CAFA's Impact on Litigation as a Public Good

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INTRODUCTION

Class actions regulate when government fails. Perhaps their use as an alternative regulatory scheme explains the fervor and rhetoric surrounding Rule 23’s political life.\(^1\) In truth, corporate officers and

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directors agonize less over the Securities Exchange Commission than over potential securities fraud class actions; pharmaceutical companies worry less about the Federal Drug Administration’s post-approval monitoring than about products liability class actions; and the Federal Trade Commission is less threatening to companies apt to ignore fair credit reporting requirements than the class action bar.

Inherent in these observations is the idea that the class action does more than aggregate claims; it augments government policing and generates external societal benefits. These societal benefits—“externalities”—are the spillover effects from facilitating small claims litigation. In federalizing class actions through the Class Action Fairness Act (CAFA), Congress, in some ways, impeded class action practice and thereby affected its positive spillovers. This Article critically considers CAFA’s effect on class litigation as ex post regulation that enhances the common good. It also develops an implicit, but overlooked, theme within the CAFA debate—the notion that litigation itself is a public good.

A “public good” is typically defined as one that the government must provide because there are insufficient market incentives for private participants to do so. Embedded in this concept is the collective action problem: there is no market incentive to provide a good that benefits

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2. See James D. Cox & Randall S. Thomas, Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?, 80 NOTRE DAME L. REV. 893, 894 (2005) (“So robust is the securities class action that with great confidence the attorney can advise her client that one is far more likely to encounter the plaintiffs’ securities class action lawyer than SEC enforcement personnel.”).

3. See generally Samuel Issacharoff, Regulating After the Fact, 56 DEPAUL L. REV. 375, 384 (2007) (“Not only is ex ante regulation by the FDA a decided outlier in American regulatory practice, but even primary reliance on governmental actors is exceptional outside the criminal context.”); Diana Zuckerman, Editorial, The Bitter Fruits of A Lax FDA: Congress Must Help Get Unsafe Medial Products Off the Market, STAR-LEDGER (Newark, N.J.), June 21, 2007, at 19; Robert Cohen, FDA Bill Debate Joins GOP, Pharma: Lawmaker Expects Cuts to be Made, STAR-LEDGER (Newark, N.J.), June 17, 2007, at 1 (“‘It is very clear that there are gaping holes in the current system and the public has lost a great amount of confidence in FDA’s ability to protect them from potentially harmful drugs,’ said Rep. Pallone (D-6th Dist.), the bill’s sponsor.”); Drug Thugs, USA TODAY, June 8, 2007, at 14A; Gardiner Harris, F.D.A. Remains Unsettled in Wake of New Questions, N.Y. TIMES, May 31, 2007, at A14.


6. Conceptions of “public good,” like public rationales, tend to incorporate cultural values, which may resonate in other comprehensive doctrines such as religion, Kantianism, utilitarianism, virtue-ethics, or the like. See Lawrence B. Solum, Procedural Justice, 78 S. CAL. L. REV. 181, 230-31 (2004). Thus, my conception of “public good” likewise will diverge from a pure utilitarian perspective although I tend to couch this Article in those familiar phrases.

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everyone equally. This disincentive has been labeled the problem of “jointness of supply and impossibility of exclusion.” Optimally deterring wrongdoing through litigation is one example of a public good. Deterrence benefits the public in general and excludes no one. There is also a collective action problem: would-be litigants with insubstantial damages may do nothing in hopes of free riding on a similar previous action’s preclusive effects or benefiting from an across-the-board policy change.

The class action overcomes this collective action conundrum by pooling claims and allowing plaintiffs’ attorneys to collect a fee based on the entire recovery. The class action thus produces a public good: litigation. Class litigation is both a public good provider—by deterring wrongdoing—and a good itself. In fact, pursuing class litigation produces a laundry list of positive externalities. To start, class litigation engenders a private cadre of supplemental regulators and shapes acceptable procedures for processing aggregate claims. It establishes rules of conduct that both delineate boundaries for acceptable social behavior and decrease the need for future lawsuits. Moreover, class litigation creates a viable litigation threat to corporate actors engaging in a cost-benefit analysis, makes information about corporate products and practices publicly available, and prompts policy changes that extend beyond the litigants and to the public. Because class litigation is a public good that generates these positive spillovers, I use this concept as a heuristic to evaluate CAFA’s derivative effects on backdoor regulation.

Still, I realize that class actions also cause negative spillovers. It is true that they are not perfect regulators. There are legitimate and compelling arguments that certain class actions have caused more harm than good. I opt here, however, to leave those questions and arguments for another day. Thus, as a starting point, I take for granted the following: class actions perform a regulatory function; this function can have a public benefit; and, to the extent that this function creates more good than harm, CAFA affects that good.

Part I begins by explaining how the private class action performs.

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8 William B. Rubenstein, Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action, 74 UMKC L. REV. 709, 711 (2006); Luban, supra note 7, at 2623 (“Economists define a public good as a beneficial product that cannot be provided to one consumer without making it available to all (or at least many others). The textbook example is a lighthouse . . . .”).

9 RUSSELL HARDIN, COLLECTIVE ACTION 17 (1982); Rubenstein, supra note 8, at 711.

10 Rubenstein, supra note 8, at 711.

11 The ability to pool small claims through the class action device is a necessary incentive for inducing private attorneys to file suit and remedy small but broadly suffered harms.

12 See id. at 723-25; Luban, supra note 7, at 2623-26 (identifying development of advocacy skills as an additional externality).

13 See Rubenstein, supra note 8, at 723-25; Luban, supra note 7, at 2623-26.
this supplemental regulatory function and highlights the controversial “private attorney general” concept. Despite divergent views, private attorney involvement can produce a public good regardless of self-interested or altruistic motivations. Still, much of the class action criticism dwells on attorney motivations and miscreant state-court judges. The argument is this: plaintiffs’ attorneys bring class actions affecting the nation as a whole in state courts where judges are elected by a few thousand constituents and are willing to certify class actions with questionable merit. Thus, this Part canvasses a few of the arguments that convinced Congress to alter the dynamic of ex post regulation by removing class actions from state to federal court.

Part II turns to the question of whether CAFA changes more than venue. It does. Examining CAFA’s impact on the longstanding substance versus procedure morass and the choice-of-law problem produces a simple and intuitive result: CAFA results in fewer class certifications. With this result in mind, I analyze how non-certification affects procedural justice—first sketching procedural fairness’s principal components and then employing a consequentialist and deontological critique of post-CAFA regulatory process. Post-CAFA process creates a procedural justice dilemma: it disproportionately favors defendants, but this may be justified by pragmatic considerations of cost and access for litigants. Finally, again bearing in mind that CAFA leads to non-certification, the last Part considers CAFA’s negation of class litigation’s positive externalities.14 These include systemic transparency, deterrence, and preclusion.

I. THE PUBLIC BENEFIT OF PRIVATIZING REGULATION

Although class actions spark controversy, no one denies that a quiet government trend to privatize various regulatory aspects for the public good has been occurring for awhile now. Class actions are stowaways within this trend. The trend is premised on the utilitarian concept of promoting the common good and on a push to minimize direct government regulation.15 Take our tort liability system for example. It incorporates, at least in some respects, the utilitarian

14 To be more precise, I consider CAFA’s theoretical impact because most class actions have not matured through a full litigation cycle since its enactment.

15 See JERRY PAQUETTE, SOCIAL PURPOSE AND SCHOOLING: ALTERNATIVES, AGENDAS AND ISSUES 8 (1991) (observing that political social purpose agendas often include minimizing government regulation and buying into the idea that “social and economic Darwinism believed to provide the greatest good for the greatest number in a market as free as possible”); David O. Brink, Mill’s Moral and Political Philosophy, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (forthcoming fall 2007) (manuscript at 59), available at http://ssrn.com/abstract=978824.
objective of optimizing public welfare through deterring socially unacceptable risks. Even social policy debates such as health care and gun control contain a thematic appeal—whether knowingly or not—to utilitarian principles.

Implicit in these debates is the abstract idea that rights do not protect themselves. Rather, the government either acts to regulate a field or, as has increasingly become the case, permits private actors to fill the void. “Regulation” in the United States is unique in its low market entry costs and stringent back-end regulation through litigation. Litigation-heavy ex post regulation across-the-board makes government funding problematic. Consequently, Congress has passed statutory incentives, such as attorneys’ fees, to promote private litigation. Moreover, a lack of governmental resources, political pressures, and federal information gaps about local occurrences on the one hand, plus public vigilance and entrepreneurial attorneys on the other, makes decentralized enforcement through private litigation a viable alternative to costly monitoring of ex ante regulation. Thus enters the class action.

This use of the private class action bar in decentralized enforcement, as Richard Stewart indicates, “frees individuals from total dependence on collective bureaucratic remedies and gives them a personal role and stake in the administration of justice. It provides a back-up guarantee of redress.” Similarly, Richard Marcus observes

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17 JAMES WOOD BAILEY, UTILITARIANISM, INSTITUTIONS, AND JUSTICE 7-8 (1997).

18 ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LIFE 4 (2003); Issacharoff, supra note 3, at 385 (“Ex post accountability is the prerequisite for ex ante liberalization.”).

19 E.g., 42 U.S.C. § 1988(b) (2000) (providing attorneys’ fees under the Civil Rights Act); 42 U.S.C. § 2000e-5(k) (2000) (providing for the payment of fees in Title VII cases). Ex post regulation through litigation is somewhat analogous to the prior restraint doctrine in the First Amendment. As Martin Redish observes, “Under the prior restraint doctrine, the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subjected to punishment after dissemination. . . . [The doctrine] assumes that prior restraints are more harmful to free speech interests than are other forms of regulation . . . .” Martin H. Redish, The Proper Role of the Prior Restraint Doctrine in First Amendment Theory, 70 VA. L. REV. 53, 53 (1984).

20 See Issacharoff, supra note 3, at 383; William B. Rubenstein, On What a “Private Attorney General” Is—and Why It Matters, 57 VAND. L. REV. 2129, 2149-50 (2004) (“Private attorneys may be better at [discerning or pursuing private wrongdoing] . . . for a variety of reasons—because public attorneys may be fewer in number, underfunded, less skilled, or prone to political pressures.”); Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DEPAUL L. REV. 227, 247-48 (2007) (“When so many agencies are understaffed and unable to enforce existing law, the private right of action is more important than ever in ensuring that unsafe practices and products are identified and kept out of the market.” (quoting Letter from Representative Jan Schakowsky to President George W. Bush (Feb. 16, 2006))).

21 Richard B. Stewart, Crisis in Tort Law? The Institutional Perspective, 54 U. CHI. L. REV.
that litigation as a private enforcement technique is a natural outcropping of regulation: “On the positive side, [the American tendency to litigate] can provide remarkable protections on the initiative of a few, including the dispossessed; those who champion the remedial potential of adversary legalism are right.” 22 Providing a bit of background, this section explores how class litigation fulfills this regulatory need and how performing this function pushed Congress to enact CAFA.

A. Privatizing Ex Post Enforcement

Private class litigation provides the principal policing function in a number of areas.23 For example, the Federal Trade Commission often takes a backseat view on Fair Credit Reporting Act litigation, preferring to file amicus briefs on behalf of private class representatives than to initiate litigation.24 Similarly, political priorities constrain the Securities Exchange Commission, resulting in enforcement agendas that ignore certain corporate misdeeds. Even former SEC Commissioner Harvey Goldschmid recognized the private bar’s importance in securities regulation: “Private enforcement is a necessary supplement to the work that the [SEC] does. It is also a safety valve against the potential capture of the agency by industry.”25

Even absent the politics behind selective enforcement and the “agency capture” notion,26 class actions vindicate substantive law norms...
despite society’s inherent distrust of (and refusal to fund) centralized government.\textsuperscript{27} Shifting enforcement to the private sector has the added benefit of creating multiple enforcers who “should generate more innovations than a monopolistic government enforcer would produce.”\textsuperscript{28} Multiple enforcers boost not only innovation, but also deterrence.\textsuperscript{29} By enabling negative or low value claims that would otherwise be economically unfeasible, class actions—at least theoretically—deter wrongdoing.\textsuperscript{30}

Through fostering accountability, enforcing public norms, and circumnavigating the possibility that an attorney general could abuse her discretionary authority, class litigation itself becomes a public good.\textsuperscript{31} As Bill Rubenstein explains, “The class action mechanism is important not just because it enables a group of litigants to conquer a collective action problem and secure relief, but also—perhaps more so—because the litigation it engenders produces external benefits for society.”\textsuperscript{32} Rubenstein labels this litigation-as-a-public-good a “positive externality” in that it creates value for nonparties even beyond deterrence.\textsuperscript{33} Class actions add value by fostering transparency, producing settlement guidelines, and creating precedent. They thus reduce the need for future litigation though decree effects, behavioral adjustments, stare decisis, and preclusion.\textsuperscript{34}

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\textIT{INT'L L.} 385, 387 (2004); Owen M. Fiss, \textit{The Political Theory of the Class Action}, 53 \textit{WASH.

\textIT{& L. REV.} 20, 22 (1996) (“This reluctance [to rely on government-initiated civil suits] may reflect the characteristic American distrust of government power and the desire to preserve a place for the ingenious and imaginative citizen.”).\textsuperscript{29} At least theoretically class actions contribute to deterrence. See infra notes 192-205 and accompanying text.

\textsuperscript{30} Rosenberg, supra note 16, at 573; see, e.g., Iliadis v. Wal-Mart Stores, Inc., 922 A.2d 710, 719-20 (N.J. 2007) (“If each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small to warrant a suit or the victim too disadvantaged to seek relief. Thus the wrongs would go without redress and there would be no deterrence to further aggressions.” (quoting Riley v. New Rapids Carpet Ctr., 294 A.2d 7, 10 (N.J. 1972))); \textit{RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW} 349-50 (1972); Gilles & Friedman, supra note 4, at 105; Kenneth W. Dam, \textit{Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest}, 4 \textit{J. LEGAL STUD.} 47, 73 (1975).


\textsuperscript{33} Rubenstein, supra note 8, at 710.
Because class litigation performs these semi-public activities, the class action plaintiff’s bar has been labeled “private attorneys general.” The most apt depiction of the private attorney general as an enforcement tool is not as contrasted with the government, i.e., private attorney general on one hand and the government on the other. Rather, it is as a fluid mix along a continuum, serving both private and public functions at various moments. This continuum recognizes that the private attorney general dynamic is not as clear-cut as “good” attorneys initiating meritorious cases and “bad” attorneys filing frivolous ones. But we see this dichotomy unfolding in the media and academic commentaries. For example, anti-tobacco plaintiffs’ attorneys have been described as a “missionary group” Agent Orange plaintiffs’ lawyers reported their goals in terms pursuing the public good; and the plaintiffs’ class action bar as a whole has come to invoke public-interestedness as standard rhetoric. Others view class actions and the plaintiffs’ attorneys who bring them as improperly circumventing democratic processes. Still others liken plaintiffs’ attorneys to

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35 See Gilles & Friedman, supra note 4, at 110; John H. Beisner, Matthew Shors & Jessica Davidson Miller, Class Action “Cops”: Public Servants or Private Entrepreneurs?, 57 STAN. L. REV. 1441, 1451 (2005) (noting the theory that class action lawyers serving as private attorneys general is appropriate only if attorneys act like and achieve the same results as a true public servant would); John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working, 42 MD. L. REV. 215, 218 (1983) (“The conventional theory of the private attorney general stresses that the role of private litigation is not simply to secure compensation for victims, but is at least equally to generate deterrence . . . .”); Kalven & Rosenfeld, supra note 23, at 715. But see Martin H. Redish, Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals, 2003 U. CHI. LEGAL F. 71, 76 (“Where the government wishes to deter or punish unlawful behavior in a more direct and reliable manner, it has several options available to it. Instead of, or in addition to, the private compensatory remedy, a legislature may utilize any permutation or combination of a variety of conceivable remedial models, including criminal enforcement, civil penalties, and administrative regulation.”). According to Professor Yeazell, the notion of a “private attorney general” originated from Professors Kalven and Rosenfeld’s 1941 scholarship. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 232 (1987) (citing Kalven & Rosenfeld, supra note 23, at 721); see also Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (“Such persons, so authorized, are, so to speak, private Attorney Generals.”).

36 Professor Rubenstein likens the private attorney general concept to Alfred Kinsey’s taxonomy of sexual orientations and points out that “[t]here are not just two pure forms—the private attorney on the one hand and the government attorney on the other—but rather an array of mixes of the public and private.” Rubenstein, supra note 20, at 2132.


38 PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 43 (1986).

39 Erichson, supra note 37, at 2099.

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“bounty hunters.”41 Yet, I am less concerned about these motivations—altruistic or selfish—so long as they further the public interest by initiating class litigation.

B. Federalizing the Private Class Action

We see this dichotomy at its extreme in CAFA’s legislative debates. Reacting to allegations that entrepreneurial lawyers lined their own pockets at the class members’ expense and that certain state court “magnets” created overly hospitable environments for drive-by certifications affecting national matters,42 Congress federalized class actions.43 CAFA’s legislative history also reveals the desire that a national body, the federal courts, resolve cases affecting the nation as a whole.44 John Beisner, CAFA’s primary author, testified openly about


41 See, e.g., Redish, supra note 35, at 90 (“The ‘bounty hunter,’ on the other hand, refers to the private litigants who care little for broader concerns of public interest but are instead focused exclusively upon the pursuit of their own private interest. As already noted, however, even litigants falling within this latter category may serve the public interest as an incident to their pursuit of their own private rights.”) (citation omitted); Coffee, supra note 35, at 215-16. For an overview of some of the cases typically cited for attorney abuse, see Beisner, Shors & Miller, supra note 35, at 1447-50. Examples of misbehaving attorneys are certainly not limited to the class action context. See, e.g., Lubna Takuri, *Judge Rules in Favor of Dry Cleaner in $54M Suit Over Missing Pants*, LAW.COM, June 26, 2007, http://www.law.com/jsp/article.jsp?id=1182762359671 (“Pearson became a worldwide symbol of legal abuse by seeking jackpot justice from a simple complaint—that a neighborhood dry cleaners lost the pants from a suit and tried to give him a pair that were not his.”). Yet even some scholars who subscribe to this model agree, “private litigation serves the public interest, regardless of the motivation of those bringing suit.” Redish, supra note 35, at 91. Professor Redish recognizes that even the Old West bounty hunters “have sought to serve the interests of the community by apprehending (and sometimes punishing) those who disturb or threaten the public peace.” Id.

42 See, e.g., 151 CONG. REC. S1178 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch) (“[M]any of today’s class actions are nothing more than business opportunities for some lawyers to strike it rich and too often have little, if anything, to do with fairly compensating injured class members.”); see also AM. TORT REFORM ASS’N., JUDICIAL HELLHOLES 2004 8 (2004), http://www.atra.org/reports/hellholes2004/hellholes2004.pdf.


this:

Who should be charged with responsibility for handling such types of large-scale, interstate class actions involving issues with significant national commerce implications—federal judges who are selected by the President and confirmed by the U.S. Senate or state court judges who are elected by a few thousand voters in a rural county?45

Still, CAFA reflects less of a hierarchy between state versus federal fora and more of a preoccupation with strategic gaming for state courts that would certify a nationwide class where others would not.46

Corporate defendants are, however, quick to complain about excessive American litigation and decry class actions as legalized blackmail.47 There are, to be sure, real examples of class action abuse. So too are there imperfect juries, pressures to settle, and imperfect justice. Perhaps this is to be expected in a system that relies primarily on decentralized, self-motivated private actors for enforcement.48 And yet, this is only part of the picture. The primacy of ex post regulation facilitates easy market entry for products, start up companies, and financial transactions.49 The focus from the front-end is on a picture of a robust economy unsaddled with bureaucratic entry barriers.50 In return for what is at times imperfect justice, we receive product innovation, new businesses, and employment opportunities; all are generally unhindered by a series of ex ante government hurdles. Both pictures—simple market entry and sometimes excessive litigation—are accurate and telling, but only when considered together. It is in this light that CAFA can be seen for what it is: the country’s latest efforts to rein in ex post accountability enforcement mechanisms.51

Just as laws curb unfettered economic competition for the public good, procedures

48 See KAGAN, supra note 18, at 3; Issacharoff, supra note 3, at 384-85.
49 Issacharoff, supra note 3, at 385.
50 Id.
51 See generally id. at 385 (“The country is awash in efforts to restrict the mechanisms of ex post accountability. Although generically falling under the rubric of ‘tort reform,’ many of the proposed alterations of the American legal system are simply efforts to eliminate wholesale the availability of redress for harms suffered in the marketplace.”).
must be available to enforce those laws.\textsuperscript{52} This begs the question of how federalizing class actions affects this ex post enforcement.

\section*{II. CAFA’s Impact on Litigation as Regulation}

This Part considers that question. It initially grapples with how a venue change undermines substantive law and then how this change splinters class actions. The crux of this initial struggle is this: although in passing CAFA, Congress intended to create federal jurisdiction over claims affecting the national market,\textsuperscript{53} it intentionally declined to grant federal courts the concomitant positive authority to create matching substantive laws.\textsuperscript{54} In fact, in changing the procedures for handling class actions, Congress expressly swore off any intent to alter \textit{Erie Railroad Co. v. Tompkins}’s\textsuperscript{55} command that federal courts apply the states’ substantive law when sitting in diversity.\textsuperscript{56} The effect is mismatched. It generates a federal forum for putative class actions of national importance, but then declines certification because applying various state laws makes the class unmanageable under Federal Rule of Civil Procedure 23(b)(3).\textsuperscript{57}

Let me explain. The majority of cases caught in CAFA’s minimal diversity removal provision would likely request certification under Rule 23(b)(3) as opposed to (b)(1) or (b)(2).\textsuperscript{58} To certify a class under

\textsuperscript{52} See generally MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 99 (1998) (“So long as the public welfare is perceived as requiring that market relationships be curbed rather than eliminated, justice according to law and pure procedural justice are certain to retain legitimacy within a part of the domain encompassed by justice.”).


\textsuperscript{55} 304 U.S. 64 (1938).


\textsuperscript{57} As Richard Nagareda observed, this prompts plaintiffs’ attorneys to shoehorn and recast state causes of action into RICO violations. Richard A. Nagareda, \textit{Class Actions in the Administrative State: Kalven and Rosenfield Revisited}, 75 CHI. L. REV. (forthcoming 2008) (manuscript at 10), available at \url{http://ssrn.com/abstract=1014659}.

\textsuperscript{58} Federal Rule of Civil Procedure 23(b)(2) permits certification where the class primarily requests injunctive or declaratory relief. \textit{Fed. R. Civ. P.} 23(b)(2). Consequently, most of these actions are civil rights actions or employment discrimination actions, which already have federal subject matter jurisdiction through a federal question. It is possible that CAFA may affect some Rule 23(b)(1)(A) or 23(b)(1)(B) class actions, addressing inconsistent results or limited funds, but, by and large, these actions are much less prevalent than their more controversial counterpart,
Rule 23(b)(3), common questions must predominate over individual ones and the class action must be the superior method for resolving the claims.\(^{59}\) Moreover, in making this determination, the court considers, among other factors, “the difficulties likely to be encountered in the management of a class action.”\(^{60}\) The classic minuet proceeds like this: class action proponents plead their complaint in generic common terms, emphasizing patterns and commonality in the offensive acts, whereas opponents highlight individual issues and manageability problems with applying multiple states’ laws.\(^{61}\) Proponents respond by suggesting subclassing under Rule 23(c)(4), denying differences in substantive laws, or proposing patterned jury instructions.

A. On Certification Procedure—The Substance-Procedure Quagmire

Consequently, it is during this so-called manageability inquiry that courts consider sticky choice-of-law questions. Under the \(\textit{Erie} \) Doctrine and the Rules of Decision Act,\(^{62}\) courts sitting in diversity, as they would under CAFA, must use substantive state laws.\(^{63}\) When these laws vary and the court has to apply numerous states’ laws—as is often the case when defendants remove classes with “nationwide” effects—courts frequently find the putative class “unmanageable” and refuse to certify it.\(^{64}\) Based on federalism notions, under \textit{Klaxon Co. v. Stentor Electric Manufacturing Co.},\(^{65}\) courts must theoretically distinguish this procedural decision—to certify or not to certify a class—from any contemplation about the underlying substantive law’s remedial scheme.\(^{66}\) Realistically, of course, this ruling on certification

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\(^{59}\) \textit{Fed. R. Civ. P.} 23(b)(3).

\(^{60}\) \textit{Id. R. 23(b)(3)(D)}.

\(^{61}\) \textit{See Samuel Issacharoff & Catherine M. Sharkey, Backdoor Federalization, 53 UCLA L. REV. 1353, 1418-19 (2006).}


\(^{63}\) \textit{Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that federal courts sitting in diversity must apply the same choice-of-law principles that the state court in the same location would).}

\(^{64}\) \textit{See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 610 (1997); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (opting to decertify a nationwide tobacco class action due to choice-of-law problems); Howard M. Erichson, A Typology of Aggregate Settlements, 80 NOTRE DAME L. REV. 1769, 1776 (2005).}

\(^{65}\) \textit{Klaxon}, 313 U.S. 487.

\(^{66}\) Nagareda, \textit{supra} note 46, at 1875. Certainly the ability of a judge to blind herself to the merits and to the likelihood of success based on substantive laws is suspect. Linda Mullenix has concluded that the so-called line between substance and procedure “is inherently irresolvable.” Linda S. Mullenix, \textit{The Constitutionality of the Proposed Rule 23 Class Action Amendments}, 39 \textit{ARIZ. L. REV.} 615, 618 (1997).
dramatically affects, and often neuters, the remedial scheme’s impact. When small claims cannot proceed collectively, many will not proceed at all.

What is more, CAFA’s legislative history disapproves of bootstrapping to apply a single state’s law to a nationwide class, thus forcing non-certification and discouraging creative remedies. This juxtaposition is caused by two key principles colliding: the aggregation principle, holding that *aggregation* should not change applicable substantive law, and the *Erie* Doctrine, similarly holding that locating claims in a federal *forum* should not change applicable substantive law. The collision leaves us holding some strange pieces.

1. Choice-of-Law

For instance, applying the aggregation principle counsels the approach taken by Congress in CAFA’s legislative history—that is, rejecting creative bootstrapping of choice-of-law theories to facilitate class action certification and resolution. But this application also greatly affects the availability of a substantive remedial scheme. And it contradicts the intent behind the 1966 Advisory Committee’s amendment to Rule 23. This amendment overcame the collective action problem by encouraging groups to join forces and vindicate substantive claims that they wouldn’t initiate on their own. Even the Supreme Court invokes this amendment to reveal procedure’s dirty little secret: “[R]ulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants.” In short, taking the aggregation principle to its extreme, thereby undermining substantive remedial schemes, overlooks wrongdoing. At least so long as the wrongdoing

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67 Nagareda, *supra* note 46, at 1875; *see also* Solum, *supra* note 6, at 200, 213-16. Justice Reed’s concurring opinion in *Erie* acknowledges as much when he notes at that early juncture that “[t]he line between procedure and substance is hazy….” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring).


69 Nagareda, *supra* note 46, at 1911.

70 See *id*. at 1913-14.


72 Mistretta v. United States, 488 U.S. 361, 392 (1989); *see also* Aggregation on the Couch, *supra* note 27, at 1928 (dubbing the use of procedure to alter substantive law procedure’s “dirty little secret”).
affects citizens in a cross-section of states just a little bit. Nationwide wrongdoing of this type is likely to escape federal class certification and the small amount makes individual actions unlikely.

Federal courts are less willing to certify these nationwide classes based on black letter *Erie* Doctrine. The *Erie* Doctrine, which includes *Klaxton*, provides that a federal forum must apply the substantive law—including choice-of-law principles—of the state in which it sits. Yet CAFA’s legislative history expressly disapproves of using one state’s law to facilitate certification. An Oklahoma state court, for example, certified a nationwide breach-of-warranty class action using only Michigan’s warranty law. It reasoned that, under the *Restatement (Second) of Conflict of Laws*, Michigan was “the only state where conduct relevant to all class members occurred.” Congress condemned this interpretation. Yes, there is plenty of irony to go around: CAFA purports to preserve *Erie* but disapproves of its application. Furthermore, unless the Oklahoma decision was an aberration (which it may be), applying state choice-of-law principles may shift the so-called “magnet” courts to federal courts that apply one state’s law to simplify certification.

The bottom line is this: either the substantive law in aggregated actions must differ from that in an individual action, or the substantive law in a federal forum must depart from that applied in state court. Although the full implications of the relationship between CAFA and *Klaxton* exceed this Article’s scope, gutting substantive remedial schemes has derivative effects on procedural justice, deterrence, and transparency.

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74 *Ysbrand*, 81 P.3d 618.

75 *Id.* at 625-26. Lamenting Oklahoma’s choice, Congress declined to enact a federal choice-of-law scheme and the Senate even voted down Senator Feinstein’s soft-form amendment that would remind federal courts not to deny class certification simply because it may require the court to apply the law of more than one state. *See* 151 CONG. REC. S1215-02, at SA4 (daily ed. Feb. 9, 2005) (text of Sen. Feinstein’s proposed amendment).


77 See Nagareda, *supra* note 46, at 1920.

78 *Id.* at 1911.

79 As a remedy to this problem, Sam Issacharoff has proposed that “[i]n the absence of national choice of law rules . . . courts should, as a default rule, apply the laws of the home state of the defendant to all standardized claims, regardless of the situs of the final injury. Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1839 (2006).
2. Non-certification

The most obvious result of the *Erie-Klaxton* clash is on certification. Statistical research on CAFA demonstrates the foregone conclusion: federal courts, as opposed to their state-court counterparts, are less likely to certify class actions. In cases removed to federal court and remanded to state court, state courts denied certification 12% of the time. Conversely, when defendants removed cases and the federal courts kept them, they denied class certification 27% of the time—a statistically significant increase compared with state-court certifications. When federal courts decline to certify a class action, the action most often concludes through a nonclass settlement. In a study conducted by Thomas Willging and Shannon Wheatman, roughly 41% of putative class actions in which the federal court expressly refused to certify a class (as opposed to taking no action on certification) resulted in nonclass settlements.

In all likelihood, these nonclass settlements were not individual settlements. The economic viability of mass litigation dictates that, even absent certification, claims proceed collectively if they proceed at all. Settling certified class actions or certifying for settlement purposes only requires successful completion of Rule 23’s procedural hurdles: fairness hearings, notification to class members, opt out periods, judicial blessings, and even judicial approval of class counsels’ fees. Underlying these hurdles is a delicate balancing act.

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80 Willging & Wheatman, *supra* note 43, at 635.
81 *Id.*
82 *Id.* Federal courts were slightly more likely to certify cases originally filed in federal court than those removed to federal court. *Id.* at 635 n.80.
83 For more discussion of nonclass settlements (and a definition), see *infra* notes 192-196 and accompanying text.
84 The study distinguishes between “settled on individual basis” and “settled as part of another case,” however, when cases were consolidated and transferred through multidistrict litigation the study counted only the lead case as a single or unique case for inclusion in the study. Thus, cases that were “settled on an individual basis” included cases that settled through multidistrict litigation. Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr., An Empirical Examination of Attorneys’ Choice of Forum in Class Action Litigation 58-59 (2005), available at http://www.fjc.gov/public/pdf.nsf/lookup/clact05.pdf/$file/clact05.pdf; Willging & Wheatman, *supra* note 43, at 593 n.1 (noting that the Article relied on the methods used in the 2005 Federal Judicial Center Study cited *supra*); see also Thomas E. Willging & Emory G. Lee III, Fed. Judicial Ctr. The Impact of the Class Action Fairness Act of 2005 on the Federal Courts 23 (Apr. 2007), available at http://www.fjc.gov/public/pdf.nsf/lookup/cafa0407.pdf/$file/cafa0407.pdf. The result is that a portion of the number of cases “settled on an individual basis” actually settled through some form of aggregation.
85 Erichson, *supra* note 64, at 1773.
86 Opt out periods are mandatory for Rule 23(b)(3) class actions, but discretionary for certification under Rule 23(b)(1) or 23(b)(2). See Fed. R. CIV. P. 23(c)(2)(A) & (B).
87 *Id.* R. 23.
On one hand, small claims aggregation makes the private attorney general model worthwhile; on the other, requirements for appointing class counsel, approving class settlements, and reviewing attorneys’ fees recognize a potential for self-interest to interfere with the private attorney general’s class representation and the dangers of unchecked “promotion” of “public interest.”

In sum, combining choice-of-law problems, Rule 23(b)(3)’s manageability requirement, and CAFA’s prerequisite that putative class actions be national in scope leads to less certified classes. This increases the likelihood that claims will proceed as collective groups or not at all—inhibiting the class’s regulatory function. Some might find this disturbing from a compensation standpoint, since smaller groups, and thus smaller recoveries and attorneys’ fees handicap plaintiffs’ attorneys in presenting their strongest case. But, from a deterrence-centric position, I am less troubled about this phenomenon producing lower individual compensation and more concerned that it will lead to cloudy legal boundaries, less judicial supervision, and less procedural fairness.

Put differently, because federal courts are less willing to certify class actions, there are four principal effects—all negative. First, non-certified actions are either dropped—prompting concern that certain areas may escape ex post regulation altogether—or they proceed collectively. The latter creates concerns that the collective process—a process without judicial quality control—is less procedurally fair. Second, when non-certified actions settle, the settlements are closed, private, and often confidential. This decreases transparency, thus inhibiting the law’s behavior-guiding function, and withholds public educational opportunities. Third, non-certification theoretically thwarts deterrence by allowing defendants to avoid internalizing the full costs of their conduct and by making some collective actions too costly to bring. Finally, non-certification disaggregates plaintiffs’ attorneys, making information-sharing more difficult. The following sections canvass each effect in turn.

88 Id. R. 23(g).
89 Id. R. 23(e).
90 Id. R. 23(h).
91 In short, mass litigation without Rule 23’s protections poses a greater danger than certified class actions. See infra Part II.B.1.
92 See L. Elizabeth Chamblee [Burch], Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements, 65 La. L. Rev. 157, 207 (2004) (“[In passing] the Class Action Fairness Act, which increases the potential for aggregation and intensifies the pressure on the federal courts to lighten their overburdened dockets, Congress may enhance the potential for collusion in settlements.”).
On Process

First, non-certification creates the potential for less just procedures. Illegitimate process—if that is a fair term—colors other positive spillovers and blackens the ex post regulatory process itself. Procedural fairness is the justice system’s cornerstone; it ensures continued faith in and public support of both the judiciary and decentralized ex post regulation. It is true that class litigation strains judicial handling procedures. Responding to the influx of class actions and other types of aggregate litigation, federal judges are forced to become increasingly creative with both process and remedies. And creativity in this regard should be encouraged so long as it squares with procedural justice principles. Accordingly, the next Part highlights traditional procedural justice literature to briefly sketch its normative components and then discusses CAFA’s pull on the already tenuous relationship between aggregate litigation and fair process.

1. A Normative Theory of Procedural Justice

I begin with a nuts and bolts overview of process—the fundamental components that theoretically must be satisfied for law to furnish a legitimate guiding function. Procedural fairness in collective actions—and indeed in any action—necessitates adequate attorney representation and informed consent to settlement. Most normative conceptions of process are, however, too traditional. That is, they are tethered to individual as opposed to aggregate procedural process. At the heart of most theories is, in Larry Solum’s words, “a process that guarantees rights of meaningful participation [, which] . . . requires notice and opportunity to be heard, [and] . . . a reasonable balance between cost and accuracy.” Still, to accommodate aggregate litigation, these barebones components have been stretched and shoehorned into a makeshift process that is not altogether satisfactory,


94 Solum, supra note 6, at 183.
particularly for non-certified class actions.

Because the Federal Rules of Civil Procedure are reactionary—that is, they were enacted to chase and enforce substantive norms—they cannot (out of a concomitant pledge to efficiency and affordability) hope to assure a perfect outcome. Thus, our aim should be to eradicate imperfections as much as possible. A limited use of utilitarianism advances this goal. Utilitarianism, however, is only one of three components defining procedural justice’s boundaries. Utilitarianism, particularly rule utilitarianism, posits that an act or procedure is “right if and only if it conforms with the system of rules, which, if universally followed, would produce the best consequences.” But, this alone elevates processes that produce accurate results regardless of transaction costs and time investment. Litigation could go on forever. Still, accuracy is important since the social institution of adjudication must produce sound outcomes. The pure cost-benefit aim of maximizing a non-moral good, however, ignores cultural and political morals that truly comprise the common good.

Given this shortcoming, the second procedural justice component is fairness. Fairness arguments are typically offered as policy reasons to trump pursuit of certain reform proposals and aggregate social goals; however, I use fairness here (and in assessing CAFA) as a supplemental constraint rather than a substitute. Employing a deontological conception of fairness to balance utility aids in, not only distributing procedural costs and correcting procedural errors, but also in ensuring that the procedural system does not disproportionately favor or burden plaintiffs or defendants. Put differently, process should disperse the risk of error and the cost of access as evenly as possible. Neither party

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95 See id. at 247 (“Given that civil procedure imposes real costs on litigants and society at large, it is difficult to argue that the smallest marginal gain in accuracy is worth the largest investment of resources. Justice has a price, and there is a point at which that price is not worth paying.”).

96 See id. at 245-46 (“That the system is not actually perfect does not mean that perfect procedural justice is not its aspiration; perfect procedural justice can be the animating principle of procedural doctrine, even though a residue of inaccuracy exists, despite the system’s best efforts.”).

97 Solum observes, “The way that rule utilitarianism supports systemic accuracy over case accuracy is clear: to the extent that accuracy is a good consequence, rule utilitarianism counsels in favor of the general rule that will promote the greatest accuracy in the long run.” Id. at 251 n.182.

98 Id. at 253.

99 See Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U. L. Rev. 485, 510 (2003); cf. Rosenberg, supra note 33, at 888 (“From a utilitarian standpoint, functional productivity is maximized when the sum of all accident costs—including injury losses, avoidance costs, and administrative costs—is minimized.”).

100 See Solum, supra note 6, at 256-57.

101 Bone, supra note 99, at 487.

102 See Solum, supra note 6, at 257.
should have an advantage. This idea of “fairness” as avoiding lopsided distribution of error can be likened to the concept of “neutrality.” To be sure, some imparity in distributing risks may be inevitable.

Finally, although analogous to fairness, participation—manifested as adequate representation in the class context—humanizes process. In its simplest form, participation necessitates that those who are bound by a decision have an opportunity to take part (and be heard) in adjudication. Moreover, it encompasses inherent rights to present evidence, observe the proceedings, cross-examine witnesses, and hear the judge’s decision. And participation, even in class litigation, affords litigants dignity by granting them a forum in which to tell their story. “Storytelling” has been criticized when used to demonstrate satisfaction with process as a proxy for “justice.” I use the term here, however, for its cathartic value only when situated within this larger

103 Id. at 257-58; Bone, supra note 99, at 514 (“In addition to considering the risk of error, a theory of procedural fairness also must take account of process costs, including the social costs of additional procedure to reduce error, and it must do so within the framework of the fairness theory itself.”); see also Michael D. Bayles, Procedural Justice: Allocating to Individuals 117-20 (1990).

104 In Marshall v. Jerrico, Inc., Justice Marshall commented on neutrality’s importance as “preserve[ing] both the appearance and reality of fairness, ’generating the feeling, so important to a popular government, that justice has been done.’” 446 U.S. 238, 242 (1980) (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)); see also Offutt v. United States, 348 U.S. 11, 14 (1954) (“[J]ustice must satisfy the appearance of justice.”); see generally Bayles, supra note 103, at 19 (observing, “[t]hat procedural justice requires an impartial decisionmaker is almost universally recognized”).

105 See Chamblee [Burch], supra note 92, at 209 (“The core of the Court’s Amchem decision held that a class action attorney could adequately represent only a class with sufficient cohesion.”). On the issue of representation, see Fiss, supra note 27, at 25 (“The class action is in fact a representative lawsuit—as noted, the named plaintiff is bringing a suit on behalf of all the unnamed members of the class—but it employs a peculiar concept of representation: self-appointment.”).


107 Bayles, supra note 103, at 40 (“The common-law principle of an opportunity to be heard has typically been taken to include rights (1) to adequate notice, (2) to pre-hearing discovery, (3) to an adjournment, (4) to present evidence, (5) to rebut evidence and often to cross-examine adverse witnesses, (6) to a copy of the transcript, and (8) [sic] to reasons for a decision.”) (citations omitted); Solum, supra note 6, at 280.

108 See generally Solum, supra note 6, at 262-64 (noting that dignity is a component of participation); Judith Resnik, Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement, 2002 J. Disp. Resol. 155, 160 (2002) (“As researchers have learned, litigants report more satisfaction with types of processes in which they understand themselves as having an opportunity to give voice to their injuries, make their defenses, be treated with dignity, and have their claims heard and evaluated by unbiased decisionmakers.”); Deborah R. Hensler, Suppose It’s Not True: Challenging Mediation Ideology, 2002 J. Disp. Resol. 81, 93-96 (2002). This respect for dignity of the individual resembles the Kantian ideal of respect for persons. See Roger H. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. Ill. L. Rev. 69, 74-76.

109 See, e.g., Bone, supra note 99, at 505-07.
procedural fairness framework. Participation’s value may be best realized in its antithesis: imagine a system in which neither the plaintiff nor the defendant could participate. Two flaws appear. First, how could such a system yield accurate results? Second, how could the public view that system as legitimate and thus authoritative? From this, we glean that participation increases accurate results, enhancing the utilitarian ideal, and that for “justice” to somehow materialize, the public must see the process as legitimate. Legitimacy does not, however, require actual participation but rather the opportunity to participate at crucial points during the proceedings. As an obvious example, for a settlement decision to be legitimate, the litigants must participate and consent.

Legitimacy, as a participation subset, is itself a public good. Again, consider the converse. If the public considers a particular law illegitimate, then it can morally rationalize disobedience. Pragmatically then, citizens must regard the procedure as legitimate to ensure voluntary cooperation and participation. As Solum observes on this point, “A society in which citizens can reasonably regard themselves as having a content-independent obligation to obey the law is better than a society in which the law begins with a presumption of illegitimacy.” In brief, procedural justice requires accuracy, as derived from utilitarianism; fairness, in terms of neutral and symmetrical distribution of costs and risks of error; and participation, which affords dignity to litigants and legitimacy to process. The key is that focusing singularly on any one component to the others’ exclusion distorts fair process.

2. Consequentialist and Deontological Critique of Post-CAFA Process

With this traditional procedural justice model as a baseline, we can compare post-CAFA process. Deviating from this model, CAFA affects the ex post regulatory process in two ways—both negative. First, CAFA splinters would-be class actions (complete with judicial oversight and approval) into collective actions with no judicial monitoring despite the presence of similar inherent dangers that make continued judicial involvement necessary in the class context. This represents (a) a deontological argument that process disproportionately disfavors claimants due to deficiencies in the representational model of
participation and (b) a corresponding consequentialist concern about whether, without this adequate representation, the process produces the best result. Put simply, defendants usually win the certification battle. Second, federalizing class actions means that these litigants have less access to judges. Because CAFA taxes federal courts with complex cases, judges will likely respond by expanding the courts’ bureaucratic infrastructure with more special masters, magistrates, and claims resolution facilities. These apprehensions over bureaucratization reflect consequentialist concerns about accuracy but also profound concerns with legitimacy and access.

Consider first the criticism that CAFA exacerbates the incidence of collective settlements, thereby prompting deontological participation anxiety over adequate attorney-client representation.\(^{114}\) Understanding this argument requires a brief explanation of the counterfactual traditional idea of adjudication. Conventional wisdom wrongly assumes that when a putative class action does not proceed as a certified class it reverts to the traditional form of individual piecemeal litigation.\(^{115}\) This view further presumes that clients protect their own interests through established norms such as monitoring attorney conduct, deciding and negotiating settlement terms, overseeing the conduct of litigation, and performing other functions that a client would in a usual lawyer-client relationship.\(^{116}\) That is not the case.

Although conventional wisdom understands the dichotomy between individual and class action litigation well enough, it ignores the inevitable: when putative classes are not certified, they do not proceed on an individual basis in the traditional sense but proceed in clustered menageries with varying cohesion. In short, non-certified actions, particularly mass torts, proceed as collective actions that lead almost inevitably to aggregate settlements. By “collective actions” and “aggregate settlements” I mean to portray cases in which scale economies make representation possible; where an attorney represents numerous claimants but lacks a significant lawyer-client relationship with each; where individual claimants thus have little substantive input or authority over how the attorney handles the case; and where the

114 CAFA’s Balkanizing effect on would-be classes may also prompt counsel to avoid the cost and delay associated with certification and opt instead for nonclass vehicles that allow for mass settlements. These vehicles might include multi-district litigation, informal coordination, aggregation through Rule 20 or consolidation through Rule 42. See FED. R. CIV. P. 20 (Permissive Joinder of Parties); id R. 42(a) (Consolidation).

115 See Chamblee [Burch], supra note 92, at 159-60; Howard M. Erichson, Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation, 2003 U. CHI. LEGAL F. 519, 525-26 (2003) (“Non-class mass collective representation, moreover, seems to invite muddled thinking among judges, clients, and lawyers. Too many judges treat class action problems as though the alternative is autonomous individual litigation, when in fact the alternative is more likely to be some form of mass collective representation.”).

116 See Chamblee [Burch], supra note 92, at 159.
attorney must, as a result of these circumstances, direct her loyalty to obtaining the best result for the collective group.\footnote{117}{See id; Erichson, supra note 115, at 525. Mancur Olson, who appears to be the primogenitor of the “collective action” phrase used it to mean “any problem that provides benefits and/or costs for more than one individual, so that some coordination of efforts is required.” Todd Sandler, Collective Action: Theory and Applications 9 (1992). From this, we glean that questions surrounding the collective somehow have to do with groups of people who gather around one central problem but at least one of the crowd must take action. See Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 8 n.6 (1991). Thus enters the plaintiffs’ attorney. I should note that Congress explicitly amended CAFA to exclude these collective settlements. H.R. Rep. No. 109-7, at 2 (2005).}

Procedural justice’s traditional participation principle stretches to accommodate aggregate litigation by assuming that individuals within the group have an adequate legal representative. This representative fairly considers and protects that individual’s interests.\footnote{118}{See Solum, supra note 6, at 317. The American Law Institute’s Principles of the Law of Aggregate Litigation recognize that in all forms of aggregate proceedings, “control of litigation of claims or defenses is separated from ownership of those claims or defenses” and that “[d]ifferent aggregate proceedings endow participants with different levels of control over the proceedings.” Principles of the Law of Aggregate Litigation § 1.04 (Am. Law Inst., discussion draft, Apr. 21, 2006).} But what happens when individuals within the same group who are represented by the same attorney have divergent or incompatible interests? The procedural answer in the certified class context is to create subclasses,\footnote{119}{For more information on sub-classing, see Scott Dodson, Subclassing, 27 Cardozo L. Rev. 2351 (2006).} each with its own representative and attorney.\footnote{120}{Fed. R. Civ. P. 23(g)(4) & (c)(5).} There is no procedural answer in nonclass aggregation. Instead, we must look to ethical rules. Rule 1.8(g) of the American Bar Association’s Model Rules of Professional Conduct forbids attorneys from aggregately settling claims of two or more clients “unless each client gives informed consent.”\footnote{121}{Model Rules of Prof’l Conduct R. 1.8(g) (2004). Disciplinary Rule 5-106 of the Model Code of Professional Responsibility may also cover settling aggregate litigation. Model Code of Prof’l Responsibility DR 5-106 (Settling of Similar Claims of Clients). Every state has adopted Rule 1.8(g) or a similarly worded rule. See Charles Silver & Lynn A. Baker, Mass Lawsuits and the Aggregate Settlement Rule, 32 Wake Forest L. Rev. 733, 734 (1997). A recent proposal by the American Law Institute in its Principles of the Law of Aggregate Litigation would further impinge on the informed consent requirement. Section 3.17(c) provides, “An individual claimant may, after consultation with counsel, affirmatively agree to be bound by a non-class aggregate settlement without prior knowledge of and consent to the terms of other claimants’ settlements by agreeing to accept an aggregate settlement as part of a known collective representation.” Principles of the Law of Aggregate Litigation § 3.17(c). This proposal essentially requires claimants to opt-in to a procedure rather than to provide informed consent to settlement terms. It thus waives the aggregate settlement rule and is difficult to reconcile with the participation principle of procedural justice.} If these ethical rules alone were sufficient to ensure adequate legal representation, then why develop separate structural safeguards for class actions? The answer surely cannot be limited to the Hansberry notion that class actions bind members who are not present
as parties.\footnote{See Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation . . ."). For thoughtful commentary on this decision and on adequate representation in the class context, see Richard Nagareda, \textit{Administering Adequacy in Class Representation}, 82 TEX. L. REV. 287 (2003).} It seems instead to hint at the possibility of inadequate representation, of collusion, and of inherent conflicts of interests.\footnote{See Chamblee [Burch], supra note 92; Susan P. Koniak & George M. Cohen, \textit{In Hell There Will Be Lawyers Without Clients or Law}, 30 HOFSTRA L. REV. 129, 145-55 (2001); John C. Coffee, Jr., \textit{Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions}, 86 COLUM. L. REV. 669, 715-16 (1986).} And I realize that “collusion” is a loaded term. Still, the circumstances of nonclass settlements, even with client “consent”—such that it is—are troubling. Perhaps they are not as troubling as the \textit{Ortiz} and \textit{Amchem}\footnote{Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).} settlements, which manufactured the term, but worrisome nevertheless. If the outcome is controlled by desires for a higher attorney’s fee in exchange for generous settlement terms, it represents neither the best nor most accurate conclusion.\footnote{I have written elsewhere about the potential for collusion in nonclass aggregation of mass torts and noted: Representing catalogues or inventories of claimants often leads to conflicts of interest that attorneys may not be able to foresee at the beginning of litigation, such as differences among bargaining positions, clients’ divergent desires to settle or litigate, or the extent of latent injuries. These repeat players may adjust their litigation tactics according to an expectation that they will meet again, and settlements may reflect past traditions and the need for future negotiations rather than the merits of the claims. Chamblee [Burch], supra note 92, at 171-72.} The class action’s regulatory function is similarly undermined.

In one respect, however, CAFA strengthened representation and decreased collusion’s likelihood. Before CAFA, any attorney in state or federal court could claim to represent the putative class’s interests. Outside of the federal system, courts had no way to identify or appoint the best competitor. This overlapping jurisdiction created a so-called “race to the bottom”: competing plaintiffs’ attorneys clamored to offer the defendant the best deal in exchange for a percentage of the attorneys’ fee.\footnote{See generally id. at 170-72 (commenting on how collusion might occur); see Luban, supra note 7, at 2649; John C. Coffee, Jr., \textit{Class Wars: The Dilemma of the Mass Tort Class Action}, 95 COLUM. L. REV. 1343, 1358-59 (1995). Bruce Hay and David Rosenberg term these settlements “sweetheart settlements” and note that “[a]ccording to this argument, the defendant and class counsel have a joint incentive to negotiate a settlement that gives the class counsel a generous attorney’s fee, but gives the class members less than the fair value of their claims.” Bruce Hay & David Rosenberg, \textit{“Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy}, 75 NOTRE DAME L. REV. 1377, 1389 (2000).} Before CAFA, even if a state case was competing with a similar one in federal court, the federal court could not interfere unless it used the All Writs Act as an exception to the Anti-Injunction
Act. Still, federal courts refereed rarely and then only when they neared a settlement that could be likened to a res. By federalizing class actions, CAFA reroutes this race. Granted, if the defendant chooses to park a collusive settlement in state court, CAFA does nothing to prevent this.

But, when defendants remove actions to multiple federal courts, the Judicial Panel on Multidistrict Litigation has authority to transfer and consolidate the actions before a single judge for pretrial proceedings when a majority of plaintiffs request it. Of course, in putative class actions, the court can use Rule 23(g) to appoint class counsel. Still, federal judges also retain liberal authority to designate lead counsel in collective actions. In so doing, judges ensure that counsel is “qualified and responsible,” that “[counsel] will fairly and adequately represent” the claimants, and that the class counsel’s attorneys’ fees are reasonable. Ensuring competent counsel alleviates, but does not eliminate, the need for judicial review of nonclass aggregate settlements.

Nonclass collective actions present a procedural justice dilemma. On one hand, the participatory legitimacy thesis dictates that inadequate attorney representation in aggregate litigation renders process illegitimate. On the other hand, collective actions often make litigation economically viable where participants would have no real means for

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128 Anti-suit injunctions are governed by 28 U.S.C. § 2283 (2000), which provides: “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” The All Writs Act, 28 U.S.C. § 1651 (2000), is often read to provide the positive authority for issuing an injunction where in necessary aid of the federal court’s jurisdiction. Thus, it falls under one of the Anti-suit Injunction Act’s exceptions. Courts occasionally cite In re Baldwin United Corp., 770 F.2d 328 (2d Cir. 1985), for the proposition that federal courts can, under the All Writs Act, issue an anti-suit injunction against both parties and nonparties in aid of its jurisdiction if a class action settlement is imminent. The Supreme Court, however, rejected an expansive use of the All Writs Act in Sygenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002).

129 See, e.g., Baldwin, 770 F.2d at 337. A “res” is property or objects as opposed to people. See BLACK’S LAW DICTIONARY 1332 (8th ed. 2004).

130 Defendants can park collusive settlements in state court by choosing not to remove the putative class to federal court.


132 MANUAL FOR COMPLEX LITIGATION, supra note 93, § 10.22. In appointing counsel, the Manual for Complex Litigation further proposes that the judge consider counsel’s qualifications, disclosure of agreements, counsel’s competence, compensation guidelines, attorney resources, counsel’s respect among colleagues, and counsel’s ability to work cooperatively with opposing counsel and the court. Id. §§ 10.224, 40.22 (sample order).

accessing the judicial system. The deontological argument that collective actions may disproportionately disfavor claimants (i.e., defendants win) due to deficiencies in the representational model of participation remains troublesome. From a consequentialist perspective, less-than-ideal representation may be justified by pragmatic considerations of cost and access.\textsuperscript{134} Surely something is better than nothing. Otherwise, the quest for perfect process could eviscerate any remedy and render participation of any kind illusory.\textsuperscript{135}

Scale economies, resource pooling, and information sharing are just some of the benefits achieved by amassing an inventory of similarly situated clients.\textsuperscript{136} Moreover, because class actions (and I would add quasi-class actions) perform a supplemental regulatory function, the public is left with a choice between mass litigation with faulty process and inept individual suits. In light of this tension, it seems that even imperfectly executing procedural principles is more appealing than the prospect of non-enforcement. In short, even though the process may not produce the best result, it at least produces some result as opposed to a complete inability to sue individually. Although a full-fledged solution to this dilemma exceeds this Article’s scope, I have proposed elsewhere that judges have the authority to review nonclass aggregate settlements and that some of the required conventions for approving class settlements are also appropriate in quasi class actions.\textsuperscript{137} For instance, in the \textit{Zyprexa} litigation, Judge Jack Weinstein tied this inherent authority to the court’s general equitable power.\textsuperscript{138} He reasoned that even though the aggregate settlement was a private agreement, it shared class action characteristics, which necessitated close supervision to ensure fairness.\textsuperscript{139} This oversight also helps maintain the integrity of the class’s ex post regulatory function.

\textsuperscript{134} As one plaintiff’s attorney commented: “If you can’t sign up enough plaintiffs, the economics don’t work.” Ericson, supra note 115, at 547 (citing the author’s Interview with Danny Abel, Esq. (Jan. 6, 2002)).


\textsuperscript{136} Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”) (quoting Mace v. Van Ru Credit Corp, 109 F.3d 338, 344 (7th Cir. 1997)); Ericson, supra note 115, at 547-48.


\textsuperscript{138} \textit{Zyprexa}, 433 F. Supp. 2d at 271.

\textsuperscript{139} \textit{Id.} at 271-72.
Both nonclass aggregation and certified class actions are affected by the second procedural justice-based CAFA critique: bureaucratization. CAFA swells the federal court docket with complex cases, causing the court to rely increasingly on bureaucracy for relief. There are two parts to the criticism of this causal effect. The first is a consequentialist concern over outcome-based accuracy in back-end regulation. A managerial judge faced with a close class certification question plus a burgeoning docket might be tempted either not to rule on the motion to certify or to deny the motion depending on how the action affects her future workload.\textsuperscript{140} Statistics indicate that if judges take no action on certification, litigants voluntarily dismiss 31\% of the cases; if judges deny certification, then litigants voluntarily dismiss 19\% of the cases.\textsuperscript{141}

Certifying class actions leads to extended battles over discovery, experts, and class-wide settlements, which might persuade a judge to delay ruling. And yet, conceding this proposition—that judges faced with difficult decisions will always take the least resistant path—illegitimates judicial institutional design. The problem is ubiquitous and pervades all levels and forms of government. To be sure, this makes checks and balances necessary, but such measures already exist within the judicial system. District court judges are subject to multifaceted layers of accountability including appellate review,\textsuperscript{142} precedent constraints, judicial codes of conduct,\textsuperscript{143} and even impeachment.\textsuperscript{144} The most worrisome, of course, for judges is the possibility of reversal on appeal. While incremental adjustments to institutional design may enhance the consequentialist’s accuracy ideal, the system’s foundation cannot be mistrust.

The second and more significant bureaucratization criticism derives from the legitimacy-participation principle. Federalizing class actions facilitates coordination and consolidation of once dueling state-federal actions, allowing them to amass in the federal courts.\textsuperscript{145} After

\textsuperscript{140} For example, Mark Moller argues that “[c]lass certification decisions are susceptible to two sources of bias: political bias and bias that stems from courts’ own self-interest in docket clearance.” Mark Moller, \textit{The Anti-Constitutional Culture}, 30 \textit{Reg.} 50, 53 (2007). Still, Moller contends that certification promotes docket clearance, which might be true from a settlement standpoint. \textit{Id.} at 55. Statistics show, however, that there may be more judicial work once certification occurs, so my critique posits the opposite—that judges might be less inclined to certify a class based on docket clearance.

\textsuperscript{141} Willging & Wheatman, supra note 43, at 636 (finding that nineteen percent of cases not certified as class actions are voluntarily dismissed).

\textsuperscript{142} Litigants may immediately request appellate review when a judge grants or denies class certification. \textit{Fed. R. Civ. P.} 23(f).

\textsuperscript{143} \textit{See, e.g.}, \textit{Model Code of Judicial Conduct} Canon 3B(2) (2004) (requiring judges to be faithful to the law).

\textsuperscript{144} Even federal judges may be removed through impeachment. \textit{U.S. Const.} art. III, §§ 1, 2 & art. I, § 3.

\textsuperscript{145} To be sure, there are other contributing causes to the increase in juridical workload such as
all, there are over 10,000 state-court trial judges \(^{146}\) and only 678 federal district court judges \(^{147}\) with varying numbers of judicial vacancies.\(^{148}\) After CAFA, the number of diversity class actions increased from 27 cases per month to approximately 53, placing an added strain on federal judicial resources.\(^{149}\) CAFA therefore constricts the fundamental right of access to the courts, to process of any kind, and to justice.\(^{150}\) In elucidating this right, the Supreme Court observed that it is a “right conservative of all other rights, and lies at the foundation of orderly government.”\(^{151}\) Granted, although CAFA obstructs access to state courts, it does not eviscerate adjudication in a way that would trigger this fundamental right. Still, less access may have derivative effects on systemic legitimacy and ex post regulation.\(^{152}\)

If nothing else, CAFA exacerbates overloaded federal dockets and stimulates a retreat into bureaucracy to cope with excess work.\(^{153}\) In the twentieth century, Congress and the judiciary responded to the expanding aegis of adjudication by broadening administrative agency authority,\(^{154}\) embedding teeth in arbitration provisions,\(^{155}\) and a growing American society, litigant innovation, and the creation of new rights.

\(^{146}\) According to the National Center for State Courts, Court Statistics Project, there are roughly 10,160 state court judges in unified and general jurisdiction courts. EXAMINING THE WORK OF STATE COURTS 18 (Richard Y. Schauffler et al. eds., 2005), available at http://www.ncsconline.org/D_Research/csp/2005_files/0-EWWhole%20Document_final_1.pdf. Civil cases comprise approximately 16.9% of the work handled by these judges. Id. at 15.


\(^{148}\) As of June 10, 2007, there were thirteen vacancies on the courts of appeals and thirty-seven on the district court level. Robert Barnes & Michael Abramowitz, Conservatives Worry About Court Vacancies, WASH. POST, June 10, 2007, at A4.

\(^{149}\) THOMAS E. WILLGING & EMERY G. LEE, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1, 2 (2007), http://www.fjc.gov/public/pdf.nsf/lookup/resbrf01.pdf/$file/resbrf01.pdf (“Seventy percent of the study districts experienced an increase in diversity class action filings in the last twelve months of the study period (July 2005 through June 2006), compared to the last full calendar year before CAFA went into effect (2004).”).

\(^{150}\) The Supreme Court has recognized access to courts as a fundamental right protected by the Constitution. Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907); see also Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983) (“The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution.”).

\(^{151}\) Chambers, 207 U.S. at 148.

\(^{152}\) See Luban, supra note 7, at 2625 (“However, when disputants turn elsewhere for resolution—private arbitration, nonjudicial government agencies, or private bargaining—the salience of adjudication fades and the authority of courts weakens.”).

\(^{153}\) Ironically, one early commentator on the problem of bureaucracy suggested that its cure could be found if Congress “[t]ook a hard look at where the bulk of the federal caseload comes from and determine[d] where, given limitations of judicial time, the jurisdiction of the federal courts can best be cut back.” Wade H. McCree, Jr., Bureaucratic Justice: An Early Warning, 129 U. PA. L. REV. 777, 793 (1981).

\(^{154}\) Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in
encouraging heavy-handed mediation.\footnote{Resnik, supra note 108, at 155 (commenting on the pressure judges use to encourage settlement).} With expanded delegation has come a winnowing of traditional judicial adjudication.\footnote{Resnik, Whither and Whether Adjudication?, 86 B.U. L. Rev. 1101, 1102 (2006).} To a greater degree after CAFA, special masters or magistrate court judges will supervise pretrial matters and settlement negotiations.\footnote{MANUAL FOR COMPLEX LITIGATION, supra note 93, at § 13.13 (suggesting that judges “refer the parties to another judge or magistrate judge for settlement negotiations”); see generally Martha Minow, Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies, 97 Colum. L. Rev. 2010, 2010 (1997); Owen M. Fiss, The Bureaucratization of the Judiciary, 92 Yale L.J. 1442, 1447-48 (1983) (describing the increased use of special masters and magistrate judges). The use of special masters is generally authorized by Federal Rule of Civil Procedure 53. Further, Rule 23, governing class actions, notes that “[t]he court may refer issues related to [attorneys’ fees] to a special master or a magistrate judge as provided in Rule 52(d)(2)(D).” Fed. R. Civ. P. 23(h)(4).} Moreover, judges have adopted an activist settlement approach, often mandating settlement conferences with other judges, special masters, magistrates, or private attorney mediators.\footnote{MANUAL FOR COMPLEX LITIGATION, supra note 93, at § 13.13; Francis E. McGovern, A Model State Mass Tort Settlement Statute, 80 Tul. L. Rev. 1809, 1810-11 (2006) (“If a court viewed the defendants as impediments to settlement, it would not be unusual for a court to set large numbers of cases for trial at the same time, even empanelling multiple juries for a single trial.”); Kim Dayton, The Myth of Alternative Dispute Resolution in the Federal Courts, 76 Iowa L. Rev. 889, 909 (1991). Some courts have imposed penalties on litigants for failing to try to settle a case. For an example, see Shedden v. Wal-Mart Stores, Inc., 196 F.R.D. 484 (E.D. Mich. 2000).} Post-settlement procedure falls increasingly to “claims resolution facilities”—ad hoc administrative agencies.\footnote{MANUAL FOR COMPLEX LITIGATION, supra note 93, at § 13.13 (“Judges have also used special masters to assist in settlement of complex litigation and in postsettlement claims-resolution proceedings. The judge can arrange for the special master’s compensation with the agreement of the parties and select an individual from a list provided by the parties.”) (internal cross-reference omitted); Lahav, supra note 135, at 391; Francis E. McGovern, The What and Why of Claims Resolution Facilities, 57 Stan. L. Rev. 1361, 1362 (2005). For an example of an agency created to deal with a mass tort, see KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005) (detailing Feinberg’s work involving the administrative allocation of funds); Lahav, supra note 135, at 413 (“The quasi-administrative agency created as a result of the Diet Drugs settlement was privately created, subject to court approval, and then privately administered.”).} Process stretches, adapts, transforms.

So what could be wrong with expanding bureaucracy if it sustains—and even oils—the wheels of justice? True, bureaucratization is a pragmatic solution. And yet it diffuses responsibility and distances litigants from the decisionmaker—creating a barrier to participation and subecting the process to criticisms of illegitimacy. As highlighted in the CAFA debate, procedure serves two masters: it sets the terms for scattered sections of 5 U.S.C); Reginald Parker, The Administrative Procedure Act: A Study in Overestimation, 60 Yale L.J. 581 (1951).


resolving disputes and guides actions. Larry Solum contends that “[f]or adjudicative procedure to perform its action-guiding function well, procedures and their outcomes must be regarded as legitimate sources of authority for officials, third parties, and litigants. . . . If the system is seen as illegitimate or without authority, then the system may fail.”

On this question of whether judicial bureaucracies can preserve the veneer of legitimacy, Owen Fiss argues that when a judge signs her name to an opinion, she assumes responsibility. Moreover, although “[w]e accept the judicial power on these terms, . . . bureaucratization raises the spectre that the judge’s signature is but a sham and that the judge is exercising power without genuinely engaging in the dialogue from which his authority flows.” This cuts through the rhetoric of the so-called “opportunity to be heard.” Rather, for legitimate process, litigants must actually be heard while participating in a dialogue.

Yet, because bureaucracy alienates the judge from the litigants, critics label this “rule by nobody.” Alienation thus creates a procedural deficiency by inhibiting litigant participation. Academics have proposed various means for cutting this Gordian knot, ranging from using fewer special masters, to authorizing more district and circuit judgeships, to creating special tribunals. Each has its own assets and flaws. Still, a full reform proposal and analysis extends beyond this section’s focus on how CAFA affects bureaucratization and process.

In short, bureaucratization presents a trade-off between using a process tainted with illegitimacy or further restricting access to justice. Again the system is confronted with a need and desire to push down work that seems trivial or mundane and to forge a bureaucratic infrastructure that accommodates this push. Outsourcing mediation to

161 See Solum, supra note 6, at 189 (observing that “the action-guiding work of substantive law is inextricably entangled in the action-guiding work of procedural law”).
162 Id. at 189.
163 Fiss, supra note 158, at 1443
164 Id.
165 Id. at 1456 (“A judge who exercises power without fully engaging in the dialogue that is the source of his authority—who leaves it to others to listen to a grievance or to explain a decision—is like a biologist who reports an opinion he has not tested by the scientific method. He may have hit upon the right result, but there is no reason for us to believe that he is right, or even that he is likely to be so. He has no claim to our respect.”); see also Bayles, supra note 103, at 170 (observing that “[t]he goal of bureaucratic investigation is to implement a purpose or policy set by others” as opposed to implementing societal norms in the process of justice).
166 Fiss, supra note 158, at 1458 (commenting that where “[r]esponsibility is shared with the multitude of other judges and with the impersonal forces and inanimate mechanisms that so pervade complex organizations. . . . [t]he Rule of Nobody becomes triumphant”); see also Lahav, supra note 135, at 393 (“The alienation argument is based on the criticism that bureaucracy is a rule by nobody.”).
167 See, e.g., Fiss, supra note 158, at 1463-66.
private attorneys, relegating discovery and case administration to special masters and magistrates, and authorizing private claims resolution facilities to disburse settlement proceeds fosters access to a new kind of system—one that is substandard from a participatory, legitimacy, and regulatory standpoint. Bureaucratic justice builds barriers between litigants and judges making direct participation difficult and rendering the litigation process sterile. It begs the question: to what extent are we willing to accept diluted process for claims that strengthen the ex post regulation system? This is the crux of the tension between post-CAFA procedural justice and the need to accommodate collective litigation for ex post regulation.

Any debate over this trade-off must consider the effects on deterrence and regulation. It must also consider the extent to which public views of legitimacy will tolerate private ordering through bureaucracy, collective settlements, and other forms of judicial diversion. Although one might hope that ex ante regulation would prevent massive harms, this hope avoids tough questions over the proper balance between enabling regulation through litigation and preserving access to judges and the courts.

C. On the Public Benefits of Class Litigation

Thus far, this Article has focused on the ways in which class litigation is a public good—performing a semi-public ex post regulatory function and shaping and defining its procedural justice limits. By making non-certification more likely, CAFA spoils these goods. It changes the class action’s regulatory punch. And, as we will see in this Part, to the extent that society is willing to concede that ex post regulation does more good than harm, non-certification (and thus CAFA) also impairs some of the class action’s positive spillovers.

As we begin to consider CAFA’s effect on the spillovers of transparency, deterrence, and precedent, bear in mind that not always, but oftentimes, class actions are controversial because of the underlying claims. Consider mass tort litigation such as Agent Orange, asbestos, Vioxx, Bendectin, Bridgestone/Firestone tires, Diet

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171 See, e.g., In re Bendectin Litig., 857 F.2d 290 (6th Cir. 1988).

172 In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002).
Drugs, and tobacco; employment class actions on gender discrimination such as *Dukes v. Wal-Mart Stores, Inc.*; and securities fraud class actions concerning Enron, Worldcom, and HealthSouth. These cases and their outcomes are obviously important to the public. Public ability to see the inner workings of both controversial and non-controversial actions lends legitimacy to this divisive regulatory process. Thus, I consider transparency as a positive externality alongside the traditional externalities—deterrence and preclusion.

1. **Transparency**

Recall that CAFA increases the incidence of private nonclass settlements. On one hand, what could the public possibly lose when litigants privately settle collective actions? To be sure, private settlements alleviate strain on the court system and thus furnish a mild economic benefit to taxpayers. Moreover, settlements are, after all, agreements where parties consent to negotiating their dispute in lieu of expensive litigation costs. Still, the troubling difference between class action settlements with judicial approval and aggregate settlements without that approval again appears. As we will see, the tension between traditional individualized process and aggregate litigation resurfaces.

Class action settlements, settlements that are court approved after a public fairness hearing, supply a window into the mysterious class action process. This window educates the public sector about legal obligations and remedies. As Judith Resnik observed, “Public access to proceedings in court has become a signature feature of courts, resulting in practices so familiar as to be under-theorized. . . . Through access, the public is educated, the judges and litigants and

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174 *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).
175 474 F.3d 1214 (9th Cir. 2007), withdrawn and superseded by 509 F.3d 1168 (9th Cir. 2007); see, e.g., Abigail Goldman, *Wal-Mart Loses Job-Bias Appeal: The Retailer Must Face a Class-Action Suit on Behalf of 1.5 Million Women, A Panel Rules*, L.A. TIMES, Feb. 7, 2007, at C-3; Sid Cassese, *Calling for Changes at Wal-Mart*, NEWSDAY, Nov. 22, 2006, at A17 (noting that protestors called for a boycott of Wal-Mart until it ended its discriminatory practices).
180 See generally Resnik, *supra* note 157, at 1102 (commenting on what is lost when adjudication is no longer public).
lawyers are supervised, and knowledge of legal requirements is disseminated.” On a macro level, fairness hearings, conducted in courthouses open to the public, create opportunities for even greater insight into both substantive laws and procedures.

That class litigation—particularly mass torts litigation, including cigarette, asbestos, handguns, and prescription drugs—has become a controversial forum for debating public policy, amplifies the need for public access. And while there is a legitimate argument that these debates should occur in legislative—not court—hearings, it seems that court battles are sometimes a necessary antecedent to legislative action.

As we’ve seen, sacrificing ideal process to accommodate aggregate litigation creates a greater need for above-the-board openness in collective settlements. Open hearings let the public observe state and federal actors generating social norms and enforcing ethical constraints on corporations that frequently seem untouchable. Some have argued that using class litigation as a venue for social policy debates is harmful to society and undemocratic because it permits judges, lawyers, and (sometimes) juries to shape policy. That may be true. It is certainly

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181 Id. at 1113-14; see also Judith Resnik, Due Process: A Public Dimension, 39 U. FLA. L. REV. 405, 405-26 (1987).

182 See generally Resnik, supra note 157, at 1103 (“The literal and material presence of adjudication stems in part from its performative qualities: much of the activity occurs in buildings open to the public.”).

183 See generally Ericson, supra note 37, at 2093 (observing that mass tort litigation has gained increasing recognition as a forum for public policy); Deborah R. Hensler, The New Social Policy Torts: Litigation as a Legislative Strategy Some Preliminary Thoughts on A New Research Project, 51 DEPAUL L. REV. 493, 495 (2001) (noting the use of “social policy torts” to bring attention to legislative and social change); cf. Ted Gup, America’s Secret Obsession, WASH. POST, June 12, 2007, at B01 (“Excessive secrecy is at the root of multiple scandals—the phantom weapons of mass destruction, the collapse of Enron, the tragedies traced to Firestone tires and Vioxx, and more.”).


186 See, e.g., WALTER K. OLSON, THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA’S RULE OF LAW 314 (2003) (“[H]owever uncertain the results of democracy, however slow and clumsy its procedures, we can feel quite sure that it is a better course than agreeing to turn over our rights of self-government to a new class of unaccountable lawyers.”); Wendy Wagner, When All Else Fails: Regulating Risky Products Through Tort Litigation, 95 GEO. L.J. 693, 694 (2007) (“Derogatorily referred to as ‘regulation through litigation,’ mass litigation against tobacco, breast implant, gun, and a number of drug and other product manufacturers is often considered to be an illegitimate end-run around the political process rather than a supplemental institutional mechanism for making products safer.”) (footnote omitted); Redish, supra note 35, at 73 (“[I]n all too many cases, the modern class action has
true that social policies underlying mass litigation, particularly certain types of mass torts, have created odd bedfellows—alliances between activists and trial lawyers.  

And yet, when collective litigation affecting public norms ends in a private aggregate settlement, these alliances may appear elitist and secretive. The public is one-step further removed from the process and the settlement’s implications are subject neither to public scrutiny nor to appellate review. If the public cannot observe justice being done—through written decisions or open proceedings—it might conclude that there is something to hide.

More often than not, aggregate settlement agreements include confidentiality provisions. These provisions withhold information from the public that could be essential to informed decision-making, such as drugs’ potential health effects. The inherent nature of confidential settlements prevents insight into their content. Only when plaintiffs’ attorneys buck the trend and refuse to agree to confidentiality are the contents discoverable. For example, several private lawyers in the tobacco litigation who represented the State of Minnesota refused to settle on a basis that would have kept documents produced in discovery out of the public eye. Even though the decision substantially reduced their attorneys’ fees, the attorneys agreed to settle only if the documents were kept in a public repository. As federal courts certify fewer class actions and an increasing number end in aggregate settlements, the public will have less opportunity for glimpses into an increasingly opaque ex post regulatory process. This surely does little to placate criticism that class aggregation is undemocratic.

undermined the foundational precepts of American democracy. It has done so by effectively transforming the essence of the governing substantive law that the class action has been created to enforce.”.

187 E.g., Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), rev’d, 84 F.3d 734 (5th Cir. 1996) (providing an example of the alliance between private tobacco plaintiffs’ lawyers and Richard Daynard, a law professor and anti-tobacco activist who created the Tobacco Products Liability Project); Peter J. Boyer, Big Guns, NEW YORKER, May 17, 1999, at 53, 54-67 (observing the alliance between the Legal Action Project, part of the Brady Center to Prevent Handgun Violence, and private law firms in gun litigation); see also PRINGLE, supra note 37, at 6 (noting Daynard’s role in the tobacco litigation).

188 Keeping discovery materials and the settlement terms confidential often prompts conflict between individual and group interests. Erichson, supra note 115, at 560-61. Erichson notes that “[i]n most of these situations, the multiple representation ought to be permitted with client consent.” Id.

189 See Wagner, supra note 186, at 697-98 (“Without key information on the ways in which a product might be risky—for example, scientific research revealing that tobacco is both addictive and carcinogenic, asbestos is carcinogenic, or a birth control device breeds lethal bacteria—regulators, the public at large, and other stakeholders cannot participate meaningfully on whether or how to regulate products that cause harms.”).

190 DEBORAH CAULFIELD RYBAK & DAVID PHELPS, SMOKED: THE INSIDE STORY OF THE MINNESOTA TOBACCO TRIAL 385 (1998); Erichson, supra note 37, at 2097-98.

191 RYBAK & PHELPS, supra note 190, at 385; Erichson, supra note 37, at 2097-98.
2. Deterrence

This higher incidence of nonclass settlements caused by federal courts’ reluctance to certify nationwide classes may also affect the class action’s ability to deter corporate wrongdoing. Measuring a class action’s deterrent effect is notoriously tricky and almost inherently theoretical. For example, it is difficult to determine what, if any, deterrent effect a latent injury class action would have on corporate actors given that those actors may have left the company years before. Nevertheless, one can at least theorize that if a class action is brought against the same corporate actors within a relatively short time, its behavioral influence might be two-fold. First, the ability to pool similar claims through Rule 23(b)(3) creates a viable litigation threat that corporate actors must consider in any cost-benefit analysis. Presumably, this “threat effect” deters risky behaviors taken without due care and results in safer products and better corporate practices.

Second, class actions decrease the need for future lawsuits by developing the law (for example, of products liability or securities fraud), which clarifies and delineates boundaries for socially acceptable risks. Class litigation can develop the law through traditional means—decisional precedent—or it can prompt structural transformation—legislative action. For an oversimplified example, if a drug manufacturer can assess the ex ante costs of additional research to create a safer product versus the costs of litigation, it will invest in additional research if the threatened tort liability approximates or exceeds prevention costs.

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192 See Rosenberg, supra note 33, at 901 (“[A] claim’s deterrence value is, in effect, a ‘public good’ that the private claims market fails to maximize because plaintiff attorneys gain nothing from its production.”) (footnote omitted); see also RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY 316-24 (2d. ed. 1978) (applying the concept of public good to mass exposure litigation).

193 See Rosenberg, supra note 33, at 900 (“Besides squandering the system’s resources, the duplicative adjudication of common questions generally places mass exposure claims at a competitive disadvantage in the claims market and deprives the system of their deterrence value. But the courts’ traditional passive role inhibits resort to interventionist methods that might reduce litigation costs, enable the claims market to reflect the relative deterrence values of competing mass exposure and sporadic accident claims, and inform potential claimants of their rights to sue or to join pending litigation.”).

194 See Rubenstein, supra note 8, at 723; Rosenberg, supra note 16, at 573-74.

195 See Rubenstein, supra note 8, at 723.

196 Owen Fiss, who coined the term “structural transformation,” argues that transformation through litigation identifies a set of values that “stand as the core of a public morality and serve as the substantive foundations of structural litigation.” Owen M. Fiss, The Social and Political Foundations of Adjudication, 6 LAW & HUM. BEHAV. 121, 124 (1982). He continues, “[t]he social function of contemporary litigation is not to resolve disputes, but rather to give concrete meaning to that morality within the contact of the bureaucratic state.” Id.
Assuming that class actions can deter wrongdoing, CAFA may cause sub-optimal deterrence in three respects. First, the higher incident of nonclass settlements may allow defendants to avoid internalizing the full costs of their tortious conduct. Second, because CAFA has a splintering effect on certification that creates more private collective settlements, there will be less opportunity for legal opinions to clarify the law, for open debates to prompt structural transformation, and for the law to perform its guiding function. This, in turn, creates uncertainty about which behaviors will result in a penalty. Finally, on a related note, the choice-of-law quagmire adds further unpredictability for actors who strive to behave within legal boundaries.

The first critique, that nonclass settlements may permit defendants to shoulder less than the full costs of their conduct, takes two points for granted. First, class actions and collective actions deter wrongdoing by threatening potential tortfeasors (such as corporate officers and directors) with liability for the full costs of their tortious behavior. Second, optimal deterrence enhances public welfare by preventing unreasonable risk that costs more to incur than to prevent. Without certification, it is likely that at least some plaintiff’s attorneys will decide that investing in collective actions is too risky. Thus, fewer suits may diffuse the threat effect needed for optimal deterrence. This is particularly troublesome given the American system’s heavy reliance on litigation as ex post regulation.

Second, because litigation helps ensure that behaviors conform to public values, settlements erode opportunities to give force to and interpret those values. On litigation’s function, Owen Fiss observes, “Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.” Also, if class actions and quasi class actions perform a semi-public regulatory function, then the higher incident of private settlements dilutes this...

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198 Rosenberg, supra note 197, at 1880.
199 See Rosenberg, supra note 33, at 906-07 (“Only if enough of the actual victims prosecute claims for compensation will the responsible institution be confronted with a threat of liability powerful enough to deter it from committing future illegals.”).
200 For a defense to some of the common arguments against the use of class actions as a deterrent, see Rosenberg, supra note 16, at 573-79.
202 Id. at 1089.
203 See generally Fiss, supra note 27, at 23 (“[T]he idea of the private attorney general has emerged. The power of initiation is vested in the individual citizen, but the function of the suit is the same as one brought by the attorney general, namely, to vindicate the public interest.”).
function in two ways. First, it hampers judicial construction of laws implementing these public values. This inhibits the law’s guiding function and creates more ambiguity about compliance. Second, private confidential settlements withhold information from the public. This makes public reactions and marketplace justice—be it outrage over an “unfair” outcome for a beloved company or boycotting products considered potentially dangerous—impossible. Overall, semi-public lawsuits escape public accountability and restrict opportunities for law to structure behavior.

Finally, CAFA’s removal provision affects deterrence by trapping more putative class actions within the federal choice-of-law quagmire. By explicitly preserving *Erie*, CAFA maintains that a federal court is bound to follow state court choice-of-law decisions even if those decisions apply a uniform law to facilitate class certification. CAFA objects to facilitating certification in this manner. This creates uncertainty about governing law, which leads to suboptimal deterrence. When state laws vary, which one should a corporation follow? Put differently, knowing that a certain body of substantive law will apply to any given case—in state or federal court—permits actors to comply with the law. Thus, predictable choice-of-law rules facilitate legal compliance and help insulate against unfavorable litigation verdicts.

A study conducted by John Calfee and Richard Craswell revealed that the effects of uncertainty—such as uncertainty about which law will govern—can “cause even risk-neutral defendants to over- or undercomply.” Over-compliance can lead to increased consumer costs, wasted resources, and denying goods to the economically disadvantaged. Moreover, if corporate actors could face penalties

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205 See generally BAYLES, supra note 103, at 42 (“Public rules and principles allow people to plan their activities to conform to them, and this reason applies whether the rules impose burdens or confer benefits.”); Cassese, supra note 175, at A17 (noting that protestors called for a boycott of Wal-Mart until it ended its discriminatory practices). Bayles recounts a story of a female shoplifter who received a harsher sentence than usual. After the newspaper ran the story, public outrage prevented a continued crack down on other shoplifters. BAYLES, supra note 103, at 42-43.

206 See supra note 73-79 and accompanying text.

207 See Issacharoff, supra note 79, at 1839-40.


regardless of their decisions, then they might ignore potential penalties, throw up their hands, and engage in wealth-maximizing behavior in the marketplace.\(^{211}\) In short, not knowing which law might ultimately govern may lead to sub-optimal deterrence. At least theoretically then, CAFA weakened litigation’s threat effects, diluted the law’s guiding function, and muddied questions about governing law.

3. Decree Effects, Collaboration, Precedent, and Preclusion

Despite weakening deterrence and reducing transparency, CAFA does not entirely emasculate the class action’s ex post regulatory function. Because class actions provide incentives to overcome the collective action dilemma and initiate litigation, the public gains some value through aggregate settlements’ positive externalities. This is particularly true where the settlement involves declaratory or injunctive relief requiring the defendant to change its policies.\(^{212}\) Absent a formal policy change, the threat of collective lawsuits by the same plaintiffs’ attorney, or attorneys sharing information, may prompt a defendant to make informal adjustments.\(^{213}\) The effects spillover to the public.

Without a confidentiality provision, it is also possible that collaborative information sharing about settlement terms could advantage other litigants. Most often, particularly in mass tort cases, defendants pattern collective settlements on other settlements. This establishes guidelines for allocating funds based on criterion such as injury.\(^{214}\) Knowing patterns could prompt favorable settlements on other litigants’ behalf and, conversely, ward off non-compensable cases.\(^{215}\) Plaintiff information sharing thus creates symmetry in settlement negotiations since repeat player defendants typically know more about previous settlements, expert evidence, and discovery materials.\(^{216}\)

37 HARV. J. ON LEGIS. 393, 403 (2000).

\(^{211}\) Cf. A.C. Pritchard, Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers, 85 VA. L. REV. 925, 959 (1999) (“The settlement dynamic in securities class actions fatally undermines the deterrent value of such suits. The cost of litigating securities class actions, tied to potentially enormous judgments, ensures that even weak cases will produce a settlement if they are not dismissed before trial.”).

\(^{212}\) Rubenstein labels these effects the “decree effects” and notes that “[t]he legal principle developed in the case will create more certainty in structuring social behavior and lower the need for future adjudication concerning the decided issue.” Rubenstein, supra note 8, at 723.

\(^{213}\) Rubenstein, supra note 8, at 724 (“Even if a defendant does not agree as a formal matter to change its general policy as a consequence of the initial case, it may nonetheless do so informally lest it be faced with repeated lawsuits.”).

\(^{214}\) E.g., In re “Agent Orange” Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984); see Rosenberg, supra note 16, at 582.

\(^{215}\) Rubenstein, supra note 8, at 724.

\(^{216}\) See Mark C. Weidmaier, Arbitration and the Individuation Critique, 49 ARIZ. L. REV. 69,
Even with plaintiff collaboration, these collective settlements may allow defendants to shoulder less than the full costs of their actions. Defendants’ repeat player status (especially as to the same claims) allows them to exploit the aggregate litigation process. Put differently, once defense attorneys have prepared one claim for litigation, they will be substantially prepared to defend all similar claims. Whereas post-CAFA process disaggregates plaintiffs’ attorneys—at least as contrasted with the certified class action process—it does not disaggregate defendants. Defendants might, therefore, capitalize on transaction cost efficiencies and aggregate settlements to pay less. Yet, without class treatment, collective actions stand a marginally higher chance of ending on the merits—through trial or summary judgment. These actions might further beneficial ex post regulation by developing legal principles, precedent, and preclusion. Settled law prevents the need for future litigation.

Preclusion stands out among these benefits. Federalizing class actions causes federal courts to retain non-certified actions and apply the broad federal preclusion doctrines. Statistics indicate that after a court denies class certification, it dismisses only 4% of cases for lack of jurisdiction. These once putative class actions thus remain in federal court. And, on the off chance that they proceed to judgment on the merits (as roughly 18% do), they are subject to the more stringent

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72 (2007) (“If a dispute occurs, the repeat player may seek to generate a favorable precedent or, conversely, to suppress rule changes that might benefit future adversaries. To that end, a repeat-player defendant might settle weak cases and litigate only those it expects to win. If it does litigate, the defendant may make substantial investments in its defense for a number of reasons. . . . The result is that, in many cases, repeat players will rationally make litigation investments that no individual litigant can hope to match.”); Rosenberg, supra note 210, at 400-02.

217 Weidmaier, supra note 216, at 71-72; Rosenberg, supra note 210, at 399-402; Rosenberg, supra note 33, at 902-03 (“Defendants that are repeatedly sued by individual plaintiffs gain the upper hand in settlement negotiations because of their greater information about previous settlements (the terms of which the parties may not have disclosed) and about discovery materials from previous cases (some of which the parties may never have made public.”).

218 See Weidmaier, supra note 216, at 71-72; Rosenberg, supra note 33, at 907.

219 See Willging & Wheatman, supra note 43, at 638 (reporting that five percent of cases went to trial after the court denied certification whereas most certified class actions ended in settlement).

220 See Rubenstein, supra note 8, at 726 (“The lawsuit might develop legal principles, change industry practices, or conserve judicial and social resources. . . . The externality story is one about how to secure the deterrent effects of litigation. But the externality story can be read even more broadly in that the externalities . . . exceed simple deterrence.”); Luban, supra note 7, at 2626 (“[L]egal rules and precedents are valuable not only as a source of certainty, but also as a reasoned elaboration and visible expression of public values.”) (footnotes omitted).

221 For a thorough and informative treatment of preclusion in class litigation, see Tobias Barrington Wolff, Preclusion in Class Action Litigation, 105 COLUM. L. REV. 717 (2005).

222 Willging & Wheatman, supra note 43, at 636. Note that this statistic includes data on both state and federal court decisions.

223 Id. (indicating that after courts deny certification they enter summary judgment thirteen percent of the time and try cases five percent of the time).
federal preclusion doctrines allowing non-mutual offensive use of collateral estoppel.224

This means that if a defendant faced with a cadre of splintered actions loses on the merits—through summary judgment, consent decrees, or trial—other plaintiffs could “borrow” that finding. They thus save judicial and litigant resources by not having to re-litigate the same issue or decision.225 Thus, if a plaintiff’s attorney can budget costs for winning one case on the merits, other cases and attorneys can potentially free ride on those efforts. Even attorneys litigating against defendants who were not in privity with defendants in the initial action may benefit from the decision’s stare decisis effect.

In sum, CAFA significantly effects class litigation’s regulatory function. It may decrease transparency within the judicial process on controversial public matters. And it can weaken deterrence by diluting litigation’s threat effects and creating uncertainty about governing law.

CONCLUSION

It is true that CAFA affects class action practice in ways that extend far beyond a venue change. Still, my intent in this Article is not to idealize pre-CAFA practice. Rather, given the cyclical nature of class action reform and retrenchment, I hope to add to the dialogue in this continuing debate. Identifying class litigation’s often ignored

225 See Chamblee [Burch], supra note 92, at 175 (“Due to the high stakes of the first trial for the defendant, the initial plaintiffs can exert more pressure on the defendant to settle.”).

Economists William Landes and Richard Posner have argued that adjudication produces a private good in that our court system produces rules and precedents that benefit future litigants. William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. LEGAL STUD. 235, 237 (1979); see also Luban, supra note 7, at 2622-23. Even if the federal court remands cases to state court, any state court ruling on the merits—of individual or collective actions—carries a preclusive effect under the Full Faith and Credit Doctrine. The Full Faith and Credit Doctrine in the Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. art. IV, § 1. The United States Code echoes this doctrine and states:

[i]the records and judicial proceedings of any court of any such state, Territory, or Possession of the United States . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state, Territory or Possession from which they are taken.

positive externalities and analyzing CAFA’s impact on these benefits is truly just a beginning. Nevertheless, it is possible to make some preliminary observations about the effect of federalizing class actions. Perhaps the most important effect from a consequentialist standpoint is that CAFA may weaken deterrence and inhibit litigation’s use as ex post regulation. Equally important, from an ethicist’s and proceduralist’s perspective, is CAFA’s impact on procedural justice and the ex post regulatory process. It causes, at times, increased bureaucracy, inadequate representation, decreased access to courts, and systemic illegitimacy. Of course, each criticism is, at other times, tempered by greater access to process and lower cost. Finally, from a public benefit perspective, CAFA may decrease systemic transparency, but may bolster the incidence of preclusion and thereby enable free riders. CAFA’s legislative history provided half of the picture. It is only through realizing that class actions can perform a public good—ex post regulation—with positive spillovers that the full picture of Rule 23 emerges. And that was, perhaps, CAFA’s dirty little secret.