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# Class Actions: Aggregation, Amplification, and Distortion

*Richard A. Epstein*<sup>†</sup>

## I. THE OMNIPRESENT CLASS ACTION

The class action represents, without question, one of the most ubiquitous topics in modern civil law. It is only a small exaggeration to say that virtually every major innovation in liability, if brought about by litigation, will either be created by or reflected in the class action. The reason for the omnipresence of class actions lies in their versatility. Class actions are, at their root, an aggregation device for separate claims, and are by design tied to no substantive theory. Class actions can, in theory, be used to amalgamate large numbers of claims brought by separate individuals, regardless of their subject matter. Any lawyer who works with antitrust, corporations, securities, discrimination, lending, real property, or torts will necessarily be familiar with class action litigation as a normal part of his or her work. It is hard to describe class actions as a distinctive specialty when so many lawyers both pursue and defend these suits on a daily basis.

Nor is it hard to see why class actions have surged to prominence in recent years. As litigation becomes ever more complex, the willingness and ability of individual plaintiffs to bear its costs are correspondingly diminished. The opportunities for gains, however, remain substantial, so entrepreneurial lawyers who hope to profit by organizing the class of potential plaintiffs and bringing their joint claim to a successful conclusion quickly fill the void. The entire process was pushed along by the adoption of the 1966 class action rules, but the reforms, like so many other reforms of the 1960s (and other ages) had this distinctive quality:

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the initial purpose was to plug the holes that existed in the previous law. The strength and weaknesses of the proposed changes were examined in a *static* sense, in that the only question asked was how the previous stock of cases would fare under the new set of rules. The usual response was that nettlesome limitations on class actions, or liability generally, would be cured so that the system would fall effortlessly into a new virtuous equilibrium. There is no question that just this result did occur in a large number of cases. Sensible suits that could not easily be brought as class actions before 1966 fell into that mode after that date.

But the overall analysis is more complex, for this optimistic account of legal transitions missed the *dynamic* element of the process: what new kinds of cases would be brought into the system, and how would those be solved under the newly created set of class action rules? To this set of questions, little or no attention was paid, either then or now, for it was not possible to foresee with precision the synergistic relationship between the changed procedures under class action law, and the great expansion of liability of the late 1960s and early 1970s, both by common law and by statute. Just to put the point in perspective, the mid-1960s and early 1970s saw the arrival of the civil rights statutes,<sup>1</sup> Medicare and Medicaid reforms,<sup>2</sup> the National Traffic and Motor Vehicle Safety Act,<sup>3</sup> OSHA,<sup>4</sup> ERISA,<sup>5</sup> the Endangered Species Act,<sup>6</sup> and the Environmental Protection Act,<sup>7</sup> all of which have been extensive enough to spawn their own separate specializations, which in combination account for a huge portion of modern legal practice. This legislation also brought into the fold cases that people thought lay outside of it. The rules that governed em-

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<sup>1</sup> For example, Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241 (1964), codified at 28 USC § 1447 (2000) and at 42 USC §§ 1971, 1975(a)-1975(d), 2000(a) et seq (2000); Equal Employment Opportunity Act of 1972, Pub L No 92-261, 86 Stat 103 (1972), codified at 42 USC § 2000(e) (2000); Education Amendments of 1972 (Title IX), Pub L No 92-318, 86 Stat 235, 373 (1972), codified at 20 USC §§ 1681 et seq (2000).

<sup>2</sup> Health Insurance for the Aged Act, Pub L No 89-97, 79 Stat 286 (1965), codified at 42 USC § 1395 (2000).

<sup>3</sup> National Traffic and Motor Vehicle Safety Act of 1966, Pub L No 89-563, 80 Stat 718 (1966), codified at 15 USC § 1381 et seq (2000).

<sup>4</sup> Occupational Safety and Health Act of 1970, Pub L No 91-596, 84 Stat 1590 (1970), codified at 29 USC §§ 651 et seq (2000).

<sup>5</sup> Employee Retirement Income Security Act of 1974, Pub L No 93-406, 88 Stat 829 (1974), codified at 29 USC §§ 1001 et seq (2000).

<sup>6</sup> Endangered Species Act of 1973, Pub L No 93-205, 87 Stat 884 (1973), codified at 16 USC §§ 1531 et seq (2000).

<sup>7</sup> National Environmental Policy Act of 1969, Pub L No 91-190, 83 Stat 852 (1970), codified at 42 USC §§ 4321 et seq (2000).

ployment discrimination were drafted with an eye to make sure that every case of employee termination or transfer did not become the source of a civil rights action. The goal was to create a regime in which the admitted cases of overt and invidious discrimination could no longer go unpunished. But within several years of its passage the statute expanded far beyond the scope envisioned by its most ardent supporters. Arguments that certain forms of discrimination were cost-justified (for example, differential wages in dangerous work because women had higher risk rates than men) were rejected even though these forms of discrimination count as rational (cost justified) to the economist.<sup>8</sup> At the same time, proof of motive and intention yielded to disparate impact suits, with an enormous expansion in potential liability.

Much the same history has taken place with the class action, which was introduced as a modest procedural reform in 1966, with the same emphasis on what could be done to correct past wrongs. Yet today the dominant pattern everywhere is to push the envelope. In 1966, any single collision involving multiple plaintiffs fit only uneasily within the new class action rules. Today in contrast, courts will certify classes that demand \$100 billion in damages on behalf of over four million potential class members, on exotic and controversial antitrust theories.<sup>9</sup> What makes the analysis of this area so difficult is that the most important judgments ultimately depend on multiple questions of degree, which are often evaluated separately even though they operate only in combination. The more generous theories of class actions interact with expansions in substantive liability, and their profound effects are profoundly synergistic.<sup>10</sup>

This simple example shows a real tension between the proper function of a class action and its actual application. On the former, the theory of class actions is to take a weak signal and to

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<sup>8</sup> For my account of the shift, see Richard A. Epstein, *Forbidden Grounds* (Harvard 1992).

<sup>9</sup> See, for example, *In re VisaCheck/MasterMoney Antitrust Litigation*, 280 F3d 124 (2d Cir 2001) (relying on a fraud-on-the-market theory to approve a class potentially including over four million merchants). The case recently settled for payments of one billion dollars from MasterCard and two billion dollars from Visa before any witnesses had even been deposed. For a criticism of the pressure that class actions place on defendants to settle even when the potential theories of liability are tenuous, see George L. Priest, *Class Warfare*, Wall St J A14 (May 5, 2003). For a reply see Lloyd Constantine, *The Antitrust Claims Against Visa/MasterCard*, Wall St J A19 (May 13, 2001).

<sup>10</sup> See, for example, Tonya Smits Rodriguez, Comment, *Extending the Fraud on the Market Theory: The Second Circuit's Connection Test for SEC Rule 10b-5*, 25 Iowa J Corp L 423 (2002).

*amplify* it by aggregating small claims that would not otherwise be pursued individually, lowering the cost per individual suit. In practice, many (but by no means all) class actions do more than amplify the status quo ante: sometimes they also *distort* the outcomes by imposing liabilities that are, when the transformations of substance and procedure are taken into account, far more onerous than a rule of simple multiplication would provide. The basic mechanism is to tailor the substantive law in ways that make complex individual suits amenable to class action litigation. These changes will almost always be in the direction of simplification, which allows for an increase in the number of common issues that in turn improves the odds of class certification. But those simplifications also make it easier for any individual plaintiff to prevail, resulting in excessive amplification of the original claim. Simplification reduces some of the factual issues needed to make out the claim and thus removes potential obstacles that might otherwise stand in the way of plaintiffs' recovery.

The purpose of this Article is to examine the class action on two levels. The first is a general framework of class actions, which should then facilitate a more detailed examination of class action litigation. This framework may not enable us to resolve all the knotty questions of class actions once the relevant trade-offs are identified, but at least it should help us make some sensible first approximations. Thereafter, I shall give a couple of examples of how amplification can turn into distortion in order to explain why this system can go off the rails.

Accordingly, the first section of this paper outlines, in brief compass, the general approach that I take to this, and indeed all legal matters. In it I try to develop the appropriate balance between two imperatives, each accepted as a good in its own right: the desire for personal control of each individual claim, and the need for the coordination of claims brought in related matters.<sup>11</sup> Thereafter, I use these principles to explain the ends to which class actions should be devoted and the mechanisms that might help advance their efficient use.

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<sup>11</sup> See *Amchem Products, Inc v Windsor*, 521 US 591, 615 (1997) (recognizing the competing interests of individual autonomy and systemic efficiency); See Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L Rev 811 (1995) (discussing the tension between individual justice and collective justice); Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (Yale 1987) (detailing the history of the struggle between individualism and group litigation).

In dealing with this issue, I begin the discussion with class actions in the context of the law of associations. The field is vast and covers the full range of voluntary associations, including partnerships, charitable associations, and corporations. The main but by no means exclusive field of action lies in the area of corporate law, both through derivative suits and direct actions by shareholders. There is no exact cubbyhole for these actions under Rule 23(b)(1)(B) as actions that "would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest."<sup>12</sup> That mouthful gives the uninitiated little information as to the paradigmatic case that falls within that provision. But one of the notes to the Federal Rules helps fill that gap. "In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would have hardly been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs."<sup>13</sup> (Other examples to which I shall refer include the declaration of corporate dividends or the handling of various other corporate distributions.) These cases are not the locus of the current controversy over class actions, but I turn to them first because they illustrate the situations in which class actions, owing to the fungible interests of all group members or shareholders, have the greatest utility. The purpose of the discussion is to show the formidable difficulties that remain in the execution of the class action ideal in the soil most congenial to its growth. Once that pattern is accepted, we should be in a position to explore the complexities added when class actions are removed from the associational and corporate contexts to cover claims brought under, for example, tort, discrimination, and antitrust law. The final result here is neither to praise nor condemn class actions *en masse*. Rather it is to develop some clear appreciation that the only way to overcome the imperfections of the ordinary rules of civil procedure used for the prosecution of individual claims is to invite a different, and sometimes larger, set of imperfections under the class action rubric, including the distortion risk alluded to above.

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<sup>12</sup> FRCP 23(b)(1)(B).

<sup>13</sup> Advisory Committee Notes to FRCP 23(b)(1)(B) (1966) (citing *Supreme Tribe of Ben-Hur v Cauble*, 255 US 356 (1921)).

## II. THE BASIC TRADE-OFF: AUTONOMY AND FORCED EXCHANGES

A somewhat outdated name for civil procedure is adjective law. The substantive law determines the rights and duties of ordinary individuals, and thus is the chief concern of any legal system. The “adjectival” rules of procedure are sidekicks to the substantive law because their major function is to apply claims to concrete cases whose outcomes comport with principles of the substantive law. In dealing with those substantive issues, it is often said that the bedrock principle of the common law lies in its respect for individual autonomy or self-rule.<sup>14</sup> Each person is said to be the owner of his own body, and can decide when to steer clear of certain transactions and when to enter into them. Individual autonomy allows ordinary individuals immunity from external aggression; it explains why they are allowed to acquire the ownership of property and why they are allowed to sell their labor only on terms that they regard as personally satisfactory.

These abstract entitlements, however, remain inchoate until one person claims that the actions of another have violated one of these rights. So to stick only with the simplest case: the right to individual autonomy may allow all individuals to have exclusive control over their own body, but the content of that right becomes most clear when some other individual invades that person by, say, assault and battery. Similarly, individual rights to property are crystallized only when some other person takes away or destroys what they own. The right to contract is made vivid only when some other person breaches an undertaking of the individual.

At this point we have to ask this threshold question: who holds the cause of action for damage to the person, for loss of property, for breach of contract? Now bedrock principles of substantive law start to blend in with the rules of civil procedure. The usual “right” answer is that any right of action belongs to that individual whose rights were invaded. That proposition seems to apply not only to the traditional common law claims just mentioned, but also to other forms of individual claims that apply to the violation of other forms of right created under statute. The victims of discrimination are normally entitled to sue the perpe-

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<sup>14</sup> See *Schloendorff v Society of New York Hospital*, 105 NE 92, 93 (NY 1914) (“Every human being of adult years and sound mind has the right to determine what is to be done with his own body.”); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L Rev 1057 (2002).

trators of that discrimination; the victims of monopoly practices normally hold their own claims.

My initial question about this outcome is the heretical "why?" Here it hardly counts as a logical contradiction to assert that X violated A's rights, but that the right of action for their vindication lies with B. Indeed, if B were an ideal claimant and A were hopeless at litigation, then this odd regime would have some real attractiveness not only for the Bs of this world, but for the entire system as a whole. The defendant, X, cares not one whit *who* gets his money, but only about the likelihood and magnitude of payment. If deterrence of wrongdoing is the dominant goal, then what matters is who pays and how much: never who collects, or why.<sup>15</sup> Let B be the perfect professional plaintiff, then these defendants will face higher liabilities, and thus will take greater steps to avoid harm. They will know a similar fate awaits them for violating the rights of other individuals. Accordingly, they will refrain from the deliberate invasion of these rights and will take care to avoid the accidental violation of these rights as well. The greater security in the person, in the protection of property, and in the performance of contracts is enjoyed not only by the Bs of the world, but by the As of the world as well. They might be quite pleased to be stripped of their rights, so long as they believe that their substantive rights will be protected by others that bring suit in the event of loss.

The point of this fairy tale is not to defend the proposition that holders of rights of action should not be the people who hold the initial substantive entitlement. It is rather to show that no necessary or logical contradiction arises from the simple fact of that separation. Putting the matter in this particular fashion thus requires us to think hard about the question of who gets the right to sue and why. It thus forces us to fashion a functional explanation for the unity of substantive and remedial rights, which in turn leaves open the possibility that this unity may be desirable in most cases, but not in all. The conceptual difficulty of this exercise has a real payoff in understanding some of the peculiar features of class actions. But, for the moment, I shall defer dealing with that question, and ask the simpler one: How do we make

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<sup>15</sup> For the most insistent defense of this position, see David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 Harv L Rev 831 (2002); David Rosenberg, *The Regulatory Advantage of Class Action*, in W. Kip Viscusi, ed, *Regulation Through Litigation* 244 (AEI-Brookings 2002).



a case for the “self-evident” proposition that A should have the cause of action for the violation of A’s rights?

The first point is that it is one thing to contemplate the separation of substantive entitlements from rights of action, but quite another thing to determine *who* has that right or action once that severance is made. Once A and B could be different people, it is necessary to posit some rule to decide *which* B is entitled to the right of action for the substantive violation of the rights of *each* A. How might this be done? One possibility is to assign the rights arbitrarily, but that will not commend itself to anyone. A has suffered a substantial loss while B gets an undeserved windfall. It looks as though we should rather have the damage payment (if such it be) neutralize the loss than give it to someone whose name is drawn out of a hat. Indeed, the Aristotelian conception of corrective justice,<sup>16</sup> which still has widespread support today, goes to the opposite extreme: far from random assignment of claims, it treats the correction of injustice as critical to the entire legal enterprise. It is absolutely essential that the wrongdoer pay the victim, no matter what the abstract rules of deterrence might provide.

Even if we reject random assignment, we might with an eye to efficiency think that the right of action for the violation to A could be auctioned off by the state, so that the winning bidder may bring the suit and keep the proceeds of settlement or litigation. After all, auctions are used all the time to sell paintings and tulips, so why not to sell causes of action for broken legs and undelivered goods? But the language of an auction invites other questions. The auction presumably involves some form of payment for the right of action. It therefore becomes necessary to ask, who gets the proceeds of the auction? One possibility is to pay A the auction proceeds as compensation for the wrong he has suffered. That solution is less than ideal if the government has to bear the costs of running the auction, without recovering its overhead expenses. Yet if in the end the proceeds go to A, then why not let him conduct the auction to begin with? And if he could do that, then why not treat him as owner of the claim who may decide to keep the claim, auction it off, or enter into some special risk-sharing arrangement, such as a contingent fee contract with a legal specialist.

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<sup>16</sup> See Aristotle, *Nicomachean Ethics*, in Jonathan Barnes, ed, 2 *The Complete Works of Aristotle* 1729, 1781–97 (Princeton 1984).

But suppose the state decides to run this auction from the center. Certainly A should be allowed to bid in order to recover the right to sue on his own behalf. It is likely, moreover, that A will be an impressive entry into the bidding wars. Prosecuting any lawsuit for the violation of A's rights will require the cooperation of A. If liability turns on whether X struck A in self-defense, then A's testimony will be critical to overcoming this defense. In general, A's cooperation is needed for all aspects of the case, but if he gains nothing from suit, he has no incentive to cooperate with the winning bidder. Other individuals will therefore discount their bids by the attendant costs of securing cooperation. A does not labor under this disability and therefore should have an inside track for the winning bid, at least if he has the resources in question. But of course he might not. The harm caused by X could have drained him of cash resources, and even our sophisticated capital markets do not allow a potential cause of action to serve as 100 percent collateral for a loan. (No risk-neutral bank could lend even \$10 on an asset worth \$1,000 if that value consists of a 50 percent chance of \$2,000 and a 50 percent chance of \$0. The high variance in payoffs leaves the bank with a huge downside and no participation in the upside.)

The auction rule does not seem to be all that attractive in the abstract. This situation does not involve individuals who auction their own property, keeping the proceeds for themselves. Rather, it is a state device for deciding who gets the right to own the cause of action in the first place. Many individuals, most notably Ronald Dworkin, have suggested that all property in the state of nature be auctioned off by the state to the highest bidder.<sup>17</sup> But that suggestion also loses its appeal once we realize how difficult it would be to organize its operation before all potential bidders died of starvation. We (by which I mean all early societies without exception) therefore adopt a rule of first possession for the acquisition of land and chattels from the state of nature.<sup>18</sup>

Reluctantly, we reach a similar conclusion when talking about the auction rule. A rule that assigns the cause of action to the victim of the wrong is less expensive to operate than any auction that we might set up. It enjoys legitimacy with a populous that quickly tires of strange mind games played by fevered law

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<sup>17</sup> Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 65–71 (Harvard 2000).

<sup>18</sup> See John Locke, *A Second Treatise of Government* Ch 5 (Liberal Arts 1952) (making just this point in favor of the labor theory of ownership).

professors; it usually ends up giving the right of action to an individual who is in a good position to prosecute the suit himself; and, most critically, it allows that person to enter into side contracts with other individuals (call them lawyers) for the prosecution of that suit if it turns out that they do not have the skills to do it themselves. Indeed, in principle it could allow the individuals to sell the claims to other persons, even by auction, if that seems appropriate, as it often is in cases that involve the collection of receivables. But most often the contingent fee arrangement is the vehicle of choice because it gives access to adjudication to aggrieved persons with both limited wealth and limited ability to monitor the conduct of their lawyers. The bottom line here is that the initial allocation of the right of action to the person who suffers from its breach appears on examination to comport not only with the shadowy dictates of natural justice, but also to have real efficiency justifications that no global auction can duplicate. It quickly and clearly assigns the right of action in question to a determinate owner, regardless of its substantive content; and that person can make voluntary dispositions of the cause of action, including contingent fee or other sharing arrangements, in the event that he is not the ideal claimant. Auctions are possible, after a fashion. But they are run not by the state, but by the owner of the cause of action, where they need not take the form of a sale but follow the lines of the ubiquitous contingent fee arrangement.

Once we have reached this simple empirical conclusion, then we can ask the painful but necessary question: Is it good in each and every case? As often happens in exercises of this sort, our mental map of the transactions in question takes a particular form that is nowhere required by the statement of the problem itself. In this case, our usual view that a cause of action flows from the violation of the substantive right takes on the following salient features. First, there is one and only one person who is victim of the violation of the right. It is B, the defendant, who has taken A's plow; no other plow has been taken. The value of the thing is large not only in absolute terms but also relative to the costs A has to incur to recover that plow from B. The legal system, moreover, will yield reliable results, such that A can prosecute his suit for a small cost, with some confidence that he will win on a meritorious claim.

Once we make these implicit assumptions explicit, we can identify why the system of private rights is workable. By adopt-

ing an inflexible rule that each owner of property retains the right of action for its theft or destruction, we have eliminated a major stumbling block in organizing the legal system. A, of course, must still prove that the plow was his, for the defendant will win if he can show that he lent the plow to the plaintiff with the understanding that it would be returned on demand. But no system of procedure can eliminate that factual dispute. Our rule only gets rid of the distraction that arises when some third party is endowed with this cause of action. That said, the plaintiff here will act normally as a self-interested person, which means that he will bring suit only if he estimates at the outset that his expected gain from the suit will exceed his expected costs. Both the cost of the legal system and the reliability of its processes enter into the plaintiff's crude calculations. Thus if the plow is worth \$1,000 and the cost of suit equals \$100, then, if recovery is certain, A will sue, for a net \$900 leaves him better off, even if he is worse off than if the plow had never been taken. But this calculation ignores the risk of loss. If A thinks that he has only a 75 percent chance of winning the case, his expected gain drops to \$650, given the \$750 he expects to recover and the \$100 cost of the suit (i.e.,  $0.75 \times \$1,000 - \$100$ ). But let the costs go up to \$500, and the chances of success drop to 40 percent, and all of a sudden, the suit does not look attractive no matter how sound the underlying cause of action: a \$400 recovery is less than \$500 cost.

We are now in a position to understand the origin and appeal of the class action in some, but not all cases. Quite simply the unthinkable becomes thinkable when the basic scenario changes—that is, what would otherwise be an unprofitable suit, given the low probability of success and high costs of bringing the suit, becomes a profitable one. All that we need to do in order to make this happen is to alter three parameters. The first of these is that the number of individuals similarly situated with respect to a common defendant is very large. The second is that the loss sustained by each individual is relatively small. The third is that the administrative costs of individual suits turn out to be quite high. In these circumstances, we can now see the consequences of a rule that allows each aggrieved individual to bring his own suit. Quite simply, he will not accept this invitation if the costs of litigation exceed the level of recovery, which could easily happen with the high price of lawyers. Within the framework of voluntary transactions, we might expect A to sell his claim, but any

individual buyer will face all the problems that beset A and still have to enlist A's support in order to make his claim good.

The obvious escape hatch to this impasse in a voluntary world is for all the individuals to pool their claims together (under the rules of permissive joinder, as authorized under Rule 20 of the Federal Rules<sup>19</sup>) in order to take advantage of what they hope will prove to be economies of scale. These rules limit the use of permissive joinder to cases in which the parties pursue their rights "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences."<sup>20</sup> But this limitation on the use of permissive joinder hardly binds at all, for unless this condition is satisfied the individual plaintiffs have little reason to pursue cooperative activities. After all, the hope of parties in a permissive joinder situation is that the cost of suit will rise less rapidly than the value of the amalgamated claims, so that in union they will find strength. But typically they quickly learn that these negotiations are fraught with difficulty, for someone has to put together the pool that divides expenses and recovery, and someone has to decide how much each claimant should contribute, both initially and thereafter. Since we are, by hypothesis, still in a world of free bargaining, nothing compels each person to accept a pro rata share of expenses and gains upon joining into the pool in question. It is possible for individuals to hold out for a larger share of the gain on condition of joining the business. The process could take place quite subtly, as when one party insists on a minimum level of recovery out of the common pool, which leaves other people at greater risk and could induce them to make the same demands, as it were, until 150 percent of the pie is fully accounted for.

What makes this problem so difficult to deal with, moreover, is that holdouts, wishing to avoid rebuke, often take concealed rather than brazen approaches toward individual aggrandizement. They assert that their claim really is worth a great deal more than anyone else thinks and calibrate their demands to the perceived value of their interest. Bargaining breakdown is high in these circumstances, which is just what we should expect. We can think of the defendant, as seen through the eyes of members of the plaintiff class, as though he were a common pool asset (say oil and gas under the land of multiple landowners), and the plain-

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<sup>19</sup> FRCP 20(a).

<sup>20</sup> *Id.*

tiffs each as claimants to some fraction of the pool. Often it happens that the surface owners cannot agree on any appropriate split of expenses and recovery, so each takes an independent course of action that leads to excessive costs of extraction, the necessary byproduct of which is the reduction of the total oil and gas taken from the pool. Permissive joinder in these cases can work in some circumstances, but often it does not. It is these failures that explain the rise of the class action.

### III. CLASS ACTIONS FOR VOLUNTARY ASSOCIATIONS AS A MODEL

To see how the argument works, it is best to examine it in an environment that is most hospitable to the class action, that is, those situations where all plaintiffs have interests that have been crafted the same under the substantive law. Suppose that the question at hand is disputed behavior in a corporation, partnership, or some voluntary association. A common version of the complaint is that a key corporate officer has purchased a collective asset in a cozy transaction for a sum well below its market price. The remedy in this case is to unravel the transaction so that the asset is returned to the corporation and the cash to the individual buyer. (I ignore all complications with the time value of money, subsequent transactions, and the like.) The question is: Who is in the best position to maintain the suit to undo this transaction? In principle the action belongs to the corporation; but, notwithstanding its lofty legal status, a corporation has no independent powers of self-generation. Usually the directors act as "its" agents and in this case they have fallen asleep at the switch. So at least one shareholder has to step up to the plate for the corporation (in other words, for the other shareholders in question). So how is this transaction organized?

One possible way is to think of a permissive joinder suit among shareholders, but this fails for a number of critical reasons. First, the chronic coordination problems can arise with shareholders every bit as much as they can arise with surface owners. Second, the proposed relief is indivisible in that it benefits one shareholder as much (or as little) as the next. As noted earlier, the proper procedure is to unravel the transaction so that the thing is restored to the corporation, usually with its purchase price refunded to the purchaser. That form of relief benefits *all* shareholders whether they participate in the litigation or not: it

is not just the case as “a practical matter,” as Rule 23 says;<sup>21</sup> rather it is as a necessary matter deriving from the structure of the corporation itself. In this setting, we now worry that some shareholders will simply choose to free ride on the efforts of others. They will bear none of the costs of running the suit (and the consequent risk of failure). Yet they will stand to gain equally with all other shareholders once the corporation has recovered the asset in question. The danger, therefore, in this situation is not that of excessive and ungrounded suits by rapacious class action attorneys. Unless something is done to fix up the imbalance, the real risk is that serious wrongdoing at the corporate level will go unchecked for want of a champion to deal with the problem.

The standard response has been to craft the derivative action whose origin has been neatly summarized as follows:

In these circumstances, the shareholders’ injury (diminution in the value of their shares) derives from the fact that the alleged misconduct has reduced the value of the corporation’s assets. Further, this type of derivative injury is suffered *in common* by all shareholders according to their proportionate interest in the corporation. The shareholders’ derivative suit was created by equity courts to permit a shareholder to vindicate wrongs done to the corporation as a whole that management, because of either self-interest or neglect, would not remedy.<sup>22</sup>

So we can now start to see how, at least in some core cases, the class action operates as a system of forced exchanges that works for the benefit of the individuals who are subject to the state-generated coercion to join a common cause of action. At this point we are not talking about class actions across the board, but solely one special instance of them, the derivative suit, (or its analogue for associations and partnerships). These lawsuits are by no means easy affairs to operate, even in the best of times. The derivative suit works for the benefit of shareholders, but it does not protect any creditor interests. In some cases the mechanism will falter if individual shareholders buy and sell shares in the interval between the time that the illegal corporate act was com-

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<sup>21</sup> FRCP 23(b)(1)(B).

<sup>22</sup> Jesse H. Choper, John C. Coffee, and Robert C. Morris, *Cases and Materials on Corporations* 785–86 (Little, Brown 3rd ed 1989).

mitted and the time that it was discovered (causing later investors to have a greater return than earlier investors). But for these purposes, it is the simple pattern that best illustrates the potential of the class action.

The basic logic is this: the knight who steps forward to maintain the suit is paid by the corporation out of the winnings of the action. This simple expedient at first look has all the right incentive features. In the first place, once we pierce the corporate veil, we discover that the champion has worked for the benefit of all the other shareholders. Since these individuals all hold fungible interests, we can treat their fractional interest in the corporation as marking their precise stake in the outcome of the litigation. It is not as though the claim is, in the words of Rule 23 "typical" of those of other class members.<sup>23</sup> It is that these claims are all "identical," so that from a structural point of view we cannot conceive of a better class representative.

At this point the conclusion clearly follows: once the action is successfully brought, the payment issue can be solved by ordering the corporation (in other words, the shareholders) to make an appropriate payment to the outside champion. If the applicable rules so allow, the corporation in turn could recover some of those fees from the wrongdoer under a version of the winner-takes-all method. But that wrinkle should depend more on the fee shifting rules generally, and not on the particulars of class actions. Each member of the class bears the same fractional interest in the payment as he obtains from the successful recovery, so that the rule in question divides up the gains from the transaction in accordance with their respective investments. No one is allowed to opt out of this particular class,<sup>24</sup> which is just as it should be, because the nature of the relief—restoration to the corporation—works to his benefit. Why, then, would anyone want to back out when the alternative is to get nothing at all?

#### IV. HOW CLASS ACTIONS DISTORT THE SUBSTANTIVE LAW

##### A. Invariance in Aggregation

Thus far it looks as though the derivative suit is the world's perfect class action in that it forces all shareholders to deviate

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<sup>23</sup> FRCP 23(a).

<sup>24</sup> FRCP 23(c)(2).



from their initial property holdings in ways that leave them better off than before. In practice this conclusion is, of course, too optimistic because the complete package requires us to develop rules for the selection and compensation of attorneys, which is not so easily done. I shall pass by these issues here, in order to pursue the central theme of this paper, which asks whether, and if so how, the aggregation of individual claims within the class-action format leads to a distortion of the substantive law that works typically in favor of the plaintiffs, even within the class action-friendly confines of these corporate and associational cases.

At this point, the vital concern involves the interplay between substantive and procedural law in dealing with class actions. As noted earlier, treating the class action as a procedural rule carries with it profound implications. Quite simply, as a matter of theory, the class action functions solely as an aggregation device to allow the pursuit of claims that could otherwise not be brought because of the high rate of administrative costs relative to the anticipated recovery. As the Supreme Court held in *Amchem Products, Inc. v Windsor*,<sup>25</sup> the central purpose of the class action "is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."<sup>26</sup> In principle, therefore, we should hold the substantive law constant regardless of whether the plaintiffs proceed by individual action, permissive joinder, or class action. Thus, the class format does not alter the terms of the basic cause of action; nor does it introduce some new defenses, or eliminate others, in the prosecution of the case. The whole point here is to avoid any extraneous influence that would give parties a reason to either bring or refuse to bring a class action. The substantive outcomes should not be distorted by the choice of procedural vehicle.

This invariance constraint has powerful roots in other substantive areas of law. One common theatre in which the point is raised is bankruptcy.<sup>27</sup> Ordinary firms have relationships with multiple creditors antecedent to and outside of bankruptcy. The

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<sup>25</sup> 521 US 591 (1997).

<sup>26</sup> Id at 617 (quoting *Mace v Van Ru Credit Corp*, 109 F3d 338, 344 (1997)).

<sup>27</sup> See Douglas G. Baird, Thomas H. Jackson, and Barry E. Adler, *Cases, Problems, and Materials on Bankruptcy* Ch 2 (Foundation 2001).

ideal bankruptcy system allows for the coordination of multiple claims, the marshalling of the defendant's assets, and a key decision over whether to liquidate or reorganize the basic business.<sup>28</sup> These issues are hard enough to resolve in their own right, and the ideal set of procedural rules is not one that induces parties to go into or to avoid bankruptcy solely on the grounds of the relative procedural advantages of the various fora. Thus, it would be quite dangerous if the legal position allowed a plaintiff-creditor to defeat a statute of limitations defense available in state court by filing for bankruptcy. At this point the plaintiff-creditor may well choose an inefficient place to litigate in order to gain a partisan advantage. Defendants will have equal and opposite incentives, and the whole system could easily grind to a halt, for in both cases the private advantage creates a social disadvantage.

Likewise, in dealing with the regulation of private land use disputes between neighbors, it is important to keep the actions (often class actions) that the state can bring on behalf of some neighbors against others parallel to the ordinary tort actions that some neighbors can bring against another. Let the state be given substantive advantages not available to the individual plaintiffs, and enforcement will migrate into public hands even if the private law offers systematically superior substantive solutions on the issues. Likewise, if the substantive private law is systematically more advantageous to plaintiffs, they now have an incentive to resist more efficient class actions solely to obtain partisan advantages. In all these cases, then, we should be careful to see that the amalgamation of claims does not alter the balance of power between the two sides except insofar as it overcomes the transactional obstacles that justify the use of the class action in the first place. It is for just this reason that zoning rules are so often problematic. In *Lucas v South Carolina Coastal Commission*,<sup>29</sup> the state sought to prevent any construction on a beachfront lot by regulation.<sup>30</sup> No private neighbor would be able to obtain an injunction to that effect, but would have to purchase a restrictive covenant. The switch from the private to the public forum should not result in a fundamental change in the ground rules, and the strength of that decision is that it prevented that maneuver from happening in the most egregious fashion, but left open the possi-

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<sup>28</sup> See Douglas G. Baird and Edward R. Morrisson, *Bankruptcy Decisionmaking*, 17 JL, Econ, & Org 356 (2001).

<sup>29</sup> 505 US 1003 (1992).

<sup>30</sup> Id at 1007.

bility of sustaining lesser forms of regulation without compensation. As with bankruptcy, the switch in forum should not result in a radical change in the rules of compensation.<sup>31</sup>

This program is, moreover, easy to implement in connection with the ordinary derivative suit against private associations and corporate defendants. Here all the plaintiffs are in precisely the same position, so that the court need only ask itself how it would resolve the suit if all the shares in question were held by a single person who had an action against members of the board of directors. But the concerns alleviated here become much more serious in the modern class action in which amalgamation and distortion could go hand in hand.

## B. Class Actions for Damages

This invariance proposition is, however, sorely tested in the context of the modern class action, which arises outside the corporate and association situations where what is sought is a restoration in cash or kind to the association or corporation. Right off the bat it should be clear that the efficiency of the class action is necessarily reduced as it is carried over into these new situations: no longer do we have any fungible corporate shares that certify the indivisible nature of the class relief and the parallel nature of the individual claims; additionally, it is no longer necessary to limit the class suit to a single (corporate) defendant, which increases the complexity of its administration. The first of these elements falls to the wayside because there is no legal entity to which the damages in question can be paid. When someone is run over by a truck, gouged by a monopolist, or victimized by discrimination or consumer or securities fraud, he sustains his loss in his individual capacity. The usual demand is for cash relief, to be paid to each victim separately. These individuals' claims, moreover, may be analogous in some ways but different in others.<sup>32</sup> The individual plaintiffs may have been sold goods at different times, for different prices, by different salesmen. Shareholders may have bought and sold stocks at different times in the pe-

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<sup>31</sup> For my discussion of these issues, see Richard A. Epstein, *Lucas v South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan L Rev 1369 (1993); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v South Carolina Coastal Council*, 26 Loyola LA Law Rev 955 (1993).

<sup>32</sup> See, for example, *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 288 F3d 1012, 1018 (7th Cir 2002) (demonstrating Judge Easterbrook's merciless dissection of such claims).

riod before a takeover bid is announced. Often the claims involve individuals in different states with different substantive laws. The claims may have some elements in common, but also have some important differences. Often the salience of these differences and similarities may not be fully apparent at the outset of the suit, but only become apparent once discovery has been undertaken, or even, perhaps, only at trial. The upshot is that the critical decision on class action certification often has to take place prior to any genuine assessment as to what the ultimate shape of the claims will be. In this regard, the identification of appropriate class members could easily shift over the life of the litigation.

To their credit, the current class action rules appear to recognize the difference in context. The rules contain no provisions for opt-outs for Rule 23(b)(1) and Rule 23(b)(2) class actions, where the relief is indivisible, but recognizes them for class actions brought under 23(b)(3): "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."<sup>33</sup> Newspaper notification will not work when names and addresses are available.<sup>34</sup>

The additional layers of complexity in ordinary damage class actions do not eliminate any of the difficulties of class administration in the context of derivative actions. But they do add a number of additional elements that require some closer examination. Owing to the want of parallelism, the question arises of whether all persons similarly situated—itself a term of art—must become members of the class whether they want to or not. At least one strand of thought, championed most conspicuously by Professor David Rosenberg, claims that this mandatory approach is correct, and holds, in effect, that the conscription of individual plaintiffs into the class action really works to their benefit, such that they have no reason to opt out of the class to control their own suit.<sup>35</sup> The law can make that judgment for them with lower cost and higher reliability.<sup>36</sup> Indeed in one sense his position goes a step further. Since the real question is deterrence of defendants, he takes the view that there is no particular reason to

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<sup>33</sup> FRCP 23(c)(2).

<sup>34</sup> See *Schroeder v City of New York*, 317 US 208, 212–13 (1961).

<sup>35</sup> See Rosenberg, 115 Harvard L Rev 831 (cited in note 15).

<sup>36</sup> See Issacharoff, 77 Notre Dame L Rev 1057 (cited in note 14) (exploring legal standards for determining propriety of mandatory class actions).

want to distribute the money to any members of the victim class.<sup>37</sup> Their protection comes in a different form: stronger deterrence reduces the occasions on which compensation is required.<sup>38</sup> At this point, the entire system becomes rickety because the contours of a "mass tort" are far from clear in the abstract. With the asbestos litigation, for example, different individuals were exposed under different working conditions to fibers produced by different manufacturers at different times. Some of these are exposure-only cases; others involve physical harm, which might be caused by other agents.<sup>39</sup> In some cases it might prove hard to decide whether certain workers should be included in a class or not. That decision is momentous enough when the stakes are how the litigation should proceed. But the boundary condition would become far more salient if class members received no compensation at the same time individual tort claimants could get full compensation. At this point, the class action ceases to be a simple aggregation device. It becomes an on/off switch for vitally different legal regimes.<sup>40</sup>

Even if we reject (as current law manifestly does) the view that ex post compensation is irrelevant, powerful implications still flow for the governance of class action litigation. This position presupposes that the judgment should be collective and not individual, such that a person who objected to the strategies pursued by the class would be required to remain a class member on the ground that the economies of scale in running the class action would leave him better off than before. There is obviously a powerful paternalistic streak in this argument. Surely a consumer class that has 100,000 potential members could operate if some fraction of them decided to opt out, perhaps to form a second class under different leadership. It also becomes hard to insist on their participation in the class if these dissenters have fundamental strategic disagreements with the lawyers and/or class committee that take direct control over the litigation. It may well be too expensive to try to recruit individuals into the class, but the transaction costs do not preclude a default position that preserves the individual right to opt out on receipt of notice, especially if they wish to join smaller, more cohesive classes. This issue could prove

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<sup>37</sup> Rosenberg, 115 Harv L Rev at 832-33 (cited in note 15).

<sup>38</sup> Id at 841-43.

<sup>39</sup> See *Amchem*, 521 US at 624.

<sup>40</sup> For further discussion, see Richard A. Epstein, *Implications for Legal Reform*, in W. Kip Viscusi, ed, *Regulation through Litigation* 310, 347-48 (AEI-Brookings 2002).

of especial importance in those situations where state-based classes have greater internal coherence than nationwide classes. There is already some authority that indicates that state-based classes should be the preferred norm insofar as the variations in state law reduce the predominance of common issues and place additional strains on the operation of the class.<sup>41</sup> Nationwide classes are, of course, more plausible for causes of action based on federal law, but highly troublesome when state and federal courts are joined in the same master complaint. The uniformity of the federal claim is compromised by the wide diversity in the various state causes of action.

Stated otherwise, the situation with individual claims differs fundamentally from the derivative suit in that it is no longer the case that the provision of a remedy to one person necessarily provides a like remedy to another. When one person opts out of the class to bring his own suit for money damages, all other individuals may proceed under the class rubric if they please. The key point here is to make sure that those who hang back do not get the benefit of the offensive use of *res judicata* should the class action be successful, while reserving the right to bring their individual suits anew should that action fail.<sup>42</sup>

Once individuals are allowed to opt out, they must be able to receive some notice, by publication or personal mailing, about the terms and conditions under which the class action will proceed, as Rule 23 provides.<sup>43</sup> In many cases where the individual sums for the class are small (as with the miscalculation of interest rates on small personal loans), most people will choose to stay put, assuming that they pay any attention to the matter at all. But, nothing about the current structure of the rules of civil procedure limits ordinary class actions to small overcharge cases. Huge tort actions and substantial antitrust claims may also be

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<sup>41</sup> See, for example, *In re Rhone-Poulenc Rorer, Inc.*, 51 F3d 1293, 1298 (7th Cir 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (Columbia 1973)).

<sup>42</sup> See, for example, *Parklane Hosiery v Shore*, 439 US 322, 332-33 (1979) (holding that the defendant corporation was collaterally estopped from relitigating in a private securities action an issue resolved against them in a prior suit brought by the government). Note that the use of offensive collateral estoppel follows the 1966 reforms. In principle, this should incline plaintiffs to steer clear of the class action in the hopes that they can take advantage of a favorable judgment if the first plaintiff succeeds but litigate anew if he does not. But the actual calculations are much more complicated than this simple model suggests. The party who hangs back may be denied the use of offensive collateral estoppel if too many cases go the other way; or the individual suit may not be worth bringing even if preclusion takes place on one element of a complex case.

<sup>43</sup> FRCP 23(c)(2).

brought in this form, and here the choice of whether to opt out is far weightier because the damages are anything but "paltry." In these cases, moreover, individual plaintiffs may well decide to commence their suit before any class action could begin, so that it is highly undesirable that a plaintiff be bound to the class unless at the very least he receives actual notice of the suit, and probably not even then unless he agrees to a stay of his own litigation pending the outcome of the class action. After all, if two individuals brought suit, neither would be stopped in his tracks simply because he had notice of the other suit. Some evidence of collusive or opportunistic behavior would seemingly be required.

The issue of class membership has, moreover, important consequences for the defendant, although it is difficult in the abstract to say which way they cut. On the one hand, corraling all the plaintiffs in an individual class action reduces the litigation costs for the defendant and avoids the possibility of follow-on suits (from which the plaintiffs can learn from earlier strategic mistakes even if they do not have the benefit of *res judicata*). On the other hand, the creation of a huge nationwide class makes it impossible for a defendant to diversify its litigation portfolio. The litigation may easily assume what some courts have called "you-bet-the-company" proportions<sup>44</sup> and lead to what has been called perhaps somewhat loosely coercive settlements.<sup>45</sup> The high stakes may well induce some juries, and indeed some judges, to adopt a compromise position that is ruinous to the defendant's interest, and the possibility of error in so complex a lawsuit is something that an innocent defendant should greet with dread. After all, a 10 percent exposure to a ten billion dollar verdict counts as real money, even today.

The amalgamation of individual damage claims raises yet another question of no simple proportions. Which claimants, holding which claims, should be eligible to participate in a class action in the first place? That problem was solved almost by definition in the derivative suit because each plaintiff occupied a position that was largely indistinguishable from other members of the class. The issue of class membership is solved in the ordinary action by making each shareholder a member of the class to the extent of his own interest. But with separate claims the matter

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<sup>44</sup> *Szabo v Bridgeport Machines, Inc.*, 249 F3d 672, 675 (7th Cir 2001) (noting that class certification would turn a \$200,000 dispute into a \$2 million dispute).

<sup>45</sup> Jack H. Friedenthal, Mary R. Kane, and Arthur R. Miller, *Civil Procedure* § 16.7 (West 2d ed 1993).

becomes far murkier. The key trade-off is easy to state. The gains from amalgamation increase as the claims are more similar to each other; but these economies of scale are much reduced to the extent that individual claims differ from one another on some material point.

In 1966, the Federal Rules of Civil Procedure made a conscious effort to liberalize the scope of the class action by adopting a posture that, at bottom, asks whether “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.”<sup>46</sup> This question of predominance of common issues covers not only those issues relevant to the plaintiff’s skeletal *prima facie* case, but to the full range of claims or defenses raised in the case.<sup>47</sup>

That predominance requirement is generally satisfied in cases of antitrust violation where all sales within a given period were made as part of the same business scheme to the same set of plaintiffs.<sup>48</sup> The level of perceived overcharge (assuming that the members of the plaintiff class have standing to sue, which may be problematic in some cases of “indirect purchasers”)<sup>49</sup> is roughly constant, so that once the difference between the monopoly and the competitive price is determined for one party in one transaction, then it is largely determined for all.<sup>50</sup> This argument presupposes that a single scheme controlled multiple separate transactions, such that the outer limits of the class could well be sensitive to changes in the defendant’s pricing policies or its relationships with other firms in the industry. There remains the constant gnawing problem that distinct state law claims may well be governed by different laws that make their amalgamation harder to justify.<sup>51</sup> But in general these cases will be amenable to some level of class formation. Even if all potential plaintiffs do

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<sup>46</sup> FRCP 23(b)(3).

<sup>47</sup> See *Amchem*, 521 US at 622 (noting that the predominance requirement of Rule 23(b)(2) also extends to any defenses to the basic cause of action).

<sup>48</sup> *In re Potash Antitrust Litigation*, 159 FRD 682, 697–98 (N D Minn 1995) (discussing the presumption that price-fixing conspiracies have a common impact on all purchasers of the product in the affected market).

<sup>49</sup> See *Illinois Brick Co v Illinois*, 431 US 720 (1977) (barring indirect purchasers from using a pass-on theory to recover treble damages for price-fixing under the Clayton Act).

<sup>50</sup> See, for example, *Potash*, 159 FRD at 697–98 (calculating damages in an antitrust action by determining overcharge and then multiplying by the unit or dollar volume each plaintiff purchased from the defendant).

<sup>51</sup> See *Phillips Petroleum Co v Shutts*, 472 US 797, 821 (1985) (rejecting the application of local state law to a transaction with little relation to the forum in order to satisfy the procedural requirement of a common question of law).



not fit snugly within the confines of a single class, it is easy to imagine a couple of subclasses that will cover the vast bulk of cases.

The problem of class actions becomes much more difficult in dealing with tort claims, including mass tort claims. The original notes to the 1966 Federal Rules of Civil Procedure made it seem doubtful that any ordinary tort claim could be subject to class actions:

“A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability would be present, affecting the individuals in different ways.”<sup>52</sup>

Thus, even if the same car hit two individuals at the same time, the issues in the two cases could overlap but not be precisely the same. Much here could turn on the theory of liability. If liability were strict, so that the only question was whether this defendant hit both plaintiffs, then the issue could easily be common between the parties. But if liability is based on negligence, then the defendant might have been negligent with respect to the plaintiff in plain view but not with respect to one that was not within his line of vision. Or some jurisdictions could adopt a principle of “transferred negligence,” such that the defendant who was aware that one plaintiff was in the field of danger is liable in negligence to a second plaintiff who could have been spared injuries if the defendant had taken only those precautions needed to deal with the plaintiff in plain view.

The situation with mass torts, of course, only becomes more difficult when the defendant has engaged in a particular line of business over a long period of time, such as the selling of asbestos or a pharmaceutical product. In these cases, we lose the Aristotelian unities of time and space, so that one might think that only rarely would the class action be appropriate in suits of this sort under the Federal Rules. But a set of ambitious certifications in a wide variety of cases, moving from blood transfusions to harm from cigarettes, indicates how the law has migrated from initial cautious attitudes in these cases to a far more aggressive stance. A similar migration can be found in cases involving misrepresentations, where the 1966 attitude toward misrepresentations,

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<sup>52</sup> Advisory Committee Notes to FRCP 23(b)(3) (1966).

which was prepared to allow many actions where the separate cases had a “common core,” but not in those instances where “although having some common core, a fraud case may be unsuited for treatment as a class action if there were material variation in the representations made or in the kinds of degrees of reliance by the persons to whom they were addressed.”<sup>53</sup> The current attitude seems to be that even if the common issues do not dominate the lawsuits, the appropriate response is to use the class action for those issues that are common and, thereafter, to allow the cases to be tried or settled separately: strategic advantage to the plaintiff.<sup>54</sup>

This brief discussion shows how difficult it is to decide at the outset of the lawsuit whether the common issues are sufficient to dominate the separate ones. What is the cart and what is the horse? Normally we would like to know whether plaintiffs are similarly situated before we are called upon to decide what legal theory is relevant in their case. But now it looks as though we cannot decide whether two or more claims are dominated by common issues until we decide which theory of liability is invoked. The problem, moreover, only gets worse when the plaintiffs seek to pursue class actions and unities of time and place are not strictly observed.

For example, in product liability actions the defendant may have sold a given drug in different tablet sizes with different warnings in different locations over different times. It could be that the jurisdiction in question uses a strict liability theory for any defects, at which point the variations in the level of care may not matter. But, if the action relates to the duty to warn, a warn-

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<sup>53</sup> *Id.*

<sup>54</sup> See, for example, *Robinson v Metro-North Commuter Line*, 267 F3d 147, 167–68 (2d Cir 2001) (finding that “litigating the pattern-or-practice liability phase for the class as a whole would reduce the range of issues in dispute and promote judicial economy”); see also *Valentino v Carter-Wallace, Inc.*, 97 F3d 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.”). FRCP 24(c)(4)(A) in turn provides that “an action may be brought or maintained as a class action with respect to particular issues....” If FRCP 24(c)(4)(A) is read to allow class action status to be determined issue by issue, then it makes a dead letter of the overall predominance requirement for FRCP 23(b)(3) class actions, which is why this provision is preferably read to provide a mere “housekeeping rule” that does not upset the requirements for a FRCP 23(b)(3). See *Castano v American Tobacco Co.*, 84 F3d 734, 745 n 21 (5th Cir 1996). The Supreme Court in *Amchem* appears to look at predominance in connection with the full range of anticipated issues raised in the case. See *Amchem*, 521 US at 622–23.

ing that was effective in 1980, when the knowledge base was more limited, may turn out to be insufficient in 1990 when the level of scientific knowledge became greater. The situation gets no easier if it turns out that the role of intermediate parties, or of the plaintiffs themselves differs in some material way that is found relevant to the lawsuit. The individual incidents could easily take place in different states.

### C. Aggregation and Distortion

The difficulties with respect to damage class actions quickly raise the question of aggregation versus distortion. One possible approach is to let the chips fall where they may. The first thing that the court does is to find out the full level of heterogeneity among class members by taking the substantive law as it is, and not as it might become. If the differences are too large, then the class action fails, either because there are no “typical” claims to meet the threshold requirements for any class action under Rule 23(a) or because it is not possible to meet the predominance requirement under Rule 23(b)(3).<sup>55</sup>

Just this remorseless reading of the class action law was found in Judge Easterbrook’s forceful opinion denying both nationwide and statewide class certification for breach of warranty claims for Firestone and Bridgestone tires that performed poorly and were subject to recall.<sup>56</sup> The initial question in these cases concerned the choice of law issue. The plaintiffs in Bridgestone/Firestone argued that all these recall cases should be treated as contract, not tort, cases, so that they could all be adjudicated under the substantive law of each defendant’s principal place of business.<sup>57</sup> The traditional rule which ties contract claims to the place where the consumer resides, typically the place of sale, would obviously place a major obstacle in the path of a nationwide class action.<sup>58</sup> Judge Easterbrook found that the plaintiff’s reinterpretation of Indiana choice-of-law rules was clear: Indiana would apply its own consumer protection laws to any transaction involving an in-state consumer who purchased goods within the state.<sup>59</sup> From that point, the nationwide class was headed toward extinction: “It follows that Indiana’s choice-of-law

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<sup>55</sup> For a discussion of the two-tiered approach, see *id.* at 613–14.

<sup>56</sup> *Bridgestone/Firestone*, 288 F3d 1012.

<sup>57</sup> *Id.* at 1017.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

rule selects the 50 states and multiple territories where the buyers live, and not the place of the sellers' headquarters for these suits."<sup>60</sup>

What about a statewide class? In the next breath, Easterbrook looked over the substantive law in light of the many different factual patterns and held that the differences between the proposed class members' cases prevailed:

About 20% of the Ford Explorers were shipped without Firestone tires. The Firestone tires supplied with the majority of the vehicles were recalled at different times; they may well have differed in their propensity to fail, and this would require sub-subclassing among the owners of Ford Explorers with Firestone tires. Some of these vehicles were resold and other have not been; the resales may have reflected different discounts that could require vehicle-specific litigation. Plaintiffs contend that many of the failures occurred because Ford and Firestone advised the owners to under inflate their tires, leading them to overheat. Other factors also affect heating; the failure rate (and hence the discount) may have been higher in Arizona than in Alaska.<sup>61</sup>

And so it goes. A clear knowledge of a fair sampling of the probable issues in the case doomed this class action, and has made the Seventh Circuit a most inhospitable jurisdiction for large class actions. I think that in most cases this analysis is sound, in that the common elements in many mass torts are far less dominant than others believe. I would follow, as many federal courts today do not, the lead of the 1966 Federal Rules in presumptively denying class actions in most mass tort cases.<sup>62</sup> Admittedly, this result may place some plaintiffs at a serious disadvantage, in that the defendant is geared up with a standard form defense that it tweaks in each individual case. But even in these cases, the issues of defendant's liability, causal intervention, plaintiff's knowledge or misuse, and plaintiff's damages could all differ from individual to individual, so that when the dust settles the standard form defense may not be all that standard. It remains possible, of course, for plaintiffs to form a volun-

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<sup>60</sup> *Bridgestone / Firestone*, 288 F3d at 1018.

<sup>61</sup> *Id.*

<sup>62</sup> Advisory Committee Notes to FRCP 23 (1966).

tary, loose alliance in which they share information about common issues while controlling their individual causes of action. But it is much riskier to follow the pattern of amalgamation, for once the cases are together, the individual differences in the plaintiff's cases will be bled out of the equation, so that all suits will appear to be cut from the same cloth. As the choice of forum will normally lie within the control of plaintiffs, it is likely that the substantive law will drift in their favor.

As will quickly become evident, there are many jurisdictions that are less responsive to the fear that the aggregation of individual claims will lead not only to (unbiased) amplification, but also to distortion. Here the great danger is that courts in close (and not so close) cases will adopt that version of the substantive law that facilitates class action suits. Several examples are in order from securities law, antitrust, and employment discrimination.

Let us start with securities law. *Basic Inc v Levinson*<sup>63</sup> involved the question of whether the officers and directors of the corporation had violated the provision of SEC Rule 10b-5 relating to the publication of misleading information—in this case a false denial that the firm was engaged in potential merger negotiations, when in fact it was.<sup>64</sup> One effect of this denial was arguably to lower the price of the shares so as to induce class members to sell before the merger was formally announced.<sup>65</sup> In an ordinary action for common law fraud, the plaintiffs must prove that they have relied in specific transactions to their detriment on the false statements made by the defendant. But, in this case the defendants had not sold any shares; nor did they make any specific statements to identifiable purchasers. If each plaintiff had been forced to show his own reliance on some particular false statements, then it would be impossible to keep the class intact. But once the Supreme Court accepted a “fraud-on-the-market” theory, which presumes that efficient capital markets quickly embed all false information into the price, then the element of reliance flips over from a separate to a common issue, allowing the class to hold together.<sup>66</sup> I have no doubt that one reason why the Supreme Court embraced this substantive theory was to foster the use of class actions in securities cases. Yet even here, its conclusion can

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<sup>63</sup> 485 US 224 (1988).

<sup>64</sup> *Id* at 226–29.

<sup>65</sup> *Id* at 248 n 27.

<sup>66</sup> *Id* at 242–47.

be criticized on the ground that the presumption of reliance is at most rebuttable, so that the defendant could try to show, on a case-by-case basis, that individual plaintiffs had disbelieved the information when published. But rebuttable evidence is admissible only in a small fraction of cases, so that even the shift in the burden of proof allows the class action to go forward under standards that would not be used in individual cases.

The question of causation comes up in other circumstances as well. In *In re Visa Check/MasterMoney Antitrust Litigation*,<sup>67</sup> the antitrust issue before the Second Circuit was whether Visa and MasterCard had adopted tie-in arrangements in violation of the Sherman Antitrust Act in setting their interchange fees—that is, the fees that the acquiring bank (which has signed up the merchant) must pay to the card-issuing bank (which has signed up the individual consumer).<sup>68</sup> Both Visa and MasterCard issue both credit and debit cards. The former allows for a genuine extension of credit, but the latter allows the charge to go through only if the customer in question has sufficient funds in his or her bank account to cover the charge. It is clear that credit transactions pose a greater risk of loss than debit transactions, yet in order to acquire the right to use Visa and MasterCard's credit services, the merchant had to accept all debit cards in these two-sided markets.<sup>69</sup> The interchange fees payable on these two accounts are the same amount, even though the level of risk is different.

In these cases, there is no doubt that the defendant's uniform policy requiring all participating merchants to "honor all cards" is a common element in the class action calculus. But it is equally clear that the level of damages, should liability be established, may well depend on the interdependence between the interchange rates set for debit and credit cards. On this matter, the initial question is whether the refusal to allow the tie-in arrangement between debit and credit cards would lead to an increase in the interchange fees for the credit card to offset, at least in part, the decline in revenues from debit cards. The two views on this subject have been dubbed the "tied product" and the

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<sup>67</sup> 280 F3d 124 (2d Cir 2001).

<sup>68</sup> *Id.* at 130 n 2.

<sup>69</sup> These are markets that can operate only where the intermediate guarantees to each side that certain persons on the opposite of the market will be present. Thus no one will acquire a credit card if there is no place to use it; likewise no one will honor credit cards if customers do not have them. For an extensive discussion of the issues that these markets raise, see David Evans and Richard Schmalensee, *Paying with Plastic: The Digital Revolution in Buying and Borrowing* (MIT 1999).

“package method” respectively.<sup>70</sup> Under the former, the only question asked is what is the difference between the interchange fee paid and the interchange fee that would have been paid for the unbundled debit-card product sold on the open market.<sup>71</sup> The alternative mode of analysis allows for the recovery of damages only to the extent that the plaintiff has overpaid for the package of tied and tying products.<sup>72</sup> Stated otherwise, if the interchange fee for the ordinary credit card transactions rose to offset in whole or in part the decline in revenues from the debit card, then the damages in question would be equal to the savings on the debit card less the increases on the credit card. That calculation, obviously, offers a more accurate account of the consequences of any antitrust violation, but is, of course, more difficult. It is, however, also true that the simplification in this case necessarily increases the expected liability of the defendant, unlike one that presupposes that each member of the class has suffered the mean amount of damages, under which the expected cost to the defendant remains unchanged.

For these purposes, however, this first risk cascades into a second. Individual merchants within a nationwide (or even single state) class do not have a fixed ratio of credit to debit transactions: high-end sellers may well sell more by credit card and less by debit card than low-end merchants. If the offset were allowed it would create a serious conflict within the class ranks. Indeed, the increase in credit card rates could leave a merchant whose customers predominantly used credit cards worse off than before, creating a serious conflict of interest that breaks up any class, state-wide or national, of any and all merchants who enter into debit card transactions. These arguments were voiced vigorously in the dissent,<sup>73</sup> but the majority of the Court held that the class could be preserved for one of two reasons: either the plaintiff’s expert was correct to assume that the separation of debit from credit cards would have resulted in no increase in the interchange fees for the credit transactions, or that the set-off was not appropriate as a matter of theory.<sup>74</sup> I have no doubt that in an ordinary action brought by a single plaintiff against a single defendant, a court would, or at least should, follow the economic

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<sup>70</sup> See *Visa Check/MasterMoney*, 280 F3d at 142–43.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 153–61, complete with numerical examples.

<sup>74</sup> *Visa Check/MasterMoney*, 280 F3d at 144.

rule that requires burdens to be offset against benefits, and commit both parties to proof on this question.<sup>75</sup> But once that procedure threatens class certification, then exactly the opposite takes place. A low standard is used to pass on the merits of the plaintiff's claim for class certification, so that the entire matter of the proper measure of damages is left in abeyance until the class is formed, to be sorted out only thereafter.<sup>76</sup> The net effect is that the burden shifts to the defendant to find ways to disentangle itself from class status only after the armies have massed on the other side of the table. Yet, as best one can tell, the class formation itself supplies no new evidence or insight on how the measure of damage question should be decided. These clear tactical edges really matter, especially in a lawsuit in which the potential damages could range, giving trebling, up to \$100 billion. Yet the theme here is not new. It is just another variation of the dominant theme of the measure of damages in *Basic* where the benefits that follow from some practice—there the false announcement of no merger activity—are ignored while its costs are taken into account, which can only lead to a perverse form of overdeterrence. The desire to preserve the class action has profound consequences on the structure of the substantive law: aggregation produces intense distortion.

The problem here is, moreover, exceptionally acute because of the treble damage feature under the Sherman Act.<sup>77</sup> That provision was introduced in part for two related reasons. First, it could be argued that the concealed nature of antitrust violations requires the use of some multiple of damages to ensure optimal deterrence. The second is that trebling offsets the difficulties of bringing complex individual lawsuits. Note that in this context, neither problem really matters. The relevant transactions in all cases are paper transactions, for which concealment is no concern. More importantly, the class action device itself is meant to offset the difficulties of bringing isolated suits. Combining the two mechanisms thus creates a form of double counting which could easily lead to overdeterrence. Yet it would start a palace revolution to insist that the double-counting problem should lead

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<sup>75</sup> See Phillip E. Areeda and Herbert Hovenkamp, II *Antitrust Law* 245 n 48 (Little, Brown 1995) (cited in *Visa Check/MasterMoney*, 280 F3d at 154).

<sup>76</sup> See Robert G. Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L J 1251 (2002) (offering a sustained attack on the view that class certification should be done without a searching view on the merits).

<sup>77</sup> See 15 USC § 15(a) (2000).



to an abrogation of the treble damage rule in anti-trust class actions brought under the Sherman Act.

Finally, the same theme can be observed in anti-discrimination cases. Thus *Visa Check* relied on the earlier decision in *Caridad v Metro-North Commuter Railroad*,<sup>78</sup> a class action suit alleging employment discrimination in discipline and promotion decisions brought forward under a disparate impact theory.<sup>79</sup> The disparate impact theory, of course, allows a plaintiff to challenge the effect of certain practices without impugning the motives or intentions of the employers who engage in them.<sup>80</sup> Once the disparate impact is shown, then the defendant can justify its conduct only by an appeal to business necessity—everywhere acknowledged as a tough standard to meet.<sup>81</sup> Metro-North was a commuter railroad that employed around five thousand union workers of whom around 1,300 were African-Americans whose employment contracts were governed by some sixteen collective bargaining agreements but subject to Metro-North's Progressive Disciplinary System (PDS).<sup>82</sup> The PDS was administered at the field level by some four hundred supervisors and managers, all of whom were capable of bringing charges against individual workers.<sup>83</sup> One complaint, voiced by Metro-North's Affirmative Action Director, expressed concern about the disproportionate number of disciplinary incidents involving people of color.<sup>84</sup> Of the twenty-seven named plaintiffs, nineteen alleged that they suffered unfair discipline because of race.<sup>85</sup>

On the promotion side, the plaintiffs alleged that the declared policy of internal promotion required that all openings be posted, but gave to the manager of each unit the final power to fill the vacancy in question.<sup>86</sup> In practice, postings were a mere formality in some cases and omitted in others.<sup>87</sup> The individual African-American plaintiff alleged that he had been passed over in favor of four Caucasian applicants who were less qualified

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<sup>78</sup> 191 F3d 283 (2d Cir 1999).

<sup>79</sup> *Id.* at 286.

<sup>80</sup> See Arthur Larson and Lex K. Larson, 2 *Employment Discrimination* § 21.01 (Matthew Bender 2d ed 1994).

<sup>81</sup> See, for example, *id.* at § 23.01.

<sup>82</sup> *Caridad*, 191 F3d at 286.

<sup>83</sup> *Id.* at 287.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Caridad*, 191 F3d at 287.

<sup>87</sup> *Id.*

than he was.<sup>88</sup> Using a regional standard of proportional representation, underutilization of African-Americans was found in five of eight job categories.<sup>89</sup>

The question was whether this information was sufficient to support a class action certification, which the district court refused to issue. The Second Circuit, however, overturned that decision as an "abuse of discretion."<sup>90</sup> That phrase, however, does not quite mean what it says, because the standard for abuse is a lot tougher when the district court refuses certification than when it allows it.<sup>91</sup> There is of course no obvious explanation based on the relative competence of district and appellate courts that supports this one-way ratchet, which turned out to be quite important in the instant case. Once the moving standard of review took place, the court then noted that the class certification stage was not the moment to examine the case closely on its merits, and thus allowed the plaintiff's statistical case to carry the day.<sup>92</sup> For these purposes, however, the key point is the transformation of the substantive theory on which this case was brought. To see why, think about how these cases would be tried as individual lawsuits for employment discrimination. The litigation would start from the ground up with detailed examinations of the work records of the individual employees, coupled with a close examination of the charges and countercharges that surrounded each decision on either discipline or promotion. The outcome of these cases could be quite different because the workers had different jobs and widely dispersed individuals throughout the organization had made the decisions on promotion and discipline. Tried in isolation, virtually the only features that would hold these cases together are the broad parameters of disparate impact and disparate treatment theory that cannot supply the necessary common element across cases without wholly trivializing the class action process. In practice, the trial in each case would depend on fact-specific information. It is for that reason that the plaintiff class offered an amalgam of statistical and anecdotal

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Caridad*, 191 F3d at 291.

<sup>91</sup> See, Thomas E. Willging, Laurel L. Hooper, and Robert J. Niemic, *Class Actions and the Rulemaking Process: An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 NYU L Rev 74, 171 (1996) ("Between 13% and 26% of plaintiffs' appeals were successful, in whole or in part, in reversing or vacating trial court decisions in three courts . . . . Few defendants' appeals resulted in reversal or vacation.").

<sup>92</sup> *Caridad*, 191 F3d at 293.

evidence to state its grievances.<sup>93</sup> The ability of the employer to show that the individual employee grievance was misguided has been eliminated. Even a disparate impact case could not survive a showing that the particular employee had been convicted of theft, had used drugs, or suffered chronic absenteeism.

In some cases, individual plaintiffs seek to make out disparate impact by pointing to some firm-wide substantive policy that fostered some forbidden disparate impact. But in this case the only relevant general policy was one that delegated to the individual units the execution of a system-wide commitment toward affirmative action. In this context, the defendants might, with some justification, use its affirmative action program to help explain any differential rates in discipline or promotion that existed at Metro-North. After all, an affirmative action program requires Metro-North to make some high risk moves *ex ante*, and these could help explain (perhaps in some units but not in others) the differential rates in promotion and discipline *ex post*. A neutral standard should be expected to yield higher failure rates with the weaker applicant pool in both cases. It should be clear that these disparate impact cases have moved a long way from the original dubious decision in *Griggs v Duke Power*,<sup>94</sup> which only asked whether certain tests might be administered, where the only relevant datum might be the relative black to white pass rates wholly without regard to individual performance records.<sup>95</sup> There might be some uncertainty as to which side would introduce what evidence, but when the dust settled nothing could prevent substantial levels of individuation in this case.

In the face of this standard mode of proof, any effort to forge a class action out of either discipline or promotion, let alone the two together, would (or, alas, at least should) be regarded as laughable. The aggregation does not make sense. But it is at this point that the substantive expansion of disparate impact theory is said to fill the gap under a very generous class standard which finds that the “commonality” requirement for class actions “is met if plaintiffs’ grievances share a common element of law or of

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<sup>93</sup> *Id* at 286.

<sup>94</sup> 401 US 424 (1971). For my criticisms, see Epstein, *Forbidden Grounds* 192–201 (cited in note 8). Any debate over the statutory authorization of disparate treatment cases has been set to rest by the passage of the Civil Rights Act of 1991, Public L No 102-166, 105 Stat 1071. For an account of the modern rules, see Arthur Larson and Lex K. Larson, 1 *Employment Discrimination* §9.03[2] (Matthew Bender 2d ed. 1994).

<sup>95</sup> *Griggs*, 401 US at 424.

fact”<sup>96</sup>—where the words “a” and “or” deserve to be put into italics, if not neon lights. The new wrong of the defendant was not its firm wide rules of equal opportunity or affirmative action. Rather it takes the novel form of “overdelegation,” to wit a “policy—the delegation to supervisors, pursuant to company-wide policies, of discretionary authority without sufficient oversight—that gives rise to common questions of fact warranting certification of the proposed class.”<sup>97</sup> Judge Newman of the Second Circuit accepted this theory without any apparent recognition of how far it has strayed from the original disparate impact cases, in which the application of the antidiscrimination law requires proof of the disparate impact of a specific policy on the employment prospects of a protected group. If proper policies are followed at the unit level, then any claim of overdelegation counts at best as some form of harmless error. As stated, the decision takes what may well be sensible business policy—the decentralization of various kinds of employment decisions—and treats that as though it were a fatal wrong. In so doing, this threadbare theory overlooks any questions of causation: the want of supervision would only matter if the individual units all deviated from the assigned standards in more or less the same way. But in each case, a trier of fact would necessarily have to find that the work done at the unit level fell below the appropriate standards that should have been imposed from the center in order for this alleged breach of duty to matter at all. Clearly the question of unit compliance raises issues that are not common to the class, even if this new substantive duty is accepted. In the end, there is ample reason to see why *Caridad* was an appropriate precedent for *Visa Check*. The need to preserve a class action at all costs drives a court to distort the underlying theory of substantive liability beyond recognition. We have more than aggregation at work. We have a wholesale distortion of the substantive standards, the chief effect of which is to facilitate a finding of discrimination in cases where it is highly unlikely to have occurred.

The full extent to which the procedural processes of the class action turn substantive law inside out is further evidenced by the subsequent history of *Caridad* on remand. Once the case was remanded to the district court, Judge Rakoff again refused to certify the class and dismissed the class action, noting the lack of

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<sup>96</sup> *Marisol A v Guiliani*, 126 F3d 372, 376 (2d Cir 1997).

<sup>97</sup> *Caridad*, 191 F3d at 291.

common issues on liability.<sup>98</sup> What makes this case so striking was that after the remand in *Caridad (Robinson v Metro-North Commuter Railroad)*,<sup>99</sup> the plaintiff sought class certification either under Rule 23(b)(2) or, alternatively, under 23(b)(3).<sup>100</sup> The latter preserves individual opt-out rights for individual claimants, but Rule 23(b)(2) does not.<sup>101</sup> In principle Rule 23(b)(2) reads like it is reserved for situations like those involving indivisible benefits to a corporation or other class members.<sup>102</sup> Outside the corporate context, the paradigmatic case might be injunctive relief against the commission of a widespread nuisance, which necessarily benefits all even if the action itself is brought by some.

In *Robinson*, however, the denial of any opt-out (at least until the damage phase) would deny individual plaintiffs control over a suit in which they have very large stakes. In addition, it hands the class lawyers a very large club with which to obtain a settlement—and to avoid competition by other lawyers who seek business from class members after opt-outs are allowed. The initial question is whether this trade makes sense in light of the interests of the class members and the defendants. For individual class members, the loss of the option to get out of the class has to count as a real drawback: after all, all options have some positive value, and the control of one's own litigation cannot be regarded as a small detail within the overall scheme of civil procedure. But the question then arises whether the individual plaintiffs receive any compensation for this total loss of control. In principle, that compensation can only come if the class aggregation strengthens their hand against the defendant. The district court in *Robinson* refused to change the basic rules of the game and thus refused to allow the class action to go forward.<sup>103</sup> The kind of evidence needed in these cases is a peculiar blend of statistical and anecdotal evidence.<sup>104</sup> The class's statistical evidence was all at the

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<sup>98</sup> *Robinson v Metro-North Commuter Railroad Co*, 197 FRD 85 (S D NY 2000).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 87.

<sup>101</sup> FRCP 23(b)(2) and 23(b)(3).

<sup>102</sup> FRCP 23(b)(2).

<sup>103</sup> See *Robinson*, 197 FRD at 85.

<sup>104</sup> The standard formulation of the rule is:

Plaintiffs have typically depended upon two kinds of circumstantial evidence to establish the existence of a policy, pattern, or practice of intentional discrimination: (1) statistical evidence aimed at establishing the defendant's past treatment of the protected group, and (2) testimony from protected class members detailing specific instances of discrimination.

global level, while the defendant could easily introduce evidence that took place at the unit level.<sup>105</sup> In addition, none of the anecdotal or testimonial evidence could take place at the global level. Nor is it likely that the situation remained constant over the full eleven-year period covered in the litigation.

The denial of class action certification in *Robinson*, suffered the same ignominious fate on appeal as *Caridad*.<sup>106</sup> Judge Walker, who had dissented on the class certification question in *Caridad*, had no difficulty in holding that the over-delegation theory might support injunctive relief on “a pattern or practice” claim.<sup>107</sup> Hence he concluded that the theory would support certification under Rule 23(b)(2) notwithstanding the individualized damage claims, which could be considered separately perhaps after liability was established.<sup>108</sup> Here, the first point the court noted was that the plaintiff was seeking both injunctive relief and damages.<sup>109</sup> The court then noted that the key question was whether the common issues associated with the injunctive portion of the case predominated over the separate issues that might arise with respect to individual causes of action for damages.<sup>110</sup>

The sensible rule here holds that injunctive relief could never predominate when individual damage actions are brought. That rule creates the right “bright-line” rule for this area and avoids expensive case-by-case determinations. On that view, Rule 23(b)(2) certification becomes permissible only where the plaintiff’s demand for monetary relief is limited to a demand for incidental damages, which do not require extensive additional fact-finding but which can be done (as with lost interest) by use of simple computational devices.<sup>111</sup> Judge Walker, however, rejected

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Larson and Larson, 1 *Employment Discrimination* §9.03[1] (cited in note 94). This passage was cited at the appellate level in *Robinson*, 267 F3d at 158.

<sup>105</sup> See *Robinson*, 267 F3d at 155.

<sup>106</sup> Compare *Caridad*, 191 F3d 283, and *Robinson*, 267 F3d 147.

<sup>107</sup> *Robinson*, 267 F3d at 155–56, 156 n 2.

<sup>108</sup> *Id* at 163–64.

<sup>109</sup> *Id* at 155.

<sup>110</sup> *Id* at 162–64.

<sup>111</sup> See, for example, *Allison v Citgo Petroleum Corp*, 151 F3d 402, 415 (5th Cir 1998). The applicable commentary to Rule 23 reads as follows:

This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.... The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.

this analysis in favor of a balancing test that asked whether the individual damage claims predominated over the injunctive relief or the reverse.<sup>112</sup>

Yet there is absolutely no way to decide how to work this balance unless one has some idea about the nature of the injunctive relief that is sought. But of course, no hint of that is offered in *Robinson*. It seems almost inconceivable that injunctive relief would even be on the table in any individual grievance where little if anything would turn on the overdelegation theory. It would of course be grotesque to allow any individual employee to obtain injunctive relief outside the class action framework. The entire point of a damage remedy is to create an incentive to avoid violation of the law, and it seems doubtful that anyone could frame an injunction that looks both sensible and enforceable.

In addition, any supposed injunctive relief could not benefit equally all members of a class that covers employees from 1985 to 1996, many of whom had surely been promoted or not disciplined, and many of whom had doubtless left Metro-North's employ never to return. Even in a class context, it is hard to think of any constructive injunctive relief in light of the comprehensive regime of affirmative action already in place, and which may have been fine-tuned since 1996, the last year covered by the class.

In principle, class aggregation should not upset the balance between these two forms of relief, but once again the key distortion sets in not because injunctions make sense for these disputes, but solely because of the greater leverage that the Rule 23(b)(2) class action affords. These effects continue to work their way through the entire case. Thus Judge Walker noted that if the entire case could not be certified as a 23(b)(2) class, then the liability phase surely could be—but not if the anecdotal evidence could freely be introduced.<sup>113</sup> So once again we alter the rules in question. If the entire case cannot be tried as a 23(b)(2) class, then insulate the liability phase from the elements of the case that cannot be reconciled with class treatment. “Indeed, to ensure that the liability phase remains manageable, the district court may limit the anecdotal evidence as it deems appropriate.”<sup>114</sup> In effect the ability of the defendant to mount an effective defense

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Advisory Committee Notes to FRCP 23(b)(2) (1966).

<sup>112</sup> *Robinson*, 267 F3d at 164.

<sup>113</sup> *Id.* at 167–69.

<sup>114</sup> *Id.*

on liability in each individual case may be effectively compromised in order to allow the class action proceed as such.

In principle, it looks as though a systematic inability to present relevant evidence against a claim counts as a denial of the right to a full and fair trial, and thus brings into question whether the class action model as applied comports with the requirements of procedural due process. Judge Walker is indeed concerned with this issue, but only with respect to absentee members of the class.<sup>115</sup> But here of course he comes up with a two-step argument that solves their problem quite neatly. First he writes:

Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process.<sup>116</sup>

This assumption might not hold throughout the trial, so a second adjustment is made as well:

[A]ny due process risk posed by (b)(2) class certification of a claim for non-incidental damages can be eliminated by the district court simply affording notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters—i.e., the damages phase of the proceedings.<sup>117</sup>

At this point it seems that individual plaintiffs receive handsome compensation for the loss of individual control over cases. They are cut out at the first stage of the case where the simplification in liability rules works to their advantage. Then they are allowed back in the second stage of the case when the damage issues are on the table. It seems quite clear that the plaintiffs should not be allowed to raise due process objections against rules that are heavily rigged in their favor. But this ostensible cure for one set of due process concerns should sound the alarm that a second set of due process violations has taken place: the

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<sup>115</sup> *Id.* at 165.

<sup>116</sup> *Robinson*, 267 F3d at 165.

<sup>117</sup> *Id.* at 166.



defendants cannot respond in full to the charges raised against them because of their inability to raise their defenses to liability. The fiction that the injunctive relief is common, when the position of class members is not, warps the liability phase of the trial beyond all recognition. The upshot is that the new legal regime created by the class action rules gives the plaintiffs' lawyers all the tools they need to bludgeon the defendants into submission on a disparate impact claim that is far, far weaker than anything contemplated under the original *Griggs* decision.<sup>118</sup> The procedural tail has wagged the substantive dog. The aggregation of claims has resulted in a powerful distortion of the substantive law in ways that systematically favor plaintiffs over defendants in contradiction to the basic model that should govern these cases.

### CONCLUSION

Face it, the class action is here to stay. And so it should, for there is no question that in some contexts it allows plaintiffs with sound but small substantive claims to gain access to the courthouse that would be denied to them without some method of amalgamation. The class action offers the key for taking the disorganized business of life and structuring it in simplified ways that permit mass adjudication. How could anyone such as myself, who authored a book entitled *Simple Rules for a Complex World*,<sup>119</sup> be opposed to that development? Yet there is more than one way in which the issue of simplification goes to the heart of the current disputes over the propriety of class actions. A generation ago, no one would have doubted that any individual tort case, antitrust tie-in case, or employment case was a complex matter under the applicable substantive law. Often the rules used in those cases were at sharp variance to those that I would apply to those same situations. In my view, the multiple factor tests used in product liability cases are far inferior to a simple common law rule that asks whether a latent defect of the defendant's product caused harm to the plaintiff while in its original condition.<sup>120</sup> If this substantive view had prevailed, we would not have to worry about class actions in tobacco cases, because the generic risks of

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<sup>118</sup> See *Griggs*, 401 US 424.

<sup>119</sup> Richard A. Epstein, *Simple Rules for a Complex World* (Harvard 1995).

<sup>120</sup> See, for example, Richard A. Epstein, *Modern Products Liability Law* (Quorum 1980).

tobacco are so well-known that they would be routinely barred, as they indeed were under the natural reading of comment (i) to Section 402A of the Second Restatement of Torts.<sup>121</sup> Likewise, I think that for the most part antitrust law should concern itself in dealing with horizontal price-fixing arrangements and mergers, so that exotic tie-in theories (with treble damage actions no less) would become things of the past. Finally, I would do away with the disparate impact theory of liability in all employment discrimination cases in their entirety.

In dealing with the soundness of class actions, however, it will not do to complain about the substantive law as it has been developed in Congress, state legislatures, and the courts. To do so introduces unneeded complexity in pursuit of unwise legal ends. As the rest of this Article has presupposed, throughout the class action debate, across the board, we have to treat procedural law as adjectival law that presupposes the soundness of the underlying substantive law. At this point, it is only because the class action system does not seem to work as planned in this (as in other) ways that we should fear or condemn its continued application. It is sometimes argued (as by Samuel Issacharoff at the class action Symposium where this talk was originally presented)<sup>122</sup> that the class action is really the friend of the conservative/libertarian intellectual because effective enforcement of class actions reduces the need for direct government regulation that conservatives and libertarians view with such suspicion. But that criticism misfires in this context for several reasons. First, it forces us to interject our views of substantive law into the separate question of whether, and if so, how, the class action is an effective means of enforcement for existing legal rights, whatever these may be. But even if we put that caveat aside, the class action does not neatly line itself up with the dispute between regulation and private ordering. The class action is a boon to private contract when it permits large numbers of individuals to gain refunds of small sums to which they are entitled under contract. It is also a boon when it allows property holders to recover damages for the

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<sup>121</sup> "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous." Restatement (Second) of Torts, comment (i) to §402A. Note that the phrase "unreasonably dangerous" is the predicate for strict liability under §402A itself.

<sup>122</sup> Remarks of Samuel Issacharoff, *Legal Forum* Symposium November 2, 2002, The University of Chicago.

wrongful conversion of their property.<sup>123</sup> But if we let the overcharge be a creature of regulation, then the class action switches sides, just as it does when it is used to enforce zoning ordinances against property owners.<sup>124</sup>

Indeed, even if we confine our attention to situations of direct government intervention, it hardly follows that ordinary private litigation is preferable to direct government regulation. In the product liability area, for example, I have long taken the view that the state should prescribe in advance the standard warnings that it wishes to impose on certain generic products, and to allow private damage actions only in the unlikely event that manufacturers deviate from those warnings. That one simple rule would eliminate huge amounts of litigation over the adequacy of warnings, whether on cigarettes or prescription drugs. The lawyers, both for plaintiffs and defendants, only earn their keep under a legal environment that maximizes the level of legal uncertainty on the dubious ground that these mandated warnings are always less stringent than appropriate. In these cases, I have no doubt that a direct administrative action trumps a class action by leaps and bounds. The point is made clear, I think, by looking again at some of these disputes that have spawned class actions, where it seems clear that the class action could easily prove to be the odd man out. In many cases, the appropriate response is to use some combination of administrative action and ordinary private lawsuits to deal with the questions at hand. The administrators can fix the defect in line with the substantive objectives of these statutes, while the private actions could allow for redress for those wrongs that are large enough and clear enough to merit such treatment. Individuals need not go it alone, moreover, because it is possible to use permissive joinder techniques to amalgamate of suits—although even here the courts should be aware of the risk that aggregation of individual cases will lead to an unjustified distortion of the substantive law.

To see how all this would work, it is useful to think back to some of the cases already discussed. In *Basic v Levinson*,<sup>125</sup> the simple remedy for misrepresentation of the status of ongoing merger talks is a fine, not a class action. It is doubtful that many traders suffered large systematic losses from the misrepresenta-

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<sup>123</sup> See, for example, *Uhl v Thoroughbred Technology and Telecommunications, Inc.*, 309 F3d 978 (7th Cir 2001).

<sup>124</sup> See, for example, *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992).

<sup>125</sup> 485 US 224 (1988).

tions, but individual suits are available if they did. The massive litigation between Wal-Mart and Visa<sup>126</sup> recasts into class form a dispute that would have been better resolved by a simple administrative order of the Federal Trade Commission on the relative interchange fees for debit and credit cards, coupled with a fine to deal with the matter. In this legal regime, some large retailers might still choose to bring private antitrust actions, but these are likely to be for millions, not billions, of dollars. Most people would just let the matter rest. Likewise, in *Caridad*,<sup>127</sup> the EEOC could order some modest changes in Metro-North's hiring practices if it found that they contained some latent defect. The administrative remedy in some cases could prove superior to the class action because it could take into account technological or business changes that occur after the date of the alleged wrong to members of the class. Most of the individual members of the class would have no occasion to sue because they were not prejudiced by any of the promotion or discipline problems under challenge. Finally, the recalls in Bridgestone/Firestone could easily be handled by administrative action and fine, coupled with tort actions for the individual harms that do take place and a general return policy for what is left of the useful life of the tires subject to recall.

The basic point is that the class action should be viewed as one of a set of devices to deal with a set of wrongful acts, both actual and potential. But all too often, the stout defenders of the class action write as though only it stands between the individual consumer, employee, or trader and oblivion.<sup>128</sup> Indeed, it should be quite evident from the decisions discussed here that it is hard to believe that the Second and Seventh Circuits are addressing the same set of Federal Rules under the same body of applicable Su-

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<sup>126</sup> *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F3d 124, 124 (2d Cir 2001).

<sup>127</sup> *Caridad v Metro-North Commuter Railroad*, 191 F3d 283, 283 (2d Cir 1999).

<sup>128</sup> See, for example, Elizabeth J. Cabraser, *Access, Equity and Finality of Adjudication: The Role of Class Actions in our Civil Justice System*, Testimony before the Subcommittee on the Judiciary, United States House of Representatives: Oversight Hearing on Mass Torts and Class Action Lawsuits, March 5, 1998:

My clients have been men and women from all walks of life and all parts of the country who needed to take action to protect their rights, their jobs, their property, their savings or their local environment; or who simply sought fair compensation, in their lifetimes, for injuries or losses from defective or dangerous products.

Id at 3. The rhetorical power of her statement should be evident. But so too its shortcomings. Her clients will take what she can provide, and will not be upset with overcompensation for admitted wrongs or errors in the system that provides them with relief when none should be forthcoming.

preme Court precedent: the cultural gulf between New York and Chicago proves that one set of judges is from Mars and the other from Venus. (The reader may determine which set of judges are from which planet.) The utter divergence in their approaches should remind us, if a reminder is needed, that error always dogs the interpretation of any complex body of law. To be sure, the denial of class action means that relief does not go necessarily to the parties who are injured. And in some cases the deterrence supplied by other methods might prove to be less (or more) than ideal. But the class action is also subject to defects in its administration that compromise its effectiveness at every step. Ultimately, the only question worth asking here is what mix of these various remedial techniques leads to the fewest imperfections. That question cannot be answered authoritatively and across the board one way or the other. But the real and persistent danger of distortion through aggregation counts as one strong mark against the class action in its current configuration. Judges got us into this pickle. Perhaps they can get us out of it.