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From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions

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I. INTRODUCTION

Class actions incite both delight and disgust. Several complementary themes in popular culture embrace the class action, including sympathy for underdog litigants challenging powerful malefactors, fascination with massive redistributions of wealth from corporations to individuals, and reluctance to permit large and influential wrongdoers to escape justice merely because of their size and clout. Class actions have thus become an appealing procedural counterweight to the burdens that modern society imposes on consumers and citizens, giving many little Davids a fighting chance for protection from or retribution against political and economic Goliaths. But class actions also expose and rile competing visions of the judicial system: suspicion of large-scale judicial proceedings, wariness of high-paid plaintiffs' lawyers, and a sense that society may subsidize the jackpot payouts that often result from group litigation and settlement. These crosscurrents of attraction and repulsion have propelled class actions to a level of political and academic prominence far exceeding the attention devoted to any other aspect of civil procedure.

Despite the critical attention focused on class actions, the debate over how best to reform them has not identified a conceptual flaw at the core of their design. Academic scrutiny of class actions over the past sixty years has usually built upon three overlapping themes: the potential utility and fairness (or disutility and unfairness) of aggregating individual claims as a solution to collective action problems that inhibit enforcement of substantive rights, the extent and significance of agency costs and diminished individual autonomy in representative litigation, and the relative roles that courts, legislators, and administrative agencies should play in redressing widespread injuries. These themes at an abstract level frame the debate over whether class actions are desirable as a matter of public policy, and at a technical level frame arguments for or against the myriad procedural reforms that scholars and legislators have proposed to expand, curtail, or manage class litigation.[1] However, analysis of

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1. A vast and growing literature analyzes the structure, role, and utility of class actions (as well as other aggregative devices) and proposes an equally vast array of regulatory, remedial, and procedural reforms to federal and state laws governing the prevention and remediation of injuries affecting large groups. Among the many excellent contributions to the field are: DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000) [hereinafter Coffee, *Accountability*]; John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) [hereinafter Coffee, *Class Wars*]; John C. Coffee, *Understanding the Plaintiffs'*

whether and how to reform class actions often overlooks a critical theoretical concept that has little direct connection to either the collective action, agency cost, or institutional role strands of class action scholarship. This Article seeks to correct that theoretical oversight, to explore some of its practical implications, and to demonstrate how rethinking the principles that animate class actions reveals a novel avenue of class action reform.

The pivotal issue in most proposed class actions seeking damages is whether class members' factual and legal circumstances are sufficiently alike to permit resolution of contested claims and defenses collectively rather than through traditional case-by-case adjudication. This issue of "alikeness" arises because the factual circumstances of multiple plaintiffs seeking to join in a single proceeding are seldom precisely the same. Factual distinctions at various levels of subtlety and materiality usually permeate the legal claims of putative class members, such that their collective claims

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Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669 (1986) [hereinafter Coffee, *Private Enforcement*]; Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, & Conflict of Interest*, 4 J. LEG. STUD. 47 (1975); Richard A. Epstein, *Class Actions: Aggregation, Amplification, & Distortion*, 2003 U. CHI. LEG. F. 475 (2003); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337; Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-400 (1967); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Francis E. McGovern, *Class Actions and Social Issue Torts in the Gulf South*, 74 TUL. L. REV. 1655 (2000); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem*," 92 HARV. L. REV. 664 (1979); Geoffrey P. Miller, *Class Actions in the Gulf States: Empirical Analysis of a Cultural Stereotype*, 74 TUL. L. REV. 1681 (2000); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149 (2003) [hereinafter Nagareda, *Preexistence*]; Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEG. STUD. 521 (1997); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Roles*, 2003 U. CHI. LEGAL F. 71; Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation & Fees*, 71 N.Y.U. L. REV. 296 (1996); Judith Resnik, *From "Cases" to "Litigation*," 54 LAW & CONTEMP. PROBS. 5, 5-46 (1991); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002) [hereinafter Rosenberg, *Mandatory Litigation*]; David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186 (1996); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998); Charles Silver, *"We're Scared to Death": Class Certification & Blackmail*, 78 N.Y.U. L. REV. 1357 (2003); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998).

raise both "common" and "individual"[2] questions relevant to proving liability and damages. The answer to common questions (such as whether a product was defectively designed or whether an advertisement was misleading) are identical for every class member, and can often be determined accurately and efficiently in a single proceeding before a single finder of fact. However, the answer to individual questions (such as whether a design defect was the proximate cause of an injury or whether a consumer relied on a misleading representation) can vary from plaintiff to plaintiff and may require time-consuming and costly proceedings to assess the merit and monetary value of each class member's claim.[3]

Common and individual questions pull in opposite directions on the issue of whether a court should certify claims for class action treatment. The prevalence of important common questions suggests that consolidating otherwise disparate claims into a class action would efficiently deploy scarce judicial resources while providing plaintiffs

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2. FED. R. CIV. P. 23(b)(3). Elsewhere in this Article, I use the words "similar" and "dissimilar" in lieu of "common" and "individual" to illustrate the problems that arise when courts attempt to resolve questions that do not yield identical answers for each class member.

3. The nature and significance of individual issues is a function of the substantive liability and damage rules applicable to asserted claims and defenses. I assume in this Article that most common law and statutory sources of rights that create private remedies will continue to include elements—such as proximate causation—that may require varying proofs depending on particular class members' circumstances. The design of procedural rules should accommodate the individualized elements of substantive laws that the procedures help to enforce. *See infra* Part III.B. However, to the extent that the content of substantive law creates undesirable obstacles to the development of fair and efficient procedures, policymakers can amend substantive rules through appropriate judicial or legislative avenues to better exploit the advantages of available procedures. For example, developments in consumer protection law that permit plaintiffs to prove reliance based on general evidence without offering direct testimony arguably illustrate the evolutionary adaptation of substantive law to a procedural environment that favors common elements over individual elements. *Cf.* Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1654 (2000) (reviewing developments in the law of reliance and arguing that "[i]n the case of reliance, the certification battles are best understood as ongoing uncertainty over the true state of substantive law"). Similarly, the growing literature considering whether the basic structure of tort law can tolerate relaxation of causation and injury requirements to treat the imposition of risk as an actionable harm is highly relevant to the debate over class actions (although it is usually not framed in those terms) because risk-based claims are easier for large numbers of claimants to prove by common evidence than are claims premised on palpable individual injuries. The question of how the structure of tort constrains the definition of required elements thus has ramifications for which procedural remedies will be available to enforce substantive rights, which in turn determines how effective liability rules are likely to be in vindicating the compensation, deterrence, and insurance objectives of tort law. For a general discussion of risk-based liability theories, see generally Matthew D. Adler, *Risk, Death & Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1436-42 (2003); Margaret A. Berger, *Eliminating General Causation: Notes Toward a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117 (1997); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risk*, 37 UCLA L. REV. 439 (1990).

with an opportunity to leverage their own resources against the defendant's inherent economy of scale.[4] In contrast, the presence of salient individual questions suggests that adjudicating a class action would either require numerous hearings on individualized questions of law or fact, or would induce courts to adopt substantive, procedural, or evidentiary shortcuts around such hearings.[5] Extensive hearings may become impractical, while shortcuts around them may become unfair. Courts considering whether to certify proposed class actions thus face a recurring dilemma about how to resolve the tension between common and individual questions that arises when class members present factual circumstances that are similar, but not exactly alike.

The theoretical and practical dimensions of the tension between common and individual questions are strikingly underexplored beyond the literature addressing agency costs. The consequences of diversity among class members have been carefully analyzed in the context of decisions about the propriety of allowing a

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4. Class actions potentially promote social welfare by overcoming collective action problems inherent in the regulation of conduct affecting disorganized groups. Injurers can derive large benefits from imposing comparatively small costs on each member of a risk-bearing population. The injurer's ability to derive a concentrated benefit from imposing diffused costs creates a significant asymmetry of resources and incentives between injurers and victims. The injurer has a strong incentive to continue its conduct and has the resources to defend itself, while no individual victim has a comparably strong incentive or sufficient resources to compel the injurer to stop. When the conduct is complete, the injurer's size and potential exposure provide it with the resources and incentives to avoid being held accountable, while the victims individually often lack the incentives or resources to sustain the effort of investigating potential claims and obtaining a remedy for losses. The traditional single plaintiff versus single defendant model of private dispute resolution thus does not provide a viable means for compensating victims or deterring injurers because victims are unlikely to sue, and if they do sue, injurers are likely to have an advantage in the litigation's war of attrition. The theory underlying the class action is that aggregating victims into a single fictional unit – "the class" – places incentives and resources into a more equitable balance and neutralizes the defendant's otherwise overwhelming tactical advantage. *See*, *e.g.*, Kalven & Rosenfield, *supra* note 1, at 686:

> Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.

See generally MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 48 (2d ed. 1971) (analyzing obstacles to the optimal creation of collective goods inherent in the costs of organizing groups and in the variance between marginal costs and marginal benefits to individual group members); Steven Shavell, *The Fundamental Divergence Between The Private and the Social Motive to Use the Legal System*, 26 J. LEG. STUD. 575 (1997) (noting that victims of wrongs do not fully internalize the benefits of litigation and thus may have insufficient incentives to file socially desirable suits).

5. *See infra* Part II.

single agent to represent diverse principles.[6] In contrast, the consequences of diversity for the valuation of aggregated claims – and thus for the effectiveness of aggregative procedures as a tool for implementing substantive rules and remedies – has received comparatively little explicit attention. Politicians, courts, and commentators have focused on controlling when, where, and by whom class actions are filed, managing class actions after they are certified, and policing how they are settled, but have given only minimal scrutiny to the logically antecedent question of how to decide whether a class action is a procedurally viable means of resolving the similar and dissimilar aspects of contested claims and defenses. In particular, rules for assessing the significance of common and individual questions within putative class actions – notably Federal Rule of Civil Procedure 23(b)(3)[7] – have not evolved since their creation in 1966, have received virtually no helpful clarification from the Supreme Court, have bewildered lower courts, and have not attracted substantial scholarly scrutiny.

The lack of critical attention to rules for assessing the similarity of putative class members' claims outside the agency context has allowed a conventional wisdom to evolve that misstates the nature and overlooks the seriousness of the problems that a lack of similarity creates. The consensus view among courts and commentators is that the critical determination in deciding whether to certify claims for class action treatment is whether the factual and legal questions that unite class members are relatively more significant than the questions that divide them.[8] The formal embodiment of this approach is Federal Rule of Civil Procedure 23(b)(3), which asks judges contemplating whether to certify a class action to decide whether "questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members."[9] The problem with this "predominance"

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6. *See*, *e.g.*, Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEG. F. 581; Rhode, *supra* note 1. This Article does not address issues relating to the construction of principal-agent relationships. Instead, the Article assumes the existence of a representative who can advocate on behalf of the class consistent with due process, and asks when the effect of diversity among putative class members' factual and legal circumstances on the valuation of claims at trial or in a settlement should provide an independent basis for refusing to certify a class action.

7. For a discussion of Rule 23(b)(3)'s text, purpose, and shortcomings, see *infra* Part IV.

8. *See infra* notes 128-138, 164 and accompanying text.

9. FED. R. CIV. P. 23(b)(3) (emphasis added). For example, in a proposed class action by ratepayers against an electric utility challenging rates exceeding a statutory tariff, the legality of the rate would be a common question, while the amount of any overcharge could vary for each person in the class. Likewise, in a proposed class action by consumers suing a credit card issuer for fraudulent oral misrepresentations, the truthfulness of the issuer's statements in a sales

approach is that the extent of dissimilarity among class members' circumstances turns out to be a much more important indicator of whether claims are suitable for class action treatment than the extent of any similarity. Accordingly, the certification inquiry should not ask whether class members' circumstances are more similar than different, but rather whether their circumstances are sufficiently different to preclude resolving their claims in a single proceeding. Unfortunately, the debate over class action reform does not recognize serious flaws in current certification criteria for assessing the similarity and dissimilarity among class members' circumstances, and thus these criteria remain relatively immune from proposed reforms even though they are the source of many of the problems that reformers are trying to solve. Accordingly, this Article seeks to highlight the importance of certification rules that have largely escaped critical scrutiny, to illustrate how these rules hinge on conceptually incoherent criteria and inspire equally confused doctrine, and to explain how reliance on these criteria both inflates and reduces the expected litigation and settlement value of claims processed through class actions. The Article then identifies principles from which replacement certification criteria can be drawn, and proposes a new rule for courts to use when deciding if a class action would be an appropriate procedural vehicle for adjudicating the common and individualized elements of contested claims and defenses.[10]

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script could be common to the class, but proof of whether a class member heard and relied on the representations in a particular script would depend on each member's individual circumstances. Rule 23(b)(3) would require a court considering a motion to certify a class in these hypothetical cases to decide whether the common questions of rate legality or truthfulness of a telemarketing script "predominate" over the individual questions of damages or reliance.

10. My examination of class action principles, rules, and doctrine focuses on Federal Rule of Civil Procedure 23 ("Rule 23"), which governs class certification in federal courts and is the model for most state class action rules. *See infra* notes 119-121 (reviewing state class action rules and noting that predominance is a certification factor in 45 of the 48 states with rules or statutes permitting class actions). I focus on Rule 23(b)(3), which permits class actions seeking primarily monetary damages, and which has become the most litigated and controversial of the three categories of class actions that Rule 23(b) creates. *See* THOMAS WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 118 (1996). The (b)(3) category has also been the focus of most recent debate over class action reform proposals. *See* Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 928 (1998). The other two categories of class actions – codified in Rules 23(b)(1) and 23(b)(2) – are generally available when plaintiffs seek primarily injunctive relief or when payment of individual damage claims would risk depleting a common fund and prejudicing litigants whose claims would not be addressed until after the defendant loses the ability to pay them. Neither of these categories relies on the concept of predominance as a criterion for certification. Instead, rules tailored to the unique institutional and policy concerns raised by injunctions (often to enforce civil rights statutes) and common fund distributions have evolved to manage the cases that fall into the (b)(1) and (b)(2) categories. Although this Article's analysis tracks the current tripartite structure of Rule 23(b), it would apply even if the rule were rewritten to create a single trans-substantive certification standard

The Article's analysis proceeds in four parts. Part II establishes the practical importance of dissimilarity among class members' circumstances by explaining how dissimilarity creates subtle distortions in the presentation and assessment of claims and defenses that either inflate or dilute the perceived value of the overall class claim and are a significant source of inaccuracy in class adjudication and settlement.[11] I define and explore three examples of these distortions: "cherry-picking" (the tendency of aggregate proceedings to generalize from examples that do not fully represent the diversity of individual claims), "claim fusion" (the process by which claims in the aggregate merge to assume characteristics that no individual claim possesses), and "ad hoc lawmaking" (the manipulation of substantive rules to assist in resolving or preventing practical difficulties that arise in the course of adjudicating dissimilar questions of fact and law). In addition, Part II explains why the fact that most class actions settle – which is often cited as a reason not to care too deeply about flaws in certification criteria – is actually a reason to reconsider such criteria due to their effect on the outcome of negotiated agreements. Part II concludes in light of these observations that there is a pressing need to analyze the theoretical and practical coherence of criteria for assessing similarity and dissimilarity among claims in proposed class actions.[12]

Part III develops three general principles of civil procedure and class actions – "finality," "fidelity," and "feasibility" [13] – that should

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because the tension between common and individualized issues that I discuss would affect any effort to parse monetary claims that are suitable for aggregate treatment from those that are unsuitable.

11. Accuracy is of course not the only value that procedure should promote – others include efficiency, distributive justice, an opportunity to be heard and participate, and the avoidance of invidious bias – but is a useful concept to consider when evaluating the wisdom of a procedural rule. *See generally* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEG. STUD. 307 (1994).

12. The certification inquiry (both before the trial court and on interlocutory appeal) on which the Article focuses is generally the judiciary's sole opportunity to assess whether particular claims are suitable for class action treatment. Cases that are not certified are usually dropped or settle, and cases that are certified usually settle before trial, such that there is rarely non-interlocutory appellate review of the certification decision (aside from the relatively unrigorous review of certification criteria that occurs in the context of approving settlements under FED. R. CIV. P. 23(e)). *Cf. infra* note 96. The certification decision is therefore the pivotal moment in the life of a putative class action, with the judge acting as a gatekeeper to the procedural benefits of Rule 23. Similarity among claims and defenses is a key that unlocks the gates to class action status, while dissimilarity is a force that slams the gates shut.

13. For a detailed explanation of each principle, *see infra* text accompanying notes 44-98. Briefly, the "finality" principle captures the need for class actions to vindicate the dispute resolution and behavior modification goals of civil procedure by eventually resulting in a judgment reflecting the rights and obligations of the parties. The timing and preclusive effect of this judgment may vary from case to case, but at a minimum class actions seeking damages

shape the judicial test for assessing similarity and dissimilarity among class member's claims. My goal is to anchor the assessment of individual and common questions more securely in broader principles that animate civil procedure generally and class actions in particular. The finality, fidelity, and feasibility principles collectively establish guideposts for evaluating how the similar and dissimilar elements of group claims should affect a court's decision about whether to certify a class. The need for a judgment (finality), the need to ensure that each beneficiary of that judgment is entitled to it (fidelity), and the need to resolve individual issues within resource constraints (feasibility) suggest that courts should certify classes featuring some dissimilarity among members' circumstances only if there is a feasible plan for resolving factual and legal disputes regarding each element and defense applicable to each class member's claim and for eventually entering judgment for or against class members for a specified sum of money. The court should either provide an opportunity for the parties to litigate individual claims or defenses, should have a reason to believe that such an opportunity is not necessary under the applicable substantive law, or should have a reason to believe that a settlement can fairly account for dissimilarity without any need for adjudication. The principles leave room for imaginative judicial solutions to complex management problems while providing a check on the permissible scope of experimentation.

Part IV applies the lessons learned from Part III to Rule 23's predominance test, concluding that the concept of predominance and the doctrine that it has spawned are inconsistent with the principles that should guide certification criteria. To prove this point, the Article discusses the historical origins of the predominance test, the failure of its drafters to provide any interpretative guidance, the ineffective efforts of the Supreme Court and lower courts to divine its meaning, its inherent conceptual flaws, and the dubious doctrine that courts have developed to apply the predominance rule to recurring fact patterns involving individualized defenses, individualized damages, and choice of law in cases with multistate contacts.

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should culminate in a judgment that determines who owes or does not owe what to whom. The "fidelity" principle addresses the connection between procedural and substantive rules, establishing a constraint on the ability of courts to permit class action procedures to alter analysis of substantive claims and defenses. Certifying classes may have the desirable effect of removing practical obstacles to the fair and efficient determination of the merits of claims and defenses, but certification is not a license for courts to tweak the merits by modifying the content of applicable substantive law. The "feasibility" principle reflects the tension between aspirations and capacity in the management of complex litigation. Courts often want to accomplish more than they are able to achieve in class actions given constraints of time, talent, and resources, and must therefore think carefully about the feasibility of potentially costly and improvident procedural remedies before embracing them.

The basic problem with the predominance test is that it requires elaborate efforts to answer a question that is not worth asking. The answer to the question "which issues predominate" is neither interesting nor useful, and is not grounded in any relevant principle. The predominance inquiry fixates on the notion that class actions are viable when class members share similar factual circumstances and raise similar legal questions. However, similarity among claims is an unhelpful concept when one thinks about the practical consequences of certifying a class and the procedural principles (such as finality, fidelity, and feasibility) to which class adjudication should conform. A more relevant concept is *dis*similarity. The existence of some similarity within the class is what makes class actions potentially efficient and appealing, but it is the lack of substantial dissimilarity that makes class actions a fair and procedurally viable means of rendering judgment for or against the class and its members. The predominance concept conflates the similarity and dissimilarity inquiries into a single balancing test, thus obscuring the practical and theoretical importance of dissimilarity standing alone.

The predominance balancing test is an exercise in futility because it relies on a subjective comparison of inherently incomparable factors that is not grounded in a principled assessment of their independent significance. The ensuing weighing process is analogous to asking a starving person to balance the nutritional value of vitamins in his only potential food source against the negative effects of poison in the same food. Any sort of balancing would be pointless. A huge nutritional value would be irrelevant if the poison is fatal, and if the poison is not fatal then any amount of nutrition would justify consumption absent a superior alternative food source. The same analysis applies when deciding whether to certify a class because dissimilarity among class members' claims at a sufficient dose is a fatal poison to class adjudication. When individual questions of law or fact unique to particular class members raise insurmountable obstacles to class adjudication, then the number and importance of common questions is irrelevant. On the other hand, if the proposed class action would be "superior"[14] to possible alternative forms of litigation even accounting for the efforts needed to cope with difficult – yet manageable – individualized issues, then denying certification based on an arbitrary notion of whether common questions "predominate" would be gratuitous. Individualized questions of law or fact viewed in isolation thus either should or should not preclude

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

certification in any particular case; their relative "predominance" with respect to common questions should neither salvage an otherwise uncertifiable class nor derail a class that should otherwise be certified. Certification rules relying on the "predominance" test thus enshrine a pointless concept that obscures the need to evaluate individual questions of law and fact directly rather than in comparison to common questions.

Having rejected the predominance test, I propose in Part V a "resolvability" test that would reconcile the practical demands of class litigation with theoretical constraints. The new test would permit certification only when the court has a feasible plan to answer all disputed questions of law and fact that must be resolved before entering judgment for or against class members under the law governing each class member's claim and applicable defenses. The test also suggests a framework for considering the propriety of settlements of otherwise uncertifiable classes, although defining the precise limits on such settlements requires developing a normative theory of consent that is beyond the scope of this Article.[15] The new resolvability approach to dissimilarity would channel the inherent subjectivity of certification decisions along more clearly defined paths and would realign certification analysis with principled constraints from which the predominance test has drifted. Rules should ideally facilitate the implementation of guiding principles, but the predominance test does the opposite, interposing a meaningless and distracting wedge between principle and practice.

Part V also notes some of the broader implications of my proposal linked to unraveling the dynamic connection between substantive and procedural constraints on the regulation of behavior that affects large groups. Class actions have become a crutch on which policymakers lean to provide a procedural boost to the efficacy of substantive rules regulating behavior. Replacing the predominance test with a resolvability test would likely make that procedural boost more difficult to obtain, which suggests that policymakers and commentators concerned about deterring corporate wrongdoing and compensating victims should refocus the debate about class actions to consider new approaches to substantive regulation for which class adjudication might be a more suitable enforcement mechanism. In addition, rather than making questionable use of the class action to optimize the remedial power of substantive liability and damage rules, there may be a need to tailor substantive rules to operate more effectively under existing individualized procedures for resolving

15. *See infra* text accompanying notes 196-199.

disputes, or to develop new and more effective aggregative procedures. While procedures must evolve in response to substantive preferences, policymakers must also reconsider substantive preferences in light of limitations on procedure.

II. THE IMPLICATIONS OF DISSIMILARITY FOR THE LITIGATED AND NEGOTIATED VALUATION OF CLASS MEMBERS' CLAIMS

This Part contends that dissimilarity among class members distorts the outcome of class actions through three phenomena – cherry-picking, claim fusion, and ad hoc lawmaking – that current class action scholarship either overlooks or underweights. When class actions are adjudicated to trial, effective advocates can harness these phenomena to exploit dissimilarity among putative class members and thereby alter the probability of a liability finding and the calculation of aggregate damages. Even when parties settle class actions before trial, bargaining occurs in the shadow of the expected trial procedure, and thus a settlement will likely replicate any distortions that dissimilarity would create during formal adjudication.

A. A Thought Experiment Confirming the Distorting Effect of Dissimilarity

A simple thought experiment confirms the importance of dissimilarity to analysis of certification criteria. Imagine that class actions were available only in cases where the claims of all class members were *exactly* alike in *every* detail and subject to proof through *identical* evidence, and where individuals could prove their membership in the class by purely *objective* submissions, such as the defendant's business records naming the people with whom the defendant interacted.

In these hypothetical circumstances, it is difficult to imagine that class actions would generate substantial controversy or occupy their current position high on political agendas. Class actions featuring such ultra-commonality would present only minor coordination problems, would be only marginally less manageable than any constituent claim standing alone, would be unlikely to confuse juries any more than non-class cases, would have outcomes approximately as predictable as outcomes in ordinary non-class litigation, and would not involve substantial conflicts among class members' interests. The expected outcome of a trial for any one plaintiff picked at random from the homogenous class should not

differ from the expected outcome for any other class member. The case presumably would settle after no more than a few sample trials of randomly selected class members' claims that would establish a range of outcomes to serve as the template for a classwide settlement. The ability to pinpoint a reasonably accurate average claim value would in turn minimize agency costs because the court could monitor settlements with an eye toward the divergence of settlement values from expected litigation outcomes. Settlements would vindicate both the compensation and deterrence objectives of applicable substantive laws because defendants would pay roughly what the merits of claims suggest is warranted, and plaintiffs would receive roughly what they would be entitled to receive (assuming that jury verdicts in sample trials would be roughly accurate). Because all claims would be identical and all class members identifiable, the averaging of sample trial verdicts would not have any distributive consequences beyond the unobjectionable smoothing over of lucky or unlucky high-end or low-end jury awards.[16] Trying a few claims would thus be functionally equivalent to trying them all.[17]

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16. *Cf.* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 569-70 (1993) ("[W]hen factual issues are identical throughout the class, the class action functions as a trivial form of sampling. The court in effect relies on a sample of one case, that of the representative plaintiff's, to adjudicate liability for the entire class.").

17. Plaintiffs might object that class proceedings would deprive them of their autonomy, but that objection would wilt if we assume that the economic value of plaintiffs' claims is small relative to the defendant's aggregate stakes in the litigation, such that plaintiffs would likely be unable to litigate at all – let alone autonomously – outside of a class action. In any event, the critique of class actions premised on a plaintiff's right to autonomous control over litigation is questionable given the lack of substantial autonomy that exists even in nominally individualized suits and the costs that an autonomy norm would impose on third parties competing for scarce judicial resources or hoping to benefit from the deterrent effects of collective litigation. *See* Bruce L. Hay, *Procedural Justice – Ex Ante v. Ex Post*, 44 UCLA L. REV. 1803, 1838 (1997) (observing that individuals behind a veil of ignorance might rationally prefer to sacrifice autonomy in favor of efficient and accurate aggregative procedures); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92-97 (discussing the obstacles to meaningful participation that plaintiffs face even in traditional non-class suits); Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791, 800 (1997) (noting that adjudicative resources are scarce, such that providing autonomy to each litigant has distributional consequences); Rosenberg, *Mandatory Litigation*, *supra* note 1, at 841-43 (noting that litigation autonomy fosters opportunistic personal wealth-maximizing behavior by litigants that undermines the deterrence and insurance objectives of tort law). *But see* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357, 364 (1978) (defining "participation" of litigants through the presentation of reasoned argument as a feature distinguishing adjudication from other mechanisms of "social ordering", such as elections and contracts); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 822 (1985) ("[G]iven the traditional respect afforded an individual tort litigant's right to control the prosecution of a substantial personal injury or wrongful death claim, and that the plaintiff loses much of this individual control when the court certifies a class action, courts should avoid using this joinder device to try these cases."); Patrick Woolley, *Rethinking the*

The difference between the thought experiment above and the highly controversial modern class action is that the circumstances of plaintiffs who claim to fit a proposed class definition are rarely exactly alike. Distinctions among class members could include, for example, the degree to which their contact with the defendant was direct or attenuated, the precise nature of the defendant's behavior toward them, the collateral circumstances of their interaction with the defendant, their mental state during their dealings with the defendant, the type and severity of their injuries, the ranking of their remedial preferences, and the nature and strength of the defenses to which they may be subject. If these differences are material – i.e., if the substantive law imposed by the institution with legitimate political authority to create rights and regulate behavior deems the differences potentially outcome-determinative – than procedure should have a mechanism to tailor adjudicated outcomes to the varying circumstances of individual plaintiffs.[18]

Once one moves from an imagined world of complete similarity to the real world of partial dissimilarity, opportunities exist to manipulate the presentation of evidence and legal argument in a manner that highlights favorable or unfavorable aspects of unique individual claims. Judges and jurors trying to assess the merit and value of these distinct claims must then engage in the difficult cognitive task of aggregating their analysis while tracking material variables that differ from claimant to claimant. As the next subsection explains, there is little reason to believe that courts and jurors adjudicating classwide liability and damages questions can accurately account for the full effects of dissimilarity.

B. Trial Distortions: Cherry-Picking, Claim Fusion, and Ad hoc Lawmaking

The practical problems with certifying class actions despite dissimilarity among claims arise from the natural human instinct to simplify the inherently complex and to create order out of what appears chaotic. These instincts manifest in class actions in the form of procedural shortcuts to squeeze heterogeneous claims into a homogenous mold and thereby avoid the procedural difficulties that dissimilarity would create. The effect is akin to mixing different colors

Adequacy of Adequate Representation, 75 TEX. L. REV. 571, 572 (1997) (arguing that due process principles require providing plaintiffs with a right to be heard directly rather than through a representative).

18. For further development of the normative foundations for the need to integrate substance and procedure, see *infra* Part III.B.

of paint into a large vat: the vibrant reds, greens, and blues will blur into gray. This blurring of constituent parts into an undifferentiated whole may be unobjectionable if one does not care about the color of the final product, but would be a serious problem if one were interested in preserving the palette of original ingredients in the mix. Likewise, aggregating distinct individual claims into a class obscures differences among class members in ways that engender substantive consequences.

The hypothesis that certification of dissimilar claims tends to distort assessment of their merits is grounded in three recurring phenomena of class litigation, which I call "cherry-picking," "claim fusion," and "ad hoc lawmaking." Each of these concepts describes a means by which certification can inflate – and sometimes deflate – the aggregate value of class claims beyond the sum of the values of individual claims.

"Cherry-picking" refers to the fact that plaintiffs' counsel often controls the presentation of plaintiffs' case and can hand-pick the most persuasive individual examples of a defendant's alleged wrongdoing to stand as representatives for the alleged classwide problem.[19] The "true" persuasiveness of class members' dissimilar liability claims may lay on a spectrum, but the class can present examples from only the top of the spectrum and thus skew the jury's assessment of the merits. For example, in a class action against a credit card issuer for making misleading representations about interest rates, class members may have had varying levels of financial sophistication, may have seen various disclosures that were more or less misleading than others, and may have relied on the misrepresentations to different extents. Yet a smart class counsel will not make his case through testimony of, say, a doctor who read a relatively benign disclosure on which he did not rely; instead, the star witness is likely to be a very sympathetic and unsophisticated victim of the most egregious example of the defendants' misconduct. The defendant can try to counter the effect of this testimony by spotlighting cases from the bottom of the spectrum, but realistically this is not likely to happen; most defendants want to deny liability, not highlight the fact that sometimes their behavior was less culpable than at other times. The consequence is that plaintiffs' ability to cherry-pick the best examples from among a pool

19. The extent of plaintiffs' control over witness selection at trial will vary depending on the role that the court plays in managing the presentation of evidence. *See* FED. R. CIV. P. 23(d) (vesting broad management powers in district courts presiding over class actions). A defendant contemplating settlement at an early stage of a class action often will not be able to predict the extent of plaintiffs' power to cherry-pick, and must factor that uncertainty into its settlement calculus.

of diverse claims skews the defendants' potential exposure above what a case-by-case merits review would suggest is the appropriate damages figure. Class members with weak claims in essence ride the coattails of class members with stronger claims and benefit from the jury's perception that the defendant's conduct in the aggregate was worse than it may actually have been.

The upward skewing of claim values can apply in reverse if the class representative turns out to be a lemon rather than a cherry. The class in these circumstances would be attempting to prove its claim based on an example drawn from the bottom of the diverse spectrum, which would artificially deflate the jury's assessment of liability and calculation of aggregate damages. The lemon-picking phenomenon thus helps to explain plaintiff-protecting critiques of class actions premised on agency costs by illustrating the potentially adverse effect of dissimilarity among claimants on the selection of a representative.

"Claim fusion" describes the phenomenon that occurs when the claims of the class morph to assume aspects of disparate individual claims, such that the class has a claim that is stronger than the claim of any particular member. The class claim in effect becomes a composite fusing the best components of its dissimilar constituent claims. Building off the example above, suppose that a credit card issuer mails three types of solicitations that are each misleading, but for different reasons. Each class member receives one of these solicitations, but none receive all three. The claims of the class will gain strength from the cumulative effect of the three misrepresentations, which in the jury's mind will likely fuse into one massive misrepresentation despite the fact that no class member received all three solicitations.[20] Even if claimants were divided into three subclasses, each subclass would benefit from the jury's awareness of the defendant's misconduct toward the other subclasses. Moreover, even assuming that only one rather than three types of misrepresentation are at issue, the claim fusion problem could occur with respect to collateral facts surrounding plaintiffs' claims. For example, suppose that one class member called the credit card issuer to complain about unexpectedly high interest rates and testifies as to her perception that she was treated rudely, that another testifies that she was particularly aggrieved because of her low income, and that a third testifies that she suffered substantial stress as a result of her dealings with the defendant. The alleged indifference of the defendant

20. Most courts have not recognized the problem of claim fusion, although the Fourth Circuit has noted the practical difficulties that arise when the aggregation of dissimilar claims creates a "fictional composite" claim that is stronger than its individual components. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 345 (4th Cir. 1998).

and the alleged stress and poverty of the plaintiffs will infuse the class claim even though most individual class members would not have any basis for alleging any of the grievances of the three testifying plaintiffs. Allowing the jury to know the myriad manifestations of a defendants' misconduct may not seem undesirable, but from the perspective of ensuring accurate judgments the fusion of dissimilar circumstances into a more compelling whole likely skews litigation outcomes above what the merits warrant by making liability findings more probable and inflating damages assessments.[21]

The claim fusion problem also applies in reverse as defense fusion. If the defendant has varying defenses to some individual class members' claims, the defenses may fuse to form an artificially strong classwide defense that skews the value of class members' claims downward. For example, if one of the class representatives in the above credit card hypothetical lied on her application, and another had an independent source of knowledge correcting the omissions in the misleading solicitations, a jury might allow those defenses to blur together and to color their perception of absent class members' claims.[22]

"Ad hoc lawmaking" occurs in class actions when courts attempt to devise substantive and evidentiary shortcuts around management problems that dissimilarity imposes on the resolution of otherwise similar claims. For example, courts will create

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21. Experiments by psychologists studying juror behavior have not directly addressed the hypothesis that claim fusion and cherry picking exploit cognitive biases and therefore skew claim valuations. However, more general experiments establish that jurors have difficulty compartmentalizing information in complex cases and that the size of a plaintiff population and distinctions among plaintiffs' circumstances can sway assessment of aggregate liability and damages depending on the process by which jurors receive information. *See*, *e.g.*, 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*, 85 J. APPLIED PSYCHOL. 909, 916 (2000); Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, & Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209, 211-13, 225-26 (1988); Dennis J. Devine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 671-72, 699 (2001). Further empirical study would be helpful in assessing the cognitive foundation for the claim fusion and cherry picking phenomena in consolidated litigation.

22. Although this Article focuses on claim fusion as a problem affecting the design of class certification standards, another way to conceptualize the problem would consider the standards that should govern the admissibility of evidence in class actions. For example, one area meriting further consideration is whether courts adjudicating class actions should strictly interpret the relevance requirement in FED. R. EVID. 402 to preclude any testimony or evidence at the liability phase of a case that is not relevant to the claims of the entire class. In this manner, courts could prevent parties from introducing evidence about the unique circumstances of particular class members, which in turn would prevent juries from making unwarranted extrapolations that inflate or dilute aggregate claim values.

irrebuttable[23] evidentiary presumptions to avoid having to consider individualized questions of fact on legal elements such as reliance,[24] invent new theories of liability to avoid having to consider the circumstances of individual class members,[25] bend the rules of evidence and alter burdens of proof so that contested facts can be resolved on a common rather than individualized basis,[26] manipulate choice of law analysis to minimize the diversity of applicable rules,[27] and try to disentangle claims and defenses so that juries consider aggregate classwide liability before they consider whether defendants have defenses to individual claims that might reduce the size of their aggregate exposure.[28] Nothing inherent in the class action device

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23. The inferences must be irrebuttable because if they were rebuttable the individual issues would remain in the case (subject to a flipped burden of proof) and would still present obstacles to adjudicating class actions.

24. For example, plaintiffs often propose that when liability is premised on a consumer not knowing a certain fact, or relying on a given representation, the court should presume that all class members who acted in a specified manner must have had a certain level of a knowledge or been relying on a misleading statement. *See*, *e.g.*, Varacallo v. Mass. Mut. Life Ins. Co., 752 A.2d 807, 817 (N.J. Super. Ct. App. Div. 2000) (citing cases). Under these proposals, objective evidence (such as the defendant's business records) of how the class member acted, which is generally easy to present in a class action, would substitute for subjective proof of knowledge or reliance, which is generally difficult to present in a class action. *See*, *e.g.*, Sandwich Chef v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 220 (5th Cir. 2003) ("A class cannot be certified when evidence of individual reliance will be necessary."). Many proposed presumptions depend on analogies to federal securities law, which permits a presumption of reliance in misrepresentation and omission cases based on the specific wording of the applicable statute and the assumption that false or misleading disclosures affect all participants in an efficient market. *See, e.g.,* Basic, Inc. v. Levinson, 485 U.S. 224, 241-49 (1988); Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 152-53 (1972). A problem with this analogy is that most consumer markets do not feature the fast and broad transmission of information characteristic of an efficient securities trading regime, so there is no factual basis for presuming that a particular piece of false or misleading information had any effect on any particular consumer. *See* Sikes v. Teleline, Inc., 281 F.3d 1351, 1362-63 (11th Cir. 2002) (distinguishing securities and RICO contexts for purposes of applying statutory reliance element).

25. *See*, *e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297, 1300 (7th Cir. 1995) (noting that in attempting to "streamlin[e]" management of a class action, the district court had merged distinct state law liability standards into an "Esperanto instruction"); Epstein, *supra* note 1, at 489-514 (discussing substantive legal developments arising from class actions in the employment, antitrust, and securities fields).

26. *See*, *e.g.*, Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 343 (4th Cir. 1998) (finding that admission of speculative evidence related to "average" class member damages impermissibly relieved plaintiffs of their burden of proving actual damages with reasonable precision).

27. For an overview and critique of how courts attempt to sidestep the inconvenient implications of rigorous choice of law analysis in complex litigation with multistate contacts, see Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996).

28. *See*, *e.g.*, Garner v. Healy, 184 F.R.D. 598, 602 (N.D. Ill. 1999) (proposing to decide the common question of whether defendants were liable to the class before deciding individualized questions of whether any class member could prove proximate causation); Wal-Mart Stores, Inc. v. Lopez, 93 S.W.3d 548, 560-61 (Tex. App. 2002) (noting that trial plan had scheduled

distorts substantive or evidentiary rules in this manner, but certification has that practical effect when judges try to manage the dissimilar aspects of class members' claims.[29] These innovations by courts trying to cope with dissimilarity may or may not be legitimate in particular cases, but they collectively help to explain the perception that class actions often produce outcomes that are not consistent with applicable substantive law.[30]

The combined effect of cherry- and lemon-picking, claim and defense fusion, and ad hoc lawmaking is that class actions exploit or obscure dissimilarity rather than resolving it. Plaintiffs' counsel find creative ways to infuse the class claim with the best of its dissimilar aspects, and judges find innovative ways to make any vestiges of dissimilarity disappear from the case. Defendants in turn try to counter these efforts by tarring the class with the least desirable traits of members with the weakest claims. The result of these efforts is that class litigation is a process of forced homogenization; the more heterogeneous claims are to begin with, the greater the effects of homogenizing them.[31]

C. The Distorting Effects of Dissimilarity on Valuation of Class Action Settlements

The problems with dissimilarity discussed in this Part arise because of the practical difficulties that individualized questions of

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calculation of classwide damages prior to presentation of the defendant's individualized defenses to liability).

29. Some commentators have noted the general practice of courts using the class action as a procedural opportunity to modify substantive rules, but these observations are usually not linked to the problems of dissimilarity that I argue are a primary cause of such substantive modifications. *See*, *e.g.*, Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 873 (1995) (noting attempts by courts to "fit[] the substantive law into the class action mold").

30. Ad hoc shortcuts can prejudice both plaintiffs and defendants, although defendants are more likely to suffer prejudice because most shortcuts are designed to facilitate the plaintiffs' preferred manner of proof. Plaintiffs' counsel usually requests the shortcuts, and generally do not do so for the defendant's benefit. However, plaintiffs are not immune from prejudice because their counsel's zeal to ensure certification may lead to shortcuts that circumvent substantive or evidentiary rules that favor some members of the diverse class.

31. Even apart from the cherry-picking, claim fusion, and ad hoc lawmaking phenomena, problems associated with dissimilarity among claims manifest themselves in other undercurrents of the class action reform debate. For example, debate about conflicts among class members' remedial preferences is usually framed as relating to agency costs inherent within the class action device, but can be reconceptualized as reflecting a concern about how to balance similarity and dissimilarity among class members' preferences and circumstances when deciding whether to certify a class. Likewise, debate over whether class actions create unnecessary burdens for courts can be framed as a disagreement about how courts at the certification stage should balance the similar, easy to manage aspects of proposed class claims against the more difficult to manage dissimilar aspects.

law or fact create when a court attempts to litigate a class action. Yet most certified class actions settle,[32] so the practical problems associated with litigating individualized questions rarely arise, or are resolved through the parties' voluntary adoption of expedited claims processing procedures to distribute the proceeds of an agreed settlement. The fact that most class actions settle may suggest that difficulties in managing them should not bar their certification. For example, if a defendant does not plan on litigating the question of liability, then the difficulty that plaintiffs would have in proving liability on a classwide basis arguably should not bar them from an opportunity to negotiate a fair and efficient settlement of claims that might otherwise go uncompensated.[33] Likewise, the fact that damages would be difficult to prove in jury trials that no party intends to initiate should not be a reason to preclude plaintiffs from proving damages through an alternative dispute resolution mechanism that all parties are willing to accept. However, this Section will show that the distortions that dissimilarity causes in trial outcomes also plague settlement outcomes, such that the near-ubiquity of settlement replicates rather than resolves the problems that the remaining parts of this Article seek to correct.

Dissimilarity distorts settlement outcomes in two principal respects. First, dissimilarity among claims prevents judges from effectively monitoring agency slack during settlement, which creates maneuvering room for agents to negotiate low-ball settlements that reward the agents without fully compensating their clients. Second, settlement bargaining involves an attempt to predict trial outcomes, and thus the value of a negotiated agreement will reflect trial distortions that the parties believe might arise from material dissimilarity among class members.

1. Ineffective Monitoring

A standard critique of class actions is that lawyers who act as agents for the class have financial incentives to negotiate settlements that prioritize their own interests at the expense of class members' interests.[34] One reason that class counsel are able to get away with

32. *See* Nagareda, *Preexistence*, *supra* note 1, at 151 ("[C]lass actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis.").

33. *See* Green, *supra* note 17, at 795 ("Everyone knows the case is not going to be tried, but . . . appraise the case under the Rule 23 criteria as if it were. That seems to me an Orwellian approach . . . .").

34. For example, class counsel may: (1) fear competition for fees from lawyers pursuing rival class actions and therefore engage in reverse auctions with defendants in which they trade diminished client compensation for the certainty of their own reward, *see, e.g.,* Coffee, *Class*

settling claims for less than their true value is that even well-intentioned potential monitors (such as courts) lack the ability to second-guess settlements because the information needed to determine the expected litigation value of claims is difficult to obtain.[35] Yet one reason why expected values are so difficult to calculate is that class members are often differently situated, which increases the number of variables in any calculation of aggregate expected damages.

For example, assume that L equals the probability that an average jury would find the defendant liable to a plaintiff, and that D is the amount of damages that an average jury would award. Now imagine two classes: one class contains 1000 members identical in all respects to representative V, while a second class contains 250 members with circumstances identical to V, 250 with circumstances identical to W, 250 with circumstances identical to Y, and 250 with circumstances identical to Z. The expected aggregate litigation outcome for the more uniform class is $1000 \times L_v \times D_v$. But the expected aggregate litigation outcome for the more fragmented class is $(250 \times L_v \times D_v) + (250 \times L_w \times D_w) + (250 \times L_y \times D_y) + (250 \times L_z \times D_z)$. The first calculation is obviously much simpler than the second because it requires the court to estimate the value of fewer contested variables. Judicial monitoring of settlements thus becomes more viable when there is relatively little outcome-determinative dissimilarity among class members. The enhanced ability of courts to monitor settlements in homogenous cases should in turn act as at least a partial check on agency costs, assuming that courts are willing to expend the effort necessary to fulfill their monitoring role.[36] Accordingly, there is an often unnoticed – albeit indeterminate – correlation between the extent of dissimilarity among class members'

Wars, *supra* note 1, at 1370; (2) perceive that the effort necessary to produce a marginal dollar of compensation for clients is not worth the fraction of that dollar that they will see in fees, *see, e.g.,* Coffee, *Private Enforcement*, *supra* note 1, at 690; (3) conclude that the risk of holding out for a better deal for their clients is not worth putting the certainty of their own fee in jeopardy, such that they lose interest in zealously pursuing the case once their fee reaches a satisfactory level, *see* Alleghany Corp. v. Kirby, 333 F.2d 327, 347 ("[A] juicy bird in the hand is worth more than the vision of a much larger one in the bush."); and (4) collude with defendants by accepting a large fee in exchange for agreeing to a settlement that allows the defendant to purchase litigation peace at a low overall cost, *see*, *e.g.,* Coffee, *Class Wars, supra* note 1, at 1367-68.

35. *See*, *e.g.*, Coffee, *Accountability*, *supra* note 1, at 376 (noting that a "distinctive" feature of class actions relative to other contexts in which principals do not directly appoint their representatives is that there is no effective third-party monitoring to minimize agency costs); Macey & Miller, *supra* note 1, at 46 (noting that settlement hearings ostensibly designed to give courts the information necessary to perform their monitoring function are usually "pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel").

36. For a discussion of why courts lack incentives to monitor class action settlements closely, especially in negative value cases, see Coffee, *Class Wars*, *supra* note 1, at 1369-70.

circumstances and a court's ability to monitor and remediate the possible effect of agency costs on settlement values.

2. Tainted Bargaining

Settlements generally cannot produce accurate valuations of dissimilar claims within a class action proceeding because of the distortions that dissimilarity creates in anticipated litigation outcomes. Prevailing models of settlement establish that parties will seek to avoid a prolonged and expensive trial by attempting to anticipate the outcome of litigation and agreeing to accept or pay an amount that approximates the expected net gain or loss.[37] Each party will calculate the expected value of claims (which is the probability of success multiplied by the potential reward), adjust for expenses and risk aversion, discount to present value, and thus establish parameters for a potential settlement. The case will then settle if the parties' settlement ranges overlap and if strategic behavior (such as low-ball offers or unrealistically high demands) do not derail negotiations. The settlement value should roughly reflect the relative merit of each side's position, but only if the litigation process whose outcome the parties are trying to predict is an accurate means of resolving disputed claims. For example, a settlement negotiated by experienced lawyers in a typical single-plaintiff versus single-defendant slip-and-fall negligence case in a fair judicial forum will probably closely correlate with the merits of the claim because litigation is presumably a reasonably accurate means of resolving such recurring negligence disputes and the lawyers can draw from prior experience when attempting to predict the suit's outcome. In contrast, if the same two lawyers were told that their clients' dispute would be resolved by a game of chess, the settlement value would bear no relationship to the merit of the claim and would instead reflect the odds associated with the chess game.

For the same reasons that the settlement value of a claim subjected to resolution by chess instead of litigation would not correlate with its merits, the settlement value of a claim that would be resolved through a class action despite distortions – such as cherry-picking, claim fusion, and ad hoc lawmaking – created by dissimilarity would also not reflect the merits of the parties' positions. Calculation

37. For a critique of expected value models, see Joseph Grundfest & Peter H. Huang, The Unexpected Value of Litigation (Stanford Law School / Olin Law & Economics Working Paper No. 292) (arguing that claims may settle for more or less than their expected value based on the parties' perception of how each will gather and exploit new information about contested facts and legal theories during multiple stages of litigation).

of expected values would be a function of each party's prediction of who would suffer greater prejudice from the distorted class action trial procedure. The parties would not be attempting to predict the outcome of any rational or known process because no such process exists for the types of claims being discussed, and thus the odds that litigation would produce an accurate outcome that the parties could predict are extremely low. The settlement value of any class action where claims are substantially dissimilar thus relates more to perceptions about which party will suffer greater prejudice from a trial conducted in violation of the principles discussed in Part III than to perceptions about which party has the more meritorious case. An example illustrates the point.

Suppose that a class of insurance policyholders who received lower-than-requested payments for property damage to their homes sue the insurer for systematically underpaying claims. Plaintiffs propose to present as evidence internal corporate memoranda discussing the insurer's claims adjustment techniques, which plaintiffs characterize as a "common classwide scheme" to defraud policyholders by providing a level of coverage that is in practice less than what policyholders had expected or paid for. The insurer believes that the challenged general claims practices were used in adjusting half of the one million property damage claims that were resolved during the proposed class period for less than the demanded amount, and that the practices reduced the value of affected claims by an average of $500, for a total classwide loss of $250 million (i.e., 500,000 claims x $500 loss). Moreover, the insurer believes that if a court reviewed each of the 500,000 affected claims, there is a 60 percent chance in each case that the court would conclude that the challenged claims practices were legal under the circumstances. The insurer thus has three individualized "defenses" to each class members' claim: (1) that the class member was not one of the insureds whose claim was affected by the challenged claims practices; (2) that the claims practices were legal under the circumstances of the class member's case; and (3) that the class member is entitled to lower damages than his complaint demands. In the vernacular of plaintiffs' "common scheme" allegation, the defendant would be using individual counterexamples to refute the existence of the scheme, denying whether the scheme affected any particular person, denying that the scheme was illegal in any particular case, and disputing the extent of damages that the alleged scheme may have caused.

Now imagine the settlement value of the case under each of two proposed procedural mechanisms for litigating it, assuming that the insurer succeeds in convincing the plaintiffs that its calculations

discussed above are accurate. For each proposal, assume that the parties are represented by well-financed and competent counsel. Under one proposal, the court would (assuming infinite time and resources) individually examine all one million claims files and assess liability on a file-by-file basis, entering a judgment for or against each class member. The expected value of a judgment in these circumstances would be $100 million (the plaintiffs' 40 percent probability of success multiplied by the $250 million potential exposure). The settlement value of the case would therefore begin at $100 million and move higher or lower depending on the parties' risk aversion and anticipated litigation costs.

Now suppose that the court decides to permit plaintiffs to litigate as a class action the "common" question of whether the insurer's claims practices were in general illegal without permitting the insurer to present defenses to individual class members' claims until after the jury rules on the common question, and even then only in a quasi-administrative claims proceeding. The expected value of a judgment would probably change in two ways.

First, the parties may conclude that a trial limited to the abstract question of whether the insurer's general practices were illegal would be more likely than a file-by-file review to result in a finding of liability because the jury would not have a context for assessing the reasonableness of claims decisions in concrete situations and would be influenced by cherry-picking and claims fusion. Moreover, the parties would probably believe that convincing a jury that a large corporate defendant had a propensity to behave poorly is much easier than proving that the defendant behaved poorly in any particular case, especially when the evidence of such a propensity consists of internal corporate documents not linked to a specific context. The prospect of a classwide liability finding (rather than file-by-file liability assessments) may therefore raise the insurer's aggregate expected probability of a loss from 40 percent to, say, 60 percent.

Second, the parties would realize that if the insurer loses on the common question of whether its claims practices were in general illegal, then the claims resolution process would be likely to conclude, based on inertia and the truncated scope of alternative dispute resolution procedures, that the previously established illegal claims practice tainted a particular claims file. The parties might therefore conclude that, say, 60 percent rather than 50 percent of files would be found to have been tainted, and that the average estimate of damages would be $600 rather than $500. Settlement values would thus change dramatically. The defendant would face a 40 percent chance of

complete victory (assuming that courts in other jurisdictions grant preclusive effect to the judgment), but a 60 percent chance of a $360 million exposure (600,000 files x $600 file). The expected value of a judgment would more than double from $100 million to $216 million (60 percent probability of loss x $360 million exposure). The starting point for settlement talks would therefore be $216 million, and the insurer would likely be more risk averse due to its higher total exposure.[38]

The likely settlement value of the common issues class action would thus be substantially higher than the settlement value of the hypothetical case where a court devoted time and energy to assessing the merits of each individual claim without relying on generalizations based on "common" evidence and inferences. The settlement value of the class action would not reflect the merits of the case so much as the parties' assessment of how a distorted litigation process would prejudice the defendant by inflating the defendant's probability of losing on common issues, diminishing the defendant's probability of prevailing on defenses, and increasing the defendant's total exposure.

Alternatively, one can imagine a scenario in which the settlement value of the class action would be lower for plaintiffs than if cases were litigated individually. Suppose in the example above that the plaintiffs' "common" evidence of illegal claims practices is weak, but that a file-by-file review creates a much stronger inference of wrongdoing in the insurer's adjustment of claims. Even assuming that the plaintiffs could present a statistical analysis of selected claims files to support their allegation of classwide wrongdoing, the parties might conclude that the "common" claim would be so complicated that the jury might reject it even though a significant

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38. The supposition that defendants will be risk-averse when threatened with a large damages award may seem counterintuitive in light of conventional models of settlement behavior, which assume that defendants are loss-averse and therefore favor the risk of trial over settlement in the hope of avoiding all liability. *See* Jeffrey J. Rachlinski, *Gains, Losses & the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 123 (1996). However, the cognitive psychology experiments on which these settlement models are founded were not designed to address risk aversion in the context of the large potential losses that are possible in class actions, *see* Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S258 (1986) (noting that experimental evidence about risk perceptions "may not apply to ruinous losses"), and to the extent relevant predict that decisionmakers focus on the magnitude of potential losses while underweighting the low probability of their occurrence, *see* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Science 453, 455 (1981). Existing scholarship about risk preferences is therefore consistent with the hypothesis that a corporate defendant faced with a massive potential class action judgment is more likely to avoid risk than to seek it. *Cf.* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations & the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 383 (1991) (concluding that the extent of a defendant's risk-aversion may partly depend on the difference between its net worth and its exposure).

percentage of individual claims are meritorious. The expected value of a class action judgment would therefore be lower than the value of a judgment in the hypothetical case where the court reviewed and rendered judgment on each file separately.

Of course, the hypothetical option of adjudicating all one million claims for the small sum of $500 does not exist in the real world, so the settlement value of the insurance cases above absent certification of a class is probably $0 or nuisance value. The ostensibly neutral point that settlements are problematic when the litigation procedure that motivates them would not accurately value claims is thus in many circumstances a veiled (but no less troubling) way of saying that defendants should escape liability entirely unless somebody invents a more accurate mechanism to hold them accountable for injuries imposed on a large group of somewhat similarly and somewhat dissimilarly situated victims. One could avoid this implication by making the fair and accurate resolution of group claims less difficult by, for example, amending substantive law to jettison hard-to-prove individualized elements, developing streamlined dispute resolution procedures geared toward quickly and accurately resolving large numbers of somewhat similar claims, or rethinking the extent to which society should care if a settlement correlates with the merits of claims.[39] However, as explained in Part III, such innovations should be debated and discussed through legitimate democratic channels, and should not be achieved covertly, as they often are now, as an ad hoc incident to judicial attempts to squeeze a square peg of dissimilar claims through the round hole of class certification criteria.

I am not arguing here that class action settlements are appropriate only in cases that could be manageably litigated. In some circumstances, the parties might be able to predict how a court would resolve claims if the court had sufficient resources to do the job properly. For example, if the obstacle to certification is that holding a hearing for each of one million similarly situated class members would be impossible, a class action settlement might be appropriate if the parties could accurately predict the likely outcome of those hearings, perhaps based on statistical analysis of a random sample (assuming that the applicable substantive law permits such sampling).[40] A

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39. *See infra* Part V.B.

40. For discussions of the benefits and limitations of statistical sampling techniques, see Bone, *supra* note 16, at 568 (noting that a "critical question" when considering sampling "is how to distribute fairly a limited number of process opportunities among persons with equal participation rights"); Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1490 (1992) (suggesting "the use of statistical claim profiles, or models, to set baseline appraisals of the value of individual claims"); Rosenberg, *Mandatory Litigation*,

settlement in these circumstances could embody a fair and accurate assessment of expected values roughly linked to the merits of class members' claims in the aggregate even if a class action trial would not be practicable, although there would still be unresolved questions about how much of an award to distribute to differently situated individual class members.[41] However, where the unwieldy nature of a class action would distort its likely outcome, as in the insurance coverage example above, then its settlement value is likely to incorporate that distortion and unlikely to reflect a socially desirable level of compensation and deterrence. Certification criteria for settlement classes must therefore permit courts to distinguish between class actions that would be manageable but for a lack of resources and class actions where manageability problems would cause the resolution of common questions to distort the valuation of dissimilar individual claims.[42]

Accordingly, underemphasizing dissimilarity among claims on the assumption that class actions will eventually settle without considering whether the action could in theory be fairly litigated injects the unfairness of potential litigation into the terms of

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supra note 1, at 853 n.47 (advocating "averaging" in the "sense of disregarding differences in litigation value among claims in order to redistribute claim-related wealth in a manner consistent with tort deterrence and insurance objectives"); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545 (1998) (proposing expanded use of established survey methodologies to assess damages).

41. The existence of classwide settlements in uncertifiable cases may seem counter-intuitive because the lack of manageability would render the plaintiffs' threat of obtaining certification hollow and defendants would have little to fear from refusing to settle. However, defendants may perceive a class action settlement as a favorable alternative to defending against numerous individual claims, and may therefore seek to buy peace on a classwide basis even though a class action would otherwise be uncertifiable. For an example of such a settlement in the context of asbestos claims, see Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

42. The Supreme Court has partially recognized the need to consider similarity among claims at the certification stage of a proposed settlement class, albeit in a disjointed manner. On the one hand, the Court has held that "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997). Yet on the other hand, the Court has held that "permitting class designation despite the impossibility of litigation" is generally not appropriate because the fair settlement value of the case cannot always be determined without reference to a credible threat of litigation. *Id.* at 621. The gist of the court's seemingly inconsistent reasoning seems to be that manageability is not important if no trial is contemplated, but that the underlying factors that would render the case unmanageable may defeat certification for other reasons. For example, the "divers[ity]" among claims and defenses that would defeat predominance and inhibit a classwide trial under Rule 23(b)(3)(D) may likewise render any classwide representation in settlement negotiations inadequate under Rule 23(a)(4). *Id.* at 622 n.17. Understood in this manner, the Court's opinion in *Amchem* is consistent with my analysis above suggesting that the propriety of class action settlements is not a function of whether claims could actually be litigated, but rather whether the settlement terms could be tested against the expected outcomes of a predictable and fair adjudicative process.

settlements. The settlement value of such cases would reflect a reaction to perceived quirks in how an unwieldy class action would be resolved rather than a rational assessment of the case's merits.[43] Assuring that settlements bear a relationship to the merits of claims therefore requires devising certification criteria that account for the potential distorting effect of dissimilarity among class members.

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In sum, diversity among the circumstances of individual class members and judicial reactions to that diversity are an often overlooked source of controversial shortcomings in the class action device. Class actions are not inherently incapable of resolving cases accurately, but in practice collectively litigating or settling dissimilar issues can distort the valuation of individual and aggregate claims. Accordingly, a central question for observers concerned about tension between the substantive aspirations of regulation and the procedural reality of adjudication should be whether courts have coherent criteria to assess how dissimilarity affects the propriety of certifying a putative class. Part III seeks to create a principled foundation for such criteria.

III. PRINCIPLES THAT SHOULD SHAPE RULES GOVERNING THE EFFECT OF INDIVIDUALIZED ISSUES ON CLASS CERTIFICATION DECISIONS

The previous Part demonstrated that dissimilarity among putative class members' circumstances can distort the valuation of claims, raising the question of how certification rules should measure and assess dissimilarity within putative classes. The next three Parts of the Article seek to answer that question. This Part identifies and analyzes three broad principles from which to extract more specific criteria for assessing the significance of individualized issues. Part IV then tests the "predominance" rule against these criteria and finds the rule conceptually flawed, and Part V proposes a replacement.

The significance of individualized questions in proposed class actions is a matter of degree rather than of absolutes. Different class members often act with different degrees of reasonableness, intent, and knowledge, are injured to different extents, value their losses differently, and have differing goals for the outcome of litigation, but

43. Such settlements might raise additional problems if the dissimilarity among differently situated claimants leads lawyers representing one group to negotiate a settlement that does not adequately address the needs of other groups. This concern about adequacy of representation has been the primary focus of the Supreme Court's decisions reviewing class action settlements. *See*, *e.g.*, *Amchem*, 521 U.S. at 625-27.

these differences are not necessarily relevant or material in every case. For example, the fact that different purchasers of a computer intended to use it for different purposes would be irrelevant in an antitrust class action against the seller for price-fixing, but would be highly relevant in an implied warranty class action against the seller claiming that the computers were unfit for a particular purpose. Designers of class certification rules must therefore develop criteria capable not only of recognizing the existence of diversity within proposed classes, but also of assessing whether that diversity could materially affect resolution of class members' claims.

Testing whether current rules governing class certification adequately assess and account for diversity among putative class members' circumstances requires identifying a broader set of principles to which such rules should conform. Drawing from general themes of civil procedure, it would be possible to identify at various levels of abstraction hundreds of principles that certification rules would need to reflect on any number of topics and subtopics from the initial filing of class actions to the final enforcement of classwide judgments. However, my goal is not to reinvent the class action from scratch. For present purposes, I identify three principles and that set minimum parameters for rules guiding judicial discretion in assessing the similarity and dissimilarity of individual claims in a putative class action. From each principle we can derive preliminary conclusions about how to draft certification rules. We can then combine the three principles to derive more concrete drafting criteria, and then test those criteria against current rules governing class certification.

The three principles, explained in greater detail below, are that: (1) a certified class action for money damages must eventually result in an enforceable judgment resolving the claims of all class members (the "finality" principle); (2) a class member may not receive a judgment in his or her favor unless he or she proves the substantive elements for the applicable cause of action and survives any applicable defenses (the "fidelity" principle); and (3) attempts to adjudicate class actions in conformity with principles 1 and 2 must occur within resource and management constraints (the "feasibility" principle). Class certification is thus proper only if the court has a plan for eventually reaching an adjudicated or negotiated judgment that reflects the parties' rights under controlling law. These three principles may not seem controversial when phrased at this level of abstraction, but we will see in Part IV that current class action rules and doctrine often overlook or contradict these ideals. Alternatively, some of the principles may seem counterintuitive based on conventional wisdom about class actions, but we will see that

conventional wisdom has slipped from its theoretical moorings.

A. The Finality Principle: A Certified Class Action Seeking Damages Should Eventually Result in a Judgment Resolving the Claims of All Class Members

A hallmark of American judicial procedure is that absent a voluntary act by the parties (such as settlement) or dismissal by the court, civil litigation eventually culminates in a final judgment establishing the rights of the litigants with respect to the subject of the suit. If a plaintiff prevails, the judgment requires the defendant to take some action with respect to the plaintiff, such as paying a specified amount of money or refraining from a course of conduct. If a defendant prevails, the doctrines of claim and issue preclusion and the Constitution's Full Faith and Credit Clause generally terminate the plaintiff's ability to litigate against the defendant again about the subject addressed in the judgment.[44] Judgments do not always come quickly, but the judicial system aspires to eventual closure.

The normative foundations of the need for a judgment reflect at least three distinct concerns about civil process – cost, scarcity, and efficiency. First, adjudication is costly to provide and should therefore produce at least some benefit. The principal potential benefits of adjudication in the context of suits for damages are the peaceful resolution of disputes, official determination of culpability (or lack thereof), amelioration of uncertainty about contested rights, payment of compensation (or termination of contingent liabilities), and the modification (or ratification) of contested behavior.[45] These benefits do not fully accrue in cases where the court would be unable to enter a judgment resolving the dispute or ruling on the propriety and consequences of the contested conduct. Indeed, even if the purpose of adjudication is understood in non-instrumental terms – for example, as promoting human dignity by providing a mechanism for the redress of grievances – it is difficult to see how leaving litigants twisting in

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44. *See*, *e.g.*, U.S. CONST. art. IV, § 1. Loopholes in the doctrine of claim preclusion permit plaintiffs in some circumstances to file multiple suits challenging different aspects of the same offensive conduct, but finality is still a goal within each separate proceeding with respect to the issues being contested. *See* Cooper v. Fed. Reserve Bank, 467 U.S. 867, 875-81 (1984) (holding that a judgment rejecting class action claims alleging that the defendant engaged in a discriminatory employment practice did not preclude class members from pursuing individual discrimination claims that did not depend on "pattern or practice" allegations).

45. *Cf.* Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975) (reviewing the "conflict resolution" and "behavior modification" models of civil procedure). Adjudication may also serve additional purposes when employed as a vehicle for reforming social and political institutions. *See* Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1976) ("Adjudication is the social process by which judges give meaning to our public values.").

the wind without an enforceable judgment would promote any plausible value or norm. Second, adjudication is a scarce resource for which demand exceeds supply. A sensible threshold sorting criteria for allocating this resource is to give it only to people who have a chance of becoming better off after adjudication than they were before.[46] A judgment is the embodiment of such potential relief. If there is no realistic possibility that a judgment can be entered for a particular claimant, distributive concerns suggest that the scarce resource of litigation should be given to another claimant who might be able to derive some benefit from it. Finally, from an efficiency perspective, adjudication diverts the parties from more socially productive pursuits, so there is value in eventually terminating litigation in a manner that justifies its existence and that returns the parties to more productive endeavors.[47]

Class actions under Rule 23(b)(3) are no different from ordinary civil suits in their need to result in a judgment. Each class member claims entitlement to a sum of money, and each seeks to walk away from the judicial proceeding enriched by that sum.[48] Defendants have countervailing interests in terminating the case in their favor without paying damages, and in not being sued again by members of the same class raising the same claims.[49] Both sets of parties

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46. This sorting criteria is evident in federal standing doctrine, which limits the availability of judicial dispute resolution to cases and controversies in which a judgment could redress a plaintiff's injury. *See infra* note 61.

47. *See* Priest, *supra* note 1, at 543-44 (defining "finality," along with "efficiency" and "equity," as a principal goal of tort law because "there is a value . . . to allow[ing] both plaintiffs and defendants to return to increasing social productivity").

48. In reality, most plaintiffs have no idea of the existence of class actions in which they are potential beneficiaries, and therefore in a formal sense do not seek or expect damages. However, the lawyers who file class actions derive their compensation from the damages awards that they obtain for the class and thus, as proxies for their clients, seek judgments specifying the nature and size of financial entitlements.

49. The bar against so-called "one-way intervention" in class actions is a manifestation of defendants' interests in assuring eventual peace: plaintiffs cannot chose to stay on the sidelines of class litigation until the likely outcome is clear, and then intervene only if the result is favorable while avoiding the binding effect of an unfavorable judgment. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974):

> A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. …The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.

But cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332-33 (1979) (endorsing the doctrine of offensive non-mutual collateral estoppel, which is in effect a form of one-way intervention). Potential class members must instead decide whether to participate in the class action before the court resolves the merits so that the defendant is able to bind the entire class to an unfavorable

therefore want the arbiter of their dispute – a civil court – to definitively state who owes or does not owe what to whom. Rule 23 recognizes the parties' mutual interest in finality by requiring class actions to culminate in some form of judgment covering all parties to the case,[50] and there is no indication in the Rule – with the exception of a provision for "issue classes" discussed below –[51] that class actions warrant a departure from the general principle that civil litigation culminates in final judgments specifying the rights and obligations of the parties.[52]

The need for a final judgment specifying the rights of the parties has important implications for how courts should evaluate the significance of similarity and dissimilarity among claims when deciding whether to certify a proposed class action. Similarity among claims facilitates crafting a judgment that specifies the rights of all class members, while dissimilarity may necessitate fact-intensive case-by-case inquiries into the propriety of judgment that would make class litigation difficult, if not impossible.[53] Certification criteria must therefore assist the court in determining which proposed class actions

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judgment. Without the bar against one-way intervention, defendants would never be certain that even a string of victories in high-stakes class action litigation would prevent an opportunistic plaintiff from eventually getting lucky and subjecting the defendant to the risk of a large classwide damages award. A defendant faced with the prospect of being unable to achieve peace even by winning multiple trials might therefore be willing to settle cases for far more than their merit warrants simply to limit its potential exposure to windfall verdicts.

50. *See* FED. R. CIV. P. 23(c)(2)(B) & 23(c)(3); Sosna v. Iowa, 419 U.S. 393, 399 n.8 (1975):

> The certification of a suit as a class action has important consequences for the unnamed members of the class. If the suit proceeds to judgment on the merits, it is contemplated that the decision will bind all persons who have been found at the time of certification to be members of the class.

The judgment requirement is buried within Rule 23(c)'s provisions governing class action notice rather than in Rule 23(b)'s criteria for certifying classes, and therefore does not factor into certification decisions as frequently as it should (as discussed *infra* in Part IV).

51. *See infra* text accompanying notes 58-64.

52. *See generally* FED. R. CIV. P. 68 (governing entry of judgment in federal civil litigation). For an example of a similar context where the Supreme Court has held that class actions do not alter generally applicable procedural principles absent express indication in a statute or rule, see Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978):

> There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation.

53. Courts could elect to achieve finality without case-by-case inquiries into the varying circumstances of each individual class member if they decide that the outcome of such inquiries would not be relevant under the applicable substantive liability and damage rules. The temptation to reach such a conclusion can be strong in cases where class certification appears to be the only way to achieve rough justice for groups that lack access to alternative remedies, which explains the ad hoc lawmaking phenomenon described above and illustrates the need for the fidelity principle described below.

can be litigated to judgment and which cannot, and which can be settled fairly based on the expected value of a final judgment and which cannot.[54]

Three hypothetical examples illustrate how different proposed class actions might be more or less suitable for certification depending on how common and individual questions influence the difficulty of crafting a judgment to resolve all class members' claims. In each example, a significant aspect of the defendant's potential liability to class members is a common question, but aspects of liability and proof of damages vary for each class member. In the first example, resolution of the common question advances class members' quest for a judgment very far, but in the second and third examples resolution of the common question would still leave difficult individual questions for the court to resolve before it could enter a judgment.

Example 1. Suppose that thousands of customers of a local telephone company allege that a surcharge of a few cents for calls to 411 violates a statute setting permissible telephone service rates and seek recovery of the overcharges. Classwide resolution of the common question of whether the charges were legal would clearly move each class member significantly closer to a final judgment. Further inquiry into each individual case would be necessary to confirm that each class member in fact incurred the alleged overcharge in a particular amount, but merely introducing copies of phone bills should suffice to prove each individual claim to the satisfaction of a fact-finder. The individual issues that remain after resolution of common questions in this example are thus a relatively inconsequential obstacle to rendering a final judgment for each class member.[55]

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54. Whether a judgment will be preclusive is a separate question from whether it must be final. The drafters of Rule 23 have been hesitant to codify the preclusive effect of class action judgments for fear of violating the Rules Enabling Act by specifying the substantive rights that flow from a procedural rule. *See* Kaplan, *supra* note 1, at 393; James Wm. Moore & Marcus Cohn, *Federal Class Actions–Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 556 (1938). The absence of a uniform rule governing preclusion has led to substantial uncertainty in assessing the preclusive effect of class action judgments. *See* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998) (analyzing the evolving and often inconsistent treatment of preclusion in equity practice and early class action litigation). Preclusion issues have also proven particularly tricky in class actions because unlike traditional suits in which plaintiffs join all transactionally related claims against a defendant into a single action, class actions usually focus on a relatively narrow subset of contestable issues, potentially freeing class members to file additional suits against the defendant on related issues without fear of preclusion. *See supra* note 44. It is not necessary here to flesh out the extent to which class action judgments must be preclusive. At a minimum, the parties must have a final judgment before they can try to enforce it, attack it, or avoid it. Thus, at a minimum, class certification rules should link the question of certification to the goal of eventually entering a judgment.

55. Some individual claims might present problems if, for example, the defendant contends that a phone bill submitted into evidence is forged, or that a plaintiff was in arrears on her bill

Example 2. Suppose that thousands of consumers receive an identical written solicitation from a financial planner promising to provide a valuable introductory financial consultation if the consumer makes a "free" call to a specified ten-digit phone number. The solicitation fails to advise consumers that the specified area code is in the Cayman Islands (which is an international toll call for most U.S. residents despite the absence of an international dialing prefix), and that callers will incur whatever long-distance charges their telephone company normally imposes for such calls. Thousands of consumers have lengthy and helpful conversations with the planning service, but are shocked to receive long-distance telephone charges for the "free" calls and sue the planner for fraud. Resolution of the common question of whether the solicitation was misleading because it omitted disclosures about long-distance charges or represented the calls as "free" would help class members to prove liability. However, because a consumer's knowledge of the truth – or failure to exercise reasonable diligence in learning the truth – is usually a defense to a common law or statutory fraud claim,[56] and given the general understanding among most telephone users that dialing strange area codes might result in high telephone bills, the defendant would want an opportunity to explore in each case whether the caller knew that the area code being dialed would incur long-distance charges or took any steps to determine how the call would be billed. Assuming that there is a plausible reason to believe that some class members may have incurred long distance charges voluntarily or negligently, resolution of common liability questions would still leave substantial obstacles to entering a final judgment entitling particular class members to reimbursement of phone charges.[57]

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and thus never paid an overcharge. However, a court should presumably be able to cope with these isolated defenses (which would likely depend on the defendant's business records) while still moving the remainder of claims along to a final judgment.

56. *See*, *e.g.*, Stephenson v. Bell Atl., 177 F.R.D. 279, 293-94 (D.N.J. 1997) (refusing to certify statutory fraud class in part because of individual issues of whether plaintiffs "already knew" allegedly omitted information); Zekman v. Direct Am. Marketers, 695 N.E.2d 853, 861 (Ill. 1998) (rejecting statutory fraud claim because plaintiff's knowledge that dialing a "900" number would incur charges precluded him from challenging warnings about such charges); Agnew v. Great Atl. & Pac. Tea Co., 502 S.E.2d 735, 737 (Ga. App. 1998) (Georgia's fraud statute bars claim by plaintiff who already knew information allegedly concealed from him).

57. Holding the defendant liable for fraud regardless of any idiosyncrasies in what class members knew about the possibility of long distance charges and how diligent they might have been in anticipating such charges may be socially desirable. However, the *optimal* scope of fraud doctrine and the availability of individualized defenses are questions distinct from whether class certification would be appropriate under *existing* fraud doctrine. For additional discussion of the relationship between substantive causes of action and procedural mechanisms for obtaining remedies, see *infra* notes 62, 70, 95, and Part V.B.

Example 3. Suppose that thousands of purchasers of an automobile contend that the parking brake was defectively designed, causing it to fail when they engaged it, such that the car incurred damage by rolling out of a parking space and striking a blunt object. Answering the common question of whether the brake was defectively designed would be helpful in resolving each individual class member's claim, sparing them the costly burden of proving a complex scientific point in each of thousands of cases. However, resolving a common question about brake design would still leave class members a long way from establishing entitlement to damages. Each plaintiff would still need to prove that the design defect was the proximate cause of the roll-away (rather than, for example, their failure to properly engage or maintain the brake) and that the damage to the car did not pre-date the accident. Assuming that the defendant elects to put plaintiffs to their proof, resolution of individual claims could require testimony from each of thousands of plaintiffs and examination of each of thousands of brakes. The effort and expense needed to move from resolution of classwide common issues to a final judgment for each class member would thus be substantially greater in Example 3 than in Example 1.

The foregoing examples illustrate that the practical significance of any individual issues remaining as an obstacle to entry of final judgment after resolution of common questions varies from case to case, even when cases appear to involve similar subject matter (such as the dispute over telephone charges in Examples 1 and 2). My point is not to show that certification should always be granted in cases similar to Example 1 and always denied in cases similar to Examples 2 and 3 – more information would be necessary to make that determination. Instead, my point is that a court must be able to understand why the foregoing examples are differently suited to class action status if it is to have any hope of making an appropriate certification decision.

The limitations that the finality principle imposes in damages cases need not entirely frustrate efforts to squeeze specific issues arising in such cases into the class action mold. In theory, courts may be able to fragment damage claims into components, confine certification to only some of these components, and then render a final class action judgment limited to the certified components rather than the ultimate question of who owes or does not owe what to whom. For example, in proposed products liability or securities fraud damages class actions, a court might render a "judgment" that "product *X* is capable of causing disease *Y*" or "proxy statement *Z* is misleading." Class members who claim to have been aggrieved by *X* or *Z* could then

attempt to use the judgment offensively in subsequent individualized proceedings against the defendant, either in the same forum or elsewhere. This approach could be useful in cases where rendering a classwide judgment on all contested damages questions would be impractical, such that the only alternative to a limited classwide judgment would be no classwide judgment at all (and probably no judgment of any kind given the collective action problems that inhibit redress of injuries to large groups). Rendering such a limited judgment could be an efficient use of scarce and costly judicial resources – and therefore consistent with the spirit of the finality principle – if it resolved uncertainty about contested questions and thereby facilitated settlement, or if it materially aided class members in their subsequent individual suits.

Although fragmenting putative class claims may present a safety valve to the demands of the finality principle, the utility of such "issue classes" in damages cases is questionable – assuming that certification rules even permit them.[58] First, issue classes should be understand as injunction classes rather than as damages classes, and therefore do not directly implicate the concerns addressed in this Article. A plea for a court to rule on a discrete factual or legal question is essentially a request for a declaratory judgment rather than a request to adjudicate a claim for damages – the damages component of the case is relevant only to post-class action proceedings rather than to the class action itself. A plaintiff's request to fragment what would otherwise be a 23(b)(3) damages class action into an issues class thus, for practical purposes, seems to transfer the certification inquiry's focus from the 23(b)(3) factors addressed in this Article to the 23(b)(2) factors.[59] Second, federal courts may conclude that plaintiffs lack standing to pursue issue classes, either because of prudential constraints on the use of declaratory judgment actions[60] or because the possibility that plaintiffs will be unable to exploit an

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58. Federal Rule of Civil Procedure 23(c)(4)(A) provides that "when appropriate," "an action may be brought or maintained as a class action with respect to particular issues." For competing views about the permissible scope of "issues" classes, compare Laura J. Hines, *Challenging the Issue Class Action End Run*, 52 EMORY L.J. 709 (2003) (endorsing a relatively narrow view), with Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249 (endorsing a relatively broad view).

59. *See* FED. R. CIV. P. 23(b)(2) (expressly encompassing requests for injunctive and declaratory relief).

60. *Compare* Calderon v. Ashmus, 523 U.S. 740, 747 (1998) (holding that Article III precludes adjudication of declaratory judgment actions seeking resolution of "a collateral legal issue governing certain aspects of [class members'] pending or future suits"), *with* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (holding that Article III permits an insurer to seek a declaratory judgment about the validity of an insurance policy in anticipation of future litigation).

issue-class judgment in subsequent proceedings attenuates the judgment's ability to resolve a concrete case or controversy.[61] Third, issue class actions regarding common liability questions divorced from individualized claims for damages will likely be rare because few lawyers will have an incentive to file them. The lucrative potential payday for class action lawyers arises from securing a damages award, not from obtaining a declaratory judgment that individual class members may – or may not – eventually parlay into damages in future individualized proceedings that the class lawyer would not necessarily control. Fourth, even if a lawyer could obtain a quasi-declaratory ruling on a subset of contested issues, the shift from a class-versus-defendant to an individuals-versus-defendant procedural posture would vitiate the lawyer's settlement leverage and permit defendants to regress to their standard tactic of stonewalling individual cases to deflate settlement values. Indeed, from the defense perspective, such stonewalling would have the added benefit of deterring other plaintiffs' lawyers from attempting similar bifurcated class actions in the future.[62] Fifth, the utility of limiting a class action judgment to

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61. *See*, *e.g.*, United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 558 (1996) (noting that if class actions and other forms of representative litigation "failed to resolve the claims of the individuals ultimately interested, their disservice to the core Article III requirements would be no secret"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (the "irreducible constitutional minimum" of Article III standing analysis is that a favorable resolution of the plaintiff's claim will "likely" "redress" a concrete injury) (citations omitted); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) ("The 'personal stake' aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving."); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99-100 (1979) ("Even when a case falls within [Article III's] constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated.").

62. There is nothing inherent in the process of allocating damage awards that renders class action litigation impracticable, and thus there is no principled reason why a bifurcated proceeding could not resolve classwide liability issues and then distribute damages among class members. For example, if the only remedy available under the applicable substantive law is a $100 per person penalty award, then distributing damages to class members would not create any significant procedural challenges after resolution of liability questions (assuming that the identities of class members can be determined objectively). However, most current forms of substantive regulation follow a corrective justice model of remedies in which the court must award damages based on individual class members' proof of entitlement to compensation, which can be time-consuming and costly to establish. I assume for purposes of this Article that the entitlement/compensation model of remedies is valid in spite of the constraints that it imposes on the design of efficient adjudication procedures. For an argument that damage allocation criteria should implement principles other than compensation that are easier to prove within the framework of a bifurcated class action trial, see David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002) (arguing that distribution of damage awards should follow principles of insurance); *see also* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75

common issues is questionable because the rendering court would probably be unable to dictate the preclusive effect of its order in other jurisdictions, creating uncertainty about the order's enforceability and potential inequality of treatment in different fora.[63] In sum, *if* certification rules permit issue classes, and *if* plaintiffs have standing and incentive to file them, and *if* they prevail, there is still a substantial possibility that plaintiffs would face insurmountable practical obstacles to translating their issue-judgment into damages-judgments for all or many class members, which calls into question whether adjudicating the issue-class action would be worth the effort.[64] In any event, for present purposes it is sufficient to observe that the finality principle comes into play whenever a plaintiff seeks to a certify a (b)(3) damages class rather than an issue class, and so it is useful to assess the rules that courts should apply to such requests.

* * *

The foregoing discussion suggests a preliminary conclusion that, in combination with conclusions from the sections below, could assist in drafting rules governing certification of classes: courts should certify class actions seeking damages only when the individual questions of law and fact that remain after resolution of common questions can be definitively resolved in a final judgment establishing the rights and responsibilities of the plaintiffs and defendants. This principle leaves room for courts to develop creative adjudication or negotiation mechanisms for resolving individual claims in preparation for a final judgment. There is no single "correct" way for a court to winnow the scope of a case and to reach conclusions about contested

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TEX. L. REV. 1801 (1997) (noting overlooked areas of commonality between deterrence and corrective justice approaches to regulation).

63. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action."); Handschu v. Special Servs. Div., 737 F. Supp. 1289, 1307-08 ("[A] declaration concerning issue preclusion by a court certifying a class action, for intended use in future litigation in another court, is not procedurally viable."), *amended by* 838 F. Supp. 81 (S.D.N.Y. 1989); Kauhane v. Acutron Co., 795 P.2d 276, 278 n.3 (Haw. 1990) (noting "the fundamental tenet of the doctrine of res judicata that the court issuing the initial judgment lacks the authority to determine the preclusive effect of that judgment"). *But cf.* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005) (contending that courts have substantial authority to control the preclusive effect of class action judgments).

64. An interesting question for further study is how much of an anticipated benefit should be required to justify the transaction costs of an issue class. Presumably, only a fraction – large or small – of all class members who prevail in an issue class action would be able to parlay that success into a satisfying victory or settlement in subsequent damage proceedings. The anticipated size of this fraction relative to transaction costs may be relevant to deciding if adjudicating the issue class action is worth the court's time and effort.

evidence in individual disputes. To the contrary, the large body of scholarship assessing procedural devices for resolving complex factual disputes attests to the variety of paths that courts can take. However, class litigation under Rule 23(b)(3) should eventually culminate in a final judgment informing the plaintiffs and defendants who owes what to whom. If adjudication cannot produce such a judgment, and if a settlement cannot do so fairly[65] (or if the parties are not willing to settle) then the class should either not be certified or should be decertified when the problem becomes apparent. As we will see in Part IV, current certification rules and doctrine often overlook this principle, resulting in the certification of class actions in circumstances where the court does not have the faintest idea of how the case could be resolved if the parties do not agree to a settlement and insist on litigating the merits.

B. The Fidelity Principle: A Class Member Should Not Receive a Favorable Judgment Unless He or She Can Prove the Substantive Elements for a Cause of Action and Survive Any Applicable Defenses

This Section builds on the previous discussion of finality by exploring how, if at all, class actions alter the manner in which a plaintiff can establish entitlement to a judgment in his or her favor. An underlying assumption of this Section is that substantive laws that regulate behavior and create enforceable entitlements have definable elements and defenses that should constrain how courts resolve contested questions.[66] The section concludes that the procedural

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65. *See infra* text accompanying notes 88-90.

66. Some conceptions of the nature of substantive law would be skeptical of this assumption. For example, instrumentalist (sometimes called realist or reductionist) approaches to tort law often postulate that the compensation and deterrence goals of tort determine the meaning of tort elements in particular cases, such that the content of a rule is partly a function of the context in which it is applied. These visions of tort law suggest that the distinction I draw between procedural fidelity to substantive law and ad hoc lawmaking is illusory because the content of substantive law is in some sense inherently ad hoc. A logical extension of such arguments would be that if class actions can improve the deterrent and compensatory force of tort, then judges in class actions can define "elements" of torts – such as breach of duty, causation, and injury – to maximize deterrence and compensation without any preconceived notion of how these elements would apply in other procedural contexts. Debating such instrumentalist visions of malleable tort elements is beyond the scope of this Article (suffice to say that it is questionable even on instrumentalist terms whether an amorphously defined tort standard provides adequate warning to potential wrongdoers about the likely consequences of their actions, such that actors faced with uncertainty may over- or under-invest in safety). For present purposes, I assume that substantive rules have at least some content capable of transcending procedural context, although this content is flexible and should evolve over time to cope with new regulatory dilemmas. *See infra* Part V.B. For a helpful taxonomy and discussion of competing conceptualizations of tort law, see John C.P. Goldberg, *Twentieth Century Tort Theory*, 91 GEO. L.J. 513 (2003).

context in which a claim is adjudicated should not alter the content of these elements and defenses or the outcome of their application. Class actions should thus feature procedural fidelity to substantive law, meaning that the merit of claims presented in a class action should be assessed using the same substantive rules that would apply if plaintiffs litigated their claims separately.[67]

There are several prerequisites to entry of judgment in ordinary civil litigation where a single plaintiff sues a single defendant. The plaintiff must identify a legally recognized right creating a private remedy, present sufficient evidence to show that the defendant infringed the right, rebut objections that the defendant raises to the significance of that evidence, prove damages, and defeat any affirmative defenses. A plaintiff who cannot carry her burden of proof or overcome defenses cannot obtain a judgment in her favor.[68]

Class actions do not alter the basic proof-and-defense structure of adjudication. A class action merely changes the manner in which class members and defendants present the evidence and argument needed to prove or refute each of their claims or defenses. Instead of each class member presenting her own evidence, a representative plaintiff attempts to prove the claims of all absent class members using evidence common to each of them. Likewise, instead of refuting each class member's claim, the defendant attempts to prevail over the entire class by defeating the claim of the representative plaintiff and attacking the sufficiency of any "common" evidence of classwide liability. After resolution of common issues, each party's focus shifts to whatever individualized issues remain. Class actions do not – or should not – change the substantive elements of a claim, relieve class members of their burden of proof, or deprive defendants of their right to raise applicable defenses.[69] Policymakers are, of course, free to mold the content of substantive regulations to best exploit the

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67. Part IV.D. will discuss how current class action doctrine often overlooks or violates the fidelity principle.

68. *See*, *e.g.*, FED. R. CIV. P. 12(b)(6) (allowing dismissal for "failure to state a claim upon which relief can be granted"); FED. R. CIV. P. 50 (allowing judgment against a party when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party"); FED. R. CIV. P. 56 (allowing summary judgment when the moving party establishes that there is "no genuine issue as to any material fact" affecting its entitlement to judgment).

69. The leading early proponents of class actions did not perceive their proposed procedural innovations as altering the substantive law applicable to claims and defenses. *See*, *e.g.*, Kalven & Rosenfield, *supra* note 1, at 694 n.33 ("When the case is conducted as a class suit, regardless of the variety of individual differences, the defendant is never deprived in any way of his right and opportunity to present any defenses arising from any of these individual variations."). Unfortunately, however, these early commentators did not explain how a court should decide when individual variations among claims should preclude certification, and assumed the problem out of existence by speculating that individual variations among class members' claims would likely be "trivial or irrelevant" and not unduly "inconvenient." *Id*.

procedural benefits of class actions, but nothing within the class action device itself alters the elements and burdens of proof associated with the parties' claims and defenses.[70]

There are several reasons why class actions should not modify the nature of claims and defenses. First, the statutes authorizing courts to promulgate procedural rules governing class actions do not ordinarily allow procedures to modify substantive rights. In the federal system, the Rules Enabling Act forbids the Supreme Court from drafting rules of civil procedure that "abridge, enlarge or modify any substantive right,"[71] which prevents Rule 23 from altering the nature of the parties' claims or defenses.[72] Many states have their own rules enabling statutes that similarly limit the scope of procedural rules.[73]

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70. To the extent that some commentators see class actions as a useful tool for permitting novel extensions of substantive law – such as various proposals to impose liability for risk and for altering proof of causation and damages in mass tort cases – the innovation is best understood as an evolution of tort law rather than class action jurisprudence. The practical dispute resolution possibilities that class actions create may provide the inspiration for substantive legal innovation, but the class action device itself ultimately follows where the substantive law leads. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 423 (1980) (Powell, J., dissenting) ("A motion for class certification, like a motion to join additional parties or to try a case before a jury instead of a judge, seeks only to present a substantive claim in a particular context."). *Cf.* Arthur R. Miller, *supra* note 1, at 674-76 (arguing that the surge of class action litigation in the 1960s and 70s was a reaction to "larger social forces" that adopted the class action as a convenient vehicle for implementing, rather than creating, newly recognized substantive rights); Nagareda, *Preexistence*, *supra* note 1, at 158 (distinguishing between the structure of procedural mechanisms and their "external policy goals").

71. 28 U.S.C. § 2072(b) (2004). The Rules of Decision Act further constrains the ability of federal courts to modify substantive rules in situations where courts must apply state rather than federal law. *See* 28 U.S.C. § 1652 (2004). Federal courts therefore lack authority to create a substantive common law for use as an adjunct to Rule 23 when resolving state law claims. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

72. *See*, *e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution" in interpreting the scope of Rule 23); Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act."); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 462 (1997) (arguing that under the Rules Enabling Act, procedural rules "aim to cause dispositions on the merits, not to redefine those merits").

73. *See*, *e.g.*, ALA. CODE § 12-2-7(4) (2003); ARIZ. REV. STAT. § 12-109(A) (2003); ARK. CONST. amend. 80 § 3; COLO. REV. STAT. § 13-2-108 (2004); CONN. GEN. STAT. § 51-14(a) (1991); HAW. REV. STAT. § 602-11 (2005); IDAHO CODE § 1-213 (2004); MAINE REV. STAT. ANN. tit. 4 § 8 (2004); MINN. STAT. § 480.051 (2004); MO. REV. STAT. § 477.010 (2005); MONT. CODE. ANN. § 3-2-701 (2003); NEV. REV. STAT. § 2.120(2) (2004); N.M. STAT. ANN. § 38-1-1(A) (2005); N.D. CENT. CODE § 27-02-10 (2004); OHIO CONST. art. IV, § 5(B) (2004); OR. REV. STAT. § 1.735(1) (2004); PA. CONST. art. 5, § 10(c); TENN. CODE. ANN. § 16-3-403 (2004); TEX. GOV'T CODE ANN. § 22.004(a) (2005); VT. STAT. ANN. tit. 12, § 1 (2004); WYO. STAT. ANN. § 5-2-115(b) (2004) ("[procedural rules] shall neither abridge, enlarge nor modify the substantive rights of any person"). Class actions in some

Second, even if the Rules Enabling Act did not constrain the permissible scope of procedural rules, there is no indication that rules creating class actions were intended to modify substantive rights or to invalidate otherwise applicable defenses to class members' individual claims. No such intent is evident in the text of Rule 23, in the official notes of its drafters, or in contemporaneous commentaries discussing its origins. Congress or a state legislature could in theory enact a statute allowing certification of a class to alter otherwise applicable substantive laws, but apparently such legislation has not been adopted.

Third, allowing class actions to modify substantive laws as an ad hoc incident to the convenient resolution of a particular case is not consistent with the customary detachment between rule-formulation and rule-application in a democracy, at least with respect to statutory rights and to a lesser extent with respect to common law rights. Substantive conduct-regulating rules and compensation-awarding remedies are usually the product of democratic institutions such as legislatures, administrative agencies subject to democratic oversight, or an established process of common-law rulemaking by courts whose decisions are open to review and debate by political institutions. Regardless of their origin, substantive rules reflect (in theory) a reasoned balancing of their relative social costs and benefits across a range of foreseeable contexts through a process that has some political legitimacy. If the content of substantive law is altered to accommodate complexities raised by the procedural device that the plaintiff chooses to use in filing her claim – for example, by creatively interpreting a statute or regulation to apply differently in class actions than one might expect based on its application in non-class cases – then courts in effect would be rebalancing the social costs and benefits of a particular rule on an ad hoc basis. This rebalancing would occur without the oversight and political legitimacy that normally accompanies a decision about the nature of a substantive rule and without the detachment that one would expect to see between the formulation of a rule and its application to a particular circumstance.[74]

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states are creations of statute rather than administratively promulgated rules and therefore could, in theory, alter substantive rights, although none of the state class action statutes indicate such an intent. *See, e.g.*, GA. CODE ANN. § 9-11-23 (2004); 735 ILL. COMP. STAT. 5/2-801 *et seq*. (2005); KAN. STAT. ANN. § 60-223 (2005); LA. CODE CIV. PROC. ANN. art. 591 *et seq*. (West 2005); NEB. REV. STAT. § 25-319 (2004); OKLA. STAT. tit. 12, § 2023 (2004); S.D. CODIFIED LAWS §§ 15-6-23 *et seq*. (2003); WIS. STAT. § 803.08 (2004).

74. Ad hoc lawmaking of this type could in theory have democratic legitimacy if Congress authorized it by delegating substantive rulemaking power to the judiciary as an incident to judicial authority to craft procedural rules, but the Rules Enabling Act expressly disclaims any

The ad hoc lawmaking problem is less acute, although still serious, when a court accommodates the complexities of a class action by modifying a common law rule rather than a statute or regulation. Unlike legislative statutes or executive regulations, common law rules are judicial creations and therefore prone to judicially-imposed changes that adapt rules to new demands. There is no reason why a class action cannot be a catalyst for the reform of the common law any more or less than the myriad other facts that have transformed common law rules over the centuries.[75] Nevertheless, there is something discomforting about changing common law liability or damage rules as an afterthought to a procedural dilemma in a particular case, rather than with full consideration of the costs and benefits of modifying the rule in all of the procedural contexts in which the rule might be litigated.[76] The discomfort grows when one considers that many successful class actions can have unintended consequences on matters that involve a delicate balance between competing policy interests. For example, a large damage award based on the side effects of a drug or vaccine might prematurely pull the product off the market to the disadvantage of people who need it. Likewise, a successful classwide challenge to insurance claims adjustment practices can have the effect of raising premiums and pricing consumers out of the insurance market. Facilitating claims against drug manufacturers and insurance companies for the massive levels of damages that class actions can deliver is thus not as clearly desirable as it might seem when viewed in the narrow context of a particular class action filed by aggrieved victims, rather than in a more self-consciously detached lawmaking context designed to weigh competing social interests in the abstract without regard for the facts of particular cases or the emotional pressure of dealing with a large

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such delegation. *See supra* notes 71-73 and accompanying text. The constitutionality of such a delegation of legislative power to the judicial branch would be hotly contested. *See generally* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1621 (2002) (assessing the debate over the nondelegation doctrine's constitutional origins). For a discussion of the practical consequences of legislative delegation of rulemaking power to courts, see Catherine T. Struve, *The Paradox of Delegation, Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002).

75. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 824 (1985) (Stevens, J., concurring in part and dissenting in part) (observing that state courts had "developed general common-law principles to accommodate the novel facts of this litigation").

76. The concern over democratic legitimacy would be even greater if there were reason to suspect that the interests of diverse class members were not fully represented in the litigation process. *See* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997) (developing a model of democratic legitimacy for judicial outcomes premised on interest representation).

class of injured claimants.[77] Allowing courts to bend substantive rules to the procedural needs of particular cases is thus inconsistent with the normal process of rulemaking and prone to prioritize the welfare of litigants over broader social welfare with undesirable distributive consequences.[78]

Fourth, a corollary to the previous argument is that allowing courts to depart from substantive rules to facilitate the resolution of particular claims raises questions about democratic transparency and accountability. Lawmakers – whether elected or subject to the oversight of elected officials – should be accountable for the rules that they create. If the content of these rules varies depending on the procedural context of particular cases, then the public will have greater difficulty assessing the rules that their representatives have created or supervised because the content of rules would be fluid; sometimes the rules would mean one thing, and sometimes they would mean something else.[79] Class actions thus create a troubling opportunity for lawmakers and courts to dodge accountability by permitting the implementation of substantive rules in a manner distinct from their apparent and advertised meaning.[80]

Finally, allowing certification of a class to alter the substantive law applicable to claims and defenses arguably raises due process

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77. The tension between private and public perspectives on risk management is particularly acute in an emerging category of class actions known as "social issue" or "social policy" suits, in which plaintiffs seek remedies against actors whose profits arise from activities that cause negative social externalities, such as tobacco companies, gun manufacturers, and health maintenance organizations (HMOs). For a general discussion of this trend, see Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 206-12 (2001); McGovern, *supra* note 1, at 1656 n.1.

78. *Cf.* Nagareda, *Preexistence*, *supra* note 1, at 204 (arguing that the "central planning" inherent in reform of broadly applicable substantive laws should occur through political institutions rather than self-appointed class representatives).

79. Accountability and transparency problems arising from ad hoc lawmaking affect the judicial branch as well as the legislative branch because procrustean distortion of substantive rules to accommodate novel procedural circumstances enables judges to cloak substantive innovations with a procedural gloss. The significance of a judicial opinion endorsing a particular substantive theory thus will often not be apparent to readers who lack a detailed familiarity with the facts of the case and the applicable law. This lack of transparency reduces the extent to which the court can be held accountable for its decision. For a general discussion of the importance of transparency in judicial opinions, see David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Suzanna Sherry, *The Unmaking of a Precedent*, 2003 SUP. CT. REV. 231, 255-56.

80. This Article approaches the problem of democratic accountability within aggregative litigation as a function of the ad hoc nature of substantive rulemaking when conducted as an incident to facilitating application of a particular procedural device to particular facts. An alternative approach would be to conceptualize the accountability problem as arising from the displacement of traditional compensatory models of litigation with a bounty hunter model that alters the remedial focus of substantive laws. For an argument developing this latter view, see Redish, *supra* note 1, at 107-29.

concerns by inhibiting defendants' ability to raise defenses that would be valid if plaintiffs pursued their claims individually rather than as a class. There is nothing inherently wrong with denying a defendant the defenses of its choice. For example, defendants in federal securities fraud cases would prefer to argue that particular purchasers of an overpriced security did not rely on the defendant's misrepresentations and thus have no claim for damages, but the fraud-on-the-market rule makes the question of reliance irrelevant.[81] Likewise, defendants in employment discrimination cases would prefer to avoid being held liable for violating Title VII of the Civil Rights Act[82] if they did not intend to discriminate, but their lack of intent can be irrelevant if their actions have a disparate impact on a protected minority group.[83] Neither the fraud-on-the-market theory nor the disparate impact doctrine violate procedural due process – even though they deprive defendants of their preferred means of defending themselves from allegations of wrongdoing – because defendants must adjust to generally applicable laws and tailor their defenses to the elements of claims. However, suppose that the fraud-on-the-market and disparate impact theories did not generally exist, but were invented by courts solely to facilitate the efficient resolution of class actions. An individual securities purchaser who wished to sue an issuer for misrepresentation would have to prove reliance, but a member of a class of purchasers would not. Likewise, an individual job applicant protesting hiring criteria would have to prove a discriminatory intent, but a member of a class of job applicants would not. Due process concerns in these circumstances would appear much more significant. The defendant would have a statutory right under the applicable substantive law to raise a defense to individual claims, but would lose that right depending on the procedural mechanism chosen by plaintiffs for adjudication. A defendant might find itself unable to conform its conduct to rules that vary with the procedural context of a claim, thus rendering it liable to groups for conduct that is not illegal with respect to any individual member of the group. The caselaw and scholarship in this area are undeveloped, but there is a plausible reason to believe that using the class action device to deny a defendant its otherwise applicable right to raise defenses to individual claims, or to relieve class members of their obligation to prove otherwise required elements of their individual claims, would violate

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81. *See supra* note 24.

82. 42 U.S.C. §§ 2000e *et seq* (2005).

83. *See*, *e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 422-23 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

the defendant's rights to procedural due process.[84] At a minimum, the scope of defendants' procedural due process rights in the class action context warrants additional scholarship.

In short, class certification should not transform an individual class member's losing claim into a winning claim, except in the sense that it may level the procedural playing field by giving class members access to better counsel and more resources with which to develop and pursue their claims.[85] The merit of each class member's claim – and the applicable elements and defenses – should remain the same whether or not the claim is certified for class treatment. A class member who would deservedly lose his case in a traditional suit against the defendant for want of sufficient proof or ability to overcome defenses – even if represented by adequate counsel with adequate resources – should also lose in a class action. The same principle applies in reverse. A defendant who would be unable to overcome a suit by any one class member should not be able to manipulate the class action device into a victory (or a low-ball settlement) over all class members. Rules governing class actions thus must provide some mechanism for ensuring that the beneficiaries of a judgment are in fact entitled to that benefit, and likewise that the persons whose rights a judgment prejudices deserve to suffer such prejudice.

A concrete example illustrates the foregoing abstract point by positing four claims that remain constant despite changes in the procedural mechanism through which they are brought. The change in procedural context cannot alter the merit of the claims and should not alter the outcome of the suit. If the outcomes nevertheless differ from one context to another – despite equivalent juries, judges, lawyers, and available resources – then procedural rules are not being properly formulated or applied.

Assume that four consumers – *W*, *X*, *Y*, and *Z* – each purchase the same model of Acme waffle iron from the same authorized retailer

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84. *See*, *e.g.*, Lindsey v. Normet, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 192 (3d Cir. 2001) (vacating certification in part because "defendants have the right to raise individual defenses against each class member"); Western Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) (denying defendants a right to "present a full defense on the issues would violate due process"); Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 437 (Tex. 2000) (noting in the context of class action litigation that "basic to the right to a fair trial – indeed, basic to the very essence of the adversarial process – is that each party have the opportunity to adequately and vigorously present any material claims and defenses").

85. Certification may arguably have a more transformative effect on claims for injunctions against public actors by creating a class that is an entity with rights and characteristics distinct from its individual members. For a theory of how group rights in institutional reform litigation may differ from the sum of constituent individual rights, see Fiss, *supra* note 45, at 19.

on the same day. Each plugs the waffle iron into an electrical outlet, precipitating an immediate explosion. Evidence suggests that a manufacturing defect that randomly effects some, but not all, Acme waffle irons could cause such an explosion. *W*, *X*, *Y*, and *Z* each file separate suits against Acme for property damage caused by the allegedly defective exploding waffle irons. As explained above, *W*, *X*, *Y*, and *Z* can prevail only if each can prove all the elements of their claims: for example, that Acme breached a duty of care to purchasers by negligently manufacturing the waffle iron, and that this breach proximately caused injury in a specified amount. Acme would have an opportunity to challenge plaintiff's proof by evidence, argument, and cross-examination. Assuming that *W*, *X*, *Y*, and *Z* survived these challenges, Acme would also have an opportunity to raise affirmative defenses.

Assume that at each trial, each plaintiff testifies about how he or she was injured, and Acme's counsel vigorously cross-examines them. Acme also conducts discovery into the circumstances of each claim and incorporates what it learns into its defenses.

The trials result in the following outcomes. *W* wins because her testimony persuasively shows that she followed the waffle iron's instructions, acted with great care, suffered extensive damages that could have been caused only by a manufacturing defect, and Acme's lawyers could not find any persuasive defenses. *X* loses because cross-examination reveals that he ignored Acme's explicit instructions to plug the iron into a grounded outlet, and only when the iron was dry. *X* instead plugged the iron into a jury-rigged outlet overloaded with extension cords after having washed the iron's circuitry with a damp cloth. The jury concludes that the cause of his injuries was his own negligence and that there was no evidence that any manufacturing defect affected the particular iron that he purchased. *Y* loses because discovery of repair invoices for his kitchen reveals that all of the claimed damage was caused by a cooking mishap that pre-dated his purchase of the iron. *Z* loses because Acme is able to show that a series of pre-suit letters between *Z* and Acme in which *Z* requested and Acme paid limited compensation constituted an accord and satisfaction and waiver of all legal claims. In sum: *W* proves all elements and survives all defenses, *X* and *Y* fail to prove their claims, and *Z* loses on an affirmative defense.

Now assume the exact same facts, but that *W*, *X*, *Y*, and *Z* all have the same lawyer and elect to bring their claims in a single action under Federal Rule of Civil Procedure 20 or 42(a) or similar state joinder and consolidation rules. The results of their individual claims should clearly be the same (assuming equivalent lawyering, judges,

and juries): W should still win, and *X*, *Y*, and *Z* should still lose. Nothing inherent in the joinder of the four individual consumers' cases should affect the cases' merit. Assuming that the judge and jury properly do their jobs, *X*, *Y*, and *Z* cannot ride *W*'s coattails to victory.

Now assume that instead of a joined action under Rule 20 or a consolidated action under Rule 42(a), W files a class action under Rule 23 for damages on behalf of all Acme waffle iron purchasers claiming to have suffered property damage caused by defective waffle irons during the relevant time period. *X*, *Y*, and *Z* (and hundreds of others) meet the class definition. Instead of appearing in court (as in the prior examples) *X*, *Y*, and *Z* are anonymous class members who attempt to have their claims proven by *W* – the named plaintiff who acts as their representative. Assuming that *W* tells her compelling story and prevails on her individual claim, *X*, *Y*, and *Z* should not be entitled to judgment in their favor as well. W is merely a representative for *X*, *Y*, and *Z*. Her existence cannot change the strength of their personal claims, nor can *W*'s invulnerability to Acme's defenses immunize *X*, *Y*, and *Z*. If Acme is able to make a showing that the outcome of *X*, *Y*, and *Z*'s cases might differ from *W*'s based on the unique circumstances of their individual claims, then some mechanism must exist to allow Acme to present that information to the finder of fact before entry of judgment in *X*, *Y*, and *Z*'s favor. If such a mechanism does not exist, then it would be inappropriate to allow *X*, *Y*, and *Z* to ride on W's coattails despite their own claims' lack of merit. Similarly, if one assumes that *X* is the named class representative instead of *W*, it would be inappropriate to extinguish *W*'s meritorious claim based on *X*'s failure of proof.

The waffle iron hypothetical thus confirms the abstract principle discussed above: class certification should not entitle a class member to a judgment to which that person would not be entitled if required to litigate on her own rather than as part of a class. Certification might as a practical matter improve a class member's chances of prevailing by giving her access to a better lawyer who presents better arguments and has the resources to locate better evidence than the class member would have found if required to litigate on her own, but certification should not alter the merits of her claim.

There is a difference between allowing the resources that certification brings to polish a diamond hidden in the rough and allowing the pressure that certification brings to create a diamond from coal. For example, if certification provides *Z* with access to a skilled lawyer who can defeat Acme's accord and satisfaction claim, then certification has served a useful purpose by helping to neutralize

the defendant's often overpowering resource advantage.[86] But if certification creates a situation where the court simply ignores Acme's otherwise dispositive accord and satisfaction defense and allows *Z* to prevail, then certification has achieved an impermissible purpose by manufacturing a whole (the class) whose claims exceed the sum of its parts (individual class members).[87]

The fidelity principle remains an important constraint on certification even when the parties are willing to settle in lieu of trial. A negotiated settlement is nominally a voluntary agreement that waives recourse to procedural alternatives. Settlements thus in theory should not raise any concerns about fidelity to substantive law because the contractual law that the parties negotiate displaces whatever principles of law might have governed if the parties had instead elected to risk a trial. However, if a settlement occurs solely because one or more parties fears the outcome of a trial that would be conducted in violation of the fidelity principle, the contractual law that the settlement creates might not be voluntary in any meaningful sense, and the negotiated contractual law would be no more legitimate than the ad hoc law whose threatened application motivated the settlement.[88] The prospect of settlement in the shadow of a certification order that would violate the fidelity principle thus adds an extra complication to class action doctrine, requiring courts to develop a theory of consent to operate in tandem with the fidelity principle so that courts can decide when fidelity-related obstacles to trial also bar certification aimed at encouraging a settlement. Developing such a theory of consent would be beyond the scope of this Article, and would require addressing several emerging fields where the consent norms underlying contract law overlap and potentially

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86. *Cf.* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 500 (1969) ("[I]nsofar as class actions will enhance the forensic opportunities of hitherto powerless groups, they will tend to probe the *terrae incognitae* of substantive law.").

87. Some commentators perceive a certified class as a legal "entity" whose interests are distinct from the interests of its individual members. *See*, *e.g.*, Shapiro, *supra* note 1, at 919. This may be a helpful way to conceptualize classes when confronting issues related to defining the "parties" to a class action for purposes of assessing the adequacy of representation and the binding effect of judgments. However, for the reasons explained in the main text, the claims of the class "entity" do not have special merit merely because a class raises them. The merit of class claims is a function of the merit of individual claims, although that merit might be easier to discern or to prove when individuals aggregate their resources. Of course, one could rewrite substantive law to create rights and remedies tailored specifically for "entity" litigants rather than individual litigants, *see id*. at 941-42, but that is a change that should arise from politically legitimate sources external to the class action rather than as a result of ad hoc procedural convenience, *see supra* text accompanying notes 74-80.

88. *Cf. supra* Part II.C. (discussing the distortions in settlement value that occur when parties attempt to resolve class actions encompassing individual claims of varying merit).

conflict with the due process norms underlying civil adjudication.[89] For present purposes, it is sufficient to note that aggregate settlements of dissimilar claims do not avoid the fidelity constraint on certification so much as shift its emphasis from the legitimacy of the substantive law that would apply at trial to the legitimacy of the contractual law that would be created by negotiation in the shadow of trial.[90]

The discussion in this Section thus suggests a second preliminary conclusion to help shape the drafting of certification criteria in cases involving claims with some degree of similarity and some degree of dissimilarity where the parties have no *ex ante* agreement to settle. A class should not be certified unless either: (1) proof of the named plaintiff's individual claim would also prove the claims of the absent class members based on the similarity between the representative and absentees, such that there is no need to inquire separately into the merit of each individual class member's claims; *or* (2) there is an appropriate litigation or negotiation mechanism for resolving individual questions unique to particular class members at some point between resolution of common questions and entry of judgment. Either way, the procedural device of certification should not circumvent resolution of individual issues that would be salient under applicable substantive law if each class member's claim were tried separately. Potentially outcome-determinative issues unique to individual class members' claims thus either preclude certification or must be accommodated in a manner consistent with applicable

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89. For a discussion of "privatization of public processes" through contractual opt-outs to otherwise binding state-created procedures and its implications for analysis of civil adjudication, see Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 623 (2005). *See also* Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, MICH. L. REV. (forthcoming 2005) (discussing the enforceability of contractual waivers of amenability to aggregative litigation). *Cf.* Marcus, *supra* note 29, at 881 ("Rule 23 may provide the glue that allows the parties to arrange tort reform by consent," but only if the consent is "meaningful."); Nagareda, *Preexistence*, *supra* note 1, at 158 ("The power to alter rights in a manner that individuals may not avoid generally rests with democratic institutions, not class counsel and courts by way of a judgment approving a class settlement.").

90. An entirely different problem arises when all parties affirmatively want to settle a dispute, and seek class certification as a vehicle for giving their agreement maximum effect. In these circumstances, the settlement is truly voluntary (assuming that the agents representing the class are in fact implementing class members' preferences), and the parties do not care how a trial would be conducted because the point of certification is merely to ratify a negotiated agreement (indeed, in some cases the agreement may pre-date the court's involvement in the case). Fidelity theory has no role in these circumstances, although there may be other reasons to question the propriety of certifying a "settlement class." *See generally* Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687 (2004).

substantive laws (or norms governing the scope of permissible consent in settlements) before entry of judgment.[91]

C. The Feasibility Principle: Attempts to Adjudicate Class Actions Should Occur Within Resource and Management Constraints

Class actions often inspire in lawyers the same boundless enthusiasm and confidence that candy stores inspire in children. A child in a candy store has remarkable confidence in his ability to consume an inordinate quantity of enticing deserts, and an unflappable desire to empirically test any limitations on his eating capacity that an adult might have the temerity to suggest. Lawyers and judges are often similarly smitten with the alluring potential of class actions to compensate victims and deter wrongdoers, and tend to overestimate their ability to cope with the burdens that class actions impose. Certification criteria must recognize this certify-now, ask-questions-later impulse that class actions inspire by grounding certification decisions in a realistic assessment of how a case can be litigated.

The burdens of class litigation are particularly acute when cases involve both common and individualized questions of fact and law and the court respects the finality and fidelity principles. A court with infinite time and resources may have the theoretical ability to resolve common questions in a consolidated proceeding, and then to

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91. An interesting question for future scholarship and empirical study concerns the extent to which the individual issues that defendants identify as obstacles to certification are as a practical matter relevant to the outcome of disputes. A clever defendant can almost always identify a theoretically relevant factual or legal variation among claims that could be resolved only through burdensome individualized procedures, but these variations are not always significant. For example, a defendant might insist on its right to cross-examine every class member in a fraud case in order to determine if the class member had some specialized knowledge that defeated his claim to have been misled, but it is difficult to predict whether such a protracted inquiry would reveal any material information. The defendant will claim that it cannot know what class members will say unless it interrogates them, and the plaintiff will oppose such examinations absent proof that they will be productive. Courts must somehow decide how likely the individual issue is to affect the case before concluding whether the issue is relevant to the certification decision. A ruling on the defendant's right to pursue individual defenses by cross-examining class members has the potential either to deny plaintiffs the opportunity to obtain the benefits of class litigation based on speculation about a dubious defense, or to deny the defendant the opportunity to raise what might be a meritorious defense simply because doing so would be inconvenient. There is presently no data or scholarship to help courts make that judgment call. Plaintiffs' advocates speculate that defendants routinely rely on "hypothetical" defenses, while defense advocates insist that most ostensibly "common" class claims actually rest on individualized inquiries, but it is unclear which side has the stronger argument. The truth is probably somewhere in between advocates' extreme positions. Empirical study devoted specifically to this question could therefore help to improve decisionmaking on a recurring question in class actions.

review the individual circumstances of each class member's claim to resolve disputes about any remaining elements and defenses.[92] But if review of individual questions requires a mini-trial on thousands or millions of claims, doing so may be practically impossible; the case would outlive its participants.[93] Thus, regardless of whether certifying a class action would in some sense be desirable, there cannot be a class action if the resources and time are not available.[94] Desire should not obscure reality.[95]

A corollary to the point that courts have finite resources that in practice limit their ability to adjudicate class actions featuring substantial dissimilarity among claimants is that courts need to have a realistic sense of what they can accomplish before they certify classes. Decertification is always an available remedy for an improvident certification, but there are substantial costs to relying on that remedy rather than making the certification decision correctly in the first instance. Certification creates immediate settlement pressures and induces substantial investment in the case by the parties and the court. Certification also creates momentum that courts may be unwilling to halt. Thus, while courts have discretion to

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92. The practical ability of a court to resolve a complex dispute is often a function of the level of generality at which lawmakers define the applicable liability rule and the extent to which lawmakers resolve policy questions at the rulemaking stage rather than delegating these questions to courts for case-by-case consideration. *See* James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 916 (1982). The feasibility principle is thus not merely procedural in nature because it helps to illuminate shortcomings in the drafting of substantive rules that inhibit the effective integration of substantive rights with procedural remedies.

93. *See*, *e.g.*, Galloway v. Am. Brands, Inc., 81 F.R.D. 580, 585-86 (E.D.N.C. 1978) (estimating that adjudicating putative class members' individualized damage claims would "consume well-over 100 years"). In reality, century-long litigation is unlikely because the parties presumably would settle to avoid the expense of trial. However, distortions that dissimilarity would create in the anticipated trial process would affect the value of any settlements. *See supra* Part II.C.

94. Whether judicial resources are "available" is partly a function of a court's discretion because judges must decide how much of their time to allocate to each case on their docket. Courts applying the feasibility principle in circumstances where adjudicating a class action could be possible if sufficient resources were diverted from other cases will therefore face difficult questions about how to weigh the competing demands of multiple claimants for scarce judicial time.

95. The frustration that arises when the desire to certify a class confronts the reality that certification is impossible may motivate policymakers to tailor substantive law more closely to the resources that are available for enforcing it. For example, common law legal rules requiring proof of causation in toxic tort cases or reliance in fraud cases create management burdens that often preclude certification of class actions asserting tort or fraud claims, and thus limit the effectiveness of private law deterrents to corporate misconduct. Some commentators have therefore proposed altering common law causes of action to eliminate these elements. *See supra* note 3. Whether these proposals are desirable is a question of substantive tort policy, not a question of procedural class action policy.

second-guess themselves by decertifying classes, they seldom have an opportunity to do so and are in practice reluctant to do so.[96] Well-reasoned plans for managing class actions are therefore necessary before certification rather than after so that the powerful and potentially irreparable consequences of certification are not unleashed absent some confidence that the case can in fact be tried as a class action[97] or fairly settled consistent with the fidelity principle. Courts have ample flexibility to be imaginative when confronting management problems raised by individual questions of fact and law, but must recognize the fine line between healthy creativity and blind overconfidence.

An implication of this observation is that certification criteria should require courts to assess at the time of a certification decision whether class adjudication would be feasible in light of dissimilar questions of fact and law. The concept of "feasibility" is intentionally vague to give courts flexibility in approaching the task of managing complex claims. Factors for determining whether a management plan is feasible could include: (1) the time necessary to implement the plan; (2) the ability of the parties to adduce the evidence necessary to resolve disputed questions; (3) the extent to which the plan relies on questionable predictions or assumptions about how various stages of the litigation are likely to proceed; (4) the cost of resolving claims relative to available resources; (5) the consistency of the plan with applicable constraints on procedure, such as constitutional or statutory requirements for a jury trial; and (6) the likelihood that certification would facilitate a voluntary settlement (as opposed to a settlement negotiated in fear of a trial conducted in violation of the principles discussed in this Part) that would obviate an extensive use of judicial resources. These factors should be sufficiently flexible to ensure that courts are not forced to adjudicate class actions according to a cookie-cutter ideal of complex litigation procedures, sufficiently attuned to the settlement pressures that certification can create to ensure that the parties are free either to settle or not to settle depending on their desire to buy peace, and sufficiently firm to ensure

96. *See*, *e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1301 & nn. 188-89 (2002) ("When a trial judge believes that settlement is likely with certification, she has little incentive to decertify the class. Accordingly, defendants have little incentive to file motions to decertify, with the result that there should be few such motions and a high settlement rate – predictions consistent with the available data.") (citing Willging et al., *supra* note 10, at 175 tbl. 32)).

97. *Cf.* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.11 (1995) (discouraging "conditional" certification orders used to "defer" final certification decisions because of their "[u]ndesirable" practical consequences).

that courts have a realistic plan for extricating themselves from a class action before they leap into it.[98]

D. Synthesis of the Three Principles

The finality, fidelity, and feasibility principles discussed above suggest several criteria that can be used to test existing rules governing class certification and to formulate new rules. The principles are particularly helpful in guiding courts confronting proposed class actions where the answers to disputed questions may not be the same for each class member. Combining the need for a judgment (principle 1), with the need to ensure that each beneficiary of that judgment is entitled to it (principle 2), and with the need for a management plan for resolving individual issues within resource constraints (principle 3) helps to frame the potential significance of similar and dissimilar questions that the parties will ask the court to resolve. The three principles suggest that when a plaintiff asks a court to certify her as a representative of absent class members seeking damages, the court may do so only if it has a feasible plan for resolving factual and legal disputes regarding each element and defense applicable to each class member's claim and for eventually entering judgment for or against each class member. There must either be an opportunity for the parties to litigate individual claims or defenses, or a reason to believe that such an opportunity is not necessary to reach a judgment that accurately values class members' claims. The existence of individualized issues of fact and law unique to the circumstances of particular class members thus does not *necessarily* preclude certification if the court has a plan for coping with individual factual and legal inquiries. In *practice*, however, certification will not be possible when there is no manageable way of reaching a final judgment that resolves all factual and legal disputes relevant to each class member's entitlement to relief under applicable substantive law, and when one or more parties is unwilling to settle voluntarily.

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98. Conventional wisdom has until recently posited that the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), limits the power of judges to incorporate practical considerations such as feasibility into their certification analysis for fear of prematurely assessing the merits of class members' claims. However, recent scholarship and the modern trend of judicial decisions establish that courts may consider how a claim would be tried before deciding whether to certify it, even if such nominally procedural analysis requires addressing some of the substantive aspects of contested claims and defenses. For a general discussion of pre-certification "merits" analysis, see Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51 (2004).

As we will see in the next Part, the predominance test at the heart of Rule 23(b)(3) does not link the certification inquiry to either the finality or fidelity principles, and is only loosely connected to the feasibility principle. Despite the large stakes riding on certification decisions, the rule on which courts currently base such decisions does not formally account for any of the factors that this Part demonstrates are essential to properly deploying the class action device.

IV. INCONSISTENCIES BETWEEN CLASS CERTIFICATION PRINCIPLES AND EXISTING CLASS CERTIFICATION RULES AND DOCTRINE

This Part assesses how well existing certification criteria conform to the principles discussed in Part III. The unfortunate answer is that a wide gap separates principle and practice on the critical issue of how courts should assess similarity and dissimilarity among claims when deciding whether to certify proposed damages classes. The predominance test at the heart of Rule 23(b)(3) strives to balance the competing pull of similar and dissimilar elements within proposed class actions, but is inherently incapable of assisting courts in making principled certification decisions.

Section A explores the historical origins and role of the predominance rule, revealing that it was created from thin air in 1966 with virtually no explanation or guidance to courts. Section B analyzes the practical and conceptual defects of the predominance rule, explaining that it is inscrutably vague, not grounded in any principled or practical assessment of whether dissimilarity among claims creates a significant obstacle to certification, and premised on a balancing test that does not serve any useful purpose. Section C then reviews the typicality and manageability components of Rule 23 and concludes that they are not capable of supplementing the predominance test in addressing whether dissimilarity among class members' claims should preclude certification. Section D examines doctrine that courts have created to help apply the predominance test to recurring fact patterns, concluding that this doctrine shares the conceptual flaws of the predominance test that spawned it and provides an additional reason for replacing the concept of predominance with a more practical and principled alternative.

A. The Origins and Role of the Predominance Test

The predominance test was the culmination of a gradual evolution in class action rules from the broad and unstructured generalities of early equity practice toward more formal constraints on

judicial discretion.[99] The architects of the 1966 Federal Rules of Civil Procedure had an intuition that evaluating the significance of similar and dissimilar aspects of proposed class claims would be important and crafted the predominance test to codify that intuition. Yet the drafters never explained the meaning of their innovative new predominance standard, leaving courts and commentators to drift between competing visions of how goals of fairness and efficiency affected the significance of similarity and dissimilarity among claims and defenses.

Early federal rules governing class actions did not contain any criteria for evaluating the effect of dissimilar individualized issues on a court's decision about whether to permit a representative to litigate claims on behalf of an absent class. The first federal class action rule – Equity Rule 48, adopted in 1842 – focused on numerosity and the impracticability of joinder rather than similarity or dissimilarity among class members' substantive claims.[100] Rule 48 did not even mention commonality as a relevant factor, although the Supreme Court in 1853 read a commonality requirement into the rule.[101] In 1912, the Supreme Court renumbered Rule 48 as Rule 38 and rewrote it to include an explicit commonality requirement, although there was still no corresponding limitation on class litigation linked to the existence of individualized questions.[102] Equity Rule 38 survived until 1938, when law and equity procedures merged into the new Federal Rules of Civil Procedure. The new rules addressed class actions in Rule 23, which permitted certification of three categories of classes.

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99. For a discussion of the origins of nineteenth-century equity practice regarding group and representative litigation, see STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 213-20 (1987); Hazard, *supra* note 54, at 1858-1923; Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 262-87 (1990).

100. Rule 48 stated:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

42 U.S. (1 How.) 1v, 1vi (1842).

101. *See* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302 (1853) (class suit must pursue "an object common" to all class members).

102. Rule 38 stated that: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Order Promulgating Rules of Practice for the Courts of Equity of the United States, 226 U.S. 629, 659 (1912). The procedural codes of most states roughly tracked the language of Rule 38. *See* William Wirt Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878, 878 n.4 (1932) (reviewing code language and precedent from law and equity courts).

Only the so-called "spurious"[103] category of class actions explicitly required "a common question of law or fact," but it did not require any formal consideration of individualized questions.

The emphasis of early class action rules on commonality among claims without any corresponding focus on individuality was likely an artifact of the partial evolution of class actions from joinder principles and equity practice. The central inquiry in joinder cases usually involves identifying a single common issue, status, or right uniting otherwise distinct claims or claimants. The possibility that claims might be too distinct to litigate in a joined proceeding is a subsidiary question related to whether practical concerns warrant severance. In contrast, equity practice offered judges substantial flexibility in bifurcating resolution of common and individual questions to an extent not present in common law damages cases requiring trial by jury.[104] Early class action formulations apparently adapted joinder's fixation on commonality without developing a counterpart to the doctrine of severance, and extended equity's flexible treatment of concurrent common and individual questions into a modern context in which law and equity had merged and bifurcation was substantially more difficult. Class action rules thus evolved to focus on common issues that united class claims without formal consideration of individualized issues that divided class claims.

Emphasis on commonality at the expense of individuality persisted until the substantial redrafting of Rule 23 in 1966.[105] The 1966 revisions invented the concept of "predominance" to capture the importance of individual issues to a court's decision about whether to certify a class action seeking damages. The amended Rule 23(b)(3) permitted courts to certify a class only upon a finding that "questions of law or fact common to the members of the class predominate over

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103. The 1938 version of Rule 23 created three categories of class actions – "true," "hybrid," and "spurious" – based on the nature of the asserted substantive right. *See* James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised By The Preliminary Draft*, 25 GEO. L.J. 551, 571-76 (1937) (proposing and explaining the new class action rule). Commonality was not an explicit element of either the true or hybrid class action, although as a practical matter such actions were possible only when class members shared a substantial common interest. *See id.* For a summary of the practical and theoretical problems that plagued litigation under the 1938 version of Rule 23, see Joseph J. Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905 (1962).

104. *See* Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1300-02 (1932) (contrasting the power of law and equity courts in complex litigation).

105. The 1946 revisions to the Federal Rules of Civil Procedure added a note to Rule 23 discussing the effect of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), on shareholder derivative litigation, but did not amend the text of the rule or address questions about similarity and dissimilarity among class members' claims. *See* ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS OF THE UNITED STATES 24-29 (1946).

any questions affecting only individual members."[106] The federal class action rule thus for the first time explicitly recognized that courts must consider both common and individual questions when deciding whether class certification is procedurally appropriate for particular substantive claims.

The 1966 amendments did not define "predominate." The drafters' official notes and unofficial working papers likewise neither explain what the predominance concept was intended to mean nor identify its origin.[107] The notes suggest that courts should not certify classes when individual questions of fact or law are "material" or "significant,"[108] but do not offer any criteria for assessing materiality or significance or for comparing the materiality and significance of individual questions with the materiality and significance of common questions. Contemporaneous commentary about the 1966 amendments also does not illuminate the meaning of predominance despite the innovative nature of the concept and its central position in the new Rule 23(b)(3).[109]

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

107. The predominance test was developed without explanation at some point between November 1960 and March 1963. *Compare* Reporter's Memorandum on Proposed Amendments (Sub-Memorandum V at 4) (1960) (noting need to replace the 1938 version of Rule 23 but not proposing specific language), *with* Reporter's Memorandum on Proposed Amendments at EE-2 (Preliminary Draft, Mar. 15, 1963) (including the predominance test amongst proposed reforms to Rule 23). The explanatory memorandum accompanying the March 1963 draft did not explain the predominance test, which apparently was not considered controversial and may have appeared in earlier drafts (of which there is no record in the Advisory Committee's publicly available files). *See* Memorandum from Benjamin Kaplan & Albert Sacks to Advisory Committee on Civil Rules at 3-4 (Mar. 18, 1963). A contentious meeting of the advisory committee in late 1963 briefly alluded to the predominance test as being important, but did not explain what it was intended to mean and focused almost exclusively on other aspects of the proposed amendments to Rule 23. *See* Transcript of Advisory Committee on Civil Rules meeting on class actions (Oct. 31-Nov. 2, 1963). The notes to the 1964 preliminary draft of Rule 23 also omit any explanation of the origin or meaning of the predominance concept. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE (1964), *reprinted in* 34 F.R.D. 325, 387-95. Although this is pure speculation, the origin of the predominance concept may trace to an influential article by Zechariah Chafee, who proposed that one critical consideration for determining whether equity courts should resolve multiple related suits in a single forum was the "relative magnitude of the common questions and the independent questions." Chafee, *supra* note 104, at 1327. Chafee offered only minimal guidance about how to conduct this balancing inquiry, see ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 282-83 (1950), although he did suggest caution in extending the availability of representative suits beyond historical precedents featuring a high degree of commonality among claims, see *id.* at 215, 224.

108. FED. R. CIV. P. 23(b)(3) advisory committee's note (1966).

109. *See*, *e.g.*, Kaplan, *supra* note 1, at 390 (devoting one sentence to the predominance test in the course of a twenty-five page discussion of the new Rule 23: "a class action loses attractiveness as the individual questions are seen to have such scope or variety as to overload the action"); Kaplan, *supra* note 86, at 498 (describing the predominance inquiry as establishing the "tough" task of "sensing" "important themes" that run "pervasively through the entire

Although the drafters did not define "predominate," they did provide four factors to help courts apply the predominance test. Yet these factors did nothing to clarify the relationship between common and individualized questions in class litigation. The first sentence of Rule 23(b)(3) creates two tests: predominance ("questions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members") and superiority ("a class action [must be] superior to other available methods for the fair and efficient adjudication of the controversy").[110] The second sentence then lists four "matters pertinent" to "these findings," with "these findings" presumably referring to both the predominance and superiority inquiries identified in the prior sentence.[111]

The four listed factors in substance address only the question of superiority and have little relevance to assessing predominance. The first factor is "the interest of members of the class in individually controlling the prosecution or defense of separate actions."[112] This factor clearly bears on whether a class action is "superior" to alternatives, but does not provide practical guidance for assessing the relative predominance of common and individual questions of fact and law. The factor's emphasis on plaintiffs' "interests" seems to link the question of predominance to whether a knowledgeable plaintiff would prefer class adjudication to available alternatives, yet a plaintiff might prefer litigating alone merely because he values autonomy without disputing that a case involves substantial common questions, or he might favor free-riding as an absent class member without disputing that the case involves substantial individualized questions. A plaintiff's "interests" in controlling litigation therefore do not seem to have any bearing on whether common or individualized questions "predominate." The second factor is "the extent and nature of any litigation concerning the controversy already commenced by or against

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litigation"); Charles Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. INDUS. & COM. L. REV. 527, 533 (1969) (noting that the predominance inquiry is "more difficult" than the commonality inquiry but not elaborating on how to conduct it); Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1216 (1966) (describing the (b)(3) category as "pragmatic" but not defining the predominance inquiry); Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967) (noting that (b)(3) actions will involve both common and individual questions but not explaining how the predominance test should balance them); Charles W. Joiner, *The New Civil Rules: A Substantial Improvement*, 40 F.R.D. 359, 367 (1966) (describing "great and important" important innovations in Rule 23 without discussing predominance).

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

111. *Id.*; *see also* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 615 (1997) (linking the four factors to both predominance and superiority); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974) (same).

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

members of the class."[113] This factor instructs a court to incorporate empirical information about the conduct of related suits into its assessment of predominance (which the court presumably would have done anyway without being told), but fails to explain how. The factor seems to focus on the question of superiority by linking the availability of a class action to an assessment of the adequacy of alternative remedies, and does not add any insight into how a court should decide when a common question "predominates" over an individual question.[114] The third factor is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum."[115] This factor is obviously relevant to the superiority inquiry, but is circular when read in context of the predominance inquiry. Concentrating predominant common questions in a single forum is presumably desirable, while concentrating predominant individualized questions in a single forum is presumably undesirable, but that observation does not explain how a court is supposed to know which questions predominate in which circumstances. Finally, the fourth factor is "the difficulties likely to be encountered in the management of a class action."[116] This factor potentially offers limited assistance in applying the predominance test, and I therefore discuss it in Section C below. Thus, with the possible exception of the manageability factor, the four "matters pertinent" in Rule 23(b)(3) do not add any content to the otherwise undefined concept of predominance.

The rest of Rule 23 likewise fails to clarify or supplement the predominance inquiry. Aside from the predominance test, the only certification criteria that directly bears on the evaluation of individualized questions is the requirement in Rule 23(a)(3) that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." The typicality inquiry, coupled with the Rule 23(b)(3)(D) manageability factor, supplements the predominance inquiry but, as shown below in Section C, does not mitigate any of the deficiencies in the predominance concept. The

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113. FED R. CIV. P. 23(b)(3)(B).

114. This factor has added importance when the related suits are pending in state court because the Anti-Injunction Act limits the ability of federal courts to enjoin state proceedings, *see* 28 U.S.C. § 2283 (2005), and thus a federal court could conclude under Rule 23(b)(3)(B) that the pendency of related state court actions may pose coordination problems that would diminish the utility of a federal class action.

115. FED R. CIV. P. 23(b)(3)(C).

116. FED R. CIV. P. 23(b)(3)(D); *see also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974) ("Commonly referred to as 'manageability,' this consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit.").

typicality and manageability tests provide some clues about how individual issues should influence the (b)(3) certification calculus, but the determination of whether individual issues are significant rests primarily on whether a court believes that they "predominate" over common issues. The predominance test is for this reason the most hotly litigated of the (b)(3) certification factors and the one on which certification usually hinges.[117]

The 1966 version of Rule 23(b) remains operative today and for the foreseeable future. There are no pending legislative or administrative proposals to modify the Rule's criteria for certifying class actions. Substantial amendments to Rule 23 became effective on December 1, 2003, but none of the amendments addressed the 23(a) or 23(b) certification factors. Congress likewise recently adopted various class action reforms, but has focused on the scope of diversity jurisdiction and the fairness of settlements rather than on questions of similarity and dissimilarity among class members' claims.[118] Rule 23(b)(3) is therefore likely to remain frozen in its 1966 state unless commentators begin to question it and propose alternatives.

The conceptual problems in federal Rule 23 also undermine state class action rules. Predominance is a certification factor in forty-five of the forty-eight states with rules or statutes permitting class actions;[119] forty states essentially copy the predominance test from Rule 23,[120] and in five others the state rule is a close variant of the

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117. *See supra* note 10.

118. *See* Class Action Fairness Act, Pub. L. No. 109-2, §§ 3-4, 119 Stat. 4 (2005).

119. Mississippi and Virginia do not have rules or statutes authorizing class actions. California, Nebraska, and South Carolina permit class actions but do not require or suggest that courts consider predominance. *See* CAL. CIV. PRO. CODE § 382 (2005) ("[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."); NEB. REV. STAT. § 25-319 (2004) (same); S.C. R. CIV. PRO. 23 (multifactor certification test). *But see* CAL. CIV. CODE § 1781(b)(2) (West 2005) (requiring predominance in consumer class actions under CAL. CIV. CODE § 1780).

120. Thirty-nine states have rules or statutes requiring courts to consider predominance, and one state has added a predominance requirement through case law. *See* ALA. R. CIV. PRO. 23(b)(3); ALASKA R. CIV. PRO. 23(b)(3); ARIZ. R. CIV. PRO. 23(b)(3); ARK. R. CIV. PRO. 23(b); COLO. R. CIV. PRO. 23(b)(3); CONN. SUPER. CT. R. § 9-8; DEL. R. CIV. PRO. 23(b)(3); FLA. R. CIV. PRO. 1.220(b)(3); GA. CODE ANN. § 9-11-23(b)(3) (2003); HAW. R. CIV. PRO. 23(b)(3); IDAHO R. CIV. PRO. 23(b)(3); 735 ILL. COMP. STAT. 5/2-801(2) (2005); IND. R. TRIAL PRO. 23(b)(3); KAN. STAT. ANN. § 60-223(b)(3) (2005); KY. R. CIV. PRO. 23.02(c); LA. CODE CIV. PROC. ANN. art. 591(B)(3) (West 2005); ME. R. CIV. PRO. 23(b)(3); MD. R. CIV. PRO. 2-231(b)(3); MASS. R. CIV. P. 23(b); MICH. CT. R. 3.501(A)(1)(B); MINN. R. CIV. PRO. 23.02(c); MO. R. CIV. PRO. 52.08(b)(3); MONT. R. CIV. PRO. 23(b)(3); NEV. R. CIV. PRO. 23(b)(3); N.H. SUPER. CT. R. 27-A(a)(2); N.J. R. Ct. 4:32-1(b)(3); N.M. R. CIV. PRO. 1-023(C)(3); N.Y. CPLR § 901(a)(2) (McKinney 2005); OHIO R. CIV. PRO. 23(B)(3); OKLA. STAT. tit. 12, § 2023(B)(3) (West 2005); R.I. SUP. CT. R. CIV. PRO. 23(b)(3); S.D. CODIFIED LAWS § 15-6-23(b)(3) (Michie 2003); TENN. R. CIV. PRO. 23.02(3); TEX. R. CIV. PRO. 42(b)(4); UTAH R. CIV. PRO. 23(b)(3); VT. R. CIV. PRO. 23(b)(3); WASH. SUP. CT. CIV. R. 23(b)(3); WEST VA. R. CIV. PRO. 23(b)(3); WY. R. CIV. PRO. 23(b)(3); Crow v. Citicorp Acceptance Co., 354 S.E.2d 459, 464

federal rule.[121] The "typicality" and "manageability" factors discussed below have similarly seeped from Rule 23 into state law: typicality is a factor in forty-one states,[122] and manageability is a factor in thirty-eight states.[123]

The lack of attention to predominance and related concepts amidst the sound and fury of the debate over class action reform – which one commentator has analogized to a "holy war"[124] – is startling. One would have thought that the steadily increasing discussion of class actions since the last major rules amendment in 1966 would have included constant attention to and reevaluation of the basic principles that justify converting ordinary claims into class actions, and in particular to the method for assessing dissimilarity among class members' claims. Yet that scrutiny has not occurred. To the contrary, the advisory committee that reviews proposed amendments to the federal class action rule recently reached the seemingly inconsistent conclusions that: (1) the authors of the 1966 class action amendments "had little conception" of how the rule would operate in practice and recognized that it would "require re-examination after a period of experience," but (2) "questions surrounding certification standards were not ripe for rulemaking" thirty-five years later.[125] The amendments to Rule 23 that took effect

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(N.C. 1987) ("[A] 'class' exists under [North Carolina] Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.").

121. Predominance is a discretionary rather than required certification factor in five states. *See* IOWA CT. R. 1.263(e); N.D. R. CIV. PRO. 23(c)(1)(E); OR. R. CIV. P. 32(B)(3); PA. R. CIV. PRO. 1708(a)(1); Derzon v. Appleton Papers, Inc., No. 96-CV-3678, 1998 WL 1031504, at *3 (Wisc. Cir. Ct. July 7, 1998) (noting that the "predominance" test "finds an echo" in and "reflects a similar purpose" as state class action statute).

122. Of the forty-five states cited above in notes 120 and 121 that have adopted a predominance rule, Illinois, Iowa, North Carolina, North Dakota, and Wisconsin have not adopted a typicality requirement. In contrast, South Carolina requires typicality but not predominance. *See* S.C. R. CIV. PRO. 23(a)(3).

123. At least thirty-eight of the forty-five states that have adopted a predominance rule have also adapted a manageability rule; the exceptions are Arkansas, Connecticut, Illinois, Massachusetts, New Hampshire, North Carolina, and Wisconsin. *See supra* note 120. Kansas has adopted a manageability test by implication rather than explicitly. *See* KAN. STAT. ANN. § 60-223(b)(3)(C) (noting that court should consider "procedural measures which may be needed" in litigating the class action).

124. Miller, *supra* note 70, at 664.

125. REPORT OF THE CIVIL RULES ADVISORY COMMITTEE TO THE JUDICIAL CONFERENCE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 24-25 (rev. July 31, 2001), *reprinted in* 201 F.R.D. 586, 588-89. In fairness to the committee, amendments to rules as controversial as Rule 23 are extremely difficult to adopt. The minutes of advisory committee meetings during the 1990s reflect intermittent concern about predominance and related concepts, but there was no consensus on how to proceed and apparently the discussion did not lead to any concrete proposals. *See* Civil Rules Advisory Committee Minutes (Feb. 16-17, 1995) (observing that "[Rule] b(3) has no workable definition of predominance"); Civil Rules Advisory

in December 2003 track this conclusion by focusing on post-certification management rather on than on pre-certification concepts such as predominance.[126] The predominance concept thus remains far more undertheorized and overlooked then its importance would suggest.

B. Defects in the Predominance Concept

The predominance inquiry in Rule 23(b)(3) commits courts to answering a meaningless question, and then offers them no guidance for doing so. At the outset, the test is needlessly vague because it fails to communicate why the relationship between common and individual questions is conceptually and practically important, and fails to identify principles that might guide courts in assessing the relationship. Aside from being vague, the predominance test is also incoherent because the balancing process it envisions seeks to compare two incomparable values. The answer to the question of whether common or individual issues predominate in a particular case is meaningless because the practical implications of individual issues can defeat certification regardless of how individual issues relate in the abstract to common issues, and regardless of the efficiencies that might arise from resolving common issues in a single proceeding. Learning how an individual question relates to a common question on some indeterminate balancing scale does not reveal any useful information about the significance of the individual question and cannot assist in determining whether a court should certify a proposed class.

An initial problem with the concept of predominance is that it is has no generally accepted meaning, leading to substantial confusion and inconsistency in judicial efforts to apply it. A consequence of the drafters' decision not to define "predominate" in the text or notes to the 1966 amendments to Rule 23 is that commentators were left to divine the concept's meaning and purpose without any substantial guideposts. The effect of the lack of guidance is evident in the leading civil procedure and class action treatises, which offer differing conceptions of how courts should assess common and individual issues when deciding whether to certify a class.[127] The lack of any consensus

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Committee Minutes (Mar. 20-21, 1997) (briefly discussing whether Rule 23(b)(3) should be amended to include a "common proof" or "common evidence" requirement); Civil Rules Advisory Committee Minutes (May 1-2, 1997) (same).

126. *See*, *e.g.*, FED. R. CIV. P. 23(e) (new provisions governing review of settlements); FED. R. CIV. P. 23(h) (new provision governing fee awards in class actions).

127. *See*, *e.g.*, 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 4:21, 4:25 (4th ed. 2004) (stating that the predominance and superiority factors "blend" and describing

among commentators spills over to judicial opinions attempting to apply the predominance test. Despite the critical importance of predominance analysis in deciding whether to certify (b)(3) classes, courts apply the test in a myriad of vague and distinct formulations, finding predominance when common issues of liability are "central,"[128] "significant," [129] or "overriding,"[130] or when there is a "common nucleus of operative fact,"[131] or when "resolution of one issue or a small group of them," even if not "conclusive," will "so advance the litigation that they may be fairly said to predominate,"[132] or when common liability questions are the "dominant core"[133] or "most important"[134] aspect of a case, or when common questions will require "most of the efforts of the litigants and the court"[135] or will "outweigh"[136] individual questions, or when proving common questions would require "the same quantum of evidence" even if the size of the class were expanded or contracted,[137] or when issues subject to "generalized proof" are "more substantial" than issues subject to individualized proof.[138] Alternatively, courts sidestep the definitional problem by ignoring it and jumping directly into predominance analysis without articulating a guiding standard.[139] The *Manual for Complex Litigation* likewise fails to fill the definitional void left by Rule 23 and does not demystify the predominance test. Indeed, the Manual's thirty-seven-page discussion of class actions does not discuss the predominance standard at all, and instead fosters confusion by suggesting that class definitions can

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at length the standards that courts should not use in assessing predominance without identifying a standard that should be used); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.44 (3d. ed.) (noting that the predominance inquiry is "pragmatic" rather than "precise"); 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1778 (3d ed. 2005) (reviewing several distinct judicial approaches to predominance without endorsing any particular test).

128. *See*, *e.g.*, Radmanovich v. Combined Ins. Co., 216 F.R.D. 424, 435 (N.D. Ill. 2003).

129. *See*, *e.g.*, Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986).

130. *See*, *e.g.*, *In re* Workers' Comp., 130 F.R.D. 99, 109 (D. Minn. 1990).

131. *See*, *e.g.*, Clark v. Bonded Adjustment Co., 204 F.R.D. 662, 666 (E.D. Wash. 2002) (citation omitted).

132. *See*, *e.g.*, *In re* Sch. Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986).

133. *See*, *e.g.*, *In re* Energy Sys. Equip. Leasing Securities Litig., 642 F. Supp. 718, 752 (E.D.N.Y. 1986).

134. *See*, *e.g.*, Chiang v. Veneman, 213 F.R.D. 256, 263 (D.V.I. 2003).

135. *See, e.g.*, Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 434 (Tex. 2000) (citations omitted).

136. *See, e.g.*, *In re* West Virginia Rezulin Litig., 585 S.E.2d 52, 71 (W. Va. 2003).

137. *See*, *e.g.*, Klay v. Humana, Inc., 382 F.3d 1241, 1255 (11th Cir. 2004).

138. *See*, *e.g.*, Moore v. Painewebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002).

139. *See*, *e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (criticizing the district court's "incomplete and inadequate predominance inquiry" without identifying a framework to guide appellate review).

encompass "diverse interests" without explaining how courts should assess the permissible scope of diversity.[140]

The Supreme Court could have helped ease confusion by clarifying the meaning of the predominance rule (which the Court itself promulgated),[141] but instead amplified interpretative uncertainty by blurring the distinct elements of Rule 23 into a single vague test while simultaneously condemning the subjectivity in certification analysis that the Court's own doctrine creates. The Court's opinion in *Amchem Products, Inc. v. Windsor*[142] exemplifies the problem. The Court held in *Amchem* that the Rule 23(a)(2) commonality test blurs into the Rule 23(a)(3) typicality test,[143] that the typicality test blurs into the Rule 23(a)(4) adequacy test,[144] and that the adequacy test blurs into the Rule 23(b)(3) predominance test.[145] These observations led the Court to collapse the commonality, typicality, adequacy, and predominance inquiries into a search for "unity"[146] and "cohesion"[147] within the proposed class. Yet the Court did not develop any standards that might help judges to evaluate the relative significance of unity and disunity (or similarity and dissimilarity) among claims and defenses. The Court achieved this reduction of Rule 23 into a "unity and cohesion" test while simultaneously repudiating the tendency of district courts to reduce certification analysis to a "gestalt" and "chancellor's foot" assessment of fairness.[148] Yet the Court's own focus on "unity" embodies precisely the sort of impressionistic analysis that the Court purports to have

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140. MANUAL FOR COMPLEX LITIGATION, *supra* note 97, § 30.15.

141. The Rules Enabling Act, 28 U.S.C. § 2072(b) (2005), delegates to the Supreme Court responsibility for promulgating rules of civil procedure subject to a potential congressional veto. The Supreme Court in turn delegates responsibility for proposing rules to the Judicial Conference of the United States Standing Committee on Practice and Procedure, which further delegates responsibility to an Advisory Committee on Civil Rules.

142. 521 U.S. 591 (1997).

143. *Id.* at 626 n.20 (citing Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982):

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement.

144. *Id.*

145. *Id.* at 621 (noting relationship of Rule 23(b) to the question of whether "absent members can fairly be bound by decisions of class representatives"); *id.* at 623 ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.").

146. *Id.* at 621 (The "dominant concern" of Rules 23(a) and 23(b) is "whether a proposed class has sufficient unity.").

147. *Id.* at 623.

148. *Id.* at 621.

rejected. The Court then added that the predominance inquiry is "demanding,"[149] but did not articulate any criteria – such as the criteria in Part III above – that judges could use in implementing the "demanding" quest for "unity." The Court in *Amchem* thus had the proper intuition – that dissimilarity is important – but reacted to that intuition with insufficient focus and clarity. Indeed, the *Amchem* opinion is a step backward in the nearly forty-year effort of judges and commentators to understand the meaning of predominance because it layers an additional set of inscrutable concepts – unity and cohesion – on to an already inscrutable rule.

The Court's few other class action decisions are no more helpful than *Amchem* on the question of predominance. In fact, a striking aspect of the Court's burgeoning class action jurisprudence is that the Court assiduously avoids reviewing certification criteria – except as these criteria relate to conflicts of interest among class members, which is an issue that seems to preoccupy the Court –[150] focusing instead on other areas of class action doctrine such as standing and mootness,[151] diversity jurisdiction,[152] tolling of statutes of

149. *Id*. at 624; *see also* Zahn v. Int'l Paper Co., 414 U.S. 291, 306-07 (1973) (Brennan, J., dissenting) (stating that the predominance test provides "ample assurances" that claims are not "unrelated").

150. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 852-59 (1999) (reversing approval of class action settlement of asbestos claims ostensibly because the trial court failed to properly apply certification standards governing suits against limited funds, but also because of perceived conflicts of interest among class counsel, class members with present damages, and class members likely to accrue damages in the future); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997) ("In significant respects, the interests of those within the single class are not aligned."); E. Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (holding that "the named plaintiffs' failure to protect the interests of class members by moving for certification" and demand for a remedy in "conflict" with the preferences of class members rendered them inadequate class representatives); Sosna v. Iowa, 419 U.S. 393, 403 n.13 (1975) (finding that the class representative was adequate but noting that "[t]here are frequently cases in which it appears that the particular class a party seeks to represent does not have sufficient homogeneity of interests to warrant certification"); Hansberry v. Lee, 311 U.S. 32, 45 (1940) ("[S]election 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."); Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853) ("In all cases where . . . a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried."); *see also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part) (noting "the centrality of the procedural due process protection of adequate representation in class action lawsuits").

151. *See* Gratz v. Bollinger, 539 U.S. 244, 261-68 (2003) (rejecting standing and adequacy challenges to named plaintiff in class action opposing affirmative action in undergraduate admissions); County of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991) (reaffirming *Gerstein*, *infra*); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980) ("an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied;" mootness instead depends on how

limitations,[153] personal jurisdiction and choice of law,[154] the preclusive effect of class action judgments,[155] the formality of certification

certification issues are resolved on appeal); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 (1980) ("[E]ntry of judgment in favor of named plaintiffs over their objections did not moot their private case or controversy" or prevent them from appealing the denial of class certification); Kremens v. Bartley, 431 U.S. 119, 134-35 (1977) (holding that when a change in substantive law moots the claims of the class representative and a substantial number of class members, courts should defer ruling on the merits of remaining claims within the "fragmented" class pending reconsideration of whether the class meets the Rule 23(a) certification criteria); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) ("That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent'" (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975))); Franks v. Bowman Transp. Co., 424 U.S. 747, 755 (1976) ("Given a properly certified class action . . . mootness turns on whether, in the specific circumstances of the given case at the time it is before this Court, an adversary relationship" exists to ensure a sharp presentation of issues); Gerstein v. Pugh, 420 U.S. 103, 110-11 & n.11 (1975) (holding that certification of a class action after the representatives' claims have become moot does not render the class claims moot when the nature of the claim is inherently transitory); *Sosna*, 419 U.S. at 399-403 (holding that resolution of the named plaintiffs' claim after certification of a class does not moot the claims of class members); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974) ("To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents"); O'Shea v. Littleton, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); Hall v. Beals, 396 U.S. 45, 48-49 (1969) (holding that a plaintiff cannot revive claims that were moot when filed by denominating the suit as a class action on behalf of members with live claims).

152. *See Zahn*, 414 U.S. at 301 ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case."); Snyder v. Harris, 394 U.S. 332, 336-37 (1969) (holding that the claims of individual class members cannot be aggregated to satisfy the jurisdictional amount in controversy requirement). The Court is currently reconsidering the questions deciding in *Zahn* in Exxon Mobil Corp. v. Allapattah Servs., Inc., Docket 04-70.

153. *See* Chardon v. Soto, 462 U.S. 650, 661-62 (1983) (holding that federal law requires at a minimum that the filing of a class action suspends the limitations period on absent class members' claims, but that state law can supplement federal tolling by permitting renewal of the limitations period after denial of certification); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983) ("The filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to interveners.") (internal citation omitted); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.").

154. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) ("[A] forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant," if it provides "minimal procedural due process protection"); *id*. at 821 ("[W]hile a State may . . . assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law . . . ").

155. *See Matsushita Elec. Indus. Co.*, 516 U.S. at 380-86 (holding that state court class action settlement releasing claims exclusively within the jurisdiction of federal courts precludes class

analysis,[156] the form and cost of notice,[157] the appealability of orders relating to certification and resolution of class claims,[158] and miscellaneous questions with no connection to predominance.[159] One would have expected that the thousands of class actions litigated in

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members from relitigating the federal claims in federal court); Martin v. Wilks, 490 U.S. 755, 761-69 (1989) (holding that consent decree resolving class action claims does not preclude non-members of the class from challenging classwide remedies); Cooper v. Fed. Reserve Bank, 467 U.S. 867, 876-81 (1984) (holding that a judgment rejecting class action claims alleging that a defendant engaged in a pattern or practice of employment discrimination does not preclude individual class members from pursuing discrimination claims unique to their individual circumstances); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921) ("If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented.").

156. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (certification requires a "specific presentation" and "rigorous analysis" of Rule 23 factors); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976) (holding that fact that all parties "treated" the case as a class action does not make the case a class action absent certification under Rule 23); Baxter v. Palmigiano, 425 U.S. 308, 312 n.1 (1976) ("Without such certification and identification of the class [under Rule 23], the action is not properly a class action" even if informally "treated" as such); Bd. of Sch. Comm'rs v. Jacobs, 420 U.S. 128, 129-30 (1975) (finding that class was not properly certified where district court failed to follow procedures in Rule 23(c)).

157. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350, 356 (1978) ("[W]here a defendant can perform one of the tasks necessary to send notice, such as identification, more efficiently than the representative plaintiff, the district court has discretion to order him to perform the task" but "ordinarily there is no warrant for shifting the cost of the representative plaintiff's performance of these tasks to the defendant."); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-79 (1974) (holding that plaintiffs must bear the cost of sending individual notice to identifiable class members).

158. *See* Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (holding that absent class members who object in the district court to the fairness of a settlement may appeal from an order approving the settlement without first intervening as a named party); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 336 (1980) ("[T]he denial of class certification [is] an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment."); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469-77 (1978) (holding that certification orders are not appealable under the collateral order or "death knell" doctrines); *Oppenheimer Fund*, 437 U.S. at 347 n.8 (an "order allocating the expense of identification [of class members for purposes of notice is] appealable under the collateral-order doctrine"); United Airlines, Inc. v. McDonald, 432 U.S. 385, 394-95 (1977) (holding that when the district court denies class certification, an absent member may wait until after entry of judgment on the named plaintiffs' individual claims before filing a motion to intervene for the purpose of appealing the district court's denial of class certification).

159. *See*, *e.g.*, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453-54 (2003) (plurality opinion) (analyzing applicability of contractual arbitration clause to class action claims); Gulf Oil Co. v. Bernard, 452 U.S. 89, 104 (1981) ("We recognize the possibility of abuses in class-action litigation, and agree with petitioners that such abuses may implicate communications with potential class members. But the mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Rules.") (footnote omitted); Evans v. Jeff D., 475 U.S. 717, 726 (1986) ("Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed"); Boeing Co. v. Gemert, 444 U.S. 472, 480-82 (1980) (permitting class counsel to claim attorney fees from the common damages fund created for class members).

federal court would have generated at least a few grants of *certiorari* to guide lower courts in applying the predominance test, but such review has not occurred,[160] and "predominate" continues to lack an authoritative judicial gloss.

Aside from being vague, the predominance test is not grounded in any principle that could guide courts in applying it to the facts of particular cases. Even if "predominate" had a precise and authoritatively determined meaning, courts would still need to know *why* common issues and individual issues are important in order to know in any particular case which predominates over the others.[161] For example, if the animating principle of predominance is a need to promote efficient resolution of disputes, then courts might be relatively more willing to tolerate individual variations among claims as the price of achieving rough justice in complex cases. Alternatively, if the predominance concept is intended to provide the defendant with a fair opportunity to defend itself, then courts would be relatively less impressed with the volume of common questions and more interested in the practical effect of individual issues on accurate adjudication of class claims and defenses. However, rather than link the predominance inquiry to a broader purpose, Rule 23(b)(3) does not specify any purpose. The Advisory Committee notes to the Rule try to fill this vacuum by linking the predominance inquiry to both fairness and efficiency, but fail to explain how judges should reconcile these often conflicting goals.[162] Predominance analysis was thus predestined to stumble aimlessly between competing ends without doing justice to either.

The predominance inquiry is further flawed because it is not linked to any practical assessment of how individual questions of fact or law would affect a class action trial. As explained in Part III, issues of law or fact unique to individual class members are significant because they may pose obstacles to entering a classwide judgment

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160. *See*, *e.g.*, *Roper*, 445 U.S. at 329 n.2, 331 (denying petition for writ of *certiorari* on question of whether certification was consistent with Rule 23's predominance test, granting writ on question of whether the representative plaintiffs' claims were moot, and remanding to the district court after finding that claims were live without addressing the merits of the court of appeals' predominance analysis); Exxon Mobil Corp. v. Allapattah Servs., Inc., Docket 04-70 (granting *certiorari* on question related to scope of diversity jurisdiction in class actions, but denying *certiorari* on a question related to application of Rule 23's predominance test).

161. *Cf.* Robert A. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 97 (1994) (noting the need for procedural rules to contain "general norms" for guiding judicial discretion).

162. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note (1966) ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

(finality), to adjudicating claims and defenses under the appropriate substantive law (fidelity), and to developing a realistic plan for managing litigation within resource constrains (feasibility). Aside from the unhelpful "matters pertinent" discussed above (and below in Section C), the predominance test does not explicitly recognize the foregoing concerns – or *any* concerns – that might justify denying certification when individualized issues are salient. As a result, the strong policy arguments in favor of class actions when a case raises important common questions often overshadow relatively amorphous concerns about individualized inquiries and lead courts to certify classes without any realistic sense of how to cope with the dissimilarities among class claims. The problem is then magnified because no other aspect of Rule 23 picks up where predominance leaves off by explaining how to handle individual issues within the context of a certified class action.[163] The predominance test read in conjunction with the rest of Rule 23 thus has the twin effects of encouraging courts to discount the significance of individual issues before certification and then to ignore individual issues after certification.

The predominance concept would remain fatally flawed even if all of the foregoing defects could be repaired because the concept's premise is incoherent. If the meaning of predominance were clarified with an authoritative interpretation grounded in principle and linked to practical guidance, the test would still require courts to balance the inherently unbalanceable. Commentators and courts do not attach much inherent meaning to the word "predominate" in Rule 23(b)(3), but generally agree that the word connotes a comparative assessment and thus requires judges to balance the significance of common and

163. Rule 23(c)(4)(B) ostensibly addresses the problem of dissimilarity among class members by permitting the court to divide a class into subclasses. However, relying on subclasses is an ineffective alternative to replacing the predominance test. First, Rule 23 does not offer any criteria for assessing the permissible degree of dissimilarity within a subclass, and thus Rule 23(c)(4)(B) replicates the defect in Rule 23(b)(3). Second, subclassing accommodates variances among homogenous *groups* of class members, but does not explain how to handle issues that require review of *individual* class members' circumstances. For example, subclasses would be useful in a product-liability class action if the only contested issue were whether versions of the product produced in different years shared the same defect. In that case, the court could establish a subclass for purchasers of each year's version, substituting several homogenous subclasses for the otherwise heterogeneous original class. In contrast, if the only contested issue were damages, and if proof of the existence or amount of damages depended on evidence unique to each class member, then subclasses would not fill the void left by the failure of the predominance test to account for significant dissimilarity among claims and defenses. Finally, presenting the facts of multiple distinct subclasses to a single jury may mitigate, but would not eliminate, the cherry-picking and claim fusion problems that arise from jurors' cognitive inability to parse individualized issues in complex litigation. *See generally* sources cited *supra* note 21.

individual questions when deciding whether to certify a class.[164] Balancing common and individual questions is a pointless exercise that confuses the reasons that class actions are attractive in general with the reasons that class actions are viable in particular cases. Class actions are attractive mechanisms for resolving disputes because the existence of a common question uniting otherwise disparate claims can create an economy of scale that overcomes collective action problems, mitigates the defendant's resource advantages, and permits efficient resolution of the issues common to class members. But as explained in Part III, class actions are viable only when the individual issues that accompany common issues are also amenable to resolution within the class action framework. The existence of common questions is thus a necessary but not a sufficient condition for certifying a class, while the existence of individualized issues beyond some threshold is a sufficient reason to deny certification. Certification standards should therefore focus on determining whether individual issues exceed a threshold level of significance – and on defining what that threshold might be – rather than on comparing common and individual questions in a gestalt balancing process. The predominance test thus systematically understates the importance of individual questions by trying to balance them against common questions instead of evaluating them independently.

In addition to understating the importance of individual questions, the predominance test also overstates the importance of common questions. The predominance test in theory permits courts to deny certification in cases where individual issues can be resolved within the parameters discussed in Part III, but nevertheless "predominate" over comparatively less significant common questions. Yet other provisions of Rule 23 address this situation more directly than the predominance test, and if those provisions would permit certification there is no apparent reason why a predominance analysis would add any useful information to the certification calculus. For example, suppose that a court concludes that a proposed class action would allow "numerous" class members represented by an "adequate" and "typical" plaintiff to litigate a "common" question of fact in a

164. *See*, *e.g.*, 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.44 (3d. ed. 1999) (predominance inquiry "focuses on the number and significance of common questions, as compared to individual issues"); Hines, *supra* note 58, at 760 (stating that the predominance inquiry requires a determination of whether "class members' claims are more dissimilar than alike"). *But see* Romberg, *supra* note 58, at 287-88 (suggesting that the predominance inquiry does not involve an assessment of whether common issues "outweigh" individual issues and instead requires courts to determine as a "threshold" matter whether adjudicating the proposed common questions would produce a "meaningful benefit").

manner that is "superior" to available alternatives. Further suppose that the court identifies significant questions of law and fact unique to individual class members' claims, but develops a feasible and substantively acceptable method to cope with these individual questions within the context of a class action. In such a case there would be no reason to care whether common questions "predominate." Whatever issues in some abstract sense "predominate," the class action would still be potentially useful and would be consistent with the principles discussed in Part III. The predominance test is thus pointless in cases where individual issues are insufficient to defeat certification of their own force and common issues are sufficient to satisfy the Rule 23(a)(2) commonality test and the Rule 23(b)(3) superiority test.[165] In contrast, the predominance test is moot when common questions are insufficient to render class actions "superior" to alternatives. Either way, in circumstances where individualized issues do not impose sufficient obstacles to render certification impracticable, the predominance test does not accomplish anything useful that the commonality and superiority tests do not already accomplish more directly.[166]

The predominance test thus fails to achieve its apparently intended purpose. The drafters of the 1966 amendments to Rule 23 recognized that claims brought as putative (b)(3) class actions would often entail both common and individualized elements, and that courts would need a mechanism to determine when claims were sufficiently similar or too dissimilar to warrant certification for class treatment. The mechanism that the drafters developed was the predominance test, but that test is too vague, too unprincipled, too impractical, and too linked to a pointless balancing inquiry to provide any meaningful guidance to courts. As we see in Section C, no other provision in Rule 23 can pick up the slack left by the conceptual implosion of the predominance test.

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165. One could argue that common questions by definition predominate when individual questions are manageable and class adjudication is superior, but that would confirm that the predominance test does not add anything to Rule 23(b)(3)'s superiority and manageability tests.

166. Predominance could arguably be a factor in determining superiority, but is best excised from the class action vernacular for the reasons noted in the text: it is vague, unprincipled, and impractical. (The superiority test is also vague, unprincipled, and impractical, but that is an issue for another article, and in any event would not justify introducing additional imprecision by linking superiority to predominance.)

C. The Failure of Additional Rule 23 Certification Criteria to Cure Defects in the Predominance Standard

The predominance test is the only element of Rule 23's certification criteria that explicitly refers to the significance of individual issues. The typicality[167] and manageability[168] inquiries indirectly address dissimilarity among class members' claims, but neither is an effective substitute or supplement for predominance.

1. Typicality

Typicality is a concept that sounds sensible but means little.[169] The typicality inquiry apparently codifies the unobjectionable sentiment that the representative of a class supposedly pursuing a common claim should not himself pursue an atypical claim, apparently because the 1966 drafters felt that such atypicality would drive a wedge between the goals and interests of the agent and his principals.[170] Yet Rule 23's requirement that class representatives be "adequate" more effectively captures this desire to link the interests of class representatives and class members by grounding the linkage in relatively well-developed principles of due process rather than in comparatively undefined notions of what is "typical." If a class representative will adequately represent class members consistent with due process, then it is difficult to see why somebody concerned with agency costs should care that the representative is atypical, especially given the consensus among commentators that a class representative is merely a figurehead in class litigation and thus not worth substantial judicial scrutiny.[171] Likewise, if the class

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167. FED. R. CIV. P. 23(a)(3).

168. FED. R. CIV. P. 23(b)(3)(D).

169. *See*, *e.g.*, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.2 (2d. ed. 1993) ("It is not entirely clear what the rulemakers intended to achieve with this requirement."); Issacharoff, *supra* note 1, at 354 (noting "amorphous" nature of the rule).

170. *See* Kaplan, *supra* note 1, at 387 n.120 ("[The typicality requirement] emphasizes that the representatives ought to be squarely aligned in interest with the represented group."). The Supreme Court has thoroughly muddled the meaning of the typicality test to the point where it no longer appears to have any unique content. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982):

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement . . . .

171. *See*, *e.g.*, Coffee, *Accountability*, *supra* note 1, at 406 ("Commentators have generally agreed that the representative in a class action is more a figurehead than an actual decisionmaker.").

representative is so inadequate that allowing him to act as an agent for absent class members would violate due process, then his "typicalness" would not be a consolation.

The typicality requirement at best promotes in a limited fashion the class action's goal of efficiency by ensuring that litigation focuses directly on the core common issues in a case without the distraction of atypical satellite issues. Analysis of typicality can thus be understood as an effort to control the potential sprawl of class actions by limiting the range of issues for the court to address. From this perspective, already complicated class litigation should not be needlessly broadened to include claims by class members that the named representative does not raise, or claims by the named representative that the class does not raise.[172] This practical aspect of the typicality test may also serve as a prudential adjunct to the general principle of Article III standing that "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."[173] Nowhere in this vision of typicality, however, is there any suggestion that monitoring the relationship between the claims of the representative and the claims of the class is an effective means of determining whether class claims are sufficiently similar to justify certification. To the contrary, the typicality inquiry is ill-suited to assess dissimilarity among class members' claims and thus cannot fix the deficiencies of the predominance test.

The flaw in the typicality test when considered in light of defects in the predominance test is that the typicality inquiry compares class representatives to absent class members without comparing absent class members to each other. Typicality analysis therefore tolerates substantial variation among class members' circumstances and cannot fill the void that a more effective version of the predominance test would occupy. Moreover, the typicality and predominance factors in practice speak past each other. The remedy when a class representative is atypical is often to find a new class representative, but not to change the class definition. The initial atypical representative thus remains a member of the class. One would expect that the atypical claimant's continued membership in the class would raise a red flag about predominance; after all, if individual questions of law or fact unique to the proposed class representative are so salient as to render claims encompassed by the

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172. *Cf.* Gen. Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980) ("The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims.").

173. Blum v. Yaretsky, 457 U.S. 991, 999 (1982).

class definition atypical, then perhaps these individual questions likewise "predominate" and render class claims too dissimilar for class action treatment.[174] Yet courts and commentators have not drawn this seemingly clear connection between the typicality and predominance inquiries because the connection appears nowhere in the text of Rule 23, which does not link the inquiry into a representative's typicality with the broader question of dissimilarity among the claims of absent class members. The Rule 23(a) typicality factor thus cannot overcome the defects in the Rule 23(b) predominance factor.

2. Manageability

The manageability inquiry in Rule 23(b)(3)(D) holds some promise for helping to grapple with questions of similarity and dissimilarity, but ultimately is not sufficient in its present form. Individual questions of fact or law unique to particular class members pose obstacles to the efficient management of a class action, and thus assessment of the manageability of a class action could be an opportune time to consider the significance of dissimilarity. However, two problems undermine the appeal of using 23(b)(3)(D) manageability analysis to patch holes in the predominance inquiry. First, amongst the mischief that individual questions of law or fact create when embedded in class actions are attempts at "management" that violate substantive law or due process, such as attempts to presume individual facts out of existence or efforts to defer individual issues to post-judgment claims proceedings without allowing a complete presentation of defenses.[175] Using the manageability inquiry to control the extent of dissimilarity among class claims is thus analogous to asking the fox to guard the henhouse. Absent some principled guidance for determining whether a management device is substantively acceptable – which Rule 23 currently does not provide – analysis of manageability is as likely to create problems as it is to prevent them. Second, the manageability inquiry is tied to the superiority inquiry as well as the predominance inquiry. The comparative nature of the superiority inquiry replicates the balancing approach of the predominance test and thus tends to share the defects of the predominance test in evaluating the independent significance of

174. The fact that a proposed class representative is atypical should be particularly troubling to courts because lawyers who finance and initiate class action litigation usually hand-pick the representative. If lawyers are unable to find a representative whose circumstances typify those on whose behalf the lawyers want to litigate, a court should be concerned about whether there is a properly defined class encompassing sufficiently similar claims.

175. *See supra* notes 24 and 28.

individual questions of law or fact. The superiority inquiry also presupposes that a class action is one of several "available methods for the fair and efficient adjudication of the controversy."[176] Analysis of superiority thus presumes that a class *could* be certified and asks whether it *should* be as a matter of judicial discretion. The questions about dissimilarity that I address in this Article relate to the antecedent question of whether a class action is even "available" in particular circumstances, and thus the superiority rule and its attendant manageability inquiry are not a relevant source of guidance. Accordingly, a modified form of manageability inquiry (as I propose in Part V) might help solve or prevent problems related to dissimilarity among claims in proposed class actions, but the present incarnation of the manageability test as a vague adjunct to both the predominance and superiority factors in Rule 23(b)(3)(D) cannot overcome the defects of the predominance test.

D. Doctrinal Consequences of Judicial Reliance on Predominance

The analysis in this Part has so far sought to identify intrinsic defects in the predominance rule related to its inscrutability and to the incoherence of the balancing inquiry at its conceptual core. This Section seeks to confirm the prior theoretical analysis by reviewing practical applications of the predominance test to determine if the test's conceptual flaws have infused the doctrine that courts have developed to ensure procedural consistency when handling recurring fact patterns in Rule 23(b)(3) litigation. Not surprisingly, predominance doctrine reflects – and in fact amplifies – the conceptual flaws in the underlying rule that the doctrine seeks to implement. In particular, doctrine addressing three critical and recurring issues highlight the need to integrate more principled and practical guidelines into the Rule 23(b)(3) certification inquiry. These three issues involve the implications for certification of individualized evidence of damages, individualized defenses to liability, and conflicts among applicable state laws.

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

1. Doctrine De-emphasizing Individualized Damages

The analysis in Part III establishes that questions related to proving and calculating individual class members' damages could raise significant obstacles to the principled resolution of class claims. If the applicable substantive law (the fidelity principle) links a class member's entitlement to judgment (the finality principle) to proof of loss in a reasonably precise amount, then practical resource constraints (the feasibility principle) may preclude the court from adjudicating contested damages claims as a class action, especially as the size of the class – and thus the number of damages calculations – grows into the thousands or millions. The problem would be even more acute if there is a contested question of comparative fault, in which case the amount of individual damages would be a function of individual liability, which would complicate or preclude efforts to streamline class litigation by litigating liability issues as if they were common to the entire class.[177] The existence of individualized evidence relevant to proving and calculating damages is thus a factor that courts should consider before deciding whether to certify a class.

The doctrine that courts have developed to assess the propriety of certifying common questions despite the need for individualized damages calculations highlights the flaws at the heart of the predominance balancing concept. The general rule in most jurisdictions is that individualized damages do not defeat certification if questions of liability otherwise predominate.[178] This doctrine is

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177. *See* Nagareda, *Preexistence*, *supra* note 1, at 239-41 (noting that analysis of damages in class actions governed by comparative fault principles requires revisiting evidence from the liability phase of litigation).

178. *See*, *e.g.*, Klay v. Humana, Inc., 382 F.3d 1241, 1260 (11th Cir. 2004) ("It is primarily when there are significant individualized questions going to liability that the need for individualized assessments of damages is enough to preclude 23(b)(3) certification"); Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003) ("Where, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain"); *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 139 (2d Cir. 2001) (citing numerous cases); State *ex rel.* Am. Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483, 488 (Mo. 2003) (en banc) (holding that "[t]he need for inquiry as to individual damages does not preclude a finding of predominance," finding the liability question to be "common," and not addressing the practical significance of individualized damages questions); *In re* Bell Atl. Corp. Sec. Litig., 1995 WL 733381, at *6 (E.D.Pa. Dec. 11, 1995) ("To determine whether common questions predominate, the court's inquiry is directed primarily towards the issue of liability; individual questions of damages will not preclude class certification."). Courts will sometimes deny certification when damages questions are highly individualized even if liability issues present common questions. *See*, *e.g.*, Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 306 (5th Cir. 2003) (holding that although "[e]ven wide disparity among class members as to the amount of damages suffered does not necessarily mean that class certification is inappropriate," on the facts of the particular case a need for "individualized damages inquiries" predominated over common liability questions).

usually stated as a self-evident truth, yet the doctrine suffers from what should be an obvious flaw: it circularly assumes its own conclusion. The question being asked is, in effect, "do individualized damages questions predominate" and the answer being given is, in effect, "not when liability questions predominate." Lost in the shuffle is any attention to how the court should determine which set of questions in fact predominates – the finding that liability questions predominate over damages questions is assumed rather than proven on the facts of particular cases. This circularity is at first glance surprising, but is alluring within the stilted context of the predominance balancing calculus. As discussed above, the conceptual flaw in the predominance rule is that it invites a gestalt balancing of common and individual questions without independent consideration of how individual questions may in practice undermine the principled resolution of class members' claims. Doctrine attempting to assess the significance of individualized damages calculations manifests this flaw in the predominance balancing test because the doctrine reflects a normative conclusion that, on balance, common liability questions are relatively more significant – along some unspecified metric – than individual damages questions.[179] This general conclusion about the propriety of certification would be impossible to reach if the certification inquiry required independent assessment of how dissimilarity among damages calculations would influence resolution of class members' claims, but becomes conceivable if the "predominance" of common liability questions is considered in the abstract and without recourse to the guiding principles discussed in Part III.

The underemphasis on individualized damages calculations in current doctrine does not mean that individualized damages should always be fatal to certification. For example, certification notwithstanding the need to determine individual damages may be justified when proof of individual damages is either: (1) a mechanical process easily accomplished through the defendant's business records (as in many cases challenging false billings) or through other accessible records (as in most securities fraud cases);[180] or (2) not

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179. An example of this phenomenon is *In re American Honda Motor Co., Inc. Dealer Relations Litigation*, in which the court lumped together individualized issues of "causation, injury-in-fact, and extent of damages" and found that common issues of liability predominated because of their relative "complexity." 979 F. Supp. 365, 366 n.1 & 367 (D. Md. 1997). The court apparently did not consider whether individual damages questions, even if *relatively* "more mundane" than common liability questions, *id*. at 367, were nevertheless *sufficiently* complex to defeat certification.

180. Although securities fraud suits are often cited as the paradigm case for class certification, recent analysis demonstrates that the paradigm is less solid than commonly

necessary before entry of judgment because the applicable substantive law permits assessment of lump-sum damages followed by a claims proceeding to allocate the award (as in some equity cases where disgorgement is a proper remedy for unjust enrichment). However, proof of individual damages before the trier of fact is not always mechanical or avoidable in complex multiparty litigation – there may be clever means of doing it efficiently, but one cannot simply assume that such means are available or desirable. Doctrine applying the predominance balancing test to focus on common liability questions without independent consideration of individual damages questions thus fails to respect the finality, fidelity, and feasibility principles discussed in Part III.

2. Doctrine Under-Weighting Individualized Defenses

The analytic flaw that infects doctrine about the propriety of certifying dissimilar damages claims is also evident in doctrine about the significance of individualized defenses. Courts routinely state that the possibility that a defendant will have unique defenses to individual claims is generally not a basis for denying certification.[181] This doctrine leaves room for exceptions when the breadth and complexity of individualized defenses pose a clear practical obstacle to aggregate adjudication,[182] but nevertheless tends to permit certification notwithstanding the presence of dissimilar defenses that raise problems under the finality, fidelity, and feasibility principles.

The intense focus on commonality at the certification stage arises from the balancing test inherent in the concept of

believed. *See* Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 REV. LITIG. 405 (2003).

181. *See*, *e.g.*, Waste Mgmt. Holdings, Inc., v. Mowbray, 208 F.3d 288, 296 n.4 (1st Cir. 2000) (rejecting a more stringent emphasis on variation among defenses as inconsistent with "the essence of the predominance inquiry"); Lender's Title Co. v. Chandler, No. 04-41, 2004 WL 1354265 (Ark. June 17, 2004) ("[T]he mere fact that individual issues and defenses may be raised regarding the recovery of individual members cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members."); Haywood v. Superior Bank FSB, 614 N.E.2d 461, 464 (Ill. App. Ct. 1993) ("[T]he existence of individual issues, individual defenses of individual damages, multiple theories of recovery, or even the inability of some class members to obtain relief because of a particular individual factor will not, standing alone, defeat a class certification if the common questions of fact or law are otherwise predominant.").

182. *See*, *e.g.*, O'Connor v. Boeing N. Am, Inc., 197 F.R.D. 404, 414 (C.D. Cal. 2000) (finding that "individualized, fact-intensive" questions about statute of limitations defenses predominated over common liability questions). *Cf.* Barnes v. Am. Tobacco Co., 161 F.3d 127, 147 n.25 (3d Cir. 1998) (affirming decertification of class and noting that "[w]e acknowledge that the existence of affirmative defenses as to some class members may not by itself enough warrant the denial of certification. . . . But we note that the defenses are only one of many matters raising individual issues in this case.") (internal citations omitted).

predominance, reflecting a value judgment that the most important question in a class action is the defendant's general liability to the class, and that this question is so important that it outweighs – i.e., predominates over – collateral questions unique to individual class members. The doctrine likewise reflects a belief that the predominance inquiry is inextricably linked to the procedural goal of efficiency, to the point where courts are reluctant to allow the prospect of individualized inquiries to derail consolidated review of more immediately pressing common questions.

The notion that individualized defenses are categorically less significant than common questions of liability is dubious even if one assumes that predominance is a coherent certification standard, but is fatally flawed when one rethinks the viability of the predominance test in light of the principles discussed in Part III. First, with the exception of affirmative defenses (such as laches and waiver), most "defenses" are merely the mirror image of arguments necessary to prove liability. For example, the defense in a fraud case that the defendant did not induce the plaintiff to take any action is the equivalent of arguing that the plaintiff has not carried her burden of proving reliance. Likewise, the defense in a product liability case that a particular item was safe and precipitated an injury only due to misuse is the equivalent of saying that the plaintiff has not carried her burden of proving causation. The doctrinal assumption that "liability" and "defenses" are somehow distinct is therefore suspect, particularly when the defendant proposes to disprove allegations of a common classwide course of conduct with individual counterexamples – in other words, by attempting to disprove aggregate liability by stating defenses to individual claims.

Second, doctrine allowing certification notwithstanding salient individualized defenses violates all three principles discussed in Part III. The doctrine permits a certification decision without substantial consideration of how defenses might affect the court's ability to reach a judgment (finality), without any assessment of how defenses affect the plaintiffs' ability to prove liability consistent with the substantive law underlying the claim (fidelity), and without any concrete plan for managing the case after resolution of common liability questions (feasibility). The doctrine flourishes only because the predominance concept hinges on a balancing test, which in turn permits courts to define the *relative* importance of common questions and individualized defenses without considering that the practical difficulty of litigating individualized defenses might preclude certification regardless of whether resolving common questions would otherwise be desirable. Judicial underemphasis of defenses is thus a manifestation of the

predominance test's failure to assess the significance of dissimilarity among claims independently from the fairness and efficiency considerations that generally favor aggregate resolution of common questions. The practical consequence of this conceptual failure is that courts routinely run the risk either that a certified action will grind to a halt before judgment when defenses raise insurmountable management obstacles, which would render the entire litigation a waste of time and money;[183] that unwieldy defenses confronted late in litigation will instigate questionable ad hoc lawmaking to accommodate them;[184] or that the dissimilarities among defenses will distort settlement outcomes.[185] Accordingly, the doctrinal treatment of individualized defenses under the predominance balancing analysis is less rigorous than the finality, fidelity, and feasibility principles would recommend.

3. Doctrine Postponing Conflict of Laws Analysis

The phenomenon of allowing a balancing test to discount otherwise serious individualized questions is also evident in doctrine holding that courts need not consider potential conflicts of law during the predominance inquiry. Many class actions involve plaintiffs from multiple states challenging conduct that occurred in their home states or that originated in an array of intermediary states. If the laws of states with significant contacts to the dispute materially differ, then the court must conduct a conflict of law analysis to select the applicable law for each contested issue, consistent with constitutional[186] and common law[187] constraints. Substantial

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183. A striking example of a class action collapsing under the weight of deferred individualized issues occurred in the twenty-five-year saga of litigation arising from the 1971 prison riots in Attica, New York. The district court held a trial on common liability questions, only to realize after several years of fruitless management efforts that the remaining individualized defense and damage questions raised intractable management problems that ultimately led the Second Circuit to hold, "[w]ith the benefit of hindsight," that certification had not produced any "benefit" to the class. Blyden v. Mancusi, 186 F.3d 252, 269-71 (2d Cir. 1999). Foresight is presumably preferable to hindsight in structuring complex and time-consuming litigation, which further supports the need for a class action rule that focuses substantial attention on dissimilarity *before* certification.

184. *See supra* text accompanying notes 23-30.

185. In practice, most certified class actions settle, rendering the question of defenses moot. However settlement does not solve the distortion problem – it merely displaces it to a new context. *See infra* Part II.C. (analyzing how dissimilarity distorts the valuation of claims for settlement).

186. The Due Process and Full Faith and Credit Clauses, and possibly the Dormant Commerce Clause, preclude states from applying forum law to the claims of class members with whom the forum has no relevant connection. *See* U.S. CONST. amend. XIV, § 1; *id*. at art. IV, § 1; *id*. at art. I, § 8. For example, if a New York resident files a nationwide class action against a Delaware company in New York state court for fraudulent representations issued from the

management problems arise when the outcome of the choice of the law calculus requires applying the varying laws of multiple states to class members' claims. For example, each substantive motion would require as many as fifty distinct rulings, the court would need to instruct the jury about the law in each of as many as fifty states, and the court would need to advise the jury about the limited admissibility of evidence that is relevant to claims in some states but not others. Even if the laws of the fifty states cluster into only a few distinct formulations on each issue, the practical burden of identifying, analyzing, and ruling on each cluster for each claim would be daunting.[188]

Courts in many jurisdictions prefer to avoid conflicts analysis by holding that certification is permissible when there is an important common question of disputed fact, regardless of whether the implications of that fact would vary under the applicable laws of

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company's Delaware headquarters, New York law might apply to the claims of class members from New York, but cannot apply to the claims of class members from, say, Alaska. Plaintiffs might argue that Delaware law should apply to the claims of all class members regardless of domicile because the tortious contract arose in Delaware, but the viability of that argument would depend on the content of the applicable choice of law rule; some choice of law rules would favor applying the laws of each of the fifty states where injury occurred, and some might favor applying the law of the one state where injury-causing conduct originated. *Cf.* Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 110-21 (summarizing the myriad methodologies for resolving conflict of laws in complex litigation with multistate contacts). For analysis of the applicable constitutional questions, see BMW v. Gore, 517 U.S. 559, 572-73 (1996) (state lacks power "to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the state] or its residents"); Healy v. Beer Inst., 491 U.S. 324, 336-37 (1989) (states cannot "control conduct beyond the boundaries of the State" and regulate "commercial activity occurring wholly outside" their borders); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (state "'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" (quoting Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930))); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 582-83 (1986) (rejecting state's attempt to "project its legislation" into other states); Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion) (Due Process and Full Faith and Credit Clauses forbid a state from applying its law to a transaction absent "significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction"); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 399 (1924) (stating that a Texas statute cannot govern a Tennessee insurance policy); New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of [a State] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends."); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

187. *See generally* RESTATEMENT (SECOND) CONFLICT OF LAWS (1971).

188. *See*, *e.g.*, Georgine v. Amchem Prods., 83 F.3d 610, 627 (3d Cir. 1996) ("[B]ecause we must apply an individualized choice of law analysis . . . the proliferation of disparate factual and legal issues is compounded exponentially"), *aff'd*, 521 U.S. 591 (1997).

different states.[189] Although there is a contrary trend emerging in federal appellate courts,[190] numerous state courts (who may soon no longer face this question)[191] and federal district courts cling to the notion that choice of law is not relevant to the certification inquiry when there is a "predominant" common question of fact.[192]

The failure of courts to conduct a rigorous conflict of laws analysis before certifying a class violates the finality, fidelity, and feasibility principles. A court cannot know whether it has the capacity to try claims (feasibility) consistent with substantive law (fidelity) if it does not know which substantive laws apply and the extent of any variations that the trier of fact would need to consider in rendering a judgment (finality). Certification under such conditions of uncertainty amounts to a blind guess about whether a class action would be viable.

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189. *See*, *e.g.*, Singer v. AT&T Corp., 185 F.R.D. 681, 691 (S.D. Fla. 1998) ("It is well-established that consideration of choice of law issues at the class certification stage is generally premature. Many courts find that it is inappropriate to decide choice of law issues incident to a motion for class certification."); *In re* Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74, 84 (D. Md. 1991) ("[M]any courts have found it inappropriate to decide choice of law issues incident to a motion for class certification."); *In re* Crazy Eddie Sec. Litig., 135 F.R.D. 39, 41 (E.D.N.Y. 1991) ("Along with other district courts in this circuit, this court declines to decide choice of law issues on a class certification motion . . . ."); Peterson v. Dougherty Dawkins, Inc., 583 N.W.2d 626, 630 (N.D. 1998) ("[C]ourts often decline to decide choice of law issues when determining whether to certify a class action."); Lobo Exploration Co. v. Amoco Prod. Co., 991 P.2d 1048, 1051-52 (Okla. Civ. App. 1999) (affirming certification order that "declined to decide choice of law issues incident to a motion for class certification"). *But see* Dragon v. Vanguard Indus., 89 P.3d 908, 916-18 (Kan. 2004) (holding that plaintiffs bear the burden of submitting a conflict of laws analysis sufficient to justify certification).

190. *See, e.g.*, Zinser v. Accufix Research Inst., 253 F.3d 1180, 1189 (9th Cir. 2001) ("Because [plaintiff] seeks certification of a nationwide class for which the law of forty-eight states potentially applies, she bears the burden of demonstrating 'a suitable and realistic plan for trial of the class claims'" as "[u]nderstanding which law will apply before making a predominance determination is important when there are variations in applicable state law."); *In re* LifeUSA Holding, 242 F.3d 136, 147 (3d Cir. 2001) (faulting district court that "failed to consider how individualized choice of law analysis of the forty-eight different jurisdictions would impact on Rule 23's predominance requirement"); *In re* Am. Med. Sys., 75 F.3d 1069, 1085 (6th Cir. 1996) (faulting district court that "failed to consider how the law of negligence differs from jurisdiction to jurisdiction" before certifying nationwide state law class, and holding that the plaintiffs bore the "burden" on this issue); Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) (district courts have a "duty" to "consider variations in state law when a class action involves multiple jurisdictions" and the "requirement that a court know which law will apply before making a predominance determination is especially important when there may be differences in state law"); Walsh v. Ford Motor Co., 807 F.2d 1000, 1016-17 (D.C. Cir. 1986) (declining to accept, "on faith," plaintiffs' "assertion" that state laws are uniform and instead making a "considered" judgment about choice of law questions based on "extensive analysis of state law variances" before certifying class).

191. A new federal statute allowing removal to federal court of class actions involving plaintiffs from multiple states will probably limit the opportunity of state courts to rule on complex choice of law questions in class actions. *See* Class Action Fairness Act, Pub. L. No. 109-2, § 4, 119 Stat. 4 (2005).

192. *See supra* note 189.

A certification standard that focused more directly on the finality, fidelity, and feasibility principles therefore would not permit a court to certify a class without first carefully considering which states' laws applied, how those laws conflicted, and whether the conflicts would render class adjudication impracticable.

Doctrine permitting courts to defer consideration of damages, defenses, and choice of law until after the decision to certify a class thus helps to underscore the flaws in the predominance test. The predominance inquiry is not grounded in any determination about how individualized questions affect a court's ability to litigate claims to a final judgment pursuant to a feasible plan and consistent with substantive law, and thus many courts have developed doctrine that is likewise not grounded in such determinations. The result is that certification decisions overlook factors – such as the need to litigate individualized defenses or damages and to resolve or account for conflicts of law – that a certification standard should consider before determining whether a class action is a procedurally appropriate mechanism for resolving a particular dispute. The misplaced emphasis of predominance doctrine on similarity among claims at the expense of attention to dissimilarity is thus another reason to rethink the viability of the underlying predominance concept.

V. PROPOSED REVISION TO RULE(23)(B)(3) AND IMPLICATIONS

The conceptual and practical flaws in the predominance test raise the question of what should replace it.[193] This Part proposes a new "resolvability" test that would focus on whether a class action is an appropriate means of resolving disputed claims that involve both common and individualized elements. The proposal incorporates the principles discussed in Part III in an effort to avoid the practical problems discussed in Parts II and IV. After presenting my proposal for replacing the predominance test, I discuss some of its practical and normative implications and suggest how these implications might inspire further scholarship about the dynamic overlap between substantive regulation of mass risks and procedural reform of group litigation.

A. The "Resolvability" Test

The principles discussed in Part III provide a foundation for formulating a replacement to the predominance test. Instead of focusing on the gestalt relationship between common and individual questions, a new certification standard can more directly implement broader principles that address the need for: (1) final judgments establishing the rights and responsibilities of the parties, (2) fidelity to substantive law, and (3) feasible plans for managing class actions within resource constraints. A new rule should be sufficiently broad to encompass the diverse array of potential class actions, sufficiently narrow to guide the development of additional layers of doctrine geared toward specific recurring problems, and sufficiently flexible to permit classwide settlements in appropriate circumstances.

My proposal would eliminate the predominance concept by rewriting the first clause of Rule 23(b)(3), which currently states that

193. The predominance concept is so vague that in theory there is no need to replace it; courts and commentators could simply interpret it to more closely track the finality, fidelity, and feasibility principles discussed in Part III. A common question would thus "predominate" over an individual question only if the court has a feasible plan for entering a judgment on both common and individual questions consistent with applicable substantive law. However, trying to fix the predominance concept rather than abandoning it would be a second-best solution. The test would still be vague and susceptible to drifting from any newly-imposed gloss, and would still rest on an inapposite notion of balancing inherent in the meaning of the word "predominate." Reinterpretation (or a more principled refinement of existing interpretations) of the predominance test would at best be an interim solution pending revision of the Rule, but is not a substitute for writing a more coherent certification standard to manage the increasingly high-stakes process of group litigation. Notably, the 1966 drafters of Rule 23 (who wrote the predominance test, as well as most of the rest of the current rule) did not intend for their work to be permanently etched in stone, and recognized that further refinements might be necessary with the benefit of accumulated experience. *See supra* text accompanying note 125.

certification is permissible when the court finds that "questions of law or fact common to members of the class predominate over any questions affecting only individual members."[194] The amended Rule 23(b)(3) (and similar state rules) would permit certification when the court finds that:

> The court has a feasible plan to answer all disputed questions of law and fact that must be resolved before entering judgment for or against class members under the law governing each class member's claim and applicable defenses.[195]

Given the inexorable desire of lawyers to create shorthand monikers for certification concepts – such as "typicality" and "adequacy" – the new test could be called "resolvability."

The new resolvability test would combine with the existing Rule 23(b)(3) superiority and 23(a)(2) commonality tests to require a four-step analysis of how similarity and dissimilarity among putative class members' claims should affect certification. First, the court would have to determine if there is a question of law or fact common to all class members that if answered would materially facilitate entry of judgment for or against the class. Second, assuming that such a common question exists, the court would have to determine if any questions of law or fact unique to individual class members could affect the propriety of entering judgment for or against them. Third, assuming that material individualized questions exist, the court would have to determine if it could feasibly resolve the individual questions consistent with applicable substantive law governing claims and defenses before entering judgment. Finally, assuming that there is a feasible way to resolve individualized issues, the court would have to decide if doing so within a class action would be superior to using available alternative remedies. Class actions seeking damages under Rule 23(b)(3) would thus be permissible only if they were a superior method of feasibly adjudicating both the similar and dissimilar aspects of class members' claims to judgment under the substantive law governing claims and defenses.[196]

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194. FED. R. CIV. P. 23(b)(3). The proposal would require action either by the Supreme Court under the Rules Enabling Act process, *see supra* note 141, or by Congress, and then parallel action by state courts or legislatures.

195. The rest of the current rule would then continue as a new sentence: "The court must also find that a class action is superior . . . ."

196. The resolvability test is unlikely to create problems related to the timing of certification decisions that are not already present under the predominance test. If a case is sufficiently complicated that an early resolvability decision is not possible – *see* FED. R. CIV. P. 23(c)(1)(A) (requiring courts to address certification "at an early practicable time") – then it is difficult to imagine how a meaningful predominance analysis could be possible under the same

Settlements of otherwise uncertifiable classes would still be possible even under the new certification rubric, but careful scrutiny of the negotiation process and the terms of the agreement would be necessary to determine if the settlement is consistent with the principles underlying the resolvability test. As explained in Part II.C, negotiated resolutions of class actions featuring excessive dissimilarity among claims incorporate the potential prejudicial effects of trial into the terms of settlements, and thus courts considering certification motions cannot assume that a future settlement will cure the defects of an improvident certification decision. This observation, coupled with the analysis in Part III, suggests that class action settlements generally fall into one of three categories, each raising different levels of concern: (1) when a class action can be certified for trial consistent with the resolvability test, it can be fairly settled (assuming that class members are represented adequately); (2) when a class action cannot be certified for trial consistent with the resolvability test, but both parties would prefer a group settlement to individualized litigation, then a settlement *might* be permissible even though the resolvability test is not satisfied, depending on myriad considerations addressed in the literature on "settlement classes";[197] but (3) when a class action cannot be certified for trial consistent with the resolvability test, and a party would prefer the absence of a class action to a negotiated classwide agreement, then any settlement negotiated by that party in the shadow of a certification order raises questions – beyond the scope of this Article – about due process, voluntariness, and the normative role that consent should play in dispute resolution.[198] The resolvability test thus does not conclusively answer the question of when courts should encourage or approve settlements, but does provide a new framework for considering the question and for rethinking Rule 23's requirement that class action settlements be "fair, reasonable, and adequate."[199]

The revised version of Rule 23(b)(3) would track the principles discussed in Part III and avoid the problems with the predominance

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circumstances. Indeed, the resolvability test is an improvement over the predominance test because its greater specificity will help to guide courts in deciding what information they need to know and in structuring pre-trial proceedings to permit acquisition of that knowledge in preparation for the certification decision. Although courts at the beginning of a case – before substantial discovery – cannot always know exactly which factual and legal questions will be salient at the end of a case, limited discovery coupled with the parties' analysis of what each hopes to prove and disprove should be sufficient in most cases to permit courts to make reasonably informed certification decisions.

197. *See supra* note 90.

198. *See supra* note 89 and accompanying text.

199. FED. R. CIV. P. 23(e)(1)(C).

test discussed in Part IV. Instead of relegating analysis of dissimilarity to the vague and conceptually hollow predominance balancing test, a revised rule would ground certification analysis directly in broader principles that should animate the class action device. Rather than silently hoping that courts apply class action rules consistently with broader principles, the new rule would require courts to do so by incorporating these principles directly into the text of the rule. The principles regarding final judgments, fidelity to substantive law, and feasible management within resource constraints discussed in Part III would no longer be mere aspirations of class action jurisprudence, and instead would factor directly into day-to-day decisionmaking. The dubious doctrines that predominance has spawned – such as the notions that consideration of defenses, damages, and choice of law are irrelevant at the certification stage – would fade away because they are facially inconsistent with the concept of resolvability.[200]

The proposed resolvability test would also mitigate the problems of cherry-picking, claim fusion, and ad hoc lawmaking discussed in Part II. All three problems arise when courts permit certification to obscure the differences among dissimilar aspects of claims and defenses, such that the trier of fact perceives commonality in circumstances where there is really individuality. A revised certification standard that spotlights dissimilarity will make individualized issues much less prevalent in certified class actions and much more prominent in the cases in which they remain. Adherence to the fidelity principle should reduce instances of ad hoc lawmaking, and adherence to the finality and feasibility principles should ensure that procedural mechanisms exist to highlight the dissimilar aspects of class members' claims so that claim fusion and cherry-picking become harder to attempt and easier to detect.[201]

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200. Plaintiffs might attempt to evade revisions to Rule 23(b)(3) by trying to squeeze (b)(3) classes into the (b)(1) or (b)(2) molds, but doctrine exists to prevent such circumvention of the (b)(3) requirements. *See*, *e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 834-48 (1999) (reviewing limits on (b)(1) class actions); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 410-18 (5th Cir. 1998) (reviewing limits on (b)(2) class actions).

201. The resolvability test's focus on dissimilarity may also have the added benefit of creating incentives for plaintiffs' lawyers to structure class definitions in a manner that minimizes the likelihood that class members with strong claims will subsidize members with weaker claims. Plaintiffs' lawyers currently have an incentive to define proposed classes as broadly as possible to encompass the maximum number of fee-generating damages recipients. If we assume that lawyers initially focus on claims with the highest value, we can surmise that as the class definition grows broader, the new entrants will have claims with progressively less merit and value, in effect diluting the value of the initial members' claims. Amending Rule 23(b)(3) creates an opportunity to reverse incentives regarding the breadth of class definitions. A rational plaintiffs' lawyer must balance the marginal potential gain from expanding the class definition against the catastrophic loss that would ensue if a court concludes that the class

Eliminating the predominance test would not eliminate subjectivity from certification decisions, but would help to redirect subjective analysis along more relevant lines and facilitate development of doctrine to guide decisionmaking. Both the predominance and resolvability tests entail subjective elements, but the predominance test is so conceptually hollow that it has not generated coherent doctrine to help structure judicial discretion. In contrast, the subjective inquiries arising from the proposed resolvability test are linked to practical and theoretical guideposts that should permit courts to develop a helpful body of precedent to guide certification analysis. The primary areas of subjectivity under the proposed rule involve: (1) determining what is and is not "feasible" for a court to accomplish in a class action; (2) identifying creative and yet acceptable mechanisms to "resolve" claims in a class proceeding; and (3) deciding when a defense is sufficiently likely to be "applicable," or when a question is sufficiently "disputed," to raise a potential obstacle to certification. These questions will recur in numerous contexts but will raise similar practical problems that should over time generate a body of precedent to provide relatively concrete guidance to courts struggling with certification decisions.[202]

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definition is too broad and therefore refuses to certify any class or *sua sponte* defines a much narrower class. The lawyer will assess the risk of expanding the class definition in light of how the court is likely to react, which in turn is a function of the procedural standard governing judicial review of class definitions. Thus, if the resolvability standard would be less receptive than the predominance standard to broadly defined classes that encompass substantial dissimilarity, then lawyers will likely try to frame their proposed classes more narrowly (unless they are risk-takers, in which case they might still frame classes broadly with the hope of being able to submit a narrower class definition if the court rejects the broad definition). Assuming that a narrow class has a higher proportion of members with meritorious claims, then the resolvability test would help to ensure that marginal claimants with comparatively low-value claims do not dilute the distribution of an aggregate award. Plaintiffs with low-value claims could of course still file their own separate class actions, but the settlement value of their claims would presumably be relatively low.

202. For example, plaintiffs and defendants will often dispute whether the myriad individual defenses that the defendant insists must be litigated are likely to meaningfully alter the outcome of any particular class member's claim or are simply hypothetical musings designed to throw a wrench into the certification machinery. *See supra* note 91. As this dispute recurs, courts will develop standards for parsing credible defenses that should be adjudicated from dubious defenses thrust into the case solely for tactical purposes. The ensuing doctrine would not be unduly novel, as many federal courts already engage in similar pre-certification analysis of substantive issues that are likely to arise in the course of class litigation. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982) ("[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."); E. Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 406 n.12 (1977) ("Where no class has been certified, however, and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of plaintiffs' individual claims."). Similar kinds of questions about tactical pleading also arise in diversity cases when courts must determine if a non-diverse party is properly part of a

Jettisoning the concept of predominance in favor of a more nuanced focus on the ability of class litigation to resolve both common and individualized aspects of claims and defenses should therefore better align the principle and practice of class litigation. A new procedural rule will not end the debate over the desirability of class actions as remedies for group injuries, but could help reorient that debate by eliminating the distracting practical and conceptual problems that the predominance inquiry creates.

B. Avenues for Further Scholarship

The resolvability test – and in particular its emphasis on fidelity to substantive law – is likely to reduce the frequency of class actions absent countervailing changes to the substantive rules that class actions enforce. The primary reason that some cases will not be amenable to certification is that traditional tort law and many statutory causes of action incorporate a compensation model of entitlements that hinges on proof of individualized questions of fact and law, such that plaintiffs are entitled to judgment in their favor only if they can prove elements of a claim that are tied to each person's unique circumstances.[203] Defendants presumably will latch on to individualized issues involved in proving entitlement to judgment as a basis for defeating certification. Thus, while the predominance test tolerates comparatively heavy emphasis on common elements of class members' claims, the resolvability test would attach heightened significance to individualized aspects of claims and defenses that materially affect the propriety of entering judgment for or against individual claimants, which would tend to justify fewer proposed class actions.

The practical consequences of the resolvability test raise three interrelated questions for future scholarship that highlight the indeterminate boundaries between substantive and procedural considerations in group litigation. The first question posits a need to develop procedures responsive to substantive objectives, the second question posits that achieving substantive objectives may require tailoring liability and damages rules to available procedures, and the third question posits that the criteria for measuring the quality of a

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case or has been "fraudulently joined" solely to defeat federal jurisdiction. *See*, *e.g.*, Marshall v. Manville Sales Corp., 6 F.3d 229, 232-33 (4th Cir. 1993).

203. *Compare* note 3 *supra* (discussing common law and statutory causation and reliance elements that hinder certification), *with* note 24 *supra* (discussing how federal statutes regulating securities permit inferences of causation and reliance that facilitate certification).

procedure requires a value judgment linked to the aspirations of the substantive laws that the procedure must implement. All three questions address the regulatory vacuum that decreased availability of the class action would create while illuminating the dynamic interplay of substantive and procedural considerations in the regulation of mass risks.

First, if class actions will be less available to compensate victims of legal wrongs, procedural architects must develop alternative compensation mechanisms to overcome the collective action problems that often make civil litigation impracticable in cases involving large numbers of somewhat similar and somewhat dissimilar injuries. Class actions are not the only means of aggregating claims, and thus any procedural reform that makes class actions more difficult to sustain without removing claimants' underlying preference to aggregate requires investigating alternatives to class litigation.[204] Second, courts and legislators should consider the extent to which substantive remedies favoring compensation over deterrence are worth their cost in procedural flexibility. By stressing the practical consequences of dissimilarity among otherwise common class claims, this Article highlights how substantive laws that fixate on individual entitlements to damages rather than the scope of the defendant's wrongful behavior complicate and potentially preclude aggregative litigation.[205] If the price of focusing on individual entitlements is that those entitlements become more difficult to vindicate in class actions, then it is worth thinking about whether the focus of statutory and common law rights should transform to facilitate group litigation and the deterrent pressures that such litigation creates.[206]

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204. *Cf.* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1573 (2004) (noting that even without class actions, tort claims have "persistently resolved themselves into what are essentially bureaucratized, aggregate settlement structures"); Howard M. Erichson, *Mississippi Class Actions and the Inevitability of Aggregate Litigation*, MISS. C. L. REV. (forthcoming 2005) ("[A] prohibition on class actions channels mass disputes into other modes of formal and informal aggregate dispute resolution."). Even when individualized claim processing is preferable to aggregation, some procedures are relatively more amenable to high volumes of claims than others. For example, Congress has created compensation systems that depend on administrative rather than judicial adjudication, such as programs linked to black lung disease, *see* 30 U.S.C. §§ 901 et seq, the side effects of vaccines, *see* 42 U.S.C. § 300aa et seq., and the September 11 terrorist attacks, *see* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

205. *See supra* note 3 (citing examples of substantive reforms that facilitate aggregate litigation).

206. Assessments of procedural innovations are inextricably intertwined with preferences regarding the laws that procedures enforce. *See*, *e.g.*, Jack B. Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 299-300 (1973) ("Whether we characterize any

Finally, a corollary to the preceding point about the relative importance of compensation and deterrence is that this Article's emphasis on dissimilarity among claims highlights an open question about the distributive implications and relative desirability of over- and under-deterrence, and over- and under-compensation. A consequence of aggregating dissimilar claims is that the trial and settlement distortions discussed in Part II may cause defendants to pay higher or lower damages than the applicable substantive law requires. Likewise, the allocation of damage awards among class members may be imperfect, such that some will receive more than they deserve under the applicable substantive law, and some will receive less. Aggregation of dissimilar claims can thus over- or under-deter, and both over- and under-compensate. Yet not aggregating claims creates analogous harms. The collective action problems that arise absent aggregation may prevent victims of a wrong from obtaining a remedy,[207] and even when adjudication is feasible plaintiffs will have varying chances of success depending on their ability to bear the burdens of litigating alone, the quality of their counsel, and the idiosyncrasies of the judge and jury. Alternatively, individual nuisance suits on weak claims might extract larger settlements than would be possible if the defendant could lower its transaction costs by fighting all related claims in the same proceeding. Thus, the absence of aggregation creates the potential for over- or under-deterrence and both over- and under-compensation. Among the normative questions that arise from this analysis are whether over-deterrence is preferable to under-deterrence, whether over-compensation is preferable to under-compensation, and whether either preference depends on if the procedural cause of the over-/under-problem is a rule fostering access to adjudication or a rule foreclosing it. The answers to these questions will influence the design of substantive regulations and procedural rules by helping to prioritize the relative importance of access to adjudication, accurate resolution of aggregate claims, and accurate resolution of individual claims. Highlighting the procedural consequences of aggregating dissimilar claims thus helps to illuminate a broader set of problems affecting deterrence and remediation of large-scale injuries.

Refining certification criteria to grapple more directly with dissimilarity among claims would thus have both substantive and procedural consequences, necessitating further creative efforts at substantive and procedural innovation. There is a connection between

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revised [class action] practice as an 'abuse' or a 'reform' depends largely on our evaluation of policies underlying the type of litigation likely to be affected.").

207. *See supra* note 4 and accompanying text.

when class actions are available, what class actions can accomplish, and how much compensation and deterrence substantive laws can achieve. Adjusting one link in the chain requires rethinking the others

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In sum, it is time to excise "predominance" from the vernacular of class action discourse and replace it with a more practical "resolvability" approach that recognizes the problems of cherry-picking, claim fusion, and ad hoc lawmaking and respects the principles of finality, fidelity, and feasibility.