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## Ending Class Actions as We Know Them: Rethinking the American Class Action

Linda S. Mullenix

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# ENDING CLASS ACTIONS AS WE KNOW THEM: RETHINKING THE AMERICAN CLASS ACTION

Linda S. Mullenix\*

## ABSTRACT

*Class actions have been a feature of the American litigation landscape for over seventy-five years. For most of this period, American-style class litigation was either unknown or resisted around the world. Notwithstanding this chilly reception abroad, American class litigation has always been a central feature of American procedural exceptionalism, nurtured on an idealized historical narrative of the class action device. Although this romantic narrative endures, the experience of the past twenty-five years illuminates a very different chronicle about class litigation. Thus, in the twenty-first century American class action litigation has evolved in ways that are significantly removed from its golden age. The transformation of class action litigation raises legitimate questions concerning the fairness and utility of this procedural mechanism, and whether class litigation actually accomplishes its stated goals and rationales. With the embrace of aggregative nonclass settlements as a primary—if not preferred—modality for large-scale dispute resolution, the time has come to question whether the American class action in its twenty-first century incarnation has become a disutilitarian artifact of an earlier time. This Article explores the evolving dysfunction of the American class action and proposes a return to a more limited, cabined role for class litigation. In so doing, the Article eschews alternative nonclass aggregate settlement mechanisms that have come to dominate the litigation landscape. The Article ultimately asks readers to envision a world without the twenty-first century American damage class action, limiting class procedure to injunctive remedies. In lieu of the damage class action, the Article encourages more robust public regulatory enforcement for alleged violation of the laws.*

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|   |     |
|---|-----|
| INTRODUCTION .....  | 401 |
| I. COMPETING CLASS ACTION NARRATIVES .....  | 406 |
| A. <i>The Romantic Narrative of Class Action Litigation</i> .....   | 406 |
| B. <i>The Darker Counternarrative</i> .....   | 413 |
| II. RETHINKING THE ROMANCE AND OTHER DARK TALES .....   | 417 |
| A. <i>Evaluating the Class Action Rationales</i> .....  | 418 |
| 1. <i>Compensation of Victims of Wrongdoing</i> .....   | 418 |
| 2. <i>Deterrence of Bad Conduct by Wrongdoers</i> .....   | 420 |
| 3. <i>Judicial Efficiency and Economy</i> .....   | 421 |
| B. <i>Problems Bred by Rule 23 Class Litigation: Doctrinal<br/>Elaboration Breeds Confusion and Inconsistent Principles</i> ..... | 423 |
| 1. <i>Definitional Issues</i> .....   | 424 |
| 2. <i>Class Categories</i> .....  | 426 |
| 3. <i>Due Process Protections</i> .....   | 429 |
| C. <i>Balancing Beneficial Effects and Deleterious Consequences</i> ...   | 431 |
| 1. <i>Effectuating or Undermining the Goals of Rule 1?</i> .....  | 432 |
| 2. <i>Invitation to Unethical Conduct, Principal–Agency<br/>Problems, and Champerty and Stirring Up Litigation</i> .....          | 434 |
| 3. <i>Public Confidence in Judicial System</i> .....  | 435 |
| III. ENVISIONING A MODIFIED CLASS ACTION RULE .....   | 436 |
| A. <i>“One Class Action”—Elimination of Class Categories</i> .....  | 437 |
| B. <i>Provide Solely for Injunctive Relief Actions and Eliminate<br/>Damage Class Actions/Negative-Value Suits</i> .....          | 439 |
| C. <i>Provide Notice and Opt-In Principle</i> .....   | 440 |
| D. <i>Preliminary Merits Review</i> .....   | 441 |
| E. <i>Financing, Attorney Fees, and Loser-Pay Rule</i> .....  | 444 |
| F. <i>Appointment of Class Counsel</i> .....  | 446 |
| G. <i>Settlement and Fairness Hearings</i> .....  | 446 |
| CONCLUSION .....  | 447 |

## INTRODUCTION

Americans seemingly love their class actions. The American class action has been a fixture in the federal procedural toolbox for over seventy-five years and has become a central feature of American procedural exceptionalism.<sup>1</sup> This narrative of American procedural exceptionalism posits that the American justice system is not only the best in the world but that American procedural rules and its jury system are superior to comparative civil and common law systems abroad.<sup>2</sup> And until fairly recently, the class action device was a uniquely American innovation, resisted (if not rejected) by most foreign legal systems.<sup>3</sup>

The modern American class action rule emerged during a period of celebrated liberal legislative initiatives intended to expand the civil rights and liberties of ordinary American citizens. President Lyndon Johnson's historic first 100 days during 1964 spearheaded his Great Society legislative program.<sup>4</sup> These legislative initiatives created new substantive rights that would have been rendered nugatory without some procedural mechanism to enforce those newly-created rights. Thus, in the early 1960s the Advisory Committee on Civil Rules embarked on a contemporaneous initiative to liberalize the Federal Rules of Civil Procedure.<sup>5</sup> The amendment of the class action rule in 1966 represented a unique convergence with the creation of new substantive rights supported through a rulemaking that provided a procedural mechanism for the enforcement of those new substantive rights.<sup>6</sup>

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<sup>1</sup> See, e.g., Richard Marcus, 'American Exceptionalism' in *Goals for Civil Litigation*, in GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS 123 (Alan Uzelac ed., 2014) (praising American procedural exceptionalism as a uniquely American role for civil litigation, illustrated by relaxed pleading, broad discovery, and jury trial); Linda S. Mullenix, *American Exceptionalism and the Theory of Convergence: Are We There Yet?*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 41 (Janet Walker & Oscar G. Chase eds., 2010).

<sup>2</sup> See *supra* note 1.

<sup>3</sup> See, e.g., Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 218–19 (1992) (documenting European resistance to and rejection of American style class action litigation, referring to it as a kind of Rube-Goldberg procedural contraption).

<sup>4</sup> See ROBERT DALLEK, LYNDON B. JOHNSON: PORTRAIT OF A PRESIDENT 190–207 (2004).

<sup>5</sup> See David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 600–01 (2013) (describing the failure of the original class action rule). See generally Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966) (commentary on the 1966 federal rules revision package); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356 (1967) (notes from the Advisory Committee Reporter on the 1966 rules amendments).

<sup>6</sup> See *supra* note 5.

Modern American class action practice, then, emerged as a consequence of the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure. The liberalized modern American class action rule has long been imbued with an idealized historical narrative in support of its merits. This narrative chronicles the deployment of the class action device in the late 1960s and early 1970s to accomplish landmark social justice reforms. During this so-called golden age of class litigation, public interest lawyers used the class action mechanism to integrate school systems, deinstitutionalize mental health facilities, reform conditions of confinement for inmates in prison systems, challenge discriminatory housing and public accommodation laws, and address various types of employment discrimination.<sup>7</sup>

This golden age of class litigation lasted for approximately a decade after the 1966 class action amendments went into effect.<sup>8</sup> Not surprisingly, the initial enthusiasm for class litigation eventually engendered a backlash, with the Supreme Court issuing several restrictive decisions during the 1970s that constrained the ability of class counsel to vigorously pursue class litigation.<sup>9</sup> By the end of the 1970s, institutional reform litigation faded somewhat from the litigation landscape, replaced by mass tort cases.<sup>10</sup> In this period mass tort

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<sup>7</sup> See, e.g., *Soc'y for the Good Will to Retarded Children, Inc. v. Cuomo*, 572 F. Supp. 1300 (E.D.N.Y. 1983) (ordering corrective measures at state institution for mentally handicapped children in violation of constitutional rights), *vacated*, 737 F.2d 1239 (2d Cir. 1984); *Manicone v. Cleary*, No. 74 C 575, slip op. (E.D.N.Y. June 30, 1975) (granting subject to certain limitations, *inter alia*, prisoner access to telephones); *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y.) (right of defendants to obtain food meeting dietary requirements), *modified*, 527 F.2d 492 (2d Cir. 1975); *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699 (E.D.N.Y. 1974) (ordering an integration plan for the Mark Twain middle school in Coney Island, Brooklyn), *aff'd*, 512 F.2d 37 (2d Cir. 1975); *Wilson v. Beame*, 380 F. Supp. 1232 (E.D.N.Y. 1974) (tolerance for Muslim prisoners). See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (discussing the new public law litigation paradigm).

<sup>8</sup> See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 648 (1988) (“Perhaps more basically, Chayes’s focus on public law litigation seems ill-conceived because the incidence of the kind of lawsuits he had in mind—school desegregation and prison conditions cases—was waning even as he wrote.”).

<sup>9</sup> See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–79 (1974) (allocating costs of sending notice to class members on plaintiffs); *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973) (requiring that all class members in diversity class actions individually satisfy the jurisdictional amount in controversy requirement), *superseded by statute*, Federal Courts Study Implementation Act of 1990, Pub. L. No. 101-650, tit. III, § 310, 104 Stat. 5104, 5113–14 (codified at 28 U.S.C. § 1367 (2012)), *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562 (2005).

<sup>10</sup> See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986). See generally LINDA S. MULLENIX, *MASS TORT LITIGATION: CASES AND MATERIALS* (2d ed. 2008) (law textbook providing extensive overview of mass tort cases and the challenges these cases pose); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995) (providing overview of mass tort litigation and assessing its effectiveness).

litigation emerged as the new paradigmatic complex litigation, and mass tort cases dominated class action litigation throughout the ensuing two decades until the end of the 1990s.<sup>11</sup>

Spanning five decades, class action litigation has always been subject to a pendulum effect, with periods of expansion typically followed by periods of retrenchment. Thus, by the end of the twentieth century, federal appellate courts and the Supreme Court effectively put the brakes on innovative class action experiments, effectively ending the era of federal mass tort class litigation.<sup>12</sup> As a consequence of judicial refinement of the threshold rigorous analysis standard and exacting application of Rule 23 requirements, federal class litigation has become more challenging to pursue.<sup>13</sup> Reflecting on the Court's series of increasingly restrictive decisions, commentators declared that class action litigation effectively is dead.<sup>14</sup> Nothing, however, could be further from the truth.<sup>15</sup> Instead, in the late 1990s the plaintiffs' class action bar regrouped and retreated to state courts, which experienced an onslaught of class litigation until Congress enacted the Class Action Fairness Act of 2005.<sup>16</sup>

Three features characterize complex litigation in the twenty-first century. First, contrary to naysayers and skeptics, federal class litigation remains vibrant and thriving.<sup>17</sup> Second, attorneys have shifted their efforts from class actions to other means to achieve collective redress, most commonly to

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<sup>11</sup> See generally RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007) (providing an analysis of the role of lawyers in mass tort litigation and discussing cases through the 1990s).

<sup>12</sup> See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 519 (1997); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

<sup>13</sup> See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

<sup>14</sup> See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); George Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24 (2012); Benjamin Sachs-Michaels, Note, *The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665 (2011).

<sup>15</sup> See Andrew J. Trask, *Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change*, 62 DEPAUL L. REV. 791, 793 (2013) (asserting that “despite the many academics and lawyers who have written otherwise [the Court’s decisions] do not represent the ‘demise’ of the class action,” but rather a trend over time of adjusting litigation standards).

<sup>16</sup> Pub. L. No. 109-2, 119 Stat. 4 (codified as 28 U.S.C. §§ 1332(d), 1453, 1711–1715, 2074 (2012)). The law noted that it would not affect the Court’s rulemaking authority. § 8, 119 Stat. at 14.

<sup>17</sup> See Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 531–36 (2013); see also *Class Action*, LAW360, <http://www.law360.com/classaction/> (last visited Dec. 14, 2014) (daily blog report of class action decisions and developments in class action cases).

nonclass contractual settlements.<sup>18</sup> In addition, attorneys involved in complex, large-scale litigation have shifted the procedural rhetoric from “class” litigation to “aggregate” litigation.<sup>19</sup> And third, multidistrict litigation procedures have assumed new prominence in the litigation landscape.<sup>20</sup>

In this changed landscape—with the shift to nonclass dispute resolution auspices—the continued fate of the class action rule in its current form takes on added significance. However, if it is true that nonclass modalities to accomplish collective redress will prevail, then debates over the class action rule might seem as useless as exercises in moving deck chairs on the Titanic.

This Article contends that, notwithstanding the advent of nonclass aggregate litigation, Rule 23 class litigation remains a vital feature of the litigation landscape. However, class litigation in the twenty-first century has moved a very long way from the golden age of class litigation during the 1960s. Instead, class litigation now is dominated by Rule 23(b)(3) damage class actions, rather than the injunctive classes of the Civil Rights Era. This tectonic shift to damage class actions, in turn, has exposed troubling fault lines in the pursuit and implementation of class action relief. This Article suggests that class actions are not dead but that they are just badly done, indicating a compelling need for rethinking of the class action rule.

The evolution of class litigation in the United States might very well be analogized to the saga of common law pleading in England. As is well known, by the mid-eighteenth century, common law pleading in England had become so complex and arcane that it entailed endless traps for the unwary pleader.<sup>21</sup> These impenetrable difficulties ultimately led to the great eighteenth-century

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<sup>18</sup> See, e.g., Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011) (discussing problems with nonclass aggregate settlements); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775 (2010) (discussing the trend towards nonclass aggregate settlements).

<sup>19</sup> AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02(a) (2010) (“An aggregate lawsuit is a single lawsuit that encompasses claims or defenses held by multiple parties or represented persons.”).

<sup>20</sup> See 28 U.S.C. § 1407 (2012); see also Willging & Lee, *supra* note 18, at 776.

<sup>21</sup> See Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1111–12 (2010).

reforms of common law pleading in England,<sup>22</sup> followed by the Field Code reforms in the United States.<sup>23</sup>

The original 1938 American class action rule was similarly opaque and difficult to apply, which led to the 1966 amendment of the rule.<sup>24</sup> In the ensuing fifty years, the development of Rule 23 class action jurisprudence has paralleled the saga of common law pleading before the eighteenth-century reforms. Thus, the principles and standards governing Rule 23 have become increasingly opaque, arcane, and difficult to apply, subject to considerable judicial discretion and inconsistency. Doctrinal nuances abound, and appellate court disagreements pervade the class action arena. Indeed, it is not too far-fetched to suggest that current class action jurisprudence similarly creates traps for unwary pleaders and defenders, who frequently are able to find judicial support for any arguable position on either side of the class action docket.<sup>25</sup> Moreover, similar to litigants subjected to eighteenth-century common law pleading, parties involved in class action litigation typically find their cases dragging on for years without reaching judicial consideration of the merits of the litigation.

This Article argues that Rule 23 is broken, dysfunctional, and in need of a wholesale root-and-branch reform. It suggests that the post-1966 class action rule, particularly the domination of the Rule 23(b)(3) damage class action, no longer serves the purported rationales justifying the rule. Furthermore, the negative consequences of certain types of class litigation offset any perceived benefits. This Article advocates a return to a simpler class action rule limited to injunctive relief cases, with abandonment of the Rule 23(b)(3) damage class action. There was no damage class action prior to the 1966 amendments. The eighteenth-century reforms of common law pleading—including the basic precepts of the Field Code—provide an illuminating approach and useful model for drafting a rule that simplifies class action procedure.

Finally, in advocating for a reformed, simplified class action rule, this Article is not intended to endorse nonclass aggregate settlement modalities as a substitute for class litigation. Moreover, it is not intended to slight the very real concerns implicated in small-claims consumer harms. It is an argument,

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<sup>22</sup> *Id.* at 1109 (“[N]otice pleading developed in the 1930s as a reaction to arcane common law pleading rules and rigid code pleading.”).

<sup>23</sup> See Doug Rendleman, *Simplification—A Civil Procedure Perspective*, 105 DICK. L. REV. 241, 243 (2001) (federal notice pleading meant to replace cumbersome code pleading).

<sup>24</sup> See Cohn, *supra* note 5; Kaplan, *supra* note 5, at 380–86; Marcus, *supra* note 5, at 600–01.

<sup>25</sup> See Schwartz & Appel, *supra* note 21, at 1111–12.



instead, for increased, robust public regulatory enforcement of laws and enhanced recourse to ombudsmen or similar auspices to resolve such small-claims aggregate harms.

## I. COMPETING CLASS ACTION NARRATIVES

### A. *The Romantic Narrative of Class Action Litigation*

A romantic narrative permeates the debate over the desirability and efficacy of class action litigation. Plaintiffs' class counsel and legal scholars consistently recite this romantic narrative,<sup>26</sup> which is often endorsed in any number of judicial decisions.<sup>27</sup> As will be seen, while class action advocates repeatedly recount the romantic narrative, business associations that are the frequent objects of class litigation have their own darker counternarrative.

There are several core elements that characterize the romantic narrative of the class action. First, class litigation always features helpless and hopeless plaintiffs in dire need of assistance who are incapable of fending for themselves and exercising independent autonomy: the downtrodden, the

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<sup>26</sup> E.g., Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 CONN. L. REV. 1239, 1242 (2001) (discussing regulation by class litigation as a means for correcting the transgressions of corporate conduct harming public health, safety, and consumer rights; redressing corporate behavior that "transgresses the social compact;" and restoring "the balance of liberties, rights, and obligations in a community of equals"); Elizabeth J. Cabraser & Thomas M. Sobel, Practitioners' Note, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005 (2000) (discussing classwide punitive damages as effective means for punishing transgressive corporate behavior); Elizabeth J. Cabraser, *The Essentials of Democratic Mass Litigation*, 45 COLUM. J.L. & SOC. PROBS. 499, 501–03 (2012) (examining how class actions afford consistent and efficient means for addressing mass harms, and promote and protect democratic principles in consumer rights, public health and safety, and human rights violations); Elizabeth J. Cabraser, *The Procedural Vision of Arthur R. Miller: A Practitioner's Tribute*, 90 OR. L. REV. 929, 931 (2012) (describing the function of class litigation as providing access to justice for investors, consumers, and tort victims).

<sup>27</sup> See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("[T]he Advisory Committee 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.'" (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969))); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 567 (6th Cir. 2007) ("[T]he 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." (quoting *Amchem*, 521 U.S. at 617) (internal quotation marks omitted)); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41–42 (1st Cir. 2003) (discussing policy goals of class action litigation, with focus on consumer small claims actions); *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 427 (5th Cir. 1998) (Dennis, J., dissenting) (summarizing the aims of class actions: to promote judicial efficiency and economy, obviate the need for multiple proceedings, aggregate small claims, and enhance access to justice).

exploited, the uneducated, the illiterate, the disarmed little-guy.<sup>28</sup> Correlatively, the narrative needs a villain, and corporations or other business entities fulfill this role.<sup>29</sup> In the romantic narrative, corporations are powerful, evil, malevolent, bad-actors intent on profit-making at the expense of the health, safety, and well-being of individuals.<sup>30</sup> In extreme versions of the romantic narrative, these defendants callously, indifferently, and cynically plot to harm their own consumers.<sup>31</sup>

A second feature of the romantic narrative focuses attention on the problem of asymmetrical power and resources, which is tied to the helplessness of the injured parties. Thus, in this telling, individual claimants lack sufficient power, resources, and information to seek relief from the bad actor.<sup>32</sup> Especially in cases of small harms—so-called negative-value suits—individual plaintiffs will be unable to pursue relief because the value of the claim is so small and the ultimate recovery so minimal, and therefore there is scant incentive for an

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<sup>28</sup> See, e.g., Helen Perry Grimwood, *Lawyers as Leaders—Part II*, ARIZ. ATT'Y, Oct. 2005, at 6, 6 (describing the world of plaintiffs' class action attorneys as a world of "sticking up for the rights of the poor and downtrodden; of representing the rights of people who, without [the attorney's] help, would be left without hope"); Troy A. McKenzie, "Helpless" Groups, 81 FORDHAM L. REV. 3213 (2013) (describing the important role of the helpless group in the history of modern class litigation).

<sup>29</sup> See, e.g., John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-food Companies*, 12 WIDENER L.J. 103, 130 (2003) ("Class actions are useful to deter corporate misconduct. . . . Companies culpable for callous disregard of human life and health are appropriate targets of large judgments.").

<sup>30</sup> See, e.g., James M. Finberg, *Class Actions: Useful Devices that Promote Judicial Economy and Provide Access to Justice*, 41 N.Y.L. SCH. L. REV. 353, 353–54 (1997) (class actions allow claimants to aggregate claims "to fight rich and powerful corporations"); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 100–01 (2003) (characterizing class actions as significant protective mechanisms "in a world where interactions with economically and politically powerful corporations are such a pervasive aspect of people's daily life"); Kathleen Flynn Peterson, *Standing Up for High Standards*, TRIAL, Apr. 2008, at 9, 9 (noting comment that class action practitioners need to "fight the efforts of the powerful special interests to take away those rights that give Americans an even playing field when it comes to holding powerful corporations accountable for misconduct that hurts people"); Sachs-Michaels, *supra* note 14, at 671 (stating that the class action device "level[s] the playing field between aggrieved individuals and powerful corporations"); Winnie Chau, Note, *Something Old, Something New, Something Borrowed, Something Blue and a Silver Sixpence for Her Shoe: Dukes v. Wal-Mart & Sex Discrimination Class Actions*, 12 CARDOZO J.L. & GENDER 969, 970 n.4 (2006) (noting the trope that some view class actions as a way for "noble crusaders . . . to pursue evil corporations" (citing *Talk of the Nation: Analysis—Class Action Lawsuits* (National Public Radio broadcast July 15, 2004)). See generally sources cited *supra* note 26 (works of Ms. Cabraser reflecting this same perspective).

<sup>31</sup> See Cohan, *supra* note 29, at 130; Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 467 (2000) ("Companies guilty of callous disregard of human life and health are appropriately at risk of such massive [class action] judgments.").

<sup>32</sup> See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1906 n.62 (2002) (noting the "dominant consensus" among scholars and commentators that the class action device helps to "correct the obvious asymmetric litigation power" seen in low-stakes claims).

attorney to undertake representation.<sup>33</sup> In addition, it is urged that corporate defendants hold superior power and financial resources to prevail through a battle of attrition.<sup>34</sup> In small-claims cases, individuals simply will not pursue relief.<sup>35</sup> Moreover, defendants defer, deflect, or defeat case development by impeding discovery of relevant information. In this view, the bad-actor defendants hold all the litigation cards.<sup>36</sup>

A third feature of the class action narrative, which plaintiffs recently have advanced, contends that, in absence of the class action mechanism, individuals would have no effective means to vindicate their rights.<sup>37</sup> The “effective vindication” argument posits that the costs and burdens of conducting some types of litigation are so great that individual claimants realistically have no means or incentive to pursue litigation.<sup>38</sup> Thus, the judicial resistance to permitting aggregation of claims effectively denies individual claimants the ability to pursue redress from more powerful defendants.<sup>39</sup> Antitrust litigation is one example that illustrates this effective vindication problem; plaintiffs recently contended that, unless they could proceed as a class and share expenses, the costs of retaining expert witnesses to prove up elements of

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<sup>33</sup> See, e.g., *Jerry Enters. of Gloucester Cnty., Inc. v. Allied Beverage Grp., LLC*, 178 F.R.D. 437, 445 (D.N.J. 1998) (“It must be understood that a class action plaintiff may not have very much incentive to contact an attorney or to investigate a potential claim where the claim may be tiny. . . . The whole mechanism of the class action recognizes this lack of incentive and the collective action problems inherent in many individuals having potentially small claims, and encourages lawyers to prosecute these actions on behalf of plaintiffs by holding out the promise of large fee awards.”).

<sup>34</sup> See Rosenberg, *supra* note 32, at 1906–07.

<sup>35</sup> See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923–24 (1998) (defining small claim class actions as “those cases in which the claim of any individual class member for harm done is too small to provide any rational justification to the individual for incurring the costs of litigation”).

<sup>36</sup> See Klonoff, *supra* note 14, at 756–57 (suggesting that while courts have imposed stricter evidentiary burdens on class plaintiffs, they have at the same time permitted defendants to seek denial of class certification without submitting to discovery).

<sup>37</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (declining to apply the effective vindication doctrine to repudiate class action waiver provision in an arbitration agreement); cases cited *supra* note 12; see also Ellen Meriwether, *Class Action Waiver and the Effective Vindication Doctrine at the Antitrust/Arbitration Crossroads*, ANTITRUST, Summer 2012, at 67 (describing the effective vindication doctrine); Linda S. Mullenix, *Arbitrating Federal Antitrust Claims, Class Action Waivers, and the “Effective Vindication” Doctrine*, 40 PREVIEW U.S. SUP. CT. CASES 191 (2013) (analyzing *Italian Colors*); Linda S. Mullenix, *The Not-So-Effective Vindication Decision; The U.S. Supreme Court’s Ruling in Italian Colors and Its Aftermath Are a Big Blow to the Class Action Bar*, NAT’L L.J., Sept. 9, 2013, at 30 (summarizing the *Italian Colors* decision and how it has been applied).

<sup>38</sup> See Brief for Respondents at 1–2, 19–28, *Italian Colors*, 133 S. Ct. 2304 (No. 12-133), 2013 WL 267025.

<sup>39</sup> See *id.* at 46–57.

alleged antitrust violations were so prohibitive as to frustrate individual claimants from effectively vindicating their rights.<sup>40</sup>

The fourth element of the romantic class action narrative shifts to an appreciation of the underlying purposes of class litigation. Here, supporters contend that class litigation achieves an efficient resolution of claims, justly compensates injured parties, and deters defendants from further misconduct and harmful behavior.<sup>41</sup> The authors of the efficiency rationale typically allude to congested court dockets, noting that judicial delays in adjudicating individual cases effectively deny claimants their day in court.<sup>42</sup> In this view, aggregating claims in a class accomplishes a speedier resolution of similar claims in one proceeding, rather than requiring thousands of like cases to languish on court dockets.<sup>43</sup> Regarding compensation, advocates contend that class settlements return just compensation to class members more efficiently and swiftly than individual litigation.<sup>44</sup> And finally, proponents of class litigation repeatedly argue that the mere threat of class litigation serves as a

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<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 169 (1998) (“The class action procedure thus evolved as a product of concern for the ‘convenient and economical’ provision of justice, coupled with the substantive concern of affording a meaningful remedy to large numbers of otherwise disenfranchised victims of breached obligations.” (footnote omitted)); Finberg, *supra* note 30, at 353 (explaining that class actions serve goals of judicial economy and access to justice); Klonoff, *supra* note 14, at 729 (noting rationales for class action device as compensation, deterrence, and efficiency); Lahav, *supra* note 30, at 70 (noting two substantive justifications for class actions: compensation and deterrence); Viivi Vanderslice, Comment, *Viability of a Nationwide Fen-Phen/Redux Class Action Lawsuit in Light of Amchem v. Windsor*, 35 CAL. W. L. REV. 199, 216 (1998) (noting that increased access and economic efficiency are among the goals of the class action).

<sup>42</sup> *Cimino v. Raymark Indus., Inc.*, No. B-86-456-CA, slip op. (E.D. Tex. Dec. 29, 1989), reprinted in MULLENIX, *supra* note 10, at 38, 39 (certifying an asbestos class action where claims had been pending for over three years and where claimants were ill or had died and concluding that the court “[could] see no justice in denying the Plaintiffs their day in court in the interest of providing Defendants with a procedure for the repetitive assertion of their defenses”). See generally Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577 (2011) (providing extensive analysis of the day-in-court theory as it intersects with class litigation).

<sup>43</sup> See *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 470–71 (5th Cir. 1986) (stating that courts “have been ill-equipped to handle [the] avalanche of [asbestos] litigation” and explaining that “[t]he purpose of class actions is to conserve the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion” (internal quotation marks omitted)); *Chavarria v. N.Y. Airport Serv., LLC*, 875 F. Supp. 2d 164, 171 (E.D.N.Y. 2012) (upholding class action settlement and explaining that “[s]ettlements are strongly favored as a matter of policy, because ‘by lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time’” (quoting *Evans v. Jeff D.*, 475 U.S. 717, 761 n.15 (1986))).

<sup>44</sup> See *Cimino*, reprinted in MULLENIX, *supra* note 10, at 39.

powerful deterrent on potential corporate misbehavior, and for this reason alone, class actions are a laudatory mechanism for accomplishing justice.<sup>45</sup>

The romantic class action narrative also turns attention to the role of attorneys. In this portion of the narrative, plaintiffs' class counsel arrive on the scene as white knights (or white-hatted cowboys) who are protectors of the downtrodden victims of corporate misfeasance and greed.<sup>46</sup> In this telling, class counsel undertake considerable hardships at great personal expense, risking their own practices and livelihoods while foregoing other business in order to achieve justice for the helpless.<sup>47</sup> These attorneys are motivated by idealistic sentiments to help the downtrodden, inspired by the great civil rights cases of the 1960s and Atticus Finch, the famed defense attorney in *To Kill a Mockingbird*.<sup>48</sup> They are beknighted "private attorneys general" stepping into

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<sup>45</sup> See generally Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010) (proposing that "the optimal award of fees to class action lawyers in small-stakes actions is 100% of judgments" to accomplish maximal deterrent effect of class litigation); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105–07 (2006) (describing deterrence as the primary goal of class actions); Linda Sandstrom Simard, *Fees, Incentives, and Deterrence*, 160 U. PA. L. REV. PENNUMBRA 10 (2011) (analyzing the Fitzpatrick proposal to promote maximal deterrent effect of class litigation on corporate behavior). *But see* David Marcus, *Attorneys' Fees and the Social Legitimacy of Class Actions*, 159 U. PA. L. REV. PENNUMBRA 157 (2011) (disputing the Fitzpatrick theory concerning maximal deterrent effect accomplished through incentivized attorney fee awards).

<sup>46</sup> See, e.g., Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1927 (2000) ("[Discussing the class action cultural stereotype in which] plaintiffs' class action lawyers were White Knights, enforcing the substantive law in order to right legal wrongs that, without their intervention, would go unprosecuted. These White Knights not only obtained compensation for their clients, but also were able to curb corporate abuse by deterring wrongful conduct. These policy implications were the stuff that plaintiffs' class counsel dream about and form the plaintiffs' 'cultural stereotype' of a class action.").

<sup>47</sup> See, e.g., Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1150 (2009) (discussing the opportunity costs to plaintiffs' attorneys in foregoing other legal work); Vaughn R. Walker, *Class Actions Along the Path of Federal Rule Making*, 44 LOY. U. CHI. L.J. 445, 448 (2012) (describing class actions as "also expensive in opportunity costs for class counsel who could devote themselves to more productive endeavors if the social value of the relief obtained in class litigation fails to match the effort and resources put into it").

<sup>48</sup> See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 493 (1976). Professor Bell describes the attorney–client tension between class clients and idealistic class attorneys during the Civil Rights Era:

This malady may afflict many idealistic lawyers who seek, through the class action device, to bring about judicial intervention affecting large segments of the community. The class action provides the vehicle for bringing about a major advance toward an idealistic goal. At the same time, prosecuting and winning the big case provides strong reinforcement of the attorney's sense of his or her abilities and professionalism. Dr. Andrew Watson has suggested that "[c]lass actions . . . have the capacity to provide large sources of narcissistic gratification and this may be one of the reasons why they are such a popular form of litigation in legal aid and poverty law

the breach of public regulatory enforcement, pursuing and vindicating justice where governmental enforcement is feeble or lacking.

On the other hand, in this narrative, defense counsel are portrayed as black-hatted desperadoes, willing to cynically defend awful clients in the name of corporate greed and callous big-law practice.<sup>49</sup> These attorneys aggressively deploy power, money, and resources to frustrate individual claims and to impede class litigation.<sup>50</sup> Defense attorneys are obstructionist withholders of information engaging in various forms of discovery abuse.<sup>51</sup> The romantic

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clinics.” The psychological motivations which influence the lawyer in taking on “a fiercer dragon” through the class action may also underlie the tendency to direct the suit toward the goals of the lawyer rather than the client.

*Id.* (alterations in original) (footnotes omitted); see also MIKE PAPANTONIO, IN SEARCH OF ATTICUS FINCH: A MOTIVATIONAL BOOK FOR LAWYERS (1995); Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211, 2216 (2004) (“These Holocaust cases exemplified the most idealistic use of class action procedure, the recognition of the federal common law incorporation of international human rights principles, and the accessibility of United States federal courts as a forum for international claims against governmental entities and private businesses with a United States nexus.”). According to Papantonio, a prominent plaintiffs’ class action attorney, Atticus Finch provides a blueprint of how modern lawyers should live their lives: “[I]f we dealt with [life’s] impediments in the same way Atticus deals with his life, many of those impediments would disappear, and many of our problems would be more easily and satisfactorily solved.” PAPANTONIO, *supra*, at 34–35.

<sup>49</sup> MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD 194–95 (1985) (describing abusive deposition tactics by defense attorneys in Dalkon Shield IUD litigation).

<sup>50</sup> A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 365 n.426 (1998) (“The defense counsel . . . seemed determined to instill fear in the individuals being deposed . . . . His approach was to bait, belittle, ridicule (even to the extent of mimicking the speech pattern and accent of one of the other plaintiffs) and threaten (‘If you lose, you may be faced with some huge legal fees incurred by the defendant company’).” (alterations in original) (quoting M. Vanderveer, *Face to Face with an Abusive Attorney*, NAT’L L.J., May 14, 1984, at 13)); Monroe Inker, *Abusive Discovery Tactics in Depositions*, 26 FAM. L.Q. 27, 34 (1992) (describing corporate defense counsel in class litigation as determined to “pursue[] a line of questioning that appeared to challenge [a plaintiff’s] ancestry in an egregious fashion”).

<sup>51</sup> See, e.g., Christine Hatfield, Comment, *The Privilege Doctrines—Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 PACE L. REV. 525, 527–28 (1996). The potentially massive damages in these cases give large corporate defendants incentive to withhold information:

Major corporations, like those comprising the tobacco industry, involved in complex tort or product liability litigations have tremendous incentive to withhold information; this incentive is directly proportional to the damages available to successful plaintiffs in those actions. Typically in such cases, the defendant is a tobacco company with greater wealth, expertise and resources than the plaintiffs, who are typically individuals or, at most, a class of individuals all seeking redress for a similar wrong. The defendant in these cases also has exclusive possession of almost all of the information necessary for the just adjudication of the claims filed against it, forcing the plaintiff to rely on the defendant’s good-faith compliance with the discovery rules in order to prove her claims.

narrative concludes with disparaging judgments concerning the amoral defense attorneys who have sold out to protect and preserve the prerogatives of corporate privilege.<sup>52</sup>

This final chapter in the romantic class action narrative reflects on the Supreme Court's recent class action jurisprudence regarding litigation classes<sup>53</sup> and classwide arbitration.<sup>54</sup> From the plaintiff's vantage, this collection of Supreme Court opinions evinces a deeply held contempt for and rejection of class action litigation, demonstrating the Court's support for corporate interests over the protection and well-being of the little guy.<sup>55</sup> In this regard, class action advocates construe the Court's recent pronouncements as denying access to justice to the poor, uneducated, and the least capable of society's citizens.<sup>56</sup>

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Consequently, over the past twenty years, discovery abuse has become a standard defense tactic in litigating many of the most complex tort and product liability cases. In particular, the tobacco industry has developed several evasion strategies of choice, including, but not limited to, delay, inundating an opponent with reams of useless information, use of the court system to wage a war of motions and protective orders against an adverse party, as well as filing patently false and misleading responses to discovery requests. Every strategy is designed to force the massive expenditure of frequently scarce plaintiff's resources in order to sort out the data provided or fight for the enforcement of discovery orders. The net result of these strategies is obstruction of the process of determining the truth of a matter and prevention of fair and impartial justice.

*Id.* (footnotes omitted).

<sup>52</sup> See, e.g., Michael McCann & William Haltom, Review Essay, *Ordinary Heroes vs. Failed Lawyers—Public Interest Litigation in Erin Brockovich and Other Contemporary Films*, 33 LAW & SOC. INQUIRY 1045, 1052 (2008) (“[F]our motifs add up to a characterization of civil justice that marshals stereotypes to ridicule ‘civil justice’ as an oxymoron. [These] motifs—(1) innocent victims seek corporate accountability but are stymied by (2) armies of amoral defense attorneys who best (3) an overmatched and socially maladroit plaintiffs’ attorney until (4) a lay ‘outsider’ ensures the eventual plaintiffs’ victory—dramatize[] a plucky heroine’s triumph over a biased, indifferent system of civil disputing.”).

<sup>53</sup> See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>54</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>55</sup> See, e.g., Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1098 (2013) (noting criticism of *Dukes* and *Concepcion* decisions as undermining class litigation); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) (suggesting the Supreme Court’s ruling in *Concepcion* will place many companies outside the reach of class action litigation); Klonoff, *supra* note 14, at 729 (arguing that courts have significantly undermined the “compensation, deterrence, and efficiency functions of the class action device” in recent years); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011) (arguing the *Dukes* standard for class certification “jeopardizes potentially meritorious challenges to systemic discrimination”); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 266–68 (2012) (claiming “the class action for consumer and employment claims is dead” in light of the *Concepcion* decision).

<sup>56</sup> See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 705, 708–09 (2012) (suggesting that without the ability to bring class action lawsuits,

### B. *The Darker Counternarrative*

The romantic class action narrative—perpetuated by the plaintiffs’ bar, judicial opinions, and academic adherents—has its counterpart in a darker narrative about class litigation advanced by corporate defendants, skeptical courts, and assorted defense-side interest groups.<sup>57</sup> The defense-side narrative, of course, renders a bleaker portrait of class litigation that counters all aspects of the plaintiffs’ romantic narrative.

Thus, class action commentators have suggested that not all class members are helpless victims in need of assistance in asserting their rights, contending that such sweeping generalizations amount to a form of unattractive paternalism.<sup>58</sup> In addition, class action critics contend that in many cases class members may not even know that they have been harmed, may not care about minor injuries, and may be entirely disinterested in pursuing litigation.<sup>59</sup> In this

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potential plaintiffs will be prevented from bringing any claim at all due to a “lack of knowledge, lack of resources, or fear of retaliation”).

<sup>57</sup> See, e.g., Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1772–73 (2005) (describing historic judicial skepticism and hostility to class action litigation, with citation to authorities). An alignment of interest groups and organizations frequently appear as amici curiae in major class litigation, supporting defense positions in these cases. These repeat-player litigants include the Business Roundtable, the Cato Institute, the Chamber of Commerce of the United States, the DRI – The Voice of the Defense Bar, the International Association of Defense Counsel, the National Association of Manufacturers, the Pharmaceutical Research and Manufacturers of America, the Products Liability Advisory Council, the Securities Industry and Financial Markets Association, and the Washington Legal Foundation. In most recent class litigation before the Supreme Court, combinations of these interest groups have filed amici briefs on behalf of the corporate defendants. See, e.g., Brief of the Cato Institute as Amicus Curiae in Support of the Petitioners, *Comcast*, 133 S. Ct. 1426 (No. 11-864), 2012 WL 3716868; Brief of Amici Curiae Chamber of Commerce of the United States of America et al. Supporting Petitioners, *Amgen Inc.*, 133 S. Ct. 1184 (No. 11-1085), 2012 WL 3555290; Brief of Amicus Curiae of Securities Industry & Financial Markets Ass’n in Support of the Petitioners, *Amgen Inc.*, 133 S. Ct. 1184 (No. 11-1085), 2012 WL 3555289.

<sup>58</sup> See, e.g., Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 71 n.208 (2003) (noting Professor David Luban’s defense of paternalism in public interest litigation, manipulating clients and putting interest of a cause above clients’ interests (citing DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 317–40 (1988))).

<sup>59</sup> See *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1047 (S.D. Tex. 2012) (noting that only eleven claims were filed from a class of over one hundred million people, “[d]espite a vigorous notice campaign”); Kelly Brilleaux & Stephen G.A. Myers, *Reevaluating the 401/403 Balance in Twenty-First Century Mass Torts*, FOR DEF., Feb. 2014, at 48, 48–49 (describing the influential effects of broad media advertisement on class litigation by claimants who may not have known about harms or cared about litigation and proposing introduction of evidence of such advertising as it affects class or mass litigation); Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 AM. J. TRIAL ADVOC. 147, 159 (1995) (“The very small claims of the plaintiffs and class members, coupled with their typical lack of interest or participation in the litigation, places small claimant class action outside the realistic boundaries of the Article III ‘case or controversy’ requirement.”); Stacey M. Lantagne, *A Matter of National*



version of the narrative, class counsel often are portrayed as stirring up litigation; impermissibly soliciting clients in order to pursue the attorney's own class action agenda, ideological cause, or (more cynically) out-sized legal fees; or pursuing a combination of these aims.<sup>60</sup> In the worst version of this narrative, particular class action litigation is the consequence of an attorney's own ideas and initiative, rather than that of any aggrieved individual seeking attorney advice and classwide relief.<sup>61</sup>

Regarding the alleged problem of asymmetrical resources, defendants contend that it is not always the case that individual litigation is impaired or impeded because of an imbalance of financial resources or informational access. In this regard, individuals with high-value, meritorious claims usually are able to retain capable counsel willing to vigorously pursue relief based on contingency fee arrangements, undercutting the need for aggregation of claims.<sup>62</sup> Thus, in individual litigation where there is likelihood of success on the merits with substantial recovery, the playing field is leveled where counsel advance costs and expenses.<sup>63</sup>

In addition, in the class action arena the advent of third-party litigation financing has allowed, supported, and encouraged mass litigation.<sup>64</sup> Moreover, it is not always the case that defendants control all relevant information that they withhold from plaintiffs; in some instances, plaintiffs either retain or have access to sufficient relevant evidence to prove up their claims without recourse to burdensome and expensive discovery. Finally, defendants contend that class

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*Importance: The Persistent Inefficiencies of Deceptive Advertising Class Actions*, 8 J. BUS. & TECH. L. 117, 134 (2013) (noting the lack of interest in making claims).

<sup>60</sup> See *supra* note 59.

<sup>61</sup> See, e.g., Brilleaux & Myers, *supra* note 59, at 49 (noting that in some situations, “[plaintiffs’] attorneys conceive of the tort, advertise to the public, and find dozens, hundreds, or even thousands of clients to pursue the claims” and that “legal advertising does not identify underserved individuals with valid legal claims”).

<sup>62</sup> See Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 240 (2003) (noting the “prevalence of contingency fee arrangements to finance litigation on the plaintiffs’ side”).

<sup>63</sup> See *id.* at 162 (noting that persons with strong claims are most at risk from the “monopoly power wielded by class counsel”).

<sup>64</sup> See Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, 23 WIDENER L.J. 229 (2013); Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012); Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 320 (2011); Geoffrey J. Lysaught & D. Scott Hazelgrove, *Economic Implications of Third-Party Litigation Financing on the U.S. Civil Justice System*, 8 J.L. ECON. & POL’Y 645, 646 (2012); Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL’Y 593, 609 (2012).

action plaintiffs wield enormous power in their ability to make excessive and disproportionate discovery requests—sometimes conducting what amounts to “fishing expeditions”—which negatively affect ongoing business operations, imposing substantial costs and burdens on defendants.<sup>65</sup>

In response to the recently-urged “effective vindication” argument, defendants counter (now supported by the Supreme Court), that denying the use of the class action mechanism is simply not a denial of an individual’s ability to vindicate his or her rights.<sup>66</sup> As such, the effective vindication argument is a rhetorical theory without jurisprudential or practical merit. This argument proceeds from the fundamental principle that no person has a “right” to pursue a claim as a class action; Rule 23 is a procedural rule that creates no substantive right to its use.<sup>67</sup> Moreover, judicial foreclosure of a class action does not result in an individual being denied access to court or adjudication of one’s claims; instead, it merely means that an individual must bring suit individually and not as a collective action.<sup>68</sup>

The defense-side counternarrative to the plaintiffs’ romantic account challenges the broad, conclusory assertions concerning the laudatory and beneficial effects of class litigation. Thus, critics of class actions contend that litigation or settlement classes fail to accomplish compensatory and deterrence goals, or at least that these assertions are largely unsupported or unproven.<sup>69</sup> With regard to deterrence, many corporate defendants view class judgments and settlements as a cost of doing business, subsidized by insurers or passed along to consumers.<sup>70</sup> In addition, class litigation gives primacy to the efficiency rationale at the expense of litigant autonomy for both plaintiffs and

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<sup>65</sup> See, e.g., Brief of the Manufactured Housing Institute et al. as Amici Curiae in Support of Petitioner at 11–15, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013) (No. 11-1450), 2011 WL 9372907 (describing examples and impact of abusive plaintiffs’ class action discovery techniques).

<sup>66</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–12 (2013).

<sup>67</sup> *Id.* at 2309–10.

<sup>68</sup> *Id.* at 2311.

<sup>69</sup> See, e.g., Brief for the Committee on Capital Markets Regulation as Amicus Curiae Supporting Petitioners at 11–17, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317), 2014 WL 60718 (arguing that purported class benefits of compensation and deterrence “are unsubstantiated in theory or fact”); Brief for Amicus Curiae the Financial Services Roundtable in Support of Petitioners at 6–8, *Italian Colors*, 133 S. Ct. 2304 (No. 12-133), 2012 WL 6759409 (“[C]lass actions may fail to compensate class members and can be used to subject defendants to tremendous settlement pressure, regardless of the merits of the claim.”).

<sup>70</sup> See Tiger Joyce, *Reining in Crazy Class-Action Lawsuits*, NAT’L REV. ONLINE (Jan. 9, 2014, 12:00 AM), <http://www.nationalreview.com/article/367911/reining-crazy-class-action-lawsuits-tiger-joyce> (commenting on the moldy washing machine cases and cost passed along to consumers).

defendants, with the sacrifice of fundamental constitutional rights.<sup>71</sup> In this view, judicial interest in efficient docket-clearing through speedy class resolution of mass claims sacrifices defendants' due process and jury trial rights.<sup>72</sup>

Perhaps most important, corporate defendants that typically are the target of class litigation repeatedly have argued that class litigation is a burden on ongoing business operations, wasteful, and generally harmful to the overall economy.<sup>73</sup> In a variation of this argument, corporate defendants have long contended that class action litigation—especially the action of a court in granting class certification—amounts to unfair settlement blackmail.<sup>74</sup> Thus, corporate defendants may capitulate to meritless or unsubstantiated claims rather than incur substantial ongoing litigation expenses with the risk of an adverse jury decision.<sup>75</sup>

In their counternarrative, defense counsel also paint an equally dark and caricatured portrait of plaintiffs' class counsel, whom they clearly do not embrace as white-hatted heroes in the litigation landscape. Instead, class counsel are viewed as entrepreneurial bounty hunters stirring up faux class actions in the attorneys' own primary interests of recovering large fees.<sup>76</sup> In this version of the narrative, class counsel often are portrayed as conflicted agents using poorly-informed plaintiffs as pawns for the attorneys' own ends.

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<sup>71</sup> See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 20 (2009) (positing that the class action “threatens core constitutional and democratic values”); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1617 (2007) (noting the surprising lack of attention to the “collectivist-individual tension” that adheres in the class action framework); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 426 (2001) (noting that primacy is given to judicial efficiency and economy over litigant rights).

<sup>72</sup> See Redish & Larsen, *supra* note 71, at 1575.

<sup>73</sup> See Brief for the Committee on Capital Markets Regulation as Amicus Curiae Supporting Petitioners, *supra* note 69, at 5–11 (arguing that “[t]he costs of securities class actions to the U.S. economy and capital markets are unjustifiable”); Brief of Amici Curiae the Partnership for New York City, Inc. et al. in Support of Respondent at 3, 18, *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (No. 08-1008), 2009 WL 2896303.

<sup>74</sup> See Brief of Intel Corp. as Amicus Curiae in Support of Petitioner at 5–16, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) 2011 WL 288897 (discussing problem of settlement blackmail).

<sup>75</sup> *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995); see also Brief of Retail Litigation Center, Inc. as Amicus Curiae in Support of Petitioners at 4, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (No. 11-864) 2012 WL 3716867 (“The risks of trying thousands of claims in a single lawsuit often are too great for rational corporate decisionmakers to bear. . . . [E]ven where the merits of the underlying case are weak . . .”).

<sup>76</sup> See REDISH, *supra* note 71, at 14 (characterizing class action plaintiffs' attorneys as free-ranging “bounty hunters”).

At worst, critics of class action litigation perceive plaintiffs' attorneys to be ethically-challenged and riddled with agency problems.<sup>77</sup> And where objectors intervene to challenge class settlements based on allegation of collusion, self-dealing, and selling out class members, class counsel are viewed as the source for breeding satellite litigation.<sup>78</sup>

Finally, defense counsel reject the plaintiffs' hyperbolic rhetoric concerning recent Supreme Court class action pronouncements, contending that no one is being denied access to justice as a consequence of the Court's pronouncements. Thus, defendants construe the Court's opinions as merely restating longstanding, fundamental class action principles, clarifying the application of those principles in particular factual contexts.<sup>79</sup> In addition, the Court's class action jurisprudence has not uniformly favored corporate interests; for example, the Court has consistently upheld the fraud-on-the-market presumption in securities class litigation, which is a plaintiff-favoring presumption.<sup>80</sup> Moreover, the Court has not presumptively ruled against classwide arbitration either.<sup>81</sup> Thus, the plaintiffs' overheated protestations concerning the Court's pro-corporate bias—as well as the end of class action litigation generally—is just that: overheated, bombastic rhetoric designed to engage sympathies of those inspired by the romantic class action narrative.

## II. RETHINKING THE ROMANCE AND OTHER DARK TALES

Fifty years of class action experience—since the 1966 amendments—has given rise to two competing extreme narratives of the value and efficacy of class litigation. Is there any way to evaluate and reconcile these Rashomon-like stories to guide reasoned consideration of American class action practice?

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<sup>77</sup> See Gilles & Friedman, *supra* note 45, at 103–04, 112–16 (rejecting arguments based on the agency costs of class litigation and ethical challenges to class representation).

<sup>78</sup> See Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2117–22 (2008).

<sup>79</sup> See Ellen Meriwether, *Comcast Corp. v. Behrend: Game Changing or Business as Usual?*, ANTITRUST, Summer 2013, at 57 (contending that recent Supreme Court class action jurisprudence has portended no major change in class action practice). *But see* John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law*, 13 WYO. L. REV. 463 (2013) (contending major shift in class action jurisprudence).

<sup>80</sup> *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1204 (2013); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011); *Basic Inc. v. Levinson*, 485 U.S. 224, 250 (1988).

<sup>81</sup> *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) (holding that an arbitrator did not exceed powers in authorizing class arbitration).

Each differing narrative contains elements of truth but, taken together, suggest a need for rethinking the class action.

Reformers should frame this debate by asking three questions: (1) whether the current rule effectuates the primary rationales for its existence; (2) whether the rule as implemented breeds satellite litigation problems that undermine its utility; and (3) whether the benefits accruing through the rule's application outweigh its deleterious effects. If the rule fails to fulfill its purposes and is a litigation-breeding instrument that is not outweighed by its benefits, then there is a need to reform the rule.

#### *A. Evaluating the Class Action Rationales*

Commentators and courts traditionally have justified the class action rule and procedure based on three primary rationales. These include the compensation of victims of alleged wrongdoing, deterrence of bad conduct by defendants, and judicial efficiency and economy.<sup>82</sup> Arguably, if the rule as applied has failed to realize (or imperfectly realizes) these goals, then it is fair to question the continued utility of the current rule.

##### *1. Compensation of Victims of Wrongdoing*

A primary goal of the class action rule is to enable large groups of claimants to recover damages or to obtain injunctive relief as a consequence of alleged wrongdoing by defendants. The Supreme Court and lower federal courts have consistently indicated that this rationale is especially salient in negative-value suits or small-claims consumer class actions, where individual claimants might be discouraged or unable to pursue relief.<sup>83</sup> Rule 23 permits aggregation of small claims in consumer cases, and courts do certify such cases, which typically leads to mass settlements of class claims.<sup>84</sup>

However, there is much that is not known about the actual, eventual compensation meted out to class claimants, either in small-claims consumer class actions or complex litigation based on other substantive theories, such as antitrust, securities, or employment discrimination cases. Although empirical

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<sup>82</sup> See *supra* notes 41–67 and accompanying text.

<sup>83</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

<sup>84</sup> See, e.g., *Matamoros v. Starbucks Corp.*, No. 1:08-cv-10772, slip op. (D. Mass. Aug. 16, 2013) (class settlement of Starbucks barista employee wait staff tip pool litigation); *Truesdale v. Nationwide Affinity Ins. Co. of Am.*, No. 1:11-cv-00467, slip op. (M.D.N.C. Apr. 4, 2013) (class settlement of insurance reinstatement fees litigation).

studies report the total aggregate amounts of settlement funds resulting from various class litigation,<sup>85</sup> there are no empirical studies that have drilled down to ascertain what class claimants actually are paid individually for their claims as a result of the class litigation. In reality, virtually all certified class actions subsequently settle; very few certified class actions proceed to trial.<sup>86</sup> Class notice communicates to class members the total class fund achieved by the settling parties; settlement notices do not typically contain information about the payment of individual claims.

Once a court judicially approves a settlement after a fairness hearing, commercial vendors usually handle claims processing. Studies suggest that very small percentages of class members actually file and receive compensation from settlement funds.<sup>87</sup> In instances where claim rates are low, settlement funds may revert to the defendant or be applied to a cy pres purpose, depending on the settlement terms. Clearly, reversionary settlements or cy pres relief do not serve the purpose of compensating the actual victims of wrongdoing. In any case, it is difficult, if not impossible, to obtain information concerning payouts to individual class members.

Consequently, there is scant evidence upon which to conclude that class action litigation and settlement actually accomplish the stated goal of compensating victims of wrongdoing. Published reports of global settlement funds fail to reveal the most crucial information that is needed to assess whether class litigation satisfies this rationale: i.e., whether individual class

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<sup>85</sup> See, e.g., Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 830–31 (2010).

<sup>86</sup> Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1650 (2008) (“Settlements dominate the landscape of class actions. The overwhelming majority of civil actions certified to proceed on a class-wide basis and not otherwise resolved by dispositive motions result in settlement, not trial.” (citing ROBERT H. KLONOFF, EDWARD K.M. BILICH & SUZETTE M. MALVEAUX, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION* 415 (2d ed. 2006))). Klonoff and his coauthors observed, “Relatively few class actions actually go to trial; most settle, either after the certification decision or as trial approaches.” KLONOFF, BILICH & MALVEAUX, *supra*, at 415.

<sup>87</sup> See, e.g., *Buchet v. ITT Consumer Fin. Corp.*, 845 F. Supp. 684, 694–95 (D. Minn. 1994); Fred Gramlich, *Scrip Damages in Antitrust Cases*, 31 ANTITRUST BULL. 261, 274 (1986); Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1396–97 (2005) (“Many, if not most, coupon settlements have been marked by low participation rates by class members. In his study of antitrust class actions settled by coupon distributions to the class, Gramlich found an average redemption rate of 26.3%. The anecdotal evidence from class action litigation as a whole paints an even bleaker picture, with redemption rates as low as 3% or less.” (footnote omitted)). In a class settlement with General Motors, “according to the marketing expert hired by *class counsel*, because of the high cost of purchasing a vehicle, the short redemption period, and the restrictions on transfer, *more than half of the class* would obtain no value at all from the settlement.” Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 474 (1996).

members actually are compensated adequately for alleged wrongdoing. On the contrary, evidence from claim administrators suggests that a very high percentage of class members fail to be compensated at all.

## 2. *Deterrence of Bad Conduct by Wrongdoers*

The most often-repeated rationale justifying the class action rule is that the rule deters defendants—in the class action arena, most typically corporate defendants—from future bad conduct. Indeed, some scholars have urged that deterrence is the primary purpose of the class action rule and that consequently all class actions should be mandatory in order to maximize the impact of class litigation.<sup>88</sup> The class action deterrence theory is based on the simple concept that the sheer size of a class and the defendant's potential exposure to massive compensatory and punitive damages induces corporate defendants to refrain from engaging in wrongful conduct.

Similar to the compensation rationale underlying the class action rule, the deterrence theory suffers from a lack of empirical evidence and is based on conjectured hypotheses about corporate behavior. It is likely that, in some cases, prudent corporate counsel guide their corporate clients' actions in the shadow of prospective class action litigation. However, it is equally likely that the prospect of future class litigation serves little or no deterrent function and that at least some (if not many) corporate clients view class litigation as a cost of doing business, with costs passed along to consumers. We do not know, and social scientists have not been able to empirically measure, the deterrent effect of class litigation on prospective defendants. Thus, judicial and scholarly arguments relating to the deterrent effect of class litigation are largely theoretical, conclusory pronouncements.

Moreover, the deterrence rationale undergirding class litigation also inadequately accounts for the realities of how class litigation evolves. Defendants, typically, will aggressively challenge plaintiffs' class certification motions. If defendants succeed in opposing class certification, then the class action rule served no use (other than a nuisance purpose). If, however, a court certifies a class action, defendants usually bargain for the most financially

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<sup>88</sup> See Fitzpatrick, *supra* note 45, at 2047 (arguing that small claims class actions serve only the function of deterrence); Gilles & Friedman, *supra* note 45, at 139 (same); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 565 (1987) (one of tort system's primary objectives is deterrence); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1879–82 (2002) (tort litigation should provide optimal deterrence).

advantageous settlement terms (i.e., a cheap settlement), and punitive damages are typically removed from the negotiation process. In addition, defendants admit no liability. Consequently, the combination of these settlement factors (cheap settlement funds, no punitive damages, no admission of liability, and reversionary or cy pres provisions), significantly undercut the deterrence rationale for class litigation.

Finally, the deterrence rationale for class litigation carries little weight at the extreme margins of class litigation, where corporate defendants are happy to buy off class counsel for the cost of attorneys' fees in return for quick and cheap dismissal of class claims. In sum, nuisance-value class suits that are quickly compromised at discount rates are unlikely to serve any deterrent function.

### 3. *Judicial Efficiency and Economy*

A third rationale in support of the class action rule posits that class action procedures enhance judicial efficiency and economy, which is largely a utilitarian justification for the rule.<sup>89</sup> In this view, class litigation benefits not only the parties to a massive dispute but also serves the interests of the federal judiciary, which otherwise might be burdened with hundreds or thousands of repetitive, similar claims.

Thus, it is argued, in situations where there are large numbers of claimants with similar injuries arising from common factual or legal questions, it is inefficient to insist that such claims be pursued on an individual basis. This is especially compelling in the instance of small consumer claims, where individuals might not be able effectively to vindicate their rights because of the asymmetrical risks and expenses entailed in individual litigation.

The aggregation of claims, then, helps to relieve docket congestion that might otherwise exist by virtue of the filing of hundreds or thousands of repetitive claims. In addition, aggregating claims allows for economies of

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<sup>89</sup> See *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 963–64 (9th Cir. 2013) (“A principal purpose behind Rule 23 class actions is to promote efficiency and economy of litigation.” (quoting *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009)) (internal quotation marks omitted)); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1147, 1156 (2009) (arguing that Rule 23 embraces rule-utilitarian approach and is primarily a utilitarian device); Note, *Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action*, 117 HARV. L. REV. 2665, 2666 (2004) (“[T]he most prevalent benefit is administrative efficiency, meaning relatively quick and inexpensive resolution of similar claims.”).



scale, leveling the playing field between litigants and lowering the cost and expense entailed in repeated individual litigation. Finally, it is contended that class action litigation, by aggregating claims, contributes to the speedy resolution of disputes because multiple claims may be resolved through one proceeding. An often recited justification in favor of class litigation, as opposed to individual proceedings, is that “justice delayed is justice denied.”<sup>90</sup> Thus, class litigation arguably serves the three stated goals of Rule 1: securing the just, speedy, and efficient resolution of civil disputes.<sup>91</sup>

Similar to the other justifications for the class action rule, the problem with the efficiency rationale is that there is scant empirical proof supporting this rationale. For example, we simply do not know whether there is or would be massive docket congestion in the absence of a class action rule. With regard to small consumer claims, it is most likely that virtually no one would pursue these claims on an individual basis, thereby flooding the courts. Arguably, large numbers of potential small consumer claimants lack interest in the alleged injury, supporting the theory that these cases—on a classwide basis—“just ain’t worth it.” Moreover, it is difficult to assess whether the compensatory awards that eventually are made to such claimants are worth the bother. If the deterrence rationale is not compelling—meaning that corporate bad actors are not deterred by small-claims class actions—then it is difficult to understand the need for a class action rule to pursue small consumer claims, which might be better handled through robust regulatory oversight, penalties, or other similar non-adjudicative means.

With regard to more substantial claims, there also is scant evidence of docket congestion in absence of the class action rule. In the 1980s and 1990s federal courts were gripped by a “crisis mentality” with regard to mass tort claims, which has failed to materialize in many instances. In fact, there has been little evidence that courts have been overwhelmed with individual suits that might better be pursued on a classwide basis. Persons with meritorious and substantial damage claims are more likely to pursue individual litigation (or to opt-out of any certified class), leaving peculiar aggregations of less valuable or dubious claims. Furthermore, federal judges have demonstrated that the courts

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<sup>90</sup> See, e.g., *Jamie S. v. Milwaukee Pub. Sch.*, No. 01-C-928, 2009 WL 2225419, at \*2 (E.D. Wis. July 22, 2009) (“justice delayed is justice denied” to student class members); *Braud v. Trans. Servs.*, No. 05-1898, 2009 WL 413505, at \*1 (E.D. La. Feb. 17, 2009) (“Justice delayed is justice denied; there has already been too much delay in this case.”).

<sup>91</sup> FED. R. CIV. P. 1 (“[The Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

are capable of designing and implementing case management programs to efficiently process large numbers of claims individually, as Judge Eduardo Robreno established with the asbestos docket bequeathed to him in the wake of the Court's *Amchem* decision.<sup>92</sup>

It is true that class action proceedings can achieve economies of scale regarding litigation resources, but the pertinent question remains: compared to what? Thus, there is meager empirical evidence that class litigation contributes to the speedy resolution of claims. Class proceedings are subject to multiple opportunities for litigation posturing and delay; parties can engage in considerable motion and discovery practice prior to class certification. It is not uncommon for class action complaints to be amended several times over the course of proceedings. Notoriously, many class actions drag on for years, including class litigation that eventually settles.

Moreover, class settlement may not result in the conclusion of proceedings, as objectors may pursue appeals from class certification orders or judicial approval of settlements. Furthermore, appellate review may result in reversals or remands of lower court determinations, effectively subjecting class members to further proceedings or putting them out of court altogether after years of contested proceedings. In the final analysis, empirical studies are lacking to show the relative temporal efficiency of class litigation as compared to individual suits arising from the same events, although this repeatedly is stated as a class action truism.

*B. Problems Bred by Rule 23 Class Litigation: Doctrinal Elaboration Breeds Confusion and Inconsistent Principles*

Historically, procedural rules have become ripe for reform when their application has become so complex and arcane so as to render the rules intrinsically unfair or—as was the case with the old common law pleading rules—create “traps for the unwary” pleader.<sup>93</sup> Rules should be simple and intended to achieve justice; interpretation and application of the current class action rule arguably does not achieve this goal. Over the span of five decades, the text of Rule 23 has lengthened by accretion, and the class action jurisprudence interpreting the rule has mutated into an intricate doctrinal swamp that is often inconsistent and difficult to apply.

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<sup>92</sup> See Eduardo C. Robreno, *The Federal Asbestos Product Liability [sic] Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 117–56 (2013).

<sup>93</sup> See *supra* notes 21–23 and accompanying text.

Class action jurisprudence has become so complex that the Wright, Miller & Kane standard treatise on federal practice and procedure now dedicates four entire volumes to class action practice.<sup>94</sup> In addition, two other separate lengthy treatises are devoted to synthesizing class action doctrine.<sup>95</sup> As most class action practitioners appreciate, the thousands of class action opinions and orders have created a body of decisional law in which advocates on either side of the docket may find support for virtually any proposition, however conflicting. Rather than clarifying doctrine, courts have instead engendered additional layers of confusion relating to basic principles that govern class procedure.

The problem with the doctrinal complexity and disarray in class action jurisprudence is that it presents litigators with multiple opportunities to encumber class proceedings with endless motions, briefing, and appeals, with consequent delay. In the same fashion that complicated common law pleading inspired endless rounds of reactive pleading that frustrated litigants' ability to reach the merits of the dispute, so too current class action litigation frustrates Rule 23's purposes. In addition, under the old complicated common law pleading rules, litigants could find themselves thrown out of court for technical pleading mistakes.<sup>96</sup> Similarly, doctrinal disputes present class litigants with multiple opportunities for deflecting or postponing engagement with the merits of the dispute, often provoking dismissal of class actions on technical procedural errors. A few of the problems (and by no means all) enmeshed in the application of Rule 23 are suggested below.

### *1. Definitional Issues*

Current class action jurisprudence presents plaintiffs with arcane traps for the unwary pleader at the very outset of class litigation and concomitantly offers defendants several opportunities for impeding such litigation in advance of addressing the merits. Among the many doctrinal quagmires that can ensnare prospective plaintiffs at the pleading stage are the implicit requirements that the plaintiff set forth an adequate class definition,<sup>97</sup> including

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<sup>94</sup> 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE (3d ed. 2005); 7AA *id.*; 7B *id.*; 7C *id.* (3d ed. 2007).

<sup>95</sup> JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE (10th ed. 2013); WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS (5th ed. 2014).

<sup>96</sup> See *supra* notes 21–23 and accompanying text.

<sup>97</sup> See 7A WRIGHT, MILLER & KANE, *supra* note 94, § 1760.

whether the class members are ascertainable<sup>98</sup> and have standing.<sup>99</sup> Problematically, the principles governing appropriate class definition, standing, and the ascertainability of class members are not consistent across federal courts,<sup>100</sup> which invites gamesmanship and satellite litigation.

In a similar vein, the jurisprudence relating to the application of the explicit Rule 23 requirements is likewise complex, inconsistent, incoherent, ambiguous, vague, and muddled. Hence, assuming a plaintiff capably satisfies the implicit requirements for pleading a class, that plaintiff then carries the burden of satisfying the threshold Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation.<sup>101</sup> In addition, a plaintiff must plead the type of class action the plaintiff seeks the court to certify under the Rule 23(b) categories.<sup>102</sup>

With regard to the standards governing a court's responsibility in evaluating the Rule 23(a) requirements, decisional law itself is likewise unclear. Thus, though the Supreme Court has endorsed the "rigorous analysis" standard for evaluating class certification motions,<sup>103</sup> lower federal courts have diverged in their understanding of what the rigorous analysis test requires.<sup>104</sup> Consequently, class advocates in different jurisdictions may be subject to more stringent or more lax consideration of their efforts to obtain class certification.

Moreover, the principles relating to satisfaction of the Rule 23(a) requirements are a muddle. Indeed, the Supreme Court has confessed that the separate Rule 23(a) requirements of commonality, typicality, and adequacy frequency overlap,<sup>105</sup> giving rise to the question whether there is a need for these separate requirements. Nonetheless, over the span of five decades an

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<sup>98</sup> See *Carrera v. Bayer Corp.*, 727 F.3d 300, 305–06 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–94 (3d Cir. 2012).

<sup>99</sup> See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799–800 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 857 (6th Cir. 2013).

<sup>100</sup> See authorities cited at 7A WRIGHT, MILLER & KANE, *supra* note 94; see also *id.* § 1761 (class representative must be a member of the class, addressing standing issues).

<sup>101</sup> FED. R. CIV. P. 23(a)(1)–(4); see discussion *infra* notes 103–06 and accompanying text.

<sup>102</sup> FED. R. CIV. P. 23(b); see discussion *infra* notes 109–15 and accompanying text.

<sup>103</sup> See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432–33 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 593 n.13 (2007) (Stevens, J., dissenting) (“[R]ule 23 requires ‘rigorous analysis’ to ensure that class certification is appropriate.” (citations omitted)).

<sup>104</sup> See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309, 315–21 (3d Cir. 2008). *But cf.* *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 418 n.8 (6th Cir. 2012) (declining to adopt the Third Circuit's requirement that class certification requirements must be shown by a preponderance of evidence).

<sup>105</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n. 20 (1997).

elaborate, nuanced jurisprudence has developed parsing distinctions among these three threshold requirements, which differ minutely across federal courts and may prove fatal to class certification.<sup>106</sup>

Finally, when plaintiffs seek certification of a Rule 23(b)(3) damage class action, which requires the court to make a finding of predominance of common questions,<sup>107</sup> the Supreme Court and lower federal courts have indicated that the predominance requirement subsumes the Rule 23(a) commonality requirement,<sup>108</sup> basically rendering the threshold commonality requirement nugatory in damage class actions.

## 2. *Class Categories*

Assuming that class proponents are able to satisfy threshold implicit definitional requirements and Rule 23(a) criteria, parties seeking class certification must plead the type of class action they are asking the court to certify. There are four possible class categories set forth in Rule 23(b),<sup>109</sup> and this typography of class categories—that may have made some sense in 1966—no longer makes sense today. Indeed, class action jurisprudence has progressively merged the different categories, resulting in a category creep that has significantly undermined the utility of these different class categories. Furthermore, the jurisprudence surrounding the appropriate circumstances for certifying the different class categories is in significant disarray.

To begin, the Rule 23(b)(1)(A) class category comparatively is rarely pursued and certified, so as to render it a kind of vestigial appendage to the class action rule. One rarely sees a plaintiff seeking certification of a Rule 23(b)(1)(A) class, and in the rare instances where it is pleaded, it is more often than not because of the pleader's confusion concerning the intended purpose of this class category.<sup>110</sup> In addition, courts traditionally have indicated that Rule 23(b)(1)(A) classes were not intended to afford damage or

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<sup>106</sup> See 7A WRIGHT, MILLER & KANE, *supra* note 94, §§ 1763–1771 (application of Rule 23(a) criteria, with citation to authorities).

<sup>107</sup> FED. R. CIV. P. 23(b)(3).

<sup>108</sup> *Amchem*, 521 U.S. at 623–24; AMERICAN LAW OF PRODUCTS LIABILITY 3D § 51:68 (2014) (noting FED. R. CIV. P. 23(b)(3) predominance requirement subsumes or supersedes the FED. R. CIV. P. 23(a)(3) commonality requirement).

<sup>109</sup> FED. R. CIV. P. 23(b)(1)(A), (b)(1)(B), (b)(2), (b)(3).

<sup>110</sup> See 7A WRIGHT, MILLER & KANE, *supra* note 94, §§ 1772–1774 (describing nature and purposes of Rule 23(b)(1)(A) and (B) subcategories).

monetary relief to class members.<sup>111</sup> Nonetheless, over time—and as an illustration of category creep—courts have permitted monetary relief to be awarded and have certified Rule 23(b)(1)(A) classes that include damage relief in the pleadings.<sup>112</sup> Once courts began to certify Rule 23(b)(1)(A) damage classes, arguably there was no longer a need for a separate and confusing (b)(1)(A) class category.

The Supreme Court's decision in *Ortiz v. Fibreboard Corp.*<sup>113</sup> effectively rendered the Rule 23(b)(1)(B) class category largely irrelevant. That decision restrained the use of the limited fund class action to an extremely narrow set of historical antecedents.<sup>114</sup> In addition, the principles governing certification of a Rule 23(b)(1)(B) limited fund class action are so difficult to satisfy<sup>115</sup> that plaintiffs hardly ever seek certification of a (b)(1)(B) class action. Thus, in the intervening fifteen years since the *Ortiz* decision, virtually no courts have certified or approved Rule 23(b)(1)(B) classes.<sup>116</sup>

Moreover, the 2003 amendments to Rule 23 provided discretion to judges to order that notice be given to prospective Rule 23(b)(1) and (b)(2) class members.<sup>117</sup> Because notice can be provided to Rule 23(b)(1) and (b)(2) class members—a due process protection formerly reserved for Rule 23(b)(3) damage class members only—this added provision further eroded conceptual differences among the distinct class categories. Taken together, then, the Rule 23(b)(1)(A) and (b)(1)(B) class categories have essentially outlived their original purposes and currently serve scant useful function in class action practice, other than to provide opportunities for satellite litigation challenging the improper pleading of such Rule 23(b)(1) classes.

While the Rule 23(b)(2) class action for injunctive and declaratory relief would appear to be the simplest class category to comprehend, it nonetheless

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<sup>111</sup> *Id.*; see, e.g., *In re First Am. Corp. ERISA Litig.*, 258 F.R.D. 610 (C.D. Cal. 2009) (class certification under Rule 23(b)(1)(A) not appropriate where participants and beneficiaries of employee pension-benefit plan primarily sought monetary damages under ERISA for alleged breach of fiduciary duties).

<sup>112</sup> See, e.g., *Harris v. Koenig*, 271 F.R.D. 383, 394 (D.D.C. 2010) (class certification appropriate in suit against ERISA plan fiduciaries seeking monetary and injunctive relief since there was “risk of inconsistent or varying adjudication with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class” (internal quotation marks omitted)).

<sup>113</sup> 527 U.S. 815 (1999).

<sup>114</sup> *Id.* at 832–38, 842.

<sup>115</sup> *Id.* at 838–42.

<sup>116</sup> See 7AA WRIGHT, MILLER & KANE, *supra* note 94, § 1774 (citing sparse class certification for Rule 23(b)(1)(B) proposed classes post-*Ortiz* and failure of proposed classes to satisfy *Ortiz* criteria).

<sup>117</sup> FED. R. CIV. P. 23(c)(2)(A).

has become similarly enmeshed in doctrinal controversy. Although the Supreme Court in its *Dukes* decision attempted to clarify the circumstances in which damages might or might not be appropriate in a (b)(2) setting, the Court failed to endorse any of the competing, conflicting lower court standards for cases in which damages are sought in the (b)(2) context.<sup>118</sup> Consequently, the appropriateness of Rule 23(b)(2) damage classes remains an open question, subject to varying interpretations across the federal circuits.<sup>119</sup>

Additionally, as indicated above, the 2003 amendments to Rule 23 provided discretion to judges to order that notice be given to prospective Rule 23(b)(2) class members, effectively rendering the (b)(2) similar to a (b)(3) damage class. In some instances, judges have ordered both notice and an opportunity to opt-out to Rule 23(b)(2) class members where the court has certified a damage class.<sup>120</sup> Arguably, there is no reason for a separate Rule 23(b)(2) class category that merges injunctive and compensatory relief, and also provides for notice and an opt-out right. In such cases, there is little difference between this type of class action and a Rule 23(b)(3) damage class action.

As further proof of class action category creep, evolving Rule 23(b)(2) class action jurisprudence has overlaid a “cohesion” requirement for certification of a Rule 23(b)(2) class.<sup>121</sup> For all practical purposes, the Rule 23(b)(2) cohesion requirement mimics the Rule 23(b)(3) predominance requirement, in that the presence of individual issues among class members will defeat both Rule 23(b)(2) cohesion and Rule 23(b)(3) predominance. Thus, class action doctrine effectively has converged for the Rule 23(b)(2) and Rule 23(b)(3) class categories.

Finally, the jurisprudence applicable to the Rule 23(b)(3) damage class action, which accounts for the major portion of current class litigation, is riddled with conflicting doctrine relating to the rule’s predominance and superiority requirements.<sup>122</sup> Courts are fairly split concerning whether

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<sup>118</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2257–61 (2011).

<sup>119</sup> *E.g.*, *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003); *Jefferson v. Ingersoll Int’l Inc.*, 195 F.3d 894 (7th Cir. 1999); *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001); *Allison v. Citigo Petrol. Corp.*, 151 F.3d 402 (5th Cir. 1998).

<sup>120</sup> *In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 (5th Cir. 2004).

<sup>121</sup> *Gates v. Rohm & Hass Co.*, 655 F.3d 255, 269–70 (3d Cir. 2011) (proposed Rule 23(b)(2) class not sufficiently cohesive to merit certification); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1122 (8th Cir. 2005); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143–46 (3d Cir. 1998).

<sup>122</sup> FED. R. CIV. P. 23(b)(3). *See generally* 7AA WRIGHT, MILLER & KANE, *supra* note 94, §§ 1777–1779 (citing authorities and noting circuit conflicts).

predominance should be evaluated with reference to differences among class members or reflective of a defendant's uniform course of conduct.<sup>123</sup> Consequently, whether a proposed Rule 23(b)(3) class will be certified or not often depends on the particular forum in which relief is sought.<sup>124</sup> The complicated expressions of tests for predominance and superiority likewise encourage forum shopping among class litigants.

### 3. *Due Process Protections*

Class action jurisprudence expresses heightened concern for the due process protections of absent class members,<sup>125</sup> but practical application of Rule 23 often falls short of accomplishing this lofty rhetorical goal. If the structural provisions of the current rule fail to accomplish this goal, then reform to encourage better protection for class members seems laudable.

As indicated above, the 2003 amendments to Rule 23 provided discretion to judges to order notice in the mandatory Rule 23(b)(1) and (b)(2) classes.<sup>126</sup> But the amendments did not require that such class members be provided with an opt-out option to the extent judges decided to provide notice to a 23(b)(1) or (b)(2) class in the first instance. Consequently, the 2003 amendments did not adequately deal with the question of the due process protection of Rule 23(b)(1) and (b)(2) class members, a problem that has remained an open question since the Court's decision in *Philips Petroleum Co. v. Shutts*.<sup>127</sup>

Moreover, judicial application of the Rule 23(a)(4) adequacy requirement, particularly as it relates to assessing the adequacy of proposed class representatives, often fails to ensure the due process protection of absent class members.<sup>128</sup> If it is the case that courts fail to seriously enforce the Rule 23(a)(4) threshold adequacy requirement, it is legitimate to question whether Rule 23(a)(4) serves a purpose other than as mere decoration in Rule 23(a). Similarly, the transposition of the adequacy requirement relating to counsel to

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<sup>123</sup> See *In re Welding Fumes Prods. Liab. Litig.*, 245 F.R.D. 279, 303–08 (N.D. Ohio 2007).

<sup>124</sup> *Id.*

<sup>125</sup> See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–28 (1997).

<sup>126</sup> See FED. R. CIV. P. 23(c)(2)(A).

<sup>127</sup> 472 U.S. 797 (1985); see also *Adams v. Robertson*, 520 U.S. 83 (1997); *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994). See generally Linda S. Mullenix, *Getting to Shutts*, 46 U. KAN. L. REV. 727 (1998) (discussing unresolved *Shutts* issue).

<sup>128</sup> See generally Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687 (2004) (discussing lax consideration and enforcement of adequacy requirements at the front- and back-end of class litigation).



Rule 23(g) has negligible effect on courts' cursory evaluation of proposed counsel.<sup>129</sup>

In theory, the Rule 23(e) requirement that a court conduct a hearing to assess the fairness, adequacy, and reasonableness of proposed settlements ought to provide another layer of due process protection for absent class members.<sup>130</sup> In practice, however, the hydraulic pressure for courts to approve settlements routinely leads courts to rubber stamp such class action settlement agreements.<sup>131</sup> Thus, although the enactment of the Class Action Fairness Act of 2005 (CAFA) was intended to address settlement abuses,<sup>132</sup> there is little evidence that courts have constrained dubious settlement practices. Hence, parties have circumvented CAFA's intent to eliminate notorious coupon settlements by creating surrogate remedies that mimic coupons but are not so designated,<sup>133</sup> and controversial cy pres and reversionary provisions continue to be included in settlement agreements.<sup>134</sup> Moreover, courts continue to

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<sup>129</sup> See Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 697, 699–702 (commenting on skepticism that Rule 23(g) would address problems with ensuring adequacy of class counsel).

<sup>130</sup> FED. R. CIV. P. 23(e).

<sup>131</sup> See Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1883 (2008) (noting that the House Judiciary Committee was suspicious of state courts that would "rubber-stamp settlements that offer little or nothing to the class members" (internal quotation marks omitted)).

<sup>132</sup> See, e.g., *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009) ("Congress enacted CAFA in 2005 to 'assure fair and prompt recoveries for class members with legitimate claims; [to] restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and [to] benefit society by encouraging innovation and lowering consumer prices.' As this description of the Act's purposes makes clear, CAFA was designed primarily to curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts." (alterations in original) (citations omitted)); see also *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404 (6th Cir. 2007) (discussing how CAFA expanded federal diversity subject matter jurisdiction to combat perceived abuses in class litigation and abusive practices by the plaintiffs' class counsel); *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1193 (11th Cir. 2007) (same); *Mississippi ex rel. Hood v. Entergy Miss., Inc.*, No. 3:08cv780 HTW-LRA, 2012 WL 3704935, at \*4 (S.D. Miss. Aug. 25, 2012) (same); *Proffitt v. Abbott Labs.*, No. 2:08-CV-151, 2008 WL 4401367, at \*1–2 (E.D. Tenn. Sept. 23, 2008) (same).

<sup>133</sup> See David L. Aronoff & Saul S. Rostamian, *Navigating the Minefield: Lessons of Figueroa v. Sharper Image and Defense Counsel's Guide to Settling Coupon-Based Class Actions After CAFA*, ANDREWS CLASS ACTION LITIG. REP. (Westlaw), Sept. 18, 2008, at \*1, \*2 (advising defense counsel on settlement terms to deal with CAFA's coupon prohibition); Donna L. Wilson, John W. McGuinness & Veronica D. Gray, *Settling Class Actions: Alternatives to Coupon Settlements After CAFA and Considerations for Corporate Defendants*, ANDREWS CLASS ACTION LITIG. REP. (Westlaw), Feb. 19, 2009, at \*1, \*1–2 (citing numerous surrogate alternatives to coupons).

<sup>134</sup> See, e.g., *Dennis v. Kellogg Co.*, 697 F.3d 858, 861, 865–67 (9th Cir. 2012) (rejecting cy pres portion of proposed class action settlement); see also Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV.

routinely approve outsized and substantial fee awards, often over the protests of objectors.<sup>135</sup>

Lastly, American class action jurisprudence has long resisted addressing due process concerns through a lens of participatory democracy, instead defaulting to the Rule 23's preference for an opt-out procedure as a surrogate mechanism for consent to jurisdiction.<sup>136</sup> The European Union recently has endorsed the opt-in principle as its model regime for collective redress mechanisms.<sup>137</sup> In American class litigation, then, it remains questionable whether Rule 23, as applied, adequately protects the individual autonomy interests of absent class members.

### C. *Balancing Beneficial Effects and Deleterious Consequences*

The question whether Rule 23 needs radical reform should be answered by balancing the rule's beneficial effects against its deleterious consequences. The class action rule allows for aggregation of common claims and empowers individual litigants through collective action. It does contribute to economies of scale in pursuing relief. The class action arguably is an especially powerful tool with regard to seeking relief for small consumer claims. But, on balance, class litigation as it is currently practiced has engendered an array of undesirable consequences that cannot be overlooked. Many of these adverse effects have developed because of the complex and arcane jurisprudence that has accreted to the rule, permitting strategic gamesmanship that undermines

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617, 620 (2010) (discussing the “dramatic turn in modern class actions toward the use of cy pres relief”). *But cf. In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) (upholding cy pres award in class settlement); *In re LivingSocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 12 (D.D.C. 2013) (same); *Minor v. FedEx Office and Print Servs., Inc.*, No. C09-1375 TEH, 2013 WL 503268, at \*4–5 (N.D. Cal. Feb. 8, 2013) (discussing problems with reversionary clauses in settlement agreements); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 186 (W.D.N.Y. 2011) (explaining why reversionary clauses require heightened scrutiny in settlement agreements).

<sup>135</sup> See Robert B. Gerard & Scott A. Johnson, *The Role of the Objector in Class Action Settlements—A Case Study of the General Motors Truck “Side Saddle” Fuel Tank Litigation*, 31 LOY. L.A. L. REV. 409, 411 (1998) (discussing award of \$26 million fee to class attorneys for \$1000 coupon to class members with market value of \$100, over objections); Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean A Lot*, 79 GEO. WASH. L. REV. 428, 434–35 (2011) (noting that the Public Citizen Litigation Group routinely objected to large attorney fee requests, which it invariably took as a sign of an unfair class settlement).

<sup>136</sup> See REDISH, *supra* note 71, at 36; Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573 (2007).

<sup>137</sup> See Commission Recommendation (EU) No. 396/2013 of 11 June 2013, On Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, 2013 O.J. (L 201) 60 (setting forth opt-in principle for claimant parties).

and subverts the rule's utility. Some of these less than desirable consequences of the class action rule are discussed below.

*1. Effectuating or Undermining the Goals of Rule 1?*

As indicated above, class action procedure is lauded because it arguably supports the goals of Rule 1 to achieve the just, speedy, and efficient resolution of large-scale complex litigation.<sup>138</sup> In addition, class action procedure is lauded because, in theory, it exerts a powerful deterrent effect on potential corporate wrongdoers.<sup>139</sup> While there is much to admire in the theory of class litigation, in practice, these lofty aspirations often fall short.

Securities class actions provide an interesting illustration of the sometimes perverse effects of class litigation. In many ways, securities class litigation presents the archetype of the much-praised small-claims action. However, the practical pursuit of securities actions demonstrates how doctrinal exegesis has contributed to gamesmanship and distortions in the class action arena. Arguably, securities class actions fail to effectuate the chief goals of the class action rule: compensation of victims, deterrence of wrongful conduct, and efficient resolution of disputes.

Securities class actions benefit from relatively easier class certification because of the fraud-on-the-market presumption applicable to such actions.<sup>140</sup> Consequently, the virtually routine certification of securities class actions exercises a strong *in terrorem* effect on defendants, often forcing settlement without regard to the merits of the underlying claims.<sup>141</sup> In securities class actions, defendants will enter into questionable settlements even if they are faced with a small chance of devastating losses.<sup>142</sup> This is true for other types of class litigation as well.<sup>143</sup>

The *in terrorem* effect of a certified securities class action is so powerful that virtually no securities class action ever goes to trial. Since 1995, of the 3,988 securities class actions filed, only fourteen went to a trial verdict,

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<sup>138</sup> See *supra* Part II.A.3.

<sup>139</sup> See *supra* Part II.A.2.

<sup>140</sup> See cases cited *supra* note 80.

<sup>141</sup> Brief for Petitioners at 41, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317), 2013 WL 6907610.

<sup>142</sup> See *id.*

<sup>143</sup> See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

representing one-third of one percent of the cases. In 2012, no securities class action went to a trial verdict.<sup>144</sup>

The lopsided risks in the securities class arena, then, have inspired a nuclear proliferation of such class actions. Industry observers indicate that in any five-year period, there is a ten percent chance that any publically-held corporation will be sued in a Rule 10(b)(5) class action.<sup>145</sup> Ironically, advocates of the fraud-on-the-market presumption believed that it would curtail securities fraud class actions, but this has proven wrong.<sup>146</sup> In the period between 1988–1991, such lawsuits tripled.<sup>147</sup> Moreover, since enactment of the Private Securities Litigation Reform Act in 1995,<sup>148</sup> which was intended to rein in abusive securities class litigation, the number of securities class actions has increased through 2012.<sup>149</sup>

Securities class litigation, arguably, has failed to effectuate the rationale to compensate victims of wrongdoing. Evidence suggests that securities fraud settlements poorly compensate alleged victims.<sup>150</sup> Thus, in the period between 1996–2010, the median securities settlements returned only 2.8% of plaintiff losses; in 2012, the percentage was even lower, at 1.8%.<sup>151</sup> Moreover, these compensation values represent gross returns before accounting for huge transaction costs, such as attorney fees, litigation expenses, officers and directors insurance, business interruption costs, as well as the adverse publicity and stigma that attaches to such litigation.<sup>152</sup>

Moreover, securities class litigation arguably fails to deter culpable parties. Thus, the class deterrent effect is muted because the corporation and its

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<sup>144</sup> Brief for Petitioners, *supra* note 141, at 41.

<sup>145</sup> *See id.* at 40.

<sup>146</sup> *Id.*; *see also* Cecilia A. Glass, Note, *Sword or Shield? Setting Limits on SLUSA's Ever-Growing Reach*, 63 DUKE L.J. 1337 (2014) (documenting increase in securities class actions in the wake of enactment of the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998).

<sup>147</sup> Brief for Petitioners, *supra* note 141, at 40.

<sup>148</sup> Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of titles 15 and 18 of the United States Code).

<sup>149</sup> Brief for Petitioners, *supra* note 141, at 40–41.

<sup>150</sup> *Id.* at 41–42.

<sup>151</sup> *Id.* at 43.

<sup>152</sup> *Id.* at 42–43 (“[T]he costs of class actions—in attorney fees and other expenses—constitutes a deadweight loss, simply rearranging shareholders own money, minus a cut for the lawyers. And that is a prime, juicy cut. Plaintiffs’ attorney fees amount to somewhere between 23% and 32% of aggregated settlement amounts; defense fees, generally paid regardless of outcome, rival that amount overall.” (citations omitted) (internal quotation marks omitted)).

insurers, rather than the corporation's agents, pay settlements.<sup>153</sup> It is extremely rare for executives or directors to personally pay for any wrongdoing; culpable individuals pay less than one-half of one percent of settlements.<sup>154</sup> Instead, insurers pay approximately sixty-eight percent of settlement judgments, and companies pay thirty-one percent.<sup>155</sup> In the securities class action arena, then, investors themselves wind up paying judgments.<sup>156</sup> It has been observed that this creates a perverse system where the innocent pay settlements and the guilty do not, and thus constitutes an arrangement that undermines deterrence.<sup>157</sup>

Finally, securities class litigation offers a counterexample of the efficiency rationale undergirding class litigation. Hence, commentators have noted that securities class actions consume excessive judicial resources, observing that sixty to seventy percent of the cases that settle require more than three years to resolve.<sup>158</sup> In addition, twenty percent of securities class actions take more than five years to resolve.<sup>159</sup>

## 2. *Invitation to Unethical Conduct, Principal–Agency Problems, and Champerty and Stirring Up Litigation*

Briefly, another negative consequence of modern class action practice is that attorney fee incentives are so substantial as to invite unethical professional conduct or old-fashioned champerty. Although class action litigation has inspired a considerable literature relating to the principal–agency problems that adhere in class litigation,<sup>160</sup> in actual practice there are few constraints on

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<sup>153</sup> *Id.* at 42 (“[T]he costs of securities class actions—both settlement payments and the litigation expenses of both sides—fall largely on the defendant corporation, which means that ‘its shareholders ultimately bear these costs indirectly and often inequitably.’” (alteration in original) (quoting John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1536 (2006))).

<sup>154</sup> *Id.* (“[E]xpansion of private class actions ‘leads to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers.’” (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 262 (1988) (White, J., dissenting))).

<sup>155</sup> *Id.* at 44.

<sup>156</sup> *Id.* at 42 (noting that “most of the plaintiff class will lose more as holders than they will gain as buyers” and that “settlements are even worse for smaller *undiversified* shareholders,” who have to share the cost of litigation, with no benefit (quoting Richard A. Booth, *Class Conflict in Securities Fraud Litigation*, 14 U. PA. J. BUS. L. 701, 701 (2012))).

<sup>157</sup> *Id.* at 43–44.

<sup>158</sup> *Id.* at 44–45 (characterizing securities class actions as “gluttonous consumers of judicial resources”).

<sup>159</sup> *Id.* at 45.

<sup>160</sup> See, e.g., 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*

unethical conduct. Because the primary checks on unethical practice are centered in adequacy requirements, lax judicial oversight often fails to detect, restrain, or otherwise chastise attorney misconduct at the expense of absent class members. In addition, objectors to dubious class settlements have proven to be relatively weak protectors of class interests, as most courts summarily dismiss objections to settlements.<sup>161</sup>

In addition, the substantial fee incentives attached to class settlements have contributed to the stirring up of class litigation; thus, no sooner does any product defect or consumer issue emerge than attorneys file multiple, repetitive class actions across the country. The pervasiveness of modern social media outlets contributes to widespread dissemination of information about filed class litigation, with concomitant client solicitation urging joinder in such actions. In the romantic narrative of class litigation, this is positively characterized as the exercise of private attorneys general vindicating the rights of injured claimants; in the counternarrative, such conduct represents private “bounty hunters” engaged in entrepreneurial litigation.<sup>162</sup> Similar to problems with lax judicial oversight of unethical attorney conduct in the class settlement arena, courts largely ignore claims of champerty or stirring up of class litigation.<sup>163</sup>

### 3. *Public Confidence in Judicial System*

In the end, those who would consider possible reform of the American class action rule might usefully question whether such current class action practice instills public confidence in the judicial system. While there is much

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*the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 480–92 (describing costs and benefits of aggregate litigation and its potential for distortions); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1885–87 (2006).

<sup>161</sup> See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 105–06 (2007) (describing settlement objection as a “futile exercise” since “history shows that courts consistently approve proposed settlements over the objections of class members”).

<sup>162</sup> Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77 (referring to class action attorneys as private “bounty hunters”); see also *supra* note 76 and accompanying text.

<sup>163</sup> See *Green v. Plantation of La., LLC*, No. 2:10-cv-0364, 2010 WL 5256354, at \*5 (W.D. La. Nov. 24, 2010) (noting duty of court to refrain from stirring up unwarranted litigation); Geoffrey P. Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent*, 22 REV. LITIG. 557, 560–61 (2003); Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 467 n.62 (2012) (noting that champerty constraints on class actions have fallen out of favor with courts).

to admire in the concept of the class action rule, it is debatable whether actual class action practice contributes to public confidence in the legal system. We do not know. The answer to this question may depend on the extent to which any person places credence and has faith in the romantic class action narrative or instead embraces the counternarrative of the darker side of class litigation.

Class action litigation is widely reported throughout modern media outlets, including huge class awards and attorneys' fees.<sup>164</sup> Consequently, it seems likely that there is a fair measure of public awareness about this form of litigation. It is difficult to assess, however, whether citizens perceive class litigation as an effective vehicle for vindicating individual claims, or whether class litigation has instead bred some degree of cynicism about the legal profession. Moreover, there is a dearth of commentary regarding claimant satisfaction with the results of class litigation or satisfaction about the attorneys who engage in this practice. If it is the case that class litigation has become a focal point for cynicism about the profession and the judicial system, then reform to counteract the sources of this cynicism seem in order.

### III. ENVISIONING A MODIFIED CLASS ACTION RULE

The Advisory Committee on Civil Rules is again considering amending Rule 23, a comprehensive project that it undertook in 1991 but abandoned by 1997.<sup>165</sup> The Committee then amended the rule again in 2003 to add provisions relating to the appointment of class counsel and attorneys' fees<sup>166</sup> and other minor revisions.<sup>167</sup> The Committee is once more considering amending the rule to add a provision relating to settlement classes, an amendment that was withdrawn in the late 1990s after considerable debate within the practicing bar and academic community.<sup>168</sup>

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<sup>164</sup> See, e.g., Jessica Silver-Greenberg & Susanne Craig, *Bank of America Settles Suit Over Merrill for \$2.43 Billion*, N.Y. TIMES, Sept. 29, 2012, at A1, available at <http://dealbook.nytimes.com/2012/09/28/bank-of-america-to-pay-2-43-billion-to-settle-class-action-over-merrill-deal/>; *Class Action*, supra note 17; Sharon Terlep, *NCAA Settles Class-Action Lawsuit Over Head Injuries*, WALL ST. J. (July 29, 2014, 10:41 a.m. ET), <http://online.wsj.com/articles/ncaa-settles-class-action-lawsuit-over-head-injuries-1406641717>.

<sup>165</sup> See 1-4 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997).

<sup>166</sup> FED. R. CIV. P. 23(g), (h).

<sup>167</sup> See, e.g., FED. R. CIV. P. 23(e)(2)(A) (permitting discretionary notice to Rule 23(b)(1) and (b)(2) classes); FED. R. CIV. P. 23(e) (requiring a fairness hearing for judicial evaluation of proposed settlements).

<sup>168</sup> See Proposed Rules, 167 F.R.D. 523, 537 (1996) (presenting a proposed addition of new Rule 23(b)(4)); Richard Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637, 642-44 (2013) (noting withdrawal of the proposed Rule 23(b)(4) settlement class and massive negative reaction to the proposed rule).

This Article instead suggests a more radical revision of the class action rule because the rule arguably no longer serves its stated purposes, has proved inefficient and unfair, has inspired entrepreneurial litigation, and has engendered an arcane, complex jurisprudence that contributes to gamesmanship and traps for the unwary. In addition, a class action practice that is characterized by substantial attorney fee awards and slight returns to class members may have engendered cynicism about the legal system.

In 1991, at the outset of the Advisory Committee's review of Rule 23, the Committee initially considered revamping the entire rule.<sup>169</sup> That approach was rejected after considerable resistance from the practicing bar. This Article invites the Advisory Committee to consider a wholesale rethinking of Rule 23 in light of what we know about the actual practice of class litigation. These proposed principles are intended to simplify the rule, return it to original purposes, reduce doctrinal confusions, mitigate abusive practices, eliminate gamesmanship and traps for the unwary litigator, and instill faith in the legal system.

The following sets forth a set of guiding principles intended as a framework for considering a radical revamping of the class action rule and practice. Clearly, some of these concepts present challenges for codification in a rule; some may be unsuitable for rule reform because of constitutional limitations imposed by the Rules Enabling Act.<sup>170</sup> Instead, those suggestions might be more appropriate for statutory consideration.

A. *“One Class Action”—Elimination of Class Categories*

As suggested above,<sup>171</sup> the current Rule 23(b) class categories are either moribund artifacts of the 1966 amendments (the (b)(1) class categories), or doctrinally problematic (the (b)(2) and (b)(3) categories). In addition, the separate class categories have experienced substantial category creep or erosion, rendering class distinctions relatively meaningless. Thus, the introduction of discretionary notice for mandatory classes has essentially merged all class categories, while simultaneously retaining the conundrum that only (b)(3) class members are entitled to opt-out. In essence, the Rule 23(b) categories represent nothing so much as mindless formalism that affords

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<sup>169</sup> See Marcus, *supra* note 168, at 642–44 (discussing the abandonment of wholesale revision of Rule 23 in the 1990s).

<sup>170</sup> 28 U.S.C. §§ 2071–2072 (2012).

<sup>171</sup> See *supra* notes 109–24.



litigants opportunities for gamesmanship, contributing to unnecessary expense and delay.

The current requirement that proposed class actions be pleaded under one or more of the Rule 23(b) categories brings to mind the old common law requirement that petitioners plead their causes through appropriate forms of action, based on appropriate writs. The complicated writ system, which served to frustrate rather than enhance justice, was famously abandoned by eighteenth century legal reformers. The centerpiece of the eighteenth century reforms was to abolish all preexisting forms of action and the complicated writ system.<sup>172</sup> In one fell swoop the reforms ended decades of legal obfuscation, a principle that was then embedded in the Field Code<sup>173</sup> and the Federal Rules of Civil Procedure.<sup>174</sup>

The class action rule might be revised to reflect the reality that, in essence, we have one form of class action, and it should simply be called “a class action.” The Rule 23(b) categories should be eliminated entirely as cumbersome artifacts of the 1966 amendment process. However rule reformers might have intended the Rule 23(b) categories to be implemented, the separate class categories have outlived their functional usefulness in the twenty-first century. Instead, the class categories merely serve as formalistic impediments to resolving aggregate litigation disputes.

Ironically, rather than embracing the concept that the class categories essentially have merged, the Advisory Committee on Civil Rules is resuscitating the proposal to add a new class category for settlement classes.<sup>175</sup> The proposal to add a new settlement class category was scuttled in the late 1990s<sup>176</sup> but may gain traction in this new round of rule reform. The proposal

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<sup>172</sup> See *supra* notes 21–23 and accompanying text.

<sup>173</sup> See Act of Apr. 12, 1848, ch. 379, § 62, 1848 N.Y. Laws 497, 510 (“The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.”). These provisions of New York law are commonly referred in the name of their drafter and proponent David Dudley Field. See generally Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 311 LAW & HIST. REV. 311 (1988) (discussing Field’s life and reviewing the development and various provisions of the Field Code).

<sup>174</sup> See FED. R. CIV. P. 2 (1938) (“There shall be one form of action to be known as ‘civil action.’”) (amended 2007).

<sup>175</sup> See sources cited *supra* note 168.

<sup>176</sup> See Marcus, *supra* note 168.

to add a settlement class provision reflects the lamentable trend to modify rules by gradual accretion, rather than to contemplate meaningful wholesale reform.

*B. Provide Solely for Injunctive Relief Actions and Eliminate Damage Class Actions/Negative-Value Suits*

Arguably—and controversially—the major driver of class action abuse since the 1966 amendments has centered on the Rule 23(b)(3) damage class action. The damage class action was the invention of the 1966 rulemakers; there were virtually no damage class actions prior to the 1966 revision of the Rule, which added the (b)(3) provision.<sup>177</sup> With the advent of the mass tort litigation crisis in the 1980s and 1990s, followed by the wave of consumer class actions in the twenty-first century, damage class actions now dominate the litigation landscape.<sup>178</sup>

The ascendancy of the damage class action has been accompanied by the panoply of problems that bring class litigation into disrepute. The damage class action, carrying with it the prospect of substantial fee awards, has incentivized class litigation as big business. This, in turn, has engendered a litany of abusive class behavior that has been the object of much of the criticism of class litigation: entrepreneurial lawyering (Redish’s “bounty hunters”) stirring up class litigation, strike suits of dubious merit, self-serving counsel selling out class members (principal–agency problems), problematic settlements green-lighted by accommodating judicial officers (inadequate due process protections, reversionary provisions, coupon settlements, cy pres awards), and insufficient or negligible compensation to class claimants. Perhaps the best evidence that the damage class action has been transformed into a lucrative business enterprise is the advent of third-party financing mechanisms to

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<sup>177</sup> See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21, at 243 (2004) (“Since 1966, when Federal Rule of Civil Procedure 23 was amended to add the damages class action under Rule 23(b)(3), class action litigation has greatly expanded.” (footnote omitted)); Amendments to Rules of Civil Procedure—Admiralty and Maritime—Criminal Procedure with Report of the Judicial Conference, 39 F.R.D. 69, 103 (1966) (discussing creation of Rule 23(b)(3) category).

<sup>178</sup> Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 614–15 (2012) (“As one group of researchers concluded, ‘[t]he data tell us that *the world of class actions . . . was primarily a world of Rule 23(b)(3) damage class actions*, not the world of civil rights and other social policy reform litigation that . . . the 1966 rule drafters had in mind.’ (alterations in original) (quoting DEBORAH R. HENSLER, NICHOLAS M. PACE, BONNIE DOMBEY-MOORE, ELIZABETH GIDDENS, JENNIFER GROSS & ERIC MOLLER, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 52–53 (2000))).

subsidize such litigation,<sup>179</sup> with the prospect of substantial returns to litigation investors.

Many of the class action harms that have developed recently would be avoided with elimination of the damage class action from the rule. This is not far-fetched: the damage class action did not exist before 1966. Lacking the fee incentives provided by the damage class action, much of the current entrepreneurial class litigation that now infuses the legal landscape would disappear. Thus, a reformed class action practice might return the class action to its primary function in the 1960s: the injunctive relief class only. Reformers are invited to envision a legal landscape that dispenses with the damage class action but retains the injunctive relief class.

Advocates of the damage class action imbue it with almost religious-like qualities, as the major vehicle for seeking redress of small consumer claims that might otherwise go unrelieved. But if small-claims consumer actions, in reality, serve a slight deterrent function and provide scant compensatory redress to class members, it is fair to question the continued legitimacy of a class action category that exists primarily to remunerate (and reward) entrepreneurial attorneys with outsized fee awards.

The corporate behavior that gives rise to small-claim harms ought to be dealt with through regulatory action, including penalties, fines, product recalls or withdrawals, or criminal sanctions. The plaintiffs' default argument against recourse to regulatory control contends that the United States has weak regulatory regimes. But the answer to this assertion is not to promote a class action system with its own egregious problems but instead to advocate and labor for more robust regulatory oversight and enforcement systems.

### *C. Provide Notice and Opt-In Principle*

The current Rule 23 and accompanying class action jurisprudence provide for a mishmash of notice provisions, some obligatory and some discretionary, depending on class category.<sup>180</sup> In addition, notwithstanding the fact that notice may be ordered in (b)(1) and (b)(2) classes, the damage class is the only class category that requires that class members be offered the opportunity to opt-out

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<sup>179</sup> See Baker, *supra* note 64, at 232, 234, 238–39; Burch, *supra* note 64, at 1275–78, Hensler, *supra* note 64, at 320–23; Lysaught & Hazelgrove, *supra* note 64; Shepherd *supra* note 64.

<sup>180</sup> See *supra* notes 117, 120 and accompanying text.

or exit the class.<sup>181</sup> Further muddying this terrain, at least some adventuresome judges have ordered that (b)(2) class claimants be afforded an opt-out right.<sup>182</sup> These doctrinal inconsistencies have engendered the so-called *Shutts* due process question,<sup>183</sup> which the Supreme Court has yet to resolve.

A revised class action rule could resolve and eliminate these doctrinal inconsistencies by requiring notice to claimants in any class action. In addition, in order to anchor class litigation in principles of participatory democracy and litigant autonomy, a revised class action rule would be based on the opt-in principle, rather than the current opt-out regime.<sup>184</sup> Class jurisprudence would no longer have to rely on the artifice of implied consent doctrine; instead, class members would affirm their desire to join class litigation by assenting to the representation.<sup>185</sup>

#### *D. Preliminary Merits Review*

A great deal of time, energy, and resources currently are devoted to the class certification process at the outset of class litigation. As indicated above,<sup>186</sup> class certification proceedings are governed by an elaborate jurisprudence relating to implicit class requirements and Rule 23(a) threshold prerequisites. The entire class certification process has become the major, dysfunctional battlefield for protracted conflict among parties that has little to do with seeking justice on the merits of the underlying dispute. The class certification process, then, ought to be jettisoned in favor of a procedure that instead ensures that plausibly meritorious claims are adjudicated on an aggregate basis.

The implicit requirement for an adequate class definition has become a pleading minefield for plaintiffs, while the ascertainability requirement has inspired a peculiar game of hide-and-peek, which can now frustrate class

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<sup>181</sup> FED. R. CIV. P. 23(c)(2)(B).

<sup>182</sup> See *In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 (5th Cir. 2004).

<sup>183</sup> See *supra* notes 126–37 and accompanying text.

<sup>184</sup> See REDISH, *supra* note 71, at 36–38, 131; Commission Recommendation (EU) No. 396/2013 of 11 June 2013, *supra* note 137.

<sup>185</sup> Suggestions to amend class action procedure to revert to an opt-in principle have been repeatedly advanced and rejected in the past. See *Kern v. Siemens Corp.*, 393 F.3d 120, 124–29 (2d Cir. 2004) (holding opt-in rule not permissible as a matter of class action jurisprudence nor in court’s inherent equitable powers); see also Edward H. Cooper, *Federal Class Action Reform in the United States: Past and Future and Where Next?*, 69 DEF. COUNS. J. 432, 439–40 (2002) (noting that several proposals have been made to the Advisory Committee to consider opt-in and that none have passed).

<sup>186</sup> See cases cited *supra* notes 103–04.

certification at the pleading stage.<sup>187</sup> The Rule 23(a) requirements fare no better. The Rule 23(a) numerosity requirement has become a quaint appendage in light of the size of most contemporary classes, accompanied by arcane jurisprudential eddies focusing on such oddities as geographic dispersion of the class.<sup>188</sup> Rule 23(a)(2) commonality has been substantially written out of the rule in (b)(3) class actions where predominance subsumes the requirement;<sup>189</sup> in (b)(1) and (b)(2) classes, the cohesion doctrine reintroduces the predominance principle into the commonality requirement. Moreover, courts disagree on the quality and nature of commonality sufficient to satisfy the requirement, opening substantial opportunities for legal contention.<sup>190</sup>

Similarly, class action jurisprudence has long struggled with the Rule 23(a)(3) typicality requirement, often defining the concept in a circular manner or indicating overlap with commonality and adequacy. And, as indicated above,<sup>191</sup> courts generally pay lip service to the Rule 23(a)(4) adequacy requirement, rendering this prerequisite a mere decoration on the rule. Finally, the requirement that class proponents request certification based on one or more Rule 23(b) class categories is bedeviled by the arcane jurisprudence that now attaches to these class categories, as indicated above.<sup>192</sup>

The entire class certification process, then, frequently resembles a complex jousting exercise in which results depend more often than not on the forum in which proponents seek class certification. In addition to the waste and inefficiencies engendered by the class certification process, one's sense of justice ought to be offended by inconsistent certification orders that vary by venue. Thus, similar to the suggestion that the Rule 23(b) categories be eliminated, the Rule 23(a) standards likewise ought to be excised from the rule. These prerequisites—constituting an incoherent and conflicting body of

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<sup>187</sup> See *supra* notes 97–100 and accompanying text.

<sup>188</sup> See, e.g., *Mays v. Tenn. Valley Auth.*, 274 F.R.D. 614, 619–20 (E.D. Tenn. 2011); *Kempner v. Town of Greenwich*, 249 F.R.D. 15, 18–19 (D. Conn. 2008); *Hewlett v. Premier Salons Int'l, Inc.*, 185 F.R.D. 211, 215–16 (D. Md. 1997).

<sup>189</sup> See *supra* notes 107–08 and accompanying text.

<sup>190</sup> See ROBERT H. KLONOFF, EDWARD K.M. BILICH & SUZETTE M. MALVEAUX, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION* 83–96 (2d ed. 2006) (comparing “‘Easy’ Commonality” to “Commonality With Teeth” and noting that “[m]ost cases treat commonality as a mere formality, but occasionally courts apply the requirement rigorously”). Compare *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372 (2d Cir. 1997) (an example of “easy commonality”), with *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999) (an example of “commonality with teeth”).

<sup>191</sup> See *supra* notes 128–29 and accompanying text.

<sup>192</sup> See *supra* Part II.B.

principles—ought to be jettisoned in favor of a meaningful threshold judicial inquiry into the need for collective redress of grievances.

Proposed class litigation ought not to be bogged down at the outset with intricate, arcane threshold inquiries that now require expensive precertification discovery, including expert witness discovery and *Daubert* evidentiary hearings.<sup>193</sup> A threshold pleading of minimal commonality (not predominance) ought to be accorded presumptive validity and be all that is needed to plead an action.<sup>194</sup> Furthermore, class proceedings ought to continue until validly challenged by parties opposing the class.<sup>195</sup> To counterbalance this easy presumption, defendants ought to be afforded an early, preliminary opportunity to challenge the underlying theories and merits of the proposed action.

A major problem with current class action practice is the reluctance of courts to consider and rule on threshold dispositive motions prior to evaluating a class certification motion, even though the Federal Judicial Center has indicated that these motions should be addressed at an early stage in the case.<sup>196</sup> The legal arena would be improved by the recognition that not all proposed class actions are meritorious and that at least some are advanced as dubious, nuisance strike-suits.

A number of commentators, then, have suggested that courts should be empowered to make a preliminary determination of the merits of proposed

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<sup>193</sup> See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553–54 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322–23 (3d Cir. 2008).

<sup>194</sup> See John Beisner, Karl Thompson & Allison Orr Larsen, *Canadian Class Action Law: A Flawed Model for European Class Actions*, ENGAGE, June 2008, at 123, 123–25 (2008) (discussing history of Canadian class action rules and more liberal approach to class certification, and the lax commonality standards and lack of predominance requirement as in the United States).

<sup>195</sup> See S. Stuart Clark, Ross McInnes, Colin Loveday, Andrew Morrison & Greg Williams, *Is the Class Action ‘Centre of Gravity’ Moving Away from the United States?*, 80 DEF. COUNS. J. 420, 421–22 (2013) (Australian class action proceeds until challenged by defense). See generally Stuart Clark & Christina Harris, *The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?*, 32 MELB. U. L. REV. 775, 779–82 (2008) (describing Australian class action legislation and procedures).

<sup>196</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 177, § 21.11, at 245–46; see also Davidson v. Worldwide Asset Purchasing, LLC, 914 F. Supp. 2d 918, 922 (N.D. Ill. 2012) (endorsing position that dispositive motions should be decided prior to class certification). See generally Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 AKRON L. REV. 1197 (2010) (discussing the need for courts to rule on precertification summary judgment motions); Linda S. Mullenix, *Standing and Other Dispositive Motions After Amchem and Ortiz: The Problem of “Logically Antecedent” Inquiries*, 2004 MICH. ST. L. REV. 703 (arguing courts should determine precertification dispositive motions before considering certification motions).

class litigation at the certification stage.<sup>197</sup> A possible revision to class action proceedings would eliminate the current Rule 23(a) and (b) inquiries and instead focus a court's attention on preliminary inquiry into the merits of a proposed class litigation, based on Rule 12(b)(6) or summary judgment-like motions. In this fashion courts could permit merits-based contentions to be advanced and evaluated at the outset of proposed aggregate litigation in order to avert the inefficiencies generated by permitting non-meritorious or dubious actions to proceed.

### *E. Financing, Attorney Fees, and Loser-Pay Rule*

In 2003, the Advisory Committee added a Rule 23(h) provision relating to attorneys' fees;<sup>198</sup> the rule does not prescribe any particular fee award methodology, but the Advisory Committee Note suggests possible approaches to fee awards.<sup>199</sup> The adoption of Rule 23(h) was intended to codify existing fee award practices, embracing both the lodestar and percentage of the benefit fund methodologies.<sup>200</sup> The rule provision relating to prescriptions concerning attorney fee awards raises Rules Enabling Act problems to the extent that fee setting implicates substantive law. Thus, any reconsideration of attorney fee awards might appropriately be addressed by legislative action rather than rule reform.

A good deal of criticism of current class action practice centers on the often controversial outsized fee awards that may bear little relationship to the time and effort expended by counsel, the nature of the underlying dispute, or the compensatory awards to class claimants. Needless to say, class action advocates are vocal defenders of the current system of fee awards.<sup>201</sup>

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<sup>197</sup> See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002) (supporting preliminary merits inquiry); Geoffrey C. Hazard, Jr., *Class Certification Based on the Merits of the Claims*, 69 TENN. L. REV. 1 (2001) (suggesting preliminary merits review during class certification); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324 (2011) (same). *But cf.* Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323 (2010) (arguing against judicial creation of merits review standards at class certification for securities cases).

<sup>198</sup> FED. R. CIV. P. 23(h).

<sup>199</sup> FED. R. CIV. P. 23(h) advisory committee's note (2003) ("The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.").

<sup>200</sup> *Id.*

<sup>201</sup> See, e.g., Fitzpatrick, *supra* note 45; Patricia M. Hynes, *Plaintiffs' Class Action Attorneys Earn What They Get*, 2 J. INST. FOR STUDY LEGAL ETHICS 243, 243-44 (1999); Andrew D. Thibedeau, *Vindicating the Public Interest?: The Public Law Implications of Attorneys' Fee Restrictions in Class Actions*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 231 (2008).

Nonetheless, attorney fee awards remain a lightning rod for cynicism about class litigation and are the object of substantial disapproval abroad.<sup>202</sup> In addition, as suggested above,<sup>203</sup> the prospect of sizeable attorney fee awards undoubtedly is the major driver of the exponential growth of Rule 23(b)(3) damage class actions in the twenty-first century, inspiring not only entrepreneurial litigation but also third-party financing schemes.

Reform of the attorney fee system and litigation financing would serve to filter out exploitative, non-meritorious class litigation. At the extreme of developing practices, third-party financing ought to be barred because it incentivizes class litigation by nonparty actors who are prompted by a profit motive—and not necessarily the best interests of class members. In addition, third-party financing has introduced challenging ethical issues into class litigation, not the least of which is nonparty control over litigation.<sup>204</sup>

Instead, based on various models abroad, it might be beneficial to publicly finance class litigation.<sup>205</sup> This is especially compelling if class litigation were returned to its injunctive roots: that is, institutional reform litigation for public purposes. There are different approaches to public finance models, which include screening committees that assess applications and determine whether to apply public funds towards subsidizing class litigation.

Revenue to finance class litigation might be generated by a minimal income tax check-off, similar to the current financing of election campaigns. In this manner, public-spirited individuals concerned about access to justice through class action litigation could support this conviction, while those opposing class litigation could decline. Furthermore, class action attorneys' fees might be based on legislatively determined fee schedules, to enable counsel to know in advance the reasonable range of fee awards for successful

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<sup>202</sup> See, e.g., Roald Nashi, Note, *Italy's Class Action Experiment*, 43 CORNELL INT'L L.J. 147, 152, 160 (2010) (noting European resistance to American contingency fee arrangements for class action financing); Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 141, 150, 153, 179 (2010) (noting European criticism of American class action procedure with meager returns to class members but large fee awards to class counsel).

<sup>203</sup> See *supra* notes 76–78 and accompanying text.

<sup>204</sup> See Baker, *supra* note 64; James M. Fischer, *Litigation Financing: A Real or Phantom Menace to Lawyer Professional Responsibility?*, 27 GEO. J. LEGAL ETHICS 191 (2014) (exploring ethical issues raised by third-party financing); Joshua G. Richey, Comment, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 EMORY L.J. 489 (2013) (exploring the ethical problems raised by third-party financing with proposals for reform).

<sup>205</sup> See Janet Walker, *Who's Afraid of U.S.-Style Class Actions?*, 18 SW. J. INT'L L. 509, 537–46 (2012) (describing various public financing mechanisms in Canada, the U.K., and European Union countries).



prosecution of a class action. Finally, a legislatively-enacted loser-pay rule would serve to advance the adjudication of meritorious aggregate grievances, while tempering enthusiasm for marginal class action strike-suits.

#### *F. Appointment of Class Counsel*

Rule 23(g), added in 2003, sets forth standards for judicial appointment of class counsel.<sup>206</sup> Similar to Rule 23(h), the class counsel provision was intended to codify existing principles relating to appointment of class counsel and adequacy of class counsel. In large-scale, complex cases, this has sometimes led to judicial review of multiple petitions for appointment as class counsel.<sup>207</sup>

In the twenty-first century, class action litigation has become a highly specialized practice, pursued by both experienced counsel as well as less-experienced novices lured by the siren song of class litigation. In the class action arena, both clients and the judicial system are best served when committed, experienced class litigators with sufficient resources pursue such advocacy.

To this end, it might be useful to create a national roster of veteran class litigators who are pre-qualified as class action specialists proficient to serve in the capacity of class counsel. Many states now certify attorneys in specialized practice areas;<sup>208</sup> class litigation might be considerably improved by prescreening mechanisms that assist courts and litigants with certified, competent counsel to vigorously represent the interests of class members.

#### *G. Settlement and Fairness Hearings*

Rule 23(e) provides for the current practice of a fairness hearing when parties have reached a negotiated settlement.<sup>209</sup> This is a good provision, and there seems little compelling need to create a new, separate settlement class provision to further complicate the existing rule. If the class action rule were

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<sup>206</sup> FED. R. CIV. P. 23(g).

<sup>207</sup> See *Martin v. Blessing*, 134 S. Ct. 402, 403 (2013) (Alito, J., respecting the denial of the petition for a writ of certiorari) (commenting on a district judge's practice in appointing counsel under Rule 23(g) to ensure diversity of representation).

<sup>208</sup> See, e.g., *Attorney Specialization Program*, OHIO STATE BAR ASS'N, <https://www.ohiobar.org/ForLawyers/Certification/Attorney/Pages/StaticPage-57.aspx> (last visited Dec. 14, 2014); *Connect with a Board Certified Texas Attorney*, TEX. BOARD LEGAL SPECIALIZATION, <http://www.tbls.org/Default.aspx> (last visited Dec. 14, 2014); *Legal Specialization*, ST. BAR CAL., <http://ls.calbar.ca.gov/> (last visited Dec. 14, 2014).

<sup>209</sup> FED. R. CIV. P. 23(e).

revised to eliminate the Rule 23(a) and (b) requirements, then back-end scrutiny of class certification standards would be obviated. There would be no need to create a settlement class category subject to different standards than litigation classes.

Instead, class action practice would be improved by more robust judicial scrutiny of settlement agreements, rather than pro forma, rubber-stamping reviews that simply endorse proffers by the settling parties. Institutionalizing a role for professional objectors or independent class guardians might assist in the process of objectively evaluating the fairness, adequacy, and reasonableness of proposed settlements. Obviously, the need for more meaningful judicial scrutiny of class settlements cannot be mandated by rule or statute but must be generated by legal culture.

Moreover, current objections to class action settlements often center on inadequate compensation to class members, inadequate representation, reversionary and cy pres provisions, and dubious coupon-like remedies (among other criticisms). Many, if not most, of these points of contention are generated as a consequence of the settlement of damage class actions, but these problems would disappear if damage class actions were no longer permitted under the rule.

#### CONCLUSION

Consideration of class action litigation has largely degenerated into a partisan, ideological debate, with neither side listening to the other. Advocates for class action litigation, on the one hand, persist in a romantic narrative, refusing to give credence to suggestions of class action abuse. In addition, class action proponents resist any change to class action practice or jurisprudence that, in their view, would deny access to justice. Critics of class action litigation, on the other hand, refuse to acknowledge the need for or benefits of some class litigation, instead broadly viewing class litigation as an unfair economic drag on the country's welfare. Critics, then, applaud reform efforts that would constrain class litigation. Thus, the debate over class litigation reform often is reduced to hyperbolic, rhetorical posturing.

The class action rule has been amended several times, and the Advisory Committee on Civil Rules has returned to a reconsideration of Rule 23. The Advisory Committee largely fashions rule reform through incremental

accretion to the existing rules; boldness is not the signature quality of the Committee.<sup>210</sup> Therefore, consistent with past practice, it is likely that the Committee will propose marginal changes to Rule 23 that will in turn inspire new doctrinal confusion, gamesmanship, and conflicting interpretation. And, inevitably, any proposed changes to Rule 23 are likely to encounter heated partisan resistance from both sides of the litigating docket.

What the Advisory Committee will not do is to consider any radical reform of the class action rule or practice. It might be useful, however, to recognize that class action practice under Rule 23 has become considerably dysfunctional; therefore, radical rethinking might be in order. The rulemakers recognized that the original Rule 23 had been rendered dysfunctional by the early 1960s; perhaps it is time to acknowledge this is true for the 1966 amended rule.

The class action rule is not a bad thing; it is just not working, or it is working poorly. The premise underlying this Article is that there is scant evidence that class action litigation as practiced accomplishes the stated goals of compensation, deterrence, and efficiency. In addition, many of the alleged class action abuses that are the subject of criticism arise from the damage class action, a type of class action essentially invented in 1966. Moreover, the current Rule 23 functions poorly because the web of accumulated class action jurisprudence serves as an inefficient impediment to the achievement of meaningful collective redress. Thus, to this end, the class action rule ought to be revisited to return it to a simplified form, to better serve the ends of justice.

As indicated above, class action litigation has now become a lucrative business with numerous stakeholders in the current system, including litigants, courts, commercial notice vendors, and third-party financiers. Consequently, there is much in this set of proposals to raise the ire of every actor involved in class litigation. For example, plaintiffs' attorneys will recoil at the prospect of the demise of the damage class action; corporate defendants will welcome this suggestion. Corporate defendants will recoil at the prospect of presumptive class proceedings based on easy commonality; plaintiffs will embrace such a proposal as advancing the interests of justice. Plaintiffs will object to any preliminary assessment of the merits of a proposed class action; defendants will view this as a sensible mechanism for screening dubious strike-suits.

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<sup>210</sup> See generally Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447 (2013) (noting trend of Advisory Committee on Civil Rules to avoid clashes but instead focus on minor issues of wordsmithing).

Defendants will appreciate constraints on third-party financing and fee awards as rational modifications to a system of perverse litigation-inducing incentives; plaintiffs will abhor such constraints as violations of freedom of contract and denials of access to justice. Both sides of the docket and the judiciary are likely to rebel at the thought of an opt-in principle replacing the current opt-out regime.

There can be no illusion that the Advisory Committee on Civil Rules would even consider any of these proposals; moreover, virtually all such proposals would be dead on arrival were they to be proposed for notice and comment. The proposals suggested here, then, are destined to be relegated to that densely populated realm of impractical ivory tower professorial musings. In the final analysis, powerful forces inevitably will converge to frustrate meaningful reform of class action practice: namely, stakeholders who have too much invested in the current system—however dysfunctional—to desire change, and an Advisory Committee that is timid, conservative, and constrained by political forces.

It is, then, nothing short of a wonder that the rule reformers in the early 1960s were able to create an entirely new class action rule. At best, this Article invites consideration and debate concerning what the litigation universe would look like under a different collective redress regime.