WALKING THE CLASS ACTION MAZE: TOWARD A MORE FUNCTIONAL RULE 23

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Over roughly the past fifteen years, the Supreme Court and lower federal courts have limited access to class actions. Many of the more restrictive decisions—such as Amchem Products, Inc. v. Windsor, Ortiz v. Fibreboard Corp.*, and* Wal-Mart Stores, Inc. v. Dukes*—are based on interpretations of Rule 23 and thus fall within the power of the Advisory Committee and rulemaking process to modify. This Article proposes revisions to Rule 23 designed to deal with some of these decisions and to make the class action a more pragmatic and functional device. It focuses on two areas: (1) the constraints imposed by fairness to absentees and due process, and (2) the problem of strategic abuse associated with frivolous and weak class action filings.*

*Responding in large part to concerns about fairness, due process, and legitimacy, the Supreme Court has adopted a vague class "cohesion" requirement (*Amchem*), an interpretive principle tethering the class action to outdated precedent (*Ortiz*), and a strong indivisibility condition for (b)(2) certification (*Wal-Mart*). The problem is that none of these limitations is based on a clear understanding of what fairness to absentees requires or how the individual day-in-court right can be reconciled with representative litigation. As a result, the Court's decisions are poorly reasoned and its restrictions inadequately justified. The Advisory Committee should do what it can to correct these deficiencies, and this Article suggests a promising approach. Furthermore, in response to concerns about the strategic filing of frivolous and weak class action suits, federal judges have tightened the standard of proof for certification. But they have done so without general agreement on the normative stakes, and the result is a collection of inconsistent and relatively vague standards. The Advisory Committee should clarify the law in this area by specifying a standard of proof in the text of Rule 23 This Article suggests a useful framework for doing so.*

Finally, the Article briefly discusses some potential obstacles to Committee action, including the advisability of overruling recent Supreme Court decisions, potential constitutional problems, Rules Enabling Act constraints, transsubstantivity objections, and the ever-present risk of political controversy.

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INTRODUCTION

One hears dire predictions these days about the death or near death of the federal class action. These concerns have intensified in the wake of two recent Supreme Court decisions, *Wal-Mart Stores, Inc. v. Dukes*[1] and *AT&T Mobility LLC v. Concepcion*.[2] Some commentators believe that *Wal-Mart* seriously undermines employment discrimination class actions and creates rough sailing for other class actions as well.[3] And many see *Concepcion* as the end of most small-claim class actions.[4] Although some of the complaints are exaggerated, there is no question that these two decisions limit the availability of the class action in federal court. However, they are just recent installments in a long line of restrictive federal court decisions that extends back almost fifteen years and that has greatly limited access to the class action device.[5]

There is hope for the class action, however. Except for *Concepcion* and a few constitutional and statutory restrictions, most of the limiting doctrines have been based on judicial interpretations of Rule 23.[6] This means that the Advisory Committee on Civil Rules can counteract the restrictive trend to some extent by amending Rule 23. This Article addresses what, if anything, the Committee should do and what obstacles it is likely to face.

My main point is that any Committee effort to reform Rule 23 must build on a coherent theory of the class action. Neither the Advisory Committee nor the federal judiciary has ever developed

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1. 131 S. Ct. 2541 (2011).

2. 131 S. Ct. 1740 (2011).

3. *See, e.g.*, Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 53–54), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985.

4. *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 627 (2012); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 266–68 (2012); Jean R. Sternlight, *Tsunami*: AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 708–09 (2012).

5. In addition, statutes such as the Private Securities Litigation Reform Act (PSLRA), adopted in 1995, and the Class Action Fairness Act (CAFA), adopted in 2005, restrict the availability of class actions to some extent. *See* 15 U.S.C. § 78u-4(b)(2) (2006) (PSLRA's strict pleading requirement); 28 U.S.C. §§ 1711–1715 (2006) (CAFA's regulation of class action settlements).

6. The Supreme Court's *Concepcion* decision relies on the preemptive effect of the Federal Arbitration Act and therefore cannot be relaxed or reversed by revising Rule 23. It is not clear, however, that *Concepcion* in fact dooms the small-claim class action. Class action waivers might still be unenforceable when they have the effect of preventing all private enforcement of the substantive law. The Supreme Court should shed some light on this issue with its decision this term in the case of *In Re Am. Express Merch. Litig.*, 667 F.3d 204, 212, 218 (2d Cir. 2012), *cert. granted*, 133 S.Ct. 594 (2012).

such a theory. The 1938 Advisory Committee relied on antiquated precedent and drafted an extremely confusing Rule 23 as a result. The 1966 Advisory Committee set out to cure that confusion but ended up drafting a Rule with a number of puzzling features.[7] The resulting muddle continues to plague Rule 23. The *Wal-Mart* decision is only the latest example. In *Wal-Mart*, the Court strengthened the 23(a)(2) common question requirement without explaining what function (a)(2) performs or why this previously unremarkable provision should receive a more prominent role in the certification analysis. Moreover, the Court did so for a class action certified under (b)(2) even though the express terms of (b)(2) already require especially strong intra-class homogeneity without help from (a)(2).

My purpose, however, is not to develop a theory of the class action in this Article. Rather, my goal is to focus attention on the need for such a theory and to sketch a general approach to formulating one. In short, any attempt to revise Rule 23 must be based on a coherent account of the functions the class action should perform, a clearer understanding of how representative litigation can be reconciled with each party's right to a personal day in court, and a sophisticated grasp of the strategic dynamics of class action litigation.

Even with such a theory, the Advisory Committee will still face a number of legal and practical obstacles to reform. The Constitution's Due Process Clause limits the Committee's power.[8] The Rules Enabling Act also imposes limits.[9] Perhaps the most troubling obstacle is practical. As the history of rulemaking efforts over the past thirty years demonstrates, any attempt to alter Rule 23 is bound to provoke interest group conflict and political controversy. Charting a way through the thicket will take considerable skill. But it is worth the effort.

The body of this Article is divided into three parts. Part I briefly reviews the history of Rule 23 as background for the discussion in the rest of the Article. Part II then focuses on two key problems with the Rule as it was revised in 1966 and describes how courts have

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7. For example, why does Rule 23(a)(2) impose a separate common question requirement when the provisions of Rule 23(b) already guarantee the existence of common questions? What does 23(a)(3)'s typicality requirement add to the adequacy of representation that is already required by 23(a)(4)? Why does Rule 23(c)(2) require notice and opt out for (b)(3) class actions when (a)(4) already requires adequacy of representation? Why does the Rule limit notice and opt-out rights to (b)(3) and not also extend them to (b)(1) and (b)(2)?

8. *See infra* Part III.B.2.

9. 28 U.S.C. § 2072 (2006). *See infra* Part III.B.3.

tried to handle these problems within the confines of a Rule poorly designed to address them. Part III outlines an approach to Rule 23 reform, suggests some specific changes to the Rule, and briefly discusses problems with implementation.

I. A BRIEF HISTORY OF RULE 23

A. Original Rule 23

The original version of Rule 23 was adopted in 1938, when the Federal Rules of Civil Procedure (FRCP) were first promulgated. Although most of the original FRCP were designed as pragmatic and functional rules aimed at efficiently enforcing the substantive law, Rule 23 was written in a highly abstract form organized around rights-based classifications. Rule 23(a) authorized a class action when "the character of the right" was (1) "joint, or common, or secondary," (2) "several, and the object of the action is the adjudication of claims which do or may affect specific property," or (3) "several, and there is a common question of law or fact affecting the several rights and a common relief is sought."[10] Moreover, the preclusive effect of a class action depended on which rights-based category it fit into. Class actions involving joint or common rights—so-called "true class actions"—bound everyone in the class. Class actions involving several rights and specific property—so-called "hybrid class actions"—bound class members only with respect to the property at issue, and class actions involving several rights and common questions and relief—so-called "spurious class actions"—bound only those who chose to intervene.[11]

This is a puzzling way for the 1938 rule drafters to have written Rule 23. These judges, lawyers, and scholars were pragmatic reformers bent on ridding civil procedure of nineteenth century technicalities that they believed had no functional value.[12] For example, they jettisoned restrictive joinder rules and based permissive

10. FED. R. CIV. P. 23(a) (1938).

11. *See* James Wm. Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 555–63 (1938). Professor Moore proposed that these preclusion rules be included in original Rule 23, but the Committee chose not to do so out of fear that specifying the binding effect of class judgments might be too substantive. *See id.* at 556. Nevertheless, Moore included these preclusion rules in his highly regarded procedure treatise, and as a result most courts ended up following them. *See* ZECHARIAH CHAFEE, JR., *Some Problems of Equity*, *in* THE THOMAS M. COOLEY LECTURES 251 (1950).

12. *See generally* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 78–98 (1988) (tracing the history of the twentieth century reform movement).

joinder on more functional common question and transaction tests; they empowered the trial judge to carve up large lawsuits into more convenient and efficient trial units; and they liberalized pleading and expanded discovery so that lawsuits could be decided on the substantive law and the facts rather than on technicalities.[13] Against this pragmatic and functional background, Rule 23 stands out for its striking use of rights-based formalisms and technical classifications.

These rights-based categories made little sense in the increasingly pragmatic legal world of the mid-twentieth century, and judges often had difficulty classifying a right as joint, common, or several.[14] Moreover, federal judges sometimes worked around the Rule by characterizing rights as joint or common when the equities of a case seemed to call for classwide preclusive effect.[15]

So why did the 1938 Advisory Committee draft such a formalistic rule? I believe there are several reasons. For one thing, it is unlikely that the original Committee worried too much about Rule 23 since class actions were relatively rare in the early twentieth century.[16] Also, the class action was not central to the procedural reform agenda of the time. The joinder focus was on removing artificial barriers to permissive joinder and empowering trial judges to use their discretion to create efficient litigating units.[17] The historic purpose of the class action—or "representative suit," as it was known at the time—was relatively narrow: to allow lawsuits to proceed without joining necessary parties.[18] The idea of using the class action as a preclusion device to aggregate related claims for efficiency gains lay in the future.

Moreover, designing a functional class action rule was much more difficult than reforming permissive joinder. Modernizing joinder involved eliminating obvious common law and code technicalities and harnessing trial judge expertise. The class action was more complicated because it implicated class members' rights and

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13. *See id.* at 98–107; Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691, 728–29 (1998).

14. *See* CHAFFEE, *supra* note 11, at 249, 251–52, 256–57; FED. R. CIV. P. 23, advisory committee's notes (1966).

15. *See, e.g.*, Dickinson v. Burnham, 197 F.2d 173 (2d Cir. 1952) (questioning 1938 Rule 23's rights-based categories and recharacterizing a case as a hybrid class action that the district court had treated as a spurious class action); FED. R. CIV. P. 23, advisory committee's notes (1966).

16. *See* Charles E. Clark & Herbert Brownell, Jr., *Joinder of Parties*, 37 YALE L. J. 28, 62 (1928) (noting the limited application of the representative suit).

17. *See* Bone, *supra* note 12, at 98–107.

18. *See* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 242–45 (1990).

fairness values.[19] Given uncertainty about how to address these fairness issues and given the marginal importance of the class action at the time, it is not surprising that the Advisory Committee chose to track nineteenth century precedent rather closely.[20]

The original Rule 23, however, was doomed almost from the outset. Its formalistic framework and limited scope were holdovers from a period that had already passed. Mid-twentieth-century jurists, accustomed to thinking about legal rights in functional terms and skeptical about abstract and universal definitions of legal concepts not tied to purposes, chafed at Rule 23's formalism. It was only a matter of time before the Advisory Committee would revisit the Rule and revise it. It did so in the 1960s, and the result is the modern version of Rule 23, which went into effect in 1966.

B. 1966 Rule 23

The 1966 revision eliminated the rights-based formalisms of the 1938 Rule and restructured it along more functional, policy-based lines.[21] For example, Rule 23(b)(1) authorizes a class action when individual litigation might create serious hardships for other class members or for the defendant.[22] Moreover, Rule 23(b)(2) allows class actions to promote remedial efficacy by facilitating the grant of a classwide injunctive remedy not possible—or at least much more difficult—with individual suits.[23] And Rule 23(b)(3) authorizes class actions that achieve efficiency and decisional consistency

19. Some key procedure reformers, including Charles Clark, the Reporter to the 1938 Advisory Committee, were unwilling to leave procedures that protected parties' substantive rights to trial judge discretion. *See* Bone, *supra* note 12, at 100.

20. James William Moore was responsible for drafting Rule 23, and it is clear that he implemented his best understanding of representative suit precedent. *See* James Wm. Moore & Marcus Cohn, *Federal Class Actions,* 32 ILL. L. REV. 307 (1937). It is worth mentioning that the Advisory Committee also drafted Rule 19 (compulsory joinder) and Rule 24 (intervention) to track precedent fairly closely and even used formalistic terminology—"joint interest" and "indispensable party"—for Rule 19. *See* Bone, *supra* note 12, at 107–14; FED. R. CIV. P. 24, advisory committee's notes (1966). It is no coincidence that Rules 19 and 24, like Rule 23, raise concerns about fairness to absentees. And it is also no coincidence that Rules 19 and 24 were revised in 1966, along with Rule 23, to eliminate formalisms and expand their application along more functional lines. *See* Fed. R. Civ. P. 19, advisory committee's notes (1966).

21. *See, e.g.*, Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1968) [hereinafter Kaplan, *Prefatory Note*] ("The reform of Rule 23 was intended to shake the law of class actions free of abstract categories contrived from such bloodless words as 'joint,' 'common,' and 'several,' and to rebuild that law on functional lines responsive to those recurrent life patterns which call for mass litigation through representatives.").

22. *See* FED. R. CIV. P. 23, advisory committee's notes, subdivision (b)(1) (1966).

23. *See* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702–08 (2011) (explaining that the 1966 Committee drafted (b)(2) to facilitate broad injunctive relief in desegregation suits).

by aggregating suits with common questions into a single adjudication, as well as class actions that promote private enforcement of the substantive law by enabling litigation where individual suits would not be cost justified.[24]

In order for the class action to serve these policy goals, class members must be bound by the class judgment. Hence the new Rule 23 was designed to be a classwide preclusion device rather than a limited exception to mandatory joinder.[25] As a result, the Committee had to face squarely the due process and fairness-to-absentee issues that the 1938 Committee had dodged. It responded by including subdivision (a)(4) based on the Supreme Court's pivotal decision in *Hansberry v. Lee*, which held that due process of law is satisfied if the interests of absentees are adequately represented.[26] It also responded by assigning responsibility to the district judge to look out for the interests of absent class members. In this regard, the Committee added a new certification stage, at which the judge could check representational adequacy before approving a class action, and it also gave the judge a set of procedural tools to safeguard absentee interests.[27]

However, the 1966 Advisory Committee was not content to rely solely on adequate representation and judicial supervision. It added other requirements to Rule 23 that make much less sense from a pragmatic and functional perspective. For example, the Committee included a mystifying typicality requirement in (a)(3) and a seemingly redundant common question requirement in (a)(2).[28]

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24. *See* Kaplan, *Prefatory Note*, *supra* note 21, at 497; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1967) [hereinafter Kaplan, *Civil Committee*].

25. *See* FED. R. CIV. P. 23 advisory committee's notes, subdivision (c)(3) (1966).

26. Hansberry v. Lee, 311 U.S. 32, 43 (1940). Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4) (1966). This provision is normally satisfied if the representative has the capacity and incentive to litigate vigorously and does not have any conflicting or antagonistic interests with the class and if the class attorney is experienced, qualified, and competent. *See* Oplchenski v. Parfums Givenchy Co., 254 F.R.D. 489, 498 (N.D. Ill. 2008); JEROLD S. SOLOVY ET AL., 5–23 MOORE'S FEDERAL PRACTICE-CIVIL § 23.25 (2012).

27. Rule 23(c)(1), as originally adopted, stated that "the court shall determine by order whether [the suit] is to be . . . maintained [as a class action]." FED. R. CIV. P. 23(c)(1) (1966); *see also* FED. R. CIV. P. 23(d) (1966) (furnishing the judge with a number of procedural tools). Moreover, the 1966 version of Rule 23(e) required judicial review and approval of all class action settlements. FED. R. CIV. P. 23(e) (1966).

28. Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class," and Rule 23(a)(2) requires that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a) (1966). No one quite understands what distinct functions these requirements perform. A separate 23(a)(2) common question requirement seems unnecessary given that the requirements of each of the 23(b) subdivisions guarantee common questions. *Id.* Moreover, 23(a)(3) typicality seems unnecessary given (a)(4)'s representational adequacy requirement. *Id.* Indeed, the Supreme

Moreover, it added notice and opt-out rights to the (b)(3) class action to respect the "interests of individuals in pursuing their own litigations,"[29] but did not extend those same rights to (b)(1) and (b)(2) to protect similar interests.[30]

One is left to puzzle over these additional provisions. They were almost certainly added because of concerns about the day-in-court rights of absent class members and the legitimacy of class adjudication. The Committee assumed that the class had to exhibit internal "homogeneity," "solidarity" or "cohesion," in addition to adequate representation, before a class judgment could fairly bind absentees.[31] This might explain the inclusion of (a)(2) and (a)(3), which are proxies for cohesion. It probably also explains the decision to confine notice and opt-out rights to (b)(3) class actions. The Committee believed that (b)(3) classes were less likely to be internally cohesive and more likely to include members with strong interests in individual control.[32]

The problem is that the Committee never justified its cohesiveness requirement in *functional* terms.[33] In fact, it never clearly defined what constitutes class "cohesion" or explained how cohesion might address day-in-court concerns.[34] More generally, there is no evidence that the Committee thought hard about the values that the day in court serves or how those values can be accommodated by litigation through a representative. Instead, it appears that the Committee mainly looked for patterns in previous cases and relied

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Court has said that (a)(2) and (a)(3) "tend to merge" and that they both "also tend to merge with the adequacy-of-representation requirement." Gen. Tel. Co. v. Falcon, 457 U.S. 147, 158 n.13 (1982).

29. FED. R. CIV. P. 23 advisory committee's notes, subdivision (c)(2) (1966).

30. The Committee mentioned that "class-action treatment is not as clearly called for" under the circumstances referred to in (b)(3). FED. R. CIV. P. 23, advisory committee's notes, subdivision (b)(3) (1966). But it did not clearly explain why this is so. After all, (b)(3) can generate substantial social benefits: huge judicial economy gains, major reductions in delay costs for plaintiffs, and remedies for small claimants that they cannot obtain on their own. Although class action treatment might seem more compelling for (b)(1) and (b)(2), it is not *logically* mandated. Nor is it qualitatively different insofar as practical benefits are concerned from those applications of (b)(3) that make meaningful recovery possible for class members.

31. *See* Kaplan, *Civil Committee*, *supra* note 24, at 380 (1967) (referring to "homogeneity" and "solidarity"); FED. R. CIV. P. 23, advisory committee's note, subdivision (b)(3) (1966) (referring to class "cohesion"); *see also* Marcus, *supra* note 23, at 698–99 (citing records of the Advisory Committee proceedings supporting this point, although not in an unqualified way).

32. *See* FED. R. CIV. P. 23, advisory committee's notes, subdivisions (b)(3), (c)(2) (1966); Marcus, *supra* note 23, at 698–99.

33. Indeed, the typicality requirement is oddly formalistic in its focus on the similarity of legal claims.

34. After all, the (b)(1) class action is mandatory with no right to opt out, yet the (b)(1) limited fund class is the opposite of a cohesive or homogeneous class. *See* FED. R. CIV. P. 23(b)(1). The limited nature of the fund inherently pits one class member against the others.

on rough intuitions about which scenarios "naturally" or "necessarily" warrant class treatment.[35]

Another shortcoming of Rule 23 has to do with the Committee's failure to appreciate fully the power that the class action gives litigating parties and their attorneys and the consequent risk of strategic abuse. In an illuminating history of the 1966 revision and its aftermath, Professor David Marcus explains that this failure was due to two aspects of the reform effort: first, most Committee members had modest ambitions for the revision, and second, many of the substantive law and other developments associated with the most controversial uses of the class action were not yet in place in 1966.[36] Even the most radical revision, the creation of the new 23(b)(3) class action, prompted surprisingly little concern. One Committee member, John P. Frank, did foresee some of the later problems, but he was unable to persuade enough of the other members. As a result, the Committee drafted Rule 23 without anticipating the later uproar over class action abuse and without taking specific steps to deal with the problems. Instead, it relied mostly on the managerial discretion of the trial judge, and it did so without seriously considering the informational and strategic obstacles to effective judicial oversight.[37]

II. CLASS ACTION PROBLEMS AND THE LIMITS OF RULE 23

Courts have struggled with day-in-court and strategic abuse problems ever since the late 1960s, and especially over the past fifteen years. The result is a series of restrictive class action decisions that lack a coherent set of guiding principles. Most of these decisions purport to be interpretations of Rule 23, but many bear only a loose relationship to the Rule itself. The following discussion focuses on two areas: (1) efforts to make sense of the constraints that fairness to absentees impose on class treatment, and (2) efforts to address strategic abuse in the form of frivolous and weak class action filings.

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35. Kaplan, *Civil Committee*, *supra* note 24, at 386 (1967) ("[T]he Committee strove to sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*," and it looked for situations that "'naturally' or 'necessarily' called for unitary adjudication.").

36. David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 12–13, 16–22), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220452.

37. *See generally* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007) (describing some of these obstacles).

A. Fairness to Absentees

As we saw in Part I, the Supreme Court made the modern class action possible by switching from a narrow rights-based framework to a broader interest representation model. After *Hansberry v. Lee*, it was possible to argue that absent class members could be bound to a class judgment consistent with due process if their interests in the litigation were adequately represented by the named plaintiffs and the class attorney.[38] However, the *Hansberry* Court did not clearly explain how representational adequacy is compatible with the fundamental principle that all persons have a right to their own personal day in court. Nor did it explain what specific conditions must be satisfied for representation to be adequate.

The case law since 1966 has only added to the resulting confusion. In *Amchem Products, Inc. v. Windsor*,[39] for example, the Supreme Court muddied the (b)(3) predominance analysis by equating predominance with "class cohesiveness." According to *Amchem*, "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," and "assure[s] the class cohesion that legitimizes representative action in the first place."[40]

This interpretation of the predominance requirement is surprising. It conflicts with the most reasonable account of the 1966 Committee's intent. Although it is difficult to tell precisely what the Committee had in mind, there is strong evidence that it meant for the predominance requirement to serve as a proxy for judicial economy gains from class treatment.[41] By equating predominance with class cohesion and then tying class cohesion to the legitimacy

38. *See* Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) ("this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it").

39. 521 U.S. 591, 623 (1997).

40. *Id.*

41. The Committee Note states that "[i]t is only when this predominance exists that economies can be achieved by means of the class-action device." FED. R. CIV. P. 23 advisory committee's notes, subdivision (b)(3) (1966). It goes on to illustrate the point with the example of "a 'mass accident' resulting in injuries to numerous persons" that generates many individual questions. *Id.* The problem with class treatment in such a case is that it "would degenerate in practice into multiple lawsuits separately tried." *Id.* In other words, while class adjudication of common questions saves litigation costs, too many individual questions focus too much attention on individual cases, undermining the efficiency benefits of class treatment.

of adjudicative representation, the *Amchem* Court enlists predominance to do due process and fairness work as well.[42] The problem is that the Court did not explain how class cohesiveness promotes fairness or serves day-in-court values, or even why cohesiveness should be measured in terms of common versus individual questions at all.

The *Amchem* Court's focus on cohesiveness has spawned a confusing body of case law.[43] Some courts have found (b)(3) predominance satisfied even when common questions are resolved before certification.[44] In one such case, the court, citing *Amchem*, reasoned that the mere existence of common questions was relevant to cohesiveness—and thus to predominance—even though the parties had stipulated answers to those questions so there could be no judicial economy gains from class treatment.[45] Moreover, some courts have extended the cohesiveness requirement to (b)(2) class actions despite the fact that the text of (b)(2) says nothing about

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42. *See Amchem,* 521 U.S. at 621 (noting that the requirements in 23(a) and (b) "focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives."). In fact, if the *Amchem* Court had conceived predominance in terms of judicial economy, it would have had considerable difficulty justifying a serious look at predominance when certifying a settlement class action like *Amchem.* Settlement class actions, by their nature, are never litigated, so judicial economy gains are irrelevant. In fact, the *Amchem* Court held that manageability need not be considered in the certification decision for precisely this reason—because settlement obviated all manageability concerns—and the same is true for judicial economy. *See id.* at 620.

43. It is worth mentioning that the dissenting opinion of Justices Ginsburg and Breyer, joined by Justices Sotomayor and Kagan, in a recent case, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 185 L. Ed. 2d 515, 524 (2013), adds even more confusion to (b)(3). After quoting the *Amchem* passage that equates predominance with cohesiveness, these dissenters go on to suggest that predominance is about judicial economy: "when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate." 185 L. Ed. 2d at 526. This is especially puzzling given that Justice Ginsburg authored the Court's opinion in *Amchem.*

44. *See, e.g.*, *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 227–28 (2d Cir. 2006); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000) ("[T]he fact that an issue has been resolved on summary judgment does not remove it from the predominance calculus."); 2 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 4:51 (5th ed. 2012).

45. *In re Nassau Cnty*, 461 F.3d, at 228–29. The court in *In Re Nassau County* struggled to certify a (b)(3) class action out of concern that many individual class members were unlikely to sue on their own. *See id.* This concern fits one of the purposes of (b)(3), which is supposed to enable enforcement of the substantive law as well as achieve judicial economy gains. However, the enforcement goal has nothing to do with cohesiveness or predominance. Rule 23 would be much improved if (b)(3) were revised to break out the two distinct class action purposes and set out rules appropriate for each.

cohesion or predominance.[46] Indeed, some of these cases focus directly on class cohesion rather than on (b)(2)'s express requirements.[47]

Two years after *Amchem*, in *Ortiz v. Fibreboard Corp.*,[48] the Supreme Court, concerned about fairness to absentees and due process, decided to tether the (b)(1)(B) limited fund class action to outdated and formalistic representative suit precedent. In particular, the *Ortiz* Court held that the "historical antecedents" of the limited fund class action imposed limitations that the modern (b)(1)(B) class action also had to satisfy.[49] The fact is that none of these limitations actually appear in Rule 23(b)(1)(B),[50] and engrafting them onto Rule 23 restricts its ability to respond pragmatically to new situations manifesting the same type of unfairness that the Rule was meant to address.[51] Worse yet, the Court did all of this without explaining how the historically-based restrictions improve fairness to absentees or when historical interpretation might limit other applications of Rule 23.[52]

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46. Some argue that stronger cohesion is necessary for (b)(2) than for (b)(3) because (b)(2) class members have no opt-out rights. *See, e.g.*, Barnes v. Am. Tobacco Co., 161 F.3d 127, 142–43 (3d Cir. 1998); RUBENSTEIN ET AL., *supra* note 44, § 4:33.

47. *See, e.g.*, Gates v. Rohm & Haas Co., 655 F.3d 255, 263–64 (3d Cir. 2011); *Barnes*, 161 F.3d at 143; *see also* Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1035 (8th Cir. 2010) (noting that a (b)(2) class is "generally bound together through preexisting or continuing legal relationships or by some significant common trait such as race or gender."); *cf.* RUBENSTEIN ET AL., *supra* note 44, § 4:34 (arguing that courts misunderstand the way (b)(2) benefits class members when they demand stronger cohesion to certify a (b)(2) class action).

48. 527 U.S. 815 (1999).

49. *See id.* at 841–42. *See also id.* at 845–48 (noting that a restrictive interpretation of the Rule helps to avoid due process and Rules Enabling Act problems). The three limitations are as follows: first, that the inadequacy of the fund be determined by comparing the total of all the claims with the fund set at its maximum; second, that "the whole of the inadequate fund . . . be devoted to the overwhelming claims" without any of it being held back to benefit the defendant or give the defendant "a better deal than *seriatim* litigation would have produced"; and third, that all the claimants must be "treated equitably among themselves" with equity presumptively a pro rata distribution and without any claimant receiving special treatment. *Id.* at 838–41.

50. *See id.* at 842 ("It is true, of course, that the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept . . . .").

51. This was the main point made by Justices Breyer and Stevens in dissent. *See id.* at 865–68. They stressed the unusual nature of the asbestos crisis, the fact that the *Ortiz* class members were likely to fare worse outside the settlement class, and the fact that Rule 23(b)(1)(B) was designed to handle this general type of problem. *Id.*

52. At least one commentator voiced a similar concern shortly after the *Ortiz* decision. John C. Coffee, Jr., *Class Action Accountability; Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 372 (2000) ("[T]he clearest message in *Ortiz* is that any innovation in class action procedures that departs from 'the traditional norm' is hereafter likely to be disfavored.").

My final example is the recent case of *Wal-Mart Stores, Inc. v. Dukes*, a huge Title VII class action seeking injunctive relief, declaratory relief, and back pay.[53] The *Wal-Mart* Court held that a lawsuit certified under 23(b)(2) is almost exclusively limited to claims for "indivisible" injunctive and declaratory relief—such as a single decree that benefits all class members at once—and cannot include "individualized" monetary relief unless that relief is "incidental" to the injunctive or declaratory relief sought.[54] The Court viewed back pay as a form of individualized relief that was not merely incidental to the injunctive and declaratory relief sought in *Wal-Mart*, and therefore the plaintiffs could not use (b)(2) to recover their back pay but instead had to meet the requirements of (b)(3).

The Court based its holding on an interpretation of Rule 23—just as it did in *Amchem* and *Ortiz*—but its interpretation was obviously influenced by due process concerns.[55] For example, the Court assumed that class members with claims for individualized monetary relief ought to receive the additional protections that (b)(3) affords, such as notice and opt-out rights, usually associated with due process values.[56] But the Court did not explain why the individualized nature of the relief made all the difference.

All three cases were huge and sprawling class actions seeking broad relief, and all three presented potentially serious problems. Moreover, *Amchem* and *Ortiz* were settlement-only class actions aimed at securing global peace, and they involved settlements that, depending on one's perspective, more closely resembled legislation or agency regulation than a product of adjudication. Perhaps the unusual nature of these cases demanded special rules, and the Court responded creatively by adapting Rule 23 provisions to do work they were not originally designed to do. Even so, the Court did not limit its holdings to the particular type of class action before it. Nor did it explain exactly how its restrictive rules satisfied the due process concerns that motivated them. Without a clear explanation, future courts are left to guess at whether cohesiveness is

53. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557–58 (2011).

54. *Id.* at 2557; *see id.* at 2558–59 (noting that (b)(2) is not available when "each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant" or to an individualized monetary award).

55. *See id.* at 2557–59 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.") (citations omitted).

56. *See id.* at 2559.

sufficient, traditional representative suit precedent relevant, or the remedy sufficiently indivisible.[57]

B. Strategic Abuse

The other area where the 1966 version of Rule 23 fell short is in controlling strategic abuse. One type of abuse involves agency problems that can result in a collusive settlement enriching the attorney at the expense of the class.[58] Although the 2003 amendments took steps to address this concern, it warrants further attention in any attempt to reform Rule 23.

There is, however, another type of strategic abuse that I wish to focus on here. By making massive damages liability turn on the outcome of a single suit, the class action can increase litigation risks so dramatically that defendants might settle even frivolous or weak class actions rather than take their chances at trial.[59] Although some commentators question the magnitude of this risk, there is no doubt that concerns about improper settlement leverage have had a major impact on class action decisions since the late 1990s.[60] Probably the most significant impact is on the standard of proof for class certification. Many courts have stiffened this standard, and made certification more difficult to obtain, in an effort to avoid certifying meritless and weak class actions and thereby reduce the pressure on defendants to settle.

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57. In its recent *Amgen* decision, holding that plaintiffs need not prove materiality to rely on a fraud-on-the-market theory at the class certification stage, the Court invokes the cohesiveness requirement but offers no additional clarification of the concept. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191, 1196–97 (2013). Indeed, *Amgen* involved an unusual situation: the core issue, materiality, was not only a condition for fraud-on-the-market, but also a pivotal liability issue. *See id.* at 1195–96 (noting that a failure to prove materiality not only excludes a fraud-on-the-market theory but also ends the litigation on the merits).

58. *See, e.g.*, Coffee, *supra* note 52, at 371–72; Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1390–91 (2000).

59. For an analysis of the strategic dynamics, see Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1296–302 (2002).

60. For a more skeptical view of frivolous settlements, see, for example, Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003). Critics of the class action have complained about unjustified settlement leverage almost since the beginning of the modern class action in 1966. *See, e.g.*, Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits-The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 8–9 (1971). But this concern moved center stage in the 1990s when Judge Posner highlighted it in a widely publicized decision, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995), and the Fifth Circuit stressed it one year later in *Castano v. American Tobacco Co.* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

Tightening the certification standard of proof implicates particularly difficult issues when the merits of a case overlap with certification requirements. Some Rule 23 requirements, such as (a)(1) numerosity, can be decided without consulting the merits. But others, such as (b)(3) predominance, overlap significantly with merits issues. To determine predominance, for example, a judge must assess the relative importance of the common and individual questions. And to do that, she has to be able to predict how the lawsuit will unfold and how the plaintiff will prove his case at trial.[61] The question is how confident the judge must be that the common issues supporting predominance have sufficient merit to actually feature prominently in the litigation of the case.

To illustrate, consider a securities fraud class action. Individual reliance is a necessary element of a plaintiff's prima facie case for securities fraud. If each plaintiff had to prove that she actually relied on the misrepresentations, few damages class actions could be certified. The class action would have to be brought under (b)(3), but (b)(3)'s predominance requirement would be very difficult to satisfy because reliance normally varies with individual circumstances. One way to solve this problem is to use a fraud-on-the-market theory. A fraud-on-the-market theory creates a rebuttable presumption of classwide reliance when securities are traded in an efficient market, and this makes it unnecessary for class members to prove individual reliance.[62] The question for the judge at the certification stage is what burden the named plaintiff must meet to demonstrate the availability of a fraud-on-the-market theory. Is it enough for the plaintiff simply to allege the theory? Or must she provide some evidence to support it, or maybe even prove it by a preponderance of the evidence?

Prior to 2000, many district judges relied mainly on the plaintiff's allegations for certification-related merits issues. When they considered evidence, they usually required only minimal evidentiary support. These judges reasoned that it was better to err on the side of granting certification than denying it, because a denial might doom the litigation and because any certification error could be

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61. *See, e.g.*, Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676 (7th Cir. 2001) (noting that the manageability factor for 23(b)(3) certification can require choice of law determinations based on the merits); Bone & Evans, *supra* note 59, at 1269 (discussing this point).

62. *See* Basic, Inc. v. Levinson, 485 U.S. 224 (1988). To use a fraud on the market theory, the plaintiff must also prove that the misleading information is material and sufficiently public to affect share price, although materiality need not be demonstrated at the certification stage. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1192–93, 1197 (2013).

corrected later by decertifying the class.[63] Starting with a Seventh Circuit decision in 2001, the federal courts of appeals began to impose stricter proof requirements.[64] Though not always explicit about their reasons, these courts were clearly influenced by a desire to prevent unjustified settlement leverage in weak and frivolous class action suits.[65]

The case law on the certification standard of proof, however, is in disarray. The problem is that Rule 23 says nothing very helpful about the issue.[66] This leaves the courts of appeals free to apply their own views of sound class action policy, and those views differ. The result is a confusing and inconsistent body of decisional law. For example, one panel of the Third Circuit has taken a particularly strict approach to the burden, holding that the plaintiff must demonstrate all Rule 23 certification requirements by a preponderance of the evidence, including any certification-related merits issues and issues that involve expert testimony.[67] Other courts seem less strict.[68] These more generous courts still require evidence and

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63. For an analysis and brief survey of the different approaches before 2001, see Bone & Evans, *supra* note 59, at 1268–76. Judges also argued that the Supreme Court decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), barred an inquiry into the merits, but this so-called Eisen Rule was abolished by the Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011).

64. *See Szabo*, 249 F.3d 672; Klonoff, *supra* note 3, at 23 (treating *Szabo* as a turning point).

65. The Third Circuit Court of Appeals stated this point clearly in an opinion that imposed a demanding standard of proof:

> In some cases, class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Accordingly, the potential for unwarranted settlement pressure "is a factor we weigh in our certification calculus." The Supreme Court recently cautioned that certain antitrust class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims.

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) (citations omitted); *accord In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 26 (1st Cir. 2008); Unger v. Amedisys, Inc., 401 F.3d 316, 322 (5th Cir. 2005); *Szabo*, 249 F.3d at 675–76; *see also* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 591 (9th Cir. 2010) ("Nearly every circuit to consider the issue . . . has recognized the practical importance of the certification decision as leverage for settlement . . . ."), *rev'd* 131 S. Ct. 2541 (2011). Another reason for a stiffer burden is to avoid the waste of investing in a class action that plaintiffs cannot win. *See In re New Motor Vehicles*, 522 F.3d at 29. Given that virtually all class actions settle, however, this cannot be the main purpose.

66. Some courts have tried to find guidance in the 2003 amendments to Rule 23, but their interpretations are extremely strained. *See, e.g., In re Hydrogen Peroxide*, 552 F.3d at 318–20 (relying on Rule 23(c)(1)(A) and (c)(1)(C)).

67. *In re Hydrogen Peroxide*, 552 F.3d at 320–25; *see also* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008); *In re* IPO Sec. Litig., 471 F.3d 24, 29–32 (2d Cir. 2006).

68. *See, e.g.*, Behrend v. Comcast Corp., 655 F.3d 182, 198–200 (3d Cir. 2011) ("Nothing in *Hydrogen Peroxide* requires plaintiffs to prove their case at the class certification

insist on a "rigorous analysis," including a merits review when relevant to certification.[69] But they tend to be less demanding and more willing to credit allegations with weaker evidentiary support.[70] These different approaches reflect different views about the value of class actions, the seriousness of the settlement leverage problem, and the desirability of incurring greater litigation costs and burdens at the certification stage.[71]

The Supreme Court addressed the standard of proof briefly in *Wal-Mart Stores, Inc. v. Dukes* but did little to resolve the core conflict. The *Wal-Mart* Court rejected what it called "a mere pleading standard," and held that "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[72] Moreover, the Court stressed the need for a "rigorous analysis," including an inquiry into the merits when relevant to certification.[73]

However, the Court did not specify any particular standard of proof—whether plausibility, preponderance, or some other standard. The majority's strict attitude toward plaintiffs' evidence in *Wal-Mart* might foreshadow adoption of a demanding standard more generally.[74] But *Wal-Mart* was an unusual class action in many ways, and one should be careful about inferring too much from the Court's approach.[75] Two more recent Supreme Court decisions

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stage . . . ."), *rev'd*, 133 S.Ct. 1426 (2013); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 818–19 (7th Cir. 2012) (reversing certification denial and criticizing the district judge for applying too strict an approach that "asked not for a showing of common questions, but for a showing of common answers to those questions"). Although the Supreme Court reversed the Third Circuit's decision in *Behrend*, *see infra* note 77, the appellate court's opinion is still a good example of more liberal attitudes toward certification.

69. *See, e.g.*, *Behrend*, 655 F.3d at 190.

70. Because courts tend to discuss these issues in rather vague and general language, it can be difficult to determine exactly how strict a court's preferred burden is. However, the language and tone of an opinion often signals a court's views. *Compare id.* at 197, 199–200 (noting that the job of the court is not to decide issues on the merits), *with In re Hydrogen Peroxide*, 552 F.3d at 316–21 (stressing the importance of deciding certification-related merits issues by a preponderance of the evidence).

71. *See, e.g.*, *Behrend*, 655 F.3d at 199–200 & n.10 (noting that "nothing in [*Hydrogen Peroxide*] indicated that class certification hearings were to become actual trials in which factual disputes are to be resolved" and citing "recent scholarship" critical of the "trend towards converting certification decisions into mini trials").

72. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

73. *Id.* at 2551–52.

74. *See id.* at 2553–56.

75. Wal-Mart is the nation's largest private employer, *see id.* at 2547, and the *Wal-Mart* class was huge, sprawling, and diverse. As originally certified, the class consisted of about 1.5 million Wal-Mart employees spread over 3,400 stores nationwide. *See id.* Moreover, the plaintiffs alleged a controversial structural discrimination theory. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 156–59 (2009).

send mixed signals. Language in the Court's *Amgen* opinion might signal a somewhat less demanding approach,[76] but language in the Court's *Comcast* opinion seems to cut the other way.[77] Especially given the Court's lack of clarity on the subject, it is important that the Advisory Committee amend Rule 23 to address the certification standard of proof explicitly. As I explain below, the Committee is in a better position than the Court to consider the relevant empirical evidence and conduct a global normative analysis.

III. REFORMING RULE 23

In the following discussion, I present an approach to Rule 23 reform that addresses the problems identified in Part II.[78] I do not set out specific rule language or even advocate a particular position on the issues, although I indicate my own views at times. My primary purpose is to chart a promising course toward sensible reform.

The key idea is to make Rule 23 a thoroughly functional and pragmatic rule. The 1966 Advisory Committee went some distance along this road. It replaced the rights-based formalism of the 1938 Rule with a more pragmatic and functional approach. But the Committee did not go far enough.

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76. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1201 (2013) ("Amgen's argument, if embraced, would necessitate a mini-trial on the issue of materiality at the class-certification stage. Such preliminary adjudications would entail considerable expenditures of judicial time and resources, costs scarcely anticipated by Federal Rule of Civil Procedure 23(c)(1)(A) . . . ."); *see also id.* at 1191 (stressing that (b)(3) predominance focuses on common "questions," not "answers").

77. Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). The majority held that the plaintiffs did not do enough to show that the (b)(3) predominance requirement for certification was satisfied because they failed to demonstrate that damages traceable to their theory of antitrust impact could be proved on a classwide basis. *Id.* at 1433–35. The Court's opinion sounds a relatively strict note, although it lacks specifics on the precise standard of proof. The majority repeats *Wal-Mart*'s admonitions that Rule 23 "does not set forth a mere pleading standard," that the party seeking certification "'must affirmatively demonstrate his compliance' with Rule 23," that the certification inquiry "will frequently entail 'overlap with the merits of the plaintiff's underlying claim,'" and that class certification requires a "rigorous analysis." *Id.* at 1432 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)). The majority also noted that the plaintiff must demonstrate "through evidentiary proof" that one of the prongs of 23(b) is satisfied and that the district court has a duty to "take a close look" at (b)(3) predominance. *Id.*

78. I focus on two areas, but these are not the only ones that the Committee should address. For example, the 23(b) pigeonholes should also be revised to better map the different social benefits from class treatment. In particular, it might make sense to craft a separate provision for small-claim class actions and perhaps also for settlement class actions. Moreover, attorney-class agency problems need careful attention.

A. Some Suggestions for Reform

1. Fairness to Absentees: Cohesiveness and Indivisibility

The best way to understand what cohesiveness and indivisibility have to do with fairness to absentees and the day-in-court right is to view them through the lens of a process-oriented rather than an outcome-oriented theory of participation.[79] An outcome-oriented theory values participation for its effect on outcome quality. In the class action context, this theory demands that the class representative and class attorney have interests in the litigation that align with those of the class as well as incentives and resources to litigate vigorously.[80] Rule 23(a)(4) addresses these factors directly, and there is no obvious reason why cohesiveness and remedial indivisibility are needed as well.

Process-oriented theory, by contrast, views participation as necessary to respect the dignity and autonomy of those affected by litigation or to make adjudication legitimate—entirely apart from any effect on outcome quality. Process-oriented participation poses a serious challenge to the class action. It is difficult to understand how representation can substitute for personal participation when dignity or legitimacy demands a personal day in court. This is where cohesiveness and indivisibility are supposed to do their work. The underlying notion seems to rely on a rough intuition that the strength of the participation right somehow varies with the degree of individuality class members possess and that class members have little individuality, and thus only a weak claim to individual control, when the class consists of a cohesive pre-existing group. The problem is how to flesh out this intuition in a rigorous way.[81]

This is not the place to examine the intuition carefully. The following discussion briefly sketches the type of analysis that should be done. The first point to note is that, if the intuition makes any sense at all, it cannot be because all class members share the same or

79. *See generally* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 508–11 (2003) (contrasting outcome-oriented and process-oriented theories).

80. For a defense of this point, see Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 580–89 (2011).

81. In the somewhat different context of nonclass aggregations, Professor Burch has argued for a view of cohesiveness based on actual group member interactions and decisions that, she claims, trigger obligations of solidarity and membership. Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 106–11 (2011). Whatever the merits of this position, it does not translate well to the class action since most class members participate only through representatives they do not choose.

similar subjective preferences or goals for the litigation. They almost certainly do not. For example, attitudes toward risk vary across class members in almost every class action, and these attitudes can affect litigation and settlement preferences.[82] Even in a (b)(2) civil rights class action, class members can hold different preferences about the scope of injunctive relief—and some might wish not to sue at all.[83] The same is true in a particularly dramatic way for the (b)(1)(B) limited fund class action. The fact that the fund is inadequate to satisfy all claims necessarily means that class members have conflicting preferences: each would like more of the fund even when others have less.

Nor does it make sense to focus on legal similarities among class members. This is what (a)(2) commonality and (a)(3) typicality do, and it is also how the *Amchem* Court viewed predominance as a measure of class cohesiveness. But it is difficult to see how sharing common questions of law or fact, no matter how numerous, or asserting claims that arise from the same dispute and involve similar legal theories makes it fair to deny a class member the right to litigate her own lawsuit in her own way. It is simply false to assume that a class representative will make the same litigation strategy choices as other class members just because she asserts a similar legal claim or theory.[84]

Even this brief analysis suggests two important revisions of Rule 23. First, (a)(2) commonality and (a)(3) typicality should be eliminated. The 1966 Committee never provided a convincing justification for their inclusion, and they bear no obvious relationship to process-oriented participation values. Second, a revised Rule 23 should make clear that (b)(3)'s predominance requirement has nothing to do with fairness to absentees. Predominance is not needed to satisfy outcome-oriented participation, and it has no connection to process-oriented dignitary values. Therefore, its only function should be to serve as a proxy for the judicial economy gains from aggregation.

Remedial indivisibility is a different matter. I have argued elsewhere that the right to a personal day in court is not triggered in a

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82. Risk-averse class members will favor less risky litigation strategies and be more eager to settle than risk-takers. *See* Coffee, *supra* note 52, at 389–90.

83. *See* Marcus, *supra* note 23, at 709–10; *see also* Burch, *supra* note 81, at 111.

84. Professor Hines argues that individuals with similar claims can trust their class representative to make "litigation resource and strategic decisions" that "serve their interests" and that, as a result, cohesiveness supports an inference of consent to representation. Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 594–98 (2004). I disagree. The fact that *A* and *B* have similar claims provides no assurance that *A* will make the same strategic decisions as *B* or even take *B*'s interests into account. Moreover, I don't see how consent follows from any of these assumptions.

strong way in those cases where the legal remedy targets a class *qua* class and confers benefits and burdens on class members only indirectly by virtue of their being members of the class.[85] Remedial indivisibility might refer to this principle if indivisibility means that the remedy targets the class as a group. But if this is so, remedial indivisibility must be understood in the correct way. It must refer to a situation where the judge does not single out any group member for individual treatment but instead acts on the class as a whole. Rule 23 should be written in a way that makes this connection clear.

Finally, the day-in-court right as reflected in litigation practice is not as absolute as the Supreme Court seems to think it is. I have argued in other writing that the right is best viewed as contextual, defined by a balance of factors including its effect on other litigants and to some extent the judicial economy benefits achieved by limiting it.[86] If I am correct about this, there is much more room for the (b)(3) class action than previously assumed. Indeed, there might even be room for a *mandatory* (b)(3) class action designed to redress major litigation imbalance, to prevent serious delay costs for some class members, or even to save litigation costs when those savings are large enough.

The important point is that the Advisory Committee should conduct a rigorous analysis along the lines sketched here. In particular, Rule 23 must be revised with an eye not only to the benefits of class treatment, but also to the functional values served by individual participation and the day-in-court right, as properly understood.

2. Strategic Abuse

The Committee should also add a provision to Rule 23 that sets out the standard of proof for certification. Elsewhere, I have outlined a way to determine the optimal standard.[87] Since the primary goal is to avoid certifying weak and frivolous class actions, the Advisory Committee should apply an error-cost analysis. More precisely, the Committee should consider four factors relevant to evaluating expected error costs: (1) the likelihood that a more lenient standard will lead to the grant of certification in weak or frivolous class action suits (which, in turn, depends on the fraction of suits that

85. Bone, *supra* note 80, at 610–14.

86. *Id.* at 614–24.

87. *See* Bone & Evans, *supra* note 59, at 1278–80; Robert G. Bone, *Sorting Through the Certification Muddle*, 63 VAND. L. REV. EN BANC 105, 112–15 (2010).

are weak or frivolous); (2) the settlement leverage that an erroneous certification is likely to confer and the social cost of the skewed settlements that might result; (3) the likelihood that a stricter standard will lead to denial of certification in meritorious class action suits; and (4) the cost of an erroneous denial in frustrating class action goals.[88]

One way to implement this approach for merits issues relevant at the certification stage is to adopt a standard of proof that operates like the substantial likelihood of success test for the grant of a preliminary injunction.[89] In the preliminary injunction setting, the plaintiff's burden for establishing a likelihood of success varies on a sliding scale with the expected error costs from granting versus denying an injunction. One could apply a similar sliding scale to the certification standard of proof. For example, consider a civil rights case in which the underlying substantive interest has high social value and there is a serious risk that denial of certification might frustrate effective vindication of the right. In such a case, the judge might impose a relatively lenient burden unless the defendant is able to show that the cost of an erroneous certification in terms of improper settlement leverage is very high.

Alternatively, the Committee might adopt a relatively strict standard of proof and carve out categorical exceptions. These exceptions would apply to general types of cases, like civil rights class actions, that tend to pose particularly serious risks of high social costs from erroneous certification denials.[90]

Furthermore, the Committee should be careful to coordinate its choice of certification standard with other elements of the procedural system that serve related purposes. In particular, the Committee should coordinate with the stricter pleading burden that the Supreme Court adopted in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.[91] The *Twombly* Court justified its plausibility standard in part as a way to screen frivolous and weak antitrust class actions early in

88. *See* Bone & Evans, *supra* note 59 at 1313–19 (outlining an error cost and process cost critique of the Eisen Rule).

89. *See id.* at 1277–80.

90. Process costs matter as well. These include the parties' litigation costs as well as judicial decision costs. Expected process costs depend on two factors: (1) the number of certification motions under a strict versus a more lenient standard, and (2) the cost of litigating a certification motion under the different standards. For example, if class action filings decline with a stricter standard of proof because plaintiffs are more pessimistic about success, the number of certification motions should decline as well. However, a stricter standard also requires more preparation, more evidence, longer hearings, and longer deliberation time. These two effects pull in opposite directions, and how they resolve on balance depends on the type of case.

91. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

litigation.[92] Insofar as this strict pleading standard already performs a screening function, there might be no need for—and it might not be a good idea to adopt—a strict certification standard as well.

B. Obstacles to Reform

In this section, I briefly discuss potential obstacles to reform. By doing so, I hope to convince the skeptical reader that major reform is possible and that there is still value in attempting it even when the effort is ultimately unsuccessful.

1. Supreme Court Precedent

Many of the reforms discussed above involve reversing or modifying Supreme Court precedent. Because these precedents are based on interpretations of Rule 23, the Committee has the power to displace them by amending the Rule. Nevertheless, one might worry about reversing a Supreme Court decision that itself was based on judgments of principle or policy, especially when the decision is fairly recent. For example, it might seem a bold move to eliminate the (a)(2) common question requirement or tinker with (b)(2) indivisibility so soon after the *Wal-Mart* decision.

This is an understandable concern, but it should not stand in the way of Committee action. The Advisory Committee can learn from what the Court has done, but it should not treat the Court's decisions as a bar to sensible reform. The Committee's job is to craft the best possible procedural rules within constitutional and statutory limits, and it is better positioned than the Court to gather and evaluate the necessary empirical information, hear from affected constituencies, and assess the consequences of a rule in light of its global effects on the procedural system as a whole.[93] Perhaps the Supreme Court's well-considered judgments about moral principle should receive greater weight, but the Court has never clearly identified the moral principles that underlie the day-in-court right.

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92. 550 U.S. at 557–59. Moreover, the Private Securities Litigation Reform Act imposes a strict pleading standard for certain elements of a federal securities fraud claim in order to screen frivolous and weak filings. 15 U.S.C. § 78u-4(b)(2) (2006).

93. *See* Bone, *supra* note 37, at 1989–90, 1995–96, 2001 (discussing advantages of the court rulemaking process).

2. Due Process

Constitutional constraints are a more serious matter. Although the holdings in *Amchem*, *Ortiz*, and *Wal-Mart* are based on Rule 23, the Court in all three cases suggested that constitutional due process concerns lurked in the background. The *Wal-Mart* Court, for example, indicated in dictum that notice and opt-out rights might be *constitutionally* required whenever monetary relief is sought.[94] If this dictum ever becomes law, any effort to make small-claim class actions mandatory—to give just one example—could run afoul of the Due Process Clause.

Even so, this is no reason for the Committee to stay its hand. Committee members should give serious weight to Supreme Court dictum when the dictum is persuasive, and, of course, they should not flout a clear constitutional decision. But when unconstitutionality is only a possibility, the Committee's responsibility to design a well-justified procedural system should take priority. The Committee should not stop short of adopting a sensible reform just because there might be an adverse judicial response.

More generally, I believe the proper relationship between the Committee and the Court is a dialogic one. Just as the Committee should give weight to the Court's arguments, the Court should give weight to the Committee's arguments when a reform is challenged on constitutional grounds. For example, the Committee's well-justified views on the constitutionality of mandatory class treatment for small-claim class actions should influence the Court's constitutional analysis. In this way, the Committee actively leads rather than passively follows, and the Court can learn from the Committee's well-considered judgments.

3. Rules Enabling Act

Section 2072(b) of the Rules Enabling Act ("REA proviso") bars procedural rules that "abridge, enlarge, or modify any substantive right."[95] This limitation creates particularly challenging problems for Rule 23 because of the key role class actions play in implementing substantive policies and the powerful impact that class

94. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011).

95. 28 U.S.C. § 2072(b) (2006). Professor Stephen Burbank has persuasively argued that the original purpose of this limitation was to protect separation of powers values by reserving substantive regulation for Congress, but the federal courts have insisted on reading it in federalism terms. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106–12 (1982).

certification can have on the distribution of power outside as well as inside the litigation.[96] Yet there is no clear test for determining when a Federal Rule abridges, enlarges, or modifies a substantive right. The Supreme Court has construed the REA proviso on several occasions, but its decisions are far from clear.

In an early statement on the issue, the Court held that a Federal Rule of Civil Procedure satisfies the REA proviso if it "really regulates procedure[ ]—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[97] This "really regulates procedure" test is singularly unhelpful: it provides little guidance in distinguishing rules that "really" regulate procedure from those that do not. Forty-six years later, the Court elaborated by explaining that Federal Rules that only "incidentally affect litigants' substantive rights" do not run afoul of the proviso, especially when they are "reasonably necessary to maintain the integrity of [the] system of rules."[98] But this test falls short as well. It is not clear how to determine when a Federal Rule has only "incidental" effects and when its effects are sufficiently direct.

Most recently, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[99] a plurality of the Supreme Court revived the "really regulates procedure" test and adopted a rather formalistic version that almost entirely ignores the substantive effects of a Federal Rule:

> The test is not whether the rule affects a litigant's substantive rights . . . [w]hat matters is what the rule itself *regulates:* If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not.[100]

As others have noted, this test adopts too simplistic a view of the relationship between procedure and substance.[101] It would seem to

96. *See, e.g.*, Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 19 (2010) (arguing that because of these factors, "the possibility that the entire [Rule 23] endeavor may have unfolded in violation of the Enabling Act seems increasingly compelling, but the disruptive consequences of such a conclusion would be unacceptable").

97. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

98. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987).

99. 130 S. Ct. 1431 (2010).

100. *Id.* at 1442.

101. *See* Burbank & Wolff, *supra* note 96, at 20, 63–66.

approve a substantive regulation disguised as a Federal Rule as long as the Rule on its face appears to regulate procedure.

Commentators offer various alternative tests. Some of these focus on effects, others focus on purposes, and some consider both.[102] My own approach, detailed elsewhere, focuses on the Committee's justification for a rule.[103] The Advisory Committee acts properly if it explicitly supports its rule choice with a substantial justification that fits one or more of the purposes of civil adjudication—achieving a fair distribution of error risk, reducing expected error or process costs, or promoting process-based procedural fairness—so long as the rule does not depart too much from core features of civil adjudication reflected in longstanding practice.[104]

The *Shady Grove* plurality's test would seem to permit at least the main Rule 23 reforms discussed in this Article. These reforms are procedural on their face; they can be seen as regulating only the manner and means by which litigants' rights are enforced. And although they have substantive consequences, they do not directly alter substantive rules of decision. Furthermore, my interpretation of the REA proviso makes wide room for Rule 23 reforms that have significant substantive effects. Roughly speaking, the Committee respects the limitations of the REA proviso in my approach as long as it proceeds with an eye to making Rule 23 a more sensible and coherent rule that better serves the goals of civil adjudication and respects adjudication's core adversarial features. For example, the Committee should be able to adopt a standard of proof for certification even though its choice affects enforcement of the substantive law, provided the Committee justifies its choice in terms of reduced error costs. So too, the Committee should be able to carve out substance-specific exceptions for civil rights claims as long as it justifies its exceptions in terms of the particularly high cost of failing to vindicate meritorious rights-based claims.

In short, the current Advisory Committee should not shy away from making Rule 23 a better version of the pragmatic and functional rule the 1966 Committee meant to create. While REA constraints must be taken seriously, the fact that Rule 23 can have a

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102. *See, e.g.*, *id.* at 44 (focusing primarily on whether the Federal Rule involves policy choices that "predictably and directly affect rights under the substantive law"); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724–25 (1974) (focusing on whether the Rule is "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes").

103. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 950–54 (1999).

104. *Id.* at 951–52.

powerful impact on substantive law enforcement and the distribution of power is not a sufficient reason alone to balk at otherwise sensible reforms.

4. Transsubstantivity and Politics

The current Rule 23 is a "transsubstantive" rule, meaning that it is written to apply broadly regardless of the nature of the underlying substantive claim. There is a longstanding debate over the virtues and vices of transsubstantive rules.[105] Those who favor transsubstantivity might object to Rule 23 reforms that create substantive-specific rules or adopt general standards that explicitly require consideration of substantive stakes.

For example, a revision of Rule 23 that adopted a fairly stiff standard of proof for certification but carved out exceptions for civil rights and other types of suits with special social value would not be transsubstantive. Also, the type of balancing test for choosing the certification burden that I propose in Part II.B might be objectionable on transsubstantivity grounds because one of the factors refers explicitly to the importance of the underlying substantive interest.[106]

I have argued elsewhere that transsubstantivity is not an intrinsic virtue of procedural rules.[107] A primary purpose of procedure is to manage the risks and costs of error, and error costs necessarily depend on the importance of the substantive interest at stake.[108] In fact, facially transsubstantive rules, like Rule 23, are often written in general and open-ended language so trial judges can adapt them to case-specific circumstances.[109] For example, judges sometimes bend

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105. *See e.g.*, Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1160–63 (2006) (criticizing the transsubstantive ideal); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 713–15 (1988) (discussing the shortcomings of uniform transsubstantive rules); Paul A. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079–85 (1989) (defending transsubstantive rules and describing how they implement principles of generalism and flexibility).

106. Indeed, a particularly extreme proponent of transsubstantivity might even object to making small-claim damage class actions mandatory but leaving large-claim class actions with opt-out rights, on the ground that any such rule treats substantive laws that typically generate small claims—securities fraud, antitrust, consumer protection, and the like—differently than other substantive laws.

107. Bone, *supra* note 105.

108. *Id.* at 1160–63.

109. For a non-class-action example, a judge might permit broader discovery in a major civil rights case than in a routine negligence suit because the substantive stakes make outcome error potentially more serious in the former than in the latter.

over backwards to find 23(a) and (b)(3) requirements satisfied when the class action is the most promising way to enforce important policies embodied in the substantive law.[110] It is hard to see how transsubstantivity can be a virtue when Rules are applied in a non-transsubstantive way.

To be sure, the Advisory Committee must still decide how to craft a revised Rule 23, such as, for example, whether to draft it as a strict rule or a more flexible standard and whether to frame it at a general or more specific level. But these choices should be made by balancing the costs and benefits and not by applying some misguided principle of transsubstantivity.[111]

There is one other concern. Even though a reform satisfies the REA proviso and is otherwise well-justified, it might still trigger political controversy. The Committee should not ignore the political risks of reexamining Rule 23. At the same time, it should not shy away from reform simply because it fears sharp interest group conflict and possible congressional intervention. There will be times when the Committee might have to settle for a suboptimal reform, or maybe no reform at all, because the optimal version is too controversial. Or it might have to exercise restraint in order to avoid congressional meddling that threatens the integrity of the rulemaking process. Still, the Committee should hesitate only in exceptional circumstances, when political resistance is very strong and failure extremely likely.[112]

CONCLUSION

I have argued in this Article that the Advisory Committee should reform Rule 23 to fulfill the 1966 Committee's vision of a pragmatic Rule. To do this, the Committee must develop a functional account of the day-in-court right and a coherent explanation of how that

110. *See, e.g.*, *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 230 (2d Cir. 2006) (applying Rule 23 liberally to reverse denial of certification of a class of detainees and observing that "without class notification, most putative class members will not even know that they suffered a violation of their constitutional rights").

111. *See* Bone, *supra* note 37, at 2002 (identifying as relevant the cost of making the rule, the cost of applying it, and the benefits of predictability, among other factors).

112. The Advisory Committee should still formulate and publish its optimal rule even when it decides not to adopt that rule in full because of political concerns. In this way, the Committee will know what it is giving up, and the courts, Congress, and the broader legal community can learn from Committee expertise. By an optimal rule, I mean one that not only balances costs and benefits but also takes account of due process and REA limits. The Committee can explain its decision to modify certain provisions, despite REA power to adopt them, on the ground that the unmodified versions are better left to the legislative process given the intense political controversy they engender.

right fits with representative litigation. Furthermore, it must directly address the kinds of strategic abuse that plague class litigation in all its different forms. None of the potential objections based on precedent, due process, the Rules Enabling Act, or transsubstantivity are compelling. The political risks must be taken seriously, and the Committee should do its best to manage them on an ongoing basis. But it would be a shame if the risk of political conflict crippled the Committee's efforts.

Some might think this project is folly. If the federal class action is dead or in its final death throes, as some commentators claim, there would be little point in amending Rule 23. But I do not believe that the situation is quite this dire. There will probably be fewer class actions in the end, but the class action itself will still survive.[113] It is important, therefore, that the Advisory Committee address restrictive decisions over the past fifteen years that involve interpretations of Rule 23.

The class action is a critical component of modern civil adjudication. It plays an important role in easing unfair burdens, furnishing remedies to help enforce the substantive law, and reducing the costs of litigation when those costs are extremely high. However, the current version of Rule 23 needs major repair if it is to promote its goals in an optimal way. The future of the class action depends on it.

113. Perhaps the most important development in this regard is the Court's decision in *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740 (2011), which some critics claim could eliminate the small-claim class action. *See supra* notes 4, 6 and accompanying text.