in *Halliburton* the Court operated under the implicit premise that the cause of action is indeed eligible for class proceedings and was intended to be by Congress. The Court was ready to presume that plaintiffs’ right to bring the federal action in question in a class form under Rule 23 should not be narrowed, even if that meant altering the otherwise-applicable burden of proof with regard to the elements of the cause of action in order to more easily protect and promote that right of plaintiffs.<sup>133</sup> In other words, consistent with the premise of part IV.B. above, *Halliburton* and *Basic* reflect the development of a federal common law of Rule 23 in the securities class action context. That common law holds that the practicalities of achieving class certification can be taken into

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<sup>130</sup> Erica P. John Fund, Inc. v. Halliburton Co., 131 S.Ct. 2179, 2185 (2011).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 242.

<sup>133</sup> Again, as in *Shady Grove*, presumably this too works in both directions: Rule 23 cannot also be expanded beyond its contours in a way that impedes the rights of defendants. The Court’s other decisions this term seem to confirm as much.

consideration – just not at the level of interpreting the elements of the cause of action but, rather, in the more traditional realm of evidentiary presumptions.<sup>134</sup>

The distinction is important: under one framework, the presumption is made at the express expense of defendants' rights in order to achieve broader societal objectives in deterrence; in the other framework, the presumption is made in order to vindicate the rights of a particular plaintiff and in a way that must be capable of being characterized as still preserving defendants' rights. To pick one example, a court deciding to indulge a presumption under the first framework would presumably reject the idea that the defendant is entitled to individualized discovery of all—or a statistically significant portion of—class members as something that would tend to undermine societal objectives. A court approaching the situation under the latter framework, however, would view such rebuttal rights of defendant as essential to preservation of the legitimacy of making the presumption in the first place.

Unlike Trial By Formula, which has now been categorically ruled out as inconsistent with the federal brand, presumptions remain in the judicial toolkit to be used in appropriate instances. The unique circumstances of the securities laws are one such instance. Even in that context, however, the Court treaded carefully. The Court made clear that this could be done only in a way that is characterizable as evidentiary rather than as a substantive alteration of the parties rights and that the defendants need to have an opportunity to rebut the presumption if they choose. Other limitations on the presumption inhere in the opinion as well.<sup>135</sup> Given the qualifications on the Court's blessing of presumptions in the obvious and traditional context of securities class actions and the Court's insistence that the presumption was acceptable only because of defendants' ability to rebut the presumption, it is fair to infer that the federal brand ordinarily will include at least some right to individualized discovery and evidence if a presumption is going to be used.

#### *D. Informed Choice*

Just as important as the right to participate fully in the proceedings is the right of parties not to subsume their individual claims into the collective class, and the federal brand takes this right seriously. For any number of reasons, individuals may decide that they do not want the actions of some other party to govern their destiny. The federal brand reminds us that class treatment is the departure from our

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<sup>134</sup> The issue was discussed in a decision by Justice Scalia staying execution of a state court judgment pending the Court's action on a petition for certiorari. *Phillip Morris USA, Inc. v. Scott*, 131 S.Ct. 1 (2010). There a state appellate court had held that defendant had no nonreliance defense in the context of a class action with the result that "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of a class action." *Scott*, 131 S.Ct. at 4. Although Justice Scalia expressed grave doubts about the constitutionality of such a result, certiorari was not ultimately granted. *Phillip Morris USA Inc. v. Jackson*, 131 S.Ct. 3057 (2011).

<sup>135</sup> For example, the Court limited its actual holding to a ruling that proof of loss was not required in order to invoke the presumption of reliance. The Court pointedly refused to decide the question of whether transaction causation – inducement of the purchase – was part of the presumption or not, leaving open the possibility that the plaintiff is entitled to a presumption of reliance only if it can establish that the purchase of shares was somehow induced by the statement in question.

individual rights tradition and that, absent good reason such as arguably exists in the mandatory classes, we should give individuals who desire to avoid amalgamation every benefit of the doubt. Further confirming that the individual rights approach has won the day, two of the Court's cases this term drive this point home and go on to suggest a future direction for class litigation that involves strengthened procedures designed to enhance and respect the exercise of individual choice by absent class members, both in the decision whether to join the class and more generally.

#### 1. Respecting Class Member Decisions

*Concepcion* implicates the right of private parties to opt out of class treatment before the trouble even begins and it also teaches us something about participatory rights more broadly. The blackletter holding is that the FAA preempts California's unconscionability doctrine insofar as that doctrine would apply to invalidate a class action waiver accompanying an agreement to arbitrate. To the longstanding rule that consumer contracts may require arbitration has now been added the corollary that a particular kind of arbitration—class action arbitration—can be foreclosed. While the opinion nominally involved interpretation of the FAA, the Court's vision of what a class action is bears the real load. In the Court's view class actions by their very nature require a level of expertise in procedure possessed by the federal courts and less likely to be possessed by arbitrators.

The Court expressed concern about the implication of this fact for the rights of both plaintiffs and defendants alike. On the plaintiff's side, if the class is to serve its fundamental purpose of resolving all claims including those of absent class members, there will need to be "at least" the same protections afforded in federal court, including adequate representation by class representatives, notice to absent class members, and opportunity to be heard and to opt-out.<sup>136</sup> The Court viewed these protections and unnamed others as having real meaning and involving real effort and expertise and therefore thought it "odd to think that an arbitrator would be entrusted" with the weighty task of implementing them.<sup>137</sup> On the defendant's side, the Court expressed concern that the absence of firm evidentiary standards and appeal rights, while tolerable in the context of individual claims presenting lower risks, would likely become intolerable to many defendants if "damages owed to tens of thousands of potential claimants are aggregated and decided at once."<sup>138</sup> *Concepcion*, then, reflects the federal branding dynamic in full swing. Not only is there a concern about individual rights that echoes concerns expressed in *Dukes*, but, echoing *Shady Grove* and CAFA, there is open skepticism about the ability of tribunals other than federal courts to adequately protect those rights in the class action context. Put more positively, the federal courts view themselves as in the business of creating a structure for the protection of important individual participatory rights. And, portending future strengthening of these protections, the Court viewed the implementation of the protections as not merely make-work but heavy lifting.

The victory of the individual participatory rights view and its implication for future strengthening of procedural protections of those rights is confirmed by not

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<sup>136</sup> AT&T Mobility LLC v. *Concepcion*, 131 S.Ct. 1740, 1751 (2011).

<sup>137</sup> *Id.* at 1752.

<sup>138</sup> *Id.*

only what the *Concepcion* Court said, but also what it did. The case was about whether the parties' agreement to resolve their dispute without resort to the class action device was enforceable or was instead void as against public policy. The Ninth Circuit concluded that California law voided all such agreements as a prima facie matter because of a broader societal interest in achieving full law enforcement through aggregate litigation. *Concepcion* analyzes the reasons why rational parties on both sides might agree that aggregate litigation disserves their mutual interests—a plaintiff's desire to achieve early settlement of his individual claim, which might not be possible if the defendant knows that class action litigation is inevitable; a plaintiff's desire to control the litigation and participate meaningfully in it, which is less likely in the class action context; a defendant's desire to avoid "bet the company" litigation that is not accompanied by meaningful safeguards such as a right to appellate review under familiar standards of review; and both parties' desire for quick and efficient litigation.<sup>139</sup> In the end, *Concepcion* rejects California's effort to displace these calculations of private parties about their own interests in favor of broader societal concerns about enforcement of the law. The case presents a direct conflict between a utilitarian vision and an individual rights vision, and the latter clearly prevails.

A related point arises when one focuses on only one side of the consent discussion—specifically, the consent of Mr. Concepcion himself and, by extension, class members more generally. By analyzing the rationality of the parties' choices, the Court was also implicitly addressing an issue not raised in *Concepcion* but existing in the background and likely to be raised in other cases. *Concepcion* involved an invalidation of class action waivers on a facial basis as void against public policy. As Justice Thomas points out in his concurring opinion, there was no issue raised in *Concepcion* about duress or, more broadly, the gateway issue of the voluntariness of Mr. Concepcion's agreement.<sup>140</sup> The issue of the degree of individual choice and informed consent actually involved here is an elephant in the room, and it is not surprising that eight justices chose to avoid the topic. While the majority's analysis of the reasons why plaintiffs might rationally agree to avoid class arbitration is sound, our own experiences suggest that even knowledgeable attorneys confronted with contracts of adhesion such as the one in *Concepcion* simply "click through" without engaging in any meaningful analysis of the terms and their costs and benefits. Of course, this too reflects an individual choice, but it is one to which we are tempted to give less weight. The majority—with its emphasis on the need to respect the autonomous desires of the parties—had good reasons for not opening this can of worms.

But so too did the dissent. If a fact-specific inquiry into the voluntariness of Mr. Concepcion's decision is called for, that issue cannot be ignored with respect to the other putative class members who also agreed to the same contract. If the battle is won, the war may still be lost because the necessity of inquiring into the facts of each case likely would render class certification inappropriate or unworkable.

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<sup>139</sup> See *id.*

<sup>140</sup> *Id.* at 1753-54 (Thomas, J., concurring). See also Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 *FORDHAM L. REV.* 2035 (2011) (discussing the distinction between an approach based on unconscionability and "gateway issues" such as duress and informed consent).

The problem is important for present purposes because the contractual provision involved in *Concepcion* and the circumstances of the agreement were not substantially different than the circumstances accompanying opt-out decisions in active and ongoing class actions. Like Mr. Concepcion, absent class members receive a complicated and lengthy form asking if they would like to participate in a class action. Like Mr. Concepcion, these putative class members are confronted with an easy option (simply “do nothing,” as these forms usually put it, and thereby put all their rights into the hands of class counsel) and a hard option (return the form with an indication that they intend to “opt out” of the class and begin the process of obtaining counsel and protecting their individual rights on their own). Like Mr. Concepcion and, presumably, tens of thousands of other customers confronted with the same choice, absent class members in federal class actions almost universally follow the easy route. The same dynamic exists not only with regard to the specifics of the opt-out decision but all “decisions” that we attribute to the minds of absent class members in class action litigation. As the majority did in Mr. Concepcion’s case, clever legal analysts have presented all the reasons why it is rational for absent class members to act in this way. But, if there is question about the adequacy of the process by which Mr. Concepcion in fact chose to opt out, those questions are just as forcefully applied to the entire process by which we legitimize the constitutionality of class actions more generally. Put more affirmatively, if we are to respect the rights of absent class members to “opt in” by doing the easy thing, then we must similarly respect the rights of the parties when they have chosen to “opt out” by doing the easy thing. This point in many ways makes Mr. Concepcion’s individual situation irrelevant. Even if he could somehow establish that he did not in fact opt out, he would be left representing a class of one—all the others whom he seeks to represent have in fact opted out and, in the absence of some contrary indication, we must respect that choice on their part.

Where does this leave us on the consent point? One reading of *Concepcion* is that it is about requiring consistency in our treatment of individual consent—the standards for opting out should be roughly the same as the standards for opting in. If that is so, two distinct paths are possible. On the one hand the Court may keep the “weak” form of consent that absent class members routinely are deemed to have exercised in class actions and that now has been confirmed as acceptable for class action waivers as well. On the other hand, and more desirable in my view, the Court may develop the federal common law of class actions in a way that requires “strong” consent in both contexts. This means conducting the sort of voluntariness inquiry that Justice Thomas alluded to in cases like those of Mr. Concepcion. But, it also means strengthening the degree of absent class member participation and decision-making in class actions – both respect to the opt out decision and with respect to all other important litigation decisions. The reforms instituted by the PSLRA were designed to begin the process of doing this. One can think of any number of additional reforms that would further this goal as well.

The decision between these two courses may be made easier by the knowledge that the impact on the breadth of class actions is likely to be the same no matter which route is taken. If the weak form of consent is allowed, classes will be smaller and class actions less frequent because of private party opt outs at the front end. If the strong form of consent is pursued, classes will be smaller and class actions less frequent because fewer individuals will include themselves by default at the back end. But the narrowing impact of both approaches on the breadth of class actions masks important differences between these two possible future worlds. In the

former, the fate of individual claims is determined by the bureaucrats who craft clever click-through agreements (at the front end) and the class action lawyers who craft clever “simply do nothing” opt out forms (at the back end). In the latter, the fate of individual claims is determined by the individuals who hold those claims. Thankfully, the Court’s language in *Concepcion* and the overall thrust of the branding project more generally suggest that it is this latter course that we have in store.

## 2. Rejecting Virtual Representation

An important part of respecting individual choice is limiting the circumstances under which the choices of others are deemed to be binding on the individual. *Smith* dealt with this situation in an idiosyncratic context that, because of the passage of CAFA, is unlikely to arise with regularity again, but the way in which *Smith* dealt with the issue is telling.

In the abstract, the issues in *Smith* were not easy. The re-litigation exception to the Anti-Injunction Act could easily be read to apply to a situation where the only difference between the state and federal inquiry was of the minor sort involved in *Smith*. And the question of the preclusive effect of class certification denials on absent “class” members had split the circuits with each side providing persuasive arguments for its position.<sup>141</sup> But for one operating in the individual rights framework the path forward is more clear and, indeed, the unanimous Court did view the path as clear.

As *Shady Grove* confirmed with respect to Rule 23, the ability to choose to proceed on a class basis is itself an individual right worthy of respect and consideration. *Smith* can be read as making clear that the same holds true with regard to rights under state analogues to Rule 23 and that such a right cannot be extinguished absent appropriate protections and counterbalancing benefits. Neither was present in *Smith*. As to the first, in the Court’s view, there were literally no protections afforded to the absent class members—Mr. Smith had no knowledge of the federal case and no participation in it.<sup>142</sup> Given this, the Court found no support in existing preclusion law—developed outside the context of class actions – for binding a non-party to a result in which it had no opportunity to participate.<sup>143</sup> Indeed, the Court went further and referenced, but reserved for another day, the possibility that absent class members have a constitutional right under the due process clause, as elucidated in *Phillips Petroleum Co. v. Shutts*,<sup>144</sup> to notice and opportunity for participation before an adverse class certification decision can have preclusive effect.<sup>145</sup> As to the second issue, societal benefits to counterbalance the intrusion on individual rights, the critical issue is the fact that Rule 23’s requirements have been found by a federal court to be lacking. In such a context, there is not even an argument to be made that there is legislative sanction for considering the societal benefits associated with class actions and weighing those benefits against the costs to

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<sup>141</sup> *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2374 (2011).

<sup>142</sup> *Id.* at 2373.

<sup>143</sup> *Id.* at 2380.

<sup>144</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

<sup>145</sup> *Smith*, 131 S.Ct. at 2376 n.7.

individual rights. In some sense, the utilitarian side of the cost-benefit scale is empty while weighty individual rights occupy the other side of the scale. The outcome is clear.

The defendants in *Smith* were not without arguments but none are persuasive from an individual rights standpoint. Clearly there is cost associated with re-litigating the class certification decision. But that cost is greatly offset by the possibility that a class will in fact be certified. Put another way, the rationale associated with saving costs and achieving final resolution of issues for societal benefit is largely a one-way ratchet—if a class is certified, society will save costs and achieve finality. If a class is not certified and that decision is deemed to have preclusive effect, in principle the only costs saved are those of the actual motion to certify. In all other respects the costs are heightened as the situation will be no different than the one where class actions did not exist at all—the possibility of multiple individual trials looms.<sup>146</sup> And this minimal savings, if any, will be achieved at the expense of individual plaintiff's rights.

There is also the issue of perceived unfairness to defendants, who are bound by the class certification determination if they lose but who cannot always take advantage of preclusion when they win. But that unfairness is in many ways minimal. *Stare decisis* and comity will as a practical measure lead to the same result at certification after defendants win, and CAFA now provides defendants in most situations an opportunity to avoid the whipsaw of differing state certification standards if they choose to do so.<sup>147</sup> Perhaps more important, this is an unfairness that we are used to as a result of centuries-old preclusion law; the situation is not that different than the one faced by defendants on the merits of their claims—multiple plaintiffs can bring claims seriatim and the defendant faces the prospect of preclusion if it loses while it frequently cannot preclude if it wins. The individual rights model long ago made peace with this result, largely on the premise that, if the defendant is ever hoisted, it will be on the petard of a litigation that it itself participated in and directed. Rule 23 breaks no new ground here.

Finally, and most importantly for present purposes, there is the argument that absent class members were “virtually represented” in the proceedings and should be bound for that reason.<sup>148</sup> The argument has force. As a practical matter, there is little difference between the degree of participation that Mr. Smith had in the federal court proceedings to which he was held not a party and the participation of absent class members in normal class actions. Indeed, frequently the entirety of a “class action” litigation consists of litigation that occurs before certification, with that event coming only at the end of the litigation in connection with court approval of a settlement. If absent class members are deemed adequately represented in this context, why not for purposes of the determination made in *Smith*? The answer lies in the role of the Court. Rule 23 has at least some measure of legislative legitimacy and it is the text of that Rule that identifies the circumstances under which aggregate

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<sup>146</sup> To be sure, as a practical matter many costs would be saved because individual actions might not be economically practical to bring. However, that cost savings is achieved at the price of extinguishing individual's claims on the merits, solely on the basis of a procedural determination under Rule 23.

<sup>147</sup> *Smith*, 131 S.Ct. at 2382.

<sup>148</sup> *Id.* at 2380-81; *see also id.* at 2379.

litigation—and the accompanying damage to individual autonomy in the name of societal benefits—will be tolerated. Because certification was denied, by definition, *Smith* was not such a case. In the absence of express authorization under Rule 23, the Court would not on its own expand the terrain of aggregate litigation by creating what amounts to a “common law kind of class action.”<sup>149</sup>

This is the enduring point of *Smith* and the point at which *Smith* fits nicely into the pattern established by the two broader trends with respect to class actions. The “absent” part of the phrase “absent class members” is of concern, and is something that is likely to be less true under the new federal brand. The Court was not at all inclined to go in the other direction and expand the circumstances under which absence is deemed acceptable. In short, even where Rule 23 does apply, the Court views itself under the federal branding project as having been charged by Congress with stepping into the breach to protect and encourage individual participatory rights against excessive zeal in the furtherance of the societal interests served by aggregate litigation. Where Rule 23 does not apply, then, as in *Smith*, the Court will be even more protective of those rights. The Court does not view itself as expanding Rule 23 and the problems of virtual representation that it creates so as to preempt state proceedings or create a federal common law right to aggregate litigation. Quite to the contrary, it views itself as sheparding Rule 23 back into the fold by bringing the level of individual participation that occurs in class actions closer to the level that we are used to seeing in other litigation.

#### E. Citizen Participation

The federal brand also has implications for the respective roles of judges and litigants. Outside the class action context, the prevailing metaphor for the judge’s role is umpireal.<sup>150</sup> The parties are the real players and the judge’s job is impartially to enforce the rules which are designed to ensure that neither side receives an unfair advantage. Indeed, in some sense the umpire metaphor overstates the judge’s role outside of the class action context. Unlike the umpire calling balls and strikes, the judge has no independent view of the truth of the matter. The parties choose what evidence to develop and what to present to the judge, and the judge’s role is largely restricted to choosing between two competing narratives. As Judge Frankel put it in his oft-cited remarks:

The judge views the case from a peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other’s. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study. . . . The ignorance and unpreparedness of the

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<sup>149</sup> *Id.* at 2380.

<sup>150</sup> Then-judge John Roberts famously and repeatedly employed the metaphor during the Senate hearings on his nomination to be Chief Justice. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States Before the S. Comm. On the Judiciary*, 109<sup>th</sup> Cong. 55 (2005) (statement of John G. Roberts, Jr., nominee to be Chief Justice of the United States). For a history of the metaphor’s use, see Aaron Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, YALE L.J. ONLINE 113 (2010).

judge are intended axioms of the system. The “facts” are to be found and asserted by the contestants.<sup>151</sup>

While Judge Frankel was urging modification of our adversary framework to embrace a system more akin to the investigative model of judging prevailing in civil law states, he nonetheless took the view that until such change occurred, “within the confines of the adversary framework, the trial judge probably serves best as a relatively passive moderator.”<sup>152</sup> Because it emphasizes the role of the judge in ensuring that all parties have a fair chance to participate and de-emphasizes the judge’s role in achieving particular substantive outcomes, the umpire metaphor fits well with the individual participatory rights view.

While the umpire metaphor predominates outside the class action context, within the field different, more utilitarian, language is sometimes used. One image frequently appearing in public discourse is that of the activist judge who uses Rule 23 as a means of acquiring for the federal judiciary those powers more traditionally thought to be exercised by state governments or the other branches of the federal government. Thus, Rule 23(b)(2) allows for class-wide injunctions and declaratory relief that, in some cases, has left federal judges dictating day-to-day decisions in schools, prisons, hospitals, or administrative agencies. Similarly, by certifying a Rule 23(b)(3) class, a judge exerts substantial leverage upon a private company to settle and, by extension, to alter its future conduct. In short, whether the institution be private or public, whether local, state or federal, whether the province of the legislature or the executive, there stands the activist federal judge ready to use Rule 23 to micromanage the situation. Put less pejoratively, Rule 23 in this view requires the judiciary to play a more active role in furthering the society-wide objectives that the underlying substantive law was designed to achieve.

To the extent that there was divergence between judges’ roles outside the class action context and their roles within it, the federal brand pushes for convergence. Review of the dockets in the securities realm provides a good example of how this has worked in the years following the PSLRA and SLUSA.<sup>153</sup> As detailed in Section III.A. above, the dockets reviewed consisted of the largest cases with the largest recoveries and yet they do not reveal stereotypical judicial activism at work. Fewer than half the cases involved an order on a contested motion for class certification; only one defendant moved for summary judgment and awaited an order on the motion (and that defendant prevailed); and there appeared to be only occasional efforts to overturn or deeply question the parties’ consensual settlements.

This does not mean that federal judges were neglectful of securities class action cases. Consistent with the express dictates of the PSLRA, the dockets revealed federal judges playing an active role, if not in the substance of the case, in policing the process. Thus, we see judges protecting defendants’ participatory rights by playing the PSLRA-envisioned role of gatekeeper. Rather than permit lawsuits to be filed without adequate pre-investigation of the facts in the hopes that discovery would later produce support for the allegations made, the PSLRA requires that the complaint meet a heightened standard of being supported by particularized evidence

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<sup>151</sup> Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042 (1975).

<sup>152</sup> *Id.* at 1043.

<sup>153</sup> See *supra* Section III.A.

and that it do so before any compulsory discovery occur. In effect this is an effort to ensure that the leverage created by Rule 23 and the compulsory discovery provided by Rules 26-36 are not themselves the mechanism for creating the claim, but instead serve only to facilitate resolution of a claim that pre-exists the application of the rules. The change is consistent with the individual rights vision that the Rules are primarily a mechanism for resolution of claims between private parties and not a mechanism for creating new claims or resolving some broader societal problem.

Just as the PSLRA contemplates active efforts by federal judges to protect the individual rights of defendants in the way just described, it also implements significant changes aimed at protecting the rights of absent class members and other plaintiffs. Thus, rather than permit the first person to the courthouse, or the first person to get the attention of a judge, to move forward with litigation that impacts the entire class, the PSLRA calls for public notice of the opportunity to be lead plaintiff. There follows an evaluation of the candidates based on statutory factors designed to diminish the degree to which the litigation is driven by lawyers and ensure that class members have a greater say in the conduct and ultimate resolution of the litigation. The court is then required to select lead plaintiff and lead counsel early in the case, before filing of an amended complaint and before any significant proceedings have occurred. This is a change to the frequent practice under Rule 23 in which class certification—and its attendant evaluation of class representatives and class counsel—do not occur until later in the case and, frequently, not until the case has in fact settled. The effects of these changes are twofold: first, the more orderly nature of the proceedings decreases the chances that decisions made by one plaintiff will have negative consequences for other class members; second, the formal designation of a lead plaintiff and lead counsel early in the litigation creates a legal obligation of those entities to represent the interests of absent class members throughout the litigation and not just at its conclusion. Both effects preserve the individual rights of absent class members.

The revised rules of the road require the federal judge to evaluate consolidation of all proceedings in one forum, ensure that proper notice of the case has been widely circulated, evaluate the conflicting positions as to who should be lead plaintiff and lead counsel and make a decision on those questions, and then evaluate the amended complaint using a heightened, gatekeeping standard. In some ways the PSLRA places the federal judge in a securities case in the role of a dinner party host who determines the invitees and sets the table before the meal begins. The judge provides the order and structure; the litigants do the talking and consuming. Or, to use another metaphor, the PSLRA envisions—and the dockets reviewed confirm—an umpireal role for the judge in securities class actions.

The development of a national brand for class actions suggests that the changes wrought by the PSLRA in the realm of securities litigation may be translated to class action practice more generally and may, indeed, be strengthened even further. For example, Congress and the courts may become more involved in the selection of class counsel. In securities class actions, there must be widespread publication of the opportunity to apply to be class counsel, and, following that publication, there are specific factors that a court must consider when selecting counsel. Whether intended to or not, this has had the effect of promoting the development of large sophisticated plaintiffs firms with expertise in the area of securities litigation. Rule 23(g) identifies a number of similar considerations relating to the appointment of class counsel in all class action litigations but the reality is that—without the statutory mandate for publication and competition among firms—the inquiry into the

adequacy of counsel is all too often prefatory. With the federal brand coming into being, expect to see heightened scrutiny under Rule 23(g) going forward.

Hand-in-glove with this is the selection of class representatives. In the context of securities litigation the PSLRA instructs courts to consider a number of factors including the amount of damages suffered by the plaintiff; the result has been larger institutions serving as lead plaintiff. As compared to individuals, these institutions have a greater ability to act as “real” clients influencing decisions made by their lawyers. While the adequacy of particular class representatives is a frequently-litigated topic outside the securities context, the question put to the court too frequently focuses exclusively on the applicability of various defenses to particular plaintiffs rather than also focusing on the demonstrated ability of plaintiff to serve as an active and engaged participant in making litigation decisions on behalf of the class. This too may change under the federal brand.

Each of these reforms in the securities context were also accompanied by a timing-related reform which, as noted above, has significant impact on the participatory rights of the parties. The decisions as to lead counsel and lead plaintiff are made at the very outset of the litigation—even before the consolidated amended complaint is filed and, therefore, before any decisions are made about the direction of the case. Rule 23(c) does require that in all class actions “the court must determine by order whether to certify the action as a class action” and appoint class counsel and class representatives “at an early practicable time” after suit is filed. On its face, this standard is more loose than the PSLRA standard and, in practice, it turns out to be substantially more loose with class certification decisions – and therefore formal appointment of binding class representatives with attendant duties – frequently made late in the case. The individual rights model suggests that this already-existing language in Rule 23 should be honored more scrupulously.

Then too there is the gatekeeping function that the PSLRA implemented with its stay of discovery and heightened pleading standard—each designed to ensure that the existence of the Rules of Procedure does not become a mechanism for creating litigation over substantive claims where none would have previously existed. The Court’s recent decisions in *Ashcroft v. Iqbal*<sup>154</sup> and *Bell Atlantic v. Twombly*<sup>155</sup> step in the direction of the PSLRA’s heightened pleading standard and we can probably expect to see an increasing tendency by courts to stay discovery pending the outcome of an *Iqbal/Twombly* motion. This same gatekeeping may apply in the class certification decision as well.<sup>156</sup>

One can imagine or propose any number of additional specific reforms designed to protect individual participatory rights. The broader point is that the PSLRA paved the way for placing federal judges in the class action context more clearly into the umpire role that they frequently play outside the class action context. As with the other two elements of the federal brand that we have discussed—factual specificity and protecting informed choice—this element of enhanced citizen participation in the litigation reflects a conforming of class action litigation more closely to the paradigm that prevails in bi-lateral litigation.

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<sup>154</sup> *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

<sup>155</sup> *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

<sup>156</sup> See Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009).

## V. CONCLUSION

Developing before us is a new national brand of class action litigation dedicated to the proposition that all litigants have and should exercise individual participatory rights. The hallmarks of the brand are an emphasis on factual specificity, informed choice, and citizen participation. Certain forms of aggregate proof are out of bounds while others require supplementation with more ground-level evidence such as testimony from fact witnesses and parties. Courts are developing and implementing procedures to encourage informed participation in litigation decisions by absent class members. In short, the new federal brand is infusing into the class action subarea many of the same participatory principles that characterize proceedings in the remainder of our judicial system and in the other two branches of our government. The result will be better litigation outcomes and a third branch of government that respects and protects the individual participatory rights of citizens.