Class Actions and Social Issue Torts
in the Gulf South

Francis E. McGovern*

This Article explores the practical, theoretical, and doctrinal evolution of class actions and social issue torts in the Gulf South. After explaining the reasons for the continued use of class actions and the recent emergence of social issue torts, the Article discusses the debate concerning the perceived abuses of both class actions and social issue torts. Professor McGovern concludes by making recommendations for incremental improvements to moderate the more egregious uses and abuses of class actions and social issue torts.

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* Visiting Professor of Law, Stanford Law School; Professor, Duke University
  School of Law. B.A. Yale University; J.D. University of Virginia School of Law. Great
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The Gulf South has been fertile ground for the growth of class actions and social issue torts. As with any emerging procedural or substantive law development, class actions and social issue torts have suffered a variety of uses and abuses as courts seek acceptable standards for their places in the litigation landscape. In order to define their appropriate roles, it is helpful to appreciate them and their interaction at the practical, economic, theoretical, and doctrinal levels.

Class actions based upon Rule 23 of the Federal Rules of Civil Procedure and similar state procedural rules implicate multiple economic and political forces: the financial interests of the parties and their counsel, as well as the role of the judiciary in promoting aggregative procedures. Social issue torts involving handguns, tobacco, health maintenance organizations, the Holocaust, genetically modified organisms, and others likewise implicate these same economic and political forces.

At the theoretical level, consideration of class actions and social issue torts involves traditional debates over corrective justice and efficiency. Normative judgments concerning the relative value of individual autonomy versus collective well-being, for example, emerge from any serious discussion of both class actions and social issue torts.

From a doctrinal perspective, there are critical class action issues involving decisions to certify, the finality of class action settlements, the fairness of these settlements, and forum shopping and competition. How these doctrinal issues play out oftentimes defines the more theoretical and practical concerns. Likewise, for social issue torts, the substantive doctrine of tort law can establish the contours of the practical and theoretical scope of these emerging social issue torts.

The focus of this Article is to enhance our appreciation of certain aspects of the practical, theoretical, and doctrinal development of class actions, social issue torts, and their interaction. The Article concludes with some minimalist suggestions for confronting doctrinal issues in

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1. “Social issue torts” refer generically to the use of tort law by plaintiffs’ counsel to achieve social goals in areas such as handguns, tobacco, health maintenance organizations, the Holocaust, genetically modified organisms, and others. In a broad sense, all torts involve “social issues.” The distinguishing aspect of “social issue torts” is the explicit intent to address a social issue globally through tort litigation rather through piecemeal lawsuits or statutory reform.
the class action debate in a manner that does not seriously implicate the parallel theoretical and practical controversies.

I. **THE CHEMISTRY OF CLASS ACTIONS IN THE GULF SOUTH**

Southern states have often been viewed as a tort hothouse, where tort cases rival kudzu in their rate of growth. Many explanations have been suggested for this perceived phenomenon. One rationale is that governmental regulation of tortious conduct through consumer protection statutes, deceptive trade practices laws, insurance regulation, workers' compensation, and other forms of legislative or administrative control have historically been quite weak in the South. Another is that the demographics and economics of the population have created an environment for fraud and excessive risk taking—either by consumers or producers. There is also the perception that the gullible public is susceptible to unscrupulous sellers and that less affluent consumers regularly engage in risky activity. Further, there is a sense that much of the ownership of commerce in some southern states resides in other parts of the country that have little concern for the well-being of local inhabitants. Thus, there is a sense that tortious conduct is ubiquitous, imposed on, and by, the populace.

In addition to an environment conducive to tortious conduct, there is a legendary enforcement mechanism under the common law of torts. Plaintiffs' counsel speak reverently of most Jefferson Counties in the South, where jury verdicts are among the highest in the nation. The Gulf South has an outstanding plaintiffs' bar capable of maximizing plaintiff recoveries. Juries can also be quite favorable to plaintiffs, particularly when there is economic, racial, or social disparity among members of the same population and a class awareness that often accompanies economies with heavy industry labor unions or other similar organizations.

Finally, there is a popularly elected judiciary that operates in a typically informal style reflecting some of the populist tendencies of southern politics. When state supreme courts take a laissez-faire approach to the review of trial court activities, there can be opportunities for "home cooking" unfamiliar to foreign palates. This judicial behavior can be viewed benignly as responsive to the democratic process, or, on the other hand, can be viewed as a conspiracy to redistribute wealth.
Superimposed on this tort landscape has been the more recent phenomenon of mass torts, particularly involving asbestos. The asbestos litigation has had enormous effects on the practice of law in the Gulf South. The monetary success of plaintiffs' counsel created a financial enterprise that heretofore has been unavailable for funding class action litigation. There has been an intriguing financial feedback loop. On the one hand, class action litigation requires deep pockets, and the asbestos litigation created many of them. On the other hand, the thousands of filed asbestos cases demanded large litigation engines with corresponding large overheads, and those engines needed new fuel, which could be provided by class actions. Attorneys who gradually became accustomed to dealing with thousands of asbestos clients not only were not intimidated by the specter of tens of thousands of class action clients, but welcomed them.

In addition, the national class action activity in mass torts created a generation of attorneys well-schooled in the economics and strategies of class actions. A brief review of fee requests by lead counsel in virtually any successful class action also provides powerful incentives for other counsel to participate in class action enterprises. Lawyers who represent single clients and find that their stream of future clients has been captured by the litigation monopoly called a class action soon learn that there is little alternative to joining the bandwagon. Even if an attorney can opt current clients out of a putative class action, that attorney is preempted by the class from representing future clients who did not opt out, thereby severely limiting the stream of future clients.

At the same time, a large number of plaintiffs' counsel have learned the intricacies of the procedures of class actions and, more importantly, the tactical and strategic maneuvering that is a prerequisite to success in this arena. They have learned, for example, that aggregating many cases in a plaintiff-friendly jurisdiction not only precludes other plaintiffs' counsel from pursuing the identical litigation but also creates a "piling on" strategy that almost inevitably leads to settlement. Companies faced with "bet your company" trials usually settle. Even if an unsuccessful defendant eventually can reverse a trial verdict, the cost of the bond on appeal and the consequent drop in stock price can be crippling. Settling, on the other hand, provides the company with global peace, at a price. And settling

2. See generally ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION (1999) (exploring and summarizing the growth of mass tort litigation, the resulting risks and problems involved therewith, and some of the proposed solutions).
with carefully chosen plaintiffs’ counsel can reduce that price by generating the benefits associated with a “reverse auction.”

In essence, the combination of a proplaintiff environment with ample actionable torts and the advent of entrepreneurial litigation in the hands of a well-funded, risk-taking plaintiffs’ bar have combined to create a favorable class action chemistry in the Gulf South. Other segments of our economy have generated wealth for a relatively small number of entrepreneurs—the “dot com” community being a recent example. This wealth, however, typically has been used for nonlitigation activity, such as philanthropy, art collections, security, or otherwise. In the Gulf South class action setting, on the other hand, great wealth is in the hands of lawyers who are risk takers, who have litigation enterprises, who know class actions, and who desire to continue their pursuit of alleged tortfeasors. This critical mass of class action lawyers, and their wanna-bes, have been, and will continue to be, the driving forces behind class actions in the Gulf South.

II. THE CHEMISTRY OF SOCIAL ISSUE TORTS IN THE GULF SOUTH

There are multiple theories suggested to explain the current phenomenon of social issue torts—lawsuits involving tobacco, firearms, health maintenance organizations, genetically modified plants, the Holocaust, and others. One of the most fertile threads of inquiry involves an examination of the incremental evolution of mass torts to social issue torts. This morphing approach hypothesizes that there is great explanatory power in understanding the respective roles of plaintiffs’ attorneys, judges, juries, substantive law, procedure, and legislative and executive branches of government in developing an engine of reform—social issue torts—that has the potential for major revisions in our social fabric. Although there are complementary threads leading to development of social issue torts that arise from securities, antitrust, discrimination, and other entrepreneurial litigation, the mass tort heritage seems critical to an understanding of the emergence of modern social issue torts.

3. Professor John C. Coffee, Jr. defines the term “reverse auction” as “a jurisdictional competition among different teams of plaintiffs’ attorneys in different actions that involve the same underlying allegations.” John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343, 1370 (1995). The effect of such a “jurisdictional competition” is that plaintiffs’ attorneys “underbid” each other in order to settle with the defendants first, thereby precluding the others. See id. at 1370-71.
A. Explanatory Theories for Social Issue Torts

One suggested theory for explaining social issue torts contemplates that there is a cyclical interaction of government and free enterprise and that social issue torts are a manifestation of a cycle toward more legal control of American corporations.4 As the Reagan Revolution released business from more governmental regulation, the natural counterforces in our society have begun to flex their political muscles in an effort to counterbalance this cyclical pendulum swing.5

Another thesis is that the forces of populism, ever present in our body politic, are exerting themselves through the vehicle of the most populist segment of our government—the jury.6 Akin to the cyclical argument, this perception of "Jurors as Populist Protectors,"7 suggests that the current use of social issue torts is a vehicle to rein in corporate and other elitist dominance.

There is also the thought that the phenomenon of social issue torts is yet another manifestation of popular reaction to legislative stagnation.8 As with the civil rights movement, for example, politically disenfranchised elements of our society are seeking relief through the courts.9

A more popular thesis is that there is no such thing as social issue torts; what we are seeing is entrepreneurial litigation.10 Under the guise of social reform, this phenomenon is little more than an effort by selective plaintiffs' attorneys to redistribute income to themselves.11

The suggestion here is that social issue torts can be appreciated at a more detailed level, by examining a natural evolution of mass torts into an environment that has produced, almost incrementally, litigation on social issues. In understanding the complex genesis of this phenomenon, it may be possible to judge its vitality and direction.

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5. See id. at 835-36, 845-46.
7. Id. at 1183.
9. See id.
11. See id. at 882-917 (discussing how the high costs of managing a class action and the financial incentives for bringing a class action encourage self-interested and opportunistic behavior among many plaintiffs' attorneys).
B. Evolution of Social Issue Torts

The following eight general areas can provide a focus for comprehending the intricacies of this evolutionary process.

1. Plaintiffs' Attorneys

Historically plaintiffs' attorneys have been individuals, typically with a left-wing political bent, who are risk takers in representing "have-not" clients against the "haves" in society. They were organized in boutique firms dominated by a small number of self-confident lawyers, often thinly financed and immune to criticism from more established authorities. Asbestos and other mass torts have changed that profile for a significant segment of the plaintiffs' bar. Now there are well-financed, and sometimes extremely well-financed, law firms with a critical mass of personnel and funding that often view their enterprise in economic as well as social terms. They are good business people who see tort litigation, not as a series of one-off cases, but as a comprehensive mechanism for financial redistribution to their clients and themselves. The existence of law firms with sufficient clout to take on entire industries was a necessary element for the development of modern social issue tort litigation. Just as important, the financial wherewithal is in the hands of socially liberal, risk-taking entrepreneurs who live in a world of litigation. This concentration of financial resources in the hands of attorneys who have decided to stay in the litigation arena to advance their social agenda is probably the single most important factor defining social issue torts. Rather than retreating, investing in other areas, engaging in massive philanthropy, or otherwise spending their money, a major segment of the plaintiffs' attorneys who are winners in mass tort litigation have decided to reinvest a significant portion of their winnings in additional litigation that implicates social control. The puzzle of what plaintiffs' lawyers would do with their newfound financial resources has been solved, at least as to some of their numbers.

2. Plaintiffs' Law Firms

As suggested above, some plaintiffs' law firms have evolved from boutique operations to major economic enterprises. A second major trend has been toward a level of cooperation among plaintiffs' firms that did not exist thirty years ago. In national mass torts the plaintiffs' bar found that, contrary to the previously prevailing wisdom, the selective sharing of information enabled them to maintain their fiefdoms while improving their chances against mutual
defendants. Networks of plaintiffs' counsel have ultimately developed for each new mass tort. These two trends toward critical mass and cooperation have had an exponential effect on the ability to finance major litigation and have generated a need to find major litigation. At the same time, once these entrepreneurial engines were created, they demanded continuing infusions of major litigation to sustain them. The establishment of these institutions necessarily led to their perpetuation.

In addition, the newfound cooperation among plaintiffs' counsel has had the psychological effect of making the collective effort bolder than it would have been individually. A law firm can spread financial risk among other firms while plaintiffs' attorneys can reinforce their natural risk-seeking propensities.

3. Juries and Social Issues

Asbestos, toxic substances, and other litigation taught plaintiffs' attorneys that juries were just as, if not more, sympathetic to collective harms as to individual harms. Individual cases with small harms or risks might not catch the social imagination of the populace, but when a large number of plaintiffs brought those otherwise minor suits collectively, the concept of corporations imposing risks and other externalities on the public at large became a powerful force when presented to juries. By translating traditional torts into social issues to "send a message" and to combat alleged corporate abuses using fellow citizens as guinea pigs, plaintiffs' lawyers oftentimes achieved far greater success in their cases. This thought was soon translated into focusing on the social issues first and the individual harms later—a major paradigm shift.


There would never have been mass torts or social issue torts without creative judging. The evolution of judges from umpire to manager created an environment where mass filings of cases would be resolved, a development critical to the financial success of plaintiffs' attorneys.12

One of the critical components in the decision whether to file a case is its expected value: the ultimate award discounted by transaction costs, the time value of money, and the probability of

success. Maintaining a stagnant inventory of cases can be financially ruinous for a plaintiffs’ firm. At the same time, slow docket movement can be the best friend of potentially liable defendants, both in terms of a deterrent effect on plaintiffs and moderation in the velocity of payments when awards are made.

A number of judges who initially confronted filings of mass torts involving literally billions of dollars were extremely creative in devising methods for their rapid resolution. The magnitude of the task became, for many of them, no longer daunting. Having entire industries, or segments of the business community, at the bar seemed almost routine in some mass torts. Therefore, when social issue torts were filed—again implicating huge amounts of money for entire industries—what might have been extraordinary to judges and attorneys of thirty years ago appeared more manageable in the mass tort environment.

At the same time, plaintiffs’ attorneys developed great expertise in the selection of favorable forums for their cases. In many mass torts the choice of a court became the single, most critical, determinative factor. Attorneys developed a keen knowledge of where social issue torts would find the most hospitable welcome, thereby reducing transaction costs and time to an outcome, while raising the chances of success.

5. Substantive Law

When section 402A of the Second Restatement of Torts was adopted in 1965, the American Law Institute created a hybrid legal theory from tort and warranty law. Because there was little precedent for section 402A, courts had few cases to draw upon for interpretation as the relatively simple Restatement language was applied in new circumstances. As a result, courts relied largely on public policy to decide cases. Plaintiffs’ lawyers, weaned on public policy analysis in mass torts and quite successful in achieving their desired outcomes, were undeterred when facing unfavorable precedent in the context of other kinds of torts. The lack of a discrete legal theory to support a

13. See Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 HARV. L. REV. 924, 937–43 (2000) (describing some of the judicial innovations and procedural adjustments over the past 50 years that have assisted judges in handling large and complex cases).
14. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (providing for strict liability of a seller of a product that causes physical harm to a user or consumer).
social agenda was typically not needed in mass torts, so it certainly should not be needed in social issue torts. At the same time, a major segment of the judiciary concurred in those conclusions, probably for a host of differing reasons including their own social agenda, personal ambition, and otherwise.\(^\text{16}\)

6. Procedure Innovation

Hand in glove with these developments were innovative uses of Rule 42 consolidation\(^\text{17}\) and issue severance,\(^\text{18}\) Rule 23 class actions,\(^\text{19}\) and multidistrict litigation.\(^\text{20}\) These procedural devices were essential in order to aggregate a critical mass of cases to accentuate global concerns, to reduce individual transaction costs, to put maximum pressure on defendants, and to capture the entire financial benefit from instigating a tort. Just as with the selection of favorable forums, aggregative techniques—originally developed to move large numbers of valid claims through an otherwise clogged litigation system—lowered transaction costs, moved cases more quickly, and increased the probabilities of success. Just as important, the class action device gave filing plaintiffs’ counsel a chance to monopolize a tort and capture its attendant monopoly rents. These massive torts were so expensive to bring that attorneys, in addition to spreading the risk in a cooperative manner, wanted to insure that they would garner as much of the financial rewards as possible. Multidistrict litigation and class actions were perfect devices for that effort. As some federal courts became inhospitable, plaintiffs’ counsel found other federal or state venues.

7. Litigation Strategy

As mass torts evolved, it became apparent that “piling on” works. One case at a time can succeed for plaintiffs’ counsel in classic circumstances. For sheer pressure, however, massive filings may force a corporation to face crippling transaction costs, the potential for a bet-your-company verdict, and even a potentially ruinous bonding requirement.

\(^{16}\) See Jack B. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices 126-27 (1995) (discussing judicial innovations in substantive law developed to provide remedies in mass toxic tort actions).

\(^{17}\) Fed. R. Civ. P. 42(a).

\(^{18}\) Fed. R. Civ. P. 42(b).

\(^{19}\) Fed. R. Civ. P. 23.

The capital markets tend to overvalue mass tort litigation risk, sending stock prices lower and making new capital unavailable—both of which can destabilize even the most successful business plans. Plaintiffs' counsel learned this strategy in mass torts and have applied it effectively in social issue torts. It is no longer uncommon to see plaintiffs' counsel lobbying Wall Street analysts on the merits of their claims in order to increase the pressure on defendants.

8. Interaction with Government

Plaintiffs' counsel had learned to work with various governmental entities in traditional products liability cases. They had joined, for example, Ralph Nader in his efforts to regulate defective products. As mass torts began to implicate larger social concerns—asbestos and Medicare, birth control devices, and the Food and Drug Administration—there was not a great leap for plaintiffs' counsel to attempt to ally themselves with other governmental entities. Being on the side of elected officials added both to the legitimacy and the critical mass of their efforts. The financial strength and litigation acumen of plaintiffs' lawyers enabled a further symbiosis with state attorneys general that broadened their mutual litigation range. In a world of executive and legislative stalemate, attorneys general may enhance their roles by furthering positive reform. At the same time, having attorneys general on the team further accentuates the plaintiffs' counsel's "piling on" strategy.

III. The Perceived Abuses of Class Actions and Social Issue Torts in the Gulf South

The ubiquity of personal injury class actions combined with the emergence of social issue torts filed as class actions has generated a negative reaction on the part of defendants that is near hysterical.

21. See McGovern, supra note 12 (manuscript at 27).
22. See generally RALPH NADER, UNSAFE AT ANY SPEED (1965) (arguing for stricter government regulation of the automobile industry).
23. For a discussion of the tobacco litigation, see PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE (1998), and Fox Butterfield & Raymond Hernandez, Gun Maker's Accord on Curbs Brings Pressure from Industry, N.Y. TIMES, Mar. 30, 2000, at A1 (discussing Smith and Wesson's agreement to manufacturing and distribution restrictions in exchange for a large number of municipal lawsuits against it being dropped).
Multiple plaintiff personal injury filings were bad enough, but the morphing of those cases into class actions that implicate virtually every social issue of interest to plaintiffs' counsel has simply been too much for defendants to countenance.

While plaintiffs' counsel may view the class action device as a vehicle to rectify many of the wrongs defendants imposed on their clients, defendants have typically focused on the wrongs class actions imposed on them. In part, this general negative reaction arises from the redistribution of income from defendants to plaintiffs' counsel, in particular, and their clients, in general. This reaction exists regardless of the merits of any allegation. There is also a natural psychological aversion to any financial losses, even if warranted. The unanticipation of these claims, their breadth, and their success rate against defendants who have been accustomed to little accountability in the Gulf South has, in addition, created significant discomfort.

Oftentimes, however, the criticism of many defendants goes beyond the level of individual losses to include an indictment of the entire justice system. There is a feeling among some defendants that unscrupulous plaintiffs' counsel are hijacking the litigation process for personal aggrandizement. These defendants argue that by self-appointment, a clique of individuals has massed unsuspecting clients and inappropriate issues in a vendetta to blackmail foreign corporations into paying huge sums of money that will generate little benefit to any individual client. They believe that this blackmail is accomplished by asserting undemocratic control over a segment of the population and using that control to generate significant transaction costs for defendants in the form of financial payments, bad publicity, lower sales, decreasing stock prices, and other problems in order to extort attorneys' fees for themselves.

The net effect of this enterprise appears to many defendants to be an affront to our legislative and judicial systems and a drag on our economy. These defendants assert that the biased decision making by local courts on behalf of local counsel is the antithesis of any concept of fairness and results in extremely high error costs because of the payment of money on unwarranted or de minimus claims. Defendants see little difference in the morality of the speed traps of the 1950s and the class action of the 1990s. At the same time, the excessive control of normal business practices demanded by class actions imposes significant inefficiencies on our economy—a net loss to society.

Once a class action that has some recognized vitality has been filed, however, there may be a radical shift in opinion concerning the value of class actions. Defendants often determine that the only
procedure available to stanch the transactional bleeding associated with lawsuits filed in multiple venues is the class action. Defendants in such circumstances are often quite comfortable with taking advantage of both the competition among dueling plaintiffs’ class action counsel and the closure offered by a class action.

A. The Changing Political and Legal Landscape

It is not uncommon to find generals fighting the last war. To a certain extent this is the situation with class actions in the Gulf South. Both the political and the legal landscape have changed radically in the last several years. In Harris County, Texas, for example, all of the trial level judges are now Republicans.25 The Texas Supreme Court has issued a series of recent opinions that can charitably be characterized as prodefendant.26

Probably the most dramatic changes in the political and legal landscapes have occurred in Alabama. The bête noire of the state action appears to have been tamed.27 The Judicial Conference of the United States recently wrote to Congressman Henry J. Hyde in opposition to certain aspects of the proposed Interstate Class Action Jurisdiction Act28 and noted that the anecdotal evidence of problems with class actions in Alabama were being addressed by both the Alabama Supreme Court and the Alabama legislature.29 A new state law “tightens the requirements before a class may be certified and provides for interlocutory appellate review of certification decisions.”30 Five recent class action cases decided by the Alabama Supreme Court respond “to specific problems in class certifications.”31

25. See Facsimile from Becky Russell, Elections Department of the County Clerk, Harris County, Texas, to Francis E. McGovern 1-10 (May 25, 2000) (on file with author) (providing a list of judges).


27. See Mullenix, supra note 26, at 1763-67.


30. Id. (citing 1999 Ala. Acts 99-250); see also ALA. CODE § 6-5-641 (Supp. 1999) (tightening certification requirements); id. § 6-5-642 (providing interlocutory appellate review of certification decisions).

31. Id. (citing Ex parte Green Tree Fin. Corp., 723 So. 2d 6 (Ala. 1998); Ex parte AmSouth Bancorp., 717 So. 2d 357 (Ala. 1998); Ex parte Federal Express Corp., 718 So. 2d 13 (Ala. 1998); Ex parte Citicorp Acceptance Co., 715 So. 2d 199 (Ala. 1997); Ex parte First Nat’l Bank, 717 So. 2d 342 (Ala. 1997)).
At the national level there have been multiple suggestions for the reform of class actions either through rules changes or through legislation. The most prominent legislative proposals are encompassed in amendments to 28 U.S.C. § 1332 to give federal jurisdiction over many state class actions with minimal diversity. Proposed rule amendments include changes for certification and review of settlement classes, federal control over the appointment of attorneys and the award of fees, opt-in classes, notice, and other aspects of class actions.

In reality there will be no "silver bullets" to address the perceived problems with class actions. Instead, there are numerous smaller measures that may have a significant cumulative effect.

B. The Class Action and Social Issue Torts Debate as a Surrogate for More Fundamental Debates

Notwithstanding debate on the use and abuse of class actions, in many senses the class action controversy and its foray into social issue torts are surrogates for other, more fundamental conflicts. The following areas illustrate the extent to which proponents and opponents of existing class action rules are conducting a conversation involving tort, philosophy, jurisprudence, and political theory.

Over the last twenty years there has been a debate concerning the preferred mechanisms for personal injury compensation. The American Law Institute, for example, instituted a project to study tort law and its alternatives. Many academics have criticized the high transaction costs, horizontal inequity, low filing rates, and lack of compensation associated with traditional tort law. Various asbestos studies suggested that of every $2.81 spent by defendants, plaintiffs received only $1.00. The examples of disparities of compensation from jurisdiction to jurisdiction and over time in the Dalkon Shield

34. See id. at 7.
35. See id. at 7-8.
36. See id. at 9.
38. See JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION at vii-viii tbl.5.2 (RAND Inst. for Civil Justice 1983).
cases are almost legendary. In medical malpractice cases, less than twenty percent of the plaintiffs who have legitimate claims of negligence against medical personnel actually file suit. Others note that the "more probable than not" rule of causation precludes many plaintiffs who have been exposed to toxic substances from recovering, even though it is well established that a given number of persons, admittedly currently of unknown identity, will suffer harms.

Proponents of alternatives to the existing tort system have advocated the New Zealand system of governmental compensation, an alteration of social security to approximate many European approaches, an expansion of Medicaid, Medicare, and workers' compensation, a variety of no-fault systems, and many others. Thus far, these proposals have met with limited success. Proponents of the legislative suggestions have advocated the use of class actions to accomplish some of the same goals of eliminating the perceived inadequacies in the existing tort system. In a class action settlement, for example, transaction costs can be substantially lowered; payment grids and computer models can be established to insure that similar cases are treated similarly; notice provisions can enhance the chances that all of the tort victims can participate in a settlement; and rules of compensation can be established to reward plaintiffs who would not otherwise receive payment.

Needless to say, the specter of currently uncompensated plaintiffs receiving money via a class action when they would otherwise not receive payment is unattractive to some defendants. These defendants rejoin by noting that high transaction costs necessarily serve as barriers to the filing of cases by false positives; individual treatment for plaintiffs and defendants demands individual, not collective, determination of liabilities and damages; and the law puts the burden on plaintiffs to establish their cases, not on a basis of risk, but on the basis of actual harm.

41. See Henderson & Twerski, supra note 15, at 141-201.
44. See Franklin & Rabin, supra note 42, at 726-53.
45. See id.
Tort litigation has the fiction that all tort victims can be fully compensated. In reality a relatively small amount of the total losses to society is compensated. If all plaintiffs were to receive full compensation via tort damages, the additional costs to defendants could be enormous. Any procedure—such as class actions—that would significantly raise that total cost will meet strenuous objections from defendants. The battle in this context is more fundamentally over cost, not procedure.

Needless to say, these arguments made in the context of personal injury cases can become magnified in a world of social issue torts. The mere thought of monetary compensation for perceived social wrongs achieved through the litigation process is an anathema to most defendants.

A second related conflict concerns the respective views of the individual and the community in the American system of government. Those who favor communitarianism and centralization tend to favor class actions. Class actions could be vehicles for accomplishing outcomes that would be fairer to society as a whole rather than the piecemeal outcomes of individual litigation. Those who share a libertarian and devolution view of government tend to object to the use of class actions. They see the class action as a coercive device to involve governmental power to accomplish the social goals of an undemocratically selected elite.

A third debate can be characterized as principle versus pragmatism or, at a higher level, moral versus practical philosophy. This debate is between those who adhere to certain fundamental principles—be they libertarian or liberal—regardless of practicality, and those who believe that the practicalities of any situation must trump. Professor Ronald Dworkin and Judge Richard Posner have


47. See, e.g., McGovern, supra note 46, at 2088-89; see also Barry F. McNeil & Beth L. Fantesi, Mass Tort and Class Actions: Facing Increased Scrutiny, 167 F.R.D. 483, 492 (1996) (recognizing the numerous arguments that consolidation is "contrary to traditional notions of individualized justice"); Roger H. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. Ill. L. Rev. 69 (suggesting that the use of mass trials to resolve mass tort cases results in unfairness to the individual plaintiffs and distorts the relationship between attorneys and their clients and the role of the judge in the settlement process).
locked horns in these terms. Arguably Justice Breyer and Justice Ginsburg in *Amchem Products, Inc. v. Windsor* and Justice Breyer and Justice Souter in *Ortiz v. Fibreboard Corp.* engaged in a similar discussion in terms of legal process and legal outcome. The majority opinions in both of these Supreme Court cases focused on the principles of legal process that are inviolate. For example, both opinions discussed the necessity for separate representation of subclasses where there are arguable differences and interests among class members. Justice Breyer, on the other hand, devoted his attention to the practicalities of the asbestos litigation and suggested that the proposed settlements were probably the best outcomes that could possibly be achieved and were consistent with the broad outlines of due process and the Federal Rules of Civil Procedure. From a pragmatic perspective both cases could have been affirmed.

There is an irony in *Ortiz* that illustrates the dilemma facing courts in the context of this debate. The Fibreboard settlement contemplated that the most seriously injured current asbestos plaintiffs would be paid before the less seriously injured current plaintiffs and that more seriously injured future plaintiffs would be paid before less seriously injured current or future plaintiffs. Because separate subclasses had not been established for the various plaintiffs, the Court rejected the settlement in favor of the default alternative, a non-class action settlement. This alternative settlement provides for all current injuries—more severe and less severe—to be paid presently with the inevitable result that there will soon be insufficient Fibreboard funds to pay all future claims. The irony is that the desire for a more perfect process will result in a less desired outcome.

A fourth megadebate generated by a discussion of the merits and demerits of class actions implicates an argument over corrective justice.

51. See id. at 854-57; *Amchem*, 521 U.S. at 625-28.
52. See *Ortiz*, 527 U.S. at 873-84 (Breyer, J., dissenting); *Amchem*, 521 U.S. at 631-41 (Breyer, J., dissenting).
54. See *Ortiz*, 527 U.S. at 864-65.
55. See *Asbestos Litig.*, 90 F.3d at 982 (noting expert testimony that Fibreboard would be unable to pay all valid claims against it within five to nine years if the class settlement failed).
versus efficiency. Those who focus on the individual plaintiffs and their autonomy tend to reject procedures that sublimate the individual's rights to those of the majority. On the other hand, supporters of a utilitarian approach find it difficult to reject an outcome that has obvious benefits for everyone, even if it disadvantages a distinct minority. In many class action settlements, for example, a defendant may be willing to settle with the vast majority of plaintiffs so long as the number of nonsettling plaintiffs is small. This situation creates the potential for certain plaintiffs to hold the majority hostage or, conversely, for the majority to override the outlier plaintiffs. This creates an obvious corrective justice versus efficiency conflict that may be quite difficult to resolve.

Another basic conflict implicates the appropriate roles of courts and legislatures in determining public policy. Those who are frustrated with the delay and gridlock associated with our system of governmental checks and balances welcome the relative expeditiousness that class actions can provide for remedying perceived wrongs. Those with a more majoritarian bent chafe at the thought of the power of an elite to commandeer governmental resources for a selected clientele. At one level this debate raises classic elitism versus populism concerns. At another level, it involves classic governmental function issues.

One of the most interesting aspects of deciphering the class action debates is to recognize why adversaries are taking their particular positions, an oftentimes perplexing task. When a noted liberal plaintiffs' lawyer and a conservative court of appeals judge advocate the same outcome, it generally will be for quite different reasons. It is this unusual confluence of disparate rationales supporting the identical outcome that makes this class action debate exquisitely complex.

56. See generally Weinstein, supra note 16, at 1-14 (discussing the inherent tensions in class actions between the individual's rights and the need to device effective remedies in cases involving large numbers of plaintiffs).

57. See id.

58. The term "outlier" is used to describe those plaintiffs who are more severely injured than the majority and who generally cause damage awards to be higher for all the plaintiffs than may be fair.

59. See Weinstein, supra note 16, at 119-21, 131-32 (pointing to political "stasis" and "gridlock" in the area of mass torts and recognizing that the "most important modern device for dealing with mass torts is the class action").

60. See, e.g., Paul V. Niemeyer, Remarks to the Institute for Law and Economic Policy, 39 Ariz. L. Rev. 719, 720-21 (1997) (arguing that resolving mass tort class actions involving wide-ranging and novel issues in a single court proceeding "depriv[es] the solution of either the democratic input of legislation or the developmental input of the common law").
These disparate rationales, from the left or right, may be based upon radically different perceptions of both the current reality of mass torts as well as the future of mass torts. If one believes that the mass tort landscape today is tainted by abuses, then an improved but imperfect alternative would be superior. If, however, one has a more ideal version of current tort practices, then an imperfect alternative is inferior. There can likewise be radically different perceptions as to the effects of class actions on mass torts. Both left and right could coalesce on the same side of a debate depending on their differing beliefs concerning future developments.

At the same time a party may be advocating a policy rationale in a doctrinal debate for unrelated and purely personal economic reasons. For example, a plaintiffs’ counsel may promote an individual autonomy rationale to oppose class certification when, in actuality, this counsel has a personal economic desire to prevent other class action counsel from monopolizing a future stream of potential clients. From a slightly different perspective, someone may be supporting relaxed class certification rules because of a political agenda that includes major redistribution of income via class actions, so that there can be a need-based and equal sharing of damages among all plaintiffs. Or, there may be an expressed desire to federalize all class actions under the rationale that the torts are national in scope, whereas the true motivation is to use the more restrictive federal standards to preclude any class certification, thereby eliminating many cases where class actions might otherwise impose liability for tortious conduct.

IV. FOCUSING ON CLASS ACTION DOCTRINE

Regardless of the underlying debate, however, the legal doctrine defining class actions becomes the active playing field for both class actions and social issue torts. This is particularly true of social issue torts where class actions often constitute an umbilical cord providing essential mass.

Rule 23 of the Federal Rules of Civil Procedure has been subject to multiple major controversies. The following five issues are worthy of immediate consideration in the context of the use and abuse of class actions and social issue torts in the Gulf South: (1) certification prior to discovery, (2) certification for trial, (3) approval of settlement, (4) settlement finality, and (5) dueling class actions. The following suggestions attempt to recognize the parallel practical, economic, theoretical, and doctrinal debates and suggest approaches, although ultimately inelegant, that are in the range of the possible.
To be ultimately successful, these suggestions would need to be embodied as prominent guidelines in the comments of the Advisory Committee on the Federal Rules of Civil Procedure and in the Manual for Complex Litigation. As long as judges have a menu of case management options available for application on an ad hoc basis, rather than an exposition of preferred approaches, there is little opportunity for enhanced predictability on how any given litigation will develop. If plaintiffs’ counsel think, for example, that a particular judge might reach the certification decision before testing the legal and factual vitality of a claim, there is an incentive to file lawsuits that could not stand on their own merits unless aggregated. There is now sufficient understanding of the dynamics of class actions to allow the Advisory Committee and the Manual’s board of editors to draft more structured guidance for judges, rather than proposing only tentative suggestions.

In addition, there needs to be a more intensive education program for judges—particularly state judges—to explain the complexity of class actions and the ramifications of class certification. The power of collective judgment by the judiciary as to optimal methods for handling class actions has been greatly underestimated. If there is such a collective wisdom, the value of peer advice is substantial.

A. Certification Prior to Discovery

The mere act of certification changes the tactical and strategic dynamics of litigation. Aggregation raises the stakes to a level that makes a trial on the merits of a case unpalatable. An alternative to immediate certification is to select test cases for full discovery and trial prior to certification or, in the alternative, let cases in other courts proceed outside class treatment to test a litigation’s vitality.61 Although this approach allows some redundancy in discovery, it provides an opportunity to determine whether cases can withstand the crucible of litigation on their own or whether their value is dependent upon aggregation. If plaintiffs’ counsel knew that courts would require this proof of vitality, there would be more scrutiny and self-selection prior to filing. The potential financial benefits of a successful class action are so great that there is a tendency to undervalue risk in the screening of cases. If, however, it is predictable that the early filed cases will be tested in the marketplace of litigation, counsel will be more wary of pursuing false positives and file fewer unmeritorious cases.

61. See McGovern, supra note 12 (manuscript at 22).
B. Certification for Trial

Recent Supreme Court and federal appellate decisions have made class action trials suspect. The application of these standards in the federal courts has become relatively consistent. Among state judges, however, there is still substantial variation. Developing more consistent approaches among judges is a high priority. The *Manual for Complex Litigation*, for example, could suggest a more definitive road map in a rule-like fashion that would promote an acceptable model of certification for trial modeled on the more recent federal decisions.

C. Approval of Settlement

There is a trend toward increased judicial scrutiny, both as to the process of settlement and the merits of a given settlement. The RAND Institute for Civil Justice has issued a report on class actions that recommends increased judicial regulation to achieve a more appropriate approval of class actions. Specifically, the report promotes judicial analysis of the relationship between the alleged losses and the proposed remedy, the methods for accomplishing the remedy, and other aspects of the actual merits of the settlement. The report also suggests a greater use of third parties to evaluate the settlement: objectors, neutral experts, discovery, and more public involvement. Finally, the report promotes numerous proposals to deal with judicial review of attorney fees.

The Advisory Committee on the Federal Rules of Civil Procedure is currently evaluating the number of proposals to amend Rule 23(e) to enhance judicial review of settlements involving: (1) the vitality and maturity of the claim, (2) the extent of participation of parties other than class counsel in the settlement negotiations, (3) the probable cost and outcome of a trial on the merits, (4) the total resources at risk in the litigation, (5) alternatives to the class action settlement that might affect those available resources, (6) a comparison of the settlement outcome with market outcomes, (7) opportunities to

64. *See* Mullenix, *supra* note 26, at 1753-78.
66. *See* id. at 32-33.
67. *See* id. at 34-35.
68. *See* id. at 33-34.
disengage or opt out of the settlement, (8) reasonableness of attorneys' fees and their division among counsel, (9) the procedures for processing claims, (10) other court review of similar settlements, (11) the overall fairness of settlement terms, and (12) independent review of settlements by court appointed neutrals. There are also proposals before the Advisory Committee to expand the role of objectors to class action settlements by allowing more extensive discovery of the merits of the settlement, the settlement negotiations, and any ancillary agreements including subsequent decisions by objectors to join the class. Costs and attorneys' fees for objectors might also be available.

One of the most helpful suggestions is the endorsement by the Advisory Committee and the Manual for increased judicial scrutiny not only of the settlement process, but also of the merits of a given settlement. The inclusion of examples of settlements that have been above and below the bar of acceptability in the Advisory Committee's note to Rule 23 and the Manual would be of enormous value. However, there will probably be no single formula available to test class action settlements. Expanding resource of outcomes can, over time, provide a more predictable de facto model for evaluation.

D. Settlement Finality

Defendants searching for litigation finality through class action settlements will probably be disappointed. Notwithstanding the generally accepted fact that defendants will pay a premium for finality, the pragmatism of a richer settlement now seems to be superseded by the principles of class action due process. In order to meet the demands of Aramchel, for example, the proposed fen-phen settlement has a series exclusions and opt-out opportunities over time that reduce the predictability of the number and identity of plaintiffs who will ultimately participate in the settlement.

69. See Memorandum on Proposed Amendments, supra note 33, at 2-10.
70. See id. at 6-7.
71. See id.
72. See Hensler et al., supra note 65, at 32-33; Memorandum on Proposed Amendments, supra note 33, at 6-7.
Current wisdom suggests there is a viable settlement model that involves several stages. The first stage contemplates a unilateral offer by a defendant to settle for a defined sum of money with all consenting plaintiffs who arguably have a current claim. Plaintiffs who accept this offer may have certain additional, but limited, rights that accrue in the future.

A second stage provides a unilateral offer to plaintiffs who have little, if any, current claim but may have a more substantial claim in the future. Plaintiffs who accept this offer may also have additional future rights. Both of these groups may have additional opt-out opportunities as well.

Thirdly, once the first two stages are completed there are individual offers to plaintiffs with substantial present harm. In this manner, claims can be settled in accordance with their relative value in the litigation system.

The overall strategy for this type of settlement is to corral the litigation, not end it. By providing manageable settlement amounts to the bulk of the pool of plaintiffs, a defendant can contain that pool and place boundaries on the amount of future damages. At the same time, the defendant can engage in discriminatory pricing by settling at low figures with the bulk of the plaintiffs and, then, once the pool of potential plaintiffs has been defined, settle at higher amounts for the more significant cases.

This strategy, at most, ranks second best. The capital markets will continue to frown on the contingent risk associated with mass tort litigation. If, however, this settlement strategy is preceded by proof that there is true vitality to the litigation and that case values can be ascertained, then the equities driving more flexible settlements are stronger. It is when defendants are forced into this type of settlement scenario without the opportunity to test the underlying value of the claims that the most severe inequities result.

E. Duelling Class Actions

The American system of federalism undoubtedly has its problems, and the dueling class action dilemma is clearly one of them. The federal system and some state judicatures have created mechanisms for dealing with competing forums. For example, judicial panels have been constituted to assign cases to centralized courts to preclude conflicts.\textsuperscript{75} However, other states have no such mechanisms,

\textsuperscript{75} See, e.g., 28 U.S.C. § 1407 (1994) (authorizing the judicial panel on multidistrict litigation to order transfers of actions); CAL. CIV. PROC. CODE § 403 (Deering Supp. 2000)
and there is no defined methodology for interaction among the states. While there has been no lack of proposals for coping with multiple interstate class actions and variations among courts in handling those class actions, the best hope for immediate relief is informal—the standardization of class action treatment suggested above and an institutional vehicle for interaction among judges. If judges across jurisdictional lines shared sense of common procedure as contained in the comments to Rule 23 and the *Manual*, there would be less chance for conflict. This would be particularly true if that common sense embodied a judicial strategy of multiple, but limited, testing of the vitality of a tort in a variety of jurisdictions before any centralization through a class action.

A second conflict mediator could involve an institutionalized form of communication to allow disparate judges to participate in the evolution of a tort, not by any collective judgment, but by cooperation among them. Peers working with peers to develop a mutually beneficial approach to resolving litigation is an effective surrogate for more formal organization. Duels are less likely when there is an opportunity for judges to interact.

This institution could be organized under the auspices of the Conference of Chief Justices and the Federal Judicial Center. It would be responsible for determining when a mass tort being litigated in federal and state courts warranted coordinating efforts. After the tort was deemed to be major or significant, judges, including the federal multidistrict litigation judges, could be invited to meet. During such a meeting, there could be an opportunity for descriptions of the status of litigation in each court and the efforts being undertaken to facilitate the litigation. If appropriate, there could also be a briefing from counsel for the parties. The judges could seek cooperative ventures involving documents, depositions, common discoveries, scheduling, and others. This might be an opportunity to promote future coordination.

V. Conclusion

The complexity of the overlapping practical, economic, theoretical, and doctrinal debates concerning class actions and social

("A judge may, on motion, transfer an action or actions from another court to that judge's court for coordination with an action involving a common question of fact or law ... .") *Id.* § 404 ("When civil actions sharing a common question of fact or law are pending in different courts, the presiding or sole judge ... may request the Chairman of the Judicial Council to assign a judge to determine whether coordination of the actions is appropriate and a judge shall be so assigned to make that determination."); *Cal. Standards Judicial Admin.* § 19(d) ("Complex litigation should be assigned to one judge for all purposes.").
issue torts does not create an environment conducive to legislative change. Absent a shift in political fortunes at the national level, there are few opportunities for a definitive "silver bullet" reform. On the other hand, there are a number of incremental improvements that could be acceptable to all interested parties and could be implemented without legislative intervention to moderate some of the more egregious uses and abuses of class actions and social issue torts in the Gulf South.

First, there can be a more rule-like approach to the management of class actions to give judges more precise guidance and to give counsel more predictability. These guidelines could emphasize (1) the importance of adequate exhibition of the vitality of a tort prior to certification, (2) standardized criteria for certification for trial, and (3) enhanced judicial scrutiny of the process and merits of settlement. The Manual for Complex Litigation and the Advisory Committee's note would be appropriate vehicles for expressing these guidelines.

Second, there can be a greater recognition that defendants are not likely to achieve instant global peace in tort litigation through a class action. There are, however, surrogates that may be sufficiently attractive to provide adequate solace at an acceptable price. These surrogates will evolve over time to approximate desired outcomes.

Third, there needs to be an institutionalized forum for cooperation to allow judges to meet and discuss common litigation. The value of discussion among peers goes far beyond eliminating conflicting customs and can dramatically improve the overall administration of justice.

The cumulative effect of multiple incremental changes offers the only viable approach currently available to moderating the excess of class actions and social issue torts in the Gulf South. At the same time, this incrementalism will reduce the likelihood of causing unintentional damage to the strength of an evolving litigation landscape.