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# Multiple Attempts at Class Certification

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# Multiple Attempts at Class Certification

*Tobias Barrington Wolff\**

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## INTRODUCTION

The phenomenon of multiple attempts at class certification—when class counsel file the same putative class action in multiple successive courts and attempt to secure an order of certification despite previous denials of the same request—has always presented a vexing analytical puzzle. The continuing practical significance of the multiple-certification phenomenon is unclear. The enactment of the Class Action Fairness Act of 2005 (“CAFA”), the ascendancy of the Multi-District Litigation process (“MDL”), and the rise of non-class alternatives to the disposition of mass claims may together defuse the power of this strategy. Even so, the puzzle is a fascinating one, raising basic questions about the analytical structure of the class action and the potentially intractable problems that arise in a federal system where states have the power to assert overlapping legislative and judicial jurisdiction on a national scale but lack consistent rules for resolving competing exercises of that jurisdiction. When the Supreme Court rejected one proposed solution to the problem in *Smith v. Bayer*,<sup>1</sup> it left unresolved some of the broader questions of preclusion doctrine, federal common law, and the constraints of due process with which any satisfying approach will have to grapple.

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\* Professor of Law, University of Pennsylvania Law School. My thanks to Steve Burbank and Deborah Hensler for their collegueship.

1. *Smith v. Bayer*, 131 S. Ct. 2368, 2374–75 (2011).

Professor Martin Redish and Megan Kiernan have proposed a novel solution in a recent Article, urging that courts apply an estoppel directly to class counsel as one potential response to multiple certification attempts.<sup>2</sup> In this instance, unfortunately, novelty is not a virtue. Redish and Kiernan's proposal is unsuccessful, exhibiting problems of theoretical inconsistency, doctrinal shallowness, and a lack of appreciation for the practical dynamics of aggregate litigation. Sorting through the problems in their Article provides a useful occasion for mapping out the shape of the multiple certification issue and the analytical terrain that any workable solution will have to navigate.

That terrain includes three key features that I will address in this Essay. First, the mechanism by which courts ordinarily prevent litigants from seeking multiple bites at the apple is the preclusive effect of a final and valid judgment. When a court refuses a request for class certification, that refusal ordinarily means that absent class members are neither bound by the proceedings nor subject to the ordinary effects of preclusion doctrine. Second, any legislative or judicial response to the preclusion problem must be consistent with the requirements of due process as articulated by the Supreme Court in *Hansberry v. Lee*,<sup>3</sup> *Mullane v. Central Hanover Bank & Trust*<sup>4</sup> and *Phillips Petroleum v. Shutts*.<sup>5</sup> As I have argued before and reiterate below, the Due Process Clause can accommodate solutions to this problem. But explaining why this is so does require some clarification of recent statements by the Court, and it also calls for a rejection of the misconceived account of due process that Redish and Kiernan employ in their Article. Third, any meaningful solution to the multiple certification problem must address practical questions of litigation dynamics: How do class actions actually operate, particularly those in which multiple certification attempts might be a genuine problem, and how would sophisticated lawyers react to different doctrinal responses? The proposal to apply an estoppel directly to class counsel fails to account for the manner in which many complex cases operate and the options that would be available to plaintiff's attorneys to circumvent such constraints if this proposal were actually put into effect.

## I. PRECLUSION DOCTRINE AND THE MECHANISMS FOR CONTROLLING SERIAL ADJUDICATION

The operation of preclusion in class litigation is an exceptional application of the doctrine. Absent class members are not parties to a class action in the traditional sense: the court does not acquire jurisdiction over them in the same manner or for the same reasons that it does over defendants. Rather, the ability of a court to bind absentees to a class proceeding depends

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2. Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659, 1660–64 (2014).

3. *Hansberry v. Lee*, 311 U.S. 32, 43–44 (1940).

4. *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 313–14 (1950).

5. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811–12 (1985).

on the court employing procedures designed to safeguard the interests of class members and the presence of a proper and adequate representative who promotes class members' interests throughout the course of the proceeding.<sup>6</sup> The type and extent of preclusion that a judgment can impose on class members is defined and limited by these requirements.<sup>7</sup>

The Supreme Court recently disapproved one attempt to use the federal common law of preclusion to bind absentees to a determination that a proposed action was not suitable for class treatment. In *Smith v. Bayer*, the Court held that an absentee cannot be considered a "party" in such a proceeding until and unless the action is certified as a class, drawing on its earlier ruling in *Devlin v. Scardaletti* to define when non-named class members achieve "party" status.<sup>8</sup> *Bayer* then pointed to *Taylor v. Sturgell*, the Court's leading decision on non-party preclusion, and found that none of the discretely defined exceptions identified in that case were satisfied in the proceeding before it. Because no "properly conducted class action" ever existed in the *Bayer* action, no "non-party preclusion" was possible.<sup>9</sup> Despite the strong policy reasons for crafting a response to serial attempts at certification, the Court found that this syllogism—no formal party status and a failure to satisfy the defined categories of non-party preclusion, therefore no binding effect—must control. In another recent decision, the Court relied on the lack of formal party status prior to class certification to reject an attempt by plaintiff's counsel to bind a putative class to a stipulation concerning the jurisdictional amount in controversy.<sup>10</sup>

As an initial matter, the textual emphasis that the Court places on the "certification" of a class when deciding when it is possible for a proceeding to affect the interests of absentees does not do as much work as the Court appears to assume. The formal step of class "certification" has a recent provenance in the text of the Rule. While that term did appear in many judicial opinions in the early years of modern class litigation, the 1966 version of Rule 23 itself said nothing about "certifying" a class or issuing a "certification" order. Rule 23(c) required that a court "determine by order" whether "an action brought as a class action . . . is to be so maintained."<sup>11</sup> The rule made no reference to a specification of the precise definition of the class in that early-stage order, except to require in actions "maintained under

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6. See *Taylor v. Sturgell*, 553 U.S. 880, 894–95, 896–97 (2008) (describing the conditions necessarily for a properly maintained class action to bind absentees); *Phillips Petroleum*, 472 U.S. at 812 (emphasizing the need for adequate representation "at all times" during a class proceeding); *Hansberry*, 311 U.S. at 40–41 (holding that procedures designed to ensure adequate representation of the interests of absent parties are constitutionally required in class litigation).

7. See Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 753 (2005).

8. *Smith v. Bayer*, 131 S. Ct. 2368, 2379–80 (2011); *Devlin v. Scardaletti*, 536 U.S. 1, 14 (2002).

9. *Bayer*, 131 S. Ct. at 2380–81.

10. See generally *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

11. FED. R. CIV. P. 23(c)(1) (1966 version).

subdivision (b)(3)” that “members . . . be identified through reasonable effort” for purposes of issuing notice.<sup>12</sup> At the same time, the 1966 version of the Rule gave the district court power to make any such order “conditional,”<sup>13</sup> a qualification that many courts took as an invitation to proceed as a class even in the face of uncertainty that the proposed action could satisfy the requirements of Rule 23.<sup>14</sup>

When seeking to determine who would be bound to the results of a class proceeding, some early decisions under the 1966 Rule placed less emphasis on the order permitting a case to proceed as a class and focused more on the content of the putative class complaint, the subsequent course of the proceedings, and the ultimate details of any resulting judgment.<sup>15</sup> That fact, when combined with the invitation for courts to make the order “conditional” and the demand that the order concerning class treatment issue quickly—“as soon as practicable after the commencement of the action”<sup>16</sup>—sometimes led courts to employ insufficient rigor at the outset of the proceedings.

This was the cluster of problems that led to the 2003 amendments to Rule 23, a set of substantial revisions to threshold practice in putative class actions.<sup>17</sup> As the Advisory Committee explained, experience had demonstrated that the practice of conditional class actions and the pressure to issue an order quickly had the capacity to impose improper settlement pressure on defendants; thus, the authority to issue conditional orders was eliminated and the requirement for a prompt order was relaxed to “an early practicable time.”<sup>18</sup> These changes were accompanied by the appearance of the terms “certify” and “certification” throughout the rule. The language of class “certification” had appeared once before when Rule 23(f) was added in

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12. *Id.* at (c)(2).

13. *Id.* at (c)(1).

14. See Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1913–16 (2014) (describing experience of lower federal courts with conditional certification under the 1966 version of Rule 23).

15. In *Harriss v. Pan Am. World Airways*, for example—an opinion by noted procedure expert Judge William Schwarzer—the district court invoked the language of former Rule 23(c)(1)(C) and explained that an order conditionally permitting an action to proceed as a class was “nothing more than a tentative determination for procedural purposes” that preserved the ability of the court to “determine whether any further proceedings directed to the issue of relief, if any, may be maintained as a class action.” *Harriss v. Pan Am. World Airways*, 74 F.R.D. 24 (N.D. Cal. 1977). See also, e.g., *Ridgeway v. International Bhd. of Elec. Workers, Local No. 134*, 74 F.R.D. 597, 603–04 (N.D. Ill. 1977) (entering conditional order permitting a Title VII action to proceed as a class and explaining that arguments that “the class, as defined at this stage of the proceeding is overbroad” are “untimely” because “the order issued today is conditional” and the court can “winnow out persons who don’t belong in the class at any later stage”).

16. Compare FED. R. CIV. P. 23(c)(1) (pre-2003 version) with FED. R. CIV. P. 23(c)(1)(A) (post-2003 version).

17. See Committee Notes on Rule 23—2003 Amendment (describing the problems with premature rulings on class treatment and improper use of conditional certification under the earlier version of the rule).

18. See Committee Notes on Rule 23—2003 Amendment.

1998,<sup>19</sup> but it begins to be used pervasively in the text only starting in the 2003 amendments.<sup>20</sup> In neither year did the Advisory Committee offer an explanation for this change in terminology, apparently considering it a semantic matter with little substantive significance.<sup>21</sup>

As a consequence of these changes, Rule 23 now demands greater specificity in determining the status of absentees at the outset of a class proceeding. That requirement is also reflected in the stricter evidentiary standards that the Court has imposed through interpretation.<sup>22</sup> This emphasis on specificity is appropriate, and it is consonant with the Court's treatment of non-party preclusion in *Taylor*, where it made clear its preference for "crisp rules with sharp corners" that are predictable and will not produce inefficient satellite litigation.<sup>23</sup> In *Bayer*, the Court reflected both these priorities when it voiced its concern that the federal district court that had denied the request for certification in that case had not devoted any explicit attention to the question whether its denial of certification would have the capacity to bind the absentees as a matter of issue preclusion. In this respect, *Bayer* adopts a precautionary approach to binding absentees that is defensible.

What is less defensible, however, is the suggestion in *Bayer* that the current version of Rule 23 would foreclose a district court from ever employing procedures designed to give a denial of certification binding effect. That view reflects an assumption that the "certification" order under Rule 23 is an all-or-nothing proposition that either authorizes the initiation of a class action making absentees full "parties" to the action or else leaves them strangers to the action altogether. Such a rigid approach is at odds with the provenance and history of Rule 23, which originally spoke in more open-ended terms about the propriety of the case "proceeding as a class" and added the language of "certification" with no apparent intention to impose new and sharply defined formal consequences. It also risks investing the language of Rule 23 with the power to dictate the bounds of preclusion doctrine, which a federal rule cannot do.<sup>24</sup> To be sure, much early practice under Rule 23

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19. See FED. R. CIV. P. 23(f) (authorizing a court of appeals to "permit an appeal from an order granting or denying class-action certification under this rule") (added in 1998).

20. The 2003 version of Rule 23 uses the term "certify" throughout. Rule 23(c), previously titled "Determination by Order Whether Class Action To Be Maintained," is restyled as "Determining by Order Whether to Certify a Class Action." Compare Rule 23(c) (pre-2003 version) with Rule 23(c) (2003 version). The 2003 version of Rule 23(c)(1)(A) makes reference for the first time to a requirement that the court "determine whether to certify the action," and Rule 23(c)(1)(B) describes "[a]n order certifying a class action" when specifying what the order must contain. See also *id.* §§ (c)(2)(A) & (B), (e)(1)(A), (e)(3), (g)(1)(A).

21. See Committee Notes on Rules—1998 Amendment; Committee Notes on Rule 23—2003 Amendment.

22. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553–54 (2011).

23. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). (citation omitted).

24. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) ("[A] rule governing the effect that must be accorded federal judgments by other courts . . . would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right,'" (quoting 28 U.S.C. § 2072(b)).

suffered from a seat-of-the-pants approach that has properly been constrained by subsequent amendments on such matters as notice, settlement, and the obligations of class counsel.<sup>25</sup> But if a district court were to apply the kind of attention to the capacity of a negative certification ruling to bind absentees that was missing in *Bayer*, expressly considering the representative nature of a decision not to certify a particular proposed class and ensuring adequate representation by putative class counsel on the question—and perhaps invoking Rule 23(c)(4) as a textual basis for applying that limited ruling to the putative absentees—then the concerns that the Court articulates in *Bayer* and *Taylor* could be satisfied. There is no reason to read the references in Rule 23 to a “certification” order as a textual barrier foreclosing that result.

Redish and Kiernan propose to dispense with such technicalities altogether. In their place, they would simply invoke an estoppel directly against the plaintiff’s attorneys in a putative class action. Emphasizing the undeniable fact that class counsel exercise *de facto* control over the lawsuit and typically have a much greater stake in the proceeding than any individual class member, Redish and Kiernan insist that it “makes no sense to confine res judicata’s reach solely to those formal litigants.” Instead, they urge that we “redefine the real party in interest in the class action context” to encompass the attorney in the initial action as well as the named plaintiffs.<sup>26</sup> As the authors acknowledge, their proposed solution would not have done any good in *Bayer v. Smith* itself, where the attorneys in the two class actions were not the same. But they forge ahead, emphasizing the role of class counsel as a guardian of a public trust<sup>27</sup> and insisting that we overlook “formalistic” objections and “[v]iew[] class attorneys as pragmatic real parties in interest . . . for purposes of res judicata.”<sup>28</sup>

There are many problems here. First, one is left to wonder why it makes sense to entertain this radical departure from traditional preclusion doctrine but not to implement the more modest alterations to that doctrine that would be necessary to bind absentees directly to a negative certification determination. If one is upending settled doctrine, why not do so in a manner that is directly responsive to the problem, rather than proposing a solution that would not even have worked in the recent Supreme Court precedent that motivates the whole inquiry? Redish and Kiernan anticipate the formal objections to their proposal—lawyers are not parties—by insisting on “the multi-party joinders rules’ modern focus on considerations of practicality.”<sup>29</sup>

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25. See FED. R. CIV. P. 23(c)(2) (detailing notice requirements); 23(e) (setting forth requirements for settlement or compromise of the action); 23(g)–(h) (obligations of class counsel and standards for compensation).

26. Redish & Kiernan, *supra* note 2, at 1670.

27. *Id.* at 1674–75. The idea that class counsel undertake a public trust when they seek to represent absentees is one that I have emphasized in my own work when examining the prerogatives of class counsel. See Wolff, *supra* note 14, at 1925–26.

28. Redish & Kiernan, *supra* note 2, at 1676.

29. Redish & Kiernan, *supra* note 2, at 1676.

Of course, joinder policy is not the same thing as preclusion policy, and even the authors' assertion about joinder policy is supported in a less than convincing manner.<sup>30</sup> But even taking practicality as the preferred emphasis, why not apply that practical approach to a modest extension of the well-established capacity of courts to bind absentees in properly entertained representative proceedings? The authors' response is to invoke the Due Process Clause in a manner that is highly formalistic (hence at odds with their exhortation for practicality) and erroneous (hence beside the point). I will address these problems in the next section of this Essay. For now, suffice it to say that principles of due process do not justify the authors' choice to shift the focus of their preclusion analysis away from the absent class members and onto the plaintiff's lawyers.

As a matter of pure doctrine, moreover, the authors' proposal raises far too many questions. Is this treatment of lawyers as "real parties in interest" limited exclusively to the class action context? Redish and Kiernan suggest as much with their extended discussion of the singular nature of class litigation. But if the authors believe class litigation to be so singular in nature as to warrant abandoning formal limitations on preclusion that have previously been held inviolate, then why do so with an indirect doctrine of limited effectiveness rather than addressing directly the problem of binding absentees? If, instead, the authors seek to ground their proposal in a more general set of principles, then what limitations will this new doctrine observe? Any contingency-fee lawyer has a substantial personal stake in the outcome of a client's case, and civil rights lawyers representing clients under fee-shifting statutes often have a larger amount at stake than the maximum extent of a client's potential recovery in damages. Despite the authors' romantic view of the "attorney and client [who] often develop a bond through one-on-one interaction,"<sup>31</sup> the experience of attorneys who process an inventory of claims in non-class mass adjudication is often far different, with lawyers offering a claims administration service aimed at group settlement with little personal interaction with their clients.<sup>32</sup> One could ask similar questions about lawyers who specialize in *qui tam* actions, or requests under the Freedom of Information Act—the statute that provoked an unsuccessful attempt to expand the doctrine of virtual representation in *Taylor v. Sturgell*—because of the shared public nature of the rights being litigated. Would all of these cases be candidates for a new doctrine of lawyer preclusion under the Redish and Kiernan proposal?

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30. The only authority that Redish and Kiernan invoke for this "practical" approach to joinder policy is the phrase "as a practical matter" in the portions of Rule 24(a) and Rule 19(a) that are concerned with impacts on the interests of unrepresented persons. *See id.*

31. Redish & Kiernan, *supra* note 2, at 1673.

32. *See generally* Deborah R. Hensler, *Bringing Shutts into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 U.M.K.C. L. REV. 585 (2006) (documenting the increasing incidence of individual plaintiffs being represented on a mass inventory basis by attorneys seeking group settlements).



And what other preclusive consequences would attach to class counsel if the authors' proposal were adopted? Redish and Kiernan concern themselves solely with the phenomenon of serial attempts at certification. Would class counsel be subject to issue preclusion on merits questions if they unsuccessfully litigated a claim on behalf of one class of claimants and then sought to prosecute a claim with overlapping issues on behalf of a different class? If we are to treat class counsel as the "real party in interest" for preclusion purposes, this result would seem to follow.

The "crisp rules with sharp corners" that the Court demanded for non-party preclusion in *Taylor v. Sturgell* are absent under the authors' proposal, unless one limits their novel doctrine of lawyer preclusion to the singular case of serial attempts at class certification. If one does that, then the entire exercise is not worth the candle. Redish and Kiernan have not offered a general approach to non-party preclusion. They have isolated the problem of serial attempts at certification and gerrymandered a one-off solution around the asserted need to avoid any approach that involves binding absentees directly. That asserted need is based on a serious mischaracterization of the Court's due process precedents in the field of representative litigation, the issue to which this Essay now turns.

## II. DUE PROCESS AND MULTIPLE ATTEMPTS AT CERTIFICATION

Throughout their Article, Redish and Kiernan justify their proposal to extend preclusion doctrine to attorneys as a necessary expression of the "foundational due process dictate that litigants have a constitutional right to their day in court."<sup>33</sup> This dictate, they say, serves both to authorize their proposed solution and to foreclose all other alternatives. Indeed, the authors claim great virtue for themselves in their adherence to this foundational dictate, seemingly casting themselves as Odysseus bound to the mast of due process, whose commands they are "not willing to ignore" despite the siren call of more expedient solutions that have tempted courts and scholars before them.<sup>34</sup>

This is a strange way to talk about a problem relating to class action litigation. The defining feature of the class action is the adjudication of claims on behalf of absentees who never have their day in court and who often have little meaningful opportunity to make an informed choice about whether to be bound by the proceedings. The day in court paradigm in due process analysis is of great importance in individual litigation, both as a source of practical protection against inaccurate or exploitative results and as an expression of respect for the dignity of persons when the law is applied on an

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33. *Id.* at 1663.

34. *Id.*

individualized basis.<sup>35</sup> In class action litigation, in contrast, the entire doctrinal edifice is geared toward defining the conditions under which the interests of a claimant can be compromised despite the absence of individualized participation. An absentee has not had his “day in court” when he receives a notice in the mail and either declines or fails to execute an opt-out form. And, of course, Rule 23 authorizes some injunctive or equitable class proceedings without any requirement for individualized notice or the chance to opt out—actions in which the individual day in court does not even have the theoretical substitute of consent, however much a formality that substitute may often be.<sup>36</sup>

The major due process precedents that address the permissible bounds of class actions and similar representative proceedings—*Hansberry v. Lee*,<sup>37</sup> *Mullane v. Central Hanover Bank & Trust Co.*,<sup>38</sup> and *Philips Petroleum v. Shutts*<sup>39</sup>—are all concerned with describing the conditions necessary for a representative action to affect the property rights of persons without an individual day in court or, in some cases, even without individualized notice. There is, quite simply, no absolute and unyielding foundational principle of the individual day in court in the context of representative litigation. To posit such a principle is to disavow the controlling precedents and to propose that the modern class action should be subject to dramatic new constitutional constraints.

It should be noted that Professor Redish has staked out a position along these lines in his book *Wholesale Justice*, questioning the viability of much of the modern class action enterprise in light of its impact on the “meta-autonomy” of individuals in “making most choices about the nature of their participation in the [democratic] process.”<sup>40</sup> Redish and Kiernan cite *Wholesale Justice* in their first sentence for its analogy of the class action to fire—Prometheus, rather than Odysseus—and they cite it again in discussing the potential for class actions to benefit only the attorneys and not the class members in some instances.<sup>41</sup> It is unclear whether the authors mean to

35. The idea of due process as a recognition of the individual regard to which litigants are entitled as a matter of dignity is one that Professor Mashaw has developed. See generally JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985).

36. See FED. R. CIV. P. 23(b)(1) & (b)(2).

37. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (imposing a constitutional requirement of adequate representation of the interests of absentees for any class action).

38. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–18 (1950) (setting forth due process standards for notice and describing the conditions under which a representative action may proceed in the absence of individual service of process to people whose legal interests will be affected).

39. *Philips Petroleum v. Shutts*, 472 U.S. 797, 811–12 (1985) (holding that state courts must establish personal jurisdiction over absent class members in a damages action through consent via notice and the opportunity to opt out if they would not otherwise have sufficient minimum contacts to adjudicate their claims).

40. MARTIN REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 4* (2009).

41. See Redish & Kiernan, *supra* note 2, at n.1, n.86 & accompanying text.

situate their Article as a corollary to *Wholesale Justice* and, hence, dependent on its assertions. If so, their proposal can make a claim to consistency, albeit at the cost of limited practical significance, as they are proposing a solution to a class certification problem that they believe should frequently not be capable of existing in the first place. If not, then the Article fails to make any case for ignoring the relevant due process precedents, merely asserting rather than justifying the seemingly misplaced “individual day in court” principle as a paradigm for due process analysis in representative litigation.

The authors also make the unfortunate error of describing the Supreme Court’s decision in *Smith v. Bayer* as a “due process” holding, or as expressing “due process” principles, in arguing that a denial of certification can never bind absentees, hence justifying—nay, demanding—their radical new approach.<sup>42</sup> The *Bayer* Court, however, rested its holding on the common law of preclusion and the constraints of the federal Anti-Injunction Act.<sup>43</sup> It expressly disavowed any due process component to its holding: “Because we rest our decision on the Anti-Injunction Act and the principles of issue preclusion that inform it, we do not consider Smith’s argument, based on *Phillips Petroleum v. Shutts*. . . . that the District Court’s action violated the Due Process Clause.”<sup>44</sup> And, citing this same language, the Court went out of its way to suggest that Congress and the rule makers still retain the authority to craft a solution to the multiple certification problem that would bind absentees directly:

[N]othing in our holding today forecloses legislation to modify established principles of preclusion should Congress decide that [the Class Action Fairness Act] does not sufficiently prevent relitigation of class certification motions. Nor does this opinion at all address the permissibility of a change in the Federal Rules of Civil Procedure pertaining to this question.<sup>45</sup>

Redish and Kiernan are free to excoriate the *Bayer* Court for failing to adopt their approach to due process, or for inviting further reforms that their constraining view of the Constitution would forbid. Advancing a misleading account of the holding that the Court actually issued, however, is another matter.

My own position on the due process question has not changed since I first explored the issue six years ago. As I explained then, “the *Mullane/Shutts* analytical methodology” requires that we analyze “the nature and extent of the change in the legal position of class members that is effectuated when a court issues a preemptive injunction to enforce its own denial of

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42. Redish & Kiernan, *supra* note 2, at 1661–62; 1666–67.

43. *Smith v. Bayer*, 131 S. Ct. 2368, 2376–79 (2011) (discussing the Anti-Injunction Act); *id.* at 2379–82 (discussing issue preclusion doctrine).

44. *Id.* at 2376 n.7

45. *Id.* at 2382 n.12.

certification.”<sup>46</sup> If such an injunction “entails [only] the removal of a single remedial option from the litigation arsenal of an absentee” but otherwise “leaves the absentees’ legal claims uncompromised” and permits “meaningful alternative avenues for relief,”<sup>47</sup> then the injunction effectuates a “limited and attenuated alteration in the legal position of class members . . . in the sense that it involves an aspect of the administration of their claims as to which they had no prelitigation expectation or reliance interest.”<sup>48</sup> For reasons that I spell out at length in my earlier Article, the issuance of such an injunction would pose no due process concerns under *Mullane* and *Shutts*, despite the lack of individualized process to all class members at the certification stage, provided that the initial court focused explicit attention on the possibility that a denial of certification might bind the absentees and ensured that the proponents of the class provided adequate representation on that question.<sup>49</sup>

The passages from *Smith v. Bayer* that are quoted above invite policymakers to craft a solution to the multiple certification problem that would bind absentees directly, with the implicit suggestion that due process can accommodate such a solution. I believe that the analytical framework set forth in my earlier treatment of the issue still provides the best justification for that proposition, subject to the constraints that framework implies. To be sure, there is room for disagreement on the issue. But there is no room to argue that *Smith v. Bayer* embodies a radically new due process holding that requires the abandonment of any solution involving absent class members because of the entitlement of those absentees to their day in court. Redish and Kiernan go seriously astray when they frame their proposal in these terms.

### III. LITIGATION DYNAMICS AND SERIAL CERTIFICATION

Finally, there remains the question of the actual impact that the Redish and Kiernan proposal would be likely to have in light of the realities of complex litigation practice. Several facts about modern complex litigation suggest that this proposal would miss the mark even if it were sustainable as a matter of theory and doctrine.

The first relates to the salience of this, or any, proposed solution to the serial certification phenomenon. With the enactment of CAFA, the availability of coordination through the MDL process, and the Court’s recent decisions constraining the scope of general “doing business” jurisdiction,<sup>50</sup> it is unclear how often the serial certification problem will arise going forward.

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46. Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2101 (2008).

47. *Id.* at 2102.

48. *Id.* at 2105–06.

49. *See id.* at 2073–2109.

50. *See Daimler AG v. Baumann*, 134 S. Ct. 746, 761 n.19 (2014) (reaffirming that general “doing business” jurisdiction is only available where a corporation is genuinely “at home” and emphasizing that it will be the “exceptional” case where such jurisdiction exists beyond the corporation’s principal place of business and the states where it is incorporated).

In order for a case to pose a serious threat of abusive attempts at serial certification, it must be worth enough money to merit the kind of time and resources that would be involved in making such attempts. It must also be amenable to the kind of forum shopping that would give serial attempts at certification a prospect for success, which would typically entail a defendant with a significant multi-state presence and, quite possibly, a class that encompasses residents of multiple states. Most cases of this description can now be removed to federal court under CAFA, meaning that serial attempts at certification will either be coordinated before a single judge through the MDL process or else subject to the principles of comity among federal courts mentioned in *Bayer* that would make it unlikely for a lawyer who is conspicuously shopping for a better result to meet with a sympathetic response.<sup>51</sup> In cases not subject to removal—which, by definition, are likely to be more localized disputes—the constraints on general jurisdiction will lessen the ability of class counsel to choose a new and more pliable forum when making multiple attempts at certification. If a lawyer is limited to a given state court system when using this tactic, there is every reason to expect that state judges would have reactions similar to those that the *Bayer* Court anticipates within the federal system, affording comity to the decisions of their colleagues on related cases and reacting with disfavor to conspicuous forms of strategic behavior. Finally, even when a given class action is not subject to removal to federal court, a recent survey by the Federal Judicial Center suggests that federal MDL judges coordinate with state courts in a significant number of complex matters when the latter entertain related or parallel proceedings.<sup>52</sup>

These facts diminish the potential significance of the serial certification problem across the board; they are not specific to the Redish and Kiernan proposal. Still, the diminishing practical significance of the problem calls into question the wisdom of floating a solution that would breach a formal barrier between the status of parties and attorneys—a distinction that has heretofore been treated as largely inviolate in preclusion doctrine.<sup>53</sup> The authors have

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51. *Smith v. Bayer*, 131 S. Ct. 2368, 2382 (2011) (“[W]e would expect federal courts to apply principles of comity to each other’s class certification decisions when addressing a common dispute.”); see also Wolff, *supra* note 14, at 1945 & nn.244–46 (discussing this passage).

52. See EMERY G. LEE III, SURVEY OF FEDERAL TRANSFEREE JUDGES IN MDL PROCEEDINGS REGARDING COORDINATION WITH PARALLEL STATE PROCEEDINGS: REPORT TO THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION AND THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION (2011) (finding that 43% of MDL judges surveyed had become aware of parallel state proceedings and that 60% of those judges had communicated in some fashion with their state counterparts to coordinate or share information).

53. In *Taylor* itself, for example, the two successive litigants who attempted to use the Freedom of Information Act to force the disclosure of airplane specifications had employed the same attorney. The lower federal courts invested that fact with great significance in finding that it was appropriate to bind the second litigant to the first judgment through a doctrine of virtual representation. See *Taylor v. Sturgell*, 553 U.S. 880, 890–91 (2008). The Court rejected that approach, finding instead that non-party preclusion would only be appropriate if the second litigant was engaged in “a collusive attempt to relitigate [the first] action,” *id.* at 905–07, and it remanded for a factual determination on that question.

not made a serious case for such a tectonic shift, suggesting once again that they intend to present only a gerrymandered one-off solution.

There is also a practical problem with the Redish and Kiernan proposal that the authors never deal with in a serious fashion. Even if one accepts their extension of preclusion doctrine to class counsel, their proposal would only apply to cases in which the same lawyers make serial attempts at certifying the same class. What does “the same lawyers” mean in this context? In cases that might present a significant danger of serial certification abuse—those with a substantial amount at stake and significant multi-state contacts—the norm is for multiple competing attorneys to jockey for position and influence.<sup>54</sup> In the multi-district litigation process, judges appoint lead counsel to manage and control the herd of attorneys that are brought together by that powerful consolidation device,<sup>55</sup> and Rule 23 itself contains a structure for selecting class counsel from among the competing lawyers who will often be involved in a given proceeding, even when the MDL process is not involved.<sup>56</sup> Complex cases frequently involve multiple lawyers and firms, sometimes cooperating with each other and coordinating their actions, and sometimes competing for influence, compensation, and control. In these paradigm cases, would Redish and Kiernan extend preclusion for a denial of certification only to the lawyers formally designated as lead or liaison counsel? How would that way of proceeding affect the incentives of these lawyers in their representation of the class and their dealings with their colleagues? Or would Redish and Kiernan extend preclusion to all the lawyers involved in an initial proceeding, regardless of the level of authority that they are able to exercise? Such a profligate doctrine would seem to violate the careful statements about non-party preclusion based on control or litigation-by-proxy that the Court delineated in *Taylor v. Sturgell*, particularly in the MDL process, where lawyers not included in the management committee may have little or no capacity to shape the proceedings.

And all of these scenarios would produce predictable strategic responses from plaintiff’s attorneys. If only lead or liaison counsel would be bound under the Redish and Kiernan doctrine, then one can predict that there would be side deals ensuring that lead counsel would still receive

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54. See, e.g., Deborah R. Hensler, Keynote, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 322–23 (2011) (describing dynamics of competition among firms in class action litigation and the potential for third-party financing to increase that competition); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1369–73 (1995) (describing the capacity for competition among multiple firms to develop into a “reverse auctions” in which “defendants can seek the lowest bidder from among these rival groups and negotiate with each simultaneously”).

55. See, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. (forthcoming 2015) (describing the “hierarchies of influence” that MDL judges create to manage their dealings with large numbers of lawyers).

56. See FED. R. CIV. P. 23(g); *id.* § (g)(2) (“If more than one adequate applicant seeks appointment [as class counsel], the court must appoint the applicant best able to represent the interests of the class.”).

compensation if other lawyers had to take the lead in any subsequent attempts at certification. If all affiliated lawyers would be swept into this expansion of preclusion doctrine, then plaintiff's lawyers might make arrangements to keep some cooperating attorneys formally unaffiliated with the initial proceeding, ready to join the suit if the court grants class certification but available to file a separate proceeding as "new" lawyers if the first court denies the certification request. Do Redish and Kiernan propose satellite proceedings with invasive discovery and the potential for intrusion into attorney-client communications and joint-representation agreements in order to determine the exact nature of the relationships among the lawyers and hence the potential applicability of preclusion? The whole thing would be a mess.

It is also presumably the case that the Redish and Kiernan proposal would be constrained by the strict requirements of issue preclusion: the "black-letter judgments law" that they insist on when critiquing pre-*Bayer* attempts to bind absentees.<sup>57</sup> This would mean that an attorney, like an absent class member, could not be precluded or enjoined from making serial attempts at certification when the subsequent action is filed in a jurisdiction with materially different certification standards. In order to achieve a more robust outcome in the face of these strategic responses, it would be necessary for any initial ruling on certification to have a stronger preemptive effect. The *Bayer* decision forecloses any argument that the Class Action Fairness Act can impose such preemption of its own force, and the authors propose no alternative.

Finally, even in the absence of coordination, hidden side-deals, or other complicated multiple-lawyer scenarios, a fatal problem remains. If one lawyer tries and fails to secure class certification in a potentially valuable case, what reason is there to believe that another lawyer will not independently file a separate action and try again on her own? If it makes financial sense for one lawyer to risk successive attempts at certification after an initial failure, it would often make sense for an unrelated lawyer to make the attempt when the first lawyer was precluded from doing so. Perhaps Redish and Kiernan imagine that class action lawyers will generally be unaware of the actions filed by other lawyers who practice in their field. But they provide no basis for believing that to be so.

#### CONCLUSION

The dynamics of high-stakes complex litigation are changing. The Class Action Fairness Act and the MDL process have federalized and consolidated many mass disputes that used to be dispersed among different courts. Within the federal system, the Supreme Court has imposed increasing constraints. Following the Court's decisions in *Amchem* and *Ortiz*, Rule 23 is largely

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57. Redish & Kiernan, *supra* note 2, at 1679.

unavailable for the resolution of mass personal injury disputes,<sup>58</sup> and much of the activity around these claims has shifted to large-scale processing on an inventory basis.<sup>59</sup> The Court's massive expansion of the Federal Arbitration Act<sup>60</sup> has called into question the enforceability of consumer protection and employment laws on an aggregate basis.<sup>61</sup> And the Court has moved toward a ratcheting up of the commonality standard, a development that could constrain the availability of broadly framed class actions in all areas of substantive law if it continues.<sup>62</sup> In this shifting terrain, any treatment of class action doctrine must combine analytical rigor with an informed understanding of the on-the-ground dynamics of litigation practice.

It remains to be seen whether the phenomenon of serial attempts at class certification will constitute a problem of any great practical significance as the activities of plaintiff's attorneys find a new center of gravity. If so, there is ample room under the Due Process Clause to address that problem, even if the Court's ruling in *Bayer v. Smith* will make lower courts cautious about implementing the necessary modifications to preclusion doctrine without further direction from Congress or the rule makers. Distorting preclusion doctrine to permit a direct estoppel against class counsel, however, is not the answer. Redish and Kiernan's proposal seeks to justify a qualitative shift in the definition of preclusion by insisting on an idiosyncratic and inapt approach to due process in representative litigation that is based on an erroneous description of the controlling precedents. The proposal they advance is impractical, would be ineffective on its own terms, and would either impose systemic costs by destabilizing preclusion law in many other areas or else operate solely as a one-off proposition that lacks any broader theoretical coherence.

The serial certification problem remains an engaging analytical puzzle. This wholesale redefinition of preclusion doctrine is not the solution.

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58. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 592, 617–19 (1997) (enforcing strict adequacy of representation standard in asbestos personal injury class action and demanding undiminished adherence to Rule 23(b)(3) predominance requirements even in a proposed settlement-only proceedings); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 (1999) (disallowing attempted use of Rule 23(b)(1)(b) as ersatz bankruptcy substitute for resolving mass asbestos claims).

59. See Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56 (2012) (“Mass tort class actions have virtually disappeared as a result of the U.S. Supreme Court decisions in *Amchem Products Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*, replaced by aggregated lawsuits resolved in multidistrict litigation (MDL).”).

60. 9 U.S.C. §§ 1–2 (2012).

61. See *Am. Express v. It. Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (enforcing arbitration clause that effectively prevented merchants from pooling their efforts to assert viable antitrust claim); *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (enforcing arbitration clause that prohibits consumers from pursuing classwide arbitration).

62. See *Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550–57 (2011); but see Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1033–47 (2013) (arguing that the commonality ruling in *Dukes* is best understood as a statement of Title VII policy rather than a broader revision of the commonality standard).



