
COMMENT

NEGOTIATING LEGITIMACY: AN EVALUATION OF THE
NEGOTIATION CLASS PROPOSAL

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INTRODUCTION 1152

I. OVERVIEW OF THE NEGOTIATION CLASS 1152

 A. *Heterogenous Class Problem*1154

 B. *The Negotiation Class as a Solution*1156

II. THE NEGOTIATION CLASS AS APPLIED: A CASE STUDY 1159

 A. *Background*..... 1160

 B. *The District Court’s Certification Order* 1161

 C. *The Court of Appeal’s Reversal*1162

III. THE NEGOTIATION CLASS IN CONTEXT 1164

 A. *The Negotiation Class as a Multi-District Litigation Settlement
 Tool* 1164

 B. *External Governance Concerns*..... 1168

IV. EVALUATING THE VIABILITY OF THE NEGOTIATION CLASS:
 RULE 23’S REQUIREMENTS1171

 A. *The Negotiation Class Exceeds the Text of Rule 23* 1171

 B. *The Negotiation Class Fails the Predominance and Superiority
 Inquiries*1176

V. ASSESSING THE VIABILITY OF THE NEGOTIATION CLASS:
 CONSTITUTIONAL REQUIREMENTS..... 1182

 A. *Adequacy of Representation*1183

 B. *Notice and the Opportunity to Be Heard*.....1188

 C. *The Opportunity to Exit*..... 1190

CONCLUSION 1192

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INTRODUCTION

The opioid epidemic currently devastating the United States has had a myriad of consequences to society. How to redress the harms caused by the ill-advised use of prescription opiates by doctors and public health institutions writ large has become a question that policymakers, scholars, lawyers, and judges are all currently attempting to solve. One proposal, put forth by Professors Francis E. McGovern and William B. Rubenstein, seeks to employ the class action device in a creative manner by enabling parties on both sides of the *v.* to achieve finality through comprehensive settlements. Their idea, coined the negotiation class, could become a useful tool in complex litigation. To do so, however, it must prove its adherence to the text and structure of Federal Rule of Civil Procedure (FRCP) 23 and constitutional procedural due process principles.

This Comment scrutinizes the negotiation class action proposal, seeking to unearth its intended applicability and assess its viability as an operative tool in federal courtrooms nationwide. In essence, this Comment argues that while the negotiation class idea provides procedural safeguards in certain contexts, it cannot currently be applied as an aggregation device as it exceeds the parameters of Rule 23 as written. However, the negotiation class action idea satisfies the constitutional procedural due process requirements for representative actions. Thus, this Comment concludes that an amendment to Rule 23 would be necessary to allow the negotiation class to become an operative tool.

This Comment proceeds in five Parts. Part I outlines the details of the negotiation class proposal and the way it is intended to operate. Through a case study, Part II illustrates the current objections to the negotiation class and potential roadblocks to its future viability. Part III, in turn, sets the negotiation class in context by focusing on the realm for which it was designed: Multidistrict Litigation. Parts IV and V assess the negotiation class's adherence to the text and structure of Rule 23, and the constitutional requirements of representative actions, respectively. This Comment concludes by building upon the evaluations in Parts IV and V and contending that, because the negotiation class meets the fundamental requisites of due process, an amendment to Rule 23 is warranted to allow the negotiation class to become a viable aggregation mechanism.

I. OVERVIEW OF THE NEGOTIATION CLASS

In 2020, Professors Francis E. McGovern and William B. Rubenstein proposed an innovative application of the class action device to solve a specific

collective action problem inherent in certain aggregate litigation cases.¹ Building on decades of scholarship, McGovern and Rubenstein identified a unique dilemma faced by a particular type of plaintiff class actions: the heterogeneous class problem.² Where a class is composed of both small- and large-value claimants, the potential for the latter to opt-out of the collective reduces the peace premium that putative defendants would otherwise be willing to pay in pursuit of global peace.³ In essence, the collective's potential disunity reduces its potential recovery and renders settlement an elusive goal.⁴

McGovern and Rubenstein's proposal attempts to solve the heterogeneous class problem by providing a "mechanism for cooperation"⁵ for both claimants as a collective, and between claimants and defendants. Their proposal suggests employing Rule 23 in a creative manner by incorporating ideas from the American Law Institute's model for aggregate non-class litigation⁶ and

¹ See generally Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73 (2020) [hereinafter *The Negotiation Class*] ("In this Article, we offer heterogeneous class members a mechanism for cooperation, a new form of class certification that we call *negotiation class certification*.").

² *Id.* at 81-82.

³ "Global peace" refers to the "comprehensive resolution of disputes" which has "independent value" as a means of "securing more for a cohesive group than what disparate individuals could hope for." Samuel Issacharoff, *Rule 23 and the Triumph of Experience*, 84 LAW & CONTEMP. PROBS. 161, 170 (2021). As Professor Alexandra Lahav explained,

Global peace is a great benefit to the defendant, who can move on without concern of mounting and never-ending litigation. At the same time, by definition, global peace requires that the plaintiffs obtain a type of rough justice rather than an individual proceeding. Individually pursued litigation, indeed, is the opposite of global peace. This represents a tension between the day-in-court ideal and the realities of the mass market.

Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1408 (2019). In turn, the phrase "peace premium" refers to the increased monetary recovery available to plaintiffs when litigants obtain global peace. See Issacharoff, *supra*, at 170 ("[T]he ensuing global peace generates a 'peace premium' . . . stem[ming] from the lower anticipated transaction costs for a defendant facing no further litigation.").

⁴ See *The Negotiation Class*, *supra* note 1, at 77 ("A heterogeneous class does not experience the same type of collective action problem as that confronting a homogeneous class of small claimants; moreover, depending upon the mix of claimants, the varieties of collective action problems only multiply.").

⁵ *Id.* at 78.

⁶ The American Law Institute embraced a supermajority voting approach for certain aggregate litigation cases. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b) (Am. L. Inst. eds., 2010) ("[I]ndividual claimants may, before the receipt of a proposed settlement offer, enter into an agreement in writing through shared counsel allowing each participating claimant to be bound by a substantial-majority vote of all claimants concerning an aggregate settlement proposal.").

bankruptcy.⁷ This solution—the negotiation class—attempts to align the parties’ incentives by certifying a plaintiff class under Rule 23(b)(3) for the purpose of negotiating a settlement with defendants.

This Section begins by detailing the heterogeneous class problem, focusing on the considerations that prompted McGovern and Rubenstein’s proposal for a “new form of class certification.”⁸ It then discusses the negotiation class’s function as a solution to the heterogeneous class problem, and identifies how the idea is meant to operate.

A. *The Heterogenous Class Problem*

In the “conventional” class action, large numbers of potential plaintiffs possess similar claims—in both type and value—against a common defendant.⁹ These homogeneous class actions often face a collective action problem: each plaintiff’s claim may be of negative value if litigated individually, but the collective’s claims may be worth substantially more if litigated as a whole.¹⁰ Essentially, the group benefits if it can pursue the individual claims en masse and spread the cost of litigation. But homogeneous class actions also face a free-rider problem, as “no class member has the incentive to undertake the organizational effort”¹¹ required for aggregation.¹² Thus, the group needs a “champion.”¹³ The class action device operates as a

⁷ The negotiation class’s envisioned voting mechanism is “somewhat akin to the manner in which bankruptcy counts votes on a pro rata and per capita basis.” *The Negotiation Class*, *supra* note 1, at 92; *see also* 11 U.S.C. § 1126(c) (allowing a voting procedure that requires creditors holding “at least two-thirds in amount and more than one-half in number of the allowed claims” to approve a bankruptcy plan before it is considered accepted).

⁸ *The Negotiation Class*, *supra* note 1, at 78.

⁹ *See id.* at 75 (describing the dynamics of “conventional class-actions lawsuit[s]”).

¹⁰ *See* JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION* 3 (2015) (“[S]mall claimants often hold meritorious claims that they cannot afford to litigate. Such ‘negative value’ claims (meaning that they cost more to assert individually than the plaintiff would recover, even if victory were certain) will be abandoned (and defendants will be enabled to exploit such claimants in the future), unless an attorney can aggregate these small claimants into an efficient procedural vehicle for common litigation.”).

¹¹ *The Negotiation Class*, *supra* note 1, at 75.

¹² *See* David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 852 (2002) (noting that plaintiffs confront “free-rider obstacles to classwide aggregation”); Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 136 (2011) (“[S]ome self-interested individuals are tempted to free ride in collective-action problems, including those inherent in large-scale litigation.”); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 8 (1991) (noting that the “class action is a tool for overcoming the free-rider” problem).

¹³ *See The Negotiation Class*, *supra* note 1, at 82 (noting the need for a large claimant to act as the class’s champion especially if the class is comprised of many stakeholders with similar small-value claims).

tool to overcome both the collective action and free-rider problems “that impair any attempt to organize a large number of discrete individuals in any common project.”¹⁴ It solves the collective’s problem by providing a means of aggregation that can capitalize on economies of scale and consolidate individual claims that would otherwise be of negative value.¹⁵ In short, the class action mechanism encourages individuals to act as champions.

The class action device goes further by providing benefits to parties on both sides of the *v*.¹⁶ For defendants, the prospect of litigating against a large number of individual plaintiffs creates significant transaction costs.¹⁷ Thus, defendants are often willing to pay an additional sum to lump claims and resolve them as a whole.¹⁸ Put simply, defendants “want peace, and they are often willing to pay for it.”¹⁹ What they are willing to pay—i.e., the value of a comprehensive settlement achieving global peace—is known in academic literature as the “peace premium.”²⁰

Heterogeneous classes, on the other hand, present a distinct problem. Where potential plaintiffs possess claims of different values, some have “enough at stake to do something other than sit back and allow the litigation to run its course.”²¹ While large-value claimants may remain inactive and stay in the class, they may also decide to exit—hold out—and pursue their own day in court. The latter path creates what Professors McGovern, Rubenstein, and others, call “the adverse selection problem”:

¹⁴ See Macey & Miller, *supra* note 12, at 8; see also William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, pincite (2006) (“Scholars have demonstrated that the small claims class faces what economists call a ‘collective action problem’ and they have applauded the class mechanism as the means by which the class overcomes this problem.”).

¹⁵ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Modern plaintiff class actions . . . permit[] litigation of a suit involving common questions when there are too many plaintiffs for proper joinder. Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”).

¹⁶ See *The Negotiation Class*, *supra* note 1, at 78 (noting that class actions can be beneficial for both claimants and defendants).

¹⁷ See Issacharoff, *supra* note 3, at 170 (“[A] ‘peace premium’ stems from the lower anticipated transaction costs for a defendant facing no further litigation. But it also reflects the value of dispelling the stigma and uncertainty that follows from potential liability.”).

¹⁸ See Lahav, *supra* note 3, 1408 (“Global peace is a great benefit to the defendant, who can move on without concern of mounting and never-ending litigation.”).

¹⁹ D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1185 (2013).

²⁰ See Issacharoff, *supra* note 3, at 170 (“[T]he ensuing global peace generates a ‘peace premium’ available only through a class resolution.” (quoting PRINCIPLES OF THE LAW, *supra* note 6, § 3.10 cmt. b)); see also Rave, *supra* note 19 at 1185 (explaining that plaintiffs can “charge a premium for total peace.”).

²¹ See *The Negotiation Class*, *supra* note 1, at 77 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810, 812-13 (1985)).

As the possibility that these large claimants will exit increases, the opportunity for a class settlement decreases: the defendant fears making a meaningful settlement offer to the class, only then to have to litigate against the most potent plaintiffs; put differently, the defendant is confronted by an “adverse selection” of litigants.²²

In short, “holdouts” are inversely related to the collective’s settlement prospects, and to the value of any potential settlement. Potential holdouts reduce the peace premium that defendants are willing to pay in pursuit of global peace.

The adverse selection problem created by heterogeneous class actions can be viewed as a type of tragedy of the anticommons. As Professor Rave describes, a tragedy of the anticommons in aggregate litigation occurs when “the rights to control [similar] claims are dispersed among the individual plaintiffs,” therefore making it “difficult to aggregate [those] into a more valuable collective.”²³ In such cases, the “transaction costs that must be incurred to aggregate rights” blocks the highest value for those rights.²⁴ From this perspective, the negotiation class proposal lowers the transaction costs necessary to pursue the collectives’ combined rights to assert their claims by aligning plaintiffs’ incentives through a transparent and democratic settlement-negotiation mechanism.

B. *The Negotiation Class as a Solution*

The purpose of McGovern and Rubenstein’s proposal is to “harness class members’ cooperative instincts [to] enable[] them to work together as a cohesive unit in bargaining with the defendant(s).”²⁵ The proposal provides a coordination mechanism that permits small- and large-value claimants to stick together and leverage their unity throughout settlement negotiations. It facilitates the ability of class members to make settlement-related decisions on the front-end and promises unity on the back end by binding class members to those decisions. In essence, before moving for class certification, plaintiffs in a negotiation class decide on an allocation formula for distributing settlement among the collective, and a voting procedure for class-wide approval of any proposed settlement. Once certified, class members receive notice and an opportunity to opt out—the only exit window afforded.

²² See *The Negotiation Class*, *supra* note 1, at 78; see also D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 479 (2016) (“Defendants place a premium on peace in cases where claims are large and incomplete settlements are vulnerable to adverse selection, such as mass torts.”).

²³ Rave, *supra* note 19, at 1192.

²⁴ *Id.* at 1191 n.16.

²⁵ *The Negotiation Class*, *supra* note 1, at 135.

Thus, following the opt-out period, the class size is presumptively fixed.²⁶ The class can then proceed to negotiate a settlement with defendants armed with comprehensive information regarding class composition.

The idea is designed to operate in five stages:

(1) [A]ctive class members initially work together to generate a distributional metric for allocating a lump sum settlement among the class members and a related voting scheme for responding to any proposed settlement; (2) once these mechanisms are in place, putative class counsel moves for certification of an opt-out Rule 23(b)(3) class, with certification limited to the sole purpose of negotiating a lump sum settlement with the defendant; (3) if the court grants class certification, class members receive notice explaining the allocation metric and the supermajority voting scheme, and they are given a one-time opportunity to opt out of the class; (4) after the opt-out period ends and the class size is fixed, the class's counsel and representatives attempt to negotiate a lump sum settlement with one or more defendants; (5) if achieved, the amount of the lump sum is put to a classwide vote, and if it garners supermajority support, the entire class is bound by that vote; class counsel and the defendant then move for final judicial approval of the settlement.²⁷

The first stage of the proposal—the development of the allocation and voting schemes—is arguably one of the most innovative aspects of the negotiation class. The idea envisions that representatives of each of the various stakeholders would be included in the development process. The assumption “is that the key negotiators will be the larger claimants and their lawyers, on the one hand, and putative class counsel and class representatives on the other.”²⁸ Thus, the interests of small claimants would be protected and represented through this process by putative class counsel.²⁹ State officials and attorney generals might also be included in the process “to help safeguard the interests of their citizens.”³⁰

A court deciding whether to certify a proposed negotiation class would scrutinize the allocation formula and voting plan to ensure their substantive

²⁶ McGovern and Rubenstein suggest that following the notice and opt-out period, the class size would necessarily be fixed. See *The Negotiation Class*, *supra* note 1, at 79. However, that may not be the case if total number of potential plaintiffs is unknown at the time of notice. For instance, in a product liability suit, the total number of potentially injured plaintiffs who used the product in question may be undetermined. Sending notice to the proposed class would therefore not establish the plaintiff's class size. This Comment adopts the authors' assumption that class size could, in fact, be set during the class certification stage.

²⁷ *The Negotiation Class*, *supra* note 1, at 79.

²⁸ *Id.* at 91.

²⁹ *Id.*

³⁰ *Id.*

fairness.³¹ The authors suggest that a court could look to Rule 23(e) for guidance in assessing whether the allocation formula and voting procedure are “fair, reasonable, and adequate” and “treat class members equitably relative to each other.”³²

Assuming the court finds the allocation and voting schemes adequate, class counsel would move for certification of a negotiation class under Rule 23(b)(3), as money damages are at issue.³³ Class certification would trigger notice and opt-out, presenting the second most important innovation of the negotiation class proposal. The opt-out opportunity provided at this stage would likely constitute the only exit window for potential class members. A second opt-out opportunity would defeat the proposal as it would trigger the hold-out problem that the idea is meant to overcome. To ensure conforming with procedural due process, notice would “clearly explain the purpose of negotiation class certification, the distributional metric, and how the class members can currently assess the relative value of their claim, the voting mechanism and its binding nature, and the class members’ right to opt out.”³⁴

With class certification and opt-out stages completed, negotiations would commence. Additionally, certification would not require the underlying litigation to be stayed.³⁵ Further, settlement discussions would remain voluntary even after certification.³⁶ Negotiations would be conducted as in any other large class action, although some third-party or special master oversight would likely be warranted.³⁷

If the negotiations concluded in a settlement agreement, the parties would seek judicial approval in a three-step process.³⁸ Specifically, the parties would first seek preliminary approval, followed by a notice, objection, and voting period.³⁹ Class members would be able to voice their concerns and cast a vote on the proposed settlement using the voting mechanism established at the outset.

Professors McGovern and Rubenstein suggest that the negotiation class provides several benefits otherwise absent in settlement classes. First, they note that a certified negotiation class would increase the peace premium by

³¹ See *id.* at 92 (noting that the composition of the group generating the settlement plan is crucial given that there is “no one right allocation or voting plan in these circumstances”).

³² *Id.* (quoting FED. R. CIV. P. 23(e)).

³³ *Id.* at 95. Of note, the negotiation class proposal seems to apply only to putative plaintiff classes seeking money damages. *Id.*

³⁴ *Id.* at 99.

³⁵ See *id.* at 98 (“Negotiation class certification does not logically require that the litigation be stayed during settlement negotiations, and indeed, we would argue that it not be.”).

³⁶ *Id.* at 100.

³⁷ *Id.* at 101.

³⁸ *Id.* at 101-02.

³⁹ *Id.* at 102-03.

fixing the class's size and enabling the defendant to make a fulsome settlement offer.⁴⁰ Second, they argue that the negotiation class would increase participation by stakeholders, which would serve as a monitoring function and ensure adequacy of representation (of both counsel and representative parties).⁴¹ Third, they contend that the negotiation class would further due process principles by adding legitimacy to the class action procedure, and certainty as to the outcome.⁴²

The authors contend that the negotiation class provides even-handed benefits from the defendant's perspective. The negotiation class would afford defendants more assurance as to the finality of the litigation, and a path to global peace.⁴³ And defendants could probe possible defects in the class prior to settlement, ensuring that the deal would not fall apart at the end.⁴⁴ The court could protect defendants' interests by stating that their lack of opposition is limited to certification for a negotiation class.⁴⁵ Finally, the court could even time-limit certification, providing the "the parties time to negotiate a settlement while preserving the status quo for trial if no settlement is reached."⁴⁶

II. THE NEGOTIATION CLASS AS APPLIED: A CASE STUDY

The viability of the negotiation class action idea was first tested in *In re National Prescription Opiate Litigation*,⁴⁷ a case involving thousands of lawsuits stemming from the opioid epidemic. There, negotiation class certification was successful at the district court stage but failed to pass judicial muster on appeal. This Part outlines the first application of the negotiation class action idea and examines the courts' treatment of the proposal. The purpose of this Part is not to provide a comprehensive history of the proceedings. Rather, this Part employs *In re National Prescription Opiate Litigation* as a case study to

⁴⁰ *Id.* at 105.

⁴¹ *See id.* at 108 ("We count as an advantage of our proposal, therefore, that it invites large stakeholders (in particular) to participate in the litigation in two distinct ways: (1) by joining in negotiations about (a) how to allocate a lump sum settlement and (b) how to generate a fair voting system and then (2) by voting on any proposed settlement amount.")

⁴² *See id.* at 116 ("At the conclusion of the opt-out period, the defendant knows precisely whose claims it is settling and can make a bespoke settlement offer, fit precisely to the size of the class with which it is negotiating.")

⁴³ *See id.* at 120 ("[D]efense counsel can negotiate a deal with the certified class with some certainty that the deal will not fall apart for want of a legitimate class at the end of the process.")

⁴⁴ *Id.*

⁴⁵ *Id.* at 96.

⁴⁶ *Id.*

⁴⁷ *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019), *rev'd and remanded*, 976 F.3d 664 (6th Cir. 2020).

illustrate objections to the proposal and potential challenges that future negotiation class certification motions may encounter.

A. Background

In the early 2000s, doctors and lawyers began taking note of the adverse consequences of the use of prescription opiates.⁴⁸ The emerging opioid epidemic generated a wave of litigation in state and federal courts around the nation.⁴⁹ The lawsuits presented a number of legal theories alleging both state and federal claims, but centered “on claims that the defendant manufacturers excessively and inappropriately marketed and promoted opioid medications, and defendant distributors and sellers did not appropriately keep track of or report excessive orders.”⁵⁰

On December 12, 2017, the Judicial Panel on Multidistrict Litigation (JPML) consolidated all opioid-related litigation pending in the federal courts and transferred the cases to Judge Dan Aaron Polster for the Northern District of Ohio pursuant to 28 U.S.C. § 1407.⁵¹ The MDL eventually grew to over 2,000 opioid-related lawsuits.⁵²

From the outset of the proceedings, Judge Polster remarked the complexity of the case and encouraged the parties to settle, as “both sides of the equation” shared “some of the responsibility” for the crisis.⁵³ During the first hearing, Judge Polster made his views clear:

⁴⁸ See U.S. FOOD & DRUG ADMIN., TIMELINE OF SELECTED FDA ACTIVITIES AND SIGNIFICANT EVENTS ADDRESSING OPIOID MISUSE AND ABUSE (Apr. 1, 2022), <https://www.fda.gov/media/126835/download> [<https://perma.cc/3K6M-F3CG>] (“[In the early 2000s] [r]eports of overdose and death from prescription drug products, especially opioids, began to rise sharply, with OxyContin at the center of the problem.”); see also German Lopez, *The Thousands of Lawsuits Against Opioid Companies, Explained*, VOX (Oct. 17, 2019, 6:10 PM), <https://www.vox.com/policy-and-politics/2017/6/7/15724054/opioid-epidemic-lawsuits-purdue-oxycontin> [<https://perma.cc/6YWR-R4V8>] (detailing the history of the opioid epidemic and the lawsuits that followed).

⁴⁹ See Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies’ Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2301 (2017) (describing the lawsuits that “have been filed and continue to be filed against opioid manufacturers and distributors”).

⁵⁰ Lance Gable, *Preemption and Privatization in the Opioid Litigation*, 13 NE. UNIV. L. REV. 297, 312 (2021); see also *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020) (“The[] cities and counties allege that opioid manufacturers, opioid distributors, and opioid-selling pharmacies and retailers acted in concert to mislead medical professionals into prescribing, and millions of Americans into taking and often becoming addicted to, opiates.”).

⁵¹ *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 536 (N.D. Ohio 2019), *rev’d and remanded*, 976 F.3d 664 (6th Cir. 2020). The MDL statute allows the JPML to “transfer[] to any district for coordinated or consolidated pretrial proceedings” any “civil actions involving one or more common questions of fact [] pending in different districts.” See 28 U.S.C. § 1407(a).

⁵² *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. at 536.

⁵³ Transcript of Initial Pretrial Conference Held on Jan. 9, 2018, Doc. #71, at 4, *In re National Prescription Opiate Litigation*, 332 F.R.D. 532 (N.D. Ohio Sept. 11, 2019) (No. 1:17-MD-02804)

The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here. So I don't think anyone in the country is interested in a whole lot of finger-pointing at this point, and I'm not either.⁵⁴

To further that objective, Judge Polster appointed Professor Francis McGovern as a Special Master. Settlement, however, became a tenuous objective. Defendants insisted on need for a "global settlement"—an agreement that would give finality to "most, if not all, lawsuits against them arising out of the opioid epidemic."⁵⁵ The possibility of local governments opting-out of a settlement class generated an adverse selection problem for defendants and significantly hampered the negotiation process. To solve this problem, Special Master McGovern proposed certification of a negotiation class.⁵⁶

B. *The District Court's Certification Order*

On June 14, 2019, the plaintiffs' leadership team filed a motion on behalf of fifty-one cities and counties to certify a negotiation class.⁵⁷ The court held a hearing, and subsequently issued a detailed opinion granting negotiation class certification. As a threshold matter, it noted "that the text of Rule 23 does not dictate, nor therefore limit, the uses to which the class action mechanism can be applied."⁵⁸ The district court next found that the class definition was both ascertainable and fully ascertained.⁵⁹ As for Rule 23(a), the district court concluded that the class adequately met each of the prerequisites. Rule 23(b)(3)'s requirements were likewise satisfied as federal Racketeer Influenced and Corrupt Organizations Act (RICO) and Controlled Substances Act (CSA) issues predominated over individualized issues and state law claims, and the superiority factors "all cut in favor of certification."⁶⁰

Finally, the district court evaluated the allocation formula and voting procedure employed in the standard set forth in Rule 23(e). Although a final

[hereinafter Pretrial Transcript]; see also *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. at 536 ("[A] settlement is especially important as it would expedite relief to communities so they can better address this devastating national health crisis.").

⁵⁴ Pretrial Transcript, *supra* note 53, at 4.

⁵⁵ *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. at 537.

⁵⁶ See discussion *supra* Part I.B.

⁵⁷ *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. at 537.

⁵⁸ *Id.* at 539.

⁵⁹ The class definition included "all counties, parishes, and boroughs;" and "all incorporated places, including without limitation cities, towns, villages, townships, and municipalities, as defined by the United States Census Bureau." *Id.* at 543.

⁶⁰ *Id.* at 551.

settlement had yet to be proposed, the binding nature of the distributional mechanisms warranted evaluating their fairness at this stage.⁶¹ Judge Polster assessed a report issued by Special Master Cathy Yanni which carefully reviewed the allocation plan and voting mechanism, and found “that neither the allocation nor voting mechanisms enshrine[d] any fundamental intra-class conflict between litigating and non-litigating entities,” and “that a single set of class representatives and class counsel could represent the whole class, without the need for sub-classes.”⁶²

The district court concluded by certifying a class composed out of all counties and incorporated places in the United States with respect to the two RICO claims and two CSA issues identified.⁶³ The court authorized the class representatives “to negotiate settlements with any of the [thirteen] sets of Defendants identified herein, on any of the claims or issues identified . . . or those arising out of a common factual predicate.”⁶⁴ Defendants and some putative class members filed a motion to appeal pursuant to Rule 23(f).⁶⁵

C. *The Appeals Court’s Reversal*

On appeal, a split Sixth Circuit panel reversed the district court’s certification of the negotiation class. The majority analogized Rule 23 to a statute,⁶⁶ and focused its analysis on the Rule’s structure, text, and framework. The court broadly reasoned that certification was improper because it exceeded the scope of Rule 23, and “district courts do not have the liberty to invent a procedure with ‘no basis in the Rule’s text,’ even absent language expressly prohibiting it.”⁶⁷

⁶¹ Judge Polster’s opinion emphasized that the assessment required by Rule 23(e) was warranted at the certification stage as otherwise, the entire purpose of employing the negotiation class would be undermined:

Given that this class certification order could set in motion an elaborate negotiation and settlement process, the Court has stated that it should make a preliminary determination of the equity of these plans, given that it would be perverse—and an enormous waste of judicial and social resources—to launch this whole negotiation class only to later hold that the allocation scheme, identified at the outset, was inequitable *ab initio*.

Id. at 552 (internal quotation marks omitted).

⁶² *Id.* at 554.

⁶³ *Id.* at 552.

⁶⁴ *Id.* at 556.

⁶⁵ *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 669 (6th Cir. 2020).

⁶⁶ *Id.* at 671-72 (“[T]he [FRCP] are binding upon court and parties alike, with fully the force of law because they are promulgated pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 When a statute’s language is plain, the sole function of the courts . . . is to enforce it according to its terms.” (internal quotation marks and alterations omitted)).

⁶⁷ *Id.* at 671 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011)).

According to the majority, Rule 23's structure did not support the certification of a negotiation class as the Rule only permitted two types of class actions: litigation and settlement classes.⁶⁸ The court reasoned that Rule 23's specific reference to class actions proceeding to trial, and classes proposed for settlement, implicitly created only two permissible purposes for the class action device. A hybrid approach would create a "separate category of certification" or "a new form of class action, wholly untethered from Rule 23."⁶⁹

The Rule's text likewise failed to authorize negotiation class certification, as the device found no support under either Rule 23(e) or Rule 23(b)(3). While Rule 23(e) allows for consideration of "a class proposed to be certified for purposes of settlement,"⁷⁰ the section only "contemplates settlement classes that are formed after a deal has been reached and the parties wish to formalize their arrangement."⁷¹ Thus, the court refused to consider Rule 23(e) for the hybrid negotiation class approach as "there is no proposal to consider at the time the negotiation class is presented to the court for approval."⁷² Rule 23(b)(3) similarly failed to support a hybrid approach as the negotiation class was "expressly certified for the purposes of fostering global settlement, rather than litigating common issues."⁷³ Specifically, the court took issue with the district court's Rule 23(b)(3) analysis, finding that the lower court had "papered over the predominance inquiry," and that the "structural problem [was] compounded by the district court's attempt to frame the negotiation class as an 'issue class.'"⁷⁴

The Sixth Circuit further emphasized that Rule 23's framework provided no support for class certification. The court rejected appellants' arguments that the open-ended wording of Rule 23(b)(3) and the text of Rule 23(c)(4) indicated that a class can be certified for purposes other than trial or settlement.⁷⁵ Instead, the court relied on the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, which cautioned that the Rule "limits judicial inventiveness," and that "[c]ourts are not free to amend a rule outside the process Congress ordered."⁷⁶

⁶⁸ *Id.* at 674 ("[A] negotiation class does not fit into either the litigation class or settlement class tracks.").

⁶⁹ *Id.* at 672.

⁷⁰ FED. R. CIV. P. 23(e).

⁷¹ *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 673.

⁷² *Id.*

⁷³ *Id.* at 674.

⁷⁴ *Id.* at 675.

⁷⁵ *Id.* at 672-73.

⁷⁶ 521 U.S. 591, 620 (1997).

III. THE NEGOTIATION CLASS IN CONTEXT

On its face, the negotiation class proposal serves only to overcome the adverse selection problem facing heterogeneous claimants in federal district courts. However, the negotiation class did not arise out of thin air. Rather, as the case study in Part II illustrates, the proposal developed alongside a highly specific aggregate litigation scenario: a nationwide MDL of public dimension. This Part argues that situating the negotiation class against such a backdrop illuminates its true dual purpose: solving problems inherent with heterogeneous actors and heterogeneous law—a rather common situation in MDL proceedings. Additionally, this Part contends that external forces motivated some of the Sixth Circuit’s concerns; therefore, the court’s rejection of the proposal should not be read as the definitive answer to the question of its future applicability.

Assuming that global peace is a desirable outcome, the negotiation class serves to achieve comprehensive finality in the MDL context and provides significant benefits to what is otherwise a “black hole.” At first glance, the Sixth Circuit’s decision in *In re National Prescription Opiate Litigation* appears to put a dagger in the heart of the negotiation class proposal. However, the Sixth Circuit’s opinion should be read as providing guidance for future cases: innovation is successful when it occurs at a smaller scale and proves itself through the triumph of experience.

A. *The Negotiation Class as a Multidistrict Litigation Settlement Tool*

The MDL story begins at the turn of the century. Following a brief renaissance in the 1990s,⁷⁷ federal courts began constraining the use of the Rule 23 class actions.⁷⁸ Fall for the class action mechanism brought spring for a different type of aggregation: the MDL. Enacted in 1968, the MDL statute establishes the Judicial Panel on Multidistrict Litigation, and allows for the consolidation and transfer of cases to a single district court if they share “one or more common questions of fact.”⁷⁹ The relatively easy threshold required to centralize cases under the MDL statute, coupled with the more stringent

⁷⁷ See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 271 (2011) (“During the 1990s, the preferred device for global peace in mass litigation was the settlement class action.”).

⁷⁸ See Andrew D. Bradt, *Something Less and Something More: MDL’s Roots As a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1715 (2017) (“Courts have applied Rule 23’s restrictions . . . in myriad ways to prevent class certification.”); see also Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455, 1467 (2015) (“[I]n the twenty-first century . . . it became increasingly difficult for plaintiffs to plead class actions, obtain class certification, or accomplish settlement classes after *Amchem* and *Ortiz*.”).

⁷⁹ 28 U.S.C. § 1407(a).

requirements for class certification, significantly altered the federal court landscape.⁸⁰ Today, the MDL is arguably the default aggregation mechanism in federal courts for complex cases—especially nationwide mass tort litigation.⁸¹

Although the role of the MDL is to organize cases only for pretrial proceedings,⁸² parties have been successful at achieving finality in that forum.⁸³ The vast majority of MDLs settle or are dismissed through pre-trial motions; only around three percent of cases are remanded back to the transferor court.⁸⁴ Thus, scholars describe the MDL as a “black hole”⁸⁵ or a “one-way ticket.”⁸⁶

MDLs achieve finality through both class and non-class settlements. Either route presents its own problems. Litigation class actions are traditionally unavailable for mass tort cases or where claims are based on state law, as variations in the underlying substantive law tend to defeat Rule 23(b)(3).⁸⁷ The predominance obstacle presented by choice of law issues is common in cases involving heterogeneous law.

⁸⁰ See Mullenix, *supra* note 78, at 1467-68 (“By 2005, plaintiffs’ attorneys and defense counsel realized that both sides profitably could use the previously underutilized MDL auspices as a mutually advantageous means to resolve large-scale litigation.”).

⁸¹ See, e.g., Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 851 (2017) (“MDL cases now account for over forty percent of actively litigated claims in federal courts.”); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 KAN. L. REV. 775, 794 (2010) (noting that in recent years, the “preferred way of handling mass tort lawsuits in the federal courts has been for the [JPML] to transfer and consolidate the cases in a single district court.”); Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (“While class actions have generally been somewhat on the decline in recent years, MDL practice has become so pervasive as to be almost routine.”).

⁸² The MDL statute requires district courts to transfer cases back to the transferee courts after pre-trial proceedings. See 28 U.S.C. § 1407(a) (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . .”).

⁸³ See Bradt, *supra* note 78, at 1712 (“[The MDL] has flourished in mass tort cases—often achieving the kind of mass settlements that one could have imagined might be obtainable under Rule 23(b)(3).”).

⁸⁴ See Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1673 (2017).

⁸⁵ See *id.* at 1709 (“MDLs are a doctrinal black hole.”).

⁸⁶ See Elizabeth C. Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014) (“Multidistrict litigation has frequently been described as a ‘black hole’ because transfer is typically a one-way ticket.”).

⁸⁷ See, e.g., Bradt, *supra* note 78, at 1717-18 (“[A]s the class action has receded, MDL has filled the void, especially in cases involving state-law tort claims involving product liability or personal injury that are not well suited to class certification.”); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1270 (2017) (“When they drafted the MDL statute, [the] judges intended it to be the primary procedural mechanism for resolving the ‘explosion’ of mass-tort litigation they predicted was coming.”).

Settlement class actions, on the other hand, present the hold-out problem identified by Professors McGovern and Rubenstein: the ability of claimants to opt-out reduces the peace premium and the availability of comprehensive global peace. In some cases, parties have attempted to overcome the hold-out problem by adding “blow-up” or “threshold” provisions.⁸⁸ Nonetheless, settlement class treatment requires compliance with Rule 23(b)(3)’s rigorous predominance and superiority inquiries, thus triggering problems similar to those faced by litigation classes.

MDLs may also achieve finality through non-class settlements; but this outcome is suspect from both a structural and policy perspective. First, the MDL is inherently an opt-in procedure,⁸⁹ and lacks the binding nature of the opt-out class action.⁹⁰ Put simply, the MDL cannot achieve global peace as it cannot bind absent parties without a further aggregation mechanism or closure provision.⁹¹ Second, non-class MDL settlements are devoid of procedural protections.⁹² “Neither the MDL statute nor the Federal Rules of Civil Procedure include any requirement that the court review a consolidated settlement, even an opt-in settlement negotiated by attorneys in the proceeding.”⁹³ The inherent backroom nature of the non-class MDL

⁸⁸ See 2 JOSEPH M. MCLAUGHLIN, *MCLAUGHLIN ON CLASS ACTIONS* § 6:21 (18th ed. 2021) (“[D]efendants ordinarily should insist on a ‘blow-up’ provision in the settlement agreement, which allows the defendant to terminate the settlement if a predetermined number or proportion of the members of the class timely and validly request exclusion from the settlement class pursuant to any second opt-out opportunity.”); see, e.g., *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015) (upholding a class settlement agreement which included a provision that allowed a defendant to opt out “if a certain percentage of class members opt out of the settlement”).

⁸⁹ See Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1347 (2014) (“Traditionally, all individual claimants have to personally opt in to any proposed MDL mass settlement, legitimizing it through personal consent.”).

⁹⁰ See Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 403 (2013) (“The inability to bind all plaintiffs to a global settlement under section 1407 presents an obvious problem: defendants will not enter into a global settlement if they cannot be reasonably certain that it will bring peace.”); see also Amy L. Saack, *Global Settlements in Non-Class MDL Mass Torts*, 21 LEWIS & CLARK L. REV. 847, 856 (2017) (“[N]on-class MDL mass settlements operate by soliciting plaintiffs to opt in to a voluntary settlement agreement negotiated by counsel appointed by the court to manage the proceeding.”); Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2176 (2017) (“In MDL, peace depends on individual claimants deciding to participate in a global settlement.”).

⁹¹ See Rave, *supra* note 90, at 2177 (“[C]losure provisions range from walk-away participation thresholds below which the defendant can back out of the deal to bonus payments as the number of claimants participating approaches 100 percent to requirements that participating lawyers recommend settling to all of their clients and withdraw from representing those who refuse.”).

⁹² See Thomas, *supra* note 89, at 1351 (“[The MDL] requires no class certification and imposes none of the complex procedural protections for absent class members built into Rule 23.”); Redish & Karaba, *supra* note 81, at 112 (“[In the MDL context,] the interference with the individual litigant’s control of the adjudication of her own claim remains substantial.”).

⁹³ Willging & Lee, *supra* note 81, at 801.

settlement has raised significant criticism by scholars. As Amy Saack explains:

In theory, claimants in a non-class MDL do not present the same policy concerns driving *Amchem* because these types of claimants receive representation by counsel of their choosing. However, in practice, the attorneys appointed by the court to a committee control discovery and negotiations for settlement, leaving little power in the hands of the attorneys representing claimants who originally filed an individual suit. Furthermore, these private settlements may affect individuals outside of any court proceeding when the settlement requires a certain percentage of individuals with tolling agreements (suspending the statute of limitations) to opt in, and who have not yet filed a case.⁹⁴

Thus, the MDL tool has been described as “something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies.”⁹⁵

The negotiation class proposal enters the scene at this juncture, at which point the mechanism it suggests accomplishes more than the proposal initially implies. At the certification stage, the authors suggest that the analysis would proceed under the standards for settlement classes,⁹⁶ but the reasoning behind this suggestion requires further exploration. The standard for certification of settlement classes differs from that of litigation classes in that it is less demanding of the manageability prong of Rule 23(b)(3)’s superiority inquiry, which is related to predominance, and more demanding of the adequacy of representation requirements of Rule 23(a) and (e).⁹⁷ Naturally, this suggestion must further some aspect of the proposal, otherwise it would be superfluous.

If a class could readily meet the standard for litigation class certification, it would be unnecessary for the negotiation class to benefit from the “more relaxed examination of the certification requirements for settlement classes.”⁹⁸ However, as the MDL origins of the negotiation class illustrate, the collectives most likely to benefit from the negotiation class are precisely those that are less likely to meet the superiority and predominance inquiry

⁹⁴ Saack, *supra* note 90, at 857 (footnote omitted).

⁹⁵ Redish & Karaba, *supra* note 81, at 111.

⁹⁶ See *The Negotiation Class*, *supra* note 1, at 97 (“[I]n practice, most courts undertake a more relaxed examination of the certification requirements for a settlement class.”).

⁹⁷ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“[A] district court need not inquire whether the case . . . would present intractable management problems But other specifications of the Rule . . . demand undiluted, even heightened, attention in the settlement context.”).

⁹⁸ *The Negotiation Class*, *supra* note 1, at 97.

under Rule 23(b)(3).⁹⁹ Employing the standard for settlement class certification serves to overcome the problem inherent in complex cases where individualized issues—such as variations in state law—render class action treatment unsuitable. In response, the negotiation class proposal provides a critical solution by addressing two problems. It solves the MDL’s problem on both sides of the “v.” by providing a mechanism for aggregation of claims on the one end, while enabling comprehensive finality through an opt-out process on the other. In one breath, the negotiation class tackles many of the key issues that arise with heterogenous actors and heterogenous law, a rather common situation in the MDL realm. Situating the proposal within the MDL context illuminates the twin aims of the negotiation class. This dual purpose, not explicitly recognized, is the real McCoy.

B. *External Governance Concerns*

As the previous Section argued, the negotiation class proposal should be understood as a roadmap for achieving settlement in nationwide MDLs. In the MDL forum, where parties are often actively pursuing settlement and the transferee judge takes on an active role,¹⁰⁰ the negotiation class can operate successfully. To do so, however, the negotiation class must survive judicial scrutiny—the kind that doomed its first foray into the courtroom in *In re National Prescription Opiate Litigation*. But the court’s opinion should not be read as the obituary of the negotiation class. This Section contends that evaluating the court’s opinion from a governance model illuminates the extent to which the decision hinged on skepticism regarding the external legitimacy of the collective. The court’s almost instinctual rebuff of class certification was driven by the same concerns that have doomed ambitious aggregation attempts of the past.

⁹⁹ Professor Dodge underscores this point by noting that,

Bilateral mass settlement offers have the power to reach all types of claims, including those claims that were the final bastion of the class action device. Indeed, the claims that have the coherence necessary for a mass offer to preclude the later certification of a class are the very claims that have the coherence necessary for certification in a post-Dukes world. But, this also means that the cases in which corporations will obtain the least closure and thus have the least incentive to create a private mass settlement fund are the cases in which post-Dukes certification is the least likely—leaving the victims to pursue individual redress through single plaintiff litigation, joinder, or MDL.

Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335, 393-94 (2014).

¹⁰⁰ See Bradt & Rave, *supra* note 87, at 1290 (“[S]ettlement is part of MDL’s DNA, and judges have played an active role in facilitating it—including weighing in on the fairness of deals—since the very beginning.”).

The Supreme Court's class action jurisprudence underscores that the justification behind the class action "exception"¹⁰¹ is representational legitimacy.¹⁰² Judicial skepticism regarding aggregate litigation can thus be described as "the product of concerns about *legitimacy*."¹⁰³ Scholars have developed a governance model to test the propriety of aggregate litigation, and "to give concrete shape to amorphous legitimacy concerns."¹⁰⁴ The governance model analogizes the class actions to an entity or organized collective, and reframes judicial skepticism as "concerns about the organization of the collective and the selection and supervision of its leaders."¹⁰⁵

The framework further distinguishes between internal and external governance concerns. The former focuses on the collective's organization, structure, leadership, and monitoring and control functions. And the latter focuses on the collective's implications for the broader polity:

[External governance concerns] raise the question whether to pursue a legitimate state goal through legislation, collective action, or individual initiative. External governance concerns about the legitimacy of the class action capture the anxiety that the device is being used in a manner that steps into a sphere reserved for some other institutional actor, such as the sovereign's legislature.¹⁰⁶

The governance model, to some extent, echoes the Supreme Court's class action jurisprudence: representational legitimacy is essential. Yet, understanding the distinction between internal and external governance uncovers concerns that may lie between the lines of a court's opinion.

On its surface, the Sixth Circuit's decision in *In re National Prescription Opiate Litigation* appears to present concerns of internal governance. In essence, the court was concerned that exceeding the bounds of Rule 23's text and structure would evade conforming to the Rule's inherent procedural safeguards. However, when reading between the lines the case presents external governance concerns—skepticism regarding the "governance of the broader polity"¹⁰⁷—which likely played a role in the court's decision.

101 *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) ("Class actions are a deviation from the usual rule that litigation is conducted by and on behalf of the individual named parties only.").

102 *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) ("In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (internal quotations omitted) (citation omitted)).

103 Troy A. McKenzie, *Internal and External Governance in Complex Litigation*, 84 L. & CONTEMP. PROBS. 207, 208 (2021).

104 *Id.* at 209.

105 *Id.* at 210.

106 *Id.* at 214.

107 *Id.* at 227.

Specifically, these external governance concerns included: (1) the scope of these class, which would have encompassed “every city and county within the United States;”¹⁰⁸ (2) the fact that “both sides of the equation” arguably “share[d] some of the responsibility;”¹⁰⁹ and (3) that although the political branches of government were arguably the best suited to handle the matter, those branches had “punted.”¹¹⁰

State sovereignty, public policy, and federalism concerns loomed in the background of the Appellate Court’s decision. Over thirty Attorneys General objected to class certification on the grounds that certification would interfere with the sovereign interests of the states.¹¹¹ The case presented major public policy issues as the opioid litigation was meant to address a major failure by institutional and legislative actors tasked with protecting public health and safety. While private litigation can “bolster additional public health policy goals,”¹¹² scholars argue that decision-making in this area should be left to the political branches.¹¹³ The effectiveness of litigation tends to be limited, as litigation is often fact-specific and retrospective, and judicial activism in this realm may decrease democratic accountability.¹¹⁴

Furthermore, the negotiation class in this case would have created an entirely new collective and empowered it to resolve the claims of all cities and counties across the fifty states. The resolution of these claims would affect the lives of millions of Americans. The power and scope of such a collective that sought to redress the opioid epidemic crippling the nation was seemingly aligned with the public health policy goals of the federal government. Undoubtedly, employing the judiciary to *create* such a collective generated amplified skepticism.

From this perspective, the Sixth Circuit’s external governance concerns become evident. Its decision reflected these concerns and delicately balanced

108 *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020).

109 Pretrial Transcript, *supra* note 53, at 4.

110 *Id.*

111 *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 538 (N.D. Ohio 2019), *rev’d and remanded*, 976 F.3d 664 (6th Cir. 2020); *see also* Amicus Letter by Attorneys General Regarding Settlement Negotiation Class at 2, *In Re National Prescription Opiate Litigation* (N.D. Ohio Jul 09, 2021) (No. 1:17-MD-2804) (“The amended proposal would interfere with the States’ ability to vindicate the rights of their citizens Notwithstanding the amended proposal’s insistence that it does not encroach on the States’ sovereignty, that is exactly its effect.”); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 6 (2021) (“[This case] is the first MDL that pits localities against their own state AGs and legislatures in a struggle for control.”).

112 Gable, *supra* note 50, at 306.

113 The effectiveness of litigation tends to be limited, as litigation is often fact-specific and retrospective, and judicial activism in this realm may decrease democratic accountability. *See id.* at 307.

114 *See id.* (“[T]ort claims provide retrospective remedies in most cases and, therefore, have limited potential for anticipatory interventions to prevent harm.”).

apprehensions regarding the legitimacy of empowering a collective of federal dimensions, but left some clues as to the broader motivating forces:

However innovative and effective the addition of negotiation classes would be to the resolution of mass tort claims—particularly those of grave social consequence—we are to be “mindful that the Rule as now composed sets the requirements [courts] are bound to enforce,” and we “are not free to amend a rule outside the process Congress ordered.”¹¹⁵

Conceivably, the Court was hesitant to endorse an innovative application of the class action device when the situation called for legislative response. Following an established pattern of relying on the text of the FRCP, the Court “punted” back to the appropriate branches of government.¹¹⁶

IV. EVALUATING THE VIABILITY OF THE NEGOTIATION CLASS: RULE 23’S REQUIREMENTS

As the case study in Part II illustrates, the negotiation class’s current status is that of a purely theoretical, academic proposal. Whether the negotiation class can become an operative tool, however, is yet to be determined. Answering that question requires assessing the proposal’s adherence to both the text and structure of Rule 23 and the constitutional requirements of procedural due process. This Part examines the negotiation class’s compliance with the provisions of Rule 23 and argues that the proposal currently fails to comply with the text and structure of the FRCP.

One reading of the Sixth Circuit’s rejection of negotiation class certification would appear to foreclose the viability of the idea entirely. That reading relies on two main objections to the negotiation class: (1) the negotiation class exceeds that allowed by the text of Rule 23; and (2) as applied, the negotiation class fails to meet the predominance and superiority inquiries of Rule 23(b)(3). This Part proceeds by scrutinizing those objections to determine whether Rule 23 in fact forecloses certification of any future certification of a negotiation class.

A. *The Negotiation Class Exceeds the Text of Rule 23*

The Sixth Circuit’s main objection to negotiation class certification can be characterized in one phrase: *where does Rule 23 mention a class for the purposes*

¹¹⁵ *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 676 (6th Cir. 2020) (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)) (alterations omitted).

¹¹⁶ *See, e.g., Amchem*, 521 U.S. at 622 (“The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration”); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“[T]his litigation defies customary judicial administration and calls for national legislation.”).

of negotiation? While the district court found—and the Sixth Circuit did not refute—that the negotiation class could meet all of the prerequisites of Rule 23(a),¹¹⁷ “a new form of class action, wholly untethered from Rule 23, [could] not be employed by a court.”¹¹⁸ This Section examines the Court of Appeal’s primary reason for rejecting certification of a negotiation class—that the idea exceeds the parameters of Rule 23—by analyzing the text and structure of the Rule. This Section concludes by maintaining that the Sixth Circuit’s reasoning is justified: that the Rule, as currently written, cannot be read to support certification of a negotiation class.

As a threshold matter, Rule 23’s text imposes certain conditions before a class action may be maintained. To obtain class treatment, plaintiffs must satisfy Rule 23(a)’s prerequisites of numerosity, commonality, typicality, and adequacy of representation.¹¹⁹ In addition, plaintiffs “must show that the action is maintainable under Rule 23(b)(1), (2), or (3).”¹²⁰ As relevant to the negotiation class proposal, parties seeking money damages under Rule 23(b)(3) must further establish that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹²¹ Rule 23(b)(3) provides a nonexhaustive list of considerations relevant to the predominance and superiority inquiries.¹²² Finally, class actions under Rule 23(b)(3) are also subject to the provisions in Rule 23(c)(2), which require district courts to “direct to class members the best notice that is practicable under the circumstances.”¹²³

Thus far, the negotiation class could operate within the parameters of Rule 23. As plaintiffs in *In re National Prescription Opiate Litigation* argued on

117 See *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. at 543-47 (finding that the class met Rule 23(a)’s factors of being so numerous that joinder is not feasible, having common questions and facts, class representative claims being synonymous with the claims of the class, and the class representative acting as an adequate representative).

118 *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 672.

119 *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013); see also FED. R. CIV. P. 23(a) (detailing the requirements for commonality, typicality, adequate representation, and numerosity).

120 *Amchem*, 521 U.S. at 614; see also FED. R. CIV. P. 23(b).

121 FED. R. CIV. P. 23(b)(3); see also *Amgen*, 568 U.S. at 460 (“[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the ‘method’ best suited to adjudication of the controversy ‘fairly and efficiently.’”).

122 FED. R. CIV. P. 23(b)(3)(A)-(D); see also *Amchem*, 521 U.S. at 616 (“(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”).

123 FED. R. CIV. P. 23(c)(2).

appeal,¹²⁴ Rule 23 “simply provides that ‘[a] class action may be maintained if Rule 23(a) is satisfied’ and additional criteria are met.”¹²⁵ Plaintiffs are correct that Rules 23(a), (b), and (c) could be read cohesively to allow for certification of a negotiation class: a negotiation class could ostensibly meet the prerequisites in Rule 23(a), the predominance and superiority inquiry in Rule 23(b), and a district court could reasonably order notice to the class “certified under Rule 23(b)(3)” as it would presumably have all the information necessary to be included in such notice.¹²⁶

However, Rule 23 imposes additional obstacles, and one of them is fatal to the negotiation class. The provision of Rule 23 which addresses settlement, Rule 23(e), squarely applies to the negotiation class proposal. And its text forecloses the possibility of certification. Concededly, Rule 23(e)—which contemplates settlement classes—does contain language which could be read to authorize a class certified for the purposes of achieving a settlement. Rule 23(e) indicates that “[t]he claims, issues, or defenses of a certified class—or for a class proposed to be certified for [the] *purposes of settlement*—may be settled, voluntarily dismissed, or compromised only with the court’s approval.”¹²⁷ Arguably, a negotiation class is one proposed to be certified “for [the] purposes of settlement.”¹²⁸

Nevertheless, the text of the entire provision, when read cohesively, refutes this argument. Specifically, Rule 23(e)(2) provides that a class certification proposal that “would bind class members” may be approved only after the court makes certain findings.¹²⁹ This provision categorically applies to a proposed negotiation class, as the idea specifically contemplates that the allocation formula and voting mechanism would be binding upon class members.¹³⁰ Thus, a court considering a negotiation class certification motion would have to make the determinations required by Rule 23(e)(2).

A court tasked with making the Rule 23(e)(2) inquiries would have to find, among other things, that “the proposal *was* negotiated at arm’s length,”¹³¹ and

¹²⁴ See Brief of Plaintiffs-Appellees at 58-60, *In re* National Prescription Opiate Litig., 976 F.3d 664 (6th Cir. 2020) (Nos. 19-4097/19-4099) (“[T]he district court’s 22-page analysis reflects that it conducted the requisite ‘rigorous analysis’ [required by Rules 23(a) and (b)] and probed behind the pleadings.”).

¹²⁵ *Id.* at 40 (quoting FED. R. CIV. P. 23(b)) (emphasis in original).

¹²⁶ See FED. R. CIV. P. 23(a)-(c).

¹²⁷ See FED. R. CIV. P. 23(e) (emphasis added).

¹²⁸ See *id.*

¹²⁹ See FED. R. CIV. P. 23(e)(2).

¹³⁰ See *The Negotiation Class*, *supra* note 1, at 79 (“By binding everyone to the supermajority vote, it also guards against strategic opt-outs . . . after a settlement offer has been secured.”); see also *infra* Part I.B. (discussing a framework for binding class members so that they cannot opt out at the last minute and prevent class certification).

¹³¹ See FED. R. CIV. P. 23(e)(2)(B).

that “the relief provided for the class is adequate.”¹³² The language in Rule 23(e)(2)(B) specifically contemplates that negotiations in a settlement class would have occurred *prior* to a class certification. Further, Rule 23(e)(2)(C) notes that the parties would have agreed on some form of “relief” before moving to certify a settlement class. These determinations could not be made in the case of a proposed negotiation class as negotiations and a final settlement agreement would occur only *after* class certification.

Moreover, Rule 23(e)(1) indicates that a court “must direct notice . . . to all class members who would be bound by the proposal” if the parties can show that the court would be able to “approve the proposal under Rule 23(e)(2)” and “certify the class for purposes of judgment on the proposal.”¹³³ This provision is likewise fatal to the negotiation class. First, the negotiation class idea hinges on class members receiving notice of class certification, as class composition cannot be fixed otherwise.¹³⁴ In addition, it unquestionably seeks to bind class members to the allocation formula and voting mechanism determined at the outset, thus the proposal would inevitably trigger Rule 23(e)(1) and (e)(2). As emphasized above, a district court could not make the findings required to approve the proposal as that information would not be available at certification stage. In sum, the text and structure of Rule 23 appear to foreclose the possibility of certifying a negotiation class.

In addition, following the Supreme Court’s decision in *Amchem Products, Inc. v. Windsor*¹³⁵ and the Judicial Committee on Rules of Practice and Procedure’s 2018 amendment to Rule 23,¹³⁶ the Rule has been interpreted as expressly contemplating two types of class actions which can be maintained: litigation and settlement classes.¹³⁷ Specifically, the Supreme Court in *Amchem* endorsed “settlement only” classes as “a stock device,” and held that district courts need not consider the manageability prong of Rule 23(b)(3) in settlement class actions, but other aspects of the Rule designed to protect absent class members “demand undiluted, even heightened, attention in the settlement context.”¹³⁸ And Rule 23(e)(1) now provides that “claims, issues, or

¹³² See FED. R. CIV. P. 23(e)(2)(C).

¹³³ See FED. R. CIV. P. 23(e)(1).

¹³⁴ See *The Negotiation Class*, *supra* note 1, at 99 (“As the goal of certifying a negotiation class is to fix the size of the class for settlement negotiation purposes, [notice] is critical.”); see also *infra* Part I.B. (describing the process by which a class is fixed).

¹³⁵ *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (Breyer, J., concurring) (“[T]he Court’s basic holding [is] that [s]ettlement is relevant to a class certification.”).

¹³⁶ See generally Letter from John G. Roberts, Jr., C.J. of the U.S., to Paul D. Ryan, Speaker of the House of Representatives (Apr. 26, 2018), https://supremecourt.gov/orders/courtorders/frcv18_5924.pdf [<https://perma.cc/3A67-2CED>] (submitting to Congress the proposed 2018 amendments to the Federal Rules of Civil Procedure).

¹³⁷ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.13 (2004) (outlining the standards and procedure for certifying litigation classes *or* settlement classes).

¹³⁸ *Amchem*, 521 U.S. at 620.

defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court’s approval,” and lists additional procedures applicable to proposed settlements.¹³⁹ Rule 23(c)(2)(B)’s reference to (e)(1) further suggests that notice and the opportunity to be excluded from the litigation extend to settlement classes as well.¹⁴⁰

The Court of Appeals relied heavily on this litigation-settlement class distinction in rejecting certification of a negotiation class. Although Rule 23 makes no explicit reference to “the uses to which the class action mechanism can be applied,”¹⁴¹ the Sixth Circuit reasoned that the Rule’s text implicitly authorized only litigation and settlement classes.¹⁴² Other federal courts have implicitly endorsed this position by treating Rule 23 as creating two alternative paths to certification: one for the purposes of litigation, and another for the purposes of settlement.¹⁴³ The Advisory Committee Notes on the Federal Rules of Civil Procedure¹⁴⁴ and the Manual on Complex Litigation likewise make note of this distinction.¹⁴⁵ In fact, the text of Rule 23 and its commentary are devoid of any reference to a negotiation class. As the Sixth Circuit stated, “there is no discussion in Rule 23 identifying negotiation as a separate category of certification distinct from settlement.”¹⁴⁶

Rule 23’s requirements operate to ensure that representative litigation accords with due process.¹⁴⁷ The Supreme Court’s jurisprudence has unequivocally emphasized that “the Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”¹⁴⁸ Thus, a party seeking class

¹³⁹ FED. R. CIV. P. 23(e).

¹⁴⁰ FED. R. CIV. P. 23(c).

¹⁴¹ *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 539 (N.D. Ohio 2019), *rev’d and remanded*, 976 F.3d 664 (6th Cir. 2020)

¹⁴² *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 673.

¹⁴³ *See, e.g.*, *Jabbari v. Farmer*, 965 F.3d 1001, 1005 (9th Cir. 2020) (“Also relevant is whether a district court certifies a class for settlement or for trial.”); *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc) (“The criteria for class certification are applied differently in litigation classes and settlement classes.”); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004) (noting that in some cases concerns “that arise with litigation classes are not present with settlement classes . . .”).

¹⁴⁴ *See* FED. R. CIV. P. 23 advisory committee’s notes to 2018 amendment (acknowledging implicitly the two uses of Rule 23(b)(3) actions by noting that the certification standards differ in the settlement and litigation contexts).

¹⁴⁵ *See supra* note 137 and accompanying text.

¹⁴⁶ *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 672.

¹⁴⁷ *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (“The Rule’s four requirements—numerosity, commonality, typicality, and adequate representation—effectively ‘limit the class claims to those fairly encompassed by the named plaintiff’s claims.’” (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982))).

¹⁴⁸ *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

action certification “must affirmatively demonstrate [their] compliance with Rule 23.”¹⁴⁹ Lack of compliance with Rule 23 is therefore fatal to any proposed class action—and the proposed negotiation class proposal is no exception.

While the district court in *In re National Prescription Opiate Litigation* found that all the requirements of Rule 23 were satisfied, the provisions of the rule cannot be read in harmony with the negotiation class proposal. Allowing certification of a negotiation class would, in essence, exceed the parameters of Rule 23—an undertaking that courts have been explicitly warned against.¹⁵⁰

B. *The Negotiation Class Fails the Predominance and Superiority Inquiries*

Rule 23(b)(3) is designed for situations where a class action treatment may be “convenient and desirable” to achieve economies of aggregation “without sacrificing procedural fairness.”¹⁵¹ To further those objectives, the Rule imposes the requirements of predominance and superiority.¹⁵² The predominance inquiry requires courts to “take a close look at whether common questions predominate over individual ones.”¹⁵³ The requirement serves as an indirect check on representational illegitimacy.¹⁵⁴

The predominance and superiority requirements may prove to be a significant obstacle for negotiation class certification. *In re National Prescription Opiate Litigation* highlights the inherent problem that Rule 23(b)(3) presents for the negotiation class. Furthermore, while Rule 23(b)(3)’s requirements may present a challenge for other nationwide MDLs, ensuring compliance with predominance and superiority is vital if a negotiation class is to succeed in the future. The negotiation class cannot operate as a

¹⁴⁹ *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart*, 564 U.S. at 350).

¹⁵⁰ *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure ‘shall not abridge . . . any substantive right.’” (quoting 28 U.S.C. § 2072(b))).

¹⁵¹ FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment.

¹⁵² *See* FED. R. CIV. P. 23(b)(3) (“[T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”); *see also Amchem*, 521 U.S. at 615 (“Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the . . . new provision invites a close look at the case before it is accepted as a class action . . .”).

¹⁵³ *Comcast*, 569 U.S. at 34.

¹⁵⁴ *See Amchem*, 521 U.S. at 623 (“[Predominance] tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation”); *see also* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS 195 (5th ed. 2011) (“Predominance is the test that identifies such situations, ensuring a sufficiently similarly situated group of individuals that due process permits their claims to be compromised in the aggregate.”); *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (“[Rule 23(b)(3)’s factors require] focus on the efficiency and economy elements of the class action so that cases allowed under [Rule 23(b)(3)] are those that can be adjudicated most profitably on a representative basis.” (citation omitted)).

workaround to thorny choice of law issues that have long precluded nationwide class certification.

The requirements of Rule 23(b)(3) are likely to be hurdles for a future negotiation class because the cases that would benefit from negotiation class treatment are those that would most likely implicate choice of law issues.¹⁵⁵ As Part III of this Comment demonstrates, the negotiation class idea was meant to address complex MDLs, mass tort situations, or cases of national dimension. However, nationwide aggregate litigation is often predicated on state law.¹⁵⁶ And, as one scholar put it: “Aggregate litigation and choice of law are poor bedfellows.”¹⁵⁷

While choice of law issues do not necessarily block class certification, the solutions are limited in practice. For example, courts have upheld class certification despite variations in state law where common federal claims apply similarly to the class, one state’s law governs the entire class,¹⁵⁸ or minimal differences allow for grouping and subclassing.¹⁵⁹ These approaches have achieved limited success and depend on the facts of each case.

The easiest path through *Erie* problems is via certification of a settlement, rather than litigation, class.¹⁶⁰ The analysis under Rule 23(b)(3) is distinct for settlement classes, “for the proposal is that there be no trial.”¹⁶¹ Specifically,

¹⁵⁵ See Bradt & Rave, *supra* note 87, at 1270 (indicating that the MDL was meant to be the forum for mass tort adjudication).

¹⁵⁶ See Gluck & Burch, *supra* note 111, at 62 (noting that MDL is dominated by state law issues).

¹⁵⁷ Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 760 (2012); see also *id.* at 780 (“While aggregation seeks to make the claims of individual plaintiffs throughout the country more alike . . . the policies respecting differences in state laws and plaintiff’s forum choices pull the other way, inhibiting aggregation by emphasizing the differences among plaintiffs’ cases.”); Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1862 (2015) (“When nationwide classes arise out of state law, the class’s scope may mirror the defendant’s conduct, but the choice-of-law problem injects a wrinkle that can render classes unmanageable and thus uncertifiable in federal court.”).

¹⁵⁸ See Burch, *supra* note 157, at 1897 (“[C]ertain forum states’ choice-of-law rules may dictate that one state’s law should apply to the entire class.”).

¹⁵⁹ See, e.g., *Pella Corp. v. Saltzman*, 606 F.3d 391, 396 (7th Cir. 2010) (“[T]he certification of the six state subclasses demonstrates that the district court carefully considered how the case would proceed, explicitly finding that the consumer protections acts of these six states have nearly identical elements. . . .”); *In re Prudential Ins. Co. Am. Sales Prac. Litig.*, 148 F.3d 283, 315 (3d Cir. 1998) (“Courts have expressed a willingness to certify ‘nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit.’”); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 998-99, 1010 (3d Cir. 1986) (granting certification of a nationwide class with four subgroups based on variations in underlying state law); see also CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MAY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 1780.1 (3d ed. 2005) (“[S]everal courts have bifurcated the federal and state claims and certified only the federal claims. Other courts have upheld certification, noting that their authority to create subclasses would allow them to handle any individual issues that might arise if it later were determined that multiple state laws were applicable to the state claims.”).

¹⁶⁰ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁶¹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

district courts need not consider the manageability prong of Rule 23(b)(3), but the specifications of the Rule designed to protect absent class members warrant heightened attention in the settlement context.¹⁶² The manageability prong is related to the predominance inquiry, as the problem of individualized adjudication undermines the purpose of aggregate litigation.¹⁶³ Still, courts have held that variation in state laws does not necessarily defeat predominance and superiority for settlement class certification.¹⁶⁴

The negotiation class proposal seeks to take advantage of the relaxed predominance and superiority inquiry for settlement classes to overcome the choice of law hurdles facing nationwide MDLs with a state law component. Absent a full settlement proposal, a court considering certification would likely find that choice of law issues defeat predominance and superiority therefore precluding class treatment. But by presenting the court with a unilateral agreement regarding settlement distribution, and framing the class for “purposes of settlement,” the negotiation class can allow the district court to apply the predominance and superiority inquiry standards pertinent to settlement classes. In other words, a nationwide, mass tort MDL can achieve certification by diminishing the importance of the variation in state law. This is precisely what plaintiffs attempted to accomplish in *In re National Prescription Opiate Litigation*.

The problem, however, is that the proposal asks too much of the settlement class certification inquiry; it relies on *Amchem*’s language while ignoring *Amchem*’s main holding. While *Amchem* lessened the importance of the manageability of individualized issues, it reaffirmed that Rule 23(b)’s

¹⁶² *Id.*

¹⁶³ See RUBENSTEIN, *supra* note 153, at § 4:63 (“[M]anageability often simply echoes the predominance analysis as those cases most likely to be unmanageable are those involving myriad individual issues.”).

¹⁶⁴ See *id.* (“Courts therefore regularly certify settlement classes that might not have been certifiable for trial purposes because of manageability concerns.”); JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:46 (18th ed. 2021) (“In the context of proposed nationwide settlement classes, citing the absence of manageability concerns, most courts have been more receptive to certification despite variations in state laws.”); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.72 (2004) (“In a number of cases [post-*Amchem*], however, judges have continued to certify settlement class actions in the mass tort context, particularly when there are no unknown future claimants and the absent class members are readily identifiable and can be given notice and an opportunity to opt out. Those judges have emphasized that because the case will be settled rather than tried, differing state laws that might make a class-wide trial unmanageable do not defeat certification for settlement purposes only.”); see, e.g., *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004) (“However, when dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class.”); *In re Nat’l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 434 (3d Cir. 2016) (“We are nonetheless ‘more inclined to find the predominance test met in the settlement context.’” (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 304 n. 29 (3d Cir. 2011) (en banc))).

attention to representational legitimacy demands “undiluted, even heightened, attention in the settlement context.”¹⁶⁵ Settlement class actions tend to further efficiency, but they do not by themselves ensure representational legitimacy. Thus, *Amchem* emphasized that Rule 23(e) cannot supersede the certification criteria: “If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context.”¹⁶⁶

This problem was fatal to the negotiation class proposed in *In re National Prescription Opiate Litigation*. There, the Sixth Circuit found that the district court failed to conduct the proper Rule 23(b)(3) analysis. The failure to comply with the requirements of the Rule threatened the representational legitimacy of the collective and rendered it inadequate for class treatment. In the court’s view, the district court “papered over the predominance inquiry” by failing to consider the choice of law problem created by the state law claims.¹⁶⁷ The effect of such omission created internal governance concerns and threatened the legitimacy of the class: the “district court’s order create[d] confusion surrounding the scope of negotiations—a putative class member [could not] be sure whether, and how, the negotiation class representatives, empowered by the court, will address their state law claims during settlement discussions.”¹⁶⁸ Similarly, the Sixth Circuit found that the lower court erroneously glossed over the superiority requirement. The district court improperly considered “the class members’ interests in individually controlling the prosecution or defense of separate actions”¹⁶⁹ as the “district court’s approach would do the opposite of increasing individual control and involvement by requiring class action participants to commit to the negotiation class without knowing the issue parameters or the amount or prospect of any potential recovery.”¹⁷⁰ The district court’s finding that the

¹⁶⁵ *Amchem*, 521 U.S. at 620-21 (“Subdivisions [of Rule 23] (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.”).

¹⁶⁶ *Id.* at 623; see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 128 (2009) (“[A] class settlement that presupposes the aggregate unit—even a deal for the class that might well represent enlightened public policy—cannot supply the basis for class certification in the first place.”).

¹⁶⁷ *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 675 (6th Cir. 2020) (“[T]he [district] court’s order minimized or marginalized the myriad state law claims that arguably divide the putative class members.”).

¹⁶⁸ *Id.*

¹⁶⁹ FED. R. CIV. P. 23(b)(3)(A).

¹⁷⁰ *In re Nat’l Prescription Opiate Litig.*, 976 F.3d at 675.

manageability prong was “inapplicable” was also erroneous as certification did not halt the underlying litigation.¹⁷¹

Another way to circumvent choice of law problems and overcome Rule 23(b)(3) predominance is through issue classing.¹⁷² As Professor Burch notes, “[s]everal recent appellate decisions suggest a greater willingness to certify issue classes in toxic torts, product liability, consumer protection, and employment discrimination.”¹⁷³ This trend suggests that issue classing may be a viable path through choice of law problems that would otherwise defeat predominance.

Currently, however, Circuits are split on the interaction between issue classing under Rule 23(c)(4) and the predominance inquiry under Rule 23(b)(3).¹⁷⁴ Pursuant to the “broad view, courts apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been

¹⁷¹ *Id.* at 674-75.

¹⁷² *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 860-61 (6th Cir. 2013) (affirming a district court’s certification of a class action on the issue of liability, and holding that those common questions predominate over individual ones); *see also* Burch, *supra* note 157, at 1898 (“Even when state laws vary, plaintiffs’ attorneys may be able to place them into a few categories such that an issue class could adjudicate common conduct components across a particular group.”); WRIGHT, MILLER & KANE, *supra* note 159, at § 1779 (“Even though a court decides that the common questions do not predominate for purposes of Rule 23(b)(3), the action should not be dismissed if it can proceed on an individual basis. The court also may consider the possibility of reshaping or subdividing the class pursuant to Rule 23(c)(4)(B) whenever that might prove efficient and economical.”).

Of note, in *Butler v. Sears, Roebuck and Co.*, the Seventh Circuit granted certification of two issue classes, held that common questions in those classes predominated over individual ones, and emphasized the importance of allowing Rule 23(c)(4) to instruct the Rule 23(b)(3) analysis by stating:

It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.

Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, 571 U.S. 1196 (2014).

¹⁷³ *See* Burch, *supra* note at 157, at 1891 (citing *In re Deepwater Horizon*, 739 F.3d 790, 806-07, 816 (5th Cir. 2014)); *Butler*, 727 F.3d at 799; *In re Whirlpool Corp.*, 722 F.3d at 853-54; *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489 (7th Cir. 2012)).

¹⁷⁴ *See* Petition for Writ of Certiorari at 11, *Russell v. Educ. Comm’n for Foreign Med. Graduates* (Dec. 29, 2021) (No. 21-948), https://www.supremecourt.gov/DocketPDF/21/21-948/206339/20211223131049510_Petition%20for%20a%20Writ%20of%20Certiorari.pdf [hereinafter *Russell Cert Petition*]; *see also*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 807-14 (2013) (“[Rule 23(c)(4)] has created significant conflict and confusion among the courts . . .”).

identified for class treatment under Rule 23(c)(4).¹⁷⁵ This approach allows courts to first consider Rule 23(c)(4) for purposes of issue classing even in cases where predominance would not be satisfied for the cause of action as a whole.¹⁷⁶ The Second,¹⁷⁷ Third,¹⁷⁸ Fourth,¹⁷⁹ Sixth,¹⁸⁰ and Ninth¹⁸¹ Circuits have embraced this view. The contrary position, known as the “narrow view,” “prohibits issue classing if predominance has not been satisfied for the cause of action as a whole.”¹⁸² The Fifth¹⁸³ and Eighth¹⁸⁴ Circuits have appeared to adopt this “narrow view.”

The district court’s decision in *In re National Prescription Opiate Litigation* employed the “broad view” to diminish the conflict between individual state-law claims and common federal-law claims by certifying a class only with respect to certain issues. Although the Sixth Circuit had previously adopted the “broad position,”¹⁸⁵ in this case, the Court of Appeals rejected the district

¹⁷⁵ *Martin v. Behr Dayton Thermal Prod. LLC*, 896 F.3d 405, 411 (6th Cir. 2018).

¹⁷⁶ *Id.*

¹⁷⁷ *See, e.g., In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (“[A] court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)’s predominance requirement.”).

¹⁷⁸ *See, e.g., Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (describing a nonexclusive list of factors that a trial court should consider even when considering partial certification); *Russell v. Educ. Comm’n for Foreign Med. Graduates*, 15 F.4th 259, 273 (3d Cir. 2021) (“Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance infirmities.”).

¹⁷⁹ *See, e.g., Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438-39 (4th Cir. 2003) (rejecting the notion that the predominance inquiry should be confined to the entire action taken as a whole.).

¹⁸⁰ *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860-61 (6th Cir. 2013) (“A class may be divided into subclasses, or, as happened in this case, a class may be certified for liability purposes only. . . . Because recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal, in the mine run of cases, it remains the black letter rule that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.” (internal quotations, alteration, and citations omitted)).

¹⁸¹ *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (“Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.”).

¹⁸² *Martin v. Behr Dayton Thermal Prod. LLC*, 896 F.3d 405, 412 (6th Cir. 2018).

¹⁸³ *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745-46 n.21 (5th Cir. 1996) (“The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule . . .”).

¹⁸⁴ *See, e.g., In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (“Even courts that have approved ‘issue certification’ have declined to certify such classes where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation [W]e think this is such a case.”).

¹⁸⁵ *See Martin*, 896 F.3d at 412 (“An evaluation of the broad approach persuades us of its merits.”).

court's analysis, stating that the "issue class device permits a court to split common issues off for class treatment; it does not provide an end-run around the weighty requirements of Rule 23(b)(3)."¹⁸⁶

The "broad view" embraced by a majority of circuits would provide a solution to the negotiation class's current choice of law problems. Such an interpretation of the relationship between issue classing and predominance would ease the path for future negotiation classes and allow them to satisfy Rule 23(b)(3)'s demanding predominance inquiry. As some courts have stressed, "Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class."¹⁸⁷ Therefore, in the settlement context, the focus should be "on the conduct (or misconduct) of the defendant and the injury suffered as a consequence. The claim or claims must be related and cohesive and should all arise out of the same nucleus of operative fact."¹⁸⁸ Variation in state law should not defeat predominance where the interest of the class members are aligned, and the "common contention" is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."¹⁸⁹

In sum, the negotiation class could be a tool that clears the path toward global peace. But in doing so, it must not do away with the predominance inquiry. Notably, the proposal makes no direct reference to "predominance," but rather suggests that "most courts undertake a more relaxed examination of the certification requirements for a settlement class."¹⁹⁰ A negotiation class can proceed only if it meets the predominance inquiry required for settlement classes—one that is focused on the cohesion underlying claims alleged. Failure to do so should preclude certification since predominance is an indirect check on representational legitimacy.

V. ASSESSING THE VIABILITY OF THE NEGOTIATION CLASS: CONSTITUTIONAL REQUIREMENTS

A strict interpretation of Rule 23 would, as the previous Part emphasized, foreclose the viability of the negotiation class. However, determining whether the idea can become an effective instrument in practice requires more than assessing the proposal against Rule 23's text and structure. Rather, it is

¹⁸⁶ *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 675 (6th Cir. 2020).

¹⁸⁷ *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 301-02 (3d Cir. 2011) (en banc) (noting that other Courts of Appeals have maintained class certifications where state laws may be organized by similar legal standards).

¹⁸⁸ *Id.* at 335 (Scirica, J., concurring).

¹⁸⁹ *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

¹⁹⁰ *The Negotiation Class*, *supra* note 1, at 97.

necessary to evaluate whether the proposal adheres to the constitutional requirements of representative actions.

Class actions are an “exception” to the “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”¹⁹¹ As is inherent in the name itself, the justification behind a “representative suit” lies in adequacy of representation: “members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present.”¹⁹² And in the context of representative actions for money damages, due process demands additional protections¹⁹³: class members must receive notice, an opportunity to be heard, and the right to be excluded from the litigation.¹⁹⁴

This Part examines the negotiation class action proposal against each of these constitutional requirements. While the negotiation class idea currently operates outside the parameters of the text of the Rule 23, nothing in the proposal inherently violates the due process prerequisites for representative actions.

A. Adequacy of Representation

Representational legitimacy is the rationale underlying any class action—absent parties can be bound by judgment because their interests are adequately represented. Put differently, adequacy of representation is a necessary precondition to ensure that aggregate litigation conforms to procedural due process. The legitimacy of a negotiation class hinges on this

¹⁹¹ *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

¹⁹² *Id.* at 41, 42-43; *see also* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (“As the Court pointed out in *Hansberry*, the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder. The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.” (citing *Hansberry*, 311 U.S. at 41)).

¹⁹³ *See Shutts*, 472 U.S. at 811-12.

¹⁹⁴ *Id.*; *see also* *Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir. 2012) (“Where money damages are sought, due process requires: (1) adequate notice to the class; (2) an opportunity for class members to be heard and participate; (3) the right of class members to opt out; and (4) adequate representation by the lead plaintiff(s).”); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring) (“[T]his Court [has] listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation.”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011) (“For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.”).

inquiry: demonstrating that the negotiation class adequately safeguards the interests of named and absent plaintiffs is vital if the idea is to survive judicial skepticism and operate in reality.

The importance of adequate representation in class action practice is hard to overstate. Since its inception group litigation was conceived of as interest representation.¹⁹⁵ Long before the passage of the Rules Enabling Act, or the creation of Rule 23, the Supreme Court recognized that cohesion of interests was the driving justification between representative collective actions. For instance, in *Beatty v. Kurtz*—decided in 1829—the Court allowed a collective suit to proceed where the case was one “in which certain persons, belonging to a voluntary society, and having a *common interest*, may sue in behalf of themselves and *others having the like interest*, as part of the same society; for purposes common to all, and beneficial to all.”¹⁹⁶ A couple of decades later, in *Smith v. Swormstedt*, the Court announced the general principle that, “[i]n all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record *fairly representing the interest* or right involved, so that it may be fully and honestly tried.”¹⁹⁷

The Supreme Court’s more recent class action jurisprudence continued its strict adherence to this principle. In *Hansberry v. Lee*, for example, the Supreme Court held that a court could “proceed to a decree” in a representative suit where: “[1] where the interests of those not joined are of the same class as the interests of those who are, and [(2)] where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest.”¹⁹⁸ And the seminal case *Amchem Products, Inc. v. Windsor*, the Court overturned certification of a class where “the interests of those within the single class [were] not aligned,”¹⁹⁹ echoing well-established the rule that “[a] class

¹⁹⁵ The roots of the class action trace back to the bill of peace—a device developed by the English Court of Chancery that enabled a court of equity to hear a representative action if joinder was impracticable and the named parties adequately represented those absent from the action. See 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1751 (4th ed.). As Frederic Calvert explained in his 1837 treatise on parties to a suit in equity, as a general rule, “[a]ll persons *having an interest in the object of the suit*, ought to be made parties.” FREDERIC CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY 7 (1837) (emphasis added). But, “when a large number of persons have a *common interest* in the entire object of a suit in its nature beneficial to them all, one or more of them may sue on behalf of all.” *Id.* at 25 (emphasis added).

¹⁹⁶ See *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 585 (1829) (emphasis added).

¹⁹⁷ See *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853) (emphasis added)).

¹⁹⁸ *Hansberry*, 311 at 41.

¹⁹⁹ See *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

representative must be part of the class and possess the same interest and suffer the same injury as the class members.”²⁰⁰

Against this backdrop, the adequacy of representation inquiry developed as an indirect check on cohesion of interests among plaintiffs.²⁰¹ In its current form, the adequacy of representation serves two separate yet related functions. First, it ensures cohesion of interests between named and absent parties. Second, it serves to discern whether representation through the named parties and attorneys is fundamentally fair. Failure to establish both will traditionally defeat class certification.²⁰²

The negotiation class action proposal, read in isolation, does not necessarily fail the adequacy of representation inquiry. Whether it can survive the “rigorous analysis” required for class certification depends on the specific details of its application. Nothing in the proposal itself violates the rules established by the Supreme Court. In theory, the interests of both named and absent plaintiffs could be sufficiently cohesive, and named plaintiffs and attorneys could have the same incentives as absent ones. However, three of proposal’s defining features raise potential red flags that warrant closer attention.

First, the negotiation class action proposal raises an adequacy of representation problem at the front-end: ensuring cohesion of interests among the named and absent plaintiffs. The negotiation class proposal hinges on the idea that, at the initial stage of negotiation class certification, small- and large-value claimants would get together to establish an allocation formula and voting mechanism. In short, the value of a plaintiff’s claim (relative to that of the other plaintiffs) would be established at the certification stage. Thus, determining *who* gets a seat at the drafting table is critical to ensuring that the compensation allocation is *fair*. The parties involved in designing the distributional mechanisms must adequately represent the interests of the class—including those of the absent parties—if the outcome is to treat class members equitably. But the proposal, in its

²⁰⁰ See *id.* at 625–26 (quotation marks and citation omitted).

²⁰¹ See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 353 (1999) (“The issue that emerges at the forefront of the Court’s recent cases, however, is the question of governance, and the requirement that there be adequacy of representation for absent class members before they may be bound to a proceeding in which they had no individual ability to participate. While this requirement is present in the Rules, it is in fact a restatement of a fundamental tenet of constitutional due process.”); Elizabeth Chamblee Burch, *Procedural Adequacy*, 88 TEX. L. REV. 55, 55 (2010) (“As an extension of constitutional due process, adequate representation ensures that class representation through attorneys and representatives is fundamentally fair.”); see also *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 799 (3d Cir. 1995) (“Rule 23 is designed to assure that courts will identify the *common interests* of class members and evaluate the named plaintiffs’ and counsel’s ability to fairly and adequately protect *class interests*.” (emphasis added)).

²⁰² *Id.*

current form, makes no mention of how those leading plaintiffs are to be selected. Naturally, those that have more at stake would have more incentives to lead the litigation efforts. But this potentially raises conflict of interest issues, as those that have more at stake would also have an incentive to create a distributional mechanism that would maximize their own compensation.

Second, the negotiation class action proposal raises an issue on the back end: safeguarding the interests of the absent class members *throughout* settlement negotiations. After a negotiation class is certified, the idea assumes that the representative parties would proceed to settlement discussions with the opposite side. If the representative parties' interests are not aligned with those of the absent members, the former may not have an equally strong incentive to vigorously pursue the absent parties' claims. For instance, where there exists significant variation in the types of claims put forth by present and absent class members, the representative parties may have an incentive to concede the value of some claims in exchange for efficiency or timeliness.²⁰³ Contingency-fee arrangements common in class action and MDL practice may incentivize lead counsel to reach a lower-value settlement, as Professor Samuel Issacharoff noted:

There is a strong pressure toward a race to the bottom when lawyers are negotiating to close out claims that they did not have any control over in the first place. Any fee generated from a low-value settlement is better than the prospect of no fee in the event that there is no settlement. Since multiple actions may be—and often are—brought over the same general course of conduct, a defendant may play the rival class counsel off against each other seeking to extract the broadest release at the lowest price.²⁰⁴

And for the representative parties, the time and resources required to continue protracted negotiations may be higher than the marginal value of pursuing additional claims, adding pressure for them to settle.

Third, representational legitimacy takes on an amplified dimension in the MDL context due to the pre-existing interests in the litigation. As discussed earlier, the negotiation class proposal is more appropriately viewed as a

²⁰³ This problem is inherent in class action practice, as noted by Professor Samuel Issacharoff:

Some allocation decisions are inescapable because there is an inevitable rough-hewn quality to the relief provided by class actions. This can take place overtly, as with the common decision to substitute imprecise damage estimates in cases where the administrative costs of fine-tuning individual recoveries would overwhelm the resources available to the class. But it can just as easily take place covertly when lawyers decide to forgo some claims, such as those arguably barred by a statute of limitations, or decide not to prosecute individual-based damages that would place the class action beyond the managerial control of one court.

Issacharoff, *supra* note 201, at 385-86.

²⁰⁴ *Id.* at 388.

roadmap for settlement in the MDL forum. There, parties are actively litigating their claims; by definition, they have interests at stake and have likely accrued significant expenses. The negotiation class vehicle brings into the fold absent parties with similar claims. By virtue of the pre-existing playing field, however, those absent parties have less to lose, and thus less incentive to actively monitor the process. These concerns warrant greater consideration of the constitutionally required adequacy of representation inquiry.

In sum, the entire negotiation class proposal hinges on representational legitimacy; adequacy of representation is the proposal's main vulnerability. Nonetheless, this analysis need not doom the proposal. As the district court's opinion in *In re National Prescription Opiate Litigation* illustrates, a negotiation class may satisfy the constitutional requirement of adequacy of representation. In that case, the court found that the putative class had the necessarily horizontal cohesion—all class members shared the same overriding interest: each was “adversely impacted by the Defendants’ actions with regard to the manufacturing and distribution of opioids and they [sought] to be compensated for their losses.”²⁰⁵ Moreover, the class had sufficient vertical cohesion: the forty-nine representative parties were from both large and small counties and cities across the country and were thus fairly representative of large and small claimants alike. The class representatives differed from the absent class members in that they were litigating, rather than passive, entities—i.e. “active in opioid litigation prior to the filing of the class action motion.”²⁰⁶ Yet this difference did not constitute a fundamental conflict, as both present and absent parties shared the overriding interest in “addressing the consequences of the opioid epidemic.”²⁰⁷ The fact that the representative parties were litigating entities was a factor in favor of finding adequate representation, as these “entities [understood] the case best and [had] been expending their own resources for years in a way that [could] now benefit the whole class.”²⁰⁸

Furthermore, as the case study illustrates, the MDL forum provides judges with ample authority to provide additional safeguards for ensuring adequacy of representation. Stated differently, the transferee judge's active role in the litigation provides the necessary tools to address the concerns

²⁰⁵ *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. 532, 547 (N.D. Ohio 2019), *rev'd and remanded*, 976 F.3d 664 (6th Cir. 2020).

²⁰⁶ *Id.* at 546.

²⁰⁷ *Id.* In all class actions, by definition, some parties will be active litigants and some will be passive. Here, the allocation formula also played a role in the Rule 23(a)(4) inquiry, as it showed that litigating and non-litigating entities, and small and large entities, were treated equitably. This rebutted “any concerns that hard-hit small counties are disadvantaged” *Id.*

²⁰⁸ *Id.*

raised previously in this Section. MDL transferee judges act as “managers, supervising case preparation and actively meeting with litigants in chambers to encourage resolution of the case.”²⁰⁹ MDL transferee judges take on a “facilitative role” and often appoint leadership committees and special masters.²¹⁰ These are precisely the tools Judge Polster employed. By appointing Professors McGovern and Rubenstein to oversee the settlement process and Special Master Cathy Yanni to analyze “whether the proposed allocation and voting plans treat the non-litigating class members equitably,”²¹¹ Judge Polster added additional checks on the representational legitimacy of the collective. In the MDL forum, where transferee judges play an “information-forcing capacity”²¹² and have ample authority to designate neutral parties,²¹³ a negotiation class can be structured to ensure that the representative parties adequately represent those absent.

The Achilles Heel of the negotiation class proposal is the adequacy of representation inquiry. The idea, on its own terms, raises several potential issues that could defeat class certification. Those red flags are not necessarily dispositive, however, as savvy litigants and their counsel could employ the tools available in the MDL forum to ensure class cohesion.

B. Notice and the Opportunity to Be Heard

Procedural due process requires that class members receive notice and an opportunity to be heard before a court can exercise jurisdiction over the matter. Specifically, plaintiffs “must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.”²¹⁴ The negotiation class, as designed, conforms with these constitutional requirements of representative actions.

The Supreme Court has emphasized that notice of pending proceedings is a necessary precondition to maintain a representative suit: “An elementary

²⁰⁹ Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 333 (2014).

²¹⁰ See Christopher A. Seeger & James A. O'Brien III, *Administrative Housekeeping and Ethical Matters in Mass Tort MDLs and Class Actions*, 13 SEDONA CONF. J. 171, 175 (2012) (noting that courts employ other methods to facilitate review, such as leveraging a certified public accountant firm to review the records and to periodically provide records to the court, or the delegation of this task to a special master); see also Dodge, *supra* note 222, at 333–34 (“If settlement is to occur, the judge often utilizes private neutrals or special masters to negotiate settlements, preserving his or her neutrality as the litigation moves forward.”).

²¹¹ *In re Nat'l Prescription Opiate Litig.*, 332 F.R.D. at 553.

²¹² Bradt & Rave, *supra* note 87, at 1264.

²¹³ See Gluck & Burch, *supra* note 111, at 19 (“The MDL judge in many ways acts more like a modern administrator than the judge envisioned by the Federal Rules, not least because MDL judges are chosen specifically for their expertise in practical administration.”).

²¹⁴ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²¹⁵ The negotiation class proposal adheres to this requirement. In fact, the proposal *relies* on providing notice to absent class members, as the notice process enables the class size to be fixed.

Similarly, the opportunity to be heard is a “fundamental requisite[] of the constitutional guarantee of procedural due process.”²¹⁶ Scholars have echoed this view, emphasizing that “procedural due process is generally thought to require that before an individual’s liberty or property may be taken away or abridged by government, [they] must receive the opportunity to present his side of the case to a neutral and objective adjudicator.”²¹⁷ This constitutional requisite, however, currently poses a low threshold, since the Supreme Court has held that “at a minimum an absent plaintiff must be provided with an opportunity to remove himself from the class” to satisfy the requirement.²¹⁸

The negotiation class proposal provides an opportunity to be heard, as the idea *depends* on class member participation throughout the class certification process. And the negotiation class proposal goes further, as it provides an information- and participation-forcing mechanism otherwise absent in representative actions. In a negotiation class, plaintiffs would know the exact settlement distributional mechanism and the relative value of their claims as compared to other class members. Thus, plaintiffs would have comprehensive information regarding the terms of any future settlement, which would not be subject to change. The information-forcing aspect adds a level of self-determination otherwise absent in traditional litigation or settlement classes.²¹⁹ Furthermore, the voting procedure provides litigant “control” that

²¹⁵ *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

²¹⁶ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974).

²¹⁷ Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1600 (2007).

²¹⁸ See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999) (alterations and quotations omitted). Some scholars have questioned the validity of treating a class members’ failure to opt out as an adequate opportunity to be heard, concluding that the opt-out procedure “raises potentially serious constitutional problems as a matter of procedural due process.” Redish & Larsen, *supra* note 217, at 1612 (noting the potential constitutional problem with treating class member’s failure to opt out as an adequate opportunity to be heard).

²¹⁹ See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 354 (“The focus on the named plaintiff . . . ignores the fact known to all participants in class actions (courts no doubt included) that class representatives often are recruited by class counsel, play no client role whatsoever, and—when deposed to test the adequacy of representation—commonly show no understanding of their litigation.” (quotations omitted)).

is likewise unavailable in typical class actions.²²⁰ The ability of a supermajority of claimants to strike down a proposed settlement adds a measure of self-government for members of the collective, and thus furthers the due process requirement that absent parties must have an “opportunity to be heard.” The negotiation class, in fact, furthers litigant self-determination and control—the principle behind the fundamental constitutional requisite.

C. *The Opportunity to Exit*

The negotiation class provides a path to global peace in the MDL context by solving the hold-out problem and transforming an opt-in procedure into an opt-out one. Both results require binding class members at the outset. While the binding nature of the proposal may initially appear problematic, due process principles support the proposition that a negotiation class could adequately provide a single opt-out period. A class sufficiently cohesive to warrant certification in the first place can bind plaintiffs on the back end without committing “obvious violence to the Rule’s structural features.”²²¹

The Supreme Court has held that the Due Process Clause requires one opt-out window for a Rule 23(b)(3) class action.²²² Lower courts have routinely echoed this position by holding that due process does not require a second opt-out window.²²³ Although some lower federal courts *have* allowed for second exit opportunities, courts have often refused to do so when information contained in the original notice did not materially change from the final settlement terms.²²⁴ Courts have also declined to offer an additional opt-out window where plaintiffs learn of the final monetary award to be

²²⁰ See *id.* at 356-57 (“Absent class plaintiffs are both members of a judicially approved collective body and yet stand apart in terms of actual participation and control over the management of that collective body.”).

²²¹ *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 674 (6th Cir. 2020).

²²² See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (“[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”).

²²³ See *Low v. Trump Univ., LLC*, 881 F.3d 1111, 1121 (9th Cir. 2018) (“[There is] no authority of any kind suggesting that due process requires that members of a Rule 23(b)(3) class be given a second chance to opt out. We think it does not.”); see also MCLAUGHLIN, *supra* note 163, at § 6:21 (“Courts have rejected the suggestion that a second opt-out should be granted as a matter of course . . .”).

²²⁴ See *Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) (“Neither due process nor Rule 23(e)(3) requires, however, a second opt-out period whenever the final terms change after the initial opt-out period An additional opt-out period is not required with every shift in the marginal attractiveness of the settlement”); *In re Diet Drugs Prod. Liab. Litig.*, 93 F. App’x 338, 343 n.7 (3d Cir. 2004) (suggesting that “imposition of a materially different settlement” might necessitate “the reinstatement of class members’ initial opt-out rights,” but then finding that no additional exit period was warranted).

received after the original opt-out period ended.²²⁵ A certified negotiation class, would therefore follow establish precedent by not requiring courts to provide a second exit opportunity after the final damages are determined. Binding class members to their decision to remain in the class would be proper as an additional opt out period “is not required with every shift in the marginal attractiveness of the settlement.”²²⁶

The reasoning stems from the same justification that allows for class treatment: a class member who chooses to remain in the class may be bound by judgment in the future because their interests, going forward, are adequately represented by the class as a whole.²²⁷ Opt-out rights preserve more than just the symbolic value of getting one’s day in court, but goes further by providing the claimholders with the “ability to decide whether or not their claims will see the inside of a court at all.”²²⁸ But once a claimant exercises this decisionmaking authority and remains in a class, the class’s cohesion justifies binding him to the outcome of the litigation. Similarly, a negotiation class that satisfies the adequacy of representation inquiry ensures that absent class members’ interests are adequately protected after they decide to remain in the class.

In fact, the negotiation class proposal furthers procedural due process in the aggregate litigation context by adding litigant autonomy. Due process requires a “day in court” before a claimant’s constitutionally protected property rights are compromised.²²⁹ Scholars have developed two theoretical rationales behind the day-in-court ideal: paternalism and autonomy.²³⁰ The paternalism rationale asks “whether the absent party’s legally protected interests have been adequately represented” and “views the representative as

²²⁵ See MCLAUGHLIN, *supra* note 163, at § 6:21 (“Courts have rejected the suggestion that a second opt-out should be granted as a matter of course, even if the terms of the settlement change after the expiration of the initial opt-out period.”); *see, e.g.*, Stanley v. U.S. Steel Co., 2008 WL 4225781, at *4 (E.D. Mich. Sept. 10, 2008), *aff’d in relevant part, vacated in part sub nom.*, Moulton v. U.S. Steel Corp., 581 F.3d 344 (6th Cir. 2009) (affirming a district court’s refusal to provide another opt out opportunity where, at “the time of class certification, it was not clear whether [there] would be a settlement,” and “class members did not know the amount they would be receiving from the settlement until publication”); Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., 2020 WL 5211035, at *13 (E.D. Pa. Sept. 1, 2020) (declining to allow a second opt-out window where doing so would permit “class members to remove themselves from the class not only after learning the terms of the settlement”).

²²⁶ *Denney*, 443 F.3d at 271.

²²⁷ Due process requires that “the named plaintiff at all times adequately represent the interests of the absent class members.” *Shutts*, 472 U.S. at 812 (emphasis added).

²²⁸ Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 659 (2015) (emphasis omitted).

²²⁹ *See* Mason v. Eldred, 73 U.S. 231, 239 (1867) (“The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court.”).

²³⁰ *See* Redish & Karaba, *supra* note 81, at 113 (“The debate between paternalism and autonomy as the ultimate rationale for the day-in-court ideal has great relevance to the class action debate”).

a type of guardian, exercising protective authority over his wards.”²³¹ The autonomy rationale, on the other hand, focuses on “the ability of individuals to control . . . [their] participation in the [governing process]” and their ability in making “choices about the nature of [their] participation in the governing process.”²³²

The Supreme Court’s procedural due process jurisprudence has relied almost exclusively on the paternalism rationale in the aggregate litigation context.²³³ However, where “circumstances permit, due process is appropriately construed to provide the individual with autonomy to choose how—and indeed, if—to protect her own interests through resort to the adjudicatory process.”²³⁴ With the negotiation class proposal, Professors McGovern and Rubenstein have designed a process that adds a level of litigant choice inherent in the autonomy model. The negotiation class acts as an information-forcing tool by providing claimants with comprehensive details regarding any future settlement distribution and stands in stark contrast with the dearth of information facing class members in typical settlement classes. Thus, class members’ decision to remain in the class represents a well-informed choice. Moreover, these class members can exercise their voice through the voting process and act as a check on their counsel and representatives.²³⁵

That class actions have relied on paternalism alone to justify binding absent parties does not mean that they cannot be devised in a manner that furthers due process by enabling litigant autonomy. This is precisely what the negotiation class achieves. And it is designed for a forum—the MDL—that lacks either paternalism or autonomy.

CONCLUSION

Rule 23 should be amended to permit for certification of a negotiation class. The negotiation class was intended to be applied in complex cases—of perhaps of national dimension—and allow for aggregation and finality while furthering transparency and judicial oversight. These benefits are not trivial. Rather, as scholars have long argued, mass tort litigation, global settlements, and MDLs need a new aggregation mechanism.

For the first-year civil procedure student, the MDL may appear to be a close relative of the class action device. But the two are inherently different.

²³¹ *Id.* at 137.

²³² Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 765 (2007).

²³³ See Redish & Karaba, *supra* note 81, at 138.

²³⁴ See *id.* at 139.

²³⁵ In addition, class members always retain the right to object.

The negotiation class proposal was designed to bridge these two aggregation mechanisms by providing a pathway for cooperation. In doing so, the negotiation class provides a significant check on litigants and their attorneys and adds autonomy to an otherwise paternalistic aggregation model. The information-forcing aspect of the negotiation class proposal, coupled with the information-forcing role of the MDL transferee judge, provide meaningful benefits to what has otherwise been described as a smoke-filled backroom.

However, the negotiation class proposal's inherent benefits are not sufficient to justify its application without an amendment to Rule 23. While nothing in the proposal inherently violates the due process principles that justify representative actions, the negotiation class proposal currently operates beyond the established framework of Rule 23. Thus, an amendment to Rule 23 is required if the class action is to emerge as an aggregation tool.

* * * * *