

FRONTLOADING, CLASS ACTIONS, AND A PROPOSAL FOR A
NEW RULE 23

by

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As we are celebrating the 50th anniversary of the modern class action Rule—the version adopted in 1966—the Advisory Committee is working on further revisions of Rule 23, conferences on the topic are proliferating, and the Supreme Court and lower federal courts are trying to navigate the technicalities of the current Rule.

Several doctrines in the federal system have generated a frontloading trend, i.e., a trend that pushes the analysis of the merits of the claim to the very outset of the litigation, before discovery has taken place, ultimately resulting in a denial of justice. The current Rule 23 and its proposed amendments seem to follow the same trend. In the article, I unearth the frontloading trend, show how and to what extent Rule 23 and its interpretation is part of it, and propose a new Rule 23, one designed to promote the underlying litigation principles the original Rule was meant to advance.

I spent my fall 2016 at the Yale Law School to work on Charles E. Clark's Papers that are stored in the Yale's Archives. Clark was the driving force behind the adoption of the Federal Rules. Clark's Papers contain Clark's thoughts, notes, sketches, ideas on the federal rules and the federal system he was designing, his philosophy of legal analysis and judicial decisionmaking. Clark's clear procedural vision produced Rules that have lasted, almost untouched, for almost 80 years. Inspired by Clark's vision and ideas, my paper articulates a theory of class actions that is truthful to the design of the original Federal Rules and proposes a new class action rule that is consistent with that theory and with Clark's original vision for the rules.

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I. INTRODUCTION

A. *Premise*

Procedural rules and decisional law have embarked on a dangerous trend that frontloads the merits analysis to the very outset of the litigation. Under this trend, the law of procedure requires the plaintiff to establish all or part of her claim at the outset or to surmount procedural obstacles that make vindication of that claim pragmatically impossible.¹

¹ See, e.g., Arthur R. Miller, N.Y. Univ. Sch. of Law, University Professorship Lecture: Are They Closing the Courthouse Doors? 16 (Mar. 19, 2012), http://www.law.nyu.edu/sites/default/files/ECM_PRO_072088.pdf (“The Judiciary has shifted the procedural system dramatically against plaintiffs by moving the specter of case termination forward in time . . . converting screening motions into merit resolving dispositive motions.”).

This trend calls for an extensive analysis of the reasons why the court should not take the case, rather than a search for the fair and efficient methods and means of managing it. Under this scenario, the merits either play an essential role in the resolution of a pre-merits procedural issue, or the procedural rules ensure the demise of the merits in service of some other non-merits value. This frontloading trend also conflates the claim and the remedy, pulling the assessment of the remedy further and further into the procedural forefront.²

The frontloading trend is the result of several intervening forces: the self-interested lobbies trying to affect the rulemaking process;³ a fragmented and mechanical approach to the rules by their revisers and interpreters, both lacking a necessary holistic vision to comprehend the procedural design and make it effectively operate;⁴ and the modern

² The risk of conflation of causes and remedies was a problem preceding the adoption of the Federal Rules of Civil Procedure. In 1937, the Fifth Circuit had warned:

Causes of action should be distinguished from remedies. One precedes and gives rise to the other, but they are separate and distinct. The cause of action is not only different from the remedy but also from the relief sought. . . . At common law, an “action” is defined by Lord Coke as a legal demand of one’s right. Our Supreme Court says a cause of action comprises what a plaintiff must prove to obtain judgment.

United States v. Smelser, 87 F.2d 799, 800–01 (5th Cir. 1937).

³ For a critical assessment of Rule 23, the amendment process, and the political forces at stake, see Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 112–47 (2011). *But see also* Miller, *supra* note 1, at 16–17 (“Could it be that it’s now the defense bar that has been empowered to extort settlements that are artificially low by subjecting plaintiffs to the costs, delays, and risks or running afoul of the various procedural stop signs that dot the pretrial landscape? Maybe that is the real extortion phenomenon—not contingent fee plaintiffs extorting settlements from defendants. Or maybe the fault lies on both sides? Or maybe extortion really is a nonissue—a rhetorical illusion? . . . Yet despite this vacuum of knowledge, dramatic procedural shifts have occurred based on unsubstantiated assertions and assumptions.”).

⁴ The mechanical, fragmented, and hyper-technical nature of the current rules is probably a result of a profound distrust of the judges. But as the drafters of the 1938 Federal Rules of Civil Procedure warned, there will never be a procedural reform if the reformers do not trust and give power to the judges. As Edmund Morgan, one of the members of the Advisory Committee, noted at the November 15, 1935 meeting:

As long as you have no confidence in your trial judges, you will never get any procedural reform. You do not care what kind of fellows they are, because you will not give them any power. And then you say you cannot give them any power, because they cannot be trusted. And there you are, in a continuous circle. That strikes every reform for procedure, evidence and pleading—that you will not trust your trial judges. It was found that all the way through all the uncertainty in regard to the right of the court to comment on the evidence, that there were floods of telegrams, and they said, “If we had good judges we would be willing, but God help us, we do not have good judges;” and then you do not have good judges because they do not have any power. You must break that continuous circle in some place.

tension between judicial case management and docket clearing, with settlements in service of the first, the second, or both, taking cases farther and farther away from courts.⁵

These forces have sometimes succeeded in shifting the analysis of the merits of the case from the post-discovery/pre-trial phase, to the very outset of the litigation, often before discovery has even started. Procedure now prevails over substance, thus preventing the vindication and enforcement of rights and the development of substantive law.

Scholars have addressed frontloading in the class action context,⁶ or have warned about the existence of the frontloading phenomenon at a more general level.⁷ This Article's original contribution to the existing literature is twofold. First, the Article situates the analysis of the class actions frontloading phenomenon within the procedural system, showing where else and how the frontloading phenomenon manifests itself and how the general trend ultimately affects class actions. Second, and having in mind the effects of the trend on the system, the Article suggests a profound revision of Rule 23 and its interpretation and application.

Part II opens by describing the frontloading trend in the context of Rule 8(a)(2) analysis, by showing how the pleading standard and its judicial interpretation essentially ask the plaintiff to prove his or her case before discovery has taken place. Here the Article demonstrates how decisional law has manipulated the letter of Rule 8(a)(2), reaching a result that is incompatible with the drafters' intent and their holistic procedural vision. This Part then examines the same frontloading trend in the context of the justiciability, abstention, sovereign immunity, and subject matter jurisdiction doctrines, showing how decisional law has

U.S. Supreme Court Advisory Committee Rules for Civil Procedure: Proceedings 506 (Nov. 16, 1935) (unpublished archive) (on file with Manuscripts and Archives, Yale University Library, in Charles Edward Clark Papers, Box 94, Folder 2).

⁵ See, e.g., Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525, 1526–27 (2014) (“Even as we have more terminations, our current system seems to give us fewer determinations. In 2013, only slightly over one percent of more than 250,000 civil terminations in the federal courts over the previous twelve consecutive months occurred after reaching trial. As Owen Fiss recognized three decades ago, such statistics call into question whether settlement is invariably a good thing, and whether, in too many cases, a fixation on achieving settlement has prioritized clearing dockets over doing justice.” (emphasis in original)).

⁶ See, e.g., Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721 (2015); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 298 (2014) (“[A] number of decisions have impregnated the certification determination with an examination of aspects of the merits and established proof burdens that have led to a substantial procedural frontloading of Rule 23 cases, many of which expire early (or simply are not brought) because courts are unwilling to certify.”).

⁷ See, e.g., Richard D. Freer, *Exodus from or Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1512 (2016) (“One characteristic of today’s litigation is ‘front-loading,’ or forcing increased activity into earlier phases of a case.”).

produced myriad exit-doors allegedly in service of the federal system. These doctrines have gradually deprived the courts of their judicial resolution mission and their instrumental role in our democratic system. Part II thus sets the stage for the analysis of class actions that follows. Part III focuses on Rule 23, showing how the text of the rule and its interpretation by judges and practitioners have generated frontloading. More precisely, the mechanical, fragmented, code-style, checklist text of Rule 23 directs courts to perform a hyper-technical assessment of the class claims at the very outset of the litigation, through the application of tests that plaintiffs can hardly meet without the benefit of full discovery. Drawing from Parts II and III, Part IV contains a proposal for a new Rule 23. Part V offers my concluding remarks.

II. FRONTLOADING AS A GENERAL LITIGATION TREND

A. *Rule 8(a)(2)*⁸

Under Rule 8(a)(2), a pleading stating a claim for relief must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁹ This statement appears general, and it was intended to be so, as reflected in the ample debate among the members of the Advisory Committee.¹⁰

Charles E. Clark, a strong proponent of legal realism and the driving force behind the adoption of the Federal Rules of Civil Procedure (Rules), wanted to create a system of procedure that was flexible, pragmatic, and conducive of substantive law.¹¹ Clark’s rules aimed at eliminating the technicalities that, departing from the essence of litigation, had created battles over forms, inefficiencies, and a reduced

⁸ For a more extensive assessment and critique of Rule 8(a)(2) and the jurisprudence interpreting it, see Simona Grossi, *The Claim* (Loyola Law Sch., L.A., Legal Studies Paper No. 2017-07).

⁹ FED. R. CIV. P. 8(a)(2).

¹⁰ Speaking before the Sixth Judicial Conference of the Fourth Circuit regarding the first draft of the proposed Rules, Charles E. Clark noted how “[t]he requirements of pleading and allegation should not be strict, so that no person shall be deprived of his rights by the chance act or ignorance of his lawyer.” Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1936) [hereinafter Clark, *The Proposed Federal Rules of Civil Procedure*]. Clark also observed how

[t]he cornerstone of the new reform is a system of simple, direct, and unprolonged allegations of claims and defenses by the litigants, resting, in turn, upon a blending of the old law and equity systems and upon the concept of a civil action inclusive in content of all points of dispute between the parties. This keys the entire reform. It is in effect a de-emphasis upon pleading as a controlling element in decision and a subordination of procedure to its proper position as an aid to the understanding of a case, rather than a series of restrictions on the parties or the court.

Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 154 (1948) [hereinafter Clark, *The Influence of Federal Procedural Reform*].

¹¹ Clark, *The Influence of Federal Procedural Reform*, *supra* note 10, at 154.

access to justice.¹² Thus, different from the equivalent code provisions that required a statement of “facts” constituting the cause of action, Clark suggested a formula that did not mention the “facts”¹³ or the “cause of action,”¹⁴ and focused on a “short and plain statement of the claim *showing*,”¹⁵ giving *notice* to the defendant of what the claim was about. Discovery and pretrial and trial motion practice would particularize the claim in incremental steps. But perhaps the innovation of Rule 8(a)(2) with respect to the code provisions was one of form more than one of substance, as the code system had meant to achieve the same result.¹⁶

In *Bell Atlantic v. Twombly*¹⁷ and *Ashcroft v. Iqbal*,¹⁸ the Supreme Court departed from this non-technical, notice-pleading approach which conformed to the natural arc of litigation, and made it increasingly

¹² *Id.*

¹³ See U.S. Supreme Court Advisory Committee Rules for Civil Procedure: Proceedings, *supra* note 4, at 444 (“I still think it would be bad to get back in any of those words that caused difficulty. I mean any word in combination with the word ‘facts.’”).

¹⁴ Clark noted:

I have tried to get away from the term “cause of action,” because it seems to me that that is one of the most misleading phrases that we can think of. It has caused trouble wherever it has been used, and I have myself been guilty of not knowing what it means, and a good many people did not know what it meant; and when I tried to explain to them and found out what they meant, I could not understand what they meant. Therefore, I have tried to kill that phrase off.

Id. at 416.

¹⁵ FED. R. CIV. P. 8(a)(2) (emphasis added).

¹⁶ Responding to Charles E. Clark’s criticism of the 1934 Connecticut Practice Book, Chief Justice William M. Maltbie noted that

[p]erhaps the heart of the whole system of code pleading lies in the provision that all that is necessary is to “make a plain and concise statement of the material facts on which the pleader relies.” However fine a principle that is from the standpoint of pleading, there is probably no rule which actually results in producing more poor pleading. Too often the lawyer reads it as meaning that he need only state those outstanding facts which have given rise to the controversy and he overlooks necessary elements in his case which are not in particular dispute and do not stand out upon the face of the situation.

PALMER D. EDMUNDS, FEDERAL RULES OF CIVIL PROCEDURE 263 (1938). Clark was in agreement with Maltbie, as he himself had defined the code cause of action as “an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts.” Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 828 (1924). Clark had argued that this definition was, in fact, what the code commissioners had in mind when they used such phrases as “facts constituting the cause of action” and “facts sufficient to constitute a cause of action.” *Id.* And, in fact, even before the advent of the codes, Equity Rule 25 had endorsed a similar, simple formula, as it provided that “[h]ereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption: . . . a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.” BYRON F. BABBITT, FEDERAL JUDICIAL CODE AND EQUITY RULES 274–75 (1925) (Rule 25).

¹⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

¹⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

difficult for the plaintiffs to access federal courts. More specifically, the Twombly Court demanded that “[f]actual allegations [in the complaint] must be enough to raise a right to relief above the speculative level,”¹⁹ that is, it demanded that the complaint be *plausible*²⁰ and contain enough factual allegations “to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”²¹ And although this language, *per se*, would still appear consistent with Rule 8(a)(2) and the notice pleading system, in applying it the Court did not draw the reasonable inference of unlawful conspiracy from the allegations of parallel conduct—a result that notice pleading would have demanded—and, relying on summary judgment precedent, it instead concluded that “lawful parallel conduct fail[ed] to bespeak unlawful agreement.”²²

Following the lead of *Twombly* and demanding that the analysis of a plausible claim be “context-specific”²³ and that “reviewing court . . . draw on its experience and common sense,”²⁴ the *Iqbal* Court found the plaintiff’s complaint insufficient. A careful examination of that complaint, though, reveals that the allegations were indeed sufficient to meet the Twombly plausibility standard and that nothing short of evidence of the intent to unlawfully discriminate would have satisfied the *Iqbal* Court.

¹⁹ *Twombly*, 550 U.S. at 555.

²⁰ It is worth noting that the word “plausible” that has troubled scholars and practitioners for years and continues to do so, had appeared, among others, in a well-known opinion rendered by the Supreme Court of California, a fact-pleading system. *See Doe v. City of Los Angeles*, 169 P.3d 559, 571 (Cal. 2007) (“In the appropriate case, a plaintiff should be able to rely on the doctrine of less particularity where he or she can *plausibly* allege that the nonperpetrator defendant withheld or concealed evidence of its knowledge or notice of the perpetrator’s past unlawful sexual conduct with minors.” (emphasis added)).

²¹ *Twombly*, 550 U.S. at 556.

²² *Id.* The Court observed that “[i]n identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the *benefit of the prior rulings and considered views of leading commentators*, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement.” *Id.* (emphasis added). But the *prior ruling* the Court relied on was a summary judgment ruling. The Court instead discarded Chief Judge Clark’s pleading ruling which would have directed the opposite result:

The Court of Appeals also relied on Chief Judge Clark’s suggestion in *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957), that facts indicating parallel conduct alone suffice to state a claim under § 1. . . . But *Nagler* gave no explanation for citing *Theatre Enterprises* (which upheld a denial of a directed verdict for plaintiff on the ground that proof of parallelism was not proof of conspiracy) as authority that pleading parallel conduct sufficed to plead a Sherman Act conspiracy. Now that *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), have made it clear that neither parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy, it is time for a fresh look at adequacy of pleading when a claim rests on parallel action.

Id. at 561 n.7.

²³ *Iqbal*, 556 U.S. at 679.

²⁴ *Id.* at 664.

The Court's interpretive amendment of Rule 8 came as a surprise given that the Court, when previously interpreting and applying Rule 8, had insisted that any amendment of the Rules had to be a product of the rulemaking process under the Rules Enabling Act, rather than a product of judicial interpretation.²⁵ And the Court had confirmed this adherence-to-the-rule approach in other contexts.²⁶ But even assuming without discussing the legitimacy of this process of rule-amendment by judicial interpretation, the Court's interpretive exercise has failed, as it has intervened on Rule 8 independently and separately from the other rules designed to operate in tandem with it.²⁷

Thus *Twombly* and *Iqbal* initiated the frontloading trend at the pleading stage, and this trend now informs litigation at the lower court level. Some lower federal courts are resisting the *Twombly/Iqbal* frontloading approach.²⁸ But others have embraced it.²⁹ The uncertainty as to the meaning of plausibility and the inconsistent interpretations and

²⁵ See *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

²⁶ See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) (“[W]e are bound to follow Rule 23 as we understood it upon its adoption, and . . . are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”).

²⁷ While in 2002 the Court had acknowledged the need for a balanced relationship between Rule 8, Rule 12 (governing motions to dismiss), and Rule 56 (on summary judgment), see *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (“[o]ther provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)’s simplified notice pleading standard”), in *Twombly* and *Iqbal* the Court proceeded to alter Rule 8 by way of interpretation without considering the changes that its own jurisprudence had in the meantime made to Rule 56. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (clarifying the shifting allocations of burdens of production, persuasion, and proof at summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (applying heightened evidentiary standard of proof in libel action to judicial assessment of propriety of summary judgment); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595–97 (1986) (holding antitrust plaintiff with an inherently implausible claim was subject to dismissal at summary judgment). *Celotex*, *Liberty Lobby*, and *Matsushita* made it easier to prevail on a summary judgment motion on the assumption that Rule 12(b)(6) had essentially lost its function of screening factually insufficient claims within the notice pleading system. In *Celotex*, the Court noted:

Before the shift to “notice pleading” accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial But with the advent of “notice pleading,” the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Celotex, 477 U.S. at 327.

²⁸ See, e.g., *Littlejohn v. City of New York*, 795 F.3d 297, 307–11 (2d Cir. 2015); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).

²⁹ See, e.g., *McCleary-Evans v. Md. Dep’t of Transp.*, 780 F.3d 582, 585 (4th Cir. 2015); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1189 (9th Cir. 2015) (endorsing alternative inferences from plaintiffs’ plus-factor allegations).

applications offered by the lower courts add further layers of complexity and unpredictability in the class action context.³⁰

B. *Justiciability*³¹

A case is justiciable when it is capable of judicial resolution by a federal court.³² Article III, section 2 of the U.S. Constitution describes the federal judiciary's function, and I argue,³³ together with Robert Pushaw³⁴ and, to a certain extent, James Pfander and David Birk,³⁵ that Article III shouldn't be read as imposing exceptional limits on the federal judicial power. The currently accepted view of Article III, section 2, though, is to the contrary, reading that provision as one imposing limits on the federal judicial power³⁶ and creating the "submerged complexities" to which Chief Justice Warren famously refers in *Flast v. Cohen*.³⁷ But it was the Court, under the influence of Felix Frankfurter and his protégés, that created such complexities, without the support of history, text, or logic, perhaps driven by case management concerns.³⁸ This approach is not

³⁰ See Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 767–68 (2015); Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2011–12 (2010).

³¹ For a more extensive assessment and critique of the doctrine, see Grossi, *supra* note 8, at 36.

³² See, e.g., *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (The dispute is one "traditionally thought to be capable of resolution through the judicial process.").

³³ See Grossi, *supra* note 8, at 37.

³⁴ See Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 531 (1994).

³⁵ See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1350–51 (2015).

³⁶ See *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches"); *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers"); see also *Flast*, 392 U.S. at 95 (conflating cases and controversies, justiciability, and separation of powers).

³⁷ In *Flast*, Chief Justice Warren observed:

The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government.

392 U.S. at 94.

³⁸ See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 225 (1988).

conducive of, and at times threatens the dispute resolution mission of federal courts.

For a case to be justiciable, the Court requires that there be a definite and concrete controversy between adversaries.³⁹ And much of the modern doctrine of justiciability is built on this adversarial framework, as “that concrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions,”⁴⁰ and prevents the courts from interfering with the coordinate branches.⁴¹

But if we’re talking about the power of judicial review, it makes little sense to import separation of powers concerns into the equation as there is no encroachment on legislative or executive prerogatives when the Court interprets a law or declares an act of Congress or an action by the Executive Branch unconstitutional. Isn’t it emphatically the duty of the Court to say what the law is?⁴² In other words, the power of interpretation and judicial review, properly directed to the analysis of the claim, presents no affront to the political branches. And I believe this to be true also with respect to advisory opinions.⁴³ In any event, if a decision by a court interferes with the legitimate policy-making prerogatives of the political branches or the states, the remedy could be shaped to avoid that risk. But the doctrine of justiciability, increasingly detached from an analysis of the claim, has worked silently or less so, ultimately contributing to the frontloading trend, which is particularly evident in the area of standing.

In *Lujan v. Defenders of Wildlife*, the Court described the doctrine of standing as follows:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized[;] and (b) “actual or imminent, not conjectural or hypothetical[.]” Second, there must be a causal connection between the injury and

³⁹ See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937). There the Court noted:

[An Article III] controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

Id. at 239–40 (internal citations omitted).

⁴⁰ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

⁴¹ See *supra* note 36 and accompanying text.

⁴² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴³ See also *Pfander & Birk*, *supra* note 35, at 1360.

the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”⁴⁴

A careful analysis of those elements reveals that they replicate the elements of the claim—there must be a concrete injury, *injury*; fairly traceable to the conduct of the defendant, *causation*; and it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision, *redressability*.

So why am I complaining about the existence of this additional layer of analysis if it merely replicates a Rule 12(b)(6) motion to dismiss for failure to state a claim inquiry?

I complain about it because, despite the seeming replica, the analysis invites judges and lawyers to make ad hoc considerations that create intricate and at times arbitrary doctrinal distinctions⁴⁵ that often result in a denial of access to justice.

The irony of the standing doctrine is that, by frontloading the merits to the very outset of the litigation, it operates in a manner that is inconsistent with the separation of powers principle, as it provides judges with an opportunity to avoid adjudicating claims for the enforcement of rights, the same rights which Congress has created.

Clapper v. Amnesty International USA demonstrates my point.⁴⁶ In *Clapper*, attorneys and human rights, labor, legal, and media organizations sued, among others, the Director of National Intelligence and the Attorney General, seeking a declaration that the provision of Foreign Intelligence Surveillance Act (FISA) allowing surveillance of individuals who were not “United States persons” and were reasonably believed to be located outside the United States, was unconstitutional, as well as seeking an injunction against surveillance authorized by the provision.⁴⁷

In an opinion authored by Justice Alito, the Supreme Court held that the plaintiffs had failed to demonstrate standing, essentially because the future injury they feared—surveillance—was not “certainly impending,” and it was not fairly traceable to the FISA provision at issue.⁴⁸

⁴⁴ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (alterations in original) (internal citations omitted).

⁴⁵ *Compare, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013) (where the Court found standing even if the appellant was not aggrieved by the trial court judgment because of “countervailing considerations”), *with* *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (where the Court did not find standing to avoid addressing the merits of the case).

⁴⁶ 133 S. Ct. 1138.

⁴⁷ *Id.* at 1142.

⁴⁸ *Id.* at 1143.

In tracing the contours of the modern standing theory, the Court observed that “it is no surprise that respondents fail to offer any *evidence* that their communications have been monitored under section 1881a, a failure that substantially undermines their standing theory,”⁴⁹ and that “respondents in the present case present no concrete *evidence* to substantiate their fears, but instead rest on mere conjecture about possible governmental actions.”⁵⁰ One, though, wonders how realistically could the plaintiffs have offered evidence that their conversations had been monitored, and whether asking for evidence at the pleading stage is consistent with the Rules, the jurisprudence interpreting them, and the very idea of litigation as a process that through discovery and dispositive motions, resolves disputes and provides the stage for the enforcement of rights and the development of substantive law.

The standing doctrinal quagmire may be particularly troublesome in a class action context.⁵¹

C. Abstention

The abstention doctrine demands that a federal court restrain its authority to decide when jurisdiction attaches in view of “scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary.”⁵²

A federal court should abstain under many and different circumstances. It should abstain when there are unsettled questions of state law that make it unnecessary to decide a federal constitutional question.⁵³ A federal court should abstain when exercising jurisdiction would lead to “[d]elay, misunderstanding of local law, and needless federal conflict with the state policy,”⁵⁴ and when the case “involves basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them.”⁵⁵ A federal court should abstain when the case is “intimately involved with

⁴⁹ *Id.* at 1148 (emphasis added).

⁵⁰ *Id.* at 1154 (emphasis added).

⁵¹ For an analysis of standing in the class actions context, see generally Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553 (2014); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1421–33 (1995); Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383 (2014); Matthew R. Ford, *Adequacy and the Public Rights Model of the Class Action After Gratz v. Bollinger*, 27 YALE L. & POL’Y REV. 1 (2008); Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 631–37 (2012).

⁵² *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (quoting *Di Giovanni v. Camden Fire Ins. Ass’n*, 296 U.S. 64, 73 (1935)).

⁵³ *See id.* at 499–500.

⁵⁴ *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943).

⁵⁵ *Id.* at 332.

sovereign prerogative.”⁵⁶ And although eminent domain proceedings might be so involved,⁵⁷ “[s]urely eminent domain [per se] is no more mystically involved with ‘sovereign prerogative’ than”⁵⁸ a number of other matters on which abstention has been refused.⁵⁹ Also, under *Younger v. Harris*, a federal court should “not act to restrain a [state] criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.”⁶⁰ More specifically, a federal court should abstain “where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings.”⁶¹ And finally, under exceptional circumstances, abstention may be appropriate “for reasons of wise judicial administration”⁶² in case of concurrent state proceedings.⁶³

The essential principle behind abstention is

the notion of “comity,” that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.⁶⁴

Or, stated otherwise, abstention is a product of

“Our Federalism,” [which] does not mean blind deference to “States’ Rights” [but] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.⁶⁵

Abstention is not limited to equity proceedings. It does “not apply a technical rule of equity procedure”⁶⁶ and “reflect[s] a deeper policy

⁵⁶ *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (eminent domain case falling within the sovereign prerogative demanded abstention).

⁵⁷ *See id.*

⁵⁸ *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 192 (1959).

⁵⁹ *See id.*

⁶⁰ *Younger v. Harris*, 401 U.S. 37, 43–44 (1971). Although, “[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved.” *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982).

⁶¹ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 816 (1976).

⁶² *Id.* at 818.

⁶³ *Id.*

⁶⁴ *Younger*, 401 U.S. at 44.

⁶⁵ *Id.*

⁶⁶ *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959).

derived from our federalism.”⁶⁷ Federal courts, though, have a “virtually unflagging obligation”⁶⁸ to exercise jurisdiction when jurisdiction attaches.⁶⁹ Thus abstention should be treated as a narrow exception to that obligation,⁷⁰ and its existence is for the defendant to demonstrate.⁷¹

But when the defendant seeks abstention due to the pendency of a state proceeding, there is a presumption in favor of abstention,⁷² and it is for the federal plaintiff to try to rebut that presumption by establishing that “the party bringing the state action [has] no reasonable expectation of obtaining a favorable outcome,”⁷³ but rather brought the proceeding with “a retaliatory, harassing, or other illegitimate motive.”⁷⁴ Essentially the plaintiff must prove that there is no case against him or, stated otherwise, that he is innocent. Thus, the plaintiff has a very “heavy burden” to overcome,⁷⁵ that is, he needs to *prove* the violation of his constitutional rights in order to have that violation adjudicated. In fact, the plaintiff must set forth “more than mere allegations of bad faith or harassment.”⁷⁶

Since *Younger v. Harris* was decided in 1971, the Court has never found the exception of bath faith or harassment satisfied.⁷⁷ The narrow

⁶⁷ *Id.*

⁶⁸ *Colo. River*, 424 U.S. at 817.

⁶⁹ *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) (dictum).

⁷⁰ *See Colo. River*, 424 U.S. at 813, 817–18.

⁷¹ *See, e.g., Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983).

⁷² *See Younger v. Harris*, 401 U.S. 37, 45 (1971); *see also Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 431 (1982) (“*Younger v. Harris* . . . and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.”).

⁷³ *Cullen v. Fliegner*, 18 F.3d 96, 103 (2d Cir. 1994).

⁷⁴ *Diamond “D” Const. Corp. v. McGowan*, 282 F.3d 191, 199 (2d Cir. 2002).

⁷⁵ *Phelps v. Hamilton*, 122 F.3d 885, 889 (10th Cir. 1997).

⁷⁶ *Id.* When determining whether a state action was commenced in bad faith or was intended to harass, the court considers “(1) whether it was frivolous or undertaken with no reasonably objective hope of success; (2) whether it was motivated by defendant’s suspect class or in retaliation for the defendant’s exercise of constitutional rights; and (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions.” *Id.*; *accord Weitzel v. Div. of Occupational & Prof’l Licensing of the Dep’t of Com.*, 240 F.3d 871, 877 (10th Cir. 2001).

⁷⁷ *See Gilliam v. Foster*, 75 F.3d 881, 906 (4th Cir. 1996). In the words of Owen Fiss, “the universe of bad-faith-harassment claims that can be established is virtually empty.” Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1115 (1977); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498 (1977) (concluding that the showings under the various exceptions are “probably impossible to make”); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1084 n.197 (1994) (noting that the exceptions are “relatively unimportant” and “inconsistent with a properly conceived abstention doctrine”); Brian Stagner, *Avoiding Abstention: The Younger Exceptions*, 29 TEX. TECH L. REV. 137, 141 (1998) (describing the *Younger* exceptions

exceptions to the *Younger* abstention rule and the fact that they are for the federal plaintiff to prove create a very clear example of frontloading as here the defendant will likely push for an accelerated, pre-discovery, dismissal of the claim to avoid federal jurisdiction. And it would be an instance of frontloading through a judicially created exception to § 1983, whose legitimacy cannot be saved by the possibility of the U.S. Supreme Court's review, as we know that possibility is quite remote, and certainly will not occur as a matter of course. However, the federal plaintiff will most likely not renounce to the federal avenue after dismissal on abstention grounds, as he or she may return to the federal court after the state court judgment by filing a petition for habeas corpus, thus generating further inefficiencies and unfairness in the federal judicial system.

Abstention has gradually expanded beyond the narrow confines of a "limited exception," causing delays in the adjudication,⁷⁸ inefficiencies, unfairness, and offering the stage for further frontloading in an area of fundamental constitutional rights that might remain unadjudicated. It is easy to foresee that the abstention doctrine might generate yet more frontloading in the class action context.⁷⁹

D. Sovereign Immunity

According to the doctrine of sovereign immunity, the state is the sovereign, the king, and "can do no wrong";⁸⁰ it cannot be sued without its consent. The Eleventh Amendment to the U.S. Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.⁸¹

Although the text of the Eleventh Amendment seems to limit sovereign immunity to diversity jurisdiction cases, the Supreme Court has long held that its provision establishes state sovereign immunity in federal courts regardless of the litigants' citizenship.⁸² But state officers are not immune from lawsuit if their action is alleged to have violated the Constitution or a federal statute or regulation that is the supreme law of the land, as the officer is then "stripped of his official or representative character and is

as an "escape hatch that rarely opens"); C. Keith Wingate, *The Bad Faith-Harassment Exception to the Younger Doctrine: Exploring the Empty Universe*, 5 REV. LITIG. 123, 124 (1986) (stating that recognition of the bad-faith exception "has been limited to a virtually empty universe").

⁷⁸ See, e.g., *Harman v. Forssenius*, 380 U.S. 528, 537 (1965).

⁷⁹ See, e.g., David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 814 n.227 (2016) (signaling the existence of this problem in foster care class actions).

⁸⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES *238–39.

⁸¹ U.S. CONST. amend. XI.

⁸² *Hans v. Louisiana*, 134 U.S. 1, 15–18 (1890).

subjected in his person to the consequences of his individual conduct.”⁸³ In those cases, the remedy obtainable is limited⁸⁴ to prospective injunctive relief.⁸⁵ Congress, though, acting under section 5 of the Fourteenth Amendment to the U.S. Constitution and determining what is “appropriate legislation” within the scope of that provision, may “provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”⁸⁶

Similar considerations apply in foreign relations, where the doctrine of foreign sovereign immunity, under certain circumstances, shields the state when sued in courts other than its own. The Foreign Sovereign Immunity Act (FSIA) of 1976⁸⁷ provides a comprehensive regulation governing access to the federal and state courts for plaintiffs asserting claims against foreign states and their instrumentalities. The FSIA provides for the immunity of foreign states with reference to claims involving the state’s public acts; immunity does not extend to suits based on the state’s commercial or private conduct.⁸⁸ The FSIA is currently under examination before the Supreme Court.

⁸³ *Ex Parte Young*, 209 U.S. 123, 160 (1908).

⁸⁴ See *Edelman v. Jordan*, 415 U.S. 651, 666 (1974) (“We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled ‘equitable’ in nature.”).

⁸⁵ *Id.* at 666–71. The current doctrinal measure as to what constitutes prospective relief for purposes of the stripping doctrine is whether the “complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002).

⁸⁶ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Thus, when plaintiffs enforce legislation passed by Congress under § 5 of the Fourteenth Amendment, they can sue the state directly—as there is no need to apply the *Ex Parte Young* fiction of suing state officers—and may seek monetary damages to be awarded from the state treasury. However, *Ex Parte Young* and *Edelman* continue to apply to suits brought under statutes that do not apply to states or that were not enacted under § 5 of the Fourteenth Amendment. *Fitzpatrick* applies to suits enacted pursuant to § 5 of the Fourteenth Amendment, in which Congress has expressly provided that states are covered. But it also applies to statutes that do not directly mention the states. For example, the Court held that *Fitzpatrick* applied to the Civil Rights Attorney’s Fees Awards Act of 1976, although that statute did not mention states. *Hutto v. Finney*, 437 U.S. 678, 694–98 (1978).

⁸⁷ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2012)).

⁸⁸ See H.R. REP. NO. 94-1487, at 8 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6605–07; see also *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007); *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1072 (D.C. Cir. 2012); *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 791 (S.D.N.Y. 2012); *Calderon-Cardona v. Democratic People’s Republic of Korea*, 723 F. Supp. 2d 441, 457 (D.P.R. 2010); *Shih v. Taipei Econ. & Cultural Representative Office*, 693 F. Supp. 2d 805, 809–10 (N.D. Ill. 2010).

In *Venezuela v. Helmerich & Payne International*,⁸⁹ the question presented to the Court is whether the pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.

When ruling on the motion to dismiss for lack of jurisdiction, the D.C. Circuit rightly stressed the difference between jurisdictional analysis and analysis of the merits.⁹⁰ In so doing, it noted that the threshold to survive a motion to dismiss for lack of subject matter jurisdiction is significantly lower than the threshold to survive a summary judgment motion, or a trial on the merits.⁹¹ The court explained that a motion to dismiss a FSIA claim for lack of subject matter jurisdiction should be granted when "the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property . . . in issue' only if the claims are 'wholly insubstantial or frivolous.'"⁹² And the court further explained that "[a] claim fails to meet this exceptionally low bar if prior judicial decisions 'inescapably render the claim[] frivolous' and 'completely devoid of merit,'"⁹³ which would not be the case when a prior decision merely renders a claim "of doubtful or questionable merit."⁹⁴

The D.C. Circuit analysis was right on point. It assessed the plaintiffs' claim through the allegations in the complaint, but without endorsing a level of exactness—as demanded by the defendants—that would appear to exceed the plausibility standard in *Bell Atlantic Corp. v. Twombly*⁹⁵ and *Ashcroft v. Iqbal*.⁹⁶ One might wonder, at this point, whether it is inappropriate to require a pleading analysis on a question of jurisdiction. The answer is "no," given that we are looking for a "non-frivolous claim," a claim not "completely devoid of merit." So the focus of the jurisdictional analysis is still on the claim as a set of operative facts giving rise to one or more "non-frivolous" rights of action,⁹⁷ which should be evident from the face of the complaint. The D.C. Circuit analysis got this right, too.

In their brief on the merits, the sovereign defendants argued that the jurisdictional analysis of a FSIA claim should be guided by a different,

⁸⁹ *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, No. 15-423, 2017 U.S. LEXIS 2802, at *7 (May 1, 2017).

⁹⁰ *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 811 (D.C. Cir. 2015), *vacated*, No. 15-423, 2017 U.S. LEXIS 2802 (May 1, 2017).

⁹¹ *Id.* at 811–12.

⁹² *Id.* at 812 (quoting *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 943 (D.C. Cir. 2008)).

⁹³ *Id.* (quoting *Hagens v. Lavine*, 415 U.S. 528, 528, 543 (1974)).

⁹⁴ *Id.* (quoting *Hagens*, 415 U.S. at 538).

⁹⁵ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

⁹⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁹⁷ CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 477 (2d ed. 1947).

higher standard and, more precisely, that “courts should determine whether the plaintiff has *actually* pleaded a taking of rights in property in violation of international law.”⁹⁸ This sentence could be read as demanding the application of a standard higher than that endorsed in *Twombly/Iqbal* and, indeed, higher than the particularity standard of Rule 9(b).⁹⁹ If adopted, this standard would frontload the merits analysis limiting jurisdiction to those cases in which the plaintiff would prevail.

This impression is somewhat allayed when defendants note that “a court should decide whether the complaint pleads *legally recognized* rights in property and a taking that is an *actual* violation of customary international law,”¹⁰⁰ and that “when deciding cases evaluating the *legal sufficiency of the pleadings* under the FSIA’s exceptions, this Court has consistently applied a single standard. A plaintiff must plead facts that, if taken as true, *establish the existence* of all of the elements set out in the relevant statutory exception.”¹⁰¹

Regardless of whether a high threshold pleading requirement might seem in line with the restrictive theory of sovereign immunity or the presumption against the exercise of jurisdiction over foreign sovereigns that the FSIA codifies,¹⁰² FSIA concerns access to federal courts,¹⁰³ it governs the types of action in which foreign sovereigns may be sued in U.S. federal and state courts,¹⁰⁴ and it “codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law.”¹⁰⁵ In essence, a FSIA claim is a claim that “really and substantially involves a dispute or controversy respecting the validity, construction, or effect of [federal law], upon the determination of which the result depends.”¹⁰⁶ And if the success of the plaintiffs’ claim, as it appears on the face of a well-pleaded complaint, depends on the “validity, construction, or effect” of federal law, that claim gives rise to a true controversy on federal law which, as such, deserves a federal forum.¹⁰⁷

The question of whether *Venezuela v. Helmerich* falls within the federal courts’ jurisdiction seems to have a straightforward, affirmative answer, and yet the United States filed an amicus brief in support of defendants arguing that it does not. When describing the interest behind its filing, the United States explained:

⁹⁸ Brief for Petitioners, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, No. 15-423 (May 1, 2017), 2016 U.S. S. Ct. Briefs LEXIS 3072, at *12.

⁹⁹ FED. R. CIV. P. 9(b).

¹⁰⁰ Brief for Petitioners, *supra* note 98, at *25–26 (emphasis in original).

¹⁰¹ *Id.* at *26–27 (emphasis added).

¹⁰² *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983).

¹⁰³ *See id.* at 496.

¹⁰⁴ *Id.* at 496–97.

¹⁰⁵ *Id.* at 497.

¹⁰⁶ *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912).

¹⁰⁷ *See id.* at 570.

This case concerns the appropriate standard for establishing jurisdiction in an action against a foreign state under the Foreign Sovereign Immunities Act of 1976 Because application of the FSIA's jurisdictional provisions has implications for the treatment of the United States in foreign courts and for its relations with other sovereigns, the United States has a substantial interest in this case.¹⁰⁸

In its brief, the United States challenged the jurisdictional standard applied by the D.C. Circuit as too low,¹⁰⁹ and it insisted that “[f]or a case to come within the scope of Section 1605(a)(3), the complaint must assert a claim that is *legally sufficient* to satisfy the provision’s substantive requirements.”¹¹⁰ This, according to the United States, “is necessary to ensure that the foreign state actually receives the protections of immunity if no exception applies, to preserve the dignity of the foreign state and comity between nations, and to safeguard the interests of the United States when it is sued in foreign courts.”¹¹¹ But what does the phrase “legally sufficient” entail? If the plaintiffs’ claim is one of discriminatory expropriation in violation of international law, is it not legally sufficient that the facts alleged align with the elements of that claim? And if the plaintiffs’ claim to “rights in property” is similarly supported, is that claim also not legally sufficient?

In their brief, plaintiffs rightly point out that:

the purpose of the FSIA’s jurisdictional grant is to abrogate the foreign sovereign’s immunity from suit in order to allow the court to decide whether a violation has occurred for which plaintiffs are entitled to relief. It makes no sense to require courts to decide that merits question in order to determine their authority to decide it.¹¹²

The United States’ amicus brief invites a return to the law of foreign sovereign immunity as it stood in the early nineteenth century,¹¹³ that is, virtually to a status of absolute immunity for foreign sovereigns. A denial of jurisdiction under FSIA would also deny access to state courts and, most likely, access to justice to plaintiffs who won’t have recourse in the courts of the defendant state. The argument furthered by the defendants and the United States presents a classic example of arguing from a conception—sovereign immunity—to an abstract but controlling proposition of law. This type of legal analysis generates more

¹⁰⁸ Brief for U.S. as Amici Curiae Supporting Petitioners, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, No. 15-423 (May 1, 2017), 2016 U.S. S. Ct. Briefs LEXIS 3114, at *6.

¹⁰⁹ *Id.* at *16.

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *Id.* at *17–18.

¹¹² Brief for Respondents, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, No. 15-423 (May 1, 2017), 2016 U.S. S. Ct. Briefs LEXIS 3494, at *31.

¹¹³ See *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 134 (1812); see also Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT’L L. 33, 39–40 (1978).

frontloading and is inconsistent with the dispute resolution mission of federal courts in a democratic system.

And again, the frontloading trend in the doctrines of sovereign immunity and foreign sovereign immunity make us predict yet more frontloading when these doctrines are applied in a class action context.¹¹⁴

E. *Subject Matter Jurisdiction*

To a certain extent, modern subject matter jurisdiction analysis also invites frontloading. Federal courts are courts of limited jurisdiction.¹¹⁵ That means that the type of cases, not the number of cases, that federal courts can hear is limited. Within the confines of those assigned subject matters, federal courts play an essential role in the constitutional scheme. As to cases arising under federal law—i.e., cases in which the plaintiff's claim gives rise to a federally premised right of action—federal courts provide a forum for the uniform exposition of federal law and for the enforcement of the Constitution and the vindication of federal rights. More specifically, a case arises under federal law if the plaintiff's claim is truly about federal law, that is, if the operative facts give rise to one or more rights of action whose adjudication depends on the construction, validity, or effect of federal law.

In *Gully v. First National Bank*,¹¹⁶ the Court provided an elegant and workable framework through which to determine whether a case is truly about federal law:

How and when a case arises “under the Constitution or laws of the United States” has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.¹¹⁷

But then the Court strayed from *Gully*, drawing an artificial distinction between claims created by federal law—the creation test—and claims created by state law that include an essential federal ingredient—the essential federal ingredient test.¹¹⁸ The modern Court also treats the creation test as the primary method through which to establish federal

¹¹⁴ See, e.g., Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279, 323–24.

¹¹⁵ U.S. CONST. art. III, § 2.

¹¹⁶ *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936).

¹¹⁷ *Id.* at 112 (citations omitted).

¹¹⁸ See *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8–9 (1983). For a critique of *Franchise Tax Board*, see Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising-Under Jurisdiction*, 88 WASH. L. REV. 961, 987–90 (2013). See also *Gunn v. Minton*, 133 S. Ct. 1059, 1064–65 (2013), for a more recent endorsement of this approach.

question jurisdiction¹¹⁹ and the essential federal ingredient test as the exception.¹²⁰ That test has been reduced to four elements: the state-created claim must include an essential federal ingredient, that ingredient must be actually disputed, its uniform resolution must be important to the federal system, and the exercise of jurisdiction over it must not upset the congressionally mandated balance between state and federal jurisdiction.¹²¹ A case that is truly about federal law might not pass that test.¹²²

In fact, the tension between the *Gully* approach and the essential federal ingredient test is found in the third and fourth elements of the latter test. By introducing dispositive, court-driven policy considerations that transcend the case and the specific claim presented, the modern approach to subject matter jurisdiction shifts the attention from the case filed to the federal system. The interests of the federal system might trump the interest of the individual seeking vindication and enforcement of his or her federal rights. But how could the vindication of federal rights conflict with the interests of the federal system?

The modern approach also requires courts and litigants to make an assessment or, better, a forecast as to factors that might (or might not) become clear only later on in the proceeding. The modern subject matter jurisdiction analysis is thus far remote from a legitimate, procedural-condition-of-the-action type of analysis, and it invites frontloading, ultimately resulting in the closing of federal courts.¹²³

The policy and merits-type inquiries that the modern approach to subject matter jurisdiction requires are to be performed on basis of the plaintiff's complaint,¹²⁴ before full discovery has taken place. Essentially, courts are required to decide whether the issue presented is important enough to run the risk of increasing the workload of federal courts on the basis of the plaintiff's complaint. And while Congress could clearly make such determination, it is unclear how the federal judiciary is properly situated to make that jurisdiction-trimming judgment at the very

¹¹⁹ *Gunn*, 133 S. Ct. at 1064.

¹²⁰ *Id.* at 1065. For further analysis of this phenomenon, see Grossi, *supra* note 118.

¹²¹ *Gunn*, 133 S. Ct. at 1064; Grossi, *supra* note 118, at 998–99.

¹²² A good example of this is the Supreme Court's recent pronouncement on subject matter jurisdiction in *Gunn* where the Court found that a legal malpractice case that turned on the resolution of an issue of federal patent law did not arise under federal law for purposes of § 1331, essentially because the case foundered on the third and fourth prong of the essential federal ingredient test. *Id.* at 1066.

¹²³ True, the objection of subject matter jurisdiction is not confined to the outset of the litigation and does remain open throughout the entire proceeding. Scott Dodson & Philip A. Pucillo, *Joint and Several Jurisdiction*, 65 DUKE L.J. 1323, 1346 (2016). However, subject matter jurisdiction questions are typically addressed and resolved at the outset, and it is then that the litigants are required to make an assessment that can hardly be reconciled with the logic of litigation.

¹²⁴ See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

outset of the case. In any event, there is no evidence that Congress signaled its desire to reduce the statutory arising-under formula in the years between the decision in *Gully* and the Court's adoption of a more restrictive formula. So, again, the Court has acted independently, significantly altering the rules by way of judicial interpretation.

The Class Action Fairness Act of 2005 (CAFA)¹²⁵ intended to expand federal jurisdiction over class actions raising state law claims.¹²⁶ And it managed to do so,¹²⁷ but encountered federal courts' resistance,¹²⁸ and increased the volume of litigation, most of which is "socially wasteful."¹²⁹ Perhaps the poor drafting—mechanical and fragmented—of the statute may have contributed to its shortcomings and to a frontloading of the analysis which has eventually resulted in dismissals.

III. FRONTLOADING IN CLASS ACTIONS

As mentioned in Part II, the frontloading trend has not spared class actions and, in fact, the text and interpretation of Rule 23, governing class actions in federal courts, has played a major role in aggravating the phenomenon in such suits.

Rule 23 was adopted to allow joinder of parties where such parties' claims couldn't be litigated individually (because of the related costs), or where it would be impractical to rely on other joinder devices to litigate such claims (because of the number of individuals with claims to be joined). In other words, without class actions there would be no way to litigate these claims, either individually or through standard rules on joinder.

For an action to be certified as a class, Rule 23(a) provides that there must be: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.¹³⁰ A class may proceed as such if it meets all

¹²⁵ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

¹²⁶ 28 U.S.C. § 1332(d) (2012) provides, subject to the exceptions listed in subsections (3), (4), (5) and (9), that federal courts have jurisdiction over classes where the plaintiff class contains at least 100 members; their claims aggregated together exceed \$5 million, exclusive of interest and costs; and at least one member of the class differs in citizenship from any one defendant. *See also* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1555 (2008) ("The statute's method was to funnel more class actions away from the state courts and into the federal courts, and perhaps thereby to discourage class actions. However, neither the cause of any malady nor the effectiveness of this cure is beyond debate.").

¹²⁷ *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 745 (2013).

¹²⁸ *See* Clermont & Eisenberg, *supra* note 126, at 1554 ("[T]he courts played a role in reshaping the Act. By examining at close range the thing adjudged, we saw social waste by litigation, and we saw wise but value-laden resistance by judges.").

¹²⁹ *Id.* at 1592.

¹³⁰ FED. R. CIV. P. 23(a).

the requirements of Rule 23(a) and falls within one of the three types under Rule 23(b).¹³¹

Under Rule 23(a), the proposed class must be “so *numerous* that joinder of all members is impracticable;”¹³² there must be “questions of law or fact *common* to the class;”¹³³ “the claims or defenses of the representative parties [must be] *typical* of the claims or defenses of the class;”¹³⁴ and “the representative parties [must] fairly and *adequately* protect the interests of the class.”¹³⁵

Under Rule 23(b), the action should fall into one of the three “types”¹³⁶ listed in that rule:

(1) prosecuting separate actions by or against individual class members would create a risk of: (A) . . . incompatible standards of conduct for the party opposing the class; or (B) 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 impede their ability to protect their interests; (2) 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; or (3) the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy.¹³⁷

The (b)(1)(A), (b)(1)(B), and (b)(2) classes are “mandatory,”¹³⁸ meaning that the rule does not entitle class members to notice of class certification or the right to opt out of the class.¹³⁹ The (b)(3) class,

¹³¹ *Id.* R. 23(b). The action, though, might also be certified as an “issues class” under Rule 23(c)(4). *Id.* R. 23(c)(4).

¹³² *Id.* R. 23(a)(1) (emphasis added).

¹³³ *Id.* R. 23(a)(2) (emphasis added).

¹³⁴ *Id.* R. 23(a)(3) (emphasis added).

¹³⁵ *Id.* R. 23(a)(4) (emphasis added).

¹³⁶ Rule 23(b) has three subdivisions but provides four types of class actions. This is because sections (b)(1)(A) and (b)(1)(B) could be considered as separate types; they are treated as one category, though, as they are both “designed to prevent prejudice to the parties resulting from multiple suits involving the same subject matter by certifying a mandatory class.” *Harris v. Koenig*, 271 F.R.D. 383, 392 (D.D.C. 2010). One could in fact count five different types if Rule 23(c)(4) issue classes were included in the list.

¹³⁷ FED. R. CIV. P. 23(b) (emphasis added).

¹³⁸ *Compare id.* R. 23(b)(1)–(2) with *id.* R. 19, 22, 24. See also 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:3 (5th ed. 2012); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967) (observing how the similarities between Rule 23(b)(1)(A) and Rule 19 are “not accidental but logical”).

¹³⁹ See FED. R. CIV. P. 23(c)(2)(A) (making notice discretionary in (b)(1) and (b)(2) classes, and containing no reference to the right to opt out); see also *Wal-Mart*

however, is an “opt-out” class, as class members have the right to notice of class certification and the right to opt out of the class.¹⁴⁰

The text of the rule is hyper-technical, also containing provisions on the “Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses,”¹⁴¹ “Conducting the Action,”¹⁴² “Settlement, Voluntary Dismissal, or Compromise,”¹⁴³ “Appeals,”¹⁴⁴ and “Class Counsel.”¹⁴⁵

Compared to the other rules, Rule 23 stands as an outlier. When approaching the text of the Rule, it is important to remember that, after all, Rule 23 is just another joinder rule, intended to allow aggregation of parties asserting claims or defenses with common questions of law or fact, when it would be impracticable or impossible to file such claims on an individual basis or through standard joinder devices. Indeed, differently from the other elegant, open-textured rules conducive to natural lawyering and judging and pragmatism, Rule 23 stands as a trophy to formalism, demanding an inquiry harder and harder to satisfy,¹⁴⁶ replete with technicalities and redundancies.

Thus Rule 23 invites, and at times demands, frontloading. Because of the technicalities and the several redundancies in the Rule, when applying it, courts tend to look for something *else*, something that would satisfy the redundant requirement and give an independent meaning to it. In search for this independent meaning, judges often make ad hoc, anti-plaintiffs considerations that elevate formality over substance, frontload the analysis of the merits,¹⁴⁷ close the doors of federal courts by

Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011) (stating that Rule 23 “provides no opportunity for (b)(1) or (b)(2) class members to opt out”). However, as Robert Klonoff noted,

the Court in *Dukes* strongly suggested that, when monetary claims are more than incidental to claims for declaratory and injunctive relief [in (b)(2) classes], due process requires notice and opt-out rights. Indeed, the Court hinted that notice and opt-out rights may be required in (b)(2) actions even where the monetary claims in the case do not predominate.

Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 GEO. WASH. L. REV. 798, 809 (2014).

¹⁴⁰ See FED. R. CIV. P. 23(c)(2)(B) (in (b)(3) classes requiring, “the best notice that is practicable under the circumstances,” which must also state that “the court will exclude from the class any member who requests exclusion”).

¹⁴¹ *Id.* R. 23(c).

¹⁴² *Id.* R. 23(d).

¹⁴³ *Id.* R. 23(e).

¹⁴⁴ *Id.* R. 23(f).

¹⁴⁵ *Id.* R. 23(g).

¹⁴⁶ See, e.g., Klonoff, *supra* note 127, at 775–76.

¹⁴⁷ In *Wal-Mart Stores, Inc. v. Dukes*, the Court even suggested that expert witnesses offered for purposes of certification must be qualified under the Federal Rules of Evidence and after a full *Daubert* hearing. 564 U.S. 338, 354 (2011).

increasing the procedural hurdles,¹⁴⁸ increase the costs of litigation,¹⁴⁹ and ultimately short-circuit the class action joinder mechanism.¹⁵⁰

A. *Frontloading through the Duplicative Analysis under the Rule 23(a) Requirements*

The requirements of commonality and typicality under Rule 23(a) demand an analysis and assessment of similar factors.

As indicated above, a class action may be certified if “there are questions of law or fact *common* to the class.”¹⁵¹ Essentially, there must be at least a single common question, or “common contention,” “capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”¹⁵² In other words, the commonality requirement does not demand only an assessment of whether all class members present the same question, but whether an assessment of the shared question will yield the same answer for all class members.¹⁵³

The focus on generating “common answers” does not come from the text of Rule 23(a)(2), nor does it come from the Advisory Committee Note. Similar to what has been observed with reference to Rule

¹⁴⁸ See, e.g., Miller, *supra* note 1, at 7 (“The class certification motion thus has become another procedural stop sign undermining the utility of one of the most important joinder mechanisms for handling disputes arising from conduct damaging large numbers of people with small claims.”).

¹⁴⁹ *Id.* at 7–8 (“If class representatives cannot clear the certification hurdle, as has become more common, individual actions are not pursued because they are not economically viable. Even when an attempt to block certification doesn’t succeed, the very elaborate process created by the courts imposes additional cost and delay, especially when interlocutory appellate review of certification is sought, let alone granted. Perhaps even more troublesome is the fact that increased costs and the heightened risk of non-certification inhibits the institution of potentially meritorious cases, leaving public policies under enforced and large numbers of citizens uncompensated.”); see also Freer, *supra* note 6, at 737 (“This front-loading increases the expense of litigating class certification. More is on the table at an early stage than in prior practice.”).

¹⁵⁰ See, e.g., Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1740 (2014).

¹⁵¹ FED. R. CIV. P. 23(a)(2) (emphasis added).

¹⁵² *Wal-Mart*, 564 U.S. at 350. *Wal-Mart* had a huge impact in class action litigation. See SEYFARTH SHAW LLP, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 1 (2013), http://www.seyfarth.com/dir_docs/publications/CAR2013preview.pdf (“As of the close of [2013], *Wal-Mart* had been cited a total of 541 times in lower court rulings, a remarkable figure for a decision rendered in June of 2011.”).

¹⁵³ *Wal-Mart*, 564 U.S. at 349–50. Commenting on *Wal-Mart*, Judith Resnik has noted that the holding in the opinion “can be read as a return to [the 1938 Rule 23] disaggregation” as under the original version, “[o]nly something found to be a ‘true’ class action . . . typology was rooted in conceptualizing the underlying right as indivisible or as a collection of rights, each held individually by different people.” Resnik, *supra* note 3, at 141.

8(a)(2),¹⁵⁴ the alteration of Rule 23(a)(2) was a product of the Supreme Court's interpretation of the rule that narrowed its scope and made it significantly harder to certify a class.¹⁵⁵ And, again, this is ironic, considering the Court's stated position that the Rules should only be altered in accord with the Rules Enabling Act rather than by judicial fiat.¹⁵⁶ Furthermore, under Rule 23(a)(2), the question must produce an answer that is "central" to the validity of the claims, an answer that is "apt to drive the resolution of the litigation."¹⁵⁷

As to the typicality requirement, "the claims or defenses of the representative parties [must be] *typical* of the claims or defenses of the class."¹⁵⁸ This requirement "is said to limit the class claims to those fairly encompassed by the named plaintiff's claims."¹⁵⁹ Thus, the class representative's claims must arise from the same events or conduct and be reasonably coextensive with those of the class.¹⁶⁰ Claims will be found not typical if they present a significant issue not shared by the class, such as a defense that would not apply to the class generally.¹⁶¹

In *General Telephone Co. of the Southwest v. Falcon*,¹⁶² the Court noted that commonality and typicality both serve as "guideposts" to determine when class treatment would be economical and whether the "interests of the class members will be fairly and adequately protected in their absence,"¹⁶³ thus suggesting the possibility of some significant overlap of analysis under the two requirements. In fact, if you look closely, you see that the two requirements significantly overlap,¹⁶⁴ and their analyses often merges in practice.¹⁶⁵

¹⁵⁴ See *supra* notes 7–29 and accompanying text.

¹⁵⁵ See, e.g., Freer, *supra* note 6, at 732–34; see also Klonoff, *supra* note 127, at 799.

¹⁵⁶ See *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

¹⁵⁷ *Wal-Mart*, 564 U.S. at 350 (quotations omitted).

¹⁵⁸ FED. R. CIV. P. 23(a)(3) (emphasis added).

¹⁵⁹ *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 330 (1980).

¹⁶⁰ See *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012); *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (must show that claims arise from same course of events and present similar legal arguments); *Arreola v. Godinez*, 546 F.3d 788, 798 (7th Cir. 2008).

¹⁶¹ See, e.g., *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 725–26 (7th Cir. 2011); *Rodriguez*, 591 F.3d at 1124; *In re Schering Plough Corp.*, 589 F.3d at 598; *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006).

¹⁶² *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982).

¹⁶³ *Id.* at 157 n.13.

¹⁶⁴ See Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1103 (2013).

¹⁶⁵ See *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012).

While commonality looks at the characteristics of the class as a whole, typicality looks at the relationship between the class and the named plaintiffs. But the class must share at least a common question of law or fact that is central to the resolution of the litigation (commonality), and the named plaintiffs' claims must share the same question (typicality). And although this seems intuitive and perfectly legitimate, the inquiry inevitably generates redundancy as we are looking for the same, common question that characterizes the individual claims. These redundant layers of analysis sometimes operate as a funnel that, coupled with the other requirements under Rule 23(b) as applied, may prevent the Rule 23 joinder provisions to operate as they were intended to.¹⁶⁶

And there is overlap with the requirement of adequacy of representation too.¹⁶⁷ "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent,"¹⁶⁸ and it calls for a determination that the proposed class representative has a basic knowledge of the case and a sufficient incentive to participate in the action and monitor the proceedings.¹⁶⁹

¹⁶⁶ See *Stirman v. Exxon Corp.*, 280 F.3d 554, 559, 562 (5th Cir. 2002) (commonality presumptively satisfied, but typicality not); *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 596, 599 (7th Cir. 1993) (court of appeals affirms district court refusal to certify class where lower court found commonality satisfied but typicality lacking); *Mwantembe v. TD Bank, N.A.*, 268 F.R.D. 548, 558 (E.D. Pa. 2010) (commonality satisfied but typicality lacking based on a merits assessment of the named plaintiffs' claims); *Klotz v. Trans Union, LLC*, 246 F.R.D. 208, 215 (E.D. Pa. 2007) (commonality satisfied but typicality lacking based on a merits assessment of the named plaintiffs' claims).

¹⁶⁷ FED. R. CIV. P. 23(a)(4).

¹⁶⁸ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); see *Kingery v. Quicken Loans, Inc.*, 300 F.R.D. 258, 265–66 (S.D. W. Va. 2014) (noting that "the typicality and commonality prongs of Rule 23(a) overlap" and that adequacy "tends to merge with the typicality and commonality requirements"); *Fisher v. CIBA Specialty Chems. Corp.*, 238 F.R.D. 273, 297 (S.D. Ala. 2006) ("[C]ommonality and typicality tend to merge with the adequacy-of-representation factor because all examine whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982))); *McClain v. Lufkin Indus. Inc.*, 187 F.R.D. 267, 279 (E.D. Tex. 1999) (noting how "[t]he elements of typicality, commonality, and adequacy of representation required by 23(a) tend to overlap and intertwine. . . . They are collectively referred to as the 'nexus requirement' of similarity between individual and shared claims." (internal citation omitted)); see also 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1769 (3d ed. 2005) ("[C]ourts have noted that coextensiveness is a common thread binding Rule 23(a)(3) and Rule 23(a)(4) together."). Indeed, no "legally sufficient nexus" can exist between individual and shared claims if the purported class representative is not even a member of the defined class; adequacy and typicality are thereby undercut because the "plaintiff's interests are not aligned with those of the class." *Fisher*, 238 F.R.D. at 297.

¹⁶⁹ See *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 132 (3d Cir. 2012); *Ratray v. Woodbury County*, 614 F.3d 831, 835–36 (8th Cir. 2010); *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 482–83 (5th Cir. 2001).

This requirement will likely be met if the named plaintiffs meet the *typicality* requirement. It will be a rare case where a named plaintiff—whose claim arises from the same events or conduct as those giving rise to the claims of the other members of the class¹⁷⁰—is in conflict of interest with the class or does not have knowledge of the case or sufficient incentive to participate.¹⁷¹

The Court has held that the *adequacy* requirement is not met when a fatal conflict of interest exists, which may occur when a single class includes both persons with present claims and persons with future claims.¹⁷² A careful assessment of claims¹⁷³ of the named parties and proper case management would adequately and more effectively take care of situations of real conflict.

Also, although in 2003 Rule 23 was amended to include Rule 23(g), which now governs the selection of class counsel,¹⁷⁴ courts have continued to assess the adequacy of counsel when determining *adequacy* under Rule 23(a)(4).¹⁷⁵ The Rule 23(g) layer of inquiry is also unnecessary, as this screening could be properly taken care of by other rules.¹⁷⁶ The elimination of this redundancy would make Rule 23 and its interpretation less fragmented and mechanical,¹⁷⁷ favoring a more realistic appraisal of the claim and its resolution and proper case management.¹⁷⁸

¹⁷⁰ See *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012).

¹⁷¹ See also *Bone*, *supra* note 164, at 1099 n.7 (“[W]hy does Rule 23(a)(2) impose a separate common question requirement when the provisions of Rule 23(b) already guarantee the existence of common questions? What does 23(a)(3)’s typicality requirement add to the adequacy of representation that is already required by 23(a)(4)? Why does Rule 23(c)(2) require notice and opt out for (b)(3) class actions when (a)(4) already requires adequacy of representation?”).

¹⁷² See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999); *Amchem*, 521 U.S. at 626.

¹⁷³ For a deeper analysis of the claim and its role within the litigation rules and doctrines, see *Grossi*, *supra* note 8.

¹⁷⁴ See FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment (“Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision.”).

¹⁷⁵ See, e.g., *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007); *Daye v. Cmty. Fin. Serv. Ctrs.*, 313 F.R.D. 147, 163–64 (D.N.M. 2016); *Amchem*, 521 U.S. at 626 n.20.

¹⁷⁶ See, e.g., FED. R. CIV. P. 11, 37.

¹⁷⁷ See *Gooch v. Life Inv’rs Ins. Co. of Am.*, 672 F.3d 402, 431 (6th Cir. 2012); *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011) (“named plaintiff” with “serious credibility problems . . . may not be an adequate class representative”); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011) (“Misconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification.”).

¹⁷⁸ See *infra* Part IV, at 966*, for a proposed text of Rule 23(a) that would reduce the problems generated by the current rule.

The several redundancies and overlaps in Rule 23(a) not only create litigation inefficiencies, but operate as a funnel that allows only few cases to proceed to the analysis of the merits. Think of it this way: if the named plaintiffs are lucky enough to pass the *numerosity* and *commonality* test, they will still have to pass the *typicality* test, largely duplicative of a test (commonality) they already passed—but that the courts will try to charge with additional demands to give it an independent meaning. If the named plaintiffs are lucky enough to also pass the *typicality* test, they will still have to pass the adequacy test, again largely duplicative of the *typicality* and *commonality* inquiries, but perhaps bearing an additional layer of screening that courts will apply to give that requirement some significance, independent from the other requirements under Rule 23(a) and the Rule 23(g) proscription.

Thus, the funnel becomes narrower and narrower as we proceed through the duplicative levels, and each duplicative level becomes harder to satisfy as we approach the exit to the merits analysis that only the few lucky class suits will see.¹⁷⁹

B. *The Revealing Past of Rule 23*

When adopted, Rule 23(a) read as follows:

- (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
 - (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
 - (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
 - (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.¹⁸⁰

The original Rule 23(a) essentially contained the gist of the entire class action discipline, as subdivision (b) governed “Secondary Action by Shareholders,”¹⁸¹ and subdivision (c) provided for “Dismissal or

¹⁷⁹ See *Romberio v. Unumprovident Corp.*, 385 Fed. App’x 423, 428–33 (6th Cir. 2009) (Sixth Circuit reverses certification order based on district court’s failure to engage in a rigorous examination of the named plaintiff’s claim including an assessment of the evidence through which plaintiff would prove that claim); *Stirman v. Exxon Corp.*, 280 F.3d 554, 561–62 (5th Cir. 2002) (Fifth Circuit runs the certification question through the gauntlet of Rules 23(a) and (b)).

¹⁸⁰ 2 PALMER D. EDMUNDS, FEDERAL RULES OF CIVIL PROCEDURE 933–34 (1938) (Rule 23).

¹⁸¹ *Id.*

Compromise,” briefly requiring court’s approval for class certification and settlement [“compromise”], mandatory notice for the members of the Rule 23(a)(1) class, and discretionary notice for the members of the Rule 23(a)(2) and (a)(3) classes.¹⁸²

The Advisory Committee Note to Rule 23(a) explained that the provision was meant as “a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable.”¹⁸³ Also,

[t]he general test of [former] Equity Rule 38 . . . that the question should be “one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court,” is a common test. . . . The rule adopts the test of [former] Equity Rule 38, but defines what constitutes a “common or general interest.”¹⁸⁴

That the drafters of the 1938 Rules were following the Equity Rule model is clear from the discussions preceding the adoption of Rule 23. Instructive in this respect is also a memorandum on the “History of Class Actions” and a draft of the class action provisions prepared by Professor James William Moore to assist the Advisory Committee on the drafting of Rule 23.¹⁸⁵ Professor Moore’s memorandum opens by observing that “[t]he class action was a procedural device, first used in equity procedure. Its growth was due to certain fundamental principles: 1) a

¹⁸² More specifically, Rule 23(c) provided:

A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivisions (a) notice shall be given only if the court requires it.

Id.

¹⁸³ See FED. R. CIV. P. 23 advisory committee’s note to 1937 amendment (the new Federal Rule of Civil Procedure would take care of the confusion defining what constituted “common and general interest”); see also THE NEW FEDERAL EQUITY RULES 239–40 (8th ed. 1933) (Equity Rule 38 provided: “Representatives of Class. When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.”); U.S. Supreme Court Advisory Committee Rules for Civil Procedure: Proceedings 881 (Nov. 17, 1935) (unpublished archive) (on file with Manuscripts and Archives, Yale University Library, in Charles Edward Clark Papers, Box 94, Folder 4) [hereinafter Charles E. Clark Papers] (At the November 17, 1935 meeting, some of the members of the Advisory Committee on the Federal Rules of Civil Procedure noted confusion on the meaning of the phrase “common or general interest” in the Equity Rule. Professor Sunderland observed that “the confusion is due to the term ‘common or general interest.’ Nobody seems to know what those terms mean.”).

¹⁸⁴ FED. R. CIV. P. 23 advisory committee’s note to 1937 amendment.

¹⁸⁵ See XX U.S. Supreme Court Advisory Committee Rules for Civil Procedure: Preparatory Papers (unpublished archive) (on file with Manuscripts and Archives, Yale University Library, in Charles Edward Clark Papers, Box 106, Folder 38).

person must have his day in court before an adjudication could affect him; and 2) joinder rules should be sufficiently broad to do complete justice in one action.”¹⁸⁶ The memo highlighted the problems generated by the Equity Rule 38 and largely reorganized the jurisprudence that had interpreted the Equity Rule.¹⁸⁷ The proposed text followed the Equity Rule structure, dividing the classes according to the rights the class sought to enforce, and providing a separate section on the “Effect of Judgment,” which would be different in each class setting.¹⁸⁸

The drafters of Rule 23 tried to maintain the open-textured nature and the flexible approach of the Equity Rule, as they believed that approach would allow courts to exercise their discretion when interpreting and applying the rule to the specificities of each case presented.¹⁸⁹ This open-textured approach was also consistent with the approach generally adopted for the Rules. But the drafters also wanted to expand the scope of the Equity Rule¹⁹⁰ and make sure the class action joinder device would work when individuals would not otherwise have access to justice.¹⁹¹

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See Charles E. Clark Papers, *supra* note 183, at 872 (Warren Olney, an attorney and one of the members of the Advisory Committee on the Federal Rules of Civil Procedure, commenting on the optimal text of a provision governing class actions, observed during the meeting of November 17, 1935: “We ought to leave that to the court, and leave it flexible, so that they can apply the reasons—apply a reasonable rule and apply it, perhaps, progressive rules as time goes on in connection with it.”). Also, Prof. Edson Sunderland, another member of the Committee, during the same meeting, observed:

I think there is some advantage in a rule which is not specific. I think that these cases are so important that the court ought to have some scheme of action in dealing with them and dealing with the specific circumstances that come up, and it is very difficult to lay down any definite detailed rules on the subject. If we have some very general and vague rule, such as the Equity rule, the courts are able, in construing that rule, to deal with the cases as they come up as they should be dealt with; in other words, it gives a very free basis of decision, and I am inclined to think, in such a difficult field as this, there ought to be a good deal of flexibility in the decisions of the court.

Id. at 890.

¹⁹⁰ See *id.* at 903 (Charles Clark, at the November 17, 1935 meeting, observed: “I think the Equity rule itself is greatly desirable to avoid . . . because I am afraid that the Equity rule is clearly restrictive.”).

¹⁹¹ See *id.* at 898–99 (Warren Olney, at the November 17, 1935 meeting, observed: “I believe in going as far as we can see our way clear to go in the way of providing a procedure by which these things can be presented to the court, and then leaving it to the court to determine just how far they shall go and just how they are affected. But I think we ought to go as far as we reasonably can in permitting the class proceeding, where there is a controversy that involves a large number of people.”).

The original Rule 23, though, did not prove successful, as the class categories had been described in terms that were “abstract,”¹⁹² “obscure”¹⁹³ and “uncertain.”¹⁹⁴ “Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions,”¹⁹⁵ and the rule did not provide guidance as to “the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class.”¹⁹⁶

To respond to some of the above problems, Rule 23(a) was amended in 1966 to provide as follows:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.¹⁹⁷

The 1966 version of Rule 23(a) has not been altered over the years, but the original 1938 three-provision rule became frayed with subdivisions, technicalities, and redundancies.

The 1966 amendment “restructured [Rule 23] along more functional, policy-based lines”;¹⁹⁸ it intended “to respond to power asymmetries in civil litigation”;¹⁹⁹ it aimed at “facilitat[ing] access to courts for those who lacked the resources or the knowledge that they had possibly been harmed”²⁰⁰ by “attenuat[ing] individual consent and participation so as to produce final and binding outcomes.”²⁰¹ But the rule endorsed a fragmented and mechanical approach²⁰² in the erroneous search for “delusive exactness,”²⁰³ and the more the rule says,

¹⁹² FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment. *See, e.g.*, *Dickinson v. Burnham*, 197 F.2d 973, 975–80 (2d Cir. 1952) (questioning 1938 Rule 23’s rights-based categories and re-characterizing a case as a hybrid class action that the district court had treated as a spurious class action); *see also* ZECHARIAH CHAFEE, JR. *SOME PROBLEMS OF EQUITY* 249–57 (1950) (courts had been struggling with the 1938 version of Rule 23).

¹⁹³ FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ FED. R. CIV. P. 23(a) (1966).

¹⁹⁸ Bone, *supra* note 164, at 1102.

¹⁹⁹ Resnik, *supra* note 3, at 84.

²⁰⁰ *Id.* at 134.

²⁰¹ *Id.* at 141.

²⁰² My proposed text of Rule 23, *infra* Part IV, further articulates my critique to the 1966 and the current version of Rule 23. My proposed text also offers a fluid, elegant model that would better serve the interests of litigation and allow the joinder rule to effectively operate.

²⁰³ Clark, *supra* note 16, at 831. Bone also criticizes the 1966 Rule as he commented on some of the additions to Rule 23 introduced by the amendment “that

the more it seems to leave out, incentivizing the courts to come up with yet additional requirements not in the text of the rule. Ascertainability is just one example of this interpretive trend that further contributes to the frontloading-funnel effect described above.

C. Back to the Present: Frontloading through Ascertainability

Courts have recognized the requirement of *ascertainability* as implicit in the Rule 23(a) list,²⁰⁴ and some courts treat it as a threshold issue that must be satisfied across all class actions categories.²⁰⁵ But other courts treat *ascertainability* as a requirement applicable only to specific types of classes²⁰⁶ rather than as a threshold requirement to be satisfied every time at certification level, and this generates confusion, conflicting results, and sometimes arbitrariness in the application of Rule 23.²⁰⁷

make much less sense from a pragmatic and functional perspective.” Bone, *supra* note 164, at 1103.

²⁰⁴ See *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 659–60 (7th Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–94 (3d Cir. 2012); *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007).

²⁰⁵ See *N.B. v. Hamos*, 26 F. Supp. 3d 756, 763 (N.D. Ill. 2014) (“if the class cannot be identified, then courts cannot reliably assess whether an action on behalf of that class satisfies the express requirements of Rule 23”); see also *Romberio v. Unumprovident Corp.*, 385 F. App’x 423, 431 (6th Cir. 2009); *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 317 F.R.D. 374, 384 (S.D.N.Y. 2016); *Givens v. Van Devere, Inc.*, No. 5:11CV666, at 16 (N.D. Ohio Sept. 17, 2012) (memorandum opinion and order).

²⁰⁶ Courts are divided on whether the requirement applies to classes under Rule 23(b)(1), (b)(2), or (b)(3). Compare *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, at 17 (N.D. Cal. June 13, 2014) (order denying motions for class certification), with *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal. 2015), and *Mullins*, 795 F.3d at 664 (where ascertainability is an element of the “superiority” inquiry in Rule 23(b)(3) actions). While there seems to be growing agreement on the applicability of this requirement to Rule 23(b)(3) classes—see, for example, *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013); *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL, 2016 WL 5371856, at *1–4 (D. Kan. Sept. 26, 2016); *O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)—some courts collapse the ascertainability and the superiority analysis—see *Brodsky v. HumanaDental Ins. Co.*, No. 1:10-cv-03233, at 19 (N.D. Ill. Sept. 29, 2016) (“As a procedural matter, ascertainability is an element of the ‘superiority’ inquiry, at least in this circuit.”). Courts are also split on the applicability of the ascertainability requirement to Rule 23(b)(2) classes. See *Bee, Denning, Inc. v. Capital All. Grp.*, No. 13-cv-02654-BAS(WVG), 2016 WL 3952153, at *4–5 (S.D. Cal. July 21, 2016).

²⁰⁷ David E. Sellinger & Aaron Van Nostrand, *Will Ninth Circuit Class Actions Force Resolution of Ascertainability Circuit Split?*, CONSUMER PRODS. COUNSELOR BLOG (Aug. 31, 2016), <http://www.gtlaw-consumerproductsadvisor.com/2016/08/will-ninth-circuit-class-actions-force-resolution-of-ascertainability-circuit-split/>; Edward Soto & Erica Rutner, *Ascertainability Requirement Leads to Inconsistency and Uncertainty in Class Actions*, AM. BAR. ASS’N (Aug. 10 2016), <http://apps.americanbar.org/litigation/committees/products/articles/summer2016-0816-ascertainability-requirement-leads-to-inconsistency->

In essence, *ascertainability* requires that class members be identifiable through objective criteria²⁰⁸ and, according to some courts, that “the description of the class [be] definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member.”²⁰⁹ This inquiry inevitably probes into the merits of the case at the very outset of the litigation, before full discovery has taken place, and it is easy to predict that it will often turn into an end-of-the-road sign.²¹⁰

Some courts, however, have rejected a heightened ascertainability standard.²¹¹ For instance, in *Mullins v. Direct Digital, LLC*, the Seventh Circuit noted that by requiring plaintiffs to “prove at the certification stage that there is a ‘reliable and administratively feasible’ way to identify all who fall within the class definition,”²¹² the new heightened standard “does not further any interest of Rule 23 that is not already adequately protected by the Rule’s explicit requirements.”²¹³ And the costs of imposing the requirement are high because this requirement “erect[s] a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims.”²¹⁴ Thus, the Seventh Circuit opted to “stick with our settled law,” and the assessment of “the adequacy of the class definition itself,” and not “whether, given an adequate class definition, it would be difficult to identify particular members of the class.”²¹⁵

uncertainty-class-actions.html; Robert W. Sparkes, III, *Grasping for a Hold on “Ascertainability”: The Implicit Requirement for Class Certification and its Evolving Application*, K&L GATES (Aug. 26, 2015), <http://www.klgates.com/grasping-for-a-hold-on-ascertainability-the-implicit-requirement-for-class-certification-and-its-evolving-application-08-26-2015>.

²⁰⁸ See *Mullins*, 795 F.3d at 659–60; In re *Nexium*, 777 F.3d at 19; *Adair*, 764 F.3d at 358; *Young*, 693 F.3d at 539; *Marcus*, 687 F.3d at 593; Union Asset Mgmt. Holding A.G. v. Dell, Inc., 669 F.3d 632, 639–40 (5th Cir. 2012).

²⁰⁹ *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 237 (N.D. Cal. 2014) (internal quotations omitted); see also *Brecher v. Republic of Argentina*, 806 F.3d 22, 24–25 (2d Cir. 2015); *Karhu v. Vital Pharm., Inc.*, 621 Fed. App’x 945, 947 (11th Cir. 2015); *Carrera*, 727 F.3d at 307.

²¹⁰ See, e.g., *Klonoff*, *supra* note 127, at 756 (noting how heightened ascertainability requires “significant (or even complete) merits discovery” for purposes of certification); see also Recent Case, M.D. ex rel. *Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), 126 HARV. L. REV. 1130, 1135 (2013) (plaintiffs must conduct more discovery to provide necessary factual material for court to decide ascertainability).

²¹¹ See *Mullins*, 795 F.3d at 659–72; *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (discussing *Carrera* and the criticism of that standard in *Mullins* and declining to adopt a heightened standard of ascertainability); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1493 (2016).

²¹² *Mullins*, 795 F.3d at 657.

²¹³ *Id.* at 662.

²¹⁴ *Id.*

²¹⁵ *Id.* at 658–59.

Along the same line, other courts have adopted a less strict approach to ascertainability, denying certification only if the class is defined in a way that would require extensive, individualized fact-finding to identify the members.²¹⁶

Still other courts have endorsed a mechanical approach to the ascertainability inquiry, adding layers of exactness and describing the assessment as a two-step inquiry—“(1) the class must be defined with reference to objective criteria; and (2) there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition”²¹⁷—or as a three-step inquiry—“(1) whether the class can be ascertained by reference to objective criteria; (2) whether the class includes members who are not entitled to recovery; and (3) whether the putative named plaintiff can show that he will be able to locate absent class members once a class is certified.”²¹⁸

The addition of ascertainability to the scope of the inquiry contributes to turning the joinder device into a growing monster that lawyers and courts have a hard time taming, as often demonstrated by the extensive and highly technical opinions that collapse and confuse the analysis of the various Rule 23 requirements. Also, the additional and redundant layers of inquiry pull the merits assessment into the outset of the litigation, to a pre-discovery phase, ultimately denying access to justice.

D. Frontloading through the Class(ification)s of Rule 23(b)

The provision governing the types of class actions, Rule 23(b), is also replete with technicalities and redundancies that generate frontloading.

1. Rule 23(b)(1)

Under Rule 23(b)(1)(A), a class may be certified as such 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 incompatible standards of conduct for the party opposing the class”²¹⁹

Essentially, an action falls within this category if individual actions would create a risk of subjecting the defendant to incompatible standards

²¹⁶ See *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 163 (3d Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307–08 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

²¹⁷ *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, 318 F.R.D. 712, 721 (N.D. Ill. 2016) (“A class is not sufficiently definite if it could include a substantial number of people who have no claim under the theory advanced by the named Plaintiff.”).

²¹⁸ *Dudum v. Carter’s Retail, Inc.*, No. 14-cv-00988-HSG, 2016 WL 946008, at *5 (N.D.Cal. Mar. 14, 2016).

²¹⁹ FED. R. CIV. P. 23(b)(1)(A).

of conduct,²²⁰ that would impair the opposing party's ability to pursue a uniform course of conduct.²²¹

Rule 23(b)(1)(A) applies only when there is a risk of inconsistent adjudications or the risk of different and incompatible affirmative relief,²²² so the possibility that some plaintiffs might be successful in their suit against a defendant, while some others might not, is not a ground to invoke Rule 23(b)(1)(A).²²³ Suits that may qualify for a Rule 23(b)(1)(A) treatment are, for example, those to invalidate a bond issue, to declare the rights to riparian owners or landowners, or to abate a common nuisance.²²⁴ And although some courts hold that Rule 23(b)(1)(A) applies only to suits for declaratory or injunctive relief,²²⁵ others believe that the provision should not be so limited.²²⁶

²²⁰ *Id.* The risk of incompatible standards does not occur in most suits for monetary damages, as the possibility that the defendant might be required to pay some plaintiffs but not others does not create a problem of incompatible standards. *See, e.g.,* Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 633 (6th Cir. 2011); Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n, 624 F.3d 185, 197 (5th Cir. 2010).

²²¹ *See Casa Orlando Apartments*, 624 F.3d at 197–98; *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (Rule 23(b)(1)(A) applies “where the party is obliged by law to treat the members of the class alike . . . or where the party must treat all alike as a matter of practical necessity.”). Essentially, Rule 23(b)(1)(A) applies when “individual adjudications would be impossible.” Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 361 (2011).

²²² *See* Emp'rs Ins. of Wausau v. Fed. Deposit Ins. Corp., 112 F.R.D. 52, 54–55 (E.D. Tenn. 1986); *see also* *In re* A.H. Robins Co., 880 F.2d 709, 742 (4th Cir. 1989), *abrogated on other grounds by Amchem*, 521 U.S. 591 (1997) (“The likelihood of conflicting decisions and varying decisions of liability based on the standards of law applied to identical facts by different courts provide the very conditions contemplated in Rule 23(b)(1)(A) for class certification herein.”); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973) (“This danger exists in those situations in which the defendant by reason of the legal relations involved can not as a practical matter pursue two different courses of conduct.”); *Hallaba v. Worldcom Network Servs. Inc.*, 196 F.R.D. 630, 643 (N.D. Okla. 2000) (“Rule 23(b)(1)(A) is satisfied only if inconsistent judgments in separate suits would place the party opposing the class in the position of being unable to comply with one judgment without violating the terms of another judgment.”); *In re* New England Mut. Life Ins. Co. Sales Practices Litig., 183 F.R.D. 33, 41 (D. Mass. 1998); *In re* Copley Pharm., Inc., 158 F.R.D. 485, 490 (D. Wyo. 1994) (“Rule 23(b)(1)(A) is for the benefit of those adverse to the putative class.”); *McBirney v. Autrey*, 106 F.R.D. 240, 245 (N.D. Tex. 1985).

²²³ *Piperfitters Local 636 Ins. Fund*, 654 F.3d at 633; *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305 (6th Cir. 1984); *see also* *Vaughtner v. E. Air Lines, Inc.*, 817 F.2d 685, 690 (11th Cir. 1987); *McDonnell Douglas Corp. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 523 F.2d 1083, 1086 (9th Cir. 1975) (Rule 23(b)(1)(A) may be invoked only where there are “incompatible standards of conduct required of the defendant in fulfilling judgments in separate actions”).

²²⁴ *See* Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment.

²²⁵ *See, e.g., In re* Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987).

²²⁶ *See* *Hans v. Tharaldson*, No. 3:05-cv-115, 2010 WL 1856267, at *10 (D.N.D. May 7, 2010); *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 173 (E.D. Pa. 2009); *Jones v.*

Rule 23(b)(1)(B), on the other hand, provides that an action may be prosecuted as a class if:

prosecuting separate actions by or against individual class members would create a risk of . . . 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 impede their ability to protect their interests.²²⁷

Thus, an action falls within the Rule 23(b)(1)(B) category when, if conducted by individual members of the class, it “would have the practical if not technical effect of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests.”²²⁸ This might happen

“in suits brought to reorganize fraternal-benefit societies,” “actions by shareholders to declare a dividend or otherwise to ‘fix [their] rights,’” “actions charging ‘a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class’ of beneficiaries, requiring an accounting or similar procedure ‘to restore the subject of the trust,’” or actions involving “the presence of property which call[ed] for distribution or management,” like “limited fund class action, aggregating ‘claims . . . made by numerous persons against a fund insufficient to satisfy all claims.’”²²⁹

Courts, though, are increasingly narrowing the scope and applicability of Rule 23(b)(1)(B),²³⁰ and there is the risk that this type will be increasingly limited to limit-fund classes only.²³¹

NovaStar Fin., Inc., 257 F.R.D. 181, 193–94 (W.D. Mo. 2009); *In re Celera Corp. S’holder Litig.*, No. 6304-VCP, 2012 WL 1020471, at *18 (Del. Ch. Mar. 23, 2012), *aff’d in part and rev’d in part*, 59 A.3d 418 (Del.); *Chritchfield Physical Therapy v. Taranto Grp., Inc.*, 263 P.3d 767, 782–83 (Kan. 2011); *Turner v. Bernstein*, 768 A.2d 24, 33–34 (Del. Ch. 2000).

²²⁷ FED. R. CIV. P. 23(b)(1)(B).

²²⁸ Kaplan, *supra* note 138, at 388.

²²⁹ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999).

²³⁰ Following *Ortiz*, several courts have refused to certify Rule 23(b)(1)(B) classes. *See, e.g., In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 189 (5th Cir. 2010) (holding that *Ortiz* “requires decertification of the mandatory class because the settlement fails to provide a procedure for distribution of the settlement fund that treats class claimants equitably amongst themselves”); *In re Teletronics Pacing Sys., Inc.*, 221 F.3d 870, 874 (6th Cir. 2000) (rejecting certification where, as “in *Ortiz*, the funds available are limited only by agreement of the parties, not because the funds do not exist as a factual matter”); *Doe v. Karadzic*, 192 F.R.D. 133, 139, 144 (S.D.N.Y. 2000) (concluding that “mandatory class treatment under a limited fund rationale must be confined to a narrow category of cases” and decertifying a (b)(1)(B) class because individual defendant’s assets could not be considered a “limited fund”).

²³¹ The text of Rule 23(b)(1)(B), however, does not limit the applicability of the provision to limited-funds classes. *See In re Teletronics Pacing Sys., Inc.*, 186 F.R.D. 459, 473 (S.D. Ohio 1999); *White v. NFL*, 822 F. Supp. 1389, 1411 (D. Minn. 1993).

When Rule 23(b)(1)(B) was introduced in 1966, the Advisory Committee explained that the provision contemplated “various situations [where] an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members.”²³² A “case when claims are made by numerous persons against a fund insufficient to satisfy all claims”²³³ would “plainly”²³⁴ fall within this class category, but there is no indication in the text of the rule or the Advisory Committee Notes that Rule 23(b)(1)(B) was intended to apply to limited-fund classes only.

Thus, the fragmented and mechanical text of the rule and its judicial interpretation has encouraged, and will continue to encourage, battles over the technicalities of this provision, thus further contributing to the funnel screening of the classes and to frontloading.

2. Rule 23(b)(2)

Rule 23(b)(2) provides that an action may proceed as a class when “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”²³⁵ The Advisory Committee explained that

[t]his subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.²³⁶

Thus, an action would not be certified as a Rule 23(b)(2) class if substantial differences exist between proposed class members and the injunction needs to be expressed at a high level of abstraction or generalization to apply to the class as a whole.²³⁷ In other words, the relief sought needs to be indivisible in nature,²³⁸ so that the injunction or declaration obtained will provide relief to all of the people who are the would-be class members.

²³² Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ FED. R. CIV. P. 23(b)(2).

²³⁶ FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

²³⁷ See *Vallario v. Vandehey*, 554 F.3d 1259, 1267–68 (10th Cir. 2009); *Shook v. Bd. of Cty. Comm’rs*, 543 F.3d 597, 604 (10th Cir. 2008); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344–45 (11th Cir. 2006). As recently explained by the Supreme Court, “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (emphasis in original).

²³⁸ See *Wal-Mart*, 564 U.S. at 360.

The Advisory Committee indicated that civil rights suits might be eligible for Rule 23(b)(2) treatment,²³⁹ but that (b)(2) would not be so limited.²⁴⁰ The Committee did not exclude the possibility of a Rule 23(b)(2) class seeking monetary damages but indicated that the relief sought by a (b)(2) class should not “relate[] exclusively or predominantly to money damages.”²⁴¹ The courts split on this precise issue, and the Supreme Court in *Wal-Mart v. Duke* clarified that monetary relief is available in a (b)(2) class only if incidental to the injunctive or declaratory relief sought.²⁴² But what exactly does that mean? This unanswered question has generated yet more litigation at the outset and, thus, more frontloading.²⁴³

Although certification under Rule 23(b)(2) doesn’t require satisfaction of the predominance or superiority requirements, courts now require that class claims be cohesive.²⁴⁴ Essentially, for the purpose of cohesiveness, even if class members do not need to have suffered the exact same injury in the exact same way, their legal injuries must be similar enough to be capable of remedy through a single “indivisible” injunction.²⁴⁵ Thus, the cohesiveness requirement mirrors the commonality requirement under Rule 23(a)(2)²⁴⁶ and, as will be explained below, it replicates the predominance analysis under Rule

²³⁹ Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment.

²⁴⁰ *Id.* As examples of possible additional (b)(2) classes, the Advisory Committee mentioned, among others, actions filed by class of purchasers or retailers against a seller for having applied to the class prices higher than the prices applied to other purchasers where this conduct was prohibited by law. *Id.*

²⁴¹ *Id.*

²⁴² *Wal-Mart*, U.S. at 366–67.

²⁴³ *See, e.g., Mary Kay Kane, The Supreme Court’s Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1036–38 (2012) (“The first question is whether an action ever may be certified under Rule 23(b)(2) for injunctive or declaratory relief when monetary relief also is being sought. . . . [S]ome lower courts in cases presenting claims for both injunctive and monetary relief have continued to evaluate whether the monetary relief may be deemed incidental and the action certified under Rule 23(b)(2). . . . Other courts have applied *Wal-Mart* more rigidly, holding that it is appropriate to certify only the issues relating to liability and classwide declaratory and injunctive relief under Rule 23(b)(2); all other claims must satisfy Rule 23(b)(3). And yet other courts have found that *Wal-Mart* also applies to certification under Rule 23(b)(1) and that monetary claims under that subdivision are also inappropriate unless they are incidental.”).

²⁴⁴ *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005) (“A suit could become unmanageable and little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently.” (internal quotations omitted)); *see also Gates v. Rohm & Hass Co.*, 655 F.3d 255, 269–70 (3d Cir. 2011); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143–46 (3d Cir. 1998); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998).

²⁴⁵ *Houser v. Pritzker*, 28 F. Supp. 3d 222, 250 (S.D.N.Y. 2014).

²⁴⁶ FED. R. CIV. P. 23(a)(2); *see Laumann v. Nat’l Hockey League*, 105 F. Supp. 3d 384, 395 (S.D.N.Y. 2015).

23(b)(3), thus essentially conflating the Rule 23(b)(2) and Rule 23(b)(3) categories.²⁴⁷

3. Rule 23(b)(3)

Rule 23(b)(3) allows the action to proceed as a class if “the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy.”²⁴⁸

In *Amchem Products, Inc. v. Windsor*, the Supreme Court explained that “the predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”²⁴⁹ The Court has not articulated any specific standard, and its earlier decisions demonstrate the Court’s own confusion as to what predominance really means.²⁵⁰

In the absence of a standard, the lower courts have come up with different methods to measure predominance.²⁵¹ The different methods share some commonalities though. They show the redundancy of the predominance inquiry with respect to Rule 23(a)(2) and Rule 23(b)(2) analysis,²⁵² and they demand that the courts make an accurate forecast as

²⁴⁷ See Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 428 (2014).

²⁴⁸ FED. R. CIV. P. 23(b)(3) (emphasis added).

²⁴⁹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

²⁵⁰ For instance, Justices Ginsburg and Breyer, joined by Justices Sotomayor and Kagan, in *Comcast Corp. v. Behrend*, suggest that predominance is about judicial economy. 133 S. Ct. 1426, 1437 (2013) (“[W]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate.”).

²⁵¹ See *Madison v. Chalmette Refining, L.L.C.*, 637 F.3d 551, 555–57 (5th Cir. 2011) (district court must identify the substantive issues and determine extent to which they can be tried on a class-wide basis); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010) (“At the core of Rule 23(b)(3)’s predominance requirement is the issue of whether the defendant’s liability to all plaintiffs may be established with common evidence.”); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311–12 (3d Cir. 2008) (district court must look to the elements of the claims or defenses to know if they allow for common proof or require individualized proof); see also Klonoff, *supra* note 127, at 778 (“The Supreme Court’s opinion [in *Wal-Mart v. Dukes*] has conflated commonality and predominance. This new interpretation of commonality should not significantly impact (b)(3) classes, which require both commonality and predominance. The *Dukes* decision, however, could have a significant impact on (b)(1) and (b)(2) classes, effectively imposing a predominance requirement where the drafters of Rule 23 chose not to include one.”).

²⁵² The requirement of predominance under Rule 23(b)(3) is not satisfied if “individual questions . . . overwhelm questions common to the class.” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013). The Court explained “individual question” in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016):

An individual question is one where “members of a proposed class will need to present evidence that varies from member to member,” while a common

to the actual likelihood that claimed individual issues will require individualized determination at trial.²⁵³ This again pushes the analysis of the merits up front, as courts are required to consider and rule upon factual issues that implicate the merits before discovery has taken place, and before the representative members have had an actual opportunity to fully understand the contours of their case.

To be certified as a Rule 23(b)(3) class, the action must also be “superior to other available methods for fairly and efficiently adjudicating the controversy.”²⁵⁴ Here the choice must be between different methods of adjudications, not between class treatment and non-adjudication, unless a non-adjudicative resolution of the case would be superior.²⁵⁵

The Advisory Committee’s Note explains that “[s]ubdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”²⁵⁶

The requirements of predominance and superiority were intended to make the joinder device achieve the above results,²⁵⁷ and the rule offers a non-exhaustive list of the “matters pertinent” to these findings.²⁵⁸

question is one where “the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.”

Id. at 1045 (quoting RUBENSTEIN, *supra* note 138, § 4:50, at 196–97). Also, showing the interdependence overlap between the predominance and the superiority inquiry, the Court noted that “predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,” *Anchem*, 521 U.S. at 623, and “goes to the efficiency of a class action as an alternative to individual suits,” *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014).

²⁵³ See *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014).

²⁵⁴ FED. R. CIV. P. 23(b)(3).

²⁵⁵ See *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 751–52 (7th Cir. 2011).

²⁵⁶ Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment.

²⁵⁷ *Id.* The Advisory Committee offered some examples of when efficiency and fairness would be achieved. For instance,

a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

Id.

²⁵⁸ FED. R. CIV. P. 23(b)(3) (“(A) the class members’ interests in individually controlling the prosecution of defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action”). The Advisory Committee explained that, when considering the interests of individual class members in controlling their own litigations and carrying them on as they saw fit,

One of the factors for the courts to consider when deciding whether the class is *superior* to other available alternatives is the “manageability,” that is, “practical problems that may render the class action format inappropriate for a particular suit.”²⁵⁹ For instance, a class would not be a superior method of adjudication if there were a multitude of individualized issues requiring “complicated mini-litigations within the class action itself,”²⁶⁰ as here due process would require that defendants be given a fair opportunity to address them.²⁶¹ Another factor to consider when determining *superiority* would be the amount of individual damages at stake, while plaintiffs in high damage cases might prefer individual control, plaintiffs with small claims would likely have little incentive to bring separate actions.²⁶²

E. Frontloading at the Certification Stage: Recapping on Rule 23(a) & (b)

So described, it seems that the requirements of commonality, typicality, and adequacy of representation under Rule 23(a)(2), and predominance and superiority under Rule 23(b)(3), significantly overlap.²⁶³ As the Court noted in *Amchem*, the requirement of commonality is “subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class ‘predominate over’ other questions.”²⁶⁴ And these redundancies come as

the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. . . . Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment. When assessing the above factors courts engage in frontloading that might translate into a denial of justice.

²⁵⁹ Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974).

²⁶⁰ Danvers Motor Co. v. Ford Motor Co., 543 F.3d 141, 149 (3d Cir. 2008).

²⁶¹ See Mullins v. Direct Dig., LLC, 795 F.3d 654, 669–70 (7th Cir. 2015).

²⁶² See *id.* at 665; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616–17 (1997).

²⁶³ See *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (commonality, typicality, and adequacy of representation “tend to merge”); see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5 (2011); *Amchem*, 521 U.S. at 626 n.20.

²⁶⁴ *Amchem*, 521 U.S. at 609. The predominance and superiority requirements of Rule 23(b)(3) are “far more demanding” than Rule 23(a)(2)’s commonality requirement. *Id.* at 623–24.

hyper-technical formalities that the party seeking certification must satisfy at the very outset, before full discovery has taken place.

Meeting this very high threshold and burden of proof has increasingly prevented the functioning of the class action device and the accomplishment of the original goals of this joinder rule.

And as if the rule-based requirements were not enough, courts have read the additional requirements of *ascertainability* and *cohesiveness* into the text of the rule²⁶⁵ and have come up with different interpretations and conflicting approaches and results.²⁶⁶

The above list of requirements under Rule 23(a) and (b) is extensive and seems to make it extremely hard for the party seeking certification, the one with the burden of establishing their existence under a preponderance of the evidence, to actually succeed.

The reason behind the list is to “ensure[] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate.”²⁶⁷ But the challenge is to read and apply these requirements to ensure that they operate as means to the fair and efficient use of the class action joinder device, rather than as an impediment to it.

Trial courts have broad discretion when deciding whether the requirements have been satisfied and, thus, whether the action may proceed as a class.²⁶⁸ But certifying a class is a challenging task given the overlaps, the redundancies, the level of technicalities and the formalism, all of which end up suffocating the class action device and the substantive rights that device was intended to help enforce.

As stated and repeated above, when a motion for certification is filed and the trial court is requested to assess the existence of the relevant requirements, discovery has not yet taken place. And even if “[t]he class action device was designed as ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,’”²⁶⁹ seemingly requiring an analysis more demanding than the one required under the other joinder rules and, more generally, at the pleading stage, it is important to remember that the class action “exception” was indeed intended to correct the limits of the ordinary rules of joinder, and that it was intended to promote access to justice when the other joinder rules would otherwise fail. Thus, it is imperative

²⁶⁵ See, e.g., *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–93 (3d Cir. 2012).

²⁶⁶ See, e.g., *Mullenix*, *supra* note 247, at 428–29.

²⁶⁷ *Wal-Mart*, 564 U.S. at 349.

²⁶⁸ See, e.g., *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 179 (3d Cir. 2014). “At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” FED. R. CIV. P. 23(c)(1)(A). And the order that certifies a class “must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).” *Id.* R. 23(c)(1)(B).

²⁶⁹ *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982).

that this exceptional joinder device is not deprived of its very important function within our system of justice.

The trend, though, is to limit the use of class actions by making it harder for the party seeking certification to meet its burden, and by frontloading the merits analysis to that very early stage of litigation. This happens notwithstanding the Court has long held that courts may not base their certification orders on their views of the ultimate merits.²⁷⁰

True, the requirements under Rule 23(a) and (b) clearly demand an analysis of the merits of the case. But the Court clarified that the relevant question at certification is whether the requirements for certification are met, not whether the plaintiff class, were it certified, would prevail.²⁷¹

And, more recently, the Court has clarified that “the office of a Rule 23(b) (3) certification ruling is not to adjudicate the case; rather, it is to select the ‘metho[d]’ best suited to adjudication of the controversy ‘fairly and efficiently.’”²⁷²

Essentially, courts are not barred from examining merits-related issues when determining whether the requirements for class certification have been met. In fact, probing into the merits is inevitable. But the trial court should limit itself to consider what the issues will be and whether those issues will be susceptible of common proof or will rather require individualized proof.²⁷³ In other words, the court is required to make a procedural, not a merits determination, and the court’s resolution of the factual dispute should be intended and designed to determine only whether the case may proceed as a class or should rather proceed through individual suits.²⁷⁴ The district court should limit itself to a tentative consideration of the potential claims and commonalities since the claim will be fully developed only after discovery. When engaging in this exercise, the court should be guided by the principles described by the Court in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*,²⁷⁵ and the mantra should be whether class action is or is not the best method for adjudicating the case.

The above analysis shows the procedural complexities and costs of certification, and those hurdles become clearer if one considers that certification analysis is not merely a pleading analysis.²⁷⁶ The parties and

²⁷⁰ See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”). But *Wal-Mart Stores, Inc. v. Dukes* makes it clear that analysis of the merits of at certification level is unavoidable. 564 U.S. at 351 n.6.

²⁷¹ See *Eisen*, 417 U.S. at 177–78.

²⁷² *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

²⁷³ See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Wal-Mart*, 564 U.S. at 350, 351 n.6; *Falcon*, 457 U.S. at 160.

²⁷⁴ See *Bell v. Ascendant Sols., Inc.*, 422 F.3d 307, 312 (5th Cir. 2005).

²⁷⁵ 133 S. Ct. 1184 (2013).

²⁷⁶ *Wal-Mart*, 564 U.S. at 350.

the court will engage in “rigorous analysis,” offer and consider “significant proof,” and assess “actual, not presumed, conformance with Rule 23,”²⁷⁷ which the parties must “be prepared to prove . . . in fact.”²⁷⁸

Rule 23, though, is a joinder rule, and yet, differently from the other joinder rules,²⁷⁹ it has been interpreted to require an analysis of the merits to be performed well beyond the allegations in the pleadings, through “significant proof,” thus frontloading the merits analysis to the early stage of litigation.

So why is that? Is it because Rule 23, differently from the other rules, has the potential of generating huge costs and inefficiencies? If that is so, frontloading the merits analysis cannot be the answer, as the formalism and hyper-technical approach at the outset of the litigation has generated and continues to generate high costs and inefficiencies, and it is ultimately thwarting the functioning of the Rule 23 joinder device.

Like Robert Bone, I believe that a theory of class action supporting the text of the rule is missing,²⁸⁰ and that this is partly responsible for the inefficiencies and malfunctioning of the rule. However, differently from Robert Bone—who in his work indicated that his purpose was “not to develop a theory of the class action,”²⁸¹ but rather “focus . . . on the need for such a theory and . . . sketch a general approach to formulating one.”²⁸² I propose a theory of class action that gives primacy to the claim, as the essential litigation unit,²⁸³ and returns the class action rule to its essential joinder purpose. I do so as I believe that any study and reflection on the rule should start from that theory, as a result of a very precise vision.

Rather than as a preclusion mechanism,²⁸⁴ my theory of class actions treats Rule 23 as a joinder device intended to promote access to justice when that access would be otherwise denied or significantly impaired if the claims were to be resolved through individual lawsuits. Thus, the fundamental questions underlying my theory, and those that should drive any amendment, interpretation, and application of Rule 23, are “what are the benefits of aggregation?” and “how are we going to achieve those benefits in a way that is fair and efficient?”²⁸⁵

²⁷⁷ *Id.* at 351, 353 (emphasis omitted).

²⁷⁸ *Id.* at 350.

²⁷⁹ *See, e.g.*, FED. R. CIV. P. 19, 20, 22, 24.

²⁸⁰ *See* Bone, *supra* note 164, at 1098–99.

²⁸¹ *Id.* at 1099.

²⁸² *Id.*

²⁸³ For further elaboration on this theme, see Grossi, *supra* note 8.

²⁸⁴ *See* Bone, *supra* note 164, at 1103, where he notes that the 1966 version of Rule 23 “was designed to be a classwide preclusion device rather than a limited exception to mandatory joinder.”

²⁸⁵ In indicating that he would not develop a theory of class actions in his article, Robert Bone suggested that such a theory should be based on “a coherent account of the functions the class action should perform, a clearer understanding of how representative litigation can be reconciled with each party’s right to a personal day in

It is true that the 1966 version of the rule treated class action as a preclusion device,²⁸⁶ but that was not the novelty of the 1966 rule, as the 1938 draft and discussions had been animated by similar concerns, and this approach and these concerns might have been responsible for the drafting of the 1938 Rule and its perceived shortcomings.

The drafters of the 1938 rule recognized that class actions had to permit joinder where traditional joinder rules would otherwise fail to provide efficient and fair administration of justice, and they thought that a flexible, non-mechanical rule would allow judges the necessary flexibility and discretion to make the joinder rule successfully operate and address the specificities of each case. Also, *res judicata* is only one of the efficiency and fairness considerations that should animate the theory of Rule 23.

True, differently from the other original Rules, the original version of Rule 23 is hardly a model to be followed.²⁸⁷ But that may be because the drafters were locked into the doctrinal categories that had been developed under Equity Rule 38. Also, they were operating under a relatively inflexible approach to due process and to the binding nature of judgments. A reform such as the 1966 reform, though, made the approach to class actions more formal and technical, and thus it went in the wrong direction. A better approach might have been to simplify the class action joinder device by eliminating the baggage of doctrine that informed the original Rule 23. On the other hand, the original intent of the drafters to produce a rule that would allow joinder and access to justice when these fundamental values would otherwise be denied should still be followed. And so we should approach Rule 23 with this pragmatic, functional vision conducive to the creation and development of substantive law. Indeed, the same vision animated the drafters of the 1938 Rules, and the Rules have proven successful and durable over the years.

court, and a sophisticated grasp of the strategic dynamics of class action litigation.” *Id.* at 1099. I believe that his formula might again invite a mechanical approach, as the considerations he believes should drive the analysis appear more like corollaries to the overarching principle describing class actions as a joinder device intended to promote access to justice when such access would be impaired or significantly impeded if pursued through individual actions. I believe that the more fundamental questions that should form the basis of a class action theory and drive the analysis are “what are the benefits of aggregation?” and “how are we going to achieve that in a way that is fair and efficient?” Answering these questions will naturally take care of the corollary considerations that Robert Bone treated as the driving factors.

²⁸⁶ See Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment.

²⁸⁷ As Robert Bone points out, the 1938 Committee most likely did not put enough efforts into the drafting of the class action rule as class actions were relatively rare at that time, they were not central to the procedural reform that they had embarked on, and designing a class action rule was significantly more complex than reforming the other rules. See Bone, *supra* note 164, at 1101.

IV. A NEW RULE 23

Before proposing a text of Rule 23, it is important to zoom in on the current text and its proposed amendments currently pending before the Advisory Committee to see what in the text is superfluous, suspicious, or wrong.

The text and the proposed amendments (*italics*) are provided below, together with a commentary that follows the sections or subsections to zero in on the problems.

A. *Rule 23(a)*

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a) introduces a mechanical approach to the discipline of class actions from the very opening. As discussed above, commonality, typicality, and adequacy of representations are redundant inquiries into a single, fundamental question: do the members of the proposed class, which would include the named plaintiffs, share a common question of law or fact capable of driving the resolution of the litigation? If they do, then there is commonality among them, including the representative party who, as *representative* of the class with the same question, will have basic knowledge of the case and a sufficient incentive to participate in the action and monitor the proceedings. Thus, Rule 23(a) could be re-written as follows:

When the plaintiffs or defendants are too numerous to be joined under the preceding rules, and the plaintiffs or defendants to be joined share a common question of law or fact capable of driving the resolution of the litigation, the plaintiffs or defendants may seek certification under Rule 23(b).

B. *Rule 23(b)*

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) 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 impede their ability to protect their interests;

(2) 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; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Rule 23(b) expands the mechanical approach of Rule 23(a) by endorsing a yet more fragmented approach to class classification. The rule designs three different types²⁸⁸ of classes, two of which are so-called “mandatory”—Rule 23(b)(1)(A), Rule 23(b)(1)(B), Rule 23(b)(2)—and one that requires notice and opt-out rights for the members of the class—Rule 23(b)(3). The proposed amendment, if ratified, will introduce yet another class under Rule 23(e), a “class proposed to be certified for purposes of settlement”—and one wonders whether such a rigid classification of the types will at some point require adding further types, as the current ones might very likely become unable to capture the evolving societal and litigation needs.

Zooming in on Rule 23(b) helps us see what the different classes have in common. All of them, again, present common questions of law or fact capable of driving the resolution of the litigation. Furthermore, in all the current three (or four) classes, the defendant has acted or refused to act on grounds that apply generally to the class, and when that happens the common questions of law or fact predominate over the individual issues. This, together with the impracticability or impossibility to pursue individual suits, would suggest class treatment.

In the Advisory Committee Note to the 1966 amendment the amended rule is presented as one that

²⁸⁸ And there might be yet another classification, if one considers the issue classes under Rule 23(c)(4).

describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.²⁸⁹

However, even if the original, 1938 version of Rule 23 had failed to achieve its fair and efficient aggregation goals, the drafters clearly had in mind that the rule should be written as a flexible principle, as it would be up to the courts, on a case-by-case basis, to

determine what the effect of [the judgments rendered in a class action proceedings] is, and . . . apply the fundamental principle that wherever a man has been genuinely represented in a piece of litigation, and there has been something or some party to it that can be said to have genuinely represented him, and there have been a determination by the court of the real issues that are involved, both of law and fact, that judgment is going to be binding on him. . . . [T]hey are going in that direction, and that is the direction they ought to go.²⁹⁰

Given their aggregation complexities, class actions especially demanded courts' flexibility to deal with the specific circumstances of each case.²⁹¹

The concern that generated the original and subsequent classifications were for the non-members of the class being bound by a judgment to which they had not participated. However, the rigid classifications have generated layers of technicalities and formalism that have ended up preventing access to justice to the putative class members.

The balance between present and absent class members has thus tipped in favor of the absent members, and it has emptied the class action device.

The concerns that the fragmentation and the rigid classification has tried to address could be adequately taken care of by providing notice reasonable under the circumstances and an opportunity to opt out where appropriate, as well as by engaging in a realistic appraisal of the claim of the representative members to identify the common questions capable of driving the resolution of the litigation.

The sophisticated modern legal analysis and technology should tremendously facilitate the assessment and notice endeavors, and permit a return to a more principle-based, more neutral and enduring formula. Hence, I suggest the elimination of the class types, and of Rule 23(b) altogether, in favor of a formula that would draw from my theory of class

²⁸⁹ Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment.

²⁹⁰ Charles E. Clark Papers, *supra* note 183, at 877 (statement rendered by Warren Olney at the November 17, 1935 meeting of the Advisory Committee).

²⁹¹ *See id.* at 890. (Professor Sunderland's statement at the November 17, 1935 meeting of the Advisory Committee).

action as a joinder device, to be extrapolated from my proposed definitional²⁹² and certification provisions.²⁹³

C. *Rule 23(c)*

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

The need to specify that certification should take place “[a]t an early practicable time after a person sues or is sued as a class representative” is unnecessary.

This formula replaced the 1966 formula of “[a]s soon as practicable after the commencement of an action brought as a class action,”²⁹⁴ with the intent to eliminate any attempt to set a fixed timeframe, and recognizing that the parties might need to conduct limited, pre-certification discovery to identify the issues that would be susceptible of common proof.²⁹⁵

The certification decision naturally belongs to the case management discretionary decisions of the court, to be applied having in mind the specificities of the case.

To a certain extent, a class certification order resembles a jurisdictional order as it allows the action to proceed in federal court as a class. Hence, the federal court will naturally make this determination as soon as possible, consistently with the ideas and principles underlying Rule 1—requiring an interpretation and application of the Rules “by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding”²⁹⁶—and with the mechanics of Rule 12(b). Thus, the specific indication of a time-set for class certification is unnecessary, and it contributes to the code-looking style of Rule 23, which invites a mechanical approach to its interpretation and application, incentivizing frontloading and ultimately frustrating the overarching and foundational principles of Rule 1.

²⁹² See *infra* Part V.

²⁹³ See *infra* Part V.

²⁹⁴ FED. R. CIV. P. 23(c)(1) (1966).

²⁹⁵ See FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment; see also *Madison v. Chalmette Refining, L.L.C.*, 637 F.3d 551, 553 (5th Cir. 2011); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009); *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309 (11th Cir. 2008); *Heerwagen v. Clear Channel Commc’ns*, 435 F.3d 219, 233 (2d Cir. 2006).

²⁹⁶ FED. R. CIV. P. 1.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

It seems also quite reasonable to expect that an order certifying the class would identify class claims, issues, or defenses—especially given that the order is now immediately appealable. Hence, I would eliminate this provision. And I would eliminate the specification that the order granting or denying class certification may be amended before final judgment, as the court’s power to alter or amend its orders is already governed by Rule 60 on “Relief from a Judgment or Order.”²⁹⁷

The selection of a class counsel would also be a necessary condition to the certification of the class, as a class represented by a counsel in conflict of interests with the members of the class or lacking the necessary knowledge or tools to defend the class would be inappropriate. But is not that a consideration that the court should make in individual actions too? In any event, I would assume that the defendant could raise this concern if there is any need to, and if so, that that would be part of the pre-certification confrontation between the parties which the certification order, subject to appeal, would have to address. And if the pre-certification confrontation between the parties or the other federal rules would provide insufficient due process safeguards, the Advisory Committee Note, written in the style of a restatement, could provide the relevant guidance and remind the courts of this important counsel-adequacy assessment in the certification process. When I suggested that, I sometimes received the comment that Advisory Committee Notes are not mandatory. The Restatements are not mandatory either. But they are an authoritative and widely followed legal source. In this case, the authority of the Advisory Committee Note would be supported by the experience and practice through which the former rule—and now the note—has been tested. And to the observation that it might be hard to write proper guidance in the text of an Advisory Committee Note, my response is that if writing such note is hard, then perhaps there is no clarity as to the meaning and contours of the Rule.

Thus, my proposed text, combining the current Rule 23(b) and part of the current Rule 23(c), would be the following:

(b) Certification. The parties seeking certification must show the existence of a common question of law or fact capable of driving the resolution of the litigation and the counsel’s ability to fairly and adequately represent the interests of the class. A court’s order granting or denying certification is immediately appealable.

²⁹⁷ *Id.* R. 60.

D. *Rule 23(c)(2)*

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—*or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)*—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. *The notice may be by United States mail, electronic means, or other appropriate means.*

The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Under considerations similar to the ones above, my proposed text on notice and opt-out would be the following:

Notice. *The court shall direct the best notice that is practicable under the circumstances.*

Right to opt-out. *The court will grant class members the right to opt-out unless the exercise of such right is incompatible with the nature and purpose of the certified class.*

The modern technology makes notice significantly easier, cheaper, and faster than it was in 30s, 60s, or even a decade ago. Hence, to make sure that the absent members are informed of the pending action and, where applicable, can make an informed opt-out decision, my proposed text starts from a presumption of notice to all members, to be effectuated in the manners and methods suitable under the circumstances, and having in mind the overarching principles of Rule 1.

E. *Rule 23(c)(3)*

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

- (A) for any class certified under Rule 23(b)(1) or (b)(2),

include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

I don't think the rule should specify the content of the judgment. Where necessary, again, I would put any relevant direction in the Advisory Committee Note, written in the form of a restatement, to provide the necessary guidance to judges and lawyers.

F. Rule 23(c)(4)

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

This would be an additional type of class and a fragmentation unnecessary for the reasons offered above. The text of this provision and its position within the rule, together with the jurisprudence interpreting it, has produced conflicting results.²⁹⁸ “Some courts refuse to certify” these classes,²⁹⁹ others require satisfaction of the (b)(3) predominance requirement as a condition certifying such classes,³⁰⁰ others require that the trial of common issues “resolve any individual plaintiff’s claims.”³⁰¹ As a consequence, this provision and class(ification) is not often used.³⁰²

G. Rule 23(c)(5), (d)(1)

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

²⁹⁸ See, e.g., Klonoff, *supra* note 127, at 807–815.

²⁹⁹ *Id.* at 808.

³⁰⁰ *Id.* at 807–08.

³⁰¹ *In re Genetically Modified Rice Litig.*, 251 F.R.D. 392, 400 (E.D. Mo. 2008).

³⁰² See Edward F. Sherman, “Abandoned Claims” in *Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 497 n.90 (2011) (citing other commentary).

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

Again, the above provisions unnecessarily spell and dissect discretionary, case management considerations. They describe the natural management decisions that a court would take in a class action proceeding and, as such, should more appropriately be made part of the Advisory Committee Note written, as indicated above, in the form of a restatement, to provide the necessary guidance to judges and lawyers.

H. Rule 23(e)

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) *the proposal was negotiated at arm's length;*

(C) *the relief provided for the class is adequate, taking into account:*

(i) *the costs, risks, and delay of trial and appeal;*

(ii) *the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;*

(iii) *the terms of any proposed award of attorney's fees, including timing of payment; and*

(iv) *any agreement required to be identified under Rule 23(e)(3); and*

(D) *class members are treated equitably relative to each other.*

(3) *Identification of Side Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision. *The objection must state whether it applies only to the objector, to a specified subset of the class, or to the entire class, and also state with specificity the grounds for the objection.*

(B) *Court Approval Required for Payment to an Objector or Objector's Counsel.* *Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:*

(i) *foregoing or withdrawing an objection; or*

(ii) *foregoing, dismissing, or abandoning an appeal from a judgment approving the proposal.*

(C) *Procedure for Approval after an Appeal.* *In approval under Rule 23(e)(5)(B) has not been obtained after an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.*

The above provisions also exacerbate the mechanical approach with details that are unnecessary, and yet leave out further details. The Advisory Committee's last proposed additions are particularly troublesome, as they add unnecessary details making it easy to predict the generation of further litigation. My proposed text would read as follows:

(e) Settlement and Voluntary Dismissal. Any proposed settlement or voluntary dismissal must receive court's approval prior notice to the members of the class.

This provision eliminates the word “compromise” as it would be part of the negotiation process that would eventually lead to settlement or voluntary dismissal, which is what the court would have to approve after making sure that the class members have been informed through the methods and manners appropriate under the circumstances.

I. Rule 23(f)

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with the duty performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

My proposed Rule 23(b) deals with appeals of certification orders and, in line with the elimination of rigid class classifications, does not suggest a different treatment of the certification order depending on the different type of class in which the order would be rendered.

J. Rule 23(g)

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

- (i) the work counsel has done in identifying or investigating potential claims in the action;*
- (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;*
- (iii) counsel's knowledge of the applicable law; and*
- (iv) the resources that counsel will commit to representing the class;*

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable

costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g) (1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

The above considerations should be made part of the Advisory Committee Note as, again, they deal with case management considerations and not directly with the joinder device that the rule is intended to design.

K. *Rule 23(h)*

(h) *Attorney's Fees and Nontaxable Costs.* In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

The above provisions are also unnecessary, as they articulate a power that the court would already possess under the law or per the parties' stipulation which, in this case, would have to be approved under my proposed Rule 23(b).

In brief, my proposed Rule 23 would read as follows:

- (a) *When the plaintiffs or defendants are too numerous to be joined under the preceding rules, and the plaintiffs or defendants to be joined share a common question of law or fact capable of driving the resolution of the litigation, the plaintiffs or defendants may seek certification under Rule 23(b).*
- (b) *Certification. The parties seeking certification must show the existence of a common question of law or fact capable of driving the resolution of the litigation and the counsel's ability to fairly and adequately represent the interests of the class. A court's order granting or denying certification is immediately appealable.*
- (c) *Notice. The court shall direct the best notice that is practicable under the circumstances.*
- (d) *Right to Opt-Out. The court will grant class members the right to opt-out unless the exercise of such right is incompatible with the nature and purpose of the certified class.*
- (e) *Settlement and Voluntary Dismissal. Any proposed settlement or voluntary dismissal must receive court's approval prior notice to the members of the class.*

I immensely appreciate the hard work of the Advisory Committee, the dedication and passion with which they have performed their role. And I am also convinced, differently from other voices,³⁰³ that the members of the Committee are not following any particular political agenda. But I do believe that they have been too timid in approaching the reform of Rule. And, somehow, to some extent, they are unconscionably replicating the same mistake the drafters of the 1938 Rules made. Rather than tinkering with the existing texts, they should step back, reassess what has worked and what has not, and reduce, rather than expand, Rule 23. Every time I participate in Rule 23 discussions, I often hear authoritative commentators suggesting the addition of this or that other requirement, this or that other standard, this or that other explanation. I believe we have more than we need, thus I suggest the adoption of a slim, more elegant, principled rule, that I believe will be more capable of addressing the current complexities, with the support of adequate and explanatory Advisory Committee Notes.

V. CONCLUDING REMARKS

Although nineteenth and twentieth century reformers intended to open courts to litigants, they have failed to address the financial costs that this would have entailed.³⁰⁴ The twenty-first century reformers have attempted to address the problems by framing rules that try to micromanage procedure and discourage litigation. This approach, though, has generated yet more inefficiencies and costs.

In a 2011 article, Judith Resnik indicated that

³⁰³ See, e.g., *supra* note 3.

³⁰⁴ Resnik, *supra* note 3, at 112.

the questions for the twenty-first century, illuminated by AT&T [and] Wal-Mart . . . are whether and how to enable the use of courts and to provide resources for them to handle the resulting volume—or, as was argued in these cases, whether leaving people to their own devices to find their way into court or leaving courts behind is the wiser course.³⁰⁵

I think that an effective answer to Judith Resnik's question is the development of theories of procedure that would help us read, interpret and, where necessary, revise the Rules and the doctrines to make them more conducive of litigation, and of a realistic, fair, and efficient appraisal of the claims presented to the judges.

The jurisprudence interpreting Rule 8(a)(2), the text of Rule 23 and its proposed amendments, the doctrines of standing, abstention, sovereign immunity and subject matter jurisdiction, all lack theoretical support conducive of a holistic vision and design intended to make litigation function according to its most natural course.

Frontloading the analysis of the merits of the case to the outset of the litigation will not reduce the costs of the litigation. Rather, it will continue to increase them. But more disturbingly, the frontloading trend has distorted and will continue to distort the essential mission of the federal courts as necessary instruments of democracy, thus threatening the very continuing existence of the courts as places where disputes are resolved on the merits.

Litigating cases on the merits is not important merely from the litigants' perspective, but it is also important from the perspective of the public and the system as a whole, as the disposition of cases on the merits is conducive to the creation and development of substantive law. Stopping dispute resolution means preventing the progress of the law and, ultimately, the progress of society.

³⁰⁵ *Id.*