INTERNAL AND EXTERNAL GOVERNANCE IN COMPLEX LITIGATION

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I
INTRODUCTION

For those of us who teach and write about complex litigation, Francis McGovern's work provides a rich source of insights across the field. His classic article surveying the asbestos crisis helped to spark my own interest in the interplay between class actions and bankruptcy in the world of aggregate litigation.[1] *The Tragedy of the Asbestos Commons* did more than summarize the history of asbestos litigation. It was a lament about the delay, confusion, and unnecessary costs generated by the failure of institutional players to "engage in joint action" that might have brought the problem to heel.[2] As McGovern explained, lawyers, litigants, and judges had failed to treat asbestos litigation as a problem in which cooperation—across the boundaries of a single case or a single court—would be the only solution. And legislators, who might have been able to act to resolve the problem on a global scale, offered no alternative to the blunt tools of litigation.

McGovern acknowledged that joint action of the sort he prescribed did not come about solely from the goodwill and benevolence of the players in mass litigation. Instead, it required some form of coercion—understood practically as cooperation born of pressure "emerg[ing] from a search for equilibrium among the parties"—that might involve a mix of legislation, individual litigation, class actions, or bankruptcy.[3] Writing shortly after the Supreme Court's rejection of asbestos settlement class actions in two landmark cases,[4] McGovern accurately predicted that the next phase of asbestos litigation would likely play out in bankruptcy court, where the finality offered by the Bankruptcy Code would prove to be the only viable alternative for asbestos litigants. In bankruptcy court, of course, cooperation and coercion walk hand-in-hand, because the totalizing

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1. Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002).
2. *Id.* at 1722.
3. *Id*. at 1756.
4. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

nature of the bankruptcy process places severe limits on the ability of stakeholders to exit and seek resolution elsewhere.[5]

It is fitting that McGovern devoted his last scholarly work to the opioid crisis,[6] which presents many of the same concerns that marked the asbestos saga. In considering solutions to opioid-related litigation, he returned to the central theme of *The Asbestos Commons*—the role of cooperation. *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, co-authored with William Rubenstein, considered a novel way of deploying Rule 23 as a mechanism that would pull together a group of litigants in order to resolve a large-scale problem.[7] As he had argued twenty years before in assessing the tragedy of asbestos litigation, McGovern saw that the resolution of opioid litigation required plaintiffs, defendants, and institutional players to work toward global resolution. And, as with asbestos, the form of cooperation would be dependent on some amount of practical corralling to give an incentive to the players to work together. The negotiation class concept uses Rule 23 to create a plaintiff class, before negotiation of a settlement, that would be bound after a supermajority vote to accept the product of that negotiation. By establishing the contours of the class first, the negotiation class gives the defendant a clear sense of the scope of finality a settlement will produce, thereby encouraging a settlement offer that promises closure.

I begin with these observations in order to frame the question that this Article will address: Under what circumstances will procedural forms of cooperation, plainly necessary in the resolution of mass claims, provoke intense judicial skepticism? That question remains a recurring one throughout the development of modern aggregate litigation. Much as the creative use of the settlement class action to resolve asbestos litigation was quashed by the Supreme Court in *Ortiz v. Fibreboard Corp.*[8] and *Amchem Products, Inc. v. Windsor*,[9] the formulation of a negotiation class action to resolve opioid litigation met a hostile reception in the U.S. Court of Appeals for the Sixth Circuit. Indeed, the Sixth Circuit's decision, *In re National Prescription Opiate Litigation*,[10] appears to read the Supreme Court's asbestos settlement class action decisions as requiring that hostility.

Judicial skepticism can be described as the product of concerns about *legitimacy*, which drove the Court's asbestos settlement class decisions. That term was the label chosen by Justice Ginsburg in her opinion for the Court in *Amchem*

5. *See* Troy A. McKenzie, *Toward a Bankruptcy Model for Non-class Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012) (describing bankruptcy as a model to analyze non-class aggregation of mass tort litigation that assumes collective resolution is necessary).

6. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEXAS L. REV. 73 (2021).

7. *Id.*

8. 527 U.S. at 815 (1999).

9. 521 U.S. at 591 (1997).

10. 976 F.3d 664 (6th Cir. 2020).

to describe the question presented in the case.[11] The Court concluded that the deployment of the *Amchem* class action, certified under Rule 23 of the Federal Rules of Civil Procedure for settlement purposes only, was not a legitimate means of resolving asbestos litigation.[12]

To state that truism about the Court's decision in *Amchem* is to give little guidance about what "legitimacy" requires. Legitimacy concerns are amorphous. To label a class action as "illegitimate" conveys a mood about the propriety of the litigation. That mood may give hints about the kinds of litigation that fall within the bounds of legitimacy and those that fall outside those bounds. But the hard work of providing theoretical justification—and practical grounding—for *Amchem*'s mood has been left to scholars and the ongoing development of real-world litigation in the lower courts.

Detecting the uncertainty of the label, scholars after *Amchem* and *Ortiz* examined legitimacy as a governance problem. Articles by Samuel Issacharoff[13] and by John Coffee[14] analogized the dilemmas of the class action to problems of governance. Drawing from a well-established literature in public law and in private law, this scholarly synthesis explored the governance model in order to give concrete shape to amorphous legitimacy concerns. The governance analogy provided a powerful analytical lens for testing the proper conduct of aggregate litigation. Under that lens, questions of the appropriate use of aggregation could be conceptualized using the familiar triad of exit, voice, and loyalty that had been developed in the literature on organizations and their governance.[15]

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11. *Amchem*, 521 U.S. at 597 ("This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims.").

12. Justice Breyer's dissenting opinion did not question the reasonableness of the majority's conclusion. Instead, it framed the problem for the Court as something akin to judicial review of an administrative agency's rulemaking—a mixed question of fact, law, and policy. In other words, the legitimacy of a settlement class, in Breyer's view, was an issue best left to the discretion of the district court. *Id.* at 641 (Breyer, J., concurring in part and dissenting in part) ("The issues in this case are complicated and difficult. The District Court might have been correct. Or not. Subclasses might be appropriate. Or not. I cannot tell.").

13. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 338–39 (1999).

14. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371 (2000) [hereinafter Coffee, *Class Action Accountability*]; *see also* John C. Coffee Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 288 (2010) (offering a model for aggregate litigation that relies on a representative plaintiff who would "function as a true 'gatekeeper,' pledging its reputational capital to assure class members of its loyal performance").

15. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). Writing with the turmoil of the 1960s in mind, Hirschman addressed the problem of organizations in decline. He considered the tradeoffs between exiting (walking away) and using one's voice (speaking up or voting) as organizational strategies, with loyalty determining the balance between them. Hirschman's central subject was the troubled business responding to dissatisfaction among its stakeholders. But his study ranged well beyond microeconomic doctrine and across the public-private divide. He attempted to find a "unifying way of looking at issues as diverse as competition and the two-party system, divorce and the American character, black power and the failure of 'unhappy' top officials to resign over Vietnam." *Id.* at vii. In doing so, Hirschman built on earlier work

The main insight of the governance model is that the class action can be thought of as presenting problems of representation. A class is an organized collective, much like a polity (in the public law literature) or a business entity (in the private law literature). Representative litigation, in turn, naturally triggers concerns about the organization of the collective and the selection and supervision of its leaders. The governance literature offered insights for resolving the problems of organizing and controlling aggregate litigation by addressing the problem of representational legitimacy.[16]

This Article seeks to give a name to a distinction implicit in the governance model by separating two different but intertwined concerns: *internal* governance and *external* governance. Internal governance concerns focus on the organization of the collective—how it is structured, who serves as its representatives, and how those representatives are monitored and controlled. For those questions, exit, voice, and loyalty provide a stable set of considerations to assess the bounds of aggregate litigation. External governance concerns, by contrast, focus on broader worries about the place of litigation in governing the larger polity. Those broader worries include matters that are sometimes articulated poorly as concerns about judicial competency, the separation of powers, or federalism—or are not articulated at all. For these concerns, exit, voice, and loyalty provide less traction. The external governance concerns touch on deeper anxieties about rule by lawyers and legislation by litigation.

This conceptual dichotomy should not be unfamiliar. But my goal is to tease apart the reasons that class actions and other forms of aggregate litigation spark judicial anxiety. My ultimate contention is that judicial concern about the internal governance of aggregate litigation is more tractable, because it is more closely tied to standards that provide grounding for the judicial role. It is therefore more predictable. Judicial concern about external governance, on the other hand, is more diffuse and more subject to unpredictable moods of suspicion. The Sixth Circuit's decision in *In re National Prescription Opiate Litigation*, in my view, provides an example of that problem.

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on competition and sorting in the marketplace—including with respect to public goods offered by local governments. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (describing a model of residential mobility and competition among local governments).

It should be noted that the concept of loyalty as described by Hirschman is different from the concept as later developed in the governance literature. In the private law realm, for instance, exit, voice, and loyalty are equated with "shareholders' tripartite rights to sell, vote, and sue." Amanda M. Rose, *Cutting Class Action Agency Costs: Lessons from the Public Company*, 54 U.C. DAVIS L. REV. 337, 340 n.6 (2020). Loyalty is therefore equated with the fiduciary obligation of leaders of an organization to act in its best interests. Hirschman's concept of loyalty, by contrast, was less rigid. He sought to explain the decision of an organization's members to stay true to it by exercising the option of voice over the option of exit. *See* HIRSCHMAN, *supra*, at 78 ("As a rule, then, loyalty holds exit at bay and activates voice.").

16. *See* discussion *infra* Part II.B.1.

II
GOVERNANCE, INTERNAL AND EXTERNAL

I begin by recounting the turn to the governance model after *Amchem* and *Ortiz*. By conceiving of legitimacy in terms of organizations, the governance model has provided a powerful set of guidelines for judging the proper functioning of the class action. I suggest that governance can also include another dimension—a concern about the effects of the class action that are external to the collective itself.

A. *Amchem* and the Legitimacy of Settlement Classes

The decision in *Amchem* upset the certification of what the Court described as a "sprawling class."[17] The parties to the *Amchem* class settlement had defined the group to include all persons in the United States who had been exposed to the defendants' asbestos products—whether occupationally or through the occupational exposure of a spouse or household member—and their spouses and family members, so long as they had not already filed suit for asbestos-related personal injury against the defendants.[18] As analyzed by Justice Ginsburg's majority opinion, the class contained multitudes with disparate and conflicting interests. The Court explained that class members shared in common their exposure to asbestos, but that they were exposed "in different ways, over different periods, and for different amounts of time."[19] Differences in state law applicable to the class members' tort claims heightened the perceived divergence across the group.[20]

The Court rested its concerns about these divergent interests on the absence of internal safeguards in the proposed class.[21] A lack of appropriate structural representation made these divergent interests fatal to class certification. Because the settlement class comprised a single group, with no subclassing, the same named plaintiffs and lawyers represented all members of the undifferentiated class. Of particular concern, the class included future claimants—class members who, although exposed to asbestos, had not yet manifested any injury.[22] They were lumped together with present claimants—class members who had already manifested asbestos-related injuries but had not yet filed suit. This intertemporal divergence, in the Court's view, could not be accommodated with common representation, because future claimants had an interest in ensuring greater payments in later years, while present claimants had an interest in immediate

17. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 622 (1997); *see also id*. at 624 ("No settlement class called to our attention is as sprawling as this one.").

18. *See* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 619 n.3 (3d Cir. 1996).

19. *Amchem*, 521 U.S. at 609.

20. *Id*. at 624.

21. *See id.* at 627 ("The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.").

22. *Id.* at 628.

payment.[23] The fact of settlement did not hold together the divergent interests of the class. It was insufficient that the class shared a common interest in adequate compensation of those injured by asbestos products, or a common interest in determining the propriety of the settlement.

This analysis did not turn on the outsized ambition of the settlement. Indeed, *Amchem* blessed the creative use of Rule 23. Certification of a class for settlement purposes only—a class that would never be litigated—was not expressly provided for in the rule as it existed at the time. Nevertheless, the Court accepted that a settlement class could be appropriate, so long as the prerequisites of Rule 23(a) and 23(b) had been satisfied.[24] Moreover, the Court accepted that the rule should be flexibly applied to accommodate the reality of settlement.[25]

The decision carried strong undertones of deeper concerns about the comprehensive, legislative cast of the *Amchem* settlement. At the end of the opinion for the Court, Justice Ginsburg observed—almost as an aside—that a "nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure" but that Congress had enacted no such legislation.[26] The unsubtle parting message of the Court was clear: judicial resolution of the asbestos problem was questionable. Deal-making by lawyers could not substitute for broad-based legislative reform. In other words, the use of the settlement class to displace legislative initiative was suspect. No one doubted that the settlement class in *Amchem* represented an effort to create comprehensive resolution of a large slice of asbestos litigation.

The Court sidestepped the need to address these concerns directly, however, by focusing on the internal structure of the class. The upshot of the decision appeared to be that faithful adherence to the required internal structure of a class action would so limit the device as to avoid the range of hard questions about its external effects—its use as a device to govern the polity.

The Court repeated the same maneuver in *Ortiz v. Fibreboard Corp.*[27] Like *Amchem*, *Ortiz* presented the Court with the creative use of a settlement class. But instead of an opt-out class certified under Rule 23(b)(3), the parties structured the *Ortiz* settlement as a limited fund—a mandatory class under Rule 23(b)(1)(B). The Court again found the class to be unworthy of certification due

23. *Id*. at 626 ("Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.").

24. *Id.* at 618–19. The Court noted that a proposal to include an explicit provision for settlement-only class actions in Rule 23 was pending before the Judicial Conference's Standing Committee on Rules of Practice and Procedure. *Id.*

25. In particular, the "manageability" inquiry under Rule 23(b)(3)(D) could be relaxed in the settlement context. *Id.* at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." (citation omitted)).

26. *Id*. at 628–29.

27. 527 U.S. 815 (1999).

to its lack of a proper internal structure.[28] It was insufficiently cohesive to justify group litigation under Rule 23,[29] and it did not adhere to the traditional antecedents of limited fund cases.[30]

But it was also clear that the use of the class action as a dealmaking device raised eyebrows. Justice Souter's opinion for the Court observed that the *Ortiz* class settlement appeared to run counter to the requirements of the Bankruptcy Code.[31] Most explicitly, Chief Justice Rehnquist offered a brief concurring opinion to announce that "the 'elephantine mass of asbestos cases' cries out for a legislative solution."[32] The Court in both *Amchem* and *Ortiz* seemed perturbed by the attempt to "mop up" the asbestos problem with settlement classes. Bold dealmaking by lawyers, overseen by courts eager to resolve protracted litigation, presented a legitimacy problem.

The holdings of those cases, however, were limited to the internal dynamics of the class action. As a doctrinal matter, the only legitimacy concern recognized by the Court was the failure of each of the settlement classes to adhere to the formal prerequisites under Rule 23. By focusing intently on the internal structure of the class as an organized collective, both cases hinted at, but did not address, the external effects of aggregate litigation. This left unresolved a significant boundary question—that is, where aggregate litigation ends and legislation should begin.

B. The Turn to Governance

Because the Court's treatment of settlement classes left so many open questions, commentators turned to theories of governance for guidance. In the years since, the governance model has been the dominant approach used by scholars to theorize problems involving the class action and other forms of aggregate litigation.[33] Unlike the unsatisfying formalism of the Supreme Court's settlement class decisions, the governance model has given a workable set of considerations for resolving hard questions in the class action world.

1. Internal Governance

Internal governance, as I use the term, refers to the conceptual framework deployed by class action scholars after *Amchem* and *Ortiz*. That framework embraces a model in which the legitimacy of the class action depends on representational adequacy. As developed in the literature on organizations,

28. *See id.* at 821 ("[A]pplicants for contested certification on this rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.").

29. *See id.* at 858–59.

30. *See id*.

31. *Id*. at 860 n.34.

32. *Id.* at 865 (Rehnquist, C.J., concurring) (citation omitted).

33. *See generally* Elizabeth J. Cabraser, *The Essentials of Democratic Mass Litigation*, 45 COLUM. J.L. & SOC. PROBS. 499 (2012); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013).

governance of a firm or a political entity is chiefly an internal matter of the relationship between those who are governed and those who govern them. By analogy, the class action presents a species of these general governance problems. The private law analogy draws on the vast body of scholarship concerning the governance of corporations. Through a private law lens, the class action is an ad hoc organization in which a principal—the group of class members holding claims—is represented by agents—class counsel and the class representative—in a fiduciary relationship. In that context, the governance model seeks to ensure representational adequacy by reducing agency costs.[34] Those representing the collective should be deemed to be faithful to the class only when agency costs—such as the potential for the fiduciary to shirk or act disloyally—are minimized. The public law analogy develops along similar lines. Through a public law lens, the class action is akin to a public association that operates in ways that bind its members. As in a public body, the key questions in the formation and operation of class actions involve, broadly speaking, the consent of the governed and control of the collective.[35]

The internal governance model balances exit, voice, and loyalty as alternative mechanisms to achieve representational adequacy. Members can be given voice in the collective (the right to express their views on key decisions), a means of exit from the collective (the right to vote with their feet), or an assurance of loyalty by those who lead them (the right to responsible fiduciaries as their representatives). This menu of institutional design choices readily fits the study of class actions and other forms of complex litigation. In the class action, the emphasis has been on the policing of loyalty, with class members enjoying relatively limited voice and exit rights.[36]

2. External Governance

External governance speaks to different anxieties about aggregate litigation. External governance concerns do not focus on the relationship among members of the collective. Instead, these concerns touch on governance in the broadest sense—the relationship among the state, civil society, and the individual. They raise the question whether to pursue a legitimate state goal through legislation, collective action, or individual initiative. External governance concerns about the legitimacy of the class action capture the anxiety that the device is being used in a manner that steps into a sphere reserved for some other institutional actor, such as the sovereign's legislature.

External governance concerns are pervasive in the conduct of complex litigation. Generally speaking, the more ambitious the litigation, the more likely it is to raise an objection on external governance grounds. An example is the

34. *See* Coffee, *Class Action Accountability*, *supra* note 14, at 375–76 ("[T]he class members, as the principals, should be deemed to have consented to the representation only if the agency costs associated with the relationship have been minimized. Then, and only then, is the fiduciary likely to be faithful.").

35. *See id.* at 381–85; Issacharoff, *supra* note 13, at 374–80.

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

Amchem Court's questioning of the use of the class action to generate a judicial resolution of a problem that appeared better suited for legislative or administrative bodies.[37] Similarly, the *Ortiz* Court raised external governance concerns by suggesting in dicta that the use of a limited fund class action in the form arranged by the parties would get uncomfortably close to the statutory scheme put in place by Congress for distressed companies facing multiple defaults, the Bankruptcy Code.[38] The heightened scrutiny of choice of law in nationwide class actions can also be placed in this category. In *Phillips Petroleum v. Shutts*, for example, the state trial court's decision to certify a class and apply the law of the forum had the effect of expanding the reach of the state's substantive law by displacing the law of other states with closer connections to the transactions involved in the litigation.[39] If aggregation serves to alter the balance of sovereign lawmaking authority across states (or within them), external governance concerns will arise.

III
THE DILEMMA OF EXTERNAL GOVERNANCE

A reader might be puzzled by my use of the label "external governance." The concerns I have described using that term are not novel. They are familiar in the study of civil litigation, and they are not necessarily tied to the class action or other forms of aggregation. The fear of "legislation by litigation," for example, is a well-known trope.[40] Similarly, an established literature considers the proper balance between encouraging litigation brought by a "private attorney general," on the one hand, and using other means of regulation.[41] Whenever private litigants invoke the jurisdiction of a court to pursue claims that have some significant public policy implications, the relationship between courts and the broader polity will be tested.[42]

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37. *See supra* note 26 and accompanying text.

38. *See supra* note 31 and accompanying text.

39. 472 U.S. 797 (1983) (stating that Kansas "'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them'" (quoting Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930))).

40. *See, e.g.*, ANDREW P. MORRISS, BRUCE YANDLE & ANDREW DORCHAK, REGULATION BY LITIGATION (2009); *see also* Luther J. Strange III, *A Prescription for Disaster: How Local Governments' Abuse of Public Nuisance Claims Wrongly Elevates Courts and Litigants into a Policy-Making Role and Subverts the Equitable Administration of Justice*, 70 S.C. L. REV. 517 (2019).

41. *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 661–75 (2013) (describing private enforcement as an institutional design choice); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005) (calling for a greater role by the executive branch in determining the existence and scope of private enforcement actions under federal law).

42. The connection between legal contestation and the development of public policy is described well by Robert Kagan's concept of "adversarial legalism"—that is, "policymaking, policy implementation, and dispute resolution by means of party-and-lawyer-dominated legal contestation." ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001). For a

But aggregate litigation greatly heightens external governance concerns in two respects. First, aggregation serves to enable litigation.[43] By lowering the per-claimant transaction costs of pursuing a claim, a class action gives life to litigation that might never have been brought in the first place.[44] Second, aggregation—by definition—expands the scope of a judicial proceeding by sweeping in large numbers of affected stakeholders. To be sure, a lawsuit brought by a single private plaintiff against a single private defendant can generate doctrine that guides future courts, and thereby influences others in the "shadow of the law" with no direct connection to the suit.[45] A class action judgment, however, directly determines the rights and obligations of those bound by it. Its resolution can serve to augment or displace the governing legal rules that determine the primary conduct of those within the class. As a form of law enforcement, aggregate litigation necessarily will involve lawmaking, and therefore will bump up against the other law enforcement and lawmaking structures within a polity.

Although these concerns are familiar ones, they should be considered as part of the vocabulary of legitimacy in class actions. It is incomplete to think of legitimacy as resting on internal governance concerns alone. Legitimacy also rests on considerations of external governance.

A. Internal Governance, External Governance, and Pretext

If external governance concerns are heightened in the class action, how do courts address them? The short answer is "very poorly." Perhaps this is because courts lack a workable model for determining when a class action presents external governance concerns. Unlike internal governance concerns, for which the focus on representational adequacy proves fruitful, there is no dominant model to guide a court that is troubled, for instance, by the potential that a class action seeks relief that is too close to the prerogatives of the legislature or touches on matters best resolved by executive action. With good reason, courts shy away from suggesting that a class action would be inappropriate because the claims do not deserve the "boost" of class certification—or vice versa. The Supreme

discussion of aggregate litigation as an example of adversarial legalism, see generally Andrew D. Bradt, *Multidistrict Litigation and Adversarial Legalism*, 53 GA. L. REV. 1375 (2019) (discussing the role of multidistrict litigation in an adversarial legal system).

43. *See* Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. no. 3, Summer 1991, at 5, 46–50 (describing the role of aggregation in the facilitation of litigation); *see also* Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 54–55 (1989) (describing the costs, incentives, and benefits of collective litigation).

44. Aggregation also enables litigation by subsidizing those who help to organize the litigation. *See* 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, 2144–52 (2000) (describing how aggregation subsidizes the costs of the organizers of litigation).

45. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (describing how the legal system facilitates private ordering without formal adjudication involving the parties).

Court's *Eisen* decision forecloses that type of consideration in the class certification decision.[46]

Lacking a model for guidance or a vocabulary for expressing external governance concerns, courts turn to the internal governance levers they have available to them. That leads to a tendency to pick at the seams of a class action's internal structure in order to vindicate matters that rest more naturally in the realm of external governance. As a consequence, the resulting judicial decisions double down on unreal formalism in the application of Rule 23's requirements.[47] Or, the decisions might take the opposite path of aggressively reimagining the rule's requirements in order to declare that they have not been satisfied for reasons internal to the structure of the class action.

Judge Easterbrook's opinion in *In re Aqua Dots Products Liability Litigation*[48] provides a concrete example of the problem. The case involved the bizarre failure of Aqua Dots, a children's toy consisting of small beads coated with an adhesive allowing them to stick together in various shapes when sprayed with water. Inevitably, Aqua Dots were swallowed by young children who mistook the brightly colored beads for candy. Unfortunately, the contractor who manufactured the product had cut corners by substituting a cheaper chemical for the adhesive specified by the toy's maker. When ingested, the substitute chemical metabolized into gamma-hydroxybutyric acid (GHB), a "knock out" drug that can cause "nausea, dizziness, drowsiness, agitation, depressed breathing, amnesia, unconsciousness, and death."[49] The product proved to be especially hazardous to children who consumed large quantities of the beads. After a number of children became seriously ill upon swallowing Aqua Dots, the toy's maker pulled it from the market in a large-scale recall. After the recall, a wave of litigation followed, including a class action brought by purchasers of the toy who sought a full refund under federal law and punitive damages under state law.[50] The district court denied class certification.[51]

The Seventh Circuit agreed that no class should have been certified, albeit for reasons different from the rationale in the district court's decision. Judge Easterbrook's opinion described the litigation as a costly undertaking to pursue an ultimate reward that would duplicate the relief provided by the toy maker's

46. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

47. *See* Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1108–10 (2013) (describing examples in which the Supreme Court applied Rule 23 formalistically).

48. 654 F.3d 748 (7th Cir. 2011).

49. *Id.* at 749.

50. *Id.* at 751. The plaintiffs sued under the Consumer Product Safety Act, 15 U.S.C. §§ 2051-89. They also brought state-law express and implied warranty claims and claims under state consumer-protection statutes.

51. The district court concluded that the case could not satisfy Rule 23(b)(3)'s requirements because a class action was not superior to the relief provided by the product maker's recall. *In re Aqua Dots Products Liability Litigation*, 270 F.R.D. 377, 384–85 (N.D. Ill. 2010) ("Since the defendants will provide a refund—without needless judicial intervention, lawyer's fees, or delay—to any purchaser who asks for one, there is no realistic sense in which putative class members would be better off coming to court.").

voluntary recall.[52] One might think that the most natural way of analyzing this objection would be to consider the value of the class action as a mechanism for deterrence compared to other mechanisms, such as regulatory measures.[53] Indeed, those considerations, which assess how the class action interfaces with other governmental institutions, appear to be the motivating factors in Judge Easterbrook's treatment of the case. The opinion paints a positive picture of the defendant's product recall—no further injuries to children were reported after the recall was announced—and notes that the "Consumer Products Safety Commission has not expressed dissatisfaction with the recall campaign or its results."[54] Instead of expressly relying on the tradeoffs between aggregation and other forms of regulation, however, the Seventh Circuit turned to Rule 23(a)(4)'s requirement that the class be adequately represented. Because, in the court's view, a class action would impose costs on class members but provide relief equivalent to that which could be had at no cost (through the defendant's recall), the named plaintiffs and class counsel could not be adequately representing the interests of the class. In other words, the legitimacy of the class was suspect because of its internal structure—a lack of representational adequacy.

By shoehorning its reasoning into an internal governance framework, the Seventh Circuit dodged a more forthright confrontation with the external governance concerns that plainly troubled the court. It seems strange to treat adequacy of representation, the crucial "catchall" protection that ensures proper internal governance of the class, as so capacious that it resolves all external governance problems as well. Again, it appears that the court took the internal governance route to vindicate a legitimacy problem because it lacked a framework and vocabulary to capture its external governance concerns.

The Seventh Circuit engaged in a similar distortion of the internal governance framework to serve external governance concerns in the *Subway Footlong* litigation.[55] Turning the creative reimagination of Rule 23(a)(4) into a broad principle of general application, the court held that when "the class representatives have agreed to a settlement that provides meaningless relief to the putative class, the district court should refuse to certify or, alternatively, decertify the class."[56] The class settlement in that case had resolved claims arising out of the apparent variations in the length of the defendant's sandwiches

52. *See In re* Aqua Dots, 654 F.3d at 751. Judge Easterbrook's conclusion that the class action simply duplicated the toy maker's recall is questionable. The recall program offered a refund or a replacement toy of like value. That might be considered equivalent to the compensatory relief sought by plaintiffs. But plaintiffs sought punitive damages as well. Easterbrook's opinion ignored the discrepancy by finding that the plaintiffs' claims for punitive damages were not manageable on choice of law grounds. *Id.* at 752. The opinion speculates that different states would have different views on whether punitive damages would be appropriate under the circumstances. *Id.* at 752.

53. For an analysis of the case along these lines, see D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT L. 91 (2012).

54. *See In re* Aqua Dots, 654 F.3d at 751.

55. *In re* Subway Footlong Sandwich Marketing & Sales Practices Litigation, 869 F.3d 551 (7th Cir. 2017).

56. *Id.* at 556.

(although advertised as "footlong" sandwiches, some of them allegedly fell short of that length). Early discovery cast doubt on the plaintiffs' chances of prevailing at trial, because the product variations were minimal and there was no showing that the defendant systematically shortchanged customers of the contents of the sandwiches.[57] The settlement that followed provided for injunctive relief for the class, mainly to alter the defendant's quality control practices, and an award of attorney's fees for class counsel. As in *Aqua Dots*, the Seventh Circuit found the relief sought to be not worth the transaction costs of class litigation and, therefore, the class to be inadequately represented.[58]

A more persuasive explanation of the outcome in *Subway Footlong* is that the court of appeals viewed the defendant's wrongdoing, if any, as *de minimis*, so that enabling rights enforcement and deterrence through the class action was unwarranted. To borrow the terminology used by Professor Edward Cooper, the Seventh Circuit had found the case to be an "it just ain't worth it" class.[59] Rather than analyze it on those terms, however, the court retreated to internal governance as pretext—that is, it insisted that a loyalty problem doomed class certification.

B. The Absence of an External Governance Framework

Is it possible to assess the legitimacy of class actions on external governance grounds without retreating to pretextual internal governance concerns? Some of the attempts at doing so in the past have been unsatisfying. I discuss three examples of attempts to introduce external governance concerns into class action doctrine: (1) the argument that courts should not certify "annihilation" classes; (2) the Rules Committee's abandoned proposal to deny class certification when "it just ain't worth it"; and (3) the use of the Rules Enabling Act and choice of law as outlets for objections to class certification.

1. "Annihilation" Classes

A recurring question that should be considered as an external governance problem is whether it is appropriate to deny class certification when the damages resulting from a class judgment would be excessive. The so-called "annihilation" class problem first surfaced in the case law shortly after the adoption of the 1966 version of Rule 23. Judge Frankel's 1972 opinion in *Ratner v. Chemical Bank New York Trust Co.* denied class certification on claims for statutory damages because it "would be a horrendous, possibly annihilating punishment" to subject the defendant to a multimillion dollar class judgment for a "technical and debatable

57. *Id.* at 554–55.

58. *Id.* at 555–57.

59. Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 937 (1998). The "just ain't worth it" label was coined in the 1990s to describe the Civil Rules Advisory Committee's proposed amendment to Rule 23(b)(3) that would allow courts to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation." *Id.* at 937. *See also infra* notes 68-70 and accompanying text.

violation of the Truth in Lending Act."[60] The Ninth Circuit then recited the reasoning of *Ratner*, albeit in *dicta*, on the way to rejecting certification, on superiority grounds, of an antitrust class action in which the treble damages award would have been "staggering."[61] Those decisions from the 1970s laid down markers for counsel in later cases.[62] Although the argument has been revived in various guises, it has not garnered much support.[63]

Framed as a superiority concern, the excessive damages argument has found disfavor in the years since. Courts have rejected it as too subjective—an assessment of the "chancellor's foot" variety that risks flouting the substantive law.[64] The Seventh Circuit, for example, has admonished district courts to confine any concerns about the potential excessiveness of a class action damages award to the post-certification stages of litigation.[65] An award that is constitutionally excessive can at that later time be reduced, but that should not affect class certification. Implicit in that direction is an acknowledgment that Rule 23 is poorly adapted to the consideration of external governance concerns. Indeed, any other approach would appear to put the court on a collision course with the

60. Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

61. Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234–35 (9th Cir. 1974).

62. *See also* Shields v. First Nat'l Bank of Ariz., 56 F.R.D. 442, 446 (D. Ariz. 1972) (calling a multimillion-dollar recovery for the class "possibly annihilating punishment").

63. The concern has found favor, however, in legislative proposals to restrict the certification of a class action in cases involving statutory penalty provisions. New York adopted a restriction of that kind when the legislature added a class action provision to the state's civil procedure code in 1975. N.Y. C.P.L.R. § 901(b); *see also* Shady Grove Orthopedic v. Allstate Ins. Co., 559 U.S. 393, 444 (2010) (Ginsburg, J., dissenting) ("Aiming to avoid 'annihilating punishment of the defendant,' the New York Legislature amended the proposed statute to bar the recovery of statutory damages in class actions.").

64. *See, e.g.*, Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954–55 (7th Cir. 2006) (suggesting that limiting the recovery based on excessiveness of damages is best done after a class is certified).

65. *Id.* at 955.

legislative direction contained in the substantive law.[66] Instead, those concerns must be delinked from the aggregation question itself.[67]

2. "It Just Ain't Worth It" Classes

More serious thought has been given to whether particular claims are undeserving of the time and expense of class treatment. The Advisory Committee on Civil Rules proposed amending Rule 23 to include the consideration, as an explicit factor in Rule 23(b)(3), of the question "whether the public interest in—and the private benefits of—the probable relief to individual class members justify the burdens of the litigation."[68] The proposal was a forthright attempt to allow courts an outlet for discussing the external governance consequences of class litigation. As described by Professor Cooper, the Reporter for the Advisory Committee, the proposal would have permitted "consideration of the balance between the need for private enforcement of public values through Rule 23 and the costs of the proceeding."[69] The proposal became known as the "it just ain't worth it" factor, accepting that some class actions could not be justified even if otherwise properly structured and conducted by faithful representatives. Due to the "trivial nature of individual benefits, and the insignificant character of the alleged wrong," claims could be denied class treatment.[70]

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66. The Second Circuit's decision in *Parker v. Time Warner Co.*, 331 F.3d 13 (2003), involved this tension between the aims of the substantive law and the possibility that procedural aggregation will outstrip those aims. The plaintiffs in the case sought certification of a class of customers, each of whom held a claim with an entitlement to $1000 in statutory damages if the class prevailed. Because of the size of the class, the aggregate statutory damages award would have been some $12 billion. Judge Jon Newman, in a concurring opinion, explained the dilemma presented by the case:

> At first glance, the tension appears to admit of only two possibilities: (1) the class certification motion is granted, and, if the allegations are proven, Time Warner becomes liable for damages of up to $12 billion, or (2) the class certification motion is denied, and each victim of Time Warner's alleged violations remains free to pursue an individual claim for $1,000 (or the alternative daily minimum recovery or actual damages). Both options are unsatisfactory.

Id. at 26. Judge Newman viewed the first option as presenting due process concerns akin to those identified by the Supreme Court in its cases imposing constitutional limits on excessive punitive damage awards. *Id.* (citing State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)). The second option would leave each claimant to pursue an individual lawsuit, which would result in "needlessly clogging the courts with repetitious suits if many are filed, or rewarding some law violators with liability for only a slight amount of total damages if, as seems more likely, few suits are filed." *Id.*

Instead, Judge Newman offered a third option—construing the remedial provision of the statute in question to permit an award of less than $1000 each to the absent class members. This option would treat the statutory damages provision as a flexible upper limit rather than a uniform, mandatory amount. *See* PRINCIPLES OF THE LAW—AGGREGATE LITIGATION § 1.03 Reporters' Notes cmt. e (AM. LAW INST. 2010) [hereinafter ALI PRINCIPLES] (discussing *Parker*).

67. *See* Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708 (9th Cir. 2010) (holding that Rule 23 does not allow trial courts to consider as a factor governing class certification whether the defendant's liability would be disproportionate to class members' actual damages).

68. Draft Civil Rule 23(b)(3)(F), in REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES (Comm. Print Dec. 1995).

69. Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 19 (1996). The language of the proposal was modified slightly before publication.

70. *Id.*

The proposed amendment to Rule 23 met broad resistance, and the Advisory Committee did not adopt it. The Advisory Committee's report explaining why the proposal was dropped gives a cogent description of the competing arguments for and against its adoption:

> The most fundamental question is whether a procedural rule that emanated from the Enabling Act process should become the authority that supports private initiation and control of public law-enforcement values. Present Rule 23(b)(3) practice is urgently supported by advocates of private enforcement as an indispensable supplement to public enforcement. It is argued that Rule 23(b)(3) has taken on a substantive role, that Congress has relied on the enforcement mechanism of (b)(3) classes in many post-1966 statutes, and that any attempt to reduce the substantive role of (b)(3) classes would violate the limits of the Enabling Act. With equal fervor, it is responded that the authors of Rule 23(b)(3) never intended that it take on the role it has assumed. Creation of private attorney-general provisions, on this view, is a matter of substantive law that should be left to Congress. The time has come to roll back the substantive consequences that have evolved from a proposal designed to provide only an efficient means of aggregating the claims of those who knowingly choose to participate in the enforcement action.[71]

The Advisory Committee pointed to theoretical and practical problems with the proposal. One fear was that an explicit weighing of the public benefits of class treatment would inevitably draw judges into assessing the wisdom and weight of statutory policies.[72] Another criticism took aim at the proposal's tethering of individual class member compensation with the worthiness of class treatment. That criticism sprang from the view that deterrence and the supplementation of public enforcement were the chief goals of the class action. The practical concerns also included the difficulty of calculating the burdens of maintaining a class action—to the litigants and to the courts.[73]

These objections were sometimes framed as Rules Enabling Act concerns. The proposal, in the view of the objectors, would have opened the door for unguided judicial discretion, which in turn would invite judges to make their own value judgments about certain types of claims.[74] Whether or not the proposal would have violated the Rules Enabling Act, this objection touched on a deeper truth. In seeking to give courts a way of venting their external governance concerns in class action litigation, the Advisory Committee had not erected a helpful framework for judicial consideration. Unlike internal governance concerns, which can be judged using the guideposts of exit, voice, and loyalty, no similar vocabulary was developed for processing external governance concerns.

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71. REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 36 (Comm. Print May 1997).

72. *Id.* at 37.

73. *Id.* at 38. As a consequence, the Advisory Committee feared that preliminary litigation over certification would be "grievously protracted."

74. *See* Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 621–22 (1997) ("In essence, objectors argue that the Advisory Committee has exceeded its authority in making this normative policy decision about a certain type of class action, which is a policy decision entrusted to Congress.").

3. The Rules Enabling Act Objection and Choice of Law

Perhaps the command of the Rules Enabling Act can be taken as setting forth a framework for raising and considering external governance concerns. The Act, of course, commands that the rules of practice and procedure promulgated by the Supreme Court "shall not abridge, enlarge or modify any substantive right."[75] As an outlet for external governance concerns, however, the Act is at once too specific and too open-ended to offer guidance.

The Third Circuit's decision in *Sullivan v. DB Investments, Inc.*[76] gives a sense of why external governance concerns are poorly expressed through invocations of the Rules Enabling Act. The class action in *Sullivan* resolved a group of claims arising out of a common nucleus of operative fact—the defendants' alleged cartelization of the diamond market.[77] The settlement covered indirect diamond purchasers seeking damages under state competition laws. Some states' competition laws, however, follow federal antitrust law and prohibit indirect purchaser claims for antitrust injuries.[78] Nevertheless, the settlement provided for payment to the indirect-purchaser class members, without further inquiry into whether the state law that would apply to an individual class member's claims would permit recovery.[79] The Third Circuit, sitting *en banc*, affirmed the district court's approval of the settlement class.

The majority and dissenting opinions chiefly disagreed on an internal governance question—whether the class of indirect purchasers was sufficiently cohesive to satisfy Rule 23(b)(3)'s predominance requirement.[80] But the answer to that question turned on an inquiry that implicated external governance concerns—whether state law variations across the class could be smoothed over by way of settlement, without the need for an intense choice-of-law analysis for individual class members. This subsidiary question could be reframed more starkly as whether, by settlement, a nationwide class action could be used to alter the governing law controlling the conduct of participants in an industry.

Judge Jordan's dissent painted the settlement as violating the Rules Enabling Act by redefining the substantive rights of class members. In Judge Jordan's telling, the class action device was being used in *Sullivan* to transform the substantive law that should regulate the primary conduct of participants in the diamond market.[81] Along the way, some class members—those who, after a choice-of-law analysis, would be governed by the law of states that reject indirect-

75. 28 U.S.C. § 2072(b).

76. 667 F.3d 273 (3d Cir. 2011).

77. *Id.* at 338 (Scirica, J., concurring).

78. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

79. The settlement was structured as two classes—a direct-purchaser class and an indirect-purchaser class. The indirect-purchaser class was in turn divided into subclasses for consumer claimants and resellers. *Sullivan*, 667 F.3d at 289.

80. *See id.* at 297 ("Our dissenting colleagues focus on this issue as well, and adopt a specific requirement that every class member has 'some colorable legal claim' in order for a district court to certify a class.") (citing Jordan, J., dissenting).

81. *Id.* at 352–55 (Jordan, J., dissenting).

purchaser claims—had their rights enlarged. As a consequence, other class members who would have a viable indirect-purchaser claim in individual litigation were forced to share the bounty with class members who had no entitlement to recover at all.

These criticisms belong to the same species as the choice-of-law problems identified in *Phillips Petroleum Co. v. Shutts*.[82] The main holding of *Shutts*—that due process protections for absent class members in a nationwide class obviate the need for their affirmative consent to personal jurisdiction in the forum[83]—is an example of the Court's assessment of class action legitimacy as a function of proper internal governance. The other part of *Shutts*—the choice-of-law holding—is quite different. The Court's attention to choice-of-law in nationwide class actions was based on external governance concerns. Because *Shutts* involved a state-court class action, the Court analyzed those external governance concerns under the Due Process Clause and the Full Faith and Credit Clause, rather than the Rules Enabling Act. But the concerns are the same.

It was highly suspect for a state court to use the class action device in a way that amplified the regulatory power of that state far beyond its legitimate reach. As then-Justice Rehnquist's opinion for the Court explained, Kansas could not "abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."[84] The problem identified in the choice-of-law portion of *Shutts* depends less on the relationship among class members and their representatives. Indeed, considerations of exit, voice, and loyalty—which explain the *Shutts* Court's personal jurisdiction holding—play no role in the choice-of-law holding.[85]

Nevertheless, *Shutts*'s choice-of-law holding proved to be something of a dead end. Although it looms as a consideration that can complicate class certification, no robust model for the appropriate external governance role of the class action guides courts in the post-*Shutts* cases. Thus, Judge Jordan's focus on the alteration of substantive rights appears unlikely to develop into a coherent framework for assessing the external governance concerns presented by class settlements that provide redress in ways that might alter the governing law applicable to an individual class member's claim.

IV

NEGOTIATIONS AND GOVERNANCE: OPIOIDS IN PERSPECTIVE

To return to the Sixth Circuit panel's rejection of the opioids negotiation class, was the decision driven by internal or external governance concerns? It is

82. 472 U.S. 797 (1985).

83. *See id.* at 811–14 (explaining the due process protections available to absent class members).

84. *Id.* at 822 (internal quotation marks omitted).

85. The Court expressly rejected the argument that members of the class had consented to the application of Kansas law to resolve their claims by failing to opt out. *Id.* at 820 ("Even if one could say that the plaintiffs 'consented' to the application of Kansas law by not opting out, plaintiff's desire for forum law is rarely, if ever controlling.").

not easy to discern a coherent answer from the panel majority's opinion. The opinion stresses the novelty of the negotiation class concept and appears particularly disturbed that Rule 23 "does not mention certification for purposes of 'negotiation' or anything along those lines."[86] Perhaps the court's decision can be reduced to an application of the questionable maxim, "What is not expressly permitted is prohibited." Yet the majority recognized that the settlement class was an innovation in class action practice that developed long before the Advisory Committee added to Rule 23 an explicit provision blessing the concept.[87] So, one must poke through the rigid formalism of the court's approach to the negotiation class concept.

A. Internal Governance and the Negotiation Class

From an internal governance perspective, it is hard to criticize the legitimacy of the opioids negotiation class. Neither exit, voice, nor loyalty problems loom large in the structure or operation of the device. Indeed, the negotiation class presented enhanced voice for class members, because it contemplated a voting process through which class members could accept or reject a settlement by a binding supermajority.[88] Recall that this was a class of over 30,000 local governmental units, all quite familiar with voting and electoral process protections. Further, any settlement would still need to be approved by the district court after a fairness hearing under Rule 23(e).[89]

The Sixth Circuit repeatedly made reference, however, to the district court's suggestion that class members who declined to opt out before negotiation commenced would not have a second opportunity to do so after a proposed settlement was reached. This might be seen as a restriction on the right to exit that would trigger internal governance concerns. But it would be no more restrictive of the right of class members to leave the collective than a class certified for litigation or for settlement. Rule 23(e) provides that, in a class certified under Rule 23(b)(3), the district court "may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."[90] The key word in that provision of the rule is *may*. A second opt-out is not required by the rule, and the case law does not show any eagerness by

86. *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 672 (6th Cir. 2020).

87. *Id.* at 672–73.

88. *In re* Nat'l Prescription Opiate Litig., 332 F.R.D. 532, 538–39 (N.D. Ill. 2019) (describing the voting mechanism).

89. *In re* Nat'l Prescription Opiate Litig., 976 F.3d at 668.

90. Fed. R. Civ. P. 23(e)(4).

appellate courts to force a second opt-out opportunity if a district court declines to grant one.[91] In practice, second opt-outs have been uncommon.[92]

There are stronger arguments, however, in favor of framing the court's problem with the negotiation class structure as a loyalty concern. Some of the objectors in the district court argued, albeit with inconsistent vigor, that the negotiation class structure caused a conflict of interest among class members and those who seek to represent them.[93] In one respect, the Sixth Circuit gestured toward such an internal governance concern by questioning the cohesion of the class. The court asserted that the district court had "papered over the predominance inquiry" by focusing on common issues under federal law that tied the class together, even though the class representatives would also be able to negotiate the resolution of "disparate state law claims brought by cities and counties throughout the country."[94] But the court did not explain how those state law claims exposed some significant fracture within the class. Instead, the court described the problem as one of "confusion surrounding the scope of negotiations."[95]

Although the court of appeals invoked *Amchem* to close out its opinion, it is hard to see in the negotiation class the same degree of internal governance problems identified by the Supreme Court's decision in that case. It makes sense, then, to examine the decision with an eye toward potential external governance problems that would justify concern about deploying the class action device.

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91. *See, e.g.* Low v. Trump Univ., L.L.C., 881 F.3d 1111, 1121 (9th Cir. 2018); Officers for Just. v. Civil Serv. Comm'n, 688 F.2d 615, 635 (9th Cir. 1982) ("[W]e have found no authority of any kind suggesting that due process requires that members of a Rule 23(b)(3) class be given a second chance to opt out.").

92. *See* ALI PRINCIPLES, *supra* note 66, 3.11 cmt. a (noting that, although Rule 23 was amended to provide express authority for a second opt-out, the amended rule "has not had a substantial impact" and "few courts have ordered a second opt-out").

93. Some objectors took the position, for example, that different local governments within the class had divergent goals with respect to the resolution of the opioid crisis and therefore the named plaintiffs did not adequately represent them. A group of Ohio cities objected to certification based in part on the differences in relief that different class members might prefer:

> The counties and cities whose claims would be bound to the negotiation class have substantially different interests in the nature of the relief they might receive and the consideration they may be willing to exchange. Some class members may have very little interest in prospective self-regulation given legislative regulation adopted by their applicable governing bodies. These class members may seek to maximize the recovery for past economic damages in exchange for releasing defendants from all past and future liability. Other class members may not have suffered significant damages and are instead interested in maximizing the defendants' agreement to self-regulate, other non-monetary recovery, and be resistant to release defendants from future liability.

Certain Plaintiffs' Memorandum in Opposition to Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class at 6, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio July 23, 2019), Doc. No. 1958. In her dissenting opinion, Judge Moore noted that these particular objectors had not filed suit on their own and suggested that they were objecting for ulterior reasons. *In re* Nat'l Prescription Opiate Litig., 976 F.3d at 700–01 (Moore, J., dissenting).

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

95. *Id.*

B. External Governance and the Negotiation Class

Novelty and a lack of explicit authorization were the recurring themes of the panel's opinion. But there are strong hints throughout the opinion of the kinds of concerns that could be categorized as external governance concerns. First, one wonders whether the case would have been decided differently if the class members had been private entities instead of units of government. Second, the nature of the litigation itself—an attempt to grapple with a national crisis with sweeping public policy implications—undoubtedly disturbed the court of appeals.

1. State and Local Conflicts

The identity of the class members, and the nature of their claims, raise potential external governance concerns. A casual reader of the court's opinion might think that the case involved a class of defenseless individuals—say, widely dispersed consumers or tort claimants.[96] The *In re National Prescription Opiate Litigation* class, of course, comprised instead some 34,000 local governments from across the United States. It seems odd to express the same concern about governmental entities—all aware of the opioid crisis and the resulting litigation—as the Supreme Court had expressed about the group of individual tort claimants in *Amchem*—most of whom had no knowledge they were being swept up in a class action that would bind them well into the future. But a class of political subdivisions presents more starkly the potential collision between the class action device and the governance of the broader polity.

The objections to class certification in the district court hewed closely to arguments about the detailed mechanics of Rule 23 and, more grandly, to familiar internal governance arguments drawn from *Amchem*. But some of the opposition to the negotiation class, although framed in terms of the internal dynamics of the collective, pointed to the external relationships between the local governments included in the class and the states of which they were political subdivisions.

Thirty-seven state attorneys general took issue at the district court level with the negotiation class on the ground that it would interfere with sovereign interests of their states. In the view of the attorneys general, the negotiation class "appears to seek to impose obligations on the States in how they interact with political subdivisions, including their own."[97] These attorneys general could not invoke internal class objections as they were not part of the proposed class. Nor could they claim an alternative role for themselves in the opioids multidistrict consolidation, as they were not federal court litigants. Instead, invoking the principle that the dignity of the states would be offended by being dragged into federal court, the attorneys general asserted that there were significant implications of the negotiation class for the structure of the larger polity: "This principle is no less applicable where the 'dragging' is accomplished by authorizing

96. *See, e.g.*, *id.* at 671 ("Rule 23 balances these laudable goals against the individual rights of litigants by imposing demanding standards on class certification.").

97. Letter from State Attorneys General to Judge Polster (June 24, 2019), at 2–3.

federal class action litigants—themselves political subdivisions of States—to approve or reject a State's settlement that would stand to benefit them."[98] The only solution to this problem would be to exclude local governments from receiving the benefit of any settlement award separately negotiated by their respective states outside the negotiation class—an admittedly "perverse result indeed" that would undermine the states' efforts to form a collaborative response to the opioid crisis.[99]

As described by the state attorneys general, the real problem with the negotiation class was not that it comprised an internally fractured group improperly litigating as a collective. Instead, the problem was that the class was an organization that threatened to impose pernicious consequences on those outside it by altering the preexisting governmental structures that lie beyond the boundaries of the class. Left unexplained by this objection, however, is the reason a state, if it indeed claimed commanding authority over its local political subdivisions, could not require them to opt out or turn over to the state any eventual recovery from a settlement of the claims in the negotiation class. The interference with local-state governmental organization, then, appeared to be one of appearance and politics rather than deep structure and legal obligation.

2. Legislative Resolution and Judicial Competence

Like the asbestos crisis, the opioid crisis calls out for comprehensive resolution. Perhaps the real motivating concern behind the Sixth Circuit's decision is that, like the use of settlement classes to mop up the asbestos problem, innovation in the class action device should be tempered when a legislative response to a problem is more appropriate. The court of appeals confined its opinion to Rule 23's text and structure and did not advert to arguments in favor of legislative, rather than judicial, resolution of the crisis. But the parallels with the institutional concern expressed by the Court in *Amchem* are clear. One implication of the panel decision is the persistent concern that courts should be reluctant to use procedural devices—the multidistrict litigation transfer statute and Rule 23—to allow the judiciary to step in, boldly, where other actors have failed to act.

Courts do, and should, take cautious steps when confronting problems that test the competence of the judiciary. Some problems are difficult to resolve through adversarial testing and argument alone. Legislatures, it is often said, have greater access to expertise and more subtle levers of power to shape a response to a society-wide problem.[100] The message of cases like *Amchem* is that courts

98. *Id.* at 3.

99. *Id.*

100. *See* Charles D. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 759–63 (1965) ("[T]he legislature has the richest apparatus for ascertaining the conditions in which the conflicting social interests are embroiled and the most democratic way of resolving them . . . ."); *see also* Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 15 (1990) ("Not only is the legislature politically responsive, but it also is imbued with relatively large resources for inquiry and investigation: the legislature is expected, and indeed has the duty, to roam the field to meet the needs of its constituency.").

have not used procedural innovation to take on a "legislative" problem, and they should remain reluctant to do so.

It is worth asking whether that reluctance is a well-founded one. Self-flagellation about the limits of judicial competence is arguably a historical anachronism. There is a long history of federal courts' using procedural tools to engage in far-reaching reform efforts. Reform litigation in the 1970s effectively placed state prison systems under federal court supervision.[101] Those court decisions cannot be confined to a fleeting era of judicial activism. Less well known, but far more sweeping, were the federal courts' efforts to restructure the railroad industry in the late Nineteenth Century.[102] Using a set of procedural devices known as the equity receivership, courts acted to reorganize distressed railroads at the behest of dealmaking lawyers within the adversary system.[103] This amounted to a massive undertaking to readjust the finances and operations of the most important industry in the nation's economy at that time.[104] More importantly, the courts took these bold and creative steps during an era when no federal bankruptcy statute provided for corporate reorganization. The plight of the railroads was a large-scale problem, but it was not considered beyond the reach of courts when available procedural tools could be used to tackle it.

Similar stories can be told about other judicial efforts to resolve problems that could be addressed by legislative bodies. The extensive experience of the courts in the rate-making proceedings of another era also come to mind.[105] The ASCAP and BMI consent decrees, entered in 1941 and 1966, respectively, govern the licenses for performances of copyrighted music.[106] Under the decrees, the Southern District of New York serves as a rate-setting body for the music industry. That role, which at one time was assigned to a single judge of that

101. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 680–85 (1979) (describing broad remedial orders entered by a district court in prison reform litigation and that court's ongoing supervisory role over a state prison system).

102. *See* Troy A. McKenzie, *Bankruptcy and the Future of Aggregate Litigation: The Past as Prologue?*, 90 WASH. U. L. REV. 839, 852–56 (2013) (discussing the court-centered reorganization practice in railroad cases).

103. The equity receivership grew from what was simply a provisional remedy available, on a temporary basis, during the pendency of a creditor's action against a debtor.

104. By one estimate, approximately 1000 railroads were placed into equity receiverships between 1870 and 1933. *See* Churchill Rodgers & Littleton Groom, *Reorganization of Railroad Corporations Under Section 77 of the Bankruptcy Act*, 33 COLUM. L. REV. 571, 571 (1933).

105. Indeed, many of the leading judges of the Twentieth Century, including Henry Friendly and John Marshall Harlan II, earned their keep as practicing lawyers in rate-making proceedings. *See* DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 49, 60–61, 68 (2012) (describing Friendly's work in private practice on public utilities cases).

106. *See* Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 10–12 (1979) (describing the history of the ASCAP consent decree).

court,[107] would seem as "legislative" as seeking to resolve claims arising out of the abuse of opioids.[108] In fact, it is more so.

V
CONCLUSION

My goal in this Article has been a modest one—to capture the two aspects of governance that prompt concerns about the legitimacy of the class action. Internal governance concerns, which focus on the structure and organization of the class, can be analyzed with an organizational model that has spawned a vast literature. External governance concerns, which focus instead on the role of aggregate litigation in governing the broader polity, have no similar model to give conceptual grounding to the problem. As a result, courts confronted with an external governance problem resort to excessive rules formalism or instead attempt to shoehorn anxieties about the outward effects of the class action into an internal governance framework. In cases such as *Aqua Dots* or *Subway Footlong*, and even in *Amchem* itself, this formalism results in a strange lack of engagement with what is really at issue.

The unsatisfying explanation given by the Sixth Circuit panel in its decision rejecting the negotiation class should serve as a call for more forthright exploration of external governance concerns in class actions. The difficulty goes beyond a lack of the appropriate label for the concerns. We lack a coherent model that can match the organizational model that serves to guide courts and scholars when internal governance problems arise.

107. In 2018 Congress amended the Judicial Code to require random assignment of some rate-setting disputes within the Southern District. *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 104, 132 Stat. 3676, 3726 (2018) (codified at 28 U.S.C. § 137(b)).

108. As Professor Arthur Miller has noted, the framers of the 1966 version of Rule 23 were well acquainted with equity practice and the broad powers exercised by courts sitting in equity. *See* Interview by Samuel Issacharoff with Arthur R. Miller, Professor, New York Univ. Sch. of Law, in New York City (Dec. 3, 2016), *in* RULE 23 @ 50: THE 50TH ANNIVERSARY OF RULE 23, at 9 ("[L]et's face it, the federal courts had been running the meat packing industry since 1920, and were running the music rights industry since the 1950s. So the notion of continuing jurisdiction over a structural decree was not unknown.").