PART I

The United States

1

The US Class Action from a Utilitarian Perspective

Balancing Social Benefits and Social Costs

Robert G. Bone[*]

1.1 INTRODUCTION

The class action is a powerful tool for adjudicating large aggregations of claims in a single proceeding.[1] While it has roots in the representative suit of the eighteenth and nineteenth centuries, the class action in the United States first assumed its modern form in 1966, with extensive revisions to Rule 23 of the Federal Rules of Civil Procedure. Ever since then, it has been the subject of intense and highly polarized debate.[2] Today the class action is under siege, as critics launch sharp attacks and supporters respond with pointed counterattacks. This chapter's goal is to step back from the fray and reflect on the normative underpinnings of the class action in a more balanced way.

There are at least two features that make the class action so controversial. First, it is based on the principle that a party can represent the litigating interests of other persons and bind the latter as though they were litigating on their own.[3] Critics are quick to point out that this principle is in tension with the litigation system's bedrock commitment to giving each individual her own personal "day in court."[4]

The second feature has to do with the practical effects of class litigation. The class action has the capacity to effect significant redistributions of economic and social power. For example, small-claim class actions make it possible for large groups of injured individuals to hold powerful corporate actors legally accountable in ways that would be impossible without the class device.

[*] I am grateful to Professor Randall S. Thomas for helpful comments on an early draft.

[1] This chapter draws its examples from class action practice in United States federal courts and focuses on the federal class action rule, Rule 23 of the Federal Rules of Civil Procedure. It does not deal specifically with state court class actions, although the normative analysis applies generally to all class actions whether they are filed in federal or in state court. Nor does it address the federal collective action under the Fair Labor Standards Act, which resembles the class action but differs in several important respects, most notably by relying on opt-in rather than opt-out. *See* Fair Labor Standards Act, 29 U.S.C. § 216 (2012); Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66 (2013). Finally, the focus is on plaintiff class actions, not the relatively rare defendant class action.

[2] However, there was a period of relative stability in the 1980s. *See* David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 643–51 (2013). For accounts of the eighteenth and nineteenth century representative suit and the history of the class action device, *see* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990).

[3] Hansberry v. Lee, 311 U.S. 32, 42–43 (1940).

[4] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–48 (1999); Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008); Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 580–89 (2011).

For another example, the class action can make it easier to challenge systemic wrongdoing perpetrated by government officials and obtain broad injunctive relief that attacks the problems at their source. In both of these examples, the class action empowers individuals who would otherwise have difficulty obtaining redress against those with much greater power – and not surprisingly the more powerful object.

For these reasons, class action proponents often find themselves having to defend the modern class action against sharp criticism. Whether defending or criticizing the class action, it is important to frame one's arguments in normative terms that take account of how well the device serves the purposes of civil adjudication and how well it fits within adjudication's legitimate sphere. This chapter describes one way to do this – through a utilitarian approach that balances social benefits and social costs. From a utilitarian perspective, the main benefits of the class action have to do with avoiding duplicative litigation costs and improving outcome quality, and the main costs have to do with procedural complexity, magnification of litigation stakes, and agency and collective action problems. The question for the utilitarian is whether the social benefits exceed the social costs.

Conducting this evaluation is complicated by two factors: the limited availability of reliable empirical information, and the fact that most class actions end in settlement. Because of limited empirics, predictions of class action effects must rely to a large extent on assumptions about what rational actors are likely to do. And because of the prominence of settlement, the analysis must consider the class action's impact on settlements as well as trial judgments.

It is also important to bear in mind that the class action should be evaluated compared to realistic alternatives. For example, as we shall see, class litigation suffers from agency problems, but so do ordinary lawsuits. Indeed, agency costs can be particularly serious in exactly those types of individual suits that are most suitable for class aggregation. This means that the class action might reduce agency costs compared to the real world of individual suits settled *en masse*.

The following discussion evaluates the class action from a utilitarian perspective. Section 1.2 describes the utilitarian approach in general and distinguishes it from other ways to evaluate procedural rules. Section 1.3 briefly summarizes how United States preclusion law works when suits are brought separately. This furnishes a baseline against which to compare the class action and evaluate its benefits and costs. Section 1.4 summarizes the social benefits of the class action, and Section 1.5 examines the social costs. Section 1.6 pulls the strands together by analyzing three controversial issues that are the subject of current debate: mandatory versus opt-out classes, cy pres distributions, and sampling.

1.2 THE UTILITARIAN APPROACH TO PROCEDURE

The analysis in this chapter focuses on one version of utilitarianism: law-and-economics. Law-and-economics applies modern economic analysis to law. Roughly speaking, the goal is to choose legal rules that minimize social costs, or equivalently, maximize social benefits net of costs. When deciding whether a procedure like the class action should be adopted, one balances the marginal social benefit the procedure confers against the marginal social cost it generates.[5]

A procedure can produce benefits in two ways: by reducing process (or administrative) costs and by reducing the risk of outcome error. Typically a new procedure increases process costs by

[5] The beginning of the law-and-economics approach to civil procedure is usually traced to three articles published in the early 1970s: William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. Econ. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Leg. Stud. 399 (1973), and John P. Gould, *The Economics of Legal Conflicts*, 2 J. Leg. Stud. 279 (1973).

inviting more motions and requiring more judicial deliberations. But it can also reduce these costs. For example, one argument for the class action is that it reduces the process costs of repeatedly litigating identical issues.

However, the most important benefit of procedure is the reduction in the risk of outcome error that it makes possible and the associated error costs it thereby avoids. "Outcomes" include decisions of legal and factual issues, dispositions of motions, final judgments after trial, and settlements – as well as outcomes of no liability that result from a party's inability to sue. An outcome is "erroneous" when it diverges from what the substantive law mandates on the facts of the case.[6]

Error reduction, however, is not an end in itself; it is a means to the end of reducing the expected costs of error. If individuals know there is some chance of avoiding liability when they should be held liable, they will be less inclined to comply with the substantive law. Noncompliance, in turn, generates social costs by frustrating the substantive law's ability to achieve its goals. Similarly, if individuals know they might be held liable even when they comply, they expect less of a benefit from complying, so their incentives to comply are weaker. And once again, a failure to comply generates social costs.

Thus, both the probability of litigation error and the cost of error matter to a law-and-economics analysis. More precisely, what matters is "expected error cost." Expected error cost is the social cost of error discounted by the probability an error will occur. There are two types of error – false negatives and false positives.[7] Adding a new procedure normally reduces one type and increases the other. For example, the small-claim class action, as we shall see, can reduce the expected cost of false negative error by enabling private enforcement of the substantive law, but it can also increase the expected cost of false positive error by over-deterring socially valuable activity.

Of course, a new procedure adds process costs of its own, including the private and public costs of administering the procedure through motions, deliberations, and decisions. Process costs are particularly salient in the class action context because of the complexity of the device, the intensity of advocacy it engenders, and the difficulty of implementing it properly.

This simple account captures the core of the law-and-economics approach. There are complexities, however, one of which deserves special mention because it is relevant to the discussion later in this chapter. The simple account assumes a functional distinction between substance and procedure: substantive law shapes real world incentives in order to promote policy goals, and procedural law applies the substantive law accurately to ensure that the desired incentives are realized. From a law-and-economics perspective, however, there is no fundamental distinction between substance and procedure: both are tools for shaping incentives. A rational actor choosing whether to comply with the law considers *all* the consequences of noncompliance, and these include not only the likely outcome of a lawsuit if one is filed, but also the process costs of defending the suit. Thus, deterrence can be strengthened directly by increasing process costs without changing outcomes.[8] And courts sometimes look past the substantive rules to the policies those rules aim to promote and adjust procedure to serve those policies more effectively.[9]

[6] I do not mean to suggest that there is always a uniquely correct outcome. Even when there are many equally acceptable outcomes, it is still sensible to refer to an outcome as erroneous if it falls outside the acceptable set.

[7] Or as statisticians refer to them, Type I and Type II errors. *See generally* Robert G. Bone, Economics of Civil Procedure 128–39 (2003).

[8] *See* Louis Kaplow, *Multistage Adjudication*, 126 Harv. L. Rev. 1179, 1195, 1235 (2013).

[9] Moreover, the simple account assumes that judges apply preexisting legal rules, but in the United States at least, judges do more than that: they make law through the common law process. It is conceivable that judges do a better job of common-law making with some procedures than with others. For example, a class action might enhance common-law making by facilitating the presentation of different views and arguments. Whether procedure generates benefits of this sort, however, depends on whether there is a link between procedure and common law reasoning.

Law-and-economics – and utilitarianism more generally – is not the only way to evaluate procedure. One might instead adopt a rights-based approach that values outcome accuracy in moral rather than economic terms and focuses on producing outcomes that honor each party's rights.[10] The key difference from utilitarianism lies in the nature of a right. In rights-based theory, a right trumps or constrains reliance on social utility maximization or broad collective goals to justify actions that interfere with what the right guarantees.[11] Because of its focus on individual rights, a rights-based theory has much more trouble justifying the outcome-averaging effects of a class action and counting process-cost reduction in favor of class action treatment.

Some theorists argue for a dignitary theory of procedure.[12] Dignitary theory focuses not on outcome quality, but on the way litigants are treated by the process itself. Dignitary theorists argue that each party has a deontological right to a litigation process that treats her with dignity and respect, and that this general right includes a more specific right to participate personally in the process. The logic of this argument is not self-evident and the existence of a process-oriented participation right is unclear.[13] If such a right exists, however, it poses a challenge to the class action, since the class action deprives absent class members of the opportunity to participate in and control their own lawsuits.[14]

One terminological point before proceeding. At times, the following discussion refers to law-and-economics by name, but more frequently, it refers to utilitarianism. To be clear, whenever I refer to a "utilitarian" approach, theory, framework, and the like, I mean the law-and-economics version of utilitarianism.

1.3 A BRIEF LOOK AT US PRECLUSION LAW

Before the revision of Rule 23 in 1966, neither the class action nor its predecessor, the representative suit, was strictly a preclusion device, although both generated preclusive effects under some circumstances.[15] The modern class action, by contrast, is first and foremost a vehicle for preclusion: a properly certified and managed class action is supposed to have full claim and issue preclusive effects on all members of the class.[16]

The reason class-wide preclusion is so important has to do with the limited scope of United States preclusion law applied to individual suits. Each person has a right to her own personal "day in court," and this right is understood to guarantee personal control over one's own lawsuit. Thus, with very few exceptions – the class action being one – a person who was not a party to the first suit and did not have a chance to control the litigation of that suit is free to litigate the issues anew in her own lawsuit.[17]

[10] *See, e.g.*, Ronald Dworkin, *Principle, Policy, Procedure*, in A Matter of Principle 72, 93–94 (1985); Robert G. Bone, *Agreeing to Fair Process: The Problem With Contractarian Theories of Procedural Fairness*, 83 B.U. L. Rev. 485, 511–16 (2003).

[11] Ronald Dworkin, *Principle, Policy, Procedure*, in A Matter of Principle 72, 73–74 (1985).

[12] *See, e.g.*, Jerry L. Mashaw, Due Process in the Administrative State (1985).

[13] *See* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 264–88 (1992).

[14] *See, e.g.*, Martin H. Redish, Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit (2009).

[15] Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. Rev. 213, 264–84, 287–91 (1990).

[16] Technically, the class action court cannot predetermine preclusive effects in future suits. 7AA Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1789 (3d ed. 2019). However, the class action was clearly designed to maximize the likelihood that judges in future cases will give preclusive effect to a class judgment.

[17] Taylor v. Sturgell, 553 U.S. 880, 892–95 (2008).

To illustrate the consequences, consider the following mass tort hypothetical. Suppose a pharmaceutical company, Drug Inc., markets a new drug, Xyrex, to treat arthritis. Suppose there are roughly 50,000 Xyrex users nationally who have developed heart problems after taking the drug. These 50,000 users all have legal claims against Drug Inc. for damages, and their claims share common issues, such as whether Xyrex is capable of causing heart problems (which is relevant to general causation) and what and when Drug Inc. knew or should have known about the drug's side effects (which is relevant to a duty to warn and breach of that duty).

Without a class action, each of the 50,000 Xyrex users can litigate the same common issues in their own individual suits. As nonparties to earlier suits, plaintiffs in later suits would not be claim or issue precluded. Thus, if the first plaintiff to sue lost on the general causation and duty-related issues, the second plaintiff, as a nonparty to the first suit, could relitigate those same issues – and possibly win. And the same is true for the third plaintiff, the fourth, the fifth, and so on. Moreover, it doesn't matter how vigorously the first plaintiff litigated. In theory at least, the 50,000th plaintiff could relitigate the same issues even if the first 49,999 plaintiffs all fought hard but still lost. The impact on social costs is obvious.

1.4 SOCIAL BENEFITS OF THE CLASS ACTION

The following discussion examines five potential benefits of the class action: (1) promoting judicial economy; (2) avoiding serious externalities; (3) improving outcome accuracy by reducing litigation asymmetries; (4) enhancing remedial efficacy; and (5) enabling private enforcement of the substantive law.[18]

1.4.1 *Promoting Judicial Economy*

One of the most common arguments in favor of the class action is that it promotes judicial economy by saving the costs of repetitive litigation of common issues.[19] As the previous section explained, the class action does this by overcoming the legal obstacles to binding nonparty plaintiffs.

As sensible as this argument might seem, there is a serious problem with it. It assumes that plaintiffs will actually litigate common issues repeatedly if not prevented from doing so by the class action. In truth, this is extremely unlikely. If a string of early cases all result in plaintiff losses, it is highly improbable that later plaintiffs will sue – or more precisely, very unlikely that they will be able to find lawyers willing to take their cases. Alternatively, if the first few lawsuits generate enough pro-plaintiff decisions, the defendant Drug Inc. will settle the rest. Thus, only a few plaintiffs will actually litigate; most will refrain from suing or settle in light of the early results. To be sure, there could still be some relitigation, but this is not necessarily inefficient. A few suits litigating the same common issues can supply useful information about claim values that helps parties reach settlement in later cases.

Given this, it is not clear how much support judicial economy actually lends to the class action. But there are other benefits, and the rest of this section examines them.

[18] The discussion of social benefits and costs in Sections 1.4 and 1.5 draws, in part, on two of my previous publications: Robert G. Bone, Economics of Civil Procedure 259–98 (2003), and Robert G. Bone, *Class Action*, in Procedural Law and Economics 67–84 (C. W. Sanchirico, ed., 2d ed., 2012).

[19] 1 William B. Rubenstein, Newberg on Class Actions § 1:9 (5th ed. 2019). "Judicial economy" focuses on the litigation system and ignores broader efficiency effects. Thus, the class action might improve judicial economy and still be globally inefficient.

1.4.2 *Avoiding Externalities*

Suppose fifty individuals all have identical rights in a limited fund that is too small to satisfy all their claims. If they sue individually, the early filers might exhaust the fund, leaving later filers without any assets to satisfy their claims. The late filers can obtain judgments, of course, but their judgments would be worthless without assets to collect. One way to solve this problem is to force all fifty claimants into a class action and distribute the limited fund proportionately among them.[20] Thus, the class action solves an externalities problem: it prevents early filers from imposing external costs on later filers.[21]

In theory at least, this rationale extends beyond the classic limited fund to mass tort cases in which defendant's total expected liability exceeds its available assets.[22] Suppose that Drug Inc. in our hypothetical faces 50,000 suits and that each plaintiff has a 70% chance of proving liability and expects to recover $5 million if she prevails. Drug Inc.'s total expected liability is: 50,000 × 5 million × 0.7 = $175 billion. Suppose this is more than Drug Inc.'s insurance coverage and corporate assets. Under these circumstances, plaintiffs who file early will obtain full recovery and the rest will receive nothing at all. A class action facilitates a more equal distribution.

A more equal distribution is a benefit from a rights-based perspective, but it is not clear how much of a benefit it is from a law-and-economics perspective.[23] The prospect of paying huge damages should have the same deterrent effect regardless of how the aggregate amount is distributed. It is possible that the ex ante incentives of prospective plaintiffs to take care or purchase insurance would be affected by knowing that there is some probability they might receive nothing. But this is far from clear. In any case, if an equal or proportionate distribution is called for, the class action is a good way to achieve it.

1.4.3 *Improving Outcome Accuracy*

The limited fund rationale applies only in those special situations where a limited fund exists. Other rationales apply more generally. One of these focuses on the way that the class action can improve outcome accuracy by eliminating a structural bias associated with asymmetric litigation investment.[24]

The bias results from economy-of-scale advantages that benefit the defendant in mass litigation. As a repeat player facing multiple plaintiffs with related suits sharing common issues, a defendant can spread the cost of preparing the common issues over all the lawsuits. Because of this, the defendant will invest more than the plaintiff in preparing these issues. Assuming that the

[20] One might wonder why a claimant would bring a class action if she expects to receive less than from an individual suit. Compulsory joinder rules can render individual litigation infeasible. Also, the plantiff might wish to share costs, or the attorney might prefer a class action and be able to file one if agency costs are high.

[21] *See* 2 William B. Rubenstein, Newberg on Class Actions §§ 4:16–4:17 (5th ed. 2019). This is not the only type of externality that the class action addresses. Individual suits can impose inconsistent obligations on a defendant, and the class action avoids this result by preventing multiple suits. See *id.* §§ 4:5–4:8.

[22] During the 1980s and 1990s, federal courts toyed with using the limited fund rationale to certify mass tort class actions under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, but the Supreme Court effectively ended this practice in its 1999 *Ortiz v. Fibreboard* decision. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); *see* 2 William B. Rubenstein, Newberg on Class Actions § 4:19 (5th ed. 2019) (discussing the availability of the limited fund class action after *Ortiz*).

[23] It is easy to see why it is a benefit from a rights-based perspective. If each plaintiff has an identical legal right to compensation, an unequal distribution fails to show the same degree of concern and respect to all rightholders. The class action matches equality of right with equality of recovery.

[24] See David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. Legal Analysis 305, 347–48 (2014).

party who invests more is more likely to win, it follows that the defendant will prevail on common issues more often than plaintiffs – and more often than it should. Moreover, since settlement is negotiated in the shadow of trial, individual settlements will end up skewed in favor of the defendant as well. The class action, by aggregating claims on the plaintiffs' side, gives the class comparable scale economies and thus helps to even out litigation investment incentives across the party line.[25]

To see this point more clearly, let us return to the Drug Inc. hypothetical. Suppose P-1 sues Drug Inc. for damages from Xyrex. Drug Inc. must decide how much to invest in researching the legal issues, investigating the factual issues, hiring experts, and otherwise preparing general causation, breach of duty, and other issues in P-1's suit that will also arise in the other 49,999 suits. In making these investment decisions, Drug Inc. will take account of the fact that it can use the results to defend all 50,000 lawsuits. As a result, the private benefit of any dollar spent in defending the common issues in P-1's suit will be multiplied by 50,000 suits, and therefore Drug Inc. will invest much more than it would if P-1's suit were the only one. For P-1, however, her suit *is* the only one. It follows that Drug Inc. will invest much more in P-1's suit than P-1 will, and the resulting asymmetry biases the outcome in favor of the defendant Drug Inc.[26]

The class action mitigates these adverse effects. It does so by aggregating the claims of the 50,000 plaintiffs into a single lawsuit and giving the class attorney a stake in all of them. Since her fee depends on the size of the total recovery, the class attorney will invest an amount that reflects the total stakes, just as the defendant does. The asymmetry might not be completely eliminated since the class attorney takes only a fraction of the total while the defendant pays it all, but assuming declining marginal returns to litigation investment, it is quite likely that the class attorney's fraction will be large enough to induce investment at a sufficiently high level.[27]

1.4.4 *Enhancing Remedial Efficacy*

A class action can enhance remedial efficacy in cases where the plaintiffs seek complex injunctive relief and also in cases where the socially optimal outcome is a global settlement of damages claims.

[25] It is worth noting that there is another way in which the class action can improve outcome accuracy, especially in large-scale mass tort litigation. Experience teaches that in the absence of a class action, mass tort lawyers will assemble large inventories of clients and settle all the inventory claims *en masse* through an aggregate settlement. Because clients cannot adequately monitor their attorneys and because professional responsibility rules apply only weakly, these aggregate settlements give mass tort lawyers wide latitude to negotiate large fees for themselves and suboptimal recoveries for class members. A class action can improve on this individual-litigation baseline by enlisting the judge to monitor attorney performance and evaluate settlement adequacy. To be sure, judges face significant obstacles to doing this job well, but the result is still likely to be better than no effective supervision at all. On informal aggregation generally and large-scale collective representation outside of the class action setting, see Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 Duke L. J. 381, 386–401 (2000) (discussing the phenomenon of informal aggregation through coordination of multiple cases before a single attorney or coordination among multiple attorneys); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. Chi. Legal F. 519, 524–25 (2003) (describing mass collective representation in litigation outside of the class action).

[26] This assumes that all the plaintiffs hire different lawyers so each lawyer must prepare anew. It also assumes that the various plaintiffs' lawyers do not cooperate to share information and strategies. Neither assumption completely holds true in the real world. *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 Duke L. J. 381, 386–401 (2000).

[27] There are other sources of litigation investment asymmetry that case aggregation through the class action can help mitigate. *See generally* Robert G. Bone, *Preclusion*, in Procedural Law and Economics 350, 359–61 (C. W. Sanchirico. ed. 2012) (explaining how US preclusion rules can create investment asymmetries and skewed outcomes when suits are individually litigated).

1.4.4.1 Complex Injunctive Relief

A complex injunction orders reforms that effect major changes in a defendant's institutional structure. For example, a court might order structural changes to a firm's employment practices in order to root out employment discrimination at its source, or require extensive alterations to state prison conditions to prevent unconstitutional treatment.

The class action facilitates this type of remedy in several ways. It prevents inconsistent decrees, enables broad relief, and helps to avoid mootness problems.[28] If plaintiffs filed multiple suits, different judges might order different injunctions that conflict. Partly to avoid this result, judges sometimes limit – and are even required to limit – the scope of injunctions in individual suits, and this can frustrate the fashioning of effective relief. The class action solves these problems by aggregating all the potential suits into one proceeding, thereby avoiding inconsistent injunctions and making a broad structural remedy possible. The class action also mitigates the risk that changed circumstances will moot an individual suit. It does this by aggregating lots of plaintiffs, some whom are likely to have a live controversy and be willing to take over as class representatives.[29]

In addition, the class action makes it easier for a judge to invite informational input useful for crafting or evaluating, a complex remedy. In a class action, a court can arrange for notice to be sent to members of the class and invite their intervention in order to solicit their views. It is worth noting, however, that this benefit might not be as substantial as it was in the past. Today, Facebook, Twitter, websites, and other Internet media make it much easier to keep interested class members informed and give them opportunities to express their views and interact without having to intervene in the suit.[30]

Admittedly, the obstacles to remedial efficacy in individual suits are largely the law's own making. We could change the rules so that courts adjudicating individual suits can grant broad relief. We could also bar inconsistent decrees, permit continuing litigation despite mootness problems, and make it easy for judges to invite input from nonparties in individual suits. But as long as the law remains as it is – and there are good policy reasons for some of these restrictions[31] – the class action has advantages for crafting and implementing injunctive remedies.

1.4.4.2 Global Resolution of Damages Claims

Global settlements that resolve all present and future claims and fix the defendant's total liability can generate substantial efficiency benefits. These settlements take many different forms, but all involve a settlement fund and some kind of distribution mechanism. In particularly complex cases, the distribution mechanism can involve an administrative-type structure with someone in charge of reviewing proofs of claim and determining individual distributions.

To illustrate the efficiency benefits of a global settlement, consider our Xyrex hypothetical. In the absence of a global settlement binding all Xyrex users, including those who have not yet manifested compensable injury, Drug Inc. must deal with the uncertainty of future litigation.[32] To avoid this uncertainty, the company should be willing pay a "peace premium" for a global

[28] *See* 2 William B. Rubenstein, Newberg on Class Actions § 4:26 (5th ed. 2019).
[29] *See also* 1 William B. Rubenstein, Newberg on Class Actions § 2:17 (5th ed. 2019).
[30] *Cf.* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846 (2017) (describing a "participatory class action" made possible, in part, by ease of communication over the Internet).
[31] Among other things, the judge is more likely to focus on the whole problem when everyone affected is involved in the case.
[32] At least until the statute of limitations expires on all the remaining claims.

settlement covering all present and future claims.[33] As a result, plaintiffs receive a larger aggregate recovery; Drug Inc. reduces its costs; and the judicial system avoids the process costs of future litigation.

Of course, global settlements are not always efficient. Designing and implementing such a settlement can add substantial process costs. Moreover, rational parties, who have no reason to consider public interests that are not also private interests, might agree to a settlement that makes them better off but sacrifices social goals.[34] Also, current claimants have incentives to capture most of the settlement for themselves, and in a world of high agency costs, attorneys can manipulate global settlements in ways that maximize their own fees and the payout to current clients at the expense of future claimants.[35]

Still, if a global settlement is efficient, a utilitarian approach favors using the class action to achieve it. Given the requirements of Rule 23 and the United States Supreme Court's interpretation of the Rule, it is not easy these days to use the class action for this purpose, at least in products liability cases like our Xyrex example. But a utilitarian approach supports a broader application than the Court's unduly restrictive rules allow.[36]

1.4.5 *Enabling Substantive Law Enforcement*

The discussion so far has assumed that rational plaintiffs file individual suits. This assumption does not always hold true. Sometimes the expected cost of litigating an individual suit exceeds the expected trial award. This can happen with personal injury claims that require very expensive scientific studies and costly expert testimony. But it is much more common in cases where the defendant's conduct causes small harms to many individuals. In these cases, each person's injury is too small to make an individual suit worthwhile even though the aggregate harm is very large.

To illustrate, suppose a company misrepresents the health benefits of its natural food product and thousands of consumers buy the product in reliance on the misrepresentation. None suffer any physical injury, but all pay more for the product than they should. Each has a state-created consumer fraud claim to recover damages, but no one has enough at stake to justify the sizable cost of hiring an attorney and litigating individually.

In these small claim cases, the class action makes litigation possible.[37] It does so by aggregating all the claims and linking the class attorney's fee to the total class recovery.[38] Indeed, the attorney

[33] *See* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 La. L. Rev. 397, 413–16 (2014) (describing three potential benefits defendants obtain from global settlements, including economy of scale benefits, avoidance of adverse selection risks, and greater certainty about the scope of liability).

[34] For example, parties to a global settlement have no reason to consider all the social benefits from general deterrence since they capture only a small fraction of those benefits for themselves. So they might agree to a settlement that is too low relative to the social optimum for deterrence. For a discussion of the divergence between private interests and public interests in settlement generally, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. Leg. Stud. 575 (1997).

[35] *But see* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*. 92 N.Y.U. L. Rev. 846, 865-67 (2017) (noting that active involvement of future claimants through the Internet and participation in websites affected the Third Circuit's willingness to approve the settlement class in *NFL Concussion Litigation*).

[36] There are other remedial advantages to a class action. For example, a class action might be necessary for an effective medical monitoring remedy. On (b)(2) class actions for medical monitoring, see Day v. NLO, Inc., 144 F.R.D. 330, 335–36 (S.D. Ohio 1992); 2 William B. Rubenstein, Newberg on Class Actions § 4:45 (5th ed. 2019).

[37] See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 8-9 (1991).

[38] There is strong empirical support for the proposition that class action fee awards, no matter how they are calculated, increase with settlement amount, though at a declining rate. *See* Theodore Eisenberg, Geoffrey P. Miller, & Roy Germano, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. Rev. 937, 946 (2017); Theodore Eisenberg & Geoffrey Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7