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Preclusion in Class Action Litigation

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PRECLUSION IN CLASS ACTION LITIGATION

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Despite the intense focus trained upon class litigation for the last twenty-five years, a central feature of the class proceeding has received no sustained attention: the preclusive effect that a class judgment should have upon the nonclass claims of absentees. The omission is a serious one. If claim and issue preclusion were to operate in their normal mode when a claim is certified for class treatment, the proceeding could compromise the high-value claims of individual absentees. Such a threat, in turn, can create ex ante conflicts of interest within a class that can prevent certification if left unresolved. Those few courts that have recognized the problem have thrown up their hands in helplessness, refusing to certify potentially beneficial classes for fear of the preclusive consequences. Worse, most courts have entirely failed to address the problem. It is not merely a lack of diligence that has produced this state of affairs. The reluctance of courts to address preclusion during certification has resulted from a deep confusion about the positive law foundations of a judgment's preclusive effects.

This Article offers the first systematic examination of these issues. It explains the threat that claim and issue preclusion can pose to class members when those doctrines are applied, unaltered, to class litigation. It then offers a more careful account of the positive law foundations of a judgment's preclusive effect, marking out the path that will allow courts to reclaim their proper role in constraining the preclusive effects of the class proceedings that they shepherd to judgment.

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Introduction

For years, courts and commentators have engaged in a fierce debate over the circumstances under which a class action judgment should have binding effect upon absent class members.[1] Despite this intensity of fo-

1. Much of that debate has focused on the availability of collateral attacks where adequate representation was arguably lacking in an initial proceeding. See, e.g., Stephenson v. Dow Chem. Co., 273 F.3d 249, 257–61 (2d Cir. 2001) (permitting "future claimant" to escape effects of class settlement due to inadequate representation in initial proceeding), aff'd by an equally divided Court, in part, and vacated on other grounds, in part, 539 U.S. 111 (2003); Epstein v. MCA, Inc. (*Epstein II*), 126 F.3d 1235, 1241 (9th Cir. 1997) (holding that representation that is actually inadequate will prevent class action from binding absentees), vacated, Epstein v. MCA, Inc. (*Epstein III*), 179 F.3d 641, 648 (9th Cir. 1999) (holding that collateral attack is never available provided that procedures were in place to ensure adequacy of representation in initial proceeding); State v. Homeside Lending, 826 A.2d 997, 1007–18 (Vt. 2003) (permitting Vermont residents to bring suit, despite Alabama judgment purporting to resolve all claims in nationwide class action, for reasons of inadequate representation and lack of personal jurisdiction); Marcel Kahan &

cus, the related question of exactly what preclusive effect such a binding judgment should have on the claims of those absentees has remained largely unexamined.[2] The omission is a serious one. The preclusive effects of a proposed class proceeding, considered ex ante, can sometimes have a dramatic impact upon the certification calculus. Nonetheless, insofar as courts have taken note of preclusion questions at all in considering requests for class certification, they have most frequently avoided any serious engagement with the issue by placing broad reliance upon the ubiquitous maxim, aptly stated by Justice Ginsburg in the *Matsushita* case, that "[a] court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action."[3] The Court further entrenched this maxim in the *Semtek* case, where it placed a construction upon Federal Rule of Civil Procedure 41(b) that limited the operative effect of a dismissal "upon the merits"

Linda Silberman, The Inadequate Search for "Adequacy" in Class Actions: A Critique of *Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 765, 774 (1998) [hereinafter Kahan & Silberman, Inadequate Search] (criticizing *Epstein II* and arguing that opportunities to opt out at certification and settlement provide adequate protection to class members); Henry Paul Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148, 1162–78 (1998) (arguing that collateral review of adequacy is necessary where forum's only basis for exercising personal jurisdiction is provision of notice and opportunity to opt out, which assumes minimal participation by absentee). The requirements of notice, personal jurisdiction, and opt-out rights have also been the focus of much attention. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809–12 (1985) (establishing notice and opt-out requirements for out-of-state absentees in damages class action where forum would otherwise lack personal jurisdiction); Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1226–29 (11th Cir. 1998) (holding that class member is not bound to class action judgment because notice was insufficient to alert him that his interests would be compromised); Samuel Issacharoff, Preclusion, Due Process, and the Right to Opt Out of Class Actions, 77 Notre Dame L. Rev. 1057 (2002) [hereinafter Issacharoff, Preclusion] (discussing certification standards and due process limitations on binding litigants to different types of class proceedings).

2. The best discussion of the issue is to be found in Wright, Miller, and Cooper, which does a good job both in identifying some of the areas of class litigation where preclusion doctrine requires careful attention and in offering commonsense solutions. See 18A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4455, at 448–94 (2d ed. 2002 & Supp. 2004). Even so, the volume's treatment of the issue is succinct and undertheorized (of necessity, given the nature of the treatise format). There has been no comprehensive treatment of the issue in any law review article and only occasional mention of it in the context of other discussions. The best partial treatment of which I am aware can be found in Richard Nagareda's discussion of the class action as a mechanism for regulating the "market" among defendants in obtaining claim preclusive repose. See Richard A. Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 159–81 (2003). Nagareda does not purport to offer a comprehensive treatment of claim and issue preclusion in aggregate litigation, but is attentive to the importance of the problem, which is rare. Some courts have attempted to grapple with the nuances of preclusion in class litigation, as I discuss at length below, but no satisfying judicial approach has emerged.

3. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (citing 7B Wright, Miller, & Cooper, supra note 2, § 1789, at 245).

under that provision to the federal court in which the dismissal is actually issued. "[I]t would be peculiar," the Court reasoned in explaining that result, "to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself."[4] Relying uncritically upon these tenets, courts regularly take it as a matter of course that the preclusive effect of a judgment is not a subject with which a rendering court should concern itself but, rather, is a feature of a judgment that can only be determined with certainty—and should only receive serious attention—in a subsequent proceeding. As with most frequently intoned propositions, this one does embody some truth. But the broad and imprecise fashion in which courts and commentators have deployed this preclusion maxim in class proceedings has led to serious error. The time for a systematic inquiry into the proper treatment of preclusion in class action litigation—and for a reexamination of the ubiquitous preclusion maxim that has pretermitted that inquiry—is long overdue.

There are some preclusion questions that a rendering court cannot answer with finality—that much is accurate. Will a subsequent attempt by a litigant to obtain a remedy in another proceeding constitute an alternative legal theory on the same claim, rather than an analytically and transactionally distinct prayer for relief?[5] Will a contested issue be essential to the final judgment, and will it remain the "same" issue over time, such that it could serve as the basis for a later estoppel?[6] When questions about the extent of a judgment's future preclusive effect depend upon events that lie outside the rendering forum's knowledge or control, their likely outcome can be a matter of legitimate and serious ex ante dispute. In such cases, litigants must compare the likely benefit of a lawsuit as

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4. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001); see also id. at 505–06 (construing provision). Rule 41(b) reads:

> Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b).

5. See, e.g., Herendeen v. Champion Int'l Corp., 525 F.2d 130, 134–35 (2d Cir. 1975) (adopting more formalistic definition and permitting lawsuit for pension benefits to proceed, even though plaintiff had previously filed unsuccessful lawsuit for same benefits, because second suit based cause of action on different contract and hence constituted distinct "claim"); Restatement (Second) of Judgments § 24 (1982) (offering pragmatic definition of series of transactions).

6. The Restatement provides:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27.

presently conceived with the risk that a judgment will produce adverse consequences in the future. The inability to answer such questions with certainty until a subsequent proceeding, and the risk that a litigant will choose unwisely, are basic structural features of preclusion doctrine.[7]

In the context of individual litigation, such risk is manageable. Just as an individual litigant in a civil proceeding does not enjoy any right of adequate representation that could enable him to escape the effects of a judgment, and hence assumes the risk that his lawyers will make bad litigation choices on his behalf, so a litigant assumes the risk that the judgment that results from a lawsuit may compromise other important interests that he possesses.[8] We trust individual litigants to make the necessary choices in navigating these risks. When litigants make bad choices, or when they fail to consider the preclusive consequences of a lawsuit at all, we consider it an appropriate expression of litigant autonomy to bind them to the result.

In a class action, however, these observations cease to be merely prosaic. There is a deep tension between the doctrine of preclusion as it is frequently applied in individual litigation and the conditions that serve to limit the use of the class action device. When absent class members are bound to a judgment, they are bound by virtue of the commonality of interest that makes it possible to find individual plaintiffs who will serve as proper representatives for them all.[9] A court's evaluation of factors like adequacy of representation, typicality, and superiority requires it to compare the respective interests and incentives of all the members of the class.[10] When a court conducts such an evaluation, it must do so not only with respect to the likely course of the litigation currently before it, but

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7. Professor Burbank makes reference to this dynamic in calling for an approach to preclusion in the federal courts that will minimize the risk associated with such uncertainty:

> Preclusion rules affect litigation strategy. It is therefore important that litigants know what the rules are. Before filing a complaint asserting federal rights in a federal court, or in response to the successful removal of such a case to federal court, the plaintiff should be able to predict with considerable assurance the rules of claim preclusion that will govern a judgment.

Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 Cornell L. Rev. 733, 767 (1986) [hereinafter Burbank, Interjurisdictional Preclusion].

8. I mean here a right that might qualify the effect of the judgment upon the individual litigant. Of course, a litigant may possess a right to recover against incompetent counsel under the law of malpractice.

9. See Hansberry v. Lee, 311 U.S. 32, 42–45 (1940) (finding that Due Process Clause prohibits binding class members to judgment without adequate protections for representation of their interests); cf. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (reiterating requirement that interests of class members be adequately represented).

10. See Fed. R. Civ. P. 23(a) (requiring showing of typicality of lead plaintiff's claims in comparison to those of class, and ability of lead plaintiff and class counsel to represent the class adequately); id. 23(b)(3) (requiring showing that class action is superior to other forms of relief).

also with respect to the likely future impact of a judgment upon the interests of class members. In other words, a court must assess, early in the proceedings, what the likely preclusive effect of a judgment will be upon members of the class it has been asked to certify.

Introducing preclusion doctrine into the certification inquiry can present two complications. The first is a time-frame problem. The type of early prognostication inherent in class action procedures is at odds with the retrospective posture that courts often treat as a necessary feature of preclusion analysis, calling for a degree of certainty about the likely effect of a judgment in subsequent proceedings that the preclusion maxim quoted above appears to foreclose.[11] The second is a doctrinal problem. Even leaving considerations of timing to one side, if the doctrines of claim and issue preclusion that are associated with individual litigation were to apply unaltered to class proceedings, the preclusion inquiry would sometimes reveal significant obstacles to class certification, often in the form of conflicts among the interests of class members in their incentive to settle an action rather than litigate to judgment.

No court can legitimately rule on a request for certification in a class action—at least, a class action that may proceed to a litigated outcome[12]—without achieving a clear understanding of the likely preclusive effect that a judgment in the case would have upon the members of the class and the options that the court has at its disposal for altering or constraining those effects. Nonetheless, many courts regularly proceed without achieving any such understanding. Some flatly refuse to certify a class when preclusion obstacles become apparent, complaining that the time-frame problem prevents any resolution of the issues in the initial forum and concluding that there is an unmanageable "risk" that absentees will suffer adverse preclusion consequences in future proceedings. Others—most others—simply fail to address the matter at all, creating the possibility that the interests of absentees will be improperly compromised in future cases. The first approach is inadequate and may prevent socially desirable class actions from being certified. The second constitutes a form of judicial malfeasance. The fact that most certifying courts have not

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11. In one of its few statements on the issue, the Court alludes to this problem in the closing passages of the *Cooper* decision, stating, "Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of *common* questions. Its purposes might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant." Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 881 (1984). I discuss the *Cooper* decision at length infra Part I.A.

12. Settlement-only class actions may greatly diminish preclusion-based problems. Indeed, the resolution of preclusion may provide an important example of a "relevant" feature of a settlement-only class action in the certification process. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619 (1997) ("Settlement is relevant to a class certification."). I discuss these issues infra Part II.A.3.

been mindful of preclusion issues in the past cannot authorize further inattention.[13]

Several steps are required to address this problem. The first is to understand it with precision. To that end, Part I of this Article discusses the different types of preclusion problems that can arise at the outset of a class proceeding. Foremost among these are potential conflicts of interest. When members of an otherwise cohesive class possess different configurations of factually related claims beyond those presented for class certification, the threat of claim and issue preclusion can give them starkly different incentives to prosecute or settle the action. Still other preclusion problems can affect the entire class uniformly. Strategic litigation choices—like a decision to eschew a federal cause of action in order to stay in state court, or a failure to request a particular form of injunctive relief when seeking institutional reform—raise questions about the limits of the representational role in a class proceeding. Part I takes up these issues in detail.

The next step is to develop more precise tools for discussing preclusion in general and, in particular, for challenging the pervasive and uncritical reliance upon the view that preclusion questions can only be addressed in any meaningful way in a subsequent proceeding. As Part II explains, preclusion questions embrace three distinct inquiries: (1) a determination as to the exercise of positive legal authority undertaken by the rendering forum; (2) an inquiry into the actual course of the proceedings in the rendering forum; and (3) an inquiry into the relationship between the matters resolved in the first lawsuit and the claims or issues raised in a subsequent proceeding. Contrary to the familiar maxim, only the third of these inquiries lies entirely outside the knowledge or control of the rendering forum. As to the first two, the initial court can exert considerable influence on the future preclusive effects of its own judgment, and often does. This is especially the case when a court seeks to impose constraints upon the preclusive effect that its judgment will have in subsequent proceedings, rather than seeking to predetermine the judgment's affirmative consequences. Part II offers a more precise positive law account of preclusion doctrine and then explores the tools of limitation that are available to a rendering forum in controlling the future preclusive effect of its own judgments.

With these tools in place, the final step is to determine the proper roles of both the rendering and the recognizing courts in navigating these preclusion issues. In the case of the initial forum, the fact that the court has the power to overcome barriers to certification through the "negative" or constraining use of preclusion doctrine does not mean that exercising that power always represents the preferred course. When a

13. Cf. Larry Kramer, Choice of Law in Complex Litigation, 71 N.Y.U. L. Rev. 547, 547 (1996) (challenging received view that "ordinary choice-of-law practices should yield in suits consolidating large numbers of claims").

diligent court identifies potential preclusion problems at the outset of a class proceeding, it should determine the steps that it can take to avoid those problems, but it should also assess the impact of those steps upon other adjudicatory values like fairness to the defendant and the integrity of its own judgments. It is necessary, in other words, to determine whether joinder policies or preclusion policies should predominate when analyzing the propriety of class certification in such a case. As Part III explains, although many class actions could be certified despite what might first appear to be intractable preclusion problems, not all should be.

In the case of a recognizing forum, the primary task will most frequently be to determine the proper response to an initial tribunal's complete inattention to preclusion problems. The number of courts that have even attempted to address preclusion issues at the initial stages of a class proceeding remains small, and the poor track record of some courts in observing other certification requirements suggests that the failure of the rendering forum to address the preclusive consequences of certification will continue to be a serious problem in class litigation. Part IV concludes by arguing that a recognizing court has an appropriate role to play in enforcing constraints upon the preclusive effects of prior class action judgments through a less disruptive application of the adequacy of representation principles that have heretofore been associated with full-scale collateral attacks.

I. Defining the Problem

It is necessary, before commencing an in-depth examination of the role of preclusion in class action litigation, to address the Supreme Court's decision in *Cooper v. Federal Reserve Bank of Richmond*.[14] *Cooper* is the only occasion on which the Court has purported to speak in any detail about the operation of preclusion doctrine in class litigation, and the Court articulated a deceptively simple set of postulates in that case to arrive at the outcome that it produced. The meaning and import of the resulting decision are often misunderstood. Unsurprisingly, *Cooper* has proven inadequate as a framework for the analysis of subsequent preclusion disputes. I preface my examination of the conflicts of interest and representational problems that claim and issue preclusion can generate in a class proceeding with a discussion of the limited usefulness of *Cooper* in moving that analysis forward.

A. *The* Cooper *Case*

The dispute in *Cooper* centered around claims of race and gender discrimination at a branch of the Federal Reserve Bank of Richmond located in Charlotte, North Carolina. The case was initially filed by the Equal Employment Opportunity Commission (EEOC), which charged

14. 467 U.S. 867.

the bank with a "pattern or practice" violation of Title VII of the Civil Rights Act of 1964 for refusing to promote black and female workers. Four employees later intervened, each asserting the same pattern or practice claim under Title VII along with a claim of individual discrimination under 42 U.S.C. § 1981, which authorized the award of more extensive damages than Title VII did at the time.[15] The district court certified the intervenors as representatives of a class consisting of all employees within a specified time period who had been "discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race."[16] The district court issued a ruling in favor of the class on the pattern or practice claim and in favor of two of the four class representatives on their individual claims of discrimination, but the court of appeals reversed on the merits and ruled in favor of the bank in all respects.[17]

A second group of employees also sought to intervene in the trial at a later point in the proceedings, but the district court denied their request. These employees then filed separate, individual claims of discrimination against the bank. The court of appeals found that the judgment in the class proceeding, as modified by its own reversal on the merits, precluded the unsuccessful intervenors from maintaining their individual claims of discrimination. It was on this portion of the Fourth Circuit's ruling that the Supreme Court granted certiorari.[18]

The Court's ruling on the preclusion question, and the attendant propositions for which *Cooper* is most frequently cited, comes in two parts. First, as a general matter, the Court issued a broad statement in which it purported to hold that the doctrines of claim and issue preclusion operate with full force in class action proceedings:

> There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim. A judgment in favor of either side is conclusive in a subsequent action between them on any issue

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15. Before the passage of the Civil Rights Act of 1991, Title VII only provided equitable relief and section 1981 was the primary vehicle for obtaining compensatory damages for racial discrimination in private employment contracts. See George Rutherglen, The Improbable History of Section 1981: CLIO Still Bemused and Confused, 2003 Sup. Ct. Rev. 303, 338–39 & nn.125–137 (describing remedial history of Title VII and section 1981).

16. *Cooper*, 467 U.S. at 869–70 & n.3.

17. EEOC v. Fed. Reserve Bank of Richmond, 698 F.2d 633, 638, 669–70, 671–73 (4th Cir. 1983), rev'd sub nom. *Cooper*, 467 U.S. 867.

18. *Cooper*, 467 U.S. at 873 n.6.

> actually litigated and determined, if its determination was essential to that judgment.[19]

Note the sequence of the reasoning here. The passage begins with an observation about the binding effect of class actions—a "properly entertained class action is binding on class members"—that is little more than a tautology. While the capacity of representative litigation to bind absentees is a relatively recent development in our adjudicatory tradition,[20] that capacity is now well established, and the assertion that class actions are binding when "properly entertained" tells us little. This reminder of a class action's binding effect is followed by a series of broad statements about the consequent applicability of "basic principles" of preclusion doctrine. The implicit suggestion is that the application of "basic" preclusion principles, in full force, must follow naturally from a determination that a judgment is binding upon class members. This logical fallacy exemplifies one of the pervasive sources of imprecision that this Article seeks to correct, and it is no coincidence that the error makes a prominent appearance in the Court's major statement on the issue to date.

The second proposition in *Cooper* concerns the relationship between a "pattern or practice" claim and a specific allegation of discrimination by an individual. Reversing the appellate court's dismissal of the discrimination claims brought by the second group of intervenors, the Court held that an adverse finding on a pattern or practice claim is not logically inconsistent with a finding of isolated instances of disparate treatment within a business. While the two types of claim might be expected to share significant areas of factual overlap, the Court explained, it is possible for the one to exist in the absence of the other.[21] As an observation about evidentiary findings and logical relationships between claims, this holding is obviously correct. How that observation translates into the actual holding on preclusion doctrine that *Cooper* embodies, however, is a different question. Mapping that translation requires careful attention to

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19. Id. at 874 (citations omitted).

20. The authoritative account of the historical evolution of class suits in this respect is Geoffrey C. Hazard, Jr. et al., An Historical Analysis of the Binding Effect of Class Suits, 146 U. Pa. L. Rev. 1849 (1998).

21. The Court put the point in these terms:

> Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of a pattern or practice of discrimination; rather it must be established by a preponderance of the evidence that "racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice."
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> . . . .
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> . . . Given the burden of establishing a prima facie case of a pattern or practice of discrimination, it was entirely consistent for the District Court simultaneously to conclude that Cooper and Russell had valid individual claims even though it had expressly found no proof of any classwide discrimination [in the relevant segments of the business].

Cooper, 467 U.S. at 875–76, 878 (citations omitted).

the posture of the claims on appeal, an issue as to which the Court's opinion is inattentive.

First, there is some tension between the Court's assertion that "basic principles of res judicata (merger and bar or claim preclusion) . . . apply" in a class action and the actual holding of the case. Under "basic principles of res judicata," a litigant is ordinarily required to assert all the claims for relief that relate to a given transaction or series of transactions in a single proceeding. If the litigant fails to satisfy this requirement, the maintenance of her claims need not be "logically inconsistent" with the prior action for a merger or bar to apply. A party attempting to split two requests for relief on the same claim into separate proceedings, or attempting to assert two related claims in successive lawsuits, will ordinarily face a preclusion defense regardless of whether the relief she requests in the second suit would be logically consistent with the result in the first. Nonetheless, the *Cooper* Court permitted the individual class members to assert their discrimination claims in a subsequent proceeding, even though those claims arose out of the same series of transactions as did the class claim—their termination or nonadvancement within the workplace. The Court's opinion does not give a careful account of the preclusion reasoning that led it to this conclusion. Rather, the opinion simply announces the limited effect of the class judgment as if claim preclusion self-evidently required the result:

> [The class judgment] (1) bars the class members from bringing another class action against the Bank alleging a pattern or practice of discrimination for the relevant time period [i.e. reasserting the class claim] and (2) precludes the class members in any other litigation with the Bank from relitigating the [issue] whether the Bank engaged in a pattern and practice of discrimination against black employees during the relevant time period. The judgment is not, however, dispositive of the individual claims the . . . petitioners have alleged in their separate action.[22]

While this result may represent the correct rule in a Title VII class action, it does not flow inevitably from an application of basic claim preclusion principles.

Second, the Court did not deal at all with any impact that the anticipated preclusive effects of the judgment might have had upon the propriety of the initial class certification in this case. There is a good reason for this omission. Not only was the issue of certification not raised on appeal, but it was not even contested below. The class in *Cooper* was certified on a "consent order"—an unusual procedure when a class action is certified for trial rather than settlement. The Supreme Court did not discuss this fact at all in its opinion, and the Fourth Circuit mentioned it only in passing.[23] Thus, there was never any opportunity in *Cooper* to consider

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22. Id. at 880.

23. See EEOC v. Fed. Reserve Bank of Richmond, 698 F.2d 633, 637 (4th Cir. 1983) ("The petition [of the four lead plaintiffs] to intervene was allowed and the intervenors

the ex ante impact that preclusion effects might have upon the propriety of certifying the class, and the Supreme Court's opinion clearly cannot be read to speak to the issue.

Third, even leaving aside the unusual circumstances surrounding the certification ruling, the preclusion question decided by the Court in *Cooper* was a limited one in other respects. The case presented only a federal question claim for employment discrimination. The federal courts were thus free to shape substantive preclusion policy in administering this action in ways that might not have been available in a suit encompassing state law claims. Moreover, the particular type of federal claim at issue in the case—an allegation of a pattern or practice of discriminatory behavior by an employer—posed a claim preclusion question that was exceptional.[24]

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were, by a consent order, certified as the class representatives . . . ."), rev'd sub nom. *Cooper*, 467 U.S. 867.

One must return to the original record in the case to uncover the sequence of events that led to this certification by consent. The complaint was filed against the bank by the EEOC and alleged discrimination on the basis of both race and sex for a twelve-year period beginning in July 1965, shortly after Title VII took effect. See Joint Appendix Petition for Writ of Certiorari Filed August 4, 1983 Certiorari Granted October 31, 1983 at 24a–26a, *Cooper* (No. 83-185) [hereinafter *Cooper* Record] (copy of consent order). When the four individual plaintiffs intervened to seek class certification, they agreed to narrow the complaint in two important respects: They dropped the classwide allegations of sex discrimination and limited the time frame for the race discrimination claim to a period beginning in January 1974, just three years before the action was filed. Id. at 26a–27a. (One of the named plaintiffs, Sylvia Cooper, retained the right to pursue her individual sex discrimination claim in the action. See id. at 27a.) The court's order suggests that the bank agreed not to contest the certification of the class in exchange for this reduction in its potential exposure. See id. at 26a ("The plaintiff-intervenors and the defendant have agreed upon a designation of the class to include all black persons who worked for the defendant at any time since January 3, 1974. The plaintiff-intervenors no longer seek to raise in this action any issues of sex discrimination."). As a consequence, the district court issued its certification ruling on consent and offered no analysis in support of its order, merely reciting the requirements of Rule 23 and announcing in a conclusory manner that those requirements were satisfied. See id. at 27a–29a.

The district court can perhaps be forgiven for this lax procedure. The independent obligation of trial courts to ascertain the propriety of class certification even in the face of agreement by the parties, set forth definitively in *Amchem*, was not clearly established in 1978 when the court issued its order. Even so, perfunctory analysis by district courts remains pervasive, even in contested certification proceedings, as a recent article by Professor Robert Klonoff demonstrates. See Robert H. Klonoff, The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement, 2004 Mich. St. L. Rev. 671, 673–74 (conducting empirical study and concluding that "the vast majority of courts conduct virtually no gate-keeping function and approve class representatives and class counsel with little or no analysis").

24. The *Cooper* plaintiffs raised only disparate treatment claims. The Supreme Court formally recognized disparate impact claims in 1971, six years before the original complaint in *Cooper* was filed. See Griggs v. Duke Power Co., 401 U.S. 424, 430–34 (1971) (concluding that legislative intent behind Title VII was to deal with consequences of allegedly discriminatory employment practices and not merely motivation).

A pattern or practice claim is a gestalt cause of action. As the Court put it in *General Telephone Co. of Southwest v. Falcon*, such a claim alleges "the existence of a class of persons who have suffered the same injury" of discriminatory treatment, revealing a "policy of . . . discrimination [that] is reflected [throughout the defendant's] employment practices."[25] Thus, the assertion of a pattern or practice claim encompasses allegations of a series of individual instances of discrimination, any one of which might itself serve as a basis for relief in an individual lawsuit. As a consequence, it is not merely the case that pattern or practice claims are well suited to classwide treatment, as is the case with many civil rights suits;[26] they call out for such treatment. An individual who has suffered discrimination could ordinarily obtain complete relief in an individual action, making a separate pattern or practice claim redundant. And an individual who has not suffered discrimination would have no standing to raise a pattern or practice claim by invoking the injuries of others, any more than she would be an appropriate representative for such a claim in a class proceeding.[27] The question of what preclusive effect to attach to a pattern or practice claim is thus most appropriately addressed in the class action context, and the *Cooper* Court used the dispute before it to set forth the appropriate policy on the litigation of such claims. The opinion's almost exclusive reliance upon Title VII precedents, with only the most perfunctory mention of preclusion doctrine, is an accurate reflection of the issues to which the Court addressed itself.[28]

Finally, there was a much simpler ground available for a ruling on the issue of preclusion, had that been the Court's true concern: The district court itself had authorized the intervening class members to proceed with their individual claims with no preclusion bar. Recall that it was the second group of claimants—the "Baxter intervenors"—whose dismissal on claim preclusion grounds gave rise to the appeal in *Cooper*. The district court had denied the request of those class members to intervene in the remedy phase of the original action and press their individual claims

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25. 457 U.S. 147, 157–58 (1982); see also *Cooper*, 467 U.S. at 877–78 (pattern or practice claim alleges "'a companywide practice'" or "a consistent practice within a given department" (quoting *Falcon*, 457 U.S. at 159)).

26. The oft-cited Advisory Committee's Note on the 1966 amendment to Rule 23(b)(2) makes this point with respect to civil rights actions generally, offering as its principle illustration "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Fed. R. Civ. P. 23(b)(2) advisory committee's note on 1966 amendment.

27. *Falcon*, 457 U.S. at 157–59 (describing requirements of adequacy and typicality in pattern or practice class claim). For an individual who has suffered disparate treatment, a pattern or practice claim might nonetheless be attractive as a way of expanding the scope of the evidence that will be available at a trial. Even so, it would constitute a redundant remedy.

28. The entirety of the Court's discussion of preclusion precedent and theory is contained in a single paragraph, part of which is quoted above, that simply offers a string cite of the "usual suspects" on the subject. See *Cooper*, 467 U.S. at 874.

because they were not employed at the pay grades as to which the district court had found a pattern of discrimination during the liability phase.[29] The court denied their motion "without prejudice to any underlying rights the intervenors may have," however, and went on to state its belief that nothing in the class proceeding would prevent the would-be intervenors from pursuing their individual claims:

> The pendency of this action has apparently tolled the rights of the would be intervenors to file separate individual actions preceded by claims filed with the EEOC as to Title VII rights, and it has also apparently tolled their rights to file suit under 42 U.S.C. § 1981.
>
> I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week. More pertinently, since the EEOC is a party to this case and seems to have an active interest in seeing that the claims of the four intervenors are pursued, I see no reason why all formalities of processing the claim and the subsequent proceedings of conciliation and mediation could not be accomplished in very short order, like two weeks or less, so that this whole question could become moot in a few weeks.[30]

On the strength of these statements, the class members did not appeal the denial of their motion to intervene in what was at that point a successful pattern or practice suit, and instead filed a separate action to pursue their individual claims. In something of a judicial bait and switch, the Fourth Circuit reversed the district court's finding for the class on the pattern or practice claim and then found that claim preclusion barred the Baxter intervenors from maintaining their individual claims in a separate suit, despite the obvious intention of the district court to avoid that result, dismissing the portions of the district court's order quoted above as "plain dictum."[31] In a final confirmation of the true nature of its focus in the case, the Supreme Court failed to analyze these aspects of the proceedings, referring only briefly to the district court's "pointed[ ] refus[al] to decide the individual claims of the Baxter petitioners" in holding that the decision whether to join such claims under Rule 23 was "a matter of judicial administration that should be decided in the first instance by the District Court."[32]

Cooper, in short, is a Title VII opinion, not an opinion about the preclusive effects of class action judgments. The Court confronted a limited question—whether plaintiffs automatically lose their ability to raise individual claims of employment discrimination when a pattern or prac-

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29. *Cooper* Record, supra note 23, at 287a–88a (copy of order denying motion for leave to intervene).

30. Id. at 288a–89a.

31. EEOC v. Fed. Reserve Bank of Richmond, 698 F.2d 633, 673–75 (4th Cir. 1983), rev'd sub nom. *Cooper*, 467 U.S. 867.

32. *Cooper*, 467 U.S. at 881.

tice claim fails—and it offered an answer informed primarily by Title VII policy, making no attempt to explain its result with reference to general preclusion principles. While the opinion may have some elements of preclusion doctrine embedded in its holding, it provides little guidance for the array of preclusion problems that can arise—and that courts have begun to confront—in the increasingly diverse range of class action litigation.

B. *Conflicts of Interest*

The potential for conflicts of interest within a putative class is the most acute problem that preclusion doctrine poses to class litigation. Such a conflict most commonly arises when different groups within a class possess different configurations of claims relating to the same transaction. Suppose, for example, that a class was certified on behalf of all purchasers of an automobile containing a design defect that reduced the car's resale value. Suppose further that some subset of the class had suffered an additional harm as a result of the defect—say, an automobile accident—giving rise to a factually related claim for relief that was unsuitable for class treatment. If the common claim for economic damages was certified and litigated on behalf of the entire class, the resulting judgment may have adverse preclusive effects on the related accident claims. Only those members of the class who possessed the accident claim will be subject to such adverse preclusive effects. As a result, a conflict of interest arises between the two groups of claimants as to the risks and benefits of litigation.

Claim preclusion and issue preclusion implicate this conflict in related but distinct fashions. In the case of claim preclusion, the potential for conflict arises from the prohibition on the "splitting" of claims. That doctrine ordinarily prevents a plaintiff from asserting two related claims in successive proceedings, even if the first claim is successful. If an individual is a member of a class that has litigated the economic damages claim in our example, and then that same individual seeks to assert her accident claim in a subsequent, individual proceeding, merger (if the plaintiff class prevailed) or bar (if it failed) may prevent recovery. Under this scenario, some members of the class in the initial proceeding are asked to sacrifice their related claims in order to permit the class claim to move forward.

In the case of issue preclusion, the potential for conflict arises from the overlap of factual or legal issues among the multiple claims. If there is a sufficient overlap of issues between one claim that is common to an entire class and other claims possessed only by some class members, an adverse determination of key issues in the common claim could preclude absentees from establishing the required elements in their related claims. This is so, of course, even where claim preclusion would not impose an absolute barrier to recovery. Thus, in our example, suppose that the plaintiff class loses on its claim for economic damages because the finder

of fact concludes that the automobiles in question were not defective. If the members of the class with accident claims seek to maintain individual lawsuits for their personal injuries, they may be estopped from relitigating the issue of defect and hence unable to recover. Under this scenario, some members of the class are asked to assume a greater risk when they participate in the class proceeding, since an adverse finding on key issues in the resolution of the common claim may fatally undermine their ability to recover on their individual claims.

Some of these preclusion problems may seem to beg simple responses. Where claim preclusion is concerned, perhaps an individual claim that is unsuitable for classwide treatment is best described as one that "could not have been brought" in the class proceeding and hence should not be subject to claim preclusion. Similarly, established limitations on issue preclusion like those making reference to the ability and incentives of litigants to contest or appeal an issue might sometimes mitigate the potential for conflict within the class.[33] Such responses may ultimately correspond to defensible doctrinal solutions in some instances. That is not always the case, however, and the apparent simplicity of these responses is deceptive.

Class certification and preclusion both entail inquiries that are difficult to discuss in the abstract.[34] In embarking upon a discussion of the intersection of these two doctrines, it will be useful to have a vocabulary of claims, claimants, and facts to draw upon for reference.[35] I begin with an overview of two of the areas of class litigation in which courts have begun to confront the potential conflicts of interest created by preclusion doctrine most directly: Title VII suits in the wake of the Civil Rights Act of 1991, and tort class actions in the wake of *Amchem Products, Inc. v. Windsor*.[36]

1. *Title VII and the Civil Rights Act of 1991.* — Perhaps the highest profile area of class litigation where preclusion problems have begun to appear is in the Title VII arena. The problems arise out of the 1991 amendment to the Civil Rights Act of 1964 and an attempt to expand the

33. See 18A Wright, Miller, & Cooper, supra note 2, § 4455, at 465 ("[I]t may be appropriate to reduce the complexity of class litigation by imposing special limits on the basic transactional approach to defining a claim or cause of action."); see also Restatement (Second) of Judgments §§ 28–29 (1982) (setting forth broadly worded qualifications to use of issue preclusion in an F2 proceeding); 18A Wright, Miller, & Cooper, supra note 2, § 4455, at 490 (offering example of class action relating to economic damages and concluding that prosaic limitations on issue preclusion would militate against any estoppel in individual action by class member for personal injury).

34. Professor Cooper's plaintive footnote in his report from the front lines of the Advisory Committee, where he despairs of providing a concise explanation of *Amchem*, is emblematic where class actions are concerned. See Edward H. Cooper, The (Cloudy) Future of Class Actions, 40 Ariz. L. Rev. 923, 925 n.2 (1998).

35. See David L. Shapiro, Civil Procedure: Preclusion in Civil Actions 22–24 (2001) [hereinafter Shapiro, Preclusion] (offering a simple factual scenario as a frequent point of reference in subsequent discussions of preclusion doctrine).

36. 521 U.S. 591 (1997).

relief available to aggrieved plaintiffs that has produced unforeseen complications.

Under the original version of the Civil Rights Act, the principal remedies available to a plaintiff in a Title VII case were injunctive or declaratory relief and equitable restitution in the form of back pay. With the Civil Rights Act of 1991, Congress significantly expanded the range of remedies under Title VII, authorizing plaintiffs who suffer from intentional discrimination to request compensatory damages for emotional or other harms, punitive damages, and a jury trial for the resolution of these claims.[37] Though crafted as a pro-plaintiff reform, the 1991 Act has had the unforeseen consequence of throwing into doubt the amenability of Title VII claims to class certification. This doubt has unfolded in two stages. The first concerns the proper treatment of these expanded Title VII actions under Rule 23(b) and is the issue that has received the lion's share of attention. The second, which implicates preclusion doctrine, has resulted from associated attempts by class counsel to circumvent these Rule 23(b) problems.

When the relief available in a Title VII action was primarily injunctive in nature, with restitutional damages occupying only a subsidiary role, Rule 23(b)(2) served as the principal vehicle for the prosecution of employment discrimination claims. Proceeding under (b)(2) enabled plaintiffs to certify a class without satisfying the additional requirements of predominance and superiority and freed them from providing the costly notice and opt-out rights that Rule 23(b)(3) would demand. When Congress expanded the relief for intentional discrimination to include compensatory and punitive damages, a question arose as to whether (b)(2) treatment remained appropriate for these suits.[38] As a purely doctrinal matter, the scope of Rule 23(b)(2) may not extend to suits in which compensatory damages constitute a substantial portion of the relief requested by the class.[39] As a constitutional matter, notice to class members and an opportunity to opt out may be required for multistate class actions that involve the adjudication of substantial monetary claims, even when those claims are admixed with an overarching request for injunctive relief.[40]

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37. 42 U.S.C. § 1981a (2000).

38. As Judge Easterbrook recently wrote, "the statutory authorization in 1991 of damages recoveries for employees in Title VII cases has complicated what used to be an almost automatic class certification in pattern-or-practice cases." Allen v. Int'l Truck & Engine Corp., 358 F.3d 469, 470 (7th Cir. 2004).

39. See Fed. R. Civ. P. 23(b)(2) advisory committee's note on 1966 amendment ("The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."); Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (per curiam) (suggesting possibility that class action seeking substantial money damages can only be certified under (b)(3) and dismissing writ of certiorari for review of constitutional question as improvidently granted).

40. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (establishing notice and opportunity to opt out as minimal requirements for establishing personal

The most dramatic response to this change in the Title VII landscape has come from the Fifth Circuit in its much-noted decision in *Allison v. Citgo Petroleum Corp.*, which upheld a district court's denial of certification in a run-of-the-mill employment discrimination suit because of the complications introduced by the 1991 Act.[41] The plaintiffs in the case had raised both disparate impact and disparate treatment claims against a Citgo plant, seeking both injunctive and monetary damages, and the district court refused to certify on the grounds that the addition of the damages claims made certification under Rule 23 impossible. The Fifth Circuit held that the district court did not abuse its discretion in finding Rule 23(b)(2) unavailable for the certification of the hybrid injunctive and monetary claims in the case, and it strongly suggested that (b)(2) might never be available for Title VII claims that include requests for substantial monetary damages.[42] It also affirmed the lower court's finding that this hybrid action—and, the court implied, almost any such action—could not satisfy the requirements of superiority and predominance under Rule 23(b)(3).[43] These two holdings—both part of the "first stage" of the doctrinal response to the 1991 Act as that term is used above—have placed significant limitations on the ability of any plaintiff in the Fifth Circuit to maintain a Title VII action for classwide relief that includes a request for damages. The Seventh Circuit has followed the Fifth in its Rule 23(b) holding[44] (though the Second Circuit has declined to[45]), and the cases have been the subject of much controversy.[46]

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jurisdiction in class suit for damages); Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 897–99 (7th Cir. 1999) (assuming that due process requires these procedures when substantial monetary claims are at stake). The constitutional issue is a bit more complicated, as explained infra Part II.B.3.b.

41. 151 F.3d 402, 410–26 (5th Cir. 1998).

42. Id. at 417–18 & n.13.

43. Id. at 418–20.

44. See *Ingersoll*, 195 F.3d at 897–99.

45. Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 162–67 (2d Cir. 2001) (rejecting uncompromising rule of *Allison* and *Ingersoll* in favor of "ad-hoc approach").

46. See, e.g., Linda S. Mullenix, No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives, 2003 U. Chi. Legal F. 177, 207–14 (criticizing ungenerous approach of *Allison* and *Ingersoll*); Brad Seligman & Jocelyn D. Larkin, Lessons in Class Certification, Trial, Oct. 2001, at 36, 36–37 (describing impact of *Allison* and its progeny on Title VII litigation).

Subsequent decisions by the Fifth Circuit have blunted some of the more far-reaching consequences of *Allison*'s Rule 23(b) holding. The court has held that a court's certification inquiry must proceed on a "claim-by-claim" rather than an "holistic" basis in order to preserve the ability of Title VII plaintiffs to pursue class actions whenever possible. See Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000) (stating an approach to framing the analysis that I scrutinize infra Part III). It has adopted more forgiving standards for determining when Title VII damages calculations may be made consistently with the requirements of Rule 23(b)(2), see In re Monumental Life Ins. Co., 365 F.3d 408, 416–20 (5th Cir. 2004), and, in an unpublished opinion, one panel has authorized certification of an "inconsistent adjudications" Title VII suit under Rule 23(b)(1)(A) to avoid *Allison* problems, see Smith v. Crystian, 91 F. Appx. 952, 954–55 (5th Cir. 2004).

After issuing these core holdings, the *Allison* court went on to reject several alternative strategies offered by the plaintiffs by which they hoped to utilize a bifurcated action to finesse the certification problem. In each of these strategies, plaintiffs proposed to litigate only the portions of the case that could be certified under Rule 23(b)(2) in the initial phase of the suit and to leave the resolution of the damages claims for later in the proceeding.[47] The appellate court rejected these attempts on the strength of an aggressive reading of the Seventh Amendment. The Amendment requires factual questions that overlap claims for damages and equitable relief in a single action to be submitted to a jury for resolution.[48] The court found that the region of overlap between disparate impact and pattern or practice claims was so great that it would require the empanelling of a jury in any initial, equitable resolution of the disparate impact claims.[49] That being so, the court went on to find, later juries empanelled to decide damages claims in the succeeding phase of litigation would inevitably run afoul of the Reexamination Clause by making independent findings on those overlapping issues.[50] The Fifth Circuit thus concluded that the difficulty of avoiding Seventh Amendment problems prevented the use of bifurcation to litigate both the equitable and the monetary Title VII claims in a single class action proceeding.

Finally, as if tying up a loose end, the Fifth Circuit added the following sentence at the close of its Seventh Amendment analysis: "Nor may [the damages claims] be advanced in a *subsequent* class action without being barred by res judicata and collateral estoppel, because all of the common factual issues will already have been decided, or could have been decided, in the prior litigation."[51] It is this part of the Fifth Circuit's opinion, addressing the second "stage" of the doctrinal response to the 1991 Act, that is relevant for present purposes.

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47. There was some confusion as to whether the plaintiffs proposed litigating both the disparate impact claim and the liability portions of the disparate treatment claim in such a bifurcated action, or instead sought to litigate only the disparate impact claim. The Fifth Circuit concluded that the district court had discretion to reject either scenario. See *Allison*, 151 F.3d at 420–26.

48. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472–73 (1962) (holding that right to jury trial on legal issues applies regardless of whether legal claims are "incidental" to equitable claims); Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 510–11 (1959) (holding that "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims").

49. *Allison*, 151 F.3d at 422–25.

50. This finding was a debatable one, as the dissent pointed out. See id. at 433–34 (Dennis, J., dissenting) (arguing that issues to be determined during proposed stages of litigation "are separate and distinct and the second jury will not reexamine issues decided by the first jury"). Indeed, the opinion is rather vague in its Seventh Amendment analysis and does not make this last step in its reasoning explicit, see id. at 423–25, leaving it to the dissent to spell out the steps of the majority's logic by way of refuting them, see id. at 433 (Dennis, J., dissenting).

51. Id. at 425 (citing Montana v. United States, 440 U.S. 147, 153 (1979); Nilsen v. City of Moss Point, 701 F.2d 556, 559–64 (5th Cir. 1983) (en banc)).

For reasons that should be obvious, the court's perfunctory statement about the preclusive consequences of conducting two separate proceedings was wrong in several ways at once. Issue preclusion never applies to issues that "could have been decided" in a prior litigation; it requires actual litigation of issues that were necessary to a prior judgment.[52] And claim preclusion does not necessarily operate to preclude litigation of factually related claims in subsequent class proceedings, as *Cooper* itself made clear in construing an earlier version of the same statute that was at issue in *Allison*. Perhaps the court was proceeding on some misguided instinct that it should not be possible to accomplish through successive lawsuits what the Seventh Amendment would prevent a court from doing in a single, bifurcated proceeding.[53] (This instinct was misguided, of course, because the Supreme Court had already rejected that proposition some twenty years earlier.[54]) Whatever its thought process, the majority should have realized that it was traveling a confused path when it produced this convoluted misstatement on preclusion. But it did not, and *Allison* has produced confusion over the preclusive effect that the certification of a (b)(2) class action for equitable relief

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52. See Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); id. § 27 cmt. e ("A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action.").

53. Professor Woolley examines a similar proposition in his article discussing Judge Posner's opinion in In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995), and the role of the Reexamination Clause in the certification of "issue classes." See Patrick Woolley, Mass Tort Litigation and the Seventh Amendment Reexamination Clause, 83 Iowa L. Rev. 499 (1998) [hereinafter Woolley, Reexamination Clause]. Woolley concludes that the Seventh Amendment should be interpreted in a dynamic and nonrigid fashion that would permit the use of issue classes, bifurcation, and other mechanisms involving overlapping issues, provided that doing so will not create undue confusion for juries. See id. at 517–42.

54. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333–37 (1979), in which the Court authorized the limited use of offensive nonmutual issue preclusion in federal question cases, presented a Seventh Amendment situation similar to this "shadow" question in *Allison*. *Parklane* involved two proceedings, the first an enforcement action brought by the government and tried before the bench in equity, the second a damages action brought by a class of stockholders and tried before a jury. The plaintiffs sought to benefit from a finding in the earlier enforcement action that Parklane had issued a false and misleading proxy statement. Parklane argued that applying an estoppel in a damages action would violate its right to trial by jury under the Seventh Amendment. The Court disagreed, finding that "if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury [in a separate action] might be foreclosed by res judicata or collateral estoppel," even if a different result would obtain if the two claims were joined in the same action. Id. at 334.

Thus, to the extent that *Allison*'s statement about preclusion relied upon a belief that any limitation imposed by the Seventh Amendment in the structuring of a single, bifurcated action must be replicated by preclusion doctrine in successive actions, that belief was mistaken.

will have upon plaintiffs' subsequent attempts to recover on individual damages claims in a Title VII case.[55]

And indeed, though *Allison*'s own statement on the preclusion issue is somewhat nonsensical, the 1991 Act does give rise to issue preclusion consequences that require close attention. A court's resolution of a disparate impact claim in a stand-alone proceeding will often involve issues of fact that overlap the elements of an intentional discrimination claim. An unfavorable result in the equitable proceeding therefore threatens to preclude class members from litigating their damages claims in individual suits, since an adverse finding on an overlapping issue might prevent a class member from establishing an element of his claim.[56] A victory in the equitable proceeding, however, would not offer the concomitant benefit of a guaranteed victory in the damages claims, since a plaintiff in a disparate treatment claim will always have to establish additional facts relating to her individual circumstances: causation, the absence of a nonpretextual explanation for the adverse employment action, and so forth.[57] Given these risks, are the interests of the class well served by authorizing class counsel to litigate the equitable claim?

If only some members of the class have viable damages claims for individual discrimination, as will usually be the case, the problem becomes more acute. The plaintiffs whose high-value damages claims are placed in jeopardy by the potential issue preclusive effects of the equitable action will likely be risk averse, willing to settle the (b)(2) action for modest structural reforms in order to avoid endangering their damages claims. The plaintiffs who have no hope of substantial monetary recovery, in contrast, will be more interested in going for broke in seeking a litigated outcome, since they have no adverse preclusion consequences to fear. If issue preclusion operates in its normal mode in such cases, an ex ante conflict can arise between the incentives of class members with viable damages claims and those without in any (b)(2) action, even if those damages claims are neither litigated in the action nor directly threatened through an application of claim preclusion.

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55. See George Rutherglen, Fed. Judicial Ctr., Major Issues in the Federal Law of Employment Discrimination 98–99 (4th ed. 2004), available at http://www.fjc.gov/public/pdf.nsf/lookup/EmplDis4.pdf/$file/EmplDis4.pdf (on file with the *Columbia Law Review*) ("The overall effect of the [*Allison*] decision certainly is not to increase the availability of class actions in Title VII cases, and the ironic consequence is that the expanded remedies created by the Civil Rights Act of 1991 might restrict the procedures formerly available to victims of discrimination.").

56. The Supreme Court makes a related point in *Cooper* in discussing the factual relatedness of classwide and individual discrimination claims. See Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 880 (1984) ("[T]he prior adjudication [of the classwide pattern or practice claim] may well prove beneficial to the Bank in the [individual discrimination] action.").

57. Professors Silver and Baker offer a useful discussion of these potentially divergent incentives in employment litigation. See Charles Silver & Lynn Baker, I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds, 84 Va. L. Rev. 1465, 1491–94 (1998).

In one post-*Allison* decision, *Zachery v. Texaco Exploration & Production, Inc.*, a district court that apprehended some of these potential conflicts proclaimed itself powerless to guard against the "very real possibility, if not . . . probability, that another court of competent jurisdiction could determine that the proposed class members would be barred from bringing individual actions for damages" if it were to certify a class for injunctive relief.[58] Invoking the ubiquitous maxim that a court "cannot conclusively determine the res judicata effect of [its own] decision," the district court concluded that its only option was to "assess the risk of such a determination and weigh it in the consideration of the certification of a class."[59] The court then denied certification altogether, explaining that it was unable to assure itself that a Title VII action could be structured in a way that would serve the interests of the class.[60]

Thus, following the Civil Rights Act of 1991, litigation of Title VII cases presents a series of preclusion-related problems. There is a claim preclusion question: Does the decision to assert only claims for injunctive relief on behalf of a class of employees require the plaintiffs to sacrifice (or "risk" sacrificing) their individual damages claims outright? It presents an issue preclusion question: Would an adverse result in an injunctive suit have issue preclusive effects that could sound the death knell for individual damages claims, and how does that risk affect the suitability of the action for class treatment? It presents a question about conflicts of interest: If only some members of the class have damages claims to lose, whether through claim or issue preclusion, is it possible to accommodate the interests of both groups of employees in a single injunctive action? And it presents a question about the desirability of class treatment in the first instance: If the use of a class action to litigate claims for equitable relief will inevitably entail a serious risk of sacrificing the damages claims of class members, does that risk call into question the propriety of proceeding under Rule 23? Contrary to the Fifth Circuit's precipitous conclusion in *Allison*, it is entirely possible to answer these questions in a fashion that enables plaintiffs to pursue the forms of relief contemplated in the 1991 Act, as Parts II and III explain.

2. *Tort Class Actions.* — The range of preclusion problems that arises out of the bifurcated litigation typical of Title VII cases has also begun to find more general expression in class actions involving tort claims. This has been particularly true following the Supreme Court's decision in *Amchem*, which imposed strict constraints on the certification of personal injury claims and has encouraged a concomitant change in the character

58. 185 F.R.D. 230, 243 (W.D. Tex. 1999).

59. Id.

60. See id. at 244–45 ("The class members the Plaintiffs seek to represent must be given the opportunity to pursue intentional discrimination claims and seek monetary damages, and certifying this class may very well deny them just that chance.").

of tort class actions.[61] *Amchem* did not produce an appreciable reduction in the rate at which class action lawsuits are brought to federal court (other than a short lived blip that surrounded the decision itself).[62] Even so, the constellation of claims asserted in these suits appears to be shifting as plaintiffs' attorneys attempt to craft class proceedings that will satisfy the new restrictions.[63] If this trend continues, preclusion issues promise

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61. The most immediate impact of *Amchem* has been felt in the federal courts, as the holding of the case related only to Rule 23. Since many states have chosen to track the Federal Rules closely and view federal decisions construing those rules as authoritative, the Court's ruling has also had a doctrinal impact upon state class litigation. See, e.g., Hoffman v. Cohen, 538 A.2d 1096, 1097–98 (Del. 1988) (noting that rules of procedure in Delaware were patterned after Federal Rules and so cases construing Federal Rules are persuasive authority); Riley v. New Rapids Carpet Ctr., 294 A.2d 7, 11 (N.J. 1972) (describing New Jersey's class action provision as "a replica of Rule 23 of the Federal Rules of Civil Procedure as amended in 1966").

62. In 2002, the Advisory Committee on Civil Rules commissioned the Federal Judicial Center to perform a comprehensive study aimed at determining the effects of *Amchem* and Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), on federal class actions. See Bob Niemic & Tom Willging, Fed. Judicial Ctr., Effects of *Amchem*/*Ortiz* on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules (Sept. 9, 2002), available at http://www.fjc.gov/public/pdf.nsf/lookup/AmChem.pdf/$file/AmChem.pdf (on file with the *Columbia Law Review*) [hereinafter FJC Filing Rate Report]. The study examined the rates at which class actions were brought to federal court (through original filing or removal) from January 1994 to June 2001 and used a time series regression model in an attempt to identify significant causal relationships between the changes in filing rates and the Supreme Court's two major opinions on certification. See id. at 4–5 (describing contents of database used in study); id. at 34–35 (describing methodology employed in data analysis).

The rate at which class action lawsuits were brought to federal court increased steadily over the course of the study period. The only significant deviation from this trend was a decrease in the filing rate of nonsecurities class actions immediately following the Court's decision in *Amchem*, followed by a renewal of the upward trend in the wake of *Ortiz*. See id. at 6–10 (describing overview of findings). While it is difficult to draw robust conclusions about the causal effect of a single Supreme Court decision on a decision as complex as whether and where to file a class action lawsuit, the study tentatively concluded that the correlation between *Amchem* and the brief decrease in filing rates was not purely coincidental. See id. at 1–2 (summarizing findings). The increase in filing rates following *Ortiz* is counterintuitive, since the decision imposed further limitations upon the use of alternative class action strategies to circumvent the holding of *Amchem*. To the extent that the two are causally linked, the upward trend might best be explained by the fact that *Ortiz* clarified the doctrinal landscape following *Amchem* and ended a period during which plaintiff attorneys may have refrained from filing new class actions while they reassessed the best strategies to employ.

63. It is difficult to offer any comprehensive assessment of the breadth and scope of class action lawsuits, particularly since reliable data often are not available from state court systems. See FJC Filing Rate Report, supra note 62, at 3 (excluding rates of state filings from class action study due to lack of available data). Nonetheless, there is good reason to think that the profile of class action lawsuits is undergoing a change. Some key state jurisdictions have begun to impose and enforce *Amchem*-like restrictions on the use of omnibus class actions, see, e.g., S.W. Refining Co. v. Bernal, 22 S.W.3d 425, 433–36 (Tex. 2000) (requiring strict enforcement of predominance and superiority requirements in damages class action), and federal courts have been turning away nationwide class actions that attempt to sweep a broad array of claims into a single proceeding, see, e.g., In re

to figure prominently in the assessment of these more tailored tort classes.

One of the most notable trends among tort class actions has been a shift toward proceeding under Rule 23(b)(1) or (2), rather than (b)(3), even when class members possess substantial damages claims. In a move paralleling some of the core issues that played out in *Allison*, class counsel in a broad range of cases have either sought to characterize damages claims as appurtenant or subordinate to equitable claims when the damages claims might be suitable for class treatment, or else to carve damages claims out of a suit entirely and litigate only equitable claims when class treatment of the damages claims is clearly not possible.[64] Courts confronting such efforts in the posture of a recognizing forum—that is, in an

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Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig. (*Bridgestone/Firestone I*), 288 F.3d 1012, 1018–21 (7th Cir. 2002) (rejecting nationwide class action in product defect case due to serious predominance and manageability problems created by divergent choice of law rules); In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 343–45 (S.D.N.Y. 2002) (refusing to certify multistate class action where need for individually tailored environmental remediation for every class member made certification under Rule 23(b)(2) inappropriate). The most noteworthy exception in the federal courts to this recent trend—the massive nationwide class action settlement being administered in the Eastern District of Pennsylvania to address the heart valve damage inflicted by the diet drugs commonly known as Fen-Phen—has been a spectacular failure that will not likely invite emulation. See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., MDL No. 1023, Civil Action No. 99-20593, 2000 WL 1222042, at *1 (E.D. Pa. Aug. 28, 2000) (granting certification for nationwide settlement-only class action encompassing approximately six million consumers with potential heart valve injuries); Class Counsel's Memorandum of Law in Support of Joint Motion by Wyeth, Class Counsel, and the Seventh Amendment Liaison Committee for the Entry of an Order Preliminarily Approving the Seventh Amendment to the Nationwide Class Action Settlement Agreement and for the Entry of Related Orders: (1) Directing the Resumption of the Parallel Processing Program; (2) Approving a Procedure for Resolving Outstanding Post-Audit Determination; and (3) Approving the Eighth Amendment to the Settlement Agreement at 38–39, *In re Diet Drugs* (MDL No. 1023, Civil Action No. 99-20593) (describing settlement as hovering on brink of complete collapse).

More broadly, class counsels' decisions about where to file a lawsuit and how to structure the action will always be influenced by their assumptions about the reception that they are likely to receive from the certifying judge—a common sense proposition to which the Federal Judicial Center recently lent credence with an attorney survey seeking to quantify the criteria that class counsel use in choosing between a federal and a state forum. See Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr., Attorney Reports on the Impact of *Amchem* and *Ortiz* on Choice of a Federal or State Forum in Class Action Litigation 5–10 (Apr. 2004), available at http://www.fjc.gov/public/pdf.nsf/lookup/AmOrt02.pdf/$file/AmOrt02.pdf (on file with the *Columbia Law Review*) [hereinafter FJC Forum Choice Report] (summarizing results of attorney survey, which found strong tendency to seek out most hospitable forum). Although the study found that *Amchem* and *Ortiz* were not foremost in the minds of most attorneys selecting between federal and state fora, the decisions have had some effect. See id. at 6. As more omnibus class actions are rejected on the authority of those two decisions, one can expect that class counsel will attempt to pare down their lawsuits in order to satisfy the newly imposed standards.

64. See, e.g., Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 820–24 (1997) [hereinafter Issacharoff, Conflicts] (describing pre-*Ortiz* attempts to use the limited-fund class action to get around notice, opt-out, and predominance requirements).

F2 proceeding where a defendant seeks to rely upon an F1 judgment for a preclusion defense—are fairly consistent in their reactions, generally rejecting expansive claim preclusion defenses but entertaining issue preclusion arguments more seriously.[65] When courts confront these issues in an initial proceeding, however—that is, as an F1 forum—they frequently repeat the complaint of powerlessness heard above in the *Zachery* decision and profess themselves unable to protect the rights of class members against possible preclusion in the future.

A recent decision from the Southern District of New York, *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*,[66] is typical of the latter trend. In 2000 and 2001, property owners around the country brought suit over the contamination of their well water by MTBE, a gasoline additive. Collectively, these plaintiffs named an enormous group of oil companies as defendants, comprising every producer of MTBE that they could identify. The suits were consolidated by the Judicial Panel on Multidistrict Litigation and transferred to Judge Shira Scheindlin's court,[67] where the plaintiffs asked to be certified as class representatives for a suit encompassing all property owners in Florida, California, New York, and Illinois whose well water was contaminated by de-

65. See, e.g., Hiser v. Franklin, 94 F.3d 1287, 1290–94 (9th Cir. 1996) (applying Alaska law to deny claim preclusion defense of prison officials in civil rights suit initiated by a prisoner alleged to be precluded by consent decree in an earlier suit); In re Jackson Lockdown/MCO Cases, 568 F. Supp. 869, 891–93 (E.D. Mich. 1983) (disallowing claim preclusion defense but entertaining issue preclusion defense in individual suit by prisoner following class action); Jahn ex rel. Jahn v. ORCR, Inc., 92 P.3d 984, 985 (Colo. 2004) (en banc) (adopting "absolute" rule that suits for injunctive relief filed under state rule 23(b)(2) never have claim preclusive effect on damages claims). Some courts have precluded individual claimants for failure to intervene in a class action and assert their individual claims, but most such opinions are sufficiently old as to have limited continuing relevance. See, e.g., Int'l Prisoners' Union v. Rizzo, 356 F. Supp. 806, 809–10 (E.D. Pa. 1973) (barring prisoner who received notice of class proceeding but failed to intervene and raise individual claims from pursuing claims in subsequent suit).

To the extent that such opinions rely upon a general duty of class members to appear and intervene when they have notice of a suit, they are undermined by Martin v. Wilks, 490 U.S. 755, 762–65 (1989), which disclaimed any general duty to intervene on the part of affected individuals with notice of a pending action. The particular intervention issue decided by the Court in *Martin* was one of the topics that Congress addressed in the Civil Rights Act of 1991, reversing portions of the Court's holding. See 42 U.S.C. § 2000e-2(n)(1)(B) (2000). Even that statutory imposition of a duty to intervene was controversial at the time it was enacted. Respected commentators expressed the view that the provision might violate the due process rights of interested nonparties, and Congress was sufficiently concerned to insert a (redundant) proviso foreclosing any application of the statute that would violate the Constitution. See 42 U.S.C. § 2000e-2(n)(2)(D) (stating that nothing in the subsection shall be construed to "authorize or permit the denial to any person of the due process of law required by the Constitution"); Owen M. Fiss, The Allure of Individualism, 78 Iowa L. Rev. 965, 971–72 (1993) (discussing majority opinion in *Martin* as articulating a "right of participation" that appears to have constitutional stature).

66. 209 F.R.D. 323 (S.D.N.Y. 2002).

67. Id. at 328–30 (recounting procedural history of case).

tectable levels of MTBE.[68] The plaintiffs proceeded under state tort theories along with a claim for failure to notify under the federal Toxic Substances Control Act, seeking injunctive relief to remediate each of their individual cases of contamination. Various unnamed class members, from whom class counsel obtained declarations in support of certification, made clear that they also had claims for individual damages that they wanted to preserve,[69] even though the lead plaintiffs apparently acknowledged that such claims could not be litigated on a classwide basis.[70]

There were more than a few obstacles to this multistate, multi-incident, multidefendant omnibus class action, and the court denied certification on many different grounds.[71] It addressed the question of preclusion under the rubric of adequacy of representation. As with the Title VII examples discussed above, this request for purely injunctive relief raised both claim and issue preclusion concerns for the related damages claims. In the case of claim preclusion, it raised the possibility, albeit one usually rejected in F2 courts, that the maintenance of an injunctive class action would bar individual class members from pursuing damages claims, even if those claims could not have been asserted in the class proceeding. In the case of issue preclusion, the suit raised the more serious concern that adverse findings on the request for injunctive relief might preclude the property owners from establishing the elements of their damages claims in subsequent individual proceedings.

One might have expected the court to conclude that it could resolve the concern over claim preclusion rather easily, given the willingness of most F2 courts to entertain individual claims that could not have been litigated on a classwide basis in an earlier proceeding.[72] This conclusion

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68. Id. at 334–35 (stating class definition).

69. The declarations were filed in support of the argument that the MTBE problem was widespread. As the court explained, "Plaintiffs also provide declarations from other residents from New York, Florida, California and Illinois to illustrate the extent of the MTBE problem as well as the proliferation of MTBE-related lawsuits. Many of the declarants seek to recover for personal injuries allegedly caused by MTBE." Id. at 334. As the court later explained, those damages claims were potentially lucrative: "[S]everal declarants—who are class members by definition—have already . . . [employed tort lawyers, on a contingency basis,] and have achieved results . . . ." Id. at 350.

70. The plaintiffs only sought injunctive relief before Judge Scheindlin, see id. at 328–29, though they did attempt to fit their injunctive claims under Rule 23(b)(3) as an alternative method of proceeding, see id. at 349–51.

71. See, e.g., id. at 337–38 (denying certification because class members did not meet typicality requirement); id. at 342–45 (describing impropriety of class treatment due to necessarily individualized nature of injunctive relief); id. at 348–49 (denying certification due to impossibility of binding absent plaintiffs to adverse result, since time when MTBE contamination occurs usually cannot be determined).

72. Wright, Miller, and Cooper are in accord:

> The basic effort to limit class adjudication as close as possible to matters common to members of the class frequently requires that nonparticipating members of the class remain free to pursue individual actions that would be merged or barred by claim preclusion had a prior individual action been brought or the relief demanded in the class action. . . . [A]n individual who has suffered particular

might not hold true in all cases, as the next subparts discuss, but it would often provide a sufficient ex ante answer to claim preclusion problems, leaving only the need to scrutinize the issue preclusive implications of the proceeding. And issue preclusion did raise some legitimate concerns in the *MTBE* litigation. The levels of contamination alleged by members of the class varied widely, suggesting that only some members of the class (and perhaps only a small number) had substantial, positive-value claims for monetary damages.[73] The potential for adverse issue preclusive effects was patent here, as would be true in almost any tort case where class counsel proposes to pursue only a limited form of classwide relief, since the elements necessary to establish liability would be the same regardless of the form of the remedy requested. The primary focus of the *MTBE* court's attention should have been issue preclusion.

But the court did not discuss issue preclusion at all. Instead, it based its preclusion ruling entirely on concerns over claim preclusion. While it acknowledged the significant number of cases in which F2 courts have rejected claim preclusion defenses based upon earlier injunctive class actions, the court dismissed those cases as "alleging civil rights violations" (primarily on behalf of prisoners), rather than tort claims.[74] Even if "most [F2] courts" would probably embrace the treatment of claim preclusion embodied in the civil rights precedents, the district court concluded, it "could not *ensure*" that the *MTBE* plaintiffs would be able to pursue their damages claims in subsequent actions.[75] In support of this proposition, the court pointed to several cases in which other F1 courts had found class representatives to be inadequate because of their willingness to forgo damages claims in the hope of satisfying the requirements of certification—a slightly different issue, as Part III explains. Invoking the ubiquitous preclusion maxim for good measure, the court concluded that the risk of adverse claim preclusion consequences in future cases was unmanageable, rendering the named plaintiffs inadequate to represent the class.[76]

Judge Scheindlin was not venturing into unoccupied terrain in issuing this ruling. A growing number of other courts, while failing to analyze the potentially significant conflicts of interest that issue preclusion might produce in class proceedings, have placed dispositive weight on the

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injury as a result of practices enjoined in a class action should remain free to seek a damages remedy even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief.

18A Wright, Miller, & Cooper, supra note 2, § 4455, at 461–62.

73. *In re MTBE*, 209 F.R.D. at 338–39 (embracing finding that only "few absent class members" have sufficient levels of contamination to support substantial damages claims).

74. Id. at 339. The court did not explain how this difference in the underlying claim might bear upon the preclusion analysis, though the instinct that it might be relevant was not entirely unwarranted as infra Part III explains.

75. Id. at 339–40 (emphasis added).

76. Id. at 340 ("[O]nly subsequent courts will determine the res judicata effect of any judgment . . . ." (citing 7B Wright, Miller, & Cooper, supra note 2, § 1789, at 245 & n.16)).

specter of claim preclusion. Although there are very few reported decisions in which an F2 court has actually recognized a claim preclusion defense preventing a plaintiff from recovering on a claim not litigated in an earlier class proceeding,[77] many F1 courts still refuse to allow class actions to proceed on the basis of a vague apprehension of "risk" that such a parade of horribles might nonetheless result for the hapless plaintiffs currently before them.[78]

This is not an acceptable way to administer an adjudicatory system. We would ordinarily be unsatisfied if a court refused to provide relief on the basis of its own professed "uncertainty" as to the proper resolution of a legal question.[79] The few situations in which we formally recognize uncertainty as an appropriate basis for refusing to proceed—usually under the rubric of abstention—are exceptional in nature, frequently impelled by concerns over comity between sovereigns, and generally accompanied by the promise of comparable relief in an alternative forum.[80] The deni-

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77. I am aware of only one such decision—Int'l Prisoners' Union v. Rizzo, 356 F. Supp. 806, 809 (E.D. Pa. 1973)—and that case placed significant reliance upon a finding that the plaintiff had notice of the earlier suit, had an opportunity to intervene in that action and assert his individual claim, and made a considered choice not to do so.

78. See, e.g., Clark v. Experian Info. Solutions, Inc., No. Civ.A.8:00-1217-24, 2001 WL 1946329, at *3–*4 (D.S.C. Mar. 19, 2001) (stating that offering only some claims for class certification when other, more lucrative claims could not be certified "defeats adequate representation since it places absent class members at the risk of having other claims forever barred by res judicata"); Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 550–51 (D. Minn. 1999) (refusing to certify because the "possible prejudice to class members" resulting from claim preclusion in the future "is simply too great"); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606 (S.D.N.Y. 1982) (refusing to certify class action for economic losses where plaintiffs also had personal injury claims because of "significant risks" that class members would "later [be told] that they had impermissibly split a single cause of action"); Millett v. Atl. Richfield Co., No. Civ.A. CV-98-555, 2000 WL 359979, at *9 (Me. Super. Ct. Mar. 2, 2000) (explaining that asserting claims for injunctive relief while leaving personal injury claims unraised places class members at risk of subsequent claim preclusion defense); Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593, 601–02 (App. Div. 1998) (stating that paring down class claims to avoid certification problems creates impermissible "risk" of adverse preclusive effects).

A substantial number of courts do continue to resist the siren song of this diffuse, risk-based argument when considering class actions outside the "civil rights" context. See, e.g., Coleman v. Gen. Motors Acceptance Corp., 220 F.R.D. 64, 79–84 (M.D. Tenn. 2004) (considering many of these authorities and distinguishing or rejecting them); Jahn ex rel. Jahn v. ORCR, Inc., 92 P.3d 984, 987–91 (Colo. 2004) (en banc) (adopting restrictive interpretation of state Rule 23(b)(2) for all types of action).

79. There is, of course, an ongoing discussion of the virtue of judicial passivity when it comes to the constitutional review of legislative enactments in contentious areas of social disputation. See Michael C. Dorf, Legal Indeterminacy and Institutional Design, 78 N.Y.U. L. Rev. 875, 892–95 (2003) (summarizing and critiquing debate over "passive virtue" of restraint in judicial review, most frequently associated with James Thayer and Alexander Bickel). The principles of political theory that motivate that debate obviously are not implicated here.

80. The Court has considered and rejected the suggestion that uncertainty as to the proper resolution of state law claims might offer a sufficient basis for a federal court to decline to exercise its diversity jurisdiction. See Meredith v. Winter Haven, 320 U.S. 228,

als of certification discussed above have none of these mitigating qualities,[81] and they rely upon a declaration of uncertainty that is no less disquieting for its attenuated quality. These courts have said, in effect, "I know that you have proposed a class action that may be properly maintainable, but I won't allow you to proceed because I must protect the absentees from the possibility that a subsequent court might misapply my judgment." This is abdication masquerading as diligence.

But it would be inappropriate to single these courts out exclusively for criticism. These are, after all, the rare judges who have taken time at the certification stage to recognize and consider the preclusive effect of their judgments upon class members. That fact alone distinguishes them from the great majority of trial courts, which pass over the issue completely. These judges have been operating from a presumption—a flawed presumption, as Part II explains, but one with a formidable pedigree in the form of the ubiquitous preclusion maxim—that it is impossible for a rendering forum to resolve preclusion problems in any meaningful fashion, leaving the rights of class members always contingent upon the whims of a future, recognizing forum. Given the appalling state of class litigation in some courts,[82] one can sympathize with the desire of these judges not to yoke the class members under their supervision to an uncertain fate.[83] Even so, the solutions that these courts have produced

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234–37 (1943) ("[W]e can discern in [Congress's diversity jurisdiction policy] no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine."). Where other public policy concerns militate in favor of abstention, and an adequate remedy exists in another forum, the Court has left the door open for declining jurisdiction, id., though it has viewed such arguments with skepticism. A good discussion of this line of cases may be found in Lewis Yelin, Note, *Burford* Abstention in Actions for Damages, 99 Colum. L. Rev. 1871, 1883–93 (1999); see also 28 U.S.C. § 1367(c)(1) (2000) (recognizing "novel[ty]" of state law claim as appropriate basis for declining to exercise court's discretionary supplemental jurisdiction).

81. Indeed, if Judge Easterbrook's opinion in *Bridgestone/Firestone II* finds general acceptance, these courts' professions of uncertainty might also bind others that do not share their reticence. See In re Bridgestone/Firestone Tires Prods. Liab. Litig. (*Bridgestone/Firestone II*), 333 F.3d 763, 769 (7th Cir. 2003) (issuing injunction to prevent any trial court from certifying nationwide class that Seventh Circuit had previously held uncertifiable).

82. The Class Action Fairness Act of 2005, which gained passage immediately before this Article went to press, includes findings in which Congress expressed particularly harsh criticism toward the negligent and manipulative use of the class action in some courts. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § (2)(a)(1)–(4), 119 Stat. 4, 4–5.

Indeed, even if the courts in the cases discussed above realize that their vague gestures of "uncertainty" and "risk" are less than satisfying as explanations for a denial of certification, one can imagine them casting their gaze over the rocky landscape of class litigation created by some of their sister courts and borrowing from Alfred Hitchcock's Mother Sebastian in assuring themselves that they will be safe from censure: "The enormity of your stupidity protects us." Notorious (RKO Radio Pictures 1946).

83. Professor Burbank captures a similar sentiment in rejecting the argument that the preclusive effect of federal diversity judgments should be determined by the legal standards of the recognizing forum, rather than those of the rendering forum: "From the

are entirely inadequate, at once conjuring obstacles to certification from claim preclusion that might be unnecessary, and failing to address issue preclusion problems that might create actual conflicts within an otherwise cohesive class.

C. *Representation and Strategic Litigation Choices*

Not all claim preclusion problems arise out of attempts to pare a class action down to a certifiable core, nor do they all lend themselves to the response that contested claims in a subsequent proceeding "could not have been brought" in the original forum. Class counsel may have strategic objectives that require them to choose between more than one viable approach in structuring a class action, and the choice between those different approaches may have claim preclusive implications for the class. Scenarios of this description do not necessarily create intraclass conflicts like those explored above. Rather, they present questions about the limits of class counsel's authority to bind absentees to costly decisions in a class proceeding.

1. *Stay-in-State-Court Suits.* — Class counsel sometimes perceive a strategic benefit in pressing only certain legal arguments in their request for relief, deliberately choosing to forgo potentially meritorious claims. An important example of such "argument splitting" is the decision to plead only state grounds for relief and forgo federal claims in order to keep an action in state court. Avoiding a federal forum through such selective pleading may redound to the benefit of the plaintiffs for a variety of reasons.

Some class counsel employ this technique simply because they assume that state courts will offer greater judicial flexibility, or lesser judicial diligence, in the supervision of class litigation—to be blunt, they assume that they can get away with more in state court than in federal court.[84] There are certainly many accounts of notorious state court systems that provide particularly hospitable homes for plaintiffs' attorneys,[85] and the Class Action Fairness Act (CAFA) that was recently signed into law includes findings that would support some broader generalizations

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perspective of litigants, . . . a system of preclusion rules for diversity judgments keyed to the locus of subsequent litigation would be hopeless, either because it would be unpredictable or because it would be, functionally, a sham." Burbank, Interjurisdictional Preclusion, supra note 7, at 797.

84. See Linda S. Mullenix, Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?, 74 Tul. L. Rev. 1709, 1712–19 (2000) [hereinafter Mullenix, Abandoning the Ship] (describing plaintiffs' increased reliance upon state fora on the assumption that state courts will be more receptive to their claims).

85. See, e.g., Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1057–68 (1996) (criticizing Alabama state courts for inadequate supervision of class members' interests in home mortgage lending cases); Mullenix, Abandoning the Ship, supra note 84, at 1756–58, 1767 (concluding that Florida remains a strongly pro-plaintiff jurisdiction but that Texas and Louisiana have begun cracking down on lax certification standards).

about the relative merits of these fora.[86] One variation on this forum manipulation that has received a great deal of attention occurs when one attorney files a nationwide class action on a federal claim and others then file parallel proceedings in state court, on state law claims, commencing a rush to settlement in hopes of securing generous fees with the promise of a global release.[87]

But not all efforts to stay in state court have a nefarious ring to them. In a dispute of national scope, for example, class counsel may perceive a strategic benefit in bringing many statewide class actions, instead of a single nationwide proceeding. While conventional wisdom holds that plaintiffs' attorneys have an incentive to sweep as many plaintiffs as possible into a single proceeding in order to raise the stakes (and hence their fees), this tenet does not always hold true. If the stakes in a dispute are sufficiently high, even a statewide class action can be a "bet the company" lawsuit for the defendant, with potential exposure that exceeds its insurance coverage and could jeopardize its viability. It may give class counsel a stronger hand to bring multiple statewide suits in such a case, rather than initiating a single, nationwide proceeding that could be resolved, and potentially dismissed, all at once.[88] If nonmutual offensive issue preclusion is available, of course, bringing multiple statewide actions may strengthen plaintiffs' hand even further. The distinctive tools that a federal cause of action offers in a federal forum—nationwide service of process, consolidation of multidistrict litigation—may work against the plaintiffs' interests here, making relinquishment of the federal claim an

86. See § (2)(a)(1)–(4), 119 Stat. at 4–5.

87. This is a simplified description of the course of events in the *Matsushita* litigation. See Epstein v. MCA, Inc. (*Epstein II*), 126 F.3d 1235, 1251–55 (9th Cir. 1997) (recounting history of proceedings). Similar races to judgment in parallel proceedings—sometimes exhibiting the appearance of collusion between class counsel and defendants—have been common. See, e.g., In re Lease Oil Antitrust Litig. (No. II), 200 F.3d 317, 321 (5th Cir. 2000) (holding that global release in settlement of nationwide class action in Alabama state court does not require dismissal of exclusively federal claims in parallel proceeding due to jurisdictional competency requirement in Alabama law).

88. Professor Issacharoff describes a related phenomenon in discussing the disincentives that sometimes exist to the filing of legitimate and socially desirable class settlements. See Issacharoff, Conflicts, supra note 64, at 817–20. Some courts have effectively required, as a prerequisite to approval of a settlement-only class proceeding, that the parties stipulate that the class could also have been certified for litigation. See id. at 817–18. In a class action aimed at the effects within a single state of a claim with national implications, Issacharoff points out "[t]he problem . . . that this stipulation may carry estoppel effects elsewhere. . . . The defendant may rightfully fear that conceding the certifiability of a litigation class in one state may preclude a defense to class certification in another state." Id. at 818. Issacharoff appears to be confusing the doctrines of issue preclusion and judicial estoppel here, however, as traditional issue preclusion would not be available in a case where certification is conceded, rather than adversarially contested. See Linda J. Silberman, Allan R. Stein, & Tobias B. Wolff, Civil Procedure: Theory and Practice 31–33 (Supp. 2004–2005) (describing difference between doctrines of judicial estoppel and issue preclusion); see also New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (embracing doctrine of judicial estoppel for federal courts).

attractive option. Along similar lines, some states have standards for certification and notification that are more permissive than their federal counterparts, making state court the only forum in which a class action can occur.[89]

In civil rights cases and other forms of impact litigation, plaintiffs may also forgo federal claims and a federal forum in order to minimize the harm associated with a bad outcome. This strategy has been the hallmark of much of the constitutional litigation on behalf of gay men and lesbians in the past twenty years, particularly as it concerns relationship rights and sexual privacy. Since 1993, when the Hawai'i Supreme Court held that the state's exclusion of gay couples from civil marriage required strict judicial scrutiny,[90] a significant number of cases, including some class actions, have been filed seeking to secure equal access to marriage, or to the legal and economic benefits that attach to the institution, for gay and lesbian couples.[91] In a reversal of the strategy that led to the issuance and implementation of *Brown v. Board of Education*,[92] most of these cases have been filed in state courts and have sought relief only on the basis of state constitutions, deliberately eschewing the argument that the U.S. Constitution invalidates discrimination against gay couples.[93] Civil rights attorneys who litigate in this field have long been apprehensive about the reception that federal constitutional arguments relating to

89. Compare, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175–76 (1974) (holding that class action filed under Rule 23(b)(3) must provide individualized notice to identifiable class members, even when doing so renders lawsuit impracticable), with, e.g., Cartt v. Superior Court, 124 Cal. Rptr. 376, 381–88 (Ct. App. 1975) (distinguishing *Eisen* and applying more permissive standard under California law for notification of class members in negative-value consumer class action).

90. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993). On remand, the Hawai'i trial court found that the state could not meet its burden and ordered that gay and lesbian couples receive equal access to marriage. Before that decision could go into effect, however, the people of Hawai'i amended their constitution and removed the substantive basis for the original decision. See Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (unpublished table decision), available at http://www.hawaii.gov/jud/20371.htm (on file with the *Columbia Law Review*) (detailing history of case on remand and dismissing following enactment of state constitutional amendment).

91. See, e.g., Clinton v. California (*Marriage Cases*), No. CGC-04-429548 (Cal. Super. Ct. filed Mar. 12, 2004) (on file with the *Columbia Law Review*) (seeking equal access to civil marriage for same-sex couples).

92. 347 U.S. 483 (1954), enforced, 349 U.S. 294 (1955).

93. See, e.g., Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998) (holding that Alaska constitution requires that gay couple enjoy equal access to civil marriage), superceded by Alaska Const. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that Massachusetts constitution requires that same-sex couples enjoy equal access to civil marriage); Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 448 (Or. Ct. App. 1998) (finding that same-sex couples are entitled to equal employment benefits from state employers under Oregon constitution); Baker v. State, 744 A.2d 864, 867 (Vt. 1999) (holding that Vermont constitution requires state to afford same-sex couples the same rights and benefits that are available to opposite-sex married couples).

marriage might receive if they were to reach the Supreme Court of the United States, fearing that they might provoke another *Bowers v. Hardwick*.[94] Given the significance that would attach to a ruling by a federal appellate court that the Constitution gives same-sex couples an equal right to marry, there is good reason to think that the Supreme Court would grant review of any such decision. Accordingly, the plaintiffs in these suits have avoided the U.S. Constitution.

The decision to disclaim any federal grounds for relief can, of course, have a real impact on a plaintiff's prospects for recovery. In the case of parallel statutory causes of action, federal law may have fewer defenses or offer more extensive damages than state law. In civil rights litigation, state charters may impose special barriers to the recognition of certain constitutional claims, particularly where the rights of gay couples are concerned.[95] And, unlike the scenarios examined in Part I.B, these stay-in-state-court suits all involve the abandonment of claims that *could* be raised in an initial class action proceeding. The strategic decisions in these cases aim to maximize the plaintiffs' expected outcome or serve some larger social purpose, not to eliminate claims that would prevent class certification.

2. *Unpled Equitable Claims.* — The failure to raise significant claims in a class proceeding is not always part of an elaborate litigation strategy. Class counsel may decide not to raise a claim if she believes it to have limited significance or little chance of success, simply as a matter of resource allocation, or she may omit claims through inattention or negligence. Once again, when such claims could have been brought in an initial proceeding, a serious question arises as to the response that class members should encounter if they attempt to assert them in subsequent lawsuits.

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94. 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 539 U.S. 558, 578–79 (2003). In *Bowers*, the Court rejected a gay man's argument that private consensual sexual activity between two gay men fell within the penumbra of constitutional privacy protected by the Due Process Clause, despite the apparent holdings of the Court in Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 407 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973), that similar sexual activity between heterosexual partners was protected. The language employed by the *Bowers* Court in explaining its holding was notoriously derisive, as the Supreme Court forthrightly admitted when it repudiated the decision seventeen years later.

95. In a recent Alaska case, for example, a group of same-sex couples in committed relationships brought suit under the Alaska constitution requesting the same employment benefits from state employers that were available to married couples. The Alaska constitution expressly forbids same-sex couples from marrying, see Alaska Const. art. I, § 25, imposing a potential obstacle to any state law claim to equal treatment. Even so, the plaintiffs have declined to raise federal constitutional claims, arguing instead that the equality provisions of the state constitution give them a right to equal employment benefits despite their inability to marry. See Alaska Civil Liberties Union v. Alaska (*AkCLU*), No. S-10459 (Alaska filed May 22, 2002). The author served as co-counsel for the plaintiffs in the *AkCLU* case from its initiation.

A prison litigation case from the Ninth Circuit, *Hiser v. Franklin*,[96] offers a useful illustration. In 1981, a group of plaintiffs initiated a state court class action on behalf of all present and future inmates in the Alaska prison system, alleging civil rights violations. The suit ended in a 1990 consent decree that addressed a broad range of issues, including the impact of confinement conditions upon prisoners' access to the courts. Some months later, Timothy Hiser, who was not incarcerated when the initial class settlement was approved, brought suit against Alaska prison officials, claiming that they were denying him reasonable access to the courts by preventing him from photocopying documents. Hiser requested damages and individual equitable relief for the denials and also sought to maintain a claim on behalf of all inmates to have the photocopying policy reformed throughout the prison. The district court cited the consent decree and dismissed all of Hiser's claims on claim preclusion grounds, but the Ninth Circuit reversed in full and allowed him to proceed, finding that Alaska preclusion law would not bar the action.[97]

The Ninth Circuit's decision to allow Hiser to proceed with his individual claims for relief is not difficult to justify under a straightforward application of claim preclusion rules, since the factual predicate for his claim—the prison's denial of photocopying services to him—did not exist at the time of the earlier judgment. Indeed, the certification of a class that includes future inmates would now warrant particular scrutiny under *Amchem* insofar as the suit purported to settle or compromise claims for damages.[98] The classwide challenge to the prison's photocopying policy, however, presented a different kind of question. The policy, and hence the factual predicate for the claim, predated Hiser's incarceration and could have been made a part of the original litigation.[99] Whether the omission of photocopying from the broader court access claim was a strategic choice or an oversight in the first suit, class counsel did not raise the issue when they could have, and they brokered a consent decree without making a classwide challenge to photocopying polices a part of the negotiating mix. The argument for applying the "could have been raised" doctrine of claim preclusion to an unpled equitable claim of this type is strong, as the Ninth Circuit recognized. In permitting Hiser to proceed with his class claim nonetheless, the Ninth Circuit did not question the applicability of this form of merger in representative litigation, and instead relied upon a finding that merger was not implicated in the case before it because the claim did not arise out of the same series of transac-

96. 94 F.3d 1287 (9th Cir. 1996).

97. Id. at 1289–90.

98. *Amchem* rejected a settlement-only class action that sought to resolve the damages claims of future victims of asbestosis, ruling that the trial court had not employed safeguards adequate to protect the interests of that diffuse group and expressing skepticism about the certification of any class action in which some class members did not yet exist as such. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–29 (1997).

99. See *Hiser*, 94 F.3d at 1292.

tions as the broader access-to-court claims litigated in the original proceeding.[100]

Both stay-in-state-court suits and unpled equitable claims raise questions about the limits of lead counsel's representational role in class litigation. In individual litigation, strategic decisions about the claims that counsel will raise in structuring a complicated case are an accepted and inevitable part of the representational relationship—as are oversights and mistakes, within reasonable parameters. The autonomy that affords a litigant such wide discretion in choosing how to structure the lawsuit in an adversarial system also offers the primary justification for binding the litigant to the result. In a class proceeding, where absentees have little or no opportunity to approve the decisions of their lawyers, the court's independent duty to ensure the adequacy of class counsel's representation serves as the principal substitute for litigant autonomy. From *Hansberry v. Lee* onward, the bulk of the attention in adequacy analysis has focused on conflicts of interest, whether among class members or between absentees and class counsel.[101] On occasion, courts and commentators have also explored the standards that should govern an adequacy challenge based on lack of competence or diligence.[102] The preclusion problems explored in this Part demonstrate the need for a third mode of adequacy analysis that speaks to the extent of class counsel's authority to make purely strategic decisions on behalf of absentees.

Before addressing that issue, however, it is necessary to articulate a more coherent approach to the structure of preclusion analysis than has been evident in class action litigation thus far. Any resolution of the preclusion problems discussed in this Article will only be enduring if it rests on a firm foundation.

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100. See id. at 1292–93. This finding may have been something of a stretch, and one member of the panel dissented from this portion of the ruling. See id. at 1294 (Rymer, J., concurring in part and dissenting in part).

101. Hansberry v. Lee, 311 U.S. 32 (1940), established the absence of conflicting interests between a representative plaintiff and absentees as a constitutional requirement in class litigation. For subsequent judicial treatments of the issue, see, for example, Stephenson v. Dow Chem. Co., 273 F.3d 249, 258–59 (2d Cir. 2001) (permitting collateral attack to Agent Orange settlement by claimants whose injuries did not manifest during settlement period and who were thus denied relief, on grounds that their interests were adverse to those of the rest of the class in the original action), aff'd by an equally divided court, in part, 539 U.S. 111 (2003); Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973) (permitting collateral attack on adequacy grounds where representation afforded class member in first action was hostile and adverse).

102. See, e.g., Epstein v. MCA, Inc. (*Epstein II*), 126 F.3d 1235, 1251–55 (9th Cir. 1997) (detailing inadequate course of representation offered by class counsel in state action while parallel federal proceeding was pending), vacated, Epstein v. MCA, Inc. (*Epstein III*), 179 F.3d 641 (9th Cir. 1999).

II. The Structure of Preclusion Analysis

My principal aim in this Part is to unseat the hegemony of the maxim that "[a] court conducting an action cannot predetermine the res judicata effect of the judgment."[103] The important but limited core of descriptive truth that this maxim embodies has metastasized throughout the law of preclusion, crowding out the vital contributions of the rendering forum in superintending the preclusive implications of the lawsuits that it shepherds to judgment. In a class action, where a court's authority to determine the scope of the litigation is especially conspicuous and its responsibility to supervise the course of the litigation at its maximum, this denuded conception of the rendering forum's role in determining the future impact of its judgment is especially pernicious. The most basic reform that is needed in this arena is for rendering fora to recognize and claim their proper role as expositors of positive law in assessing and controlling the preclusive effects of their own judgments.[104]

A. *A Positive Law Account of Preclusion Doctrine*

Much of the confusion that surrounds the analysis of a judgment's prescriptive scope—particularly the confusion surrounding the timeframe problem that the ubiquitous preclusion maxim purports to describe—stems from a failure to think carefully about adjudication as an exercise of positive legal authority. Indeed, rendering courts sometimes seem to treat the future preclusive effects of their own judgments as a species of "brooding omnipresence":[105] a system of legal rules that is mysteriously unconnected to the exercise of sovereign authority—the court's own judgment—to which those rules will later be applied. One of the important conceptual lessons of *Erie*[106] is that courts serve as wellsprings of positive legal authority, just as legislatures do. That lesson is most frequently identified with the broad rules of decision that courts issue as expositors of common law principles. But it has equal application

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103. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (citing 7B Wright, Miller, & Cooper, supra note 2, § 1789, at 245).

104. The cognitive problem here is as widespread as the one that Walter Wheeler Cook took aim at when he leveled his challenge to the a priori approach to choice of law analysis, which predominated through the first half of the twentieth century. See Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws 6–8 (1942) (describing traditional method of conflicts analysis, which attempted to derive solutions from "the general or essential nature of law and legal rights"). Indeed, the problem is more serious in some respects. According to Cook, common law courts were aware that "the absurd and socially bad result" produced by the a priori method in some cases "[was] not due to inherent lack of power on the part of our states, but merely to the operation of certain rules of positive law." Id. at 13. Cases like those discussed in the previous sections lead me to conclude that this realization has not taken root in the analysis of preclusion doctrine by most rendering courts.

105. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting).

106. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

to the more specialized rules of decision that the preclusive effect of a court's judgment attaches to the parties to a dispute.

1. *Preclusion as a Rule of Decision.* — When a court issues a judgment, that sovereign act has two different types of impact upon the parties: its mandate and its preclusive effect. The "mandate" consists of a judgment's immediate and executory impacts upon the persons and property of the parties. A judicial mandate transforms the parties' rights and responsibilities—it imposes an executory obligation to pay money, obliges the parties to take or refrain from taking certain actions, or transforms their civil status. When a court spreads the mandate of its judgment, that action attaches a new set of obligations and entitlements to the parties.[107]

The "preclusive effect" of a judgment does not exert any such immediate or executory impact. Rather, a judgment's preclusive effect prescribes a rule of decision for the resolution of future disputes: It proclaims one or more elements of a cause of action to be satisfied, provides an affirmative defense to the assertion of transactionally related claims, or establishes a rule of evidence for the resolution of factual disputes.[108] The specialized rule of decision bound up in the preclusive effect of a judgment is much more limited in its prescriptive scope than the rules of decision generally issued by legislatures. A judgment's rule of decision can only be invoked against the parties bound by the proceeding, or their privies, and it relates only to a specific, temporally bounded set of issues or transactions. The Supreme Court's decision in *Baker v. General Motors Corp.* contains its most nuanced discussion of the positive law foundations of preclusion law in this respect.[109] In addition, determining the contents of a judgment's prescriptive scope may depend upon the actual

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107. As the Restatement points out, when enforcement of a judgment is sought across territorial jurisdictions, this "coercive" effect of the mandate can only be realized through the cooperation of a subsequent forum. See Restatement (Second) of Judgments ch. 2 introductory note at 23 (1982) ("[O]utside the territorial limits of a court's jurisdiction, the coercive effectiveness of its judgment depends upon the judgment's being given recognition by the authorities of another government, under a principle of comity or by virtue of legal provisions such as the Full Faith and Credit Clause of the Constitution.").

108. Burbank makes a similar observation, in passing, in his article on interjurisdictional preclusion. See Burbank, Interjurisdictional Preclusion, supra note 7, at 771 ("Claim preclusion includes defenses to rights asserted under the substantive law.").

109. 522 U.S. 222 (1998). *Baker* involved an attempt by General Motors to take an injunction obtained against a former employee that prohibited the employee from testifying about certain product defect issues and to apply that prohibition against subsequent claimants who had no involvement in the earlier proceeding. Id. at 226–31. The Court rejected this attempt, holding that only litigants who were parties to the earlier proceeding could be bound, as a matter of preclusion law, to the evidentiary issues determined therein. Id. at 237–39. As to all other litigants, the Court found, subsequent courts were entitled to determine for themselves what role the earlier injunction should play in constraining the evidence available at trial, free from the unyielding mandate of Full Faith and Credit. Id. at 234–36, 238–41. In explaining the principles that required this result, the *Baker* Court offered an analysis of the limits of the prescriptive scope of the rule of decision bound up in the disputed injunction. The passage nicely captures the relationship between the parties to the action and the prescriptive scope of the judgment

course of the proceedings giving rise to the judgment, a type of inquiry that has no analog in determining the scope of a legislative enactment.[110] Despite this narrowness of scope, however, a judgment's preclusive effect still operates as a rule of decision—an element, defense, or rule of evidence—in adjudicating a claim for relief made in a subsequent lawsuit.[111] Indeed, the very reason for specifying a legal category to describe a judgment's "preclusive effect," as distinct from the judgment's "mandate," is to distinguish between those features of a judgment that operate as rules of decision in subsequent adjudications and those that have immediate or executory impacts upon the rights and obligations of the parties.

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and, by implication, the distinction between the judgment's rule of decision and its mandate:

> Michigan's judgment . . . cannot reach beyond the Elwell-GM controversy to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered. Michigan has no power over those parties, and no basis for commanding them to become intervenors in the Elwell-GM dispute. Most essentially, Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth.

Id. at 238 (citation omitted); see also id. at 239 n.12 ("If the Bakers had been parties to the Michigan proceedings and had actually litigated the privileged character of Elwell's testimony, the Bakers would of course be precluded from relitigating that issue in Missouri.").

110. The Supreme Court resolved early on, in *Fletcher v. Peck*, that it would not permit challenges to the scope or validity of a law based upon a detailed inquiry into the process giving rise to that law. 10 U.S. (6 Cranch) 87, 130–31 (1810). But this decision was a matter of constitutional policy, not metaphysical inevitability. There is no logical or analytical impediment to an analogous inquiry into "legislative due process" that would ask, for example, whether a law can be applied to a segment of the population that was denied an opportunity to be heard on the matter (through disenfranchisement), or, in the case of a ballot initiative, whether the public received adequate notice of the meaning and effect of a ballot initiative before being asked to vote. See, e.g., Jones v. Bates, 127 F.3d 839, 855–63 (9th Cir. 1997) (exploring these issues in challenge to California ballot initiative on term limits for elected officials), rev'd en banc, 131 F.3d 843 (9th Cir. 1997).

111. The Court has used the language of evidence and jurisdiction in drawing this distinction between a judgment's mandatory and prescriptive features.

> [The Full Faith and Credit Clause and its implementing act] establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being reexaminable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.

Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291–92 (1888); see also *Baker*, 522 U.S. at 242 (Scalia, J., concurring in judgment) (reiterating this language in discussing enforcement of out-of-state injunctions).

Choice of law analysis offers a useful guide to developing a more precise positive account of preclusion law, since both doctrines address the application of sovereign authority across jurisdictions in prescribing rules of decision. In choice of law analysis, the source of sovereign authority is legislative and regulatory, and the jurisdictional line is territorial. A conflicts regime provides an approach for identifying situations where more than one sovereign wishes to apply its regulatory authority to a state of affairs in the world—that is, it identifies when a "true conflict" exists—and then offers rules for determining which sovereign's authority should predominate—that is, it directs how to resolve the conflict. The first task is interpretive, requiring a determination as to what extraterritorial scope the legislature intended its laws to have. The second task is normative, requiring a set of principles for assessing competing regulatory claims. Larry Kramer offers the most precise account of these structural features of the choice of law process. He describes the first, interpretive task of conflicts analysis in the following terms.

> A lawsuit with multistate contacts is still just a lawsuit: the plaintiff still alleges that because something happened he or she is entitled to relief; the court still must determine whether the facts alleged are true and whether, if they are true, some rule of law confers a right to recover. Making this determination is still a problem of interpretation. The only difference is that some of the facts are connected to different states, and the court must determine if that affects whether the law or laws at issue confer a right. While this determination may sometimes be difficult, it does not alter the nature of the problem confronting the court, which remains to decide what rights are conferred by positive law.[112]

In the absence of express statements about a law's intended extraterritorial effect—the usual case—a state's choice of law regime "establishes the state's rules of interpretation for questions of territorial scope."[113]

Preclusion doctrine shares important structural parallels with choice of law analysis. Preclusion, too, addresses the application of sovereign

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112. Larry Kramer, Rethinking Choice of Law, 90 Colum. L. Rev. 277, 290 (1990) [hereinafter Kramer, Rethinking]; see also Larry Kramer, Return of the Renvoi, 66 N.Y.U. L. Rev. 979, 1005 (1991) [hereinafter Kramer, Renvoi] (reproducing this passage as a predicate to describing proper treatment of another state's choice of law rules in conflicts analysis).

113. Kramer, Renvoi, supra note 112, at 982. There are plenty of smart people in the field who take issue with Kramer's account of the structure of choice of law analysis. Lea Brilmayer is well known for her broad attack on the capacity of positive accounts of choice of law to say anything useful or "objective" about the purposes underlying a law and the interests that the law serves. See, e.g., Lea Brilmayer, Conflict of Laws §§ 2.5.1–.5 (2d ed. 1995). Kim Roosevelt, though embracing a positivist approach, questions Kramer's assertion that a choice of law regime provides default rules for the territorial scope of legislation. See Kermit Roosevelt III, The Myth of Choice of Law: Rethinking Conflicts, 97 Mich. L. Rev. 2448, 2480–81 (1999). I do not view either type of criticism as detracting from the purposes to which I put Kramer's analysis in the discussion that follows.

authority across jurisdictional lines. The source of sovereign authority here is judicial rather than legislative, and the relevant jurisdictional line marks the boundary between different adjudicatory proceedings within a given court system.[114] These differences in the form of the authority being exercised call for a different interpretive focus in assessing a judgment's prescriptive scope. But the judgment of a court still serves as a sovereign source of prescriptive authority: It sets forth a specialized rule of decision for future disputes involving the parties bound by a particular proceeding. That specialized rule of decision can produce a "conflict of laws" with a general rule prescribed by legislation, just as with two legislative enactments in a classic choice of law problem. When a prior judgment is one of the competitors in such a conflict of prescriptive authority, however, the method for resolving that conflict is much simpler than would be true of an ordinary choice of law problem. With few exceptions, a court will apply the rule of decision bound up in a jurisdictionally sufficient judgment, to the exclusion of any conflicting legislative rule. The same holds true when a judgment is given effect across territorial lines, as will frequently be the case in successive lawsuits in which class actions are involved. While federal law is generally silent on the resolution of conflicts between state legislative enactments, and the Constitution allows for a diversity of choice of law regimes, the Full Faith and Credit Clause and its enforcement statute establish a uniform policy for the interjurisdictional treatment of state court judgments[115] under which a valid judgment's rule of decision (1) must be given the same effect that it would receive in a court of the rendering state, and (2) always trumps a legislative rule when domestic preclusion law would require that result.[116] The burden of the analysis in preclusion doctrine thus resides in the first, interpretive task described above: determining whether the rule of decision established by the earlier exercise of sovereign authority—the judgment—has application in a subsequent dispute.

Where ordinary choice of law analysis is concerned, the authority of a legislature to specify the interjurisdictional reach that it intends for its

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114. I use the terms "legislative" and "legislation" here to denote the exposition of general laws of liability allocation and conduct regulation. Of course, courts often serve as the sole source of such laws when they interpret the common law. My characterization of the structure of choice of law analysis is meant to describe such general rules, whether judicial or legislative in origin—a common convention in choice of law discussions. See, e.g., Kramer, Renvoi, supra note 112, at 1005–06 (employing hypothetical concerning "legislative" scope that combines common law and statutory elements).

115. For ease of reference, I will use state court judgments and the full faith and credit requirement in discussing preclusion doctrine between jurisdictions. In the case of federal judgments, the recognition requirement arises from federal common law. See Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001).

116. See *Baker*, 522 U.S. at 232–33 (describing obligation of states to enforce intended claim and issue preclusive effect of valid judgments from other states); id. at 233–34 (rejecting any "public policy" exception for enforcement of judgments, in contrast to recognition of statutory enactments in choice of law analysis).

laws is a matter of common understanding.[117] The problem is that legislatures exercise that authority only rarely,[118] requiring courts to develop methods of interpretation for divining, or imputing, the interjurisdictional application that the legislature intended for its law.[119] Where preclusion doctrine is concerned, the situation is essentially reversed. A rendering court has the opportunity that is usually denied to a legislature to focus its attention on a narrow, defined set of circumstances in assessing and controlling the prescriptive scope that any rule of decision resulting from its exercise of sovereign authority will have in the resolution of future disputes. Even so, courts rarely exercise this power. Although the positive role of courts as expositors of common law principles has long since become a transparent part of our conceptual vocabulary, the power of courts to play a positive legal role in determining the prescriptive scope of their judgments' preclusive effect remains poorly understood.[120]

This failure of understanding is all the more striking in the class action context, where the opportunity for a court to determine whether and to what extent its judgment will establish a rule of decision for absent class members is so conspicuously on display. The certification hearing represents a singular concentration of attention by the court and the parties on the future preclusive effect of the court's judgment. Even so, the ubiquitous preclusion maxim continues to dissuade rendering courts from recognizing the opportunity that the certification process offers for shaping that preclusive effect.[121]

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117. See Kramer, Renvoi, supra note 112, at 1006–08 (describing role of legislature in prescribing multistate elements of its laws and observing that need to interpret these features of a law in conducting choice of law analysis is "uncontroversial").

118. As Kramer has put it:

> Sometimes a law will specify what elements of a claim must be connected to or located in the state for the law to apply. With such laws, the court need not look beyond the face of the statute to determine prima facie applicability. Unfortunately, the great majority of laws are silent with respect to extraterritorial reach, and determining their prima facie applicability is more difficult.

Kramer, Rethinking, supra note 112, at 293.

119. See Kramer, Renvoi, supra note 112, at 1008 ("[D]etermining whether a law applies in a multistate case requires interpreting it in a way that is not qualitatively different from other legal problems [and] the proper method of interpretation looks to purposes."); Kramer, Rethinking, supra note 112, at 294 ("Since the legislature's failure to specify the statute's extraterritorial reach is an oversight, the court must infer what limits—if any—there ought to be on the extraterritorial reach of the law.").

120. Professor Burbank has made a similar observation in his discussion of the federal rulemaking process, where he has criticized the "literature specific to the proposed Federal Rules of Evidence" for "obscuring the distinction between power and prudence in court rulemaking." Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1022 (1982) [hereinafter Burbank, Rules Enabling Act].

121. Wright, Miller, and Cooper, despite their otherwise sophisticated and thoughtful treatment of preclusion in class litigation, themselves contribute to this problem in the closing passages of their discussion on the issue, writing:

> These limitations on preclusion by a class judgment are wrapped up with the general proposition that "the court conducting the action cannot predetermine the res judicata effect of the judgment." Even though a court hearing a class

2. *The Components of Preclusion Analysis.* — When a recognizing forum is called upon to determine the impact that a prior judgment will have upon the resolution of a current dispute, there are three distinct types of inquiry that it must perform. The first is to assess the exercise of positive legal authority that the initial forum undertook in rendering the judgment, an inquiry that will itself consist of several components. The court must determine what claims and transactions were placed in issue in the pleadings of the prior action. It must take stock of the preclusion doctrines that would have applied in the rendering forum—the availability of nonmutual issue preclusion, the approach to defining a transaction or series of transactions, the treatment of a statute of limitations dismissal, and so forth. And it must determine whether the rendering forum placed any constraints upon the preclusive effect that its judgment should have in subsequent proceedings. Second, the court must inquire into the actual course of proceedings in the rendering forum to determine, for example, whether a contested issue was actually litigated and determined, or whether the parties were afforded a full and fair opportunity to litigate a contested claim.[122] Third, the court must examine the relationship between the matters that were resolved in the initial proceeding and the claims or issues presently before it in order to decide how the rules of decision embodied in the first judgment should apply to the current dispute—whether the current claims are part of the same series of transactions that were adjudicated by the rendering forum, for example, or whether an issue resolved by the rendering forum is identical to an issue raised in the present lawsuit in all pertinent respects.

The core of truth contained in the ubiquitous preclusion maxim derives primarily from the third of these inquiries. As a descriptive matter,

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> action may at times undertake to reject an assertion that the judgment will not be binding on nonparticipating class members, final enforcement of preclusion ordinarily occurs only with the decision of the court hearing a later action. The class-action court can easily defeat preclusion, however, either by adopting a narrow class definition to ensure adequate representation or by decertifying the class at the close of trial or on appeal on the ground that the class was not adequately represented.

18A Wright, Miller, & Cooper, supra note 2, § 4455, at 493–94 (citations omitted). While technically correct, the assertion that "final enforcement of preclusion" ordinarily must wait for a recognizing forum simply perpetuates the fallacy of the ubiquitous preclusion maxim by overstating its significance. It implicitly suggests that the only tools available to a rendering court in addressing preclusion are a narrow class definition, which rendering courts have already proclaimed to be insufficient in giving them confidence that their judgments will not be misinterpreted, or decertification of the class at the close of the proceedings, an extreme and disruptive step that rendering courts cannot be relied upon to undertake.

122. This requirement is captured in the Restatement's allowance for the use of extrinsic evidence in determining the prescriptive scope of a prior judgment. See Restatement (Second) of Judgments § 27 cmt. f (1982) ("If it cannot be determined from the pleadings and other materials of record in the prior action what issues, if any, were litigated and determined by the verdict and judgment, extrinsic evidence is admissible to aid in such a determination.").

it is obviously not possible for a rendering forum to conduct an analysis of claims and issues that have not yet been raised, in a lawsuit that has not yet been filed. To employ more formal language, it is not possible for the rendering forum to predetermine how the specialized rule of decision embodied in its judgment will come to be interpreted and applied in future disputes. The relevant body of information for this final step in the preclusion inquiry lies outside the rendering court's knowledge and experience. Indeed, insofar as the phrase "predetermine the res judicata effect of a judgment" implies some control over the mandate of a future court as well as the application of the judgment's rule of decision, such an action would lie outside the power and jurisdiction of a rendering court as well as its knowledge and experience.[123]

This observation is at once consequential and trivially true. It identifies an important feature of the manner in which sovereigns exercise power, but one that is neither novel nor limited to preclusion analysis. On an analytical level, the assertion that a court cannot "predetermine" the effect of its judgment in this limited sense of the term is no different from the observation that a legislature cannot predetermine how a rule of decision in one of its laws will come to be applied in future disputes. These observations do not reveal any profound limitations on the power of a rendering forum. They constitute a prosaic statement about the manner in which the prescriptive force of a rule of decision becomes actualized in particular cases, a statement that applies with equal force to legislative enactments.[124]

Clarifying the limited import of the preclusion maxim in this respect allows for a clearer analysis of a rendering court's capacity to exert influence over those elements of the preclusion inquiry that do lie within its ambit—in particular, the extent of the positive legal authority that at-

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123. This is the import of the distinction that the Court draws between the substantive content of a judgment and the method for its enforcement in *Baker v. General Motors Corp.*:

> Full faith and credit . . . does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law.
>
> Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority. Thus, a sister State's decree concerning land ownership in another State has been held ineffective to transfer title, although such a decree may indeed preclusively adjudicate the rights and obligations running between the parties to the foreign litigation.

522 U.S. 222, 235 (1998) (citations omitted).

124. I take Professor Kramer to be making a similar observation in his approach to choice of law when he argues that, "[f]rom an analytical standpoint, . . . both 'choosing' and 'applying' [law] entail the same process of interpretation." Kramer, Rethinking, supra note 112, at 289. In both types of situation, Kramer observes, a court must determine "whether a party has a claim (or defense)" in light of the inherent limits on the ability of a legislature to specify the precise situations that its laws are designed to govern. Id.

taches to the court's judgment. Consider the legislative parallel once again. A legislature's inability to identify the actual disputes to which its laws will apply does not call into question its ability to prescribe the scope of those laws in a meaningful fashion. Similarly, a court's inability to predetermine the future cases in which the preclusive effects of its judgment will play a determinative role does not call into question the ability of the court to exert other types of influence in prescribing the judgment's scope. There are some important respects in which these situations are not strictly parallel. A court operates under prescriptive limitations that a legislature does not. But the broad assertion that is implicit in the ubiquitous preclusion maxim—that a court's inability to predetermine the precise role that its judgment will play in resolving future disputes is indicative of a deeper inability of the court to play any meaningful or authoritative role in determining the preclusive effect of that judgment—is logically and descriptively incorrect.

The preclusion rules of a jurisdiction can best be understood as a source of authorization for a court to attach prescriptive force to its judgment, along with a set of default rules that determine the extent of that prescriptive force in the absence of any express statement by the rendering forum.[125] A court cannot give its judgment prescriptive force in excess of that authorized by the applicable preclusion rules—it cannot proclaim that the judgment in a particular case will be available as a future rule of evidence through offensive nonmutual issue preclusion, for example, if the applicable law does not authorize offensive issue preclusion in the absence of mutuality. This is one respect in which a rendering court has considerably less freedom than a legislature, which can assign a different prescriptive scope to every law it passes, if it wishes. Within the parameters established by the applicable preclusion doctrine, however, the rendering court has many tools at its disposal through which to shape the course of the proceedings and control the positive effects of its judgment.

The most important such tools, for present purposes, are those through which the rendering forum can impose constraints—that is, the mechanisms by which it can employ less than the full extent of the authorization that the applicable preclusion doctrine provides in attaching prescriptive force to its judgment. Perhaps the most familiar tool that a rendering court can use to constrain the positive legal effect of its own judgment in this manner is the dismissal without prejudice, governed by Rule 41 in the federal system. Rule 41 expressly grants federal courts the authority to designate any dismissal as "an adjudication [not] upon the

125. I deliberately invite a parallel here with Kramer's description of choice of law rules as providing default "rules of interpretation for questions of extraterritorial scope" in determining the prescriptive reach of a legislative enactment. See Kramer, Renvoi, supra note 112, at 1011; see also Kramer, Rethinking, supra note 112, at 289–311 (developing an approach based on statutory interpretation for determining whether a law is "prima facie applicable" to a multistate dispute).

merits" or "without prejudice."[126] As the Supreme Court's *Semtek* decision has confirmed, such a designation deprives a dismissal of any preclusive force as a rule of decision in subsequent proceedings.

The *Semtek* case called upon the Court to decide what source of authority governs the preclusive effect of a judgment issued by a federal court sitting in diversity, and what role Rule 41 plays in prescribing that effect. The Court held that federal common law governs the preclusive effect of all federal judgments, but that it is ordinarily appropriate to incorporate state preclusion standards as a rule of decision when determining the prescriptive effect of a diversity judgment, rather than imposing an independent federal standard.[127] In keeping with that holding, the Court imposed a restrictive definition on Rule 41. Rather than serving as an independent source of authority for developing a federal rule of decision on the preclusive impact of judgments, the Court found a dismissal "upon the merits" under Rule 41(b) speaks only to the ability of the parties to refile their claim in the same federal district court in which the dismissal was issued.[128] A federal diversity court, in other words, receives no authority from Rule 41 to make an independent determination about the affirmative prescriptive force that a dismissal on statute of limitations grounds, or any other basis, should have in future proceedings. Rather, it must depend upon the authority that a state court in the same forum would exercise in identifying the preclusion rules that apply to its judgments.[129]

Even in setting forth these restrictive conclusions about the sources of a federal diversity court's preclusion authority, however, the Supreme Court confirmed the continuing ability of a district court to decline to exercise that authority to its fullest extent. While Rule 41(b) does not authorize a court to develop an independent standard for determining the affirmative "effect that must be accorded federal judgments by other courts,"[130] the Court explained, a dismissal "upon the merits" under that provision "is undoubtedly a necessary condition, [even though] not a suf-

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126. Fed. R. Civ. P. 41(b) ("*Unless the court in its order for dismissal otherwise specifies*, a dismissal under this subdivision . . . operates as an adjudication upon the merits." (emphasis added)); id. 41(a)(2) ("*Unless otherwise specified in the order*, a dismissal under this paragraph is without prejudice." (emphasis added)).

127. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506–09 (2001). While the Court cited the work of Ronan Degnan in setting forth this result, id. at 508, it actually embraced Professor Burbank's prescriptions. Degnan had argued for a uniform federal standard in assessing the preclusive effect of federal diversity judgments, while Burbank urged that federal common law adopt state preclusion rules in most such cases. Compare Ronan Degnan, Federalized Res Judicata, 85 Yale L.J. 741, 755–73 (1976) (calling for uniform federal rule), with Burbank, Interjurisdictional Preclusion, supra note 7, at 736–39 (urging incorporation of state standards in federal common law of preclusion).

128. *Semtek*, 531 U.S. at 504–06.

129. Id. at 506–09 (calling for federal reference to state preclusion law in determining effect of federal diversity judgment, at least in absence of exceptional circumstances implicating strong federal interest).

130. Id. at 503; see also id. at 505–06 (construing Rule 41(b)).

ficient one, for claim preclusive effect in other courts."[131] A dismissal without prejudice or "not upon the merits," in other words, is not merely a "factor" that a recognizing forum would look to in deciding whether to accord preclusive effect to a judgment. Such a dismissal has a determinative impact upon the prescriptive scope of a judgment, depriving the judgment of a necessary condition for serving as a rule of decision in other courts.[132] Professor Burbank has characterized this tool of limitation as a necessary corollary to any regime in which federal judgments must be respected.[133]

This particular mechanism for predetermining the preclusive effect of one's own judgment is a common one. Courts regularly issue dismissals without prejudice with the expectation that their judgments will neither impose any immediate mandate upon the parties nor serve as a rule of decision in future cases.[134] Indeed, in the case of claim preclusion, the Restatement has formally recognized such designations as an appropriate basis for permitting a plaintiff to "split" her claims between multiple proceedings.[135] Nonetheless, even the efficacy of a dismissal

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131. Id. at 506.

132. This approach to preclusion analysis is consistent with the posture that the Court has adopted in other important interjurisdictional cases. In *Marrese*, for example, the Court reaffirmed the primacy of the rendering court's policies in determining the preclusive effect of a judgment, even when the F1 proceeding involves a state law claim in a state court and the F2 proceeding involves an exclusively federal claim in a federal court. See Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380–82 (1985). Given the powerful federal interest embodied in the grant of exclusive jurisdiction, the Court might have concluded that the preclusive effect of the prior judgment should be determined by federal law in the federal proceeding, with the outcome contemplated by state law merely constituting one factor for consideration. See id. at 387–91 (Burger, C.J., concurring in judgment) (calling for federal preclusion rule with only minimal consideration of state law in such a case). Instead, the Court found that the Full Faith and Credit Clause and its implementing statute "generally allow States to determine the preclusive scope of their own courts' judgments" in the first instance. Id. at 385.

133. Burbank writes:

> Save for any constitutional constraints, neither validity nor finality need play a part in domestic preclusion law. But if, as it appears, there is a federal common law obligation not to disregard federal judgments [across jurisdictions], it requires as a corollary that the federal courts have the power to define the conditions precedent to status as a "judgment" having the potential for preclusive effect. Moreover, the need here is not simply for federal law-in-reverse, acting only as a check against hostile or inconsistent state law. The nature of the problem demands a uniform, and uniformly federal, solution.

Burbank, Interjurisdictional Preclusion, supra note 7, at 764.

134. See, e.g., Equitable Fire & Marine Ins. Co. v. Bradford Builders, Inc., 174 So. 2d 44, 45 (Fla. Dist. Ct. App. 1965) ("To support a defense of res judicata, it must be clear that the court in the previous action intended that the disposition there was to be without right to further proceedings by the plaintiff.").

135. Restatement (Second) of Judgments § 26(1)(b) (1982) ("[T]he general rule [against claim splitting] does not apply [when] . . . [t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action."); see also id. § 26(1)(b) cmt. b (discussing application of this proposition to dismissals "without prejudice").

without prejudice is sometimes challenged, as happened in the *Cooper* case. When the district court refused to allow the Baxter class members to intervene and press their individual claims for damages in the original action in *Cooper*, it issued an order that carved those claims out of any subsequent preclusive effect that might flow from the action.[136] In other words, the district court imposed a constraint upon the prescriptive scope of its judgment as a rule of decision in the future resolution of those claims. While it is unclear how such a constraint would have applied to the issue preclusive effects of the judgment—a question that I address in the next subpart—the court's intention to prevent the judgment from having claim preclusive effect in the form of a subsequent defense of merger or bar was clear. Even so, the Fourth Circuit disregarded this feature of the district court's order, dismissing it as "plain dictum"[137] and reaffirming the misguided instinct that rendering courts cannot exercise such control over their own judgments.[138]

That misguided instinct is particularly out of place in a class action proceeding. Rule 23 grants district courts the authority to multiply the binding effect of their proceedings enormously, sweeping in huge numbers of absent plaintiffs who will be subject to the court's mandate and bound to the rules of decision embodied in the court's judgment. As a consequence, Rule 23 is hedged about with elaborate protections aimed at ensuring that the court will exercise that authority only to an extent consistent with the interests of the absentees. The Rule makes certification discretionary, not mandatory, as a confirmation of the court's role in exercising its own judgment as to whether and to what extent a case should move forward on a classwide basis. Rule 23(d) even makes express provision for the court to "make appropriate orders . . . requiring . . . that notice be given [to the class] . . . of the proposed extent of the judgment"[139] in setting the conditions for certification, reiterating the role of the court in prescribing the contours of the action. To urge a court to exercise restraint when invoking its authority to bind absentees to a judgment, but then to deny the court the ability to control the preclusive effect of its judgment as one such tool of restraint, is both anomalous and illogical.[140] The role of the rendering court as an exposi-

136. *Cooper* Record, supra note 23, at 288a–89a (copy of order denying motion for leave to intervene).

137. EEOC v. Fed. Reserve Bank of Richmond, 698 F.2d 633, 675 (4th Cir. 1983), rev'd sub nom. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867 (1984).

138. It is worth noting that the Fourth Circuit did not engage in a substantive review of the district court's designation of its order as "without prejudice." Rather, it dismissed that designation as ineffectual. A ruling that the district court should not have allowed the Baxter intervenors to maintain separate individual actions would have been quite different from the Fourth Circuit's statement that the district court was powerless to do so once having certified the class.

139. Fed. R. Civ. P. 23(d)(2).

140. One might express Rule 23's concern over constraining the scope of class proceedings as a question of the court's institutional legitimacy, as well as a concern over

tor of positive law in the certification process is broad enough to cover both functions.

In his canonical article addressing the source and content of the obligation to grant interjurisdictional recognition to judgments, Professor Burbank offers a broad observation that nicely captures the dilemma that litigants increasingly face when attempting to navigate the threat of preclusion during the certification process.

> [B]roadly preclusive trans-substantive rules are tolerable only to the extent that they are sufficiently nonformal, or contain sufficient qualifications or exceptions, to permit the avoidance of preclusion in circumstances where it would be unjust. But the characteristics that may make modern preclusion law tolerable in the administration of substantive law are the very characteristics that bedevil litigants, who desire clear and certain rules in planning litigation strategy.
>
> These considerations suggest that a court administering a modern domestic body of preclusion law must be alert to the loss of substantive rights caused by the failure of that body of law to provide fair notice of its implications for a particular context or by the failure of the jurisdiction's law as a whole to afford a fair opportunity to pursue claims of substantive right. Moreover, both concerns are more pressing when the preclusion law is not only trans-substantive, but trans-systemic.[141]

In the special circumstance of representative litigation, where the principle of litigant autonomy is not available to reinforce the moral authority of harsh or imperfect outcomes, these sentiments are more pressing still.[142] The most effective means of providing class members with the

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the rights of affected parties. Professor Nagareda makes this point in his discussion of the class action as a regulatory device.

> The claim preclusive effect of class settlements is what carries the potential to push them perilously close to civil justice reform legislation. It is because class counsel do not have nearly the kind of institutional legitimacy as legislators do to alter the rights of the populace that class settlements cannot do all that Congress might by way of legislation—whether to impose a compressed bureaucratic damage schedule or any other type of civil justice reform that one might consider desirable on instrumental grounds.

Nagareda, supra note 2, at 174.

141. Burbank, Interjurisdictional Preclusion, supra note 7, at 815–16.

142. Owen Fiss has discussed this feature of representative litigation as embodying the difference between a "right of participation" and a "right of representation." Fiss, supra note 65, at 970–71. As Fiss correctly observes, representation and participation offer overlapping but distinct theoretical justifications for binding individuals to adjudicatory outcomes—justifications with very different practical implications in hard cases. One's assessment of the importance of participation as a means of reinforcing the dignity and worth of the individual in a given adjudicatory context, as opposed to its importance as a proxy for ensuring adequate representation of interests, may dictate one's view as to whether the costs of imperfect or harsh outcomes should fall upon unlucky individuals or should be spread more broadly as a systemic cost by permitting collateral challenge or relitigation. See id. at 978–79 (discussing varying importance of individual participation in different contexts); see also Douglas Laycock, Due Process of Law in Trilateral Disputes, 78

clarity and certainty that Burbank has urged is the prospective imposition of constraints upon the preclusive effects of class judgments.

3. *Settlement and Preclusion.* — The assertion that a trial court has the authority to place constraints upon the preclusive effect of its own judgment that are calibrated to the needs of a particular class proceeding may sound unfamiliar. In fact, however, that authority has a close cousin that occupies a well-established position in the doctrinal landscape of representative litigation: the class settlement.

In most circumstances, a settlement between two individual litigants is a simple contract. While such agreements are always made against a backdrop of sovereign authority, the active participation of the state generally is required in a settlement agreement between individuals only when a party seeks assistance in enforcing its terms.[143] The same is not true of a class settlement. A settlement in a class action binds all the members of the class, just as a judgment would, even though absent class members never manifest the sort of individual consent or agreement that contract law would ordinarily require. This result is possible only because a class settlement constitutes an exercise of judicial authority, just as a judgment does. It is through the issuance of a certification order that a court acquires the power to bind absentees to a settlement agreement—a fact reinforced by Rule 23(e)'s requirement that a court provide further process to class members and then review and approve any settlement before such an agreement can take effect.[144] These features of the class settlement lie at the heart of the Court's pronouncement in *Amchem* that the requirements of Rule 23, and the due process principles to which they give voice, "demand undiluted, even heightened, attention in the settlement context."[145] Individuals can compromise their interests in all kinds of foolish ways when they act on their own behalf, but class representatives act with the authority of the state when they compromise the interests of absentees and they must act within the limitations of that authority.[146]

Iowa L. Rev. 1011, 1020 (1993) (identifying individual notice and opportunity to participate as "the essence of due process").

143. The standard illustration of the relationship between contractual arrangements and state authority centers around the Court's treatment of racially restrictive covenants. See Shelley v. Kraemer, 334 U.S. 1, 14–23 (1948). The classic discussion of *Shelley* is Louis Henkin, *Shelley v. Kraemer*: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962), wherein Professor Henkin explores the broad implications of finding "state action" in the state's enforcement of obligations between private citizens.

144. See Fed. R. Civ. P. 23(e)(1)(A) ("The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class."); id. 23(e)(1)(B)–(4)(B) (detailing process that court must provide before approving class settlement).

145. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

146. In this connection, the Supreme Court's suggestion in *Matsushita* that some jurisdictions might treat class action settlements as "a question of pure contract law," if taken literally, is incoherent. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.6 (1996). "Pure contract law" speaks only to the circumstances under which an individual

Settlement agreements almost always contain some form of release, and this is equally true of class settlements. A release is, in effect, the contractual version of claim preclusion: an agreement not to assert specified claims against one's adversary in any future proceeding.[147] Like claim preclusion, a settlement release is invoked as an affirmative defense if a covered claim is asserted in a subsequent lawsuit.[148] Unlike claim preclusion, however, a settlement release typically specifies, often in great detail, the claims to which it will apply. Naturally, parties sometimes argue, and litigate, over whether the terms of a release in an earlier settlement apply to a newly raised claim. Even when disagreements emerge as to the proper interpretation of a release in a particular dispute, however, no one doubts the ability of two contracting parties to make meaningful prospective choices about what claims they will include in such an agreement.

When a release is contained in a settlement that has been approved by a court on behalf of a class, it is the sovereign authority of the court that binds the absentees to the surrender of future claims. Thus, courts regularly use their authority to place carefully calibrated constraints upon the extent to which a class action will compromise the claims of class members in future proceedings.[149] They simply do so through the device of an order approving a settlement agreement, rather than an order limiting the preclusive effect of a judgment terminating a fully litigated action.

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binds her own person to a voluntary obligation. When individuals can bind others through their actions, another juridical category is at work. Agency law, family law, the law of business organizations, and the law of representative litigation all describe circumstances under which one individual might bind another to a contractual obligation. Each of those juridical categories possesses its own set of internal doctrinal requirements, and each must abide by external constitutional constraints. A jurisdiction might well choose not to adopt any special canons of construction for a class settlement, relying only on general contract principles to interpret the settlement's terms. This appears to be how some courts have construed *Matsushita*'s footnote. See, e.g., In re Lease Oil Antitrust Litig. (No. II), 200 F.3d 317, 320 (5th Cir. 2000) (citing *Matsushita* footnote and interpreting "pure contract law" approach to mean that "a settlement will be enforced according to its terms" without reference to broader class concerns). But when a lead plaintiff and her counsel exercise the authority to bind absentees to a settlement agreement, something more than "pure contract law" is at work.

147. See Restatement (Second) of Judgments § 27 reporter's note to cmt. e (1982) ("A stipulation or consent judgment may have preclusive effect in a subsequent action if the parties have so agreed. In such a case the effect results not from the rule of this Section but from an agreement manifesting an intention to be bound." (citations omitted)).

148. See, e.g., Fed. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . release [and] res judicata . . . .").

149. See, e.g., Trotsky v. L.A. Fed. Sav. & Loan Ass'n, 121 Cal. Rptr. 637, 646 (Ct. App. 1975) (holding that court should exercise caution in approving settlement that includes general release of claims not raised in complaint or litigated in action, even though it has power to do so).

Indeed, the capacity to specify in precise detail the scope of the release that a settlement will include is one of those features of a settlement that is clearly "relevant" to the certification calculus, as that term was used in *Amchem*.[150] A settlement-only class action can greatly reduce the potential conflicts of interest that preclusion doctrine might otherwise introduce, precisely because it allows class counsel to remove much of the uncertainty associated with preclusion and to predetermine how the claims of class members will be affected in future lawsuits. The constraints on the preclusive effects of the judgment in a litigated action that I advocate here aim to resolve potential Rule 23 problems in the same manner.

To be clear, there are important differences between a court-approved settlement agreement and the judgment that results from a litigated action, on both a formal and a practical level. In particular, preclusion doctrine sometimes gives voice to institutional values that are not implicated by settlement, even in the case of a class proceeding. The contours of a judgment's preclusive effect—and the permissible forms of the constraints that a rendering forum can impose upon it—may differ markedly from the typical scope of a negotiated release. I discuss these issues in Part III. My point here is a more basic one. The aggressive reading that so many courts have given to the ubiquitous preclusion maxim appears to be founded upon a belief that rendering courts operate under some inherent disability when it comes to placing meaningful or effective constraints upon the preclusive effect that their own judgments will have in future cases. In the last subpart, I demonstrated that there is no logical or theoretical basis for such a belief. Commonly accepted practice in the approval of class action settlements further demonstrates that, in fact, courts regularly disprove the existence of any such categorical disability on the imposition of preclusion constraints by using their sovereign authority to achieve the same result in a closely analogous manner.[151]

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150. See *Amchem*, 521 U.S. at 619–20 (explaining that decision to proceed as a settlement-only class action is relevant to those elements of certification calculus that are inherently dependent upon the fact of litigation, like the manageability of the action).

151. Cook offered a trenchant observation in setting forth the "scientific" method that he employed in his challenge to traditional choice of law analysis that is equally apt here:

> We shall therefore undertake to formulate general statements as to what the 'law' of a given country 'can' or 'cannot' do in the way of attaching legal consequences to situations and transactions by observing what has actually been done. In making our observations we shall, however, find it necessary to focus our attention primarily upon what courts have done, rather than upon the description they have given of the reasons for their action. Whatever generalizations we reach will therefore purport to be first of all an attempt to describe in as simple a way as possible the concrete judicial phenomena observed, and their 'validity' will be measured by their effectiveness in accomplishing that purpose. In other words, they will be regarded as 'true' only in so far as they enable us to handle effectively the concrete materials with which we must deal.

B. *Tools of Limitation in Class Action Proceedings*

It is not difficult to offer a basic description of the tools by which trial courts might constrain the preclusive effects of their own judgments in appropriate cases. Indeed, rendering courts already employ such tools in isolated instances.[152] It is only the threat of the ubiquitous preclusion maxim that dissuades courts from incorporating these constraints into the regular administration of class action proceedings, even when doing so is obviously the most sensible course. One decision from a Wisconsin appellate court, *Milwaukee Women's Medical Service, Inc. v. Scheidler*,[153] nicely captures the tenor of the response that many trial courts must expect when they attempt to incorporate such limitations into the orders that they craft. I begin here with a brief account of that case as a reminder of the judicial mindset that has prevented the simple steps that I describe from being widely implemented.

The *Milwaukee Women's Medical Service* decision involved a pair of lawsuits: one a federal class action, the other an individual litigation brought in state court. The federal proceeding was a nationwide class action initiated in the Northern District of Illinois in 1986 on behalf of all women seeking reproductive health services.[154] The plaintiffs in the federal action included a trio of Wisconsin-based women's health care providers collectively referred to as "Summit," while the defendants included Joseph Scheidler, an anti-abortion activist whom the plaintiffs accused of engaging in racketeering activities in the early 1980s in order to intimidate and threaten women away from clinic entrances.[155] In 1997, when the federal action was in its eleventh year, Summit brought a separate, individual lawsuit against Scheidler and fifty-two other defendants in Wisconsin state court on the basis of more recent protests that the defendants had targeted at the plaintiffs' local facilities. In that action, Summit requested an order to keep the defendants from blocking their Wisconsin clinic entrances or harassing their patients. After failing to secure a preliminary injunction, Summit settled the state action with the defendants and joined in a stipulation of dismissal.[156]

The stipulation, and the court's attendant order, included a carelessly worded release broadly providing that "*all claims* against [the defendants] *relating to conduct which occurred prior to the signing of this stipula-*

Cook, supra note 104, at 8.

152. Wright, Miller, and Cooper appear to assume the propriety of utilizing such constraints in discussing the use of narrow definitions of class certification, though they neither identify that analytic step expressly nor offer a defense for the propriety of its use—an unfortunate omission. See supra note 72 (quoting 18A Wright, Miller, & Cooper, supra note 2, § 4455, at 461, 459 & n.15).

153. 598 N.W.2d 588 (Wis. Ct. App. 1999).

154. The federal action eventually gave rise to the Supreme Court's decision in National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).

155. Id. at 252–53.

156. *Milwaukee Women's Med. Serv.*, 598 N.W.2d at 590–91.

tion are hereby dismissed [as to Summit], with prejudice . . . ."[157] Although Summit sought to settle only the claims in the Wisconsin action, the broad release appeared to encompass the pending RICO claims. Seeking to capitalize upon Summit's mistake, Scheidler took the stipulation to the federal proceeding and sought to have Summit dismissed as a named plaintiff on collateral estoppel grounds.[158] In response, Summit then returned to the state trial court and asked for a modification of the stipulation and order, arguing that the broad language in the release was an error and did not reflect the more limited intentions of the parties. The trial court agreed, amending the order and stipulation so that it released only claims "asserted in the [state court] Complaint." To reinforce the limited scope of its amended order, the court added: "[I]t is not the intent of this court that this order have any effect upon National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al., Case No. 86 C 7888 in the United States District Court for the Northern District of Illinois, Eastern District."[159]

The Wisconsin appeals court rejected the amendment to the stipulation and vacated the amended order. The appellate court spent much of its decision discussing the standard for granting relief from a final judgment under Wisconsin's equivalent of Federal Rule 60(b), which is not pertinent here. As an alternative ground, however, the appellate court also categorically repudiated the trial court's effort to place constraints upon the effects of its order of dismissal. The appellate court discarded the trial court's limiting clause as dicta, explaining that a rendering court does not have "power" to impose such constraints—a proposition that it explained solely through an invocation of the ubiquitous preclusion maxim.[160] A concurring judge, seeking to place an additional gloss upon this holding, further explained that the trial court "could not affect how the United States District Court for the Northern District of Illinois . . . will interpret or apply the parties' stipulation or the trial court's order based on that stipulation."[161]

The series of steps by which the Wisconsin appellate court reached its result form a roadmap of the errors of reasoning in preclusion doc-

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157. Id. at 590 (emphasis added).

158. Id. at 590–91. Actually, the proper basis for Scheidler's motion was presumably release, not collateral estoppel, since the two lawsuits dealt with different protesting activities separated by more than a decade and the state proceeding did not finally resolve any factual issues.

159. Id. at 591–92.

160. The entire passage reads:

> Finally, we note that the circuit court's attempt to narrow the legal effect, if any, of its second order by adding language explaining the circuit court's own intent that the order not "have any effect upon [the federal action]" amounted to dicta. A court rendering a first judgment does not have the power to determine that judgment's effect; the successor court will make its own decision.

Id. at 593 (citation omitted).

161. Id. at 594 (Fine, J., concurring in part and dissenting in part).

trine discussed in this Article. The trial court's dismissal was only an order implementing a stipulated settlement, not a judgment following an adjudication, so there should have been little problem in placing limitations upon the terms of its negotiated release—assuming, as the trial court did, that it was proper as a matter of contract law to revisit the stipulation's language.[162] As for the pure claim preclusive effect of the order, a 1997 judgment in the state court action should not have affected the claims raised in the federal suit at all. The two sets of claims arose from facts separated in time by a span of years, presumably bringing them comfortably outside any impact that the state court judgment might have on transactionally related claims. Thus, the "constraint" that the trial court imposed upon the claim preclusive effect of its order did not detract from any effect that would actually have resulted had the state lawsuit been litigated to judgment. Finally, the appellate court's explanation for rejecting the trial court's order in the face of these facts concisely exemplifies the failure of understanding that has perpetuated the reign of the ubiquitous preclusion maxim. The majority and concurrence opined that the trial court had no "power" to "affect how [another court] will interpret or apply" the stipulation and order.[163] That is quite true—and entirely irrelevant to the power of the trial court to enter the order that it did. As the last section explained, neither legislatures nor courts can control the manner in which the rules of decision that they enact will come to be applied in future cases. They can, however, place constraints upon the prescriptive scope of those rules of decision. The state trial court was not attempting to issue an order mandating the federal district court to "interpret or apply" its judgment in a particular fashion. It was seeking to clarify the positive legal effect of the consent judgment so that the federal court would know exactly what rule of decision it was being called upon to interpret and apply. In rejecting that attempt, the appellate court chastised the trial court for an error that it did not make.

When trial judges must fear such categorical repudiation as the thanks for exercising sensible restraint, it is small wonder that even diligent courts have not yet begun to implement the simple and straightforward steps that might allow them to resolve preclusion problems during class certification.

1. *Constraining a Judgment's Preclusive Effect.* — When a court apprehends a preclusion problem at the outset of a proposed class action, there are two questions that it must ask: What constraints on the prescriptive scope of a judgment in this action would ameliorate the problem; and would those constraints be permissible, and appropriate, under the preclusion and joinder policies that apply to the dispute? The second question is the subject of Part III, and I leave it to one side for now. In this subpart, my focus is the forms of the constraints that a court can

162. See id. at 592–93 (analyzing trial court's amendment of stipulation under principles of contract law).

163. Id. at 593–94.

impose upon a certification order and judgment in addressing ex ante preclusion problems.

a. *Constraints Relating to a Parallel Proceeding.* — The narrowest type of preclusion constraint that a court can impose is one that identifies a particular proceeding for which the court does not wish its judgment to have claim or issue preclusive effect. The attempt by the trial court in *Milwaukee Women's Medical Service* to amend its earlier judgment so as not to interfere with the pending RICO case offers an example of such a constraint, and also of the type of situation where it is most likely to be pertinent—where two parallel actions involving related claims are being litigated simultaneously.

Parallel class action proceedings are not unusual, particularly where federal law creates a cause of action with close analogs among the laws of the various states, as in the regulation of anticompetitive activities or certain types of corporate malfeasance in publicly traded companies.[164] When a nationwide class action is initiated in federal court on federal claims, follow-on class actions in state court are often not far behind. Class counsel in these state actions typically assert only state law claims in order to avoid having the cases removed to federal court and consolidated with the original action through the Multidistrict Litigation Panel. These stay-in-state-court suits may raise claims that could not have been certified in the federal action because of choice of law complications, or they may be entirely duplicative, with class counsel hoping to race ahead of the federal action to judgment or settlement. Either way, a judgment in such an action carries a risk of compromising the claims of plaintiffs in the federal suit through claim or issue preclusion, even where there is exclusive jurisdiction over the federal claims.[165]

A diligent state court might conclude that some follow-on class actions of this description are suitable for certification and would serve the interests of the class—as, for example, in the case of a statewide suit seeking to raise valuable state law claims that could not be asserted in a nationwide federal action. At the same time, the state court might conclude that it would be inappropriate for a judgment in a state proceeding to compromise federal claims that are being thoroughly litigated in a fed-

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164. See, e.g., Richard A. Posner, Antitrust in the New Economy, 68 Antitrust L.J. 925, 940–43 (2001) (discussing parallel federal and state antitrust regimes and capacity of state officials to enforce federal antitrust laws, and arguing for broad federal preemption and elimination of state parens patriae actions).

165. As Wright, Miller, and Cooper explain:

> Difficult choices must be made . . . if the plaintiff knowingly chose a court of more limited jurisdiction when a court of broader jurisdiction was available, or chose a narrower remedy over a broader remedy. It has been urged that the plaintiff should be required to seek out the most comprehensive proceeding available, so that the dimensions of the claim are measured by that possibility.

18 Wright, Miller, & Cooper, supra note 2, § 4412, at 277–78.

eral forum.[166] Where there is exclusive jurisdiction over the federal claims, a straight application of preclusion doctrine might provide protection from merger or bar through the "jurisdictional competency" exception that some states employ,[167] but the exception is not firmly established in every state[168] and does not generally apply to issue preclusion in any event.[169] As a consequence, a state court must always think about the preclusive consequences of certifying such a parallel proceeding.

Cases of this description appear to be particularly good candidates for the imposition of a constraint on the prescriptive scope of the state court's judgment. Following the lead of the Wisconsin trial court in *Milwaukee Women's Medical Service*, the court could provide in its certification order that nothing in any judgment or dismissal of the action it has certified would have any preclusive impact upon the parallel action currently pending in federal court. Such an order would have the added benefit of helping to focus the attention of the court on the propriety of any global release (i.e., one including federal claims) that the parties might attempt to incorporate into a proposed settlement—a mechanism by which class counsel in parallel state proceedings sometimes seek to entice the defendants to settle quickly, to the benefit of class counsel's fee award but not always to the benefit of the class.[170]

b. *Constraints Relating to a Specific Cause of Action.* — Where no parallel action exists, or where an order specifying a particular lawsuit would

166. In his first *Epstein* opinion, Judge William Norris adopted this limitation as a federal common law constraint on the capacity of state court class settlements to compromise exclusively federal claims. See Epstein v. MCA, Inc. (*Epstein I*), 50 F.3d 644, 662–66 (9th Cir. 1995) (arguing that state courts do not have "the power to extinguish exclusively federal claims by approving a class action settlement that could have been extinguished by adjudicating the class action"), rev'd sub nom. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

167. See Restatement (Second) of Judgments § 26(1)(c) (1982) (describing general rule that preclusion should not attach where "plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts").

168. See, e.g., In re Heckert, 272 F.3d 253, 258–60 (4th Cir. 2001) (holding that West Virginia law demands that prior state court judgment exert claim preclusive effect upon subsequent federal bankruptcy proceeding, despite exclusive federal jurisdiction in bankruptcy proceedings); In re Genesys Data Techs., Inc., 245 F.3d 312, 314–15 (4th Cir. 2001) (same for prior state court judgment from Hawai'i).

169. See, e.g., Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1142 n.8 (9th Cir. 2003) (observing that California does not apply claim preclusion where exclusively federal claims could not have been raised in initial action, but conducting issue preclusion analysis even so because that doctrine continues to apply).

170. Judge Friendly's observation on this score remains one of the most cogent. See Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9, 18 (2d Cir. 1981) (Friendly, J.) ("If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either."). It was a global release in a parallel state court proceeding that produced the dispute which ultimately gave rise to the Court's decision in *Matsushita*. See 516 U.S. at 369–72 (recounting case history); Epstein v. MCA, Inc. (*Epstein II*), 126 F.3d 1235, 1251–55 (9th Cir. 1997) (same).

not resolve the preclusion problem, a court might consider carving a particular cause of action out of the preclusive impact of the proceeding it is certifying. Such an order might limit itself to preserving the right of class members to raise certain types of claims in any future proceedings without fear of merger or bar, or it might also place limits on the issue preclusive effect of the court's judgment. The choice would depend upon the nature of the preclusion problem that the court sought to address.

An order of the first type might be appropriate for some stay-in-state-court civil rights litigation. A state court might decide that it is desirable for a civil rights suit raising important and novel questions under the state's constitution to be heard in state court. In such a case, the court could view the decision of class counsel not to plead federal grounds for relief in order to eliminate the possibility of removal as wholly legitimate. At the same time, the court might conclude that members of the class should not have to forgo any possibility of federal relief in order to obtain a state forum for their state claims. The court could thus provide in its certification order that any judgment in the case would have no impact through merger or bar upon the ability of class members to pursue federal relief in a future case, even though the federal claims could have been asserted on a classwide basis in the state forum. It would not be necessary, and probably would not be appropriate, to extend the effect of that exception to issue preclusion, since the state court is presumably as competent as any federal court to resolve contested issues of fact. The preclusion dilemma in this case arises from the court's desire to preserve a state forum for important state claims without categorically depriving the class of a federal cause of action. An exception that is limited to merger and bar would accomplish that goal.

In contrast, such an order would not eliminate the problems associated with conflict of interest cases where class members who possess high-value damages claims have much more to lose from the issue preclusive effects of an adverse judgment than do class members who are only able to benefit from injunctive relief. Consider the Title VII case that the district court refused to certify in *Zachery v. Texaco Exploration & Production, Inc.*[171] The Supreme Court's decision in *Cooper* already made it clear that merger and bar would not operate in a disparate impact case to compromise the class members' individual claims of discriminatory treatment when those claims could not have been certified in the original action, a fact that the *Zachery* court understood.[172] But issue preclusion would still threaten to compromise the high-value claims of those individuals, giving them a much stronger incentive to settle for a lesser form of injunctive relief rather than litigating through to judgment, thus placing them in conflict with the rest of the class. Where the rendering court concludes that it is desirable for the disparate impact suit to proceed on a classwide

171. 185 F.R.D. 230 (W.D. Tex. 1999).

172. Id. at 243 (discussing *Cooper* and claim preclusion).

basis, it would have to specify that its certification order and judgment are without prejudice from either claim or issue preclusion to the ability of individual class members to pursue individual damages claims alleging discriminatory treatment. Once again, the nature of the preclusion problem—here, a conflict of interest arising from the threat of issue preclusion—dictates the scope of the order needed to ameliorate that problem.

c. *Constraints Relating to the Entire Action.* — Exempting a particular cause of action from the prescriptive scope of a future judgment in a certified class sometimes will not suffice, or will not be practicable, in the effort to eliminate an ex ante preclusion problem. Where this is so, a court may have to consider the imposition of a broader limitation that will restrict the preclusive effect of its judgment in any future action—the type of constraint that is the most likely to raise concerns under the broader policies embodied in the forum's preclusion doctrines, as the next Part discusses.

Actions seeking to pursue defective product claims on behalf of a class of consumers—which are becoming increasingly common, despite the many barriers to certification that they present—might present preclusion problems redressable only through such broad measures. When a defective product is released into the market, it will generally give rise to two types of claims: the economic damages associated with the reduced value of the product, which will often be readily calculable on a classwide basis; and the consequential damages that occur when the defect actually causes the product to fail, which may include claims for personal injuries and property damage that will be unsuited for class treatment. In the *Bridgestone/Firestone* litigation, for example, the economic harm that consumers suffered when the tires they had purchased were revealed to be defective was not an inherently difficult claim to resolve on a classwide basis.[173] The personal injuries and property damages of consumers who actually experienced a tire failure, however, would have entailed highly individualized determinations of causation, comparative fault, and damages, which would be unsuited for class treatment. Nonetheless, a plaintiff seeking to pursue only economic damages would have to establish certain elements, like the defective nature of the tires or the inadequate level of care exhibited by the defendant in their manufacture, that are shared in common with the more valuable claims. As a result, a class certified to resolve only the economic damages claims would raise a serious conflict between the absentees who want maximum value for their unusable tires and the absentees who possess valuable claims for conse-

173. See In re Bridgestone/Firestone Tires Prods. Liab. Litig. (*Bridgestone/Firestone I*), 288 F.3d 1012, 1014–16 (7th Cir. 2002) (discussing claims for economic harm). The Seventh Circuit concluded that a nationwide class on these claims was nonetheless impossible because of the multiple state law regimes that would apply to the dispute and the diversity of tire models encompassed in the omnibus action. Id. at 1018–20.

quential damages and would not want to risk an adverse judgment on such a relatively insignificant item.[174]

This is not to say that high-stakes claimants would derive no material benefit from an economic damages class action in a defective products case. The aggregate recovery in such a suit would be large enough to focus substantial energy and resources upon the issues common to both types of claim, and high-stakes claimants would benefit from those efforts. Nonetheless, a serious conflict of interest would remain when the decision arose whether to litigate or settle, and it would be necessary to restrict the issue preclusive effects of the judgment in order to remove that conflict. The range of individual claims that might be compromised by the class suit, however—personal injury, wrongful death, loss of consortium, property damages to the vehicle, and so forth—would not lend it-

174. Instead of acknowledging and confronting the conflicts of interest that preclusion doctrine created within the class, the Seventh Circuit finessed the issue by accepting the assertion of class counsel that all individuals possessing high-value damages claims were "sure to opt out and litigate independently," id. at 1016, and hence could safely be assumed away in considering class certification. This is a remarkable proposition. While it is probably true that most individuals who suffer serious injury or harm would consider pursuing litigation on their own, it is quite another matter to assume breezily that all those individuals will in fact exercise their right to opt out and hence require no further consideration by the certifying court. Many people do not pay attention to the notices that they receive, and some people who do receive a notice may make unwise or uninformed decisions, either from a failure to understand the consequences of not opting out or from a simple lack of good judgment. See Debra Lyn Bassett, Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation, 2004 Mich. St. L. Rev. 619, 626–28 (describing challenges that recipients of notice frequently experience in understanding its meaning). As I discuss at greater length in Part II.B.3.b, notice and opt out are poor proxies for the type of robust litigant autonomy that justifies binding individuals to bad litigation choices.

One rather suspects that Judge Easterbrook would have been less cavalier about the status of the high-stakes class members had their presence in the suit been dispositive of the certification analysis. In fact, the Seventh Circuit's opinion makes much more sense if one reads into it an implicit recognition that no class could be certified in an action of this type unless it was understood to include a constraint on the issue preclusive effect that any judgment would have upon the high-value claims of injured absentees.

The Seventh Circuit, per Judge Easterbrook, recently passed up another opportunity to address the conflicts of interest that issue preclusion can generate. In Allen v. International Truck & Engine Corp., 358 F.3d 469 (7th Cir. 2004) (Easterbrook, J.), the court reversed a district court's denial of certification in a Title VII case. The district court had found that it was impossible to certify a suit seeking only injunctive relief on behalf of a 350-person class because the divergent facts surrounding the individual damages claims in the case would make the lawsuit unmanageable. Id. at 470–71. The Seventh Circuit reversed on the manageability finding and sent the case back. Id. at 471–72. It did not, however, address the divergent settlement interests that employees with high-value damages claims and those without such claims would apparently possess. Since the court ruled, following its decision in Jefferson v. Ingersoll International Inc., 195 F.3d 894 (7th Cir. 1999), that the class members must have an opportunity to opt out in a bifurcated action of this sort, its failure to address the divergent settlement interests of class members may proceed from the same instinct that apparently informed Judge Easterbrook's opinion in *Bridgestone/Firestone II*: the assumption that class members with high-value claims will opt out when doing so is necessary to protect their interests.

self to the type of specific delineation that resolved the conflict between disparate impact and disparate treatment claims in the Title VII context. Here, the court would need to impose a broader constraint, providing that any judgment in the certified action would be without prejudice, either from issue preclusion or from merger or bar, to the ability of class members to pursue any claims not raised in the complaint itself. In essence, such an order would restrict the action from having any preclusive effect upon the class beyond the final resolution of the claims actually raised therein.

These three forms of limitation—constraints relating to a parallel proceeding, to a specific type of claim, and to the entire action certified for class treatment—are tools with which a court might be able to eliminate the ex ante problems that preclusion doctrine can pose to the certification of a class. There may be legitimate objections to the use of these tools in some cases, as they might be inconsistent with the broader preclusion policies that govern the action. Those potential objections are the subject of Part III. If a court determines that these "negative" or constraining applications of preclusion doctrine are not available to it, and that no alternatives exist for addressing an ex ante preclusion problem, then it may be justified in concluding that a class action is not appropriate. But the posture of vague powerlessness toward preclusion problems that some courts have adopted in refusing to certify a class action can no longer be tolerated.

2. *The Seventh Amendment and Reexamination.* — It is worth taking a moment to discuss the Seventh Amendment's Reexamination Clause, since the same error that led the Fifth Circuit to make its confused statement about reexamination and preclusion in *Allison* might also lead a certifying court to have misplaced concerns about the use of preclusion constraints like those discussed above.[175] The Clause provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[176] The amendment has not been incorporated against the states and so applies only to federal courts,[177] though a few states have similar provisions in their own constitutions.[178] In some of the cases explored above in which a preclusion constraint might be appropriate—for example, a class action

175. See supra notes 51–60 and accompanying text.

176. U.S. Const. amend. VII.

177. See Gasperini v. Ctr. for the Humanities, Inc., 518 U.S. 415, 432 (1996) (holding that Seventh Amendment "governs proceedings in federal court, but not in state court"). The Reexamination Clause does apply to federal court review of state court jury findings, however. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 508 n.27 (1984).

178. See, e.g., S.C. Const. art. V, § 5 ("[The Supreme Court of South Carolina] shall have appellate jurisdiction only in cases of equity, and in such appeals they shall review the findings of fact as well as the law, except in cases where the facts are settled by jury and the verdict not set aside."); W. Va. Const. art. III, § 13 ("No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.").

for economic damages in which some absentees possess related claims for personal injuries—the initial proceeding will be tried before a jury. Suppose that the class loses before the jury in such a case on an explicit finding that it had failed to prove a key factual issue, and a class member then sought to pursue his individual claim for personal injuries in a subsequent suit, taking advantage of the preclusion constraint imposed by the court in the initial action. The question might arise whether the second suit, by raising a factual issue that the jury in F1 decided adversely, would run afoul of the Seventh Amendment's prohibition on reexamination.

The Court has often said that the Seventh Amendment "preserve[d] the right to jury trial as it existed in 1791."[179] While this formulation has at times been read to impose a "static" limitation demanding strict adherence to the jury practices of the late eighteenth century, that mode of interpretation has given way to a "dynamic" approach that preserves the basic prerogatives of the jury but allows for procedural innovation.[180] In *Gasperini*, the Court applied that dynamic mode of interpretation to the Reexamination Clause, rejecting the view that "the meaning of the Seventh Amendment [was] fixed at 1791" and formally acknowledging that procedures "not in conformity with practice at common law when the Amendment was adopted" remain consistent with the Clause when they are "necessary and proper to the fair administration of justice."[181] Thus, in framing a Seventh Amendment inquiry, it is useful to ask whether a procedural innovation is inconsistent with a core function of the civil jury as it functioned at common law, and also what role the proposed innova-

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179. Curtis v. Loether, 415 U.S. 189, 193 (1974).

180. See Woolley, Reexamination Clause, supra note 53, at 502–06 (describing development of the Court's Seventh Amendment doctrine).

181. 518 U.S. at 435, 436 n.20. In an early commentary on the Seventh Amendment and the reform of civil procedure in American courts, Professor Austin Scott embraced this "dynamic" interpretive approach to the amendment when discussing the many variations among the jury practices of early American courts. He wrote:

> First. Whatever was an incident or characteristic of trial by jury in a particular jurisdiction at the time of the adoption of the constitutional guaranty in that jurisdiction is not thereby abolished. In determining what is meant by trial by jury under the Seventh Amendment, inasmuch as the practice was different in the different colonies, the federal courts look to the common law of England rather than to the law of any particular colony; and incidents of trial by jury, known in England at the time of the adoption of the Seventh Amendment, are not done away with by its adoption.
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> Second. Although the incidents of trial by jury which existed at the time of the adoption of the constitutional guaranty are not thereby abolished, yet those incidents are not necessarily made unalterable. Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree.

Austin Wakeman Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 671 (1918) (citation omitted).

tion will play in promoting other adjudicatory values. Much of this Article is devoted to addressing the second of these inquiries. As to the first, it would be exceedingly difficult to argue that the type of preclusion constraint that I have suggested here derogates from the common law prerogatives of the jury, or from the purposes animating the Reexamination Clause.

When American courts received the common law from England, pleading practice in civil proceedings still required conformity with the traditional forms of action. In English law courts, a bundle of claims that we would now describe as "transactionally related" had long required the issuance of separate writs in order to obtain different types of judicial remedy.[182] This requirement migrated to the American colonial courts and persisted through the eighteenth century. As Professor Millar has explained, with rare exception, the common law limited the "joinder of causes of action [in early American courts] . . . to the case where all fell within the same form of action."[183] In a judicial system shackled by such constraints, claims for economic harm and personal injury, or contract and tort, frequently could not be joined in a single proceeding. When an individual suffered a harm that sounded in more than one form of action, she would thus need to bring multiple suits with multiple juries to obtain complete relief.[184] It was only with the enactment of the amended Field Code of 1852 that a court system in the United States expressly permitted the joinder of all claims that "arise out of the same transaction, or transactions connected with the same subject of action," before a single jury.[185] Even then, this innovation was slow to spread from New York to

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182. A rich account of the writ system may be found in Sir John Baker, 6 The Oxford History of the Laws of England, 1483–1558, at 323–49 (2003) [hereinafter Baker, Oxford History]. While Baker writes exclusively of the Tudor period in this volume, the relevant structural features of the writ system remained essentially unchanged through the end of the eighteenth century. See J.H. Baker, An Introduction to English Legal History 37–51 (4th ed. 2002) (describing evolution of English common law courts). As Baker explains, the diverse array of original writs "had come to be regarded not only as 'the foundation of every suit' but as the foundations of the law itself, on which the whole law depended." Baker, Oxford History, supra, at 323 (citation omitted). "The writs exerted their dominion not only over procedure but over the common-law mind. If there was no writ, there was no remedy." Id.

183. Robert Wyness Millar, Civil Procedure of the Trial Court in Historical Perspective 111 (1952) [hereinafter Millar, Historical Perspective].

184. See id. at 112. Millar states,

> "[U]nless there existed the common origin indicated, it would not permit, for example, the joinder of a claim in contract with one in tort, or one for injury to character with one for injury to the person, or one for the recovery of real property with one for the recovery of personal property."

Id.

185. Id. at 111 (quoting Act of Apr. 16, 1852, ch. 392, 1852 N.Y. Laws 655). The Field Code, which was first enacted into law in New York in 1848, was named for David Dudley Field, "one of [the code's] chief architects and certainly its most ardent supporter." Robert G. Bone, Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 Colum. L. Rev. 1, 10 n.13 (1989).

other states during the eighty-six years that elapsed before the adoption of the Federal Rules.[186]

These rigid rules of common law pleading and joinder were combined with concomitantly narrow rules of preclusion. A judgment in one action would preclude parties from relitigating the same legal theory, applying what we would call a "direct estoppel"[187] that marked the proceedings as final. But judgments did not attach the sort of transproceeding finality to factual determinations that we associate with modern issue preclusion. "Estoppel by record"—the closest analog to modern issue preclusion in actions at law—was grounded in a desire to protect the integrity of the initial proceeding as manifest in the written record. The preclusive effect that attached to that determination was such as was necessary to prevent an unsuccessful party from undermining the integrity of that record. Estoppel by record thus prohibited a second attempt to obtain the same form of relief that was once denied, which would constitute an affront to the verdict recorded in the first proceeding. It also prohibited a party's disavowal of the sworn testimony and admissions that he offered in a prior proceeding, which would attack the integrity of the original testimonial record. The first concern was not implicated when parties brought successive suits for different forms of relief under properly distinct forms of action. The second is a species of concern that we now police through perjury laws, judicial estoppel, and the use of inconsistent testimony for impeachment. Our current concerns over inefficient relitigation and the value of repose, and our tendency to place special reliance upon the view of the facts propounded by the first tribunal to hear a dispute between parties, were not the motivating purposes behind the estoppel employed by common law courts.[188] While the "ver-

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186. See Millar, Historical Perspective, supra note 183, at 113–14 (describing gradual liberalization of joinder standards in other states before adoption of Fed. R. Civ. P. 18).

187. Woolley, Reexamination Clause, supra note 53, at 523 ("The rules [of direct estoppel] are designed to prevent a party from relitigating facts decided between the same parties on the same cause of action.").

188. As one commentator writes:

> Originally, parties were permitted to relitigate issues. Indeed, common law writ systems invited such multiple litigation. The litigation followed a certain hierarchy, however. A litigant might sue first for possession of property, later for a sort of ownership. The parties could not deny the matters in the record of a suit; they were estopped from doing so. Until recently, that concern could be found reflected in the frequent use of "estoppel by record" to refer to issue preclusion. The record consisted of matters that had been sworn to by witnesses in testimony or by the jury in delivering its verdict. At first, one might conclude that the record, therefore, included only matters of fact. To modern legal minds, juries consider questions of fact alone, leaving any decision on the relevant law to the judge. Such distinctions result from a [more] developed legal system than that which devised estoppel. . . .
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> . . . Even in America, the distinction between questions of law and fact only developed after the colonial period. Estoppel by record, therefore, was not a doctrine regarding facts but concerned court decision-making both of fact and law.

dict" of a jury could serve as the basis for an estoppel in appropriate cases,[189] that estoppel by record bore little relationship to modern preclusion doctrine.[190] As Professor Millar has put it, "the ghost of [common law estoppel] may still occasionally walk, . . . but it would be difficult to maintain that it preserves today its corporeal identity."[191]

When the Seventh Amendment established a constitutional prohibition on reexamination, it did not supersede or alter the need to bring multiple, separate actions to vindicate multiple rights. Concern over successive actions was not the motivating force behind the amendment. Rather, as Professor Woolley explains, the amendment sought to guard against the possibility that federal judges might usurp the role of the jury within a given proceeding,[192] particularly in the case of the Supreme Court and its capacity to exercise appellate jurisdiction "both as to Law and Fact" under Article III.[193] Indeed, Alexander Hamilton's oft-quoted

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> Estoppel by record had little to do with relitigation and ignored any distinction between law and fact. Instead, the doctrine sought to protect the integrity of the court. Other courts, presented with different causes of action, might come to different conclusions, both of the law and the facts. However, in each court (it is too early to talk of jurisdiction), there existed a record, and that record bound the parties to the court's findings. Those notions of independent court determinations and of court integrity play large roles in unraveling the present state of the issue preclusion doctrine.

Colin Hugh Buckley, Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History, 24 Hous. L. Rev. 875, 877–79 (1987) (citations omitted); see also Joseph H. Koffler & Alison Reppy, Handbook of Common Law Pleading 406 (1969) ("The Ground upon which the Estoppel rests . . . is a determination of the Merits of the Action, which, by Reason of the Admitted Facts shown upon the Record, the Unsuccessful Party is precluded from again bringing into question.").

189. See, e.g., Robert Wyness Millar, The Historical Relation of Estoppel by Record to Res Judicata, 35 Ill. L. Rev. 41, 47–49 (1940) (describing historical forms of pleading preclusion by reason of former judgment).

190. Most importantly, estoppel by record did not depend upon the existence of a final judgment on the merits. See id. at 55 ("[I]t is clear that the only part played by the judgment in the realm of estoppel was in perfecting, confirming and authenticating the record of the antecedent episode of the proceeding which constituted the estoppel. The judgment, itself, operating under the principle of *res judicata*, was quite another thing."). A judgment was necessary to mark the termination of the prior suit (and delimit the content of the record available for estoppel), but the content of that judgment was immaterial. Id.

Professor Millar points out that a more modern, transproceeding style of estoppel was sometimes available in equity courts, where the resolution of an issue "plainly decided as a step toward the award or denial of the relief sought by a plaintiff might foreclose the relitigation of the same question in a later suit, though this was other than a repetition of the earlier." Id. at 56. But, he explains, this form of preclusion operated only "outside the peculiar sphere of common-law estoppel." Id. The chancery derived authority for this form of preclusion "not from the common-law principle, which it did not know, but . . . from the Roman principle of *res judicata*." Id.

191. Id. at 59.

192. See Woolley, Reexamination Clause, supra note 53, at 508–10.

193. U.S. Const. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as

reassurance on this score, from *The Federalist No. 81*, offers the possibility of a second trial by jury as the innocuous alternative to the concentration of unaccountable federal authority that direct judicial review of jury findings threatened.[194] It is thus unclear whether the Seventh Amendment should ever place limitations on the maintenance of successive suits, at least in the absence of a blatant attempt to usurp the function or integrity of the jury.[195]

What is more, the Amendment clearly does not operate to foreclose successive jury trials where mutuality of parties is absent.[196] How should one view a class proceeding against this requirement of mutuality? Nothing remotely resembling the modern class action—with its shadowy absentees who are bound by the judgment but never fully embodied as parties in the lawsuit—existed in a world of common law forms of action, power-based personal jurisdiction, and the capias ad respondendum. To argue that the sparse words of the Reexamination Clause should be read categorically to foreclose successive class action proceedings with some areas of factual overlap—as Judge Posner did in his much noted *Rhone-Poulenc* opinion, which imposed significant Seventh Amendment obsta-

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the Congress shall make."). Justice Scalia emphasizes the primacy of this concern in his *Gasperini* dissent:

> The desire for an explicit constitutional guarantee against reexamination of jury findings was explained by Justice Story, sitting as Circuit Justice in 1812, as having been specifically prompted by Article III's conferral of "appellate Jurisdiction, both as to Law and Fact" upon the Supreme Court. "[O]ne of the most powerful objections urged against [the Constitution]," he recounted, was that this authority "would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury." *United States v. Wonson*, 28 F. Cas. 745, 750 (No. 16,750) (CC Mass.). . . .
>
> . . . The Reexamination Clause put to rest "apprehensions" of "new trials by the appellate courts," *Wonson*, 28 F. Cas., at 750, by adopting, in broad fashion, "the rules of the common law" to govern federal-court interference with jury determinations.

Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 450–51 (1996) (Scalia, J., dissenting).

194. Hamilton wrote:

> If . . . the re-examination of a fact once determined by a jury should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

The Federalist No. 81, at 489 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

195. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), could be read as support for that proposition. See supra note 54 (discussing *Parklane*'s holding that a prior action can exert dispositive preclusive effect upon a jury trial without violating the Trial by Jury Clause).

196. Mutuality of parties was, of course, a consistent and ubiquitous prerequisite for preclusion at common law. Justice Traynor recounts this historical requirement in his famous *Bernhard* opinion, even as he condemns it as "facile" and formally disavows it. See Bernhard v. Bank of Am. Nat'l Trust & Sav. Assoc., 122 P.2d 892, 894–95 (Cal. 1942).

cles to the use of issue-only classes in complex cases[197]—is simply not sustainable.[198]

As I discuss in Part III, a jurisdiction's preclusion policies may sometimes embody systemic commitments that will counsel against imposing certain types of constraint upon the preclusive effects of a class judgment. But, as Professor Woolley has aptly stated, "there is no basis for concluding that the burden inherent in requiring parties to present evidence more than once raises an issue of constitutional dimension."[199] This is all the more true where the specific manifestation of that burden—permitting parties to bring multiple actions in order to secure multiple forms of relief—was one of the defining features of the common law system in force when the Seventh Amendment was ratified.[200]

3. *Alternative Mechanisms for Addressing Preclusion Problems.* — Imposing constraints upon the preclusive effect of a judgment is not the only mechanism that a court can employ in seeking to address ex ante preclusion problems. When the problem is a conflict of interest arising from the different risk structures that the threat of adverse preclusion consequences appears to present to different groups within a class, the creation of subclasses might sometimes form part of an appropriate response. More broadly, some courts have invoked notice and opt-out rights in ana-

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197. In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303–04 (7th Cir. 1995). Judge Posner has shown a willingness to entertain issue-only class actions where, to use the Seventh Circuit's distinctive turn of phrase, the issue may be "carv[ed] at the joint" in such a way as to prevent factual overlap with successive actions. See, e.g., Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911–12 (7th Cir. 2003) (Posner, J.) (affirming district court's certification of issue-only class in pollution case where class treatment of common issue will not need to be revisited in individual damages determinations).

198. Professor Scott makes a similar point in discussing the Trial by Jury Clause: "The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form." Scott, supra note 181, at 671.

199. Woolley, Reexamination Clause, supra note 53, at 533.

200. I therefore disagree with the American Law Institute's seemingly uncompromising view on reexamination in its forthcoming statement on the principles of aggregate litigation. In discussing the role of the Reexamination Clause, the current draft of the ALI report takes the position that

> aggregation should not occur if a jury determination made in the aggregate proceeding would, as a practical matter, have to be reconsidered in subsequent individual proceedings. This concern implicates the foundational point . . . that the determination of a common overlapping issue on an aggregate basis should have preclusive effect, a stance implying that putative aggregation that would lack preclusive effect should not be pursued.

Am. Law Inst., Principles of the Law of Aggregate Litigation § 2.08 cmt. a, at 55 (Preliminary Draft No. 1, Aug. 13, 2004); see also id. at 56 ("[A]ggregation should not occur where the relationship of issues under applicable substantive law is such as to create a need for reconsideration in subsequent proceedings of the determination of a given issue made in the aggregate proceeding."). In my view, this is a vast overstatement of the role that the reexamination inquiry should play in the certification decision, both as a matter of constitutional mandate and as a matter of remedial policy. I discuss the latter issue infra Part III.

lyzing the preclusive reach of a class action judgment, though these devices are less likely to bear upon the appropriate ex ante response to a preclusion problem.

a. *Subclasses.* — Subclassing has been one of the first responses that diligent certifying courts have considered to apparent conflicts of interest since the Supreme Court gave the practice prominent and approving treatment in *Amchem* and *Ortiz v. Fibreboard Corp.*[201] When claim and issue preclusive effects create widely varying risk structures for the members of a class, those variations translate to different incentives to settle the action or to prosecute it vigorously, and so may render it impossible for the class to receive adequate representation in a single, unitary action. Creating a subclass with separate representation for each distinct interest group might help to cure this adequacy problem.

But there are practical impediments to the use of subclasses to alleviate preclusion-related conflicts. Foremost among these is a potentially serious ascertainability problem. Rule 23 contains an implied requirement that the members of a class or subclass be specifically identifiable through the use of some objective criteria and that the process of identification be administratively feasible. Ascertaining the identities of class members with potentially meritorious individual claims might be prohibitively difficult. Objective criteria might be available in some circumstances, as in the *MTBE* case, where levels of MTBE contamination might have served as a reliable proxy for the identification of class members with positive-value damages claims.[202] In other cases, however, such identification would not be possible. Consider a Title VII disparate impact suit in which some of the class members have viable claims for intentional discrimination. In many instances, the only facts by which one could identify the class members with high-value claims would coincide with the proof required to establish the elements of those same claims—for example, through a prima facie showing of discriminatory intent when some adverse employment action has been taken against them. Where it is necessary to make complicated evidentiary findings or to employ state of

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201. 527 U.S. 815 (1999). In both cases, the Court reversed proposed class action settlements, offering the trial court's failure to create separately represented subclasses for each distinct interest group as one explanation for why the right of class members to adequate representation was not satisfied. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997) ("The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency."); see also *Ortiz*, 527 U.S. at 846–48 (applying holding of *Amchem* to (b)(1)(B) limited-fund class action and criticizing failure to certify subclasses with separate representation for each distinct interest group in conflicted class).

202. See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 349–50 (S.D.N.Y. 2002) (discussing relationship between damages claims and exposure levels).

mind or other subjective criteria in order to identify the members of a vital subclass, it may be inappropriate, or impossible, to proceed.[203]

Subclasses might also turn out to be of limited use in addressing one of the most frequent manifestations of a preclusion-related conflict of interest: divergent incentives on the part of class members in the choice between settling and litigating through to judgment. Conflicts of this sort often arise in cases like those discussed in Part I where plaintiffs' counsel seek to pursue equitable relief under Rule 23(b)(2) and carve out individual damages claims that are not suitable for class treatment. The primary purpose of subclassing in such a case is to ensure that members of each interest group receive separate representation in the decision whether to settle the case or risk the issue preclusive effects of an adverse judgment.

The problem is that settlement with only part of the class might be of little use to the defendant in a (b)(2) action, where a demand for equitable relief from the remaining subset of the plaintiffs might still require the defendant to take actions that would benefit the entire group. Such non-atomizable relief is, after all, the defining feature of a class action under Rule 23(b)(2).[204] Having separate representation will be of considerably less benefit to risk-averse class members if the defendant has no incentive to negotiate a separate settlement with them.[205] Separate counsel may serve an informational function, helping to ensure that the court will take the potential threat to damages claims into account when assessing whether a proposed settlement is fair and reasonable.[206] But that is a limited benefit.

Finally, subclassing is a cumbersome business. If done properly, it involves the introduction of a greater number of wholly independent law-

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203. See, e.g., id. at 337 n.20 (explaining that class definition requiring plaintiffs to "prevail on the merits in order to qualify as a class member . . . 'would preclude certification of just about any class of persons'" (quoting Forbush v. J.C. Penney Co., 994 F.2d 1101, 1104–06 (5th Cir. 1993))); Zapka v. Coca-Cola Co., No. 99 CV 8238, 2000 WL 1644539, at *3 (N.D. Ill. Oct. 27, 2000) (refusing to certify class where membership is defined in terms of state of mind regarding advertising).

204. See Fed. R. Civ. P. 23(b)(2) (authorizing certification of class where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole").

205. Patrick Woolley makes a similar point in discussing his proposal that absentees be granted robust intervention rights in class action proceedings. See Patrick J. Woolley, Rethinking the Adequacy of Adequate Representation, 75 Tex. L. Rev. 571, 617 (1997) ("Because individual structural reform claims can be inextricably intertwined with each other, defendants have no incentive to agree to a partial settlement.").

Silver and Baker explore other types of free-rider problems in their discussion of plaintiff incentives in complex class actions. See Silver & Baker, supra note 57, at 1528–30.

206. See Fed. R. Civ. P. 23(e)(1)(C) ("The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.").

yers into a class action, with all the attendant increase in paper and posture that multiple class counsel can bring. As Professor Issacharoff has observed:

> In an extreme form, this [pro-subclass] reading of *Amchem* would create a spiral of subclasses and sets of counsel that would not only swamp the incentive to invest in bringing a class action, but would impose tremendous transactional costs on an already vulnerable procedure that turned heavily on its ability to realize economies of scale.[207]

The conflicts of interest that can arise from preclusion problems in class litigation are both real and serious, but it will often be the case that only a small portion of a class will be at risk of losing valuable individual claims. Where this is so, the expense and inefficiency that subclassing threatens to introduce make that procedure less attractive.

There may be some cases in which subclassing will provide an adequate or superior method of dealing with intraclass conflicts arising from preclusive effects. In most instances, however, it will make more sense simply to impose constraints upon the preclusive effects themselves.

b. *Notice and Opt Out.* — Notice and opt-out rights are even less good candidates for ameliorating the adverse consequences that can flow from preclusion doctrine in class litigation. When offered as a means of addressing potential sources of unfairness to class members in an ongoing proceeding, notice and opt out operate on the presumption that absentees will read the contents of a notification and possess the capacity to make a meaningful decision about how best to protect their own interests.[208] The level of sophistication that an absentee would have to exhibit in order to make an informed decision about the risk that preclusion doctrine poses to her individual claims, however, would make notice and opt-out poorly suited to the protection of those interests, even, or perhaps especially, if the notice were to include a detailed description of the nature of the doctrinal risk.[209] To the extent that notice and opt-out

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207. Samuel Issacharoff, Governance and Legitimacy in the Law of Class Actions, 1999 Sup. Ct. Rev. 337, 380 [hereinafter Issacharoff, Governance and Legitimacy].

208. Rule 23 now contains prolix requirements for the contents of class notice in a (b)(3) action:

> For any class certified under Rule 23(b)(3), . . . [t]he notice must concisely and clearly state in plain, easily understood language:
> - the nature of the action,
> - the definition of the class certified,
> - the class claims, issues, or defenses,
> - that a class member may enter an appearance through counsel if the member so desires,
> - that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
> - the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

209. See 18A Wright, Miller, & Cooper, supra note 2, § 4455, at 486 ("The opportunity to opt out of a state class action is only as good as the clarity of the notice and

rights have played a role in the reported decisions addressing these issues, that role has instead related to the ex post consideration of a class judgment's preclusive impact.

Individual notice and opt-out rights serve two distinct functions in a class proceeding. The first function is jurisdictional. In a class action that spans multiple states or otherwise involves absent plaintiffs who have no minimum contacts with the rendering forum, notice and the opportunity to opt out provide the minimal manifestation of consent that is necessary for the rendering forum to bind the absentees to its judgment. The Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, which is so frequently cited for the proposition that notice and opt-out rights are a constitutional requirement in a damages class action, dealt almost exclusively with the function of those procedures in conferring personal jurisdiction where it would otherwise be lacking.[210]

The second function that opt-out rights serve is to reintroduce an element of litigant autonomy into an ongoing class action. In theory, notifying the absentees about developments in a class proceeding (like a proposed settlement), and giving them the opportunity to opt out, provides a check on the adequacy of class counsel's representational efforts and reinforces the moral authority of binding absentees to the result.[211] The reiteration of the court's discretion to provide opt-out rights during settlement that is contained in the recent revisions to Rule 23 aims at such process-reinforcing goals.[212]

In practical terms, these two functions often have very little to do with each other. The constitutional requirements of personal jurisdiction aim primarily at protecting litigants against inconvenience and expense. Even in that capacity, personal jurisdiction rules exhibit a highly formal structure and a fetishistic treatment of state boundaries that often make them better as gatekeepers for the substantive law that will apply to a dispute than as protection against inconvenience. These constraints on choice of forum, which were the primary concern in *Shutts*, have little relation to the fairness or integrity of an ongoing proceeding. The manifestation of consent that *Shutts* requires is a blunt instrument that seeks only a "yes" or "no" answer best suited to the threshold question of forum choice. The established place that notice and opt out occupy in the certification process as a means of establishing jurisdiction thus says little

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the sophistication and incentives of class members. In realistic terms, the opt-out opportunity provides no real protection to many members of many classes.").

210. 472 U.S. 797, 811–12 (1985).

211. Professor Fiss makes a similar point in his discussion of representation and individualism. See Fiss, supra note 65, at 977 ("Notice is provided to members of the class, but only as a way of checking on the adequacy of representation, not to protect the individual's right to participation.").

212. See Fed. R. Civ. P. 23(e)(1)(B), (e)(3) (requiring that court provide notice to class members before approving settlement and reaffirming power of court to order second opt-out opportunity in (b)(3) cases).

about the usefulness of those devices in reinforcing process values once the action is underway.[213]

Those few courts that have concluded that notice and opt-out rights are of central importance in analyzing preclusion in class action litigation have tended to conflate the jurisdiction-conferring and process-reinforcing functions of those devices. A few such courts, for example, have held that a class action for equitable relief, certified without individual notice and opt-out rights, can never extinguish the individual damages claims of class members through merger or bar because notice and the opportunity to opt out are threshold constitutional requirements for the extinguishment of damages claims in representative litigation.[214] When the equitable proceeding in question presents no personal jurisdiction problems, however,[215] opt-out rights have little constitutional relevance to the claim preclusive effect of the judgment, and there is little reason to think that providing notice and opt-out rights to the members of an equitable class action would give them a meaningful opportunity to decide whether to place their individual damages claims at risk.[216]

Notice and opt-out rights function best when they present class members with relatively straightforward choices: Do you wish to have your claims litigated in this class proceeding; or do you think this settlement offers you fair value for the injuries you have suffered? They are not well suited to operate as a proxy for robust expressions of litigant autonomy

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213. See Issacharoff, Governance and Legitimacy, supra note 207, at 369 ("The ability to opt out rises to constitutional dimensions only with [*Shutts*], in which the ability to opt out is considered a mild signifier of consent to jurisdiction—although not to adequacy of representation—in a forum that otherwise had no contact with the injuries claimed by some portion of the absent class members.").

214. See, e.g., Jahn ex rel. Jahn v. ORCR, Inc., 92 P.3d 984, 987–92 (Colo. 2004) (en banc) (holding that action certified under Rule 23(b)(2) can never have claim preclusive effect on individual damages claims). The Seventh Circuit suggests as much in Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 897–99 (7th Cir. 1999).

215. See *Jahn*, 92 P.3d at 985 (describing scope of class, which includes only residents from a single nursing home in Colorado).

216. Commentators differ greatly as to the need for and utility of opt-out rights, even in the case of damages claims where class members have no contact with the proposed forum. Compare David Rosenberg, Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit, 2003 U. Chi. Legal F. 19, 19–24 (criticizing utility of opt-out rights in settlement of damages class actions), David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 Harv. L. Rev. 831, 896–97 (2002) (issuing broad call for binding class actions without opportunity to opt out), and David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913, 950–60 (1998) [hereinafter Shapiro, Class Actions] (arguing against mandatory opt-out rights where class may properly be treated as independent entity rather than aggregate of individual claims), with John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 371–80 (2000) (endorsing opt-out rights as appropriate opportunity for exit where ability of class members to count upon loyalty of their representatives or voice their interests effectively are compromised), and Issacharoff, Preclusion, supra note 1, at 1073–80 (urging that opt-out rights be provided in high-stakes cases where individual litigants are more likely to make meaningful individual choices).

on complicated doctrinal matters like those associated with preclusive effects.[217]

4. *The Incentives of Counsel and the Need for Judicial Supervision.* — There is a practical impediment to identifying and confronting preclusion problems during certification: It will sometimes be the case that neither plaintiffs' counsel nor the defendant will have a clear incentive to raise the issue. Where this is so, the court will have to be diligent in recognizing potential preclusion problems on its own initiative.

The natural party to bring preclusion problems to the attention of the court in a litigated action might seem to be the defendant, since a preclusion analysis might expose conflicts of interest within the class that could defeat certification. The problem is that it will often be necessary, in making a convincing argument on this score, to accentuate the importance and viability of the class members' unpled claims. That may be a very unattractive prospect for a defendant. While there may be nothing illogical about attacking the merits of the classwide claims while at the same time pointing out the theoretical existence of meritorious individual claims, one can easily imagine many defense lawyers deciding that the potential benefit of raising the argument is outweighed by the potential harm to their credibility. This is particularly true in light of the fact that the result of conducting a preclusion analysis at the outset of a class proceeding might be an order expressly constraining the effects of the judgment, rather than a denial of certification. Unless the merits of plaintiffs' claims are undeniable and the viability of any constraining order in serious doubt, there may be little reason for defendants to place preclusion issues before the court.

Class counsel is also an imperfect agent here. In theory, of course, class counsel would have a duty to bring any preclusion problems to the court's attention in order to avoid potential harm to the absentees' future interests and resolve a potential impediment to class certification by requesting a constraining order that would expressly avoid those bad results. In practice, many plaintiff lawyers may be dissuaded from doing so by the risk that a court will respond by denying certification rather than imposing a curative constraint. Indeed, even responsible class counsel might sometimes conclude, whether rightly or not, that any threat to the interests of individual claimants within a class would be outweighed by the benefits of the class action and could possibly be addressed by a subsequent forum in any event.[218] While some class counsel would undoubt-

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217. See 18A Wright, Miller, & Cooper, supra note 2, § 4455, at 486 (concluding that "[i]t requires extraordinary faith to rely on the opportunity to opt out to justify preclusion without actually adequate representation in any setting" and noting that "[t]o rely on the opportunity to opt out from litigation in a state court that could not command personal jurisdiction over absent class members for any other purpose is even more extraordinary").

218. Some state courts have demonstrated a greater willingness than is usually evident in the federal system to allow class counsel to certify broad actions, particularly for low-value claims, and allow any problems to be sorted out in subsequent challenges to the

edly be willing to risk their own fees to protect the interests of the class, Rule 23 must also guard against less responsible actors.

The responsibility thus falls to the certifying court to inquire into the preclusive effects of a class proceeding, even if neither party raises the issue as an initial matter. Such an independent duty of judicial supervision has become a more broadly acknowledged feature of class litigation since the Supreme Court proclaimed it to be indispensable in the review of settlement-only proceedings.[219] The responsibility is a more modest one here, for the parties should have every incentive to litigate the threat of adverse preclusion effects vigorously once the issue is before the court.

III. Harmonizing Joinder and Preclusion Policies

It remains to be determined when the tools set forth above should be put to use—in other words, how joinder and preclusion policies should be harmonized—in a complex class action. When attempting to bring together two concepts, one of which is quite familiar and one largely unexplored, there is a natural tendency to place the more familiar concept in the dominant position and then attempt to bring the less familiar concept into conformity with it. That tendency could offer a powerful temptation in the present context. We have a rich vocabulary for discussing the familiar requirements for certifying a class action, while the role of preclusive effects in that calculus has received only scant and superficial attention. Having recognized the threat that preclusion doctrine can pose to certification, it would be easy to take the theoretical and doctrinal tools laid out in Part II and frame a preclusion analysis solely in terms of the most expedient way to overcome preclusion problems so as to enable a class action to proceed. Indeed, this tendency is already discernible among those authorities that have attempted to navigate the issue. Wright, Miller, and Cooper, for example, offer the following exhortation where the claim preclusive effect of an injunctive class action is concerned:

> The basic effort to limit class adjudication as close as possible to matters common to members of the class frequently requires that nonparticipating members of the class remain free to pursue individual actions that would be merged or barred by claim preclusion had a prior individual action been brought from the relief demanded in the class action. . . . [A]n individual who has

judgment. See, e.g., Cartt v. Superior Court, 124 Cal. Rptr. 376, 382–85 (Ct. App. 1975) (permitting negative-value class action to proceed despite problems in providing notice on theory that aggrieved class members can challenge adequacy of notice in subsequent proceedings). But see S.W. Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) (rejecting "approach of certify now and worry later" and requiring Texas state courts to adhere strictly to class action requirements). I discuss the role of the rendering forum in policing the preclusive effects of class judgments infra Part IV.

219. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621–22 (1997) (describing danger that settlement proponents will not fairly represent downsides of proffered bargain to court, and concomitant need for court to be independently vigilant).

> suffered particular injury as a result of practices enjoined in a class action should remain free to seek a damages remedy even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief.[220]

As Part I discusses, this proposed solution to the treatment of injunctive class actions represents the dominant approach among the few courts that have considered the issue, and it may well be the best course in most cases. But Wright, Miller, and Cooper frame the analysis in an oversimplified manner, assuming without analysis that preclusion doctrine should give way to certification when the two come into conflict.

The clarification of preclusion doctrine's ex ante impact upon the certification process, and the demystification of the rendering forum's role in managing that impact, need not and should not equate to the subordination of a forum's preclusion policies to all competing concerns. The question "How should preclusion doctrine be managed in order to permit a class action to be filed?" could as easily be met with the rejoinder "Which class actions should be prohibited in order to give proper expression to the principles underlying the forum's preclusion doctrines?" When a court considers the imposition of constraints upon its judgment in order to eliminate a preclusion problem that might prevent class certification, it must also assess the impact of those constraints upon the jurisdiction's preclusion policies and determine whether joinder or preclusion should take precedence when the two come into conflict.

A. *Preclusion Policies*

The task of assessing how a proposed constraint on the preclusive effect of a class proceeding should be measured against a jurisdiction's policy commitments in that field requires one to look beyond the simple rules of the doctrine to examine the systemic preclusion values that the jurisdiction has embraced. In a trivial sense, every decision by a court to place limitations upon the preclusive effect of a class judgment will run contrary to the ordinary practice of the jurisdiction. That observation is not helpful in seeking to determine the acceptable metes and bounds of such constraints. Rather, the goal must be to identify those doctrines that reveal a considered and definite choice between competing values. When a jurisdiction has placed particular emphasis on one or more systemic values in crafting the preclusion rules for its judicial system, a certifying court should be hesitant to impose a constraint that operates in derogation of those values.

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220. 18A Wright, Miller, & Cooper, supra note 2, § 4455, at 461–62. The omitted text consists mostly of a discussion of the *Cooper* case. See also Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000) ("To determine whether damages predominate, a court should certify a class on a claim-by-claim basis, treating each claim individually and certifying the class with respect to only those claims for which certification is appropriate.").

One such systemic value relates to the imperative to choose the most efficient forum when initiating a lawsuit. Some jurisdictions adopt preclusion doctrines that threaten plaintiffs with harsh penalties if they fail to select a forum in which all of their claims can be litigated in a single proceeding. In states that have refused to adopt the "jurisdictional competency" exception, for example, a plaintiff who initiates a suit in a court of limited subject matter jurisdiction may find himself precluded from filing a related claim later on, even if that claim could not have been brought in the original action due to the limitations of the forum.[221] Some courts have penalized plaintiffs for "splitting" claims when they utilize a small claims court or other specialized tribunal of limited jurisdiction and then attempt to file a related claim in a court of general jurisdiction.[222] In the context of exclusive federal jurisdiction, *Marrese* offers the possibility that a plaintiff who brings a state claim in state court may forfeit his right to assert exclusively federal claims in a subsequent federal proceeding, though the opinion also does hint that there may sometimes be a sufficient interest in preserving a federal forum for such claims to override state policy when this situation arises.[223] One court has even adopted a similar rule in supplemental jurisdiction cases, holding that when a federal court declines to hear related state law claims in a federal question suit, the plaintiff must nonsuit the federal claims and refile the entire suit in state court or else lose the chance to assert the state law claims.[224] New Jersey's much-noted experiment with the "entire contro-

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221. See supra note 168 and accompanying text.

222. See, e.g., Humphrey v. Tharaldson Enters., 95 F.3d 624, 626–27 (7th Cir. 1996) (precluding plaintiff from raising federal discrimination claims where plaintiff chose to litigate related claims in a state administrative tribunal, even though tribunal could not have heard federal claims, because more convenient forum was available). Indeed, the Restatement offers this result as the expected outcome when a plaintiff has access to a court of general jurisdiction but chooses to file in a limited forum:

> The same considerations apply when the first action is brought in a court which has jurisdiction to redress an invasion of a certain interest of the plaintiff, but not another, and the action goes to judgment on the merits. . . . The plaintiff, having voluntarily brought his action in a court which can grant him only limited relief, cannot insist upon maintaining another action on the claim.

Restatement (Second) of Judgments § 24 cmt. g (1982).

223. See Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 386 (1985) ("Resolution of this question will depend upon the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action."); supra note 168 (citing cases where court of appeals found state judgments to have claim preclusive effect on subsequent bankruptcy proceeding despite exclusive jurisdiction of federal courts).

224. A California appellate court adopted this harsh policy in *Mattson v. City of Costa Mesa*:

> The initial choice by the plaintiff to file suit in federal court will not necessarily result in splitting his cause of action, because the federal court may well exercise pendent jurisdiction over the non-federal claim. However, when the federal court has been requested to and has declined to exercise pendent jurisdiction over the non-federal claim, the plaintiff is presented with a new choice. He may proceed to trial on the federal claim or, usually, he may elect to dismiss the federal claim without prejudice and litigate both claims in the state court. Once

versy" doctrine, which subjected plaintiffs to nonmutual claim preclusion for failing to join all available defendants on transactionally related claims, might also be characterized as embodying a strong policy in favor of having all related claims heard in a single proceeding.[225]

Jurisdictions that embrace such policies assign a higher value to the repose for defendants, consistency of result, and responsible behavior by plaintiffs that come from requiring a single, comprehensive adjudication than they ascribe to the expertise and comity associated with preserving a specialized forum for the adjudication of certain types of claims. A certifying court that imposed a preclusion constraint intended solely to preserve the benefits of a specialized forum—as, for example, with the stay-in-state-court civil rights suit described in Part II.B—would be acting in derogation of that policy decision. If the jurisdiction has made a clear choice in its preclusion policies to elevate repose, consistency, and responsible litigation choices over the benefits of specialized fora, the certifying court might have to conclude that those policies militate strongly against the use of preclusion constraints to enable a class of civil rights plaintiffs to bring state claims in a state forum while also preserving the right of individuals to seek federal relief.

Another body of preclusion policies relates to what might be called equality of downside risk. The doctrine of offensive nonmutual issue preclusion most clearly implicates these concerns. When a defendant suffers from broad liability exposure to a large number of potential claimants, the threat of an offensive use of issue preclusion with no requirement of mutuality makes every lawsuit a high-stakes proposition. While any individual plaintiff may stand to gain only a modest recovery from a victory in such a case, the defendant might stand to lose a fortune from any defeat. This imbalance in the downside risk of litigation can strengthen the plaintiff's hand significantly in settlement negotiations.[226] Some jurisdictions reject the use of offensive nonmutual issue preclusion because they

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> it is known that the federal court will not exercise pendent jurisdiction over the state claim, plaintiff's proceeding to trial in the federal court on the federal claim alone will necessarily result in splitting the plaintiff's cause of action, and that fact should be apparent to the plaintiff.

164 Cal. Rptr. 913, 921–22 (Ct. App. 1980) (citations omitted). This unusual holding probably does not survive the Court's opinion in *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 491 (2001). The federal court's dismissal under § 1367 in this case was a dismissal for lack of subject matter jurisdiction—albeit one involving the special case of a discretionary jurisdictional grant. The federal courts treat such a dismissal as "without prejudice" for the refiling of those claims, see Fed. R. Civ. P. 41(b), and *Semtek* confirms that such a designation has dispositive effect in a subsequent proceeding, see supra notes 126–133 and accompanying text.

225. See generally Allan R. Stein, Commentary: Power, Duty and the Entire Controversy Doctrine, 28 Rutgers L.J. 27 (1996) (describing entire controversy doctrine and benefits and disadvantages of such aggressive joinder policies).

226. See Michael D. Green, The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation, 70 Iowa L. Rev. 141, 207–16 (1984) (enumerating costs to fairness values associated with use of nonmutual offensive

conclude that the unfairness to the defendant resulting from this imbalance in downside risk outweighs the benefits—of efficiency, consistency of result, or integrity of judgments—that the doctrine promises.[227]

Such a policy determination might be relevant to a certifying court faced with a conflict of interest of the type that a defective products case may pose. As Part II.B explains, when a class wishes to pursue a claim for economic damages or equitable relief in a defective products case without compromising the ability of injured class members to pursue more valuable individual claims, the certifying court will likely need to impose a constraint upon its judgment that would remove all prejudice to the class from issue preclusion or merger and bar outside of the claims actually litigated in the action. Such an order—which, in practical terms, would prohibit the defendants from invoking the class action version of "nonmutual" defensive issue preclusion in subsequent suits by absentees—would serve to eliminate the conflict in settlement incentives that the class would otherwise experience. But it would also have the effect of shifting disproportionate risk to the defendant, who would face the threat of widespread offensive issue preclusion by individual plaintiffs if the class secured a favorable judgment but would enjoy no preclusion benefits if the class lost.[228]

In a jurisdiction that has chosen to forgo offensive nonmutual issue preclusion in order to avoid imposing the unfairness of unequal downside risk upon defendants, these consequences would militate against the issuance of such broad constraints upon the preclusive effects of a class action judgment. If a class cannot be certified on claims for economic damages or equitable relief in a defective products case (or similar tort suit) without the use of these constraints, the court might have to conclude that the applicable preclusion policies foreclose the resolution of those claims on a classwide basis. Indeed, even in jurisdictions that do not place determinative weight on inequality of downside risk when setting their mutuality requirements, these concerns about fairness to the defendant would surely be recognized as legitimate.[229] Thus, the extra burden to the defendant that would flow from imposing broad, unilateral

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issue preclusion in mass tort litigation and calling into serious question concomitant benefits).

227. See Shapiro, Preclusion, supra note 35, at 110–16 (discussing offensive nonmutual issue preclusion in light of these systemic preclusion values).

228. Such an arrangement is somewhat reminiscent of the "premodern class actions" in which "absent class members could, in effect, join into the lawsuit" only after a representative plaintiff achieved a victory while suffering no detriment in the event of a loss. Issacharoff, Governance and Legitimacy, supra note 207, at 364–65. There is a key difference, of course, in that class members in the above scenario would be bound by the resolution of the certified claim. But in a case where the certified claim is of low value and the individual claims are large, the impact upon the defendant is not dissimilar. The *Bridgestone/Firestone* cases probably fit this description. See supra notes 173–174 and accompanying text.

229. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330–33 (1979) (discussing fairness concerns that offensive use of nonmutual issue preclusion introduces).

constraints on issue preclusion in a defective products case will likely be a consideration in almost any certification analysis. In a suit for economic damages under Rule 23(b)(3), for example, the need for the defendant to bear disproportionate risk from issue preclusion in order for the suit to proceed should factor into the superiority determination.

A court could mitigate these consequences by extending its broad constraint on issue preclusion to benefit the defendant as well as the class. But a bilateral constraint of this kind would raise its own set of concerns. For starters, it would eliminate all efficiency benefits from the class action beyond the resolution of the certified claim itself. It would also significantly amplify the likelihood of inconsistent factual determinations—on the same issues and between the "same" parties—across multiple suits. In the case of a unilateral constraint, inconsistent determinations would, by definition, be possible only if the defendant prevailed in the class suit, since the absentees could invoke the judgment as an offensive estoppel if they prevailed in the first action. In the case of a bilateral constraint on issue preclusion, in contrast, every individual suit would present an opportunity for a finding inconsistent with the class judgment, regardless of the outcome in the first proceeding. For a jurisdiction that places particular weight upon preserving the integrity of its judgments and avoiding inconsistent resolutions—policies that might find expression in a liberal doctrine of offensive nonmutual issue preclusion—this type of bilateral constraint on the preclusive effects of the class judgment would be disfavored.[230]

In short, in a defective products or other tort suit where some class members possess substantial damages claims that are not suitable for classwide treatment, any attempt to use constraints on the preclusive effect of the judgment to eliminate the conflicts of interest within the class is likely to operate in tension with the jurisdiction's broader preclusion policies, regardless of what configuration of policies the jurisdiction embraces. When the use of such constraints is the only way to make any part of a complicated tort case suitable for class treatment, class counsel should be required to offer a convincing argument as to why certification is nonetheless desirable.

As with any form of governmental interest analysis, these inquiries into the values underlying a jurisdiction's preclusion doctrine could be subject to manipulation[231]—though perhaps less so than in other fields,

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230. In his monograph on preclusion doctrine, Professor Shapiro, for one, has taken the position that "the virtues of [nonmutual issue preclusion] exceed the defects so long as the limitations are marked with sufficient clarity and uniformly applied by all tribunals within the jurisdiction." Shapiro, Preclusion, supra note 35, at 115.

231. The debate about such manipulation in the choice of law field is fully joined. See Lea Brilmayer, Governmental Interest Analysis: A House Without Foundations, 46 Ohio St. L.J. 459, 466–76 (1985) (issuing broad critique of interest analysis in choice of law as devoid of constraints and excessively malleable); Kramer, Rethinking, supra note 112, at 299–301 (arguing that criticisms of governmental interest analysis apply with at least some force to all instances where courts must interpret and apply laws in cases presenting

given the relatively concise vocabulary of concepts that tends to be utilized in preclusion analysis.[232] Still, one might argue that placing a powerful new tool in the hands of a rendering forum and then offering policy analysis as the principal restriction on that tool is an invitation for aggressive courts to certify ever more inappropriate class actions. It seems more likely, however, that any court that is strongly inclined to certify at all costs will simply continue the dominant practice of ignoring preclusion concerns altogether. The proper audience for this discussion, at least for the present, is made up of those rendering courts—and also those recognizing courts, as I discuss in Part IV—that diligently seek to balance the ability of plaintiffs to obtain effective relief against the other important policies that a jurisdiction has adopted. For those courts, the form of policy analysis described in this section provides a practicable method for determining which constraints will operate in tension with a jurisdiction's broader preclusion commitments.

B. *Sources of Law and the Rules Enabling Act*

If a class action cannot be certified without the use of a preclusion constraint that the jurisdiction appears to disfavor, the certifying court must determine whether the plaintiffs' interest in proceeding as a class is nonetheless strong enough to justify the use of the constraint. The specific responsibility of the court in such a case is to determine the policy that the forum has embraced for making aggregate relief, as opposed to individual relief, available to the class of claimants before it. The Rules Enabling Act, with its proviso forbidding any application of a rule of procedure that would "abridge, enlarge or modify any substantive right,"[233] makes the task of assessing that policy interest more complicated.[234] Al-

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"unforeseen or uncontemplated circumstances"); Robert A. Sedler, Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack", 46 Ohio St. L.J. 483, 483 (1985) (defending interest analysis as best option for securing fairness to litigants and reasonable outcomes); Patrick J. Borchers, Professor Brilmayer and the Holy Grail, 1991 Wis. L. Rev. 465, 476–89 (reviewing Lea Brilmayer, Conflict of Laws: Foundations and Future Directions (1991)) (criticizing the alternatives that Brilmayer has offered to interest analysis as equally subject to manipulation).

232. See Shapiro, Preclusion, supra note 35, at 13–18 (discussing range of interests generally associated with preclusion doctrine).

233. 28 U.S.C. § 2072(b) (2000). Many states have a parallel provision to the Act that includes a reservation clause for substantive rights. See, e.g., Tex. Gov't Code Ann. § 22.004(a) (Vernon 2004) (stating that Texas Supreme Court cannot "abridge, enlarge, or modify the substantive rights of a litigant" using its rulemaking power); Tex. R. Civ. P. 815 (stating that Texas Rules of Civil Procedure cannot abridge, enlarge, or modify any substantive right). As Professor Burbank has explained, there may be significant theoretical and practical differences between the application of this proviso in the federal system and in a state court. See Burbank, Rules Enabling Act, supra note 120, at 1091–92. Nonetheless, I will treat the Rules Enabling Act and its state counterparts as interchangeable, a simplifying gesture that is adequate for the broad discussion of joinder policy that follows.

234. Professor Burbank has demonstrated that those who drafted the Rules Enabling Act likely viewed subsection (a) of the statute, which granted authority to prescribe only

though Rule 23 occupies a central position as the tool by which broad joinder is effectuated in representative litigation, it is not an appropriate authority to look to for the type of robust interest in aggregate relief that is necessary here.

Seventy years after the enactment of the Rules Enabling Act, there is still no general agreement concerning the proper interpretation of the statute's "substantive rights" proviso. The two dominant approaches come to us from John Hart Ely and Stephen Burbank. Ely set forth the view that the limitations contained in the Act are primarily an expression of federalism values. He therefore advocated an interpretive approach that would treat substantive state policies as "trumps," available on a roving basis to override otherwise applicable Federal Rules.[235] Burbank, in contrast, has argued that the Act is primarily an embodiment of separation of powers principles—specifically, a judgment that decisionmaking authority for matters of substantive policy should ordinarily be reserved to Congress rather than the federal courts. Burbank would interpret the proviso to impose more unitary limitations upon the Rules, branding as ultra vires any interpretation that would have predictable and identifiable effects of the type normally reserved for substantive lawmaking, but otherwise not bowing to contrary state policies, "substantive" or otherwise.[236]

Although the Act's proviso appeared to lapse into partial desuetude for some time following the narrow construction that the Court placed upon it in *Sibbach v. Wilson & Co.*,[237] it has recently received renewed

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"general rules of practice and procedure," as the primary source of limitation contained in the Act, with the proviso of subsection (b) serving merely to confirm that limited authority. See Burbank, Rules Enabling Act, supra note 120, at 1077–90; see also 28 U.S.C. § 2072(a)–(b). Nevertheless, since the second subsection has become the primary focus of judicial attention in discussing limitations on the Federal Rules, I will follow the more common convention.

235. See John Hart Ely, The Irrepressible Myth of *Erie*, 87 Harv. L. Rev. 693, 718–38 (1974) (suggesting that substantive state law should prevail over federal procedural rules).

236. See Burbank, Rules Enabling Act, supra note 120, at 1025 ("[T]he famous first two sentences of the Act . . . were intended to allocate power between the Supreme Court as rulemaker and Congress and thus to circumscribe the delegation of legislative power . . . ."); id. at 1122–25 (criticizing manner in which Ely frames "substantive rights" question which improperly places federalism values at center of analysis and produces interpretations of Federal Rules that can vary across jurisdictions).

237. 312 U.S. 1 (1941). *Sibbach* involved an application of Federal Rule of Civil Procedure 35, the provision that authorizes physical and mental examinations of persons. The plaintiff in the case, who was asserting personal injury claims, was ordered to undergo a physical examination during discovery, and she argued that this application of Rule 35 violated her right to privacy. Id. at 7–8. The Court rejected the argument and adopted an interpretation of the Enabling Act proviso under which a party could assert an abridgment of her substantive rights only when a Rule imposed a mandatory requirement upon her that impacted her primary, extralitigation activities. Since the plaintiff in *Sibbach* could have chosen not to comply with the discovery order, the Court held, she had no basis for arguing that the application of Rule 35 had infringed her substantive rights. See id. at 13–14 (explaining that test for such rules is whether they truly regulate procedure). The fact that this refusal would have resulted in a discovery sanction, such that the plaintiff's "choice" lay between complying with the order or losing the right to pursue her claim, did

attention in a pair of cases that happen to address the two halves of the present doctrinal inquiry: *Ortiz* and *Semtek*. In *Ortiz*—the class action case in which the Court invalidated a limited fund variation on the asbestos settlement previously rejected in *Amchem*—the settling parties had attempted to misuse Rule 23(b)(1)(B) as a device for reducing the total amount of monetary relief that would be available to class members by manufacturing a "limited fund" of available assets by stipulation.[238] The majority invoked the Act's substantive rights language in rejecting this attempt and cautioned against any interpretation of Rule 23 that would dramatically limit the relief available to class members under the applicable liability regime.[239] In *Semtek*, the Court invoked the Act in explaining its refusal to read an independent set of preclusion doctrines into Rule 41(b), suggesting that an interpretation of the Rule that would eliminate a remedy otherwise allowed by the applicable preclusion law might constitute an "abridgement" of rights under the proviso.[240]

These recent statements imply that the remedial expectations that a party enjoys under a given preclusion regime constitute one of those "substantive rights" that the Federal Rules cannot alter. In extreme cases, where a Federal Rule threatens to extinguish or dramatically limit a form of relief that a claimant would otherwise enjoy, that result is intuitively satisfying and probably in accord both with Ely, who would identify such remedial expectations as substantive policies sufficient to trump an otherwise applicable rule, and with Burbank, who has already expressed the view that preclusion doctrines exceed the regulatory authority of the federal rulemakers when they "dramatically affect the ability of litigants to enforce their substantive rights."[241]

Now, it would be a mistake to overestimate the relevance of the substantive rights language in interpreting Rule 23, even following these suggestive dicta. At this late date, it is untenable to urge a reading of the Rules Enabling Act that would prohibit Rule 23 from having any impact whatsoever on the ability of class members to employ the full range of

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not change the Court's assessment of the Rule's nonmandatory character. See Schlagenhauf v. Holder, 379 U.S. 104, 114 (1964) (applying *Sibbach*'s holding to defendant); Burbank, Rules Enabling Act, supra note 120, at 1176–84 (arguing that *Sibbach* was rightly decided, though wrongly explained, in light of purposes originally animating Rules Enabling Act).

238. Ortiz v. Fibreboard Corp., 527 U.S. 815, 850–53 (1999).

239. Id. at 845.

240. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001) ("In the present case . . . if California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court's extinguishment of that right (through Rule 41(b)'s mandated claim preclusive effect of its judgment) would seem to violate this limitation.").

241. Burbank, Rules Enabling Act, supra note 120, at 1128 ("Clearly preclusive doctrines like a statute of limitations, laches, or res judicata dramatically affect the ability of litigants to enforce their substantive rights and . . . determine in a practical sense whether those rights exist at all, at least when viewed from the point in time at which they are asserted." (citation omitted)).

remedial options that would be available to them in individual litigation, and neither *Ortiz* nor *Semtek* compels that result.[242] Indeed, the Court's suggestion in *Semtek* that a jurisdiction's preclusion rules constitute one of the substantive rights protected by the Act's proviso clearly cannot be read too literally. Taken to its logical conclusion, this proposition would seem to foreclose a federal court from designating a dismissal as without prejudice whenever a state court would not do likewise, since allowing the plaintiff another bite at the apple would presumably "enlarge or modify" his remedial rights. The *Semtek* Court itself rejected this result, however, when it reaffirmed the ability of a federal court to utilize the without prejudice designation in Rule 41 to dispositive effect.[243]

Nonetheless, these passages do have some bearing upon the present question. They suggest that, when a proposed constraint on the preclusive effect of a class action judgment derogates from a jurisdiction's broader preclusion policies, a court cannot rely upon its joinder rules alone to serve as an independent counterweight in analyzing the propriety of the proposed constraint. Rather, the court will have to rely upon more clearly "substantive" sources of law—in particular, the liability regime that applies to the dispute—in determining the extent to which the benefits of aggregate relief can serve to offset any burden that the constraint places upon preclusion values.[244] This observation is particularly important in the case of a federal diversity court. When a diversity court considers a proposed constraint upon the preclusive effect of a class ac-

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242. The Court said as much in one of its earliest interpretations of the Act:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.

Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946). Professor Woolley argues that certain Federal Rules can entail the articulation of supporting preclusion doctrines that will survive the Rules Enabling Act. See Patrick Woolley, The Sources of Federal Preclusion Law After *Semtek*, 72 U. Cin. L. Rev. 527, 590–91 (2003) (arguing that "preclusion rules [aimed at] enforcing procedural obligations [lie] within the scope of the REA"). But see *Semtek*, 531 U.S. at 506 n.2 (flagging the possibility that a district court's "'dismissal upon the merits' [in a diversity action] under circumstances where a state court would decree only a 'dismissal without prejudice,'" might conceivably "abridge[ ] a 'substantive right' and thus exceed[ ] the authorization of the Rules Enabling Act"); Stephen B. Burbank, *Semtek*, Forum Shopping, and Federal Common Law, 77 Notre Dame L. Rev. 1027, 1042 n.66 (2002) (discussing this passage).

243. *Semtek*, 531 U.S. at 505–06.

244. Burbank makes a similar point in his discussion of the federal common law origins of preclusion doctrine for federal judgments. See Burbank, Interjurisdictional Preclusion, supra note 7, at 766 ("So long as preclusion law affects substantive rights, there is a federal interest in the definition of the federal rights adjudicated in a federal judgment."); see also id. at 790 (discussing the importance of "disciplining the process by which federal policies finding expression in the permissible legal sources are considered, as against competing policies, in determining whether federal common law applies").

tion judgment that would burden preclusion commitments under state law, the court cannot look to Rule 23 as an independent source of authority to counterbalance that burden.[245] It must rely instead upon the state liability regime.[246]

There are many situations in which a jurisdiction's liability rules will have something to say about the desirability of liberal joinder rules in a class action proceeding. The circumstance that has received the most attention in this respect is the negative-value claim, where aggregate litigation may represent the only economically viable opportunity for obtaining relief. The Supreme Court has thus far resisted the argument

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245. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, might complicate the analysis. As an independent federal statute, the CAFA is not bound by the proviso of the Rules Enabling Act, and any independent joinder policies that the CAFA entails are available to influence or control assessments about the propriety of employing particular constraints on preclusion to facilitate class certification. It is unclear, however, what independent policy it would be appropriate to read into the statute in this respect. On the one hand, the CAFA aims to curb the abuses of overly ambitious state court actions, which might suggest that the statute would be cautious about replicating such actions in federal court. See § (2)(a)(1)–(4), 119 Stat. at 4–5 (criticizing certification practices in state and local courts). On the other hand, that very concern over state court abuses might counsel in favor of reading broad joinder policies into the statute so that the maximum number of claims coming within its jurisdictional provisions could be adjudicated in a federal forum.

246. Professor Burbank makes a similar point in his discussion of the sources of authority for preclusion rules in federal diversity court:

> If the Constitution or acts of Congress, fairly read, provide for or require federal common law, state law does not apply [in a federal diversity court]. The same is true whether a uniform federal rule is called for or a particular state rule is found to be hostile to or inconsistent with federal interests. In other cases where the Constitution does not so ordain, state law applies, not "of its own force" and not by judicial grace or borrowing, but because Congress has borrowed it.

Burbank, Interjurisdictional Preclusion, supra note 7, at 762.

Burbank has also suggested the possibility that Federal Rules might embrace a broader set of federal common law interests where such interests are pertinent to their proper spheres of regulatory concern:

> Federal Rules of Civil Procedure can thus serve as sources of federal common law, not only by leaving interstices to be filled but also by expressing policies that are pertinent in areas not covered by the Rules. Even when legal regulation in a certain area is forbidden to the Rules, the policies underlying valid Rules may help to shape valid federal common law.

Id. at 774; see also id. at 773 ("In authorizing the Court to promulgate Federal Rules, Congress must have contemplated that the federal courts would interpret them, fill their interstices, and, when necessary, ensure that their provisions were not frustrated by other legal rules."). But that power is a limited one that must be tied to legitimate sources of regulatory authority. See id. at 789–90 ("Federal courts are not free to conjure up 'interests'; rather, they must tie them to policies already articulated in, or at least articulable from, valid legal prescriptions.").

Rule 23 does not embody a policy in favor of the broadest joinder possible. Rather, it is hedged about with many qualifications aimed at constraining its potentially far reaching effects. In Burbank's terms, there is no federal interest in a "uniform . . . decisional law" of broad joinder that would "displace particular state law rules in areas untouched by the Federal Rules." Id. at 773.

that negative-value suits should enjoy more permissive treatment under mandatory Rule 23 requirements like notice and adequacy of representation.[247] When a court must decide whether to impose a discretionary constraint on the preclusive effect of a class action judgment, however, the question is different. The purpose of such a constraint is to bring a class action into compliance with the mandatory requirements of the Rule, not to circumvent them. The relevant question is whether liberal joinder is consistent with the constellation of remedial policies that apply to the dispute.[248] In a small-stakes suit, where recovery would be effectively impossible without aggregation, that exigency alone militates in favor of employing a preclusion constraint in order to eliminate a conflict of interest that might otherwise make certification impossible.[249]

Particular liability schemes may speak even more directly to the propriety of liberal joinder. Consider the Civil Rights Act of 1991. The express purpose of Congress in passing the Act was to expand the remedies available to individuals who suffer from employment discrimination. The Act was enacted against an acknowledged backdrop of class litigation as the primary vehicle for obtaining relief for employees.[250] And, as Part I.B.1 discusses, the statute had the unintended consequence of complicating the certification calculus in those cases where class members might have viable claims for individual damages. When a certifying court in a Title VII case wishes to employ a preclusion constraint in order to permit a class action to go forward without compromising the claims of individ-

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247. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) ("There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs. . . . Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided.").

State courts have not always followed the Court's lead in this regard. In his innovative opinion in *Cartt v. Superior Court*, for example, Justice Kaus rejected the Court's reasoning in *Eisen* and found instead that a court is justified in applying looser notification standards to a negative-value consumer class action suit where doing so is necessary to make any recovery available to class members and the likelihood of subsequent challenges to the adequacy of the notice is remote. 124 Cal. Rptr. 376, 381–85 (Ct. App. 1975).

248. In this vein, Wright, Miller, and Cooper suggest that "[w]hen the only realistic opportunity to litigate is an aggregated opportunity, whether called a class action or something else, it is not difficult to adopt a new conception of the underlying claim. The claim is not so much an individual claim as a share in a class claim." 18A Wright, Miller, & Cooper, supra note 2, § 4455, at 486; see also Shapiro, Class Actions, supra note 216, at 923–25 (discussing "entity" theory of class litigation and attractiveness of that theory in negative-value class action).

249. Some commentators have argued that the same exigencies that warrant flexibility in the certification of negative-value class actions also warrant stricter adherence to finality, and fewer opportunities for collateral attack, following the close of the proceeding. See 18A Wright, Miller, & Cooper, supra note 2, § 4455, at 486–87 ("This view [of limited collateral attack opportunities] is particularly beguiling with respect to individual claims that would not in fact be litigated individually.").

250. Cf. Burbank, Interjurisdictional Preclusion, supra note 7, at 815 ("It seems unlikely that legislatures often think about preclusion law when they are enacting schemes of substantive rights. But they do legislate against a background of judge-made preclusion law.").

ual class members, the 1991 Act must be read to embody a substantive joinder policy in favor of permitting that step. Such a policy is a natural concomitant to the statute's remedial purposes.

A state law regime that assigns damages among multiple defendants on an actuarial basis—like market-share liability—is another example of a liability rule that would embody a clear preference for liberal joinder in the face of potential preclusion problems. The more comprehensively an actuarial liability rule is applied in adjudicating claims, the more accurate the apportionment of damages will be among the defendants.[251] The broad application of such a liability rule to the claims that it properly embraces will promote fairness and avoid overdeterrence.[252] Where preclusive effects would prevent the certification of an otherwise desirable class action in the absence of an ex ante constraint, an actuarial liability rule should thus be read to include a policy in favor of broad joinder and hence in favor of using the constraint.

Thus, the *MTBE* court was correct when it voiced its instinct that the nature and source of the liability rule might be relevant to the resolution of a preclusion problem in class litigation.[253] The court was also correct in concluding that precedents from the civil rights arena might not speak directly to the preclusion problems posed by a massive, multi-incident tort suit. In a civil rights dispute like the prison riot cases that the *MTBE* court distinguished away, any injunctive suit would be frustrated and its relief undermined by the possibility of multiple inconsistent adjudications. A policy in favor of broad joinder is substantively related to the underlying rights being vindicated in a civil rights action seeking institutional reform. This is the classic example of a "true" class action, where providing a benefit to one class member necessarily redounds to the benefit of the others.[254] When an ex ante constraint is required in such a

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251. I take Professor David Rosenberg to be making a similar point in his discussion of aggregate litigation and risk based claims. See David Rosenberg, Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases, 71 N.Y.U. L. Rev. 210, 236–44 (1996).

252. There may be other reasons for caution in applying such a liability rule broadly in aggregate litigation. In the case of "immature" claims, for example, it might be difficult to achieve a high level of confidence in the scientific evidence for causation, or the proper measure of damages, without the benefit of a large number of fully litigated individual actions. In such a case, the precipitous certification of a class, or the broad use of nonmutual preclusion, might be contraindicated. See, e.g., Kaufman v. Eli Lilly & Co., 482 N.E.2d 63, 66–70 (N.Y. 1985) (discussing availability of issue preclusion following test cases in DES litigation, where scientific evidence for causation was disputed); see also Issacharoff, Governance and Legitimacy, supra note 207, at 342–43 (describing asbestos claims as the quintessential "mature" tort because strengths and weaknesses of the science, valuation of claims, and litigation options are now so well established).

253. See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 339–40 (S.D.N.Y. 2002); see also supra notes 74–75 and accompanying text.

254. See Hazard et al., supra note 20, at 1921–23 (describing treatment of "true" and "spurious" class actions prior to enactment of Rule 23); Issacharoff, Governance and Legitimacy, supra note 207, at 359–63 (characterizing such actions as "compelled participation cases whose coerced quality is justified by the inability for any legal resolution

case to preserve the damages claims of individual class members from adverse preclusive consequences and to eliminate conflicts of interest within the class, the underlying liability rule militates in favor of employing the constraint. In a multi-incident tort suit like *MTBE*, in contrast, the relief sought by the plaintiff class was not interdependent and contingent; rather, it was highly atomized.[255] The liability regime thus included no special imperative that would have favored the use of ex ante constraints to overcome preclusion problems and ensure class certification. Such constraints might still have been allowable, but they enjoyed no special preference.

Since the *MTBE* court was operating under the baleful influence of the ubiquitous preclusion maxim, it failed to set forth these distinctions with any precision. The court's core instinct, however, was sound. When a certifying court would have to impose a constraint on the preclusive effect of its judgment in order for certification to be proper, and the requisite constraint would operate in clear derogation of a jurisdiction's broader preclusion commitments, the court must look to substantive joinder policies like those embodied in certain liability rules in order to determine whether it should employ the constraint or, instead, decline to certify the class.

IV. The Role of the Recognizing Forum

Any discussion of the proper theoretical and doctrinal treatment of class litigation would be of limited utility if it did not make allowance for the inevitable fact that its suggestions would frequently be disregarded. Classes that should not be certified routinely are. The push for ever more ambitious classwide resolutions of personal injury and other highly individualized claims has easily kept pace with the rate at which the legal community has internalized the norms of limitation that should apply to such actions. Indeed, the primary reason for the intense focus on the binding effect of class action judgments that I referred to in the introduction to this Article has been the failure of rendering courts to pay careful enough attention to the adequacy of representation afforded to absentees, particularly as it relates to conflicts of interest within the class.[256] There is a more robust dialogue between academy, bench, and bar in the

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to proceed absent complete resolution"). The standard work on the history of representative or aggregative litigation is Yeazell's. See Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987) (tracing history of representative or aggregative litigation); see also Robert G. Bone, Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation, 70 B.U. L. Rev. 213, 236–38 (1990) (reviewing Yeazell and characterizing suits involving contingent relief, as in many civil rights actions, as involving "general right").

255. *In re MTBE*, 209 F.R.D. at 342–45 (discussing individualized nature of injunctive relief).

256. See Klonoff, supra note 23, at 677–89 (conducting broad empirical study of adequacy analysis by certifying courts and concluding that slipshod analysis is more the norm than the exception).

field of complex litigation than in many others, owing to such institutions as the Rules Advisory Committee and the Federal Judicial Conference, and also in part to the growing practice of soliciting expert testimony from legal academics during the certification hearing.[257] Even so, any proposal for reform in the standards that rendering courts should apply to the certification process must anticipate gradual and incomplete acceptance, at best.

As a consequence, recognizing fora will continue to play an important role in defining and enforcing the proper scope of a class judgment's preclusive effects. While a subsequent tribunal cannot undo the effect of an improper denial of certification of the type that has occurred in recent Title VII litigation,[258] it will sometimes be able to mitigate an initial court's failure to consider the impact of preclusion on the interests of absentees following entry of judgment when a class action does move forward. The appropriate means for undertaking such mitigating efforts is through scrutiny of the adequacy of the representation that class members were afforded in the first action.

It remains a matter of serious dispute whether an F2 court may recognize a full-scale collateral attack and set aside a class judgment on adequacy grounds. The Supreme Court recently failed to answer the question in *Dow Chemical Co. v. Stephenson*,[259] the circuits remain split,[260] and commentators divide sharply between those who would err in favor of ensuring that class members have a reliably fair opportunity to recover[261] and those who fear that permitting collateral attacks would harm all plaintiffs by fatally undermining the finality of judgments, thereby dissuading defendants from settling.[262] The form of adequacy analysis that I contemplate here, however, is much less disruptive than a full-scale collateral attack would be. It is, in essence, a more nuanced form of the preclusion analysis that is already an accepted part of a recognizing court's role in reviewing prior judgments.

In addition to the familiar limitations on claim and issue preclusion that F2 courts already apply,[263] a court that is asked to give effect to a

257. See, e.g., West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002) (instructing district courts to resolve competing opinions of experts on question of certification). The apparent willingness of some law professors to attest to the propriety of certifying the most wildly overreaching class actions has itself become a focus of critical inquiry within the academy, and properly so.

258. See supra Part I.B.1.

259. 539 U.S. 111, 112 (2003) (per curiam) (dividing four to four on appeal from Second Circuit opinion that permitted collateral attack by Agent Orange victims on grounds of inadequate representation in initial class proceeding).

260. See supra note 1 and accompanying text.

261. See, e.g., Monaghan, supra note 1, at 1200–02; Patrick J. Woolley, The Availability of Collateral Attack for Inadequate Representation in Class Suits, 79 Tex. L. Rev. 383, 389–97 (2000) [hereinafter Woolley, Availability] (arguing in favor of permitting collateral attack upon showing of inadequate representation).

262. See, e.g., Kahan & Silberman, Inadequate Search, supra note 1, at 779.

263. See, e.g., Restatement (Second) of Judgments §§ 28–29 (1982).

class action judgment may need to ask what prospective constraints the rendering court should have imposed upon the judgment in order for the representation of all class members to have been minimally adequate in the initial proceeding. Where the failure of the F1 court to apply such a constraint has resulted in the inadequate representation of class members' interests, the F2 court should limit the preclusive effect of the judgment as if the initial tribunal had acted properly. The F2 court would not reopen claims actually adjudicated in the first action, as in a full-scale collateral attack. Rather, the court would constrain the judgment's effect upon the claims not litigated in that action to the extent necessary to cure the prejudice that the absentees would otherwise suffer from the inadequate representation of their interests.[264]

Many recognizing courts have already embraced this role in cases involving damages claims brought by individuals who were members of an earlier injunctive class action. While certifying courts can still be skittish about the issue, subsequent courts have been fairly consistent in holding that a judgment from an equitable class proceeding should not preclude individual damages claims that were not litigated in the first action. Some courts have simply invoked the "could not have been brought" language in explaining why claim preclusion does not apply to such cases,[265] but others have explained their holding under the rubric of adequacy of representation.[266] What I am suggesting here is a more generalized application of the rule implicit in that practice.[267]

The most difficult problem that a rendering court is likely to face in this posture involves the issue preclusive effect of a prior judgment. Consider a class action for equitable relief in which some members of the

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264. Wright, Miller, and Cooper speak in favorable, if general, terms of this form of adequacy analysis:

> The conduct of a class action may often create conflicts between the best interests of non-participating class members and the substantive or procedural arguments that seem best calculated to maintain the momentum of the class action itself. Such conflicts may often be difficult to identify, and may not always warrant denial of preclusion. They should not be ignored, however, and at least should be considered in attempting to apply the more objective requirement that the class have been adequately represented in fact.

18A Wright, Miller, & Cooper, supra note 2, § 4455, at 474.

265. See, e.g., In re Jackson Lockdown/MCO Cases, 568 F. Supp. 869, 891–93 (E.D. Mich. 1983) (permitting inmates to assert individual claims that could not have been brought in prior class proceeding).

266. See, e.g., Ferguson v. Alaska Dep't of Corr., 816 P.2d 134, 138–39 (Alaska 1991) (invoking adequacy as one basis for refusing to preclude inmate from litigating individual claim arguably precluded by prior injunctive class proceeding).

267. The Restatement captures some elements of this more generalized application when it allows for issue preclusion to be withheld from a judgment when "the party sought to be precluded, as a result of . . . special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments § 28(5)(c). One could thus interpret the analysis that follows as an explanation of when the Restatement's qualification is properly implicated in class litigation.

class also possess substantial damages claims. As should now be second nature, such an action will often create an ex ante conflict of interest between the absentees with no damages claims, who would have less to lose from an adverse judgment and hence would adopt a tougher negotiating position on settlement, and those possessing high-value claims, who would be risk averse and eager to settle the equitable proceeding cheaply. Suppose that the initial tribunal certifies the class without acknowledging the interests of the absentees who possess high-value claims or otherwise taking any steps to protect them. The case is then fully litigated and results in a judgment for defendant. The rendering court in this case has failed to ensure adequate representation for the class members with high-value claims. Instead, their interest in avoiding an adverse judgment that would compromise their damages claims has been subordinated to the interest of other class members in maximizing the benefits from the equitable suit.[268] To resolve this conflict, the rendering court should have imposed an ex ante constraint that would have prevented its judgment from having issue preclusive effect on individual damages claims. To cure the first court's error, the F2 court must now impose an ex post constraint to the same effect.

A stay-in-state-court case—where class counsel forgoes a federal claim in order to defeat removal—might call for a different kind of adequacy analysis. If a class member in such a case seeks to raise the abandoned federal claim in an F2 forum, there is no conflict of interest to point to in the initial proceeding, since by hypothesis the class was affected uniformly by class counsel's decision to pursue only state law relief. And when the federal claim is one that could have been raised in the state court—or, in the case of exclusively federal claims, when the entire action could have been filed in federal court—traditional claim preclusion doctrine may offer no obvious basis for avoiding merger or bar. Here, the adequacy analysis undertaken by the recognizing forum must focus upon the limits of counsel's representational role in a class proceeding. The court must ask whether it constituted a legitimate strategic decision for class counsel in F1 to trade the federal claim for a state forum on behalf of the class.[269] The line of Sixth Amendment decisions that federal courts have developed in assessing adequacy of representa-

268. This conflict of interest recalls the one between asbestos claimants seeking immediate payments and those wanting to ensure the availability of funds for future relief, which the Court found fatal in *Amchem.* See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997) ("[F]or the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.").

269. Professor Issacharoff appears to recognize the need for adequacy review of strategic decisions in class litigation. See Issacharoff, Governance and Legitimacy, supra note 207, at 385–86 (discussing methods by which class counsel can "overtly" and "covertly" make allocation decisions on behalf of a class, including the decision "to forgo some claims" or "not to prosecute individual-based damages" claims that might prevent certification, and recognizing need for both leeway and limitations).

tion in the criminal context—and, in particular, in assessing decisions by counsel to abandon certain claims or defenses—would likely be an important source to draw upon in such an inquiry.[270]

If the answer is no—if counsel acted incompetently in eschewing the federal claim or else was acting from selfish or nefarious motives—then the F2 court should permit the federal claim to proceed.[271] Class counsel's actions would constitute inadequate representation in such a case, and the recognizing forum should cure the error that the rendering forum committed when it allowed the suit to proceed without imposing a preclusion constraint. But if responsible counsel could have chosen to relinquish federal claims in favor of a state forum in F1—for example, if the relief that the federal claim offered was largely duplicative and the benefits of preserving a state forum were substantial—then the F2 court might have to conclude that merger and bar apply. This result may seem counterintuitive, as it appears that class members are being penalized for having competent counsel in the first proceeding. Indeed, if class counsel in such a case never even requested that the certifying court impose a constraint upon its judgment that would preserve the federal claims, the absentees might be able to challenge that decision itself as inadequate, counsel's legitimate strategic motives notwithstanding.[272] But if the F1 court considered and rejected such a constraint—perhaps concluding that it would be inconsistent with the jurisdiction's broader preclusion commitments—and class counsel made a legitimate strategic decision in continuing to litigate in state court nonetheless, there would seem to be

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270. Those cases articulate a strict standard for challenging "strategic" decisions. See Strickland v. Washington, 466 U.S. 668, 687–88 (1984) (requiring a showing that counsel's advice "was not 'within the range of competence demanded of attorneys in criminal cases'" (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970))); id. at 690–91 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). In applying this standard, the Court has tended to rely heavily upon an assessment of the diligence that counsel exhibited in arriving at a strategic decision and to shy away from second guessing the wisdom of decisions that are well informed. See, e.g., Wiggins v. Smith, 539 U.S. 510, 523–29 (2003) (finding defense attorney's investigation of mitigating evidence in capital case to be inadequate and, hence, his decision not to put on mitigation case was inadequate and entitled to little deference).

271. Wright, Miller, and Cooper appear to endorse this form of collateral adequacy attack for certain unpled claims. See 18A Wright, Miller, & Cooper, supra note 2, § 4455, at 474 (discussing Haas v. Harris, 436 F. Supp. 279 (D.R.I. 1977), rev'd sub nom. Haas v. Howard, 579 F.2d 654 (1st Cir. 1978)) (offering favorable account of district court opinion that limited res judicata effect of earlier judgment where class counsel's failure to raise argument rendered representation inadequate). Some courts disagree. See, e.g., Nathan v. Rowan, 651 F.2d 1223, 1227–28 & n.8 (6th Cir. 1981) (barring federal claims that went unpled in state class action, apparently through inadvertence, under "'might have been offered' aspect of res judicata").

272. But see *Nathan*, 651 F.2d at 1227–28 (refusing to recognize failure of plaintiff in state class action to seek leave to amend complaint and add federal claims as constituting inadequate representation).

no basis for invoking adequacy of representation to prohibit a subsequent merger or bar.[273]

In each of these cases, the question for the F2 court is no longer whether a class action should have been certified at all in light of its impact upon preclusion values in the initial forum. Rather, the question is what preclusion constraints the rendering forum would have had to apply in order to afford constitutionally adequate representation to the absentees, given the class that was actually certified. This modest form of adequacy based collateral challenge, which leaves intact the claims actually litigated in the original action, poses none of the threats to finality and predictability that are associated with full-scale collateral attacks. It merely constitutes a variation on the type of retrospective interpretation of judgments that the ubiquitous preclusion maxim—even in its properly limited form—already warns parties to expect.

CONCLUSION

Many of the doctrinal proposals set forth in this Article are new. The insights that lie at their core, however, should sound familiar. The power of a court to constrain the preclusive effects of its own judgment in a class proceeding rests on the same theoretical foundation as the court's power to enter a prosaic dismissal without prejudice, or to approve a class settlement containing a narrowly tailored release of claims. As courts confront requests to certify increasingly ambitious class actions, and as class counsel increasingly tailor the causes of action that they assert in an effort to comply with the other requirements of certification, the threat of adverse preclusive effects will require courts to employ that power with care and precision. It is a testament to the tenacity of the ubiquitous preclusion maxim that most courts consistently fail to consider the threat of preclusion at all, while those few that do make the attempt frequently throw up their hands in helplessness.

Improving upon this inadequate state of affairs will require a more thoughtful and realistic description of the array of interests possessed by the members of a class outside the four corners of the complaint. We have seen the need for this type of reform many times. An example from a related juridical context makes the point succinctly. Linda Silberman

273. In some cases, this mode of analysis might implicate the continuing debate over whether a rendering court can conclusively determine the adequacy of the representation that class members have received in a proceeding before it—a question that collapses into one variant of the collateral attack problem. See Marcel Kahan & Linda Silberman, Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims, 1996 Sup. Ct. Rev. 219, 262–66 (concluding that "adequacy of representation should be raised directly, and not be permitted to be raised collaterally," provided that class members had a "fair opportunity to raise the issue"); Woolley, Availability, supra note 261, at 389–97 (arguing against ability of rendering forum to issue conclusive determination of adequacy, at least where class members lack minimum contacts or other jurisdictional nexus with forum).

has famously noted that a judge who places more weight upon a litigant's forum contacts when analyzing personal jurisdiction than when analyzing choice of law operates under the mistaken assumption that an accused cares more about "where he will be hanged than whether."[274] The quip brilliantly captures the manner in which a misguided, formalistic doctrinal myopia can lead judges to misdescribe reality and unwittingly harm the interests of litigants. A similar danger is becoming manifest in the treatment of preclusion in class litigation. When a court fails to consider the consequences of certification for the unpled claims of absentees, its attempt to uncover hidden treasure for the class may wind up digging the hole for a premature burial. Choice of law has now begun to assume its proper place as a regular inquiry at the threshold of the certification process. Preclusion should not be far behind.

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274. Linda J. Silberman, *Shaffer v. Heitner*: The End of an Era, 53 N.Y.U. L. Rev. 33, 88 (1978).