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Aggregate Litigation & All That We Do Not Know

*Brooke D. Coleman**

A good article raises a normative question, wrestles with it, and ultimately answers it. A great article also inspires the reader to cogitate. Briana Rosenbaum's *The RICO Trend in Class Action Warfare*¹ is undoubtedly a great article. The article addresses a complex and interesting issue—the use of the federal Racketeer Influenced and Corrupt Organizations (“RICO”) statute to sanction attorneys—while also inspiring thought about other fascinating questions. My Response to the article will focus on one such question: What do we really know about aggregate litigation?²

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1. Briana Lynn Rosenbaum, *The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165 (2016).

2. For the purpose of this discussion, I will use the term aggregate litigation to refer to class actions, mass actions, and multidistrict litigation.

Legal empirical work is more fashionable than ever,³ and this is certainly true in the field of civil procedure.⁴ Yet, there are some aspects of civil litigation and civil procedure that appear to be empirically understudied. Perhaps there is a lack of interest in the specific rule or doctrine such that it is overlooked. Perhaps there is no way of knowing what we need to know. Or, perhaps even if we discovered what we wanted to know, it would not overcome our own biases and perceptions.

Aggregate litigation is a hotbed of scholarly activity, so surely there is an interest in how it really works.⁵ This leaves us with the latter two justifications. I argue both apply. First, while there is much we would like to know about aggregate litigation, some of it—due to structural and institutional challenges—is simply unknowable.⁶ Second, even if empirical work could

5. See generally Daniel E. Ho & Larry Kramer, *Introduction: The Empirical Revolution in Law*, 65 STAN. L. REV. 1195, 1195 (2015) (introducing collection of six essays discussing the ascendance of empirical scholarship and noting that empirical work in Stanford Law Review articles has “skyrocketed over the decades”); Kathryn Zeiler, *The Future of Empirical Legal Scholarship: Where Might We Go from Here?*, 66 J. LEGAL EDUC. 78, 78 (2016) (“The number of empirical legal studies that show up in the pages of journals has been on the rise as empirical methods improve and researchers gain easy access to a growing number of data sets. This addition to legal scholarship is welcome after decades of theory’s dominance.”). The rise of empirical work spans a number of different schools of legal thought and legal fields. See, e.g., *11th Annual Conference on Empirical Legal Studies (CELS)*, DUKE L., <https://law.duke.edu/cels2016> (last visited Mar. 20, 2017) (covering topics such as “criminal law and policy, corporate governance, judicial decision-making, intellectual property, and law and psychology”); *Critical Race Theory and Empirical Methods: Wisconsin Law Review Symposium and Institute for Legal Studies Research Workshop*, UNIV. WIS. L. SCH., <http://law.wisc.edu/ils/2015lawreviewsymposium/index.html> (last visited Mar. 20, 2017); *Critical Race Theory and Empirical Methods Conference*, FORDHAM L. REV., <http://fordhamlawreview.org/symposiumcategory/critical-race-theory-and-empirical-methods-conference> (last visited Mar. 20, 2017); *The Relationship Between Insurance and Legal Regulation: Normative, Theoretical, and Empirical Perspectives*, U.C. IRVINE SCH. L., <http://www.law.uci.edu/events/insurance-law/symposium-2014> (last visited Mar. 20, 2017) (offering “empirical, legal, normative, theoretical, and historical perspectives on the relationship between insurance and legal regulation”).

4. For example, there was a flurry of empirical legal scholarship following the Court’s pleading decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Aschcroft v. Iqbal*, 556 U.S. 662 (2009). See generally, e.g., JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/\\$file/motioniqbal2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U.L. REV. 553 (2010); Lonny Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2326–27 (2012).

5. See *infra* note 22.

6. See *infra* notes 25–38 and accompanying text.

provide credible answers to questions about aggregate litigation, it would not diffuse the us-versus-them nature of the debate. At bottom, this is about our values. One either believes in the enterprise of aggregate litigation and will therefore find the support—theoretical or empirical—to buttress that evaluation, or one is skeptical of aggregation and will similarly marshal whatever evidence is available to support that viewpoint.⁷ It is this question—what we know and what we do not know and whether it matters—over which I will ruminate.

Before reaching that discussion, however, a quick summary of the article that inspired it is instructive. Rosenbaum’s article seeks to confront the question of whether what she terms “the RICO reprisal” is a valid response to potentially frivolous aggregate litigation.⁸ Ultimately, she determines that—especially given the existing remedial structure for vexatious litigants—RICO is an ill-fit for combatting specious claiming.⁹ She provides a number of reasons: RICO was not designed or adopted with such use in mind,¹⁰ it offends federalism values,¹¹ may violate the Rules Enabling Act,¹² and it is too strong a weapon in this context¹³—think about bringing a semi-automatic weapon to a knife fight. Yet, even if one accepts that RICO is necessary to deter frivolous aggregate litigation, Rosenbaum argues that we must modify its application in order to curtail its negative impact on critical litigation values such as access to justice.¹⁴

As Rosenbaum works through her impressive normative argument, she must necessarily weave together an atomized set of issues—state procedure rules, federal procedure rules, RICO’s adoption and subsequent use, the Rules Enabling Act, federalism, aggregate litigation, and litigation values. Like any great scholar, however, Rosenbaum knows the limits of her inquiry. For example, there are potential structural solutions to the problem of frivolous

7. I have made a similar argument in the summary judgment context. See Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought To Know*, 43 LOY. U. CHI. L.J. 705, 725 (2012) (“[T]he real question is not so much about the efficiency or fairness of the summary judgment process, but really just about one critical issue—the jury trial. Regardless of what the data might tell us, the bottom line is that one either has great faith in the value of the jury trial or one does not. And maybe that is where the debate about summary judgment should start and end.”).

8. Rosenbaum, *supra* note 1, at 168.

9. *Id.* at 220–21.

10. *Id.* at 184–87.

11. *Id.* at 187, 208–11.

12. *Id.* at 186–88, 204.

13. *Id.* at 201, 203–04 (noting that “[c]ivil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device” (quoting *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991))).

14. *Id.* at 216–20.

aggregate litigation that she acknowledges but does not cover exhaustively.¹⁵ Similarly, Rosenbaum recognizes that perceptions—largely negative—about aggregate litigation abound even though we are often unsure if those perceptions are reality.¹⁶ More specifically, Rosenbaum notes that it is unclear “[w]hether there is a problem with specious claiming in the mass tort context, or more broadly in aggregate litigation.”¹⁷

Even still, Rosenbaum feels compelled to admit that some mass-action attorneys include frivolous claims among meritorious ones in an attempt to obtain a larger settlement¹⁸—an empirical notion that she simultaneously questions.¹⁹ She assumes as much, however, in order to reach her broader point about why the RICO reprisal is a mistake and how that mistake can be mitigated. Rosenbaum is not alone in taking this tact—literature on aggregate litigation is rife with a recognition of its frailties.²⁰ Yet, most of those weaknesses are assessed using a potent combination of theoretical arguments and anecdotal evidence. With a few exceptions, there is very little comprehensive empirical study of the success and abuse of aggregate litigation.²¹ Stated differently, we really do not know how much good or ill results from this rather established litigation method.

I am by no means questioning the groundbreaking theoretical work grappling with the challenges inherent in aggregate litigation. As Rosenbaum explains, the tension that arises from lawyers’ role as “fiduciary and entrepreneur” has been thoughtfully addressed in the literature.²² Similarly,

15. *Id.* at 214 (discussing a series of proposed reforms to the various “flaws in aggregate litigation devices”).

16. *Id.* at 168–69.

17. *Id.* at 169.

18. *Id.* at 173 (“Unfortunately, improper conduct in litigation—both in traditional two-party actions and aggregate litigation—is not a new issue); *id.* at 215 (“Although over-aggregation is indeed a problem requiring a remedy . . .”).

19. *Id.* at 174 (describing the defense bar’s criticism of aggregate litigation as not necessarily established); *id.* at 215 (describing the potential abuses in aggregate litigation as due to structural flaws in the aggregate litigation system, and not necessarily due to bad behavior or intent); *id.* at 171–72 (arguing that aggregate litigation “scholarship has largely gone the way of popular opinion, often focusing on a smaller subset of ethical issues related to perceived egregious plaintiff lawyering in aggregate cases”).

20. *See infra* note 22.

21. *See infra* notes 32–37 and the accompanying text.

22. Rosenbaum, *supra* note 1, at 171. *See generally, e.g.*, DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1345 (1995); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2005 U. CHI. LEGAL F. 475 (2005); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337 (2000); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92

there is a breadth of engaging and important scholarship on the unique challenges that certain kinds of aggregate litigation present.²³ What is missing is an understanding of the degree to which these tensions are problematic. How much frivolous litigation is filed? And, how often do defendants settle because they rationally fear aggregate litigation and its ability to consolidate claims into a “bet-the-company” scenario? Finally, how much meritorious litigation is chilled by the adoption of policies like the RICO reprisal or by recent developments in the law like the restrictive approach to certification taken by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*?²⁴

If we are adopting policies like the RICO reprisal, it seems that we should concretely understand and know the answers to these questions. The RICO reprisal, like other aggregate litigation reforms, is spurred by a sense that attorneys file needless litigation. Yet, where policies such as the RICO reprisal are adopted, one would hope that it is in response to something more than mere conjecture.

Thus, a return to my brief reflections on empirical work and aggregate litigation.

First, there are a number of challenges to this kind of work. The Administrative Office of the Courts, a bureaucracy that many scholars look to for basic statistics, does not even track the number of class actions filed in federal court.²⁵ This makes it nearly impossible to develop a theory of class

HARV. L. REV. 664 (1979); Geoffrey P. Miller, *Class Actions in the Gulf States: Empirical Analysis of a Cultural Stereotype*, 74 TUL. L. REV. 1681 (2000); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 105 COLUM. L. REV. 149 (2005); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2005); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, & Fees*, 71 N.Y.U. L. REV. 296 (1996); Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 5, 5–46; Deborah L. Rhode, *Class Conflicts in Class Actions*, 54 STAN. L. REV. 1183 (1982); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); David L. Shapiro, *Class Actions: The Class as Party and Client*, 75 NOTRE DAME L. REV. 913 (1998); Charles Silver, *“We’re Scared to Death”: Class Certification & Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

23. See generally, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) (assessing the repeat-player phenomenon in multidistrict litigation); Michael D. Sant’Ambrogio & Adam Zimmerman, *Inside the Agency Class Action*, YALE L.J. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827187 (discussing a study of agency class actions and procedures that have developed).

24. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–52 (2011) (rejecting certification of a class of women alleging employment discrimination, in part, because of a determination that the women did not meet Rule 23’s commonality standard).

25. See *Statistical Tables for the Federal Judiciary—June 2016*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2016> (last updated June 30, 2016) (tracking litigation by nature of suit and other metrics, but not by class action or multidistrict litigation). The Judicial Panel on Multidistrict Litigation provides statistics on its cases, but it does not disaggregate the

action filing trends. While scholars generally agree that—over time—class action filing rates in federal court have varied, we are not altogether sure of the magnitude of that change. In other words, the lack of even the most basic data on class actions presents a huge challenge to doing empirical work.²⁶

With respect to multidistrict litigation, the black box is even more pronounced. For example, when class actions settle, the court assesses the settlement terms for fairness.²⁷ In multidistrict non-class litigation, however, the judge is not required to undertake any review of settlement agreements.²⁸ There is almost universal agreement that settlement rates in all aspects of civil litigation have increased—another empirical question that is somewhat unsettled²⁹—yet, there is similarly universal agreement that when settlements are private, there is no way to know what values and objectives were used to resolve the claim.³⁰ When a class action settles, a court’s evaluation pulls back the curtain on some of these issues and provides good insight.³¹ That insight is completely lost in the context of some multidistrict litigation, leaving critical empirical information in the dark.

This is not to say that—in the face of these challenges—valuable empirical work on aggregate litigation is not being done. Deborah Hensler is

information finely to provide a sense of class action filing rates versus individual cases that are consolidated. See *Statistical Information*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/statistics-info> (last visited Mar. 20, 2016).

26. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 147 (2011) (noting that only limited data is available about class-action litigation); see also HENSLER ET AL., *supra* note 22, at 51 n.52 (2000) (discussing the absence of comprehensive data on class actions in both state and federal courts).

27. FED. R. CIV. P. 23(e)(2) (“If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.”).

28. See Burch, *supra* note 23, at 116–17 (“[N]onclass settlements like those in *Guidant*, *Zyprexa*, *Vioxx*, and the *World Trade Center Disaster Site Litigation* are private agreements that parties presumably enter voluntarily. Thus, the existence of a legal basis for policing a ‘voluntary’ settlement between private parties is uncertain at best.” (footnotes omitted)). A number of courts have, however, still found ways to review a multidistrict non-class litigation settlement. *Id.* at 117–18.

29. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 525 (1991) (“While it is true that most civil suits are settled, the figure is nowhere near the 90 to 95 percent figure that has passed into procedure folklore, and is more likely in the neighborhood of 60 to 70 percent.”).

30. See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (discussing the public cost of private settlement).

31. Although, even then, getting good information about how a class action settlement actually works after a judge’s approval is a challenge. See Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes?: Empirical Research on the Availability of Class Action Claims Data* (RAND Inst. for Civ. Just., Working Paper No. WR-599-ICJ, 2008), http://www.rand.org/content/dam/rand/pubs/working_papers/2008/RAND_WR599.pdf (“[A] veil of secrecy can fall over class action litigation the moment the judge signs off on the agreement and ultimately, little information is available about how many class members actually received compensation and to what degree.”).

a notable leader in empirical research on this front.³² In addition, the Federal Judicial Center has done important studies.³³ Finally, other scholars are entering the fold. For example, in *Judging Multidistrict Litigation*, Beth Burch used a cross-section of multidistrict litigation cases to determine the impact of repeat players.³⁴ And, others like Bob Klonoff have surveyed case law in an effort to unearth trends.³⁵ Most recently, Klonoff surveyed a wide variety of district and appellate court cases and made predictions about how parties will respond on key issues like ascertainability and the use of statistical proof.³⁶

Yet, when it comes to research on how aggregate litigation actually affects settlement or whether there is a burgeoning set of frivolous cases being filed, the empirical work is quite thin. Again, there are exceptions. For example, in 1996, a Federal Judicial Center study found that settlement rates for class action cases were generally the same as in individual cases.³⁷ Yet, overall—mostly because there is so little data on how aggregate litigation systemically works—scholars cannot study some of the thornier questions. Thus, empirical work is largely based on observations about the developing case law or is focused on discrete issues that can actually be studied. In other words, we know a lot less than we should.³⁸

This leads to my second point. While I believe that we should endeavor to remove the barriers to doing empirical work on aggregate litigation, I am skeptical that it would make a difference in our collective hearts and minds.

32. See *Deborah Hensler: Biography*, STAN. L. SCH., [https://law.stanford.edu/directory/deborah-](https://law.stanford.edu/directory/deborah-hensler)

hensler (last visited Mar. 20, 2017) (stating Deborah Hensler is the Judge John W. Ford Professor of Dispute Resolution, and her “empirical research on dispute resolution, complex litigation, class actions and mass tort liability has won international recognition”).

33. See, e.g., Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1725, 1742 (2008) (discussing concerns over the Class Action Fairness Act’s impact on civil rights actions); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 92, 182 fig.2 (1996).

34. See generally Burch, *supra* note 25.

35. See generally Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1571–72 (2016).

36. *Id.*

37. See Willging et al., *supra* note 33, at 92, 182 fig.2 (studying only four districts); see also Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 645, 652–54 (2006) (finding, on limited data, no differences in treatment of class actions between state and federal courts, and observing that “[a]ttorney perceptions of judicial predispositions toward their clients’ interests show little or no relationship to the judicial rulings in the surveyed [state and federal class action] cases”).

38. See Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 212 (1995) (“Despite aggregate litigation’s now major impact on the federal courts, relatively little systematic information is currently gathered about that genre.”).

First, there are fundamentally different views about the value of aggregate litigation.³⁹ These differences will necessarily impact our ability to agree on what this new, additional empirical evidence might demonstrate. Even now—with the limited information we have—studies are used to suit one’s fundamental views. For example, the Supreme Court has recently taken certiorari in less class action cases.⁴⁰ Klonoff argues that the Court might be wary of defendants’ rhetoric regarding the “blackmail pressure to settle” in aggregate litigation⁴¹—an argument that Klonoff believes might be valid, but one he also believes is largely overblown. Yet, we have no way of knowing whether the Court believes this rhetoric is overstated. The Court could just be waiting for a better case with better facts. We also do not know whether one of the largest criticisms of aggregate litigation—the blackmail settlement effect—is true, and further, we do not know whether the Court believes it to be true. One’s sense of the value of aggregate litigation necessarily colors how one might judge even this small data point. It is hard to see how this tendency would change, whether we have better information or not.

Second, as Rosenbaum points out, our collective tolerance for frivolous claims is largely behind the debates about aggregate litigation.⁴² She states, “The goal of the civil justice system is not, and cannot be, to have a system absolutely free of frivolous lawsuits.”⁴³ I think she is right, but it is not that simple. The problem is that we do not agree on how much frivolous litigation we are systemically willing to tolerate. Put differently, we do not agree on how much meritorious litigation we are willing to forego in order to decrease the number of frivolous cases overall.⁴⁴

39. See Fiss, *supra* note 22, at 51 (“The individualistic values that the class action calls into question are all pervasive features of our law, perhaps of all law, and, for good or bad, will always exert a restraining influence on the great temptation of social reformers to create collective instruments that might better serve their ends.”); John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453, 457 (1997) (“Distrust of the government led many in the 1960s and 1970s to welcome the class action brought by the ‘private attorney general’ as an alternative. Now, the conflicting values and the disbelief in a common good that fostered distrust of the government have infected trust in class actions. Those who want to cut back government also want to cut back class actions.”).

40. See generally Robert H. Klonoff, *Class Actions II: A Respite from the Decline*, 92 N.Y.U. L. REV. (forthcoming Oct. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881484.

41. *Id.* at 11–14.

42. Rosenbaum, *supra* note 1, at 217.

43. *Id.*

44. See Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 504 (2012) (“[I]f it were the case that more restrictive procedural rules resulted in less frivolous litigation, with only a slight loss in unique meritorious claims, a restrictive procedural regime may make sense. . . . If it were determined, however, that a restrictive procedural regime filters out more meritorious claims than what is ultimately beneficial to society—meaning that the claims being lost are unique and not otherwise captured by successful litigation—then there is more room to question a procedural regime that is guided by a restrictive ethos.”).

It is this conundrum that comes up squarely in aggregate litigation. There are positive values to aggregate litigation—social change, aggregation of small negative-value claims, and deterrence, to name a few. Yet, there are negative aspects of the method—loss of individualism and perverse incentives inherent in representative litigation. For myself—and for Rosenbaum, I believe—tolerating a higher number of frivolous cases is an acceptable price for the greater good aggregate litigation can achieve. Yet, ours is not the only view. That difference alone prevents empirical evidence from doing much to move people away from their deep-seated positions on the basic value of aggregate litigation. In other words, aggregate litigation might just have to say, “you either like me or you don’t,” and we might just have to accept that polarity regardless of what the data might show.

So, where does this leave us? After all, garnering useful empirical evidence—much like the RICO reprisal—is not the only challenge facing aggregate litigation. For example, more and more cases are shunted into private arbitration and often the ability to aggregate claims—even in arbitration—is prohibited.⁴⁵ All of this could lead one to be quite dubious of aggregate litigation’s future. From my perspective, however, the picture is not quite that bleak. As long as lawyers innovate the way they are bound to do and as long as scholars like Rosenbaum are paying attention, I am fairly sanguine.⁴⁶ I may not have the numbers and data to back up my rather rosy view, but maybe, just maybe, that is beside the point.⁴⁷

45. Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 300 (2014) (noting that recent Supreme Court cases “take away access to the judicial system and the opportunity for class or aggregate arbitration from countless consumers, employees, investors, and small businesses that lack any real bargaining ability and are left subject to adhesive no-class arbitration clauses relating to a wide range of basic transactions and societal amenities”).

46. I am not alone in this assessment. *See id.* at 306 (“Uncharacteristically for those who know my negative personality, I will be optimistic for a change and answer ‘no.’ As Mark Twain might say, ‘The reports of aggregate litigation’s death are greatly exaggerated.’ But, of course, inevitably the landscape will continue to change, reformulate, and transmogrify.” (footnote omitted)); *see also generally* Klonoff, *supra* note 40.

47. This may not just be the case in the class action context, but in other areas of procedure as well. *See* Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369 (2016) (concluding that even after assembling a comprehensive collection of data, “it might not be possible to settle the controversy over *Twiqbal*’s quality-filtering effects using empirical evidence”).