CLASS SETTLEMENTS UNDER ATTACK

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Brian Fitzpatrick and Catherine Struve provided helpful comments on an earlier draft. Matthew Blumenstein, Josh Stillman, and Kelly Walsh provided valuable research assistance. This Article is informed by our joint work as reporters for the American Law Institute (ALI) project. *See* ALI, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Council Draft No. 1, Nov. 19, 2007) [hereinafter ALI DRAFT PRINCIPLES OF AGGREGATE LITIGATION]. We are deeply appreciative of the assistance from our fellow reporters, Robert Klonoff and Charles Silver, in discussing the issues presented here over the course of our multiyear collaboration. The views stated herein represent our shared assessment as commentators, not necessarily the position of the ALI.

INTRODUCTION

Settlements dominate the landscape of class actions. The overwhelming majority of civil actions certified to proceed on a class-wide basis and not otherwise resolved by dispositive motions result in settlement, not trial.[1] This is far from unusual in civil litigation generally, where observations about "the vanishing trial" have become commonplace.[2] Seemingly, the paucity of actual trials should have been integrated into the core structures of the class action. That, however, is not so, and the failure to integrate the fact of settlement into class action law permeates the difficulties now facing the field.

In its most obvious form, the question of trial remains at the core of the certification of class actions under Rule 23(b)(3).[3] So long as the prescribed inquiry speaks to the "manageability" of the aggregated proceeding at trial and so long as a court must assess the "predominance" of the aggregate issues versus the individual ones in the case, procedural law inevitably directs the attention of the litigants to the hypothetical scenario of a class-wide trial.[4] The Supreme Court rec-

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[1] *See* ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 415 (2d ed. 2006) ("Relatively few class actions actually go to trial; most settle, either after the certification decision or as trial approaches.").

[2] *See* Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (documenting and analyzing data on the decreasing number of civil trials).

[3] FED. R. CIV. P. 23(b)(3).

[4] For discussion of certification battles post-*Amchem*, see Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 752-54 (2002) (discussing John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337; George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998)).

ognized this tension in *Amchem Products, Inc. v. Windsor*,[5] mildly distancing settled cases from any stringent proof as to the manageability of an ultimate trial, but the issue persists across the perennial certification battles.

This Article focuses on a second, and less explored, consequence of the fact of settlement over trial as the primary form of case resolution. It is commonplace by now to understand the class-certification decision as setting the value of the asserted legal claims. Some cases have value when aggregated but are simply not viable—they have "negative value," in the modern economic parlance of class action law—as individual claims. But the value of claims is established not just at the front end, where the conditions for certification dominate the case law and the academic literature, but also at the back end; inevitably, part of the value generated by the resolution of a claim through settlement (or even at trial) is the finality it may offer to the litigants.

One would think that a world in which settlements comprise the endgame for class actions would have produced, with relative ease and rapidity, a consensus on the legal principles that govern the preclusive effect of those settlements. At the end of the day, all litigation is ultimately about repose. The value of a claim, whether litigated or settled, is a function of the price of peace on the disputed issue. That price may be as low as zero for meritless claims, but for claims that have at least some viability, the value corresponds directly to the finality that resolution offers the defendant. The purpose of a judgment, whether litigated or settled, is precisely the certainty that finality offers the parties.

Our aim in this Article is to provide a cohesive framework for establishing the finality of class actions under the real-world conditions of settlement. This is far from a secondary issue in class action litigation. One of the major flashpoints in class action law for some time has concerned the proper parameters for collateral attacks on the binding effect of class settlements. While less contentious for most parties than the initial decision to certify a class, the context of collateral challenge exposes many of the critical frailties of the class action. Further, we shall contend, the policy implications of collateral chal-

[5] 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.").

lenge raise many of the same concerns as animated the Class Action Fairness Act of 2005 (CAFA).[6]

We should begin with the foundational basics. In a collateral attack, an absent class member sues the settling defendant, advancing claims that the class settlement purportedly resolved. The defendant responds that the new lawsuit is barred by claim preclusion. The collateral attack plaintiff then seeks to parry by arguing that the judgment said to lend preclusive effect to the class settlement is defective on federal constitutional due process grounds—characteristically, because the plaintiff was inadequately represented in the class proceedings.[7] At least for the class action in its modern form,[8] a determination of adequate representation is a precondition to the entry of a class-wide judgment.[9] Collateral attacks ask what latitude the plaintiff should have to revisit the adequacy question—usually, in a court different from the one that entered the class judgment said to be binding.

The binding effect of a class settlement is ultimately a question of proper preclusion—in less formal terms, of what it should take for the law to regard the binding of an absent class member to a class settlement as fundamentally fair, such that she may not sue the defendant anew. Not surprisingly, courts have attempted to address this topic through application of ordinary preclusion principles to the class action setting. This process of application has not run smoothly, however. Prescriptions in case law run the gamut of the usual preclusion categories. Some judges urge the application of claim preclusion principles, asking whether the collateral attack plaintiff had a "full and fair opportunity" to raise the alleged constitutional defect in the class-settlement court.[10] Others point to issue preclusion principles, asking whether the asserted defect was actually litigated in and determined

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[6] Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

[7] Due process challenges might also encompass the adequacy of notice afforded to the class.

[8] *But see infra* text accompanying notes 175-177 (discussing the dramatic difference between the modern class action and Illinois equitable procedures at the time of the Supreme Court's landmark 1940 decision in Hansberry v. Lee, 311 U.S. 32 (1940)).

[9] *See, e.g.*, FED. R. CIV. P. 23(a)(4) (conditioning class certification on a judicial determination that "the representative parties will fairly and adequately protect the interests of the class"); 23(g)(1)(B) (requiring judicial appointment of class counsel who will "fairly and adequately represent the interests of the class").

[10] *See, e.g.*, Epstein v. MCA, Inc., 179 F.3d 641, 648-49 (9th Cir. 1999) (*Epstein III*) (O'Scannlain, J.).

by the rendering court.[11] Still others advocate no preclusion, positing that the collateral-attack court should determine the constitutional question de novo.[12] In a long-running series of articles, commentators have splintered similarly over how to handle collateral attacks.[13]

For its part, the Supreme Court appeared poised to lend greater clarity to this area in 2002. The Court granted review to consider a collateral attack on the binding effect of a much-discussed class action settlement concerning latent-disease claims in tort related to the Viet-

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[11] *See, e.g.*, Wolfert v. Transamerica Home First, Inc., 439 F.3d 165, 172 (2d Cir. 2006) ("[I]f, in the class action, a defendant opposing class certification or an objector to the settlement had made a serious argument that a sub-class was required because of claims substantially similar to hers, and that argument had been considered and rejected by the class action court, it would not be unfair to preclude collateral review of that ruling and relegate [the collateral attack plaintiff] to her direct review remedies."); *In re* Diet Drugs Prods. Liab. Litig., 431 F.3d 141, 146 (3d Cir. 2005) ("Once a court has decided that the due process protections did occur for a particular class member or group of class members, the issue may not be relitigated."); *Epstein III*, 179 F.3d at 651 (Wiggins, J., concurring) (focusing on whether "the adequacy of representation issue was fully and fairly litigated and necessarily decided" by the rendering court).

[12] *See, e.g.*, *Epstein III*, 179 F.3d at 655 (Thomas, J., dissenting) (arguing that "none of the [rendering court's] findings address the claim of the plaintiffs before this court today: namely, that the . . . plaintiffs were inadequately represented before the [rendering] court, and that, consequently, a decision to bind them to the terms of the settlement would violate their rights to due process"); Epstein v. MCA, Inc., 126 F.3d 1235, 1244 (9th Cir. 1997) (*Epstein II*) (Norris, J.) (contending that to disallow collateral attack "would be to require absent class members to monitor the proceedings [in the rendering court] in order to secure their rights to adequate representation," something they "are not required" to do), *rev'd on reh'g*, 179 F.3d 641 (9th Cir. 1999).

[13] For commentary advocating relatively broad latitude for collateral attacks, see, David A. Dana, *Adequacy of Representation after* Stephenson*: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279 (2006); Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787 (2004); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383 (2000). For commentary advocating more circumscribed parameters, see, for example, Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765 (1998); Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219 [hereinafter Kahan & Silberman, Matsushita *and Beyond*]; Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287 (2003). The latest addition to this literature seeks to chart a "middle-ground approach." *See* William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 829 (2007) (concluding that "a resort to policy" does not "easily resolve[] the adequacy question in either direction").

nam War era defoliant Agent Orange.[14] But the eight sitting Justices split four to four,[15] thereby frustrating any hopes for clarification.

This Article frames the ongoing debates over collateral attacks on class settlements as part of an unresolved conflict between the individualist premise of our inherited tradition of civil litigation and the reality of circumscribed litigant autonomy in aggregate litigation, most notably in class actions. Of necessity, aggregation in any form limits the control that any litigant may exercise over her claims or defenses. Class actions further compromise litigant autonomy, for absent class members typically express their consent to a binding settlement not affirmatively but only tacitly, through their failure to withdraw from the class representation.[16] Class settlements accordingly present a paradox. They require the same certainty of termination as any other case where legal claims are surrendered in exchange for a payment or a release. Yet the contractual terms that underlie class settlements are deeply problematic because the contracting party is an agent—class counsel—who can claim only indirect authorization to represent the absent class members.

Our claim is that the binding effect of a class settlement cannot be resolved simply within our inherited litigation vocabulary. In a landmark 1989 case involving a civil rights consent decree, for example, Justice Stevens, in dissent, tried to limit the scope of potential challenges to a class settlement to only those grounds that would justify relief from a conventional settlement, such as fraud or collusion.[17] This argument was necessarily unavailing where the persons seeking to challenge the impact of a decree upon them—the white incumbent firefighters of Birmingham, Alabama—were not even nominally represented in the prior action. But even non-participation in a prior litigation does not necessarily delimit the controversy. In the seminal 1940 case of *Hansberry v. Lee*,[18] a judgment enforcing a racially restric-

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[14] *See* Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001), *cert. granted*, 537 U.S. 999 (2002), *aff'd by an equally divided Court*, 539 U.S. 111 (2003). On the background of the Agent Orange class settlement, see PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (enlarged ed. 1987).

[15] Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003). Justice Stevens recused himself. *Id.* at 112.

[16] *See infra* Part II.C (discussing exit rights as a component of due process in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)).

[17] Martin v. Wilks, 490 U.S. 755, 771 (1989) (Stevens, J., dissenting) ("Persons who have no right to appeal from a final judgment . . . may nevertheless collaterally attack a judgment on certain narrow grounds.").

[18] 311 U.S. 32 (1940).

tive covenant would necessarily implicate the rights of aspiring African American homeowners in the future, a concern that bewildered the Court as it sought to disengage from the legal protection of American racialism.[19]

We urge a new approach that is more responsive to the realities of class action settlements: proper preclusion in the class action setting flows from proper coordination of what we term the "where," "what," and "how" of class-settlement review. More specifically, challenges to the preclusive effect of a class settlement implicate the forum for the class action, the structure of the representation, and the form that the particular challenge at hand may take. Each of these dimensions speaks to distinctive features of the class action as a form of aggregate litigation in an integrated national market for goods and services. Our account seeks to advance the literature in two ways: first, simply by laying out the three pertinent dimensions as the appropriate terms for the debate, and second, by explaining how proper preclusion consists of the necessary coordination of these three dimensions in the context of a specific challenge.

The "where" question speaks to forum selection. Surprisingly enough, CAFA helps to situate the discussion of class settlements, even though the statute says precious little on that subject.[20] Both CAFA and the debate over the binding effect of class settlements focus, in substantial part, on how to address the problem of the anomalous court in a world of national markets. Political rhetoric aside,[21] the core justification for CAFA stems from the problem of the anomalous court—usually thought to be a state court—selected for its inclination to reward the first-mover plaintiff in two distinct ways.

First, such a court might be inclined to certify a nationwide class action when the overwhelming majority of other courts in the federal

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[19] *See* Nagareda, *supra* note 13, at 298-309 (discussing the *Hansberry* decision and the confusion it creates in determining adequacy of class representation).

[20] On the meager guidance provided by CAFA directly on class settlements, see Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1697 (2006), noting that "[o]n the settlement front, . . . Congress lacked any clear understanding of what it was trying to fix . . . [and] passed a series of unrelated provisions that . . . raise more questions than they answer."

[21] Other articles for this Symposium explore the political rhetoric behind CAFA. *See* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765 (2008); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008).

system, other states' systems, and quite arguably within the state's own judicial system would be disinclined to certify. Second, the anomalous court might couple the certification with interpretations of substantive law favorable to the plaintiff class. CAFA seeks to address this problem by pulling national-market cases into the federal judicial system[22]—a system thought both less susceptible to capture and more capable of remedying improper forum selection through transfer[23] or multidistrict consolidation.[24]

CAFA's treatment of the anomalous court, however, is incomplete for a variety of reasons. In the settlement context, the mechanisms for removal still allow willing parties to shop a settlement to an anomalous court inclined to grant dispensation from further litigation. Further, CAFA says nothing about the outer bounds of preclusion when anomalous courts are induced to launch a collateral attack on a class settlement. Judicial review for class settlements—as distinct from contested class certification determinations—must account for both the anomalous court inclined to approve a class-settlement agreement (on the part of the settling defendant and class counsel) and the anomalous court inclined to bust the deal under the auspices of federal constitutional due process (at the behest of a dissenting plaintiff in a collateral attack).

The "what" question surrounding review of class settlements concerns the content of the federal constitutional command itself. The varying prescriptions for handling collateral attacks stem, in part, from the tendency of class action doctrine, over time, to encompass within the rubric of "adequate representation" an inconsistent array of concerns. Adequate representation encompasses the problem of structural conflicts of interest—conflicts arising from material differences among the members of the would-be class or conflicts between

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[22] *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1416 (2006) ("The congressional response was to open up the federal forum as a bulwark against improper or opportunistic state-court oversight of the national market.").

[23] *See* 28 U.S.C. § 1404 (2000) (authorizing transfers "[f]or the convenience of parties and witnesses, in the interest of justice").

[24] *See id.* § 1407 (authorizing a "Judicial Panel for Multidistrict Litigation" to consolidate actions in federal courts "for the convenience of parties and witnesses and . . . [to] promote the just and efficient conduct of such actions"); Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (enforcing § 1407(a)'s requirement that actions "shall be remanded by the panel at or before the conclusion of . . . pretrial proceedings to the district from which it was transferred").

the class as a whole and the lawyers who purport to represent them.[25] The same words, however, might have a very different meaning. They might convey a kind of minimal performance standard broadly akin to notions of ineffective assistance of counsel in the criminal sphere[26]—here, a concern that even unconflicted class counsel for a properly composed class simply might do a bad job or might shirk responsibility by accepting an inadequate settlement so as to gain quickly at least some modicum of a fee award from the litigation.[27] In still another permutation, "adequate representation" might speak to the personal jurisdiction of the rendering court[28] over class members who otherwise lack "minimum contacts" with the forum—something thought to afford due process only if, among other things, class members are adequately represented "at all times," in the words of the Supreme Court in *Phillips Petroleum Co. v. Shutts*.[29]

When the most common basis for collateral attacks itself ranges broadly, it should not surprise us that prescriptions for those attacks should also diverge. Like the fictional household product "Shimmer" touted in the 1970s on the comedy show *Saturday Night Live*, the concept of adequate representation purports to function today, one might say, as both a floor wax and a dessert topping.[30] We find the encumbering of "adequate representation" with multiple meanings to be similarly unpalatable. Unpacking the concept of adequate representation has the benefit of highlighting that its various meanings do not have the same implications for collateral attacks. Allegations of an inadequate class settlement warrant more narrow parameters for collateral attacks than, say, a structural conflict of interest that under-

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[25] *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 385 ("The key is that a supervising court must be assured at the threshold stage of the litigation that there are no structural allegiances of class counsel that would create incentives to favor one part of the class over another, or be biased against seeking the best possible return to a defined subset of claims.").

[26] On the analogy to ineffective assistance claims in habeas corpus litigation, see Rubenstein, *supra* note 13, at 858 tbl., which summarizes the standard for ineffective assistance in terms of "[s]ubstandard performance of counsel resulting in prejudice to petitioner."

[27] The potential for shirking, apart from any conflict of interest on class counsel's part, remains a staple of the economic literature on class actions. *See infra* text accompanying notes 151-154.

[28] Throughout this Article we use the terms "rendering court" or "court of first instance" to refer to the court that initially approved a class action settlement.

[29] 472 U.S. 797, 812 (1985).

[30] For a transcript of this comedy sketch, see Saturday Night Live Transcripts, http://snltranscripts.jt.org/75/75ishimmer.phtml (last visited Apr. 15, 2008).

mines the legitimacy of the proceeding ab initio and regardless of the outcome for the class. Yet the use of the same terminology for all manner of representational defects allows even a claim of subpar performance to assume the mantle of a constitutional affront.

The "how" question speaks to the proper scope for collateral review. We urge a perspective that broadens the terms of the debate and matches the scope of collateral review to the varying meanings of adequate representation on functional rather than formalistic grounds. The broadening consists of situating collateral review within the array of other avenues for consideration of the adequate representation question. All forms of judicial review in the class action area coexist with generally applicable tools, such as Rule 60(b),[31] malpractice litigation against class counsel,[32] and, of course, the right of direct appeal from the class judgment pursuant to the normal rules of appellate procedure—something greatly facilitated by the Supreme Court's 2002 decision in *Devlin v. Scardelletti*[33] to reject any requirement of formal intervention as a prerequisite to appeal by an absent class member.

Recent decades have witnessed an emerging conceptualization of the court conducting direct review as a fiduciary for absent class members.[34] This fiduciary conception is a welcome advance, but it remains incomplete. A fiduciary court suffers from a considerable informational disadvantage vis-à-vis the settling lawyers, joined arm-in-arm in favor of their proposed deal. Commentators have suggested a variety of approaches to address this informational disadvantage within the direct review process itself,[35] and we generally applaud those efforts. The law of class actions would benefit further by viewing the problems of direct review and collateral review as functionally re-

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[31] FED. R. CIV. P. 60(b) (concerning relief from all manner of civil judgments in the federal system).

[32] For an argument in favor of expanded use of malpractice liability with regard to class counsel misconduct, see Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1074-89 (1996).

[33] 536 U.S. 1 (2002) (reversing the circuit court's ruling that an absent class member lacked standing to appeal from district court approval of a class settlement for lack of intervention).

[34] Perhaps the leading case law articulation appears in *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) (Posner, J.). *See also* Chris Brummer, Note, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1062-67 (2004) (detailing the elements of judicial fiduciary scrutiny).

[35] *See infra* text accompanying notes 190-192.

lated, thereby synching with the notion of a cohesive theory of class-settlement review that we offer here.

We urge a view that simultaneously accounts for the differing meanings of inadequate representation, the fiduciary role of the court on direct review, and the provision of a federal forum in CAFA for class actions of national significance. Specifically, the latitude available for collateral attack should vary depending on whether the specific defect in the class representation is structural or performance-based. Structural defects, as we shall detail, warrant an approach adapted from notions of issue preclusion. The focus should be on whether the rendering court has considered and rejected the alleged structural defect, not on who raised that defect—whether the class member now positioned as the collateral-attack plaintiff, the defendant in its resistance to class certification, or the rendering court sua sponte, as part of its fiduciary obligation. By contrast, the relevant inquiry for performance defects should cast preclusion more broadly by focusing, in an adaptation of claim preclusion principles, on the availability of a full and fair opportunity to raise such defects in the rendering court. We explain how a previously overlooked difference in the notice afforded to absent class members by the rendering court supports the intuitive difference between structural defects and performance defects as the basis for a collateral attack.

As to both sorts of defects, moreover, the status of the rendering court, as one duly selected pursuant to congressional choice—as in CAFA—or one chosen simply by the dealmaking lawyers, should affect the latitude available for collateral attacks. Simply put, greater preclusion should flow from use of the congressionally preferred forum as compared to the potentially anomalous court in which the dealmakers otherwise might wish to "park" a desired deal. As a formal matter, review of structural defects and performance defects should follow the framework summarized above. The additional nuance consists of the recognition that CAFA, in combination with the existing law of the Anti-Injunction Act (AIA), effectively channels collateral attacks on class settlements in the federal judicial system back to the rendering federal court. The federal court thus would be positioned to rule on the alleged structural or performance defect in the posture of ruling on the propriety of its own previous conduct of the federal class action litigation—a posture that will tend toward a modest additional disinclination toward collateral attack in practical operation. This is entirely appropriate, in our view. Cutbacks in the latitude available for

the anomalous certifying court, as in CAFA, logically warrant circumscription of the latitude available for collateral attack.

This Article proceeds in three Parts that track the "where," "what," and "how" of class-settlement review: forum selection, the meanings of adequate representation, and the scope of judicial review on both a direct and a collateral basis. We close with some more speculative thoughts on how the ongoing debates over collateral attacks might play out in ways that would reinforce the effects of CAFA on the relationship of federal and state courts and on the structure of the class action plaintiffs' bar.[36]

I. THE PROBLEM OF THE ANOMALOUS COURT

CAFA might seem an odd place to start a discussion of class-settlement review, for the statute devotes little discussion to that subject.[37] Properly framed, however, the central problem addressed by CAFA sheds light on the landscape in which both direct review and collateral review of class settlements operate. We begin, in Section A, with a broad-brush account of the developments that brought this landscape into being and then turn to CAFA's prescription directed to the class certification determination rather than to class-settlement review. Section B then explains how the concern underlying CAFA stands to unfold today with respect to class settlements, taking into account both strategic considerations and the law governing the relationship between federal and state courts. Section C reflects more broadly on the problem of regulatory mismatch presented by the post-CAFA world.

A. *National Markets and the Anomalous Court*

Forum matters. It may appear banal to observe that the court in which a case is situated, the rules and substantive laws that operate,

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[36] As to the effects on the plaintiffs' bar, we find ourselves in broad agreement with the assessment offered in Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, Part III (2008), which suggests that CAFA has encouraged class action attorneys to "alter[] both the nature of their lawsuits and the places where they bring them."

[37] CAFA requires the federal courts to provide notice concerning proposed class settlements to appropriate public regulatory bodies, enabling them to comment on the fairness of the deal. 28 U.S.C. § 1715(b) (Supp. V 2005). CAFA also speaks to judicial review of proposed class settlements in the form of coupon distribution to consumers in the class. *See id.* § 1712.

and even the presiding judge all have important effects on the prospects of a case. As much as the choice of forum has become a signal issue in recent class action law, it is worth noting at the onset that this was not always the case.

The modern class action has its antecedents in the need for coordinated disposition of confined conduct.[38] Thus, for example, an early challenge by the citizens of York to upstream contamination of their river[39] highlighted the joint nature of the claimed harm and the impossibility of disaggregated resolution. Such cases illustrated the "if as to one, then as to all" feature that is the hallmark of what was formerly termed a "true" class action. Such actions would pose no question of forum. The case would be filed in the equity court for the affected jurisdiction, plain and simple.

So long as the class action continued to be used primarily to challenge confined conduct, the same pattern would persist. Whatever the difficulties in *Hansberry v. Lee*,[40] forum was not one of them. The case would challenge residential segregation in the South Side of Chicago, and either the state or the federal courts in Illinois would resolve the matter. Similarly, a landmark case such as *Brown v. Board of Education*[41] would emerge from the federal court in Topeka, Kansas, or, as with its companion case from Wilmington, Delaware, from a local state court.[42] But even in such landmark cases, rich with national significance, the immediate challenge would be local. Whether the subject matter was school desegregation, employment practices at a local steel mill, or voting rights, the forum for litigation followed from the local nature of the immediate actors responsible for the claimed harms.

This pattern began to change with the advent of antitrust and securities class actions, a trend that would accelerate with the rise of consumer claims and mass harm cases. It is, therefore, no coincidence that an elaborated law of class actions should have emerged in this country in the twentieth century. The period saw not only the rise

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[38] For an excellent historical treatment of the roots of the modern class action, see STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987). *See also* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) (reviewing YEAZELL, *supra*).

[39] Mayor of York v. Pilkington, (1737) 25 Eng. Rep. 946.

[40] 311 U.S. 32 (1940).

[41] 347 U.S. 483 (1954).

[42] Gebhart v. Belton, 91 A.2d 137 (Del. 1952), *aff'd sub nom.* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

of the modern class action, but also—arguably, its antecedent—the emergence of integrated national markets for standardized goods and services. National markets for undifferentiated products gave rise to a potential for harm on a mass scale, to which both class actions in private litigation and the modern regulatory state in the public sphere form the principal legal responses.[43] National markets also broadened the fora within which a given plaintiff seeking to litigate a dispute concerning an undifferentiated, nationally marketed product might attempt to sue. So it is that, even in a world of conventional individual lawsuits, the broadened—if only modestly—array for forum selection contributed to the need for forum-selection rules to define where a case could be brought and for choice of law principles to enable the forum court to select the substantive law to govern the dispute.[44]

Now, add to the picture aggregate procedure, layered on top of national markets. The mid-twentieth century saw the emergence of Rule 23 of the Federal Rules of Civil Procedure and the mimicking of its language by state counterpart rules in the vast majority of jurisdictions.[45] This near-nationwide recognition of the class action in its modern form had the unanticipated effect of broadening further the array of potential fora. For a class action, class counsel need only name in the complaint a few representatives of the proposed class—just one is often sufficient—in order to assert authority to litigate on behalf of a nationwide group comprised of similarly situated persons.[46] Where both the disputed conduct and the would-be members of the class extend broadly, the range of potential fora expands commensurately. The range of possible locations for suit in a given instance might well extend to the various federal district courts in addition to their state trial-level counterparts spread across the nation. This practice received its formal approval in *Phillips Petroleum Co. v.*

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[43] On the intellectual tension between the plaintiffs' bar and supporters of the New Deal administrative state, see JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS ch. 4 (2007). On the array of difficulties presented today by the parallel existence of class action litigation and public administrative regulation, see Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014659.

[44] For more extensive discussion of the problems presented by national markets for choice of law analysis, see Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006).

[45] The various state rules are compiled in LINDA S. MULLENIX, STATE CLASS ACTIONS: PRACTICE AND PROCEDURE (2000).

[46] The familiar requirements of commonality and typicality in Rule 23(a) embody this notion. FED. R. CIV. P. 23(a)(2)–(3).

Shutts, where the nationwide class action was born of the minimal process requirements of notice and an ability to opt out, coupled with adequate representation.[47] But *Shutts* would ask only whether a nationwide forum could be constituted; it did not ask whether the chosen forum was the dominant one, or even one that was particularly suitable. It would not be long before sophisticated lawyers for both would-be plaintiff classes and defendants would begin to discern and to deploy strategically this expanded range of potential fora.

CAFA responds to only one variant of such strategic uses of forum. CAFA amends the federal diversity jurisdiction statute to make it much easier for defendants to remove to federal court proposed nationwide class actions involving high-stakes, state law claims originally filed in state court.[48] There are a variety of alternative technical requirements for removal under CAFA that, taken as a whole, seek to define the boundaries between litigation of local concern and litigation premised on generalized conduct in a national market.[49] These boundaries may be imprecise—and they may well give rise to a new round of jockeying for advantage in litigation—but the basic contours correspond to goods and services directed by national firms to national markets.

The change in forum authorized by CAFA is more than just cosmetic. CAFA supporters sought to blunt the strategy of class counsel to frame proposed nationwide classes so as to inhibit the removal of broad-reaching class actions to federal court and thereby to exploit particular state courts thought exceptionally amenable to class certification.[50] CAFA authorizes a change in the forum that shall rule on the class certification question precisely in order to drive a change in result on that question in some instances. On the flip side, CAFA pro-

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[47] 472 U.S. 797, 812 (1985).

[48] *See* 28 U.S.C. § 1332(d)(2) (Supp. V 2005) (providing for federal diversity jurisdiction over class actions with more than $5 million in controversy and minimal diversity of citizenship).

[49] *See id.* § 1332 (d)(3)–(4) (carving out from the broadened grant of diversity jurisdiction those class actions of local concern).

[50] The Senate Judiciary Committee Report discusses the strategies of removal-proofing used under the pre-CAFA federal diversity statute and cites examples of state court class certifications described as out of line with the prevailing approach of the federal courts. *See* S. REP. NO. 109-14, at 10-27 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11-27. The Committee Report, however, was written after the bill had been signed into law, a feature that compromises the utility of the Report as a guide to congressional thought processes in the pre-enactment debates. *See, e.g.*, Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 683 (9th Cir. 2006) (noting that the Senate Report was "issued ten days after CAFA's passage into law").

vides potential class counsel in a nationwide case with protection from copycat class actions filed by local lawyers in friendly home jurisdictions.[51] Those actions are now subject to removal to federal court as well. Oddly enough, then, the removal power given to defendants to combat class certification operates, in part, to protect incumbent class counsel already in federal court. The first effect was the dominant concern of the active champions of the proposed legislation; the second is in the nature of an unintended, but significant, effect.

Framed in its most plausible light, the core justification for CAFA sounds less in categorical, federal-versus-state terms and more in the creation of a centralized power to control the range of potential fora for class actions concerning national-market behavior. Writing for the Seventh Circuit prior to CAFA, Judge Frank Easterbrook captured the essential problem as one of the anomalous court—the court inclined to exercise its discretion in the interpretation or application of broadly shared procedural requirements[52] so as to yield class certification, even though the vast majority of courts in the federal system, in other states, and perhaps even within the same state would not certify. As Judge Easterbrook noted, "if one nationwide class *is* certified, then all the no-certification decisions fade into insignificance. A single positive trumps all the negatives."[53] National markets and the authori-

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[51] The mechanism here consists of the combination of CAFA (to get the various competing class actions into federal court) and the existing authority of the Judicial Panel on Multidistrict Litigation (to consolidate related federal-court actions in a single district). *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 162 (2006) (predicting that "the enactment of CAFA will reduce the incidence of . . . [reverse auctions in class settlements] by forcing many class actions into federal courts, where the Judicial Panel on Multidistrict Litigation will consolidate like claims in a single jurisdiction").

[52] CAFA supporters accurately observed that:

> The reason for th[e] dramatic increase in state court class actions cannot be found in variations in class actions rules; after all, the rules governing the decision whether cases may proceed as class actions are basically the same in federal and state courts—and, of course, they are the same within states, i.e., the same in "magnet" jurisdictions such as Madison County and St. Clair County, Illinois, as they are in more easily accessible jurisdictions such as Cook County, Illinois.

S. REP. NO. 109-14, at 13, *reprinted in* 2005 U.S.C.C.A.N. 3, 13 .

[53] *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766-67 (7th Cir. 2003). By way of illustration: "Even if just one judge in ten believes that a nationwide class is lawful, then if the plaintiffs file in ten different states the probability that at least one will certify a nationwide class is 65% ($0.9^{10} = 0.349$). Filing in 20 states produces an 88% probability of national class certification ($0.9^{20} = 0.122$)." *Id.* at 767.

zation of class actions by nearly all procedural regimes nationwide, together, had the unintended effect of empowering anomalous courts—those state courts characterized in CAFA rhetoric as magnets for nationwide class actions[54] and seemingly located, as one of us has ventured, in "any county named after a president that's by a body of water."[55] CAFA expands the diversity jurisdiction of the federal courts to turn this phenomenon on its head, effectively enabling the defendant, if she wishes, to use a change of forum to empower the negatives on the class certification question to trump the anomalous positive.[56]

The problem of the anomalous court explains why observations about the lack of "empirical evidence supporting the belief that state and federal court differ generally in their treatment of class actions" are largely beside the point with respect to CAFA. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 593 (2006).

For present purposes, we put aside the debate prompted by *Bridgestone/Firestone* concerning the authority, if any, that a federal court has to enjoin in state court the same proposed nationwide class action that the federal court has declined to certify under Rule 23. Other courts have concluded that no such authority exists under current law, reasoning that the federal court's decision to decline certification is not properly regarded as issue preclusive with respect even to the same proposed class in a state court. Rather, the state court retains discretion, within the wide berth of federal constitutional due process, to apply even an identically phrased state class action rule in a manner different from the federal court. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998) ("[O]ur interpretation of Rule 23 is not binding on the Louisiana courts."); J.R. Clearwater, Inc. v. Ashland Chem. Co., 93 F.3d 176, 180 (5th Cir. 1996) ("While Texas Rule of Civil Procedure 42 is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the Texas class action rules, . . . a Texas court might well exercise this discretion in a different manner."). *But see* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035 (2008) (urging recognition of federal injunctive power in this scenario); *cf.* ALI DRAFT PRINCIPLES OF AGGREGATE LITIGATION, *supra* note ††, § 2.11 cmts. b, d (urging state courts to afford comity to the federal class decertification decision, but also noting special situations in which that decision might have issue-preclusive effect).

[54] S. REP. NO. 109-14, at 22, *reprinted in* 2005 U.S.C.C.A.N. 3 at 22; *see also* 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, 155 (2001) (describing how "class action lawyers are bringing a large number of cases in a small number of state courts that have become 'magnets' for interstate class actions and that thus exercise a widely disproportionate role in adjudicating national disputes").

[55] Roundtable, *Class Action Fairness Act*, NAT'L L.J., May 16, 2005, at 18, 20 (remarks of Samuel Issacharoff). One topic yet to be explored systematically in the empirical literature concerns the relationship between the anomalous-court problem and the use in pertinent state systems of elected, rather than appointed, judges.

[56] To be sure, the federal forum favored by CAFA does not eliminate entirely the potential for divergent results on class certification. Federal courts can disagree over the interpretation and application of Rule 23, just as they can for any other source of federal law. Still, CAFA supporters plausibly regarded the degree of divergence within

From the plaintiffs' perspective, CAFA empowers those class action lawyers who are willing and able to play for national stakes. Oddly, the presence of anomalous courts—both state and, occasionally, federal[57]—served to compromise the willingness and ability of class counsel to invest in large cases and to resist early settlement demands, for fear that their investments would be undercut by an alternative class action. CAFA alters the strategic dynamics by trusting federal courts to police the legitimacy of class counsel's representation of the absent class members in a fashion analogous to the role of the lead institutional plaintiff under the Private Securities Litigation Reform Act of 1995 (PSLRA).[58] One can see CAFA's unintended empowering of nationally oriented plaintiffs' lawyers as the counterpart to the PSLRA's unintended empowering of securities plaintiffs' law firms—chiefly Milberg Weiss, before it divided into two firms—that already had long-standing relationships with the sorts of large institutional investors preferred as lead plaintiffs by the latter statute, or were best positioned to establish such relationships based on a track record of success in such cases.[59]

B. *The Strategy and Judicial Federalism of Class Settlements After CAFA*

CAFA's treatment of the anomalous court nonetheless remains incomplete. Although the statute expands federal diversity jurisdiction over class actions, it leaves intact the customary power of removal at the discretion of the defendant.[60] This feature of CAFA gives rise to a troubling potential for the anomalous-court problem to persist, not with respect to class certification in the face of the defendant's opposi-

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the federal system as substantially less than the divergence across all trial-level courts in the nation. *See* S. REP. NO. 109-14, at 53-54, *reprinted in* 2005 U.S.C.C.A.N. 3 at 49-51 (asserting that the levels of abuse are not even comparable). In addition, the authority of the Judicial Panel on Multidistrict Litigation to consolidate in a single federal district court civil lawsuits of all sorts concerning the same underlying matter, 28 U.S.C. § 1407 (Supp. V 2005), reduces dramatically the prospect for multiple shots at class certification across different federal districts.

[57] *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 283 (7th Cir. 2002) (overturning the approval of a class settlement by a federal court in an alleged reverse auction).

[58] Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in 15 U.S.C. §§ 77–78 (2000)).

[59] *See* Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1515 tbl.3 (2006) (noting that Milberg Weiss enjoyed a 27.4% share of the market for representation of plaintiffs in securities class actions during the immediate post-PSLRA period).

[60] *See* 28 U.S.C. § 1453(b) (2000) (cross-referencing the usual statute for removal, 28 U.S.C. § 1446).

tion but, rather, for certification and settlement approval at the defendant's behest, in tandem with class counsel.[61]

Well before CAFA, the class action literature described the potential for a "reverse auction," whereby a defendant in search of a class settlement identifies plaintiffs' lawyers willing to join in seeking judicial approval for a deal such that the defendant may purchase the preclusion of class members' claims on the cheap.[62] As the term "reverse auction" suggests, this form of collusion holds for the defendant the tantalizing promise of turning competition for litigation control within the plaintiffs' bar against the interests of class members themselves.

By aggregating small claims, class actions offer enterprising plaintiffs' counsel the benefits of leveraging the incremental stakes of individual plaintiffs into a worthwhile undertaking.[63] The key to such leveraging is the reduced transaction costs in "opt-out" class actions that flow from not having to find and contract with the numerous small-value claim holders. But, as in all leveraged endeavors, with opportunity comes risk. The lack of a contractual basis for representation means that, until a class is certified and that certification is exclusive, new class counsel can emerge, claiming—usually in a different court—to be the true champions of the class. This form of competition among plaintiffs' law firms is itself expanded as a result of national markets. Not surprisingly, then, a world in which undifferentiated goods and services are marketed nationwide is also one in which claims arising from that activity might be pursued by a roster of plaintiffs' law firms that is similarly broad.

Settling class counsel collude with the defendant in the reverse-auction scenario in order to garner some manner of a fee award—if only from a reduced class-settlement carcass—rather than nothing at

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[61] *See* Wolff, *supra* note 53, at 2126 ("The excision of absent-plaintiff removal . . . eliminated the most direct mechanism by which class members could have sought protection from collusion . . . .").

[62] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (1995) (describing a tendency toward "structural collusion" in mass tort class actions).

[63] As the Supreme Court has noted,

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

all, in the face of class representation by rivals within the plaintiffs' bar. The connection to the array of potential fora is this: collusion might extend not only to the obvious agreement to the class-settlement terms but also to the selection of an approving court from among the same nationwide array of potential fora as existed for contested class certifications pre-CAFA. In its most unabashed form, the usual move is to seek class certification and settlement approval in a state court where class counsel are familiar members of the local bar and have long-standing professional relationships with elected local judges.

Unlike CAFA's main focus on state law claims, moreover, the potential for use of the anomalous settlement-approving court—to be sure, a potential that existed prior to CAFA and that remains unchanged—is not similarly confined in subject matter. State courts are courts of general subject matter jurisdiction and thus, broadly speaking, can settle all manner of civil claims, save the small set of those for which federal law provides exclusive federal subject matter jurisdiction.[64] And even for federal law claims as to which the federal courts have exclusive subject matter jurisdiction by statute, the Supreme Court has understood such jurisdiction narrowly. If it wishes as a matter of its own preclusion principles, a state court may serve as a forum for settlement of such claims short of adjudication on the merits, in tandem with related claims under state law—at least, unless Congress specifies otherwise by clear language in the grant of exclusive federal jurisdiction.[65]

This then presents an initial paradox. Collateral attack could be a way to rein in rogue actors. After all, if colluding class counsel and defendants can go searching the land for the welcoming forum in which to park their settlement, then the ability to challenge the consequences in a subsequent action elsewhere should provide a safety valve against improper conduct. Indeed, a review of the literature extolling the virtues of subsequent challenges to class action settlements

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[64] *See, e.g.*, Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2000).

[65] *See* Matsushita Elec. Indust. Co. v. Epstein, 516 U.S. 367, 381-82 (1996) (holding that the exclusive grant of subject matter jurisdiction to the federal courts over "actions . . . brought to enforce any liability or duty created by" the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (2000), does not warrant the withholding of full faith and credit from a Delaware state court judgment approving a class settlement that encompassed such claims, along with Delaware corporate law claims).

yields a nearly unalloyed picture of saintly second fora, providing welcome shelter from the ravages of abusive class settlements.[66]

But why should we assume that the initial forum is corrupt and the second forum beknighted?[67] Or, to put the point another way, what if the second forum is the product of the same type of forum shopping, only this time on behalf of an improperly motivated attack on a well-considered class settlement? Or, even more simply stated: what if the forum for the collateral attack is the outlier, contrary to the assumption that the forum that approved the class settlement is necessarily complicit in wrongdoing? Seen in this light, collateral attacks themselves do not avoid the problem of the anomalous court; rather, they can replicate the problem in a new procedural posture. Just as the array of potential fora invites proponents of collusive class settlements to seek the anomalous approving forum, the same array invites those hostile to the deal to seek the forum anomalously inclined to allow the collateral challenger some extraordinary gain by threatening to blow up the entire settlement. The stock in trade for this maneuver is to claim inadequate class representation and thereby to deny preclusive effect to the deal. Further, because the collateral challenge can be had anywhere a class member may be found, collateral attacks on class judgments differ in kind from other forms of collateral attack. For example, collateral challenge by writ of habeas corpus, in a federal forum for habeas litigation concerning a state criminal conviction, is tightly circumscribed by federal statute.[68]

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[66] For arguments in favor of liberalized collateral review, see sources cited *supra* note 13.

[67] For a summary of the arguments between "preclusionists" who favor the conclusiveness of initial court review and "constitutionalists" who support a broad individual right to collateral challenge, see Rubenstein, *supra* note 13, at 828-41.

[68] As the Supreme Court has explained, Congress designed the federal habeas statute precisely to disable a search for the anomalous court to overturn a state criminal conviction:

> Congress added the limiting clause—"within their respective jurisdictions" — to the habeas statute [28 U.S.C. § 2241] in 1867 to avert the "inconvenient [and] potentially embarrassing" possibility that "every judge anywhere [could] issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." . . . Accordingly, with respect to habeas petitions "designed to relieve an individual from oppressive confinement," the traditional rule has always been that the Great Writ is "issuable only in the district of confinement."

Rumsfeld v. Padilla, 542 U.S. 426, 442 (2004) (quoting Carbo v. United States, 364 U.S. 611, 617-18 (1961)).

The problem, then, is that the search for an anomalous forum might allow collateral attacks on class settlements to bust not only bad class judgments, but also good ones. Here, again, competition among plaintiffs' law firms for control of a given subject area of litigation has strategic implications. One theme in the case law on collateral attacks consists of some underlying rivalry between plaintiffs' law firms to gain, or to wrest from one another, the power to tender class members' claims for settlement.[69] The upshot of a successful collateral attack is, at the very least, to empower the plaintiff's counsel to negotiate a separate settlement for her client. More broadly, the establishment of a forum prepared to regard the class settlement as constitutionally defective presents a credible threat to unravel the binding effect of the deal overall—something with the potential to induce the defendant in search of peace to negotiate for the elimination of that threat with the rival plaintiffs' law firm that mounted the collateral attack.

The law of judicial federalism—in curricular terms, the law of federal courts—also influences strategic choices in forum selection. For example, the availability of the All-Writs Act and the Anti-Injunction Act means that a federal court judgment approving a class settlement carries with it a power on the part of that court to enjoin state court litigation that would challenge the preclusive effect of the resulting judgment.[70] In practical effect, the existing law of judicial federalism disempowers the ability of an anomalous state court to authorize a collateral attack on a federal court class judgment. The particular federal court that originally approved the class settlement is the same court that stands to rule, through the vehicle of the settling-defendant's motion to enjoin the state court collateral attack, on subsequent challenges to the adequacy of representation afforded to the class.

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[69] *See* Nagareda, *supra* note 13, at 347 (drawing on case law to illustrate "the potential for the law to unleash competitive forces to discipline the adequacy of class representation and, for that matter, the oversight afforded by the courts themselves").

[70] As a technical matter, the injunction flows from the authority of the federal court to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2000). The general prohibition in the Anti-Injunction Act against federal court injunctions of state court proceedings is turned off by the exception in the Act for injunctions to "protect or effectuate" a federal judgment. 28 U.S.C. § 2283 (2000). *See, e.g.*, *In re* Corrugated Container Antitrust Litig., 659 F.2d 1332, 1335 (5th Cir. Unit A Oct. 1981) ("Since there are federal judgments that approve some of the settlements and that control the further litigation of the appellants' cause of action, . . . the injunction was and is not precluded by 28 U.S.C. § 2283.").

Federal injunctive power is doubly attractive for the settling parties. Simply as a predictive matter, the federal court that previously certified the class and approved the class settlement is unlikely to be receptive to a contention that it somehow botched its analysis of adequate representation. In addition, federal injunctive power eliminates the need for the defendant to assert claim preclusion as a defense in the state court collateral attack, with the attendant risk that the state court might issue a judgment rejecting the defense that then would be entitled to "full faith and credit" from other judicial systems across the country.[71] This is well-understood by all sophisticated litigants and explains the increasing preference for federal court as the forum in which to settle large-scale class actions, even independent of CAFA's conferral of diversity jurisdiction. Indeed, the most contested issues in this area of law concern the moment at which federal courts may begin to exercise their injunctive power to protect their jurisdiction over consideration of a pending settlement, before absent class members have received notice of the proposed settlement[72]—a prerequisite for jurisdiction under most areas of substantive law.[73]

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[71] *See* Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 525-26 (1986) (holding, in a non–class action case, that even a mistaken rejection by a state court of a claim-preclusion defense predicated on an earlier federal judgment is entitled to full faith and credit). The quoted language stems from the Full Faith and Credit Clause of the Constitution, U.S. CONST. art. IV, § 1, with regard to the effect of a state court judgment in the courts of a sister state, and from the Full Faith and Credit Act, 28 U.S.C. § 1738 (2000), with respect to the effect in federal courts.

[72] After canvassing the case law on this question, the Ninth Circuit recently declined to enjoin state court litigation. The court noted that

> none of the considerations that have induced courts to issue injunctions despite the strictures of the Anti-Injunction Act was present. This was not an MDL case; discovery was not complete; no class settlement was imminent, in fact, as far as the record shows no serious settlement progress has been made; and, finally, there was no evidence of collusive procedures, reverse auction, or otherwise, even assuming that the existence of those would justify an injunction of state proceedings.

Negrete v. Allianz Life Ins. Co. of N. Am., No. 07-55505, 2008 WL 1868993 (9th Cir. Apr. 29, 2008).

[73] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (holding that absent class members must "receive notice plus an opportunity to be heard and participate in the litigation"). Some areas of law are subject to nationwide jurisdiction in federal court. For example, the Federal Circuit has exclusive jurisdiction to hear all patent appeals, as well as appeals from the Court of International Trade and the Court of Federal Claims. United States v. Souffront, 338 F.3d 809, 827 n.9 (7th Cir. 2003). Other statutes vest federal authorities with the power to issue nationwide service of process, effectively extending their jurisdictional reach nationwide, as with the securities laws. *See* 15 U.S.C. §§ 77v, 78aa (2000). Finally, several statutes create exclusive

The same injunctive power does not attend a state court judgment approving a class settlement. Collateral attacks on the binding effect of such a judgment may proceed in the courts of other states (or, for that matter, in federal court), such that the problem of the anomalous court remains unabated. As a general matter, the rendering state court has no power to enjoin such collateral attacks, or at least none recognized by case law to date.[74] Rather, the forum selected for the collateral attack stands to rule on challenges to the preclusive effect of the class judgment under the auspices of a determination of the full faith and credit owed to that judgment. A constitutionally defective judgment is not entitled to preclusive effect in another forum,[75] for even the rendering forum could not properly afford the judgment such effect.

CAFA, however, alters the mix. The statutory allocation to federal courts of more-or-less exclusive power over suits of national dimension creates distinct rules for national market cases. For cases of national dimension, the anomalous state court threatens to impose an idiosyncratic and likely rent-seeking tax on the activities of the national market. CAFA disempowers that strategy by placing the regulatory power of national-market litigation in the courts of the national government. The paradox is that an unalloyed power of collateral attack allows the same aberrant courts to return to the scene, only this time in the guise of rejecting the work of the federal courts rather than in the posture of fashioning the litigation in the first instance.

Further, and borrowing from the analogy initially developed by William Rubenstein between collateral attacks on class settlements

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federal court subject matter jurisdiction, although that is independent of the notice issue. *See, e.g.*, 28 U.S.C. § 1333 (2006) (admiralty and maritime jurisdiction), § 1338 (patents and copyrights), § 1346(b) (United States as defendant in tort actions), § 1351 (foreign consul or member of foreign mission as defendant), & § 1355 (action for recovery of fine, penalty, or forfeiture under federal legislation).

[74] The one narrow exception consists of state court class judgments concerning a limited fund, by analogy to the well-established authority of state courts in proceedings in rem to enjoin litigation elsewhere concerning the res. *See* Donovan v. City of Dallas, 377 U.S. 408, 412 (1964) (noting that, for in rem or quasi in rem proceedings, "the state or federal court having custody of such property has exclusive jurisdiction to proceed"); Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 136 (1941) (noting that "where a state court first acquires control of the res, the federal courts are disabled from exercising any power over it, by injunction or otherwise").

[75] *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part) (emphasizing that a "state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause").

and habeas review,[76] the availability of collateral review does not necessarily empower any court in any jurisdiction to exercise that power. So, for example, the Federal Rules of Civil Procedure anticipate that judgments may be revisited in light of new knowledge under the strict guidelines of Rule 60(b),[77] which we shall discuss further in Part III. Unlike collateral challenges that are shopped around the country in search of a hospitable court, however, a Rule 60(b) motion for relief from judgment must be brought in the court that rendered the judgment. This removes the ability to scour the countryside for a friendly court to attack a class settlement or even a litigated class judgment. To the critics of class action settlements, however, the prospect of challenge in the rendering court is likely unappealing, for it effectively would make impotent the claim that the rendering court was incompetent, malevolent, or worse.

In circumstances where class actions may be shopped for certification from forum to forum by plaintiffs' counsel, or where they may be parked for settlement by the joint undertakings of defendants and plaintiffs' counsel, a rule disfavoring collateral attacks and forcing claims into the difficult mold of Rule 60(b) may overly empower forum shopping at the expense of fairness. But where forum selection is undertaken pursuant to congressional policy rather than strategic behavior on the part of the dealmaking lawyers, a procedural regime that would allow any jurisdiction—particularly, a craftily selected state court jurisdiction—to appoint itself as the agent of review has no compelling logic. To the contrary, granting greater protection against collateral challenge to cases properly filed in federal court—what the AIA effectively does—serves to cure a gap in the CAFA framework: it would afford defendants who prefer a quick-and-dirty class settlement in state court less protection from collateral challenge, something that strikes us as an eminently deserved outcome.

Taken together, the law of judicial federalism, the rivalries in the market for litigation control, and the allocation of removal power under CAFA help to frame the first of the challenges posed for a cohesive theory of class-settlement review. Such a theory should do two things at once with respect to forum selection: it should discourage the use of the anomalous forum for both class-settlement approval and collateral attack.

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[76] *See* Rubenstein, *supra* note 13, at 796 ("Habeas therefore can serve as a foil for the class action finality debate.").

[77] FED. R. CIV. P. 60(b).

C. *Regulatory Mismatch*

CAFA-related forum difficulties are part of a much larger structural problem that arises where there is economic conduct of a scale greater than the body that seeks to review it. We term this effect a "regulatory mismatch" to convey the idea of local actors trying to impose their will on economic activity beyond the scope of the government that has constituted them. Simply put, a regulatory mismatch may occur whenever the authority charged with overseeing some economic activity has jurisdiction that is smaller than the conduct to be regulated. It is difficult, for example, to produce cars for the national market yet also to be subject to inconsistent state tort liability for product design. If Ohio were to require self-locking seatbelts and Indiana were to prohibit them, a manufacturer could find itself liable in either state as cars predictably move in interstate commerce. At some point, both the manufacturers and the states would have to look to federal regulation to set the appropriate standards and, presumably, preempt inconsistent state law.[78] This is an extraordinarily complicated area of law that, in the form of preemption claims, has come to dominate a significant portion of the Supreme Court's civil caseload.[79] Among the many problems presented is that congressional efforts to fix the liability standards for nationwide conduct typically ignore the compensatory and deterrent ambitions of the state law that may be displaced.

This is a broad topic that pushes beyond what can be addressed in this Article. Nonetheless, it is critical to recognize that CAFA is a partial attempt to fix a problem of misalignment between the conduct that is subject to regulation and the jurisdictional reach of the reviewing court. While its statutory structure is complicated, CAFA proceeds from a core intuition that cases of national market scope should be in federal court—the best approximation available for aggregate over-

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[78] This argument is developed at length in Issacharoff & Sharkey, *supra* note 22.

[79] *See* Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008) (declaring the preemptive effect of Food and Drug Administration (FDA) premarket approval of a Class III medical device); Good v. Altria Group, Inc., 501 F.3d 29 (1st Cir. 2007) (analyzing the preemptive effect of Federal Trade Commission regulation of "light" cigarettes), *cert. granted*, 128 S. Ct. 1119 (2008) (No. 07-0562); Desiano v. Warner-Lambert & Co., 467 F.3d 85 (2d Cir. 2006) (discussing the relationship between FDA regulation of prescription drug labeling and the fraud exception to state regulatory compliance defense in tort), *cert. granted sub. nom.* Warner-Lambert Co. v. Kent, 128 S. Ct. 31 (2007) (No. 06-1498); Levine v. Wyeth, No. 2004-384, 2006 WL 3041078 (Vt. 2006) (discussing the preemptive effect of FDA approval of prescription drug labeling), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 06-1249).

sight of economic activity of a national ambit. A more complete statutory framework would have provided clear choice of law rules for such cases, as well as a substantive law framework that would resist balkanizing pressures on national market conduct. But the substantive law limitations of congressional intervention into the litigation of national market claims is yet another topic beyond the scope of this Article. Rather, our concern here is the jurisdictional element in CAFA's distinct treatment of common law claims arising from national-market conduct.

Leaving aside the complicated motivations behind CAFA, and also putting aside some of the difficulties in the statutory definitions of national-market cases, CAFA emerges as a partial fix to the problem of state-level regulation of national-market conduct, particularly where the state norms of conduct conflict. Although less developed, the same argument could be advanced for cases subject to consolidation by the Judicial Panel on Multidistrict Litigation (MDL). While such consolidations consist of cases already in the federal court system, the purpose of MDL consolidation in a single federal district court is to realize aggregate efficiencies for cases of broad sweep. MDL consolidation does not vest federal courts with additional subject matter jurisdiction, or even with the power to try all the consolidated cases.[80] But each statute represents a congressional recognition, even if only partial, that individually or collectively filed cases transcend their immediate jurisdictional boundaries.

Understood against the backdrop of regulatory mismatches, CAFA (and to a lesser extent the MDL statute) speaks directly to the "where" issue of the relation between state and federal courts for national-market cases. As developed further in Part III, congressional allocation of decision-making authority in national-market cases to federal courts also has direct implications for the form of review—and the extent of preclusion—available in different fora.

II. THE MULTIPLE MEANINGS OF ADEQUATE CLASS REPRESENTATION

The preceding Part framed the "where" question surrounding judicial review of class settlements, analyzing where, among the potential fora, direct and collateral review might respectively occur. This Part turns to the "what" question for such review—namely, what the

[80] *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998) (holding that a district court cannot itself try a case transferred to it by the Judicial Panel on Multidistrict Litigation).

reviewing court asks with respect to a proposed class settlement or a subsequent effort to challenge its preclusive effect. Independent of the forum in which the challenge is lodged or the procedural form of the challenge (to be addressed in the next Part), there is the substantive question of what may be raised as a bar to the preclusive effect of a class action settlement.

One component of the answer to this question is easy enough to state under current doctrine. Since *Hansberry*, the law of class actions has embraced the bedrock proposition that adequate class representation is a constitutional due process prerequisite to a binding class-wide judgment.[81] What "adequate representation" actually means in the class action setting beyond this high level of generality, however, is far less easy to state in a single breath. The concept of adequacy clearly concerns the role of the class representative and, more significantly, the role of class counsel in carrying out their respective representative duties in the litigation. Both constitutional doctrine and Rule 23 use the term "adequate representation" to signify this important feature of representative litigation. Nonetheless, the exact parameters of adequacy remain surprisingly ill defined.[82]

The central observation in this Part is that current doctrine under both the Constitution and Rule 23 has loaded the concept of adequate representation with multiple meanings, oftentimes in conflict with each other. Adequacy at various points encompasses no less than the structure of the class representation, the performance of class counsel with regard to the class-settlement terms and, often, the personal jurisdiction of the rendering court over absent class members. Because any process of settlement involves allocation of the joint gains from peace—gains that do not inherently belong to one side or the other—the gradations of settlement quality cannot possibly present questions of constitutional magnitude. Similarly, the Constitution seems an unlikely source of review for the exercise of personal jurisdiction, something that is easily waived under Rule 12 of the Federal Rules of Civil Procedure and readily satisfied under *Shutts* for absent class members. Instead, we begin by distinguishing situations where due process brooks no class action structured along the lines now said to be binding from situations that involve allegations more in the na-

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[81] *See* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) ("[M]embers of a class not present as parties . . . may be bound by the judgment where they are . . . adequately represented by parties who are present.").

[82] *See* Rubenstein, *supra* note 13, at 805 (describing the array of lower court decisions as "rais[ing] as many questions as they answer").

ture of ordinary error—where a permissibly structured class nonetheless receives what a disenchanted plaintiff later characterizes as a raw deal. Indeed, as will be elaborated, one much-debated federal appellate decision[83] actually manages to match the broadest latitude for collateral attacks with the aspect of adequate representation that least demands such inquiry.

This Part will first elaborate upon what the law of class actions has come to understand as a structural defect. It will then turn to the distinct meaning of adequate representation as a performance standard focused on the settlement terms negotiated by class counsel. Finally, it will discuss adequate representation as a component of personal jurisdiction where absent class members lack minimum contacts with the rendering forum.

A. *Structural Defects*

One meaning of adequate representation concerns the structure of representation for the class. "Representation" here encompasses both the relationship of class members to one another (a potential source of intraclass conflicts of interest) and the relationship between class counsel and the class as a whole (a potential source of attorney-client conflicts). We discuss these two forms of conflicts in turn, explaining the significance of the focus on "structural" matters.

1. Intraclass Conflicts

By its terms, Rule 23(a)(4) speaks to intraclass conflicts, conditioning class certification on a judicial determination that "the representative parties will fairly and adequately protect the interests of the class."[84] The straightforward objective is to enable the class representative to protect the interests of the absent class members in the litigation simply by protecting her own self-interest therein. Much of the case law interprets this requirement formalistically—in tandem with the Rule 23(a)(3) inquiry into the "typicality" of the class representative—to ask whether the named individuals at the head of the class are identical in all relevant concerns to the rest of the class.

In reality, the concern is otherwise. The issue is whether the newly constructed collective entity—the class—is a proper stand-in for

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[83] Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001), *aff'd by an equally divided Court*, 539 U.S. 111 (2003).

[84] FED. R. CIV. P. 23(a)(4).

the interests of the individual class members. In significant part, this inquiry casts attention to the adequacy of class counsel, for class members often will have little incentive or ability to monitor the prosecution of their collective claims. We shall turn to class counsel momentarily. But in significant part, the question of the typicality and adequacy of the representation awkwardly frames an important insight about whether the objectives of the class members are truly aligned. Here, the insight is that no representative, no matter how capable or faithful, can adequately represent a class comprised of persons whose interests in the litigation diverge. No agent, in other words, can adequately serve multiple principals when the interests of the principals themselves conflict.

The hard question concerning intraclass conflicts asks which conflicts should matter—which conflicts, in other words, call into question the sense of unified objectives so as to defeat the ability to recognize an "entity" shaped by common purpose, as recognized by David Shapiro.[85] Framed this way, the conflict inquiry asks what divisions should render the class representation so defective in structure as to rise to the level of a constitutional dereliction. We first explain how a conception of class actions focused on the endgame of settlement can help the law to answer this question. We next draw on conflicting case law to delineate the proper inquiry into intraclass conflicts where the class-settlement terms are known—as they are in all situations of collateral attack and, earlier, where the rendering court stands to make the class certification and the class-settlement fairness determinations simultaneously.

a. *Which Conflicts Matter*

In *Amchem Products, Inc. v. Windsor*,[86] the Supreme Court underscored the deep connection between adequate representation in the intraclass-conflict sense and the design of class settlements. In practical effect, the *Amchem* class settlement sought to replace the tort system prospectively with a private administrative compensation scheme for persons exposed to the asbestos-containing products of the defendant companies.[87] The *Amchem* class exhibited a fundamental mismatch between its structure and the "essential allocation decisions"

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[85] *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918-24 (1998) (articulating an "entity" model of class actions).

[86] 521 U.S. 591 (1997).

[87] *Id.* at 599-601.

made in the class settlement.[88] The class encompassed both persons presently impaired by asbestos-related disease (interested simply in the immediate payouts described in the settlement) and asbestos-exposed persons without present-day impairment, but who might develop an asbestos-related disease in the future (interested in both payout levels and the preservation of resources to fund them years or decades hence).[89] Yet the crux of the class settlement was precisely to make tradeoffs between these two subgroups within the single, undifferentiated *Amchem* class—in particular, to provide cash compensation only if and when a given class member became impaired under specified medical criteria.[90]

This tradeoff was far from unexpected. Asbestos litigation was grinding to a halt over the inability to resolve the critical issue of the overall exposure of companies with asbestos liabilities. Defendants could find no respite through settlements, even for the thousands of claims that were presented in nonclass cases like *Cimino v. Raymark Industries, Inc.*,[91] unless some mechanism for back-end finality could be devised. The proposed class settlement in *Amchem* provided a means to free up funds for present claimants precisely because the deal also included measures that promised to contain the defendants' future liabilities within a structured system of payments.[92] The technical question before the Court was whether class litigation—or, more realistically, class settlement—was the appropriate mechanism by which to provide the indispensable back-end closure. The efforts at peacemaking in the asbestos context after *Amchem* further highlight the inevitability of cabining future exposures in order to free up present payments. Whether attempted privately (through the National Settlement Program devised by Owens Corning)[93] or publicly (through § 524(g)

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[88] *Id.* at 626-27.

[89] *Id.* at 602-03.

[90] *Id.* at 604.

[91] 151 F.3d 297 (5th Cir. 1998) (overturning a trial plan for consolidated treatment of more than three thousand asbestos cases).

[92] *Amchem*, 521 U.S. at 600-01. This is a topic we have both addressed before. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007); Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1925 (2002).

[93] *See Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 134 (1999) (statement of Maura J. Abeln, Senior Vice President, General Counsel, and Secretary, Owens Corning) (describing a private settlement process involving contractual agreements with prominent asbestos plaintiffs' law firms as an alternative to proposed federal asbestos legislation).

of the Bankruptcy Code,[94] enacted specifically for asbestos-related reorganizations), the result is the same: no defendant could gain any significant peace from settlement unless it was accompanied by some long-term mechanism to manage liabilities.

In particular, the dynamics of the asbestos litigation prior to *Amchem* had made it glaringly apparent that any comprehensive peace that defendants might prefer to continued slogging through the tort system would have to involve assurances concerning the compensation terms for unimpaired persons.[95] There not only would have to be a way of channeling future liabilities in terms of the amounts and timing of future payments, but there also would have to be limitations on what constituted a compensable claim in the future. The intraclass conflict in *Amchem* mattered, in short, because it was already apparent in the asbestos litigation that any realistic peace would turn on the making of tradeoffs across critical dividing lines within the proposed plaintiff class.

As a matter of public policy, there remains considerable debate over whether the deal envisioned in *Amchem* would have been a good one for asbestos plaintiffs.[96] But the desirability of the deal in some "gestalt" or "overarching" sense does not, in itself, make for a structurally sound class.[97] To say otherwise would be to deny the need for inquiry into the propriety of the unit for settlement negotiations in the first place. *Any* proposed class settlement, irrespective of its particulars, raises an issue as to whether it is "fair, reasonable, and adequate" in the Rule 23(e) sense. This is ultimately the crux of the error

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[94] 11 U.S.C. § 524(g) (2000) (describing the requirements for an injunction that would channel asbestos claims against the debtor and related entities to a juridically separate trust fund for payment).

[95] For a more detailed discussion of the strategic dynamics behind the *Amchem* class settlement, see NAGAREDA, *supra* note 92, at 76-80.

[96] Faced with a spate of asbestos-related bankruptcies in the post-*Amchem* period and spurred by language in the Court's opinion, *see Amchem*, 521 U.S. at 628-29, Congress went on to consider seriously proposed asbestos reform legislation that largely would track the central tradeoff of the *Amchem* class settlement. *See* Fairness in Asbestos Injury Resolution Act of 2006, S. 3274, 109th Cong. (2006) (proposing a $140 billion trust fund to resolve all asbestos claims). Writing some years after *Amchem*, one prominent plaintiffs' lawyer lamented that "the multibillion-dollar settlement, rejected by the Supreme Court, was lost forever, and thousands of claimants who would gladly have traded their pristine due process rights for substantial monetary compensation have been consigned to the endless waiting that characterizes asbestos bankruptcies." Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005).

[97] *See Amchem*, 521 U.S. at 621 (noting that class certification standards "serve to inhibit . . . class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness").

in *Amchem* made by the district court, which had characterized the question of whether the proposed class settlement was fair overall as giving rise to a predominant common issue that warranted class certification under Rule 23(b)(3).[98]

After *Amchem*, the focus on potential intraclass conflicts metastasized.[99] Every difference in the potential interests of class members was seemingly fair game for challenge. Whether on direct or collateral review, challenges to the adequacy of class representation in the intraclass conflict sense quickly came to center on the contention that the class was, in one way or another, too encompassing in its scope, such that subclasses were needed with separate class representatives and, even more importantly, separate class counsel.[100]

Aside from material differences in the interests of various subgroups arising from their differing factual circumstances, differences in substantive law also have the potential to give rise to intraclass conflicts. In national-market cases involving state law claims, choice of law analysis often forms a significant barrier to class certification by calling for application of the substantive law of the multitude of jurisdictions in which the various class members find themselves[101] or by offering different statutes of limitations that might allow for different amounts of damages.[102] If anything, CAFA proponents seized on this observation, expanding the federal forum for class actions involving state law

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[98] *See id.* at 607 (summarizing the district court's reasoning).

[99] For a thoughtful response to the ad infinitum quality of some claimed conflicts, see Petrovic v. Amoco Oil Co., 200 F.3d 1141, 1146-48 (8th Cir. 1999).

[100] *See* FED. R. CIV. P. 23(c)(5) (allowing for classes to be divided into subclasses). Prior to the 2007 restyling of the Federal Rules of Civil Procedure, the portion of Rule 23 concerning subclasses appeared as subsection 23(c)(4)(B).

[101] *See, e.g.*, *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1018, 1021 (7th Cir. 2002) (decertifying a nationwide class action upon a choice of law determination that the governing law would be that found in each class member's respective home state). Though fifty-one nominally different bodies of state law rarely amount to fifty-one different laws in substance, even a smaller number of substantive variations may defeat class certification. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222, at 271 (2004) (noting that the need to keep the variations distinct may make a single class-wide proceeding unmanageable). For an argument that choice of law analysis in class actions seeks awkwardly and indirectly to assess the maturity of the underlying litigation, see Sue-Yun Ahn, *CAFA, Choice-of-Law, and the Problem of Legal Maturity in Nationwide Class Actions*, 76 U. CIN. L. REV. 105 (2007).

[102] *But see* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (allowing the law of the forum state to provide the statute of limitations for the entire class).

claims on the expectation that, once in federal court, such actions simply would not be certified.[103]

Differences in the underlying state laws, real or imagined, provide a fertile field for strategic folderol. For example, class counsel might seek to facilitate class certification in a national market dispute by pleading the claims of the class in terms of a single body of state substantive law and, in so doing, avoid the potential pitfall of choice of law analysis for certification of a nationwide class. Such a strategic choice by class counsel would not matter when the body of state law selected either does not differ materially from that of other contending states (a "false conflict" scenario, in choice of law parlance) or is the most favorable in content to the class (a potential due process problem for the defendant,[104] but not for class members). The same approach has the potential to give rise to an intraclass conflict, however, where some class members would be able to sue under another body of state law materially more favorable to them than the common denominator pleaded in the class complaint.[105] In any case, a defendant resisting class certification, or a collateral attacker, would quickly seize on every jot and tittle of difference to create a picture of a disqualifying conflict. In the hands of class counsel, it appeared that by

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[103] As currently understood, *Erie* principles require a federal court sitting in diversity to apply the same choice of law principles as would a state court in the same location. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). But, like the application of commonly shared class action rules, choice of law analysis—particularly, under widely used methodologies that call for multifactor balancing—can entail the exercise of wide discretion by the court. *See* Issacharoff, *supra* note 44, at 1844-51 (criticizing the "most significant relationship" standard used in the Restatement (Second) of Conflicts of Laws). The anomalous court might be inclined to conduct its choice of law analysis so as to select a single body of substantive law, thereby facilitating certification of a nationwide class. *Cf.* S. REP. NO. 109-14, at 25 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 25 (describing state courts' interference with the laws of other jurisdiction, as in Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618 (Okla. 2003)).

[104] *See infra* Part II.C (discussing Phillips Petroleum Co. v. Shutts, and its aftermath).

[105] The discussion here generalizes from the contention of the collateral attack plaintiff in *Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165 (2d Cir. 2006). In *Wolfert*, a California state court certified a class action with respect to a California statutory claim concerning the defendant lender's marketing of reverse mortgages. The class settlement, however, released all claims concerning such mortgages, whatever their source in substantive law. *Id.* at 168. The collateral attack plaintiff then sought to bring various claims under New York law against the settling defendant, alleging inadequate representation in the class proceedings. *See id.* at 169-70. *See generally* Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799, 825-32 (2004) (discussing strategic decisions by class counsel regarding choice of law as a potential basis for inadequate class representation).

peradventure the common law had evolved identically in every state.[106] Yet, in the hands of class opponents, it often seemed a miracle that Americans are able to cross from one state to another and buy a newspaper, given the radically different legal regimes said to coexist across Interstate 80.

No class action can account for all conceivable differences among its members.[107] Simply for the immediate purpose of settlement negotiation, subclassing along every imaginable fissure within the class would dissipate the very bargaining power that aggregate procedure seeks to create.[108] By empowering would-be rivals to class counsel to contend that the class unit should have been sliced ever more finely, subclassing as a panacea for intraclass conflicts would also threaten the all-encompassing finality that gives class litigation its ability to obtain superior results from the defendant in settlement negotiations.

In a post-*Amchem* decision overturning the certification of another asbestos-related class settlement—this time, for lack of a bona fide limited fund under Rule 23(b)(1)(B)—the Supreme Court in *Ortiz v. Fibreboard Corp.* noted that subclassing need only account for "easily identifiable categories" among the persons in the class.[109] Our suggestion is that this reference to "easily identifiable categories" can be combined with the link drawn in *Amchem* between subclassing and settlement design in such a way as to impart an outer limit to subclassing.

The identified conflict in *Ortiz* was significant. There, part of the class stood to gain from insurance policies that were still solvent but that covered only exposures up to 1959. Another part of the class was not exposed to asbestos until after 1959 and was therefore ineligible for such coverage.[110] The settlement blended the claimants into one group for purposes of insurance eligibility, in effect creating a cross-

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[106] As colorfully put by Judge Posner, this became the "serendipity theory" of doctrinal evolution. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

[107] The Federal Rules capture this difficulty through the use of the ill-defined term "predominate" in Rule 23(b)(3). The Rule does not require an identity of issues among class members, only that the common issues predominate in the litigation. In our work as Reporters for the ALI, we have been critical of the predominance requirement as creating an acontextual minefield for litigants. At its most basic level, however, the term captures the sense that aggregate litigation can rarely be expected to have a perfect identity of interests among all affected participants.

[108] *See* Coffee, *supra* note 4, at 374-75 (fearing the "Balkanization" of the class "into a loose-knit coalition of potentially feuding enclaves that could seldom litigate effectively as an organization").

[109] 527 U.S. 815, 832 (1999).

[110] *Id.* at 857.

subsidy from the pre-1959 group to the post-1959 group.[111] To put the point more generally: intraclass conflicts are most apparent when a settlement contemplates a direct wealth transfer from one portion of the class to another.

Were a class to be certified for litigation purposes, the initial inquiry into intraclass conflicts would occur in total ignorance of the class-settlement terms, which would not yet exist. Again, this is not the only posture for the inquiry; it is simply to suggest, at a conceptual level, that the nature of the inquiry must be such as to be undertaken fully by a court on direct review without reference to a settlement. The second feature of the inquiry concerns its operational significance. The composition of the class unit matters not out of an abstract desire for similarity within the class but, rather, because the unit chosen stands to influence the dynamics for settlement negotiations.

Together, these two features enable the law to identify which differences matter and which do not, with regard to intraclass conflicts. The ones that matter are those that give rise to a significant potential for negotiation on behalf of an undifferentiated class to skew in some predictable way the design of class-settlement terms in favor of one or another subgroup for reasons unrelated to evaluation of the relevant claims. There are several parts to this definition. First, "easily identifiable" means that which is identifiable by reference to the expected dynamics of class-settlement negotiations. Second, there has to be an incentive for the negotiation to be skewed in a predictable direction. Third, the difference in the position of class members must be independent of the substantive merits of their respective claims. Thus, there is no conflict in an antitrust class action where different class members will receive larger or smaller compensation depending on how much of the price-fixed product they purchased during the relevant time period.

Applied to the controlling Supreme Court asbestos cases, our definition helps identify which intraclass conflicts are substantial. The difference between presently impaired and presently unimpaired asbestos claimants mattered in *Amchem* because of the broadly shared understanding that any deal would have to make tradeoffs along that very line—an expectation borne out by the deal ultimately reached. Similarly, the presence of claimants with recourse to significant insur-

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[111] Even here, the division is not absolute. Many members of the class would have had exposures before *and* after 1959 and likely would have been unable to trace the harmful exposure to any specific time period.

ance coverage in *Ortiz* and those without such coverage creates a similar invitation to cross-subsidization by way of the class-settlement terms. By contrast, another difference mentioned in passing by the *Amchem* Court—class members' "expos[ure] to different asbestos-containing products" from different companies[112]—presented no realistic potential to skew the settlement design, for all of the defendant companies already were jointly represented and had, through that vehicle, previously allocated settlement expenses among themselves.[113]

Case law on intraclass conflicts nonetheless remains far from uniform. Consideration of several prominent lower court decisions from the post-*Amchem* period pinpoints the proper relationship between intraclass conflicts and the settlement endgame, particularly for settings in which the settlement terms are known.

b. *Intraclass Conflicts and the Settlement Endgame*

The structural conception of intraclass conflicts sketched here has two important implications. First, distinctions drawn by the class settlement—for instance, about which class members shall be paid based upon contingent future events—cannot render the class representation inadequate where no structural conflict existed at the time of the class judgment. Second, design features of the class settlement might, in a given instance, dissipate structural conflicts within the class, by analogy to the familiar doctrine of harmless error. This subsection addresses the specifics of these two implications and their consistency with the logic of *Amchem.*

i. Differences Created by the Settlement

At the outset, it may seem quite straightforward to see that distinctions drawn by the class settlement cannot render inadequate the structure for class representation where no such conflicts existed at the time of the class judgment. Current doctrine, however, is not so straightforward. Juxtaposition of two prominent federal appellate decisions from the post-*Amchem* period—*Stephenson v. Dow Chemical Co.* from the Second Circuit[114] and *Uhl v. Thoroughbred Technology & Tele-*

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[112] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624 (1997) (quoting the Third Circuit opinion, 83 F.3d 610, 626 (1996)).

[113] On the operations of the joint-defense entity, see generally Lawrence Fitzpatrick, *The Center for Claims Resolution*, LAW & CONTEMP. PROBS., Autumn 1990, at 13.

[114] 273 F.3d 249 (2d Cir. 2001).

communications, Inc. from the Seventh Circuit[115]—illustrates the surprising level of confusion on this first point.

Stephenson involved a challenge to the resolution of the Agent Orange litigation in front of U.S. District Judge Jack Weinstein. Agent Orange was a defoliant used during the Vietnam War, but one whose exact relation to the subsequent illnesses suffered by exposed Vietnam veterans was never proven. Substantial adversarial litigation ultimately yielded a class settlement, which Judge Weinstein approved, and which the Second Circuit affirmed on direct appeal.[116] The class settlement provided for cash compensation to class members, were they to manifest disease within ten years after the class settlement approval.[117] In effect, the settlement provided veterans with a kind of ten-year term health insurance policy.[118] Unlike the troubling scenario of a class settlement fashioned by colluding lawyers, moreover,

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[115] 309 F.3d 978 (7th Cir. 2002).

[116] *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

[117] *See Stephenson*, 273 F.3d at 253. The ten-year cutoff for cash compensation was far from arbitrary and surely would not have been invalidated as such had an administrative agency adopted it as part of a public compensation plan for Vietnam veterans. *See* Nagareda, *supra* note 13, at 322. At the time of the class settlement, formidable uncertainty existed as a scientific matter concerning the causal relationship, if any, between Agent Orange and the various diseases of concern to the plaintiff class. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d at 172-73. (For that matter, evidence of disease pathology for the exposed population of Vietnam veterans appears still to be lacking.) The lapse of time—the ten-year cutoff came more than twenty years after the last alleged exposure to Agent Orange, *see Stephenson*, 273 F.3d at 252—made a causal connection increasingly implausible. Indeed, Judge Weinstein—again, with the appellate endorsement of the Second Circuit—went so far as to grant summary judgment for the defendants for lack of a triable issue on the causation element in individual cases brought in the immediate aftermath of the class settlement by diseased veterans who had opted out of the Rule 23(b)(3) class. *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1229 (E.D.N.Y. 1985) ("Plaintiff Vietnam veterans do suffer. Many deserve help . . . . They cannot obtain aid through this suit."), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

[118] We thus find ourselves in disagreement with commentators who characterize the Agent Orange class settlement as one in which class members effectively settled their tort claims in exchange for an arrangement whereby some would receive nothing. *See* Dana, *supra* note 13, at 282 (arguing that the strong aversion to uninsurable risk posited by behavioral economics suggests that no reasonable group of people would agree to a settlement in which some would receive "no relief whatever" ex post); Koniak, *supra* note 13, at 1821 (asserting that "[Stephenson's] group got nothing"). Such a view does not account for the present-day dollar value of any term insurance policy, something that ordinary consumers routinely regard as valuable in such arrangements as life insurance. That some commentary in praise of *Stephenson* should ground itself in behavioral economics, see Dana, *supra* note 13, at 283-84, thus strikes us as ironic, at the very least.

the ten-year cutoff here was the product of the district court's own assessment—informed by the recommendation of a court-appointed special master, Kenneth Feinberg—of how to allocate fairly the $180 million lump sum that the defendants committed to the deal.[119] Class counsel had nothing to gain by spreading the limited settlement proceeds over a ten-year insurance plan as opposed to using it to buy a twenty- or thirty-year annuity that would pay out less for those who manifested harm during the policy term. Moreover, because no class members had any information as to whether they would manifest disease within ten, twenty, or thirty years, all were in exactly the same position regardless of what the term of the insurance coverage might be.

The plaintiffs in *Stephenson* consisted of individual veterans who had not opted out of the class and claimed to have been diagnosed with compensable diseases that manifested after the ten-year cutoff for cash compensation. In the usual series of moves, Dow Chemical raised the defense of claim preclusion, which the plaintiffs then sought to defeat by contending that they had been inadequately represented in the class proceeding, so that preclusion would amount to a denial of constitutional due process. The Second Circuit sided with the plaintiffs. The court's reasoning bears precise description, for it belies the seemingly straightforward point that distinctions drawn by a class settlement cannot give rise to structural conflicts that did not exist within the class at the time of the class judgment.

In the crucial sentence of its opinion, the Second Circuit concluded that a fatal conflict existed between the class representatives and the class members now suing as collateral attack plaintiffs, "[b]ecause the [class settlement] purported to settle all future claims [of disease], but only provided for recovery for those whose death or disability was discovered prior to [the ten-year cutoff]."[120] In an accompanying footnote, the court made unmistakably clear that the difference that mattered for due process purposes was indeed the one between veterans who manifested disease, or claimed to have done so, before and after the ten-year cutoff for cash compensation—not the difference between veterans who had manifested disease at the time of the class settlement and those who, at that time, merely stood at risk of disease in the future.[121] This reasoning strikes us as gravely mis-

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[119] *See* SCHUCK, *supra* note 14, at 145 (describing Special Master Feinberg's plan to allocate the settlement fund).

[120] *Stephenson*, 273 F.3d at 260.

[121] *See id.* at 260-61 n.7 (distinguishing earlier cases that held that class members manifesting disease after the settlement, but before the ten-year cutoff, were ade-

taken in a way that threatens to resolve the paradox of litigant autonomy and finality only by eliminating finality in class actions under the supposed command of due process.

First, the Second Circuit confused ex ante probabilities for ex post probabilities. Imagine a resolution of a case in which every class member receives an insurance policy against home fires for a ten-year period. Or imagine an even simpler case in which every class member receives one hundred lottery tickets as part of a settlement. In all likelihood, only a very small number of class members will have a house fire within the ten-year period. Likewise, in the second example, a small—perhaps much smaller—number would actually hit the lottery with one of the one hundred tickets. Viewed after the fact, the unlucky fire victims and the lucky lottery winners would appear to have gotten a disproportionate recovery. Indeed, viewed after the fact, the nonincendiary members of the class and the unlucky lottery players would appear to have gotten nothing. But, at the time of the award, they all obtained something of value: either a ten-year insurance policy or one hundred chances to win the lottery, each of which has a readily ascertainable present value, in economic parlance.

The difference within the class found unconstitutional in *Stephenson* was not a difference that existed at the time of the class settlement and thus, on a structural account, could not possibly skew the design of any settlement. Simply as a medical matter, it would have been impossible at the time of the class settlement to distinguish those veterans who would go on to manifest disease before the ten-year cutoff from those who would do so after, if at all. That cutoff was a distinction created by the class settlement, not one that preexisted the class. The difference that really mattered for due process purposes in *Stephenson* was precisely the one that the Second Circuit said did not: the same *Amchem*-like lumping together of both presently diseased and presently healthy veterans at the time of the class judgment. Class settlements routinely draw lines, create distinctions, and generate differences in outcome among class members postjudgment. If the mere

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quately represented in the class proceedings on the ground that those class members were still eligible for compensation from the settlement fund). In a decision rendered prior to *Amchem* but before *Stephenson*, the Second Circuit had held that the difference between veterans with and without disease at the time of the class judgment did not present an intraclass conflict. *See In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1433-38 (2d Cir. 1993) (holding that class members who manifested disease after the time of the class settlement were properly within the Agent Orange class).

drawing of those distinctions—even if nonarbitrarily—can give rise to a due process defect in the representational structure of the class, then it is hard to see what finality a class action world dominated by settlement can generate.

A better-reasoned counterexample comes in the Seventh Circuit's decision in *Uhl v. Thoroughbred Technology & Telecommunications, Inc.*[122] If the fact pattern of *Uhl* did not exist, professors may well have invented it for purposes of a law school examination, so neatly does it illustrate our point. The *Uhl* class consisted of persons who owned land located adjacent to various railroad lines. The defendant telecommunications companies had asserted rights of way to lay fiber-optic cable next to the railroad lines. At the time of the class litigation, however, cable had yet to be laid in particular areas and, ultimately, would need to be situated in any given instance on only one side of the railroad line. Moreover, in many instances, the railroad line separated one property owner from another, such that only one of the two owners might suffer the trespass of having cable actually laid on her land.[123] *Uhl* presented the Seventh Circuit on direct review with an allegation of intraclass conflict in connection with a proposed class settlement that, unsurprisingly, provided for much higher payouts to those property owners who ultimately ended up on the cable side.

Writing for the court, Judge Diane Wood concluded that the difference between the eventual cable-side and non-cable-side property owners within the single, undifferentiated *Uhl* class was beside the point for purposes of adequate representation. The court emphasized that "the named representative had an equal incentive to represent both sides as long as he did not know where his property would end up. Until the cable has been laid, no 'Cable Side' exists."[124] The fact that class members on the eventual cable side would come to be identified and paid more than their non-cable-side cohorts—just like the veterans who manifested disease within ten years of the Agent Orange class settlement—had no capacity to skew the settlement design.[125] No

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[122] 309 F.3d 978 (7th Cir. 2002).

[123] *Id.* at 980-81.

[124] *Id.* at 986.

[125] The court accurately observed that the *Uhl* class representative stood in a position broadly akin to what political philosopher John Rawls envisions as a decision maker behind the "veil of ignorance" as to how she will fare ex post. *See id.* (noting that the class representation would be a "concrete working example of John Rawls' celebrated theory of the 'veil of ignorance'"); *cf.* JOHN RAWLS, A THEORY OF JUSTICE (1971). We thus find misplaced the invocation of Rawls in support of the radically dif-

one knew which class members would be in which cohort, and no counsel or class representative had any incentive (or ability) to direct payments to the benefit of any particular class members.

Situating the inquiry into intraclass conflicts within the proper temporal perspective has additional benefits. As a strategic matter, collateral attacks along the lines countenanced in *Stephenson* create a troubling potential for a kind of one-way ratchet. Settlements of all sorts take place in the face of uncertainty. In the Agent Orange litigation, for example, there was considerable uncertainty over the causation element as a scientific matter, among other issues.[126] Collateral attacks necessarily take place at times after the deal is done—potentially years later, after additional information may well have emerged on the points of uncertainty behind the settlement.[127] Overturning class settlements on due-process grounds whenever new information might suggest an additional source of compensation to some class members would sound an understandable note of compassion. But that compassion would operate in only one direction. In the converse scenario, where subsequent information reveals that class members' claims were meritless all along, the defendant enjoys no constitutional right to recoup the money it has put into the deal.[128] And any ill-conceived recognition of such a prospect by the law of due process stands to hurt not only defendants but also class members.

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ferent conception of adequate class representation that animates *Stephenson*. *See* Dana, *supra* note 13, at 282-83 (building an argument upon the Rawlsian notion of fairness).

[126] In the end, the collateral attack in *Stephenson* was unsuccessful quite apart from the preclusive effect of the class settlement. Judge Weinstein ultimately dismissed the case based on the government-contractor defense interposed on the merits by Dow Chemical, and the Second Circuit affirmed. *In re* "Agent Orange" Prod. Liab. Litig., 344 F. Supp. 2d 873, 874-75 (E.D.N.Y. 2004), *aff'd*, 517 F.3d 76 (2d Cir. 2008). This, too, was a point of uncertainty at the time of the class settlement. *See* SCHUCK, *supra* note 14, at 61-62 (discussing the government contractor defense raised in the Agent Orange litigation).

[127] Between the time of the Agent Orange class settlement and the *Stephenson* litigation, a major government study noted the emergence of at least some scientific evidence of a quasi-relationship between Agent Orange and the particular diseases—multiple myeloma and non-Hodgkins lymphoma—suffered by the collateral attack plaintiffs. *See* INST. OF MED., VETERANS AND AGENT ORANGE: HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM 6 (1994); Stephenson v. Dow Chem. Co., 273 F.3d 249, 255 (noting Daniel Stephenson's diagnosis with multiple myeloma and Joe Isaacson's diagnosis with non-Hodgkins lymphoma). Tort litigation on the merits would have enabled the plaintiffs to draw on this subsequent evidence.

[128] We find unconvincing an attempted defense of the reasoning in *Stephenson* in terms of the adage "better late than never." It is not as if the reasoning embraced in *Stephenson* enabled the settling defendants to recoup the $180 million already distributed to the class during the ten-year period.

Cognizant of the potential for a one-way ratchet, settling defendants would have to withhold resources from class members in any settlement negotiation as a form of self-insurance against future settlement enhancements. Evaluating intraclass conflicts from the time of the class settlement, by contrast, brings the adequacy analysis into line with the uncertainty that underlies all manner of settlement on both sides at the relevant time—namely, the time of the class judgment, not thereafter.

ii. Differences Dissipated by the Settlement

As often as not, the demand for ever-finer slicing of subclasses is an objector's ploy that offers little real advantage to class members. Additional subclassing does not, however, exhaust the universe of potential protections against uncertainty that a class action may offer to class members. More promising, particularly in the context of substantial personal injuries, is another development since *Amchem* that pushes from the opposite direction, adjusting the degree of finality that the class settlement wields by enhancing litigant autonomy in a conventional, individualistic sense.

The most ambitious class settlement to be approved in the mass tort area since *Amchem* concerned the diet drug combination "fen-phen."[129] The fen-phen litigation offers an interesting contrast between formal and functional protections of class member interests. *Amchem* prompted a formalistic attachment to subclasses and, to be sure, the fen-phen class duly included subclasses along multiple dimensions—not only the "obvious" one of present-day disease versus future disease,[130] but also further division based on categorical differences in claim strength related to the duration of fen-phen use.[131] Different lawyers were assigned responsibility for the comparative treatment of the subclasses that reflected the various harms that could

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[129] Professor Issacharoff has served as counsel to the claimant class for the past ten years. The discussion herein is taken exclusively from publicly available documents and court decisions.

[130] The Court in *Ortiz* so described the necessity of division along these lines per *Amchem*. *See* Ortiz v. Fireboard Corp., 527 U.S. 815, 854-59 (1999) ("[I]t is obvious after *Amchem* that a class divided between present and future claims . . . requires division into homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.").

[131] *See* Brown v. Am. Home Prods. Corp. (*In re* Diet Drugs Prods. Liab. Litig.), No. 99-20593, 2000 WL 1222042, at *14 (E.D. Pa. Aug. 28, 2000) (discussing research indicating significantly elevated risk of valvular heart problems for persons who used fen-phen for more than three months), *aff'd without opinion*, 275 F.3d 34 (3d Cir. 2001).

befall exposed individuals. Unaddressed by *Amchem*, however, was how such formal subclasses were supposed to work, particularly for individuals whose exposure was known but whose future prospects were necessarily uncertain. Because the future disease progression of most class members was unknown, the formal distinctions among different parts of the class drawn by way of subclassing represented abstract categories, for the most part, rather than flesh-and-blood persons. In reality, many class members were, in effect, members of several subclasses, at least potentially.

By contrast, the signature feature of the fen-phen class settlement had nothing to do with the parceling out of subclass representation. Rather, the settlement in its original form afforded additional individual protections that allowed class members to return to the tort system should the settlement fail to meet their claims. These were termed "back-end" opt-out rights—that is, opportunities for class members to sue the defendant in tort at times after the one-shot, front-end opt-out process required by Rule 23(c)(3). Class members could exercise these back-end opt-out rights in the event of specified heart abnormalities in the future and only with an accompanying price: the inability to seek punitive damages for their tort claims.[132]

The back-end opt-out rights created by the original fen-phen class settlement, like many novel experiments in the law, proved to be vulnerable in practice. Rivals to class counsel within the fen-phen plaintiffs' bar undertook a multifront strategy of back-end opt outs, presentation of dubious claims for compensation under the class settlement in large numbers, Rule 60(b) motions for reconsideration, and collateral attacks.[133] After several years, court-approved amendments to the class settlement ultimately supplemented its back-end opt-out rights with a more conventional, "once and for all" opt-out process for those still in the class who chose not to avail themselves of the original set-

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[132] *See id.* at *49 n.22. On the procedural legitimacy of this price, as distinct from others that a class settlement might set, see Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 805-22 (2002).

[133] *See In re* Diet Drugs Prods. Liab. Litig., 431 F.3d 141, 149-50 (3d Cir. 2005) (denying collateral review of adequacy of representation with respect to class members who had exercised opt-out rights); *In re* Diet Drugs Prods. Liab. Litig., 89 F. App'x 314, 318 (3d Cir. 2003) (upholding the rejection of a challenge to the adequacy of notice as to opt-out rights); Brown v. Am. Home Prods. Corp. (*In re* Diet Drugs Prods. Liab. Litig.), No. 99-20593, 2002 WL 32067308, at *5 (E.D. Pa. 2002) (discussing the flood of settlement claims). *See generally* Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 413-16 (2007) (discussing the aftermath of the fen-phen settlement).

tlement structure.[134] For now, our general observation is simply that the design of a class settlement may dissipate intraclass conflicts rather than accentuate them, as in *Amchem*. Given that such conflicts matter because of their potential to skew settlement design, it is only fitting for the court to consider that design when it is known, as it is inherently on collateral review and on direct review when it involves simultaneous class certification and class-settlement approval. Evidence of actual design, when available, properly informs the inquiry into the potential for skewed design by enabling the court to make an assessment in the nature of harmless error.

The basic idea is quite simple, even if problematic in execution. The less a class settlement purports to cover all future contingencies, the lower the risk of constraining class members improperly. This is not to say that the settlement design itself can substitute for the necessary cohesiveness of the basic class interests. The *Amchem* Court rightly rejected the notion that the existence of a proposed class settlement in itself, and irrespective of its content, may supply the grounds that legitimize class-wide treatment. In positing that settlement design may dissipate intraclass conflicts, we mean simply to connect adequate representation in that sense to the well-established notion that the process "due" as a constitutional matter is necessarily sensitive to the nature and degree of the deprivation at stake.[135] The class-settlement terms define the deprivation in a given instance and, as such, influence the process due. On this view, subclassing loses its talismanic quality in favor of a role as one of a number of structural protections for absent class members. Moreover, an inquiry framed in terms of the array of protections afforded may reveal that subclassing is only one among many mechanisms—and not necessarily the most protective means—for individual protection.

One may grasp readily enough the implications of this view in the case of back-end opt-out rights. Where the settlement design itself preserves a degree of conventional litigant autonomy in the nature of self-help, there should be less pressure on the exact terms of the class

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[134] *In re* Diet Drugs Prods. Liab. Litig., 226 F.R.D. 498 (E.D. Pa. 2005).

[135] This proposition takes its most salient form in the framework that determines the procedural protections required for deprivations of government-created property rights without close analogues in the common law. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (calling for calibration of the process due based on the "the private interest that will be affected[,] . . . the risk of an erroneous deprivation . . . and the probable value . . . of additional or substitute procedural safeguards[,] . . . [and] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

composition.[136] Individual class members, particularly if the stakes are high enough, can be expected to make independent decisions within the terms offered by the settlement. It is true, of course, that settlements that preserve a great deal of litigant autonomy may not actually yield peace. However, these matters are appropriately left first to the settlement designers and then to the court on direct review for class-settlement fairness; they are not the stuff of a possible constitutional defect in the class structure.

Creative mechanisms, such as back-end opt-out rights, signal that a welcome degree of latitude should exist for experimentation in class-settlement design. If the due process concern is understood to be primarily over the fidelity and adequacy of the representative, then a range of protections may prove superior to ad infinitum subclassing. The fen-phen litigation provides another example: conditioning the fee award for the class representation upon the performance of class counsel. Faced with considerable delays in the distribution of compensation under the class settlement due to an influx of dubious claims, the district court provided for delay in its fee award to class counsel, pending further information on the actual operation of the settlement regime over time.[137] In effect, this wait-and-see approach to fees amounts to a working translation of the prescription in CAFA for the specific context of coupon settlements in consumer class litigation—there, the setting of the fee award based on the value of the coupons actually redeemed by class members rather than the value of all coupons made available.[138] Similar concerns surrounding the ac-

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[136] As expressed by Judge Posner, "[t]he less that is at stake, . . . the less process is due." Van Harken v. City of Chicago, 103 F.3d 1346, 1353 (7th Cir. 1997). For an earlier suggestion of this point in connection with the fen-phen class settlement, see Coffee, *supra* note 4, at 432-33.

[137] *Am. Home Prods. Corp*, 2002 WL 32067308, at *25. The court only recently finalized its fee award. *See* Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.), No. 99-20593, 2008 WL 942592 (E.D. Pa. Apr. 9, 2008).

[138] *See* 28 U.S.C. § 1712(a) (Supp. V 2005) ("[A]ttorney's fee award to class counsel . . . shall be based on the value to class members of the coupons that are redeemed."). On the problems presented by coupon settlements, see Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 996-97 (2002) (arguing that, because class counsel are paid in cash, they do not have an adequate incentive to ensure that class members receive meaningful compensation rather than restrictive coupons); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, LAW & CONTEMP. PROBS., Autumn 1997, at 97, 130-31 (summarizing a theoretical and empirical analysis of coupon and other nonpecuniary settlements to identify the benefits and costs of these arguments); *Protecting Consumer Interests in Class Actions, Panel 1: The Use of "Coupon" Compensation and Other Non-Pecuniary Redress*, 18 GEO. J. LEGAL ETHICS 1161 *passim* (2005)

tual take-up rate under class settlements have arisen even in such familiar settings as securities class actions involving institutional investors.[139]

Taken together, the various means to protect the interests of absent class members allow a reviewing court to insist less fastidiously on alignment of interests among the class members.[140] Here again, the fact of settlement irrespective of its content is not what legitimizes the structure of the class. Rather, the particular content of the settlement chosen, when it is known, properly informs the inquiry into whether an asserted difference within the class should matter for structural purposes or whether the absence of subclassing to account for that difference amounts to harmless error.

2. Class Counsel Conflicts

In many class actions, there is little realistic prospect of individual class members playing an active role, either in monitoring class counsel or pursuing their own interests independently. In most consumer cases and other negative-value class actions, the individual class members do not have the significant economic stake that might allow subsequent recourse in the civil justice system—as was true for back-end opt-outs in the fen-phen context. More often than not, the only real protection for absent class members takes the form of the incentives operating on class counsel. Here, too, both *Ortiz* and *Amchem* shed light.

Apart from the divergent interests within the two classes of asbestos-exposed persons, the lawyers that purported to represent them in each instance labored under the same type of conflict vis-à-vis the

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(discussing at a Federal Trade Commission Workshop whether coupon settlements provide adequate relief to consumers).

[139] *See* James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411, 424 (2005) (investigating the frequency with which financial institutions submit claims in settled securities class actions and finding that less than thirty percent of institutional investors perfect their claims).

[140] This, too, has a due process pedigree in keeping with the operation of many class settlements as privatized administrative compensation regimes. The process that constrains rulemaking by public administrative agencies consists not of the kind of individual autonomy for affected persons found in conventional civil litigation, but rather, primarily of measures that hew the administrators' interests in retaining their governing powers to the welfare of those affected by their actions. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding, as to agency rulemaking, that affected individuals have no due process right to an individualized hearing because they may hold decision makers accountable through the political process).

class. In each case, class counsel consisted of asbestos plaintiffs' lawyers who had large "inventories" of clients with conventional suits already on file in the tort system.[141] The class definitions in both *Ortiz* and *Amchem* excluded these inventory cases, encompassing only asbestos-exposed persons who had not already sued the relevant defendants in tort.[142] The class settlements nonetheless occurred contemporaneously with a series of aggregate settlements for inventory cases in the tort system[143]—not only those in the inventories of class counsel but also those represented by other asbestos plaintiffs' lawyers.[144] The terms of these aggregate settlements differed from those in the class settlement, however, providing cash compensation for unimpaired persons, albeit without the insurance-like promise that class members would have garnered against the risk that they might become impaired in the future.[145]

All told, the situation presented significant potential for class counsel to skew the design of the class-settlement terms for reasons unrelated to considered evaluation of the relevant claims—in essence, to compromise the interests of future claimants in exchange for advantageous aggregate settlements for the group of asbestos claimants with cases pending.[146] In one sense, this is entirely proper, for class counsel had direct attorney-client relations with those claimants in their own inventories and owed them a duty of zealous representation.

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[141] Ortiz v. Fibreboard Corp., 527 U.S. 815, 824 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 601 (1997).

[142] *Ortiz*, 527 U.S. at 819; *Amchem*, 521 U.S. at 601.

[143] These aggregate settlements consisted of settlements for nominally separate tort cases brought on behalf of individual plaintiffs, albeit represented by the same law firm within the asbestos plaintiffs' bar. On the variety of ways in which aggregate settlements might be structured, see Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005).

[144] *See, e.g.*, Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 294-96 (E.D. Pa. 1994) (providing a list of the settlements of inventory claims).

[145] *See, e.g., id.* at 292 (noting that inventory cases were settled in exchange for full releases by plaintiffs, whereas class members without present-day disease could seek compensation under the class settlement in the event of disease manifestation in the future).

[146] *See Ortiz*, 527 U.S. at 852:

> In this case . . . any assumption that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims . . . . Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class.

But the reality of asbestos litigation created a tremendous dilemma for designing any kind of binding work-out of the defendants' asbestos liabilities.

No group of lawyers could plausibly claim to negotiate a prospective settlement of asbestos claims without deep immersion in the real world of asbestos litigation. But any such experienced asbestos plaintiffs' lawyer would, of necessity, have had large numbers of inventory cases.[147] Indeed, no lawyer without significant immersion in asbestos litigation could credibly be thought to have the stature to negotiate such a complex deal. But this observation only serves to underscore the structural nature of the deficiency in the class representation. That class counsel owed a specific duty to represent zealously their own present claimants is what raised the potential for arbitrage detrimental to the class. A differently structured class—one, as in the fen-phen litigation, that encompassed all pending cases[148]—would have eliminated the conflict posed by class counsel's inventories by eliminating the potential for disparate treatment of the class on grounds unrelated to claim merit, even if that particular mechanism might prove unavailing given the long latency period of asbestos exposure. In short, the class counsel conflicts in *Amchem* and *Ortiz* amounted to disabling conflicts because of the structure of the classes involved.

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[147] As Justice Breyer noted in dissent:

> Of course, class counsel consisted of individual attorneys who represented other asbestos claimants, including many other Fibreboard claimants outside the certified class. Since Fibreboard had been settling cases . . . for several years, any attorney who had been involved in previous litigation against Fibreboard was likely to suffer from a similar 'conflict.' So whom should the District Court have appointed to negotiate a settlement that had to be reached soon, if ever? Should it have appointed attorneys unfamiliar with Fibreboard and the history of its asbestos litigation? Where was the District Court to find those competent, knowledgeable, conflict-free attorneys? The District Court said they did not exist.

Id. at 878.

[148] *See* Brown v. Am. Home Prods. Corp. (*In re* Diet Drugs Prods. Liab. Litig.), No. 99-20593, 2000 WL 1222042, at *19 (E.D. Pa. Aug. 28, 2000) (noting that the fen-phen class complaint "was filed as a vehicle for combining the claims of class members asserted in pending federal and state diet drug litigation throughout the country into a single complaint to facilitate class action treatment of those claims for settlement purposes"), *aff'd without opinion*, 275 F.3d 34 (3d Cir. 2001).

B. *Performance Defects*

People make mistakes in litigation, as in life. No clearly defined metric states the value of a given claim or the potential reservation price of one's adversary in settlement negotiations. Uncertainty abounds in the environment of imperfect information that almost invariably surrounds litigation. So, what happens when a class settlement appears to be a bad deal? It is one thing to say that parties in customary one-to-one litigation may have settled unwisely. But class settlements necessarily complicate this picture because of the noncontractual agency relationship between class counsel and the absent class members. It is one thing to make a bad deal for yourself; it is quite another to be bound to the terms of such a deal accepted on your behalf by another.

Some account must therefore be made for class settlements that simply do not provide an adequate return to class members. With characteristic economic flair, Judge Richard Posner famously describes judicial review of class-settlement fairness in *Reynolds v. Beneficial National Bank* as an effort "to quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate."[149] The phrasing is both revealing and problematic. The insufficiency of class recovery is quickly equated to the critical concern for adequate representation under the Constitution and Rule 23. Assent by class counsel to an unfair deal in the *Reynolds* sense amounts to a lack of "adequate" class representation in the most commonplace terms. As the preceding section has noted, structural conflicts of interest matter because of their potential to lead to unfair settlements. A bad deal, however, also might arise quite apart from improper class composition or conflicted lawyers. Unfair settlements are a well-nigh inherent risk of class action litigation, precisely because of its representative nature.[150]

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[149] 288 F.3d 277, 284-85 (7th Cir. 2002); *see also id.* at 285 ("Determining [the net expected value of continued litigation to the class] would require estimating the range of possible outcomes and ascribing a probability to each point on the range.").

[150] We consciously bracket the question raised by some commentators as to whether a method for fee calculation other than those long established might make the risk of an inadequate class settlement something less than an inherent feature of class litigation. *See generally* Hay & Rosenberg, *supra* note 4 (focusing on the post-*Amchem* context).

Our discussion here draws on the now extensive economic literature on the class action device.[151] One widely shared insight in the literature is that even fee-calculation methods that reward class counsel for additional increments of settlement value obtained for the class—as does the dominant method, which casts the fee award in terms of a percentage of the common fund recovered for the class[152]—still do not perfectly align the incentives of class counsel with those of class members.[153] The richness of detail in the literature on this subject need not detain us here, for the gist of the point is easily stated: even unconflicted class counsel for a properly composed class might shirk their responsibilities.

In colloquial terms, counsel simply might not work hard enough to maximize the value of the settlement given that, among other things, class counsel would bear all of the marginal cost associated with such effort but capture only part of the marginal benefit in the form of a larger fee award.[154] The defendant in a reverse-auction scenario plays on this residual risk of shirking by parking a desired class settlement with class counsel most inclined to shirk in exchange for at least some measure of a fee award. But for all the richness found in discussions of the agency problem in class representation, the fact remains that agency problems abound in all legal representation. A lawyer paid on a contingency-fee basis might shirk even if she has only

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[151] For an overview of the literature, see Charles Silver, *Class Actions—Representative Proceedings*, *in* 5 ENCYCLOPEDIA OF LAW AND ECON. 194 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

[152] The lodestar method, by contrast, calculates the fee award by multiplying the hours reasonably devoted to the litigation by class counsel by a reasonable hourly rate. Empirical research nonetheless documents that, as applied by judges, fee awards under the percentage-of-recovery and lodestar methods correlate remarkably closely with one another. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 47-72 (2004) (presenting data on client recovery and fee awards).

[153] This shows, within the class action setting, the general point in the economic literature that no principal-agent relationship ever aligns the interests perfectly. Some do better; some do worse. Although contingency-fee arrangements in ordinary litigation better incentivize counsel to maximize the recovery and to do so swiftly, they do not align perfectly the interests of lawyer and client. *See, e.g.*, Hugh Gravelle & Michael Waterson, *No Win, No Fee: Some Economics of Contingent Legal Fees*, 103 ECON. J. 1205 (1993) (identifying potential conflicts of interest between the client and lawyer).

[154] *See generally* Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 72-78 (2004) (listing several models which denote the agency problems in class representation); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2074-79 (1995) (noting the potential for plaintiffs' attorneys' opportunistic behavior).

one client. Alternatively, a lawyer for many claimants may be tempted to gamble on long-shot recoveries across a portfolio of cases—say, with regard to the possibility of punitive damages at trial—even if the recoveries of many individuals would predictably be compromised. Similarly, lawyers paid on an hourly basis may chase remote litigation options at the client's expense.

Simply stated, agency relationships are rife with difficulties, and even well-structured classes may yield an unfair deal. Sweeping all agency difficulties under the rubric of adequate representation obscures critical differences between structural conflicts and mediocre results. As Part III will elaborate, the two different meanings of adequate representation matter, for only the first bespeaks a proceeding illegitimate from its inception and, as such, relatively more suited for collateral review. There is an intuitive difference, in short, between the existence of legitimate authority to act upon class members on an aggregate basis and the proper exercise of that authority in the settlement at hand.

The Second Circuit's reasoning in *Stephenson* illustrates the ease with which a court might mistake an alleged performance defect for a structural defect.[155] *Stephenson* compounds this error through a confused analysis of the returns to different class members.[156] Nonetheless, lower court decisions since *Amchem* aside, the confusion between structural defects and performance defects runs even deeper in the law. As we now discuss, the Supreme Court itself has contributed substantially to the confusion in its treatment of personal jurisdiction in the class action context.

C. *The Jurisdictional Confusion*

As discussed earlier, one of the distinguishing features of the modern class action is the likely geographic dispersal of class members who find themselves similarly situated with respect to the defendant's market-wide conduct. As a result, much class action litigation today involves class members who might well lack the kinds of "minimum contacts" with the forum that would assert personal jurisdiction over them in the aggregate. It certainly would be difficult for all class members in such a situation to be bound by the same judgment if they

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[155] Stephenson v. Dow Chem. Co., 273 F.3d 249, 257-61 (2d Cir. 2001) (reviewing both collateral attack and due process considerations).

[156] *Id.* at 255, 259-61.

had to operate under the familiar due process principles for personal jurisdiction applicable to defendants.[157] The kinds of classes subject to CAFA tend strongly toward this description.

Speaking to personal jurisdiction in the class setting in its 1985 decision in *Shutts*, the Supreme Court distinguished categorically between absent class members and defendants.[158] Unlike a defendant, an absent class member "is not required to do anything," but rather, "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[159] We shall return later to whether this image of the supine absent class member who need not "fend for himself"[160] continues to hold true categorically.[161] For now, it is enough to recognize, along with the *Shutts* Court, that the haling of absent class members into a remote forum presents categorically less of an intrusion on their liberty than the corresponding compelled presence of a defendant.[162]

In place of the usual test for personal jurisdiction, the Court in *Shutts* substituted a checklist of what commentators label as "exit," "voice," and "loyalty" rights:[163] respectively, the opportunity to opt out of the class, notice of the opportunity "to be heard and to participate in the litigation," and—our focus here—a due process requirement "that the named plaintiff at all times adequately represent the interests of the absent class members."[164] For this last component, the Court cited its earlier decision in *Hansberry*,[165] a precedent to which we shall return shortly.

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[157] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (setting forth the familiar "minimum contacts" requirement for personal jurisdiction over defendants).

[158] 472 U.S. 797 (1985) (citing Hansberry v. Lee, 311 U.S. 32 (1940)).

[159] *Id.* at 810.

[160] *Id.* at 809.

[161] *See infra* Part III.A (discussing the holding in Devlin v. Scardelletti, 536 U.S. 1 (2002), that absent class members may not take a direct appeal from the approval of a class settlement absent objection in the district court fairness hearing).

[162] *See* 472 U.S. at 809 (noting, for example, that there is no threat of a default judgment if a plaintiff fails to appear).

[163] *See, e.g.*, Issacharoff, *supra* note 4, at 341-42; Coffee, *supra* note 4, at 376.

[164] 472 U.S. at 812. We bracket the lingering debate over the capacity of a mandatory class action to encompass in any fashion claims for damage relief in light of the right to opt out prescribed in *Shutts*. *See* Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992) (withholding preclusive effect from the mandatory class settlement, at least as to damage claims raised via collateral attack); *In re* Real Estate Title & Settlement Serv. Antitrust Litig., 869 F.2d 760, 768 (3d Cir. 1989) (withholding, in an earlier decision in the *Brown* litigation, injunctive power from the rendering federal court for the mandatory class vis-à-vis state court collateral attack).

[165] 472 U.S. at 812.

No sooner than personal jurisdiction was added to the due process baggage of class actions, however, did it become yet another source of contention over the proper scope for collateral attacks. On one account, jurisdictional defects comprise the paradigmatic basis for collateral review of civil judgments generally and, as such, would seem to provide fertile ground for claims of a right to de novo collateral review of the adequate-representation question in a class action. The syllogism seems inescapable: if adequate representation is to be included as an aspect of jurisdiction, and if jurisdiction is a basis for de novo collateral review, it would follow that adequate representation must be so reviewed.[166] Our suggestion here is that preclusion principles drawn from the world of conventional civil litigation cannot, by themselves, generate a coherent theory of class-settlement review. On that score, the labeling of adequate representation "at all times" as an aspect of jurisdiction in *Shutts* confuses as much as it illuminates.[167]

The simple fact is that national markets transcend the territorial boundaries of particular states. As a result, national markets give rise to both legal claims and demands for closure that are national in scope. Where jurisdiction realistically cannot turn on some vestigial notion of territoriality, the basis for the rendering court's assertion of authority over absent class members must proceed on some other basis—in *Shutts*, implied consent to a process that combines rights in the vein of self-help (exit and voice rights) with a right to oversight by fiduciaries (loyalty rights, whereby "the court and named plaintiffs protect [absent class members'] interests"[168]). One or another aspect of this fiduciary oversight undoubtedly exists "at all times" in class proceedings.

The leap from fiduciary oversight as an aspect of personal jurisdiction to the broadest parameters for collateral attacks, however, is considerable. Here, the reference to adequate representation "at all times" as a component of personal jurisdiction is a source of understandable confusion. Jurisdictional defects are the paradigmatic grounds for collateral review in ordinary litigation, because such de-

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[166] *See, e.g.*, Woolley, *supra* note 13, at 388 ("The argument for limiting collateral attack contradicts two fundamental principles: first, a court has no jurisdiction over absent class members who have not been adequately represented; second, a judgment entered without jurisdiction may be collaterally attacked if the party bound by the judgment did not appear and had no obligation to do so.").

[167] 472 U.S. at 812.

[168] *Id.* at 809.

fects speak to the authority of the rendering court to act at all.[169] A due process command for adequate representation "at all times" is susceptible to overextension, however, if read to admit no difference between structural defects and performance defects in class representation. Both, to be sure, can be a concern at some point within the class proceeding.[170] Yet, only structural defects go to the authority to aggregate, as distinct from the manner of its exercise.

Elevated attention to personal jurisdiction in the class action context also would present a paradoxical departure from the normal setting of litigation. In a conventional lawsuit, the absence of personal jurisdiction is a disfavored defense. It must be raised affirmatively in the answer to the complaint (or by a Rule 12 motion) or be forever waived. The procedural rules are notoriously reluctant to allow claimed defects in personal jurisdiction to be hidden from view, only to surface when litigation has run much of its course. A defect in personal jurisdiction is not like some crucial fact in an M. Night Shyamalan film: something to be revealed to the viewer only in the final scene. Yet if performance defects really could form the basis for a jurisdictional deficiency, they would undo class actions in the fashion of the now-famous ending of *The Sixth Sense*: they would reveal at the last moment that the class action, like Bruce Willis's character, actually has been dead all along. Everywhere else in procedural law, jurisdiction is the paradigmatic subject of first-order inquiry that courts are obliged to address at the outset of a lawsuit. The inclusion of "adequate representation" in the *Shutts* due process checklist accordingly should be read in a similar light—as speaking to structural defects in class representation, and not to performance defects. In the ordinary sequence, after all, performance defects become apparent only at the end of the class litigation, not at its inception in the manner of the inquiry into personal jurisdiction for ordinary actions.

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[169] *See generally* Woolley, *supra* note 13, at 392 n.24 (citing Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 970 (1999) (distinguishing between direct and indirect jurisdiction related to judgment enforceability); FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 2.3, at 53 (4th ed. 1992) ("The exercise of judicial jurisdiction implies the authority to enter legally binding judgments and to use the coercive powers of executive agencies (for example, the sheriff) to compel compliance with those judgments.").

[170] *See, e.g.*, Monaghan, *supra* note 13, at 1173 ("F1's in personam jurisdiction . . . is not permanently established by a class member's failure to opt out. That jurisdiction is conditioned upon adequate representation 'at all times,' such that jurisdiction is lost when representation is inadequate. . . . It is not finally established until the F1 proceedings have been concluded in accordance with due process.").

Moreover, simply as a matter of precedent, neither *Shutts* nor *Hansberry* warrants the equating of structural and performance defects. *Shutts* did not present either form of defect vis-à-vis absent class members. From the perspective of class members, both the structure of their litigation unit (a collection of small-stakes claims unmarketable on an individual basis[171]) and the performance of class counsel (winning a multimillion dollar damages award against the defendant under Kansas substantive law) were quite advantageous. If anything, the potential due process difficulty in *Shutts* lay in subjecting the defendant to the class-wide damage award under Kansas law.[172] *Shutts*, in other words, presented a situation apt to become vanishingly rare in the post-CAFA world: an effort to turn something like the anomalous state court—at least, a court willing to project the law of its home turf across the nation—to the plaintiff class's advantage against the defendant's resistance.[173]

Viewed in this light, the *Shutts* Court's reliance on *Hansberry* underscores the critical concern that there must be some threshold alignment of interest to constitute a class. This alignment of interest becomes a requirement of constitutional dimensions, such that stark, 180-degree misalignments—there, the intraclass conflict between those property owners subject to the racially restrictive covenant in-

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[171] The *Shutts* Court noted that the individual damage claims of class members amounted to only one hundred dollars on average. 472 U.S. at 801; *cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

[172] At the time, the rendering Kansas court had not undertaken a "thoroughgoing treatment" of the choice of law question, even though nearly all of the underlying contractual agreements and the absent class members otherwise had no connection to the state. 472 U.S. at 814-15, 818. On remand, the Kansas court persisted in applying Kansas law, but this time, based on a choice of law analysis that, in the court's view, deemed any nominal differences in substantive law as between Kansas and other contending states to present a false conflict. *See* Shutts v. Phillips Petroleum Co., 732 P.2d 1286, 1312-13 (Kan. 1987). The U.S. Supreme Court ultimately upheld this determination as a matter of the full faith and credit owed by Kansas to the laws of the other contending states. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 730-31 (1988) (holding that it is "not enough" for a state to "misconstrue the law of another State" in the course of finding a false conflict and that a constitutional violation occurs only when such a construction "contradict[s]" the law of the other state "that is clearly established and that has been brought to the court's attention").

[173] *See* Stephen C. Yeazell, *Overhearing Part of a Conversation:* Shutts *as a Moment in a Long Dialogue*, 74 UMKC L. REV. 779, 781 (2006) (suggesting that the Kansas forum was chosen, in all likelihood, to position class counsel to pursue application of what was thought to be the atypically pro-plaintiff law of Kansas concerning natural gas leases).

terested in enforcing it and those interested in resisting it[174]—plainly do not afford due process. The misalignment in *Hansberry*, in other words, was of the structural kind.

Hansberry was a collateral attack of sorts, in the sense that the procedural dispute in the case centered on the preclusive effect, if any, of an earlier judgment in an Illinois equitable forerunner of the modern class action. But *Hansberry* actually has little bearing on the contemporary debates over collateral challenges. To begin with, *Hansberry* was a locally confined dispute, such that the search for a welcoming second court was not present. Second, *Hansberry* did not occasion judicial examination of the relationship between what we now know as direct and collateral review. At the time, Illinois practices in equity provided for judicial oversight as to the class treatment of the underlying claims only after the entry of a judgment in the aggregate, not before.

In something of a shock to the modern eye, Illinois procedure at the time "required no further action beyond pleading a claim as a class action in order for the case to be treated as a class action."[175] What we know today as the class-certification determination "was unheard of," for "Illinois courts did not make the determination that a case was in fact a class action until a second lawsuit was filed, when a party to that case argued that an opposing party was bound by the judgment in the prior case."[176] A cohesive theory of class-settlement review is unnecessary when there are not multiple facets to coordinate but, instead, just a single, after-the-fact inquiry that necessarily takes place de novo and in a collateral posture—perhaps, in a court other than the one that rendered the disputed judgment, or at least in a set of claims distinct from the original action.[177]

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[174] *See* Hansberry v. Lee, 311 U.S. 32, 44 (1940) ("[I]t is evident that those signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation.").

[175] Jay Tidmarsh, *The Story of* Hansberry*: The Foundation for Modern Class Actions*, *in* CIVIL PROCEDURE STORIES 217, 253 (Kevin M. Clermont ed., 2004); *see also* Kahan & Silberman, Matsushita *and Beyond*, *supra* note 13, at 266 (commenting on the lack of formal procedures for class certification under Illinois equity practice at the time).

[176] Tidmarsh, *supra* note 175, at 253.

[177] We accordingly find overstated arguments that invoke *Hansberry* as well-nigh controlling precedent in the modern debates over collateral attacks. *See, e.g.*, Woolley, *supra* note 13, at 384 ("May an absent class member who has been inadequately represented attack the class judgment in subsequent litigation? The traditional answer,

The treatment of *Hansberry* provides a convenient transition to the second point of confusion raised by the reference in *Shutts* to adequate representation "at all times." Both *Hansberry* and *Shutts* speak to the "what" of class-settlement review, reminding us of the due process underpinnings of adequate representation. But neither frames, much less answers, the question addressed in the next Part: how the law should conceive of the relationship between direct and collateral review, with attention to the multiple meanings of adequate representation and the problem of the anomalous court. The notion of adequate representation "at all times" does not prescribe what form the judicial inquiry into that subject might take at different times relative to the entry of the class judgment. We now take up that enterprise.

III. THE FORMS OF REVIEW

This Part investigates the possible forms for a class-settlement challenge. Much attention has focused on the forum in which a challenge might be lodged and on the various kinds of failures that one might attribute to the class representation. By contrast, the narrower procedural question regarding the form of the challenge has tended to be overlooked.

The central question here is not so much whether a class action settlement may be challenged but what the form of the challenge should be. Stated most simply, some avenue for challenge is always available. No claimant may be bound to a class settlement in which she has an individual stake without notice and the opportunity to opt out. The latter alone is a form of challenge. So, too, is the right of appeal, especially since the Supreme Court in *Devlin v. Scardelletti*[178] afforded appellate standing to anyone who is to be bound by the class settlement and who has objected at the trial-court level, regardless of any formal intervention. Further, challenges brought on the basis of information unearthed postjudgment, such as collusion between plaintiffs' counsel and the settling defendant, appropriately trigger the framework for relief from final judgments under Federal Rule of Civil Procedure 60(b) for all civil actions. *Some* avenue for challenge, in short, is *always* available.

The prospect of a true collateral attack—which we define as the seeking of relief from a judgment in a forum unrelated to the court of

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enunciated by the Supreme Court in *Hansberry v. Lee*, has been a clear 'yes.'" (internal footnotes omitted)).

[178] 536 U.S. 1 (2002).

first instance—arises only when there is some threshold justification put forward that would explain why the customary forms of review cannot or should not suffice. In our view, therefore, the question of what to do with collateral attacks properly begins with the scope of direct review and an examination of the situations that warrant departure from that standard form of review.

A. *Direct Review by a Fiduciary Court*

1. Fiduciaries and the Right of Appeal

In recent decades, much has changed in our conception of the judge's role in complex litigation. Abram Chayes identified the beginnings of this shift in "public law litigation" during the 1970s, as civil rights and institutional reform lawsuits led judges to assume an ongoing, quasi-administrative role rather than the usual posture of "neutral umpires" in a dispute between adversaries.[179] With appropriate nods to Chayes, subsequent commentators went on to highlight a similar shift in the role of courts in class actions generally, even in private-law areas such as torts.[180] While the court does not fully occupy the inquisitorial role of civil law tradition, it comes close. As Judith Resnik has noted,[181] the court constructs the critical party (the certification decision), creates a noncontractual representational relationship (the appointment of class counsel), and confers a state-subsidized monopoly (the ability to bind class members in the absence of affirmative choice on their part).

The change in the judicial function has brought with it a change in the normative conception of the judge. In one prominent articulation, Judge Posner in *Reynolds* speaks of the court on direct review as "a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries."[182] This conception flows not

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[179] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1286 (1976).

[180] *See, e.g.*, Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 668-82 (1988); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 35-36 (2003).

[181] Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2127-29 (2000).

[182] Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 280 (7th Cir. 2002); *see also In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 805 (3d Cir. 1995) (Becker, J.) (noting the "fiduciary responsibility" of the court in class-settlement review).

from the kind of principal-agent relationship that usually underlies the imposition of fiduciary duties but, rather, from the court's role as the governmental institution with make-or-break power over the class action enterprise. At its most basic, a class-settlement deal may not be consummated without the imprimatur of a court.[183]

Precisely because of the heightened solicitude owed to them, class members should have the ability and should be incentivized to seek review before the court of first instance. Two implications flow from the special role of the court of first instance here. First, the fiduciary conception implies that the court's vigilance may extend to matters beyond those raised by any particular litigant, especially with respect to the adequacy of representation. This is in keeping with what fiduciaries are supposed to do: look out for the interests of persons in a vulnerable position, even when no one else tells the fiduciary to do so. As we shall explain shortly, recognition of this implication informs the debate over collateral attacks in a way that casts conventional issue-preclusion principles in a new light.

Second, as evidenced by *Devlin*, the broad impact of class certification by the court of first instance requires a similarly expansive right of direct appeal.[184] The usual stricture of appellate procedure holds that only a "party" may appeal an adverse judgment.[185] In the class action setting, however, the Court found the "party" label to be considerably less than self-defining[186]—understandably so, given the conceptual development of "party" status with reference to conventional, non-aggregate litigation. *Devlin* recognized that, as a functional matter, absent class members stand to be bound by the class settlement and therefore must be "allowed to appeal the approval of a settlement when they have objected at the fairness hearing."[187] The garnering of formal "party" status by way of intervention under Rule 24 is not necessary.[188]

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[183] *See* Brummer, *supra* note 34, at 1064 ("Judges are not agents of plaintiffs, traditionally conceived. There is neither a contract nor a pledge of loyalty to plaintiffs; if anything, they act on behalf of the state and larger civil society.").

[184] Devlin v. Scardelletti, 536 U.S. 1, 10 (2002).

[185] *Id.* at 7 (noting the general principle that "'only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment'" (quoting Marino v. Ortiz, 484 U.S. 301, 304 (1988))).

[186] *See id.* at 10 ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.").

[187] *Id.*

[188] *See id.* at 14 (rejecting the argument that "the structure of the rules of class action procedure requires intervention for the purposes of appeal"). An objector none-

The answer given to the seemingly technical question of appellate procedure in *Devlin* sheds light on the more difficult questions surrounding collateral attacks. Someone who is sub judice and has objected at the class-settlement approval stage has a right to appeal. But, in so holding, *Devlin* qualifies substantially the notion that class members may simply "sit back" and remain unaffected by the outcome, as a casual reading of *Shutts* might suggest. Put differently, *Devlin* conditions the opportunity for direct appeal on objection—if not intervention—in the trial court. As we shall elaborate momentarily, this now-established proposition in the post-*Devlin* world has unrecognized implications for the scope of collateral review with respect to class-settlement fairness questions—what we have deemed to be alleged performance defects in the class representation.

2. Limitations

The fiduciary capabilities of any court are limited. Even a court dedicated to "the highest degree of vigilance"[189] in its fiduciary role stands at a considerable informational disadvantage vis-à-vis class-settlement proponents, who are no longer adversaries but, now, willing buyers and sellers of the preclusion that would flow from a court-issued judgment.

The class action literature contains a variety of proposals that seek to lessen these deficits. In an insightful article, William Rubenstein categorizes these proposals in terms of "adversarial" and "regulatory" approaches.[190] As the label suggests, adversarial approaches seek to inject some measure of dispute into the direct review process when the settling lawyers are no longer in such a posture—for example, through the creation of financial incentives for objection or the appointment of a "devil's advocate" to critique the proposed deal.[191]

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theless might find it strategically advantageous to seek intervenor status from the court, as that would make the objector a "party" in the ordinary sense and thereby position her to seek limited discovery regarding the proposed deal. *See* FED. R. CIV. P. 24 (describing standards for intervention); FED. R. CIV. P. 26 (confining discovery to those with "party" status).

[189] Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279 (7th Cir. 2002).

[190] William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1452-67 (2006) (describing four approaches: devil's advocate, bonds, labels, and marks).

[191] Financial incentives might range from, say, a bond posted by the settling parties from which the court might make a fee award to objectors who improve the deal, see *id.* at 1456-59, to outright replacement of incumbent class counsel by objectors who succeed in showing that the proposed deal is unfair, see Geoffrey P. Miller, *Competing*

Regulatory approaches seek to provide the court with assessments from disinterested evaluators with expertise in the relevant settlement subject area.[192]

Such efforts to improve the ability of courts on direct review to act meaningfully as fiduciaries for the class are a useful starting point. Still, both adversarial and regulatory approaches assume the benefits of oversight outside of the judicial process for bad deals, and both are vulnerable to the suggestion that collateral attacks might alter the incentives of the deal-making lawyers themselves by threatening the commodity—preclusion—that they aspire to buy and sell with the court's blessing.[193] Cast in their best light, collateral attacks might function as a kind of implicit penalty for efforts on the part of the deal-making lawyers to "put one over on the court, in a staged performance."[194]

When presented with the benefits of settlement by friends of the deal, courts are necessarily at a disadvantage, because they lack the sort of information that would develop through true adversarial presentation. And even apart from informational deficiencies and adversarial presentation, there is always the risk that the reviewing court will simply fail in the exercise of its supposed fiduciary role. Once again, the single positive threatens to trump all the negatives. If the risk is that the initial court might be captured, then the Panglossian account would have it that collateral attacks offer the prospect of a second check on judicial malfeasance. Unfortunately, such review also permits the anomalous court to reenter the picture as the forum for collateral attacks on duly certified and approved class settlements.

Bids in Class Action Settlements, 31 HOFSTRA L. REV. 633, 633 (2003); Nagareda, *supra* note 13, at 365. On the idea of a devil's advocate, see Rubenstein, *supra* note 190, at 1453-56.

[192] *See* Rubenstein, *supra* note 190, at 1460-67 (creating a system of "labels" similar to nutritional labels to evaluate class action settlements).

[193] Rubenstein himself notes this additional approach in his separate article on collateral attacks. *See* Rubenstein, *supra* note 13, at 840 ("Conceivably, the ready availability of collateral review could act like a sword of Damocles hanging over the initial proceedings, forcing the participants in those proceedings to act in accord with the requirements of adequate representation.").

[194] Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc).

B. *Alternatives to Collateral Attack*

Rival images emerge from the case law on challenges to class action settlements. From one perspective, courts are inherently vulnerable to fraud or collusion in approving a class settlement because of the lack of true adversarialism in a judicial proceeding populated only by friends of the deal. From another view, collateral attack serves as a convenient stalking horse in a kind of multifront, guerilla warfare against the deal[195]—one in which the object of the collateral challenge conceivably might be favorable disposition of claims not even encompassed by the terms of the challenged settlement. Before turning to collateral attacks as an adjunct to direct review, however, we note the possibility of two other kinds of challenges to class settlements and their limitations.

1. Rule 60(b)

Even in conventional individual litigation, it is not as if civil procedure lacks a way to address such things as newly discovered evidence or fraud by one's party opponent as grounds to reopen a judgment. Rule 60(b) of the Federal Rules, for example, defines the grounds for relief from civil judgments to include such matters. This built-in safety valve serves to protect against collusion, newly discovered evidence (particularly if previously suppressed), or simple injustice in the continued application of a civil judgment.

For a challenge to the performance side of a class settlement—that is, a claim that the deal obtained simply was not very good—there is no reason that settlement should not be channeled through the same prospective procedures as are available for other decrees or judgments. Mediocre dispute resolutions are a fact of life and, absent fraud or collusion, do not cry out for distinct treatment. But Rule 60(b) contains two limitations: it directs any such motion for relief to the rendering court[196] and limits motions on the grounds most pertinent to class settlements to a period of one year after entry of the judgment.[197] In steering motions for relief from judgment to the rendering court, Rule 60(b) is keeping with the effective channeling of

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[195] *See In re* Diet Drugs Prods. Liab. Litig., 369 F.3d 293, 304 (3d Cir. 2004) (discussing an injunction issued to "protect the settlement against guerilla warfare" from dissenting lawyers).

[196] *See* FED. R. CIV. P. 60(b).

[197] *Id.*

other disputes concerning the preclusive effect of a federal court class settlement to the rendering federal court by way of the Anti-Injunction Act.[198] This then eliminates the prospect of a search for the anomalous court to undermine a federal class settlement—a notion consistent with the general Rule 60(b) framework.

2. Malpractice

The literature rightly has identified malpractice actions by absent class members directly against class counsel as an alternative to collateral attacks.[199] But the same literature also notes the relative dearth of information with which to evaluate the incidence of conduct that would rise to the level of malpractice in legal representation undertaken in the class action setting.[200] We do not enter this debate over the appropriate bounds for the professional responsibility of lawyers but, instead, simply note the essential premise of such actions, in contrast to collateral attacks. Actions for malpractice and the like (seeking damages or, perhaps, disgorgement by class counsel of their gains from the representation) proceed on the premise that the class settlement is indeed binding. The requested remedy would redress in some fashion the alleged wrong of that binding effect.[201] But malpractice on class counsel's part relieves neither class members nor defendants from the judgment outside of the parameters stated in Rule 60(b). And, though malpractice litigation might proceed in the anomalous court, the nature of such litigation does not position that court to overturn the binding effect of the rendering court's judgment.

C. *Proper Preclusion in Collateral Attacks*

We now arrive at the subject of collateral attacks themselves. The term "collateral attack" is used here in a narrow sense—to refer to the ability to seek review outside the processes of direct appeal and Rule

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[198] *See supra* text accompanying notes 70-72.

[199] *See* Koniak & Cohen, *supra* note 32, at 1069-80 (discussing prospects for malpractice actions in the class settlement context).

[200] *Id.* at 1084.

[201] *See* Kamilewicz v. Bank of Boston, 100 F.3d 1348, 1351 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (noting that class members' malpractice claim against class counsel "takes the [class] judgment as a given—indeed, it is only so long as the judgment stands that the litigant has a compensable loss").

60(b) review, including in a new forum.[202] The simplest part of the argument is that such challenges must be limited to structural problems that target either the power of the rendering court to act or the integrity of the judicial process for objection before that court. Under our approach, therefore, it is proper to calibrate collateral attacks based on the nature of the representational defect that they raise. There is a difference between challenges directed at the authority to aggregate at all and challenges to the outcome of the deal in a properly aggregated case—what we have termed "performance defects."

Our analysis also points toward a distinction based on the nature of the court that entered the class judgment. Our intuition is that the law can sensibly mediate the competing risks of captured rendering courts and anomalous courts for collateral attack by reference to the jurisdictional authority of the court of first instance. Here, the combined effects of CAFA, federal MDL procedure, and the existing framework of the Anti-Injunction Act point the way.

Where the class action is in a particular federal forum as a result of congressional determination that (1) the case is one of national-market significance, and (2) a single forum needs to be created, then collateral attacks should be directed to the rendering federal court. Where the class action is in state court, either because the underlying dispute is localized or because the settling parties have sought to avoid the federal forum made available by Congress, then challenges to the class representation should be contestable in a subsequent forum.

The preceding distinction between structural and performance defects in the class representation continues to apply wherever the class representation is brought. The practical point is this: collateral attacks on state court class judgments may proceed in another court system where jurisdiction can be found. However, collateral attacks on federal court class settlements are channeled by the Anti-Injunction Act—properly so, in our view—back to the rendering federal court, which then stands to rule upon the propriety of its own earlier rendering process for the class-wide judgment. This approach ac-

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[202] A collateral attack immediately prompts the defense that claim preclusion from the class judgment extinguished all claims arising from the disputed "transaction." RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1980) (noting that a "valid and final judgment" extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of transactions, out of which the action arose"). On the prospects for rendering courts to limit the preclusive effect of their own judgments in class actions, see Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 770-76 (2005).

cords at an operational level with our intuition that the settling parties should enjoy a greater security of repose if they satisfy the more exacting standards associated with class settlement under unifying federal procedural standards. In terms of on-the-ground practice, if not as a formal matter, the prospects for successful collateral attack ought to differ where the rendering forum is fixed by federal law, as compared to where that forum results from the selection of private parties capable, in effect, of "shopping the deal."

1. Structural Defects

Neither full claim preclusion, at one extreme, nor lack of preclusion, at the other, captures what is at stake in challenges over structural defects. In the event of a class settlement, absent class members may raise both structural and performance defects arising from the class representation in the rendering court, and that court retains discretion to alter its initial class certification prior to judgment.[203]

Full claim preclusion nonetheless does not address the procedural oddity of how structural defects are likely to be presented to the court of first instance. The initial—and, in practice, usually determinative—inquiry into structural defects in the ordinary sequence occurs unbeknownst to absent class members, as part of the judicial decision to certify the class in the first place.[204] Take, for example, the situation in which a class is certified for litigation purposes and settlement occurs only subsequently. When certification precedes settlement, the motion for certification is likely to be contested by the defendant, who will have self-interested reasons to raise all manner of counterarguments in an effort to derail class certification in any form. The fact that the rendering court might consider and reject a structural defect raised by the defendant may well bear on preclusion in a later collateral attack, as we shall see momentarily, but only along lines adapted from issue-preclusion principles to the class action context, not notions of claim preclusion. The image of the defendant as a kind of constitutional policeman for the proposed class matches poorly with the core notion behind claim preclusion—that of an opportunity to raise structural defects that someone on the same side of the action as

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[203] *See* FED. R. CIV. P. 23(c)(1)(C) (providing that a class certification order "may be altered or amended before final judgment").

[204] Rule 23(c)(2) requires notice to class members only with respect to certified class actions. FED. R. CIV. P. 23(c)(2)(A)-(B).

the collateral attack plaintiff (or, at least, owing her a fiduciary duty) somehow has bypassed.

Suggestions of no preclusion sweep too broadly in the opposite direction, according no significance even to a fiduciary court's well-informed and considered rejection of a structural challenge made by the very same class member now suing as the collateral-attack plaintiff. Indeed, such a view would admit of no distinctions across situations in which the structural defect is not raised at all in the rendering court and those where it is raised, respectively, by the defendant in opposition to class certification, by the court sua sponte in its fiduciary capacity, by some other absent class member, or by the same absent class member now suing collaterally. A no-preclusion view likewise would not distinguish a genuine fiduciary court from an anomalous court disinclined to take seriously its obligations on direct review.

For structural defects, a middle solution is warranted.[205] At the very least, adaptation of preclusion principles for collateral attacks should guard against the situation of a literal "do-over." It would be intolerable to allow a collateral-attack plaintiff to escape the binding effect of a class settlement by raising the same structural defects in the class representation that she previously had raised on direct review in the original court and where she had lost on that precise point.[206] Preclusion in what one might term a "been there, done that" scenario calls for little translation of conventional issue-preclusion principles cast in terms of what has been "actually litigated" and "determined" between the same "parties" in the rendering court.[207] Clearly, there must be finality where the very same class member made the same

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[205] As to structural defects, we find ourselves broadly in accord with William Rubenstein's recent call for a "nuanced, middle-ground approach" for collateral attacks. Rubenstein, *supra* note 13, at 829. Rubenstein, however, grounds his analysis in a comparison of collateral attacks to habeas litigation involving claims of ineffective assistance, a comparison that puts aside consideration of forum selection, *see supra* note 26, and tends to cast the representational defect as one of deficient performance rather than structural conflict of interest. We see a middle solution as suited for structural defects but less so for the kinds of performance defects most closely analogous to ineffective assistance of counsel in a criminal trial. *See supra* Part III.C.2.

[206] *See In re* Diet Drugs Prods. Liab. Litig., 431 F.3d 141, 149 (3d Cir. 2005) ("All three sets of Appellants . . . have already raised and litigated [before the rendering court] the challenges they argue here."). One of us represented class counsel in this case and thereafter defended the Third Circuit's decision against a petition for certiorari ultimately dismissed by the Supreme Court. *See id.* at 143; Brief in Opposition for Respondent Class Counsel, Clark v. Wyeth, Inc., 547 U.S. 1109 (2006) (No. 05-1111).

[207] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (summarizing conventional principles of issue preclusion).

structural claims in the form of an original objection in the rendering court. No plausible conception of adequate representation can countenance a literal re-presentation of the same structural claim collaterally. A case involving no consideration of the alleged structural defect by the rendering court occupies the opposite end of the preclusion spectrum. Once one rejects—as we think the law must—an approach rooted in notions of claim preclusion, the inquiry necessarily shifts from the mere existence of an opportunity to raise the structural defect to a determination of some sort on that matter.

The hard question for any translation of issue-preclusion principles to collateral attacks concerns the degree of relaxation, if any, that the class action warrants in notions of "party" status. Should the law adhere, in other words, to a conventional conception of "party" status, whereby the plaintiff in a collateral attack can be bound only by the rejection of a structural objection that she herself has raised in the rendering court? The nature of class actions and the direct review process, together, persuade us against such a literalistic rendering of issue-preclusion principles in the class action setting.[208] Indeed, one may see the question here for collateral attacks as the cousin once removed of the debate in *Devlin* over the "party" status of absent class members for purposes of direct appeal. Here, as the *Devlin* Court ultimately realized, if only backhandedly, functional consequences—not formalistic notions of "party" status—show the way.

A fiduciary conception of direct review suggests that what should matter for a collateral attack is the rigor of the rendering court's determination of the structural question, not necessarily whether that question has been "actually litigated" by someone in the familiar, adversarial litigation sense. When the basis for preclusion turns on what the rendering court has done—where there may be nothing "actually litigated" in the conventional sense—then it should not matter that the defendant, rather than someone aligned on the plaintiffs' side, has raised the structural defect that the rendering court rejected. What matters is the existence of a determination by the rendering court, such that the raising of a structural defect by the defendant in a contested class certification properly may trigger preclusion of class members.

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[208] For insistence on such an understanding, see *Epstein II*, 126 F.3d 1235, 1242 (9th Cir. 1997) ("The individual objectors who voluntarily appeared at the fairness hearing were not authorized by the absentees to represent their interests, nor were they certified by the [rendering court] to do so.").

Our focus on the rendering court's determination has real teeth. A determination, on our account, means a reasoned determination, not a passing, boilerplate dismissal of the structural objection or an unspecific assertion about the absence of any structural defect in the class representation. Rather, the court must articulate the alleged defect and explain why it is not disabling. One helpful model here might be an administrative agency's reasoned explanation of the grounds for rejecting counterarguments to its chosen course of action, so as to save agency action from judicial invalidation on grounds of arbitrariness.[209]

The importance of insistence on a reasoned determination by the rendering court rests less on rough analogies in public law, however, and more on the incentives that such a view generates for both the settling lawyers on direct review and rivals who might undertake collateral attacks. For the settling lawyers, a reasoned determination as the touchstone for preclusion places a premium on the generation of a detailed record on the matters considered by the rendering court. As for issue preclusion in ordinary litigation, the burden of showing that the rendering court made an actual determination rests with the party asserting preclusion.[210]

Inducement of counsel to build a record in the rendering court creates the right incentives for parties to make the certification decision a meaningful event, not just a show put on by the friends of the deal. Already, there is a growing recognition by lower courts that class certification requirements present "a mixed question of fact and law."[211] In contested certifications, courts now routinely allow for con-

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[209] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 52 (1983) (emphasizing that the agency "must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made'" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))). For an elaboration of the analogy to administrative-law arbitrariness review, see Nagareda, *supra* note 13, at 357-59.

[210] *See* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4420, at 516-18 (2d ed. 2002) (discussing the allocation of burden).

[211] *In re* IPO Secs. Litig., 471 F.3d 24, 40 (2d Cir. 2006). *IPO Securities* is the most recent in a series of federal appellate decisions that lend greater content to the Supreme Court's cryptic admonition in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that trial-level courts lack "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." In *IPO Securities*, the Second Circuit underscored this point: "the fact that a Rule 23 requirement might overlap with an issue on the merits does not avoid the court's obligation to make a ruling as to whether the requirement is met." 471 F.3d at 27. *Accord, e.g.*, Oscar Private Equity Invs. v. Allegiance Telecomm., Inc., 487 F.3d 261, 268 (5th Cir. 2007) ("A district court . . . must give full and independent weight to each Rule 23

trolled discovery and evidentiary hearings, such that the rendering court will "receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met."[212] Our proposal would extend this approach from contested certifications to the context of class settlements, effectively creating an incentive for settling counsel to build a body of evidence to elicit and support the rendering court's determination of structural defects with the potential to form the grounds for collateral attack. An approach to preclusion in collateral review that effectively advantages the presentation of information to the rendering court can help to reduce the informational deficit facing courts at the settlement stage, along with refinement of the direct review process itself.

By tying preclusion to what has been determined by the rendering court, we can both provide incentives for the presentation of fuller information to the first court *and* limit the scope of collateral review by potentially anomalous second courts. There undoubtedly remains a degree of wiggle room in this inquiry, of course, and one may expect users of anomalous courts for collateral attacks to attempt to exploit it. Still, we regard that degree of latitude as a tolerable price for the law to bear in order to bring the standard for collateral review of structural defects into accord with both the nature and the limitations of direct review by a fiduciary court.

2. Performance Defects

Performance defects in class representation present not a question of authority in the ordinary sense of defects in "jurisdiction," but rather, a question of results. Accordingly, preclusion of collateral attacks should extend more broadly. The hard question concerns how to set the parameters for preclusion to achieve such a relative ordering. Here, we find a translation of claim-preclusion principles to hold more promise.

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requirement, regardless of whether that requirement overlaps with the merits." (internal citation omitted)); Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676 (7th Cir. 2001) ("[I]f some of the considerations under Rule 23(b)(3) . . . overlap the merits[,] . . . then the judge must make a preliminary inquiry into the merits.").

One prescient commentator largely anticipated the approach now adopted in *IPO Securities*. *See* Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 87 (2004) (recommending that courts "investigate the merits provided that doing so is convenient and useful to analyzing the [applicable class] certification requirements").

[212] *IPO Securities*, 471 F.3d at 41.

Unlike the initial inquiry into the adequacy of representation in the structural sense, direct review of the class counsel's performance in a proposed class settlement takes place only upon notice to absent class members. This holds true when settlement postdates class certification[213] and for simultaneous consideration of the certification and class-settlement fairness questions.[214] Notice differs, in short, across structural and performance defects in a way that tracks the intuitive difference between the two as grounds for challenges to the adequacy of the class representation.

Using claim-preclusion principles for collateral review of performance defects would, of course, render insufficient the kind of nonexistent inquiry into that subject by the rendering court in the *Hansberry* era.[215] Latter-day "drive-by" approvals for class settlements should meet the same fate.[216] But the inquiry for collateral review also extends beyond these extreme forms of dereliction to the modern eye. There is the added implication from *Devlin* that any absent class member who does not object at the trial level may not thereafter take a direct appeal from a settlement approval. Because notice is not required when the court undertakes its initial inquiry into structural defects for purposes of class certification, the bypassing of a later opportunity to object on that ground should not carry the same degree of collateral foreclosure as for performance defects. But absent class members may fairly be held individually responsible for bypassing the opportunity to raise performance defects when adequate notice of a proceeding to that end has been provided, just as they now are held to have bypassed a direct appeal.

A full and fair opportunity to raise performance defects presupposes adequate notice, itself part of the due process checklist set forth in *Shutts*. Like the inquiry into structural defects, considerations of adequate notice can place outer limits on those whom a class may encompass by identifying situations where even the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,"[217] would

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[213] *See* FED. R. CIV. P. 23(c)(2)(A)–(B) (requiring notice only as to certified class actions).

[214] *See* FED. R. CIV. P. 23(e)(1)(B) (requiring notice of a proposed class settlement to "all class members who would be bound by a proposed settlement").

[215] *See supra* text accompanying notes 175-176.

[216] The Senate Report on CAFA expressed concern over "drive-by class certification cases." S. REP. No. 109-14, at 22 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 22.

[217] FED. R. CIV. P. 23(c)(2)(B).

likely leave predictable, systematic gaps within the proposed class.[218] A world in which seemingly every trivial document or video manages to find its way onto some internet blog or YouTube, moreover, is surely a world where courts can make full and fair, in operational terms, the opportunity to object—and with much less expense to the judicial system than in decades past.[219]

3. The Settlement Forum

Any account that contemplates some nontrivial latitude for collateral challenges to class settlements—certainly, ours—cannot eliminate entirely the incentive to search for the anomalous court for such review. The prospect that any cohesive theory for judicial review will garner a comparably unified endorsement by courts throughout the country, moreover, is sufficiently small as to dampen even the academic ego. We cannot help but observe, nonetheless, how the ongoing debate over collateral attacks reinforces the impulse of CAFA in a way not previously appreciated.

Uncertainty over the scope available for collateral attacks—whether the macro-level confusion in current law or the micro-level questions about the operation of a regime such as ours—effectively increases the cost associated with parking a class settlement in any state court. The lack of injunctive power to enforce the preclusive effect of a state court class settlement is what turns the preclusion ques-

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[218] In dicta, the *Amchem* Court expressed concern over the adequacy of the extensive notice campaign contemplated there with respect to asbestos-exposed workers' family members who might not know of their exposure. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997). By contrast, the concern voiced in *Amchem* for persons who do not know their ultimate medical fate at the time of the class judgment, *id.*, has not rendered inadequate notice campaigns for mass tort class settlements where the fact of exposure is known. *See* Brown v. Am. Home Prods. Corp. (*In re* Diet Drugs Prods. Liab. Litig.), No. 99-20593, 2000 WL 32067308, at *39 (E.D. Pa. 2002) (emphasizing that "there are no class members unwittingly exposed to the diet drugs, which were available only through a doctor's prescription and had to be consciously ingested").

[219] For an illustration in state law of a more flexible approach to notice, by comparison to Rule 23, see CAL. CIV. R. 3.766(f) which notes that, "[i]f personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action—for example, publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group.".

tion into one for consideration in a collateral forum.[220] In order to avoid that inquiry entirely, and to recast the preclusion question into a federal injunctive question for the rendering court, lawyers are best advised to do for settlement purposes what CAFA prescribes for defendants with regard to contested certifications: get thee to federal court.

In practice, this means that collateral attacks will be less viable where the law has more confidence in the rendering court by virtue of congressional choice—chiefly, by way of CAFA, but also through the operation of the MDL process and the Anti-Injunction Act, both of which are themselves matters of federal legislative authorization. Here, practical operation aligns with normative intuition.

The effective federalization of class settlements would reinforce the advantage that CAFA unintentionally confers on plaintiffs' lawyers positioned to play for national stakes.[221] Those lawyers now may invest in class litigation to challenge national-market activity with the assurance that removal under CAFA and consolidation of related cases within the federal system, together, will inhibit efforts by rivals to garner the certification of a copycat class action and, with it, control of the litigation—or at least the chance to extract rents. Recognition of the federal forum as a way to avoid questions about collateral attacks only adds to the power of national players within the class action bar. If national markets have led to both litigation and consequent demands for peace that are similarly national in scope, then, we suppose, it is only fitting that the masters of the post-CAFA universe should be a segment of the plaintiffs' bar comprised of players at a correspondingly national level.

But the effect of CAFA goes beyond simply magnifying the incentives for national-level counsel able to navigate the shoals of federal courts. CAFA offers the prospect of greater finality to settlements realized in the courts selected by Congress as the appropriate fora for cases of national significance. In such cases, settling parties in federal court not only can garner full protection from subsequent challenges to the performance outcomes of a class action settlement but also can gain protection from collateral challenge in a potentially anomalous court.[222] The injunctive powers of federal courts can force post-

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[220] *See supra* text accompanying notes 71-72.

[221] This effect is rightly highlighted in Erichson, *supra* note 36.

[222] This proposal cures a defect in CAFA's jurisdictional grant carefully identified in Wolff, *supra* note 53, by which the right of removal is reserved to the defendant but not to absent class members who may wish to challenge a settlement being "parked" in a friendly state court.

settlement review into the familiar pathways of Rule 60(b) or even collateral review, but only in the court of first instance.

CONCLUSION

Slowly but surely, the Class Action Fairness Act is transforming class action practice. The days of drive-by certifications in Alabama and the nationwide reach of the judges of Madison County, Illinois, are fading from the landscape.[223] One need not yield to the optimism of Dr. Pangloss to recognize that many of the most abusive practices of forum manipulation, sweetheart deals, and questionable class certifications have, at the very least, been curbed.

Our attention in this Article, however, is to the unexplored doctrinal inheritance that a shakier era of class action practice has left behind. Once removed from the concern about rogue courts improperly certifying national class actions, the accompanying doctrines of collateral challenge stand alone more precariously. Or more directly stated, once Congress has interceded to determine the forum in which cases of national import should be adjudicated, doctrines that permit any court to revisit class judgments at any time—obtained by settlement or trial—lose whatever core justification they may once have enjoyed.

Viewed from the perspective of a concern about the anomalous court—the more polite rendition of captured or rogue judicial systems—the broad and imprecise sweep of the term "collateral challenge" is perhaps explicable. But when forum concerns are removed, or at least allayed, expansive notions of collateral challenge not only are unjustified, they also emerge as a backdoor invitation for the reassertion of power by anomalous courts once again. Our hope is that by disentangling the "where," "what," and "how" of class-settlement review, the residual force of improper attacks on such settlements can be curbed appropriately.

At the end of the day, class actions have emerged as a necessary evolutionary response to the problems of mass society. For as long as they are part of our legal system, class actions need to be litigated or settled with finality, just as every other sort of legal proceeding does. No more, but certainly no less.

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[223] For further discussion of the implications of increased federal oversight, see David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1296-1304 (2007), which argues that CAFA operates in tension with *Erie*'s principles concerning federal-state relations.