1. INTRODUCTION

Class action filings in the federal courts surged after the Class Action Fairness Act of 2005 (CAFA) took effect, and resolution of major controversies in a single multidistrict litigation became the norm. Correspondingly, since 2010, the Supreme Court has shown an increased interest in class action procedure. As with other cases, when the Court grants review in a class case it reverses more often than not—a pattern that makes the certiorari stage critical to litigants.

Although the Justices in recent cases reached consensus on minor points of class action procedure, their opinions diverged on more significant issues. The addition of Justices Gorsuch and Kavanaugh to the bench all but guarantees that strict constructionism will influence how class action law develops. Even before these two Justices joined the Court, its decisions reflected a divide in how the Justices view the class action device.

The 5–3 decision in American Express Co. v. Italian Colors Restaurant demonstrates these contrasting views. 570 U.S. 228 (2013). A restaurant alleging an antitrust tying violation filed a class action against American Express on behalf of similarly situated merchants. Justice Scalia’s opinion for the Court held that the restaurant could not nullify a provision in its contract with American Express mandating that all disputes between them be decided in individual arbitration. Rejecting the argument that enforcing this clause would serve to immunize American Express, the Court held that “courts must ‘rigorously enforce’ arbitration agreements according to their terms.” Id. at 233 (citation omitted). Only if an arbitration agreement waives a party’s right to pursue statutory remedies may the agreement be invalidated, the Court reasoned, and the class waiver “no more eliminates [the contracting] parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action . . . in 1938.” Id. at 236. In addition, the Federal Arbitration Act’s (FAA) “command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.” Id. at 238 n.5. Justice Kagan, joined by Justices Ginsburg and Breyer, dissented, opining that for the restaurant to pursue its claim individually in arbitration would be a “fool’s errand” as “[n]o rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.” Id. at 240, 245 (Kagan, J., dissenting). The dissent went on to assert that the majority, “bent on diminishing the usefulness of Rule 23,” had reasoned as if it were still “ye olde glory days.” Id. at 251–52 (Kagan, J., dissenting).

Despite disagreements over how competing class action policies should be balanced, the Court’s precedents make clear that Rule 23 must be interpreted as written. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (“[O]f overriding importance, courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce.”). The Court’s most recent class action decisions have been unanimous. The per curiam ruling in Frank v. Gaos, 139 S. Ct. 1041 (2019), avoided reaching the cy pres issue presented, reminding for an assessment of whether plaintiffs whose search terms Google allegedly shared

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1. Miriam E. Marks assisted with the “mountain peaks” section; views and research are my own.
with third parties had standing to maintain Stored Communications Act claims under Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016). In China Agritech, Inc. v. Resh, the Justices agreed that the tolling of statutes of limitations affected by a class action filing does not apply to class—as opposed to individual—claims filed after a denial of class certification. 138 S. Ct. 1800 (2018) (distinguishing American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974)). And in Microsoft Corporation v. Baker, the Court unanimously held (with three Justices concurring in the judgment) that class plaintiffs cannot manufacture a final judgment subject to immediate appellate review by voluntarily dismissing their claims upon a denial of certification. 137 S. Ct. 1702 (2017).

In keeping with how class action issues that reach the Supreme Court are often analyzed, this chapter focuses more on public policy than do the circuit-by-circuit chapters that form the bulk of this book. After a brief excursion into the origins and development of class actions in our legal system, the chapter describes how the Court has approached dueling policies embedded in Rule 23. The discussion then shifts gears, delving more deeply into three of the Court’s most consequential class action decisions. The chapter proceeds to consider the more immediate matter of how class action jurisprudence has evolved in the twenty-first century. The conclusion frames some open questions of class action law that the Court may address in years to come.

2. CLASS ACTION ORIGINS AND DEVELOPMENT

With roots in medieval group litigation, representative suits took their place in early American legal practice. See Stephen C. Yeazell, Group Litigation and Social Context: Toward a History of the Class Action, 77 Colum. L. Rev. 866 (1977) (describing seventeenth-century chancery suits by English lords and clergy against groups of rural tenants or parishioners for tithes and other property); Zechariah Chafee, Jr., Bills of Peace with Multiple Parties, 45 Harv. L. Rev. 1297, 1303–07 (1932) (reviewing the early history of bills of peace with multiple parties). In the fledgling republic, old Equity Rule 48, amended in 1912 as Equity Rule 38, recognized a precursor to the class action. In the antebellum era the Supreme Court articulated what remains the core rationale for representative litigation: “Where the parties interested in the suit are numerous . . . it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.” Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853). The Court, citing Justice Story’s commentaries on equity pleadings, deemed it “well established” that “where the parties interested are numerous, and the suit is for an object common to them all, some of the body may sue in behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.” Id. at 302; see also Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 672 (1915) (“The principle [stated in Swormstedt] is recognized both in England and in this country.”); Beatty v. Kurtz, 27 U.S. (2 Pet.) 566, 585 (1829) (Story, J.) (holding that “certain persons . . . having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society; for purposes common to all, and beneficial to all.”); West v. Randall, 29 F. Cas. 718, 722–23 (C.C.D.R.I. 1820) (Story, J.) (stating that in certain “cases of general right” the court may “dispense with having all the parties, who claim the same right, before it, from the manifest inconvenience, if not impossibility of doing it, and is satisfied with bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole, and therefore binding, in a sense, that right.”). Such cases, the Court pronounced in Swormstedt, embody an exception to the general rule that all interested parties must be joined—and

2. See Fed. R. Civ. P. 12(b)(7), 19 (a civil action may be dismissed for failure to join an indispensable party).
“care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.” 57 U.S. at 303. Hence, the twin concerns of efficiency and fundamental fairness have animated the American class action. See, e.g., Deborah R. Hensler, Happy 50th Anniversary, Rule 23! Shouldn’t We Know You Better After All This Time?, 165 U. Pa. L. Rev. 1599, 1600 (2017) (“The joining of group litigation with a legal regime based on individual autonomy was long considered mainly a marriage of convenience, justified by the inefficiency of resolving large numbers of claims arising out of the same facts and law in individual proceedings.”).

Toward the end of the nineteenth century, three “‘Old Settlers,’ or ‘Western Cherokee,’ Indians” sued the federal government on behalf of the tribe. United States v. “Old Settlers,” 148 U.S. 427, 427–28 (1893). The Supreme Court dismissed “the suggestion that these so-called ‘commissioners’ did not bring themselves as strictly within the rule [of Swormstedt] as they should,” affirming a money judgment for the tribe as modified and concluding that the plaintiffs did “so far represent the interests or rights involved that the case may be allowed to proceed to judgment.” Id. at 480. Further, there was no need for individual beneficiaries “to come in and establish their right to share in the fund”; the Court instead approved a process by which a committee of five would ascertain the beneficiaries and disburse awards on a per capita basis. Id. at 480–81.

Class actions in the nineteenth century did not bind absent parties unless the court so ordered.3 In 1921, however, the Supreme Court held that a federal diversity judgment permitting a fraternal benefit society’s reorganization precluded a subsequent state court action challenging that reorganization. Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921). Under Swormstedt and Equity Rule 38, the earlier decree bound the class, including its Indiana members, since “their rights were duly represented by those before the court” and “[i]f the decree is to be effective and conflicted judgments are to be avoided, all of the class must be concluded by the decree.” Supreme Tribe of Ben Hur, 255 U.S. at 366–67.

Among the innovations of the New Deal was the merger of law and equity, intended to simplify legal practice, and to that end the Federal Rules of Civil Procedure supplanted the old code pleading system. The original Rule 23, nonetheless, was formalistically framed. It provided that “[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insured the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that an owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.” A subdivision governing shareholder derivative suits followed, and then a subdivision requiring court approval for any dismissal or compromise of a class action with corresponding notice required to the members of a class certified under subdivision (a)(1). The three types of classes defined in the rule were known as “true,” “hybrid,” and “spurious,” respectively. The 1938 rule’s “silence . . . on the matter of who would be bound by a judgment was thought to be a necessary concession to the requirement that the rules not determine substantive rights.” John G. Harkins, Jr., Federal Rule 23—The Early Years, 39 Ariz. L. Rev. 705, 708 (1997) (citation omitted).

Predictably, the codification of Rule 23 spurred an expansion of class litigation in the federal courts. Many of the new cases filed mid-century alleged securities fraud, monopolistic conduct, or overtime pay violations—complex subject matter not previously litigated in class cases. See Zechariah Chafee, Some Problems of Equity 200 (1950). And in

practice, the asymmetric quality of the “spurious” class action proved unfair. Class members in such an action could wait until after entry of judgment to decide whether to intervene and be bound by the outcome. See James W. Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551, 574–76 (1937) (the architect of Rule 23 described the spurious class action as a permissive joinder device—“an invitation to become a fellow traveller in the litigation, which might or might not be accepted.”). The rule consequently gave class members an incentive to intervene only upon entry of a judgment favorable to them. The 1966 amendments removed this nonmutual procedure, providing that a judgment in an action for money damages under subdivision (b)(3) binds the class members, who are, however, entitled to notice of the action and the opportunity to opt out to avoid the judgment’s binding effect.

The 1966 overhaul cast the rule in functional rather than formal terms, eliminating “Moore’s accursed labels” for the various types of class actions. Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U.Chi. L. Rev. 684, 707 n.73 (1941); see Snyder v. Harris, 394 U.S. 332, 343 (1969) (Fortas, J., dissenting) (the amended rule “replaced the metaphysics of conceptual analysis of the ‘character of the right sought to be enforced’ by a pragmatic, workable definition of when class actions might be maintained”). In addition to all four Rule 23(a) subdivisions, a plaintiff must satisfy at least one Rule 23(b) subdivision to maintain a class action, and “[i]n drafting Rule 23(b), the Advisory Committee sought to catalogue in ‘functional’ terms ‘those recurrent life patterns which call for mass litigation through representative parties.’” Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 (1999) (quoting Benjamin Kaplan, A Prefatory Note, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)). Rule 23(b)(1) applies to mandatory class actions—examined in Ortiz—while Rule 23(b)(3) replaced the “spurious” opt-in class action. See Amchem, 521 U.S. at 614. Rule 23(b)(2) governs class actions for injunctive or declaratory relief, requires that the relief sought be unitary, and may apply in actions for an injunction to enforce civil rights laws. See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360–63 (2011); Fed. R. Civ. P. 23(b)(2) advisory committee’s note (1966).4

3. COMPETING POLICIES IN CLASS ACTIONS

Supreme Court law recognizes that class actions serve important needs but are also subject to abuse and demand careful oversight. The Justices return to the text of Rule 23 for ultimate guidance. Chief Justice Burger summed up the rule’s purpose as “promot[ing] judicial economy by allowing for litigation of common questions of law and fact at one time. We have stressed that strict attention to the requirements of Rule 23 is indispensable.” General Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 161 (1982) (Burger, C.J., concurring in part and dissenting in part) (citations omitted); see also East Texas Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (instructing courts to pay “careful attention to the requirements of” Rule 23).

A class certification decision is reviewed for an abuse of discretion. Califano, 442 U.S. at 703. “[A] district court has both the duty and the broad authority to exercise control over a class action and to appropriate orders governing the conduct of counsel and parties. But this discretion is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules.” Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981). For example, because Rule 23 refers to a class action being “maintained,” rather than merely “permitted,” a district court lacks discretion to deny class certification if the rule is satisfied. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 399–401 (2010).

Importantly, “the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.” Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 332 (1980). The Rules Enabling Act limits the scope of class litigation through its command that procedural rules “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b); see Ortiz, 527 U.S. at 845 (“As we said in Amchem, no reading of the Rule can ignore the [Rules Enabling] Act’s mandate”); Principles of the Law of Aggregate Litigation § 2.02 cmt. d (Am. Law. Inst. 2010) (“Aggregate treatment thus is possible when a trial would allow for the presentation of evidence sufficient to demonstrate the validity or invalidity of all claims with respect to a common issue under applicable substantive law, without altering the substantive standards that would be applied were each claim to be tried independently and without compromising the ability of the defendant to dispute the allegations made by claimants or to raise pertinent substantive defenses.”).

The fairness considerations of Rule 23 protect the due process rights of the parties and class members. The rule’s efficiency rationale includes several aims—not just relieving the justice system of duplicative litigation but also delivering relief to numerous persons at once; not just deterring violations by allowing pursuit of relatively small claims but also ensuring that defendants can vest repose in a preclusive classwide judgment. The below chart suggested by the Supreme Court’s class action precedents depicts how the basic policy triad of efficiency, fairness, and finality may interact with the rule over the life of a case.

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5. **Fairness:** Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (“Of course” the class action procedure is subject to “requirements of due process”) (quoting Fed. R. Civ. P. 23(d)(2) advisory committee’s note (1966)); Wal-Mart, 564 U.S. at 367 (“Because the Rules Enabling Act forbids interpreting Rule 23 to ‘abridge, enlarge or modify any substantive right,’ a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.”) (internal citations omitted).

6. **Economy:** Califano v. Yamasaki, 442 U.S. 682, 690 (1979) (“‘Unnecessary duplication of actions’ is ‘the evil that Rule 23 was designed to prevent’”); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 881 (1984) (“Indeed, Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of common questions.”).

7. **Access / Redress:** Amchem, 521 U.S. at 617 (“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”) (citation omitted); Roper, 445 U.S. at 338–39 (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”).


9. **Finality:** Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985) (“Whether it wins or loses on the merits, [the defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata”); Cooper, 467 U.S. at 874 (“Under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.”).
The fairness and efficiency interests codified in Rule 23(b)(3) permeate the rule as a whole. The court in any class action is expressly empowered to “prescribe measures to prevent undue repetition or complication in presenting evidence or argument.” Fed. R. Civ. P. 23(d)(1)(A). The inquiries under the last three subdivisions of Rule 23(a) “tend to merge,” looking at whether the putative class claims are “fairly encompassed” by the named plaintiff’s claims, based on the existence of common questions, interests, and evidence, such that binding aggregate litigation is advantageous and just. Falcon, 457 U.S. at 158 n.13, 156–58. Where class treatment is unfair, it may also be inefficient. See, e.g., Falcon, 457 U.S. at 159.

If the defendant acted on grounds generally applicable to the class, making injunctive-relief certification appropriate under Rule 23(b)(2), “[p]redominance and superiority are self-evident.” Wal-Mart, 564 U.S. at 363. Impracticability of joinder relates both to superiority and to the numerosity requirement for all class actions. See Eisen, 417 U.S. at 182; Fed. R. Civ. P. 23(a)(1), (b)(3)(A). The manageability and subclass provisions modify each other, and the flexibility to amend class-related determinations allows courts to order suitably tailored remedies. See Fed. R. Civ. P. 23(b)(3)(D), (c)(5), (c)(1)(C), (c)(3). So although the Rule 23 analysis proceeds element by element, the inquiries overlap and are subject to the primary rule of statutory construction that all provisions must be read together and applied in light of one another. Rule 23 also stands in pari materia with the other procedural rules providing for adjudication of multiple claims in a single proceeding—Rules 19, 20, and 42—and with Rule 1, providing for the just, speedy, and inexpensive disposition of every civil proceeding.

The policies underlying class actions can be further understood as revolving around a series of dichotomies, discussed below.

a. Merits v. Case Structure

The class action procedure cannot be used to abridge any party’s substantive rights; by the same token, the procedural determination of whether a suit may advance as a class action cannot adjudicate any claim or defense. The Supreme Court’s Wal-Mart and Amgen decisions provide guidance on the distinction—and overlap—between the inquiries as to how a case should be organized and its substantive merits.

Some confusion resulted from the Court’s 1974 decision in Eisen, which held that a district judge erred in imposing nearly all of the notice costs on the defendants after conducting a preliminary minitrial and concluding that the class was “more than likely” to prevail. 417 U.S. at 177. The plaintiff “must pay for the cost of notice,” the Supreme Court held, and “nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” Id. at 177–79.

In Wal-Mart and Amgen, the Court reconciled this holding with the reality that an analysis under Rule 23 of whether claim elements are subject to common proof may require examining that proof. Wal-Mart thus accepts that the “rigorous analysis” of whether the plaintiff has satisfied Rule 23 “[f]requently . . . will entail some overlap with the merits of the plaintiff’s underlying claim.” 564 U.S. at 350–51 (internal citations omitted). But while the proof at trial goes to who should prevail, the proof at class certification goes to how the case should be structured. Given this distinction, Amgen clarifies that courts have “no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to

10. See also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995) (“The drafters designed the procedural requirements of Rule 23, especially the requisites of subsection (a), so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests.”).


12. See, e.g., Snyder, 394 U.S. at 337–40; see also Sprint Commc’ns Co. v. APCC Servs., Inc., 554 U.S. 269, 291 (2008) (class actions “are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum.”).
determining whether the Rule 23 prerequisites . . . are satisfied.” 568 U.S. at 466; see Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (the predominance inquiry of Rule 23(b)(3) “asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.”) (quoting 2 William B. Rubenstein, Newberg on Class Actions § 4:49 (5th ed. 2012)).

A minor rule change in 2003 anticipated the Supreme Court’s focus on the burden of a plaintiff seeking certification to show that Rule 23 is satisfied by the preponderance of the evidence. By requiring courts to make certification decisions “at an early practicable time,” instead of “as soon as practicable,” the rule allows breathing room for parties to develop the evidentiary record to enable an informed determination. Fed. R. Civ. P. 23(c)(1)(A); see Fed. R. Civ. P. 23(c)(1) advisory committee’s note (2003) (advising that, “[a]lthough an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. . . . A critical need is to determine how the case will be tried.”).

b. Small-Claim Vindication v. Settlement Pressure

Trials are the exception rather than the rule in class action practice. See Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 99 (2009). The Supreme Court has recognized for over forty years that class certification, in particular, may trigger a settlement. Most recently, the Court stated in Epic Systems Corporation v. Lewis that, “[w]hile the dissent is no doubt right that class actions can enhance enforcement by spreading the costs of litigation, it’s also well known that they can unfairly place pressure on the defendant to settle even unmeritorious claims.” 138 S. Ct. 1612, 1632 (2018) (internal quotation marks, citations, and alterations omitted). Both strands of this policy dichotomy fill the Court’s jurisprudence.

In furtherance of small-claim aggregation, Rule 23(b)(3) calls for consideration of “the class members’ interests in individually controlling the prosecution or defense of separate actions.” Fed. R. Civ. P. 23(b)(3)(A). In enacting this provision the rulemakers “had dominantly in mind vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’” Amchem, 521 U.S. at 617 (quoting Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L. Rev. at 497); see also Fed. R. Civ. P. 23(b)(3) advisory committee’s note (1966) (“[T]he amounts at stake for individuals may be so small that separate suits would be impracticable.”). A class action, then, can “overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” Amchem, 521 U.S. at 617 (citation omitted).

Over the years the Court has stressed this policy of combining low-value claims to promote access to justice. At a recent oral argument, Justice Gorsuch said, “I don’t think anybody questions the importance of that—that function of the rule.” Transcript of Oral Argument at 39, China Agritech v. Resh, No. 17–432, 2018 WL 1471037 (Mar. 26, 2018); see, e.g., Shuts, 472 U.S. at 809 (recognizing that “most of the plaintiffs would have no realistic day in court if a class action were not available.”); Roper, 445 U.S. at 339 (commenting that “aggrieved persons may be without any effective redress unless they may employ the class-action device.”); Exxon Shipping Co. v. Baker, 554 U.S. 471, 515 n.28 (2008) (noting, in a discussion of punitive damages, that “the class option . . . facilitates suit” when individual “compensation may not be enough to encourage suit” and “large numbers of potential

13. See also Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1234 (11th Cir. 2000) (“Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member’s underlying cause of action.”); Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 655 (4th Cir. 2019) (“Efficient and manageable classes require common proof, and the availability of such proof turns on what exactly needs to be proven.”).
plaintiffs are involved."); Eisen, 417 U.S. at 161 ("Economic reality dictates that [plaintiff's] suit proceed as a class action or not at all.").

Many Supreme Court decisions also recognize, on the other hand, that class certification may induce an unfair settlement. Baker repeats what has become a truism for the Court: "class certification often leads to a hefty settlement." 137 S. Ct. at 1713. Baker cites Coopers & Lybrand v. Livesay, which acknowledges "criticism of the class action as a vexatious kind of litigation" and goes on to state that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." 437 U.S. 463, 470, 476 (1978). Similarly, when the Court held that the FAA prohibits nonconsensual class arbitration, it reasoned in part that "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011); see also Angen, 568 U.S. at 485 (Scalia, J., dissenting) (stating that class certification "is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."). Halliburton Co. v. Erica P.约翰 Fund, Inc., 573 U.S. 258, 296 n.7 (2014) (Thomas, J., concurring in the judgment) (referring to "the substantial in terrorem settlement pressures brought to bear by certification."); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347–48 (2005) (rejecting a pleading standard that "would tend to transform a private securities action into a partial downside insurance policy.").

Justices across the bench have expressed similar concerns about pressure and costs from high-stakes litigation. At an April 2019 oral argument, Justice Kagan alluded to how the Court "has sometimes indicated real concern with abuse of private suits and particularly with the opportunity for strike litigation." Transcript of Oral Argument at 70, Emulex Corp. v. Varjabedian, No. 18–459, 2019 WL 1598075 (Apr. 15, 2019). Justice Ginsburg’s dissent in Shady Grove notes that ["w]hen representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) (citations omitted). And Justice Sotomayor, while on the Second Circuit, wrote that "[t]he effect of certification on parties’ leverage in settlement negotiations is a fact of life for class action litigants." In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001), cert. denied, 536 U.S. 917 (2002), superseded by statute on other grounds as stated in Attenborough v. Constr. & Gen. Bldg. Laborers’ Local 79, 238 F.R.D. 82, 100 (S.D.N.Y. 2006).

In 1998, the Supreme Court adopted the discretionary appeal provision of Rule 23(f), essentially as a safety valve for parties faced with erroneous class certification decisions. See Baker, 137 S. Ct. at 1709–10. The advisory committee observed that, just as an order denying certification may foreclose appellate review to a plaintiff who chooses not to proceed to judgment individually, so may an order granting certification “force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.” Fed. R. Civ. P. 23(f) advisory committee’s note (1998). Still, Rule 23 makes no mention of settlement pressure, and certification of a class does not technically change a defendant’s aggregate liability. See Shady Grove, 559 U.S. at 408 (plurality opinion). Thus it has been held in the lower courts that “[m]ere pressure to settle is not a sufficient reason . . . to avoid certifying an otherwise meritorious class action suit.” Klay v. Humana, Inc., 382 F.3d 1241, 1275 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005), abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008).14