PROSPECTIVE INJUNCTIVE RELIEF AND CLASS SETTLEMENTS

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INTRODUCTION

In 2012 the District of Kansas approved the settlement of a class action against Costco brought on behalf of its gasoline customers.[1] Gasoline, like most liquids, is sold by volume, ra-

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1. *In re* Motor Fuel Temperature Sales Practices Litig., No. 07-MD-1840-KHV, 2012 WL 1415508 (D. Kan. Apr. 24, 2012), *appeal docketed*, No. 15-3228 (10th Cir. Sept. 25, 2015) [hereinafter *Hot Fuel MDL*]. The Competitive Enterprise Institute's Center for Class Action Fairness (CCAF) has litigated on behalf of class members

ther than weight. And, like most liquids, gasoline is subject to the laws of physics that dictate that it will expand as the temperature increases if pressure is held constant.[2] Plaintiffs sued dozens of retailers for failing to disclose this effect of increasing temperatures on the number of gasoline molecules present in a gallon of gas.[3] Under the plaintiffs' theory, because motor fuel expands when heated, "[a] consumer who buys a gallon of fuel at a warmer temperature unknowingly receives less fuel (fewer molecules and less mass) than a consumer who purchases a gallon of that same fuel at a cooler temperature."[4]

As part of the settlement—which paid zero dollars to the millions of absent class members, while the plaintiffs' attorneys filed a still-pending fee request for $10 million—Costco agreed to convert its motor fuel dispensers in states where it purchases fuel on a temperature-adjusted basis to "automatic temperature compensation" (ATC) dispensers and to install ATC dispensers at any new retail stations it opens.[5] The upshot of this development is that customers who purchase gasoline at higher temperatures now have a better deal than they used to and those who purchase it at lower temperatures a worse deal. It should be clear that for many repeat customers over time this is

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objecting to approval of various settlements in this MDL since 2010, and much of the discussion of this litigation comes from the work product of attorneys who worked for the Center during this time, including Theodore H. Frank, M. Frank Bednarz, Adam E. Schulman, Anna W. St. John, Erin L. Sheley, and the Center's expert witness, David R. Henderson. Several other CEI cases are discussed or cited in this Article.

2. E.D. HIRSCH, WHAT YOUR FIFTH GRADER NEEDS TO KNOW 367 (2006).

3. *Hot Fuel MDL*, *supra* note 1, at *57. For many documents relevant to this case, see IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION SETTLEMENT, https://www.hotfuelsettlements.com/Index [https://perma.cc/AWY8-HHUV] (last visited May 11, 2016). The settlements of twenty-eight of these cases are still pending in a multi-district litigation (MDL), No. 07-MD-1840 (D. Kan.); other cases in the MDL have been litigated to defense judgments, while still others are pending in the MDL or have been remanded to their original transferor courts.

4. *See* Complaint at 2, *Hot Fuel MDL*, ECF No. 652.

5. *See* Order at 7, *Hot Fuel MDL*, ECF No. 4248. An ATC dispenser is an electronic device that allows for a measured volume of fuel to be adjusted to the volume it would occupy if it were measured at the set temperature of 60 degrees Fahrenheit, thereby equalizing the number of molecules of fuel a customer receives for the price of a gallon. Such a dispenser means that, at certain temperatures, a consumer who purchases a "gallon" of gasoline will receive less than a gallon.

likely a wash, except insofar as all consumers must now absorb, through increased prices, the costs of the new pumps.[6]

At first blush, Costco's expensive conversion of its fuel equipment appears to be a typical instance of the now well-established phenomenon of social policymaking through class action litigation. Scholars of mass torts have spent the better part of the last half-century debating whether the class action suit enabled by Rule 23 of the Federal Rules of Civil Procedure should be considered a device for "the private litigant who is motivated in his attempt to serve the public interest primarily, if not exclusively, by idealistic or communitarian concerns,"[7] the case of "a rent-seeking entrepreneur pursuing her own interests with little oversight by her principals,"[8] or some combination of the two.[9] Despite the controversy and criticism, however, the class action is alive and well. And specifically the injunctive remedy—requiring, as consideration for class members' release of claims in lieu of or in addition to cash, the defendant to change some aspect of its business practice—has become a common feature of class action settlements.[10] Yet the Costco settlement presents a taxonomically distinct remedial category of injunction that has, as of yet, not generally been considered by courts and scholars as such: the prospective injunctive remedy—that is, the injunction that functions solely with respect to future transactions between the defendant and its customers, be they class members or not. This Article will demonstrate how the prospective injunctive remedy operates and argue that, in light of the unique policy and legal problems

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6. We discuss the economics of this transition in greater detail in Part II, *infra. See also* LESTER BRICKMAN, LAWYER BARONS 348, 363–66 (2011) (calling injunctive relief in an earlier iteration of this settlement "economically worthless").

7. Martin Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 90.

8. *See generally* Georgene Vairo, *Is the Class Action Really Dead? Is that Good or Bad for Class Members?*, 64 EMORY L.J. 477 (2014) (concluding that, although recent Supreme Court jurisprudence has tightened up certification standards, because lower federal courts relax *settlement* certification standards, and due to the preclusive power of a class action, which binds all class members who do not opt out, the class action remains a potent settlement tool).

9. *See* William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2162–63 (2004).

10. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. CHI. LEGAL F. 475, 514.

it creates, judges should rarely approve private-party class action settlements containing one.

Rule 23(b)[11] allows for injunctive remedies under all three subsections. Subsection (b)(2) provides the easiest path to certification where a class seeks mainly equitable or injunctive relief.[12] By contrast, claims for monetary damages must normally be certified under either subsection (b)(1) or (b)(3), though both types of actions may also contain injunctive components. Classes may be certified under subsection (b)(1) when bringing together all similarly situated claimants in one proceeding is necessary to protect the defendant from inconsistent adjudications[13] or to protect the rights of absent class members.[14] Subsection (b)(3) requires a showing that common issues "predominate" over individual issues and that a class action is the "superior" method of adjudicating the claims.[15] A (b)(3) class is also the sole non-"mandatory" class; the Rules require that the settling parties give the class "the best notice that is practicable under the circumstances" and that the court "exclude from the class any members who require exclusion."[16] No such opt-out rights from injunctive relief exist under (b)(1) or (b)(2).[17]

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11. FED. R. CIV. P. 23(b).

12. FED. R. CIV. P. 23(b)(2) (stating that a "class action may be maintained if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole").

13. FED. R. CIV. P. 23(b)(1)(A) (stating that a "class action may be maintained if . . . prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incomplete standards of conduct for the party opposing the class").

14. FED. R. CIV. P. 23(b)(1)(B) (stating that "a class action may be maintained if . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impeded their ability to protect their interests.") The prototypical 23(b)(1)(B) action is the "diminishing fund" case.

15. FED. R. CIV. P. 23(b)(3). Courts do sometimes give notice or allow opt-outs in (b)(2) actions.

16. FED. R. CIV. P. 23(c)(2)(B).

17. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011). While the rules make no provision for opt-out in *any* kind of (b)(1) or (b)(2) action, *Dukes* has raised the possibility that (b)(1) actions might require notice and opt-out rights as a matter of due process in cases where significant monetary relief is sought. *See* Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and*

Injunctive relief can be broadly categorized as being either retrospective or prospective depending upon whether the injunction serves to cure a wrong in past transactions, or affects future relationships between a defendant and its customers. Courts generally ignore this distinction but, as we will show, much is at stake in it. Unlike retrospective injunctive relief, which ostensibly benefits members of the plaintiff class (for example, an automobile recall to fix a defect), prospective relief does nothing to directly benefit actual plaintiffs or to redress their alleged injuries. Were we to pretend that the new fuel pumps actually imparted some value on future customers, we would still have no idea whether any of the class members would ever purchase Costco gasoline again and therefore have occasion to enjoy them. Moreover, to the extent a settlement reflects a bargained-for exchange, class members receive nothing incremental in consideration for their waiver of a right to compensatory damages for alleged past injury. This is because the prospective injunctive relief applies to class members and non-class members alike. Prospective injunctive relief is effectively an impermissible return to the doctrine of fluid recovery.[18]

Such remedies are, therefore, entirely unmoored from the basic relational nature of a tort or contract claim. Tort and contract law are distinct from criminal law because they provide a forum for plaintiffs to be personally, civilly vindicated for wrongs or contract breaches done *to them*.[19] Because prospective injunctive relief runs counter to these basic functions, plaintiffs' lawyers justify being paid millions of dollars for obtaining it by

(b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?, 82 GEO. WASH. L. REV. 798, 803 (2014) (concluding that, while opt-out rights are not required in such cases, due process does require reasonable notice of class certification be provided to enable class members to monitor the lawsuit and ensure adequate representation).

18. Fluid recovery is a theory of the class action that seeks to demonstrate causation on a class-wide basis through the use of statistics, rather than focusing on compensating the victims who have actually suffered harm. *See* Stan Karas, *The Role of Fluid Recovery in Consumer Protection Litigation:* Kraus v. Trinity Investment Services, 90 CALIF. L. REV. 959, 970 (2002). Under this theory remedies such as *cy pres* awards to charitable organizations often replace payouts to actual class members. As we discuss in Part I, *infra*, federal courts have increasingly found that such remedies violate the adequacy requirement of Rule 23(a)(4).

19. In other words, while a legal wrong takes the form "[f]or all x, x shall not A," torts occur when the directive "[f]or all x and for all y, x shall not do A to y" is violated. John C.P. Goldberg and Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 945 (2010).

styling themselves "private attorneys general."[20] This label suggests that class action plaintiffs' lawyers benefit society as a whole in the same way as states' attorneys general acting in *parens patriae*,[21] by getting judges to implement social policy through such prospective settlement terms. Yet, as Brian Wolfman and Alan Morrison have argued, deterrence goals must not eclipse the system's basic duty to provide compensation to victims.[22] In their proposal for changes to the Federal Rules to better achieve real compensation for "unrepresented" class members, they outline the numerous risks of mass justice "unjustly submerg[ing] the interests of some, for the benefit of others."[23]

Furthermore, the parties to a class action settlement have no incentive to achieve—and courts have no institutional competence to evaluate— the public deterrence benefits that purportedly justify the absence of compensation. As we discuss in detail below, the ATC devices forced on Costco will have, if anything, a negative effect on both class members and gas purchasers in general. This explains why every state weights-and-measures regulator that considered the devices rejected them in the first place. Moreover, even if gasoline vendors and regulators had already universally used ATC instead of selling gasoline volumetrically, plaintiffs' attorneys could have brought the mirror lawsuit, claiming consumer fraud (because some customers buying a temperature-adjusted "gallon" would be receiving less than a gallon in volume) and demanding prospective injunctive relief to switch to volumetric measurements.

20. *See generally* Rubenstein, *supra* note 9.

21. *See, e.g.*, State of Texas v. Am. Tobacco Co., 14 F. Supp. 956, 971 (E.D. Tex. 1997) (approving Texas' use of *parens patriae* to aggregate tort damages claims against tobacco manufacturers). It should be noted that states' use of *parens patriae* as a means of regulation has itself been criticized for, among other things, creating a symbiotic relationship between plaintiffs' firms and state attorneys general, distorting governmental and fiscal policy. *See, e.g.*, Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 966 (2008) ("The government's selection of a course of action to solve highly complex public health problems probably is inherently influenced by the possible presence of a 'deep pocket' manufacturing defendant. Mass products plaintiffs' firms routinely lobby state attorneys general and urge them to litigate against one industry or another. The evolving partnership between contingent fee counsel and state attorneys general thus determines which public health problems receive public attention.").

22. Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented*, 71 N.Y.U. L. REV. 439 (1996).

23. *Id.* at 507.

Similar problems accrue in other settlements for prospective injunctive relief.

This Article will argue, for reasons of both law and policy, that courts in civil cases between private non-governmental parties should observe a presumption against approving settlements that contain provisions for prospective injunctive relief. In Part I we show how the parties to a class action have, in general, no incentive to benefit either absent class members or society at large. This requires courts to police them to ensure justice. In Part II we describe the public law underpinnings of prospective injunctive relief and provide three case studies of consumer class actions that demonstrate how and why courts fail to accurately police this relief in the private law context. We compare the approved relief in these cases to the regulatory regimes they disrupt to argue that courts in this way inevitably allow class action litigation to produce bad public policy. In Part III we explore the ways in which these prospective remedies likewise produce bad law—namely through the inappropriate creation of regulatory preemption and the potential violations of attorney-client fiduciary duty, and through ignoring the adequacy requirement of Rule 23(a)(4) and constitutional standing requirements. In Part IV we consider counterarguments, and in Part V we conclude our discussion.

I. THE PROBLEMATIC AND PERVERSE INCENTIVES OF CLASS ACTION SETTLEMENTS

When parties to a class action come to the settlement table, the defendant's incentives are clear: to dispose of the litigation for as small a figure as possible. At this stage, however, the fragmented identity of the "plaintiff" creates a conflict of interest on the other side of the table. Class counsel and named plaintiffs have the incentive to maximize the size of their respective shares of whatever amount the defendant pays. So, for example, they would prefer a $10 million settlement with a 40% cut for attorneys' fees and incentive payments to a $20 million settlement with a 10% cut—even though in the prior scenario the class members themselves would receive $12 million less than in the latter. Yet no one else present in the room has the incentive to hold out for the latter scenario.[24] Nor does the defendant have reason to care about the allocation of its settlement as between the class and its counsel; once the money is on the table, the defendant is economically neutral as to who pockets it.

This problem of conflict of interest between class counsel and class members is well recognized in the literature and the case law.[25] As John Coffee put it, in the classic formulation of the problem: "[h]igh agency costs" inherent in class action litigation "permit opportunistic behavior by attorneys" and, "[a]s a result, it is more accurate to describe the plaintiff's attorney as an independent entrepreneur than as an agent of the client."[26] In his most recent book, Coffee identifies a related problem impeding deterrence: class action lawyers are primarily interested in suing the "deep pockets" from which they can recover the most money. This results in lawyers suing corporate entities as opposed to the individual officers and directors actually responsible for the

24. *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 811 (1997) (noting in the context of class settlement that "since these are class actions, there is of necessity no meaningful capacity of individual plaintiffs to participate in the settlement process").

25. *See* Redman v. Radioshack Corp., 768 F.3d 622, 629 (7th Cir. 2014) ("The judge asked to approve the settlement of a class action is not to assume the passive role that is appropriate when there is genuine adverseness between the parties rather than the conflict of interest recognized and discussed in many previous class action cases, and present in this case"); Eubank v. Pella Corp., 753 F.3d 718, 719–20 (7th Cir. 2014); *In re* Dry Max Pampers Litig., 724 F.3d 713, 715 (6th Cir. 2013); *In re* Bluetooth Headset Prod. Liab. Litig., 654 F.3d 935, 949 (9th Cir. 2011); Thorogood v. Sears, Roebuck, & Co., 627 F.3d 289, 293 (7th Cir. 2010) (denying rehearing en banc), *underlying opinion rev'd on other grounds*, 131 S. Ct. 3060, 3060–61 (2011); Staton v. Boeing Co., 327 F.3d 938, 959–61 (9th Cir. 2003); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 801, 819–20 (3d Cir. 1995). For the classic academic formulation of the problem, see John R. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987). *See also* Christopher Hodges, *U.S. Class Actions: Promise and Reality* 1 (EUI Department of Law Research Paper No. 2015/36, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665228 [https://perma.cc/5KLC-QB5N] (explaining that, from the European perspective, the claimant-friendly class action system of the United States "produces major conflicts of interest for the intermediaries and potential for abuse"); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1098 (1996) (noting prevalence of collusive settlements); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 23 (1991) (describing the "obvious incentive problems" of plaintiffs' attorneys earning "windfall profits" at the expense of class members).

26. Coffee, *supra* note 25, at 882–83.

misconduct.[27] It is for precisely these reasons that class representatives and class counsel have been held to have a fiduciary duty to protect the interests of absent class members.[28]

The primary way that class attorneys self-deal to maximize their fees at the expense of the class is by creating the illusion of relief.[29] For example, if attorney Lionel Hutz settled the fictional class action of *Simpson v. The Frying Dutchman Restaurant* with a straightforward common-fund cash settlement that paid attorneys $2 million and class members $200,000, few judges would approve it, and those that would do so would risk reversal for the disproportion.[30] But if instead the parties settled the case by issuing coupons with a face-value of $10 million to the class with the same $2 million attorney award, a judge might be deceived into thinking the settlement allocation fair—even though (because so few coupons in coupon settlements are actually redeemed) the economic effect to the defendant

27. JOHN COFFEE, ENTREPRENEURIAL LITIGATION (2015).

28. As the Sixth Circuit has explained, class action settlements are different from other settlements because:

> the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class. Instead, the law relies upon the fiduciary obligations of the class representatives and, especially, class counsel, to protect those interests. And that means the courts must carefully scrutinize whether those fiduciary obligations have been met.

In re Dry Max Pampers Litig., 724 F.3d at 713, 715, 718; *see also In re* Mercury Interactive Corp., 618 F.3d 988, 994–95 (9th Cir. 2010); Mirfasihi v. Fleet Mortg. Corp., 450 F.3d 745, 748 (7th Cir. 2006).

29. *See* Theodore H. Frank, *Class Actions, Arbitration, and Consumer Rights*, 16 MANHATTAN INST. LEGAL POL'Y REP. 8 (2013). Though not the focus of this Article, it should be noted, too, that in the particular case of securities class actions, where a corporation's shareholders ostensibly sue the corporation itself for the loss of stock value due to some allegation of mismanagement, the lawsuit will frequently *harm the plaintiffs themselves.* As S.D.N.Y. Judge Jed Rakoff explains, in most such suits "the monies awarded to the victim shareholders are paid not by the executives responsible for the frauds, but by the companies themselves—which means, in effect, by the current shareholders." Jed S. Rakoff, *The Cure for Corporate Wrongdoing: Class Actions versus Individual Prosecutions*, N.Y. REV. BOOKS (Nov. 19, 2015). Because there is often substantial overlap between these two equally innocent groups, "the prime beneficiaries appear to be the lawyers who brought the cases and who typically receive very large fees in *re*turn." *Id.*

30. *See, e.g.*, Pearson v. NBTY, Inc., 772 F.3d 778, 782–84 (7th Cir. 2014) (improper for class counsel to structure settlement to receive more cash than class members actually receive); Dennis v. Kellogg Co., 697 F.3d 858, 868 (9th Cir. 2012) (class counsel receiving 38.9% of settlement benefit "clearly excessive").

and benefit to the class is about the same $200,000 as the transparently objectionable settlement, or even less.[31]

The Class Action Fairness Act of 2005 (CAFA) put a statutory stop to the most abusive coupon settlement practices in federal courts.[32] But although non-pecuniary relief is generally "recognized as a prime indicator of suspect settlements,"[33] CAFA only directly addressed the issue of "coupons."[34] Class counsel can obtain the same problematic result through other means of creating the illusion of relief, such as injunctive remedies, use of claims processes so burdensome that there are few direct payments to the class,[35] or *cy pres*.[36]

31. *See In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1179 (9th Cir. 2013) ("[P]aying the class members in coupons masks the relative payment of the class counsel as compared to the amount of money actually received by the class members.") (internal quotation omitted). For example, in *In re* EasySaver Rewards Litig., 921 F. Supp. 2d 1040 (S.D. Cal. 2013), *rev'd*, 599 F. App'x 274 (9th Cir. 2015), the district court approved a settlement with a web vendor of flower and gift delivery that paid class counsel $8.65 million, while the class received about $200,000 in cash, justifying it by attributing full face value to "$20 credits" issued to each class member—even though those $20 credits expired in one year and could not be used in the weeks before Valentine's Day, Mother's Day, or Christmas. Such coupon settlements are in reality marketing programs for the defendant. *See* Figueroa v. Sharper Image Corp., 517 F. Supp. 2d. 1292, 1302 (S.D. Fla. 2007); Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1396–97 (2005).

32. 28 U.S.C. § 1712 (2012) (requiring coupons to be valued at redemption value). *See generally In re HP Inkjet Printer Litig.*, 716 F.3d at 1173. *But see* Tyler v. Michaels Stores, Inc., No. CV 11-10920-WGY, 2015 WL 8484421 (D. Mass. Dec. 9, 2015).

33. *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 803 (3d Cir. 1995).

34. And incompletely at that, as courts grapple inconsistently with the question of what in-kind instruments constitute "coupons" under § 1712. *Compare Redman*, 78 F.3d at 633–36, *with In re* Online DVD-Rental Antitrust Litig., 779 F.3d 934, 949–50 (9th Cir. 2015); *see also* David Segal, *A Little Walmart Gift Card for You, a Big Payout for Lawyers*, N.Y. TIMES (Jan. 30, 2016), http://www.nytimes.com/2016/01/31/your-money/a-little-walmart-gift-card-for-you-a-big-payout-for-lawyers.html [https://perma.cc/BW8L-DY8D].

35. *See, e.g.*, *Pearson*, 772 F.3d at 784; Eubank v. Pella Corp., 753 F.3d 718, 725–26 (7th Cir. 2014). In general, "claims-made" settlements where a defendant putatively "makes available" payments to every class member who files a claim within a claims period result in relief to less than 0.5% of the class. *Pearson*, 772 F.3d at 782 (citing Daniel Fisher, *Odds of a Payoff in Consumer Class Action? Less Than a Straight Flush*, FORBES (May 8, 2014), www.forbes.com/sites/danielfisher/2014/05/08/odds-of-a-payoff-in-consumer-class-action-less-than-a-straight-flush [https://perma.cc/79MH-EY79]). *See also* ANDREW PINCUS, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, WHAT'S WRONG WITH SECURITIES CLASS ACTION LAWSUITS? THE COST TO INVESTORS OF TODAY'S PRIVATE SECURITIES CLASS

Unfortunately, case law has developed to permit the collection of attorneys' fees for accomplishing any injunctive relief at all. This creates perverse incentives both to make illusory injunctive relief part of a settlement and to bring low-merit class actions that can be quickly settled for illusory injunctive relief plus attorneys' fees. The problem of illusory injunctive relief is particularly well illustrated by shareholder derivative actions in the mergers and acquisitions (M&A) context. Shareholder challenges to M&A deals have become ubiquitous; in 2012, for example, 93% of such deals were challenged, with an average of 4.8 lawsuits filed per deal.[37] On average, plaintiffs' lawyers file these lawsuits around two weeks after the companies announce their merger, and in fact often begin their investigations within hours after an announcement.[38] In 80% of the M&A cases settled in 2012, however, the only remedy for shareholders consisted of additional disclosures by the issuers in connection with the merger vote.[39] Empirical evidence shows that these disclosures have no meaningful effect on actual shareholder votes.[40] This demonstrates that these so-called set-

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ACTION SYSTEM FAR OUTWEIGHS ANY BENEFITS (2014), *available at* https://www.mayerbrown.com/files/Publication/21680723-8205-4663-bf2d-b36440000d2d/Presentation/PublicationAttachment/3e5a905f-98eb-461c-9b5f-b711b5a652a3/Securities_Class_Actions_Final1.pdf [https://perma.cc/Z8YB-Y26S]; MAYER BROWN LLP, DO CLASS ACTIONS BENEFIT CLASS MEMBERS? AN EMPIRICAL ANALYSIS OF CLASS ACTIONS 1 (2013), *available at* https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf [https://perma.cc/CX9X-F4W9] (finding that low claims rates are common in class action settlements).

36. *See* text accompanying notes 45–50, *infra*.

37. ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION TO MERGERS AND ACQUISITIONS 1 (2013), https://www.cornerstone.com/GetAttachment/9d8fd78f-7807-485a-a8fc-4ec4182dedd6/2012-Shareholder-Litigation-Involving-M-and-A.pdf [https://perma.cc/U875-R2EY].

38. *Id.*

39. *Id* at 6. Note that such pre-vote disclosures are effectively retrospective injunctive relief.

40. Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 557–58 (2014). For example, in the CCAF case of *Kazman v. Frontier Oil Corp.*, 398 S.W.3d 377 (Tex. App. 2013), the 1,300 words of new disclosures included that Morgan Stanley & Co. Inc., would not receive "a portion" of its financial advisory service fees on announcement and a "substantial portion" on completion, but would receive approximately $1.5 million and $3.6 million respectively. The Texas state appeals court decided the case on a technicality of procedure without reaching the question of whether the new disclosures were

tlement "benefits" for shareholders (and the economy in general, to the extent that an informed shareholder vote promotes the latter) amount to no more than a rearranging of the deck chairs to create the illusion of value to justify attorneys' fees.[41] It also suggests that courts lack the specialized financial expertise necessary to detect these problems. Indeed some courts have themselves recognized that, precisely because the value of injunctive relief is difficult to quantify, its value is easily manipulable by overreaching lawyers seeking to increase the value assigned to a settlement fund.[42]

The problems of principal-agent and illusory relief are exacerbated further in the case of prospective injunctive relief, with which we are specifically concerned here. A settlement in which the supposed value comes primarily from forward-looking remedies does not even theoretically benefit the class

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material to shareholders. But it is hard to imagine a suit for fraud over the omitted 1,300 words in the original pre-settlement disclosure would ever reach trial. *Cf.* Wielgos v. Commonwealth Edison, Inc., 892 F.2d 509, 516–18 (7th Cir. 1989) (Easterbrook, J.).

41. Another particularly egregious example of this practice was the shareholder litigation against Johnson & Johnson, premised on a series of FDA warning letters, qui tam complaints, and state attorneys general letters. *See In re* Johnson & Johnson Derivative Litig., 900 F. Supp. 2d 467 (D.N.J. 2012). In exchange for $10.45 million in fees extracted from the value of the corporation itself, the plaintiffs' counsel obtained zero dollars for shareholders and a number of wholly meaningless injunctive "remedies" including the company's promise to "provide quality products"—a core objective the company had already had for nearly 70 years—and "governance changes" that had *already* been implemented by the corporation prior to the litigation based on recommendations from a Special Committee formed to investigate demand letters the Board had received. *See* Objection of Mark G. Petri. at 1–2, *In re* Johnson & Johnson Derivative Litig., 900 F. Supp. 2d 467 (D.N.J. 2012) (No. 10-2033), ECF No. 191-2. Because it was nothing but a wealth transfer from the corporation to the pockets of the attorneys, the litigation thus served solely to diminish the value of the investments of the ostensible plaintiffs. *Id.*

42. *See* Staton v. Boeing Co., 327 F.3d 938, 974 (9th Cir. 2003); *see also* Pearson v. NBTY, Inc., 772 F.3d 778, 785–86 (7th Cir. 2014) (criticizing proposed injunctive relief); *In re* Oracle Sec. Litig., 132 F.R.D. 538, 544 (N.D. Cal. 1990) (referring to injunctive relief as "'expert valued' at some fictitious figure" coupled with "arrangements to pay plaintiffs' lawyers their fees" to be the "classic manifestation" of the class-action agency problem); *cf.* Dennis v. Kellogg Co., 697 F.3d 858, 868 (9th Cir. 2012) (chronicling problem of "fictitious" fund valuations that "serve[] only the 'self-interests' of the attorneys and the parties, and not the class."); Alison Frankel, *Law prof objects to Dela. M&A settlement, could be first of many*, REUTERS (July 14, 2015), http://blogs.reuters.com/alison-frankel/2015/07/14/law-prof-objects-to-dela-ma-settlement-could-be-first-of-many/ [https://perma.cc/N68B-428Y].

members beyond their membership in society at large. In such settlements, class counsel does not purport to act on behalf of the class but instead, as class action proponents so frequently describe the role, purely as a "private attorney general," attempting to redress a social problem allegedly caused by the defendant.[43] As Bill Rubenstein explains, "[a]ccording to this account, private attorneys general might be better at either discerning or pursuing private wrongdoing, or they may simply supplement public enforcement by increasing the intensity of the penalty wrongdoers must pay."[44] What the catchphrase misses is that these cases present an inherent conflict of interest even under the best of circumstances.

In the first place, the pursuit of the social good often conflicts directly with the plaintiff's attorney's duty to his own client. This conflict has been recognized by courts and commentators in the "*cy pres*" context where—as a purported remedy for harm to class members—the defendant agrees to make a payment to a third party.[45] Courts have traditionally allowed *cy pres* remedies in two sorts of circumstances: when funds are left over from the settlement after all individual claims have been satisfied, or when a settlement requires payment *only* to a third party *instead* of directly to class members.[46] In recent years, courts have followed the American Law Institute's *Principles of the Law of Aggregate Litigation* to determine that the latter scenario may run afoul of Federal Rule of Civil Procedure 23(a)(4), which makes it a requirement of class certification that "the representative parties will fairly and adequately protect the

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43. *See* Rubenstein, *supra* note 9, at 2131.

44. *Id.* at 2149.

45. This remedy was originally suggested in a student note in the 1970's. Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972). *See generally* Marek v. Lane, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari); *Examination of Litigation Abuses: Hearing Before the H. Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. 21 (2013) (statement of Theodore H. Frank); Frank, *Class Actions, Arbitration, and Consumer Rights*, *supra* note 29, at 8–9; Theodore H. Frank, *Cy Pres Settlements*, CLASS ACTION WATCH (Mar. 2008), https://www.aei.org/wp-content/uploads/2011/10/20080410_TedClassActionWatch.pdf [https://perma.cc/FSH6-6JC9]; Martin Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

46. AMERICAN LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07, cmt. a (2010) [hereinafter ALI PRINCIPLES].

interests of the class."[47] The ALI provides the following guidelines for evaluating *cy pres* provisions:

> If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.[48]

These limitations on *cy pres* awards recognize the fact that class counsel are breaching their fiduciary obligations when they prioritize the financial interests of a third-party charity over their putative class clients, however noble the goals of that third party may be.

It has been less widely-understood that nearly identical issues arise in the case of prospective injunctive remedies, such as Costco's adoption of temperature compensation devices for use by future purchasers. In these cases the defendant changes its practices vis-à-vis consumers who purchase their products in the future, not the actual class members who were allegedly wronged in the past.[49] This means that class counsel violate their duty to their actual clients—the class members—by look-

47. *See, e.g.*, *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1062 (8th Cir. 2015); *Pearson*, 772 F.3d at 781; Ira Holtzman, C.P.A., & Assocs. v. Turza, 728 F.3d 682, 689–690 (7th Cir. 2013); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468 (5th Cir. 2011).

48. ALI PRINCIPLES, *supra* note 46, at § 3.07.

49. *See, e.g.*, *In re* Dry Max Pampers Litig., 724 F.3d 713, 720 (6th Cir. 2013) (stating that "'[t]he fairness of the settlement must be evaluated primarily based on how it *compensates class members*'—not on whether it provides relief to other people, much less on whether it interferes with the defendant's marketing plans") (quoting Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 654 (7th Cir. 2006)); *Pearson*, 772 F.3d at 786 ("[F]uture purchasers are not members of the class, defined as it is as consumers who have purchased [the product]."); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 880 (7th Cir. 2000) (deeming defendant's injunctive agreement not to use the abusive debt collection letter that was at issue in the case to be a "gain" of "nothing" for class members); True v. Am. Honda Motor Co., 749 F. Supp. 2d 1052, 1077 (C.D. Cal. 2010) (finding that "[n]o changes to future advertising by [the defendant] will benefit those who were already misled by [the defendant]'s representations").

ing out instead for some abstract notion of the public good, as embodied by either *cy pres* charities or future purchasers.[50]

Such prospective remedies are equally problematic even if one takes the position, which we address in greater detail in Part IV, that class action litigation should be freed from consideration of the actual plaintiffs and allowed to pursue the general good through enforcement of the law or other deterrence of undesirable conduct by corporate defendants. Parties to a class action settlement have little more incentive to maximize the social good than they do to maximize the benefit to absent class members. After all, "society"—although perhaps, at least, more rhetorically useful—is not in the negotiating room either. This reality is demonstrated by *Poertner v. Gillette Co.*,[51] a textbook example of illusory prospective injunctive relief.

In *Poertner*, the plaintiffs accused Gillette of defrauding consumers through false representations about its line of Duracell Ultra batteries, a product line discontinued before the case settled.[52] Defendants were able to settle through a claims process that paid the millions of class members less than $400,000, and the attorneys over $5.6 million.[53] The settling parties and the district court rationalized the settlement approval in part by crediting the injunctive relief as a class benefit—Gillette and its successors would be enjoined from making the challenged representations on the discontinued Ultra battery line. The injunction did not preclude Gillette from making the same alleged misrepresentation about the same battery if it was marketed with a different name, like Duracell Multra or Duracell Ultima, or if Duracell Ultra were reintroduced with a slightly different formulation.[54] It is hard to imagine a more illusory injunction. Indeed, it parallels the American Law Institute example of an

50. *See* Part III.B, *infra.*

51. 618 F. App'x 624 (11th Cir. 2015), *cert. denied*, 2016 WL 1079040 (Mar. 21, 2016). Theodore H. Frank was the unsuccessful appellant in that case, represented by the Center for Class Action Fairness.

52. *Id.* at 625.

53. *Id.* at 626.

54. And, in fact, Duracell did introduce batteries in the same market space as "Duracell Ultra," but named "Quantum," calling those the "longest-lasting" batteries. Press Release, Procter & Gamble, Duracell Introduces Quantum the World's Most Advanced Alkaline Battery with One Million Battery Donation to First Responders across North America (Aug. 15, 2013), http://news.pg.com/press-release/pg-corporate-announcements/duracell-introduces-quantum-worlds-most-advanced-alkaline-0 [https://perma.cc/72ZV-AAYN].

injunction that should not be considered to have class benefit.[55] But the district court held otherwise, and the Eleventh Circuit refused to consider that ruling an abuse of discretion, affirming a settlement where the vast majority of the economic benefit went to the attorneys while leaving over 99% of the class uncompensated.[56] The fact that no reasonable person could identify any value of the injunction to society at large, much less to the class, was no bar to the district court's discretion in considering it a class benefit meriting settlement approval and an outsized attorney fee.

The *Gillette* case and others like it suggest that plaintiffs' attorneys do not necessarily have the incentive to look out for the interests of society. When attorneys' fees can be collected simply because an injunction has been achieved through the defendant's consent, if the court reviewing the settlement at a fairness hearing is not considering whether the injunction actually does class members or society any good, the class attorneys' profit-maximizing incentive will be to achieve an injunction even if it is ineffectual or counterproductive.[57] But even assuming a good faith attempt by the parties to promote the social good, it is impossible to be certain how to measure or define the social good in the first place.[58] As a general matter we rely upon courts to step in and police settlements, operating free from the self-interested incentives of the parties. Yet the slipperiness of the concept of the social good becomes uniquely problematic in cases of prospective injunctive relief, where courts are forced to act beyond their spheres of institutional competence, to evaluate forward-looking features of settlements that, because they are outside the scope of legislatively-

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55. ALI PRINCIPLES, *supra* note 46, at § 3.07 cmt. b, illus. 2.

56. *See Poertner*, 618 F. App'x at 631.

57. *See generally* Eric Helland & Jonathan Klick, *The Tradeoffs between Regulation and Litigation: Evidence from Insurance Class Actions*, 1 J. TORT L. 2 (2007) (finding no evidence to support the proposition that public regulation and private litigation function as substitute channels to deter harmful behavior, and finding some evidence that litigation and regulation tend to piggyback on each other at least in the insurance industry).

58. *See* Alexandra Lahav, *Two Views of the Class Action,* 79 FORDHAM L. REV. 1939, 1952–53 (2011) (describing as a problem with the "private attorney general model" the fact that "there is no universally agreed upon definition of the 'public good' by which her performance can be judged" and that "[i]t is much easier to deduce what is in the financial interest of the lawyer and what her private incentives must be than to determine what is truly in the 'public interest'").

endorsed litigation remedies, function as pure legislative decision-making, and nearly always do so in a de facto ex parte proceeding without adequate adversary presentation.[59]

II. COURTS HAVE NO EXPERTISE IN EVALUATING REGULATORY-STYLE INJUNCTIVE REMEDIES

Against this backdrop of perverse incentives we now turn to the policy problems these incentives create in the special case of prospective injunctive relief. In the first subsection we draw upon history, literature, and case law to sketch the theoretical and practical problems with courts attempting to function as regulators. We argue that, while the injunctive power is an important tool for addressing the institutional failures of public entities in contexts such as civil rights, the considerations that require the power to bestow injunctive relief in those contexts do not apply in the private law context. In the next section, we take up three specific case studies, demonstrating how these prospective injunctions in the private law context have created bad policy through the interference with particular regulatory regimes.

A. The Consent Decree as Historical Foundation

The genealogy of the federal courts' use of their discretion to promote social policy spans varied substantive areas of the law. It is a familiar story, one of the triumph of the civil rights movement as lower federal courts responded to the Supreme Court's directive in *Brown v. Board of Education* to oversee the racial integration of schools.[60] What followed was the rise of the consent decree—a settlement contained in a court order—as a

59. *Cf.* Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014). Even when a legislature authorizes an injunctive remedy for a consumer-fraud violation, the terms of settlements often act in a manner, as in *Pearson*, to create an injunction that differs from that sought in the complaint. *Id.* at 786 (noting that not only are the future purchasers of the disputed product, included in the plaintiff's valuation of the settlement, not actually class members as defined in the complaint, but the term of the injunction obtained was in reality shorter than the thirty months claimed).

60. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (discussing "period of transition" during which district courts should maintain jurisdiction over desegregation cases to "consider the adequacy of any plans the defendants may propose . . . and to effectuate a transition to a racially nondiscriminatory school system").

remedy for institutional misconduct.[61] The civil rights consent decrees issued by the district courts in the wake of *Brown* exemplified the cabined exercise of the judicial function to vindicate a fundamental Constitutional determination—that racial segregation violates the Fourteenth Amendment—under the express command of the Supreme Court. In the wake of the desegregation struggle the consent decree against government institutions exploded into a widely accepted goal of litigation across a broad range of contexts, and civil rights plaintiffs began to seek injunctive relief against prisons, jails, mental health facilities, and many other types of institutions.[62]

Today, federal courts are explicitly empowered by Congress to enter decrees against state and local officials for violation of one of the numerous federal laws regulating state and local governments passed in the years since passage of the Civil Rights Act.[63] And, of course, 42 U.S.C. § 1983 has, since 1961, provided a federal forum for constitutional tort claims against government officials, which often take the form of class actions resolved with either or both of consent decrees and money damages.[64]

The theoretical relationship between the civil rights injunction specifically and the class action generally relates to the coincidental timing of *Brown*'s progeny and Congress's 1966 amendment of the Federal Rules of Civil Procedure to provide

61. Over time these injunctive remedies in institutional reform cases have come to be known by a variety of names but with similar effects. *See* Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Consent Decree*, 59 DEPAUL L. REV. 515, 515 (2010) ("Every year, federal and state courts put in place orders that regulate the prospective operations of certainly hundreds and probably thousands of large government and private enterprises. Injunctions and injunction-like settlement agreements—whether styled consent decrees, settlements, conditional dismissals, or some other more creative title—bind the activities of employers, polluters, competitors, lenders, creditors, property holders, schools, housing authorities, police departments, jails, prisons, nursing homes, and many others.").

62. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1995 (1999).

63. For a comprehensive list of this legislation, which runs the substantive gamut from the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, to the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, see ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 22–23 (2004).

64. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961).

for class actions with Rule 23.[65] Indeed the Rules Advisory Committee explained that the mandatory injunctive class remedy created by section (b)(2) was specifically "inspired by the civil rights litigation then taking shape."[66] It is therefore productive to compare the robust debate over the expansions of the judicial role in the public law context to the much-less-theorized case of the prospective injunctive remedy in private class action litigation. This comparison shows how the policy virtues of the former do not translate to the latter.

In the late 1970s, during the ascent of the consent decree, Lon Fuller argued that such deviations from the adversarial model could be dangerous to the basic integrity of adjudication.[67] While Fuller's critique points to a basic rule-of-law problem with the injunction as a class action remedy, which we discuss in Part III, it also suggests an overriding pragmatic problem.

Judges are trained to evaluate competing proofs to decide which party has the best of a "reasoned argument." At the point at which the parties present a judge with a settlement, it is the joint product of the parties' negotiations and it is rare that someone with standing has an incentive to present a reasoned argument against it.[68] When, due to the absence of class members from the negotiating room, the judge must exercise his duty to consider whether injunctive remedies adequately vindicate their claims, he must do so without the benefit of adversar-adversarial debate. When these injunctive remedies involve the future effects of complex economic, business, and public health

65. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 237 (1987); Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2184–86 (1989); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 783–84 (2016).

66. John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1433 (2003); *see also* Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 603 (2012) (asserting that the drafters of the modern Rule 23 knew that civil rights litigants had encountered a series of obstacles that federal courts placed in the path of individuals seeking to enjoin unconstitutional racial segregation in the South); James E. Pfander, Brown II*: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 71 (2006) (observing that class action treatment might have facilitated a speedier challenge to segregation laws by "cutting through the ordinary rule that individuals must exhaust their administrative remedies before bringing suit to challenge administrative action").

67. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382–85 (1978).

68. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Settlement*, 59 FLA. L. REV. 71, 90–113 (2007).

measures, they cannot be fully evaluated for their utility to the absent class (much less "society") without knowledge of fields beyond the ken of the average lawyer.[69]

In the case of public law class actions where the defendant is an institutional political actor, these formal concerns, however well taken, fall before more pressing issues of substantive justice. Abram Chayes and Owen Fiss made the most prominent early defenses against the Fullerian critique of what Chayes termed the "public law model of litigation."[70] Chayes argued that concerns over the institutional competence of courts to engage in this kind of policy-making can be mitigated by such "institutional advantages" as the judge's participation in both the confirmation process and contemporary legal practice, giving her "some experience of the political process and acquaintance with a fairly broad range of public policy problems."[71] He also pointed out that litigation "permits a relatively high degree of participation by representatives of those who will be directly affected by the decision, without establishing a *liberum veto*."[72] Fundamentally, when a judge approves a remedy correcting the violation of constitutional or statutory rights by a public institution, she operates in a substantive area with which she is most likely to be familiar as a political actor and over which the judicial check is critical on basic separation-of-powers grounds. The executive asserts authority over the citizen through its institutions and—as *Brown* anticipated—the judiciary can and should curtail its unconstitutional abuses of that authority.

Yet Fuller's concerns over public law consent decrees—and even Chayes' arguments in support of them—illuminate some features of the injunctive remedy that become more problemat-

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69. *See Federal Consent Decree Fairness Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (July 19, 2015) (statement of Michael S. Greve), *available at* http://www.aei.org/publication/federal-consent-decree-fairness-act-s-489/ [https://perma.cc/6W2J-PS9R] (arguing in part that the private enforcement, through consent decree, of conditional funding statutes erodes local government autonomy and accountability).

70. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: the Forms of Justice*, 93 HARV. L. REV. 1 (1979).

71. Chayes, *supra* note 70, at 1308.

72. *Id*. A *liberum veto* is a parliamentary device allowing any member to unilaterally end the legislative session and nullify any legislation that had passed during its duration.

ic in the civil class action context. While judges' experience of the political process is relevant in considering the functions of political institutions, when the litigation in question moves to the realm of the private law class action it more frequently demands knowledge of business practices, branding, health, science, and technology. And, as discussed in Part I, the hallmark of the class action is the near-absence of true representatives of those who will be directly affected by injunctive remedies. While a plaintiff seeking an injunction against a government entity explicitly wants the thing he simultaneously secures for others—admission to a desegregated school, better prison conditions, a marriage license, and so on—no such identity exists in a civil class action between named plaintiffs and other class members.[73] In a civil case, named plaintiffs typically receive four- and five-digit incentive payments and their attorneys receive millions, regardless of how little the class receives.[74] Therefore, their participation is hardly probative of the desirability of any injunctive relief they obtain for the rest of the class.

In a pessimistic study of federal courts' regulation of state governments through consent decrees, Ross Sandler and David Schoenbrod argue that the disconnect between the judicial role and the task of policy-making has disastrous effects. Because judges are "[t]aught to believe in rationality as the way to solve policy problems, they tend to look down their noses at the work-a-day politicians who habituate city hall and the state capitol" and instead they see plaintiffs' attorneys as "the tribunes of such rationality."[75] Furthermore:

> Compounding the tilt in favor of supplanting ordinary government at the behest of plaintiffs' attorneys, the federal judge is apt to be presented with moving scenes of great harms to plaintiffs and obvious failings by defendants. For the judge, the understandably felt urgency to solve the prob-

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73. *But see* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (plaintiff lacked Article III standing to seek injunction against police chokehold policy because he failed to allege a sufficiently plausible threat of future injury).

74. *See* 4 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 11:38 (4th ed. 2008). The preclusion effect also differs in these cases, vis-à-vis potential future plaintiffs. *See* Part V, *infra.*

75. SANDLER & SCHOENBROD, *supra* note 63, at 165.

> lem is apt to distract attention from the abstract concern of letting the government function.[76]

While the authors were not discussing private class actions, their view of the interaction between plaintiffs' attorneys and the judicial personality has explanatory power for the private law case studies we discuss below. Indeed, our cases support the intuition that judges may have an even greater potential to ignore abstract concerns about functional government when they approve private injunctive remedies. Unlike injunctions issued directly against government entities themselves, these indirectly supplant the regulatory authority of such entities.

William Fletcher strikes a more nuanced middle ground on the subject of public law consent decrees that is particularly useful to apply to prospective injunctive remedies in private class actions. He argues, first, that "since trial court remedial discretion in institutional suits is inevitably political in nature, it must be regarded as presumptively illegitimate."[77] On this point he acknowledges the structural problems Fuller identifies. Yet, recognizing the need for intervention in moments of widespread political injustice, he concludes that:

> the presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default. In that event, and for so long as those political bodies remain in default, judicial discretion may be a necessary and therefore legitimate substitute for political discretion.[78]

For Fletcher, then, adjudicative legitimacy in issuing injunctions turns on necessity and requires a showing of nonfeasance on the part of government actors. Fletcher's analysis suggests a fundamental difference between Section 1983 litigation against government actors and consumer litigation against private parties. This distinction points to the core problem at the heart of many

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76. *Id.* Sandler & Schoenbrod also recognize the problem of state actors colluding with private parties to use federal consent decrees to achieve results unobtainable through normal democratic political processes. *Id. See also* Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99 (2005). That underappreciated problem is beyond the scope of this Article.

77. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982).

78. *Id.*; *see also* David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1918 (2014).

prospective injunctive remedies involving private actors: they supplant the work of actively functioning regulatory regimes.

B. Regulation through Civil Litigation

The original "public law model of litigation" had itself private law origins in earlier antitrust injunctions, court-supervised bankruptcy reorganizations of complex corporate entities such as railroads, and some trust and probate matters.[79] Since Rule 23 was promulgated in 1966, the explosion in private law class action litigation has paralleled the expansion of liability under both common law and statute.[80] As Richard Epstein argues:

> [T]oday the dominant pattern everywhere is to push the envelope. In 1966 any single collision involving multiple plaintiffs fit only uneasily within the new class action rules. Today in contrast, courts will certify class [actions] that demand $100 billion in damages on behalf of over four million potential class [members], on exotic antitrust theories that are controversial to say the least.[81]

The extent to which this explosion has empowered courts to make regulatory decisions beyond their sphere of competence has been criticized as a usurpation of the legislative and administrative branches of government.[82] Many scholars have already offered compelling critiques of the increasing dominance of "regulation through litigation" generally. Victor Schwartz and Leah Lorber provide a succinct summary of the argument on comparative institutional competence:

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79. *See* Schlanger, *supra* note 62, at 1995 & n.5; Chayes, *supra* note 70, at 1284; Michael E. DeBow, *Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees*, 1987 U. CHI. LEGAL F. 353, 363–64.

80. Epstein, *supra* note 10, at 477.

81. *Id.*

82. *See, e.g.*, Victor E. Schwartz & Christopher E. Appel, *Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War*, 23 B.U. PUB. INT. L.J. 185, 198–99 (2014) ("[C]ourts are not an appropriate mechanism for establishing industry regulations. First, courts are not politically responsive institutions. The civil judicial system is designed to compensate people who have been wrongfully injured by another's conduct; its purpose is not to supplant the administrative and legislative branches of government through regulation. Those branches have the opportunity to see beyond the merits of an individual case, and assess the impact of a rule on society itself. These impacts may be profound and affect the national economy, the health of American citizens, and people's freedom to choose what goods and services they wish to purchase.").

> Legislatures are in the best position to consider far reaching and complex public policy issues. First, they can gather facts from a wide range of sources to help lawmakers decide whether the law should be changed and, if so, what sorts of changes should be made. Second, legislatures make law prospectively, which gives the public fair notice about significant legal changes. As the United States Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]." Third, they must be sensitive to the will of the public; if they are not, the public can vote them out of office. In our democratic system, if far-reaching public policy decisions are to be made, the public should have the opportunity to evaluate those changes and express their agreement or disagreement in the voting booth.[83]

In contrast, the disadvantages to court-driven regulation are lack of accountability, uniformity, predictability, and federal agency expertise.[84] As to accountability, scholars have pointed out that private enforcement regimes can undermine administrative responsibility for legislative policy.[85] Private litigants

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83. Victor E. Schwartz & Leah Lorber, State Farm v. Avery*: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1219 (2001) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996)). Schwartz and Lorber wrote in the particular context of *Avery v. State Farm*, originally an Illinois state court case in which the court certified a nationwide class of 4.7 million State Farm customers who had had their damaged cars repaired with non-original parts, as permitted under their policies. Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1242 (Ill. App. Ct. 2001); Schwartz & Lorber, *supra*, at 1216. The trial court applied Illinois law to the claims of class members in 48 other jurisdictions—all of which permitted or required this practice to keep costs down. Schwartz & Lorber, *supra*, at 1216–17. In single-handedly permitting this blanket, nationwide policy change, the trial court inadequately considered the fact that State Farm fully disclosed this practice to its policyholders and, most importantly, that, as a mutual insurer owned by its policyholders, State Farm passed on the savings to them in the form of lower premiums and dividends. *Id.* at 1217. While eventually overturned by the Illinois Supreme Court, Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801 (Ill. 2005), the case nonetheless caused many auto insurance carriers to change the terms of their policies. *See* Schwartz & Lorber, *supra*, at 1217.

84. *See* Timothy D. Lytton, *The Complementary Role of Tort Litigation in Regulating the Gun Industry*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 250, 264 (Timothy D. Lytton ed., 2005); PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE 363–64 (2000).

85. Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1292–93 (1982).

can force courts to define the content of necessarily overbroad regulatory statutes, thereby undermining the agency's comparative advantage in political accountability, specialization, and centralization.[86] Private actions may also hamper an agency effort to harmonize conflicting statutory provisions and to negotiate with regulated firms and other affected interests in order to establish a consistent regulatory system.[87] This is particularly problematic in light of some evidence suggesting that cooperation promotes greater compliance than deterrence.[88]

As to the problem of comparative expertise, Frank Easterbrook gives a compelling account in the antitrust context, where the task of determining how to eliminate business practices that threaten competitive markets—the end goal of antitrust law—requires an economic perspective nearly impossible to obtain from the bench in any particular case. He explains:

> A fundamental difficulty facing the court is the incommensurability of the stakes. If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time . . . . In most cases even a perfectly informed court will have trouble deciding what the optimal long-run structure of the industry is, because there is no "right" balance between cooperation and competition. The judge has no benchmark. Small wonder that the history of antitrust is filled with decisions that now seem blunders.[89]

Finally, scholars have pointed out that private enforcement is both time-consuming and costly.[90]

In recent years, some federal courts have echoed these concerns about regulation through litigation. For example, in

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86. *Id.* at 1291; *see also* Engstrom, *supra* note 78.

87. Stewart & Sunstein, *supra* note 85, at 1292–93.

88. *See* Harry V. Ball, *Social Structure and Rent-Control Violations*, 65 AM. J. SOC. 598, 601–02 (1960) (finding that landlords' violations of rent control statutes were closely related to their perception of the reasonableness of its implementation); John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 LAW & POL'Y 385 (1984) (suggesting that enforcement be reserved for uncooperative firms or those who breach negotiated compliance).

89. Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2–3 (1984).

90. *See* Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 828 (2008).

Winzler v. Toyota Motor Sales U.S.A., Inc., the plaintiff brought state law product defect claims on behalf of a putative nationwide class of Toyota Corolla owners.[91] During the case, Toyota implemented a recall by way of a regulatory process of the National Highway Transportation Safety Administration (NHTSA).[92] The Tenth Circuit held that this "remedial commitment from our coordinate branches" prudentially mooted the case.[93] *Winzler* was driven by separation of powers concerns:

> [A]ffording a judicial remedy on top of one already promised by a coordinate branch risks needless inter-branch disputes over the execution of the remedial process and the duplicative expenditure of finite public resources. It risks, too, the entirely unwanted consequence of discouraging other branches from seeking to resolve disputes pending in court.[94]

Other courts have likewise found that plaintiffs do not have the right to supplant the national framework with their own preference through resolution of a case in an Article III court.[95]

While the literature just surveyed highlights the numerous general problems with private enforcement of regulatory prerogatives, prospective injunctive remedies present a uniquely problematic case wherein the harms most clearly outweigh the benefits. In the remainder of this Part we discuss three case studies of class actions, arising in very different regulatory environments, which demonstrate how regulation through prospective injunctive remedies leads to bad policy.

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91. 681 F.3d 1208 (10th Cir. 2012).

92. *Id.* at 1209.

93. *Id.* at 1211. Other circuits have reached similar conclusions on differing legal grounds. Carrera v. Bayer Corp., 727 F.3d 300, 304 (3d Cir. 2013) (class certification improper due to the Rule 23 prerequisite of ascertainability); *In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 752 (7th Cir. 2011) (class certification improper where no marginal benefit to class was possible, but on Fed R. Civ. P. 23(a)(4) grounds, rather than (b)(3) grounds).

94. 681 F.3d at 1211.

95. *See* Gutierrez v. Wells Fargo Bank, NA, 704 F.3d 712, 716 (9th Cir. 2012) (holding that national scheme preempted federal court from relying on state law to enjoin bank from using the particular system of posting or requiring bank to make specific disclosures); Authors Guild v. Google Inc., 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011) (rejecting settlement where parties sought to use class action to overwrite Congress's copyright scheme).

C. Hot Fuel Litigation[96]

We opened this Article with a brief account of the injunctive remedy proposed in the *Hot Fuel MDL*: gasoline retailers agree to adopt "temperature compensation" devices (ATC) to standardize the number of molecules of gasoline sold as a gallon. From a basic economic standpoint this remedy makes no sense as a benefit to consumers, past or future. In the first place, the market price of a product in a competitive marketplace is equivalent to its marginal cost.[97] Marginal cost is the increase in total cost that arises from an additional unit of production.[98] Therefore, absent regulatory interference to set the price itself, any intervention that increases only the marginal cost of a unit to the seller will simply increase the price to the consumer. Thus, as the California Energy Commission (CEC) noted, though ATC would mean that consumers purchasing a gallon of gas would, on average, get a larger "gallon," "retail station owners will in fact raise their fuel prices to compensate for selling fewer units, all other things being equal."[99] The CEC estimated that the total cost to all of California citizens from mistaken purchases of low-cost gasoline that is actually higher cost because of temperature differences between stations is "a little more than $250,000 a year."[100] With about 25.9 million licensed drivers in California,[101] that translates to just over $0.0097—less than a penny—per California driver per year. This benefit is dwarfed by the cost of installing and maintaining ATC dispensers, much less the social cost of an MDL class action with dozens of defendants and several hundred attorneys.

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96. Much of this analysis is found in briefs filed by the Center for Class Action Fairness on behalf of objectors to *Hot Fuel* settlements. Frank Bednarz, Adam Schulman, and Anna St. John did substantial research and writing on those briefs, and should be credited with the development of many of these ideas.

97. N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 336 (6th ed., 2012). The district court explicitly found that "the retail fuel market is a competitive one." Memorandum and Order at 30, *Hot Fuel MDL*, ECF No. 4248.

98. MANKIW, *supra* note 97, at 491.

99. STATE OF CAL. ENERGY COMM'N, FUEL DELIVERY TEMPERATURE STUDY 70 (2009), http://www.energy.ca.gov/2009publications/CEC-600-2009-002/CEC-600-2009-002-CMF.PDF [https://perma.cc/G6SQ-NG7C] [hereinafter CEC STUDY].

100. *Id.* at 71.

101. STATE OF CAL., DEP'T OF MOTOR VEHICLES, STATISTICS FOR PUBLICATION: JANUARY THROUGH DECEMBER 2015 (2016), https://www.dmv.ca.gov/portal/wcm/connect/5aa16cd3-39a5-402f-9453-0d353706cc9a/official.pdf?MOD=AJPERES [https://perma.cc/P7LG-EKJN].

These economic truisms explain why, prior to the litigation, every single regulatory agency to evaluate the question had concluded that ATC would yield no economic benefit to consumers. The National Conference of Weights and Measures (NCWM), a group composed of state and local weights-and-measures officials, has rejected the use of ATC at retail. At its July 2009 National Conference, a NCWM committee withdrew two proposals that would have allowed or mandated it. In reaching its decision, the committee reviewed reports, studies, and received public comments that were opposed to the measures by "overwhelming majority."[102] The primary reasons for withdrawing the proposals were "conference consensus against ATC, economic cost factors, *lack of benefit to consumers*, absence of uniformity in the marketplace, and the additional cost to Weights and Measures officials and service companies."[103] As part of its reasoning, the NCWM cited a thorough study by the state of California.

California regulators undertook a yearlong cost-benefit analysis and concluded that ATC would result in no economic benefit, and that ATC would actually *harm* consumers because they would bear the costs of new equipment. In October 2007, the California legislature directed the California Energy Commission (CEC), in partnership with two other agencies, to complete a "comprehensive survey and cost benefit analysis" of temperature correction, including the utility of "[r]equiring the installation of temperature correction or compensation equipment at the pump."[104] On March 11, 2009—five days after the Costco Settlement Agreement was signed—the five CEC Commissioners unanimously adopted its final 147-page report. The Commission found that the "cost-benefit analysis concludes that the results are *negative or a net cost to society* under all the options examined."[105] It also found that "[i]t is . . . unlikely that there are any plausible circumstances con-

102. *W&M Rejects ATC Proposals*, CSP DAILY NEWS (July 17, 2009), http://www.cspnet.com/fuels-news-prices-analysis/fuels-news/articles/wm-rejects-atc-proposals [https://perma.cc/UP4F-MD54].

103. *Id.* (emphasis added).

104. CAL. BUS. & PROF. CODE § 13630(a)(2)(D) (West 2016).

105. CEC STUDY, *supra* note 99, at 1 (emphasis added).

sumers could receive a small net benefit with installed ATC devices at California's retail stations."[106]

The commission found that switching to ATC at retail would not result in savings, although the average size of "gallons" dispensed would increase. This is because "retail station owners will in fact raise their fuel prices to compensate for selling fewer units, all other things being equal."[107] Because gas retailers will adjust prices to maintain their profitability, "this potential benefit to consumers perceived by some stakeholders is not expected to materialize."[108] The installation and promotion of ATC is therefore economically worthless to the consumers at large. And even this assumes that there even exists a problem at the consumer level: Consumers Union and Consumer Watchdog, neither any sort of corporate shill, call the "hot fuel" phenomenon an urban legend because underground double-walled tanks are generally insulated against temperature changes, even confirming the absence of difference through empirical testing.[109] Organizations that purchase motor fuel, such as the American Trucking Associations, the largest diesel fuel consumer group in the United States, have repeatedly taken a public position against ATC.[110]

The absurdity of the suit seeking injunctive relief under the rubric of "consumer fraud" can be further demonstrated by imagining the alternative universe where every retailer uses ATC. There, some purchasers of "gallons" of gas will get "temperature-adjusted" gallons that deliver less volume than a gallon. It is difficult to see why this would not attract consumer-fraud suits by entrepreneurial trial lawyers demanding a shift to volumetric sales—that is, the real-world status quo.

Indeed, the judicial system theoretically "worked." Every *Hot Fuel* case fully litigated to judgment—including the rare instance

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106. *Id.*

107. *Id.* at 70.

108. *Id.* at 71.

109. Gordon Hard, *Save on gas with morning fill-ups? Don't bet on it*, CONSUMER REPORTS NEWS (Aug. 11, 2008), http://www.consumerreports.org/cro/news/2008/08/save-on-gas-with-morning-fill-ups-don-t-bet-on-it/index.htm [https://perma.cc/N9ZZ-VNGC].

110. Comments of the American Trucking Associations Re: National Conference of Weights & Measures DGE and GGE Proposals for Sale of Natural Gas as a Motor Fuel (July 14, 2014), *available at* http://www.trucking.org/article.aspx?uid=a861be3f-88a7-43c2-9c1f-41108ad51157 [http://perma.cc/4CPE-ECEQ].

of a class-action jury trial—has resulted in a defense verdict.[111] So why would Costco or the dozens of other defendants settle? Under the American system, plaintiffs' attorneys can impose substantial litigation expenses on those who refused to settle. In a world where relatively costless illusory injunctive relief is permitted to be the consideration for a settlement, an individual defendant might be excused for agreeing to pay a lower sum to plaintiffs' attorneys (and no cash to the class) than the larger expense of defending themselves at trial, which, beyond the obvious cost of paying defense attorneys, has additional burdens of distractions to company executives who would have to take time away from core business to testify.

In light of this widespread repudiation by state regulators of the sort of "relief" that the Costco settlement provided, it is unsurprising that the currently pending *Hot Fuel* settlements contain more elaborate injunctive "relief" purporting to benefit state weights-and-measures regulators. Notably, most of the settlements establish funds earmarked for "contributions to the departments of weights and measures, or other agencies . . . for purposes of defraying some of the States' costs of implementing the use of ATC."[112] Setting aside the vague aura of bribery surrounding these provisions, they amount, even more so than the mandate of ATC itself, to an overt usurpation, by courts and litigants, of the highly specialized work these agencies do. To understand why, we look to the role of the regulatory system—the NCWM and the numerous entities that comprise it—whose expertise the court so thoroughly ignored when it allowed the Costco settlement to go forward with the injunctive provisions intact.

The Founders deemed the power to establish weights and measures so significant that they constitutionally vested it in

111. *See* Brianne Pfannenstiel, *Defense lawyer gets pumped about 'hot fuel' dismissals*, KANSAS CITY BUS. J. (Feb. 14, 2014), http://www.bizjournals.com/kansascity/print-edition/2014/02/14/brianne-pfannenstiel-defense-lawyer.html [http://perma.cc/HR7J-PWAV]; Gavin Broady, *7-Eleven Scores Win In Kansas Hot Fuel MDL*, LAW360 (Sept. 25, 2012), http://www.law360.com/articles/381341/7-eleven-scores-win-in-kansas-hot-fuel-mdl [http://perma.cc/33TD-5V2M].

112. Renewed Motion of Plaintiffs for Order Conditionally Certifying Settlement Classes, Preliminarily Approving Class Action Settlements, Directing and Approving Distribution of Class Notice, Setting Hearing for Final Approval of Class Action Settlements and Appointing Class Counsel at 16 ¶ 14(e), *Hot Fuel MDL*, ECF No. 4447-4.

the United States Congress.[113] Both Thomas Jefferson and John Quincy Adams, during their respective tenures as Secretary of State, wrote comprehensive reports on the subject, which Congress subsequently followed.[114] Finally, after an 1835 Senate resolution, the Treasury adopted standards for the yard, pound, gallon, and bushel for the use of the Customs Service, on the theory that "'divergences among the weights and measures in use' for this purpose 'were directly opposed to the spirit of the Constitution, which requires that all duties, imposts, and excises shall be uniform throughout the United States.'"[115] In 1836 Congress had copies of these standards sent to each of the states, which soon adopted them.[116]

The lack of uniformity in standards that persisted even after this modicum of federal involvement caused significant problems in areas ranging from tax collection and customs duties to commerce and scientific progress.[117] Even worse, the public welfare was threatened by faulty household products, construction materials, and industrial items.[118] Over the course of the twentieth century these deficiencies were corrected in large part due to the collaboration between federal agencies and private standards-creating entities such as the American National Standards Institute (ANSI).[119] The reason for this expanded role of private standard-making organizations is practical necessity: "Public policy and regulation, not engineering and design, are the domain of federal agencies."[120]

Today the federal Office of Weights and Measures partners with the NCWM—itself an organization of state and local weights-and-measures officials and representatives of business,

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113. U.S. CONST. art. I, § 8, cl. 5.

114. For an interesting account of this history, see David P. Currie, *Weights & Measures*, 2 GREEN BAG 2d 261 (1999).

115. *Id.* at 266 (quoting LEWIS V. JUDSON, WEIGHTS AND MEASURES OF THE UNITED STATES 6 (Nat'l Bureau of Standards, 1976)).

116. *Id.*

117. Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279, 304 (2015).

118. *Id.*

119. *See* American National Standards Institute, *ANSI: Historical Overview*, http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1 [https://perma.cc/MN84-XKLC] (last visited May 12, 2016). There are currently around 600 private standards-development organizations in the United States. Bremer, *supra* note 117, at 306.

120. Bremer, *supra* note 117, at 308.

industry, consumer groups, and Federal agencies—to "develop U.S. standards in the form of uniform laws, regulations, and methods of practice."[121] In other words, the most crucial attributes of weights-and-measures development specifically and standards development generally can be identified as *uniformity* and *specialization*. When even regulatory agencies rely to such a great extent on the expertise of a myriad of specialized, private entities wholly committed to the generation of standards, a single judge simply lacks the substantive competence to approve a wholesale unmaking of regulatory policy in the area. Furthermore, if even state-by-state variation in weights and measures has caused such grave problems historically, how much worse will case-by-case variation be? In the case of the *Hot Fuel* settlements the judicial interference with standard-making merely results in economic waste; the nature of standards are such that other sorts of injunctive remedies could go so far as to jeopardize public health and safety.

D. Pearson v. NBTY

If the *Hot Fuel* settlements exemplify over-regulation through litigation, the injunctive remedies proposed by the settlement in *Pearson v. NBTY, Inc.* exemplify mindless under-regulation.[122] Both dangers arise when plaintiffs' counsel attempts to justify fees without having provided any benefit to class members or consumers.

Pearson involved several class actions over glucosamine supplements made by NBTY's subsidiary Rexall Sundown, Inc. The supplements had labels containing allegedly scientifically unsupported claims that the products "'help rebuild cartilage,' 'support renewal of cartilage,' help 'maintain the structural integrity of joints,' 'lubricate joints,' and 'support[] mobility and flexibility,'" among others.[123] The district court approved a settlement that would pay about $8.5 million to class members due to a claims process that failed to compensate over ninety-

121. *Weights and Measures: Welcome*, NAT'L INST. OF STANDARDS AND TECH., http://www.nist.gov/pml/wmd/ [https://perma.cc/CV37-4LD4] (last visited May 12, 2016).

122. 772 F.3d 778 (7th Cir. 2014). One of us was the successful appellant in that case.

123. *Id.* at 779.

nine percent of the class.[124] Class counsel attempted to justify a $4.5 million fee request based in large part on Rexall's agreement to make certain changes to its labeling for a period of thirty months (minus the six months allowed for Rexall to make the changes and begin shipping the new packages); the district court agreed with the objector that the injunctive relief was of unproven benefit and approved the settlement while reducing the fee award to $1.93 million.[125]

The objector appealed the settlement approval, while the class counsel cross-appealed the fee reduction.[126] Class counsel's cross-appeal argued that the labeling changes were a class benefit. In rejecting class counsel's argument and reversing the settlement approval, the Seventh Circuit provided a blistering account of the lack of value in the labeling changes touted as class "benefits":

> [I]t's superfluous—or even adverse to consumers. Given the emphasis that class counsel place on the fraudulent character of Rexall's claims, Rexall might have an incentive even without an injunction to change them. The injunction actually gives it protection by allowing it, with a judicial imprimatur (because it's part of a settlement approved by the district court), to preserve the substance of the claims by making . . . purely cosmetic changes in wording, which Rexall in effect is seeking judicial approval of.[127]

The Court went on to call the proposed labeling changes "substantively empty," pointing out the lack of meaningful difference between original language, such as "support[s] renewal of cartilage," and its replacement "contains a key building block of cartilage."[128] In other words, the defendants would lose nothing in terms of advertising content through this remedy even if it did not have a limitation of twenty-four months.

124. *Id.* at 781, 784.

125. *Id.* at 781.

126. *Id.* at 780. That said, the district court also erroneously found that the $14.2 million made available to the class was a class benefit. *Id.* at 780–81.

127. *Id.* at 785.

128. *Id.* The court also failed to see a substantive difference between "works by providing the nourishment your body needs to build cartilage, lubricate, and strengthen your joints," and "works by providing the nourishment your body needs to support cartilage, lubricate, and strengthen your joints." Finally, it failed to find a difference between "rebuilds cartilage," "repairs cartilage," or "renews cartilage." *Id.*

In an amicus brief filed in opposition to a similarly empty settlement of glucosamine labeling claims against Walgreens Drug and other retail defendants, the consumer watchdog Truth in Advertising, Inc. (TIA) emphasized how meaningless labeling changes exacerbate, rather than abate, the victimization of consumers: "[D]efendants can use any term – except for the six that were blacklisted in the agreement – that suggest[s] glucosamine supplements can improve joint health and/or build cartilage."[129] As TIA put it, the settlement "gives the companies the green light to continue marketing their supplements just as they had before this lawsuit was filed and this agreement was reached."[130] Notwithstanding TIA's objection, to say nothing of the Seventh Circuit's decision in *Pearson*, the district court approved the settlement.

It is important to understand that, with the settlement approved by the *Pearson* district courts, the parties achieved, with no meaningful adversarial process, what even the Food and Drug Administration (FDA) cannot: the preclusion of future claims by class members against Rexall for any representations made in the new labels. Some scholars have argued that manufacturers' adherence to FDA labeling requirements should have the power to create a preemptive safe harbor against tort litigation. Richard Epstein points to the "comprehensive control that the FDA exercises in issuing warnings about the dangerous side effects and counter-indications for the use of any drug" and asserts that "[t]he FDA, for all its flaws, does have one advantage over a system of tort liability: It makes its judgments on the overall effects of drug use, not on the particulars of individual cases where the question of proper warning is compromised in a number of ways."[131] In holding that FDA regulations lack such preemptive effect, the Supreme Court has relied

129. Brief of Truth in Advertising, Inc., as Amici Curiae in Opposition to Proposed Settlement at 3, Quinn v. Walgreen Co., 958 F. Supp. 2d 533 (S.D.N.Y. 2013) (No. 7:12-cv-8187-VB).

130. *Id*. at 4.

131. Richard A. Epstein, *What Tort Theory Tells Us About Federal Preemption: the Tragic Saga of* Wyeth v. Levine, 65 NYU ANN. SURVEY OF AM. L. 485, 488 (2010); *see also* Richard A. Epstein & Michael S. Greve, *Introduction: Preemption in Context, in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 1, 10–16 (Richard A. Epstein & Michael S. Greve eds., 2007) (arguing that concurrent regulation mistakenly ratchets up government control so that the most intrusive regulator wins). *But see* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006).

on the theory that the FDA has "limited resources" to monitor the 11,000 drugs on the market and that "state [tort] law offers an additional, and important, layer of consumer protection that complements FDA regulation."[132] If the FDA regulatory process cannot preempt collateral litigation, what sense does it make to allow the parties to a single, non-adversarial settlement—who have every incentive to negotiate the least meaningful labeling changes they can get away with—to do so?[133]

We will consider the question of preemption in greater detail in the next Part, but for the present we note that *Pearson* exemplifies the judicial illegitimacy described by William Fletcher and referenced in Part II above. The district court exercised "remedial discretion" in a context far from one in which "political bodies that should ordinarily exercise such discretion are seriously and chronically in default."[134] Indeed the FDA was industriously occupying the space in which plaintiffs' attorneys and the district court illegitimately intervened. In reality, the injunctive provision of this settlement operates to harm consumers by creating an unsupported mirage of government approval to justify higher fees for the attorneys.

E. American Express Merchant Litigation

As badly as the *Pearson* litigation usurped regulatory authority, the situation worsens in cases where political bodies are not only regulating actively in the relevant area, but are already regulating the specific defendants the class action targeted. Case in point is the antitrust class action litigation brought on behalf of merchant classes against credit card companies for the

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132. Wyeth v. Levine, 555 U.S. 555, 578–79 (2009) (citing David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461, 491–95 (2008)).

133. This question will only increase in significance as courts begin to adjudicate the more than 150 food labeling lawsuits filed by consumer groups against manufacturers since 2011. *See* Nicole E. Negowetti, *Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority*, GOVERNANCE STUDIES AT BROOKINGS 1, 1, 22 (June 2014) (surveying the surge of food labeling cases, which involve both alleged violations of existing FDA regulations and consumer fraud claims in areas where the FDA has been silent, and arguing that the FDA should ramp up its enforcement activity because "[p]olicing labeling violations is the responsibility of the FDA, not plaintiffs' attorneys").

134. Fletcher, *supra* note 77, at 637.

"anti-steering" terms in their contracts.[135] These nondiscrimination provisions (NDPs), which were ubiquitous across the credit card industry, prohibited merchants from either offering customers incentives such as discounts or levying surcharges for the use of one particular credit card over another. The NDPs are anti-competitive in that they "create an environment in which there is nothing to offset credit card networks' incentive . . . to charge merchants inflated prices for their services.[136]

As a result of these provisions, the Antitrust Division of the Department of Justice, together with the attorneys general of seventeen states, brought enforcement actions against Visa, MasterCard, and American Express ("Amex") for violations of section 1 of the Sherman Act.[137] Visa and MasterCard entered into consent decrees with the government while Amex litigated the action to judgment in a bench trial, which Amex lost.[138] In deciding against Amex the court held that the government had proved by a preponderance of the evidence that the defendants' NDPs violated the federal antitrust laws.[139] Accordingly, the court issued an injunction requiring that Amex "not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement, that directly or indirectly prohibits, prevents, or restrains" a merchant from offering a customer incentives or discounts in exchange for using "a particular Brand or Type of General Purpose or brand of debit card" different from the card initially proffered.[140] The injunction restricted the company's anti-steering attempts far more broadly than the settlement negotiated in the class action.[141] That

135. *In re* Am. Express Anti-Steering Rules Antitrust Litig., No. 11–MD–2221 (NGG)(RER), 2016 WL 748089 (E.D.N.Y. Jan. 7, 2016). The Center for Class Action Fairness represented an objector to the settlement.

136. United States v. Am. Express Co., 88 F. Supp. 3d 143, 150 (E.D.N.Y. 2015)

137. Complaint at 1–2, United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015) (No. 10-cv-4496-NGG-CLP).

138. *Am. Express Co.*, 88 F. Supp. 3d at 149, 238.

139. *Id.* at 238.

140. Order Entering Permanent Injunction as to the American Express Defendants at 4–5, United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015) (No. 10-cv-4496-NGG-RER).

141. A similar settlement of the class actions against Visa and MasterCard was approved by the Eastern District of New York and is currently pending in the Second Circuit. *See In re* Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., 986 F. Supp. 2d 207, 241 (E.D.N.Y. 2013), *appeal docketed*, *In re* Payment

agreement provided that the NDPs "shall continue to prohibit discrimination against the use of American Express-Branded Cards, except as expressly set forth in this Class Settlement Agreement."[142] The most significant change the settlement made from the prior status quo was to require that Amex allow a merchant to impose a surcharge on all credit card transactions without imposing any on debit cards.[143]

The court's findings in the enforcement action reveal the lack of value in the class settlement from the perspective of the merchants. As part of its analysis, the court found that general purpose credit cards and debit cards belong to separate antitrust markets.[144] For antitrust purposes, a product market exists if a hypothetical profit-maximizing monopolist that is the only seller of the product included in the proposed market could impose a small but significant and non-transitory price increase (SSNIP) without losing so many sales to other products that its price became unprofitable.[145]

After considering both expert price sensitivity analysis and the evidence of competitive realities produced at trial, the court concluded:

> [T]here is no indication that merchants—the 'relevant consumer' for defining the relevant product market in this case—historically have been or would be inclined to switch to debit network services (i.e., drop acceptance of credit cards) in response to rising prices in the GPCC card network services market, or that such substitution, if it did occur, would be sufficient to temper an exercise of market power therein.[146]

Card Interchange, No. 14-241 (2d Cir. argued Sept. 28, 2015). For a detailed, and equally critical, account of that litigation, see Steven Semeraro, *Settlement Without Consent: Assessing the Credit Card Merchant Fee Class Action*, 2015 COLUM. BUS. L. REV. 186, 186–87.

142. Class Settlement Agreement at 20, *In re* Am. Express Anti-Steering Rules Antitrust Litig., No. 11-MD-2221 (NGG)(RER) (E.D.N.Y. Jan. 7, 2014), ECF No. 306-2.

143. *Id.* at 20–21.

144. *Am. Express Co.*, 88 F. Supp. 3d at 171–74 (citing United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 335–39 (S.D.N.Y. 2001); United States v. Visa U.S.A., Inc., 344 F.3d 229, 269 (2d Cir. 2003)).

145. *Am. Express Co.*, 88 F. Supp. 3d at 176 (internal citations omitted).

146. *Id.*

This finding undercuts the class counsel's theory of why the credit card surcharges they negotiated should be valuable to merchants. According to class counsel:

> [M]erchants will be free to impose a separate charge to account for the costs of credit card acceptance, thus offering consumers a powerful and direct economic incentive to use debit cards—the cost of which is regulated by the Federal Reserve and far cheaper than credit card transactions . . . . By driving consumers to debit U.S. merchants stand to gain 1.57% of literally trillions of dollars over time.[147]

Yet, according to the court's analysis in the enforcement action, merchants will not, in fact, try to "drive consumers to debit," even if they can ostensibly save money by doing so. This is because a "merchant's profit margin is likely to significantly exceed the price differential between credit and other forms of payment" such that "the foregone profits lost to a competitor because the merchant no longer accepts credit will significantly exceed the per transaction savings realized from successfully shifting a customer to a less expensive payment method."[148] As the court noted, "Amex cardholders may be prompted to use another GPCC card, which they likely carry given the ubiquity of Visa and MasterCard, but may not be as easily switched from GPCC cards to another form of payment entirely."[149] Thus, the idea that merchants will gain 1.57% of "literally trillions of dollars" from the surcharge provision negotiated in the class settlement is fanciful. In reality—and as the court concluded as a matter of law in the enforcement action—customers are not easily "driven" to debit cards, and the merchant who tries to drive them will lose sales. The general confusion on this point only serves to emphasize the difficulty of predicting what injunctive measures will actually have an anticompetitive effect in the long run. [150]

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147. Class Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement at 3, *In re* Am. Express Anti-Steering Rules Antitrust Litig., No. 11-MD-2221 (NGG)(RER) (E.D.N.Y. Apr. 15, 2014), ECF No. 362 [hereinafter Fee Motion].

148. *Am. Express Co.*, 88 F. Supp. 3d at 178.

149. *Id.*

150. In considering the findings of the experts in the similar Visa-MasterCard settlement, Semeraro has concluded that:

> The benefits of surcharging to consumers . . . are highly uncertain because a merchant's economic interests would lead it to undervalue the utility

In their fee motion, class counsel admitted they were unable to obtain the broader injunctions obtained by the government and likewise admitted such injunctions were important.[151] Yet they would have nonetheless negotiated them away, forever, from future merchants who might have sought them. Had the government failed in its enforcement action, the class settlement would have precluded all future plaintiffs' unripe claims, at least as to past conduct, with respect to the very honor-all-cards and non-discrimination rules held to have violated the Sherman Act.[152] Apart from the fact that the court's opinion establishes that the class settlement was valueless to class members and thus unfair as a functional matter, the existence of the parallel DOJ enforcement action further illuminates the inappropriateness of this injunctive settlement at the systemic level.

The Amex case represents the opposite end of the spectrum from one in which a "private attorney general" is necessary to obtain injunctive relief for the public wellbeing. This is because there were *actual* attorneys general on the job. The settlement was not necessary to obtain relief that regulatory authorities were unable to obtain, regardless of whether we consider it from the perspective of class members or the public at large. Instead, it would have operated to interfere with the regulatory prerogatives of agencies such as the Consumer Financial Protection Bureau and the enforcement prerogatives of the antitrust experts in the Department of Justice and the Federal Trade Commission by binding all merchants who will accept Amex cards in perpetuity.[153] Had the United States' enforcement action been unsuccessful, the defendants would have had carte blanche with respect to these violations (acknowledged as such by class counsel), because the proposed settlement exempts them from any anti-steering antitrust suit prosecuted by any private plaintiff for at least the next ten years. In short, the proposed Amex settlement turns the entire concept of "sup-

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> that its customers derive from using credit cards when they would still make a purchase without them. As a result, at least some merchants would surcharge at excessive levels.

Semeraro, *supra* note 141, at 247.

151. *See* Fee Motion, *supra* note 147, at 4.

152. We discuss the legal problems created by such releases in Part III.A, *infra*.

153. *See* Part III.A, *infra.*

plemental" private enforcement on its head by interfering with existing public enforcement.[154]

III. PROSPECTIVE INJUNCTIVE REMEDIES MAKE BAD LAW AS WELL AS BAD POLICY

Thus far we have used these case studies primarily to illustrate the bad policy outcomes that result when courts usurp the role of regulators and approve wide-ranging prospective injunctive remedies without the necessary knowledge or training to evaluate them. In this section we turn to the detrimental legal consequences of this practice.

A. Improper Regulatory Preemption of Future Claims

As we note in our case studies in Part II, prospective injunctive relief acts to create de facto regulatory preemption. Take, for example, the label change in *Pearson*. The settlement contains the language common to such agreements releasing the defendants from class members' future litigation of:

> any and all rights, duties, obligations, claims, actions, causes of action, or liabilities, whether arising under local, state, or federal law, whether by statute, contract, common law, or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated . . . arising out of or relating in any way . . . to . . . the [products covered in the litigation], including, but not limited to, their efficacy or performance, and any and all advertising, labeling, packaging, marketing, claims, or representations of any type made in connection with [those products].[155]

In other words, the settlement permits the defendant to change a handful of verbs on its label and thereby preclude any consumer-fraud litigation by class members over the *new* label—which still includes even some claims that the original complaint had alleged to be fraudulent. Perhaps those claims

154. While the district court ultimately rejected the Amex settlement, it did so because of idiosyncratic facts relating to class counsel's unethical behavior in sharing confidential information with attorneys for MasterCard, and made no effort to scrutinize the settlement. *In re* Am. Express Anti Steering Rules Antitrust Litig., No. 11-MD-2211 (NGG)(RER), 2015 WL 4645240, at *13 (E.D.N.Y. Aug. 4, 2015).

155. Settlement Agreement and General Release at 10, Pearson v. Target Corp., No. 11-CV-7972 (N.D. Ill. May 14, 2015), ECF No. 213-1.

were not fraudulent and should not have been sued upon in the first place. But a district court is poorly situated to come to that conclusion based upon the ex parte presentation of the settling private parties.

For better or worse, scientific experts at the Food and Drug Administration cannot provide litigation certainty to a manufacturer over its label, unless the label pertains to a generic drug.[156] We have discussed why, as a policy matter, it makes little sense to allow untrained district court judges to create that preemption through Rule 23(e) at the behest of self-interested attorneys, without the benefit of adversarial presentation. But consider too, as a legal matter, how this effect unfairly privileges the claims of past class members over future ones. Why should a future class member with an unexpired statute of limitations be precluded from prosecuting her challenge to one of the potentially fraudulent statements on NBTY's label simply because class counsel abandoned it during negotiations? The sheer arbitrariness of this outcome runs counter to basic principles of the rule of law.[157]

Because prospective injunctive remedies go hand-in-hand with future conduct releases, they generally run afoul of the "elementary" principle that "a settlement agreement cannot release claims that the parties were not authorized to release."[158] Indeed, some courts have attempted to limit future-

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156. *See, e.g.*, POM Wonderful LLC v. Coca Cola Co., 134 S. Ct. 2228, 2239 (2014) (FDA approval of labeling does not provide safe harbor from false advertising suits under the Lanham Act, 15 U.S.C. § 1051 (2012)); Wyeth v. Levine, 555 U.S. 555, 576–81 (FDA approval of labeling does not preempt product liability claim over allegedly inadequate label). For a critical explication of this state of affairs, see generally Epstein, *What Tort Theory Tells Us About Federal Preemption*, *supra* note 131.

157. The *Hot Fuel* litigation presents similar problems of preemption as at least some of the pending settlements intend to preclude future claims by class members. Perhaps, for example, a class member might consider it fraud that, after the settlement, a "gallon" of gas sold by the retailer might be smaller than a volumetric gallon. She would be barred from suit by language in the settlement releasing the defendant from, *inter alia*, "actions taken by a [Releasee] that are authorized or required by this Amended Settlement agreement or by the Final Judgment." *See, e.g.*, Amended Class Action Settlement Agreement and Release at 13, *Hot Fuel MDL*, ECF. No. 4447-2.

158. *In re* Am. Express Fin. Advisors Secs. Litig., 672 F.3d 113, 135 (2d Cir. 2011). *See also* Schwartz v. Dallas Cowboys Football Club, Ltd., 157 F. Supp. 2d 561, 578 (E.D. Pa. 2001) ("The release is also too broad because it bars later claims based on future conduct."); WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 12:15

conduct releases in prospective injunctive settlements.[159] Claims released by a settlement must ostensibly share "the identical factual predicate" underlying the claims of the original action.[160] "Subject matter specificity" is insufficient; the released claims must hew to the facts of the underlying complaint.[161] James Grimmelman has argued that "[t]he presence of a future-conduct release is, at the very least, a major warning sign that this is not a run-of-the-mill settlement" and urges that courts "look on future conduct settlements with more than their usual skepticism."[162] When a settlement's agreed-upon release exceeds its permissible scope, both the defendants and class counsel get a benefit at the expense of absent class members. An expanded release makes the terms more valuable to the defendant while simultaneously inducing them to grant an even more sizable award of fees to class counsel. As such, the terms of the release need to be closely policed, because the preclusion of future claims makes such a settlement worse than fluid recovery.

Prospective injunctive relief involving labeling changes such as those in *Pearson* and *Quinn* should presumed to violate these requirements. It is paradoxical to suggest that new labeling—touted by class counsel as a *benefit* of litigation—can be a factual predicate "identical" to the original disputed labeling for the purposes of immunity from future claims. Because the settling

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(4th ed. 2002) ("As a matter of settlement strategy, the defendants may negotiate a release of all claims *up to the date of settlement*, though this date naturally falls after the date the complaint was filed.") (emphasis added); *cf. In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d at 138 ("[T]here can be no question that the [class members'] claims, to the extent that they involve conduct occurring *after* the Class Period, cannot be Released Claims."); Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 313 (5th Cir. 2007) ("[A] release does not ordinarily preclude claims based on subsequent conduct.").

159. *See* Authors Guild v. Google Inc., 770 F. Supp. 2d 666, 666, 677 (S.D.N.Y. 2011) (repudiating settlement that insulated a "forward-looking business arrangement" as exceeding the permissible scope of a release).

160. *See, e.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 107 (2d Cir. 2005); TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982). That said, settlements regularly contain waivers far broader than any litigation anticipated by the original complaint. *See* S. REP. NO. 108-123, at 88 (2003).

161. *See, e.g.*, Chavez v. PVH Corp., No. 13-CV-01797-LHK, 2015 WL 581382, at *5–6 (N.D. Cal. Feb. 11, 2015); Custom LED, LLC v. eBay, Inc., No. 12-CV-00350-JST, 2013 WL 4552789, at *6 (N.D. Cal. Aug. 27, 2013).

162. James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. REV. 387, 431 (2012).

parties are attempting to waive liability for events that have not yet occurred—reliance by future parties on the representations made in Rexall's revised labeling—those events by definition cannot share a factual predicate with the acts alleged in the complaint. As Grimmelman puts it:

> [F]uture-conduct releases are a monstrous hybrid between private and public planning, the worst of both worlds. They impose plans on people who have never heard of or consented to them—but they are negotiated by self-interested private parties rather than elected representatives. Courts are planners of last resort: their job is to sort out the consequences of past plans gone awry, not to make new plans.[163]

To take another example, the recently-rejected Amex settlement would not only direct all available tangible relief toward class counsel and the named representatives, but its mandatory release of future claims would affirmatively hamper class members. The settlement purports to bind Rule 23(b)(2) class members to a prospective release of Fair Credit Reporting Act (FCRA) liability *after* the "Provisions Change Date" until the "Release Termination Date" (no sooner than ten years following the change date).[164] Because the settling parties were attempting to waive liability for acts that had not yet occurred, those acts by definition cannot share a factual predicate with the acts alleged in the complaint. More than that however, the future card acceptance agreements would necessarily differ in substance from those at issue in the litigation (because of the injunctive terms and the discretion afforded Amex under the settlement). Allowing defendants like Amex to insulate their future conduct with respect to post-settlement agreements—which had not even been implemented yet—should not be permitted because it leaves un-consenting parties to the agreement with no notice or remedy.

In his critique of the Visa/MasterCard settlement Steve Semeraro points out that only a small portion of the companies' massive rulebooks were examined during the litigation, despite the fact that the release provision enjoins claims on all of them.[165]

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163. *Id.* at 474 (internal quotation omitted).

164. *See* Class Action Settlement at 27 ¶ 1(vv), *In re* Am. Express Anti-Steering Rules Antitrust Litig., No. 1:11-MD-2221 (NGG)(RER) (E.D.N.Y. Apr. 15, 2014), ECF No. 364-1.

165. Semeraro, *supra* note 141, at 266.

That case, like the Amex case, had an exemption from the release agreement based on the pending work of another branch of government: the DOJ was investigating the cards' rules imposing new fees on merchants' banks that they had adopted only after Congress regulated debit card interchange fees.[166] Yet, as Semeraro puts it, "[I]f a special settlement provision were needed to ensure that merchants could attack this particular new fee, presumably merchants would be barred from attacking other problematic provisions that the defendants might adopt."[167]

Releasing future claims presents a further problem: it violates Article III of the Constitution. If a new plaintiff tried to bring a lawsuit against Amex today contending that its card acceptance agreement for the year 2017 would violate antitrust law, the complaint would be dismissed as unripe. In other words, Amex seeks in this settlement that which would be unobtainable at trial: the preclusion of unripe claims with respect to their honor-all-cards and non-discrimination rules.

Defendants should not be permitted to insulate their future conduct with respect to unripe claims, and future class members have not authorized class counsel and named representatives to trade these claims away.[168] Approving such settlements requires courts "to ignore the reality that there are nearly always (if not always) some differences between Executive, Legislative and Judicial remedial procedures given how differently the three branches operate: by regulation, legislation, and decree."[169] Beyond just ignoring coordinate branches' prerogatives, however, endorsing these release provisions as applied to prospective injunctive remedies requires courts to affirmatively trespass into these domains as a regulator or legislator.[170]

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166. *Id.*

167. *Id.*

168. *See, e.g.*, *Authors Guild*, 770 F. Supp. 2d at 677 (repudiating settlement that insulated a "forward-looking business arrangement" as exceeding the permissible scope of a release); *Schwartz*, 157 F. Supp. 2d at 578 ("The release is also too broad because it bars later claims based on future conduct."). *See generally* James Grimmelmann, *supra* note 162.

169. Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208, 1214 (10th Cir. 2012).

170. *See* Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 480 F.3d 470, 474 (7th Cir. 2007) ("[S]uch a [compliance] rule should be adopted (if at all) through the administrative process or a statutory amendment rather than a judicial definition of the phrase 'unfair or unconscionable.' The legislative and administrative processes can take full account of all affected interests in a way that judicial case-

B. *Violation of Counsel's Fiduciary Duty to Absent Class Members*

An attorney has a fiduciary duty to her client to act solely in the client's interests.[171] A threshold requirement for class certification under Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class."[172] In Part I of this Article we explained the basic conflict of interest between a class action plaintiffs' attorney and her supposed clients at the point where the attorney begins to pursue prospective injunctive remedies in lieu of compensation for actual class members.[173] In cases where a particular class member is not a repeat customer or stakeholder of the defendants, he receives no benefit from a prospective injunction on the defendant's business practices. Furthermore, if that defendant has agreed to the injunctive remedy in exchange for providing less of a cash payout to class members—as will invariably be the case if the injunction is not actually a benefit to the defendant—then the representation can hardly be said to have "fairly and adequately" protected class interests.

In addition to these general problems, prospective injunctive remedies will frequently present what can be termed "intra-class" conflicts, which occur when one subset of class members have claims that are much more valuable than another.[174] This is likewise a problem where some class members suffer ongoing harm from the defendant and others not.[175] A putative rep-

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by-case decisionmaking cannot."); *cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 594 (1997) ("The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration . . . ").

171. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2014).

172. FED. R. CIV. P. 23(a)(4).

173. *See* Part I, *supra*.

174. Hesse v. Sprint Corp., 598 F.3d 581, 589 (9th Cir. 2010) ("Conflicts of interest may arise when one group within a larger class possesses a claim that is neither typical of the rest of the class nor shared by the class representative."); *see also* Melong v. Micronesian Claims Comm'n, 643 F.2d 10, 14 (D.C. Cir. 1980) (holding that a named plaintiff is not an adequate class representative where "there is no assurance that [he] will vigorously litigate those questions of fact and law which he need not address to prevail on his individual claim but which are essential to any recovery by the [other class members]"); Wolfman & Morrison, *supra* note 22, at 442–72 (outlining the many ways in which problems with representation can deny compensation to groups of class members in both simple and complex class actions).

175. *See, e.g.*, Broussard v. Meineke Discount Muffler Shops, 155 F.3d 331 (4th Cir. 1998) (Rule 23(a)(4) violation with past and current employers); Larson v.

resentative cannot adequately represent the class, and therefore violates Rule 23(a)(4), if the representative's interests are antagonistic to or in conflict with the objectives of those being represented.[176] A fundamental conflict likewise exists where some class members claim to have been harmed by the same conduct that benefitted other members of the class.[177] This long line of cases dates back to the Supreme Court's watershed 1940 decision in *Hansberry v. Lee*, which dealt with a racially restrictive covenant between owners of lots in a particular neighborhood, which one owner, on behalf of himself and others, had obtained a decree to have enforced against violators.[178] The Supreme Court held that other lot owners who were privy to the agreement, but not made parties to the litigation, and whose substantial interest was in resisting performance of the agreement, could not be bound by the decree upon the theory that the suit was a class suit in which they were duly represented.[179]

AT&T Mobility LLC, 687 F.3d 109 (3d Cir. 2012) (Rule 23(a)(4) violation with past and former subscribers).

176. 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1768 (3d ed. 2012).

177. Dewey v. Volkswagen AG, 681 F.3d 170, 184 (3d Cir. 2012); *see also* Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 315 (5th Cir. 2007) (finding incurable intraclass conflict where named plaintiffs sought to dissolve an investment option that was favored by some absent class members); Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir. 2000) ("a class cannot be certified . . . when it consists of members who benefit from the same acts alleged to be harmful to other members of the class"); *Broussard*, 155 F.3d at 337 ("The first obstacle to class treatment of this suit is a conflict of interest between different groups of franchisees with respect to the appropriate relief."); Retired Chi. Police Ass'n v. City of Chi., 7 F.3d 584, 598 (7th Cir. 1993) (no adequate representation where the proposed class included class members who had benefitted from the city's health care plan and stood to lose those benefits if the class action succeeded); Phillips v. Klassen, 502 F.2d 362, 367 (D.C. Cir. 1974) (where the challenged conduct "may be taken as conferring economic benefits or working economic harm, depending on the circumstances of the individual [class member], the foundations of maintenance of a class action are undermined."); *In re* Photochromic Lens Antitrust Litig., No. 8-:10-md-02173-T-27EAJ, 2014 WL 1338605, at *10 (M.D. Fla. Apr. 3, 2014) ("a class cannot be certified when some members of the class benefitted from the alleged wrongful conduct, such that the proposed class consists of winners and losers."); Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Grp., L.P., 247 F.R.D. 156, 177–78 (C.D. Cal. 2007) (rejecting class certification where some class members benefited from pricing scheme challenged by lead plaintiffs).

178. 311 U.S. 32 (1940).

179. *Id.* at 44.

The *Hot Fuel* litigation demonstrates how this problem plays out. The use of ATC devices is an economic zero-sum game. Routine cold-weather purchasers of gasoline, whether they live in places in settlement states where the average temperature is well under 60 degrees or whether they just prefer to purchase gas early in the morning,[180] will suffer a monetary loss if ATC is implemented. Addressing this objection with respect to the Costco settlement, the district court noted that the class definition excluded persons who exclusively purchased sub-60 degree gas, and that "any such class members . . . remain free to purchase fuel from vendors who do not adjust for temperature."[181] However, the definitions in the currently pending settlements do not limit class membership to those who purchased fuel at a temperature above 60 degrees.[182] And under any class definition, some class members will be net losers under the settlement. What is more, if the currently pending settlements are approved, then there will be no remaining option to purchase non-ATC fuel. These settlements cover the majority of branded gas stations in the states at issue; there is no way for cold weather purchasers to avoid the harm inflicted upon them.

In cases such as this, class counsel effectively undertakes a joint representation of clients with opposing interests. The ABA Model Rules of Professional Conduct state that a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client" or certain others.[183] When class members' interests are so at odds because of the disparate

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180. *See* Alkon Objectors' Objection to Amended Settlement at 3 n.1, *Hot Fuel MDL*, ECF No. 3737 (describing one purchaser's early morning purchasing preference and another's purchases in Los Angeles, where the average daytime temperature is above 60 degrees year-round).

181. *Hot Fuel MDL*, *supra* note 1, at *15.

182. *See, e.g.*, Memorandum and Order sustaining in part and denying in part Unopposed Motion of Plaintiffs For Order Conditionally Certifying Settlement Classes, Preliminarily Approving Class Action Settlements, Directing and Approving Distribution of Class Notice, Setting Hearing for Final Approval of Class Action Settlements and Approving Class Counsel at 22, *Hot Fuel MDL*, ECF No. 4424 (quoting definition of putative Valero class). Regardless, even such a limitation would not eliminate the intraclass conflict. Individuals who routinely purchase fuel at temperatures less than 60 degrees still incur economic harm from the class action even if they have purchased fuel on one or several occasions when the temperature exceeded 60 degrees.

183. MODEL RULES OF PROF'L CONDUCT r. 1.7 (a)(2) (AM. BAR ASS'N 2014).

effects of a proposed injunctive remedy, the attorney violates her fiduciary duty to at least some members by pursuing it.[184]

C. Potential Violations of Rule 23(a)(4)

Closely related to the potential ethical conflict of joint representation is the adequacy requirement of Rule 23(a)(4). The rule states that, as a threshold for all three types of class certification, the named plaintiffs must "fairly and adequately protect the interests of the class," such that genuine adversity between members should defeat certification.[185] Furthermore, (b)(3) class actions also specifically require the heightened finding that common questions of law or fact "predominate over any questions affecting only individual members,"[186] and many circuits have observed an analogous requirement of "cohesion" in mandatory (b)(2) cases.[187] Even if no such separate cohesion requirement exists, as Randy Gordon argues, by the very text of (b)(2) a class "may not be certified if the members are so disparately situated that injunctive relief would need to be customized to the needs of individual members."[188]

Prospective injunctive remedies present the heightened possibility of violating the adequacy requirement of Rule 23(a)(4), the predominance requirement of (b)(3), and the cohesion requirement of (b)(2). This is simply because the future is uncertain, and therefore a court is even less able than in the case of a retrospective injunction to consider how a certain remedy might benefit some class members at the expense of others. This risk is particularly severe in (b)(1) and (b)(2) classes where

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184. Arguably a court could subclassify the different groups of purchasers and appoint counsel for each, but it would be very difficult as an administrative matter even to determine who was who.

185. FED. R. CIV. P. 23(a)(4).

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

187. *See* Romberio v. Unumprovident Corp., 385 F. App'x 423, 433 (6th Cir. 2009); *In re* St. Jude Med., Inc., 425 F.3d 1116, 1121 (8th Cir. 2005); Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 580 (7th Cir. 2000); Barnes v. Am. Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1998). *But see* Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998).

188. Randy D. Gordon, *A Question of Taste: Touchstones for Determining the Certifiability of Classwide Claims for Declaratory and Injunctive Relief Under Rule 23 of the Federal Rules of Civil Procedure*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 1, 19 (2012) (quoting the (b)(2) requirements that (1) the defendant has "acted . . . on grounds that apply generally to the class," (2) "so that final injunctive relief . . . is appropriate," and (3) "respecting the class as a whole").

no opt-out rights exist, effectively preventing reluctant class members from making this determination themselves.

In cases involving significant money damages under (b)(1) and (b)(2), a string of Supreme Court cases has suggested that due process might require that class members be afforded opt-out rights.[189] So, for example, in *Wal-Mart Stores, Inc. v. Dukes*, the Court held that claims for monetary relief cannot be certified under (b)(2) when the monetary relief is not incidental to the requested injunctive or declaratory relief.[190] The related question of whether *Dukes* and its predecessors means opt-out rights are now likewise constitutionally required for otherwise mandatory (b)(1) claims involving money damages remains in flux.[191] That issue has not, however, been seriously raised with respect to injunctive relief under either of the mandatory sections, because of "impracticability."[192]

189. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 n.3, 812 (1985) (stating that in a class action "wholly or predominately for money judgments," the court must afford notice and the opportunity to opt out); *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011) (noting the *Shutts* holding that "[i]n the context of a class action predominately for money damages . . . absence of notice and opt-out violates due process"); Ortiz v. Fibreboard Corp., 527 U.S. 815, 848 n.24 (1999) (stating that "[i]n *Shutts*, as an important caveat to our holding, we made clear that we were only examining the procedural protections attendant on binding out-of-state class members whose claims were 'wholly or predominately for money judgments'" (quoting *Shutts*, 472 U.S. at 811 n.3)); Brian Wolfman & Alan B. Morrison, *What the* Shutts *Opt-Out Right is and What it Ought to Be*, 74 UMKC L. REV. 729, 734 (2006) (defending the opt-out right in part on the grounds that "the day-in-court ideal is more than an empty platitude untethered to the realities of modern litigation.").

190. *Wal-Mart*, 564 U.S. at 354–60.

191. *See* Klonoff, *supra* note 17, at 798.

192. For a summary of the impracticability argument, see Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058–59 (2002) ("[I]n cases for injunctive relief against institutional conduct, it is difficult to conceptualize an individual right of autonomy, even where we would no doubt recognize an individual's ability to bring a claim in court. In such circumstances, an individual may be an exemplar of the harm visited by allegedly wrongful institutional conduct, but that same individual cannot claim an autonomous right to separate control of the outcome of the legal challenge. To give but the most obvious example, a school desegregation challenge may or may not succeed, but if it does it will establish the wrongful conduct directed across a group of affected school children. In such cases, which are formed under Rule 23(b)(2), it would be nonsensical to claim that any one child has an autonomous right to an independent outcome of the litigation. While each aggrieved child is deemed to have standing to bring a claim for wrongful deprivation of a claimed right to integrated schools, no child has an individual stake in the outcome of that litigation . . . .").

Yet once a (b)(1) or (b)(2) class is certified, the potential injunctions prospectively apply to everyone, willing or not. Unlike monetary damages, which may be inadequate but do not generally interfere with a class member's existing interests, a prospective injunctive remedy can rearrange a particular class member's relationship with the defendant moving forward. When dealing with the sorts of civil rights challenges contemplated by (b)(2) this makes sense; the section was created explicitly to enable courts to remedy structural inequalities by public entities who, by their very institutional natures, were wronging society as a whole.[193] One student seeking, for example, to opt-out of school desegregation would have nowhere else to go. The situation changes, however, when we look at classes composed of the stakeholders of private institutions, whose relationship with those institutions is non-compulsory.

Take the pending litigation against Uber Technologies by a purported class of California Uber drivers seeking recognition as employees rather than independent contractors.[194] As Uber noted in its opposition to certification, and supported with the declarations of 400 drivers, "countless" putative class members "intended to be and want to stay . . . independent contractor[s]" because a change in classification "could force Uber to restructure its entire business model, thus jeopardizing the very attributes (e.g., flexibility, autonomy) that make the Uber App so appealing to drivers" and result in the loss of livelihood for many.[195] The Defendant likewise noted that a Plaintiff victory could subject some drivers to disciplinary or legal action because some are employees of other companies with exclusivity provisions in their employment contracts.[196]

The court certified the Uber class with only cursory attention to this problem. First it dismissed the 400 declarations as only a "small fraction" of Uber's 160,000 California drivers, without any indication of how many drivers' interests would need to be

193. Even this point has been debated, however. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1978).

194. O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989 (N.D. Cal. 2014).

195. Defendant Uber Technologies, Inc.'s Opposition to Plaintiffs' Motion for Class Certification at 31, *O'Connor*, No. C-13-3826 EMC (N.D. Cal. July 9, 2015), ECF No. 298 (internal quotation marks omitted).

196. *Id.* at 31–32.

compromised before Rule 23(a)(4) adequacy became a concern.[197] In addition to questioning the understanding and susceptibility to bias of the opposing drivers (while pointing to only five plaintiffs' counter-declarations that might support those concerns), the court makes the remarkable observation that:

> most (if not all) Uber drivers who reported a desire to remain independent contractors are operating under the assumption that they would lose all "flexibility" in their working relationship with Uber if they are reclassified as employees. But Uber has not definitely established that all (or even much) of this "flexibility" would necessarily be lost, nor has Uber even established that a victory for Plaintiffs in this lawsuit would require Uber to use "less flexible" work schedules going forward.[198]

Beyond betraying a lack of substantive familiarity with basic principles of labor economics, the court hereby states the tautology that, because individual class members' *future interests* cannot be "definitely established," their judgment about them can be ignored by their own so-called counsel. Unless the court can find a way to subclassify the groups of class members, this is problematic from the standpoints of both due process and attorney-client duty.

There is surprisingly little case law or scholarly commentary on the question of whether a class victory that is, for the purposes of argument, legally warranted but nonetheless results in a binding, prospective detriment to certain class members presents due process problems. Randy Gordon provides one of the more comprehensive recent discussions of this question. He notes that questions of differing "taste" between class members can sometimes defeat class certification, as in the case of *Pico v. Board of Education, Island Trees Union Free School District*. In that case, certification of a class opposing the removal of books from school libraries found by the school board to be "in bad taste" was denied because the named plaintiffs and at least some members of the putative class disagreed about whether the books should be restricted.[199]

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197. Amended Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification at 24, *O'Connor*, No. C-13-3826 EMC (N.D. Cal. Sept. 1, 2015), ECF No. 342.

198. *Id*. at 25 (internal citations omitted).

199. 474 F. Supp. 387, 392 (E.D.N.Y. 1979).

Yet the limited district court precedent Gordon and the *Uber* court identify suggests that, where certain class members would prefer to leave the status quo alone, "adversity arising because some class members might choose an illegal status quo over a legal remedy is not 'adversity' in any legally significant sense."[200] For example—in a case strikingly similar to the pending Uber litigation—plaintiffs alleged that FedEx had misclassified its drivers as independent contractors rather than employees.[201] The fact that certain drivers preferred to be treated as independent contractors did not defeat certification. According to the *FedEx* court:

> All Tennessee plaintiffs signed the same standard Operating Agreement and were classified as independent contractors . . . If the Tennessee plaintiffs are being treated as FedEx Ground employees, however, the law requires them to be classified as such. Current contractors don't have the option to be classified as one type and treated as another.[202]

By the same logic, however, a factually guilty criminal defendant should not have the right to enter a not guilty plea because the "law requires" him to be treated as what he is. The reason that assertion would be preposterous—that before the defendant has been adjudicated guilty he has the right to counsel to argue otherwise—applies in the case of class members likely to be harmed by prospective injunctive remedies. They ought not have their interests compromised against their will by counsel *purporting to act on their behalf*. This issue warrants a separate law review article in its own right, and we lack the space to fully explore it here. Yet the potential violation of due process—or, at a minimum, professional responsibility—raised by the conflict between Rule 23(a)(4) and prospective injunctive remedies is yet another reason for courts to disallow them.

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200. Gordon, *supra* note 188, at 28.

201. *In re* FedEx Ground Package System, Inc., Emp't Practices Litig., 273 F.R.D. 424 (N.D. Ind. 2008); *see also* Norris-Wilson v. Delta-T Group, Inc., 270 F.R.D. 596, 606 (S.D. Cal. 2010); Smith v. Cardinal Logistics Mgmt. Corp., No. 07-2104 SC, 2008 WL 4156364, at *7 (N.D. Cal. Sept. 5, 2008).

202. *In re FedEx Ground Package System, Inc., Emp't Practices Litig.*, 273 F.R.D. at 438.

D. Standing Problems

The Supreme Court has been emphatic that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases and controversies."[203] To obtain federal jurisdiction, a litigant must prove the three elements necessary to meet "the irreducible constitutional minimum of standing": (1) an "injury in fact," defined as "an inva-invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of" that is "fairly traceable" to the actions of the defendant; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable [court] decision."[204] Specifically, the injury relied upon to establish standing "must affect the plaintiff in a personal and individual way."[205] In cases where the relief sought is an injunction, a plaintiff's standing depends on a showing of plausible future injury by the defendant.[206] This is so even where the plaintiff also has valid claims for damages or other retrospective relief.[207]

In applying these requirements to a class action, the question arises as to who counts as the plaintiff for the purposes of establishing that standing has been shown. The Supreme Court has rejected the idea that absent class members do not count as parties to litigation.[208] Nonetheless, there is a circuit split on the question of whether each member of a class must meet these requirements in order for the class to be certified under Rule 23. The Second and Eighth Circuits have held that they must.[209]

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203. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006).

204. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

205. *Id.* at 560 n.1.

206. City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983) ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant.").

207. *Id.* at 109.

208. Devlin v. Scardelletti, 536 U.S. 1, 9 (2002) (holding that absent class members are parties for the purposes of bringing an appeal).

209. Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013); Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006).

The Ninth and the D.C. Circuits seem to have followed suit, although less decisively.[210] However the Seventh, the Tenth, and the Third Circuits have all held that "as long as one member of a class has a plausible claim to have suffered damages, the requirement of standing is satisfied."[211]

Critics have pointed out that the courts that took the last path failed to adequately consider the constitutional question, and that:

> granting absent class members a special exemption from Article III that would not apply in an individual suit runs afoul of the Supreme Court's teaching that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure shall not abridge, enlarge or modify any substantive right.[212]

Furthermore, exempting absent class members from showing Article III standing would also violate the directive of Rule 82, which provides that the federal rules "do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts."[213]

The potential for class actions seeking prospective injunctive remedies to violate these Constitutional standing requirements is clear. When classes are defined broadly—say, for example, all purchasers of a particular product anywhere in the country during a range of specified years—individual members have countless distinct factual circumstances that change the nature

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210. *See In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013) (not mentioning Article III standing but holding that to satisfy the predominance requirement of Rule 23 plaintiffs must "show that they can prove, through common evidence, that *all* class members were in fact injured by the alleged conspiracy") (emphasis added). *Compare* Mazza v. Am. Honda Motor Co., 666 F.3d 581, 594 (9th Cir. 2012) (holding that no class may be certified that contains members that do not have Article III standing), *with* Stearns v. Ticketmaster Corp. 655 F.3d 1013, 1021 (9th Cir. 2011) (stating that the question of Article III standing "keys on the representative party, not all of the class members, and has done so for many years").

211. Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009); DG *ex rel*. Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010); Krell v. Prudential Ins. Co. of Am., 148 F.3d 283, 306–07 (3d Cir. 1998).

212. Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383, 393 (2014) (internal quotations omitted).

213. *Id.* (quoting FED. R. CIV. P. 82); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997); Flast v. Cohen, 392 U.S. 83, 94 (1968) ("The jurisdiction of federal courts is defined and limited by Article III of the Constitution.").

of their requisite "injury in fact" and the extent to which it is "fairly traceable" to the defendant's conduct. Consumer fraud class actions provide a good example of this problem. Under the law of many states, an individual plaintiff can state a claim for fraud only where she can demonstrate reliance on the false representation in making her purchase.[214] One can imagine a range of reasons why a particular consumer might select one product over another—many traceable to the specific representations on its label but others doubtless traceable to its location in the store or the recommendation of a friend.[215] In these cases, while many class members would meet the standing requirement, others would clearly not.

Prospective injunctive relief presents a special case of disparate circumstances. As discussed earlier, classes consist of both repeat and one-time stakeholders; while the former group

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214. *See, e.g.*, ALA. CODE § 8-19-10(e) (2016); TEX. BUS & COM. CODE ANN. § 17.50(a)(1)(B) (West 2015); WYO. STAT. ANN. § 40-12-108(a) (West 2015).

215. It should also be noted that in some cases of consumer fraud the question of Article III standing tracks, to a degree, with the certification requirement of Rule 23(b)(3) that questions of law or fact common to settlement class members must predominate over any questions affecting only individual members. Although the predominance requirement may be met in some cases of consumer fraud, the presence of individualized issues such as the necessity of proving reliance on the defendant's alleged misrepresentations, or the content of the underlying applicable law, preclude a finding of predominance. *See* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 223 (2d Cir. 2008) ("[P]roof of misrepresentation—even widespread and uniform misrepresentation—only satisfies half of the equation; the other half, reliance on the misrepresentation, cannot be the subject of general proof."); *see also* Moore v. PaineWebber, Inc., 306 F.3d 1247, 1253 (2d Cir. 2002) ("[A]lthough having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation . . . in the kinds or degrees of reliance by the persons to whom they were addressed.") (quoting FED. R. CIV. P. 23(b)(3), Advisory Committee's Note); *In re* St. Jude Med., Inc., 522 F.3d 836, 840 (8th Cir. 2008) ("The need for detailed and individual factual inquiries concerning the appropriate remedy for any violation still weighs strongly against class certification."); Langendorf v. Skinnygirl Cocktails, LLC, 306 F.R.D. 574, 581–84 (N.D. Ill. 2014); *In re* Clorox Consumer Litig., 301 F.R.D. 436, 446 (N.D. Cal. 2014) (denying class certification for lack of commonality because plaintiffs had no basis for their claim that Clorox had presented a uniform message to its customers and were therefore not entitled to a class-wide presumption of reliance); Blessing v. Sirius XM Radio Inc., No. 09-CV-10035 (HB), 2011 WL 1194707, at *10 (S.D.N.Y. Mar. 29, 2011) ("Courts have often held that reliance on a misrepresentation requires individualized proof."); *In re* Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 155 (S.D.N.Y. 2008) ("[M]embers of the Settlement Class may have purchased *GTA:SA* for any number of reasons other than its 'M' rating, including because they hoped the game would contain sex, violence, and other controversial content in abundance").

might be able to meet the future injury requirement of *Lyons*, as they plan to do business with the defendant again and might therefore once more be subject to the objectionable conduct, the latter group clearly cannot.

Furthermore, even if the Supreme Court were to resolve the circuit split by holding that only class representatives are required to satisfy standing requirements, cases imposing prospective injunctive relief would still have an undue potential to violate the requirement, at least in cases of false advertising. *All* members of the actual class, including the named representative, are presumed to be on notice of the defendant's alleged misrepresentations—to the extent that the named representative satisfies the Rule 23(a) typicality requirement. They should therefore be presumed to have stopped relying upon them in making purchases because "the law accords people the dignity of assuming that they act rationally, in light of the information they possess."[216] At least in these cases no class members can validly claim an "imminent" invasion of a legally protected interest.

IV. COUNTERARGUMENTS

The question of whether the prospective injunctive remedy is good law or policy is, of course, embedded in the far wider debate over the appropriate role of the large-scale class action in the first place. Much ink has been spilled over whether the "private attorney general" model is, even theoretically, a valid role for the class action plaintiff's attorney to play. In Part I, we sketched out the perverse incentive structures that render the function of a class action attorney problematic as a general matter; other scholars across a range of methodologies have made much more expansive critiques, many of them premised on the problems of agency initially identified by Coffee.[217]

216. McNair v. Synapse Group Inc., 672 F.3d 213, 225 (3d Cir. 2012). *Accord* Fink v. Time Warner Cable, 810 F. Supp. 2d 633, 647 (S.D.N.Y. 2011); *see also* Martin v. Cargill, Inc., 295 F.R.D. 380, 384 n.4 (D. Minn. 2013) (finding that "the proposed changes will not aid the class in any significant way, as its members have (allegedly) already been 'deceived' by the labeling and marketing of Truvia").

217. *See* Lisa L. Casey, *Reforming Securities Class Actions From the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1241; Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1469–74 (2004); Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163, 1163 (1986); Donald C. Langevoort, *Capping Damages for Open-Market Securities*

Some defenders of the class action argue that much of the scholarly skepticism over the system stems from a misguided concern for the compensation of plaintiffs; that, in reality, there is "but one true objective . . . . All that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions."[218] This deterrence-based view of the class action has roots dating back to the 1940s and some high-profile adherents.[219] Myriam Gilles and Gary Friedman give one of the most robust recent accounts of the view that compensation of class-action plaintiffs is "not really an important goal":

> We think this conclusion follows from several truths and postulates, including (1) many consumer class actions concern a trifling per-plaintiff sum, which most class members do not care very much about recouping; (2) if the amount at issue is worth chasing, the plaintiff may opt out of the class; (3) the right to be represented as a passive class member in a Rule 23(b)(3) class action for damages is not one to which parties attach any meaningful value at the time of contract-

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Fraud, 38 ARIZ. L. REV. 639, 646 (1996); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1043 (2002); Mohsen Manesh, Note, *The New Class Action Rule: Procedural Reforms in an Ethical Vacuum*, 18 GEO. J. LEGAL ETHICS 923, 935 (2005); Linda A. Willett, *Litigation as an Alternative to Regulation: Problems Created by Follow-On Lawsuits with Multiple Outcomes*, 18 GEO. J. LEGAL ETHICS 1477, 1491 (2005).

218. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006); *see also* Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821 (2008) (arguing that class actions help avoid the problem of regulatory capture attendant to enforcement by public entities); Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 LAW & SOC'Y REV. 237, 267 (1992) (arguing that the class action is "a politically empowering legal artifice").

219. *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 349–50 (1972) ("[T]he most important point, on an economic analysis, is that the violator be confronted with the costs of his violation—this achieves the allocative purpose of the suit—not that he pays them to his victims."); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1879–80 (2002) ("[M]andatory collectivization is necessary to minimize the sum of accident costs through optimal deterrence and insurance and does not contravene any coherent or real individual preference for having one's own 'day in court.'"); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 839 (2002) ("[M]andatory-litigation class action best deters accidents and insures against accident risks, thus securing maximum individual welfare ex ante.").

ing; and (4) compensating individual small-claims class members is simply not what opt-out class actions do well.[220]

We note at the threshold that—even as a basic defense of the deterrence theory of class action—this argument is rather circular: it suggests we should not be concerned that class actions are bad at compensating plaintiffs because class actions are, in fact, bad at compensating plaintiffs.

It is also worth noting that scholars attempting to unmoor the class action from the compensatory function of the law have been buttressed theoretically by the "entity model" of the class action.[221] According to entity theory, courts should consider a class action to be brought not by the named plaintiff but by the class as an "entity."[222] This distinction would, it was argued, clarify a court's duty to absent class members as well as resolve certain problems related to choice of law, diversity jurisdiction, and preclusion.[223] Over time, many scholars came to accept this theory over the competing model of the class action as an aggregation of individual claims.[224] As Andrew Trask points out, the entity model encourages courts to shift control from the named plaintiff as spokesperson in favor of class counsel (who speaks for "the entity") creating a presumption in favor of class certification (which is presumably in the best interest of "the entity" if not all individuals).[225] Yet as Trask also notes, the Roberts Court has, in a series of unanimous deci-

220. Gilles & Friedman, *supra* note 218, at 105–06.

221. *See, e.g.*, Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 26 (1996) (noting courts' ambivalence as to whether a class action was a traditional lawsuit brought by a human being or something new brought by a "token, offered up to appease memories of a superseded client-adversary model that lingers only in tradition and the formal trappings of Rule 23(a)"); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998).

222. *See* Cooper, *supra* note 221, at 26.

223. *Id.* at 28–30.

224. *See, e.g.*, Issacharoff, *supra* note 192, at 1060 (noting the "increasing skepticism over the view that a class action is simply an unaltered aggregation of individual claims"); Lahav, *supra* note 58, at 1941 (describing "[t]he two dominant schools of thought on the structure of the class action" as considering it to be "either an advanced joinder device, merely aggregating individual cases, or a transformative procedural rule that creates an entity out of a dispersed population of claimants").

225. Andrew J. Trask, *The Roberts Court and the End of the Entity Theory*, 48 AKRON L. REV. 831, 834 (2015).

sions, seemingly rejected the entity theory in favor of the aggregate model.[226]

While a large-scale debate about the fundamental nature of the class action—much less of the compensatory function of private law in general—exceeds the scope of this Article, it is important to realize that the argument that the law should wholly jettison the predicate relationship between the injured plaintiff and the remedy sought proves too much to be justified on the grounds of pure convenience alone. Even if we accept that re-orientation, we must still ask whether the incentives of the parties to a class action do in fact advance this social welfare purpose. On the one hand, it seems intuitive that the prospect of litigation might deter potential defendants from misconduct. On the other, as we also explained in Part I above, and as supported by such evidence as the studies on merger lawsuits and the cases we also discuss, class counsel do not have the incentives to maximize social benefit either. This becomes even clearer when we take into account the various externalities imposed on society by the class actions themselves.[227] While this question, too, is broader than the remedial question we address in this Article, it is important to understand the many layers of justification that must be penetrated before we even reach the particular question of the prospective injunctive remedy itself.

Some scholars have defended injunctive remedies on a sort of blended conception of the deterrent and compensatory functions of class action. For example, Bill Rubenstein urges that we reconceptualize the concept of "private attorneys general" as "supplemental attorneys general" who "perform public as well

226. *Id.* at 849–60 (citing Taylor v. Sturgell, 553 U.S. 880, 886 (2008) (holding "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process")); *see also* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1347 (2013) (holding that a plaintiff cannot bind the rest of a class to a stipulation as to the measure of damages prior to certification); Smith v. Bayer Corp., 564 U.S. 299, 302 (2011) (holding that a federal court cannot enjoin a state court from re-litigating a class action that had been denied certification in federal court and that a plaintiff is not precluded from asserting his claim because he was not a party to the previous action); Shady Grove Orthopedics Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

227. *See* William Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 710 (2006).

as private functions."[228] For Rubenstein, these lawyers' clients "are not just the class members, but the public and the class members; their goal is not just compensation, but deterrence and compensation."[229] Rubenstein's formulation conflates the idea of deterrence in general with the desirability of forward looking remedies in class actions. It addresses the former problem by freeing the plaintiff's lawyer from looking out only for the needs of class members; a settlement in which class members receive only $4 for a $500 wrong clearly does a poor job at compensating those harmed. But perhaps, like the prosecution of a killer whose victim cannot be compensated, it provides deterrence to prevent defendants from harming future class members. Or maybe supplemental injunctive remedies obtain public-law-like benefits for the public at large. These goals, plus the $4 for the class members, perhaps serve the goals of deterrence *and* compensation.

Note, however, that *purely* prospective injunctive remedies move beyond even this blended conception to a function entirely divorced from the goal of compensation. If a settlement has little or no benefit beyond a prospective injunctive remedy it ceases to retain even a compensation-law tail to wag the public-law dog. Thus, whatever problems the "supplemental" model presents on its face, the prospective injunction is yet a bridge beyond, requiring additional justification.

Nonetheless such justifications have been offered in the literature and case law. Unsurprisingly, some of the best defenses have arisen in the context of civil rights suits against government entities, where scholars have identified the need for full-scale "judicial policy making." For example, Malcolm Feeley and Edward Rubin have conducted an exhaustive study of the prison reform cases in the last three decades of the twentieth century.[230] They describe these cases as "the most striking example of judicial policy making in modern America" and explore, among many other things, how "judges chose the solution of bureaucratization and rehabilitation as the legal standards for prisons"

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228. Rubenstein, *supra* note 9, at 2168.

229. *Id.*

230. MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE (1998); *see also* Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 L. & SOC'Y REV. 371, 376 (1980).

and explain "why judges were willing to create such legal standards ab initio, although such an approach seems to violate the rule of law."[231] Although the authors claim their project is mostly descriptive, they do state that part of their purpose is to "demonstrate the legitimacy" of judicial policy-making as an enterprise.[232] This legitimacy appears to turn on the outdated status of federalism, and the fact that judicial policy-making predated the rise of the administrative state.[233]

Much like the arguments of Chayes and Fiss, summarized above,[234] Feeley and Rubin's defense of the concept of judicial policy-making in the context of their specific subject-matter only highlights its inapplicability to the class action context. Feeley and Rubin emphasize the extent to which judicial intervention in prison reform has been "incremental" because the nature of case-based doctrine.[235] They also note the relationship between the judiciary and the prison as aspects of the same penal continuum: "It is the state that makes prisons possible as mechanisms for the punishment of offenders, and it is that same state that generates the conceptual possibilities that enable us to solve the problems that these prisons present."[236] In other words, where the state does a particular sort of harm it is particularly appropriate for the state to find the means to rectify it.

But in the context of prospective injunctive relief in a private law class action, we are faced with exactly the opposite situation. In any given case the court is rarely grappling with complaints against a permanent institution with respect to which it is formally affiliated. As a result, there is no occasion for "incremental" policy reform—the specific terms of each settlement agreement are devised by the parties and may have nothing to do with other settlements in similar contexts. Most importantly, where cases such as prison reform require that the judge intervene in *failing* governmental processes, class actions require that the judge usurp or, in the worst cases, incapacitate *functional* government processes. Again William Fletcher's

231. FEELEY & RUBIN, *supra* note 230, at 13, 26.
232. *Id.* at 361.
233. *Id.*
234. *See supra* text accompanying notes 70–72.
235. FEELEY & RUBIN, *supra* note 230, at 234–35.
236. *Id.* at 388.

formulation[237] provides insight: while necessity may justify courts intervening to remedy the problems created by prisons, it hardly justifies their dilution of the FDA approval process by robbing consumers of some of its protections.

Furthermore, litigation is not only more *legitimate* when it addresses regulatory inaction rather than action, but it also appears to be more effective from a pragmatic standpoint. Timothy Lytton has compared the success of private litigation over sexual abuse in the Catholic Church to the less successful effort to affect gun control policy through litigation.[238] He found, among the reasons for the difference in outcome, that "the friction created by resistance to policy change among Church and government officials required significant reform pressure, which made eventual changes in policy especially dramatic" and "the litigation complemented, rather than competed with, other policy-making institutions by enhancing their understanding of the problem and their motivation to address it."[239]

In the antitrust context, David Rosenberg and James Sullivan's proposal for coordinating private and public enforcement regimes initially vests a "total enforcement license" with the public enforcer, which also has the power to put a private license up for auction.[240] The purpose of this staggered system would be to provide the public authority with "an opportunity, uncomplicated with private enforcement efforts, to investigate, determine and implement public enforcement objectives in the matter, in particular regarding how much to invest in pursuing conventional public criminal and injunctive remedies and strategies."[241] The concerns that motivate such a model for the adjudication of a particular case are only magnified when such an adjudication can lead to the sort of long-standing enforcement complications created by a prospective injunctive reme-

237. *See* Fletcher, *supra* note 77.

238. Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Control and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1837–38 (2008).

239. *Id.* at 1866.

240. David Rosenberg & James Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159 (2006).

241. *Id.* at 165. In his most recent book, John Coffee proposes a similar blended innovation for reducing class action abuses, whereby regulators would hire private litigators to prosecute appropriate actions for the benefit of individual plaintiffs. COFFEE, *supra* note 27, at 219–35.

dy. Our case study of the Amex merchant litigation provides a perfect example of exactly such a problem.

Finally, Linda Mullenix takes a unique approach that specifically seeks to remedy the pervasive problems endemic to class action litigation *through* injunctive remedies.[242] Mullenix argues that Rule 23 requires revision due to many of the problems discussed in this Article: "the rule arguably no longer serves its stated purposes, has proved inefficient and unfair, has inspired entrepreneurial litigation, and has engendered an arcane, complex jurisprudence that contributes to gamesmanship and traps for the unwary."[243] She lays most of the abuses of the contemporary class action landscape at the head of the (b)(3) damages lawsuit and proposes that reformers of Rule 23 "envision a legal landscape that dispenses with the damage class action but retains the injunctive relief class."[244]

Mullenix's critique of the current state of affairs is fair-minded and accurate. Her solution, however, does not appear to account for the likelihood of plaintiffs' counsel dramatically inflating the value of the injunctive relief they obtain (already a problem under the current Rule but likely an even bigger one in an injunction-only class action universe). Assuming the continued existence of the current evidentiary practices that justify enormous injunction-based payouts, most of the system's perverse incentives would endure, fully untethered to the sole empirical measure of damages constituted by cash payments. Mullenix does not address the important issue of prospective injunctive relief. Therefore, if rule-makers follow her proposal, and even if some workable system for reasonably keying fees to injunctive value were to be developed, the legal and policy problems of prospective injunctive relief would endure.

CONCLUSION

Settlements with prospective injunctive relief raise conflicts of interest and other problems with class certification. Argua-

242. Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 399 (2014).

243. *Id.* at 437.

244. *Id.* at 439–40. She would couple this more limited private cause of action with increased regulatory action in areas of corporate conduct that give rise to small-claim actions. *Id.* at 440.

bly, these problems could be mitigated if a class settlement fairness hearing was a genuinely adversarial process, with the interests of the class itself adequately represented. In this world of misaligned incentives, however, because district courts are poorly situated to police settlements with prospective injunctive relief, there should be a presumption against approval of such settlements or awarding fees for such relief outside of the actions against public institutions originally contemplated by Rule 23(b)(2).