

# Rethinking Adequacy of Representation

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*Class representatives and class counsel must adequately represent the members of a class.* This principle forms the foundation for the modern American class action, and it determines the structure of Rule 23 of the Federal Rules of Civil Procedure and every analogous state class-action rule.<sup>1</sup> The absence of adequate representation dooms the certification of a class. The gnawing fear that class representation is inadequate—manifested through such phrases as “collusion,”<sup>2</sup> “conflicts of interest,”<sup>3</sup> “selling out the class,”<sup>4</sup> and “sweetheart deals”<sup>5</sup>—is an enduring criticism of class actions. Indeed, the demand of adequate representation is so irresistible that in recent years the principle has spread beyond class actions to other forms of aggregate litigation.<sup>6</sup>

Despite the allure of the principle, we have very little sense of what adequate representation means, how we can measure it, or how we can

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1. FED. R. CIV. P. 23. Unless otherwise stated, all references to Rules are to the Federal Rules of Civil Procedure.

2. See *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (rejecting the representation as inadequate in part because it afforded “opportunities . . . for the fraudulent and collusive sacrifice of the rights of absent parties”); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1048 (1995) (describing “collusion between class counsel and the defendants” in a mass-tort class-action settlement).

3. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (stating that the inquiry into adequacy of representation “serves to uncover conflicts of interest between named parties and the class they seek to represent”).

4. See *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002) (recognizing “the danger that the lawyer will sell out the class in exchange for the defendant’s tacit agreement not to challenge the lawyer’s fee request”).

5. See Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377 (2000) (noting that one of the “dangers associated with the settlement of class actions” is “the problem of ‘sweetheart’ settlements, in which the class members’ interests are compromised by class counsel”); Charles Silver, *Class Actions—Representative Proceedings*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 194, 213 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (discussing four types of “sweetheart deals”).

6. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 (Tentative Draft No. 1, 2008) [hereinafter AGGREGATE LITIGATION] (suggesting guidelines for dealing with all forms of aggregate litigation to ensure adequate representation); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 468 (2000) (arguing that attorneys should, in the absence of formal class certification, use written cooperation agreements to replicate the same protections available to class-action plaintiffs).

guarantee it.<sup>7</sup> We use a few heuristics—for instance, “conflicts of interest and collusion are bad”—but the complexities of class-action practice quickly blur even these seemingly bright-line measuring rods.<sup>8</sup> If you look for them, conflicts and the possibility of collusion lurk in almost every class action.<sup>9</sup> The question therefore becomes how great must the conflict of interest be or how strong must the evidence of collusion be in order to deem a class’s representation inadequate.<sup>10</sup>

Some of the difficulty in determining the meaning and measure of adequate representation derives from the ambiguities in *Hansberry v. Lee*,<sup>11</sup> the seminal case that rooted adequate representation, at least in part, in the Constitution.<sup>12</sup> A greater part of the difficulty is the ambivalent relationship between the requirement of adequate representation and the underlying goal of class actions. The class action sweeps together parties with similarly situated claims,<sup>13</sup> thus avoiding one or more of a number of evils—to the litigants, to the absent class members, or to the court system—that repetitive individual litigation creates.<sup>14</sup> But these economic and social benefits can often be reaped even when the representation of the class members is less than adequate. To take a crass example, a class action might achieve more deterrent effect at no greater litigation expense if the class representative and class counsel were allowed to split ninety-nine percent of the recovery due to class members;<sup>15</sup> but such an arrangement would surely doom class

7. See Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEXAS L. REV. 287, 288 (2003) (“For all the agreement on the centrality of adequate representation to the modern class action . . . there remains remarkably little agreement on the content of that concept or how to enforce it.”).

8. See, e.g., *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (“[I]n light of the modesty of the stakes . . . we are not disposed to regard this [conflict of interest] as fatal.”); *In re “Agent Orange” Prod. Liab. Litig.*, 800 F.2d 14, 19 (2d Cir. 1986) (noting that principles of efficiency and fairness uniquely implicated in class actions may compel a court to disregard technical conflicts of interest in order to allow an attorney to continue representation of the class); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 46 (1995) (“The common practice in mass tort cases . . . unfortunately has been to ignore ethical problems in the name of expediency.”).

9. For a discussion of the inevitability of conflicts of interest, see *infra* Part II.

10. See Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs’ Counsel In Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1468–69 (1998) (“There being no way to eliminate conflicts [of interest] from multiple-claimant representations, the only question is how to deal with them.”).

11. 311 U.S. 32 (1940).

12. For a discussion of *Hansberry* and its ambiguities, see *infra* notes 66–91 and accompanying text.

13. Class actions can be brought on behalf of a class of claimants or against a class of persons. The former are usually, though misleadingly, referred to as “plaintiff class actions,” and the latter as “defendant class actions.” See *Taylor v. Sturgell*, 128 S. Ct. 2161, 2172 (2008) (noting that members of a class are in fact “nonparties” bound by the judgment). In this Article, I will refer only to the far more common plaintiff class action, although my analysis applies equally to both types.

14. For an expanded description of these evils, see *infra* subpart I(B).

15. This arrangement could be economically justified on the ground that, from the viewpoint of deterrence, the recipient of the recovery is irrelevant and the award of the bulk of recovery to the

certification because of self-dealing by the representative and counsel. Thus, adequacy of representation can retard the realization of the benefits of class treatment. The desire to realize those benefits can lead a court to compromise on the bright-line version of adequacy that absolutely bars class treatment when conflicts of interest surface.

This Article argues that the doctrine of adequacy of representation should be recast to achieve a single, easily determined metric: Representation by class representatives and counsel is adequate if, and only if, the representation makes class members no worse off than they would have been if they had engaged in individual litigation.<sup>16</sup> In explaining this metric, Part I begins by locating class actions and adequacy of representation within the tradition of American adversarialism, which privileges individual autonomy and self-interested behavior in joinder decisions. Class actions constitute an exception to the principle of individual autonomy, and adequate representation—traditionally understood to require the avoidance of conflicts of interest or collusion—acts as the antidote to the self-interest of the class representative and class counsel. But this combination of class litigation and adequate representation is inherently unstable. As Part II describes, the reasons that class actions are thought to be necessary invariably generate the very conflicts of interest, either among class members or between class members and class counsel, that the traditional view of adequate representation forbids. Part III then explains how the metric I have described—the requirement that class representation not worsen the expected litigation outcomes of class members—avoids the friction between the utility of class treatment and the demands of adequate representation. Part III also responds to the objections to the use of this metric.

Throughout this Article, I draw on moral philosophy and economics to describe the present conundrum of adequate representation and to justify the new metric for measuring adequacy. From within moral and economic theory, the metric seems unremarkable. It is closely associated with well-known principles such as the Rawlsian veil of ignorance and Pareto improvements. Why we have not adopted this simple metric, and why we must, is the story of this Article.

## I. The Rise of Adequate Representation

This Part lays out the basic argument for the doctrine of adequate representation. I begin by considering traditional principles of joinder, to

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class representative and class counsel creates an incentive to maximize recovery. For the classic argument advancing the private-attorney-general rationale, see generally Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 716–17 (1941). For a critique of its operation in practice, see generally John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983).

16. This sentence is too simplistic. Later, I add a necessary refinement concerning a type of class-action litigation known as “negative-value suits.” See *infra* text accompanying note 170.

which class actions constitute a critical exception. I describe why class actions are thought to be a necessary exception and why adequate representation is thought to be a necessary corollary to this exception.

*A. Traditional Joinder: The Principle of Self-Interested Autonomy*

In the American system, plaintiffs typically make the critical decisions affecting the structure of their cases: who to sue, when to sue, in which court to sue, which claims to assert, which lawyer to employ, and whether to join forces with other potential plaintiffs.<sup>17</sup> This “master of the complaint” concept is deeply ingrained in the law.<sup>18</sup> A related, and equally embedded, principle is one of preclusion: “[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”<sup>19</sup> In combination, the

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17. Exceptions exist. Through a counterclaim, a defendant can add new claims against the plaintiff. See FED. R. CIV. P. 13(a) (compulsory counterclaims); FED. R. CIV. P. 13(b) (permissive counterclaims). Through a crossclaim, a defendant can insert a claim against a co-party, see FED. R. CIV. P. 13(g), and through a third-party claim a defendant can add a new party who “is or may be liable” to the defendant, see FED. R. CIV. P. 14(a). In addition, in limited circumstances, procedural codes sometimes mandate, when feasible, the joinder of persons that the plaintiff has not joined and typically afford nonjoined parties the opportunity to intervene in the case. See FED. R. CIV. P. 19(a) (necessary joinder); FED. R. CIV. P. 24(a) (intervention of right); FED. R. CIV. P. 24(b) (permissive intervention). Class actions, of course, constitute another exception. In reality, plaintiffs’ counsel exercises many of these powers. See Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92–97 (documenting the marginal degree of control that tort plaintiffs exercise over their claims).

18. Strictly speaking, the “master of the complaint” idea refers to the plaintiff’s ability to choose the forum by means of including or excluding certain parties and claims in the complaint. See, e.g., *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 94 (2005) (affirming a plaintiff’s right to maintain federal court diversity jurisdiction by declining to permissively join additional potential defendants); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831–32 (2002) (rejecting the view that the presence of a federal question in a defendant’s counterclaim is sufficient to establish “arising under” jurisdiction because that view would undermine the principle that the plaintiff is the “master of the complaint” by “defeating [the] plaintiff’s choice of forum”); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 395 (1987) (upholding a plaintiff’s right to select which legal claims to bring as a way to control the judicial forum in which those claims are heard); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (“Of course the party who brings a suit is master to decide what law he will rely upon . . .”); see also 16 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 107.14[2][c][v] (3d ed. 2005) (“In general, the plaintiff is the master of the complaint . . . and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder of necessary parties.”). But the concept also implies the right to choose counsel. See *Richardson–Merrell, Inc. v. Koller*, 472 U.S. 424, 441 (1985) (Brennan, J., concurring) (“A fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings.”); *id.* at 442 (Stevens, J., dissenting) (“Everyone must agree that the litigant’s freedom to choose his own lawyer in a civil case is a fundamental right.”).

19. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); accord *Richards v. Jefferson County*, 517 U.S. 793, 798–99 (1996); *Martin v. Wilks*, 490 U.S. 755, 761–64 (1989); *Chase Nat’l Bank v. Norwalk*, 291 U.S. 431, 441 (1934). *Hansberry* elevated this principle to constitutional stature, rooting it in notions of both due process and full faith and credit. See *Hansberry*, 311 U.S. at 40–41. Cases have recognized exceptions to the principle in the conclave of class actions, *Hansberry*, 311 U.S. at 41; “special remedial schemes” such as bankruptcy, *Martin v. Wilks*, 490 U.S. at 762 n.2; suits brought by those in privity with a prior party, *Montana v. United States*, 440 U.S. 147, 153 (1979);

two principles mean that no judgment can bind a plaintiff unless she consents to join the case as a party.

Effectively, therefore, the default principle is the permissive, or voluntary, joinder of plaintiffs: Each plaintiff must agree to join the case. At the federal level, Rule 20(a) embodies this principle, and permits the joinder of plaintiffs when their claims for relief “aris[e] out of the same transaction, occurrence, or series of transactions or occurrences”<sup>20</sup> and “any question of law or fact common to all plaintiffs will arise in the action.”<sup>21</sup> Although ambiguously expressed in the word “may,”<sup>22</sup> the idea underlying Rule 20(a) is to give each plaintiff the choice to join a case.<sup>23</sup>

Voluntary joinder is highly consonant with the adversarial approach to litigation employed in American courts. The adversarial system places control over critical litigation decisions regarding the shaping of proofs and arguments in the hands of each party.<sup>24</sup> Because few decisions so affect the proofs and arguments as the joinder of those with whom and against whom the case will proceed,<sup>25</sup> placing the joinder decision in the hands of each

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and in three other limited areas, see *Taylor v. Sturgell*, 128 S. Ct. 2161, 2172–73 (2008). *Taylor* identified these three circumstances as a nonparty’s agreement to be bound by a judgment, a nonparty’s assumption of control over prior litigation, and litigation brought by a nonparty proxy on behalf of a party to prior litigation. *Id.*

20. FED. R. CIV. P. 20(a)(1)(A).

21. FED. R. CIV. P. 20(a)(1)(B). Because it is difficult to imagine any claims involving the same transaction or occurrence that would not also involve a common question of law or fact, the independent significance of Rule 20(a)(1)(B) is uncertain. See JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 108 (1998) (questioning whether “the common ‘question of law or fact’ requirement in Rule 20 [is] superfluous”).

22. See FED. R. CIV. P. 20(a)(1) (“Persons may join in one action as plaintiffs . . .”).

23. Indeed, the idea of individual consent is so embedded in Rule 20(a) that, despite the arguable ambiguity in the rule, it is difficult to find cases that discuss whether a plaintiff can use Rule 20(a) to join another plaintiff involuntarily. In *Cle-Ware Rayco, Inc. v. Perlstein*, 401 F. Supp. 1231 (S.D.N.Y. 1975), the court granted a motion to make a third-party defendant an additional plaintiff, but it was not clear from the opinion whether the third-party defendant consented to joinder as a plaintiff or was joined involuntarily. See *id.* at 1232–33 (joining a corporation as a party plaintiff after a merger between that corporation and the named plaintiff). In *Lyne v. Arthur Anderson & Co.*, No. 91 C 1885, 1991 WL 247576 (N.D. Ill. Nov. 12, 1991), a court refused to allow ten plaintiffs who had joined together under Rule 20(a) to use the rule to join another seven plaintiffs involuntarily, noting that “[t]here is nothing fundamentally fair about joining plaintiffs who have expressed no interest in participating in this litigation.” *Id.* at \*3.

24. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383–84 (1978) (“[T]he true significance of partisan advocacy lies deeper, touching . . . the integrity of the adjudicative process itself. . . . Each advocate comes to the hearing prepared to present his proofs and arguments . . .”).

25. Cf. *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–87 (9th Cir. 1996) (permitting proof of damages through statistical sampling and a master’s testimony, rather than individualized proof of damages, in a class action containing 10,000 members). Experimental data suggest that the aggregation of claims increases the likelihood of recovery on weak claims, but suppresses the value of strong claims. Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209, 226 (1988) [hereinafter Horowitz & Bordens, *Aggregation*]; see Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors’ Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*,

plaintiff makes perfect sense from the viewpoint of adversarial theory. At a deeper level, both the adversarial system in general and voluntary joinder in particular respond to the same philosophical intuition about individual autonomy: Allowing individuals the freedom to act on and to govern their own legal affairs is a political and moral good.<sup>26</sup>

The American version of adversarialism embodies another principle: In making basic decisions regarding the structure and prosecution of a case, a plaintiff is entitled to be guided by self-interest. The relationship between autonomy and self-interest is evident, but hardly inevitable; for instance, a Kantian conception of autonomy leads to the recognition of duties that cannot be justified by, and often are inconsistent with, an individual's self-interest.<sup>27</sup> Whatever the philosophical justification, the American litigation system does not expect litigants to be concerned with the effects of their litigation decisions on the positions or rights of others. The freedom to act given to the plaintiff in the adversarial system includes the freedom to act in a decidedly self-interested fashion. Thus, a plaintiff is within her rights to join with others when it advances her interests, and equally within her rights to refuse to join with others when doing so does not advance her interests—even when other plaintiffs' claims, the defendant's position, or society's interests are made worse by her decision.<sup>28</sup>

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85 J. APPLIED PSYCHOL. 909, 914 (2000) [hereinafter Horowitz & Bordens, *Consolidation*] (reporting data showing that the likelihood of recovery increases with the inclusion of more plaintiffs, but the average damage award decreases if more than four plaintiffs are aggregated).

26. See STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 33–39 (1988) (defending the adversarial process as important to maintaining a free society); Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 *FORDHAM L. REV.* 1717, 1727 (2002) (“[W]orking within the rule of law in our constitutionalized adversary system, we enhance our clients’ autonomy as free citizens in a free society.”); Fuller, *supra* note 24, at 372 (discussing the relationship between adjudication and the rule of law).

27. See Immanuel Kant, *On the Common Saying: “This May Be True in Theory, But It Does Not Apply in Practice,”* reprinted in *KANT: POLITICAL WRITINGS* 61, 70 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991) (“[T]he concept of duty . . . is far *more powerful*, incisive and likely to promote success than all incentives borrowed from the . . . selfish principle [of happiness].”); David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 *U. ILL. L. REV.* 815, 826 (“Kantian autonomy represents freedom achieved through stoic self-control and self-command; it means reasoned self-restraint. Freedom of choice represents casting off restraints.”).

28. Due to the costliness of litigation, a plaintiff’s lawsuit almost invariably worsens the defendant’s position. I do not suggest that it is unjust for the plaintiff to invoke the machinery of the legal system when she has a nonfrivolous claim. What I mean when I describe a plaintiff’s “worsening” of the positions of other plaintiffs, defendants, or society is the plaintiff’s imposition of costs above and beyond the direct and ordinary costs of litigating and satisfying a judgment or settlement. To take a paradigmatic situation of worsening a defendant’s position, consider an interpleader-type scenario in which a defendant holds 1,000 shares of stock that multiple plaintiffs claim. If one plaintiff successfully brings an action and recovers the stock, the defendant might be subject to later suits by other plaintiffs, who, as nonparties to the first case, are not bound by the finding in the first case that the stock belongs to the first plaintiff. See *supra* note 19 and accompanying text. The defendant might thus be subject to numerous judgments when only one is appropriate. To take a paradigmatic situation of worsening other potential plaintiffs’ positions, if we assume that the sum total of claims exceeds a defendant’s assets, an early plaintiff that receives

Viewed from the vantage point of moral philosophy, this license to act in a purely self-interested way, and to ignore the harms that actions cause others, is intriguing. Somewhat simplistically, ethical theories can be divided into the nonconsequentialist (i.e., evaluating the moral significance of actions without regard to their consequences) and the consequentialist (i.e., evaluating the moral significance of actions by evaluating their consequences).<sup>29</sup> Nonconsequentialist ethical theories subdivide into two branches: virtue ethics, which emphasizes the development of moral character in the actor,<sup>30</sup> and deontological ethics, which emphasizes the moral quality of the action and often leads to the specification of duties, rules, and obligations.<sup>31</sup> Consequentialist theories subdivide into three branches. The first is egoism, which involves either a claim that people inevitably act only in their own self-interest (psychological egoism), or a claim that they should act only in their own self-interest (ethical egoism).<sup>32</sup> The opposite theory is altruism, which

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full satisfaction can cause later plaintiffs to receive less than a proportional share of the defendant's assets. The paradigmatic example of increasing social costs results from a refusal to join with similarly situated plaintiffs, thus generating unnecessary expenses associated with the repetitive relitigation of common issues.

Another potential cost in entrusting joinder decisions to the plaintiff is a shift, in the plaintiff's favor, of the probability of recovery when multiple cases are joined. *See supra* note 25. If we assume that a decision rendered in individual litigation is the most accurate (an admittedly controversial assumption), a shift in the outcome due to joinder makes a judgment less accurate. Loss in accuracy is a cost to the defendant, as well as a social cost. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.1–21.2, at 593–95 (7th ed. 2007) (arguing that, from the perspective of an individual defendant or society, when the cost of judicial error outweighs the per-case cost of reducing the chance of such error, the result of judicial error is a net social loss, which should not be tolerated). The extent of this cost is uncertain, for the loss in accuracy due to the aggregation of claims might be offset by lower per-plaintiff awards in aggregated proceedings. *See* Horowitz & Bordens, *Consolidation*, *supra* note 25, at 914.

29. Walter Sinnott-Armstrong, *Consequentialism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2008) [hereinafter *ENCYCLOPEDIA OF PHILOSOPHY*], <http://plato.stanford.edu/archives/fall2008/entries/consequentialism> (“Consequentialism, as its name suggests, is the view that normative properties depend only on consequences.”).

30. Rosalind Hursthouse, *Virtue Ethics*, in *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 29, <http://plato.stanford.edu/archives/fall2003/entries/ethics-virtue>. Virtue theories are sometimes referred to as “aretaic theories” after the Greek word *arete*, or “virtue.” *See* Lawrence B. Solum, *Public Legal Reasoning*, 94 VA. L. REV. 1449, 1463 (2006) (referring to virtue theories as aretaic theories and describing the Greek origin of the term).

31. Larry Alexander & Michael Moore, *Deontological Ethics*, in *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 29, <http://plato.stanford.edu/archives/win2007/entries/ethics-deontological>. Some deontological theories exclude consideration of the consequences of actions, but others allow such consideration while denying that the only measure of good action is its consequences. *See* Solum, *supra* note 30, at 1463 (“Some deontological theories exclude consequentialist reasons altogether . . . . Other deontological moral theories allow for the consideration of consequences but maintain that considerations of fairness trump good consequences in other circumstances.”).

32. Robert Shaver, *Egoism*, in *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 29, <http://plato.stanford.edu/archives/win2002/entries/egoism>. A related theory is rational egoism, which argues that it is rational for a person to act in her self-interest and irrational not to. *Id.* Egoist theories allow for the possibility that cooperation among people is possible, but they assert that cooperation occurs only when the mutual best interests of the parties dictate cooperation. *Id.*

argues that people should act to advance the interests of others, giving little or no regard to their own interests.<sup>33</sup> The third consequentialist theory is utilitarianism, which argues that people should act to maximize the utility of all (both self and others).<sup>34</sup> Neoclassical economic theory, which holds that actors should maximize wealth, is a form of consequentialism aligned with the utilitarian branch.<sup>35</sup>

If we seek a philosophical justification for the self-regarding nature of American adversarialism, the nonconsequentialist theories are barren soil; abject self-interest is not a virtue, and deontological theories reject the legitimacy of acting according to consequences, whether it is self-enriching or not. Nor, for obvious reasons, is it possible to justify self-interested litigation behavior on the consequentialist theory of altruism. Therefore, the only philosophical positions that justify plaintiffs' license to attend to only their own self-interest in joinder decisions are egoist or utilitarian. The egoist argument—that parties should be able to conduct litigation with only their own interests in mind—clearly supports the principle of voluntary joinder. But egoism has greater difficulty accounting for the transactional constraint on Rule 20(a) joinder, which can be more readily justified on a fairness or a utilitarian basis.<sup>36</sup> Utilitarian acceptance of self-interested behavior, however, is conditional: A plaintiff's self-interested joinder decisions can be justified only if the benefits of such decisions—in terms of deterrence of

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33. John Doris & Stephen Stich, *Moral Psychology: Empirical Approaches*, in ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 29, <http://plato.stanford.edu/archives/sum2006/entries/moral-psych-emp>. I will not deal with the issue of whether a person must care more for others than for herself, or whether a person is entitled to weigh her interests proportionally with those of others.

34. Sinnott-Armstrong, *supra* note 29. I use “welfare” as a neutral term. Utilitarian theories disagree amongst themselves about exactly what should be maximized: individual happiness, social well-being, wealth, or preference satisfaction. *See* Solum, *supra* note 30, at 1492 (exposing contradictions between and within utilitarian theories of individual well-being and preference satisfaction).

35. *See* Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323, 329–30 (2008) (discussing utilitarianism and welfare economics as examples of consequentialist theories). *But see* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119–27 (1979) (distinguishing between utilitarianism (or “welfare maximization”) and “wealth maximization”).

36. *Cf.* *Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980) (refusing to accept the plaintiff's decision to join defendants under Rule 20(a) unless “the permissive joinder of a [defendant] will comport with the principles of fundamental fairness”). Although egoism might justify such restrictions—with the argument that some accommodation and cooperation are necessary in order to avoid ruthlessness that would in the end hurt everyone's self-interest—the transactional limitation in Rule 20(a) is better explained by, and usually described in terms of, efficiency. *See, e.g., Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974) (“The purpose of [Rule 20(a)] is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.”). Other restrictions that American adversarialism imposes on self-regarding behavior—such as restrictions on the ability of parties to lie or to bring frivolous claims, or on the ability of lawyers to represent conflicting interests, *see* FED. R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT R. 1.7–1.9, 3.3–3.5 (1983)—likewise are more readily explained on non-egoist (whether virtue-based, deontological, altruistic, or utilitarian) grounds.

wrongful behavior, efficient disposition of litigation, accuracy of judgments, and acceptability of judgments among a people with a strong affinity for freedom of action and hostility to government intervention that Americans evince<sup>37</sup>—outweigh the benefits of other joinder arrangements that give the parties less freedom of action.<sup>38</sup> Because an empirical demonstration that plaintiff autonomy generates these net benefits has never been made, however, the utilitarian case for entrusting to the plaintiff the power to make self-interested joinder decisions is uncertain. At best, it appears that the American approach to joinder is essentially egoist, with some case-by-case nonconsequentialist (i.e., fairness-based) and utilitarian constraints on abject self-interest.

Egoism and utilitarianism are controversial ethical theories, as is the pursuit of wealth-maximizing efficiency. I do not suggest that, in adopting an adversarial approach to litigation, and in granting plaintiffs wide discretion in making joinder decisions, our Anglo-American ancestors consciously intended to adopt and apply one or more of these theories. As Holmes once observed, “The law did not begin with a theory. It has never worked one out.”<sup>39</sup> Our adversarial approach in general, and our joinder rules in particular, are products more of historical circumstance than of deduction from first principles of moral or economic theory.<sup>40</sup> Nor am I suggesting that the law of joinder has as its only operative principle the satisfaction of plaintiffs’ desires. Nonetheless, whatever we might think of a license to act in a selfish fashion, two significant facts stand out: first, American adversarialism countenances a high degree of self-interested behavior in the plaintiffs’ choice to join—or not to join—with other plaintiffs; and second, that self-interested behavior within this sphere can be justified on certain philosophical and economic grounds.

*B. Class-Action Joinder: An Incomplete Tempering of the Principle of Self-Interested Autonomy*

Class actions stand the individual plaintiff’s joinder autonomy on its head. The class action bundles together the claims of similarly situated claimants, and nominates a class representative and class counsel to prosecute these claims on each claimant’s behalf. Thus, the members of a class

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37. See generally MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 47–70 (1986) (arguing that the political commitments and structures of a nation determine the nation’s basic orientation in its procedural system).

38. Again, “benefits” is a soft word, for I have not suggested any measure—whether money, happiness, or some other metric—for these benefits. The efficiency orientation of the transactional limit on Rule 20(a) joinder suggests that our system typically uses an economic, or wealth-maximizing, approach to measuring benefits. See *supra* note 36 and accompanying text.

39. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77 (1881).

40. Cf. Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1399–1403 (2008) (describing the historical roots and evolving tradition of the adversarial system).

lose rights that the American adversarial system affords nonclass litigants. Class members do not get the opportunity to decide with whom and against whom to file suit; they do not control the forum, the timing of their cases, or the presentation of the proofs and arguments concerning their claims. Members of the class will probably never talk with their lawyer; their lawyer will likely never know the details and circumstances of their individual claims. Indeed, class members might never know that they are parties in the case. Yet the judgment obtained on the class's behalf binds the members to the outcome. The license to act self-interestedly by refusing to join another's lawsuit collapses.<sup>41</sup>

Strong reasons must accompany such a fundamental reordering of the litigation paradigm. At the federal level, Rule 23(b) provides four such reasons.<sup>42</sup> First, a class action can be certified when the plaintiffs' autonomy to bring separate actions creates a risk of "inconsistent or varying adjudications . . . that would establish incompatible standards of conduct for" the defendant.<sup>43</sup> Second, a class action can be certified when one plaintiff's autonomous decision to bring a lawsuit might result in a judgment "that, as a practical matter, would be dispositive of the interests of the other members" of the class or "would substantially impair or impede their ability to protect their interests."<sup>44</sup> Third, class treatment is proper when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."<sup>45</sup> Finally, a class action may be maintained when "the questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."<sup>46</sup>

It is possible to restate and unify these four scenarios in a single principle: An individual plaintiff's autonomy to choose not to join with other plaintiffs stops when that choice threatens harm to others<sup>47</sup>—whether that harm is to other potential plaintiffs, who might find their own interests

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41. As I describe *infra* at notes 54–56 and accompanying text, in some circumstances a class member can retain a measure of autonomy by opting out of the class.

42. In addition, a class action must meet the six requirements of Rule 23(a). These requirements can loosely be grouped into two meta-requirements: efficiency and adequate representation. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). For further discussion, see *infra* notes 78–79 and accompanying text.

43. FED. R. CIV. P. 23(b)(1)(A).

44. FED. R. CIV. P. 23(b)(1)(B).

45. FED. R. CIV. P. 23(b)(2).

46. FED. R. CIV. P. 23(b)(3). In assessing these two requirements of predominance and superiority, Rule 23(b)(3) lists four relevant factors to consider: "the class members' interests in individually controlling the prosecution" of their claims; "the extent and nature" of any individual actions that class members have already brought; "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and "the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3)(A)–(D).

47. Again, the concept of "harm" does not encompass the imposition of the ordinary costs of good faith litigation on the defendant or the court system. See *supra* note 28 and accompanying text.

impaired by the plaintiff's choice to sue separately; to the defendant, who might be whipsawed by inconsistent judgments of multiple plaintiffs exercising their choices to sue separately or else beaten down by the costs of repetitive litigation; or to society, which finds individual litigation too expensive a luxury to subsidize or too vagarious a method to deter illegal conduct. The harm must be more than *de minimis*: Rule 23 allows a class action only when the class of plaintiffs "is so numerous that joinder of all members is impracticable."<sup>48</sup> Once that threshold is crossed, however, Rule 23 sacrifices individual class members' abilities to pursue self-interested litigation strategies to the achievement of a greater good.

Cast in this light, the class action embodies a consequentialist perspective to joinder: Avoidance of negative consequences, not the inculcation of virtue in litigants or the fulfillment of a priori litigation duties toward others, is its principal justification. Indeed, Rule 23 works out, in a particular litigation context, the limits of autonomy. Captured in the famous aphorism that my right to swing my fist ends where your nose begins,<sup>49</sup> a central problem in consequentialist ethical theory is to specify the point (if any) at which a person's autonomy to act must yield to the harm that those actions cause others. Rule 23's answer to that question appears to reject an egoist stance and to embrace a rule-utilitarian approach to class treatment.<sup>50</sup>

In two important ways, however, Rule 23 retains an orientation toward individual autonomy. First, class members retain some rights to promote or protect their individual claims. In all class actions, class members may seek to intervene to "present claims or defenses, or otherwise to come into the action,"<sup>51</sup> and in Rule (b)(3) class actions, class members are entitled to

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48. FED. R. CIV. P. 23(a)(1).

49. The saying is usually used as a shorthand description of Mill's argument for liberty. See JOHN STUART MILL, ON LIBERTY (1859), reprinted in ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM 13–16, 56–57, 75–76, 94–96 (Stefan Collini ed., Cambridge Univ. Press 1989).

50. Utilitarian theory can be divided into "act utilitarianism" and "rule utilitarianism." Under the former, the moral significance of an action is determined by whether that specific action maximizes utility. A problem with act utilitarianism is the costliness of engaging in this inquiry for every action. Rule utilitarianism seeks to eliminate those costs by establishing rules of behavior that, in the main, maximize utility; even though the rule does not maximize for each action, the savings from not needing to engage in an action-by-action evaluation exceed the losses in utility in specific cases. Sinnott-Armstrong, *supra* note 29. Rule 23's four scenarios for class treatment could thus be seen as the rule makers' conclusion about the occasions when, in the main, the costs of permitting individual litigation exceed the costs of the lost autonomy that class certification entails.

Some might argue that Rule 23 even reflects an altruistic (rather than a utilitarian) impulse, allowing individuals to sacrifice their autonomy to bring their own claims and to take up the burden of championing the claims of others. Although I do not deny the possibility that a class representative and class counsel might take on class litigation for altruistic reasons, the ensuing paragraphs describe the reasons that altruism constitutes a poor justification for Rule 23.

51. FED. R. CIV. P. 23(d)(1)(B)(iii), 24(a), 24(b); see THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 56 (1996) (indicating that intervention occurred in 0% to 11% of cases in four class-action data sets).

appear through their own counsel.<sup>52</sup> Moreover, filing a class action does not prevent class members from also filing individual cases, or even prevent “dueling” class actions; as long as they beat the class action in the race to judgment or settlement, individual class members can enjoy the benefits of their individual resolution.<sup>53</sup>

The most significant provision retaining individual autonomy, however, is the opt-out right for (b)(3) class members.<sup>54</sup> In effect, the (b)(3) opt-out right returns to the individual the decision of whether to join with others or to strike out independently. By requiring an affirmative decision to opt out, rather than by adopting a Rule 20(a)-like demand that each plaintiff affirmatively opt in,<sup>55</sup> Rule 23(b)(3) flips the consequence for doing nothing from nonjoinder to joinder. This flip in the default rule is hardly insignificant; the apathetic plaintiff, the tardy plaintiff, and the plaintiff who never receives notice of the right to opt out lose control of their lawsuits. Nonetheless, in light of the prevalence of (b)(3) class actions over either (b)(1) or (b)(2) class

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This opportunity to intervene is something less than the full “master of the complaint” autonomy guaranteed individual litigants, because the appearing class member loses the right to determine when, where, with whom, and against whom to file suit. In addition, most courts granted only permissive intervention under Rule 24(b), *id.*, and courts can impose significant limitations on the opportunity of permissive intervenors to participate, *see* 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1922 (3d ed. 2007).

52. FED. R. CIV. P. 23(c)(2)(B)(iv).

53. *See* Epstein v. MCA, Inc., 179 F.3d 641, 643–44 (9th Cir. 1999) (holding that class members in a state class action who commenced a separate federal class action were precluded when the state class action won the race to settlement); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462 (2000) (noting that dueling class actions are “rampant” and discussing the pressure to settle first on the part of plaintiffs attorneys). Although its reasoning is suspect, one court has held that a class-certification order in a mandatory class action effectively bars separate actions involving the same claims, but has further held that this bar violates the Anti-Injunction Act, 28 U.S.C. § 2283 (2000), when applied to cases filed in state court. *In re* Fed. Skywalk Cases, 680 F.2d 1175, 1180, 1183 (8th Cir. 1982); *cf.* Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 880 (1984) (holding that the individual claims of class members not encompassed within the class allegations are not precluded by the class judgment).

54. *See* FED. R. CIV. P. 23(c)(2)(B)(v). Because (b)(1)(A), (b)(1)(B), and (b)(2) class actions lack a comparable opt-out right, they are often called “mandatory” class actions. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 n.13 (1999) (contrasting (b)(1) class actions’ lack of opt-out or notice rights to (b)(3) class actions, which include these rights). Courts have on rare occasion nonetheless fashioned an off-book, opt-out right for class members in mandatory class actions when an opt-out right would not create the types of harm that the (b)(1) and (b)(2) class actions were meant to avoid. *See, e.g.,* Eubanks v. Billington, 110 F.3d 87, 94–95 (D.C. Cir. 1997) (holding that courts have discretion to fashion opt-outs in (b)(1) and (b)(2) class actions when necessary to “protect the rights of individual class members”); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1302 (2d Cir. 1990) (“Rule 23 does authorize a district court to allow a class member to opt out of a [(b)(1) action] under some circumstances . . . .”); *cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3 (1986) (leaving open the question of whether mandatory class actions are consistent with the Due Process Clause).

55. *Cf.* 29 U.S.C. § 216 (2000) (providing an opt-in process for Fair Labor Standards Act class actions); John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1446–47 (2003) (arguing that class members should be required to opt into a settlement class).

actions,<sup>56</sup> Rule 23's sacrifice of the plaintiff's autonomy to make self-regarding joinder choices is less dramatic than it might initially appear.

The second way in which class actions retain an important egoist cast is this simple, and often overlooked, fact: No one is required to bring a case as a class action. Rather, the decision to seek class treatment lies in the unfettered discretion of the class representative and class counsel. The class representative and class counsel can make this choice for any of a number of reasons. Perhaps the representative is virtuous, and wishes to assume the mantle of disinterested and benevolent leadership. Perhaps the representative operates from a sense of duty to take no more than a fair share of a defendant's assets or to treat other claimants as equals. Perhaps she is altruistic, and wants to advance the interests of others above her own. Perhaps she is utilitarian, and believes that class treatment will result in the highest net gain to herself and to others. Or perhaps—and here is the rub—she is an egoist, whose only interest is advancing her own interests and who sees class treatment as the best way to do so.

Indeed, in a number of situations, class treatment can serve a litigant's private interests better than individual litigation. For example, suppose that the plaintiff's claim were worth only \$25; the costs of prosecuting the claim would far exceed the recovery, and a self-interested plaintiff will not pursue the claim. But if she could pool her claim with those of thousands of other similarly situated victims, the plaintiff could spread the costs of litigation and make the suit worthwhile. Likewise, even if a plaintiff has an independently viable claim (say, for \$100,000), the claim might be weak. Joining her claim with those of others might improve the probability of recovery,<sup>57</sup> and thus increase the expected settlement value of her suit. Or perhaps, a class representative might hope for a premium, above her expected recovery, for her service as the class representative.<sup>58</sup> Another example in which a plaintiff might use class treatment for personal gain occurs when the plaintiff fears

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56. See WILLGING ET AL., *supra* note 51, at 21 (stating that 61% of the class actions in four data sets were certified under Rule 23(b)(3)).

57. For experimental data suggesting that aggregation with other claims increases the likelihood of recovery on a weak claim, see Horowitz & Bordens, *Aggregation*, *supra* note 25, at 226. The data add fuel to the claim that class actions are a form of legalized blackmail that extorts large recoveries for frivolous cases. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (endorsing the view that “settlements induced by a small probability of an immense judgment in a class action [are] ‘blackmail settlements’”).

58. “Premium” is a neutral word. Sometimes courts award appropriate compensation to class representatives “for time spent meeting with class members, monitoring cases, or responding to discovery.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.62, at 317 n.971 (2004); *Romero v. Producers Dairy Foods, Inc.*, No. 1:05CV0484(DLB), 2007 WL 3492841 (E.D. Cal. Nov. 14, 2007) (approving \$7,000 in premiums to two class representatives for their activities). But the premium can also be a sweetheart deal for the class representative, who collusively accepts a large payment in return for agreeing to settle the claims of class members for pennies on the dollar. See WILLGING ET AL., *supra* note 51, at 26 (finding that awards to class representatives occurred in a substantial minority of cases, with a median award of under \$3,000 in three districts and \$7,500 in a fourth); *supra* note 5 and accompanying text.

that later litigation by other plaintiffs might effectively undo a remedy that the plaintiff wishes to achieve. By forcing them into a case that she controls, the class representative effectively binds these plaintiffs to the judgment that she prefers.<sup>59</sup> As a final example, the plaintiff might wish to retain an effective, but pricey, counsel, who (with a self-interested eye comparing the size of the fee to the opportunity costs of forsaking other legal work) will agree to take the case only if it holds the promise of the hefty fee award that a class action might generate.<sup>60</sup>

In each of these examples, the egoist representative is willing to bring a class action principally to advance her own interests. The final example also interjects the possibility of an egoist class counsel. In these cases, neither the class representative nor the class counsel is necessarily hostile to the interests of class members.<sup>61</sup> The problem is that egoist representatives and counsel are ultimately indifferent to the interests of those whom they represent—and that indifference creates the risk that, when it is no longer convenient to advance the interests of others, the self-interested representative or counsel will abandon those interests.

Thus arises the great structural dilemma of the American class action. As a general matter, the American litigation system expects, and even extols, self-interested behavior. Because of the harm that this autonomy creates in some cases of widespread wrongdoing, Rule 23 requires class members to give up a measure of that autonomy. What they get in return are a class representative and a class counsel that might be guided by the very self-interest

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59. For instance, in *Martin v. Wilks*, 490 U.S. 755 (1989), the Court allowed white employees to file a subsequent lawsuit seeking to challenge a hard-fought affirmative-action consent decree that African-American employees had procured. *Id.* at 758–59. Had the African-American employees joined the white employees as members of the class, they might have been able to bind the white employees to the outcome they preferred. Another example is *Hansberry v. Lee*, 311 U.S. 32 (1940), in which a class representative sought to bind all property owners to the determination that the class representative favored—that a particular covenant was valid and enforceable. *See infra* notes 66–77 and accompanying text. A third example involves one set of plaintiffs who want an injunction establishing one type of medical-monitoring system to detect future health consequences from a defendant’s product, while another set of plaintiffs prefer a different system. If separate cases were brought, the defendant might not be able to comply with both injunctions. *Cf. In re Teletronics Pacing Sys.*, 172 F.R.D. 271, 284–85 (S.D. Ohio 1997) (describing this possibility as a reason to certify a class under Rule 23(b)(1)(A)). If the later injunction takes precedence, a harm would befall the original plaintiff, who would find the earlier judgment effectively overridden.

60. Again, I describe counsel’s motivation to obtain a large fee neutrally. On the one hand, counsel might work hard to advance the interests of the class and enhance their recovery, thus earning a large fee. On the other hand, class counsel might collude with the defendant, selling out the class by agreeing to nominal individual recoveries in return for a very large fee. *Compare* 28 U.S.C. §§ 1711–1715 (2006) (banning certain coupon settlements), *with WILLGING ET AL.*, *supra* note 51, at 68–69 (finding little evidence that class members received only trivial benefits in relation to attorneys fees).

61. Egoists can advance the interests of others when those interests enhance (or at least do not impede) the probability of realizing of their own interests. *See supra* note 32 and accompanying text.

toward their positions—and indifference toward the positions of others—that class members have been required to sacrifice.

### C. *The Requirement of Adequate Representation*

The bridge spanning the gulf between the interests of class members and the actions of the class representative and class counsel is the doctrine of adequate representation. The doctrine handles two distinct problems, one of incompetence and one of indifference. “Incompetence” concerns class representatives and class counsel who sincerely (whether for virtuous, deontological, altruistic, or utilitarian reasons) want to represent the interests of class members, but are incapable of effectively doing so because of insufficient financing, experience, talent, probity, or mental capacity. “Indifference” concerns egoist class representatives and class counsel who are willing to represent the interests of class members only to the extent that such representations serve their own interests.<sup>62</sup>

The desire to address these problems does not, however, fully specify the content of the doctrine. Although class actions have ancient roots, shaping the contours of adequate representation is a fairly recent phenomenon.<sup>63</sup> The phrase shows up in the 1938 version of Rule 23.<sup>64</sup> Before then, it was subsumed within the idea that class actions were maintainable when the representative’s claim was one of “common interest” (or “general interest”) to a

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62. I use “indifference” as an umbrella term to describe two different possibilities. The first is true indifference; the class representative and class counsel do not care one way or the other about the interests of those they represent, except to the extent that such interests are useful to advancing their own interests. The second is actual hostility, in which promoting the interests of some or all class members will injure the interests of the class representative or class counsel. Cases of hostility are rare, but they exist. See *supra* note 57; *infra* notes 104–07 and accompanying text; *infra* text accompanying notes 119, 134. Because they present the same analytical problem—an unwillingness at some point to advance the interests of class members—I consider the situations together.

63. See generally STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987) (describing the emergence, from its medieval roots, of the twentieth-century class action, which for the first time clearly operated on a “congruence of interest” model).

64. See FED. R. CIV. P. 23(a), 308 U.S. 689 (1939) (revised 1966) (permitting a class action when, among other things, a class representative “will fairly insure the adequate representation of all”). Cases before the 1930s tended not to use the phrase “adequate representation” or variants like “adequacy of representation.” The earliest use of the phrase that I could find was in 1889. See *Lancashire Ins. Co. v. Maxwell*, 5 N.Y.S. 399, 401 (N.Y. Sup. Ct. 1889) (stating that according to New York’s rules of civil procedure, one prerequisite of aggregate suits is that the plaintiffs “may be adequately and efficiently represented by one or more of their number less than the whole”). The earliest federal reference—and an ambiguous one at that—was in 1912. See *Carpenter v. Knollwood Cemetery*, 198 F. 297, 300 (D. Mass. 1912) (citing 1 ROGER FOSTER, *FEDERAL PRACTICE* 317 (4th ed. 1909)) (asserting that one trustee is held “adequately to represent” the rest of the trustees in a case involving a deed that secured the rights of real property in a large number of beneficiaries).

group of parties too numerous to join.<sup>65</sup> But we can trace the rise of the modern concept of adequate representation to 1940, with *Hansberry v. Lee*.<sup>66</sup>

*Hansberry* involved a racially restrictive covenant that was arguably invalid.<sup>67</sup> But in a prior class action, *Burke v. Kleiman*,<sup>68</sup> in which a class of signatory landowners sued one of their number who had violated the covenant, the class and the defendant stipulated, and the court found, that the covenant was valid.<sup>69</sup> When an African-American family, the Hansberrys, bought another property subject to the same covenant, one of their defenses against an eviction proceeding brought by a class of landowners was the covenant's invalidity.<sup>70</sup> The plaintiffs argued that the Hansberrys were precluded from raising the argument—that the question of validity had been decided in *Burke*, and that, as successors in interest to a class member in that action, the Hansberrys were bound by that decision.<sup>71</sup> The Illinois courts agreed,<sup>72</sup> but the U.S. Supreme Court reversed.<sup>73</sup>

The basis for the Supreme Court's decision was the inadequacy of the representation that the Hansberrys received in *Burke*. The Court explained:

It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . .

. . . .

It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class . . . . Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. . . . Apart from the opportunities it would afford for the

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65. See *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 566 (1829) (recognizing that “this is one of those cases in which certain persons . . . having a common interest, may sue in behalf of themselves and others . . . for purposes common to all, and beneficial to all”); *Frederick v. Douglas County*, 71 N.W. 798, 799 (Wis. 1897) (quoting a statute authorizing suit “when the question is one of common or general interest of many persons”).

66. For a discussion of the facts and historical context of the case, see Jay Tidmarsh, *The Story of Hansberry: The Rise of the Modern Class Action*, in *CIVIL PROCEDURE STORIES* 233 (Kevin M. Clermont ed., 2d ed. 2008).

67. *Hansberry v. Lee*, 311 U.S. 32, 37–38 (1940).

68. 277 Ill. App. 519 (App. Ct. 1934).

69. *Id.* at 522; see also Tidmarsh, *supra* note 66, at 243–44.

70. *Hansberry*, 311 U.S. at 38; see also Tidmarsh, *supra* note 66, at 262.

71. *Hansberry*, 311 U.S. at 38; see also Tidmarsh, *supra* note 66, at 262.

72. *Hansberry*, 311 U.S. at 38; see also Tidmarsh, *supra* note 66, at 271.

73. *Hansberry*, 311 U.S. at 38.

fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants.<sup>74</sup>

Sensibly enough, the *Hansberry* Court thought that the representative in *Burke* could not adequately represent both the interests of those home owners who, like the representative herself, wanted to enforce the covenant and the interests of those home owners who, like the Hansberrys, wanted not to enforce the covenant:

[T]hose signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation.<sup>75</sup>

*Hansberry* presented a case of indifference rather than a case of incompetence. The self-interest of the class representative in *Burke* was to enforce the restrictive covenant. The best way to do so was to bring a class action, which bound every signatory to the determination that the covenant was enforceable. The class representative and class counsel<sup>76</sup> were at best indifferent, and more likely were hostile, to the interests of those members of the class that had no interest in enforcing the covenant.<sup>77</sup>

Thus, *Hansberry* harbored no illusions about the goodness of humanity; it accepted the reality that class representatives were going to act self-interestedly—or egoistically. Its solution was to require a tight alignment of the interests of class representatives and the interests of class members. Even if class representatives were self-interested, the rising tide of their self-

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74. *Id.* at 42–45 (citations omitted).

75. *Id.* at 44.

76. Although *Hansberry* focused on the deficiencies of the class representative in *Burke*, the defendants in *Hansberry* also alleged that the class counsel in *Burke* was deficient. Brief of Petitioners at 45, *Hansberry*, 311 U.S. 32 (No. 29). In particular, the defendants argued that class counsel colluded with a willing defense counsel to enter a fraudulent stipulation that the covenant was valid. *Id.* This allegation of collusion was never proven, although it formed the backdrop for the Supreme Court’s decision. See *Hansberry*, 311 U.S. at 45 (noting “the opportunities” that the representation of conflicting interests “would afford for the fraudulent and collusive sacrifice of the rights of absent parties”); Tidmarsh, *supra* note 66, at 267–70.

77. Presumably, all signatories to the covenant had an interest in its enforcement when they signed the agreement during 1927 and 1928. But those interests began to change over time, and the covenant ran with each property for twenty-five years. Tidmarsh, *supra* note 66, at 239. The combination of the Great Depression, the changing racial composition of the surrounding neighborhoods, white flight, and the ready supply of African-American families willing to pay a premium for housing made some of the original signatories regret their decisions. See *id.* at 240 (“The inexorable law of supply and demand has already washed away restrictive covenants in other areas, and it seemed unlikely that the Association could keep its homeowners from eventually breaking rank.”). In addition, some new owners of the property likely had different attitudes toward the covenants than the original owners. Nagareda, *supra* note 7, at 288.

interest would inevitably lift the boats of class members with similar interests. If the interests were not so aligned, however, the class action could not be maintained.

*Hansberry's* rendering of adequate representation has loomed over class-action practice ever since. Most evidently, it influences the structure of Rules 23(a) and (g). Read together, these rules establish two fundamental requirements for all class actions. The first is that a class action be an efficient vehicle for handling claims.<sup>78</sup> The second—and here is *Hansberry's* influence—is that the class representative and class counsel adequately represent the interests of class members.<sup>79</sup> *Hansberry* has also driven the case law, which, when deciding questions of adequacy, often focuses on the presence (or absence) of the *Hansberry* evils: conflicts of interest within the class or collusion by the class representative or class counsel.<sup>80</sup> The Supreme Court itself has returned only once to the identity-of-interest construct *Hansberry* created—and has reinforced it. In *Amchem Products, Inc. v.*

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78. In particular, the requirements of numerosity (Rule 23(a)(1)), commonality (Rule 23(a)(2)), and to some extent typicality (Rule 23(a)(3)) make sure that joint treatment advances economy and efficiency. Numerosity ensures the possibility of realizing economies of scale. See *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (stating that “judicial economy arising from the avoidance of a multiplicity of actions” is a relevant factor in determining numerosity). Commonality and typicality ensure that a common issue exists and that noncommon issues will not sidetrack the case—thus helping to prevent expensive case-by-case relitigation of common questions. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (explaining that commonality and typicality help ensure that maintaining the class action is economical and that the interests of the class members are interrelated so that they “will be fairly and adequately protected in their absence”); THOMAS D. ROWE, JR. ET AL., *CIVIL PROCEDURE* 648–49 (2d ed. 2008) (stating that commonality requires that the class members have common factual or legal issues, because otherwise “it is difficult to imagine how the class representative could adequately represent the divergent interests of the members,” while typicality requires that the class representatives have claims that are typical of the class, because otherwise “reason exists to doubt the vigor of the representatives’ advocacy and the efficiency of the class proceeding”).

79. Most directly, Rule 23(a)(4) requires that the class representative “fairly and adequately protect the interests of the class,” and Rules 23(g)(1)(A) and (B) require a court to consider various matters “pertinent to counsel’s ability to fairly and adequately represent the interests of the class.” FED. R. CIV. P. 23(a)(4), 23(g)(1). But the demand for adequate representation runs throughout Rules 23(a) and (g), which list the prerequisites for class representatives and class counsel. Other requirements in Rule 23(a)—for instance, that the class representative be a “member[ ] of a class,” FED. R. CIV. P. 23(a), that “there are questions of law or fact common to the class,” FED. R. CIV. P. 23(a)(2), and that the class representative’s claims be “typical of the claims . . . of the class,” FED. R. CIV. P. 23(a)(3)—also seek to assure a close alignment of interests among the class representative, the class counsel, and the class members. See also *Falcon*, 457 U.S. at 157–58 n.13 (discussing how Rule 23(a) requires that the class representative’s claim be similar to the interests of the class and that class counsel has no conflicts of interest).

80. See, e.g., *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) (emphasizing the district court’s role in overseeing proposed class settlements in order to ensure that class counsel has no conflicts of interests with the class members); 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 1768–1769 (3d ed. 2005) (compiling case law on what constitutes coextensive, antagonistic, and conflicting interests between class representatives and the class).

*Windsor*,<sup>81</sup> the Court held that, in settling the claims of victims of the defendants' wrongdoing, class representatives with present claims against the defendants could not adequately represent class members whose claims had not yet matured—at least when the settlement that the class representatives were advocating failed to include terms as favorable for future claimants as those that the present claimants received.<sup>82</sup> Nor could those representatives agree to settle the valuable consortium claims of some class members for nothing, as the settlement in *Amchem* did.<sup>83</sup>

The development of the adequacy doctrine from *Hansberry* through *Amchem* can be critiqued on a number of grounds. The first is its failure to develop a clear test for incompetence,<sup>84</sup> or to suggest how that test might be linked to the test for indifference.<sup>85</sup> In determining competence, courts usually examine questions of physical and financial capacity<sup>86</sup>—logical enough

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81. 521 U.S. 591 (1997). Without extended discussion, the Court has also recognized the principle of adequate representation in a few other cases. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (stating that due process requires that the plaintiff “adequately represent” the class members’ interests); *Falcon*, 457 U.S. at 157 n.13 (mentioning the “adequacy-of-representation requirement” that ensures that class representatives have no conflicts of interest).

82. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626–27 (1997). *Amchem* also identified the array of illnesses and medical conditions of the class members as another reason to doubt the adequacy of representation. *Id.* In addition, *Amchem* involved claims of collusion between class counsel and defense counsel to sell out the interests of absent class members. See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 306 (E.D. Pa. 1994) (mem.), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (finding that claims that the “class action was the product of collusion, i.e., that Class Counsel ‘sold out’ the interests of the class members” were not supported by the evidence); *Koniak*, *supra* note 2, at 1118 (criticizing *Georgine*’s collusion standard as so high that it “virtually guarantees a finding of no collusion”). The district court found that such collusion did not exist. *Georgine*, 157 F.R.D. at 305–10. Neither the court of appeals nor the Supreme Court reached the question.

83. 521 U.S. at 627.

84. In addition to using Rules 23(a)(4) and (g) to determine questions of indifference to class members’ interests, courts use these rules to examine the question of capacity. Indeed, some courts interpret Rule 23(a)(3) as the place to explore questions of conflict or collusion, and Rule 23(a)(4) as the place to examine the question of the capacity of the class representative to represent the class. See, e.g., *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082–83 (6th Cir. 1996) (using Rule 23(a)(3) to evaluate whether the class representative’s interests were aligned with the class, and using Rule 23(a)(4) to evaluate whether the class representative had the mental capacity to represent the class). Likewise, the criteria for class counsel outlined in Rule 23(g)(1)(A) principally explore counsel’s financial, experiential, and legal capacity to represent the class.

85. The Supreme Court has lumped questions of competence and questions of conflict of interest into Rule 23(a)(4) without any attempt to explain their connection. *Amchem*, 521 U.S. at 626 n.20; *Falcon*, 457 U.S. at 157 n.13.

86. On the physical and mental competence of class representatives, see *Am. Med. Sys.*, 75 F.3d at 1083; and *Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295, 299–300 (N.D. Ill. 2005). Courts have tended to find that the financial capacity of class representatives is irrelevant. See *In re Intel Corp. Microprocessor Antitrust Litig.*, 526 F. Supp. 2d 461, 464 (D. Del. 2007) (“[T]he financial status of class representatives is irrelevant to class certification issues and not discoverable . . .”). But courts do focus on the financial resources of counsel. See *FED. R. CIV. P. 23(g)(1)(A)(iv)* (stating that, in appointing class counsel, the court must consider the resources the counsel will commit to the representation); *Doe v. Karadzic*, 176 F.R.D. 458, 462 (S.D.N.Y. 1997) (determining that counsel was qualified to represent the class based on credentials and adequate resources).

requirements, but ones that are hard to tease out of a doctrine concerned with conflicts and collusion.

That disconnection is itself a small point. But it feeds into two larger problems in the progression from *Hansberry* to *Amchem*. The first is the movement from dichotomous to polycentric interests. In *Hansberry* there were essentially only two possible positions that class members might have wished to take: either the covenant was valid and therefore enforceable, or the covenant was invalid and therefore unenforceable. In a world with such dichotomous choices, it is easy to recognize conflicts of interest. In *Amchem*, however, the interests were far more complex and diffuse. The factual and legal positions of class members varied considerably, and class members had a range of possible interests other than the dichotomous poles of “I favor settlement” and “I favor no settlement.” *Hansberry*’s identity-of-interests test works best when the interests in litigation break into readily opposing, clear-cut camps; *Amchem* shows that interests are often shades of grey. Because it involved only two dichotomous positions, *Hansberry* never needed to specify exactly how tightly aligned the interests had to be in order for a class representative to be regarded as adequate. *Amchem* might have done so, but the majority ducked the issue.<sup>87</sup> So we do not know whether a representative can stand in only for those claimants whose interests are exactly the same shade of grey, or, if not, how close the shades of grey must be. *Hansberry*’s test for adequacy seems poorly suited for a world that involves a multiplicity of interests among class members.

Second, and relatedly, in the vocabulary of ethics, the class action is a consequentialist—specifically, a utilitarian—device, which is principally concerned with preventing certain harms to potential class members, to the defendant, or to society.<sup>88</sup> A doctrine requiring avoidance of conflicts of interest or collusion has a deontological ring to it; it is a duty-based requirement that must be satisfied regardless of the consequences. In *Hansberry*, it was not clear that adequate representation was a deontological principle. On one view, *Hansberry* “constitutionalized” adequate representation to achieve a social good; it allowed an attack on a racially restrictive covenant to go forward. The petitioners in *Hansberry* had asked the Supreme Court to declare all racially restrictive covenants invalid, making the very arguments against restrictive covenants that the Court would adopt eight years later in *Shelley v. Kraemer*.<sup>89</sup> In 1940, the Supreme Court was

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87. At one point *Amchem* appeared to suggest that the settlement could have been saved if subclasses composed of members with comparable interests had been certified, instead of one large class that threw together people with varying interests. 521 U.S. at 627. But this suggestion came only in the Court’s quotation of a Second Circuit opinion, and in any event the Court did not make clear how many subclasses—or with what array of interests—would have been acceptable.

88. See *supra* note 47 and accompanying text.

89. 334 U.S. 1 (1948).

not yet willing to go that far;<sup>90</sup> adequacy of representation thus became a convenient vehicle that gave the *Hansberry* petitioners the chance to contest a particular covenant without the Court embroiling itself in far trickier constitutional and political questions whose outcome would have been in considerable doubt.<sup>91</sup>

By the time of *Amchem*, however, any sense that adequate representation was a utilitarian doctrine crafted with an eye toward achieving a good outcome was gone. The majority's opinion both opened and closed with a lament about the social and judicial ills that asbestos litigation had caused.<sup>92</sup> It recognized that the *Amchem* settlement might have alleviated those ills in some significant measure.<sup>93</sup> Despite these benefits, however, the Court felt constrained to find a lack of adequate representation without weighing the benefits of settlement against the costs of less than ideal representation<sup>94</sup>—clearly a nonconsequentialist approach.

The point of this critique is not to catch the Court in a bit of philosophical incoherence. Rather, it is to show that the doctrine of adequate representation—at least if it is understood to require strict avoidance of conflicts of interest or collusion—has drifted from the moorings of the law to which it was attached. Class actions are designed to prevent harm to similarly situated claimants, to defendants, or to society. Class actions also impose costs,<sup>95</sup> including two costs—depressed judgment (or settlement) values for class members and a concomitant loss in optimal deterrence of the defendant<sup>96</sup>—that can occur when conflicts of interest or collusion make representation inadequate. Viewed consequentially, representation should be deemed inadequate only when the marginal cost of a more imperfect

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90. One of the Court's difficulties was that, in the recent past, it had dismissed an appeal of a case challenging the constitutionality and legality of racially restrictive covenants for want of a substantial federal question. *Corrigan v. Buckley*, 271 U.S. 323, 331–32 (1926).

91. For this interpretation of *Hansberry*, see YEAZELL, *supra* note 63, at 235–36.

92. *Amchem*, 521 U.S. at 597–99, 628–29.

93. *Id.* at 628–29; *see id.* at 629 (Breyer, J., dissenting) (“[T]he need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests.”).

94. This turn seems particularly out of place because *Hansberry v. Lee* located the adequacy-of-representation doctrine in the Due Process Clause. 311 U.S. 32, 45 (1940); *see also id.* at 42 (stating that the due process and full faith and credit clauses shape the doctrine). Today, due process is mainly regarded as a consequentialist doctrine, balancing the costs of greater procedural protections against their benefits. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (identifying three factors the Court considers when determining whether a government action is in harmony with procedural due process: (1) the private interest that will be affected by the state action; (2) the effectiveness of the proposed procedural requirements in safeguarding against due process deprivations; and (3) the burdens such procedural requirements would place upon the government). For further discussion, see *infra* notes 193–94 and accompanying text.

95. One example is the potential cost of inaccuracy due to an increased probability of recovery from class aggregation. *See supra* note 28.

96. On the deterrence effect of class actions, see David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 570 (1987), which explains that adhering to a disaggregative dispute-resolution system with regard to mass torts reduces the deterrence effect that threatened liability normally has on defendants.

representation, when added to the other costs of class treatment, exceeds the costs to similarly situated claimants, to the defendant, or to society that non-class litigation would impose. But this is not the inquiry in which *Amchem* engages.<sup>97</sup>

Finally, treating adequate representation as an absolute bar to class treatment ignores a critical fact. Conflicts of interest are not occasional occurrences involving a shady class counsel or two. Rather, as I describe in the next Part, conflicts of interest are built into the very fabric of our present class-action regime. If we are serious about enforcing as tight an alignment of interests as *Hansberry* and *Amchem* seem to require, we must abandon Rule 23, or rewrite it.

## II. Adequacy's Conundrum: The Inevitability of Conflicts of Interest in American Class Actions

The four circumstances in which Rule 23(b) permits class treatment almost invariably bring into a single class people with antagonistic interests. This Part details the reasons for this perhaps surprising conclusion. In brief, the four class-action scenarios described in Rule 23(b) seek to prevent harms to other claimants (Rules 23(b)(1)(A) and, to some extent, 23(b)(2)), to defendants (Rules 23(b)(1)(B) and, to some extent, 23(b)(2)), or to society (Rule 23(b)(3)). To minimize these harms, people with diverging interests must be placed side-by-side in the class, and those interests must be adjusted one against the other.

The observation that conflicts inhere in many class actions is hardly new.<sup>98</sup> This Part, however, is the first systematic effort to prove why that observation is correct. In doing so, this proof raises the disconcerting possibility that virtually all class actions exceed the due process strictures that *Hansberry* imposes on adequate representation, and are therefore unconstitutional.

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97. Had *Amchem* undertaken such an inquiry, it is not clear what the outcome would have been. The settlement contained complex provisions that tended to set awards around the historical averages for asbestos settlements, but also tended to suppress high-end awards and made no allowance for inflation, thus, over time, suppressing all awards beneath real-dollar historical averages. There is some reason to believe that the willingness of class counsel to accept a low settlement was related to the arguable conflicts of interest that they had, both in simultaneously representing individual claimants and class claimants and in simultaneously representing present class claimants and future class claimants. For a full description of the settlement's terms, see JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 51–54 (1998), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Tidmarsh.pdf/\\$file/Tidmarsh.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Tidmarsh.pdf/$file/Tidmarsh.pdf).

98. See, e.g., Silver & Baker, *supra* note 10, at 1468 (“Conflicts of interest and associated tradeoffs among plaintiffs are an unavoidable part of all group lawsuits and all group settlements.”).

*A. Conflicts of Interest when Nonclass Treatment Will Harm Absent Class Members: Rule 23(b)(1)(B) and Rule 23(b)(2) Classes*

Begin with the problem of harm to the absent class members—that their interests will be disposed of, or at least substantially impaired “as a practical matter,” in the absence of class certification.<sup>99</sup> The two paradigms for this type of harm are a case seeking a remedy such as a declaration of rights or an injunction, and a case involving a limited fund. In the former, if the defendant’s conduct threatens widespread future harm, a court often cannot readily confine the remedy just to the plaintiff,<sup>100</sup> thus, the first plaintiff to secure a declaration or injunction effectively makes it difficult for similarly situated claimants to obtain relief more suited to their interests. In the latter, because the fund is insufficient to satisfy all claimants fully, early-filing plaintiffs receive full value for their claims, leaving little or no money for equally deserving, later litigants. In both situations, (b)(1)(B) and (b)(2) class actions promise equitable treatment for all members of the class.<sup>101</sup>

By definition, however, the self-interested plaintiff could care less about equitable treatment. She is interested in getting as much of the pie for herself as possible; she is under no obligation to<sup>102</sup>—and therefore will not—seek class treatment unless the class action helps her achieve her goals. It is therefore tempting to dismiss the problem of self-interested class representatives in this context; presumably, the only class representatives who will bring such cases as class actions must care about equity among claimants, and therefore (as long as they are competent) they will be adequate representatives. Such a view, however, is badly mistaken, for sometimes certification of a (b)(1)(B) or (b)(2) class is an advantage for a self-interested class representative. The reason that a self-interested plaintiff will wish to bring a declaratory or injunctive claim as a class action is that as class representative, she gets to control the arguments about the nature of the remedy to tailor the remedy to her own interests, and bind other potential litigants that might have preferred a different remedy to the judgment—thus preventing them from engaging in subsequent litigation that might undermine her preferred remedy.

The reasons that a self-interested plaintiff will seek class treatment in the limited-fund situation (or in a situation in which it is unlikely that the plaintiff will get the injunctive tailoring she wants) are less evident, but they

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99. FED. R. CIV. P. 23(b)(1)(B).

100. See FED. R. CIV. P. 23 advisory committee’s note (1966).

101. The harm that these rules prevent is the failure of the autonomy-centered joinder approach of Rule 20(a) to provide equitable treatment to potential litigants who are not joined. Such a harm is not necessarily a social harm. To use the limited-fund example, deterrence theory is indifferent as to whether the fund is given to one person or one thousand; in either event, the defendant will be equally deterred. See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1892 (2002) (“How damages are distributed among plaintiffs . . . is generally . . . irrelevant to achieving deterrence.”).

102. See *supra* text accompanying notes 57–61.

exist. To use a limited-fund hypothetical, assume that the defendant has control of \$1 million in assets, the legitimate claims of 100 plaintiffs against this fund amount to \$2 million, and each plaintiff has an identical claim for \$20,000. If the first plaintiff sues individually, she will recover the full value of her claim—\$20,000. The same will be true of the next forty-nine plaintiffs. But at that point the fund dries up, and as a practical matter, the claims of those last fifty potential plaintiffs are worthless. If the first plaintiff brings a class action, however, she will get only \$10,000—a loss of \$10,000 that would seem to prevent self-interested plaintiffs from seeking class treatment.<sup>103</sup>

But not always. In four scenarios a self-interested plaintiff will seek class certification:

- Scenario One: The increase in the chance of success plus the ability to spread costs and attorneys fees makes class treatment worthwhile. For instance, suppose that the plaintiff stands a 40% chance of winning \$20,000 in an individual suit, and it will cost her \$7,000 in fees and costs if she wins (and nothing if she loses). The expected value of her suit is \$5,200. Assume that with class treatment, however, the odds of victory go up to 75%<sup>104</sup> and that the plaintiff's share of the fees and costs, which can now be spread among all 100 class members, falls to \$3,000<sup>105</sup> if there is a victory (and nothing if she loses). Now the self-interested plaintiff's expected recovery is \$5,250, and she will seek class treatment.<sup>106</sup>

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103. The defendant is also unlikely to seek class certification, because the defendant is likely to be indifferent about who receives the \$1 million and probably prefers to stave off the day of bankruptcy or asset depletion as long as possible.

104. See *supra* note 57 and accompanying text.

105. Although the \$3,000 figure for litigation costs might seem high, class actions often involve expenses—such as the time spent discovering and briefing the class-certification motion and the cost of notifying the class in the event of a settlement—that would not be incurred in individual litigation. See FED. R. CIV. P. 23(e)(1) (requiring an attempt to notify class members that will be bound by the settlement); WILLGING ET AL., *supra* note 51, at 68–69 (noting that the median attorneys fee in class actions was 27%–30%). As the per-plaintiff costs fall, the incentive of the self-interested plaintiff to seek class certification grows.

106. Class actions allow a class representative to reduce the risk of exposure to litigation costs in one particular fashion. Although the rule is often honored in the breach, traditional ethical theory made a litigant responsible for payment of litigation expenses; the attorney cannot bear those costs. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1988). *But see* MODEL RULES OF PROF'L CONDUCT R. 1.8(e)(1) (2008) (permitting a lawyer to make the repayment of costs contingent on the outcome of the case). In class actions, however, a number of jurisdictions have held that the class representative is not responsible for the full costs of litigation. See *Rand v. Monsanto Co.*, 926 F.2d 596, 600–01 (7th Cir. 1991) (refusing to apply DR 5-103(B) in a federal class action, and refusing to find that the class representative's unwillingness to bear all the expenses of litigation made the representative inadequate under Rule 23(a)(4)). See generally Geoffrey P. Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent*, 22 REV. LITIG. 557 (2003) (analyzing ethical and Rule 23 issues concerning lawyers that advance the costs of litigation). Therefore, in the minority of jurisdictions that adhere to DR 5-103(B) for individual lawsuits, the legal exposure of the class representative for the costs of litigation is theoretically less.

- Scenario Two: The claimants do not have identical remedial claims. The self-interested class representative might hope that, after using the class's number to help establish liability, she can effectively denigrate or devalue the claims of fellow class members, thus getting a larger share of the judgment. For instance, assume that class treatment raises the chance of recovery only to 70%, but the class representative expects to be able to shade the remedial proof to enhance her claim to \$12,000. Still assuming pro rata litigation costs of \$3,000, her expected recovery is \$6,300, so she will seek class certification.
- Scenario Three: The self-interested plaintiff's preferred counsel agrees to take the case only as a class action, so that class treatment becomes the only viable way to bring suit. For instance, using the numbers described in the first example, the plaintiff might expect that retaining the preferred counsel will increase the chance of winning from 40% to 80%. On these numbers, it is rational for the class representative to assent to a class action.
- Scenario Four: The putative class counsel, with an eye only on the fee award, advises the putative class representative to seek class status without advising her that she stands to lose money from class treatment—and the putative representative lacks the legal acumen to realize that class treatment is not in her best interests.

Whichever reason is at work, class treatment ends up bundling together plaintiffs whose interests are not aligned. The class representative and the members of the class are locked in a competition for a limited resource—whether an injunction that cannot be perfectly tailored to all their interests or a fund that is insufficient to satisfy fully all their claims. The interests of the class representative, class counsel, and class members might converge on certain issues—in particular, on the issue of the defendant's liability.<sup>107</sup> On the issue of remedy, however, class representatives and class members who are competing with each other for a resource that cannot fully satisfy all claimants lack an “identity of interests.” Thus, there is reason to doubt that the self-interested class representative, who wants the relief shaped as favorably to her interests as possible, will adequately represent the interests of those with different interests.

True enough, but a doubting Thomas might point to two situations in which this self-interest will not manifest itself. The first occurs when the class members do not disagree about either the theory of liability or the nature of the relief they seek. For example, under the relevant law, the choice might be either injunction *X* or no injunction; every potential plaintiff wishes to obtain exactly the same remedy, which will apply to and equally benefit

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107. But not always. To the extent that the nature of the defendant's liability determines the shape of the relief, plaintiffs interested in different relief might not agree on which theory of liability to pursue.

all.<sup>108</sup> Here, our Thomas might rejoin, the rising tide of the plaintiff's self-interested desire to get injunction *X* really does lift all class members' boats. Even in this situation, however, conflict exists. In this example, the only reason that a self-interested putative class representative would seek class certification is to offload some of the costs of litigation onto class members. Although it is difficult to have much sympathy for class members who are hoping to be free riders on an individual suit, the self-interest of class members—a self-interest that I have not discussed before, but one that exists every bit as much as the self-interest of the class representative—is not to certify the case, for class members will be required to pay a pro rata share of litigation expenses for an injunction that they otherwise would have obtained for free. We can (and do) ignore the free-rider problem in (b)(1)(B) and (b)(2) cases, but ignoring it does not mean that the antagonism of interests goes away.<sup>109</sup>

The second situation a doubting Thomas might raise involves the use of subclasses, which *Amchem* has suggested as a solution to the polycentric interests of class members.<sup>110</sup> The idea of subclasses is to subdivide plaintiffs

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108. It is not clear how many cases this hypothetical encompasses. For the sake of argument, I am willing to admit that some cases fall within this description.

109. Because putative class members cannot opt out of (b)(1)(B) and (b)(2) class actions, *see supra* note 54, the free-rider problem cannot be assuaged by allowing class members to exit. It is interesting to note that the conflict of interest here does not concern the substance of the claim, but rather the litigation strategy: whether to seek class certification. Neither *Hansberry* nor *Amchem* involved a disagreement over litigation strategy, nor has the Court ever held that disagreements over strategy are a sufficient reason for finding a conflict of interest. Indeed, it is difficult to imagine that it would, for then no class action could be certified when any class member objected to certification. What makes this situation different from a simple disagreement over strategy, however, is the reason for the disagreement: Class members wish to see the class *not* certified because they will obtain a better outcome (i.e., the same injunction at less expense) without certification. Conversely, the class representative is making herself better off by making class members worse off. In both *Hansberry* and *Amchem*, comparable disagreements over the remedial outcome were sufficient to find a conflict of interest.

The one situation in which no antagonism appears to exist occurs when it is too costly for any claimant to bring the injunctive claim on her own. In such a case—the injunctive equivalent of the “negative-value suit” discussed *infra* in the text following note 124—it appears to be in every class member's interest to join the class. Nonetheless, as the discussion of negative-value suits will show, internal conflicts can arise in this situation. Moreover, unless the expected value of the injunction is very close to the cost of prosecuting the claim, so that the claim becomes viable only when litigation costs are spread across every member of the class, the free-rider problem still exists: An absent class member would prefer for the class definition to be broad enough to spread the litigation costs among enough people to make the class action viable, but narrow enough to exclude her. It is also worth noting that determining a lack of conflict by calculating the net effect of a class action on the interests of the class members is a consequentialist approach to determining conflicts of interest—precisely the approach that *Amchem*'s deontological analysis eschewed. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (“[T]he standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.”).

110. *Amchem*, 521 U.S. at 627; *see* FED. R. CIV. P. 23(c)(5) (“When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.”); *see supra* note 87 and accompanying text. *Amchem*'s suggestion was mild: After noting that class representatives “served

into smaller groups, each of which shares an identity of interests. Although useful in theory, subclassing is far less helpful in practice for two reasons. First, each subclass must be large enough not to run afoul of the numerosity requirement<sup>111</sup> but still contain within it no remedial antagonism among the members. Although it is possible to hypothesize such situations,<sup>112</sup> they are rare in the real world. Second, subclassing along interest lines institutionalizes the conflict among competing interests, rather than eliminating it. Because subclasses are still part of a larger single class, the conflicts among class members remain.

Third, although separate classes might overcome this problem, it is tricky to imagine how a court could engineer the filing—and consolidation into a single litigation—of separate class actions, each of which represents distinct, conflicting interests. Separate classes or subclasses require multiple class representatives and multiple class counsel. But separate classes or subclasses undercut the incentives for self-interested class representatives and class counsel to seek certification. Assuming that willing representatives for multiple classes or subclasses are available (and this is hardly a given), multiple classes loosen the self-interested class representative's control of the litigation and her ability to steer the litigation in her favor, thus reducing her expected recovery from class treatment; multiple representatives further reduce the number of people over whom the costs of litigation can be spread, thus increasing the pro rata costs. In the example above, if separate classing or subclassing reduces the expected recovery from 75% to 65%, and increases per-person litigation expenses to \$500, the expected recovery from class treatment falls to \$6,000—less than the \$6,500 that a self-interested plaintiff might expect from individual treatment. Similarly, assuming that multiple willing class counsel are available, a self-interested lawyer will realize that successfully settling the case becomes harder with more classes, and the fee that the counsel can expect will be substantially less than she could expect in a scenario in which she was the sole lawyer for a larger class.

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generally as representative for the whole, not for a separate constituency,” it quoted a Second Circuit decision that suggested subclassing as a solution to the problem of adverse interests within a settlement class. *Amchem*, 521 U.S. at 627 (discussing *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742–43 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993)). The Court never endorsed subclassing directly.

111. FED. R. CIV. P. 23(a)(1). In general, a class of 100 or more members meets this requirement; even smaller numbers can sometimes be satisfactory. *See, e.g.*, *Robidoux v. Celani*, 987 F.2d 931, 935–36 (2d Cir. 1993) (permitting inexact numbers of a potential class size to satisfy the numerosity requirement); *WRIGHT ET AL.*, *supra* note 80, § 1762 (emphasizing that there are no arbitrary rules establishing a required class size and there only needs to be a showing that joining all the members is impracticable).

112. For example, in the limited-fund hypothetical discussed *supra* in note 103 and accompanying text, rather than individual claimants, each entity with a \$20,000 claim could be an unincorporated association or trust composed of thousands of members. On the further assumption that the members of each association have no legally cognizable internal conflicts about the proper distribution of its \$20,000 claim, subclasses or separate classes composed of the members of each association would be numerous enough and also would not be remedially conflicted.

The class action also loses some of its efficiency due to the cost of multiple representation.<sup>113</sup> Once separate classes or subclasses are introduced, the litigation calculus changes, the advantages of individual action become greater, and the odds that the self-interested class representative and class counsel will seek class certification falls. Unsurprisingly, separate classes and subclasses are very uncommon in practice.<sup>114</sup>

Therefore, except in those rare cases in which subclassing into smaller and utterly cohesive groups is a viable option, conflicts of interest inhere in (b)(1)(B) or (b)(2) classes. These conflicts are less nettlesome if we assume that the class representative and class counsel are virtuous, principled, altruistic, or else are committed to maximizing the common good—and, in addition, that they are competent enough to achieve their goal. But the law of adequate representation cannot afford to make that assumption, given the reality that self-interested class representatives and class counsel can also use class actions to achieve private advantage. Moreover, even selfless class representatives and class counsel do not eliminate conflicts within the class; the conflicts exist, ever tempting the virtuous, the upright, and the altruistic to cave into abject self-interest.

If we read *Hansberry* and *Amchem* strictly, so as to require an identity-of-interests approach to adequate representation, the unconstitutionality of the (b)(1)(B) and (b)(2) class actions in nearly every context is a matter of elementary logic. The only remarkable thing is that the issue has not been widely noticed in the past.<sup>115</sup>

*B. Conflicts of Interest when Nonclass Treatment Will Harm the Defendant: Rule 23(b)(1)(A) and Rule 23(b)(2) Classes*

Next, consider the situation in which the harm that class treatment alleviates would befall the defendant. Rules 23(b)(1)(A) and 23(b)(2) are the texts for analysis; the former authorizes a class action when separate actions by a group of plaintiffs “create a risk” of “inconsistent or varying

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113. See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (holding that subclassing was not required, despite a conflict of interest within the class, because of the difficulty and expense of creating appropriate subclasses).

114. See WILLGING ET AL., *supra* note 51, at 41–44 (finding no use of issue classes and little use of subclasses within the four data sets). A hybrid solution often adopted by class counsel in lieu of subclassing is to constitute a single class with multiple class representatives, each of whom represents a particular type of injury or claim. In this way, a single counsel can try to represent all the various permutations of the claim, injury, and circumstance. But instantiating in particular people the conflicts among class members does not change the fact that conflicts within the class exist. See *Amchem*, 521 U.S. at 627 (“Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.”).

115. Courts have noticed other constitutional issues with either (b)(1)(B) or (b)(2) class actions, including the arguable due process violation in failing to provide an opt-out right, see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 & n.3 (1985), and Seventh Amendment issues in adjudicating injunctive claims when class members might also have monetary claims, see *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 405 (5th Cir. 1998).

adjudications . . . that would establish incompatible standards of conduct” for the defendant,<sup>116</sup> while the latter permits class treatment when the defendant has acted in a way that makes “final injunctive relief . . . appropriate.”<sup>117</sup> This language invokes two paradigmatic cases of harm. The first paradigm involves an injunction situation, in which one claimant with one set of interests wishes to obtain an injunction requiring the defendant to do *X*, while the interests of another claimant—who, as a nonparty, cannot be bound to the judgment in the first case—wishes to obtain an injunction requiring the defendant to do *Y*. The interests of other claimants might lead them to seek an injunction requiring *Z*. If *X*, *Y*, and *Z* are inconsistent with each other, so that it is very costly or even impossible for the defendant to meet all three obligations simultaneously, and if the plaintiffs are numerous enough, class treatment seems appropriate.<sup>118</sup>

The second paradigm involves an interpleader-like situation with numerous claimants. Assume that 100 people claim an interest in a *res* that the defendant is holding, and that each has a legal claim superior to that of the defendant. If individual actions are filed, the first plaintiff to judgment will obtain a judgment that the *res* belongs to him. The second-filing plaintiff is not bound by that judgment, and thus is free to obtain a judgment that the defendant owes her the *res* (or, more accurately, because the defendant gave the *res* to the first plaintiff, the defendant owes monetary equivalent of the *res* due to the defendant’s “conversion” of the *res*). And the same is true for the third plaintiff, and the fourth, right on to the hundredth.

In neither of these paradigms does it necessarily appear to be in the interests of the egoist plaintiff to seek class certification; the problems the defendant has in meeting other plaintiffs’ demands are not her business, as long as the defendant can give her the remedy she wants. There are, however, a number of situations in which the egoist plaintiff will seek certification. These situations largely parallel those described above<sup>119</sup>:

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116. FED. R. CIV. P. 23(b)(1)(A); *cf.* 28 U.S.C. § 1335 (2000) (statutory interpleader); FED. R. CIV. P. 19(a)(1)(B)(ii) (mandatory joinder when the defendant is “subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations”); FED. R. CIV. P. 22 (rule interpleader).

117. FED. R. CIV. P. 23(b)(2).

118. Of course, this situation is nothing more than the flip side of the injunctive situation involving the (b)(1)(B) and (b)(2) class actions described *supra* in subpart II(A). There, the first to obtain an injunction was in practical effect able to prevent later plaintiffs from obtaining an injunction that suited their needs; the absent plaintiffs were therefore the harmed parties. In this context, the later plaintiffs are not so prevented; thus, the harmed party is the defendant, who must comply with conflicting requirements. One factor determining whether the former or the latter harm is pertinent is likely to be the viability of independent suits. If enough is at stake that multiple claimants have an incentive to sue, then the latter harm is more likely to occur. Another determinant is temporal dispersion. If the claims of some litigants have not yet ripened when the early claims mature, the former harm is more likely to occur.

119. *See supra* notes 104–07 and accompanying text.

- Scenario One: Later-filed suits seeking injunction *Y* or injunction *Z* threaten the ability of the defendant to provide the first plaintiff with the injunction *X* that she seeks, or threaten to undo the injunction.
- Scenario Two: A class action increases the chances of winning or spreads the class representative's cost of litigation across the class (or both), and these expected advantages outweigh any loss in the quality of the remedy that the plaintiff would have achieved in individual litigation.
- Scenario Three: By taking control of the entire litigation, the self-interested plaintiff steers the case toward her preferred relief. For instance, the plaintiff might believe her claim to injunction *X* (or to the *res*) is better than that of other potential plaintiffs. A class action under (b)(1)(A) or (b)(2) becomes a way to spread the costs of litigation among class members, as well as a way to obtain a clear entitlement to injunction *X* or to secure clear title to the *res* that the competing claims of other class members might undo.
- Scenario Four: The only way to attract a lawyer who will increase the chances of victory is to dangle the lure of the recovery of class-action fees; the increased chances of recovery exceed any potential loss in the quality of an individual remedy.
- Scenario Five: Tantalized by the promise of larger class fees, class counsel misleads the putative class representative into believing that class treatment will lead (on balance) to a better remedy, even if it will not.

In addition, another scenario is possible in the (b)(1)(A) and (b)(2) situations: A self-interested defendant could seek or consent to class certification to avoid the risk of multiple or inconsistent liability.<sup>120</sup>

As with the (b)(1)(B) and (b)(2) classes, the class now contains members that have competing interests. Indeed, by definition, the members of the class wish to subject the defendant to “inconsistent or varying” lawsuits and “incompatible” remedies. Some of the class members have an interest in achieving one remedy, and others in achieving another remedy. Although in limited circumstances constituting separate classes according to group interests might provide an escape from the conundrum of conflicting

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120. Although requests by defendants to certify class actions against them are in theory possible, *see* Rossetto v. Pabst Brewing Co., 71 F. Supp. 2d 913, 917 (E.D. Wis. 1999), *rev'd on other grounds*, 217 F.3d 539 (7th Cir. 2000), they are as rare as hens' teeth. More typically, the defendant is likely to negotiate a settlement with a putative class representative and class counsel, and then support the plaintiffs' request for class certification. *See, e.g.,* Ortiz v. Fibreboard Corp., 527 U.S. 815, 822–26 (1999) (noting a defendant's attempt to reach a “global settlement” before supporting class certification).

class interests, as a practical matter that solution is unlikely to be effective for the reasons already explained.<sup>121</sup>

Therefore, the (b)(1)(A) and (b)(2) “harm to defendants” class actions contain the same constitutional infirmity as the (b)(1)(B) and (b)(2) “harm to absent class members” class actions. If the Due Process Clause in fact requires an identity of interests among class members, a court cannot certify a (b)(1)(B) or (b)(2) defendant-harm class action.

*C. Conflicts of Interest when a Class Action Is the Superior Aggregation Mechanism: Rule 23(b)(3) Classes*

Unlike the (b)(1) and (b)(2) class actions, the (b)(3) class action is not designed specifically to prevent harm to absent plaintiffs or to the defendant. The (b)(3) class action applies principally to monetary claims; plaintiffs with injunctive claims will use Rules 23(b)(1) and 23(b)(2).<sup>122</sup> The assumption underlying the (b)(3) class action is that the defendant has sufficient assets to satisfy putative class members’ monetary claims.<sup>123</sup> Unlike a limited-fund or interpleader-type situation, serial suits by individual plaintiffs will not leave later-filing plaintiffs without adequate monetary remedies. Nor will a series of such suits leave the defendant exposed to multiple or inconsistent obligations within the meaning of Rule 23(b)(1)(A); as courts have long recognized, inconsistent monetary judgments—some of which order a defendant to pay damages to some plaintiffs and others of which find the defendant not liable to other plaintiffs for the same behavior—do not constitute a harm to the defendant within the meaning of this rule.<sup>124</sup>

Instead, the focus of Rule 23(b)(3) is a more diffuse harm to society as a whole. Two types of social harm are the central cases. The first is inadequate deterrence. The paradigmatic case is “large-scale, small-stakes” litigation, also known as “negative-value suits.” Assume that a credit-card company has illegally overcharged ten million customers \$2 apiece. It is unlikely that very many, if any, individual cases will be filed; the costs of litigating each case exceeds the expected recovery (thus giving the suit a negative net value), and no attorney will work for such a small potential

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121. See *supra* notes 110–14 and accompanying text.

122. In limited circumstances, a court can award monetary relief incidental to an injunctive claim in a (b)(2) class action. Courts are presently divided over how “incidental” the relief must be, but under no construction can Rule 23(b)(2) be used when the case is principally about monetary recovery. Compare *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (narrowly construing the monetary relief available in (b)(2) suits), with *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 157 (2d Cir. 2001) (rejecting *Allison*’s approach).

123. Cf. *Ortiz*, 527 U.S. at 859–60 (reversing certification of a (b)(1)(B) settlement class action when the defendant retained some assets, thus making the action unsusceptible to limited-fund treatment).

124. See *In re “Agent Orange” Prod. Liab. Litig.*, 506 F. Supp. 762, 789 (E.D.N.Y. 1980) (“Rule 23(b)(1)(A) is *not* meant to apply . . . where the risk of inconsistent results in individual actions is merely the possibility that the defendants will prevail in some cases and not in others, thereby paying damages to some claimants and not others.”).

recovery. But this failure to deter the credit-card company has a significant social cost. By aggregating all ten million cases and by spreading the costs of litigation across all the claims, the suit becomes economically viable, a lawyer will now be willing to handle the case in return for a fee based on the class's recovery, and society achieves a better level of deterrence.

The second central case for the (b)(3) class action involves excessive litigation costs.<sup>125</sup> Here the paradigmatic case is "large-scale, large-stakes" litigation, in which the expected net recoveries make individual lawsuits economically viable. Because the cases tend to arise out of a common pattern of conduct by the defendant and tend to involve a limited array of injuries, the same issues are litigated in case after case, courtroom after courtroom. At a certain point, this repetitive litigation becomes a socially unnecessary expense.<sup>126</sup> A class action that brings together all of the claimants promises to reduce these costs, as well as the strain on the judiciary, substantially.<sup>127</sup>

But (b)(3) status is not always in an individual class member's best interest. The recovery on a class claim can be lower<sup>128</sup> and slower<sup>129</sup> than recovery on an individual claim. Class treatment can also be unattractive to

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125. Opt-out (b)(3) class actions impose certain costs not found in individual litigation, such as the often pricey cost of giving notice to class members of their right to opt out. See FED. R. CIV. P. 23(c)(2)(B) (delineating the requirements for individual notifications to class members). Therefore, when I refer to "excessive litigation costs," I mean *net* excessive costs—the costs that repetitive individual litigation creates less the costs that (b)(3) litigation imposes.

126. There is an argument that a certain amount of repetitive litigation is socially useful. According to Professor McGovern's thesis on maturity, large-scale, large-stakes cases often go through cycles, from the early cycle in which defendants win most cases to a cycle when plaintiffs respond to the early defense strategies and break through with some significant victories, before finally reaching a mature equilibrium when the chances of victory can be predicted with some statistical accuracy. See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEXAS L. REV. 1821, 1841–43 (1995) (discussing the three phases of mass-tort cases under a maturity theory). Arguably, the most accurate assessment of the value of cases occurs only after the equilibrium has been reached. Therefore, before reaching this equilibrium, repetitive litigation is justified as long as its marginal costs are less than the case's marginal contribution to the establishment of a more accurate equilibrium. Once an equilibrium is reached, however, the costs of repetitive litigation cannot be justified.

127. Although it might seem that the reduction of these costs is an advantage to the parties as well as to society, that is not necessarily the case. For instance, from a defendant's viewpoint, high litigation costs act as a barrier to entry for some plaintiffs. As long as the defendant's litigation costs are less than the additional liability costs that the defendant would incur from a lower barrier to entry, the defendant will prefer to expend money on litigation costs. In particular, a litigation class action typically threatens a liability judgment far in excess of the savings that the defendant incurs in lower litigation costs.

128. See Horowitz & Bordens, *Aggregation*, *supra* note 25, at 226 (reporting on experimental results showing that "a plaintiff with a quite strong case . . . appears to be better served by being disaggregated, particularly with reference to punitive damages"). For data on typical recoveries in class actions, see Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 638–40 & tbl.15 (2006), which provides data showing that in state class actions the median recovery was \$850,000 and the median per capita recovery was \$350, while in federal class actions the median recovery was \$300,000 and the median per capita recovery was \$517.

129. See JAMES S. KAKALIK ET AL., DISCOVERY MANAGEMENT 90 tbl.A-3 (1998) (noting the positive correlation between time to disposition and class certification).

counsel: The financial and resource requirements are considerable, pricing many counsel out of the market;<sup>130</sup> class-action law is a highly specialized field, beyond the ken or competence of many lawyers;<sup>131</sup> and the lawyer might lose control of the case to another counsel who ultimately garners the big fees.<sup>132</sup> In addition, since the mid-1990s, federal courts have been less hospitable to (b)(3) class actions, especially in the large-scale, large-stakes context;<sup>133</sup> therefore, class treatment is hardly a given, and might fruitlessly add cost and delay for claimants and counsel alike.

Nonetheless, without a strong, independently viable claim, a self-interested claimant is likely to consider class certification for one or more of the reasons that typically motivate self-interested claimants to seek class certification: spreading litigation costs, increasing the probability of recovery, obtaining a litigation premium, or luring a more effective lawyer through the promise of a large class fee.<sup>134</sup> The opportunity to secure a large fee is also likely to be attractive to a self-interested lawyer, and might tempt the lawyer to advise a client to seek class certification even if it is not in the client's interest to do so. The calculation of self-interested class representatives and class counsel is slightly different in (b)(3) cases than in mandatory (b)(1) and (b)(2) cases: On one hand, the likely remedy—a fund of money—often makes class treatment a more lucrative prospect for class counsel; on the other hand, the expense of giving notice of class members' right to opt out, and the consequent chance that opt-outs will decrease the value of the class's claim and increase the chance of competing class actions that might cost the class representative and class counsel control of the case, create risks for the representative and counsel.

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130. See FED. R. CIV. P. 23(g)(1)(A)(iv) (making “the resources that counsel will commit to representing the class” an issue in determining the adequacy of class counsel).

131. See FED. R. CIV. P. 23(g)(1)(A)(ii) (making “counsel's experience in handling class actions [and] other complex litigation” an issue in determining the adequacy of class counsel).

132. Indeed, for a while, a number of courts auctioned off the position of class counsel to the lowest responsible bidder; the counsel that brought the case initially received no preferential treatment in class-counsel selection. See, e.g., *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 539 (N.D. Cal. 1990) (justifying the selection of class counsel via competitive bidding by asserting that the bidding process allows assessment of the “reasonableness of the fee application by reference to other applications”). In addition, in suits under the Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C. § 78u-4 (2000)), the court designates the lead plaintiff, who might not be the plaintiff that initially filed the action. The lead plaintiff then chooses the class counsel, who might not be the counsel that the original plaintiff chose. See *In re Cendant Corp. Litig.*, 264 F.3d 201, 222–25 (3d Cir. 2001) (rejecting the auction theory in PSLRA cases and placing the lead plaintiff in charge of selecting class counsel).

133. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997) (holding that a class in an asbestos case failed to meet the predominance requirement of Rule 23(b)(3)); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744–46 (5th Cir. 1996) (overturning class certification because the class failed to meet both the predominance and superiority requirements of Rule 23(b)(3)); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (granting a writ of mandamus and ordering decertification of a class of mass-tort claimants).

134. See *supra* notes 104–07, 119 and accompanying text.

When self-interested class representatives and self-interested class counsel seek class status, however, their interests are not the interests that society hopes to vindicate through the (b)(3) class action.<sup>135</sup> The class representative seeks to maximize the value of the claim, and class counsel seeks to maximize the value of the fee.<sup>136</sup> Neither the representative nor the counsel has the goal of achieving optimal deterrence or reducing litigation costs as such.

According to *Hansberry*, however, the critical issue is whether the interests of class representatives align with the interests of others in the class; their alignment with society's interests is not the relevant issue. Once again, however, the structure of the (b)(3) class action creates conflicts within the class.

The conflict is evident from the language of Rule 23(b)(3). A court can certify a (b)(3) class action only when "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."<sup>137</sup> The predominance requirement concedes the existence of noncommon, nonpredominant issues in (b)(3) class actions.<sup>138</sup> An obvious problem is the self-interested class representative's incentive to litigate and prove noncommon issues beyond the point at which those proofs aid her own case.<sup>139</sup> Indeed, spending even one dime litigating the noncommon issues of class members eats into the net recovery that the class representative can expect.<sup>140</sup> The problem typically

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135. This fact is hardly surprising. For an economic analysis of the inefficiencies that can arise when parties use the public good of adjudication to achieve private gain, see STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 265–70 (1987).

136. Maximizing the value of the fee is not the same as maximizing the value of the class's claim. POSNER, *supra* note 28, § 21.11, at 614–16. The literature often analyzes the incentives for class counsel to depart from the interests of the class as a type of "agency cost." See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987) (denominating the conflicts of interest between attorneys and clients that can arise in class-action litigation as an "agency cost" problem); Jonathon R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Change*, 58 U. CHI. L. REV. 1, 22–27 (1991) (arguing that the lack of monitoring of attorneys by class members and the inefficacy of bonding in class actions create deviations of interests between attorneys and clients). For a case illustrating how the fee structure chosen by counsel was not as advantageous to the class as other structures might have been, see *Cendant*, 264 F.3d at 285.

137. FED. R. CIV. P. 23(b)(3). The rule also provides four specific criteria—the interest of class members in controlling their own cases, the extent of preexisting litigation, the wisdom of centralizing the litigation in one forum, and the manageability of the class action—that help a court to flesh out the "predominance" and "superiority" criteria. FED. R. CIV. P. 23(b)(3)(A)–(D).

138. For the exception to this statement, see *infra* notes 152–58 and accompanying text.

139. Indeed, even on common issues, the interests of the class representative and class members might not line up perfectly. Given the class representative's particular factual position, pressing certain claims or theories of liability might enhance her claim, while pressing other claims or theories might better benefit class members that occupy somewhat different litigation postures.

140. We would expect to find that, when it becomes too costly for them to prove a class member's claim, the class representative and class counsel will abandon the claim. The

becomes more acute as the case moves from questions of general liability to the questions specific to each plaintiff (such as individual causation, damages, and case-specific defenses) that usually inhabit (b)(3) class actions. This lack of enthusiasm for proving the noncommon issues of class members is somewhat counterbalanced by the interests of class counsel, who has an incentive to maximize the fee and therefore, within limits, to enhance the value of class members' claims. But that fact merely highlights a conflict of interest that pertains between the class representative and class counsel. Moreover, class counsel has an incentive to litigate noncommon issues only to the extent that doing so maximizes the fee—in other words, to expend time and money on increasing the size of the monetary recovery only to the point that an additional unit of time and money earns a greater fee than counsel can earn for other legal work. This point is not necessarily the point at which the recovery for either the class representative or the class members is at its maximum.<sup>141</sup> Thus, counsel's interest does not always align tightly with the interests of either the class representative or the class members.

The misalignment of interests between the class and its counsel extends beyond the question of fees. One of the enduring realities of most (b)(3) class actions is that class counsel advances the funds for the litigation (including the often considerable money required to give notice).<sup>142</sup> Losing a class action can visit financial ruin on class counsel. The combination of fronted costs and expected attorneys fees typically makes class counsel the largest stakeholder in the class action. In a large-scale, small-stakes case, the counsel's stake can exceed that of any plaintiff by five or even six orders of magnitude. Even in large-scale, large-stakes cases, the disparity can be enormous. For instance, in the *Blood Factor* settlement class action,<sup>143</sup> class

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development of *cy pres* and other doctrines for providing substituted remedies bears out the expected result. See *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 689 (8th Cir. 2002) (approving *cy pres* distribution of unclaimed settlement proceeds, but modifying the distribution plan); *Democratic Cent. Comm. v. Wash. Metro. Area Transit Comm'n*, 84 F.3d 451, 454–56 (D.C. Cir. 1996) (describing *cy pres* and other approaches to distribution of funds when it was too costly to determine the victims of excessive transit charges); cf. *Molski v. Gleich*, 318 F.3d 937, 953–56 (9th Cir. 2003) (rejecting the settlement in a mandatory class action, and also rejecting the finding that the class representative and class counsel provided adequate representation, where the representative received \$5,000, counsel received \$50,000, class members received nothing, and the defendant instead made contributions to third-party advocacy groups). This cost–benefit calculus is not the deontological identity-of-interest analysis that *Hansberry* and *Amchem* appear to demand.

141. See *supra* note 610 and accompanying text; *supra* text accompanying notes 107 and 119.

142. Class counsel commonly advances the costs of class-action litigation. See 5 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 15:21, at 78 (4th ed. 2002) (stating that cost advancements on a contingency basis are critical in class actions); *supra* note 106 and accompanying text.

143. This case, *In re Factor VIII or IX Concentrate Blood Products Litigation (Blood Factor)*, 159 F.3d 1016 (7th Cir. 1998), was a class action for settlement brought by one class representative, Susan Walker, on behalf of all hemophiliacs infected with HIV that had used the defendant's products, as well as their infected spouses and children, their estates, and all persons with derivative claims such as loss of consortium and emotional distress. See DEBORAH R. HENSLER ET AL., *CLASS*

counsel received \$40 million for fees and reimbursement of costs, while each of the 6,500 class members received \$100,000.<sup>144</sup> And counsel must deal with competitive pressures from overlapping class actions brought by other lawyers who pose a constant risk of settling the case out from underneath class counsel, thus leaving counsel holding the bag of uncompensated costs and time.<sup>145</sup> Therefore, the risk tolerance of the class counsel is often different from that of the class representative and class members. In such a circumstance, it is understandable—even if not ethically laudable—when class counsel acts to protect that investment in the case rather than undertaking riskier strategies that match up better with the risk positions of the class.<sup>146</sup>

The superiority inquiry adds to the tension within the class. Superiority examines the issue of class certification from the viewpoint of society, ensuring that a class action is a better vehicle for resolving a case than other possible methods, such as individual litigation, consolidation,<sup>147</sup> multidistricting,<sup>148</sup> and so on.<sup>149</sup> It is likely that some class members would have been better served by one of these alternate methods. But none of those methods better serves the interests of the class representative or class counsel; if they did, the representative or counsel would have employed them to begin with.

The opt-out feature of (b)(3) class actions arguably softens these conflicting interests. It could be argued that class members waive any possible conflicts of interest by failing to opt out when afforded the

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ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 305 (2000) (describing the class of plaintiffs); *id.* at 315 n.59 (noting that Susan Walker is a fictitious name used to protect the privacy of the actual class representative).

144. *Blood Factor*, 159 F.3d at 1018; HENSLER ET AL., *supra* note 143, at 305–07.

145. There are cases in which defendants arguably pitted counsel in two overlapping class actions against each other in a reverse auction to drive down the settlement's price. See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282–83 (7th Cir. 2002) (remanding the case to determine if a reverse auction occurred); *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1250 (9th Cir. 1997) (withholding full faith and credit from a related state-court settlement because the conflicts of interest between class counsel in state-court action and plaintiff class amounted to inadequate representation), *withdrawn on reh'g*, 179 F.3d 641, 650 (9th Cir. 1999).

146. Although I do not explore them here, these pressures are also a reality in (b)(1) and (b)(2) class actions. Because those classes are less common, and they rarely involve monetary awards akin in size to (b)(3) awards, the degree of conflict between the interests of the class and the interests of counsel is often less. Cf. John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1542, 1544–50 (1998) (demonstrating that serious conflicts of interest exist at the stage of allocating money among class members).

147. See FED. R. CIV. P. 42(a).

148. See 28 U.S.C. § 1407 (2000).

149. For a full discussion of potential aggregation methods, see generally JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE* 10–200 (2002).

opportunity to do so.<sup>150</sup> But this argument proves too much, for it wipes out the doctrine of adequate representation in (b)(3) class actions. It puts those who do not opt out at the mercy of self-interested class representatives and class counsel, creating an incentive for rational class members to opt out and frustrating the hoped-for gains from class treatment. Indeed, treating a failure to opt out as a waiver turns the idea of adequate representation on its head; Rule 23's promised trade-off for giving up the right to bring an individual action is adequate representation—not the absence of adequate representation.<sup>151</sup>

It is possible to specify one (albeit uncommon) condition in which a class representative lacks a conflict of interest with class members. The situation occurs when a class of claimants have a joint entitlement to receive a lump-sum award, and the proper distribution of the award among the beneficiaries is not in dispute.<sup>152</sup> Further assuming that any variations in the factual positions of the claimants create no varying legal positions or theories,<sup>153</sup> there are no noncommon issues. This hypothetical situation is the monetary equivalent of the “injunction *X*” or “no injunction” situation described in connection with (b)(1)(B) and (b)(2) class actions.<sup>154</sup> But the (b)(3) class action does not present a comparable free-rider conflict between the class representative and the class members. The reason is that the (b)(3) class action generates the fund of money from which expenses will be paid; had the class representative brought an individual action, the common fund would have been charged for these expenses in any event.<sup>155</sup> Unless the

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150. *Hansberry v. Lee*, which created the constitutional requirement of adequate representation, did not involve an opt-out class action. 311 U.S. 32, 39–44 (1940).

151. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (“Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”). In addition, the waiver argument fails to account for the possibility that, even if representation is adequate at the time that the opt-out right is provided, subsequent events could render the class representation inadequate. *See id.* at 812 (“[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.”); *cf.* FED. R. CIV. P. 23(e)(4) (permitting, but not requiring, a court to give a second opt-out right at the time of settlement).

152. For instance, the claimants might be the numerous beneficiaries of a trust or the members of a corporation or unincorporated association suing on behalf of the trust, corporation, or association because of an action that injured the trust or corporation, not just the interests of some beneficiaries of shareholders. *Cf.* FED. R. CIV. P. 23.1–23.2 (derivative actions and actions by unincorporated associations).

153. For example, in a case brought by shareholders against a corporation, the actions of the officers or the board of directors might be called into question; if the officers or board also own shares, the class's conflicting positions take this situation outside of the narrow exception that I am describing.

154. *See supra* notes 108–09 and accompanying text.

155. *See Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74, 88 n.15 (1980) (acknowledging “the established power of a court of equity to charge beneficiaries with a proportionate share of the costs of creating a common fund through litigation”).

additional costs occasioned by class treatment<sup>156</sup> exceed the expected benefits (including the greater likelihood of recovery) of class treatment for a particular class member,<sup>157</sup> no free-rider problem exists.

Cases of this description are rare, and it would be even rarer for a claimant or counsel to choose to incur the expense and uncertainty associated with seeking class treatment when the claimant can sue for, and recover, the same award without encountering such difficulties.<sup>158</sup> Because this example contains an important insight into the conundrum of adequate representation, I return to it later.<sup>159</sup> For now, however, the bottom line is that (b)(3) class actions also pit the interests of class representatives, class counsel, and class members against each other—not rarely, but nearly all the time.

#### D. Summary

The point of this Part has been to demonstrate that a deontological, identity-of-interests, rising-tides interpretation of adequate representation—the interpretation seemingly offered by *Hansberry* and adopted by *Amchem*—is unworkable. The circumstances that Rule 23 has identified as eligible for class treatment almost invariably create divisive interests among class representatives, class counsel, and class members. Self-interested class representatives can exploit these conflicts to their advantage and to the disadvantage of some class members; self-interested class counsel can exploit these conflicts to counsel's advantage and to the disadvantage of some class representatives, some class members, or both. We can try to minimize the force of this conclusion by arguing that conflicts are permissible as long as they are “not too bad”—by which we might mean that conflicts can be ignored either when the harm they cause is small (i.e., smaller than the gains from class treatment)<sup>160</sup> or when the evidence suggests that the better angels of the representative's and counsel's natures have risen above abject self-interest. The former argument is impermissible from the conflict-of-interests perspective suggested in *Amchem*, for it grounds adequate representation on

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156. See *supra* note 105.

157. Such a case can exist: If the costs of class litigation are spread equally among all class members, a class member with a very small proportional share of recovery might find that the costs of litigation are greater than the recovery. Cf. *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 508 (7th Cir. 1996) (describing a class action suit in which an individual plaintiff paid attorneys fees in an amount forty times greater than his recovery on the merits). This case is discussed *infra* at notes 162–65 and accompanying text.

158. The evident circumstances in which class certification might nonetheless be sought are when class treatment is perceived to increase the likelihood of recovery for the claimant or counsel, see *supra* notes 57–58, 60 and accompanying text, or when a claimant that remains ultimately liable under a jurisdiction's ethical rules for the payment of litigation expenses wishes to limit her liability for those expenses, see *supra* note 106 and accompanying text.

159. See *infra* note 166 and accompanying text.

160. See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (noting a conflict within a class but declining “to regard this particular defect as fatal” due to the costliness of remedying it through proper subclassing).

the “greatest good for the greatest number” footing that *Amchem* eschewed.<sup>161</sup> The latter argument assumes that class representatives and counsel are virtuous, principled, altruistic, or other-regarding to some degree—or at least that the threat of decertification can make them so. On this view, Rule 23 is written to set temptation in the path of class representatives and class counsel, and then it measures their worth by how well they resist. Such a rule is, to say the least, passing strange. Nor is it entirely consistent with *Hansberry* and *Amchem*, both of which proceeded from the premise that when a facial conflict of interest existed, representation was inadequate; in neither case did the Court ask whether, on the facts, the class representatives and class counsel had successfully resisted the temptation to self-deal. Finally, replacing a “no conflict of interest” rule with a “no self-dealing in fact” rule begs the question of how we determine when self-dealing is going on, and puts great pressure on court’s ability to detect self-dealing.

As a constitutional requirement, adequate representation is not a doctrine we can discard because it is inconvenient. If class actions cannot guarantee adequate representation, it is the law of class actions—not the doctrine of adequate representation—that must give way. Hence the central conundrum of class actions: Can we give meaning to the doctrine of adequate representation without rendering the modern American class action unconstitutional?

### III. Reconstituting Adequacy of Representation

This Part proposes and defends a test for determining adequate representation that navigates between the reality of internal class conflict and the benefits of class actions. In short, “adequate representation” with respect to a class member exists when the actions of the class representative and class counsel place that class member in no worse a position than the class member would have occupied by retaining individual control of her litigation. I begin by describing and justifying this principle. I then defend the proposal against its principal objections and show its superiority to other possible solutions.

#### *A. Adequacy of Representation: Not Harming Class Members’ Net Expectations*

The definition of adequate representation that best accommodates the preference for individual control of litigation, the need for class actions, and

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161. After identifying a series of potential conflicts within the class—between those with present claims and those with future claims; between those entitled to opt out and those not entitled to opt out; and between those asked to sacrifice their claims for consortium and those not asked to sacrifice their claims of asbestos exposure—*Amchem* did not then ask how “small” these conflicts were in relation to the benefits of the class settlement. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997).

the conflicting interests within the class is simple: The representation provided to a class member is adequate if and only if the actions of the class representative and class counsel can reasonably be expected to place that class member in no worse a position than that class member would have enjoyed had she retained control of her own case. More simply, the principle might be stated: *Do no harm*.

So stated, the principle seems self-evident. Representation that leaves some class members worse off than they would have been without class certification must be inadequate, right? Surprisingly, the answer has not always been “yes.” The poster-child counterexample occurred in *Kamilewicz v. Bank of Boston Corp.*,<sup>162</sup> in which a state-court, negative-value class settlement resulted in a \$2.19 recovery and a \$91.33 assessment of attorneys fees for some class members—thus leaving these class members owing \$89 as a result of their lawsuit.<sup>163</sup> The federal court refused to reexamine the state court’s decision upholding the reasonableness of the settlement.<sup>164</sup> Admittedly, cases with *Kamilewicz*’s egregious facts are rare;<sup>165</sup> typically, a successful class action garners a positive recovery for class members. But that fact does not mean that the representation was adequate in the sense that I describe; adequacy does not hinge on a positive result in absolute terms, but rather a positive result in comparative terms, so that the net result from class treatment equals or exceeds the net result from a class member’s retention of control over her own case. It is not difficult to imagine circumstances in which a class action might result in a positive result for class members but still fail the adequacy-of-representation test that I propose.

At the same time, the requirement is fairly minimal—a modest and elementary principle of justice rather than an extraordinary and heroic burden.<sup>166</sup> It is easy to comprehend and, in most circumstances, easy to apply. Indeed, it is possible to state the condition of *adequate* in mathematical form. Let  $P_i$  represent that probability of a class member’s recovery in

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162. 92 F.3d 506 (7th Cir. 1996).

163. The total amount awarded for attorneys fees was in dispute, but lay somewhere between \$8.5 million and \$14 million. *Id.* at 508.

164. The underlying state-court class action involved an alleged overcharge in a mortgage escrow account. *Kamilewicz*, 92 F.3d at 508. The plaintiffs claimed in their federal suit that class counsel and the defendants in the state-court class action had colluded in the settlement, thus violating federal racketeering laws and their civil rights, and further committing fraud, conversion, and malpractice. *Id.* at 509. The district court dismissed the suit on the basis of the *Rooker-Feldman* doctrine, which holds that federal courts cannot act as appellate courts over the decisions of state courts. *Id.* at 509–12. The Supreme Court denied certiorari. *Kamilewicz v. Bank of Boston Corp.*, 520 U.S. 1204 (1997). For a scathing critique of the decision, see Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1808–17 (2004).

165. *But see* Koniak, *supra* note 164, at 1797 (suggesting that class-action litigation is rife with abuse).

166. Indeed, the “do no harm” principle is a generalized statement of the reason that no conflict of interest exists in the Rule 23(b)(3) class action that I described *supra* at notes 152–58 and accompanying text.

individual litigation,  $L_I$  the size of the recovery in individual litigation,  $F_I$  the attorneys fees in individual litigation, and  $C_I$  the costs of individual litigation. And let  $P_C$  represent that probability of a class member's recovery in class litigation,  $L_C$  the size of the recovery in class litigation,  $F_C$  the member's pro rata share of attorneys fees in class litigation, and  $C_C$  the member's pro rata share of costs in class litigation. Adequate representation exists when:

$$(P_I \times L_I) - (F_I + C_I) \leq (P_C \times L_C) - (F_C + C_C),$$

where  $0 \leq (P_C \times L_C) - (F_C + C_C)$ .

1. *Explaining the Operation of the Principle.*—This formulation allows me to explore a number of the central features of this adequate-representation principle. First, as the  $P \times L$  term reflects, adequacy of representation depends on expected recoveries; it is determined before the fact, not based on how the case actually turns out.<sup>167</sup> Second, as the  $F + C$  term reflects, adequacy of representation depends on net, rather than gross, recovery. Individual litigation can lead to an award ( $L_I$ ) that is higher than a class award ( $L_C$ ).<sup>168</sup> Compared to individual litigation, however, a class action can increase  $P$  and decrease  $F + C$ , which together raise the net expectancy despite the lower award.<sup>169</sup> In effect, therefore, the “do no harm” principle requires the class representative and class counsel to spread the gains anticipated from a rising  $P$  and a falling  $F + C$  (net of losses anticipated by a falling  $L$ ) among class members, so none are disadvantaged by class treatment.

Third, the lower limit of the formula ( $0 \leq (P_C \times L_C) - (F_C + C_C)$ ) is necessary to account for negative-value suits like *Kamilewicz*, which would normally not be brought as independent litigation. Without the lower limit, a self-interested class representative or class counsel can engage in a significant amount of self-dealing in such cases. To take *Kamilewicz* as an example,<sup>170</sup> assume that in order to recover the class members' \$2.19 in overcharges, an individual suit would have cost \$2,000. With an expected recovery of  $-\$1,997.83$ , the class members almost surely will not bring the suit; thus, the effective value of their suit is \$0. If  $-\$1,997.83$  rather than \$0 is the number that constrains a self-interested class representative or class counsel, then the actions of the class counsel in *Kamilewicz* could have worsened the financial position of the Kamilewiczes by as much as \$1,997 without being regarded as inadequate—a far more unjust result than the \$89 injustice that occurred. Placing the lower limit of zero on the adequacy

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167. Thus, a class member cannot claim the representation was inadequate merely because the class lost the case, while the class member would have won an individual case.

168. See *supra* note 103 and accompanying text.

169. For an illustration of this statement, see *supra* notes 104–06 and accompanying text.

170. See *supra* notes 162–64 and accompanying text.

principle reflects the reality that many large-scale, small-stakes claims are not independently viable.

Fourth, the calculation of adequacy must be done for each class member. It is not enough that, overall, the benefits of class treatment exceed the benefits of individual control; that issue has already been determined by other provisions in Rule 23(a).<sup>171</sup> Rather, the Due Process Clause guarantees each and every class member adequate representation. This demand can be tricky when class members have a variety of types of claims, types of injuries, and strength of claims, and also have temporal variations. To take the hypothetical example previously discussed, assume a \$1 million limited fund with 100 potential claimants, each of whom has an equal and identical \$20,000 claim.<sup>172</sup> Assume as well that the claims of thirty of the claimants have already matured, and those of the other seventy will mature in several years. Individual actions by the present thirty claimants will deplete the bulk of the fund (\$600,000, or \$20,000 apiece for each claimant), and leave the remaining seventy claimants to recover a fractional share (\$5,714 apiece) of their claims in their individual suits. Self-interested class counsel might wish to bring this case as a (b)(1)(B) class action in order to obtain fees based on recovery of the full \$1 million fund. If the class action is successful, class counsel might well contend for a simple (and equitable) distribution of \$10,000 to each class member, less costs and fees. If so, it is unlikely that class counsel has adequately represented the thirty present claimants, even though counsel has adequately represented the seventy future claimants and even though, from a social viewpoint, the settlement causes no overall harm (the windfall to the seventy offsets the losses to the thirty, and the per capita cost of implementing the remedy is likely less as well).<sup>173</sup> The only circumstance in which representation of the thirty class members would be adequate is when the costs of individual litigation ( $F_I + C_I$ ) are so high that the net individual recovery for the thirty claimants is greater than the net recovery under an equal-share class settlement.<sup>174</sup>

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171. See *supra* note 78 and accompanying text.

172. See *supra* text accompanying note 103.

173. This example shows a limitation of the “do no harm” principle: its potential to achieve less efficiency than other possible solutions. I consider this criticism *infra* in subpart III(B)(3). For a case on which this example is loosely based, see *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857–59 (1999), in which the court rejected certification of a (b)(1)(B) class in part because the settlement treated claimants equally even though class members whose claims accrued before 1959 had stronger claims than class members whose claims accrued after 1959.

174. For instance, if we assumed that a present claimant’s fees and costs for recovering \$20,000 were \$10,000, and the likelihood of recovery were 70%, then the net expected recovery for the thirty claimants in individual litigation would be \$4,000 ( $0.7 \times \$20,000 - \$10,000$ ). On the other hand, if we assumed that the total fees and costs in the class action were \$500,000 (or \$5,000 per class member), then a settlement that proposed an equal division of the fund (\$10,000 apiece) would lead to a net recovery of \$5,000 ( $1 \times \$10,000 - \$5,000$ ) for the thirty present class members, and the class counsel’s representation in agreeing to an equal settlement would be adequate.

Fifth, adequate representation is not perfect representation. The “do no harm” principle does not require the class representative and class counsel to maximize each class member’s individual recovery. It requires only that the class representative and class counsel do no worse for each class member than the class member would have done individually. Thus, a range of actions are likely to be deemed adequate; the class representative and class counsel need not select the action that best advances the interests of each class member. Indeed, in light of nearly inevitable tensions within the class,<sup>175</sup> it is unlikely that they could consistently select actions that did so. They need not be worried that their litigation decisions will be deemed inadequate merely because, after the fact, it turns out that those actions did not realize the greatest possible gain for a particular class member. The “do no harm” principle is designed as a check on self-interested behavior, not as a principle that chooses actions based on the greatest good of a class member or even of the class as a whole.

Sixth, and conversely, the formulation is a floor, not a ceiling. Nothing prevents a class representative or class counsel motivated by notions of fairness or justice from trying to make class members better off than they would have been in individual litigation.<sup>176</sup>

Seventh, the “do no harm” principle allows—indeed, expects—constant recalculation of adequate representation as a class action proceeds. The actions of the class representative and class counsel are constantly altering *P*, *L*, *F*, and *C*. Thus, at the outset of a case, the actions of the class representative and class counsel might appear likely to better the lot of all class members. Once settlement negotiations begin, however, the class representative or class counsel might be tempted to agree to terms that sell out the interests of some class members. Upon settlement, adequacy must be recalculated to compare the value of each class member’s recovery under the settlement to the recovery that could have been expected through individual litigation.

Eighth, the principle controls collusive behavior. Any principle of adequacy that asks only whether there is an identity of interests among class members does not prevent one identically situated class member from turning on another, or the class counsel from turning on the class as a whole. Any principle of adequacy that looks only to overall class benefits runs the risk that the class representative or class counsel will, with the tacit cooperation of the defendant, capture most of those benefits for herself. The “do no harm” principle assures that, whatever side deals or wink-and-nod agreements might occur in class actions, class members are not made worse by them.

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175. See *supra* subparts II(A)–(C).

176. Indeed, in many situations, institutional structures are likely to require, or at least push, class representatives and class counsel toward a more equitable treatment of class members than the one that the “do no harm” principle requires as its minimum. See *infra* notes 235–39 and accompanying text.

Ninth, and significantly, the “do no harm” formulation makes no distinction between the actions of the class representative and the actions of class counsel. As I have described, conflicts can arise due to the actions of either.<sup>177</sup> This formulation looks at the results, not the sources, of action. Thus, it becomes unnecessary to specify separate duties or obligations for class representatives and class counsel.<sup>178</sup>

Tenth, and finally, although this formulation is designed to deal with the problem of indifference in class representation,<sup>179</sup> it also links up with the other half of the adequacy-of-representation problem: incompetence.<sup>180</sup> One of the difficulties of an identity-of-interest approach to adequate representation is its inability to answer the question: How do we measure the competence of the class representative and class counsel? The “do no harm” principle provides the answer: Incompetence exists when neither the class representatives nor class counsel are able to ensure that class members will end up no worse off than they would have been if they had retained control of their case. This answer provides a reference point for determining the financial, experiential, legal, mental, and probity requirements that the competence doctrine places on class representatives and class counsel.

Indeed, the operation of the principle promises numerous benefits and solves some of the present predicament involved in the representation of competing interests. In the following section, I demonstrate that the principle can also be justified with reference to structural, philosophical, and economic arguments.

2. *Justifying the Principle.*—The “do no harm” principle for determining adequacy of representation is consequentialist; it measures the adequacy of the actions of class representatives and class counsel solely in terms of their effects on class members. It evaluates outcomes, not motivations. Therefore, the principle becomes immediately unappealing to those who prefer to ground reasons for action, or reasons for procedural rules, either in virtue or in deontological duty.<sup>181</sup> If class representatives and

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177. See *supra* notes 57–60, 107, 121, 134–36 and accompanying text.

178. In this regard, the principle offers a coherent legal ethic for attorneys involved in complex litigation. See TIDMARSH & TRANGSRUD, *supra* note 21, at 914 (“Ethical questions lie at the very heart of complex litigation, and no proposed solution for complex litigation can be deemed adequate unless the solution works out its ethical implications.”); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 44 (1995) (noting that his experience on the bench demonstrated that the present ethics rules are predicated on the traditional relationships in two-litigant cases and do not do enough to provide “realistic guidance to today’s lawyers and judges”).

179. See *supra* notes 62, 85 and accompanying text.

180. See *supra* notes 62, 84–86 and accompanying text.

181. For an examination of various virtue-based, deontological, and consequentialist theories of procedure, including a strong critique of the consequentialist approach, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 226–32, 242–73 (2004). See generally Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 918–53 (1999) (describing efficiency-based, rights-based, and process-based theories of procedure).

class counsel were compelled by a sense of virtue, duty, or altruism to make the class members better off than individual litigation would, the adequacy principle that I propose might be unnecessary.<sup>182</sup> But the principle admits of no illusions on that score; it is intended to act as a constraint on the self-interested who wish to achieve the maximum benefit for themselves. As such, the “do no harm” principle imposes a consequentialist limit on their actions—a limit that speaks in the same language that they do.

Indeed, both internal arguments<sup>183</sup> and external arguments<sup>184</sup> support the principle. To begin with internal arguments, the “do no harm” principle aligns the doctrine of adequate representation with the other central requirements of Rule 23—efficiency and the avoidance of harms—as well as with the structure of the joinder rules, with the modern understanding of procedural due process, and with the results in *Hansberry* and *Amchem*. As I have described, the foundational requirement for all class actions, which Rule 23(a) seeks in part to ensure, is the efficiency of the class action in relation to individual litigation.<sup>185</sup> Likewise, Rule 23(b) specifies certain harms that class actions must avoid.<sup>186</sup> Both requirements are consequentialist in orientation; Rules 23(a) and (b)(3) are utilitarian in orientation, while Rules 23(b)(1) and (b)(2) have more solicitude for preventing harms to individuals even if they are not necessarily social harms. As we have also seen, Rule 23 still retains an egoist or self-interested cast in certain regards, especially in its willingness to place the decision to seek class certification in the hands of class representatives and class counsel.<sup>187</sup> The “do no harm” principle mediates among these diverging consequentialist tendencies and harmonizes them. It leaves room for some self-interested behavior—it does not require the representative or counsel to seek the best outcome for the class or for each class member. At the same time, it assures that the class action will do at least as much good as individual litigation would do, thus achieving certain social benefits. And it avoids harming absent class members, which is a concern that manifests itself specifically in Rule 23(b)(1)(B) and (b)(2). The “do no harm” formula is not the only prin-

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182. The principle is a floor on action, not a ceiling.

183. By “internal” arguments, I refer to arguments derived from legal rules, structures, and precedents. These arguments might also be described as formalist, in the sense that existing legal rules, structures, and precedents constrain or determine the choice of a proper legal outcome. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511–29 (1988) (defining common uses of the term “formalism” as, variously, the “denial of choice” or the “limitation of choice”); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1189–93 (1999) (stating that arguments by analogy help to make law more stable and less error-prone than does open-ended reasoning).

184. By “external” arguments, I mean arguments grounded in sources other than legal structures, rules, and precedents.

185. See *supra* note 78 and accompanying text.

186. See *supra* notes 42–46 and accompanying text.

187. See *supra* notes 517–61 and accompanying text.

ciple that can mediate among these tendencies,<sup>188</sup> but it sits nicely as a compromise among them.

For the same reason, the formula is aligned with principles and ideas that drive joinder law more generally. As I have discussed, the default joinder rule, Rule 20, allows plaintiffs to engage in egoist joinder behavior—but it ultimately checks that behavior by considering both the efficiency of a plaintiff's joinder decision and the fairness of that decision to the defendant.<sup>189</sup> In addition, Rule 19(a)(1)(B)(i) requires joinder of absent parties when the failure to join such parties “as a practical matter impair[s] or impede[s] the person’s ability to protect the interest.”<sup>190</sup> Thus, at the broader level of joinder, the compromise among egoism, utilitarianism, and altruism that manifests itself in Rule 23 also finds a place. Therefore, the “do no harm” principle, which likewise finds middle ground that partially validates each of these tendencies, fits comfortably within the range of ideas that animate American joinder decisions.

A third internal argument is the “do no harm” principle’s consistency with the modern approach to due process. Although *Hansberry* itself was a bit dodgy about the exact source of the constitutional right to adequate representation—it located the source of the right in both the Due Process Clause and the Full Faith and Credit Clause<sup>191</sup>—the right is cast purely in due process terms today.<sup>192</sup> The Supreme Court provided the modern test for determining the constitutionality of deprivations of individualized adversarial procedure in *Mathews v. Eldridge*<sup>193</sup>: departures from adversarial process must have expected benefits that equal or exceed the costs to an individual from the loss of traditional adversarial process.<sup>194</sup> Therefore, as a type of

188. For instance, I consider another possible principle—a rule that adequacy requires class representatives and class counsel to improve the positions of class members in relation the second-best joinder alternative. See *infra* notes 248–55 and accompanying text.

189. See *supra* notes 20–23, 36–38 and accompanying text; see also FED. R. CIV. P. 19(a)(1)(B)(ii) (requiring joinder when a plaintiff’s joinder decision “leave[s] an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations”).

190. This language parallels that of Rule 23(b)(1)(B), which shows a similar solicitude for protecting the rights of absent plaintiffs. The two protections do not conflict; joinder under Rule 19, however, is subject to the requirements of Rule 23. FED. R. CIV. P. 19(d).

191. See *supra* note 94.

192. See, e.g., *Richards v. Jefferson County*, 517 U.S. 793, 805 (1996) (holding that due process prevents the assertion of the preclusive effect of a prior judgment against a nonparty that was not adequately represented in the prior case); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (explaining that due process requires “that the named plaintiff at all times adequately represent the interests of the absent class members”).

193. 424 U.S. 319 (1976).

194. *Id.* at 319, 335. The Supreme Court continues to adhere to this formulation. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2268 (2008) (citing to the *Mathews v. Eldridge* test to support the “idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 529 (2004) (using the *Mathews v. Eldridge* test to determine the scope of an enemy combatant’s opportunity to contest his detention). On the economic underpinnings of *Mathews v. Eldridge*, see POSNER, *supra* note 28, § 21.1, at 593–94.

departure from traditional adversarial theory,<sup>195</sup> class actions satisfy the *Mathews v. Eldridge* formulation of due process as long as the loss to each class member from not being able to individually litigate her claim does not exceed the expected benefits of class treatment. One of the problems of the conflict-of-interest approach for determining adequacy of representation as a constitutional matter is its poor match-up with the decidedly consequentialist test of *Mathews v. Eldridge*; under the conflict-of-interest approach, representation can be inadequate even if the conflict costs less than the gains from class treatment.<sup>196</sup> On the other hand, the “do no harm” approach matches up well with the *Mathews v. Eldridge* formulation for due process: Its insistence that class members not be made worse by class treatment guarantees that, as long as the class action reaps social benefits,<sup>197</sup> *Mathews v. Eldridge*-style due process has been satisfied.<sup>198</sup>

The final internal argument is the principle’s consistency with the outcomes in both *Hansberry* and *Amchem*. In *Hansberry*, the position staked out by the class representative in the first class action had the potential to harm those class members—including future property owners who would buy the property during the twenty-five year term of the racially restrictive covenant—who, for economic or social reasons, wished to sell to African-Americans. On a “do no harm” theory, answering the question of adequate representation is not as simple as showing the possibility of different litigation positions among class members. Rather, the issue is whether, at the time that the first class action was certified, obtaining a judgment finding that the covenant was valid was expected to put any class member in a worse position than she would have been in had she been allowed to control her own litigation. To answer that question, a court would have needed to compare (1) the expected value—for each present and future homeowner during the remaining duration of the covenant—of the home in a white-only neighborhood, after subtracting the cost of bringing the first class-action litigation but adding the expected cost of an individual’s possible future suit to enforce the covenant, against (2) the expected value—for each present and future homeowner—of the home without any restrictive covenants. If the latter value was greater than the former, then the *Hansberry* class action violated the “do no harm” principle. On the facts of *Hansberry*, it appeared that this was the

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195. See *supra* text accompanying note 41.

196. See *supra* notes 88–97 and accompanying text.

197. The requirements of class certification ensure that these benefits will accrue; class treatment must be more efficient than individual litigation, see *supra* note 78 and accompanying text, and must avoid harms that individual litigation causes, see *supra* notes 42–48 and accompanying text.

198. Of course, the *Mathews v. Eldridge* test could also be satisfied on a lesser showing than the “do no harm” approach, for it allows individual litigants (or class members) to be made worse off as long as the social gains from class treatment are great enough. Thus, the “do no harm” approach is not the constitutional minimum that *Mathews v. Eldridge* might tolerate.

case.<sup>199</sup> Therefore, the representation in the first case harmed the interests of some class members and was inadequate as to them.

Likewise, *Amchem* is correctly decided on a “do no harm” approach, even though the Court used a different rationale. *Amchem* had identified two principal conflicts within the class: the failure to provide any recovery for consortium claimants and the failure to protect future claimants by giving them inflation-adjusted future awards that would have made their claims equivalent in value, in real-dollar terms, to those of class members with present claims.<sup>200</sup> On the first issue, the Court was clearly correct, *as long as* consortium claims had a positive value in individual litigation; if they did, then the class representatives who agreed to the dismissal of the claims did harm to the interests of those class members. Available evidence suggests that such claims had a positive net value.<sup>201</sup> With regard to the present–future conflict that *Amchem* identified, the “do no harm” approach is a more complex analysis than the one in which the Court engaged, but its outcome is the same. With respect to future claimants, the “do no harm” principle would have required the Court to compare the expected value of each class member’s individual claim (discounted by the possibility that the defendants would become insolvent and less the cost of individual litigation) to the value received in the litigation; if any class member stood to gain from individual treatment, then representation was inadequate as to that member. Given the values of such claims in relation to the expected payouts in the settlement, it seems likely that the decision of class representatives in *Amchem* to settle caused harm to some class members.<sup>202</sup> Under the “do no harm” approach, however, the harm was most likely incurred by present class members; the value of future class members’ claims needed to be discounted by the realistic possibility that the settling defendants might declare bankruptcy or become insolvent. In addition, the “do no harm” approach reveals another problem with adequate representation on which the Court did not focus. In *Amchem*, class counsel agreed to settle existing individual claims on better

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199. At the time that the first class action was litigated, property values in the racially restricted neighborhood were falling; due to economic and social conditions, African-Americans were the only willing purchasers—and they were willing to pay a premium to buy the homes in the neighborhood. Sales conditions continued to deteriorate between the time of the first class action and the time of the *Hansberry* litigation, and some home owners were eager and willing to sell to African-Americans. See Tidmarsh, *supra* note 66, at 240, 251, 254, 256–57, 262 (describing forces that caused African-American demand for homes in the Washington Park neighborhood and the sale of certain homes to African Americans).

200. See *supra* notes 82–83 and accompanying text.

201. For an example of pre-*Amchem* asbestos-exposure litigation involving individual claims akin to the claims settled in *Amchem*—a case in which two spouses were awarded \$100,000 apiece for consortium damages—see *Carpenter v. GAF Corp.*, Nos. 90-3460, 90-3461, 1994 WL 47781, at \*1 (6th Cir. Feb. 15, 1994).

202. Compare *id.* (affirming damages awards in individual asbestos litigation of \$498,750 and \$540,000), with TIDMARSH, *supra* note 97, at 52–53 (noting that the settlement range for most mesothelioma claims in *Amchem* was \$20,000 to \$200,000).

terms than they settled the claims of class members.<sup>203</sup> Assuming that the amounts of the individual settlements were fair,<sup>204</sup> a “do no harm” principle holds that, in failing to obtain comparable settlement amounts for class members whose claims would mature before the defendants’ bankruptcy or insolvency would presumably drive down the value of future claims, the *Amchem* representatives and counsel left those class members worse off than they would have been in individual litigation, and therefore failed to provide them with adequate representation.<sup>205</sup>

The “do no harm” principle also is justified by external arguments. Philosophically, the principle rests on two premises: individual autonomy and the view that, as John Rawls put it, people organize into societies as “a cooperative venture for mutual advantage.”<sup>206</sup> The value of autonomy is a foundational premise in modern Western moral and political philosophy.<sup>207</sup> Likewise, the classic modern account of society—from Hobbes through Locke, Rousseau, and Mill to Rawls—is that people give up some of their autonomy because social cooperation attains something more desirable, whether that “something” is security, enjoyment of property, the moral basis for civil liberty, or the prevention of harm to others.<sup>208</sup> But that account still does not determine the precise constraints that society can impose on an individual’s right to act—in other words, the extent to which society can bend one individual’s autonomy to the comparable claims of others to their

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203. See *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 298, 305–11 (E.D. Pa. 1994) (analyzing the degree of the disparity), *rev’d on other grounds*, 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); Koniak, *supra* note 2, at 1064–78.

204. The objectors to the *Amchem* settlement argued that the amounts of the individual settlements were too high, thus proving collusion between class counsel and the defendants. *Georgine*, 157 F.R.D. at 306. The district court found that the payments to individuals were within historical settlement ranges and therefore justified. *Id.* at 307–10.

205. As I have noted, the “do no harm” principle makes no distinction between the ethical obligations of lawyers and the representational responsibilities of class representatives, nor does it need to break out collusion as a separate concern. See *supra* notes 177–78 and accompanying text. Therefore, even though the district court found neither ethical improprieties nor collusion in the settlement of the individual claims, *Georgine*, 157 F.R.D. at 305–11, the “do no harm” principle nonetheless finds the settlement improper as to those class members whose claims matured before or soon after the filing of the class complaint. Whether the representation of class members with claims that matured in the far future was inadequate—the issue on which the Supreme Court focused in *Amchem*—is less clear under the “do no harm” approach; the answer requires a comparison between the settlement value of the claims and the expected value of those claims—after discounting for the possibility of bankruptcy or other events (such as a congressional bailout of the asbestos industry) that might diminish their value—in the absence of a settlement.

206. JOHN RAWLS, *A THEORY OF JUSTICE* 4 (rev. ed. 1999).

207. See John Christman, *Autonomy in Moral and Political Philosophy*, in *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 29, <http://plato.stanford.edu/archives/fall2003/entries/autonomy-moral>. “Autonomy” is a word with multiple potential meanings. *Id.* Here I use it in the sense of freedom from external constraints on achieving an individual’s desired goods.

208. THOMAS HOBBS, *LEVIATHAN* 87–90 (J.M. Dent & Sons Ltd. 1914) (1651); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 95 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690); MILL, *supra* note 49, at 23; RAWLS, *supra* note 206, at 4; JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 52–56 (Roger D. Masters ed., Judith R. Masters trans., 1978) (1762).

autonomy.<sup>209</sup> For Locke, the natural law imposed necessary limits;<sup>210</sup> for Kant, the categorical imperative required each individual to treat every individual as an end, not a means;<sup>211</sup> for Mill, the limiting principle was the maximization of utility;<sup>212</sup> for Rawls, it was the veil of ignorance.<sup>213</sup>

The “do no harm” principle borrows from this tradition, relying most on Mill’s famous observation that one individual’s right to swing a fist ends at another person’s nose,<sup>214</sup> on Kant’s categorical imperative, and on the Rawlsian veil of ignorance. In effect, class representatives and class counsel become the agents placed in charge of the claims of class members; at the same time, they are also looking after their distinct and independent interests. The “do no harm” principle insists that in exercising their autonomous right to advance their own litigation interests, they do not act in a way that harms the litigation interests of those for whom they serve as agents. It guarantees that the “society” created by the class representative and class counsel works together for mutual advantage; the representative and counsel cannot represent those that the class action places at a disadvantage in relation to their autonomous right to bring individual litigation. It does not deny the class representative and class counsel the opportunity to achieve better outcomes for themselves than they could achieve through individual litigation. Indeed, the provision of such an opportunity is a necessary incentive to attract representatives and counsel to file class actions that, as we have seen, beneficially prevent certain types of undesirable harm.<sup>215</sup> But in exercising this personal freedom—this right to swing their arms, if you will—representatives and counsel must stop when they threaten to hit the “noses” of class members. By guaranteeing absent class members the same expected (if not better) outcome as individual litigation would have yielded, class representatives and class counsel also respect absent class members as their own ends, rather than simply as a means to achieve the ends of the representative and counsel.

Moreover, according to the Rawlsian veil of ignorance, arrangements that benefit some more than others can be regarded as just when all those affected by the arrangement—not knowing whether they will occupy a favored or unfavored position under the arrangement—will nonetheless

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209. See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1645, 1645–46 (1997) (“The primary problem with the individualist model is the central downside of liberalism generally: a satisfactory account of its limits.”).

210. See LOCKE, *supra* note 208, § 96 (finding that once individuals choose to become part of a community, they “submit to the will and determination of the majority,” where the majority “determines, . . . by the law of nature and reason, the power of the whole”).

211. Hans Reiss, *Introduction to KANT: POLITICAL WRITINGS*, *supra* note 27, at 1, 18.

212. MILL, *supra* note 49, at 14.

213. RAWLS, *supra* note 206, at 11.

214. See *supra* note 49 and accompanying text.

215. See *supra* subpart I(B).

consent to it.<sup>216</sup> Thus, assume that we place the class representative, the class counsel, and all class members behind a veil of ignorance, so that they do not know which position they will occupy in a class action. We then ask them to choose one of three governing principles for the behavior of the class representative and class counsel: a principle that permits no conflicts of interest; a principle that tolerates conflicts of interest and further allows the class representative and class counsel to act in a self-interested way that risks harm to class members; and a principle that tolerates conflicts of interest when no one is made worse by the conflict and some are made better. The position on which all (including the risk-averse) should be able to agree is the last—the “do no harm” principle.<sup>217</sup> Like the “no conflicts” position, no one ends up worse off from class treatment; like the “allow all conflicts” position, some are made better off. The “do no harm” principle creates no risk of loss, and promises the possibility of a gain, from class treatment. It is therefore the principle on which all, sitting behind the veil of ignorance, can agree on.

What the “do no harm” principle rejects is the “greatest good for the greatest number” solution of utilitarianism. It is easily possible to construct a *Kamilewicz*-type class-action hypothetical in which most class members end up better off from class as opposed to individual litigation by, say, \$5 apiece, while just a few class members end up worse off by \$1 apiece. Under a “greatest good” measure of adequacy, the representation is fine. Under the “do no harm” approach, it is not. The “do no harm” approach retains a greater respect for the individualist model of American adjudication, which places a premium on each litigant’s liberty and autonomy.<sup>218</sup> It also forces those who gain from class treatment to redistribute some of those gains to others, so they become at least indifferent to the outcome.<sup>219</sup> Even if class-

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216. RAWLS, *supra* note 206, at 118–23.

217. Rational wealth maximizers might prefer the second position in some circumstances. Assume that the class action contains one million people plus one class counsel. Assume as well that the expected outcome from individual litigation is a gain of \$1, but the expected outcome from the class action is a loss of 50 cents for every person in the class except for the class counsel, who will receive a fee of \$2 million. Under this scenario, a rational individual sitting behind the veil of ignorance might support the class action, for there is a one in 1,000,001 chance of obtaining \$2 million (thus an expected gain of roughly \$2), and a one million in 1,000,001 chance of being made worse \$1.50 (roughly, an expected loss of \$1.50). When we consider risk-averse individuals, however, the “do no harm” principle becomes the principle on which all, sitting behind a veil of ignorance, would choose.

218. See Rubenstein, *supra* note 209, at 1644 (“Current procedural and ethical rules encourage group members and attorneys to pursue their own individual paths in filing, pursuing, and constructing test cases.”); *supra* notes 24–28 and accompanying text.

219. Utilitarian theory recognizes the reality that harm must sometimes be visited on a few in order to achieve the greater good; thus, a switchman can permissibly route a runaway train onto the track with one worker rather than keep it on the track with five workers. See Judith Jarvis Thomson, *The Trolley Problem*, 94 *YALE L.J.* 1395, 1395 (1985). These hard ethical dilemmas arise when harm to some is inevitable, and the question is how to keep harm to its bare minimum. But that problem is different from harming someone when there is no reason to do so. In the context of class actions, when the class achieves gains that exceed its costs, asking some members of the class to bear losses, when it is possible to distribute some of the gains achieved by others in

action status takes away the autonomy of class members to act on their own litigation interests, it guarantees them the expected benefits of that autonomy.

The distribution of the gains of class treatment among the class members can also be explained on economic grounds. The “do no harm” approach to adequate representation forces class representatives, class counsel, and class members who benefit from class treatment to internalize the costs that the class action might otherwise impose on other class members. Without a mechanism to internalize these costs, class representatives and class counsel will be too willing to offload the costs of the class action onto some class members, and to set out on courses of conduct that enrich themselves while neglecting the costs of their behavior.

Indeed, “do no harm” adequacy of representation is a specific application of the principle of Pareto improvement, the economic concept that holds an action to be more efficient when at least one person is made better off by the action and no one is made worse off.<sup>220</sup> Thus, in comparison to individual litigation, the “do no harm” principle ensures greater efficiency. Admittedly, the “do no harm” principle does not go so far as to insist on Pareto optimality, the economic concept that defines efficiency as the state of affairs in which no further Pareto improvements can be made.<sup>221</sup> In neoclassical economics, Pareto optimality is often tempered by the Kaldor–Hicks refinement, which holds that an action is efficient if wealth transfers to achieve Pareto optimality could be made, even when they are not in fact made.<sup>222</sup> One reason that the Kaldor–Hicks refinement has been thought necessary is because of the difficulty of adopting large-scale social or economic policies that make no one worse off and the related costliness of identifying those who are made worse off and transferring wealth to them.<sup>223</sup> The “do no harm” principle rejects the Kaldor–Hicks refinement, and insists on transfers to those who might be made worse off by class treatment. The reason is that, unlike large-scale social or economic policies whose various permutations can create polycentric distributions of winners and losers,<sup>224</sup> class actions are fairly self-contained and organized around the discrete goal of maximizing the value of a class’s legal claims. Therefore, it is relatively

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the class to those that would be harmed, is impermissible. The “do no harm” principle requires this distribution.

220. See POSNER, *supra* note 28, § 1.2, at 12.

221. See THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW* 4 (2004) (explaining that an allocation is Pareto efficient or Pareto optimal if there is no other allocation that is Pareto superior to it).

222. This state is also sometimes described as “potential Pareto efficiency.” *Id.* at 5–6; POSNER, *supra* note 28, § 1.2, at 13.

223. See MICELI, *supra* note 221, at 5–6 (describing the problems with using Pareto efficiency to evaluate proposed policy changes and explaining that economists employ Kaldor–Hicks efficiency to address these problems); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 8–9 (3d ed. 2003) (illustrating the conflict between efficiency and equity).

224. *Cf.* Fuller, *supra* note 24, at 394–95 (discussing polycentrism in the adoption of wage and price legislation whose various permutations create different advantaged and disadvantaged parties).

easy and inexpensive for class representatives and class counsel to identify class members who might be harmed by the positions taken by the representative and counsel in seeking to maximize that value, and then to modulate their behavior to make those class members at least indifferent to the outcomes they receive in the class action. I will return to this point shortly.<sup>225</sup> For now, however, it is enough to say that the “do no harm” principle ensures that class treatment will be more efficient than individual litigation, and—because the “no conflict of interest” principle prevents certification of class actions in which such efficiency might otherwise be attained<sup>226</sup>—will also lead to greater efficiency than the “no conflict of interest” principle.

In sum, the “do no harm” principle acknowledges the inevitability of conflicts of interest in class actions, and addresses those conflicts through a simple rule that leaves no one worse off because of them. Because all have an expected outcome equal to or greater than the outcome that they would have achieved through individual lawsuits, the principle vindicates the substance of the individualist model of litigation. At the same time, it captures the benefits of reduced harms to class members, to the defendant, and to society that class actions seek to achieve. Because none are made worse and some are made better, the “do no harm” principle also ensures that class actions will enhance social welfare.

#### *B. Four Objections*

Admittedly, the “do no harm” measure of adequate representation is not a perfect solution. In this subpart, I examine four objections. The first three—administrability, equity, and inefficiency—attack potential weaknesses in the principle itself. The final objection—the availability of alternatives—explores whether other solutions might achieve better results in dealing with conflicts of interest while still enhancing social welfare.

*1. Administrability.*—The first critique of the “do no harm” principle is the potential difficulty of its administration. The critique has two components. The first is the inability to quantify many of the variables necessary for an exact calculation. The second, related concern is the seeming need for recalculation of the class representative’s and class counsel’s adequacy after every action that they take.

It is indeed true that precise measurements under the “do no harm” formula are difficult to make, especially early in the litigation. On the other hand, it is unlikely that such detailed calculations will be necessary. Early in a class action that is filed as a litigation class action,<sup>227</sup> a *prima facie* showing

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225. See *infra* notes 2305–39 and accompanying text.

226. See *supra* notes 88–97 and accompanying text.

227. A “litigation class action” is distinguishable from a “settlement class action.” As the terms imply, the former is filed with the stated goal of adjudicating the dispute to a final judgment; the latter is filed to give effect to a settlement upon which the defendant has agreed with the putative

of adequate representation can be made by proving that the class action does not reduce the value of any class member's claims, but does reduce the litigation costs of each class member in relation to individual litigation.<sup>228</sup> The same ballpark estimate can be used as major developments in the case—the joinder of new parties, the filing of amended pleadings, the dismissal of claims, summary judgment, the trial, and so on—unfold.<sup>229</sup> Should a settlement occur, the court has the opportunity to calculate adequacy with greater precision; some necessary values, such as the amount of per capita recovery and the size of the fees and costs can now be known with a degree of certainty. Of course, even here, some variables—such as the expected value and costs associated with individual litigation—cannot be known with precision, but ballpark data will be available in many cases.<sup>230</sup> And, in the event of true uncertainty about whether class treatment will harm a class member's interest, the rule that the class representative must prove adequacy of representation will defeat class certification.<sup>231</sup>

2. *Equity*.—A second criticism of the “do no harm” position is that it permits inequalities within the class. This criticism can take two forms. The first form—that it does not guarantee an equal outcome to every class member—can be dismissed out of hand. In most situations, different class members come into the class with claims that are unequal in terms of their

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class representative and class counsel. See TIDMARSH & TRANGSRUD, *supra* note 21, at 550 (explaining that class actions formerly were brought principally to litigate claims, but now class actions are increasingly used as a way to achieve settlements).

228. Conversely, inadequacy of representation could be shown with respect to a particular class member if, in a positive-value suit, either (1) the class action reduces the expected gross recovery of that class member's claim (for instance, by not asserting a unique, viable, recovery-enhancing legal theory that a particular class member has) by more than any expected savings arising from the spread of litigation costs among the class; or (2) the per capita cost of class treatment exceeds any increases in expected gross recovery from class treatment. In a negative-value case, inadequacy of representation exists when the expected gross recovery for some class members is less than the per capita litigation costs that are likely be assessed against that member.

229. If a defendant or class member believes that interim developments between major events demonstrate inadequacy, nothing prevents that party from raising the issue with the court.

230. *Cf.* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 285 (7th Cir. 2002) (noting the difficulty of the precise valuation of a class's expected recovery in litigation, but suggesting ways to achieve at least a “ballpark valuation”). Especially when a class action is certified after the litigation has matured, *see supra* note 126, such data should be available. In negative-value cases, however, it is unlikely that there have been enough prior cases for the litigation to reach maturity, and therefore there is a dearth of data. See Benjamin J. Siegel, Note, *Applying a “Maturity Factor” Without Compromising the Goals of the Class Action*, 85 TEXAS L. REV. 741, 751–52 (2007) (observing that negative-value suits are unlikely to be litigated enough to yield adequate data for maturity analyses). Nonetheless, in these cases, the “do no harm” adequacy question is simple, and the answer does not require data from prior cases: Does any class member have a negative net recovery (calculated by subtracting the pro rata share of fees and expenses assessed against that class member from the settlement proceeds that the class member receives)?

231. *See* Berger v. Compaq Computer Corp., 257 F.3d 475, 481, 481–82 (5th Cir. 2001) (articulating the standard that “the party seeking certification bears the burden of establishing that all requirements of rule 23(a) have been satisfied”).

number and strength, and in terms of the injuries that they have suffered. Class actions are not economic leveling devices intended to enforce a strict equality of outcome on their members.

A second form of this criticism is more troubling—that the “do no harm” principle can foster greater inequalities than individual litigation would. The criticism has particular salience in the large-scale, small-stakes context. To take a hypothetical example, assume a negative-value suit in which 10 million customers have lost \$2 apiece as a result of an illegal overcharge by a credit card company. The “do no harm” principle would be satisfied if the case settled for \$10,000,003, with the class representative receiving \$3, the class counsel receiving \$10 million, and the remaining class members receiving nothing. Because the remaining class members are no worse off than they would have been with individual control (their claims were, as a practical matter, worthless), and because the class representative and class counsel are better off, the representation in this case is, under the “do no harm” principle, adequate.

My initial reaction to this evident difficulty was to switch the “do no harm” principle to the weak Pareto-optimal condition of “do some good”: in other words, to require the class representative and class counsel to distribute the overall gains from class treatment in such a way that every class member is better off as a result of class treatment. But that change does little to solve the problem; for the “do some good” condition is satisfied if class counsel agrees to take \$9,990,000.01 in fees and costs, gives \$3 to the class representative, and gives one cent to the remaining 9,999,999 class members. Indeed, on these facts, the “do some good” solution is less efficient than the “do no harm” principle because of the costs associated with distributing the penny to each class member.

The “do no harm” principle does not bar the hypothetical \$10,000,003 settlement. “Do no harm” adequacy does not require equality of treatment among class members, and it can create greater inequities between the class representative and class members than those that predated the lawsuit (when the class representative and class members had equal \$2 claims that, as a practical matter, were equally worthless).<sup>232</sup> The principle is intended to check self-interest and collusion that make class members worse off. It is a minimal principle, rather than a maximal version of adequacy that requires the gains from class treatment to be distributed among claimants in proportion to the strength and extent of their claims—in effect, it is an “equal gains for equal claims” principle.

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232. This example is an application of one common criticism of Pareto improvements and optimality—that they can foster greater social inequalities even as they improve efficiency. See POSNER, *supra* note 28, § 1.2, at 13–14 (discussing how inequalities in the distribution of wealth affect the consumption and production decisions of parties to an economic transaction); AMARTYA KUMAR SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 22 (1970) (“An economy can be optimal in this sense even when some people are rolling in luxury and others are near starvation as long as the starvers cannot be made better off without cutting into the pleasures of the rich.”).

Despite its surface appeal, one problem with an “equal gains for equal claims” principle is the difficulty of applying it in many class actions. When class members present an array of temporally and geographically dispersed claims and injuries, an “equal gains for equal claims” principle requires the collection of a great deal of information, as well as difficult judgments about which claims, claimants, and distributions are in fact “equal.”<sup>233</sup> Such a principle would therefore eat deeply into—and perhaps surpass—the gains in reduced litigation costs and avoidance of harms that are the *raison d’être* of Rule 23. The implementation of the principle will also make the tasks of serving as class representative and class counsel more onerous and less appealing and will make collateral attacks on the adequacy of representation, which undermine the finality of class litigation, more likely.<sup>234</sup> In short, an “equal gains for equal claims” principle will likely lead to fewer class actions than a “do no harm” principle, thereby thwarting the benefits that class actions provide.

That fact alone is not a reason to reject such a principle, but there is another reason as well. Real-world dynamics temper the inequities inherent in the “do no harm” principle and push the parties toward the “equal gains for equal claims” principle without incurring the added costs of adopting the latter principle across the board. To explain, begin by assuming that the class action reaches trial, and the factfinder (jury or judge) finds the defendant liable. In considering the appropriate remedy, the self-interested class representative will want to pitch the remedy (whether injunctive or monetary) as favorably to herself as possible. The self-interested class counsel is likely to push back against the preference, at least in cases seeking monetary relief; for the size of the attorneys fee grows as counsel enhances the value of the claims of the entire class. Moreover, to use to the credit-card hypothetical again, it is inconceivable that, after finding the defendant liable,

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233. The “do no harm” principle also requires the collection of some of this same information. See *infra* note 235 and accompanying text. But it does not require a judge to classify class members into equal groups for the purposes of determining adequacy.

234. The scope of a class member’s right to attack a judgment collaterally has divided the courts. Compare *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999) (restricting the right of collateral attack), with *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257 (2d Cir. 2001), *aff’d in part by an equally divided Court and vacated in part*, 539 U.S. 111 (2003) (permitting collateral attack when class members were inadequately represented in the class action), and *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 110 (2d Cir. 2005) (distinguishing *Stephenson* and restricting the right of collateral attack). The literature is equally divided. See, e.g., Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1946–47 (1998) (tracing the historical progress of class suits, with particular focus on the consistent failure to adequately resolve the issue of class suits’ preclusive effect on absentees); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1202 (1998) (“[A]bsent class members should be allowed to make their collateral due process challenges in a forum of their own choosing.”). For attempts to find a middle ground, see Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 789 (1998); and William B. Rubenstein, *Finality in Class Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 867 (2007).

a jury or judge will order a \$3 recovery for the class representative and a one-cent recovery for the remainder of the class. It is important to recall that, in order to satisfy a “do no harm” principle, the class representative and class counsel must have presented to the trial judge evidence of the nature, strength, and extent of the claims of class members. Armed with the knowledge that the claims of every class member are equal in strength and size, the trial judge, and the judges on appeal, will not permit such an inequitable distribution to survive post-trial review of the judgment.<sup>235</sup>

Therefore, as a realistic matter, the only circumstance in which the inequity created by a “do no harm” principle might be realized is the settlement context. Even with settlement, however, real-world checks prevent gross inequalities in treatment. A class settlement requires judicial approval, and judicial approval can be given only if the court finds the settlement to be “fair, reasonable, and adequate.”<sup>236</sup> As the last paragraph noted, the judge will possess information regarding the nature of each class member’s claim. Given the judge’s knowledge, a settlement containing gross disparities in the distribution of settlement proceeds, in which the class representative and class counsel capture virtually all of the remedy that exceeds the remedy that class members would receive in individual litigation, is unlikely to secure judicial approval.<sup>237</sup> Moreover, in positive-value monetary suits, a gross distributional disparity is likely to cause some class members to opt out of the settlement if they have the opportunity to do so.<sup>238</sup> For these reasons alone, a self-interested class counsel, who is ultimately indifferent to the distribution of the remedy, would be unlikely to acquiesce to seriously inequitable provisions that threaten either the certification of the class (and hence the ability to obtain a fee) or the size of the fee. A final dynamic that minimizes the possibility of inequitable treatment under the “do no harm” approach is the likelihood that a settlement would establish a claims-

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235. Admittedly, self-interested class representatives knowing this fact have an incentive to skew the evidence presented in the initial “do no harm” showing in order to make their cases appear stronger, and therefore deserving of a greater eventual remedy. But there are clear limits on the extent of the skewing that can occur; if class representatives make their claims appear too disparate from that of the remainder of the class, they will fail the commonality and typicality requirements of Rules 23(a)(2) and (a)(3). See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156–60 (1982) (reversing the class-certification order because the district court committed error by presuming that the class representative’s claim was typical of other racial-discrimination claims against the defendant corporation).

236. FED. R. CIV. P. 23(e)(2).

237. But, unfortunately, it is not impossible, as the *Kamilewicz* story proves. See *supra* notes 162–64 and accompanying text.

238. In a (b)(3) settlement class action, class members have a right to opt out. FED. R. CIV. P. 23(c)(2)(B)(v). In a litigation class action that was previously certified, a court has the power to provide a second opt-out right at the time of the settlement. FED. R. CIV. P. 23(e)(4); see also AGGREGATE LITIGATION, *supra* note 6, § 3.11 (recommending that a second opt-out right ordinarily be given). But see David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 840–66 (2002) (arguing that plaintiffs should not be permitted to opt out of class actions).

resolution facility, perhaps in combination with a back-end opt-out provision that allows parties dissatisfied with an award to enter a trial-like dispute-resolution process.<sup>239</sup> These quasi-administrative mechanisms tend to treat groups of like claimants very much alike, rather than to create disparate remedies for similarly situated class members.

3. *Efficiency*.—The “do no harm” principle can also be criticized for its inefficiency. There are two branches in the criticism. The first is that the “do no harm” calculation—especially the calculation determining each class member’s expected outcome from retaining individual control (the baseline against which adequate representation is measured)—is either too costly or too prone to error. The second is that alternate formulations of adequate representation realize greater efficiency than the “do no harm” principle.

As to the first criticism, determining each class member’s expected outcome from individual litigation presents no difficulty in negative-value suits, in which the practical value of recovery is, by definition, zero. When the claims of class members have positive value—and when the value of those claims can depend on such matters as the type and strength of the claims and defenses, the type and extent of injury, temporal or geographical dispersion, and the defendant’s future solvency—the criticism has more salience. Once again, however, practical considerations modulate this concern. First, the costs of making the “do no harm” calculation and of erring in the calculation are less troublesome in injunctive suits, which typically involve a limited array of potential remedies, than they are in actions seeking monetary recovery. Second, other constraints in Rule 23, such as *Amchem*’s narrow interpretation of Rule 23(b)(3),<sup>240</sup> make sprawling class actions with vastly different claims, defenses, and injuries unsuitable for class treatment on grounds other than adequacy—thus making the difficult calculation of individual-litigation variants in these cases unnecessary. Next, for most purposes, a judge can ballpark the “do no harm” calculation.<sup>241</sup> Fourth, the risk of failing to prove adequate representation falls on the class representative and class counsel,<sup>242</sup> who are typically in the best position to provide information from which a reasonably accurate and inexpensive calculation

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239. Two variants of this approach are found in the settlements established (and invalidated on other grounds) in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). For descriptions of these plans, see TIDMARSH, *supra* note 97, at 51–54, 64–66. A comparable plan was negotiated in the *Silicon Gel Breast Implant* litigation. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994); TIDMARSH, *supra* note 97, at 79–82. On claims-resolution facilities generally, see Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 LAW & CONTEMP. PROBS., Autumn 1990, at 113, 114–21.

240. See *Amchem*, 521 U.S. at 624, 622–25 (emphasizing that even if Rule 23(b)(3)’s commonality requirement could be met by a showing that each of the class members had been exposed to defendant’s asbestos products, the “predominance criterion is far more demanding”).

241. See *supra* notes 227–31 and accompanying text.

242. See *supra* note 231 and accompanying text.

can be made; thus, the incentives to provide sufficient information are aligned properly. Finally, with regard to litigation that has matured before class certification is sought,<sup>243</sup> data from which to make the calculations are available.

Nonetheless, to the extent that the “do no harm” calculation is excessively costly, it dooms class treatment. A central criterion for any class action that operates independently of the “do no harm” principle is that the class action achieve greater efficiency than individual litigation.<sup>244</sup> But it is important to note that the criticism of costliness is not peculiar to the “do no harm” principle. Any principle to determine adequacy of representation entails costs of administration and costs of erroneous determinations. The questions, therefore, are whether the “do no harm” approach creates marginally greater costs than other adequacy formulations do, and whether those marginal additional costs (if any) outweigh the benefits of the “do no harm” approach in relation to the benefits of those other approaches. As I have described, “do some good” or “equal gains for equal claims” approaches can be more costly in terms of implementation and information-gathering;<sup>245</sup> and the traditional “no conflicts of interest” approach, if rigorously enforced, leads to the certification (and resulting elimination of harm) of very few class actions.<sup>246</sup>

The second criticism, which is more substantial, contains two related parts. First, it might be argued, minimally, that we should adopt another principle that is a Pareto improvement over the “do no harm” principle. Second, it might be argued, maximally, that we should adopt as the principle of adequate representation the requirement that the class representative and class counsel maximize the value of the class’s claim.

On the first, minimalist criticism, it is possible to posit other adequacy-of-representation principles that might be Pareto improvements over the “do no harm” principle. One possible principle is this: the class representative and class counsel must achieve from the class action the best net result for each class member. For example, class representatives and class counsel are inadequate if they agree to a settlement that provides less recovery to some class members than the members’ expected recovery after a class-action trial.<sup>247</sup> Such a principle is not, however, a Pareto improvement over the “do no harm” principle in all circumstances; if both the class settlement and the net expected class recovery at trial are less than a class member’s net

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243. *See supra* note 126.

244. *See supra* note 78 and accompanying text.

245. *See supra* text preceding note 232; *supra* note 233 and accompanying text.

246. *See supra* Part II.

247. *See Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 284–85 (7th Cir. 2002) (stating that judges should “quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate”).

expected recovery from individual litigation, this principle is not more efficient.

A different principle that appears to be a Pareto improvement is this: the class representative and class counsel are adequate representatives of a class member if and only if they act in such a way that they obtain for that class member a net expected recovery that is at least as good as the recovery that the class member could obtain from the best available method other than the present class action for resolving the case. In effect, this too is a “do no harm” principle; but the baseline against which harm is measured is not individual litigation, but rather all other possible methods by which the case might be resolved—including multidistrict litigation, consolidation, and even competing class actions filed elsewhere.<sup>248</sup>

First, although this principle sounds like a Pareto improvement over the “do no harm” principle, in some circumstances it is not; the principle can lead to a finding of inadequacy (and hence no class treatment) even though class treatment would be the most efficient result.<sup>249</sup> Second, the dynamics of class-action litigation, which I have previously described, are sufficient in many cases to push a judgment or settlement in a direction that is Pareto superior to the position the class members would occupy under the “do no harm” principle.<sup>250</sup> Third, the reason that I chose individual litigation as the baseline against which to measure Pareto improvements—as opposed to another baseline such as the best alternative other than the present class

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248. I am grateful to Sarah Lawsky for the precision with which she stated this principle.

249. Consider the hypothetical situation in which the defendant holds a \$1 million fund, against which 100 claimants have identical \$20,000 claims. Assume as well that eighty of the claimants have present claims (the other twenty claims having not yet matured), that the claims involve a federal question, and all eighty claimants file in federal court. Finally, assume that there are three possible ways to adjudicate the dispute: (1) Individual actions, in which each plaintiff has a 40% probability of success and each case involves \$7,000 in fees and costs (incurred by claimants only if the case is successful); (2) a multidistrict (MDL) proceeding, in which the eighty present claimants are consolidated for pretrial purposes, the probability of success on each claim rises to 75%, and the per-plaintiff expected fees and costs (incurred only if the case is successful) are \$4,200; and (3) a mandatory class action of all 100 claimants, in which the probability of success is 75% and the per-plaintiff expected costs and fees (incurred only if the case is successful) are \$3,000. In this case, the net expected recovery in individual litigation is \$5,200 (\$20,000 gross recovery less \$7,000 in expenses, discounted by the 0.4 probability). The net expected recovery per claimant in the mass-joinder action is \$6,225 (\$12,500 gross recovery less \$4,200 in expenses, discounted by the 0.75 probability). The net expected recovery per claimant in the class action is \$5,250 (\$10,000 gross recovery less \$3,000 in expenses, discounted by the 0.75 probability). On these facts, the class action “does harm” in relation to the mass-joinder option; the class representative and class counsel therefore cannot adequately represent the class under the “do no harm compared to other methods” principle. The problem, however, is that the MDL approach is inefficient in relation to the class-action approach. First, it creates a risk of harm either to the absent twenty claimants (if the MDL approach renders the defendant insolvent) or to the defendant (if the defendant is called upon to make good on the twenty remaining \$20,000 claims). Second, the cost of obtaining judgment in the MDL situation is \$336,000 (\$4,200 per plaintiff multiplied by eighty plaintiffs), a less efficient result than the \$300,000 (\$3,000 per class member multiplied by 100 class members) cost under the class-action approach.

250. See *supra* notes 235–39 and accompanying text.

action—is the orientation of our joinder system toward individual control as the default litigation position.<sup>251</sup> The same orientation exists in the *Mathews v. Eldridge* formulation of due process: The constitutionality of any departure from adversarial process is measured against the outcome achieved in individual litigation, not against other second-best alternatives.<sup>252</sup> It is perhaps a trite, but nonetheless accurate, observation that “adequate” representation is not perfect representation, and we have always measured adequacy in relation to the opportunities that a litigant might enjoy in a separate lawsuit.

Fourth, the majority of class actions are Rule 23(b)(3) actions, and Rule 23(b)(3) requires as a condition of certification that class treatment be “superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>253</sup> Nothing in this language suggests that the (b)(3) class action must make the position of *each* class member better in relation to second-best alternatives.<sup>254</sup> Conversely, one factor that is relevant in determining superiority is Rule 23(b)(3)(A), which provides that a court can consider class members’ “interests in individually controlling the prosecution . . . of separate actions.”<sup>255</sup> Thus, the idea that a class action must not worsen the interests of class members in relation to individual litigation is built into the superiority analysis in a way that the idea of not worsening the position of class members in relation to second-best alternatives is not.

The second, maximalist criticism of the “do no harm” principle is to attack its inefficiency in relation to another possible adequacy principle: a principle that the constitutional duty of class representatives and class counsel is to maximize the value of the claim of the class and to ignore the harm to the positions of individual class members completely. This principle requires representatives and counsel to pursue the Pareto-optimal outcome (as reconfigured by the Kaldor–Hicks refinement). Admittedly, the “do no harm” principle does not require the class representative or class counsel to engage in actions that maximize the value of the claims of the class as a whole. From a utilitarian perspective, this fact is problematic. The logical conclusion of utilitarianism is to maximize the good. In theory, one action achieves that maximum and can therefore be regarded as ethically superior to any other action. The “do no harm” principle stops short of requiring that

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251. *See supra* subpart I(A).

252. *See supra* note 194 and accompanying text.

253. FED. R. CIV. P. 23(b)(3).

254. In effect, the superiority analysis of Rule 23(b)(3) operates like a principle of Pareto superiority, but with the Kaldor–Hicks refinement: It requires that a class action be a Pareto improvement over alternative methods of recovery, but it does not require that the benefits of that improvement be spread across all members of the class so that no class member is less worse off than the member would be under the second-best alternative. If it were otherwise, the superiority requirement would defeat some class actions that were more efficient than the second-best alternative.

255. FED. R. CIV. P. 23(b)(3)(A).

action and therefore cannot be regarded as the ethically superior rule. Nor does the principle lead to the greatest economic efficiency.

But this criticism can be leveled against most of the law, including the law of joinder and the law of class actions. Individual control of litigation under Rule 20 does not necessarily lead to maximum social utility in every case. More to the point, class actions under Rule 23(b)(1) and (b)(2), which contain no superiority requirement, will not achieve the maximum social utility in every case; a measure of adequacy requiring wealth maximization would prevent such class actions from being certified.<sup>256</sup> Indeed, if pursuing the most efficient outcome were the constitutional baseline for measuring adequacy, then all class representation, save for the single wealth-maximizing strategy, must be deemed inadequate. *Mathews v. Eldridge*'s formulation of due process is not so stringent; it does not require wealth-maximizing procedure, but rather holds that any procedure that is a Pareto improvement over adversarial process is constitutional. Moreover, by forcing the class representative and class counsel to adopt a wealth-maximizing strategy, which might not allow them to capture for themselves some gains associated with class treatment, one incentive for representatives and counsel to seek certification is reduced, possibly reducing the effective level of deterrence that class actions can achieve.

As I have described, the efficiency requirements of Rules 23(a)(1)–(3),<sup>257</sup> the superiority requirement of Rule 23(b)(3),<sup>258</sup> and the dynamics of class-action litigation<sup>259</sup> already do the heavy lifting of maximizing utility. The “do no harm” principle also works to promote efficiency to a degree: It prevents backsliding toward less efficient solutions due to the actions of self-interested class representatives and class counsel who seek to improve their own positions by causing greater harm to others. The point of the principle is not to maximize wealth directly, but to check selfish behavior by those who are not committed to maximizing the class's wealth or otherwise caring for their interests. The “do no harm” principle does not prevent class representatives and class counsel who wish to do so from maximizing class wealth—as long as the consequence of doing so is not visited on a few whose positions are made worse. The principle respects the substance, if not the form, of individual control, on which American society sets a high value. Finally, by not inflexibly requiring the pursuit of the single path of wealth maximization, the “do no harm” principle allows class representatives and class counsel some latitude of action without raising the fear that every

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256. The harms that Rules 23(b)(1) and (b)(2) protect against are not necessarily harms in an economic sense. For instance, in the limited-fund context of Rule 23(b)(1)(B), it is a matter of indifference from the viewpoint of deterrence and efficiency whether the fund is given only to the early claimants or instead is spread equitably among all claimants. A no-class-action alternative leads to the former result, and the 23(b)(1)(B) alternative leads to the latter.

257. See *supra* note 78 and accompanying text.

258. See *supra* notes 147–49 and accompanying text.

259. See *supra* notes 235–39 and accompanying text.

action they take will result in a challenge to their constitutional adequacy. Adequate representation does not require optimal representation.

4. *Alternative Solutions.*—A final criticism of the “do no harm” principle is the possible availability of other mechanisms or principles that might achieve greater utility at less cost. I have already examined a few alternatives for defining adequate representation, such as a “do some good” principle and an “equal gains for equal claims” principle, and found them lacking.<sup>260</sup>

In its *Principles on the Law of Aggregate Litigation*, the American Law Institute (ALI) has created a menu of solutions for achieving adequate representation. Among its suggestions are “control of litigation decisions” by “named parties with sizeable stakes,” “fiduciary duties,” appointment of “competent counsel,” “financial incentives,” and subclassing and other “case-management techniques.”<sup>261</sup> Using the vocabulary of the ALI, the “do no harm” principle can be regarded as a fiduciary duty for the class representative and an ethical obligation of competent counsel. But the generality of the ALI’s suggestions renders them less than helpful in creating specific potential alternatives to the “do no harm” principle.<sup>262</sup> Hence, I consider several specific alternatives to the “do no harm” principle that meet the general guidelines of the ALI. None are superior to “do no harm” adequacy.

a. *Reconceptualizing the Nature of the Class Action.*—An option for dealing with the inevitability of conflicting individual interests that sometimes appears in the popular literature is to reconceive the nature of the class, so that it is no longer seen as an amalgam of self-interested individuals, but rather as an organic entity with its own interests distinct from those of the members of the class.<sup>263</sup> The class representative and class counsel would then be seen as having fiduciary duties to represent this gestalt class interest, rather than the interest of individuals within the class.

The problem with this approach is that it still does not tell a class representative or class counsel how to behave, or tell the court how to measure adequacy. The apparent (albeit not certain) corollary of a “class as client” theory is an ethical requirement that the class representative and class counsel work to maximize the utility of the class as a whole. As we have

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260. See *supra* notes 232–34 and accompanying text.

261. AGGREGATE LITIGATION, *supra* note 6, § 1.05(c). These suggestions are intended to apply both to class actions and to nonclass-action litigation. As the draft recognizes, however, the ability to impose an adequacy-of-representation requirement by law is often possible only in class actions and similar representational litigation. *Id.* cmt. (c).

262. I have already treated one of the few specific suggestions of the ALI—subclassing—and found it wanting as a sufficient control over the reality of self-interested behavior by the class representative and class counsel. See *supra* notes 110–14 and accompanying text.

263. For one exploration of this issue, see generally David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

seen, there are numerous difficulties with adopting a constitutional requirement that only one set of actions can fulfill.<sup>264</sup> The model does not solve the problem of the self-interested class representative or class counsel: There is no reason to believe that self-interested class representatives and class counsel will protect the interests of this organic entity any more than they will protect the interests of absent class members. Unless class representatives and class counsel are invariably altruistic actors or wealth maximizers—and if they are, we would not be in the present conundrum—some class representatives and class counsel will still look out for their self-interests when those interests diverge from those of the class.

*b. Designating an Overseer of the Class's Interests.*—In a prior draft of *Principles on the Law of Aggregate Litigation*, the ALI suggested as a means of ensuring adequacy the appointment of someone to oversee the class representative and class counsel and thus to ensure that they are representing the interests of absent class members.<sup>265</sup> An evident difficulty with this approach is finding the appropriate guardian of the class members' interests. For obvious reasons, this overseer cannot be class counsel: It is precisely the self-interest of class counsel that often inspires the need for a doctrine of adequate representation.

In looking elsewhere for an overseer to save the class from a self-interested class representative and class counsel, an obvious candidate is the judge, who could be charged with being especially solicitous of the interests of the absent class. Sometimes the judge's role has been conceived in such terms, but judges understandably resist this approach. In the first instance, they lack the information or institutional capacity to police self-interested behavior by the class representative or class counsel. In the second instance, this model of judicial behavior fundamentally changes the nature of the judicial function in an adversarial system. A judge cannot be both a fiduciary for class members and an impartial adjudicator of their claims.

Realizing this, a judge might look elsewhere—to guardians ad litem, for instance—for someone to represent the interests of absent class members. The literature on the performance of guardians ad litem is not, however, encouraging in terms of their ability to protect those whom they represent.<sup>266</sup> Moreover, we need to assume that guardians ad litem are altruistically interested in advancing the aims of the class members they represent, not self-interested in their own fees or reputation. Finally, a guardian turns the idea

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264. See *supra* note 256 and accompanying text.

265. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.06(b)(5) (Discussion Draft 2006) (including “judges, participants, other litigation managers, and third parties” as possible overseers).

266. See Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 389–91 (1994) (recounting the story of the Mannville reorganization, where the representative of future claimants was mostly unmonitored and brokered a deal that effectively left the future claimants with nothing).

of Rule 23(a) on its head: One of the requirements of Rule 23(a) designed to ensure adequacy of representation is that the class representative must be a member of the class,<sup>267</sup> and the guardian is not.

In any event, reconceiving the roles of class counsel, judge, or guardian ad litem assumes that the designated overseer can decipher the interests of the class and employ a metric to determine when those interests are adequately represented. Without a metric, oversight seems futile, or at least will result in oversight among class actions as widely disparate as the measure of a chancellor's foot. With a metric—such as the “do no harm” principle—there is no need for complex institutional arrangements; the judge (aided, perhaps by a traditional adjunct such as a magistrate judge or master) can determine adequacy directly.

*c. Continual Opt-Out Rights.*—A third solution is to allow class members a continual right to opt out of a class action. Opt-out rights are rarely invoked,<sup>268</sup> so there is still the realistic concern for self-interested behavior in such a setting. Opt-out rights are expensive, at least if we are serious about providing notice to class members at every stage at which class members might wish to opt out. Permitting opt-outs also reduces the preclusive effect of a class action, thus spawning satellite litigation. A general opt-out right would significantly restructure the present Rule 23, which allows (in almost all cases) an opt-out right only in (b)(3) class actions.<sup>269</sup> Finally, once class members have opted out, the very harms that class actions are intended to prevent (to the class representative, the defendant, the class members, or society) can occur.

*d. Opt-In Requirements.*—A fourth solution is to require class members to opt in: Class actions consist only of those members who affirmatively choose to opt into the class.<sup>270</sup> At a theoretical level, this solution avoids all of the concerns for self-interested behavior of class actions; an opt-in model is an exercise of a litigant's autonomy, akin to joinder under Rule 20, and thus any failings of the class representative and class counsel to

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267. See FED. R. CIV. P. 23(a) (“One or more members of a class may sue . . . on behalf of all . . .”).

268. See WILLGING ET AL., *supra* note 51, at 52, 52–53 (“[T]he median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class and 75% of the opt-out cases had 1.2% or fewer class members opt out.”).

269. See *supra* note 54 and accompanying text.

270. This is a return to the “spurious” class action idea that predated the present Rule 23(b)(3), which instead set the default as an opt-out rule. Owen Fiss and John Bronsteen are modern proponents of an opt-in solution. See John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 906 (proposing that class-action settlements, which are currently binding on any class member who does not expressly opt-out, should instead be binding only on those who explicitly opt into the settlement); Bronsteen & Fiss, *supra* note 55, at 1453 (suggesting a change in class-action rules that would require class members to consent to the settlement before it would become binding on them).

protect class members' interests can be treated as a waiver by the class member of individual rights. At a practical level, however, an opt-in strategy gets even less preclusive effect than an opt-out strategy, and increases the likelihood and scope of the potential harm from multiple lawsuits. It can require an expensive notice campaign. Moreover, the concern for self-interested behavior by class representatives and class counsel does not disappear in an opt-in class action; the doctrine of waiver simply ignores the problem.<sup>271</sup>

#### IV. Conclusion

Colleagues who have heard my proposal have sometimes asked whether the “do no harm” measure of adequate representation will lead to more or fewer class actions. To some, the principle seems likely to lead to certification of fewer class actions, with the undesirable result that more widespread wrongdoing by large entities will go undeterred and more victims will remain uncompensated. To others, the principle seems likely to lead to more class certifications, both because it replaces an unworkable identity-of-interests approach with something more flexible, and because it might have the spillover effect of making courts willing to rein in some of their recent hostility to (b)(3) class actions.

It seems out of place in an Article that has stressed a consequentialist approach to the adequacy problem to answer this question by saying, “I don’t know, and I don’t care. The principle is right regardless of its consequences.” So my first inclination—to say that adoption of the “do no harm” principle ensures that those class actions that are certified will have the beneficial consequence of increasing social welfare—dodges the question. My second inclination is to believe that the principle is unlikely to have a significant effect on the number of class actions filed. Even though class actions inherently place people with conflicting interests into a single class,<sup>272</sup> class actions are frequently certified. That fact suggests that courts are already finding (perhaps subconscious) ways to reconcile the adequacy requirement with the presence of conflicts of interest. Indeed, the “do no harm” principle might well be the rule of thumb already operating in some courts. Elsewhere, the operative rule of thumb is probably more restrictive than the “do no harm” rule in some courts and less restrictive in others. In global terms, therefore, the adoption of a “do no harm” principle is probably a wash.

One of the principal advantages of replacing these rules of thumb with the “do no harm” principle is the transparency of an above-the-table rule that can replace a bevy of uncertain and unknown rules by which individual judges likely measure adequacy of representation today. The “do no harm”

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271. See *supra* note 151 and accompanying text.

272. See *supra* Part II.

principle is the type of simple, fair rule that makes all of Rule 23 into a pull harness to achieve the efficient handling of mass litigation and the simultaneous reduction of harm to class members, to defendants, and to society. If we employ it, we will come closer to having the right number of class actions, whether that number is more or less than the number of class actions today.