

RULE 23 AND THE TRIUMPH OF EXPERIENCE

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I

INTRODUCTION

Four years ago, on the fiftieth anniversary of the watershed 1966 reforms of the Federal Rules of Civil Procedure, I had the opportunity to interview my colleague and friend Arthur Miller on the transformation of Rule 23.¹ Beginning in the early 1960s when the Rules Committee commenced its work on overhauling the joinder rules, Miller was much the junior participant in that process, leaving him now the only living memory of the discussions and debates that launched modern class action process. As an assistant to Benjamin Kaplan, the Reporter on the amendments, Miller served as scribe, draftsman, confidante, and shrewd observer to the lions of the legal world giving birth to a powerful new litigation tool. The theme of an old guard confronting and trying to contain a new world is a constant in literature, from Shakespeare to Chekhov, and is always filled with drama, misperception, and yet the potential for great insight. Though perhaps not quite imparting those epic themes, in its own way our little procedural innovation was a great story of the past giving birth to the future. And Miller is always a great storyteller.

At the end of the interview, I asked Miller what he thought the reaction of those gathered a half-century earlier would have been to some of the further reaches of class action law today.² Such cross-temporal questions are always hard as it requires projecting forward from a world in which jet planes had only recently come on line for commercial travel, the fax machine was a decade away, legal pleadings were still typed by hand, and the first photocopier had only recently come to market. But the seeds of the present can always be found in the past, and the question was what elements would have been recognizable even across technological frontiers.

To ground the discussion, I inquired about what reactions might have been to three of the largest class action cases of recent times: the Deepwater Horizon

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1. Samuel Issacharoff & Peter Zimroth, *An Oral History of Rule 23: An Interview with Professor Arthur Miller*, 74 N.Y.U. ANN. SURV. AM. L. 105 (2018) [hereinafter *Miller*].

2. *Id.* at 124–27.

litigation in the Fifth Circuit,³ the Volkswagen emissions case in the Ninth Circuit,⁴ and the NFL Concussion litigation in the Third Circuit.⁵ Like so many cases, large and small, each had yielded a settlement that was in turn subject to challenge by objectors of various kinds, including a settling party itself—British Petroleum—in the Fifth Circuit.⁶

The pervasive fact of settlement by itself marked an evolution in class action practice, and the term “settlement” did not appear in the 1966 version of the Rules. As Miller captured the ethos of the time, a class action was conceived of as “trial-ready.”⁷ The word “settlement” did not appear in the Rules at all until 1983 when Miller, serving as the Reporter to the Advisory Committee, introduced it into the new found managerial powers of the courts under Rule 16.⁸ The term did not appear in Rule 23 until 2003 when Rule 23(e) was changed from “Dismissal or Compromise” to “Settlement, Voluntary Dismissal, or Compromise.” And only in 2018 was Rule 23 amended to reach “a class proposed to be certified for purposes of settlement[.]”⁹ Even so, as the Supreme Court noted in 1997, and even without formal amendment, “[a]mong current applications of Rule 23(b)(3), the ‘settlement only’ class ha[d] become a stock device.”¹⁰ On this view, the Rules provide guidance, “[b]ut they are not all encompassing.”¹¹

In teaching complex litigation together, Miller and I had remarked that when he served as Reporter for the Complex Litigation Project of the American Law Institute¹² in the 1980s, the main focus had been trying to harmonize state and federal cases for common trial; there had been no discussion of judicial oversight of settlement. By the time I served as Reporter for the Aggregate Litigation Project twenty years later, one of the main themes became the role and proper regulation of settlement.¹³ Aggregate litigation had been reorganized on the ground, with the organizing principle being settlement rather than trial. But that

3. *In re Deepwater Horizon (Deepwater Horizon II)*, 744 F.3d 370 (5th Cir. 2014).

4. *In re Volkswagen “Clean Diesel” Mktg. Litig.*, 895 F.3d 597 (9th Cir. 2018).

5. *In re Nat’l Football League Players Concussion Inj. Litig.*, 821 F.3d 410 (3d Cir. 2016).

6. I must disclose having participated in these cases, including as counsel on appeal. Nothing presented here goes beyond the public record in decisions in the cases.

7. *Miller*, *supra* note 1, at 126.

8. *Id.*

9. FED. R. CIV. P. 23(e) (introductory paragraph); *accord id.* at 23(c)(2)(B) (adopted in 2018, referring “to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)”).

10. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997).

11. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016).

12. AM. L. INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994).

13. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 3.01, 3.02 (AM. L. INST. 2010) (discussing “General Settlement Principles” and “Court Approval of a Class-Action Settlement”).

transformation had to be fitted within Rules designed with adjudication in mind.¹⁴ We had all learned from judicial experience.¹⁵

The prevalence of class action settlements might have been new, but certainly disputes have reached resolution without formal adjudication for as long as there has been law. And the practices of non-adjudicatory resolution would no doubt move into every litigated domain. Of more immediate concern was the sheer scale of these cases involving many billions of dollars, thousands of claimants, complex interplays between state and federal law, and the driving force of a formidable plaintiffs' bar in facing down some of the most powerful institutional actors in the economy.

For Miller, the scale may have been unimaginable, but the inquiries actually fell into recognizable patterns. For example, the Volkswagen emissions litigation involved improper conduct of a single critical market actor, something that could be seen as a consumer-protection extension of the antitrust cases that were well-known in the mid-twentieth century.¹⁶ The expansion of antitrust in the 1960s followed on the colossal action against the Alcoa aluminum monopoly and would lead to the extraordinary lawsuit filed by the Department of Justice in 1974 that led to the break-up of the ATT monopoly. Similarly, the Deepwater Horizon calamity was the product of a single-event accident organized around the potential fault-based liability of a primary defendant, and perhaps some related parties. This was not different in kind from the mass harms caused by an airplane crash or a hotel fire, the kinds of tort actions that were not only known to the Rules Committee, but were the prompts for the coordination offered by the Multidistrict Litigation statute that quickly followed in 1968.¹⁷

But the one that stood apart was *In re National Football League Players Concussion Injury Litigation (NFL Concussion)*,¹⁸ a case Miller believed would have given the Rules adopters grave pause.¹⁹ Certainly, this view had support in the drafting history of the Rules. In the language of the Rules Committee in 1966, "mass accident" cases, such as airplane crashes or hotel fires, were seen as likely presenting too many idiosyncratic individual issues, such that what are now called mass torts would be "ordinarily not appropriate" for class treatment.²⁰ Judicial skepticism over mass tort class actions would define the Supreme Court's

14. See J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1716 (2012) ("Because the drafters of the Federal Rules placed the mechanisms for robust merits adjudication at the end of the litigation process, those mechanisms are largely unavailable to influence settlement outcomes in a world without trials.") (footnote omitted).

15. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 819 (2010) ("68 percent of the federal [class action] settlements in 2006 and 2007 were settlement classes.").

16. See generally Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809 (2000).

17. 28 U.S.C. § 1407.

18. 821 F.3d 410 (3d Cir. 2016) (MDL No. 2323).

19. *Miller*, *supra* note 1, at 125.

20. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (quoting the Committee for the 1966 revision of Rule 23).

participation in the field for a generation in reaction to expansive asbestos settlements.²¹ Those rulings tended to suggest that, “in most personal injury class actions, individual issues outweigh common issues, thus disqualifying such actions on predominance and manageability grounds”—even if some latitude might be given to settlements.²²

Although not the only example of mass torts that were resolved through class actions, *NFL Concussion* was no doubt the most high profile, as would be almost anything involving the NFL. What is most striking about the NFL decision is the care that Judge Ambro, on behalf of unanimous panel, took to fit the decision within well-trod guidelines for reviewing class actions. This meant not only walking the settlement through the various Rule 23 factors, but through the multi-step analysis offered in the Third Circuit for the approval of settlements.²³ Certainly the NFL class was less sweeping than the comprehensive class definition certified by the district court in *Amchem*, one that consisted of all persons in the United States who might have been exposed occupationally to asbestos and to all household members who were in contact with them.²⁴ Also, the NFL class created clear subclasses, with separate representation, for those who had present manifestation of harm and those who only faced the prospect of various neurocognitive impairments as a result of years of concussive hits.²⁵ But the real difference lay elsewhere. The gulf between *Amchem* and *NFL Concussion* reflects both a measure of judicial confidence in the ability to handle increasingly complex class actions, and a different focus on what is at stake in these cases. Simply put, *Amchem* reads as a tale of loss, in which individual tort claimants have relinquished their autonomous rights to pursue individual litigation. By contrast, *NFL Concussion* presents as a triumph of collective redress, one in which joint prosecution and resolution allowed the class of retired football players to overcome several formidable defenses²⁶ and to induce dispositive resolution for the NFL.

NFL Concussion opens another window on the role of the class action. Broad areas of class adjudication are being compromised, if not eviscerated, by

21. See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 677–82 (1979) (describing that history); see also John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 372–73 (2000) (noting that the Supreme Court’s asbestos cases “chilled” the more expansive use of class actions); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 352 (describing how mass tort cases prompted the Supreme Court to address “the conditions that call for aggregate treatment of the perceived class injury”); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1201 (2013) (tracing the application of class action principles in the World Trade Center litigation).

22. Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1599–1600 (2016).

23. *In re Nat’l Football League Players Concussion Inj. Litig. (NFL Concussion)*, 821 F.3d 410, 437–41 (3d Cir. 2016) (discussing the factors considered under Third Circuit precedent “when determining the fairness of a proposed settlement”).

24. *Amchem Prod., Inc.*, 521 U.S. at 602 n.5.

25. *NFL Concussion*, 821 F.3d at 428–30.

26. *Id.* at 421–22.

arbitration clauses inserted into every manner of consumer contract and employment relation.²⁷ Tort cases tend to arise in extra-contractual settings, thereby foreclosing defendants' ability to contract out of class proceedings—with the NFL being an odd hybrid because of it having arisen in the setting of professional sports. Without relitigating the particulars of *NFL Concussion*, I want to ask a different set of questions: what was it in judicial experience that made this case seemingly so ordinary at the final stage of settlement class approval, and what class action values have emerged through this experience that bear independent examination?

My proposition is two-fold. The first is that the confining language of Rule 23(b)(3) captures two competing impulses. One is to respect the ordinary presumption in favor of autonomy and the preservation of the individual interest in controlling one's own legal fate. Per the Supreme Court, a class action is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”²⁸ The second is that there are gains to be realized through coordination. As in all problems of collective action, we are forever confronted by one or another variant of the prisoner's dilemma, the gnawing doubt that trust in others may be betrayed by their pursuit of narrow self-interest. We can avoid the “tragedy of the commons,”²⁹ or more fiercely, the war of “all against all,” through cooperation.³⁰ But such cooperation, especially among dispersed strangers, requires an institutional mechanism. The class action serves, in Judith Resnik's term, as a subsidy to this kind of collective effort to achieve legal aims unavailable to the sole litigant.³¹

This tension between a commitment to the individual stake in a legal claim and the need for collective action to realize any effective legal remedy is reflected in Rule 23 itself, and in the mandatory inquiries into manageability, predominance, superiority, and the desires of class members to control their own litigation. Viewed through the prism of a light-touch textualism, even these epigrammatic terms from the Rules highlight the tension that is being resolved by judicial experience.

II

COORDINATION AS AN INDEPENDENT PROCESS VALUE

In interviewing Professor Miller, I pressed him on the awkward language of Rule 23(b)(3), seemingly alone in the Rules of that period in running together a series of convoluted formulations that seemed designed to burden the use of

27. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 623 (2012) (“[M]ost class cases will not survive the impending tsunami of class action waivers.”).

28. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

29. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

30. THOMAS HOBBES, *THE LEVIATHAN* 186 (C.B. MacPherson ed., Penguin Books 1968) (1651).

31. Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2144–46 (2000).

equitable powers by the courts. In general, the revisions to Rule 23 had eliminated prior language that had no grounding in everyday speech, and had acquired little precision in case law—terms such as “true” or “spurious” class actions.³² Whereas the rest of the Rule was streamlined—a feature that has now partially succumbed to a prolix era—Rule 23(b)(3), like its predecessor, threw together terms of imprecise meaning and uncertain relation to prior cases. These terms dictated an initial inquiry into predominance and superiority, followed by a list of manageability and individual control considerations. From the beginning, the language reflected a tension between those on the Rules Committee that wanted to facilitate aggregation of low value claims and those that feared the potential for misbehavior in the guise of efficiency. The elaborate language of Rule 23(b)(3) was intended as a “safeguard,” said Miller, allowing some expansion into new domains, but as always, hopefully not too much.³³

The language of the Rule reflected the two competing values of individual autonomy and the efficiency of aggregation. Two values present in (b)(3)—predominance and an assessment of litigant interest in controlling individual litigation—relate to individual autonomy and one’s presumptive control over a chose in action.³⁴ In the cases that arose mostly in equity, notably the desegregation cases that were the primary concern of the rule revision,³⁵ individual autonomy could have little role in shaping an injunction or a declaratory judgment against a defendant. Clearly, no litigant could claim a right to a personal injunction either compelling or forbidding school desegregation, for a constitutional ruling would necessarily bind all affected parties. Even in cases for damages at law, many involved multiple passive victims of a generalized fraud or defective product. As Justice Ginsburg noted in *Amchem*, the Rule’s inquiry, especially into predominance, “is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.”³⁶

Concerns for predominance and the desire of an individual to retain control over a cause of action certainly convey a distrust of where the reach of class actions might end up.³⁷ The Supreme Court has long endorsed the idea of a property right in a chose in action; if compromised, “the injury is one to

32. See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (“Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called ‘true’ category . . . [and] the ‘spurious’ category . . .”).

33. Miller, *supra* note 1, at 116.

34. A “chose in action” refers to “1. A proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. 2. The right to bring an action to recover a debt, money, or thing.” *Chose*, BLACK’S LAW DICTIONARY (11th ed. 2019).

35. See e.g., David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587 (2013); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

36. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

37. See, e.g., Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1574–75 (2007) (“[C]onclud[ing] that litigant autonomy should be acknowledged as . . . a foundational element of procedural due process . . . [and thus] Rule 23(b)(3) class actions . . . must . . . be deemed unconstitutional.”).

the right of property in the thing, and it is therefore unimportant as it respects the derivation of the title; it is sufficient if it belongs to the party bringing the suit at the time of the injury.”³⁸ The injury is to the classic liberal right of autonomy in the disposition of property. As famously captured by John Locke, men must be able to “order their Actions, and dispose of their Possessions and Persons, as they think fit, within the bounds of the Law of Nature, without . . . depending upon the Will of any other Man. A State also of Equality, wherein all the Power and Jurisdiction is reciprocal, no one having more than another.”³⁹ This concept of litigant autonomy continues to underpin European refusal to afford *res judicata* effect to American class actions. The notion that parties might be bound to a judgment to which one did not affirmatively assent is widely perceived as compromising rights to individual autonomy guaranteed under European law.⁴⁰

Other components of Rule 23 reinforce concerns about individual rights and acquiescence. Most notably, the right to opt out of a (b)(3) class action gives a semblance of contractual voluntarism to the enforceability of a class decree. Similarly, the inquiry into adequacy of representation evokes the process of selecting leaders in both the public sphere and in private organizational structures, such as the selection of corporate directors. But these are poor substitutes for real participation. And if the point is to ensure something like democratic accountability, as through elections, this generally requires repeat play and the ability to reflect retrospectively on leadership in the next election; that is obviously missing in class actions.⁴¹ Even the right to opt out is rarely exercised—not surprisingly, for cases that do not justify individual prosecution typically do not justify the investment of personal resources to monitor the results.⁴² Only recently have the costs of personal participation in mass litigation dropped sufficiently so that some forms of participation by absent class members may supplement more traditional governance mechanisms in these cases.⁴³

In fact, neither contract nor democracy, whatever their normative appeal, captures the animating spirit of class actions. The fact that one does not opt out from an undertaking that offers little fortune on its own is a poor substitute for a

38. *Deshler v. Dodge*, 57 U.S. 622, 631 (1853).

39. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 195–96 (Thomas Hollis ed., London, A. Millar et al. 1764).

40. See Andrea Pinna, *Recognition and Res Judicata of US Class Action Judgments in European Legal Systems*, 1 ERASMUS L. REV. 31, 37 (2008) (“[T]he opt-in requirement is fundamental to European legal systems and therefore a judgment rendered in respect of absent and even ignorant plaintiffs would be considered contrary to these countries’ concept of international public policy.”).

41. Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3169, 3177 (2013).

42. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1548 (2004) (finding that opt out numbers are low in low value consumer cases and higher in mass tort cases, as value of claims rises).

43. See generally Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017).

genuine meeting of the minds in classic contract tradition.⁴⁴ It is closer to a contract of adhesion whose terms cannot be altered transactionally. Similarly, a court's inquiry into the adequacy of representation is a far cry from the democratic capability to pass retrospective judgment on one's leaders through periodic elections. Courts may test the sections of Rule 23 that mandate inquiry into predominance and adequacy of representation as part of the formal requirements of the Rule. But finding predominance of common issues or adequacy of representation does not capture the key question as to why something should proceed as a class action.

At the same time, the language in Rule 23(b)(3) about whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" goes to something different. Loosely applying principles of statutory interpretation, both the text of the Rule itself and Professor Miller's account of the concerns at the time indicate that the drafters meant to do more than subject free-standing individual claims to administrative joinder. I leave to the side whether the language of the Rules deserves the same deference as statutory or constitutional language, whether the Advisory Committee notes constitute an actual legislative history, or what should be the relative weight of text, purpose, and history in interpretation. A simple "light touch" textual reading shows that the words point to concerns about the overall administration of justice, measured in terms of the substantive results of aggregate litigation rather than the nature of the rights-holder.

The superiority requirement and the inquiry about the "manageability" of a single aggregated proceeding focus on the benefits to be gained through coordination, and the relative costs and benefits of individual or collective litigation. In part this is a question of whether the focus of the litigation is on the upstream conduct of the defendant as opposed to the downstream impact on individual plaintiffs.⁴⁵ But I want to suggest here that there is more at issue. The text of Rule 23(b)(3) directs an inquiry into the rationale for concerted prosecution, a time-honored account of the benefits of coordination.

In political theory, contract and coordination draw on different justifications. Whereas contract recognizes a volitional exchange of one's property for a desired aim, coordination does not claim the same authority. For Locke, and for the contractarian tradition more broadly, the root of agreement comes in the right of disposition of property, an endowment that in turn stems from exalted natural law principles, such as the transformation of fallow land.⁴⁶ But coordination claims a more prosaic utilitarian justification in terms of what returns result. Its leading exponent is not Locke but David Hume, for whom "the goods of human

44. See Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 *IND. L. REV.* 65, 86–87 (2003) (arguing that small-claim class members tend to be relatively uninformed about potential legal claims).

45. *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION*, § 2.01 cmt. c (AM. LAW INST. 2010) (distinguishing upstream focus from downstream cases that must assess individual harm on a class-member basis).

46. LOCKE, *supra* note 39, 197–99.

society stem largely from doing as others do, in certain limited but crucial matters, so that each person's purposes in all other matters will mutually further others' purposes instead of crossing them."⁴⁷ In such "coordination contexts we act from interest and serve the mutual benefit."⁴⁸

The gains from cooperation transform an agglomeration of individual claims into something greater than their sum, much as a corporation may create wealth by binding individual investors to aggregated economic pursuits. The concept of an institutional form emerging from disparate legal claims is best captured by David Shapiro's concept of the class as an "entity," a corporate body that stands above and apart from its constituent parts:

[T]he entity is the litigant and the client. Moreover, in the situations in which class action treatment is warranted, the individual who is a member of the class, for whatever purpose, is and must remain a member of that class, and as a result must tie his fortunes to those of the group with respect to the litigation, its progress, and its outcome.⁴⁹

On this account, class actions resemble limited venture corporations organized for one single undertaking, with the Rules providing the distinct internal commands of governance. Such limited liability ventures are well known in history, with my favorite analogy being to the Venetian grant of legal status to the sea-faring *commenda*, "a rudimentary type of joint stock company, which formed only for the duration of a single trading mission."⁵⁰ In effect, Rule 23 confers the exclusive legal personhood to the class and allows it to bind class members in order to pursue mutual gains that were unavailable individually. And like the *commenda*, which unleashed the seafaring merchant power of Venice, the Rules allowed the entrepreneurial plaintiffs' bar to forge new economic ventures in the form of class actions that would test the boundaries of what the courts could handle. To the extent that class actions could resolve disputes with gains for all the participants, the judicial comfort evident in cases such as *NFL Concussion* could be realized.

III

CAPTURING JOINT GAINS

The virtues of coordination are generally implicit rather than explicit in decisional law. This largely results from the posture of most litigated challenges to class certification. When the opponent of certification is a defendant seeking to force all individuals into futile private endeavors, or a serial objector who claims an individual entitlement as a hold-up threat, challenges that focus on the nature of individual entitlements are strategic. Almost invariably this steers the challenge to class certification into a discussion of the predominance of individual

47. ANDREW SABL, *HUME'S POLITICS: COORDINATION AND CRISIS IN THE HISTORY OF ENGLAND* 6 (2012).

48. RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 18 (2000).

49. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 919 (1998).

50. DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 152 (2012).

versus common issues. The result is a highly unsatisfying body of case law that asks whether common issues outnumber individual inquiries,⁵¹ the amount of trial time that would be devoted to each (even if approval of a settlement class was at issue),⁵² and the persistence of individual inquiries over reliance, choice of law, or damages.⁵³ Courts try to grapple with this within the framework of the predominance inquiry, but the result is generally frustrating.⁵⁴

Case law built around strategic invocations of individual autonomy tilt the jurisprudence away from serious engagement with the reasons class actions continue to thrive. For courts faced with mass harms, the question is not whether to aggregate but how to aggregate. Although not guided by the case law, courts increasingly recognize the gains from coordinated activity, and have started to recognize those concrete gains alongside formal concerns with predominance or the putative individual interest in controlling litigation. A decade ago, the American Law Institute remarked on the growing attention to the independent value of comprehensive resolution of disputes—what is termed “global peace”—in securing more for a cohesive group than what disparate individuals could hope for.⁵⁵ Comprehensive resolution offers “predictability and conclusiveness . . . to bring into existence additional resources for distribution by way of the class settlement.” And the ensuing global peace generates a “peace premium” available only through a class resolution.⁵⁶

Such a “peace premium” stems from the lower anticipated transaction costs for a defendant facing no further litigation. But it also reflects the value of dispelling the stigma and uncertainty that follows from potential liability. Realizing this collective benefit, which by definition cannot be realized by any litigant operating individually, may provide one element of the “superiority” anticipated by the language of the Rules.

51. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–25 (1997); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–36 (2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800–01 (7th Cir. 2013); *see also* 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 4:49, 4:52 (5th ed. 2012) (articulating the predominance requirement and providing examples).

52. By and large, parties to settlements address the predominance issue to the satisfaction of reviewing courts. RUBENSTEIN, *supra* note 51, § 4:77 (noting that cases generally show that “courts have granted certification at settlement after themselves having denied it for trial purposes”). There are, however, the occasional misfires that raise predominance of trial issues even in the settlement context. *See, e.g.*, *In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679 (9th Cir. 2018); *In re Am. Int’l Grp., Inc. Sec. Litig.*, 265 F.R.D. 157 (S.D.N.Y. 2010).

53. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 792–800 (2013) (highlighting these as areas of doctrinal resistance to class actions).

54. *See, e.g.*, *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (“Predominance is not, however, a matter of nose-counting. Rather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class.”) (citation omitted).

55. In turn, the concept developed from the observations of Francis McGovern. *See* Francis E. McGovern, *Toward A Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1894 (2000) (formulating the term as a “peace premium for corporate predictability”).

56. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.10 cmt. b (AM. LAW INST. 2010).

This intuition can be grounded in recent class action case law, with an initial example to set the inquiry. In *Sullivan v. DB Investments*,⁵⁷ the Third Circuit confronted a proposed settlement of a national antitrust case against De Beers, the giant South African diamond conglomerate. De Beers was notoriously and openly a cartel. But it scrupulously maintained all its operations outside the United States, even though its market domination conditioned prices in every corner of the world.⁵⁸ For more than half a century, antitrust challenges floundered on the legal obstacles this imposed, including such mundane issues as personal jurisdiction and service of process.⁵⁹ De Beers conducted its direct transactions only with foreign intermediaries who in turn sold to wholesalers that imported the product into the American market. Cartel power yielded the ability to dominate sales in the United States, but from a safe perch beyond this country.

After the fall of the Soviet Union, however, Russia began mass production of cheaper and mostly lower-quality diamonds, which flooded the market and began to erode the effectiveness of the De Beers cartel. For the first time, De Beers sought to tap into the American retail market to profit from its strategic market presence and the brand value of its name. But to do so would require a presence in the United States that in turn could serve as the basis for liability under the American antitrust laws and their presumption of treble damages. The pull of American consumers directly met the push of liability.

Not surprisingly, a deal was in the offing. De Beers would accept service of process and submit to personal jurisdiction in the United States, in exchange for a structured deal covering its past liabilities.⁶⁰ What is significant is that, absent a comprehensive deal, there could be no release from litigation that would allow for entry into the American market.⁶¹ Without coordination, no plaintiff standing alone would fare any better than plaintiffs in all the prior efforts to pursue claims against De Beers. For De Beers, there was a huge market reward if the deal could be consummated. For the class of purchasers of diamonds in the retail jewelry market—termed indirect purchasers in the antitrust context—De Beers offered

57. 667 F.3d 273 (3d Cir. 2011).

58. *Id.* at 300.

59. *See id.* at 314 (“De Beers’s avoidance of effective antitrust prosecution in light of the twin difficulties of obtaining jurisdiction over the foreign corporations and of retaining within the court’s reach tangible assets sufficient to enforce a decree.”) (quoting *The Diamond Cartel*, 56 YALE L.J. 1404, 1411 (1947)) (internal quotation marks omitted).

60. *Sullivan*, 667 F.3d at 288, 291.

61. Some would argue that there should be no unanimity requirement and that more individual autonomy is preserved by allowing a 98% level of acceptance or a 95% level of acceptance so that the pressure to compel client acceptance is not so overwhelming. Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1024 (2010); *see also* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 864 (2016) (arguing that class action settlements have the propensity to unjustly disempower claimants). This has the feel of debates over moving first base back five feet to avoid close plays; wherever the threshold is set, the question becomes whether the gains from coordination can be factored into the reason to have a class action. *See* THE GIGANTIC BOOK OF BASEBALL QUOTATIONS 63 (Wayne Stewart ed., 2007) (“‘They should move first base back one step to eliminate all those close plays.’ – Outfielder/designated hitter John Lowenstein.”).

a payoff of over \$272 million, with another \$22.5 million going to direct purchasers.⁶² All in all, this was a fairly common class settlement, closing out liability in exchange for a damages payment and some injunctive relief against future anticompetitive activity.

But there was a problem: not all plaintiffs were identically situated. At least some of the claims were arguably more valuable in states that allowed what is termed an “*Illinois Brick* repealer,” meaning that indirect purchasers had an independent cause of action even though they had not purchased directly from the cartel. By contrast, purchasers in “non-repealer” states could not sue, and could only hope that direct purchasers would protect them against anticompetitive behavior. To be sure, Rule 23(a)(2) speaks only of common issues, not identical issues, and Rule 23(b)(3) insists that common issues must predominate, not that they must be exclusive. Nonetheless, on its face, this was a genuine intraclass distinction, yielding more valuable claims for some class members, and potentially no claims for others who were limited to recovery as indirect purchasers in a non-repealer state. In addition, there were state consumer protection law claims that varied state-by-state. The challengers, and an initial panel of the Third Circuit, were persuaded that “a district court must ensure that each class member possesses a viable claim or ‘some colorable legal claim.’”⁶³

But even at this level, the cases were complicated. After all, a resident of a non-repealer state could have bought a diamond while traveling to another state or may have been asserting a claim based on the first sale of a particular diamond in New York, the port of entry for the bulk of the American diamond market. Perhaps the state of purchase allowed for the extraterritorial protection of consumers, or perhaps the state antitrust laws of one or another state allowed an extra modicum of legal protection and potential recovery. These were potential differences among all class members, and they muddied the waters as to whether common issues predominated. Indeed, that is what the original panel had ruled,⁶⁴ and what the dissent on rehearing continued to advocate.⁶⁵

What then? It would be possible, at least in theory, to trace the appropriate choice of law for each of the many thousand class members, but only at a cost far exceeding the small value of most consumer diamond purchases. Such an approach would doom a class action just as surely as requiring individual actions. In Judge Posner’s memorable formulation, “only a lunatic or a fanatic sues for \$30.”⁶⁶ In the small value context, “the realistic alternative to a class action is not

62. *Sullivan*, 667 F.3d at 288.

63. *Id.* at 285.

64. *Id.* at 293–94.

65. *Id.* at 346 (Jordan, J., dissenting) (“Because of differences among those statutes, it is clear that some class members are entirely without a cognizable claim. . . . [S]uch variances . . . are so significant as to defeat commonality and predominance even in a settlement class certification[.]”) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529–30 (3d Cir. 2004)).

66. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

17 million individual suits, but zero individual suits.”⁶⁷ By extension, raising the transactional cost of a consumer class action by requiring these individualized inquiries would doom the collective enterprise every bit as surely as the limited value of the underlying individual claims would doom efforts at individual litigation.

The Third Circuit, now acting *en banc*, addressed this issue as a matter of the manageability of a class action, as a court routinely confronting an onslaught of litigation arising from the undifferentiated conduct of a particular actor:

[W]here a defendant’s singular conduct gives rise to one cause of action in one state, while providing for a different cause of action in another jurisdiction, the courts may group both claims in a single class action. This tactic in litigation advances the laudatory purposes of the class action device, “preserv[ing] the resources of both the courts and the parties by permitting issues affecting all class members to be litigated in an efficient, expedited, and manageable fashion.”⁶⁸

But that could hardly be all; a refusal to certify the class would have doomed any individual enforcement action to the likely lack of personal jurisdiction, and the insufficiency of individual stakes to incentivize an effort to overcome that legal hurdle. So, the real question before the court was whether there could be private redress for systematic conduct with wide effects.

Sullivan presented an extreme version of a phenomenon that I have previously described as “private rights, aggregate claims”⁶⁹—an endowment of rights to individual persons that have value as legal claims only when joined together with others. Most often, this is the problem of “negative value” claims, in which the transactional costs of vindication exceed the expected return from prosecution of the legal action. This is what Judge Posner captured in referring to the (hopefully) limited population of lunatics and fanatics who would bring such claims. Courts frequently refer to such negative value claims as a significant factor favoring class certification.⁷⁰ But transactional costs are not the entire story and represent a subset of a broader universe of gains from coordination. Amortizing the costs of litigation is one reason that there are gains from proceeding in the aggregate, and may be the most significant in many cases. But the inquiry goes beyond the cost calculus.

Class actions are but one of a series of coordinating devices that compel transactional completion in the resolution of legal claims. A state may bring a

67. *Id.* (emphasis omitted).

68. *Sullivan*, 667 F.3d at 302 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 410 (5th Cir. 1998)).

69. Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183.

70. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (“The most compelling rationale for finding superiority in a class action . . . [is] the existence of a negative value suit.”); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (“In most class actions—and those the ones in which the rationale for the procedure is most compelling—individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation.”); RUBENSTEIN, *supra* note 51, § 4:65 (discussing the “[s]uperiority [of class actions] in small claim or vulnerable population cases”).

parens patriae action asserting the rights of all its affected citizens.⁷¹ Similarly, a probate hearing must compel the complete resolution of all claims against an estate, and a bankruptcy proceeding must similarly resolve all claims against a distressed business in deciding whether to liquidate or restructure as an ongoing concern. In all such circumstances the rights belong to an individual, but cannot be vindicated without collective resolution. In individual hands, such rights are phantasmagoric, a semblance of reality like the shadows in Plato's allegory of the cave. Without a mechanism for vindication, these rights have form but no substance.

Bankruptcy well recognizes the interplay between private entitlement and collective redress. The claim of a creditor in bankruptcy arises from private contractual relations and, classically, that chose in action is a private endowment of a property claim. Yet there is no due process right to individual vindication of such a creditor's claim because the beneficial disposition of the corpus of the debtor turns on joint resolution of all creditor obligations. Bankruptcy therefore recognizes the individual source of the right to recover but presumes that any such recovery will be through the aggregate.

As a result, bankruptcy law and procedure are replete with analyses of how to protect the individual interest through the collective resolution, starting with the formation of creditor's committees, and continuing through the recognition of priorities of different claims on the estate, and finally ending up in the equal treatment of comparably situated claimants.⁷² The aims of all these aggregative devices largely converge,⁷³ with one exception. Bankruptcy and probate start from the assumption that there must be collective resolution and then adjust individual protections accordingly, whereas ordinary civil litigation starts from the premise of individual autonomy, even where aggregate proceedings are inevitable. Troy McKenzie develops this point in arguing for the comparative advantage of bankruptcy as a model for mass adjudication, particularly in the mass tort context:

The major element running throughout the architecture of the bankruptcy process is that the judicial system and society benefit from unified proceedings in a single forum in which all interested parties in the debtor's fate are represented. For mass tort litigation, that conception of the role of a court in guiding litigation has obvious advantages for the management and equitable resolution of a multitude of claims. The judicial system as a whole benefits from the reduction in duplicative and competing

71. On the parallels and competing benefits of class actions and *parens patriae* actions including the risk of agency costs, see generally Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 *HARV. L. REV.* 486 (2012).

72. 1 *COLLIER ON BANKRUPTCY* ¶ 1.01 (16th ed. 2020) (describing the basic tenets of American bankruptcy law).

73. See *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 242 n.57, 245 (3d Cir. 2004) (“[S]ettlement must provide for ‘equity among members of the class’ and ‘fairness of the distribution of the fund among class members’ Though *Ortiz* was decided under FED. R. CIV. P. 23(b)(1)(B), the Court’s requirement of fair treatment for all claimants—a principle at the core of equity—also applies in the context of this case.” (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 854–55 (1999))) (“In the resolution of future asbestos liability, under bankruptcy or otherwise, future claimants must be adequately represented throughout the process.” (citing *Amchem, Prods., Inc. v. Windsor*, 521 U.S. 591, 625–28 (1997))).

proceedings. Claimants benefit from the greater attention to equitable treatment of claims for compensation. And society benefits from the closer calibration of a defendant's conduct to the compensation the defendant will pay for harms caused by that conduct.⁷⁴

Further, bankruptcy presumes that there will be gains from the unified resolution of all creditors' claims, and that this will accrue to the benefit of all those with demands upon the estate. There is a reason that bankruptcy proved to be the coordination mechanism in asbestos cases following the Supreme Court's decisions in *Amchem* and *Ortiz v. Fibreboard Corp.*⁷⁵ Bankruptcy also introduces the critical element of voting to allow stakeholders to vindicate their individual rights within the aggregate.⁷⁶

Sullivan significantly advances the inquiry in class action law by moving the discussion of those joint gains, now embraced under the term of "global peace," front and center in class action law parallel to the view advocated by the American Law Institute. For the Third Circuit, compelling a reviewing court to limit a class settlement to individuals with an established claim "would effectively rule out the ability of a defendant to achieve 'global peace' by obtaining releases from all those who might wish to assert claims, meritorious or not."⁷⁷ The court went on to credit the underlying interest that could only be achieved by a comprehensive resolution:

[I]n an effort to avoid protracted litigation and future relitigation of settled questions in federal and state courts across numerous jurisdictions, De Beers pursued a global settlement and demanded a release of potential damage claims in all fifty states Specifically, De Beers sought "global peace" in a settlement covering plaintiffs in every federal and state case, as well as potential plaintiffs who had not yet filed cases in either federal or state court.⁷⁸

Such a return to finality cannot be realized by any individual claimant in negotiating the terms of an individual settlement nor, correspondingly, can it be achieved by the defendant in settlement with any particular claimant. Professor Rave explains the gain-gain scenario that prompts the greater returns for all claimants if a comprehensive deal can be realized:

[A] global settlement generates efficiencies and saves on transaction costs for defendants as well as plaintiffs. Handling claims in bulk is more cost effective for defendants. Accordingly, the cost of litigating against a few opt-outs may be disproportionately high – the flip side of the economies of scale in aggregation. There are simply fewer cases across which to spread the costs of developing common factual or legal issues that will arise at trial. Further, if defendants can offer a lump sum and disclaim any role in the allocation, they can avoid the cost of valuing and negotiating

74. Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 97 N.Y.U. L. REV. 960, 1004–05 (2012).

75. See Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1741–50 (2002) (describing challenges of mass tort as problems of coordination among the various constellations of defendants, plaintiffs, and courts that are typically involved).

76. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 244 (3d Cir. 2004) ("By providing impaired creditors the right to vote on confirmation, the Bankruptcy Code ensures the terms of the reorganization are monitored by those who have a financial stake in its outcome.").

77. *Sullivan v. DB Invs.*, 667 F.3d 273, 310 (3d Cir. 2011).

78. *Id.* at 310–11.

individual claims. And broad settlements give defendants better returns on the sunk costs they have already spent on valuation and negotiation. The marginal cost of adding another claim to a group settlement is typically less than the cost of negotiating a separate settlement. For similar reasons, defendants will often pay to settle even weak claims as part of a global deal to avoid the nuisance of protracted litigation [Further,] defendants may be willing to pay extra for finality because it reduces the chances that future losses at trial or serial settlements will encourage the filing of new claims.⁷⁹

To circle back to *NFL Concussion*, the prior experience of *Sullivan* and similar cases allowed the Third Circuit to give independent weight to the need for closure to improve the condition of the entire class of retired football players. For the NFL, a main consideration was the public explosiveness of the charge that “despite the NFL’s awareness of the risks of repetitive head trauma, the League ignored, minimized, or outright suppressed information concerning the link between that trauma and cognitive damage.”⁸⁰ On the other side of the ledger, the former players faced having most of their claims preempted by federal labor laws governing the interpretation of the NFL’s collective bargaining agreements.⁸¹ For the NFL, the glare of adverse publicity was a vulnerability, but one that could only be addressed in the aggregate—discovery in any individual case could yield the same information, assuming that individual cases could justify the expenses of the process. For the retired players, any legal resolution of preemption, even in an individual case, threatened the viability of all litigation as a practical matter, as did the hurdle of translating epidemiological evidence into the causation for any particular player’s injuries.⁸²

Doctrinally, consistent with how litigation challenges are framed, the opinion in *NFL Concussion* pushed the inquiry into the framework of predominance.⁸³ A handful of individual objectors claimed that their interests were not represented and that other issues of latent injuries compromised predominance of the settlement terms. The major doctrinal innovation of the opinion—crediting the number of private lawsuits and non-class lawyers as evidence of the oversight on the quality of the deal obtained⁸⁴—was considered under the rather ill-fitting rubric of adequacy of representation. The court looked to the extraordinary number of lawyers scrutinizing the deal to confirm that real stakeholders appreciated the benefits obtained from the overall settlement. The court took the challenges doctrinally as presented: individuals claiming that adequacy of representation or predominance were not met. But the court’s resolution would not have made sense without the core insight that there were gains from coordination, and that those had been realized to the benefit of the entire class.

79. Rave, *supra* note 21, at 1194; *see also* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 414, 417 (2014) (analyzing the greater returns available as a result of comprehensive settlement following Deepwater Horizon spill).

80. *In re Nat’l Football League Players’ Concussion Inj. Litig.*, 821 F.3d 410, 422 (3d Cir. 2016).

81. *Id.*

82. *Id.* at 439–40.

83. *Id.* at 434.

84. *Id.* at 433.

IV TESTING THE BOUNDARIES

Returning to the language, Rule 23(b)(3) requires a court to find “that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy.”⁸⁵ As discussed earlier, these can be thought of as presenting the two sides of aggregation: integrity in the handling of private rights of action and overcoming coordination problems in seeking aggregated resolution. Cases such as *NFL Concussion* or *Sullivan* address the initial hurdle of excessive attention to individual claims based on narrow interpretations of predominance. *NFL Concussion* goes one step further in allowing active participation and monitoring by a substantial portion of the class to be a guarantee of proper representation. Each of these cases underscores the gains to be realized from global resolution, not only for the defendants, but for the collective welfare of the plaintiff classes. But these cases stop short of addressing exactly how to overcome the deleterious consequences of allowing individual class member to hold out for a disproportionate share by objecting or threatening to opt out of any proposed global resolution.

The ability to claim an individual premium after a potential deal is struck is the foothold for strategic objectors to class actions.⁸⁶ Once the deal is in place, the need for global resolution allows for a hold-out by the last class member standing whose participation is necessary for the deal to close. The preferred mechanism for such strategic objectors is to file a notice of appeal after a perfunctory objection in the district court, and then to offer to withdraw that appeal for a premium, generally paid to objector’s counsel. The intervention of such objectors reduces the benefit for the class because both the defendant and class counsel have to withhold some of the potential class payment in order to pay off subsequent extortion. The 2018 reforms of Rule 23(e) sought to curb that practice by requiring disclosure to the district court of any side payment arrangements, hoping thereby to deter an evident strategic impediment to being able to negotiate for global peace.

Unfortunately, such strategic objectors are not the only obstacle to obtaining the peace premium that comes with complete resolution. Most class actions are settled before a litigation class is certified, meaning that class counsel and the class representatives cannot claim any conclusive authority to represent all class members. To the extent the defendant is willing to reward completion, the ability to achieve global peace remains speculative. Class settlements typically contract around this with a minimum participation threshold—frequently termed a “blow

85. FED. R. CIV. P. 23(b)(3).

86. Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 FORD. L. REV. 475, 477 (2021) (defining ugly objectors as those that “raise objections not to improve the settlement but to extort payments from class counsel in exchange for dismissing their objections. Such objectors do not even arguably serve a legitimate purpose”).

provision”—that defines a walk-away right for the defendant.⁸⁷ Such negotiations, however, risk leaving potential benefits on the table in the form of funds reserved to address opt outs who continue to litigate, in addition to buying off strategic objectors.

The inability to commit ahead of time to a coordinated strategy is a variant of the tragedy of the commons, particularly when stakeholders have different claims that might prompt strategic holdouts. As Professors McGovern and Rubenstein explain,

Heterogeneous classes therefore present a collective action problem somewhat akin to a prisoner’s dilemma: everyone in the group might be best off – along several dimensions – if they could work together, but lacking a clear mechanism by which to do so, coordination costs render that option illusive. The tragedy of this commons is that, built on a different template, class action law does not immediately appear to provide a coordination mechanism.⁸⁸

In individual litigation, parties can agree to coordinate by waiving conflicts, as with a wife and husband agreeing to be represented by the same estate lawyer, so long as they are sophisticated enough to trade off the transactional gains against the potential conflicts.⁸⁹ The question becomes whether the same elements can be realized in aggregated proceedings. In such aggregated proceedings, there is the compounding problem that the mass of potential claimants present themselves as an undifferentiated bundle, each of which has the ability to opt out. For defendants, there is the overwhelming risk of adverse selection as a result of the right of class action plaintiffs to opt out. “When plaintiffs can opt-out of settlements, there is a danger that those with the strongest claims will do so, leaving a defendant with a settlement dominated by weak claims.”⁹⁰

A New Jersey state case posed the collective action issue in provocative fashion outside the class action context. A group of franchisees of a national tax preparation service decided to sue collectively and agreed to bind themselves to joint funding of the lawsuit, a predetermined recovery schedule, and an agreement to be bound by the outcome of any settlement if a supermajority voted

87. 4 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 13:6 (5th ed. Dec. 2020 update) (explaining that these provisions allow “the defendant to withdraw from—or ‘blow up’—a settlement if a certain number of class members opt out of the settlement”); *see also* D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 *FORDHAM L. REV.* 2175, 2180 (2017) (addressing “walk-away provisions”).

88. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 *TEX. L. REV.* 73, 78 (2020).

89. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 122 cmt. D (AM. L. INST. 2000) (“A client’s open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.”); MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 22 (“[I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, [general and open-ended] consent is more likely to be effective.”).

90. Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 *WAKE FOREST L. REV.* 733, 760 (1997).

in favor.⁹¹ An agreement was reached, a vote was taken, but then a hold-out challenged the ability to enforce the outcome. The case clearly presented the Lockean private right to a chose in action against the Humean gain from coordinated action. The New Jersey Supreme Court hesitated, found the contract enforceable in the immediate case, but then expressed skepticism that this could be done and pushed the question of such arrangements off to the rules process prospectively. But the question endured: Why cannot a sophisticated group of commonly situated litigants form their own *commenda*, a limited liability joint venture with clear rules of participation and internal resolution? Every purchase of stock, every purchase of a condominium, every membership at a gym, all are contractual realizations of potential joint gains at the cost of yielding elements of personal autonomy to specified forms of organization. Why not a joint litigation venture among the same people who routinely buy stock, homes, and club memberships? If global peace is a collective good, why cannot those who benefit by it agree ahead of time on the rules by which it might be realized?

The American Law Institute proposed just such an approach,⁹² adapting the voting system from Section 524(g) of the bankruptcy code governing agreed upon resolution of asbestos insolvencies⁹³ and proposing similar supermajority resolution for common legal undertakings.⁹⁴ Such an approach would not help small-claim consumer actions,⁹⁵ but would create the ability to form a class-like mechanism without the formality of Rule 23. In effect, the ALI approach allowed a class-like mechanism to emerge from private ordering rather than judicial decree, reflecting a world of complex cases in which closure became the desired end state.⁹⁶ The ALI proposal, to borrow from Professor Lahav, did not come from nowhere, but reflected the maturing judicial understanding that “aggregate solutions are inevitable and aggregation takes on whichever form most easily allows cases to travel towards settlement.”⁹⁷ By whichever pathway, the various forms of aggregation share both central problematics and aims. As summarized by Lahav, these are the goal of “horizontal equity” among the stakeholders, the risk of principal-agent costs as individuals are subsumed in the aggregate, and the

91. *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512 (N.J. 2006) (holding that a retainer agreement containing a weighted-majority provision for settlement of the litigation would be unenforceable under Rule 1.8(g); however, the court upheld the settlement in question and applied its decision only prospectively).

92. PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 3.17 (AM. L. INST. 2010). Once again, a disclosure: Together with Robert Klonoff, Richard Nagareda, and Charles Silver, I served as the Reporter for the ALI on this undertaking.

93. 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

94. See PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 3.17 cmt. d(2) (AM. L. INST. 2010) (“Sophisticated clients, such as businesspersons or investors, are more likely than others to appreciate the benefits and risks of subjecting themselves to some form of substantial-majority rule.”).

95. For skepticism that claimants can rely on democratic mechanisms if the stakes are low, see Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 86–87 (2003).

96. Morgan A. McCollum, *Local Government Plaintiffs and the Opioid Multi-District Litigation*, 94 N.Y.U. L. REV. 938 (2019).

97. Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394 (2019).

need to reconcile global resolution with the decentralized system of dispute resolution across multiple states and the federal-state divide.⁹⁸

From that came the most innovative effort at realizing collective gains from aggregated litigation. Fittingly in an issue devoted to the achievements of Francis McGovern, the undertaking came from him and Professor Rubinstein. The effort is to realize the gains from global peace by inviting class members to agree to be bound by collective resolution based on a clear supermajority vote, drawing on the ALI proposal, and in turn on the experience with asbestos bankruptcies and the New Jersey state tax franchisees' collective action. Voting is key under bankruptcy because "providing impaired creditors the right to vote on confirmation, the Bankruptcy Code ensures the terms of the reorganization are monitored by those who have a financial stake in its outcome."⁹⁹

The proposal goes thus:

As applied in the class context, the idea unfolds in five stages: (1) active class members initially work together to generate a distributional metric for allocating a lump sum settlement among the class members and a related voting scheme for responding to any proposed settlement; (2) once these mechanisms are in place, putative class counsel moves for certification of an opt-out Rule 23(b)(3) class, with certification limited to the sole purpose of negotiating a lump sum settlement with the defendant; (3) if the court grants class certification, class members receive notice explaining the allocation metric and the supermajority voting scheme and they are given a one-time opportunity to opt out of the class; (4) after the opt-out period ends and the class size is fixed, the class's counsel and representatives attempt to negotiate a lump sum settlement with one or more defendants; (5) if achieved, the amount of the lump sum is put to a classwide vote, and if it garners supermajority support, the entire class is bound by that vote; class counsel and the defendant then move for final judicial approval of the settlement.¹⁰⁰

This proposal was realized in what is termed the "negotiation class" in the National Prescription Opiate Litigation. Fittingly, the litigation exists across all frontiers of aggregation, with Purdue Pharma in bankruptcy, state level litigation in various courts, a nationwide MDL of all the cities and counties that have filed suit, and, finally, the proposed creation of a pre-arranged negotiation entity in an MDL proceeding. The architects of the proposal, Professors McGovern and Rubinstein, served as special masters in the opioid MDL and could help usher their proposal from the drawing board to lived experience. The aim was to realize collective benefits through bargaining and voting: "By providing a mechanism for keeping the whole class together as a bargaining unit, the negotiation class's primary goal is to resolve the collective action problem presented by a heterogeneous class of large and small stakeholders."¹⁰¹

As with many first steps, the results are mixed. The proposal was approved by the district court and then reversed by a split panel of the Sixth Circuit.¹⁰² Because I served as counsel to advocate adoption in both the district court and

98. *Id.* at 1404–09.

99. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 244 (3d Cir. 2004).

100. McGovern & Rubenstein, *supra* note 88, at 79.

101. *Id.* at 104.

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

the Sixth Circuit, I will leave further elaboration to others. Suffice it to say that, in keeping with Professor Lahav's assessment of the evolving understanding of aggregation, this proposal too "did not come out of nowhere."¹⁰³ Whether the precise form of the negotiation class perseveres on future application or is replaced by another mechanism, no approach to redressing mass harm will ever return to the presumed halcyon days of one-by-one adjudication.

V

CONCLUSION

More than a century ago, Oliver Wendell Holmes captured the heart of the common law methodology: "The life of the law has not been logic: it has been experience The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."¹⁰⁴

When pressed about the perceived need to reform the Federal Rules only a quarter century after their initial adoption, Arthur Miller invoked the Holmesian concept of law as a distillation of lived experience. The joinder rules as initially promulgated in 1938 "were underused, and it was thought time to rationalize them, to tie them together better than they had been tied in the 30s, and to clarify the text to capture the 25 years of experience, and to insert that experience under the Federal Rules of Civil Procedure into the rules."¹⁰⁵

Much has changed in the scale and reach of class actions since the major reforms of Rule 23 in 1966, driven in the Holmesian sense by the growing confidence of the judicial ability to manage increasingly complex social issues and the ability to realize the benefits of collective resolution. As judicial experience with large class actions has grown, courts have come to appreciate the value of global peace as providing greater benefits than could ever be realized in isolated litigation, even were that to be pursued. The core argument presented in this Article is that the open-textured language of the Rules invites judicial experimentation and that this experience becomes the lifeblood of the evolution of the law.

For reasons well beyond the scope of this Article, the reforms of today move through judicial innovation rather than formal rules amendment; the latter trails rather than leads. The first conclusion that emerges is the increasing judicial capacity to engage in "midstream corrections" that innovate "while litigation is pending, in response to problems that arise in specific disputes, resulting in ad hoc procedure."¹⁰⁶ What begins ad hoc gets refined through practice. Whatever the formal amendments to Rule 23 in the years after 1966, what changed most between the initial skepticism over the class resolution of mass harm cases and

103. Lahav, *supra* note 97, at 1403.

104. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Harvard Univ. Press 2009) (1881).

105. Miller, *supra* note 1, at 107.

106. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 774 (2017).

NFL Concussion was the testing of judicial innovation and the emerging confidence in the ability of aggregative procedures to address major societal concerns.

The second conclusion also pushes the boundaries of this Article. Much of the innovation of what is termed “ad hoc procedure” occurs through the give and take of case management. These matters become the deep wisdom of courts that must handle the large disaster cases. By contrast, doctrine reflects only the manner in which cases are presented for final adjudication. Thus, in the sweeping resolution of the VW emissions scandal, the Ninth Circuit responded only to objectors who were either trying to insinuate themselves into the settlement by claiming a trivial conflict in representation of resold versus owner-retained cars¹⁰⁷ or by demanding attorneys’ fees in disregard of the district court’s case management orders.¹⁰⁸ Only the most discerning interstitial reader could piece together the complex organizational structure that allowed the entire controversy to be resolved in barely a year. Similarly, because so much of the class action law is generated by strategic objectors claiming that their ability to vindicate their \$30 claim is compromised by nefarious aggregative procedures, the law is heavily focused on the predominance prong of Rule 23(b)(3). Predominance is only one of the lines of inquiry of Rule 23(b)(3), but it is the one that sounds most clearly in a Lockean claim to inalienable individual rights.

For courts tasked with the great mass cases of the day, the question is one of the equitable administration of justice and the efficient use of judicial resources. Rule 23(b)(3) assigns these values to the superiority prong of the class inquiry, a recognition of the Humean insight into coordinated behavior. While not as prominent in the case law, this well captures the practices in courts today.

Amchem may still define the doctrinal contours of mass harm class actions. Judicial experience moves on.

107. *In re Volkswagen “Clean Diesel” Mktg. Litig.*, 895 F.3d 597 (9th Cir. 2018).

108. *In re Volkswagen “Clean Diesel” Mktg. Litig.*, 914 F.3d 623 (9th Cir. 2019).