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ARTICLES

THE PREEXISTENCE PRINCIPLE AND THE STRUCTURE OF THE CLASS ACTION

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In recent decades, the class action has emerged as a system of law reform that rivals conventional legislation. Through class settlements, private attorneys and courts seek to make binding deals that alter en masse the legal rights of class members. This transactional dimension of class settlements cries out for an account of the class action that situates that device in institutional terms within the conventional avenues of law reform.

This Article provides an institutional theory of the class action. Drawing upon the economics of large-scale civil litigation, procedural doctrines of preclusion, and public-law literature on delegations, Professor Nagareda articulates the "preexistence principle" as a touchstone with which to understand the modern class action. The preexistence principle holds that attorneys and courts enjoy no general power to alter legal rights unilaterally. A class settlement thus must stop short of what Congress might do by way of civil justice reform legislation, such as that enacted in the aftermath of September 11, 2001.

The preexistence principle illuminates the fundamental structural distinction drawn between mandatory and opt-out classes, and thus enables courts to answer important questions circulating in class action litigation today: questions, for instance, about whether the right to opt out is personal or transactional, and about how a class settlement may legitimately deter opt-outs.

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INTRODUCTION

Class actions are exceptional things. As the Supreme Court remarked more than two decades ago, the class action stands as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[1] In class actions, litigation proceeds under the leadership of class counsel, lawyers with whom the vast majority of class members have neither contracted for legal representation nor even met. Although the class action complaint must name a "representative part[y]" whose claims typify those of absent class members,[2] that representative characteristically is a figurehead who exercises little, if any, meaningful supervision over the conduct of the litigation by class counsel.[3] With rare exception,[4] class counsel effectively appoint themselves as

1. Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979).

2. Fed. R. Civ. P. 23(a)(3).

3. See Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 Ariz. L. Rev. 923, 927 (1998).

4. In some instances identified through the exercise of discretion by the district courts, class counsel are not self-appointed but, rather, judicially appointed through some form of auction. Class counsel auctions have taken several different forms, but the basic idea is for the court to solicit bids that specify in advance the fee arrangement under which a given bidder will undertake the class representation. The most recent and comprehensive assessments of class counsel auctions, however, express substantial doubt about both the desirability and the workability of that process in most class action scenarios. See generally Jill E. Fisch, Lawyers on the Auction Block: Evaluating the

agents for the class, wielding a power to transact in class members' rights to sue that stems, at best, from a delegation of power implied by Rule 23 of the Federal Rules of Civil Procedure or its state law equivalent.[5]

Disputing through agents is hardly unknown in the civil justice system.[6] The exceptional nature of the class action as a form of representative litigation, however, is quite striking in light of one simple and stark fact: Only "a handful" of class actions under Rule 23 actually have been tried to conclusion.[7] Settlements, not judgments after trial, stand overwhelmingly as the end result of actions certified to proceed on a classwide basis[8] that are not resolved on dispositive motions.[9] In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis—what William Rubenstein dubs a "transaction" in which class members' rights to sue are "bought and sold."[10] These transactions extend throughout the subject areas of civil litigation in which the class action operates, ranging across tort, securities, consumer protection, and civil rights disputes, to name only a few examples.

Settlements, too, are far from foreign to civil litigation as a whole. Most individual lawsuits settle,[11] and any settlement of an ordinary civil

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Selection of Class Counsel by Auction, 102 Colum. L. Rev. 650 (2002); Third Circuit Task Force Report on Selection of Class Counsel (Jan. 15, 2002), reprinted in 74 Temp. L. Rev. 689 (2001).

5. See Robert H. Klonoff & Edward K.M. Bilich, Class Actions and Other Multi-Party Litigation: Cases and Materials 362 (2000) ("Approximately two-thirds of the states have class-action rules patterned after Federal Rule 23. . . . In most of these states, courts view interpretations of Federal Rule 23 as authoritative."). For a comprehensive treatment of state class action rules, see generally Linda S. Mullenix, State Class Actions: Practice and Procedure (2000).

6. I borrow my rhetoric from the title of a classic article. See Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 Colum. L. Rev. 509 (1994).

7. Klonoff & Bilich, supra note 5, at 362. R

8. See Fed. R. Civ. P. 23(c)(1) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."). A pending amendment would change this language to call simply for the court to make the class certification determination "at an early practicable time." Report of the Judicial Conference, Committee on Rules of Practice and Procedure, appx. B at 96 (Sept. 2002), available at http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf (on file with the *Columbia Law Review*) [hereinafter Rules Comm. Rep.] (proposed Rule 23(c)(1)(A)).

9. See Thomas E. Willging et al., An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 143 (1996).

10. William B. Rubenstein, A Transactional Model of Adjudication, 89 Geo. L.J. 371, 419 (2001). The notion of switching from adversarial litigation to the structuring of a transaction is a prominent theme in the scholarly literature on negotiation. See, e.g., Robert H. Mnookin et al., Beyond Winning: Negotiating to Create Value in Deals and Disputes 226 (2000) (urging negotiators to "[s]earch for ways to turn the dispute into a deal").

11. See Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1339 (1994).

action entails the substitution of a bundle of rights described in the settlement agreement for the rights that the parties previously had. Class settlements envision the same substitution of rights on a wholesale basis. In fact, for the settling defendant, the purchase of class members' rights to sue is the whole point of the transaction. Through claim preclusion,[12] the court-issued judgment approving the sale terms described in the class settlement agreement[13] will bar class members henceforth from suing the defendant over the underlying matters in dispute. The defendant seeks to purchase this preclusive effect and, with it, peace in the litigation as a whole.[14]

The bargaining power wielded by class counsel and the practical reality of class actions as vehicles for settlements make for a potent combination in contemporary civil law. Specifically, the tendency is for class settlements designed by class counsel and their defense counterparts to amount to a kind of privatized civil justice reform, positing the displacement of class members' preexisting rights as delineated by legislatures or common law courts. This tendency marks a transformation of the modern class action.

Early commentators such as Harry Kalven and Maurice Rosenfeld, writing in 1941, saw the class action simply as a device for litigation on an aggregate basis that might supplement the enforcement efforts of public regulatory agencies.[15] The aggregate treatment afforded by the class action, so the argument went, simply would enable litigation procedure to fulfill the promise of public law recognizing widespread injuries that otherwise would not give rise to claims marketable on an individual basis.

The class action today extends well beyond the paradigmatic situation of unmarketable claims of the sort that animated Kalven and Rosenfield, reaching claims of dollar value or importance that might well warrant individual litigation.[16] Even more significantly, the class action—with its tendency toward settlement at the behest of self-appointed agents for the class—has emerged not simply as a procedural supplement to preexisting law but, rather, as an institutional rival to the ordinary process of lawmaking itself. Class settlements aspire to operate as a kind of privatized mini-legislation—a vehicle by which the dealmakers may fashion a binding peace for a constellation of wrongs allegedly suffered by a cross-

12. In accordance with contemporary usage, I use throughout the terms "claim preclusion" and "issue preclusion" in preference to the older terms "res judicata" and "collateral estoppel," respectively. See 18 Charles Alan Wright et al., Federal Practice and Procedure § 4402, at 12 (2d ed. 2002) (preferring use of preclusion terminology).

13. See Fed. R. Civ. P. 23(e) ("A class action shall not be . . . compromised without the approval of the court . . . .").

14. See Rubenstein, supra note 10, at 372 ("In complex class actions, defendants purchase a commodity—finality."). R

15. See Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 684–87 (1941).

16. See John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 904–06 (1987).

segment of the populace. In recent decades, many class settlements have gone even further, positing the creation of administrative bodies—private administrative agencies, in effect—to oversee the compensation of class members years into the future.[17] The upshot of all these developments has been to empower class action attorneys to buy and sell rights en masse but largely outside the familiar constraints of the legislative or the public administrative process.

That the modern class action has come to operate as a rival to public lawmaking rather than a procedural afterthought thereto serves to frame the central focus of this Article: namely, the distinction between situations in which class treatment may be mandated (such that all class members may be forced to sell their rights through the transaction negotiated by class counsel) and situations in which the court must afford class members the opportunity to opt out (and, in so doing, to avoid the sale).[18] The operation of the class action today as a rival to the conventional institutions of public lawmaking cries out for a normative account of the distinction drawn between mandatory and opt-out class actions, for the distinction defines the binding effect of class settlements. One leading commentator candidly notes that the mandatory and opt-out classes described in Rule 23 seem to proceed upon different premises that "coexist uneasily in modern class action law without any meta-theory to define their proper roles."[19] The articulation of such a theory is the enterprise of this Article.

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17. See Martha Minow, Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies, 97 Colum. L. Rev. 2010, 2019–26 (1997).

18. The choice of whether to seek certification of a class action on either a mandatory or an opt-out basis rests initially with class counsel, who draft the class complaint. The court thereafter determines whether the case satisfies the general requirements for class certification set forth in Rule 23(a) and the specific requirements for certification as either a mandatory or an opt-out class in the relevant portion of Rule 23(b). Strictly speaking, one does not find the right to opt out in the text of Rule 23(b) itself. That right comes via Rule 23(c)(2), which requires the court to afford class members the opportunity to exclude themselves only from classes certified under Rule 23(b)(3)—hence, the commonplace description of Rule 23(b)(3) classes as opt-out classes, in contrast to the various forms of mandatory classes under Rule 23(b)(1)–(2).

If anything, the pending amendments to Rule 23 would reinforce the importance of the right to opt out. One such amendment would recognize explicitly in the text of Rule 23 the discretion currently exercised by district courts to "refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." Rules Comm. Rep., supra note 8, at 102 (proposed Rule 23(e)(3)). R

19. Robert G. Bone, Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation, 70 B.U. L. Rev. 213, 292 (1990) (reviewing Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987) [hereinafter Yeazell, Modern Class Action]). Upon tracing the development of the modern class action from its medieval forebears, the leading historical study likewise notes that "the contours of Rule 23 do not assume a neat doctrinal shape; corners poke out, and the whole design seems ad hoc and patchwork." Yeazell, supra, at 261. This seemingly ad hoc quality may stem from what the reporter to the advisory committee describes as an aspiration to craft a rule that would stand largely as a restatement of then-accumulated case

I argue that, by developing a coherent explanation for the distinction between mandatory and opt-out classes, one may arrive at a theory of the class action as a whole that situates that device appropriately within the panoply of lawmaking institutions. In its own oblique way, the law of civil procedure actually invites such an institutional perspective on the class action, positing in the Rules Enabling Act that the Federal Rules of Civil Procedure shall not "abridge, enlarge or modify" preexisting rights[20]—what class members already have that the class settlement would trade away. I argue that a proper conception of the right to opt out—and, relatedly, of the measures that class settlement designers may deploy to deter its exercise—serves to position the class action on a rung of legitimacy below conventional lawmaking institutions.

Given my focus on the class action as a lawmaking vehicle, a useful starting point for discussion of class action structure comes, appropriately enough, from recent legislation. In the aftermath of the terrorist attacks of September 11, 2001, Congress enacted legislation to address what many feared would be an onslaught of damage suits by the estates of those killed against the airlines that operated the ill-fated flights.[21] Though Congress might have attempted to displace entirely these would-be plaintiffs' rights to sue, Congress did not do so. Congress instead put would-be plaintiffs to a choice, albeit one designed to induce them to forego conventional lawsuits. Victims of the terrorist attacks still may sue the airlines, but the legislation caps airline liability[22] and requires victims to sue, if at all, in a single federal district court.[23] Litigation under these limitations was thought to be undesirable by comparison to the major feature of the legislation: its creation of the September 11th Victim Compensation Fund ("9/11 Fund"), backed by the credit of the United States Treasury, as a public administrative alternative to litigation.[24]

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law. See Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 386 (1967) ("[T]he Committee strove to sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*.").

20. 28 U.S.C. § 2072(b) (2000). For further discussion of this limitation, see infra Part II.B.1.

21. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42 (2001), 2001 U.S.C.C.A.N. (115 Stat.) 230.

22. See id. § 408(a), 2001 U.S.C.C.A.N. 240 (capping liability at insurance limits). Victims thus lose their right to tap the net worth of the airlines as needed to satisfy tort judgments.

23. See id. § 408(b)(3), 2001 U.S.C.C.A.N. 241 (limiting jurisdiction to S.D.N.Y.). Victims thus lose their right to sue in state courts perceived to be hospitable fora for tort plaintiffs.

24. Special Master Kenneth Feinberg—an experienced class action lawyer appointed by the Attorney General pursuant to the legislation, see id. § 404(a), 2001 U.S.C.C.A.N. 237—administers the 9/11 Fund. The Department of Justice recently promulgated a final rule that sets forth the grids that will govern presumptively the calculation of compensation for victims. See September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104 (2002).

The workings of the 9/11 Fund undoubtedly will prompt much study for years to come. One major question that has emerged even at this early stage is whether the 9/11 Fund legislation ultimately will succeed in its aspiration to discourage individual lawsuits.[25] Whatever its ultimate efficacy as a public policy matter, the 9/11 Fund legislation looks like a sui generis congressional response to a sui generis set of events. Only very rarely has Congress stepped in to provide a public administrative alternative for an area of litigation thought to pose difficulty for the civil justice system.[26] From the standpoint of class actions in recent years, however, the most remarkable feature of the 9/11 Fund legislation is not its newness but, rather, the striking familiarity of the choice that it places before would-be plaintiffs. The legislation provides for an administrative compensation system akin to those used in class settlements for tort claims;[27] it permits victims to forego that system and to bring a conventional lawsuit; but the terms of the legislation are designed to make that opportunity to sue relatively unattractive. The 9/11 Fund legislation *both* alters victims' preexisting rights to sue *and* holds out what Congress sought to make an attractive alternative bundle of rights.

The choice written into law by Congress with the 9/11 Fund is the legislative analogue to one of several developments that go to the heart of the distinction between mandatory and opt-out classes. The closest counterpart in the world of class actions consists of opt-out class settlements that seek to operate in practice like mandatory class settlements—namely, by making unattractive the prospects for conventional lawsuits by opt-out claimants in ways akin to the liability cap imposed by the 9/11 Fund legislation.[28]

Other developments in recent years call into question both the contours and the justification for the right to opt out. One emerging debate

25. See, e.g., Holman W. Jenkins, Jr., How Much Do We Owe the 9-11 Victims?, Wall St. J., Sept. 25, 2002, at A15 (defending the 9/11 Fund against critics who have sought higher awards through conventional tort litigation).

26. Congress has failed to take similar action with respect to the still-burgeoning litigation over asbestos, notwithstanding invitations from no less than the Supreme Court. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (observing that asbestos litigation "defies customary judicial administration and calls for national legislation"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628–29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure."). On the latest effort to secure federal asbestos legislation, spearheaded by an unusual coalition of insurers and segments of the asbestos plaintiffs' bar, see Greg Hitt, Asbestos Makers, Litigants: Uneasy Allies, Wall St. J., May 28, 2002, at A4.

27. On the development of private administrative compensation schemes in mass tort class settlements, see Richard A. Nagareda, Turning from Tort to Administration, 94 Mich. L. Rev. 899, 919–30 (1996) [hereinafter Nagareda, Turning].

28. See, e.g., In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 353–56 (N.D. Ohio 2001). This opinion has the dubious distinction of being printed twice in succession in the Federal Rules Decisions, with differing headnotes in the two printed versions! Compare id. at 331–34 with id. at 359–63. Only the first published version appears on Westlaw; hence, the preference for that source for purposes of citation.

centers upon whether the right to opt out is a personal or transactional right—that is, whether class members may be required to opt out, if at all, with respect to all of the underlying transactions that might form the basis for civil claims against the settling defendant and, if partial opt-outs are permitted, what consequences a class settlement may attach thereto.[29] Federal appellate courts faced with ostensible mandatory classes have, on occasion, imported the procedural trappings of opt-out classes, such as notice to class members[30] and, in one prominent decision, the opportunity to opt out itself.[31] A branch of academic commentary, moreover, raises serious questions about whether class action law ought to recognize a right to opt out at all, deeming it counterproductive to class members on instrumental grounds.[32]

It would be tempting to approach each of these developments within its own parameters. Several of them have garnered no systematic attention in the class action literature. My descriptive claim, however, is that all of these questions are of one piece. They stem from a deeper lack of clarity concerning the structural distinction drawn by the modern class action between mandatory and opt-out classes.[33] Only by forming a structural account of the class action—an account attuned to its role as a transactional vehicle for mini-legislation—can the law begin to answer the specific questions raised by cases and commentary in recent years. To determine what (if anything) amounts to impermissible coercion upon class members' right to opt out, when an opportunity to opt out must be afforded, and what its operational parameters should be, one first must explain what the right to opt out is doing in the modern class action.

My normative claim is that the law may discern the appropriate structure for the class action by reference to what I defend here as the "preexistence principle": the proposition that the basis for the implied delegation of bargaining power to class counsel must arise from matters that

29. See In re Prudential Ins. Co. of America Sales Practice Litig., 261 F.3d 355, 367–69 (3d Cir. 2001).

30. See, e.g., Johnson v. General Motors Corp., 598 F.2d 432, 436–37 (5th Cir. 1979).

31. See Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992).

32. See, e.g., David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 Harv. L. Rev. 831, 840 (2002) ("[O]nly mandatory-litigation class action enables the aggregation and averaging of claims that maximizes benefits from scale economies . . . and from redistribution of claim-related wealth to achieve optimal deterrence and insurance from mass tort liability."); Michael A. Perino, Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions, 46 Emory L.J. 85, 136 (1997) ("[P]roviding an unrestrained right to opt out . . . may impose significant costs on other claimants . . . .").

33. Though not directed to the developments of which this Article speaks, one commentator's recent observation is in keeping with my descriptive claim: "Seemingly arcane disputes over the scope of class actions and the subdivision of Rule 23 under which they should be certified really concern the fundamental question whether class members have the right to opt out and to seek full compensation in individual actions." George A. Rutherglen, Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity, 88 Va. L. Rev. 1989, 1995 (2002).

preexist the class action itself and, accordingly, that a class settlement—unlike public legislation—enjoys no general mandate to alter unilaterally the rights of class members. Mandatory treatment of class members' claims—denial of the right to opt out—is warranted only when conditions antecedent to the class itself make class members' rights to sue interdependent and, in so doing, necessitate a choice between competing preexisting rights. The classic scenario of this sort consists of litigation against a limited fund but, I will argue, one may understand the other major scenario for the mandatory class—the civil rights class action seeking injunctive or declaratory relief—in similar terms.[34]

Thus framed, the preexistence principle has a host of implications for the questions mentioned earlier. For any given class member, a good settlement of an opt-out class action literally should be "an offer he can't refuse."[35] It may include a wide array of provisions designed to make the alternative bundle of rights described in the settlement agreement more attractive, in relative terms, than class members' preexisting rights to sue. In this sense, the settlement legitimately may deter opt-outs. What an opt-out class settlement may not do is what Congress itself did in the 9/11 Fund legislation: make the settlement terms relatively more attractive by *both* altering preexisting rights *and* positing an appealing alternative.

The preexistence principle likewise informs the operational parameters of the right to opt out. Although courts have yet to recognize the point, the question of whether the right to opt out is a personal or transactional right is appropriately analyzed in terms of the preexisting ability, if any, of class members to split their claims.[36] This recognition is in keeping with a vision of the class action as a vehicle for the sale of preclusive effect, for the body of law that regulates claim splitting is none other than the law of claim preclusion. In addition, the preexistence principle suggests that one may best understand the appellate cases that have imported the procedural trappings of opt-out classes into some mandatory classes as awkward attempts to pursue the laudable goal of confining the mandatory class for damages to its proper parameters.

One important implication of this approach is to question the justification for the longstanding practice of certifying as mandatory class actions under Rule 23(b)(2) employment discrimination classes that include claims for backpay. As the law of employment discrimination becomes increasingly tort-like,[37] the law of class actions should reflect

34. See infra Part III.D.2.

35. The Godfather (Paramount Pictures 1972).

36. See infra Part III.B.2.

37. As I shall explain, employment discrimination law since the creation of the class action rule in 1966 increasingly has embraced forms of relief akin to familiar tort remedies—not only the purportedly equitable remedy of backpay (essentially, lost wages and other benefits as a result of prohibited discrimination) but also, upon enactment of the Civil Rights Act of 1991, remedies amounting to damages at law. See infra note 379 and accompanying text. But cf. Colleen P. Murphy, Misclassifying Monetary Restitution, **R**

that convergence in its treatment of claims that—whatever their label—boil down to the transfer of money calculated on the basis of matters that are not common across the class.

The preexistence principle is neither an invention out of whole cloth nor a pipedream unachievable from where the law stands today. The Supreme Court has alluded to facets of the preexistence principle in its late 1990s decisions on class settlements: *Amchem Products, Inc. v. Windsor*[38] and *Ortiz v. Fibreboard Corp.*[39] But, in those cases, the Court touched upon the preexistence principle only in ways that obscure its broader explanatory power, speaking to seemingly technical details of the subsections within Rule 23 (in *Amchem*)[40] or burying the principle in a lengthy exegesis into the history of the mandatory, limited fund class (in *Ortiz*).[41]

My goal here is to expose the preexistence principle and to defend it not merely as a sensible extension of what the Court has said but, more importantly, as the appropriate normative basis for the modern class action. The normative argument stems not only from the Rules Enabling Act as the statutory primogenitor of Rule 23 but also, more fundamentally, from the appropriate division of lawmaking authority. 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. In advancing this argument, I draw parallels between current debates over the structure of the class action and constitutional law scholarship concerning the delegation of lawmaking power.

My larger objective is to reorient the way that we think about the class action. With its focus on the institutional position that the class action occupies between legislation and ordinary litigation, the preexistence principle forms the centerpiece for an account of the fundamental character and limitations of the class action. Only by understanding what the class action *is* can we productively discern what the class action can and cannot do as a vehicle for the achievement of external policy goals. This perspective stands in contrast to that of the commentators most perplexed by the right to opt out. They seek to analyze the class action in purely instrumental terms, as a way to serve the policy objectives that they attribute—perhaps wishfully—to particular areas of law in which the class action operates.[42]

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55 SMU L. Rev. 1577, 1633 (2002) ("The backpay remedy is more appropriately characterized as damages for the plaintiff's loss and thus legal relief.").

38. 521 U.S. 591 (1997).

39. 527 U.S. 815 (1999).

40. See infra Part II.A.1.

41. See infra Part II.A.2.

42. A leading advocate of this approach is Rosenberg, who argues for mandatory class actions as "the only option for mass tort cases" based upon the instrumental objectives—optimal deterrence and optimal insurance—that he attributes to the law of torts. See Rosenberg, supra note 32, at 843–46. R

Rejecting such an approach, I seek to provide for class actions an account akin to what theorists of private law have brought to areas such as tort law: namely, an internally focused account—there, labeled broadly as "corrective justice"—that conceptualizes torts as situations giving rise to obligations for redress that only incidentally contribute to the achievement of larger public policy goals. The corrective justice tradition stands in contrast to instrumental theories that see tort adjudications as little more than convenient occasions for policymaking to promote such goals as optimal deterrence and optimal insurance.[43]

My defense of the preexistence principle proceeds from an account of the nature of the class action to derive conclusions about the ways in which the class action may and may not contribute to instrumental goals. Like corrective justice theories in private law, my conception of the class action is consciously holistic. It seeks to reveal an underlying order embedded within a set of seemingly disparate legal doctrines that bear upon lawmaking and civil litigation. It envisions coherence where others see chaos. The preexistence principle thus ties together the law of class actions and surrounding bodies of law in a way that existing courts and commentators have yet to perceive.

My argument proceeds in three Parts. Part I provides an overview of the class action as a transactional device for the sale of class members' rights to sue. Part II articulates the preexistence principle, explaining its normative basis in the proper allocation of lawmaking power between class counsel and courts on the one hand and democratically accountable institutions on the other. Part III focuses on implications, explaining how the preexistence principle can help both courts and commentators derive answers to the specific doctrinal questions highlighted earlier.

I. Class Actions and the Market for Preclusive Effect

The ability of the class action to serve as the font for mini-legislation stems from the transactions it facilitates. My normative argument in subsequent Parts is that the structure of the modern class action, properly understood, stems from its general lack of the binding authority that public lawmaking institutions wield. To understand why class actions appropriately rest on a legal rung below public legislation, however, one first must develop a clear sense of both the transactions brought about by class actions and the strategic incentives of those who design and rule on those deals. To expose these underpinnings of class settlements, however, is

43. See John C.P. Goldberg, Unloved: Tort in the Modern Legal Academy, 55 Vand. L. Rev. 1501, 1509–13 (2002). Though one cannot do justice in the span of a footnote to the rich theoretical debate among tort scholars, one at least can identify a representative sampling of the relevant sources. For prominent corrective justice theories of tort law, see generally, e.g., Jules L. Coleman, Risks and Wrongs (1992); Ernest J. Weinrib, The Idea of Private Law (1995). For prominent instrumental theories, see generally, e.g., William M. Landes & Richard A. Posner, The Economic Structure of Tort Law (1987); Steven Shavell, Economic Analysis of Accident Law (1987).

not to cast the debate simply in instrumental terms. Rather, my objective in this Part is to examine the class settlement as a device for the sale of preclusive effect in order to frame the normative analysis, in subsequent Parts, of how the structural distinction between mandatory and opt-out classes underlies the legitimacy of the class action device in institutional terms.

To focus upon the transactional nature of class actions is not to suggest that ordinary individual lawsuits do not also have a transactional dimension. To the contrary, all civil litigation stands as a vehicle for the sale of the plaintiff's right to sue, whether by private contract (a settlement) or legal compulsion (a judgment rendered upon a verdict at trial). Civil litigation, moreover, is an awkward sale device. The plaintiff can sell her right to sue only to the defendant; and the defendant can purchase that right (and the preclusive effect that the purchase brings) only from the plaintiff.[44] As a result, bargaining over the division of the gains to be had from a settlement—saved trial costs, reduced risk-bearing costs associated with continued litigation, and the like—can prove difficult.[45] Class actions accentuate the difficulty of bargaining, for the gains to be divided often are greater and the parties' resulting bargaining range wider than in ordinary civil litigation[46]—an observation to which I shall return later in this Part.[47]

Though negotiations over the terms of the sale may prove difficult in an ordinary civil lawsuit, the sale at least takes place through a conventional agency relationship based upon a contract. An attorney acts as the sales agent for the plaintiff in the same way that a real estate broker might act as the sales agent for a homeowner. In fact, the analogy to familiar forms of sales resonates even deeper in the law. Applying the Due Process Clause to class actions, the Supreme Court has characterized the right to sue as a form of property.[48] And the usual rule for sales of either personal or real property is that the power of sale resides with the property owner or someone to whom the owner herself has delegated that power. As one commentator observes, "[t]he question of who controls the presentation of a claim in court is not much different from the question of who owns it. . . . Ownership of property is, in a sense, nothing more than the right to bring actions to enforce a claim to the property."[49]

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44. In this sense, the civil settlement process presents the usual problems associated with bargaining under conditions of bilateral monopoly. See Richard A. Posner, Economic Analysis of Law § 21.5, at 608 (5th ed. 1998).

45. See id.

46. See Geoffrey C. Hazard, Jr., The Settlement Black Box, 75 B.U. L. Rev. 1257, 1267 (1995).

47. See infra text accompanying notes 101–102. R

48. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

49. George Rutherglen, Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions, 71 N.Y.U. L. Rev. 258, 286 (1996) [hereinafter Rutherglen, Better Late].

From this conception of the right to sue as a property right stems the usual rule to which class actions are a glaring exception: the rule "that litigation is conducted by and on behalf of the individual named parties only."[50]

The class action diverges from the usual process for civil litigation in a second respect. The voluntary dismissal of a conventional civil action pursuant to a settlement is just that—voluntary, not a matter on which the court must rule. By contrast, the law of class actions insists upon a judgment, not only to mark the conclusion of litigation after a full-scale trial but also to do so by way of a settlement.[51] The sale of class members' rights to sue through the vehicle of a class settlement thus gives rise to other legal rights in the judgment itself. The law of preclusion defines those rights and forms the focal point of this Part.

A sale of property means, quite simply, that the previous owner no longer owns the property and, hence, no longer can make use of it. This general point about sales helps to explain why the sale of a right to sue has claim-preclusive effect such that the seller thereafter may not sue the buyer. Indeed, a bedrock principle of claim preclusion is that the seller cannot sue again not only on those claims advanced in the original lawsuit but also on any additional claims that could have been brought.[52] The observation that class actions operate as a vehicle for the sale of claim preclusion on a mass basis is a familiar feature of the academic literature.[53]

For several reasons, class settlements tend to accentuate this claim-preclusive effect by binding as many class members as the dealmakers can shoehorn into the class judgment. These reasons stem not only from the obvious desire of defendants for peace and of trial judges for docket clearance, but also, most revealingly, from the anticompetitive effect of the class action itself. In every class action, class counsel aspire to a monopoly that will displace competition among lawyers for the opportunity to represent individual litigants.[54]

The first section of this Part details the interaction between claim preclusion principles and the monopolization effected by the class action.

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50. Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979). On the relationship between this conception of rights of action and rights of first possession in property law, see Richard A. Epstein, Class Actions: The Need for a Hard Second Look, *in* Manhattan Institute, 2002 Civil Justice Report 4, 3–4 (Mar. 2002), available at http://www.manhattan-institute.org/html/cjr_4.htm (on file with the *Columbia Law Review*).

51. See Fed. R. Civ. P. 23(e).

52. See 18 Wright et al., supra note 12, § 4406, at 138. R

53. See, e.g., Rubenstein, supra note 10, at 375 (describing class actions "as a market for res judicata"). R

54. Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1094–95 (1996). Others have used similar rhetoric. See Fisch, supra note 4, at 657 (referring to the "monopoly position for class counsel"); Francis E. McGovern, Class Actions and Social Issue Torts in the Gulf South, 74 Tul. L. Rev. 1655, 1658 (2000) (referring to "the litigation monopoly called the class action"). R

My new twist on existing work lies in the following claim: The persons who are most at risk from the monopoly power wielded by class counsel are precisely those for whom a right to opt out is best suited. They consist of persons with high-value claims for damages that, as a result, realistically could obtain legal representation on an individual basis—that is, representation by some plaintiffs' law firm other than the class counsel monopolist.[55] For such persons, in a manner different in kind from other would-be class members, a right to opt out forms an important competitive check on the power of class counsel.

Claim preclusion is only one facet of preclusion doctrine, of course. A second variety of preclusion forms the backdrop for the sale of class members' rights to sue. The class action not only enables the settling defendant to purchase claim preclusion as against the members of the class, it also displaces the process of issue preclusion that otherwise could arise in conventional civil litigation. Since the adoption of Rule 23 in 1966, the law of issue preclusion has changed. Today, a victory for a given plaintiff on a particular disputed issue vis-à-vis a defendant in conventional civil litigation may conceivably have issue-preclusive effect in subsequent lawsuits by other, similar plaintiffs eager to prevail on the same issue against the same defendant.[56] But that defendant may not invoke issue preclusion to extend a victory for the defense on a particular issue in one plaintiff's lawsuit to subsequent lawsuits brought by other similar plaintiffs who wish to relitigate that issue.[57] Oddly enough, the asymmetry that has emerged in the law of issue preclusion since the adoption of Rule 23 actually makes the structure of the modern class action more, rather than less, plausible. The second section of this Part details the post-1966 change in issue preclusion and how it helps to explain why class actions for injunctive or declaratory relief, but generally not those for damages, warrant mandatory class treatment.

The overarching point of this Part as a whole is to situate my subsequent argument for the preexistence principle within an assessment of how class actions actually function in the real world of civil litigation. An understanding of the class action from the vantage point of preclusion doctrine highlights both the transactional nature of that procedural device and the reasons for differentiating between opt-out and mandatory classes. With those points in mind, one then may turn in subsequent Parts to the case for the preexistence principle. The beauty of that principle lies in its capacity both to account for the transactional nature of the

55. Class counsel may not represent both the class and particular class members who have opted out. In fact, class counsel may continue to represent the class even if the class representatives disavow the class settlement negotiated by class counsel on their behalf. Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 590 (3d Cir. 1999).

56. This, of course, describes nonmutual offensive issue preclusion against a party to the earlier lawsuit. See infra text accompanying notes 117–118.

57. This describes what the law of issue preclusion does not permit: namely, issue preclusion against one not a party to the earlier lawsuit. See infra text accompanying note 116.

modern class action and to explain the structure of the procedural rule that gives it life. The emphasis on the preexisting rights of class members simultaneously situates the transactional power of class settlements within the array of public institutions for law reform, explains the concomitant need for different forms of class actions, and enables one to frame principled limitations applicable to each form.

A. *Claim Preclusion and Monopolization*

That defendants should look to class actions to purchase claim preclusion en masse is not surprising. Defendants want any class settlement to mark the achievement of an enduring peace in the litigation, not just a flimsy peace in our time. The preferences of defendants readily explain why they desire to purchase the maximum scope of claim preclusion for the minimum price. The self-interest of judges to bless class settlements as a way to clear judicial dockets means that the procedural requirements of class certification and class settlement approval[58] are likely to control only loosely the sale of claim preclusion, especially at the trial court level.[59]

The existence of one eager dancer on the defense side and a band willing to play the tune, however, does not explain the existence of an equally eager dance partner on the plaintiffs' side. A staple of the class action literature is the recognition that class counsel might embrace a settlement inadequate for all, many, or some class members in exchange for the prospect of obtaining a fee award for their service based either upon their time spent on the class litigation or the total payoff to the class.[60] The recognition that the implied agency relationship at the heart of the class action carries with it serious agency costs has animated much productive thinking by scholars over the past decade,[61] and rightly so. What remains relatively unexplored is the anticompetitive effect that the

58. See Fed. R. Civ. P. 23(c)(1), (e).

59. See Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 829 (1997) ("No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members."); Koniak & Cohen, supra note 54, at 1229 ("[C]ourts in class actions seem to be exposed to the same capture, corruption, and collusion influences as federal agencies. . . . Judges have a strong self-interest in settling these lawsuits—docket clearance being perhaps the strongest—even if those settlements have various troubling features."). R

Judicial scrutiny would be both more constrained and better informed insofar as the class settlement arises after substantial individual litigation, such that there exists a set of de facto guidelines on claim values.

60. See John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 685 (1986).

61. For an overview of this literature, see Charles Silver, Class Actions—Representative Proceedings, *in* 5 Encyclopedia of Law and Economics 194, 199–200, 215–17 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

class action has within the plaintiffs' bar and the implications of that effect for the structural distinction between mandatory and opt-out classes.

1. *Class Action as Monopoly*. — Rule 23 is as much a regulatory regime as it is a procedural rule for the conduct of litigation in aggregate. The regulated market here is the market for legal representation of would-be class members. Class certification enables class counsel to obtain as their clients the absent members of the class through the operation of a procedural rule rather than in the usual, more costly way: having to identify potential clients, meet them in the flesh, and secure their contractual consent to representation.[62] Procedure offers a cheaper substitute for privity.

For class actions, no less than for any economic market, monopoly power carries the usual potential for higher prices and lower output. Here, higher prices come in the form of excessive fees for class counsel, and lower output consists of low-quality representation of the class in the form of an inadequate settlement. But, as in any market, a monopoly is not always a bad thing. Antitrust law prohibits not monopolies per se but, rather, the obtaining and maintaining of monopolies through restraint of trade.[63] For all its attendant risks, the monopoly conferred upon class counsel by procedural rule is precisely what has the potential to unlock gains for the class. The monopoly is what enables class counsel to tender for sale the entirety of claims in the litigation and, hence, the prospect of lasting peace for the defendant. That peace has considerable value for the defendant and, accordingly, is something for which the defendant may be willing to pay dearly, above the aggregate value of class members' claims if resolved only sporadically over time on a non-class basis. To put the point less formally: The monopoly is what increases the size of the pie over which the class settlement negotiations take place.[64] From the plaintiffs' perspective, however, the overall size of the pie is not the only consideration; equally important is the allocation of the pie. To discern the appropriate structure of the class action, the revealing question is how to allocate the gains to be had from a settlement—the question anticipated at the outset of this Part.[65]

62. In some areas of large-scale civil litigation, plaintiffs' law firms enter into referral relationships with one another as a way to overcome this obstacle. See Deborah R. Hensler & Mark A. Peterson, Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis, 59 Brook. L. Rev. 961, 1026 (1993).

63. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (noting that the monopolist "threatened retaliation against firms that contemplated inaugurating central station service" (citation omitted)); United States v. Microsoft, 253 F.3d 34, 58 (D.C. Cir. 2001), cert. denied, 534 U.S. 952 (2001) (emphasizing that the Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself").

64. See Charles Silver & Lynn Baker, I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds, 84 Va. L. Rev. 1465, 1507–08 (1998) (noting that all forms of aggregate litigation present both the prospect for joint gains and the risk of dereliction by the agent for the aggregate group).

65. See supra note 46 and accompanying text.

All class members in all kinds of class actions are not equally at risk in the negotiations over how to allocate the gains from a class settlement. Existing law hints at which class members stand most at risk in such an allocation. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court famously referred to a constitutional right to opt out of class actions involving damage claims.[66] *Shutts* nonetheless remains an elliptical source of guidance, at best. The specific issue in *Shutts* concerned not the proper structure for class actions generally but, rather, how a trial court might obtain personal jurisdiction over absent class members who otherwise lack minimum contacts with the forum.[67] The opportunity to opt out supported the exercise of personal jurisdiction over the absent class members, said the Court, because the foregoing of that opportunity implies their consent to the jurisdiction of the court over their persons.[68]

The insight that damage claims somehow differ from other types of claims is a valuable one, but the context of *Shutts* has left it underdeveloped. Whether *Shutts* states just a principle of personal jurisdiction or a broader theory of the class action as a whole is a question that has vexed commentators since the Court's decision.[69] To understand the distinctiveness of damage claims and to derive an account of appropriate class action structure, one must move beyond the tea leaves of *Shutts* to an assessment of how the class action actually operates—namely, as a transactional device.[70]

The reason why damage claims present distinctive problems in class settlement negotiations actually has little to do with the vantage point of class members—the focus of the jurisdictional inquiry in *Shutts*—and

66. 472 U.S. 797, 811–12 (1985) (stating that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class" if "the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law"); see also id. at 811 n.3 (reiterating that "[o]ur holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments" and disavowing the intimation of any "view concerning other types of class actions, such as those seeking equitable relief").

67. In *Shutts*, a Kansas trial court asserted personal jurisdiction over a nationwide class of royalty owners, even though many members of the class lacked contact with the state of Kansas. Id. at 806.

68. Id. at 812–14.

69. See Arthur R. Miller & David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 52–55 (1986) (noting that one can read *Shutts* simply as a case concerned with the evils of distant forum abuse or, more broadly, as a decision that protects an individual right to control the litigation of one's claim); Henry Paul Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148, 1168 (1998) (arguing that "*Shutts*'s opt-out right is limited to contexts in which [the forum] would not otherwise have a basis for in personam jurisdiction").

70. See generally Samuel Issacharoff, Preclusion, Due Process, and the Right to Opt Out of Class Actions, 77 Notre Dame L. Rev. 1057, 1058 (2002) [hereinafter Issacharoff, Preclusion] ("Absent from [*Shutts*, among other Supreme Court class action decisions,] is a direct confrontation with the nature of the class action as a state-created mechanism for binding absent parties to a judgment.").

much more to do with that of the defendant. The major gain to be had by defendants from the settlement of a damage class action consists of risk reduction of a particular sort: namely, reduction of the potential *variance* in the total value of class members' claims. This potential for variance, in turn, stems from two features of the legal landscape for damage claims: the institutional commitment to the determination of damages by juries and the doctrinal commitment to forms of damages that call upon juries to make difficult valuations that are not tied closely to objective phenomena.

In many longstanding areas of civil law, such as tort, litigants have a constitutional right to a jury trial.[71] The scholarly literature on law and cognitive psychology teaches that people in general, and hence jurors, are susceptible to a wide variety of cognitive biases.[72] Most pertinent here is the "severity effect," whereby jurors in damage cases may be more inclined to resolve contested issues in a lawsuit in favor of plaintiffs with more severe injuries.[73] For that matter, all jurors everywhere in the country are not necessarily the same. Some class members may have the right—perhaps, more accurately, only the good fortune—to sue in a jurisdiction in which juries are perceived to be more sympathetic to plaintiffs than those elsewhere or to award damages with unusual generosity.[74] Components of the damage calculus contribute further to the potential for variance. The academic literature on punitive damages[75] and com-

71. U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."); Curtis v. Loether, 415 U.S. 189, 195–96 (1974) (holding that right to jury applies to tort claims).

72. For application of the cognitive psychological literature to decision making in tort cases, see generally Neal Feigenson, Legal Blame: How Jurors Think and Talk About Accidents (2000).

73. Id. at 64–65.

74. The high concentration of class action litigation in certain localities strongly suggests the perception of an advantage to plaintiffs from suing in those places. See John H. Beisner & Jessica Davidson Miller, They're Making a Federal Case Out of It . . . in State Court, 25 Harv. J.L. & Pub. Pol'y 143, 160–68 (2001) (discussing results of study showing small group of firms brought multiple class actions in particular counties with little relationship to underlying litigation). Whether reality follows perception remains a contested proposition. See Theodore Eisenberg & Martin T. Wells, Trial Outcomes and Demographics: Is There a Bronx Effect?, 80 Tex. L. Rev. 1839, 1840 (2002) (empirical study of non-class litigation, finding "little evidence of consistent demographic effects on trial outcomes"). An interesting question unresolved in the literature is why the behavior of plaintiffs' lawyers—hardly a group unversed in the strategic realities of civil litigation—should continue to reflect a perception that certain localities favor plaintiffs if that perception is unfounded, as some empirical researchers steadfastly maintain.

75. For a concise overview of recent research on punitive damages, see Reid Hastie, Overview: What We Did and What We Found, *in* Punitive Damages: How Juries Decide 17, 22–25 tbl.1.1 (Cass R. Sunstein et al. eds., 2002). Two findings from this literature are especially significant for the problem of variance: First, "[u]nder existing law, widely shared and reasonably predictable judgments about punitive intent are turned into highly erratic judgments about appropriate dollar punishments." Daniel Kahneman et al., Shared Outrage, Erratic Awards, *in* Punitive Damages: How Juries Decide, supra, at 31, 31. Second, defendants that have done more harm to the plaintiff tend to be considered by

pensatory damages for pain and suffering[76] suggests that both are features of the damage calculus prone to variance.

The overarching point, for present purposes, is not to debate as a policy matter the sources of variance in the civil justice system. Indeed, the proposition that the class action, properly conceived, should maintain a certain agnosticism about the policy merits of class members' preexisting rights stands as a central feature of my account that the next Part will develop in greater depth.[77] Whatever one might make of the reasons for variance in damage claims, the important observation, for now, is that class members with high-value claims are the ones most at risk from the sale of claims en masse by class counsel as monopolist.[78] The greater the variance in claim value, the more fervent the effort at variance reduction through the embrace of a class settlement that dampens the prospect for variance at the high end of the damage scale and pushes payouts toward the average.[79] The defendant's strategic incentive to seek such a settlement dovetails not simply with the self-interest of class counsel to obtain a large fee but, more specifically, with the monopoly wielded by class counsel through the class action rule. It is the ability to present *all* class members' claims for settlement that creates the opportunity for the greatest reduction in variance.

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jurors to deserve greater punishment—hence, punitive damages are more likely for claims warranting high compensatory damages. See id. at 39–40. For an earlier discussion of these findings by the same authors, see Cass R. Sunstein et al., Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071, 2075–80 (1998).

76. See, e.g., Mark Geistfeld, Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries, 83 Cal. L. Rev. 773, 777–79 (1995); see also Edward J. McCaffery et al., Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards, 81 Va. L. Rev. 1341, 1354–73 (1995) (experimental research linking variance to wording of jury instructions on pain and suffering damage awards).

77. See infra Part II.

78. Class actions today often consist of damage classes that contain a range of claim values. In fact, an unresolved question of subject matter jurisdiction stems from that scenario. In federal class actions predicated upon diversity jurisdiction, lower courts have struggled with the question of whether they have authority to exercise supplemental jurisdiction under 28 U.S.C. § 1367 (2000) over class members with claims below the $75,000 amount in controversy based upon the (arguable) existence of diversity jurisdiction over other class members with claims above the specified amount. Compare, e.g., In re Abbott Labs., 51 F.3d 524, 526–27 (5th Cir. 1995) (supplemental jurisdiction available), aff'd sub nom. Free v. Abbott Labs., 529 U.S. 333 (2000) (nonprecedential affirmance by equally divided court), with Trimble v. Asarco, Inc., 232 F.3d 946, 959–62 (8th Cir. 2000) (supplemental jurisdiction not available). The answer to this question turns on, among other things, whether the supplemental jurisdiction statute overrules Zahn v. Int'l Paper Co., 414 U.S. 291, 294 (1973), in which the Court held that all class members, not just the class representatives, must satisfy the requisite amount in controversy.

79. One criticism lodged by some observers against the 9/11 Fund compensation grid is precisely that it lops off the top end of the scale—the compensation presumptively available for high-income victims. See Diana B. Henriques, In Death's Shadow, Valuing Each Life, N.Y. Times, Dec. 30, 2001, § 4, at 10.

2. *Market Discipline of Monopoly Power.* — The three observations thus far—the conception of the class action as a vehicle for a mass sale of claim preclusion, the notion of monopoly power in the hands of class counsel, and the recognition of the risk posed thereby to persons with high-value damage claims—together help to frame more precisely the terms for discussion of the right to opt out. Some commentators ridicule this right, describing it in terms of a naïve desire to preserve for individual class members a "day in court."[80] These commentators have not invented a straw man; rather, they seize upon the rhetoric sometimes used by the Supreme Court when addressing the preclusive effect of class actions.[81] That rhetoric has led astray the debate over the right to opt out.

The point is not to preserve some idealized "day in court" for individual class members. The goal instead is to discern a set of principled and institutionally appropriate checks upon the exercise of monopoly power by class counsel over the representation of class members. What high-value damage claimants need is not so much a "day in court" as the prospect of a different bargaining agent whose self-interest is not tied up with the sale of class members' rights en masse so as to achieve maximum claim preclusive effect.

Conception of the class action as a monopoly accentuates the importance of preserving the prospect for a different bargaining agent and doing so especially for damage classes with variance. An understanding of the class action as a monopoly naturally raises the question of how to discipline the exercise of monopoly power by class counsel. One may understand several of the developments in class action law over the past decade as reflecting a growing recognition of the need for judicial oversight of class counsel's monopoly power. Examples include heightened judicial attention to the determination of fee awards for class counsel,[82] experimentation with judicially administered auctions to select class counsel,[83] and heightened demands for judicial scrutiny of class settlements.[84] By regulating the returns that class counsel may gain from their monopoly and by scrutinizing the transactions into which class counsel enter, courts operate in the fashion of public utility commissions. But

80. See Rosenberg, supra note 32, at 863–66. Another commentator has argued for a broadening of preclusion in complex civil litigation, advancing a similar critique of the "day in court" ideal. See Robert G. Bone, Rethinking the "Day in Court" Ideal and Nonparty Preclusion, 67 N.Y.U. L. Rev. 193, 195–99 (1992). R

81. See, e.g., Martin v. Wilks, 490 U.S. 755, 762 (1989).

82. See, e.g., In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 742 (3d Cir. 2001), cert. denied sub nom. Kirby McInerney & Squire, LLP v. Joanne A. Aboff Family Trust, 534 U.S. 889 (2001) (urging use of multiple methods of fee calculation to double check one another and noting that fee award to class counsel should be in line with that in comparable class actions).

83. See supra note 4 (noting the misgivings expressed in recent commentary on class counsel auctions). R

84. See, e.g., Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279 (7th Cir. 2002) (Posner, J.) (requiring district judges "to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions").

courts, at best, are awkwardly suited for this role, for it requires them to act contrary to their self-interest in docket clearance.

Another kind of response—indeed, the familiar counterpart to monopoly regulation in the manner of a public utility commission—consists of harnessing market forces to discipline monopoly power. The prospect of a market-based check on class counsel takes the inquiry closer to a normative account of the right to opt out, for that right ultimately is what enables class members to secure immunity from the sale negotiated by class counsel[85] and to sell, if at all, through a different agent. In this sense, one might say that exit[86] (the right of class members to opt out) is correlative with entry (the opportunity for alternative law firms to seek such persons as clients). The challenge lies in whether such alternative bargaining agents are likely to appear on the scene.

High-value damage claims simultaneously stand most at risk from the sale of claim preclusion by class counsel as monopolist *and* present the most credible prospects for competitive entry. As in any market, the prospects for competitive entry turn upon its benefits and costs. The benefits are not hard to see. The contingency fee remains "one of the defining characteristics of civil litigation in the United States";[87] and the prospect of obtaining the contingency fees from high-value claims serves as the enticement for entry.

Equally important are the costs of entry. Here, too, the literature on monopolies is helpful. For the past two decades, the economic literature has included discussions of how the potential for entry in "contestable markets" can constrain the exercise of monopoly power by a single incumbent firm. One commentator summarizes the theory in its most rarefied theoretical form:

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85. See John E. Kennedy, Class Actions: The Right to Opt Out, 25 Ariz. L. Rev. 3, 17 n.81 (1983).

86. Two commentators speak explicitly of the right to opt out as a right of "exit," invoking Albert Hirschman's classic treatment of the "exit," "voice," and "loyalty" rights that individuals might have within a larger collective organization such as a corporation or a government. See John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 376–77 (2000); Samuel Issacharoff, Governance and Legitimacy in the Law of Class Actions, 1999 Sup. Ct. Rev. 337, 366 [hereinafter Issacharoff, Governance]. See generally Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States (1970).

Exit rights are especially important in practical terms due to the risk that defendants will attempt to conduct a "reverse auction"—that is, will seek to negotiate a class settlement with the one firm among the many in the plaintiffs' bar most eager to provide the defendant with beneficial settlement terms. See Coffee, supra, at 434. The existence of the reverse auction problem, if anything, underscores the practical importance of ascertaining principled limits on the scope of dealmaking between the defendant and any would-be counsel for the plaintiff class. The preexistence principle stands as just such a limit.

87. Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 267 (1998).

> The theory [of contestable markets] pertains to markets which have substantial attributes of natural monopoly, but which are characterized by free and easy entry and exit. For such markets, the cost-minimizing market structure calls for a single seller, yet the theory asserts that these sellers are without monopoly power. In the case of contestable markets, potential entry or competition *for* the market disciplines behavior almost as effectively as would actual competition *within* the market. Thus, even if operated by a single firm, a market that can be readily contested performs in a competitive fashion.[88]

I certainly do not mean to suggest that entry into or exit from the market for representation of class members is "free and easy" in the manner of contestable markets in a theoretically pristine form. Just as Ronald Coase's famous vision of a world without transaction costs[89] served to highlight the practical importance of those costs for the assignment of legal entitlements,[90] so too the theory of contestable markets in a world of free entry and exit underscores the importance of the costs that potential entrants must incur.

As theorists of contestable markets emphasize, the crucial distinction is between fixed costs and sunk costs.[91] Potential entry can constrain an incumbent monopolist as long as entrants will incur relatively low sunk costs, even if the fixed costs of entry are relatively high.[92] To put the

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88. Elizabeth E. Bailey, Contestability and the Design of Regulatory and Antitrust Policy, 71 Am. Econ. Rev. 178, 178 (1981). For a more detailed exposition of the theory, see generally William J. Baumol et al., Contestable Markets and the Theory of Industry Structure (1982). The theory of contestable markets builds upon earlier criticism of conventional monopoly regulation. See, e.g., Harold Demsetz, Why Regulate Utilities?, 11 J.L. & Econ. 55, 65 (1968) (arguing in the context of utility regulation that "the rivalry of the open market place disciplines more effectively than do the regulatory processes of the commission").

By invoking the literature on contestable markets, I nonetheless leave for another day the question of whether class actions are natural monopolies. I argue simply that, given the decision of procedural law to create monopolies by providing for class actions, the literature on contestable markets sheds light on how class actions should function.

89. See R.H. Coase, The Problem of Social Costs, 3 J.L. & Econ. 1 (1960).

90. See Daniel A. Farber, Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem, 83 Va. L. Rev. 397, 416–21 (1997).

91. As theorists of contestable markets explain:

> Long-run fixed costs are those costs that are not reduced, even in the long run, by decreases in output so long as production is not discontinued altogether. But they can be eliminated in the long run by total cessation of production.
>
> Sunk costs, on the other hand, are costs that (in some short or intermediate run) cannot be eliminated, even by total cessation of production. As such, once committed, sunk costs are no longer a portion of the opportunity costs of production.

Baumol et al., supra note 88, at 280; see also Don Coursey et al., Market Contestability in the Presence of Sunk (Entry) Costs, 15 Rand. J. Econ. 69, 70–71 (1984) ("The significance of a sunk cost is that it is a fixed opportunity cost of the *entry* decision; i.e., sunk costs can be avoided by a decision not to enter a particular market. The concept is to be distinguished from fixed costs that are independent of any operating decision."). R

92. See Baumol et al., supra note 88, at 279. R

point less formally, the crucial question is whether entrants must incur costs that they later could not eliminate by shifting to some other productive activity. The classic example is the cost of laying a railroad line on a particular route to compete with that of an incumbent railroad.[93] The railroad line cannot be redeployed for some other productive activity but, rather, remains sunk in the entrant's effort to compete with the incumbent firm.

The costs associated with entry into the market for representation of class members consist predominantly of fixed rather than sunk costs. The principal fixed cost consists of people—literally, associates and paralegals—to do the legal work needed to obtain clients from among the would-be members of the class and to develop familiarity with the merits of the litigation. Neither potential clients nor information about the merits of the litigation is something to which class counsel can limit access in the manner that a monopolist with a patent on a critical productive technology can prevent entry by a competitor.

In most areas of large-scale nationwide litigation amenable to class treatment, class members will be spread across the country, making it difficult for any single firm to control access to those potential clients. Indeed, as noted earlier, class actions are attractive vehicles for the sale of preclusive effect because they alleviate the need for class counsel to meet in the flesh with all of the class members. Furthermore, information about the merits of the litigation is not protected in the manner of a patent. Civil complaints are quintessentially public documents, for they must be filed in court. The civil discovery process, moreover, enables any entrant that can manage to find a client and mimic the allegations of the class complaint to compel the disclosure of information about the merits of the litigation.[94]

True enough, entry into the market for representation of high-value claims within the class will not necessarily meet with success. But the sunk costs associated with entry nonetheless remain low. Associates and paralegals can be redeployed to other, more lucrative areas of litigation in the event that entry into a given area proves unsuccessful. If necessary, the firm may discharge personnel—in short, fire people—if there is not

93. See id. at 281.

94. One respect in which class counsel might be able to undercut the prospect for entry lies in those areas in which there is a limited supply of suitable expert witnesses to support the allegations in the litigation. As part of the heightened attention during the past decade to the admissibility of expert testimony, courts have expressed a preference for experts who testify based upon independent work on the matters in question, as distinct from experts who formulate their opinions solely for purposes of litigation. See, e.g., Daubert v. Merrell Dow Pharm., 43 F.3d 1311, 1317 (9th Cir. 1995). If the body of independent work is sufficiently small, then class counsel might be able to recruit the experts with prior work in the area and to secure from them an obligation not to work for anyone else. Such an approach would leave potential entrants with the unenticing prospect of finding suitable experts with no preexisting work in the area who, as such, would be more vulnerable to defense motions to exclude.

enough work to go around. In any event, associates and paralegals simply are not sunk costs in the manner of railroad track laid on a particular route.

Monopoly regulation in the manner of a public utility commission and regulation through the disciplinary effect of potential entry do not present a stark, either/or choice. To discern the structure of the class action, the important point lies in when these two mechanisms are realistically available. In this regard, class actions for damages with variance in claim values stand in contrast to class actions involving uniformly low-value claims or those seeking only injunctive or declaratory relief. Class actions involving uniformly low-value claims do not displace a preexisting market for the representation of class members. Here, the practical choice in private litigation is between a class action and no action at all.[95] As a result, the only realistic vehicle for monopoly regulation consists of court-centered measures on the model of a public utility commission.[96]

Class actions seeking only injunctive or declaratory relief do not raise concern over variance in the manner of damage classes. Classes for injunctive or declaratory relief characteristically center upon broadly applicable policies or conduct[97]—say, administrative procedures applied to support denials of benefits from the government, provisions of a pension plan, or a discriminatory employment practice. The disputed policies or conduct may well affect particular class members to varying degrees. Some class members may benefit more or less from a class settlement whereby the defendant promises to make changes in the disputed conduct short of all relief sought in the class complaint. But when the complaint calls simply for the defendant to stop a course of unlawful conduct and to bring itself into compliance with the law, there is little *systematic* incentive on class counsel's part toward the kind of compression in benefits under a settlement akin to the tendency in classes involving variance in damages. The challenge lies in ensuring an appropriate level of care and effort on the part of class counsel in the conduct of the litigation as a whole, not in the allocation within the class of the gains from settlement.

Given the distinctiveness of damage classes with variance, one final nuance remains—one that relates the potential for entry by a competing

95. The alternative to a privately initiated class action is public regulatory enforcement. Litigation by the Securities and Exchange Commission or the Antitrust Division of the Department of Justice characteristically seeks to protect the legal rights of persons with claims of too little value individually to justify private lawsuits.

96. One commentator criticizes the right to opt out on the ground that low-value claimants have "no realistic opportunity" to exercise that right, "because their claims are unlikely to be economically viable as independent suits." Perino, supra note 32, at 104–05. This, however, is simply a quizzical reiteration of the point that, for unmarketable claims, the only realistic vehicle for regulation consists of courts as public utility commissions, not the prospect of entry. R

97. The text of Rule 23(b)(2) captures this notion, authorizing class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2).

firm within the plaintiffs' bar to the conduct of negotiations between class counsel and the defendant over how to divide the gains from a class settlement. Some commentators see the right to opt out as giving rise to "an inherent paradox" in the law of class actions: "[T]he recognition of opt-out rights in cases where they can be feasibly exercised can destroy the effectiveness of the class mechanism that serves as the foundation for those rights in the first place."[98] This contention ignores the central lesson from the theory of contestable markets by confusing the effect of actual entry and the disciplinary effect of credible *potential* entry. Entry that precipitates the opting out of high-value claimants en masse might well scuttle an opt-out class settlement.[99] That recognition, however, is not an insight beholden only to would-be competitors within the plaintiffs' bar. It is a concern that will bear upon the design of the class settlement itself, particularly its treatment of high-value claims. For class actions, no less than for other monopolies, the prospect of entry by a would-be competitor can operate to discipline the exercise of monopoly power, even without entry actually occurring.[100]

The disciplinary effect of potential entry takes us back to the point made at the outset of this Part about the difficulty of negotiations over the division of the gains to be had from a class settlement.[101] The reason why such negotiations are difficult is that no category of persons has a clear entitlement to those gains. That the defendant would save money from not having to continue the litigation does not mean that the defendant necessarily is entitled to pocket those savings. But neither must the reduction of risk on the plaintiffs' side of a class action necessarily redound to their benefit. The effect of a credible threat of entry is to give class counsel and their defense counterparts reason to allocate a healthy dollop of the gains from settlement to high-value claims.[102]

The compensation framework for damage claimants may range from the wide variance permitted—for better or worse—by the conventional civil justice system all the way to the kinds of compressed bureaucratic compensation schedules exemplified by the 9/11 Fund or workers' compensation. The choice between those two extremes is a stark one. The

98. Perino, supra note 32, at 89. For similar criticism of the right to opt out, see Rosenberg, supra note 32, at 870–73; see also Rutherglen, Better Late, supra note 49, at 278–79 ("A mix of viable and nonviable claims might leave the defendant faced with the risk that a settlement precludes only nonviable claims that would not have been brought anyway, while class members with more valuable, viable claims opt out to pursue separate actions."). R R

99. See infra text accompanying note 290 (noting that defendants in settlements of opt-out class actions typically retain a right to withdraw from the settlement in the event of excessive opt-outs). R

100. See supra text accompanying note 88. R

101. See supra text accompanying note 46. R

102. A related point deferred for later discussion is the criticism that substantial allocation of the gains from settlement to high-value damage claims will come at the expense—so to speak—of average claims that remain in the class. For the misconceptions on which this criticism rests, see infra Part III.A.

threat of competitive entry preserved by the right to opt out operates to prevent a settlement for a damage class with variance from proceeding completely to a compressed compensation grid.[103] In this manner, a credible threat of entry serves as a brake upon the tendency of the class settlement to function as mini-legislation for civil justice reform.

The relationship between the threat of entry and the *legitimacy* of class settlements in *institutional* terms bears emphasis. My point here is not simply to append the vocabulary of contestable markets to the right to opt out as a way to defend that right on instrumental grounds. Thoughtful defense of opt-outs along such lines is already a part of the scholarly literature.[104] Nor is my account of competitive entry simply another theory of adequate class representation, gussied up by economic terminology. My objective, instead, is to use the literature on monopoly regulation to lay the descriptive groundwork for analysis of class action structure in terms of class members' preexisting rights. The claim preclusive effect of class settlements is what carries the potential to push them perilously close to civil justice reform legislation. It is because class counsel do not have nearly the kind of institutional legitimacy as legislators do to alter the rights of the populace that class settlements cannot do all that Congress might by way of legislation—whether to impose a compressed bureaucratic damage schedule or any other type of civil justice reform that one might consider desirable on instrumental grounds.

As Part II shall explain, the justification for this brake on the bargaining power of class counsel lies in the preexistence principle—the idea that the class action must take as given class members' preexisting bundle of rights, whatever the merit of those rights as an instrumental matter.[105] It is precisely because the choice between a civil litigation system for compensation and a streamlined bureaucratic regime is so stark and implicates hotly contested questions of individual autonomy and social efficiency that answers to those questions ought to be imposed upon people—if at all—through political institutions, not through the private sale of claim preclusion via a class action. The point of this section—that the sale takes place at the behest of would-be monopolists—is to highlight the acuteness of the legitimacy problem. Before turning to concerns of institutional legitimacy, however, one must assess the effect of another aspect of preclusion law upon the structure of the modern class action. The next section addresses that subject, with particular attention to classes seeking injunctive or declaratory relief.

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103. Criticizing the right to opt out as a "market check" on inadequate class settlements, one commentator nonetheless makes the considerable concession that the right does "test[ ] whether the proposed settlement amount allocated to large claimants is equivalent to the baseline tort awards those claimants reasonably expect in individual actions." Perino, supra note 32, at 130. R

104. For analysis of when exit rights are likely to be superior to rights of loyalty or voice in terms of the instrumental objective to safeguard absent class members, see Coffee, supra note 86, at 417–28. R

105. See infra Part II.B.2.

B. *Issue Preclusion and Remedial Choice*

The recognition that class actions sell claim preclusion on a mass basis leads to some revealing observations on the nature of the damage class and the right to opt out. But a single-minded focus upon claim preclusion would obscure the additional insights to be gained from attention to the interplay between issue preclusion and the class action. Since the adoption of Rule 23 in 1966, much has changed in surrounding areas of law and in class action practice. Curiously enough, and no doubt unintentionally, developments in the law of issue preclusion since 1966 actually help to frame a fresh line of support for the structural distinction between mandatory and opt-out classes.

1. *Post-1966 Developments.* — The ideal of symmetry in class action litigation played an important and well-documented role in the creation of the opt-out class action. A quick word about the events that led to that innovation lends content to the term "symmetry" and sets the stage for discussion of issue preclusion post-1966.

The advisory committee that crafted Rule 23 cast the opt-out class as a response to the then-pressing problem of "one-way" intervention.[106] Under the predecessor provision to Rule 23, the class action in nonmandatory form consisted of a procedural device that would generate a judgment binding only upon the named parties plus any intervenors.[107] Would-be class members thus had a powerful incentive to wait to intervene, if at all, until after a judgment on the merits in favor of the named plaintiff in the class proceeding but to remain on the sidelines if the class judgment were in the defendant's favor.[108] This process of one-way intervention gave rise to a glaring asymmetry in the class action, with defendants faced with the prospect of a loss that effectively would inure to the benefit of all potential plaintiffs but with defendants unable to bind all such persons to the class judgment in the event of a defense victory. The advisory committee responded to this asymmetry by creating the opt-out class in Rule 23(b)(3) and specifying that the judgment therein, "whether favorable or not, will include all [class] members who do not request exclusion" by affirmatively opting out prior to judgment.[109]

Although Rule 23 thus addressed the asymmetry of one-way intervention, developments in issue preclusion since 1966 highlight an asymmetry of a different sort. The kinds of disputes amenable to class treatment are, by definition, those in which "there are questions of law or fact com-

106. See Kaplan, supra note 19, at 397. R

107. See Fed. R. Civ. P. 23 advisory committee's note.

108. See Kaplan, supra note 19, at 385, 397. R

109. Fed. R. Civ. P. 23(c)(2)(B). The need to prevent one-way intervention, moreover, supplied the justification for creating a right to opt out as opposed to a right to opt into the class. See Kaplan, supra note 19, at 397–98. For more detailed discussion of the opt-out versus opt-in choice, see infra Part III.C. R

mon"[110] across a class "so numerous that joinder of all members is impracticable."[111] Common issues across multiple would-be litigants are the stuff of which arguments for issue preclusion are made.

In the late 1960s, the law of issue preclusion was in a state of transition that stemmed from mounting dissatisfaction with the "mutuality" requirement: the notion that, if one party to a subsequent lawsuit could not be bound by the determination of an issue in a previous lawsuit, then neither party could be bound.[112] Dissatisfaction with the mutuality requirement had begun to gain momentum in the lower courts[113] but had yet to receive endorsement from the Supreme Court. As a result, a group of would-be plaintiffs in ordinary civil litigation could not necessarily count on the ability to wield issue preclusion in their respective individual lawsuits to secure the benefit of a favorable determination of an issue obtained in an earlier lawsuit against the same defendant by a similarly situated plaintiff. This use of earlier determinations describes the now-familiar scenario of nonmutual offensive issue preclusion against a party—here, the defendant—to the earlier lawsuit invoked for its preclusive effect. As of 1966, nonmutual offensive issue preclusion had yet to become firmly entrenched.[114]

The absence of firm recognition for nonmutual offensive issue preclusion nonetheless preserved a symmetry of sorts. Other would-be plaintiffs could not secure the benefits of a victory for an earlier plaintiff on a particular issue obtained in a lawsuit against the defendant. But neither could such a defendant secure the benefits of a victory for the defense on that issue against other plaintiffs who were not parties to the earlier lawsuit. Due process, then and now, generally does not permit issue preclusion against a nonparty.[115]

The law of issue preclusion post-1966 effectively eliminated the foregoing symmetry. The narrative of that change is well told in the existing literature, so one need recall only the important scenes here. In 1979, the Supreme Court in *Parklane Hosiery Co. v. Shore* endorsed nonmutual

110. Fed. R. Civ. P. 23(a)(2). Even a single question of law or fact common to the members of the class will satisfy the commonality requirement, notwithstanding the use of the plural—"questions of law or fact"—in Rule 23(a)(2). See Klonoff & Bilich, supra note 5, at 88. **R**

111. Fed. R. Civ. P. 23(a)(1).

112. See 18A Wright et al., supra note 12, § 4463, at 677. **R**

113. Procedural scholars trace the judicial attack upon the mutuality requirement to the California Supreme Court's decision in Bernhard v. Bank of America, 122 P.2d 892 (Cal. 1942). See David L. Shapiro, Civil Procedure: Preclusion in Civil Actions 107–08 (2001); 18A Wright et al., supra note 12, § 4464, at 694. For an oft-cited assessment of **R** issue preclusion around the time of Rule 23, see generally Brainerd Currie, Civil Procedure: The Tempest Brews, 53 Cal. L. Rev. 25 (1965) (paying tribute to Judge Traynor and his decision in *Bernhard*).

114. See, e.g., Allan D. Vestal, Res Judicata/Preclusion V-322 (1969) (noting that nonmutual offensive issue preclusion depends on "all of the facts and nuances" of the situation).

115. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979).

offensive issue preclusion against a party to an earlier lawsuit.[116] In fact, some sources use the sobriquet "*Parklane* issue preclusion" synonymously with the term "nonmutual offensive issue preclusion."[117] As if the Court's holding were not enough, the *Restatement (Second) of Judgments*—in preparation at the time of *Parklane* and adopted shortly thereafter—broke with its predecessor edition to embrace the same view of issue preclusion.[118]

To be sure, *Parklane* issue preclusion remains unavailable to a plaintiff who "easily" could have joined the earlier lawsuit for which preclusive effect is sought.[119] Situations addressed by the modern class action lie largely outside this constraint, however, as they consist of instances in which joinder of all class members would be "impracticable."[120] Absent class treatment, those situations would have a potential for precisely the kind of asymmetry that the earlier mutuality requirement—for all its faults—avoided in situations of multiple civil claimants. In conventional individual litigation, other plaintiffs conceivably might obtain the benefit of a favorable determination of an issue made in an earlier lawsuit brought by another plaintiff against the same defendant.[121] But the defendant still could not wield issue preclusion in the event of a victory for the defense on an issue that subsequent plaintiffs wished to relitigate.

Commentary from around the time of *Parklane* makes the basic point that class actions rope the would-be invokers of *Parklane* issue preclusion into a single class such that they will be bound by any resulting adjudication of classwide issues.[122] But not all situations amenable to class treatment in some form pose the problem of asymmetry in the same way or with the same disfavored consequences. The differences between those situations cast new light upon the distinction between mandatory and opt-out classes.

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116. See id. at 329–31. The holding in *Parklane* built upon the Court's earlier decision in Blonder-Tongue Labs. v. Univ. of Illinois Foundation, 402 U.S. 313 (1971). That case involved nonmutual defensive issue preclusion—invocation of an earlier judgment by a nonparty to prevent the losing party from relitigating an issue determined against it—rather than the offensive variety recognized in *Parklane*.

117. See, e.g., Lawrence C. George, Sweet Uses of Adversity: *Parklane Hosiery* and the Collateral Class Action, 32 Stan. L. Rev. 655, 665 (1980).

118. Compare Restatement (Second) of Judgments § 29 (1982) with Restatement of Judgments § 93 (1942).

119. See *Parklane*, 439 U.S. at 331. In addition, *Parklane* issue preclusion is unavailable where "the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion." 18A Wright et al., supra note 12, § 4464, at 702. R

120. Fed. R. Civ. P. 23(a)(1).

121. The ability of subsequent plaintiffs to wield successfully *Parklane* issue preclusion may be limited in highly complex civil litigation involving multiple defendants and products. For detailed analysis of problems along these lines in the asbestos litigation, see Michael D. Green, The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation, 70 Iowa L. Rev. 141, 186–212 (1984).

122. See George, supra note 117, at 665 ("The most prominent distinction between post-judgment issue preclusion and class actions . . . is that class actions do, and *Parklane* issue preclusion does not, expose potential parties to future actions to risk."). R

2. *The Significance of the Class Relief Sought.* — A class action involving claims for damages necessarily will include a common nondamage issue—typically, one pertaining to the liability of the defendant. Examples include whether the defendant engaged in wrongful conduct (say, negligence under tort law, restraint of trade under antitrust law, or fraud under consumer protection or securities law) or whether there exists a causal connection between the defendant's conduct and the kind of ailment suffered by the class. There would remain questions as to whether a particular issue of liability sufficient to demonstrate commonality for purposes of class certification would constitute the same issue across multiple claimants needed to support issue preclusion in the context of conventional lawsuits.[123] But one observation can confidently be made: The one significant issue that realistically could not give rise to assertions of *Parklane* issue preclusion by would-be class members in individual lawsuits is the calculus of damages for those individuals. For the most part, civil law takes the position that damages are a personal matter in the sense that the plaintiff, upon a showing of liability, may recover for *her* damages, not those suffered by others.[124] Her damages depend upon her particular situation. Issue preclusion, by contrast, applies only with respect to the same issue actually litigated and determined in a previous lawsuit, not to issues that exhibit only some looser degree of similarity.[125]

The rise of *Parklane* issue preclusion highlights the significance of the damage remedy sought against a common defendant said to have wronged in similar fashion a large number of would-be plaintiffs. Prior to *Parklane*, none of the issues in a damage class action would have been amenable to issue preclusion in individual litigation. *Parklane*, however, effectively separates liability from the damage remedy, raising the possibility of asymmetric issue preclusion as to those questions of liability that are identical across the would-be plaintiffs. Aside from the special case of claims against a limited fund,[126] damage classes thus present only a partial case, at best, for insistence upon class treatment of all claims as a way to forestall the asymmetry in issue preclusion created by *Parklane*.[127] The

123. On the nuances of the requirement that the issue be the same, see 18 Wright et al., supra note 12, § 4417, at 412–65. R

124. Punitive damages—drawn, as their name suggests, from notions of criminal punishment—represent a notable exception to this conception of the civil damage remedy. See Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991) (noting that, in assessing punitive damages, the jury may consider the effect of the defendant's conduct upon persons situated similarly to the plaintiff).

125. See supra note 123. R

126. As explained later, the justification for mandatory treatment of the limited fund scenario does not rest upon concerns of issue preclusion. See infra Part III.D.1.

127. I defer for the moment the question of when it may be possible to design a damage class action to address issues of liability common across the class but to leave room for non-class treatment of the damage calculus for individual class members. Cf. Fed. R. Civ. P. 23(c)(4)(A) ("When appropriate . . . an action may be brought or maintained as a class action with respect to particular issues . . . ."). In keeping with the preexistence principle, the answer turns upon the content of substantive law applicable in the

portion of the litigation that presents no potential for asymmetry in issue preclusion—the damage calculus that distinguishes high-value from low-value claims—is precisely the portion for which some would-be class members could use representation by a competitor to class counsel. In this way, the analysis here of issue preclusion reinforces the conclusion of the previous section that high-value damage claims present a distinctive case for nonmandatory—that is, nonmonopolistic—class treatment.

There are, however, situations in which issues potentially amenable to *Parklane* issue preclusion permeate the entirety of the class action: namely, instances in which the class action presents *only* liability issues directed to whether the defendant has deviated from the applicable standard of conduct. This description fits situations in which the class alleges that the defendant "has acted or refused to act on grounds generally applicable to the class" such as to make appropriate injunctive or declaratory relief[128] or, similarly, where individual lawsuits otherwise would "create a risk of . . . establish[ing] incompatible standards of conduct" for the defendant.[129] This language, of course, comes from the subsections of Rule 23 that do not merely permit a class action but, in the event that one is brought, authorize the court to make it mandatory for all class members. Since the enactment of Rule 23, commentators have come to recognize the considerable overlap between these two subsections as a practical matter[130]—hence, the lumping of them together for purposes of analysis here.

Of the quoted passages, the reference to "incompatible standards of conduct" in Rule 23(b)(1)(A) is the more telling for present purposes. If sued by a class in which membership was not mandatory, the defendant could not invoke issue preclusion to generalize any pro-defense results of that litigation to class members who had opted out. Those individuals, by definition, would not be parties to the class proceeding and, as such, could not have issue preclusion successfully interposed against them.

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litigation—specifically, whether that law enables the court certifying the class to "carve at the joint" between issues of liability and damages or whether that law intertwines the two such that attempts so to carve only would create additional problems. See infra text accompanying notes 387–394 (contrasting employment discrimination cases under Title VII with conventional tort cases). For the carving metaphor, credit (or blame) In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995) (Posner, J.).

128. Fed. R. Civ. P. 23(b)(2).

129. Id. 23(b)(1)(A).

130. Describing "the type of class action context most likely to qualify for class treatment under Rule 23(b)(1)(A)," the authors of the leading treatise on class actions point to "a broad spectrum of class actions seeking declaratory or injunctive relief against a party opposing the class." 2 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 4:8, at 31–32 (4th ed. 2002). They add that "[m]ost of these examples, particularly in the civil rights area, will also qualify as Rule 23(b)(2) class actions." Id. The one slight difference, they suggest, is that "Rule 23(b)(1)(A) class actions are not limited to those suits seeking primarily declaratory or injunctive relief. Monetary damages may be a major if not predominant form of relief sought." Id. § 4:8, at 32–33.

Their separate lawsuits would create at least "a risk . . . of establish[ing] incompatible standards of conduct."

If permitted to opt out, however, the members of such a class would enjoy the benefits of a class victory on the liability question either practically or, if need be, through invocation of *Parklane* issue preclusion. Absent demands for damages, the liability issue—whether the defendant's generally applicable conduct deviates from the governing legal standard—is indivisible in the sense that the defendant's conduct is either lawful or unlawful as to everyone it affects. A disputed feature of a pension plan is either permissible or not; the same is true of a disputed administrative procedure or employment practice. As a result, a winning effort to stop the disputed conduct (or to compel legally required conduct) would, as a practical matter, redound to the benefit not just of those who are parties to the litigation but also to other affected persons who remain on the sidelines. And, even if this were not true as a practical matter, opt-out claimants could attempt to invoke *Parklane* issue preclusion in order to get the benefit of a class victory against the defendant. The situation of the injunctive or declaratory relief class challenging a general course of conduct thus forms a distinctive case for mandatory class treatment to rope in all would-be invokers of *Parklane* issue preclusion, if a class action is to take place at all.[131]

By focusing upon issue preclusion—a doctrine that turns upon actual litigation and determination of a disputed issue—I do not mean to slight the significance of settlements for class actions seeking injunctive

131. It bears emphasis that the analysis here explains why mandatory class treatment is appropriate once a class action in a Rule 23(b)(1)(A) or (b)(2) situation has been brought. The decision whether to sue on a classwide basis rests with plaintiffs' counsel. The further question of whether class treatment itself should be required—that is, whether a mandatory class should be preferred not just over an opt-out class but even over litigation by individual named plaintiffs—implicates an aspect of class action law beyond the scope of this Article: namely, the proper parameters of the so-called defendant class. That term refers to situations in which the complaint transposes the two conventional sides in a class action lawsuit—where the nominal plaintiff (usually, the defendant) is the party that has acted or refused to act on generally applicable grounds and the nominal defendant (usually, the plaintiff class) consists of the class of affected persons. The crucial strategic difference is that the decision to proceed on a classwide basis resides with the party that would have been the defendant in a conventional class action, not with counsel for the would-be plaintiff class. If permitted, a defendant class action thus would enable the conventional defendant to force class treatment upon the class members rather than vice versa.

Though the Supreme Court has yet to speak definitively to the matter, federal appellate courts have proven relatively unreceptive to defendant classes under Rule 23(b)(2). See, e.g., Henson v. East Lincoln Township, 814 F.2d 410, 413 (7th Cir. 1987) (citing cases in which defendant class actions were greeted with judicial skepticism). Whether that chilly reception stands as either a proper reading of Rule 23 or otherwise a sensible conception of the class action is a question that I leave for another day. The point here is simply to use the law of issue preclusion as a template with which to understand the distinction between mandatory and non-mandatory class treatment in the event that a class action is pursued.

or declaratory relief. Here, too, the characteristic end of the litigation is a deal, not a trial. To say that the dealmakers on the plaintiff class side have the power to negotiate on behalf of a mandatory class is to confer upon those lawyers the kind of monopoly vis-à-vis competing law firms of which the previous section speaks with trepidation. The insight of the present section is that there exists a deep connection between the monopoly conferred with respect to classes for injunctive or declaratory relief and the content of the preexisting rights associated with class members' claims—here, the rights afforded by the law of issue preclusion. The nature of that connection, its derivation in institutional terms, and its larger significance for the structure of the modern class action are the subjects of the next Part.

II. The Preexistence Principle

Examination of the class action from the standpoint of preclusion helps to describe more precisely the manner in which the mass sale effected by a class settlement acts upon class members' preexisting rights. Simply describing the operation of that sale, however, does not identify the proper terms under which the law of class actions *should* confer a power of sale upon class counsel. As noted earlier, the right to opt out of a damage class with variance in claim values will encourage class settlement negotiators to stop short of the full-bore embrace of a compressed damage grid.[132] But that observation simply raises the question of why the law should have a class action rule with such an effect. Similar normative questions surround the justification for providing class counsel with an unassailable monopoly with respect to the sale of claims against a limited fund or of claims for injunctive or declaratory relief—the familiar scenarios for mandatory class actions.[133]

This Part advances a simple but revealing claim about these normative questions: namely, that the law may best conceive of the modern class action by reference to what I label here the "preexistence principle." That principle holds that the class action has no roving authority to alter unilaterally class members' preexisting bundle of rights, because the class action, properly understood, inherently differs from legislation enacted through the political branches of government. Those instances in which the class action ought to dispense with this limitation consist of situations in which conditions antecedent to the class itself give rise to a conflict in preexisting rights.

The preexistence principle is by no means foreign to current law. As section A of this Part explains, pieces of the principle already appear in the Supreme Court's leading decisions on class settlements, though they do so in seemingly unconnected ways. This initial section supplies the conceptual frame within which to see those pieces as part of a larger and

132. See supra Part I.A.2.

133. See Fed. R. Civ. P. 23(b)(1), (2).

more powerful picture. Section B sets forth the institutional basis for the principle, pointing first to the Rules Enabling Act as the source of authority for Rule 23 and then speaking more broadly about the basis for the limited delegation of law reform power contained in that Act. That basis relates closely to the enduring constitutional concern over the delegation of lawmaking power to private persons.

The preexistence principle redirects efforts to accord binding force to contested programs of law reform, channeling those efforts away from class settlements and toward public lawmaking institutions less susceptible to capture by narrow private interests. In this way, the present Part links the preexistence principle back to the earlier discussion of the monopoly power to which class counsel aspire. The temptation of all monopolists to serve their own private ends but to disserve those of consumers dovetails with the basic thrust of the preexistence principle that unilateral alterations of class members' rights generally are best effected, if at all, through public bodies. The preexistence principle imposes a substantive restriction on the bargaining power of class counsel—generally barring them from acting upon class members' preexisting rights—that simultaneously facilitates competitive entry to check the exercise of class counsel's monopoly power.

A. *Rudiments in Current Law*

Appropriately enough, the Supreme Court's leading decisions on class settlements—*Amchem Products, Inc. v. Windsor*[134] and *Ortiz v. Fibreboard Corp.*[135]—have spoken, in turn, to the opt-out class and the mandatory class scenarios. This seemingly separate focus makes it all too tempting to regard the two cases as speaking to distinct aspects of the class action rule. Such a view, however, would obscure the larger conception of the class action lurking within the details. This section exposes that conception.

The class settlements struck down by the Court in *Amchem* and *Ortiz* provide apt vehicles for discussion of the relationship between the class action and the legislative process. In both cases, a class settlement agreement sought to switch future claims for occupational exposure to asbestos from the conventional tort system to some form of streamlined administrative compensation scheme.[136] In this enterprise, these "sprawling"[137] class settlements undoubtedly were exceptional. Class settlements typically are not confined to future claims. And class settlements generally grow out of some degree of adversarial maneuvering by the opposing

134. 521 U.S. 591 (1997) (decertifying opt-out class under Rule 23(b)(3)).

135. 527 U.S. 815 (1999) (decertifying mandatory class under Rule 23(b)(1)(B)).

136. For a more detailed exposition of how the specific terms of the class settlements in *Amchem* and *Ortiz* developed from dysfunctions evident in earlier phases of the asbestos litigation, see Richard A. Nagareda, Autonomy, Peace, and Put Options in the Mass Tort Class Action, 115 Harv. L. Rev. 747, 775–78 (2002) [hereinafter Nagareda, Autonomy].

137. *Amchem*, 521 U.S. at 622.

sides during the pretrial phase. They usually are not presented to the court simultaneously with pro forma class complaints, as in *Amchem* and *Ortiz*.[138] The class settlements in the two cases nonetheless are illustrative, for they amount—albeit, in stark form—to mini-legislation. In both instances, the essence of the transaction to be effected through the class judgment would have been to replace class members' preexisting rights with an alternative bundle of rights described in the settlement agreement. The use of the class action as a transactional vehicle of this sort permeates civil litigation today.[139]

The Court struck down both settlements on the ground that Rule 23 does not authorize the certification of the proposed class in either instance.[140] Given that the existing literature ably explores the details of these decisions,[141] it will suffice here simply to highlight those that point toward the preexistence principle.

1. *The Principle Lurking in the Interstices of Rule 23.* — Confronted with a settlement agreement presented in tandem with a proposed opt-out class under Rule 23(b)(3), the *Amchem* Court initially addressed the question of what significance the existence of the settlement should have upon the decision whether to certify that class. In the parlance of the previous Part, the class certification decision is what legitimizes the authority of class counsel to bargain on behalf of absent class members. The district court in *Amchem* had certified the class on the ground that the fairness of the proposed class settlement agreement supplied the predominant issue common to all class members that Rule 23(b)(3) requires.[142]

Writing for the Court, Justice Ginsburg pointed to the distinction drawn in the structure of Rule 23 between questions of class certification (addressed in subsections (a) and (b)) and questions of class settlement approval (treated in subsection (e)).[143] Although the existence of a settlement "is relevant to class certification,"[144] the Court concluded that

138. See id. at 603; *Ortiz*, 527 U.S. at 824–25.

139. See Rubenstein, supra note 10, at 420–22. R

140. See *Amchem*, 521 U.S. at 597; *Ortiz*, 527 U.S. at 864–65.

141. See, e.g., Coffee, supra note 86, at 370–80 (using corporate governance principles to critique *Amchem* and *Ortiz*); George M. Cohen, The "Fair" is the Enemy of the Good: *Ortiz v. Fibreboard Corp.* and Class Action Settlements, 8 Sup. Ct. Econ. Rev. 23, 26–28 (2000) (criticizing the grounding of *Ortiz* in abstract principles instead of a pragmatic view of the world); Issacharoff, Governance, supra note 86, at 337–42 (suggesting that *Amchem* and *Ortiz* form part of the Court's "robust due process tradition"); Silver & Baker, supra note 64, at 1465–69 (criticizing *Amchem* to the extent that it "establishes a strict 'no conflict' rule for class actions"). R R R

142. See *Amchem*, 521 U.S. at 607. Rule 23(b)(3) calls for a finding "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

143. See 521 U.S. at 620–22.

144. Id. at 619. Rule 23(b)(3)(D) points to "the difficulties likely to be encountered in the management of a class action" as one consideration bearing upon whether "a class action is superior to other available methods for the fair and efficient adjudication of the

the settlement itself could not supply the predominant common issue needed for certification of an opt-out class. So to hold would "substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper."[145] In a telling choice of rhetoric, the Court hastened to note that "[t]he benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for *legislative* consideration."[146] By contrast, the predominance inquiry for purposes of class certification "trains on the legal or factual questions" underlying each class member's claim—"questions that *preexist* any settlement."[147]

Though confined on its face to the relationship between specific subsections of Rule 23, the Court's discussion embodies a distinctly noninstrumental view of the class action. If the advancement of laudable policy ends were all that mattered, the transaction envisioned in *Amchem* quite possibly would have passed muster.[148] A good deal, in itself, cannot make for a permissible class, however, because the permissibility of the class is what legitimizes the dealmaking power of class counsel in the first place. That power cannot stem from all the good that the deal ultimately might do but, instead, must arise from matters that preexist the deal. To suggest otherwise, as the district court had in *Amchem*, would be to enable class counsel to engage in a form of self-dealing—to seize by self-appointment the power to bargain on behalf of class members and then to justify that appointment by reference to the exercise of that power. In class

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controversy." Fed. R. Civ. P. 23(b)(3). The existence of a settlement at least means that "the 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*, 521 U.S. at 620.

145. 521 U.S. at 622.

146. Id. (emphasis added).

147. Id. at 623 (emphasis added).

148. The pervasive dysfunctions associated with the post-*Amchem* phase of the asbestos litigation form a familiar refrain in both academic and popular commentary. See Samuel Issacharoff, "Shocked": Mass Torts and Aggregate Asbestos Litigation After *Amchem* and *Ortiz*, 80 Tex. L. Rev. 1925, 1927–29 (2002) (arguing that removal of the class settlement option has done little to advance the legal system's ability to deal with asbestos litigation); Francis E. McGovern, The Tragedy of the Asbestos Commons, 88 Va. L. Rev. 1721, 1723, 1741–50 (2002) (attributing much of the current asbestos crisis to lack of coordination by both courts and litigants); Alex Berenson, A Surge in Asbestos Suits, Many by Healthy Plaintiffs, N.Y. Times, Apr. 10, 2002, at A1 (noting that new asbestos claims by unimpaired plaintiffs have risen steadily since 1997); Roger Parloff, The $200 Billion Miscarriage of Justice, Fortune, Mar. 4, 2002, at 155, 164–70 (discussing developments in asbestos litigation since the mid-1990s); Susan Warren, As Asbestos Mess Spreads, Sickest See Payouts Shrink, Wall St. J., Apr. 25, 2002, at A1 (increasing number of bankruptcies making it difficult to satisfy claims of sickest plaintiffs); Deborah Hensler et al., RAND Institute for Civil Justice, Asbestos Litigation in the U.S.: A New Look at an Old Issue, 4–5, 12–13 (Aug. 2001), available at http://www.rand.org/publications/DB/DB362.0/DB362.0.pdf (on file with the *Columbia Law Review*) (noting increase in asbestos filings throughout the 1990s and that the future course of asbestos litigation is "uncertain").

actions, no less than in politics, power grasped solely through self-appointment is power not held legitimately.

Principles familiar from administrative law nail down the foregoing point about class actions. The analogy to administrative law should come as little surprise, given that early commentators like Kalven and Rosenfield accurately anticipated the emergence of the class action as the civil litigation cousin of the public regulatory process.[149] The Supreme Court too has spoken of how a class action "resembles a 'quasi-administrative proceeding.'"[150] The modern administrative state is all about delegations of power from Congress to administrative agencies. Exercising their delegated powers, agencies frequently engage in lawmaking through the promulgation of rules that have the force of law upon the citizenry[151] and that, as such, may alter preexisting rights. Yet, the legitimacy of a given rule does not depend exclusively upon whether it is well supported by information in the rulemaking record or whether the rule plausibly advances instrumental objectives. Those questions go largely to whether the content of the rule is arbitrary, not to whether Congress delegated to the agency the power to issue rules concerning the matter at hand in the first place. Administrative law has long distinguished these two questions,[152] the latter going to the existence of delegated authority to the agency and the former going to whether the agency has exercised its delegated power in an "arbitrary" or "capricious" manner (after the terminology used in the judicial review provision of the Administrative Procedure Act).[153] To take a simple illustration: The question of whether Congress has delegated to the Environmental Protection Agency the power to promulgate rules to limit emissions of a particular air pollutant is distinct from the question of what maximum emission level the agency should set by rule for that pollutant.

The question of class certification is the counterpart to the delegation question in administrative law. It asks whether an implied delegation of power to class counsel exists in the first place, apart from whether that power has been exercised in a permissible fashion in the class settlement at hand. The question of class settlement approval is the analogue to review for arbitrariness. The settlement approval question asks whether class counsel, having legitimate power to bargain for the class, have exer-

149. Kalven & Rosenfield, supra note 15, at 686–87, 715. R

150. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985).

151. This feature defines the category of "legislative rules," as distinct from "interpretative rules" that merely inform the public of the agency's view but lack the binding force of legislation. See 1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.4, at 324–25 (4th ed. 2002).

152. See Gary Lawson, Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions, 48 Rutgers L. Rev. 313, 325–26 (1996).

153. See 5 U.S.C. § 706(2)(A) (2000). The Act itself distinguishes this ground for invalidation of agency action from invalidation based upon the assertion of agency power "in excess of statutory jurisdiction, authority, or limitations." Id. § 706(2)(C).

cised that power to strike a "fair, reasonable, and adequate" deal.[154] If anything, the "fairness hearings" typically convened by courts to examine the handiwork of class counsel in a proposed settlement resemble the notice-and-comment process employed by administrative agencies to guard against arbitrariness in their consideration of proposed rules.[155] The upshot for both class counsel and administrative agencies is the same: The agents who purport to be the recipients of a delegation—whether actually in regulatory legislation or by implication through the operation of the class action rule—must justify their delegated power by something antecedent to all the good that its exercise might do.

2. *The Principle Immersed in Historical Detail.* — The notion in *Amchem* that the authority to bargain on behalf of an opt-out class must stem from matters that "preexist any settlement" takes us only one step toward the preexistence principle. If anything, the Court's decision two years later in *Ortiz* points more revealingly toward a distinction between class actions and legislation, speaking as *Ortiz* does to the context of a mandatory class.

The transaction in *Ortiz* was more complex than that in *Amchem*, as it sought to resolve a series of related disputes involving Fibreboard Corporation, its liability insurers, and workers who had yet to sue Fibreboard in tort for their exposure to the corporation's asbestos-containing products on the job. The essence of the deal was for Fibreboard and its insurers to settle a long-running dispute over the extent of insurance coverage for the corporation's asbestos liabilities[156] and, then, for Fibreboard more or less to confine future tort claimants to recovery against the funds provided by that insurance coverage settlement.[157] Resolution of the insurance coverage dispute proved simple enough, requiring nothing more than an ordinary settlement agreement between Fibreboard and its insur-

154. The quoted phrase is the mantra used to describe the standard for class settlement approval pursuant to Rule 23(e). Manual for Complex Litigation (Third) § 30.42, at 238 (1995) ("In determining whether a settlement should be approved, the court must decide whether it is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued."). A pending amendment to Rule 23(e) would write this language into the text of the rule itself. See Rules Comm. Rep., supra note 8, at 102 (proposed Rule 23(e)(1)(C)). R

155. For development of this analogy, see Nagareda, Turning, supra note 27, at 938–52. The analogy to rulemaking proceedings by administrative agencies explains the Supreme Court's recent holding that an absent class member whose rights a proposed class settlement would affect need not seek formal status as an intervenor in order to be able to appeal a district court's approval of the settlement; rather, the class member need only voice her objection before the district court. See Devlin v. Scardelletti, 122 S. Ct. 2005, 2013 (2002). Similarly, to challenge an agency rule in court, one adversely affected simply must voice her objection before the agency. See 2 Pierce, supra note 151, § 15.8, at 1017. R R

156. See Cohen, supra note 141, at 27 (explaining that the dispute centered on whether the policies included an aggregate limit on coverage). R

157. Ortiz v. Fibreboard Corp., 527 U.S. 815, 822–25 (1999). To the $1.535 billion provided by its insurers in settlement of the coverage dispute, Fibreboard added the comparatively paltry sum of $10 million—all but $500,000 of which consisted of other insurance proceeds. Id. at 824–25.

ers as conventional named parties to an ongoing civil lawsuit.[158] The trick lay in how to confine future tort claimants to the proceeds of that insurance coverage settlement. The settling parties looked to the mandatory, "limited fund" class under Rule 23(b)(1)(B)[159] to achieve that objective, which would have had the far from incidental consequence of leaving Fibreboard's net worth essentially unscathed.[160]

Speaking through Justice Souter, the Court turned away the settling parties' efforts to use the limited fund class action in the foregoing manner. Though seemingly directed to a different rule provision than *Amchem* and couched in copious historical detail, the *Ortiz* Court's analysis of the limited fund class actually is the natural outgrowth of *Amchem*'s stricture against self-dealing by class counsel. Tracing the origins of the limited fund concept, the Court discussed at length the facts of early equity cases involving a range of characters:[161] investors alleging the misuse of their money by a company with "nothing . . . left but a pool of secret profits on a fraction of the original investment";[162] purchasers of steamship tickets from a seller who "converted to personal use" the funds received, "was then adjudged bankrupt, and absconded";[163] and a collection of legatees and creditors suing an estate too small to "satisfy the aggregate claims against it."[164] The Court then noted that the advisory committee that crafted Rule 23(b)(1)(B) sought simply "to capture the 'standard' class actions recognized in pre-Rule practice"[165] and, thereby, to keep the limited fund class action "close to the historical model" embodied in the equity precedents.[166] The purported limited fund in *Ortiz* ran afoul of this stricture, held the Court, for that fund was limited by nothing more than the say-so of the class settlement negotiators.[167]

Given the Court's lengthy historical exegesis and the consciously "backward look[ing]" perspective of the advisory committee,[168] it would

158. Id. at 824 (noting that the insurance coverage settlement came shortly before an anticipated judicial ruling on the coverage question).

159. The term "limited fund" is a well-recognized gloss on the language in Rule 23(b)(1)(B) itself, which authorizes the certification of a mandatory class upon a finding that "adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B).

160. See 527 U.S. at 859 (noting that "Fibreboard was allowed to retain virtually its entire net worth").

161. The cases discussed by the Court consisted of those relied upon by the advisory committee in its note on Rule 23(b)(1)(B). See id. at 834–37.

162. Id. at 835 (discussing Dickinson v. Burnham, 197 F.2d 973 (2d Cir. 1952)).

163. Id. at 836 (discussing Guffanti v. Nat'l Sur. Co., 90 N.E. 174 (N.Y. 1909)).

164. Id. at 837 (discussing Ross v. Crary, 1 Paige Ch. 416 (N.Y. Ch. 1829)).

165. Id. at 843.

166. Id. at 842.

167. See id. at 848 (noting that the record "failed to demonstrate that the fund was limited except by the agreement of the parties").

168. Id. at 843.

be easy to dismiss the result in *Ortiz* as a paean to history for little more than history's sake. There is, however, a deeper normative conception lurking within the historical trivia. In each of the examples parsed by the Court, the limits on the disputed funds existed wholly apart from the determination of equity to afford class treatment to competing claims. Those limited funds, in short, preexisted class treatment. The purported limited fund in *Ortiz* did not justify mandatory class treatment under the current Rule 23, and it should not do so under a proper conception of the class action. The reason why is the same reason that the class settlement in *Amchem* could not supply the predominant common issue needed for opt-out class treatment: Class counsel must justify their bargaining power by reference to matters that preexist the settlement, not in terms of what the settlement itself does. And what the settlement itself did in *Ortiz*—indeed, its raison d'etre—was to constitute the sum of insurance proceeds as the sole source of recourse for class members.

So understood, the transaction struck down in *Ortiz* bears a revealing resemblance to the transaction written into federal law last fall by Congress in the 9/11 Fund legislation. The purported limited fund in *Ortiz* merited scrutiny, because recognition of its limit would have cut off class members from a substantial additional pool of money otherwise available for recoveries in tort: the net worth of Fibreboard, above and beyond its insurance coverage. In this sense, the faux limited fund in *Ortiz* sought to achieve by way of a mandatory class action what Congress actually achieved for the airlines that operated the fatal September 11 flights: namely, the restriction of tort liability to the limits of corporate insurance coverage, notwithstanding the readily apparent existence of additional corporate assets.

True enough, the 9/11 Fund legislation does not restrict victims to the making of claims against a pot of money capped at insurance limits in the manner of the mandatory class settlement in *Ortiz*. The legislation additionally provides an administrative alternative backed by the United States Treasury.[169] The key point for purposes of comparison, however, is that the airline liability cap in the 9/11 Fund legislation operates—it has the binding force of law—irrespective of whether the victims of the terrorist attacks exercise their prerogative to seek compensation from the administrative process provided. The cap alters victims' preexisting rights, regardless of whether they choose to avail themselves of the new bundle of rights described in the legislation. Comparison of the holding in *Ortiz* with the 9/11 Fund legislation thus leads directly to the institu-

169. See supra text accompanying note 24. One might push even further the comparison of the 9/11 Fund legislation and the *Ortiz* class settlement. In both instances, would-be defendants in civil litigation stood to gain the benefit of giving away someone else's money. In the 9/11 Fund legislation, the money consists of public funds that Congress might have chosen to spend in other ways, not the private funds of the airline industry. In the *Ortiz* class settlement, the money consisted of Fibreboard's contested insurance coverage, not Fibreboard's other sources of net worth. R

tional point at the heart of the preexistence principle: Within the wide berth afforded by Article I of the Constitution, Congress has the power unilaterally to alter preexisting rights. The class action, by contrast, enjoys no such roving mandate. The derivation of this principle and its normative defense form the subjects of the next section.

B. *The Institutional Basis for the Principle*

Congress often has delegated to administrative agencies the power to alter preexisting rights in the manner of legislation enacted by Congress itself. Those alterations are the stuff of the modern administrative state. This section asks whether Congress, in effect, has made a similar delegation to class counsel via Rule 23 and, if not, whether the law ought to do so in the future. The scope of the delegation currently made in Rule 23 is a function of the Rules Enabling Act. The question of whether the class action rule should shuffle off the strictures of that Act goes to the appropriate institutions for lawmaking. The subsections that follow discuss these two questions in turn.

1. *The Rules Enabling Act.* — Like all of the Federal Rules of Civil Procedure, Rule 23 finds its source in the delegation of rulemaking power to the Supreme Court from Congress in the Rules Enabling Act.[170] In that delegation, Congress granted the Court "the power to prescribe general rules of practice and procedure" for cases in the federal courts but famously withheld the power to "abridge, enlarge or modify any substantive right."[171] The full implications of these words have occupied both the Court itself[172] and scholars of civil procedure in a long-running series of commentaries.[173] I seek not to add to that outpouring. To the contrary, my claim here is that the preexistence principle that I offer as the interpretive key to the modern class action follows readily from some very familiar points about the meaning of the Rules Enabling Act.

The first point is that, whatever its outer limits, the delegation made in the Act must stop short of the full scope of legislative power that Congress itself might wield to "abridge, enlarge or modify" preexisting

170. See 28 U.S.C. § 2072 (2000).

171. Id. § 2072(a)–(b).

172. Compare Hanna v. Plumer, 380 U.S. 460, 472 (1965) (recognizing "congressional power to make rules governing the practice and pleading in [the federal] courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either"), with Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.").

173. See, e.g., Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1025–26 (1982); John Hart Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 695 (1974); Paul J. Mishkin, Some Further Last Words on Erie—The Thread, 87 Harv. L. Rev. 1682, 1686 (1974); Peter Westen & Jeffrey S. Lehman, Is There Life for *Erie* After the Death of Diversity?, 78 Mich. L. Rev. 311, 315 (1980).

rights.[174] As a result, one may not do everything via a judgment obtained under Rule 23 that Congress itself might choose to do through reform legislation. This first point simply puts the weight of the Rules Enabling Act behind the contrast already drawn between the liability cap that the limited fund class in *Ortiz* could not impose but that the 9/11 Fund legislation does impose.

The second, related point is even more helpful, as it suggests an account of how lawmaking power should be allocated between the class action and the political process. The distinction drawn in the Rules Enabling Act between procedure and substance is notoriously slippery. "[E]very procedural rule has consequences of a substantive nature, for every such rule may affect the outcome in some cases, and some of them are deliberately intended to alter the outcome in many cases."[175] Rulemakings, even of the last sort, nonetheless have long been regarded as permissible: "Although they affect the outcome of cases, they do so in a quite unpredictable fashion, and do not help or hurt any particular identifiable class of litigants."[176]

By contrast, notes Charles Alan Wright, changes with more predictable consequences for identifiable interest groups "should come from those who are elected to make laws, with full awareness of what they are doing."[177] Based upon a comprehensive examination of the developments that led to the Rules Enabling Act, Stephen Burbank similarly concludes that Congress sought "to exclude rulemaking by the Supreme Court, and to require that any prospective federal lawmaking be done by Congress, where the choice among legal prescriptions would have a predictable and identifiable effect on [existing legal] rights."[178] A choice of that sort entails the weighing of instrumental considerations "extrinsic to the process of litigation" and, for that reason, is for Congress to make.[179]

One must take care to frame precisely the significance of this learning about the Rules Enabling Act for the structure of the modern class action. The point is not that the Act somehow forbids all transactions involving class members' preexisting rights. If that were true, there would be precious little left to Rule 23, given its prevalent use as a means for the sale of claims by settlement, not by judgment after trial. The significance of the Act instead lies in the boundaries that it implies for the

174. 19 Wright et al., supra note 12, § 4509, at 261–62. For similar conclusions, see Mishkin, supra note 173, at 1686; Westen & Lehman, supra note 173, at 362. R R

175. Charles Alan Wright, Procedural Reform: Its Limitations and Its Future, 1 Ga. L. Rev. 563, 570 (1967).

176. Id. at 571.

177. Id. at 570; see also Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 Duke L.J. 281, 308 (contending that a rule does not run afoul of the Rules Enabling Act "if its application is sufficiently broad to evoke no organized political attention of a group of litigants or *prospective* litigants who (reasonably) claim to be specially and adversely affected by the rule").

178. Burbank, supra note 173, at 1114. R

179. Id. at 1190.

delegation of bargaining power to class counsel in Rule 23. If that delegation really were to encompass a general power to alter unilaterally class members' preexisting rights, then there would be no distinction between what could be done by a class action and by the legislative power of Congress—a violation of the first point drawn from the literature on the Act.

Likewise, if Rule 23 were understood to afford class counsel a general power to alter preexisting rights, it is quite arguably the case that such a power would have the kind of "predictable and identifiable effect" upon an "identifiable class of litigants" of the sort thought appropriate only for legislative consideration. The account offered in the preceding Part of why high-value claims in damage classes with variance present a distinctive case for a right to opt out is, if anything, a specification of such an "identifiable class."[180] Once one understands class actions in the way that they actually operate today—as the grist for a transaction mill, not as a vehicle for full-scale adjudications—it becomes evident that high-value damage claimants stand most at risk in the deal making process.

2. *Delegating Lawmaking Power to Private Persons*. — Recognition of the limitations implied by the Rules Enabling Act still leaves the question of whether those limitations make sense. In general, one of the advantages of civil litigation lies in the ability of a private person to lodge a complaint in a manner independent from the government.[181] Although the individual litigant depends on the government as law provider, that individual does not need the government's permission to sue, even to do so on a classwide basis. For their part, the political branches surely lack the time, the resources, and, frequently, the will to act on the full gamut of wrongs addressed by class actions. The creation of a public administrative compensation regime in the 9/11 Fund legislation stands out, but only because legislative interventions in burgeoning areas of civil litigation are so rare. Early class action commentators like Kalven and Rosenfield, moreover, are correct to question the idea that enforcement by regulatory agencies should constitute the exclusive means of redress under statutory regimes that recognize widely dispersed civil wrongs.[182]

The foregoing arguments about the position of the class action vis-à-vis the political branches should not sound new. In fact, they are quite familiar when considered, again, from the standpoint of administrative law. The recognition of a practical need for some institution (here, the class action) to supplement a theoretically preferable but practically constrained mode of recourse (legislation) is an observation common to the enduring debate over delegations. Like the modern class action in the world of civil litigation, the modern administrative state within the

180. See supra Part I.A.2.

181. For a stronger version of the argument about the social function of complaints, see Anita Bernstein, Complaints, 32 McGeorge L. Rev. 37, 62 (2000) ("Complaints begin the work of restoration: an expressed complaint is the instrument for both individual redress and the amelioration of societal ills.").

182. See Kalven & Rosenfield, supra note 15, at 715. R

scheme of government arose from a practical frustration with the inability of conventional institutions to address the problems of industrial society.[183] It thus should not surprise that the debate over delegation should bear upon the normative basis for the modern class action.

I hasten to emphasize that what I advance here is not an argument about whether the nondelegation doctrine as currently understood stands as a correct interpretation of the Constitution. One certainly need not embrace a gung-ho revival of the nondelegation doctrine in its now defunct New Deal form in order to discern the proper structure for the class action.[184] To expose the normative basis for the preexistence principle, I make only a more modest claim: that the justification for that principle does not come from whole cloth but, rather, fits comfortably within the body of thought behind the modern administrative state. One strength of the preexistence principle lies in its consonance with even the highly circumscribed version of the nondelegation doctrine embraced today.[185] Stronger versions of that doctrine only would enhance the normative attractiveness of the preexistence principle.

A conception of the class action as a vehicle for the mass sale of class members' rights to sue highlights the nature of the delegation made by that device. The recipients of the delegation here consist not of politically accountable government agencies but, instead, private persons in the form of class counsel as the self-appointed agents for the class, albeit subject to the loose check of judicial review under Rule 23. The prospect that some law might delegate to private persons a power to alter the rights of others is not unfamiliar to the discourse about delegations. That, in fact, was the gist of the New Deal legislation notoriously struck down in 1936 by the Supreme Court in *Carter v. Carter Coal Co.*[186]

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183. See Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877–1920, at 13 (1982) ("Providing the national institutional capacities commensurate with the demands of an industrial society required nothing less than building a different kind of state organization.").

184. I accordingly put aside the powerful arguments advanced by some constitutionalists for the resurrection of the nondelegation doctrine in a more probing form. See, e.g., David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 3 (1993); Marci A. Hamilton, Representation and Nondelegation: Back to Basics, 20 Cardozo L. Rev. 807, 807–09 (1999). Another commentator advances the descriptive claim that the modern nondelegation doctrine contravenes the original meaning of the Constitution but contends simply that scholars should acknowledge that deviation as a pragmatic judgment. Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 334–35 (2002).

185. The Supreme Court's most recent foray into the area—its opinion in Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001), crafted by no less of a textualist than Justice Scalia—confirms the ascendancy of the modern nondelegation doctrine. Id. at 474–75.

186. 298 U.S. 238 (1936). The Court's contemporaneous decision in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), is the source usually cited as the high-water mark for the nondelegation doctrine. I focus instead on *Carter Coal*, because it contains the important added dimension of a delegation to private parties and, as such, provides the more apt comparison for class actions.

The statute in *Carter Coal* gave the force of law to maximum work hours negotiated as a matter of contract between a specified proportion of coal producers in the nation and a specified proportion of unionized mine workers.[187] As Louis Jaffe pointed out at the time in an article aptly titled *Law Making by Private Groups*: "The contract itself is a binding regulation, though only among the parties, of the very subject matter of wages and hours. The Act gives to this expression of economic power a universal effect, an effect desired and intended by the parties to the agreement but not previously attainable."[188] One could say much the same thing about the private contract—the class settlement agreement—to which the class action rule gives binding effect over absent class members. That effect is no less "intended by the parties to the agreement but not previously attainable" than the generalizing by statute of the private contract for work hours in *Carter Coal*. In a coincidentally revealing choice of words, Jaffe remarked that, under the statute in *Carter Coal*, "the majority [of coal producers and unions] secure the power to negotiate a contract which will be *binding on all members of the class*."[189]

The last six decades have not treated kindly the holding in *Carter Coal* or, for that matter, the aggressive enforcement of the nondelegation doctrine characteristic of the New Deal-era Supreme Court as a whole. Since then, the federal courts "have consistently allowed delegations of federal power to private actors," to the point that the matter "is no longer a federal constitutional issue."[190] Yet, even those who accept that turn as a matter of constitutional interpretation—or, at least, see no realistic way to go back now—recognize the need to control the pitfalls of lawmaking delegations to private persons. Two illustrations from recent commentary coalesce around this point.

Writing from the perspective of administrative law, Lisa Schultz Bressman cautions that "private lawmaking has a tendency to produce regulation that both interferes with individual liberty for suspect public purposes and inadequately reflects a broad public purpose to justify such interference."[191] With only minimal transposition, one could turn this observation into the usual criticism of class settlements: that they may serve the interests of the negotiating attorneys but disserve those of absent class members. As for delegations, Bressman argues, the answer lies not in resurrection of the New Deal-era nondelegation doctrine but, rather, in application of administrative law principles to discipline the

187. *Carter Coal*, 298 U.S. at 283–84.

188. Louis L. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201, 205 (1937).

189. Id. at 250 (emphasis added).

190. David M. Lawrence, Private Exercise of Governmental Power, 61 Ind. L.J. 647, 648–49 (1986). As this source notes, the legitimacy of delegations to private persons has remained a subject of debate under some state constitutions. See id. at 672–75.

191. Lisa Schultz Bressman, *Schechter Poultry* at the Millennium: A Delegation Doctrine for the Administrative State, 109 Yale L.J. 1399, 1428 (2000).

exercise of delegated powers.[192] Commenting on the phenomenon of privatization, Jody Freeman likewise recoils from the objective of "[r]esurrecting the nondelegation doctrine to invalidate private delegations."[193] The focus, she contends, should be "on how to structure these arrangements effectively and milk their positive potential."[194]

These prescriptions from recent commentary on private delegations help to frame the preexistence principle as a constraint upon the modern class action. To translate Freeman's words to the class action context: Rule 23 is what structures the settlement arrangements into which class counsel may enter. To be sure, class settlements do not alter preexisting rights solely at the instigation of class counsel. As noted in Part I, class settlements do so only upon the issuance of a judgment that then has preclusive effect upon class members.[195] Judicial review for compliance with Rule 23 nonetheless cannot legitimate the delegation of power made by the modern class action any more than judicial review for compliance with the statute in *Carter Coal*—say, to ensure that the requisite percentage of unionized workers really approved a given set of work hours—could legitimate the delegation there. The question of legitimacy depends upon the nature of the delegation made in the first place—to class counsel in Rule 23 and to private parties in the *Carter Coal* statute—not upon the existence of judicial review to ensure compliance with the parameters of that delegation after the fact. Even in its modern delegation decisions, the Supreme Court never has said that the existence of judicial review over agency action somehow relieves Congress of the minimal obligation to supply an "intelligible principle" in the statute that empowers the agency to act.[196]

The demand of Rule 23(e) for judicial approval of class settlements guards loosely against arbitrary deals. But it actually makes the delegation of dealmaking power to class counsel all the more problematic from

192. Lisa Schultz Bressman, Disciplining Delegation After *Whitman v. American Trucking Ass'ns*, 87 Cornell L. Rev. 452, 454–55 (2002). For further development of how administrative law should constrain agency arbitrariness, see Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. (forthcoming 2003).

193. Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 584 (2000).

194. Id. at 586.

195. See supra text accompanying note 51. R

196. The Court's most recent delegation decision reaffirms this obligation on the part of Congress, see Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001), one that traces its origins to J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). Again, I speak here of current doctrine with respect to delegations, leaving for others the question of whether that doctrine stands as the correct interpretation of the Constitution. See *American Trucking*, 531 U.S. at 487 (Thomas, J., concurring) (questioning the constitutional grounding for the "intelligible principle" standard); Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1723 (2002) (arguing that "a statutory grant of authority to the executive branch or other agents can *never* amount to a delegation of legislative power").

the standpoint of legitimacy, especially at the federal level, once one recognizes the nature of class settlements as mini-legislation. The federal courts do not have authority either to substitute a regime of general federal common law for applicable state law[197] or to change the legal rights afforded by Congress in a federal statute (or by the Constitution itself). Yet, that is precisely what a class settlement effectuated by a federal court judgment would do if class members could not escape its binding effect. In class actions to which state law applies, per the principle of *Erie Railroad Co. v. Tompkins*,[198] the class settlement would substitute a new set of rights for those that class members previously had under state law. In class actions arising under federal law, the class settlement would substitute a new set of rights for those provided by Congress or by the Constitution.

One can imagine some constellations of conditions under which class settlements at the state level would be less susceptible to the foregoing concerns. One example might be a state court judgment that would effectuate a class settlement involving claims based exclusively in the common law of that state. Another might be a class settlement under a state procedural rule promulgated directly by the state legislature, as distinct from the state judiciary under a limited grant of rulemaking power.[199] But the existence of isolated pockets in which class settlements might have somewhat more legitimacy as mini-legislation does not undermine the normative argument advanced here: The appropriate conception for the modern class action *as a whole* is one that recognizes a fundamental distinction between class settlements and legislation.

The proposition that class counsel have no general mandate to alter preexisting rights—even with the blessing of a conscientious court—means that the holders of those rights generally must have the opportunity to exclude themselves from the transaction. As illustrated in the previous discussion of the damage class,[200] a right to opt out circumscribes the exercise of delegated power by opening the monopoly conferred upon class counsel to potential entry. The point of this potential for entry is largely that it will remain potential and, as such, constrain the ability of class counsel to shortchange the high-value claims within the class.

197. Absent preemption of state law by congressional legislation, the authority of the federal courts to develop federal common law is sharply limited, reaching only "a few areas" that implicate "uniquely federal interests." Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (discussing federal contractor defense). For a comprehensive treatment of the institutional limitations on federal common law, see generally Bradford R. Clark, Federal Common Law: A Structural Interpretation, 144 U. Pa. L. Rev. 1245 (1996).

198. 304 U.S. 64 (1938).

199. For a general description of the variations at the state level in delegations of power to promulgate rules of civil procedure, see Jeffrey A. Parness, Respecting State Judicial Articles, 3 Emerging Issues in State Const. L. 65, 68 (1990). For a state-by-state survey of rulemaking authority, see generally Donna J. Pugh et al., Judicial Rulemaking: A Compendium (1984).

200. See supra Part I.A.2.

This constraint will tend to operate not through some manner of noble self-restraint by class counsel but, rather, through the self-interested insistence of the settling *defendant* upon transaction terms that will minimize entry and, in so doing, secure closure in the litigation. In this way, the preexistence principle turns not on self-restraint—by class counsel, defendants, reviewing courts, or potential entrants—but, instead, upon the pursuit of self-interest within a structure that harnesses that motivation to induce a respect for preexisting rights. This is the discipline that the preexistence principle imparts to the delegation made by the modern class action.

Beneath all of this lies a powerful conception of the appropriate allocation of lawmaking power. In contrast to the work of legislators, agencies, or, for that matter, union and industry leaders negotiating over work hours, the class action is not a vehicle for an ongoing series of transactions. It instead supplies the framework for what literally is a one-shot deal from the standpoint of class members.[201] The essence of any class settlement is to bring about a grand compromise—to call upon class members to sacrifice some of their latitude to maximize their own individual gains for the sake of joint gain.[202] Compromises of this sort are not difficult to achieve in settings that involve repeated interactions, as analysts of the legislative process remind us.[203] Because "there is no long run in collective litigation," the content of any compromise there "must be justified in the lawsuit itself."[204] And the only way to do that is to rest the justification upon respect for the preexisting bundle of rights settled upon by public policymakers prior to the lawsuit.[205]

The preexistence principle stands as a brake upon the tendency of the class action toward a kind of "central planning,"[206] a cautionary check upon the temptation characteristic of all central planning schemes of

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201. Class counsel themselves might well be repeat players, but their rights are not those sold in the transaction.

202. Stephen C. Yeazell, Collective Litigation as Collective Action, 1989 U. Ill. L. Rev. 43, 45–46 [hereinafter Yeazell, Collective Litigation]. I am indebted to this source for pinpointing the lack of repeated interactions in the class action context and sketching the difficulties that arise therefrom.

203. In the legislative process, the phenomenon of logrolling is the most salient illustration of how the prospect of repeated interaction enhances cooperation. See Clayton P. Gillette, Rules, Standards, and Precautions in Payment Systems, 82 Va. L. Rev. 181, 197 (1996) ("[O]nly congressional representatives have the chance to engage in the repeat play that facilitates logrolling . . . ."). For a recent empirical study of repeated interaction as an impetus for cooperation among lawyers involved in multiple lawsuits in the same locality, see generally Jason Scott Johnston & Joel Waldfogel, Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation, 31 J. Legal Stud. 39 (2002).

204. Yeazell, Collective Litigation, supra note 202, at 46. R

205. Though the emphasis here has been upon the legislative and administrative processes, the vehicles for lawmaking in the public sphere undoubtedly include common law courts, which set policy subject to legislative override.

206. Cf. In re Bridgestone/Firestone Tires Prods. Liab. Litig., 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.). Writing for the court, Judge Easterbrook uses the term "central planning" in a slightly different light, noting that class certification aborts the

governance to impose contested enterprises of law reform in a manner insulated from political accountability. The principle prefers to respect the bundle of rights previously generated through processes *in which there is a long run*—flawed though that bundle might be—over the alternatives that might be created through the one-shot, and thus more fallible, vehicle of private delegations by class action rule. In this respect, the preexistence principle undoubtedly shares the consequence of all efforts to discipline delegations of lawmaking power. It reinforces the tendency of the legislative process toward inaction, absent a broad-based consensus as to the appropriate content of change.[207] But, as the designers of the Constitution recognized[208] and as the fate of central planning around the world continues to attest, a certain stickiness to status quo arrangements is not an unreasonable price to pay in order to guard against central planning run amok.

A now familiar insight from the political science literature is that legislative decisionmaking as delineated in Article I of the Constitution requires substantial consensus to bring about change and, in so doing, circumscribes the power of narrow interest groups to advance their own private ends through legislation.[209] Specifically, the structural demands of Article I—passage by a bicameral legislature and presentment to the president, subject to legislative override—have the effect of imposing a supermajoritarian rule for the enactment of legislation.[210]

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usual process for ascertaining the value of civil claims through a decentralized sequence of cases.

207. See William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 532 (1992).

208. Drawing upon the Federalist Papers, Eskridge and Ferejohn conclude that the

> decision to require both bicameral approval and presentment of legislation before it becomes law represents the Framers' judgments about the need for balance between republican liberty, in which popular preferences would generate laws, and stability, in which laws would reflect deliberation among many perspectives and would not yield abrupt changes in social policy.

Id. at 528. To speak of the Framers' views in this manner is not to make an empirical claim so much as it is to appeal to a canonical source from the Founding period broadly accepted as a legitimate touchstone on constitutional design. See Jack Goldsmith & Adrian Vermeule, Empirical Methodology and Legal Scholarship, 69 U. Chi. L. Rev. 153, 157–58 (2002) (distinguishing appeals to canonical sources from empirical claims).

209. The leading account remains James M. Buchanan & Gordon Tullock, The Calculus of Consent 233–48 (1962). Recent scholarship in public law draws on the concept of supermajoritanism to yield fresh insights on constitutional structure and statutory interpretation. See John O. McGinnis & Michael B. Rappaport, Our Supermajoritarian Constitution, 80 Tex. L. Rev. 703, 712–17, 729–43 (2002); John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 70–78 (2001).

210. On the effect of a bicameral legislature, see Buchanan & Tullock, supra note 209, at 235–36; William T. Mayton, The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies, 1986 Duke L.J. 948, 956. On the additional consensus-building effect of presentment to the president, see McGinnis & Rappaport, supra note 209, at 715 ("The President's veto power has the effect of making the President a third legislative house, turning our system

The mini-legislation effected by class settlements must remain on a plane below that of duly enacted legislation precisely because class settlements do not entail anything approaching the degree of consensus demanded of legislation. The implication of the analysis in Part I—the monopoly position of class counsel and the institutional self-interest of reviewing courts—is that class settlements, if anything, are *especially* prone to the advancement of narrow private agendas of the sort that a supermajoritarian process inhibits. To say that the mini-legislation of a class settlement cannot alter unilaterally the rights of class members in the manner of public legislation thus is to insist simply that rights be altered upon the securing of the same degree of consensus that created them in the first place.[211] This is not an exaltation of process for its own sake but, rather, an insistence upon broad-based consensus as a shield against the kind of self-dealing to which class settlements—like all forms of delegation to private parties—are susceptible.

The next Part takes the discussion forward to the present day, sketching the implications of the preexistence principle for the controversies swirling now over the appropriate structure of the class action.

III. IMPLICATIONS

In recent years, the distinction drawn by the modern class action between mandatory and opt-out classes has been questioned from a variety of perspectives. Normatively, commentators have disparaged the right to opt out as operating to the collective detriment of class members.[212] Descriptively, courts have begun to see a variety of devices designed to discourage class members from actually opting out and, in so doing, to make

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into one of tricameralism. This third house will reinforce the supermajoritarianism of the legislative process . . . .").

211. Although I focus here upon rights secured by preexisting legislation, a class settlement involving rights at common law generally will raise similar concerns. True enough, judicial approval by a state court of a class settlement involving only rights secured by the common law of that particular state might approach the procedural hurdles needed to effectuate a new body of common law in some jurisdictions—namely, a judicial decision. But class settlements involving common-law rights—for instance, in tort litigation—usually are not so narrowly circumscribed. They characteristically implicate the common law of multiple jurisdictions—law that could be changed, if at all, only through the securing of common-law decisions from multiple states' courts. The notion of a class settlement unilaterally altering common-law rights thus admits of the same problem of a class action altering rights secured by legislation—namely, of changing rights without the same degree of consensus that produced those rights in the first place.

In fact, some state courts have taken an even more dramatic step in the direction of supermajoritarianism by holding that alterations of their common law of tort may take place only through the vehicle of state constitutional amendment. See Victor E. Schwartz & Leah Lorber, Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance, 32 Rutgers L.J. 907, 939–51 (2001) (summarizing state decisions striking down tort reforms as inconsistent with state constitutions).

212. See infra Part III.A.

ostensible opt-out classes approach mandatory classes in operation.[213] And, for mandatory classes themselves, the appropriate boundaries of both the limited fund class and the injunctive or declaratory relief class remain unclear.[214]

The overarching contention of this Part is straightforward: Each of these challenges stems from an underlying confusion about the justification for the distinction between mandatory and opt-out classes. That confusion is most evident in commentary that seeks to evaluate class actions from a purely instrumental perspective; but it permeates the case law as well. This Part shows that an understanding informed by the preexistence principle can generate normatively satisfying and workable answers to the questions posed by these recent challenges. The first section discusses the effect that recognition of a right to opt out has upon the persons who remain in the class, addressing the academic criticism of that right as enabling high-value claimants to leave the class to the detriment of those who remain. The second section speaks to opt-out class settlements designed as offers that class members cannot refuse, identifying a principled line between permissible and impermissible influences upon the right to opt out. The same section goes on to discuss a related controversy concerning the nature of that right as a personal or transactional right.

The third section takes up the question of how to structure a right to escape the binding effect of a class action—whether in the form of a right to opt out or a right to opt in. As this third section explains, the lessons learned in the previous sections about class settlement structure actually help to situate the opt-out versus opt-in question within the preexistence principle. The final section then explains how the preexistence principle provides a unified explanation for the two classic scenarios thought to warrant mandatory class treatment, adding a cautionary note about some trends in the case law that contravene the principle.

A. *Paying for the Principle in the Opt-Out Class*

In separate articles, David Rosenberg and Michael Perino advance a trenchant critique of the right to opt out.[215] The Rosenberg-Perino critique focuses on mass tort litigation, perhaps the most pressing scenario involving damage claims with high variance of the sort discussed in Part I.[216] Both commentators observe that a right to opt out of a class settlement will operate to the benefit of those class members who consider themselves—or, more likely, whom competing plaintiffs' lawyers perceive—as having claims markedly higher in value than the average claims

213. See infra Part III.B.

214. See infra Part III.D.

215. Rosenberg, supra note 32; Perino, supra note 32. R

216. For an explanation of the tendency in mass tort litigation toward a combination of high-value claims with large numbers of claims of only marginal value, at best, see Nagareda, Autonomy, supra note 136, at 763–67. R

in the class.[217] Rosenberg and Perino also recognize the threat posed by the departure of high-value claimants for persons expected to remain in the class. The effect, they assert, will be to reduce the value of the class settlement, because the settling defendant must retain sufficient funds to cover the high-value opt-outs whose claims it must resolve separately through the ordinary civil litigation process.[218] The consequence, they say, is a form of cross-subsidization: namely, for average-value claimants in the class effectively to fund the opportunity of high-value claimants to maximize the value of their particular claims by bringing conventional individual lawsuits.[219] In less formal terms, according to Rosenberg, opt-out rights enable the few to play a kind of litigation "lottery" to the detriment of the many in the class.[220]

Of these two critics of the right to opt out, Rosenberg is the more detailed in his prescriptive analysis. For Rosenberg, mandatory class treatment should be "the only option" for mass tort cases[221] and, by implication, for all situations of damage claims with high variance. He posits that, if would-be class members were to consider their collective situation from an ex ante perspective—that is, from behind a Rawlsian "veil of ignorance," such that each person would remain ignorant of the ultimate value of her particular claim—would-be class members readily would consent to mandatory class treatment in order to maximize their joint gains.[222] Recognition of a right to opt out prevents the maximization of joint gains, Rosenberg contends, because it enables each class member to approach the litigation from an ex post perspective, such that each person has every incentive to maximize merely her own individual gain.[223] Like the Odysseus of myth, would-be class members would agree in advance to bind themselves to the mast of the mandatory class action in order to avoid giving in later to the sirens' call to maximize their individual self-interest.[224] Therefore, Rosenberg argues, we in the real world should similarly embrace mandatory class actions as fair.

Both the descriptive and the prescriptive component of this critique contravene the preexistence principle. To state the manner of those violations is to reveal the flaws of the critique. The first problem stems from the initial description of subsidization across different groups of damage claimants. The major challenge in the design of any class settlement for damage claims lies in how to divide the gains to be had from avoidance of

217. See Rosenberg, supra note 32, at 871–73; Perino, supra note 32, at 104–05. **R**

218. See Rosenberg, supra note 32, at 871; Perino, supra note 32, at 105. **R**

219. See Rosenberg, supra note 32, at 870–71; Perino, supra note 32, at 104–05. **R**

220. Rosenberg, supra note 32, at 871, 878. **R**

221. The title of Rosenberg's article states this prescription. Id. at 831; see also id. at 839.

222. See id. at 840 & n.23 (drawing on political theorist John Rawls's concept of choice behind the veil of ignorance as the touchstone of social justice).

223. See id. at 833.

224. See id. at 833 n.4, 857–66 (pointing to political theorist Jon Elster's use of the mast-tying image).

continued litigation[225]—gains generated by the settlement itself. That difficulty stems from the lack of any preexisting entitlement to those gains on the part of any player in the litigation. In particular, average-value claimants within a damage class have no stronger of a case to benefit from those gains than high-value claimants or, for that matter, the settling defendant itself. Characterization of opt-out class actions as giving rise to redistribution implies the existence of such an entitlement where there is none.

In fact, the error runs even deeper, to the implication that litigants somehow do not have a preexisting right to maximize their own individual gains. Yet, civil law, including tort law, generally regards damage recoveries as being independent from one another.[226] Absent the existence of a true limited fund, the ability of any given claimant to obtain a higher-than-average damage award in individual litigation is not thought to trample upon the legal rights of other damage claimants. That ability may be objectionable on instrumental grounds. It may be unwise policy. It may "preserve individualism," yet "foster inequality" of a sort.[227] But it is not thought to abridge the rights of other claimants. Insofar as there is a preexisting entitlement, then, it is—for better or worse—in the nature of every person for herself.

Apart from its rhetorical slipperiness, the critique of the right to opt out also is objectionable on a second ground: its jarring dissonance with actual behavior in insurance markets. The right to opt out operates as a kind of insurance policy. For those who turn out to have high-value claims, the right facilitates their legal representation in a manner separate from class counsel's monopoly and, in so doing, protects them against the most dramatic forms of damage averaging to which class settlements tend for high-variance damage claims.[228] The right ensures that high-value claimants, if need be, can assert their preexisting right to a nonaveraged recovery. The observation that the right to opt out reduces the size of the overall settlement pie from what it hypothetically might be in a world of mandatory class treatment is simply a loaded reformulation of the insight that the right is an insurance policy. Like every insurance policy, it *costs* something for all those who have coverage, even if they ultimately never collect. The question is whether the creation of that insurance policy is defensible. And one cannot answer that question through a purely instrumental calculus, but only with attention, as well, to the institutional implications of competing answers.

Rosenberg conflates the instrumental inquiry with the institutional one by casting the debate in terms of the procedural arrangement to which he believes would-be class members would consent, if only they

225. See supra text accompanying note 46. R

226. Again, punitive damages are the exception that proves the general rule. See supra note 124. R

227. Rubenstein, supra note 10, at 434. R

228. See supra text accompanying note 103. R

could view their collective situation from an ex ante perspective. The hypothesized product of that hypothesized deliberation supplies the hypothesized consent said to justify mandatory class treatment. Behavior in the real world points in a different direction, however. The insurance policy provided by the right to opt out resembles the sorts of insurance policies that ordinary people regularly purchase. In popular terms, perhaps the most common form of insurance consists of policies that protect ordinary people against the kinds of low-probability but potentially high-value losses akin to the bad fortune of turning out to have an anomalously high-value claim in damage litigation: namely, term life insurance to hedge the loss of future income from premature death. Ordinary people literally pay for such insurance policies—and, of course, pay before knowing their specific fate—even though only an unfortunate few ever will collect on them. True enough, life insurance policies are subject to a variety of qualifications and exclusions designed to guard against the problem of moral hazard.[229] But the point about the willingness of people to pay for such coverage remains. The insurance industry is all about effecting the kind of cross-subsidization—if one can call it that—of which Rosenberg and Perino complain.

It thus is far from clear that the cross-subsidization point forms an argument against, rather than for, a right to opt out, even if one indulges the supposition of a collective choice made behind the veil of ignorance. The insurance supplied by the right to opt out stands as a plausible form of protection for would-be class members precisely because it enables them to insist upon a set of preexisting arrangements—what the class settlement would take away in the same manner that premature death takes away a future income stream. This protection is only fitting, given the tenuousness of the one-shot delegation of bargaining power to class counsel by comparison to the actual delegations made to legislatures or administrative agencies to alter rights over time.

Reference to other legal institutions raises a third, related flaw in the critique of the right to opt out: its institutional misallocation of the authority to engage in law reform. At bottom, the cross-subsidization argument is not a critique of the opt-out class action; indeed, it does not even support a theory of the class action per se. Rather, the criticism lodged by Rosenberg and Perino is an expression of their dissatisfaction with class members' preexisting bundle of rights in civil law—for them, tort law specifically.[230] It conceivably might be a good idea on instrumental

229. Qualifications often include some degree of inquiry into medical history. Exclusions operate to deny coverage for, most obviously, suicide.

230. One commentator hints at this point, though not in reference to Rosenberg or Perino specifically. See Epstein, supra note 50, at 16 ("Quite simply, the class action serves as an amplifier for the ordinary principles of civil litigation. Where those are correctly announced, then the class action increases their effectiveness. Yet when these are incorrectly stated, then the class action increases the mischief that these new actions can bring."). R

grounds to eliminate from the tort system the features that make for variance in damage claims: say, the constitutional right to a jury; the status of tort law as the product of diverse state court systems; and the inclusion of components for pain, suffering, and punishment in the calculus of damages.[231] The critics of the right to opt out ultimately have no theory of the class action *as class action* but only a wish that the class action might bring about the kind of mini-legislation by way of its delegation of bargaining power to class counsel that the actual political process has not supplied.[232]

The foregoing weakness is most apparent in Rosenberg's argument. He intertwines his case for mandatory class treatment of mass tort cases with a reiteration of his longstanding call for expanded recognition of new tort causes of action predicated upon the mere imposition of an increased risk of future injury.[233] Such a revolution in tort doctrine indeed would smooth the path to class treatment by valuing tort claims according to the risk posed to exposed persons as a collective group rather than by the magnitude of the particular injuries that some of them later suffer. But Rosenberg's plea for tort reform of this sort—a plea now nearly two decades old[234]—has yet to make much of a dent on the actual content of tort law.[235] The preexistence principle holds that reform of substantive

231. See supra text accompanying notes 70–75 (discussing sources of variance in total value of damage claims).

232. The critics of the right to opt out share this deficiency with instrumental theorists of tort law, who ultimately value tort only because it creates an occasion for policymaking. See Goldberg, supra note 43, at 1509–13. R

233. As Rosenberg explains:

> There are three types of these risk-based (or "exposure-only") claims: claims for the enhanced risk of future serious harm; mental distress claims (typically for nonpecuniary costs of bearing the enhanced risk); and mitigation claims to pay or provide for reducing expected tortious harm (for example, nuisance abatement, product recall, and medical monitoring).

Rosenberg, supra note 32, at 883. R

234. Rosenberg's argument on this score traces its lineage to his pathbreaking 1984 article on the problems posed by latent diseases for conventional tort concepts of causation. See David Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 Harv. L. Rev. 849, 885–87 (1984) (arguing that "risk by itself imposes actual losses on *all* individual members of the exposed population").

235. See Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 432–33 (1997) (surveying the current treatment of risk-based claims at common law to inform the Court's interpretation of the obligation of railroads under the Federal Employers' Liability Act to provide compensation for "injury" suffered by workers on the job). For an explanation of the general resistance to risk-based claims in the law of torts, see John C.P. Goldberg & Benjamin C. Zipursky, Unrealized Torts, 88 Va. L. Rev. 1625 (2002).

The one area in which risk-based claims of a sort have gained at least a toehold in the common law of torts consists of demands for medical monitoring. See *Metro-North*, 521 U.S. at 440–41 (noting the constraints imposed by courts that recognize medical monitoring). Recent commentary contends that medical monitoring differs from other forms of risk-based claims in that it consists, at bottom, of a demand for injunctive relief rather than damages. See Goldberg & Zipursky, supra, at 1709–15 (situating medical monitoring within the category of affirmative duties imposed by tort law on persons whose

law through public processes appropriately drives the formation of class actions in private litigation, not vice-versa. It leaves the unilateral imposition of central planning—if it is to occur at all—in the hands of duly constituted central planners.

B. *Reconciling Settlement Structure with Rule Structure*

Apart from academic debates, recent developments in the design of class settlements in the real world also challenge the distinction between mandatory and opt-out classes. This is not surprising, when one considers the strategic incentives in the class settlement process and the legacy of the Supreme Court's decisions in *Amchem* and *Ortiz*. As discussed in Part I, the claim preclusive effect of any class settlement is the means by which defendants purchase peace and class counsel secure their monopoly over the sale of class members' claims.[236] The greater the scope of the class, the more would-be litigants will be bound by a judgment approving a class settlement. And would-be litigants barred by claim preclusion can neither sue the defendant nor garner representation by a competing plaintiffs' law firm. In short, the incentives of the dealmakers in the class settlement process all run toward the design of their deal to approach as closely as possible a mandatory class in operation.

The Court's decisions in *Amchem* and *Ortiz* give class settlement negotiators all the more reason to put forward the settlement as one for an ostensible opt-out class under Rule 23(b)(3) but to embrace settlement terms that make it highly unattractive for class members actually to opt out. In so doing, class counsel and the settling defendant stand to gain the functional benefits of a mandatory, limited fund class under Rule 23(b)(1)(B) without having to satisfy the demands in *Ortiz* for proof of a true limited fund and allocation of it in its entirety to the class.[237] The tendency, in short, will be toward the design of ostensible opt-out settlements along the lines of the 9/11 Fund legislation: to leave open the

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tortious misconduct places others in a vulnerable position); Issacharoff, Preclusion, supra note 70, at 1073–80 (arguing for certification of medical monitoring class actions under Rule 23(b)(2) based on their injunctive nature). R

236. See supra Part I.A.1.

237. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 838–39 (1999). In this respect, the distinction between opt-out and mandatory classes resembles the differential treatment of debt and equity in the law of corporate taxation. Modern finance enables corporations to design instruments that function as one but to be accorded the tax treatment of the other. See Herwig J. Schlunk, Little Boxes: Can Optimal Commodity Tax Methodology Save the Debt-Equity Distinction?, 80 Tex. L. Rev. 859, 861–62 (2002) (arguing that innovation in financial instruments portends the collapse of the debt-equity distinction). My contention here is that the nature of the class action—its institutional position short of actual legislation—gives rise to limits on the analogous innovations that class counsel may pursue to skirt the line between opt-out and mandatory classes.

possibility of conventional lawsuits in theory but to deter their pursuit in practice.[238]

A controversial early version of a class settlement in product liability litigation over the Sulzer hip implant took this form, garnering approval at the district court level[239] but later being redesigned prior to the disposition of challenges on appeal.[240] In fact, the story of the Sulzer hip implant deal stands as only the most dramatic illustration of efforts to influence the right to opt out. The class action literature, however, has yet to deliver a principled assessment of these influences.[241] The first subsection fills that gap, contending that the preexistence principle stands as the proper dividing line between permissible and impermissible influences. The second subsection deals with another development that poses related questions about the nature of the right to opt out. A recent multibillion-dollar settlement in insurance litigation permits class members, if they wish, to pursue what one might describe as a "partial opt-out"—that is, to opt out with respect to claims arising from some of the covered insurance policies but not others.[242] The second subsection explains how this seemingly distinct phenomenon actually is another manifestation of efforts to deter opt-outs.

1. *Deterring Opt-Outs Through Settlement Design.* — Before one may delve productively into settlement provisions that deter the exercise of the right to opt out, three preliminary remarks are in order. First, a good opt-out class settlement is *supposed to be* an offer that the class members cannot refuse. Part I analyzed how the threat of entry by competing law firms within the plaintiffs' bar affects class settlement design.[243] The threat of entry secured by opt-out rights serves to push class settlements toward devices to deter entry. The challenge lies in discerning legal principles that will drive that process of innovation toward devices that pro-

238. See supra text accompanying notes 22–23 (noting that the 9/11 Fund legislation both caps conventional tort litigation against the airlines at the limits of their insurance coverage and creates an alternative compensation regime backed by the federal government). R

239. In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330 (N.D. Ohio 2001).

240. A preliminary ruling by the Sixth Circuit did not bode well for that court's ultimate disposition of the settlement and, as such, spurred negotiations that ultimately recast the deal. See Drummer v. Sulzer Orthopedics, Inc. (In re Inter-Op Hip Prosthesis Prod. Liab. Litig.), No. 01-4039, 2001 U.S. App. LEXIS 25910, at *5–*6 (6th Cir. Oct. 29, 2001).

241. One commentator at least identifies the issue:

> If one is intent on providing some meaningful opportunity to opt out, then one of the primary design difficulties will be crafting a restriction that is not so onerous that it takes away all incentive to opt out, while at the same time creating a sufficient disincentive to prevent large claimants from imposing externalities on those who must remain in the class. Crafting such a precise restriction is likely to be exceedingly difficult.

Perino, supra note 32, at 156. R

242. See In re Prudential Ins. Co. of America Sales Practice Litig., 261 F.3d 355, 360–61 (3d Cir. 2001).

243. See supra Part I.A.1.

vide genuine benefits to class members rather than act as impermissible guns to their heads.

Second, the choice of whether to opt out depends upon the *relative* merit of the class settlement as compared to class members' preexisting rights to sue. In practical terms, one can steer that choice toward the class settlement in two different ways: by making the class settlement relatively attractive and/or by making class members' preexisting rights to sue relatively unattractive. The preexistence principle drives innovation toward the boosting of benefits under the class settlement by insisting that the settlement designers have no power unilaterally to alter class members' preexisting rights.

Third, the existence of an opt-out class settlement may precipitate the generation of additional information about the value of class members' preexisting rights to sue, even though the settlement terms have no legal effect whatsoever—much less an impermissible one—upon those rights. Specifically, it is well nigh inevitable that the process of class settlement approval required under Rule 23(e) will lead the reviewing court to reflect upon class members' preexisting rights. One can say that a proposed class settlement is "fair, reasonable, and adequate,"[244] after all, only by comparison to what class members already have. One recent appellate decision puts the point more formally, instructing district judges under Rule 23(e) "to quantify the net expected value of continued litigation to the class."[245]

The information generated as a result of this inquiry is undoubtedly useful, as it reduces uncertainty over the value of class members' preexisting rights. If the information thus generated suggests the existence of serious barriers to successful litigation, then that information undoubtedly will influence the relative attractiveness of opting out versus remaining in the settlement. But the resulting deterrence of opt-outs—if one can call it that—is unobjectionable, for it stems not from the provisions of the class settlement but, rather, from preexisting weaknesses associated with the claims in the class. The existence of the class settlement may focus attention on weaknesses that dampen "the net expected value" of class members' claims, but the class settlement does not create those weaknesses. Their source will lie, instead, in the legal elements of class members' underlying causes of action[246] or, perhaps, related bodies of

244. See supra note 154 and accompanying text (discussing prevailing standard for class settlement approval under Rule 23(e)). R

245. Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 284 (7th Cir. 2002) (Posner, J.).

246. Approving an opt-out class settlement for Vietnam veterans allegedly injured by the defoliant Agent Orange, Judge Jack Weinstein pointedly noted that the available evidence on the existence of a causal relationship between Agent Orange and class members' maladies would not be "sufficient to support a recovery in tort." In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 795 (E.D.N.Y. 1984). This conclusion as part of the settlement approval process simply put into writing the doubts about the causation element expressed behind the scenes by Judge Weinstein to persuade class counsel to reach a settlement in the first place. See Peter H. Schuck, Agent Orange on Trial 160–61

law that constrain litigation for other reasons, such as applicable statutes of limitations.[247]

a. *Deterrence Through Alteration of Preexisting Rights.* — A deal that makes unattractive the prospect of opting out by altering class members' preexisting rights is different in kind from one that merely precipitates a revelation that class members do not have much to gain by suing individually. Recent events suggest that arrangements of the first sort have become the new battleground in the law of class settlements. A settlement attempted in 2001 in a class action over the Sulzer hip implant provides a vivid illustration.[248] Its provisions and its ultimate fate[249] bear examination in detail, for both shed light upon the implications of the preexistence principle.

(enlarged ed. 1987) (quoting a sworn statement in which class counsel recalls Judge Weinstein as stating during the marathon weekend negotiations on the eve of trial: "I want you to know that at nine o'clock Monday morning I am through carrying you. . . . You know, remember, I just don't think you have got a case on medical causation."). True to his word, Judge Weinstein ultimately granted summary judgment for the defense based upon the absence of a triable issue on causation in subsequent opt-out cases transferred to his court. See In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1259–60 (E.D.N.Y. 1985).

247. Approving an opt-out class settlement in litigation over the diet drug combination popularly known as "fen-phen," Judge Louis Bechtle noted that class members might encounter serious statute of limitations problems in the event of individual litigation. See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., MDL Docket No. 1203, Civil Action No. 99-20593, 2000 U.S. Dist. LEXIS 12275, at *52–*53 (E.D. Pa. Aug. 28, 2000) (approving class settlement), aff'd without opinion, 275 F.3d 34 (3d Cir. 2001).

For that matter, class members' preexisting rights to sue also remain subject to the law of bankruptcy. Recognition by the court of a realistic prospect that the defendant might seek the protection of the Bankruptcy Code absent the viability of an opt-out class settlement might well induce class members not to opt out. See infra note 283. But this effect is no different in principle from the "coercion" that comes from judicial recognition of other weaknesses that stem from problems of causation or statutes of limitations. R

248. For clarity of presentation, I shall describe this early version as the "original" Sulzer class settlement to distinguish it from the "final" version that is revealingly different in content. For a summary of the original class settlement, see In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 351–52 (N.D. Ohio 2001). For the original settlement agreement itself, see Class Action Settlement Agreement Among Sulzer Orthopedics and Affiliated Entities Including Sulzer Medica Ltd. and Class Counsel on Behalf of Class Representatives (Aug. 23, 2001), *Inter-Op Hip Prosthesis* (MDL Docket No. 01-CV-9000) (on file with the *Columbia Law Review*) [hereinafter Original Sulzer Class Settlement].

249. For a summary of the final version of the class settlement, see In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig., MDL Docket No. 1401, Case No. 1:01-CV-9000, slip op. at 3 (N.D. Ohio Mar. 14, 2002), available at http://www.hipimplantlaw.com/pdf/20020314_memo_and_order.pdf (on file with the *Columbia Law Review*) [hereinafter Sulzer Summary]. For the final settlement agreement itself, see Class Action Settlement Agreement Among Sulzer Orthopedics Inc., Sulzer Medica AG, Sulzer AG, and Class Counsel on Behalf of Class Representatives (Mar. 13, 2002), *Sulzer Hip Prosthesis* (MDL Docket No. 01-CV-9000), available at http://www.sulzerimplantsettlement.com/classaction settlement.htm (on file with the *Columbia Law Review*) [hereinafter Final Sulzer Class Settlement].

The Sulzer hip implant litigation arose from the discovery in the late 1990s of a manufacturing defect in one component of a larger system designed to replace the ball-and-socket structure of the hip joint.[250] The defect had the potential to prevent the system from bonding properly with the thigh bone of the implant recipient.[251] Sulzer[252] voluntarily recalled the defectively made units, but not until after tens of thousands already had been implanted in patients across the country.[253] The plaintiff class consisted of patients with claims of varying value. The substantial majority of the class was comprised of patients with claims that would not have been marketable on an individual basis.[254] At most, their situation called for modest medical examinations to confirm their lack of need for "revision" surgery to replace the defective component.[255] Other class members had claims of substantial value, however, as they already had undergone revision surgery, needed it in the future, or suffered from impairments under circumstances that made them ineligible for surgery.[256] For settlement negotiators, the trick lay in ensuring that this minority of high-value claimants would not opt out.

One way to achieve that goal would have been for the class settlement to provide benefits for would-be high-value claims and, for that matter, for the rest of the class too. The original version of the Sulzer hip implant settlement did so to a degree, though it structured much of the

250. See *Inter-Op Hip Prosthesis*, 204 F.R.D. at 335. Although the court took care to note as a formal matter that the defect remained merely an alleged defect, its existence was not seriously contested by Sulzer. See id. at 335 n.2.

251. See id. at 335.

252. By referring to the defendant simply as "Sulzer," I am consciously simplifying the discussion in the text in order to focus attention on the structure of the class settlement. In fact, the litigation implicated multiple corporations, each bearing the Sulzer name. The hip implants in question were manufactured by a Texas-based firm (Sulzer Orthopedics, Inc.), the domestic subsidiary of a Swiss parent corporation (Sulzer Medica Ltd.). See Amy Schatz, Sulzer Medica Distances Itself from Faulty Hip Implants, Austin Am.-Statesman, July 18, 2001, at D1, available at 2001 WL 4581554. One hotly contested question in the hip implant litigation centered upon the amenability of the Swiss parent to litigation in this country. See id.

As discussed below, see infra text accompanying notes 284–285, the final version of the class settlement boosted substantially the payouts to class members, with that boost stemming largely from the willingness of the Swiss parent to participate in the funding of the deal in the aftermath of objections to the original class settlement. See Goran Mijuk, Sulzer Medica's Stock Jumps on Proposed Legal Settlement, Wall St. J. Eur., Feb. 5, 2002, at 16. R

253. See *Inter-Op Hip Prosthesis*, 204 F.R.D. at 335 ("Sulzer Orthopedics recalled approximately 40,000 units of its Inter-Op shell, of which about 26,000 had already been implanted in patients.").

254. Id. at 348 ("[I]t appears that about 70–80% of the class members may have negative value claims—they were implanted with recalled Inter-Op shells, but are not expected to need revision surgery.").

255. Id. The original settlement provided medical monitoring for these class members, a remedy that the district court said "would not be available, as a practical matter, in the absence of class treatment." Id.

256. See id.

benefits for those in need of revision surgery in terms of stock in a corporate affiliate, as distinct from cash.[257] And, even then, the settlement imposed time restrictions on the alienability of those shares.[258] There was more to the transaction, however.

In its original form, the class settlement agreement did not leave peace to chance. It called for the creation of a lien on all of Sulzer's assets in favor of a trust created by the settlement to fund the benefits promised to class members. This trust fund would have consisted of less than Sulzer's entire net worth, a point whose importance will emerge momentarily.[259] Specifically, the trust fund would have included Sulzer's available insurance proceeds, available cash (but for one month of working capital), a specified number of shares, plus one-half of its net annual income until payment of all benefits promised in the settlement.[260]

The lien on Sulzer's assets in favor of this trust fund, moreover, would have included a revealing loophole: The class settlement agreement would have permitted Sulzer to sell its assets "for business purposes" free and clear of the lien, as long as the proceeds from those sales were not used to pay opt-out claimants.[261] This loophole was notably more expansive than the provision of the Uniform Commercial Code under which the holder of an asset in which a creditor has a security interest can sell that asset free and clear of that interest without the creditor's consent only if the sale occurs "in the *ordinary course* of business."[262]

The effect would have been simple enough in practical terms: Any opt-out claimants would have to wait roughly six years—the time period anticipated for the distribution of settlement benefits to the entire class—for payment on any judgment or settlement obtained in conventional litigation.[263] And, even then, opt-out claimants could not count on finding much left. As counsel for Sulzer summarized the deal to the *Wall Street Journal*: "[I]f anybody opts out, they still have to try their case, win their

257. See id. at 351–52. Unlike cash, equity shares fluctuate in value based upon market evaluation of the issuer's future business prospects. That evaluation would be distinctly rosier were the class settlement itself to bring peace to the litigation. In practical terms, the predominant use of stock over cash for high-value claimants would have given them—or, perhaps more accurately, the would-be competitors to class counsel who would represent such persons in making claims under the settlement or via individual litigation on an opt-out basis—reason to stay in the class settlement and thereby to boost the value of the shares.

258. See Original Sulzer Class Settlement, supra note 248, § 6.4 (prohibiting transfer of all shares for six months and restricting one-half of those shares for an additional six months). R

259. See infra text accompanying note 264. R

260. See *Inter-Op Hip Prosthesis*, 204 F.R.D. at 352.

261. Original Sulzer Class Settlement, supra note 248, § 2.8(f). R

262. See U.C.C. § 9-320(a) (2002) (emphasis added).

263. See *Inter-Op Hip Prosthesis*, 204 F.R.D. at 352 n.23.

case, win their appeal, and then there would be no assets to satisfy their judgment, because they are all pledged to the class."[264]

The legal significance of the class settlement lies not in simple delay, however. Its effect on would-be class members' preexisting rights is subtle—consciously so—and becomes apparent only upon comparison with the legal world absent the settlement. Absent the lien in favor of the trust fund created for their benefit, class members *as a collective group* would not have been entitled to priority vis-à-vis anyone who had obtained a damage judgment against the corporation. Nor, in particular, could they collectively have blocked payment to any other person pursuant to a settlement of a conventional individual lawsuit by that person. Rather, those injured by tortious activity stand in a race with each other. Their ability to reach the finish line—actual receipt of payment—depends simply upon the unencumbered assets left in the defendant's hands at the time that payment either is made or obtained through coercive process of law.[265] For that matter, the same is true of the relationship between persons tortiously injured by Sulzer and, say, persons whose ordinary contracts the corporation had breached. All would have the right to race one another to obtain payment, with the winners of the race consisting of those whom one might describe as the more wily runners.

There is room in the race, of course, for security interests. It is far from unusual for a corporation to grant a security interest in some portion of its assets in favor of a particular "person."[266] Article 9 of the Uniform Commercial Code is all about secured transactions whereby creditors gain an advantage in the race to get at the debtor's assets in the event that their deal goes sour. As a result, all those upon whom a corporation has committed torts stand at risk that the corporation might convey to other persons a security interest in corporate assets before tort litigation can make successful demands thereon.

The original class settlement in the Sulzer hip implant litigation would have altered the rules of the race and, in so doing, changed the preexisting rights not merely of those who might remain in the class but also of any opt-outs. To this end, the lien and the trust fund would have worked in tandem. The effect of the lien would have been to place opt-out claimants behind class members for ultimate payment and thereby to prohibit them from leapfrogging those class members even though they previously were entitled to attempt to leapfrog any other would-be claim-

264. Jess Bravin, Sulzer Medica Reaches Novel Class-Action Pact, Wall St. J., Aug. 16, 2001, at A3 (quoting Richard Scruggs). Sulzer's retention of Scruggs as its class settlement negotiator for the hip implant litigation was itself ironic, given Scruggs's longtime business of representing tort plaintiffs in other lawsuits. See id. Scruggs stood to be paid "a 'low seven-figure number,' plus a 'success fee' of about $20 million should the settlement be approved." Id.

265. Enforcement of a judgment is by writ of execution. On the basics of this writ, see 33 C.J.S. Executions § 2, at 155–56 (1998).

266. See U.C.C. § 9-102(72)(A) (defining "secured party").

ants in the race.[267] If anything, the loophole in the lien spotlights this effect: The security interest enshrined in the lien would have been a security interest *only* in the sense of restructuring hip implant recipients' rights vis-à-vis each other, not as against any other creditors. Sulzer might choose to satisfy other creditors' demands—indeed, apparently, to enter into new contracts "for business purposes" outside the ordinary course—in ways that would entail the sale of assets free and clear of the lien.

The crucial point is that the indispensable vehicle for this change—what makes possible the change in the rules of the race—is none other than the class settlement itself. Here, one must take care to frame clearly the effect of that settlement. As noted earlier, a class settlement does not bind class members unless approved by the court under Rule 23(e); and a court-issued judgment is the manifestation of that approval. But a judgment approving the Sulzer class settlement would not have immediately entitled any given individual within the class to payment of a specific sum in the manner of a conventional damage judgment.[268]

Rather, the effect of the class judgment would have been simply as described in Part I: to substitute for class members' preexisting rights to sue a different set of compensation rules set forth in the class settlement agreement. In exchange for their rights to sue in tort, class members would have received not an immediate check but, rather, a promise to pay under the conditions set forth in the settlement agreement for the presentation of claims. In short, the role of the class judgment—the whole reason for using a class settlement at all—was simply to make the members of the class parties to the private contract consisting of the class settlement agreement.

Absent the binding effect of the class judgment, the dealmakers behind the Sulzer class settlement could have attempted to create security interests only in the conventional manner: by actually contracting with individual members of the class. That process, however, still would have consisted of an individualized race, for those various security interests would stand vis-à-vis one another in the usual manner of multiple security

267. The lien in the original Sulzer class settlement is a relatively subtle way to drive an ostensible opt-out class settlement toward a mandatory class settlement in operation. Other, more flagrant alternatives might include the imposition of a time limit for the bringing of lawsuits by opt-out claimants in order to expedite peace for the defendant in the litigation as a whole. One commentator mentions in passing the prospect of such time limits—essentially, amendments of the statute of limitations for opt-outs—and correctly discerns that they could be imposed only via reform legislation, not by an opt-out class settlement. See Rutherglen, Better Late, supra note 49, at 294. R

268. Class members thus could not file a judgment lien on Sulzer's assets upon issuance of the judgment approving the class settlement. A judgment lien turns upon the reduction of one's claim against the debtor to "a definite amount" that is "not dependent on any contingency." 50 C.J.S. Judgment § 554, at 108 (1997). The judgment approving the Sulzer class settlement under Rule 23(e) would not fix the amount of any class members' claim, or even that of the class as a whole, given the nature of the class settlement as a contractual promise to pay the stream of claims ultimately presented under the settlement terms.

interests in the same asset: the first filed would have priority over the second filed, and so on.[269] In particular, the wily runners able to extract security interests from Sulzer as part of their individual settlements would have priority over all other tort claimants. The race would still be on; it simply would be a race to extract and then to file one's security interest.

The class judgment was essential precisely because it would bypass and restructure this individualized process of securitization. And the way that the class judgment would have done so is by bringing into being a new legal entity—namely, the trust fund—to serve as the juridical person through which Sulzer then could provide a security interest to all members of the class *in one fell swoop*. It would have brought into being this new type of creditor in the same way that the class action in *Ortiz* would have brought into being a faux limited fund—something that did not exist previously and, hence, could not have affected the rights of anyone *but for the class action*.

In short, prior to the class settlement, the rules of the race were such that persons with legal claims against the corporation remained vulnerable to the granting of security interests in corporate assets to specific other persons. And those who ran a better race stood to gain priority over others. But the one kind of "person" not in existence—the one entity to whom all claimants were not vulnerable in the race—was exactly the juridical person that the Sulzer class settlement would have brought into being: a trust fund created as the payout vehicle for the class on a collective basis and to be constituted by the class judgment itself. Seen in this light, the class settlement attempted in the Sulzer hip implant litigation exhibits the same fatal circularity as the faux limited fund in *Ortiz*. It unilaterally alters legal rights through the vehicle of something that exists only by the say-so of the class settlement designers. This a class action generally cannot do.

The case for leaving undisturbed the ability of any given claimant to attempt to leapfrog others in the race for Sulzer's assets undoubtedly would wither in the event of a true limited fund—one antecedent to any class action. As this Part shall explain in greater depth,[270] individual efforts to leapfrog in a limited fund situation would carry a risk of imposing externalities on others by reducing the assets available to satisfy their claims. The existence of a limited fund, however, is the one assertion that the designers of the original Sulzer class settlement had to avoid.

Reliance upon the existence of a limited fund would have cast the original class settlement on a collision course with *Ortiz*—specifically, the Supreme Court's insistence that the fund must be "set definitely at [its] maximum[ ]"[271] and that the "whole" of it must be devoted to the

269. See U.C.C. § 9-322(a)(1) (setting priorities among perfected security interests in same collateral).

270. See infra Part III.D.1 (explaining how the mandatory, limited fund class action serves the preexistence principle).

271. Ortiz v. Fibreboard Corp., 527 U.S. 815, 838 (1999).

class.[272] These demands the class settlement could not possibly satisfy, as there was no reason to believe that the trust fund—sizeable though it was—constituted Sulzer's net worth. Specifically, there is no reason to think that a fund consisting merely of the cash that Sulzer could raise should pass muster as a true limited fund. The objective seemingly was to create in an opt-out class settlement something decidedly *less* than the "maximum" available fund and then to make that settlement operate in the manner of a mandatory class by deterring class members from opting out. In doing so, however, the settlement designers left themselves in an untenable position, unable to make the one argument capable of surmounting the objection that they were taking away class members' preexisting right to attempt to leapfrog over others in the race.

For its part, the district court recognized the original settlement as an "inventive" arrangement "on the 'growing edge' of Rule 23(b)(3)'s provisions for an opt-out class action";[273] but the court blessed the deal nonetheless. In so holding, the district court revealed not only a misunderstanding of what I defend here as the preexistence principle but also a related misperception of the transaction before it. The district court opined that rejection of the original settlement based upon the fear that little or nothing would remain for opt-out claimants "would place an impossible and inherently irreconcilable obligation upon class counsel—to negotiate a class-wide settlement which is fair, adequate, and beneficial to its participants, while leaving *completely unaffected* the interests of those who would choose not to participate in it."[274] The district court's italics notwithstanding, the telling word here is "interests."

What must remain "completely unaffected" are not the economic "interests" of opt-out claimants but, rather, their preexisting rights. One may encapsulate the distinction in terms of measures that merely affect the economic value of the right to sue and those that change the content of that right itself. The distinction between interests and rights is an important one that bears, as I shall elaborate later, upon the provisions that a class settlement permissibly may include to deter opt-outs.[275] The same distinction also bears upon the fundamental determination of Rule 23 to provide class members with a right to opt out rather than a right to opt in.[276]

The district court's failure to recognize the difference between interests and rights led astray its analysis of the original Sulzer class settlement. The district court is correct in the narrow sense that a good opt-out class settlement need not undertake to ensure that conventional litigation by opt-out claimants will be comparably lucrative. A good opt-out class settlement always affects the interests of would-be opt-out claimants in a

272. Id. at 839.
273. In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 356 (N.D. Ohio 2001).
274. Id. at 344.
275. See infra Part III.B.1.b.
276. See infra Part III.C.

strictly economic sense by dangling in front of them a superior alternative to what they already have. In so doing, a good opt-out class settlement necessarily increases the opportunity costs associated with adherence by class members to their preexisting rights to sue. What should have doomed the original Sulzer class settlement in legal terms was not the pragmatic concern that opt-out claimants ultimately might obtain only "minuscule" recoveries upon the eventual lifting of the lien[277] but, instead, the taking away of their preexisting right to attempt to leapfrog over other tort claimants in the race to obtain Sulzer's assets. To continue the race analogy: There is a difference between assuring someone a desirable outcome in the race and subjecting her, in her effort to win the race, to a barrier created only by the class action itself.

To be fair, the district court's lack of focus upon this critical aspect of the original class settlement appears to have stemmed from a similar lack of focus in the arguments made by the settlement objectors.[278] In fact, "one of the most vocal objectors" consisted of none other than a compet-

277. *Inter-Op Hip Prosthesis*, 204 F.R.D. at 354.

278. See id. (summarizing objectors' arguments). The objectors emphasized a Seventh Circuit decision from the late 1970s in which that court cautioned against the approval of opt-out settlements that would "abridg[e] the substantive rights of those who did not accept the settlement offer." In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1136 (7th Cir. 1979), quoted in Plaintiff's Objection to Preliminary Approval of Terms of Proposed Class Settlement at 7, *Inter-Op Hip Prosthesis* (MDL Docket No. 01-CV-9000) (on file with the *Columbia Law Review*) [hereinafter Plaintiff's Objection]. Though the quoted language does sound in the preexistence principle, *GM Engine Interchange* did not present a class settlement comparable to the original Sulzer hip implant deal. The problem that troubled the Seventh Circuit in *GM Engine Interchange* stemmed not from the class settlement design so much as from what one might describe charitably as a peculiar move by the district court upon review of the settlement under Rule 23(e).

The litigation in *GM Engine Interchange* stemmed from the discovery that General Motors had used surplus Chevrolet engines in certain automobiles manufactured by other General Motors divisions, principally Oldsmobile. See 594 F.2d at 1113. The engine substitution, unbeknownst to consumers, ultimately led to a nationwide opt-out class action in which the plaintiff class of car owners asserted claims under both state law and the federal Magnuson-Moss Act. Id. at 1114–15. The district court declined to exercise pendant jurisdiction over the state-law claims, certifying the class only as to the federal Magnuson-Moss Act claims. Id. at 1115. The parties then reached a class settlement that offered certain benefits—some cash plus an extended warranty—to class members in exchange for full releases of both their federal and state claims. Id. at 1116.

In the course of the fairness hearing on the proposed class settlement, however, the district court determined that the Chevrolet engines were functionally "comparable" to the engines that General Motors had represented to consumers as being in the cars. Id. at 1117. In essence, the district court concluded that the various engines were effectively the same, rather like the way in which Homer Simpson discovered, during his tour of the Duff Beer factory, that all ostensible varieties of Duff beer—Duff, Duff Light, and Duff Dry—actually flow from the same spigot. See The Simpsons: Duffless (Fox television broadcast, Feb. 18, 1993). It remains unclear why, upon its finding of engine comparability, the district court did not simply mention that class members' claims seemed of dubious value, at best, and then proceed to approve the proposed settlement. Getting some cash and an extended warranty for alleged misrepresentations that did not actually diminish the functions of one's car would seem to be quite a good deal, after all. The district court,

ing plaintiffs' law firm that earlier had sought unsuccessfully to secure nationwide leadership of the litigation.[279] There was more to the objectors' stance, however, than mere sour grapes. The role of the objectors to the original Sulzer class settlement actually confirms the vitality of the preexistence principle as a check upon the monopoly power of class counsel.

The objectors already had obtained as individual clients substantial numbers of hip implant recipients in need of revision surgery.[280] The objectors thus faced the prospect not simply of being unable to reap the gains from service as class counsel but, more importantly, of having their high-value cases roped into the class settlement crafted by class counsel. A strategy on the objectors' part of simply opting out their individual clients would have been to no avail, as opt-outs would have faced the alteration of their preexisting rights in the manner described above. Here, if anything, was the anticompetitive effect of the class action writ large. The point of the lien and trust fund at the heart of the class settlement was to ensure that opt-out claimants—and, hence, the competing law firms within the plaintiffs' bar who already represented many such persons—would no longer be able to leapfrog ahead of class members in the race against Sulzer's assets. The class settlement sought to slip the leash of potential entry by signaling to any entrants that they likely would obtain no payoff at all.

The objectors appealed the district court's settlement approval decision to the Sixth Circuit, which expressed "serious doubts as to the legitimacy of the proposed class settlement" in the course of granting a preliminary motion to lift a stay on related litigation imposed by the district

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however, dismissed outright the federal Magnuson-Moss Act claims, the only ones remaining in the class action. See 594 F.2d at 1117.

This dismissal created the odd situation that so disturbed the Seventh Circuit. The combination of the proposed settlement and the district court's dismissal meant that class members would lose their federal Magnuson-Moss Act claims, irrespective of whether they chose to remain in the class or to opt out. Id. at 1134 (observing that any given class member "is presented with an accept-or-else situation: if he does not accept, his federal claim is lost even though he cannot receive the benefits of the settlement package"). That consequence, however, stemmed not from the settlement design, but from the district court's curious dismissal. Indeed, the dismissal at least arguably contravenes the familiar principle that a district court, upon class settlement review under Rule 23(e), must rule in the manner of a Roman emperor: thumbs up or thumbs down on the proposed settlement as a whole, without the power to tweak particular provisions. See Manual for Complex Litigation (Third), supra note 154, § 30.42. R

279. *Inter-Op Hip Prosthesis*, 204 F.R.D. at 336 n.5. The district court's remark refers to Richard Heimann, a member of the prominent plaintiffs' law firm of Lieff, Cabraser, Heimann & Bernstein, based in San Francisco. Heimann had sought unsuccessfully to persuade the Judicial Panel on Multidistrict Litigation to consolidate all federal lawsuits over the Sulzer hip implant under his leadership as class counsel in federal district court located—not surprisingly—in San Francisco. See id.

280. See Petitioners' Consolidated Brief in Support of Appeal Pursuant to FRCP 23(f) and FRAP 5 at 3–4, In re Inter-Op Hip Prosthesis Prod. Liab. Litig. (6th Cir. Feb. 2002) (Nos. 01-303 & 01-304) (on file with the *Columbia Law Review*).

court.[281] The efforts of the objectors ultimately led class counsel and their defense counterparts to fashion a substantially different deal[282] before the Sixth Circuit could rule on the original one.

The differences between the two settlements are revealing and lend real-world support to the inferences drawn earlier, in theoretical terms, about the effect of the preexistence principle on class settlements involving high-variance damage claims. Given the district court's approval of the original Sulzer class settlement, the same court's recent blessing of the final version is hardly surprising.[283] This time, however, the court is right. The final class settlement eliminates the controversial lien and trust fund at the heart of the original deal.[284] Absent the ability to induce class members to forego the opportunity to opt out by altering their preexisting rights, the final settlement predictably boosts the benefits to be gained by class members for remaining in the class—most tellingly, those provided to members who undergo revision surgery and, hence, who stand to be the holders of high-value claims.[285] Not only does the final settlement boost the overall value of the benefits for high-value claims—and, to a lesser extent, for low-value claims as well—it also restructures those benefits by providing them virtually entirely in cash rather than stock.[286]

The point is not that one should applaud the final version of the Sulzer class settlement simply because it gives class members more money. Rather, the point is to highlight the practical consequences of the respect for class members' rights accorded by the preexistence principle. Absent the ability to alter unilaterally class members' preexisting rights to sue in tort—as the combination of the lien and trust fund in the original deal would have done—settlement designers must purchase those rights by way of the benefits promised to class members for remaining in the settlement. In this manner, the preexistence principle constrains the design of class settlements by insisting that they must truly be transactional in nature—that they constitute arrangements by which class members' preexisting rights really are purchased rather than simply ap-

281. Drummer v. Sulzer Orthopedics Inc. (In re Inter-Op Hip Prosthesis Prod. Liab. Litig.), No. 01-4039, 2001 U.S. App. LEXIS 25910, at *5 (6th Cir. Oct. 29, 2001).

282. See Final Sulzer Class Settlement, supra note 249. R

283. See In re Inter-Op Hip Prosthesis Prod. Liab. Litig., MDL Docket No. 1401, Case No. 1:01-CV-9000, slip op. (N.D. Ohio May 8, 2002), available at http://www.ohnd.uscourts.gov/Clerk_s_Office/Notable_Cases/01cv9000-fairness-ord.PDF (on file with the *Columbia Law Review*). The court emphasized the prospect that Sulzer would seek protection in bankruptcy absent approval of the final class settlement. See id. at 2. Averment by the reviewing court to the prospect of bankruptcy without the class settlement might deter class members from opting out. But that prospect does not differ in principle from other preexisting weaknesses associated with class members' claims that may come to the fore in the settlement review process. See supra note 247. R

284. See Final Sulzer Class Settlement, supra note 249, § 2.4(a) (requiring Sulzer to secure the release of the liens previously created as part of the original class settlement). R

285. See Sulzer Summary, supra note 249, at 3. R

286. See id.

propriated. And that purchase is paid for, by and large, by unlocking for class members the gains from settlement that class counsel and the settling defendant otherwise might seek to appropriate for themselves.

One may see the same effect in recent product liability litigation over a defective component used in pacemakers manufactured by Telectronics Pacing Systems. There, the settling parties originally had pursued a mandatory, limited fund class settlement, but that effort foundered upon appellate review of the settlement in light of the Supreme Court's intervening decision in *Ortiz*.[287] The settling parties thereafter crafted a similar deal, but this time as an opt-out class settlement.[288] The principal change consisted of higher benefit levels for class members.[289]

b. *Deterrence Through Other Means.* — The boosting of the benefits provided to class members is far from the only means by which a class settlement might deter opt-outs while still respecting the preexistence principle. Another common device consists of a "right-to-withdraw" clause: a provision in the settlement agreement that empowers the defendant to withdraw from the deal "if, in its judgment, a substantial and material proportion of the class members have requested exclusion."[290] In the Sulzer hip implant litigation, the settlement designers notably added such a right-to-withdraw clause when they switched from the original class settlement (which would have effectively deterred opt-outs through its lien and trust fund for the class) to the final version (which left class members free to choose between the settlement and their preexisting rights to sue).[291]

One commentator helpfully analogizes an opt-out class settlement with a right-to-withdraw clause to a tender offer in corporate law "conditional upon acceptance by a minimum number of shareholders."[292] A right-to-withdraw clause undoubtedly introduces a degree of interdependence to class members' claims. All will lose the benefit of the class settlement if too many choose to opt out. Under the preexistence principle, however, threatening would-be class members with the denial of settlement benefits is not the same thing as threatening them with unilateral modifications to their preexisting legal rights. The settling defendant's right to withdraw serves merely as a condition upon the contract that is

287. See In re Telectronics Pacing Sys., Inc., 221 F.3d 870, 880–81 (6th Cir. 2000).

288. See In re Telectronics Pacing Sys., Inc., 137 F. Supp. 2d 985, 1001–02 (S.D. Ohio 2001).

289. See id. at 1002–03 (comparing original mandatory class settlement with final opt-out class settlement).

290. 4 Conte & Newberg, supra note 130, § 12:12, at 304. R

291. See Final Sulzer Class Settlement, supra note 249, § 10.1. Sulzer decided to stand by the final class settlement, though it did scrutinize closely the nature of opt-out cases in deciding whether to exercise its right to withdraw. See Press Release, Sulzer Orthopedics, Centerpulse Approves Settlement with Minimal Number of Opt Outs (May 31, 2002), available at http://www.hipimplantlaw.com/press08.htm (on file with the *Columbia Law Review*). R

292. Rutherglen, Better Late, supra note 49, at 282. R

the class settlement.[293] Nonfulfillment of a contractual condition does not alter the preexisting rights retained by the would-be contracting parties; it simply denies them the benefit of an alternative set of rights.[294]

Another common device consists of a "most-favored-nation" clause, whereby the class settlement assures class members of additional benefits in the event that comparable opt-out cases receive judgments or settlements higher in value than the benefits described in the class settlement agreement.[295] These too are permissible, for they enhance the attractiveness of the settlement while leaving unaltered preexisting rights. As a strategic matter, the existence of a most-favored-nation clause might well prompt the settling defendant to take a stingy approach to the resolution of opt-out cases.[296] For that matter, during the opt-out period, the defendant might announce its intention to do just that as a way to deter opt-outs. That a most-favored-nation clause might prompt such obstinacy from the defendant undoubtedly affects the economic interests of opt-out claimants, but it does not alter their rights. All civil claimants are always at risk that the defendant, for whatever reason, suddenly might change its approach to the litigation from one of relatively prompt settlement to one of stonewalling through invocation of its own right to refuse to pay until a final judgment for damages.

Finally, a class settlement might deter the exercise of the right to opt out conferred by Rule 23[297] by providing class members with additional opt-out rights at later times—what commentators have described as "back-end opt-out" rights.[298] A recent class settlement in litigation over the diet drug combination popularly known as fen-phen illustrates this approach.[299] The fen-phen class settlement respects the preexistence principle by affording fen-phen users the opportunity to exit the class at the outset. If they choose to do so, class members keep their preexisting

293. Cf. Abbott Labs. v. CVS Pharmacy, 290 F.3d 854, 857 (7th Cir. 2002) (Easterbrook, J.) ("Although the class action that ended in settlement was within federal-question jurisdiction, the settlement is just a contract, so a suit *on the settlement* needs an independent basis of federal jurisdiction.").

294. The same analysis would hold true for an opt-out class settlement that took the converse approach, positing an across-the-board boost in payouts under the settlement contingent upon opt-outs remaining below a specified maximum.

295. 4 Conte & Newberg, supra note 130, § 12:2, at 276.

296. See id.

297. See Fed. R. Civ. P. 23(c)(2)(A) (stipulating that notice provided to members of Rule 23(b)(3) class "shall advise each member that . . . the court will exclude the member from the class if the member so requests by a specified date").

298. See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1448–52 (1995); Eric D. Green, What Will We Do When Adjudications Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century, 44 UCLA L. Rev. 1773, 1790 (1997); Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 Cornell L. Rev. 941, 967 (1995).

299. In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., MDL No. 1203, Civil Action No. 99-20593, 2000 U.S. Dist. LEXIS 12275 (E.D. Pa. Aug. 28, 2000) (approving class settlement), aff'd without opinion, 275 F.3d 34 (3d Cir. 2001).

rights intact, including the prospect of seeking punitive damages from the defendant manufacturer American Home Products.[300] Those who remain in the class after this initial opt-out process are not obligated to seek compensation under the class settlement, however. They instead may choose to opt out at either of two later times, upon the diagnosis of two specified types of heart problems allegedly associated with fen-phen.[301]

These back-end opt-out rights—beyond the initial opt-out demanded by Rule 23—come at a price: Class members who exercise their back-end opt-out rights and thereupon sue American Home in tort may not seek punitive damages.[302] The workings of the fen-phen deal are complex and have garnered more detailed attention elsewhere.[303] For present purposes, the point is a simple one: A class settlement may deter the exercise of the Rule 23 right to opt out not just by boosting dollar payouts under the settlement, but also by conferring additional procedural rights beyond the Rule 23 minimum that will enable class members to compare the merits of the settlement versus conventional litigation over time, rather than on a one-shot basis at the outset.

2. *Opt-Out as a Personal or Transactional Right.* — The preexistence principle helps to define the dividing line between permissible and impermissible measures to deter opt-outs. Another variation on this problem highlights an emerging controversy over the nature of that right itself. And resolution of that controversy leads one back, appropriately enough, to the earlier discussion of the class action as a vehicle for the sale of claim preclusion.

Class actions for damages often stem from transactions whose parameters are readily discernible—to take a simple example, the purchase of one thousand defective cars by each of one thousand different consumers. In such a scenario, the class member and her transaction are one and the same, as each class member owns only one of the implicated cars. Other damage classes, however, may stem from transactions that one might characterize as either a single unit or multiple discrete units.[304] The aftermath of a recent multibillion-dollar class settlement in the "vanishing premium" litigation illustrates the problem.

The term "vanishing premium" refers to one of several practices used by Prudential Insurance Company in connection with the sale of life insurance policies to consumers across the country[305]—for some consum-

300. See id. at *75.

301. See id. at *75–*78.

302. See id. at *76–*77.

303. See Nagareda, Autonomy, supra note 136, at 797–817. R

304. The problem of how to define the parameters of a transaction for legal purposes is not unique to the class action area. For a penetrating analysis of similar problems throughout public law, see generally Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 Yale L.J. 1311 (2002).

305. As the district court found:

ers, multiple policies. In their complaint, the plaintiff class of Prudential policy holders alleged that these various practices amounted to fraud.[306] The class action ultimately resulted in a $3.3 billion opt-out class settlement, which garnered judicial approval.[307] The completion of the deal, however, was only the beginning of the story. The notice sent to class members informed them that they might exercise a partial opt-out: They might choose to opt out of the class with respect to some of their Prudential life insurance policies but to remain in the class with respect to others.[308] Some class members did just that and then sued Prudential in state court based upon the policies that they had excluded from the class, filing a complaint that mimicked the allegations in the now-settled class action.[309] Their situation was by no means idiosyncratic; to the contrary, the scope of the vanishing premium litigation meant that similar suits "could number in the millions."[310]

The federal district court that had approved the class settlement enjoined the opt-out plaintiffs from presenting in their state lawsuit evidence related to the matters resolved in the class settlement[311]—a category that included any evidence concerning the nationwide, systematic nature of the alleged fraud, such as would support a demand for punitive damages. On appeal, the Third Circuit upheld this evidentiary injunction, casting the question of its validity largely in terms of a pragmatic choice of how best to safeguard "the possibility for settling any large, mul-

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> Prudential agents misrepresented that policyholders would have to pay no out-of-pocket premiums [for life insurance] after a certain number of premium payments during the initial years of the policies.
>
> . . . .
>
> Prudential's standardized sales presentations and policy illustrations failed to disclose that the policy premiums would not vanish and that Prudential did not expect the policies to pay for themselves as illustrated. Prudential's illustrations also did not inform policyholders of the assumptions on which the policy illustrations were based, assumptions which had no reasonable basis in fact.

In re Prudential Ins. Co. Sales Practices Litig., 962 F. Supp. 450, 476 (D.N.J. 1997) (citations omitted), aff'd 148 F.3d 283 (3d Cir. 1998). For a summary of the other sales practices used by Prudential, see In re Prudential Ins. Co. Sales Practices Litig., 261 F.3d 355, 358–59 (3d Cir. 2001).

306. *In re Prudential*, 261 F.3d at 359.

307. See *In re Prudential*, 148 F.3d at 290. The $3.3 billion estimate for payouts by Prudential under the class settlement comes from subsequent litigation over the fee award for class counsel. See In re Prudential Ins. Co. Sales Practices Litig., 106 F. Supp. 2d 721, 730 (D.N.J. 2000).

308. *In re Prudential*, 261 F.3d at 360.

309. See id. at 361–62.

310. Id. at 367.

311. See id. at 363. Prudential, of course, could have insisted that opt-out plaintiffs not admit evidence of the class settlement itself, or the negotiations that led to it, to support their individual lawsuits. See Fed. R. Evid. 408 (excluding evidence of offers to "compromise" a disputed claim if offered "to prove liability for . . . the claim or its amount"). The district court's injunction went further, however, barring the admission of substantive evidence concerning the alleged nationwide fraud scheme.

tidistrict class action."[312] The Third Circuit feared that, absent the evidentiary injunction, "defendants in such suits would always be concerned that a settlement of the federal class action would leave them exposed" to the prospect of "countless suits" by partial opt-outs to relitigate the nationwide scheme supposedly settled.[313] The question here, however, is not one of pragmatics so much as one of principle.

At bottom, the evidentiary injunction in the vanishing premium litigation is simply another class settlement device to deter class members from opting out at all.[314] It deters the would-be wielders of partial opt-out rights by telling them: You can exclude some of your life insurance policies from the class. But, if you do so, then you will have a harder time suing on those policies, because you will not to be able to present evidence that clearly could be used by a pure opt-out claimant—that is, someone who had excluded herself entirely from the class settlement.[315]

The Third Circuit in the vanishing premium litigation failed to discern the affinity of the question before it with the larger debate over deterrence of opt-outs. As a result, the court overlooked completely the decisive point: namely, the extent, if any, of would-be class members' preexisting ability to split their claims. If class members did have a preexisting right to bring separate lawsuits for some of their Prudential life insurance policies, then the evidentiary restriction in the injunction should not stand. In that event, the restriction would amount to the kind of unilateral alteration of rights that the preexistence principle forbids. In particular, if class members would have been entitled to split their life insurance policies across different lawsuits, then there would be no rea-

312. 261 F.3d at 367.

313. Id.

314. The Third Circuit noted that the evidentiary injunction made it "difficult to imagine" how the partial opt-out plaintiffs realistically could litigate certain of their claims that centered upon the nationwide, systematic nature of the alleged fraud scheme. Id. at 368.

For clarity of presentation, I assume that the evidentiary restriction would stem from a clear statement in the class settlement itself. On the particular facts of the vanishing premium litigation, however, that point was far from clear. The class settlement agreement there contained boilerplate language, whereby class members released "any and all" claims that they could have asserted "on the basis of, connected with, arising out of, or related to, in whole or in part," the disputed life insurance policies. Id. at 367 (quoting release provision of class settlement agreement). The Third Circuit concluded that this language provided class members with adequate notice of the evidentiary restriction that would apply to partial opt-outs. See id. at 369. But the court cautioned:

> In the future, however, it may be advisable for district courts to consider adding more specific language to settlement documents. Any such language would advise class members that, even though they retain certain claims as to transactions excluded from a settlement, their ability to pursue those claims may be hindered by the terms of the release of claims that remain part of any class settlement.

Id. at 369 n.8.

315. A pure opt-out claimant, by definition, would not be bound in any respect by the release in the class settlement agreement; and *In re Prudential* did not suggest otherwise.

son to treat any such lawsuits in the aftermath of the class settlement in a manner different from that of a pure opt-out claimant. And such a claimant clearly could present whatever helpful evidence she might wish, subject to the general rules of evidence.

If class members really could have split their claims, then one could not characterize the prospect of partial opt-outs subject to an evidentiary restriction as simply the creation of a new option in addition to those that class members already had. Rather, the evidentiary restriction would take away from class members a legal right that they already had: namely, to have a lawsuit as to certain of their life insurance policies treated in the same manner—no evidentiary restriction—as that of a claimant suing individually as to her one and only policy.

The framing of the question in terms of whether class members could split their claims ties the preexistence principle back to the earlier discussion of claim preclusion. The prospect of claim splitting, after all, is the central preoccupation of claim preclusion law. The Restatement (Second) of Judgments states the now-familiar standard, providing that a judgment will extinguish "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected connected transactions, out of which the action arose."[316] Identification of a "series of connected transactions," in turn, depends upon "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[317]

A would-be class member in product liability litigation over a prescription drug clearly could not bring one thousand different lawsuits for each of one thousand pills purchased of that drug. Whether multiple Prudential life insurance policies would constitute a single "series of transactions" for claim preclusion purposes would depend upon subsidiary questions that the Third Circuit simply did not ask: among others, whether all the policies were purchased contemporaneously[318] and whether those sales took place in different jurisdictions—insurance law being primarily a creature of state law. Whatever the particulars, the overarching point remains: The proper focus of the inquiry is not on what result would serve some undefined pragmatic calculus but, rather, on what would-be class members were free to do absent the class.[319]

316. Restatement (Second) of Judgments § 24(1) (1982).

317. Id. § 24(2).

318. The allegedly fraudulent sales practices extended over a fourteen year period. See *In re Prudential*, 261 F.3d at 359.

319. This approach accords with the Court's most recent guidance on claim preclusion in Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001). *Semtek* concerned the claim preclusive effect of a decision rendered by a federal district court sitting in diversity. The federal court had dismissed on statute of limitations grounds an action brought under California tort and contract law. When the plaintiff sued again on

The framing of the inquiry in terms of claim preclusion points toward a factually dense inquiry that, as in all close claim preclusion cases, could prove messy at the margin. The further question implied by the vanishing premium litigation is whether an opt-out class settlement could avoid that inquiry altogether by insisting upon the exercise of the right to opt out on a person-by-person basis rather than a transaction-by-transaction basis. If anything, a casual glance at Rule 23 would suggest that a class settlement could forbid partial opt-outs. Rule 23(c)(2)(A) requires the court to notify each member of an opt-out class that "the court will exclude *the member* from the class if *the member* so requests by a specified date."[320] Read literally, the casting of the opportunity to opt out in terms of each class "member" suggests that a class settlement would be perfectly free to insist that each "member" opt out or remain in the class as to all of her claims.

There is no evidence, however, that the quoted language stemmed from any awareness of the foregoing question, much less an effort to resolve it. In fact, the structure of Rule 23(c)(2) itself may have led to the inadvertent suggestion of a position on the issue. The reference to the right to opt out in Rule 23(c)(2)(A) appears as part of a larger discussion of the notice required in an opt-out class action. The quoted language stands as an elaboration of the specification in the preceding sentence of "individual notice to all members who can be identified through reasonable effort."[321] And notice, of course, can be sent only to each class "member" as a person, not to her abstract legal claims. Accordingly, only an overreading of rule language could resolve the choice between a personal or transactional conception of the right to opt out.

The preexistence principle holds that this question cannot be answered in the abstract for all class actions but only by reference to the rights held by would-be class members absent the class. Given the breadth of claim preclusion under current law, the class member and her transactional unit for claim preclusion purposes often will be one and the same. But that recognition should not blind courts to instances—the

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the same claims in Maryland state court, the defendant pointed to the earlier federal dismissal. Id. at 499–500.

The defendant argued that Rule 41(b) of the Federal Rules of Civil Procedure required the dismissal to be treated as an "adjudication upon the merits" and hence, the defendant asserted, one that precluded the subsequent Maryland lawsuit. Id. at 501. The Supreme Court rejected this contention, noting that such a reading of Rule 41(b) would place it in tension with the limited delegation of rulemaking power to the federal courts in the Rules Enabling Act. Id. at 503. Specifically, the Court observed that "if California [claim preclusion] law left [the plaintiff] free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court's extinguishment of that right [via Rule 41(b)] . . . would seem to violate th[e] limitation" of the Rules Enabling Act. Id. at 503–04. My suggested application of claim preclusion principles to the situation of partial opt-outs reflects a similarly constrained reading of Rule 23.

320. Fed. R. Civ. P. 23(c)(2)(A) (emphasis added). The Third Circuit curiously did not refer to this language.

321. Id. 23(c)(2).

vanishing premium litigation may have been one—in which class member and transactional unit are not identical. In that event, the right to opt out must follow the transactional unit of claim preclusion, not some alternative line of division imposed by the class settlement itself.[322]

C. *Opt-Out Versus Opt-In*

To say that class settlements generally cannot bind the public in the manner of legislation still leaves the important question of what action, if any, class members must take to escape that binding effect. That question goes to how the law should set the default rule concerning the binding effect of class actions. The modern opt-out class action effectively sets a default rule in favor of binding effect: Absent class members will be bound by the class judgment unless they affirmatively opt out after the court has provided them with the "best notice practicable" under Rule 23(c)(2) of their membership in the class. But one can imagine a different default rule, whereby absent class members would not be bound by the judgment unless they affirmatively opt in.[323]

The default rule in favor of binding effect—like default rules generally—has a certain stickiness.[324] Having to act affirmatively to remove oneself from any default rule means having to incur transaction costs. The default rule of Rule 23 changes the presumptive consequence of inaction from no sale of one's right to sue into a sale under the terms negotiated by class counsel and approved by the court. The structure of the right to opt out—a right to escape the binding effect of the class judg-

322. This is not to suggest that courts somehow act illegitimately when they alter the general rules of claim preclusion by judicial decision. When determining the proper claim preclusive effect of civil judgments, courts wield lawmaking power of a sort. A class settlement of the kind addressed here, by contrast, is not the vehicle for the rethinking of claim preclusion generally but, at most, an effort to secure judicial approval for an ad hoc replacement of existing, undisputed preclusion rules. If courts wish to fashion new rules of claim preclusion, they must do just that—make new rules applicable to all similarly situated litigants, not just to the members of the class or opt-out claimants.

323. Two federal employment statutes authorize a procedural device vaguely akin to an opt-in class action, though they do so largely as a constraint upon the litigation power of labor unions. The Fair Labor Standards Act authorizes representatives of employees to bring actions to recover wages due under that statute. See 29 U.S.C. § 216(b) (2000). A similar provision appears in the Age Discrimination in Employment Act. See id. § 626(b). Both statutes require affirmative consent from individual employees to be part of such lawsuits. On the congressional objective to curb union litigation, see, e.g., United States v. Cook, 795 F.2d 987, 992–93 (Fed. Cir. 1986).

324. A recent empirical study in the context of 401(k) savings plans for employees bears out this stickiness. See Brigitte C. Madrian & Dennis F. Shea, The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior, 116 Q.J. Econ. 1149, 1150 (2001). For a general discussion of default rules in employment law, see Cass R. Sunstein, Switching the Default Rule, 77 N.Y.U. L. Rev. 106 (2002).

Empirical research, moreover, suggests that opt-out rates are relatively low across Rule 23(b)(3) class actions as a whole. See Willging et al., supra note 9, at 135. These data nonetheless are difficult to interpret, as they treat together classes in which individual claims are marketable and those in which they are not. R

ment only upon the incurring of transaction costs—nonetheless is consonant with the preexistence principle that I defend here. To see why, one need only recall the earlier discussion of how a good class settlement necessarily affects the economic interests of would-be opt-out claimants but not their preexisting rights.

The transaction costs of affirmatively opting out are no different in principle from what one might describe as the opportunity costs "imposed" on all would-be class members by any good class settlement that is not mandatory. Such a settlement is supposed to create an alternative bundle of rights superior to those that would-be class members already have. In fact, that is all that a non-mandatory class settlement legitimately may do to induce people to remain in the class. Any good class settlement affects in a strictly economic sense the interests of *all* would-be class members—even those who ultimately forego the deal under a rule of opt-out or opt-in—for any good class settlement increases the opportunity costs associated with adherence to one's preexisting rights. To do so, however, is not to alter those rights. A quick look back at two earlier examples illustrates the point: One would not say that class members whose preexisting rights to sue are of dubious merit due to causation or statute-of-limitations obstacles somehow have had their rights unilaterally altered because a class settlement comes along with an attractive alternative that carries a higher expected sales price.[325]

Both opportunity costs and transaction costs are quite real in economic terms, but they are not the stuff of which violations of the preexistence principle are made. Those violations instead consist of the unilateral taking away of some avenue for recourse that class members previously had—the right to sue at all, to seek recovery against the defendant's net worth rather than just its insurance coverage, or to leapfrog other claimants in the race to recover against the defendant's assets. The preexistence principle, in short, is about the content of one's rights, not about strictly economic effects like opportunity or transaction costs. That is not to deny in the least the practical importance of how the law sets the default rule; it is simply to cast that matter in its proper light. The question of how to set the default rule is not one of institutional legitimacy on par with the preexistence principle but, rather, one appropriately addressed in pragmatic terms.[326]

The institutional perspective behind the preexistence principle nonetheless helps to channel that pragmatic inquiry in two ways. First, the preexistence principle appropriately situates the class action in practical terms between the poles of public legislation and private contract. In the world of public legislation, there is neither a right to opt out nor a

325. See supra notes 246–247 and accompanying text. R

326. My stance thus contrasts with that taken by critics of the right to opt out, such as Rosenberg and Perino, who seek to cast all questions of class action law in strictly pragmatic terms, such that there is no distinct category of questions rooted in institutional legitimacy.

right to opt in, except as the legislature itself might choose to provide in a given instance. There is no general right, in other words, to escape the binding effect of a statute or, for that matter, an agency rule with the force of law. By contrast, the power of private contracts to alter preexisting rights stems exclusively from what one might describe as an opt-in process. Only those parties who affirmatively enter into the contract alter their preexisting rights. Indeed, so-called unilateral contracts—in which "the offeror makes the promise contained in the offer, and the offeree renders some [specified] performance as acceptance"[327]—are all about inducing the offeree to opt into the transaction.

If one were to say that class actions are binding only insofar as individual class members choose to opt in, then one effectively would be allocating the area between legislation and contract entirely to the model of contract. By contrast, the right to escape the binding effect of a class judgment by opting out is essentially sui generis in the law of civil procedure. That, however, is a testament not to the folly of Rule 23 in setting its default rule in favor of binding effect but, rather, to its practical realism in situating the modern class action in the middle ground between public legislation (no opportunity to exclude oneself) and private contract (organized in terms of a right to opt in).

Second, as noted in Part I, the importance of any right to escape the binding effect of a class settlement—however one sets the default rule—lies in the potential for entry that it creates for rival plaintiffs' lawyers.[328] Speaking practically, one wants to leave open a potential for entry precisely because it entails a culling out of atypically high-value claims from the mass of claims that monopolistic class counsel otherwise would wield. This effect is consistent with the theoretical literature on default rules in contract law. There, commentators similarly have noted that the transaction costs of contracting around the default rule place the burden of disclosing valuable information on those who have it.[329] The right to opt out targets the attention of would-be competitors to class counsel on those claimants with enough at stake to make the transaction costs of opting out worthwhile.

As a practical matter, moreover, opt-out claimants do not even bear those transaction costs themselves, given the pervasive financing of damage litigation on the plaintiffs' side by way of contingency fee arrangements.[330] Indeed, the cost of simply opting out—excluding oneself from the class judgment, not necessarily to sue individually—are relatively low. One can understand the emphasis in Rule 23(c)(2) on the providing to class members of "the best notice practicable under the circumstances" as an effort to ensure low transaction costs in this sense.

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327. 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.4 (2d ed. 1998).

328. See supra text accompanying notes 100–102. R

329. See, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 97 (1989).

330. See Kritzer, supra note 87, at 267. R

The hard questions surrounding the structure of the modern class action concern not how to set the default rule as to binding effect but, rather, when to withhold entirely the right to escape the effect of the class judgment. The mandatory class action and its relationship to the preexistence principle are the subjects to which the next section turns.

D. *Discerning the Mandate for Mandatory Classes*

At first glance, the preexistence principle seems at odds with the idea of a mandatory class. The whole point of a mandatory class, after all, is to deny to class members the maneuverability that they otherwise would have enjoyed in conventional litigation. This section examines the rationale for mandatory classes, showing how the preexistence principle actually explains the treatment of the two classic scenarios in which the modern class action mandates membership in a class. Both scenarios involve circumstances antecedent to the class that make interdependent the claims of class members.

The first subsection considers the limited fund class, which denies to class members the opportunity to engage in a race against one another for the assets of the defendant. Here, conditions that preexist the class necessitate a choice between rights that, but for those conditions, would coexist peaceably. The subsection defends the content of that choice, relating the mandatory, limited fund class action back to the preference in Part II for policy choices through the vehicle of public institutions.[331] The subsection then links together that notion of respect for the policy choices reflected in preexisting law and the critique offered earlier, in the present Part, of the academic argument for expansion of mandatory class treatment.

The second subsection turns to mandatory classes for injunctive or declaratory relief, arguing that the rationale for mandatory treatment there tracks surprisingly closely the justification for the mandatory, limited fund class. Here, too, conditions antecedent to the class itself—in this instance, the generally applicable conduct to be enjoined or declared unlawful—make interdependent the claims of would-be class members. The subsection relates this interdependence back to the discussion in Part I of issue preclusion in the class action context, arguing that mandatory class treatment actually serves preexisting law by avoiding conflicting directives to the defendant concerning the legality of its conduct.

Some recent decisions have imported to this context the procedures for opt-out classes, but one may best understand those decisions as stemming from an underlying suspicion about the appropriateness of mandatory class treatment in the particular situations presented.[332] That

331. See supra Part II.B.2.

332. One commentator suggests a similar reading of these cases but draws somewhat different normative conclusions therefrom. See Issacharoff, Preclusion, supra note 70, at 1068–69 (noting that courts grant opt-out rights in cases where "the monetary claims R

suspicion is well taken, but the law of class action would better serve it through clearer demarcation of the mandatory class for injunctive or declaratory relief. Drawing on developments in employment discrimination litigation—a prime area for the mandatory injunctive or declaratory class—the subsection ends with some words of caution about longstanding efforts to push the mandatory Rule 23(b)(2) class beyond its proper parameters.

1. *Limited Fund Classes.* — The job of discerning the proper basis for mandatory class treatment in the limited fund scenario harks back to the discussion of *Ortiz*.[333] There, the Court correctly insisted that the kind of fund that warrants mandatory class treatment consists of one limited by conditions antecedent to the class, not from negotiations that are themselves the product of class counsel's assertion of power to bargain for the class.[334] The insight that the limited fund class action acts upon conditions antecedent to the class serves both to situate that device within the preceding discussion of efforts to deter opt-outs and to pinpoint the rationale for mandatory class treatment.

A mandatory class action in any situation is nothing more than the harshest imaginable sort of deterrent to the exercise of the right to opt out: a perfect, complete, and insurmountable deterrent consisting of a legal guarantee that class members will collect nothing on their damage claims outside of the class.[335] One insight from the previous discussion is that a nonmandatory class settlement might well deter the exercise of the right to opt out by focusing attention on preexisting barriers to the bringing of successful damage claims—say, shaky evidence of causation or problems under applicable statutes of limitations.[336] Deterrence of this sort nonetheless is permissible, for it does not stem from the alteration of preexisting rights so much as from the recognition of their tenuousness in the circumstances at hand. Another insight is that a nonmandatory class settlement legitimately may deter opt-outs by dangling before the would-be class members an attractive package of benefits for remaining in the class.[337]

The proper rationale for mandatory class treatment in the limited fund scenario stems from similar insights, with an additional move from imperfect to perfect deterrence. Absent the existence of a limited fund, class members who think themselves entitled to damages from a common defendant have two related rights that coexist peaceably. Each claim for

predominate over the claims for equitable relief," but not where "the monetary claims are merely incidental to the equitable relief").

333. See supra Part II.A.2.

334. See supra text accompanying notes 167–168. R

335. Cf. Perino, supra note 32, at 123 ("A player could . . . refus[e] to participate in the mandatory class action, but such an action would be irrational because the player would obtain a payoff of zero."). R

336. See supra notes 246–247 and accompanying text. R

337. See supra Part III.B.1.b.

damages is equally entitled to payment, as long as that claim is meritorious under applicable substantive law. The notion of equal entitlement to payment translates to a right on the part of each claimant to payment of her claim, irrespective of the claims that others might advance. Each civil claimant also is entitled to race other would-be claimants to obtain actual payment from the defendant.[338] Given the time value of money, a damage judgment or conventional settlement paid today is preferable to one paid tomorrow. The prospect of such a race does not conflict with the proposition that all meritorious damage claims are equally and independently entitled to payment, as long as the defendant has enough assets to go around.

The existence of a true limited fund—one in which the total claims and the total fund available to satisfy them, "set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims"[339]—places the right to payment of meritorious claims into conflict with the right to race. The presence of a limited fund makes claims interdependent, for it creates—in the parlance of Rule 23—a "risk" of individual lawsuits that "would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."[340] A focus upon the preexisting rights of class members clarifies that the proper rationale for the mandatory, limited fund class stems from an antecedent conflict of rights within the class.[341] Only when such a conflict

338. See supra text accompanying note 265. One commentator overreaches in contending that denial of the right to opt out in Rule 23(b)(1) as a whole "does not affect [class members'] substantive rights because, in the absence of a class action, they would not be able to bring any action at all." Rutherglen, Better Late, supra note 49, at 287. The problem in the limited fund scenario is not the prospect of no action but, rather, of successful action by the few to the effective detriment of the many. R R

339. Ortiz v. Fibreboard Corp., 527 U.S. 815, 838 (1999).

340. Fed. R. Civ. P. 23(b)(1)(B).

341. In recent years, attention has focused on the prospect of mandatory class treatment under Rule 23(b)(1)(B) of punitive damage claims against a common defendant. The argument for such treatment starts from the premise that there exists a limited fund for such relief in the form of an upper limit as a matter of constitutional due process on the total amount of punitive damages that may be awarded based upon a single course of conduct. See Elizabeth J. Cabraser, Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication, 36 Wake Forest L. Rev. 979, 1030–31 (2001); Elizabeth J. Cabraser & Thomas M. Sobol, Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims, 74 Tul. L. Rev. 2005, 2020 (2000); John C. Coffee, Jr., The Tobacco Wars: Peace in Our Time?, N.Y.L.J., July 20, 2000, at 1. In fact, Judge Jack Weinstein recently certified a mandatory, limited fund class against the tobacco industry on this ground. See In re Simon II Litig., 211 F.R.D. 86 (E.D.N.Y. 2002).

For reasons that I articulate in greater depth elsewhere, a conception of the limited fund class action grounded in a preexisting conflict of rights within the plaintiff class sheds substantial doubt upon such an application of Rule 23(b)(1)(B). See Richard A. Nagareda, Punitive Damage Class Actions and the Baseline of Tort, 36 Wake Forest L. Rev. 943, 957–61 (2001).

is present—when one right necessarily will be sacrificed in the service of another, *even without class treatment*—does the preexistence principle permit mandatory class treatment. The choice in the limited fund scenario lies between respect for the right to race to the detriment of the right to payment for meritorious claims, or vice versa. The mandatory class outlaws the race in order to ensure the payment of claims pro rata.

On this rationale, mandatory class treatment of the limited fund scenario is the nicer cousin of the original opt-out class settlement attempted in the Sulzer hip implant litigation. There, the benefits offered to class members for remaining in the class—the lien on Sulzer's assets in their favor—came as part and parcel of alterations to the rules of the race for opt-out claimants.[342] The preference for class members that the lien would have created could function as a preference for them only by *simultaneously* creating a disadvantage for nonclass members. Class settlements in this form—benefiting class members only by abridging nonclass members' preexisting rights—are not permissible for opt-out class actions. But those arrangements are precisely what the law of class actions has long mandated for a true limited fund scenario. Here, preservation of the benefits for class members from the class arrangement—that is, preservation of the limited fund—necessarily entails the abridgment of everyone's preexisting right to race for those assets.

No doubt, the choice to serve the right to payment for meritorious claims to the detriment of the right to race entails an exercise of judgment based on instrumental considerations—a sense that the world would be better off with all claims paid in part rather than a few gaining full payment through a rush on the defendant that leaves all others with crumbs, if anything. The choice made by the modern class action is hardly foreign to the civil justice system; bankruptcy law makes the same choice.[343] The instrumentalism behind the limited fund class action nonetheless is an instrumentalism *of last resort*, only after a determination that there is no way to respect both of the rights reflected—for better or worse—in preexisting law.

By contrast, the academic critique of the right to opt out, discussed earlier in this Part,[344] rests upon an overgeneralization of the rationale for the limited fund class action. Recall that David Rosenberg's argument for mandatory classes as "the only option" for mass tort cases holds that would-be class members would readily consent to mandatory class treat-

342. See supra text accompanying note 267. R

343. The choice between reorganizations in bankruptcy and limited fund classes is beyond the scope of this Article, which speaks simply to the structure of the modern class action. On the bankruptcy versus class action debate in the context of mass tort litigation, see generally, e.g., Edith H. Jones, Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?, 76 Tex. L. Rev. 1695 (1998); Joseph F. Rice & Nancy Worth Davis, The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims, 50 S.C. L. Rev. 405 (1999).

344. See supra Part III.A.

ment, if only they could bind one another ex ante.[345] Rosenberg's stance is consonant with a view of the mandatory, limited fund class that sees its rationale as resting upon a similar form of inferred consent: specifically, an inference that would-be class members would agree to a pro rata distribution of a limited fund rather than the continuance of their race, if they only could view their situation behind a Rawlsian veil of ignorance. Mandatory class treatment across the board, in Rosenberg's view, simply gives effect to the same kind of hypothesized consent.

The proper justification for the mandatory, limited fund class rests upon an analytical inference, but one that is made only grudgingly, if at all, and in a manner respectful of the policy choices embodied in preexisting law. That justification holds that, insofar as one can respect *both* the right to damages for meritorious claims *and* the right to race other claimants, the law of class actions ought to do so. And the reason why stems not from some hypothesized narrative of what would-be class members would choose behind the veil of ignorance but, rather, from what public institutions *actually have chosen* through the enactment of law. Only when a conflict emerges in preexisting rights—a conflict not generated by the class itself—need the law of class actions intervene to make a choice of rights. Rosenberg's overgeneralization of this reasoning stems not just from a misunderstanding of the limited fund class but, at bottom, from a deeper sense that the choices made in current law are simply ill-advised.[346] The preexistence principle holds that politics, not a mandatory class action, is generally the proper vehicle for that sentiment.

2. *The Injunctive or Declaratory Relief Class.* — The existing literature recognizes that the justification for mandatory treatment of class actions for injunctive or declaratory relief[347] has some affinity to the rationale for mandatory treatment of class actions against a limited fund. Speaking to this point in his study of the class action in Anglo-American legal history, Stephen Yeazell contends that, in both situations, "the integrity of the legal system is at stake" such that "the failure to provide for class treatment could result either in contradiction or inconsistency."[348] This is a helpful step toward an explanation of the mandatory class, though it is cast too generally. My contention here is that analysis of mandatory classes for injunctive or declaratory relief from the standpoint of the preexistence principle crystallizes the nature of its affinity to the mandatory, limited fund class.

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345. See supra text accompanying notes 221–222. R

346. Cf. supra notes 233–235 and accompanying text (noting that Rosenberg's argument for mandatory class treatment ultimately turns upon a contested agenda to change the substantive law of torts). R

347. Here, again, I treat together mandatory classes under Rules 23(b)(1)(A) and (b)(2). See supra text accompanying note 130 (noting the near-equivalence of these two subsections as a functional matter). R

348. Yeazell, Modern Class Action, supra note 19, at 256. R

In both instances, a mandatory class action does not so much impose its mandate as act upon the antecedent interdependence of class members' claims. In the limited fund scenario, that interdependence springs from the lack of assets sufficient to satisfy all claims in full. For classes seeking injunctive or declaratory relief, interdependence stems from the nature of the conduct that provides the characteristic target for relief in those forms: conduct whereby the defendant "has acted or refused to act on grounds generally applicable to the class."[349] As noted in Part I, generally applicable conduct is what gives rise to the prospect of affected persons wielding *Parklane* issue preclusion to obtain the benefit of pro-plaintiff results in individual litigation but of the defendant being unable to wield issue preclusion to generalize pro-defendant results in those suits.[350]

Properly conceived, mandatory class treatment proceeds from the recognition that it is not possible to ascertain the legality of the defendant's conduct as to one affected claimant without necessarily doing so as to all others. Here, as in the limited fund scenario, there is a conflict in preexisting rights. Class members have a preexisting right, rooted in due process,[351] to escape the issue preclusive effect of a losing lawsuit by one of their ilk. In this sense, they may choose to sit on the sidelines. The would-be defendant, however, has a right to rely upon a judicial decision that its conduct is lawful, at least until that determination is duly overturned. The defendant, in short, is at liberty to continue its generally applicable conduct until such time as it is found unlawful (or, at least, preliminarily enjoined in order to facilitate a determination of its lawfulness).[352]

Like the scenario of a limited fund, the situation of generally applicable conduct warrants mandatory class treatment, because arrangements antecedent to the class already portend a violation of one or another preexisting right. In the limited fund context, the violation stems from a conflict between preexisting rights of the class members themselves—the all too real prospect that the race will trump class members' equal entitlement to payment of meritorious claims. When the defendant has en-

349. Fed. R. Civ. P. 23(b)(2).

350. See supra text accompanying notes 121–122. R

351. See supra text accompanying note 115. R

352. For ease of reference, I cast this point in terms of private defendants. The same point is only slightly more complicated for generally applicable conduct of the government, a frequent defendant in civil rights class actions seeking injunctive or declaratory relief. But there, too, government conduct based upon some legitimate source of authority may proceed until enjoined on the ground that it violates individual rights. Thus, for instance, an administrative agency may use a duly promulgated procedure to deny benefits under a welfare program created pursuant to the Commerce Clause until such time as that procedure is found to violate would-be recipients' due process rights. Or, to take another example, an agency duly authorized to enforce the criminal law may pursue an investigative program to do so until such time as that program is found to violate the Fourth Amendment.

gaged in generally applicable conduct, the violation stems from a conflict between a right of the class members to sit on the sidelines and a right of the defendant to rely upon the say of a court. The mandatory class intervenes here for the same reasons and in the same manner as in the limited fund scenario: namely, based upon a recognition that the law otherwise cannot respect both preexisting rights and, hence, that mandatory class treatment is needed to effect a choice of rights.

The mandatory class for injunctive or declaratory relief, like that for true limited fund situations, extends a policy choice familiar from related areas of law—in this instance, mandatory joinder in ordinary civil litigation.[353] There, too, as other commentators have recognized, the choice is to avoid a situation in which the legal system "issues simultaneously contradictory orders to the same person or entity: 'Do X; cease to do X.'"[354] In fact, the reference in Rule 23(b)(1)(A) to the risk that separate lawsuits "would establish incompatible standards of conduct" borrows the locution of the mandatory joinder rule.[355] The mandatory class action simply extends this preference to situations in which joinder of all affected persons is impracticable.[356]

Conception of mandatory class treatment as effecting a resolution of a conflict in preexisting rights sheds light upon the proper parameters of injunctive or declaratory classes: namely, that they really should be confined to such relief, as distinct from damages. This limitation is simply the application in the present context of the earlier insight that mandatory classes are vehicles of last resort. Absent a conflict in rights, the preexistence principle holds that the class action has no mandate unilaterally to alter preexisting rights. Part I pointed to the distinctiveness of the damage remedy, noting that the one aspect of damage lawsuits that clearly could not give rise to an asymmetry in issue preclusion consists of the calculus of damages itself.[357] The analysis here lends further support to that insight. One way to rephrase the conclusion drawn in Part I is that, as to the calculation of damages, there is *no* basis for reliance on the part of the defendant that might conflict with class members' right to sit on the sidelines. Indeed, it is peculiar to speak in terms of reliance at all, given that damage relief, unlike injunctive or declaratory relief, generally

353. See Fed. R. Civ. P. 19.

354. Yeazell, Modern Class Action, supra note 19, at 257; see also Rutherglen, Better Late, supra note 49, at 287 ("Following the model—and much of the language—of Rule 19 on necessary and indispensable parties, subdivision (b)(1) requires class actions because individual actions would prejudice either the party opposing the class or the class members themselves.").

355. See Fed. R. Civ. P. 19(a)(2)(ii) (requiring joinder when, among other things, failure to join "may . . . leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations").

356. See id. 23(a)(1).

357. See supra text accompanying note 124.

does not go to the alteration of conduct prospectively, aside from the payment of money.[358]

The proposition that mandatory class actions seeking injunctive or declaratory relief should be just that—classes that do not involve damage claims—helps to untangle the issues at stake in two important lines of case law. The first line consists of decisions from lower federal courts that seek to import to the mandatory class the procedural trappings of opt-out classes, such as notice to class members and even the right to opt out itself. The second line of cases from the employment discrimination context centers upon the suitability of backpay claims for treatment in a mandatory Rule 23(b)(2) class.

Two oft-cited circuit court decisions illustrate the confusion in current law over the proper basis for the distinction drawn between mandatory and opt-out classes. In *Johnson v. General Motors Corp.*, the Fifth Circuit held that a member of a Rule 23(b)(2) mandatory class action for employment discrimination could not be barred from seeking monetary relief in the form of backpay in an individual lawsuit.[359] The court concluded that the judgment in the mandatory class action—affording injunctive but no monetary relief—could not bar an individual lawsuit for backpay, because the plaintiff employee had not received notice of the class action.[360] The holding in *Johnson* presses at the distinction between mandatory and opt-out class actions, for one of the procedural protections required in the latter but not in the former consists of notice to class members of the proceedings.[361]

In an even more dramatic challenge to that distinction, the Ninth Circuit in *Brown v. Ticor Title Insurance Co.* concluded that the members of an ostensible mandatory class in securities litigation could not be barred thereafter from bringing lawsuits for damages based upon a class settlement that purported to resolve both injunctive and damage claims.[362] To give the mandatory class settlement claim preclusive effect, said the court, would violate class members' due process rights, for those members

358. A damage award, of course, may have a deterrent effect, such that the defendant might change its course of conduct for fear of similar awards. But this alteration of prospective conduct is simply an outgrowth of the damage remedy in practice, not the focus of the relief itself.

359. 598 F.2d 432 (5th Cir. 1979).

360. See id. at 436.

361. As a practical matter—not surprisingly, given *Johnson*—it is not uncommon today for courts to afford notice to the members of a mandatory class, even though they are not strictly required by Rule 23 to do so. A proposed rule amendment would lend force to this practice by requiring "appropriate" notice in all mandatory class actions. See Rules Comm. Rep., supra note 8, at 96 (proposed Rule 23(c)(2)(A)). The point about *Johnson* is simply that the court there denied claim preclusive effect to a mandatory class settlement based upon a perceived procedural defect not rooted in any requirement in the current Rule 23. *Johnson*, 598 F.2d at 436.

362. 982 F.2d 386 (9th Cir. 1992), cert. granted, 510 U.S. 810 (1993), cert. dismissed, 511 U.S. 117 (1994) (dismissing writ of certiorari as improvidently granted).

lacked the opportunity to opt out of the class action.[363] Yet, the right to opt out—even more than the right to notice—is the essence of the distinction between mandatory and opt-out classes.

For its part, the Supreme Court has expressed interest in this line of cases, granting a writ of certiorari in *Ticor Title* but subsequently dismissing it as improvidently granted.[364] Much of the confusion stems from the Court's own earlier reference in *Phillips Petroleum Co. v. Shutts* to the right to opt out as one of constitutional dimensions under the Due Process Clause, at least with regard to claims for damages.[365] As noted earlier, *Shutts* yields precious little insight into the appropriate structure of the modern class action, for the Court there referred to a constitutional right to opt out not as a structural feature of the class action per se but, instead, as the basis for personal jurisdiction over absent class members who lack minimum contacts with the forum.[366]

The analysis offered in this Article lends content to the cryptic suggestion in *Shutts* that the right to opt out bears some connection to damage claims. The reason why damage claims differ from demands only for injunctive or declaratory relief is that the former do not give rise to a conflict in rights of the sort needed to justify deviation from the preexistence principle. One may best understand the insistence upon notice in *Johnson* and upon a right to opt out in *Ticor Title* as reflecting an underlying suspicion about the suitability of mandatory class treatment for damage claims, outside the scenario of a limited fund.[367] The question before the courts in *Johnson* and *Ticor Title* concerned the preclusive effect of already-approved mandatory class settlements on subsequent litigation. The real problem in both cases, however, stems not so much from the effect of the class settlements upon subsequent litigation as from the wisdom of mandatory classes—and the resulting mandatory class settlements—in the first place. The law of class actions would better implement the well-taken suspicion of the *Johnson* and *Ticor Title* courts by confining the mandatory class for injunctive or declaratory relief to—shockingly enough—claims for injunctive or declaratory relief.

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363. Id. at 392.

364. See supra note 362. For the details of the litigation in *Ticor Title* and the Court's dismissal of the writ of certiorari, see Linda S. Mullenix, Getting to *Shutts*, 46 Kan. L. Rev. 727, 730–36 (1998). R

365. 472 U.S. 797, 811–12 (1985).

366. See supra text accompanying note 70 (noting the relative unhelpfulness of *Shutts*). R

367. The suitability of damage claims for mandatory class treatment absent a limited fund is another question that has elicited interest from the Supreme Court. In the period between the Court's dismissal of the writ of certiorari in *Ticor Title* and its decision in *Ortiz*, the Court initially granted review in a case from the Supreme Court of Alabama that raised the issue, but the Court later concluded that the writ of certiorari was improvidently granted. See Adams v. Robertson, 676 So. 2d 1265 (Ala. 1995), cert. granted, 518 U.S. 1056 (1996), cert. dismissed, 520 U.S. 83 (1997). On the details of *Adams*, see Mullenix, supra note 364, at 738–48. R

Though consistent with the text of Rule 23, such a limitation admittedly would cut against the expressed expectation of the advisory committee that mandatory classes for injunctive or declaratory relief might encompass damage claims, at least to some degree. In a passage long the subject of judicial consternation, the advisory committee stated that mandatory class treatment outside the limited fund scenario "does not extend to cases in which the appropriate final relief relates exclusively *or predominantly* to money damages."[368] The analysis here holds that this passage is not only a considerable gloss upon the text of Rule 23 but also one that misconceives the proper normative foundation for mandatory class treatment.[369] It should not hold sway.

Perhaps the most important area in which the foregoing change in doctrine would have practical consequence consists of class actions for employment discrimination. The advisory committee presciently noted its expectation that mandatory classes for injunctive or declaratory relief would deal frequently with civil rights disputes;[370] and employment discrimination lawsuits of various sorts have become a major growth area for civil litigation in the period since the adoption of Rule 23.[371] Two points merit mention here. The first goes to the treatment of claims for backpay, particularly in light of statutory amendments that have added to

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368. Fed. R. Civ. P. 23(b)(2) advisory committee's note (emphasis added). Judicial efforts to give practical meaning to this passage have led to a dizzying array of approaches:

> [S]ome courts require that the monetary claims be incidental to the main claims for equitable relief. . . . Other courts look to the extent that the claims of individual class members are cohesive in determining whether the class as a whole or individual members deserve the right to opt out. . . . Sometimes the court will simply not certify the case if it is determined that claims for monetary relief predominate. . . . At least one court simply considers the relative importance of claims on an ad hoc basis even when the monetary damages claim is "non-incidental." . . . Finally, in some cases, the predominance test has little meaning since some courts have characterized monetary damages as equitable relief.

Issacharoff, Preclusion, supra note 70, at 1069 n.59 (reviewing the range of approaches adopted by courts (internal citations omitted)). **R**

369. Arguments about the appropriate relationship between text and enactment history are a staple of the huge literature on statutory interpretation. For an overview of the debate, see William N. Eskridge, Jr. et al., Legislation and Statutory Interpretation 295–312 (2000). In advocating a preference for the text of Rule 23 over the remarks of the advisory committee with regard to mandatory class treatment of damage claims, I simply advance the practical observation that pursuit of the normatively correct account of the class action would not necessitate amendment of Rule 23(b)(2) itself. For a thoughtful account of the relationship between rule text and advisory committee notes elsewhere in the Federal Rules of Civil Procedure, see Catherine T. Struve, The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure, 150 U. Pa. L. Rev. 1099, 1152–69 (2002).

370. Fed. R. Civ. P. 23(b)(2) advisory committee's note (citing various pre-1966 civil rights class actions as "[i]llustrative" of Rule 23(b)(2)).

371. See John V. Jansonius & Andrew M. Gould, Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility, 50 Baylor L. Rev. 267, 281 (1998) ("Since 1964, employment discrimination suits have grown into a significant percentage of federal court civil litigation dockets.").

the repertoire of employment discrimination remedies. The second speaks to the certification of class actions under Rule 23(c)(4)(A) with respect to particular issues, tying the discussion of employment discrimination suits to the broader sense of respect accorded by the preexistence principle for the choices made by policymakers.

Lower federal courts have upheld the certification of mandatory class actions under Rule 23(b)(2) in the employment discrimination context, the inclusion of backpay claims notwithstanding.[372] In this regard, the courts have sought to shape class action practice to post-Rule 23 developments in the law of employment discrimination remedies. As one leading commentator on employment discrimination class actions observes, "[t]he earliest cases awarding backpay to class members were not decided until the late 1960s. The Supreme Court did not establish a presumption in favor of awarding backpay under Title VII until 1975,"[373] in *Albemarle Paper Co. v. Moody*.[374]

Backpay to account for the wages and other benefits lost by a given class member as a result of prohibited discrimination is unquestionably a form of monetary relief.[375] Though often susceptible more to a kind of mechanical accounting than to extensive individualized proof,[376] relief in the form of backpay centers upon the situation of the particular worker. Courts nonetheless countenanced the inclusion of backpay claims in Rule 23(b)(2) classes, pointing to the equitable nature of that remedy.[377] The important distinction for purposes of mandatory class treatment, however, lies not in whether a given remedy finds its roots in law (damages) or equity (backpay) but, instead, in whether the remedy "restructures employment practices" as opposed to providing individualized redress for the wrong.[378]

The inclusion of backpay claims within mandatory classes has become increasingly awkward as employment discrimination law itself has become increasingly tort-like. The Civil Rights Act of 1991 added to the repertoire of remedies under Title VII both conventional compensatory damages (such as for emotional distress) and punitive damages.[379] Sad-

372. See, e.g., Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250–51 (3d Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971).

373. George Rutherglen, Notice, Scope, and Preclusion in Title VII Class Actions, 69 Va. L. Rev. 11, 25 n.63 (1983) [hereinafter Rutherglen, Notice] (internal citations omitted).

374. 422 U.S. 405 (1975).

375. See Robert Belton & Dianne Avery, Employment Discrimination Law 803 (6th ed. 1999) ("The theory of back pay . . . is to compensate victims of unlawful employment discrimination for the economic losses they have suffered . . . .").

376. See Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).

377. See cases cited supra note 372. But see Murphy, supra note 37, at 1633 (questioning the characterization of backpay as an equitable remedy). R

378. Rutherglen, Notice, supra note 373, at 26. R

379. See 42 U.S.C. § 1981a(a)(1) (2000).

dled with the precedents permitting the inclusion of backpay claims, the same lower courts have struggled mightily to adhere thereto while, at the same time, guarding against the wholesale inclusion of claims that are no different from damage claims in tort itself. In one prominent case—*Allison v. Citgo Petroleum Corp.*—the Fifth Circuit split the difference, continuing to permit the inclusion of backpay claims in Rule 23(b)(2) class actions but disallowing the inclusion of claims for the additional monetary remedies authorized by the 1991 Act.[380] A later decision from the Second Circuit—*Robinson v. Metro-North Commuter Railroad Co.*—calls for an "ad hoc balancing" approach to the identification of the predominant claims in the class.[381] Not surprisingly, these developments have elicited consternation from commentators.[382]

All of this confusion need not be so. A clear understanding of the normative basis for the mandatory class holds that the pertinent distinction lies between those matters that otherwise might give rise to asymmetrical issue preclusion (the question of liability for generally applicable conduct) and those that will not (the calculus of monetary relief, whatever its label or place in the law-equity divide, based upon the situation of the particular class member). In fact, the insight that the problems besetting the employment discrimination class action stem, at bottom, from a move toward the tort model makes for a revealing comparison. To grasp the significance of the comparison, however, a brief word about Rule 23(c)(4) is necessary.

The idea that mandatory classes for injunctive or declaratory relief should be confined to those forms of relief is in keeping with the authority in Rule 23(c)(4)(A) to certify class actions "with respect to particular issues" within a larger litigation.[383] The authority for so-called issue classes is not limited to either the mandatory or the opt-out class context. Rule 23(c)(4) does begin, however, with a vague caution that issue classes should be certified only "[w]hen appropriate."[384] These cautionary words surely preclude the certification of issue classes through what one might describe as a slice-and-dice method, with the certifying court including and omitting particular issues in the litigation simply in order to shoehorn the resulting subset into the desired category for class certification under Rule 23(b).[385] But the whole notion of a class action confined

380. 151 F.3d at 425.

381. 267 F.3d 147, 164 (2d Cir. 2001), cert. denied, 535 U.S. 951 (2002).

382. See, e.g., Issacharoff, Preclusion, supra note 70, at 1069–73; Daniel F. Piar, The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991, 2001 BYU L. Rev. 305, 316–23; Lesley Frieder Wolf, Note, Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991, 100 Colum. L. Rev. 1847, 1858–61 (2000).

383. Fed. R. Civ. P. 23(c)(4)(A). Issue classes, of course, must also satisfy the general class certification requirements of Rule 23(a) and fit within one of the specific categories in Rule 23(b).

384. Id. 23(c)(4).

385. This danger is most acute for opt-out class actions under Rule 23(b)(3), which turn upon a judicial finding that "the questions of law or fact common to the members of

to "particular issues" within a larger litigation necessarily must countenance some manner of slicing and dicing. The question is: What slicing and dicing is nonetheless "appropriate"?

The foregoing question would have considerable significance for a legal world—advocated here—in which only the question of liability (and the consequent need for injunctive or declaratory relief) would be amenable to mandatory class treatment in employment discrimination litigation. In keeping with the respect accorded by the preexistence principle for the policy choices embodied in preexisting law, I submit that issue classes to split off the question of liability from the calculus of monetary relief are "appropriate" when underlying substantive law itself marks a clear separation of those two facets of class members' claims. Here is where the comparison of employment discrimination and tort gains force.

Efforts to carve out and certify as opt-out classes under Rule 23(b)(3) issues of liability in mass tort litigation have rightly met with reversal. Appellate courts have noted that tort law itself intertwines questions of liability and damages by means of the now-familiar principle of comparative fault.[386] In order to calculate the damages for a given plaintiff, one must compare any fault on her part to the fault of the defendant. Simply as a practical matter, then, the principle of comparative fault means that an individual proceeding on the damage question necessarily would have to revisit, for purposes of the required comparison, the defendant's wrongful conduct previously addressed in the class proceeding on the liability question.[387] The nature of tort law, in short,

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the class predominate over any questions affecting only individual members." Id. 23(b)(3). The certifying court surely cannot seek to satisfy this demand for a heightened showing of commonality simply by culling out the other, non-common issues and then declaring itself in compliance with Rule 23(b)(3). See Castano v. American Tobacco Co., 84 F.3d 734, 745–46 n.21 (5th Cir. 1996).

For an argument that the authority to certify a class as to particular issues under Rule 23(c)(4)(A) must be read sparingly so as not to undermine the predominance requirement of Rule 23(b)(3), see Laura J. Hines, Challenging the Issue Class Action End-Run, 52 Emory L.J. (forthcoming 2003).

386. See *Castano*, 84 F.3d at 751; In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

387. I consciously cast the discussion in practical rather than constitutional terms. The practical point rests upon the demand in Rule 23(b)(3) for a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). One hardly could say that a class action limited to questions of liability would be "superior" to a series of individual lawsuits if the courts in subsequent individual proceedings for the calculation of damages would have to revisit the evidence already presented in the class proceedings in order to determine comparative fault.

The courts in *Castano* and *Rhone-Poulenc* took this practical point a major step further, however, arguing that the revisiting by juries in individual damage suits of liability questions addressed in the class action would violate the Reexamination Clause of the Seventh Amendment. See *Castano*, 84 F.3d at 751; *Rhone-Poulenc*, 51 F.3d at 1303; see also U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any

prevents courts from "carv[ing] at the joint" to separate liability from damages.[388]

That is not the case in other areas, where damage relief does not hinge upon a revisiting, by way of comparison, of matters surrounding liability. If anything, many areas of employment discrimination doctrine demarcate relatively clear dividing lines even within the liability question itself, positing a sequence of discrete inquiries in which the burden of production switches from side to side. To make out a case under the disparate impact theory of employment discrimination, for instance, the plaintiff class first must make a prima facie showing that the challenged employment practice has a disparate impact on some protected group. The burden of production then shifts to the defendant to put forward a legitimate, nondiscriminatory reason for its practice.[389] If the defendant does so, the onus then switches back to the plaintiff to show that the defendant's purported justification is pretextual.[390] The specifics of the proof regime aside, the overarching point remains: The carving out of particular issues for class treatment per Rule 23(c)(4)(A) properly flows from the degree to which preexisting law itself creates joints at which to carve.

A further distinction of employment discrimination law by comparison to tort law—really, a feature characteristic of civil rights statutes generally—serves to answer the concern that insistence upon a pristine account of mandatory classes under Rule 23(b)(2) might undermine the incentive of plaintiffs' law firms to bring such actions. Tort litigation remains subject to the usual American rule on legal fees,[391] whereby each side bears its own costs—hence, the prevalence of contingency fee arrangements to finance litigation on the plaintiffs' side. By contrast, civil rights statutes characteristically include fee-shifting provisions whereby the prevailing plaintiff may recover her legal fees from the losing defendant.[392] As a result, the financing for civil rights class actions typically

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Court of the United States, than according to the rules of the common law."). This reading of the Reexamination Clause has garnered scholarly criticism. See Patrick Woolley, Mass Tort Litigation and the Seventh Amendment Reexamination Clause, 83 Iowa L. Rev. 499, 517–22 (1998). I take no position here on this constitutional debate but merely offer two points. First, that debate would benefit from a close examination of the specific wording in the Reexamination Clause, particularly in light of the contemporaneous practice in some states of full-scale retrials by a jury empanelled in an appellate court. See id. at 507 n.43. Second, even if the revisiting of liability questions by juries in subsequent individual suits for damages would not violate the Reexamination Clause, the practical, nonconstitutional objection retains force.

388. *Rhone-Poulenc*, 51 F.3d at 1302.

389. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

390. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

391. See John G. Fleming, The Collateral Source Rule and Contract Damages, 71 Cal. L. Rev. 56, 59 (1983).

392. See Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Res., 532 U.S. 598, 624–25 n.1 (2001) (Ginsburg, J., dissenting) (citing examples of fee-shifting

comes from organized groups with an ideological interest in such litigation.[393] Fee-shifting provisions in civil rights statutes would continue to provide incentive for mandatory class litigation, even of the purer injunctive or declaratory variety advocated here.[394]

CONCLUSION

The distinction between opt-out and mandatory classes supplies the structure for the modern class action, yet the normative foundations for that distinction remain only vaguely understood. The resulting confusion pervades class action law today, from questions surrounding permissible class settlement structure to academic debates over the desirability of a right to opt out at all. A purely instrumental calculus unmoored to the institutional character of the class action itself cannot end this confusion. Instead, the law should understand what the class action *is* in institutional terms—we must discern the nature and the recipients of its delegation of bargaining power—before the law may productively delineate what the class action can and cannot do.

The stark fact today is that the class action serves not as a vehicle for actual adjudication but as the enforcement mechanism for transactions that trade on class members' rights to sue—transactions spearheaded not by class members themselves but by self-appointed agents. Only by parsing the implications of those transactions in terms of the monopoly power conferred upon class counsel and the relationship of the resulting deals to preclusion principles may courts, commentators, and class action lawyers come to grips with the nature of the modern class action. The class action is a deal-enforcing device that delegates bargaining power to private parties, and, like all such delegations, the class action cries out for disciplining devices.

The preexistence principle holds that the predominant source of discipline lies not in judicial oversight akin to the conventional regulation of

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provisions in Title VII, the Americans with Disabilities Act, the Fair Housing Amendments Act, the Voting Rights Act, and the Civil Rights Attorney's Fees Awards Act).

393. See Yeazell, Modern Class Action, supra note 19, at 262–64. I remain skeptical, however, about the further leap made by Yeazell, who contends that the need for the organization to "raise enough funds from either public or private sources to finance the litigation" justifies procedural law in making "only the most cursory checking of th[at] representative's credentials" to spearhead litigation on behalf of absent class members. Id. at 263. The same easily might be said of entrepreneurial tort plaintiffs' law firms, as Yeazell himself appears to recognize in a fascinating recent article on the financing of civil litigation that postdates his book on the history of class actions. See Stephen C. Yeazell, Re-Financing Civil Litigation, 51 DePaul L. Rev. 183, 198–205 (2001). R

394. The Sixth Circuit recently overturned the certification of a mandatory Rule 23(b)(2) class under the Equal Credit Opportunity Act (ECOA) on the ground that the class consisted predominantly of damage claims. See Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 450–51 (6th Cir. 2002). In so holding, the court observed that "the primary justification for class treatment of these claims is largely absent in this case because the ECOA's provision for the award of attorney's fees and costs to successful plaintiffs eliminates any potential financial bar to pursuing individual claims." Id. at 449.

monopolies. Rather, the principal source of discipline lies in the market for preclusive effect itself—here, the potential for entry by competitors to class counsel that the right to opt out safeguards. By preserving the prospect of entry, the law of class actions may discipline the crafting of class settlements by class counsel and, not incidentally, secure a place within the scheme of public lawmaking for the kind of mini-legislation that class settlements effect. The proper place for class actions nonetheless remains on a rung below duly enacted legislation itself. One generally should not be able to achieve by way of a class settlement the unilateral alteration of preexisting rights that Congress itself wrote into federal law in the aftermath of September 11. And that is a good thing, not just for the law of class actions and for all of us whose rights they might alter, but also, more broadly, for the appropriate allocation of policymaking power in our democracy.