Issue Preclusion Effect of Class Certification Orders

Antonio Gidi*

This Article addresses the peculiarities of issue preclusion in class action certification, particularly after the approval of the American Law Institute's Principles of the Law of Aggregate Litigation *in 2010 and the U.S. Supreme Court decision in* Smith v. Bayer Corp. *in 2011. After discussing the reasons why orders that deny class certification cannot have issue preclusive effect, this Article analyzes proposals to address the problem.*

* Assistant Professor, University of Houston Law Center; Visiting Professor, University of Tennessee College of Law. S.J.D., University of Pennsylvania Law School. I thank Geoffrey C. Hazard, Jr., Peter Linzer, Kevin Clermont, and William Taylor for helpful comments on earlier versions of this Article.

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Introduction

Issue preclusion in class actions has been a difficult and controversial topic ever since the birth of the modern class action. Yet no satisfactory resolution of the problem has ever been reached.

The controversy has come back in full force in the past few years, most recently with the approval of the American Law Institute's ("ALI") *Principles of the Law of Aggregate Litigation* in 2010,[1] the Eighth Circuit's decision in *In re Baycol Products Litigation* in the same year,[2] and the U.S. Supreme Court decision in *Smith v. Bayer Corp.* in the summer of 2011.[3]

The persistency of the controversy is not surprising, given the importance of the subject. Both class actions and issue preclusion are extremely complex and important issues today, involving considerations of fairness, access to justice, and finality. Together, the preclusive force of a class action judgment represents one of the most formidable issues in modern civil litigation.

Despite the importance of issue preclusion in class action litigation, we still do not have a satisfactory understanding of the issues involved, let alone any semblance of an adequate resolution of the many problems implicated. The matters have not been completely or adequately addressed, and they will only grow in relevance. This void is in sharp contrast with the overall field of res judicata law, which is extremely well developed and well settled.[4]

This Article starts by briefly discussing in Part I the rules of issue preclusion in individual litigation. The Article then analyzes in Part II some peculiarities that arise in the class action context. In Part III, it analyzes the major question in the area, namely the issue preclusive effect of an order that denies (or grants) class certification. Some courts have given issue preclusive effect to such orders, in practice prohibiting the relitigation of the certification issue in future class actions. Other courts, and most recently the Supreme Court, have held that certification orders do not have preclusive effect. I demonstrate that class certification orders simply cannot have preclusive effect.

The Article also addresses in Part IV the several solutions that have been proposed to deal with the problems of what effect, if any, to give to class certification orders. Finally, in Part V, the Article discusses the insufficiency of these proposals to deal with the subject and the need for a new approach.

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1. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010).
2. 593 F.3d 716 (8th Cir. 2010).
3. 131 S. Ct. 2368 (2011).
4. *See* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 5–7 (2001) (stating that except for some details, "the United States today enjoys a semi-codification of most of res judicata law" and attributing such stage of development and uniformity to the long history of the device, the many treatises on the subject, and the Second Restatement of Judgments).

I. Issue Preclusion in Individual Actions

Although this Article focuses on the application of issue preclusion in the class action context, it is important to understand how the doctrine is generally applied in individual lawsuits. The focus here will be limited to the basic aspects of the preclusion doctrine that are most relevant to the topic at hand. By understanding the traditional rules of issue preclusion, we will be able to determine when they can be directly applied and when they need to be tailored to the peculiarities of class action litigation.

Issue preclusion, previously known as collateral estoppel, prevents the relitigation of an "issue" decided in an earlier proceeding based on a different cause of action.[5] Although its primary focus is on avoiding the relitigation of issues of fact, not pure issues of law,[6] it is recognized that issues of law may also be subject to issue preclusion, particularly the application of the law to facts.[7] For an issue decided in a proceeding to be precluded from being relitigated, the law imposes these basic requirements: (1) the issues in both proceedings must be identical; (2) the issue must have been actually litigated and decided in the prior proceeding; (3) the prior proceeding must have afforded a full and fair opportunity for the litigation of the issue; (4) the issue must have been necessary to support the outcome of the action; (5) there must have been a valid and final judgment on the merits;[8] and (6) the defendant could foresee that the issue would later be used against her in a different

5. *See* Restatement (Second) of Judgments §§ 17(3), 27 (1982); Casad & Clermont, *supra* note 4, at 11–12.

6. *Compare* United States v. Moser, 266 U.S. 236, 242 (1924) ("Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact*, *question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."), *with* United States v. Stauffer Chem. Co., 464 U.S. 165, 170–71 (1984) ("[T]he doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action."), *and* Montana v. United States, 440 U.S. 147, 163 (1979).

7. *See* Restatement (Second) of Judgments § 28(2) & cmt. b ("[Issue preclusion applies to issues of law, except when] (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . . ."). For a broad discussion, see Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, Civil Procedure 704–08 (4th ed. 2005); Geoffrey C. Hazard, Jr., John Leubsdorf & Debra Lyn Bassett, Civil Procedure 642–44 (6th ed. 2011); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction 2d § 4425 (2d ed. 2002); *see also* Casad & Clermont, *supra* note 4, at 130–34.

8. *See* Restatement (Second) of Judgments §§ 17(3), 27; Casad & Clermont, *supra* note 4, at 113–48; 18 Wright, Miller & Cooper, *supra* note 7, § 4416; *see also* Adams Parking Garage, Inc. v. City of Scranton, 33 Fed. App'x 28, 31 (3d Cir. 2002); Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995).

proceeding.[9] There are also several exceptions to the application of issue preclusion, though it is not necessary to discuss them here.[10]

II. Issue Preclusion in Class Actions

Like judgments in traditional individual litigation, class action judgments also have issue preclusive effects.[11] The parties in a class action are bound by the doctrine of issue preclusion in the same manner as parties in an individual lawsuit. Generally speaking, the same requirements of issue preclusion in the context of individual litigation must be met for the doctrine to apply to class action judgments.[12]

A class action contains two types of causes of action against the defendant: one is asserted by the class as a whole (the class cause of action) and the other is asserted by each class member individually (the class members' individual causes of action). This leads to what can be called the "two facets of class action preclusion," because a class judgment binds the class as a whole (collectively) as well as the class members (individually). Accordingly, the class as a whole, the individual class members, and the defendants are bound by the decisions of issues that are essential to the judgment, as long as they were actually litigated and determined by a valid and final judgment.[13]

9. *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.7 (1979) (stating that collaterally estopping a party from litigating an issue may violate that party's due process rights if it was unforeseeable that the issue would later be used collaterally against her); *In re* Microsoft Corp. Antitrust Litig., 355 F.3d 322, 325–29 (4th Cir. 2004); Hunter v. City of Des Moines, 300 N.W.2d 121, 124–25 n.4 (Iowa 1981); Goodson v. McDonough Power Equip., Inc., 443 N.E.2d 978, 987–88 (Ohio 1983); *see also* Restatement (Second) of Judgments § 28(5)(b). This is especially true when in the first action a party lacked the motivation or incentive to litigate the issue fully and vigorously. *See* Restatement (Second) of Judgments §§ 27 cmt. j, 28 cmt. i.

10. *See, e.g.*, State *ex rel.* Westchester Estates, Inc. v. Bacon, 399 N.E.2d 81, 83 (Ohio 1980) ("Where, however, there has been a change in the facts in a given action which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of *res judicata* nor the doctrine of collateral estoppel will bar litigation of that issue in the later action."). Some of these exceptions are prescribed in the Restatement (Second) of Judgments § 28.

11. *See* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1789, at 557–58 (3d ed. 2005).

12. *See* Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984) ("A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment."); *see also* 7AA Wright, Miller & Kane, *supra* note 11, § 1789, at 559. (citing Laskey v. UAW, 638 F.2d 954 (6th Cir. 1981); Lee v. Criterion Ins. Co., 659 F. Supp. 813 (S.D. Ga. 1987); McCormack v. Abbott Labs., 617 F. Supp. 1521 (D. Mass. 1985)).

13. *See* Gribben v. Kirk, 466 S.E.2d 147, 151, 157 n.21 (W. Va. 1995) (stating that the defendant in an individual action brought by class members was collaterally estopped from relitigating an issue previously decided on a class action). The plaintiffs in *Gribben* had originally opted out of the class, but the court held that they were coerced and mislead into opting out and considered them as class members.

Certain problems, however, are peculiar to the application of the issue preclusion doctrine to class action litigation. More specifically, there are two particularly salient problems to resolve within the class action context. The first is whether class members who exercised their right to opt out of the class are allowed to assert in their individual lawsuits (as any nonparty would) nonmutual offensive issue preclusion against the class defendant. The second is whether an order denying class certification has preclusive effect in future class actions, in other words, whether a class action that was not certified by one court can be certified by another. I will address the first issue in a forthcoming article.[14] This Article focuses on the second issue.

III. Issue Preclusion of Class Certification Orders

A. The Problem

The certification order is a peculiar aspect of class action litigation that does not fit well within the application of traditional doctrines of issue preclusion. For the past few decades, courts have been confronted with the question of which effect, if any, to give a previous court's denial of class certification.

The issue generally appears in two different practical scenarios. The first is where a second court (federal or state) is faced with the decision of whether or not to give preclusive effect to an earlier (federal or state) court's denial of certification.[15] The second is when a federal court must decide whether or not to issue an injunction to bar the plaintiff class from pursuing, in state court, the same class action that was originally denied certification in federal court.[16]

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14. *See* Antonio Gidi, *Loneliness in the Crowd: Why Nobody Wants Opt-Out Class Members to Assert Offensive Issue Preclusion Against a Class Defendant* (forthcoming 2012).

15. *See, e.g.*, *In re* Piper Aircraft Distrib. Sys. Antitrust Litig. (*Piper II*), 551 F.2d 213, 219 (8th Cir. 1977) (involving a federal court not giving issue preclusive effect to a previous federal court class certification denial); Alvarez v. May Dep't Stores Co., 49 Cal. Rptr. 3d 892, 897 (Ct. App. 2006) (state court giving preclusive effect to a previous state class certification denial); Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 365–67 (Tex. App. 1994) (state court not giving issue preclusive effect to a previous federal class certification denial).

16. *See*, *e.g.*, *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 769 (7th Cir. 2003) (granting the injunction); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998) (denying the injunction). Yet a third scenario occurs when a class action, after having the merits decided through trial and final verdict, is later decertified. Some courts have given preclusive effect to the judgment on the merits, while others have not. *Compare* Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1259 (Fla. 2006) (giving preclusive effect to the jury's findings of fact), *and* Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1335–36 (11th Cir. 2010) (same), *with* Spitzfaden v. Dow Corning Corp., 833 So. 2d 512, 522 (La. Ct. App. 2002) (finding that the trial judge decertified not only part of, but the entire class action). This scenario will not be discussed here, although the possibility of preclusion in this case seems likely after *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379–80 n.10 (2011) ("[A] commonplace of preclusion law [is] that nonparties sometimes may benefit from, even though they cannot be bound by, former litigation.").

The question is the same in both situations: Should a decision that denies class certification have issue preclusive effect and prevent the same class from attempting to certify the same class action at a later date? Or, to put it differently, once certification is denied, are the absent class members precluded from bringing the same class action again in a different court and relitigating the same certification issue previously decided? Is the issue of certifiability subject to issue preclusion?

Although similar, the second scenario involves the added complexity of the propriety of a federal court issuing an injunction interfering with state judicial proceedings. This analysis is further complicated by the strict requirements and narrow exceptions of the Anti-Injunction Act[17] and federalism issues.[18] After decades of struggle, only recently did the Supreme Court hold that the Anti-Injunction Act's "relitigation exception" does not allow a federal court to enjoin a state court from certifying a class action that has previously been denied certification in federal court.[19]

The complicating factors raised by federalism make the search for a consistent rule on issue preclusion and class certification an elusive task. These factors do not arise if both class actions are brought in federal court,[20] in the same state court, or in two different state courts.[21]

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17. The Anti-Injunction Act, 28 U.S.C. § 2283 (2010), provides that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The exception "to protect or effectuate its judgment," also known as the "relitigation exception" is based partly on the doctrine of issue and claim preclusion. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 147 (1988) ("[T]he relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel."); Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 286–87 (1970) (explaining the limited exceptions to the anti-injunction rule).

18. *Compare In re Gen. Motors*, 134 F.3d at 138 ("[A]ppellants' requested injunction does not fall under any of the three exceptions to the Anti-Injunction Act."), *and* J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 177 (5th Cir. 1996) ("[T]he instant denial of class certification does not come within one of the exceptions to the Anti-Injunction Act."), *with* Canady v. Allstate Ins. Co., 282 F.3d 1005, 1020 (8th Cir. 2002) (deciding that the denial of class certification comes within the exceptions to the Anti-Injunction Act), *and In re* Baycol Prods. Litig., 593 F.3d 716, 726 (8th Cir. 2010) (same), *and In re Bridgestone/Firestone*, 333 F.3d at 769 (same).

19. *See Smith*, 131 S. Ct. at 2373 (2011).

20. The risk of relitigation of the same certification issue in the federal courts is reduced whenever several class actions are consolidated by the Judicial Panel on Multidistrict Litigation. By concentrating nationwide class actions in the federal courts, the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2010), further reduces the problem, essentially because the statute prevents the certification of nationwide class actions in state courts. *See Smith*, 131 S. Ct. at 2382 (finding that when federal courts address a common dispute, they should apply principles of comity to one another's class certification decisions, even in the absence of consolidation); Timothy Kerr, *Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power, and the Class Action Fairness Act of 2005*, 29 HAMLINE L. REV. 217, 235, 258 (2006) (noting that, in practice, CAFA has the same effect as the application of preclusion to a certification order); Kara M. Moorcroft, *The Path to Preclusion: Federal Injunctive Relief Against*

B. Reasons to Allow Preclusion of Class Certification Orders

Proponents of preclusion of certification orders argue that the issue of whether the lawsuit can proceed as a class action (the certification issue) has actually been litigated once in a court of competent jurisdiction. The matter need not, indeed it cannot, be litigated again. Furthermore, they argue that the parties and the courts have spent a substantial amount of time, money, and energy in sorting out the facts and deciding the legal issues. The application of issue preclusion, therefore, increases judicial efficiency and economy because the class certification process usually consumes a large amount of time and judicial resources, particularly with discovery and attorneys' fees.[22] Allowing the plaintiff class to relitigate the same issue again in different courts, they say, is not only wasteful, but unfair to the defendant. It may be considered unfair to submit the defendant to a repeated lengthy and expensive litigation over the same or substantially similar procedural issues of class certification.[23]

As the Seventh Circuit stated in *In re Bridgestone/Firestone, Inc.*, allowing relitigation would enable a plaintiff class to bring several class action lawsuits.[24] Even if most of the courts would deny class certification, if a single court would certify the class action, "all the no-certification decisions fade into insignificance. A single positive trumps all the negatives."[25] This could constitute illegitimate forum shopping.[26]

Nationwide Classes in State Court, 54 Duke L.J. 221, 253–54 (2004) (praising the then-proposed CAFA as a "far better solution," given the difficulties with the doctrine of preclusion). For an earlier assessment, see generally Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. 461 (2000) (proposing ways to deal with overlapping class actions).

21. *See* Principles of the Law of Aggregate Litigation § 2.11 cmt. a (2010) ("As yet, there is no comparable institution [to the Judicial Panel on Multidistrict Litigation] for the coordination of civil litigation across the various states or between the federal courts and the various state courts."); *id.* § 2.11 Reporters' Notes cmt. a.

22. *See Piper II*, 551 F.2d 213, 219 (8th Cir. 1977) (acknowledging that "[t]here are strong arguments that may be advanced for applying the rule of collateral estoppel to a class action determination when the plaintiff is engaging in multidistrict litigation" but ultimately refusing to do so); Moorcroft, *supra* note 20, at 226 ("In many cases, defendants and plaintiffs will spend two or three years battling over the initial certification decision in federal court. Fighting this same battle in multiple state courts, after it was fully and fairly litigated in the original federal forum, is fundamentally unfair.").

23. *J.R. Clearwater Inc.*, 93 F.3d at 179 ("[W]e are sympathetic to [defendant's] desire to avoid another protracted and costly round of litigation over class certification in the Texas state courts."); *In re* New Motor Vehicles Can. Exp. Antitrust Litig., 609 F. Supp. 2d 104, 106 (D. Me. 2009) ("[T]he defendants may . . . be deprived of realizing finally their hard-earned victory and have to start from the beginning in a different forum.").

24. *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766 (7th Cir. 2003).

25. *Id.* at 766–67 ("This happens whenever plaintiffs can roll the dice as many times as they please—when nationwide class certification sticks (because it subsumes all other suits) while a no-certification decision has no enduring effect. Section 2283 permits a federal court to issue an injunction that will stop such a process in its tracks and hold *both* sides to a fully litigated outcome, rather than perpetuating an asymmetric system in which class counsel can win but never lose."); *see Piper II*,

In any litigation, "[t]he concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring the suit."[27] This concern becomes especially troubling in the context of overlapping class actions.[28] The class, having already chosen the initial venue and upon receiving an unfavorable certification decision, can simply voluntarily dismiss its case and refile in another court.[29] Furthermore, the class representative has a right to appeal an unfavorable certification decision.[30]

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551 F.2d at 219 ("[A]ssuming a fair hearing, a plaintiff ought not to have unlimited bites at the apple until he can convince a single district court that he qualifies as a class representative under Rule 23. This is wasteful and runs counter to the sound administration of multi-district cases."); Note, *Seventh Circuit Holds That Denial of Class Certification Can Have Preclusive Effect in State and Federal Courts*, 117 HARV. L. REV. 2031, 2035 (2004) ("It is easy to sympathize with Judge Easterbrook's frustration at the ease with which class plaintiffs and their counsel can dodge a court's decision to deny certification.").

26. *See In re* Piper Aircraft Distrib. Sys. Antitrust Litig. (*Piper I*), 411 F. Supp. 115, 121 (W.D. Mo. 1976), *rev'd*, 551 F.2d 213, 218 (8th Cir. 1977) ("[I]t would be entirely unjust and inequitable to allow plaintiff to renew its request for class action determination in six (6) other district courts after having been denied in the Florida action. It is quite clear that plaintiff is shopping around for the forum which would be the most receptive to plaintiff's views. Our system of justice does not permit this type of action."); s*ee also* Duffy v. Si-Sifh Corp., 726 So. 2d 438, 443 (La. Ct. App. 1999) ("[A]llowing the plaintiffs to relitigate the class action question in the instant case would encourage forum shopping, allowing the plaintiffs numerous 'bites' at the class action 'apple,' and frustrate the purposes of the res judicata doctrine."); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1660–66 (2008) (discussing the search for the anomalous certifying court in the context of class settlements).

27. Olmstead v. Anderson, 400 N.W.2d 292, 303 (Mich. 1987).

28. *See* Wasserman, *supra* note 20, at 486–87 ("The protections and limitations built into preclusion doctrine—designed to protect non-parties and to ensure that only issues actually litigated are precluded—provide litigants with opportunities to 'repackage' class actions rejected by one court and file them in another court.").

29. *See* FED. R. CIV. P. 41; Canady v. Allstate Ins. Co., 282 F.3d 1005, 1018 (8th Cir. 2002) ("[A]ppellants may not . . . recycle the same claims and issues in different courts, hoping to achieve the result they desire."); *Piper I*, 411 F. Supp. at 117–18 (discussing the plaintiffs' claim that denial of class certification was not a conclusive determination of the issue and thus was not final for purposes of res judicata).

30. *See* FED R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification . . . ."); *see also* 56 AM. JUR. 2d *Motions, Rules, & Orders* § 41 (2010) (stating that parties can seek reconsideration of adverse rulings and that trial judges have discretion to review these determinations). Before the 1998 amendment to Rule 23(f), however, the possibility of appealing a class certification decision was limited to the restrictive 28 U.S.C. § 1292(b) or other exceptions to the general rule against interlocutory appeals. *See* Gardner v. Westinghouse Broad. Corp., 437 U.S. 478, 482 (1978) ("The [§ 1292] exception does not embrace orders that have no direct or irreparable impact on the merits of the controversy. The [certification] order in this case . . . had no such impact; it in no way touch[ed] on the merits of the claim but only related to pretrial procedures." (alteration in original) (quoting Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23, 25 (1966))); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) ("Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 624 (3d Cir. 1996) (citing *Coopers* and *Gardner*). *But see In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (granting a writ of mandamus and ordering the district court to decertify the class).

The risks associated with this situation did not escape the Advisory Committee on the Federal Rules of Civil Procedure. The committee recognized that the potential for abuse presented by "unfettered opportunities" to file the same class action in several different courts justified the application of preclusion to class certification orders: The class could escape more rigid scrutiny in one court by refiling the same class action lawsuit in another court, whose standards "may be less rigorous or the court may be more accommodating."[31]

Applying preclusion to the class certification order avoids "inconsistent results that tend to undermine [public] confidence in the judicial process"[32] and also prevents "unnecessary friction between judicial systems."[33] It is also viewed as an essential element in the quest to avoid waste and inefficiency, the use of the class action for *in terrorem* strategic effect, and forum shopping.[34] The reasoning based on the above-described fears, however, has been severely yet deservedly criticized. According to one commentator, the Seventh Circuit in *Bridgestone/Firestone* "certainly succeeded in eliminating the prospect of repeat litigation, but it did so only by expanding the reach of its prior ruling in a way that strayed from deep-seated principles of federalism and the law of judgments."[35]

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31. Advisory Comm. on the Fed. Rules of Civil Procedure, Report of the Civil Rules Advisory Committee 2, 31 (2001) [hereinafter Advisory Comm. Report] ("The central focus is on . . . addressing some of the most pressing problems that arise from competing, [parallel, duplicative,] and overlapping class actions . . . ."). In addition to preclusion of the class certification order, the report proposed two other rules addressing the issue of parallel class action litigation: the preclusive effect of orders that refused to approve a class settlement and the court's power to prohibit class members from filing the same class action in other courts. *See id.* at 31–37. Neither of the three proposals of this otherwise successful report were approved.

32. Clements v. Airport Auth., 69 F.3d 321, 330 (9th Cir. 1995); *see* 18 Wright, Miller & Cooper, *supra* note 7, § 4403 n.2, at 22 ("Preclusion serves both public and private values. . . . [and] protects the courts against the embarrassment of inconsistent decisions.").

33. *See* Principles of the Law of Aggregate Litigation § 2.11 cmt. b, at 179 (2010) ("Such friction arises with greatest force when the party opposing certification raises in a subsequent forum the same alleged defect that defeated class certification in the initial forum.").

34. *See* Martin H. Redish, *The Need for Jurisdictional and Structural Class Action Reform*, 32 Envtl. L. Rep. 10,984, 10,985 (2002) (arguing, furthermore, that the risk of duplicative litigation is a serious problem that defendants face, and that the eventual problems caused to absent class members with the imposition of preclusion of class certification orders are "significantly overstated"); *see also* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Pa. L. Rev. 2035, 2115 (2008) ("[S]eriatim attempts at class certification are often controlled by a single group of entrepreneurial lawyers who switch plaintiffs and venues in search of a favorable result.").

35. Note, *supra* note 25, at 2032, 2038 ("[T]he misguided decision the Seventh Circuit delivered in *Firestone II* shows that the easy options may well be the wrong ones."); *see* Kerr, *supra* note 20, at 234 (stating that the decision pushed the limits of Supreme Court precedent); Gary Young, *Class Action "Tort Reform" Ruling*, Nat'l L.J., July 7, 2003 ("[The] Firestone case . . . bowled over attorneys with its sweeping—and, some say, wrongheaded—curtailment of state court authority to certify nationwide classes after a federal court has declined to do so.").

In 2011, the Supreme Court expressly rejected the notion that the mere fear of repetitive litigation of similar class action issues trumps the rule against nonparty preclusion.[36] After all, the risk of repetitive litigation stems from the principles of federalism.

C. Reasons Not to Allow Preclusion of Certification Orders

There are no easy answers to this problem that has troubled courts and commentators for several decades. On the one hand, numerous practical, policy, and doctrinal considerations suggest that the application of preclusion to certification orders is the best solution under the circumstances.[37] The ideal of judicial efficiency alone may be enough to claim that preclusion is the right choice: One full and fair opportunity to litigate the certification issue must be enough.

On the other hand, regardless of how unfair and wasteful relitigation of class certification issues may be for the defendant and the court system, there are numerous practical, policy, and doctrinal considerations that advise, if not mandate, against application of the preclusion doctrine. Some of these are related to a strict interpretation of the doctrine of issue preclusion; others are policy considerations.

The problem is complex and cannot easily be addressed by a mechanical application of the traditional preclusion doctrines. Indeed, a deeper and more thorough look at affording preclusive effect to certification reveals that it creates many more problems than it solves. Perhaps the issues of fact and law in both actions were exactly the same and were actually presented, controverted, litigated, and expressly decided in the prior litigation. Perhaps even the class was the same and was adequately represented in court and had a full and fair opportunity to present its position in the first class proceeding. However, even if all these requirements are met, there are still reasons why the application of issue preclusion to a certification decision might not be warranted.

1. A Certification Order Is Not a Final Judgment

In order to avoid the application of issue preclusion to class certification orders, some courts have argued that a decision denying

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36. Smith v. Bayer Corp., 131 S. Ct. 2368, 2379–82 (2011) (citing Taylor v. Sturgell, 553 U.S. 880, 901 (2008)); *see Taylor*, 553 U.S. at 883 ("'[T]he threat of vexatious litigation is heightened' in public-law cases because 'the number of plaintiffs with standing is potentially limitless.' FOIA does allow 'any person' whose request is denied to resort to federal court for review of the agency's determination. Thus it is theoretically possible that several persons could coordinate to mount a series of repetitive lawsuits. But we are not convinced that this risk justifies departure from the usual rules governing nonparty preclusion. First, stare decisis will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when stare decisis is not dispositive 'the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others.'" (citations omitted)).

37. *See supra* Part III.B.

certification is not technically a "judgment" or a final determination to which issue preclusion can attach.[38] It is simply a procedural decision that does not normally reach the merits of the case.[39] Other courts have circumvented this technical argument in two different ways. One approach is simply to consider the denial of class certification a "valid and final order" that is subject to the doctrine of issue preclusion "whether or not the claim sought to be certified is subsequently prosecuted to final judgment."[40] Indeed, several courts have taken this approach.[41]

Another way to sidestep the need for a "final order" seems to be more straightforward and intellectually honest. In *Bridgestone/Firestone*, the Seventh Circuit noted that issue preclusion does not depend on a final judgment.[42] Instead, relying on the Restatement (Second) of Judgments, the court reasoned that "for purposes of issue preclusion . . . 'final judgment' includes any prior adjudication of an issue in another

38. *Piper II*, 551 F.2d 213, 219 (8th Cir. 1977) ("A class action determination is in the nature of an interlocutory order. As such, it must necessarily fall if the case itself is dismissed without a judgment amounting to an adjudication on the merits."); *see In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998) ("[D]enial of class certification . . . lacks sufficient finality to be entitled to preclusive effect."); J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 (5th Cir. 1996) ("An order denying class certification is not a final judgment, and therefore is not appealable as a matter of right until conclusion of the litigation in the district court. . . . Accordingly, it seems apparent to us that the denial of class certification similarly lacks sufficient finality to be entitled to preclusive effect while the underlying litigation remains pending."); Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 365–67 (Tex. App. 1994) ("A class certification order cannot usually be characterized as final or irrevocable because it is subject to redetermination as the litigation progresses."); *see also* Polk v. Montgomery Cnty., 782 F.2d 1196, 1201 (4th Cir. 1986) (refusing to apply collateral estoppel to a decision on liability in a class action while the damages phase was still pending because "[t]he decision . . . is not sufficiently final at this time to permit [plaintiff] to use the case to preclude issues at her trial. The . . . class action is still pending in district court. The court in (the class action) has changed the definition of the class once and conceivably the trial judge may modify the definition again.").

39. *But see* Hazard, *supra* note 7, at 635 ("[A] judgment against plaintiff is preclusive not simply when it is on the merits but when the procedure in the first action afforded plaintiff a fair opportunity to get to the merits."). This comment, however, is limited to claim preclusion in individual actions, whereas we are dealing with issue preclusion in class actions.

40. 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 3:15, at 407 (5th ed. 2009).

41. *See* Johns v. Rozet, 141 F.R.D. 211, 214–15 (D.D.C. 1992) (finding that where the determination of class certification was "necessary to the settlement reached in the case," issue preclusion should apply); *In re* Dalkon Shield Punitive Damages Litig., 613 F. Supp. 1112, 1115 (E.D. Va. 1985) (holding that alternative findings should be given preclusive effect when it has been reviewed and upheld on appeal); *see also* Deposit Guar. Nat. Bank v. Roper, 445 U.S. 326, 336 (1980) (stating that on appeal of a certification order, a denial of class certification stands as an adjudication of an issue).

42. *In re* Bridgestone/Firestone, Inc., Tire Prods. Liab. Litig., 333 F.3d 763, 767 (7th Cir. 2003) ("Although claim preclusion (res judicata) depends on a final judgment, issue preclusion (collateral estoppel) does not."); *see Piper I*, 411 F. Supp. 115, 118–21 (W.D. Mo. 1976) (granting a motion to dismiss under the doctrine of collateral estoppel because the class action issue was fully litigated and conclusively determined in a different action where certification was denied), *rev'd*, 551 F.2d 213, 218 (8th Cir. 1977); 18A Wright, Miller & Cooper, *supra* note 7, § 4455.

action that is determined to be sufficiently firm to be accorded conclusive effect."[43] The basic idea seems to be that satisfaction of the "actually litigated" and "finality" requirements can rest on distinct parts of a case, and that an issue can actually be litigated at a preliminary or midway stage of a proceeding.

The Seventh Circuit applied this rationale and held that its prior decision denying class certification was "sufficiently firm" to be afforded collateral estoppel treatment.[44] It stated that its decision "was the result of focused attention by counsel in both the district court and this court; both courts addressed the issue exhaustively in published opinions and brought the debate to a conclusion; certiorari was sought and denied."[45] Therefore, the plaintiff class was precluded from relitigating the certification issue, as long as the class was adequately represented in the first proceeding.[46]

By referring to the adequacy-of-representation prerequisite, the *Bridgestone/Firestone* court touched the cornerstone of class action litigation. Indeed, the essential requirement of any preclusive effect in a class action is adequacy of representation.[47] Because "absent [class] members are to be conclusively bound by the result of an action prosecuted or defended by a party alleged to represent their interests, basic notions of fairness and justice demand that the representation they receive be adequate."[48] Therefore, not only must adequacy have been an issue expressly controverted and determined in the first proceeding, the second court must also independently determine that adequacy indeed

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43. *In re Bridgestone/Firestone*, 333 F.3d at 767 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982)); *see* RESTATEMENT (SECOND) OF JUDGMENTS § 13 ("The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."); *see also Piper II*, 551 F.2d at 218 ("[T]he class action [certification] issue was fully litigated and conclusively determined in the [prior action]."); CASAD & CLERMONT, *supra* note 4, at 52–55; 18A WRIGHT, MILLER & COOPER, *supra* note 7, § 4455. For an earlier statement in a similar sense, see *Lummus Co. v. Commonwealth Oil Refining. Co.*, 297 F.2d 80, 89 (2d Cir. 1961) ("'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.").

44. *In re Bridgestone/Firestone*, 333 F.3d at 769; *see* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 illus. c, at 216–17 (Tentative Draft No. 1, 2008) ("Though not formally a final judgment, a denial of class certification is considered sufficiently definite to support direct review of the certification question at the discretion of the appellate court.").

45. *In re Bridgestone/Firestone*, 333 F.3d at 767.

46. *Id.* at 769 ("Our prior [decision denying class certification of a nationwide class action] is binding *in personam* with respect to the unnamed class members."). The issue decided in the previous order denying certification, however, was limited to a nationwide class action. *Id.* Absent members were free to bring statewide class actions. *Id.* at 767.

47. *See* Hansberry v. Lee, 311 U.S. 32, 43 (1940).

48. *See* 7A WRIGHT, MILLER & KANE, *supra* note 11, § 1765, at 317.

existed in the first proceeding and that the class had a full and fair opportunity to protect its interests.[49]

The rule that an issue determined in a prior action may be considered final if it was "sufficiently firm to be accorded conclusive effect" was originally adopted in the Restatement (Second) of Judgments for application in traditional individual litigation.[50] The *Bridgestone/Firestone* court, however, took this rule out of context and applied it to a delicate class action setting, which is a completely different environment from the one in which the rule was originally conceived. This solution may well be appropriate for individual litigation, where the parties generally are individuals with direct control over their own proceedings. In class actions, however, where the interests of numerous absent members are at stake, the situation is much more complex and does not lend itself to easy solutions.

Indeed, one would be hard pressed to claim that any procedural decision at the certification stage is final.[51] Federal Rule of Civil Procedure 23(c)(1)(C) makes it clear that "[a]n order that grants or denies class certification may be altered or amended before final judgment."[52] "Such an order cannot usually be characterized as 'final' . . . . [because] it is the common practice to leave a class action order subject to redetermination as the litigation progresses."[53] Therefore, as a nonfinal decision that can be reviewed at any time during the proceeding, it cannot be afforded the "definiteness" of preclusion. The Restatement (Second) of Judgments

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49. *See In re* Baycol Prods. Litig., 593 F.3d 716, 721–25 (8th Cir. 2010) (citing *Bridgestone/Firestone* and stating that, for a certification decision to have preclusive effect, it is essential that the issue of adequacy be thoroughly decided by the previous court); *In re Bridgestone/Firestone*, 333 F.3d at 768–69 ("A decision with respect to the class is conclusive only if the absent members were adequately represented by the named litigants and class counsel. That requirement has been met. . . . Holding the absent class members to the outcome is no more an exercise in virtual representation than it is to hold them to a decision on the merits."). *But see* Daboub v. Bell Gardens Bicycle Club, Inc., No. B200685, 2008 WL 4648797, at *6 (Cal. Ct. App. Oct. 22, 2008) (distinguishing adequacy of representation from virtual representation, and holding that the class members were virtually represented in the first class action lawsuit); *see also* Taylor v. Sturgell, 553 U.S. 880, 901 (2008) (rejecting the propriety of binding nonparties under a theory of "virtual representation" based on "identity of interests and some kind of relationship between parties and nonparties").

50. RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982).

51. *See* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982) ("[E]ven after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978) ("[A] district court's order denying or granting class status is inherently tentative.").

52. FED. R. CIV. P. 23(c)(1)(C).

53. *Piper II*, 551 F.2d 213, 217 (8th Cir. 1977); *see* J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 (5th Cir. 1996) ("An order denying class certification is not a final judgment and therefore . . . . lacks sufficient finality to be entitled to preclusive effect while the underling litigation remains pending." (citation omitted)); Rhonda Wasserman, *Tolling: The* American Pipe *Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 840–41 (2006) (discussing and collecting authorities on the issue of the characterization of class (de)certification orders as final and the preclusive effects of such orders); Wasserman, *supra* note 20, at 484–87 (same).

itself considered it a "general common sense point" that issue preclusion "should not be accorded [to] a judgment which is considered merely tentative in the very action in which it was rendered."[54]

In *Morgan v. Deere Credit, Inc.*, a Texas state court specifically considered section 13 of the Restatement (Second) of Judgments' proviso.[55] As we have seen, the Restatement determines that any prior adjudication that is sufficiently firm to be accorded conclusive effect can be considered a "final judgment" for purposes of issue preclusion.[56] The *Morgan* court, however, considered that a class certification issue is not "procedurally definite"; rather, "it is subject to change as provided in the rules."[57] Thus, "the issue of class certification does not satisfy the test of finality for application of issue preclusion."[58]

The argument that a class certification decision is not a "final judgment" rang particularly true before the 1998 amendment to Rule 23.[59] Before Rule 23(f) was enacted, class certification orders could not be immediately appealed.[60] Only after 1998, Rule 23 allowed interlocutory appeal of the certification order.[61] Additionally, in the past it was common for commentators to say that when in doubt, the court should certify the class action and err on the side of caution. If later it was proven that the decision was a mistake, the court could always review it.[62] In practice, however, it can hardly be said that certification

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54. Restatement (Second) of Judgments § 13 cmt. a; s*ee* Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961) (finding that a nonfinal judgment may be considered final for purposes of issue preclusion if, inter alia, the nature of the decision was "not avowedly tentative").

55. *See* 889 S.W.2d 360, 367 (Tex. App. 1994).

56. Restatement (Second) of Judgments § 13.

57. 889 S.W.2d at 365–67.

58. *Id.* at 367.

59. *See* Hazard, *supra* note 7, at 611 ("[A]n interlocutory order, *which is not ordinarily appealable*, would not be treated as a final judgment for purposes of res judicata . . . ." (emphasis added)).

60. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 463 (1978) (holding that a class certification order is not "final" and therefore cannot be immediately appealed); *see also* Gardner v. Westinghouse Corp., 437 U.S. 478, 480–82 (1978); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 624 (3d Cir. 1996). *But see In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

61. *See* Fed. R. Civ. P. 23(f); Moorcroft, *supra* note 20, at 239 ("When an order cannot be appealed, it can hardly be called a 'sufficiently firm' judgment that warrants federal court protection. The recent adoption of Rule 23(f), however, made class certification an appealable order; thus, the certification decision seems 'final' enough . . . ."). Although enacted in 1998, the idea of allowing appeals of certification orders is not recent, having been openly discussed at least three decades before, only two years after the 1966 Amendment to Rule 23. *See* U.S. Dep't of Justice, Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure 58–59 (1979); Comment, *Adequate Representation*, *Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. Pa. L. Rev. 889, 921–23 (1968); James Andrew Hinds, Jr., Note, *To Right Mass Wrongs: A Federal Consumer Class Action Act*, 13 Harv. J. on Legis. 776, 840 (1976).

62. *See* Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970); Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968); *see also Piper II*, 551 F.2d 213, 217 (8th Cir. 1977) (stating that class action determinations "cannot usually be characterized as

decisions are entered lightly or without extensive litigation and court review.

With time, experience with class action litigation has revealed the importance of the class certification decision to both parties. If class action status is denied, class counsel will not be able to afford to proceed with the litigation in an individualized form, asserting only the individual claim of one class member against the defendant. If the class action status is granted, however, the stakes are magnified to a point where, regardless of the strength of the class claim, the defendant will feel pressured to settle. This was indeed one of the reasons why Rule 23(f) was enacted in 1998, making class certification orders appealable.[63]

As a result, in most cases class certification is a hotly contested issue and involves years-long battles, comprehensive investigation, and discovery, and is often appealed, in some instances reaching the Supreme Court.[64] Therefore, in practice, any certification decision reached after absent members interests have been adequately represented is certainly "final."[65] This conclusion is supported by the Restatements (Second) of Judgments:

> [P]reclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion. The test of finality, however, is whether the conclusion in question is procedurally definite and not whether the court might have had doubts in reaching the decision.[66]

It has been universally ignored, however, that in practice, a certification order can be considered "final" in the above sense only if the decision is to *deny* certification. If, on the other hand, the decision is

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final" because, inter alia, the common practice is to leave such orders "subject to redetermination as the litigation progresses"). For further analysis see the cases cited in 7AA Wright, Miller & Kane, *supra* note 11, § 1785.

63. *See* Fed. R. Civ. P. 23 advisory committee's note (1998 amendments) ("An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.").

64. For the most recent such example, see *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

65. *See* Murray v. Sears, Roebuck & Co., No. 09-05744CW, 2010 WL 2898291, at *5 (N.D. Cal. July 21, 2010) (finding that the class certification issue had been "extensively litigated" in the previous class action in the first instance, on appeal, on a petition for rehearing, and on a petition for writ of certiorari, and holding that because the class had pursued every available avenue to litigate class certification and the courts had given the issue thorough consideration, the issue was "sufficiently firm" to be accorded conclusive effect).

66. *See* Restatement (Second) of Judgments § 13 cmt. g (1982).

to *grant* certification, and the class action progresses, the decision is not "final" and the court may change its ruling and decertify the class if it realizes that it was erroneously granted.[67] In addition, a district court's certification order may be reversed on appeal even after final judgment or settlement approval.[68] Herein lies the problem with this theory, because it is unacceptable that the same kind of decision will be considered "final" in one situation and not in the other, especially because of its disparate impact on the parties: a systematic disadvantage to one of the parties (the class) and an advantage to the other (the class defendant).[69]

It may seem ironic to argue issue preclusion in terms of coherence or symmetry of outcomes, in light of the abandonment of the mutuality doctrine in issue preclusion.[70] However, while there is a reason for the abandonment of mutuality in both its defensive as well as offensive use,[71] there is no justification for a difference in outcomes in orders granting and in orders denying certification. Whatever one may think of the final character of a certification order, it is not enough to grant it preclusive effect.

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67. *See* FED. R. CIV. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 579 (9th Cir. 2010) ("If evidence not available at the time of certification disproves Plaintiffs' contentions that common issues predominate, the district court has the authority to modify or even decertify the class."), *rev'd*, 131 S. Ct. 2541 (2011).

68. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (affirming the Third Circuit's reversal of the district court certification of a settlement class action).

69. *See infra* Part IV.C.8 (discussing the necessity of a preclusion rule that is equally applied to grants and denials of class certification). It is true that, in some cases, the difference between a grant or denial of a motion may affect finality. For example, granting a motion to dismiss will produce a final decision, whereas denying it will not. However, in that situation, there is no asymmetry and no disparate impact on the parties. The situation is completely different in the case of a motion to certify a class action.

70. The erosion of the mutuality doctrine has a long pedigree. For earlier criticisms, see 3 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 579 (1827), *reprinted in* 7 WORKS OF JEREMY BENTHAM 171 (J. Bowring ed. 1843); Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607, 608–09 (1926). The case law trend started with Justice Traynor in *Bernhard v. Bank of America*, 122 P.2d 892, 895 (Cal. 1942). In *Blonder-Tongue Laboratory, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 327 (1971), the Supreme Court endorsed the use of defensive nonmutual issue preclusion in federal courts, and in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Court allowed offensive nonmutual issue preclusion.

71. *See Blonder-Tongue Lab.*, 402 U.S. at 328–29 ("In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources.").

2. *Absent Class Members Cannot Be Bound Without Class Certification*

The most important doctrinal argument against giving preclusive effect to certification decisions may seem a mere technicality, but it is not. In order to bind class members, a proposed class action must be duly certified. Before the putative class action is certified, there is no formal class action and, therefore, no representation: The putative class members were not made "parties by representation."[72] Thus, it would be inappropriate to bind third parties.

As we have seen above, there are several cases in which a lawsuit, even though originally brought as a class action, was adjudicated without ever being certified or litigated as such. In the absence of formal (or informal) class certification, however, the judgment may not bind absent members of the putative class.[73]

Once a class action is actually certified, its representative nature mandates that absent class members be considered parties to the proceeding and bound by its decisions.[74] It does not matter who the representative is. What is important to characterize the conflict is the class definition and the cause of action. The whole class (and each class member individually) is party to the proceeding and will be bound by its final judgment. Before the formal act of certification, however, there is no class action and the absent class members are not made parties to it: the certification issue is litigated entirely without their knowledge or participation through a representative.[75]

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72. *See* Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he had not been made a party by services of process."); RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) (1982) ("A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is: [t]he representative of a class of persons similarly situated, *designated as such with the approval of the court*, of which the person is a member." (emphasis added)); *see also id.* § 41 cmt. e; Wasserman, *supra* note 53, at 840.

73. *See* 18A WRIGHT, MILLER & COOPER, *supra* note 7, § 4455, at 466–67 (citing several cases to support an obvious limitation to preclusion: that "there must actually have been a class action, although formal failure to certify an action that is in fact treated by all parties as a class action may not defeat class preclusion").

74. *See* FED. R. CIV. P. 23(c)(3); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e); Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1850 (1998).

75. *See* Kerr, *supra* note 20, at 243 ("Without certification . . . there is no jurisdictional or rule-based foundation for preclusion."); *see also* Johnson v. GlaxoSmithKline, Inc., 83 Cal. Rptr. 3d 607, 618–19 n.8 (Ct. App. 2008) ("The protections for absent class members prescribed by rule 23, of course, are afforded after a motion for class certification has been granted, not by the filing of a motion for certification that is denied. Similarly, the concept of a 'properly conducted class action' suggests a class action that has been certified, following a hearing in which the named representatives have established they satisfy the requirements of rule 23, and then litigated to judgment or settled, not a[n] individual lawsuit in which a motion for class certification was denied.").

The *Bridgestone/Firestone* court tried to respond to this apparently insurmountable obstacle by arguing that, because any absent class member is entitled to appeal a decision denying class certification, every class member must be bound by it.[76] Yet the fallacy in the court's reasoning is apparent. First of all, on a practical level, absent class members theoretically may be entitled to appeal the denial of a class certification decision,[77] but there is no real opportunity to do so because there is no notice to class members before class certification.[78] Moreover, on a doctrinal level, the fact that a nonparty has interest to appeal a decision (or intervene in a proceeding) means only that the person has an interest to benefit from that decision, not necessarily that she will be bound by it if she chooses not to do so. Such a rule puts the law of representative litigation upside down.[79] Notwithstanding the technical fragility of its arguments, the decision still attracted supporters.[80]

In *Murray v. Sears, Roebuck & Co.*, the court was content that the district court in the previous class action had found that the class was adequately represented, that the defendant did not challenge the adequacy on appeal, and that adequacy was not being seriously contested before the court.[81] The court limited itself to making general and obvious remarks that absent class members are bound by class action judgments.[82]

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76. *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 768 (7th Cir. 2003) ("The premise of allowing class members to seek review by a higher court is that otherwise they would be bound by defeat.").

77. For an example of absent class members excluded from the case who appealed an unfavorable class certification decision, see *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

78. *See infra* Part III.C.4 (discussing the absence of adequate notice as an impediment to granting preclusive effect to the denial of class certification).

79. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) (stating the rule that in a class action the absent class members are represented by a party "designated as such with the approval of the court"); *see also id.* § 41 cmt. e ("Because the representative's status is voluntary and non-contractual, it is subject to careful judicial scrutiny . . . .").

80. *See* Kevin M. Clermont, *Class Certification's Preclusive Effects*, 159 U. PA. L. REV. PENNUMBRA 203, 227 (2011) ("The *Bridgestone/Firestone* progeny . . . could adopt the proposition that certification of a class action is not necessary to render a judgment valid enough to bind absentees only on the determination of no certification.").

81. No. 09-05744CW, 2010 WL 2898291, at *5 (N.D. Cal. July 21, 2010); *see* Alvarez v. May Dep't Stores Co., 49 Cal. Rptr. 3d 892, 900 (Ct. App. 2006) ("[T]here is no allegation that the representation provided to the plaintiffs in [the previous class action] was inadequate."). *But see* Daboub v. Bell Gardens Bicycle Club, Inc., No. B200685, 2008 WL 4648797, at *6 (Cal. Ct. App. Oct. 22, 2008) (distinguishing adequacy of representation from virtual representation and holding that the class members were virtually represented in the first class action lawsuit); *see also* Taylor v. Sturgell, 553 U.S. 880, 901 (2008) (rejecting the propriety of binding nonparties under a theory of "virtual representation" based on "identity of interests and some kind of relationship between parties and nonparties").

82. *See Murray*, 2010 WL 2898291, at *5 ("In a class action, 'a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation.' . . . That Plaintiff was not a named plaintiff, class representative, witness or deponent in the [previous class action] is not significant because such is the case with virtually every member in every class action. Here, the issue is whether Plaintiff was adequately

The weakness of this argument is apparent. The *Murray* court did not address the fact that the class certification order was ultimately reversed and there was no class certification in the prior class action.[83] Kevin Clermont criticized this decision as "a suspect application of collateral estoppel against the victorious party" because it was based on the district court's reversed certification in the prior class action and the class had no incentive to appeal such decision.[84] Clermont also criticized the decision because the finding of adequacy was rendered nonessential by its reversal and could not be accorded preclusive effect.[85]

The *Murray* court thought it relevant that the class was represented by the same lead counsel in both class actions and considered this as evidence that the class was trying to deliberately maneuver to avoid the effects of the previous class certification order.[86] Although the detail of which lawyer or law firm represented the class may be considered an interesting curiosity for the blogosphere, the name of the class counsel should not play any role in determining whether a party is bound by issue preclusion from a previous lawsuit.[87] It is unclear how that irrelevant

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represented in the [previous] case, and the Court finds that he was." (quoting *Taylor*, 553 U.S. at 884)).

83. The Seventh Circuit addressed the issue but dismissed it. *See* Thorogood v. Sears, Roebuck & Co., 624 F.3d 842, 854 (7th Cir. 2010) ("[T]he class . . . *was* certified, albeit later decertified at our direction.").

84. Clermont, *supra* note 80, at 208 n.22 ("[A] finding which a party had no incentive (other than fear of collateral estoppel) to appeal, because he won, *has* no collateral estoppel effect." (quoting LaBuhn v. Bulkmatic Transp. Co., 865 F.2d 119, 122 (7th Cir. 1988))); *see* CASAD & CLERMONT, *supra* note 4, at 138–39 (stating that whenever a party cannot appeal an issue there is no issue preclusion).

85. *See* Clermont, *supra* note 80, at 208. The author extended his criticisms to *Bridgestone/Firestone* and *Baycol Products*.

86. *See* 2010 WL 2898291, at *5. The Seventh Circuit and the California Court of Appeals also appeared intrigued by this fact. *See Thorogood*, 624 F.3d at 844, 847 (making unnecessary personal comments about class counsel, including stating his name several times); *Alvarez*, 49 Cal. Rptr. 3d at 892, 901 ("We conclude that similarity of counsel is one factor that may be considered on the issue of whether a non-party's interest was truly represented in the first lawsuit."); *see also* Wolff, *supra* note 34, at 2115 ("[S]eriatim attempts at class certification are often controlled by a single group of entrepreneurial lawyers who switch plaintiffs and venues in search of a favorable result."). No one doubts that this is sociologically relevant information. What is not clear is its legal relevance.

87. With its decision in *Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934 (8th Cir. 1995), the Eighth Circuit is in a class of its own. In *Sondel*, class representatives filed a class action lawsuit in federal court against Northwest. *Id.* at 936. After the state law claim was dismissed from the federal class action, the class representatives, represented by the same attorneys, filed a class action in state court to pursue the state claim. *Id.* The state court refused to certify the class action and, proceeding as an individual lawsuit, the case went to trial and was decided on the merits in favor of the defendants. *Id.* at 936–37. Following the state court decision, the federal court granted Northwest's motion for summary judgment and dismissed the federal class action with prejudice, because the absent class members were in privity with the plaintiffs in the state court. *Id.* at 937. According to the Eight Circuit, because they were the class representative in the federal court, the plaintiffs in the state court, although pursuing an individual lawsuit, represented the interests of the absent class members in the state suit. *Id.* at 938–39. Therefore, the absent class members were bound by issue and claim preclusion on the merits of the class claim. *Id.* at 940. In reaching this awkward conclusion, the Eight Circuit was influenced by the fact that the attorneys who represented the plaintiffs in the individual lawsuit in state

detail really influenced the decision and how the court would have reacted if the lawyers were not the same. In any event, the message was received: Class counsel must be more creative from now on and learn to share, inviting another attorney to independently pursue the litigation.

A previous version of the ALI's *Principles of the Law of Aggregate Litigation* seemed to recognize that absent class members were not actual parties to a class action before certification.[88] However, in reasoning remarkably similar to *Bridgestone/Firestone*, the ALI bypassed that "small detail" because "the class-certification determination is made as to the entire proposed class, not as to individual class members."[89] This argument does not stand on solid logical ground. The argument seems to say that the class certification order binds all absent class members *because* it was issued to affect the class as a whole. This clearly confuses the scope of a class certification decision with its preclusive effect: The mere fact that a decision *affects* a third person cannot be the reason why that third person can be *bound* by it.

The Supreme Court put the controversy to rest in *Smith v. Bayer Corp.*, holding unambiguously that an absent class member is not a party to a class action that was not certified and, although she may benefit from it, she can never be bound by it.[90] That decision certainly came as a surprise to Judge Posner, who had stated a few months before that "[w]e do not think it likely that the Court [in *Smith*] will go so far as to hold that injunctive relief against class-action harassment is inappropriate

court were the same as those who represented the class in federal court, and that the class counsel would not "introduce any additional evidence beyond that presented at the state trial." *Id.* This strange decision seriously upsets the delicate due process balance that exists in binding absent class members in representative litigation.

88. *See* Principles of the Law of Aggregate Litigation § 2.11 Reporters' Notes cmt. c (Tentative Draft No. 1, 2008) ("Though absent class members are considered parties for some purposes upon class certification . . . absent class members do not become parties when class certification is denied.").

89. *Id.* ("As a conceptual matter and in terms of practice . . . the class-certification determination is made as to the entire proposed class, not as to individual class members. It thus is appropriate to treat absent class members as parties for issue-preclusion purposes, if only when the determination said to have issue-preclusive effect is the class-certification determination itself.").

90. 131 S. Ct. 2368, 2380 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties."); *see* Devlin v. Scardelletti, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting) ("Not even petitioner . . . is willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.*"). Before *Smith*, courts disagreed on the issue. *Compare In re* Baycol Prods. Litig., 593 F.3d 716 (8th Cir. 2010) (holding that absent class members are bound before class certification), *and In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763 (7th Cir. 2003) (same), *and* Murray v. Sears, Roebuck & Co., No. 09-05744CW, 2010 WL 2898291 (N.D. Cal. July 21, 2010) (same), *with In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 141 (3d Cir. 1998) (holding that absent class members are not bound before class certification), *and In re* Ford Motor Co., 471 F. 3d 1233, 1245 (11th Cir. 2006) (same).

under the All Writs Act . . . on the theory that before certification class members cannot be thought to have been adequately represented."[91]

Martin Redish tried to minimize the risks posed to the plaintiff class, while maximizing the harms to defendants:

> [A] denial of class certification *never* deprives [an absent class member] of his individual cause of action. Indeed, denial of certification . . . will *in no way* negatively impact the individual [class member's] ability to pursue her own claim. *At most*, future plaintiffs are denied the right to use of a particular procedural device [unrelated to the merits of the claim]. This fact *clearly* dilutes *any conceivable negative* impact on [absent class members'] rights to pursue their individual causes of action caused by the invocation of preclusion.[92]

This is a rather curious argument, because it bases preclusion on the idea that the right that is being precluded is *merely* procedural and therefore not relevant enough.

3. Absent Class Members Did Not Have an Opportunity to Opt Out

Another argument that may be raised against preclusion is that, because of the timing of the denial of class certification, class members are afforded no opportunity to opt out. This is particularly important if one considers that the right to opt out might be a constitutional due process guarantee,[93] but is equally valid if one considers it merely a rule mandate with no constitutional implication.[94]

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91. *See Thorogood*, 624 F.3d at 847, 854.

92. *See* Redish, *supra* note 34, at 10,986 (emphasis added). Redish argues, furthermore, that the risk of duplicative litigation is a serious problem that defendants face, and that the eventual problems caused to absent class members with the imposition of preclusion of class certification orders are "significantly overstated." *Id.* at 10,985. Kevin Clermont seems to share the same perspective. *See* Clermont, *supra* note 80, at 216 ("The absentee does not risk losing the individual claim, but only the 'right' to bring a class action. . . . [S]ociety could defensibly conclude that absentees lose the 'privilege' (and windfall returns) of bringing a class action after an adequate representative has unsuccessfully litigated the class certification question.") In substantially the same vein, see *Alvarez v. May Department Stores Co.*, 49 Cal. Rptr. 3d 892, 898–901 (Ct. App. 2006) ("[T]here is a distinction between using a prior ruling to bar a litigant from receiving a hearing on the merits and applying a prior decision to prevent a litigant from proceeding as a class representative. . . . Ultimately, applying the doctrine of collateral estoppel does not lead to an unfair result, as appellants remain free to litigate the merits of their personal claims.").

93. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("[D]ue process requires at a minimum that an absent plaintiff [in a class action seeking money judgment] be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."); Steven T.O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480, 483 (1998) ("[A]s a matter of basic procedural fairness . . . . due process requires courts to grant opt out rights in some cases.").

94. *See* Mark W. Friedman, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 YALE L.J. 745, 746 (1990).

The *Bridgestone/Firestone* court directly addressed this issue and determined that class members are not entitled to opt out of the certification phase: A class member can only opt out of an already certified class action.[95] Moreover, the court thought, the right to opt out gives the member only the possibility of litigating individually, not the right to bring another class action.[96] According to the court, a denial of a class certification does not infringe on this right because the putative class member may still bring her own individual lawsuit, even if another class action may not be certified.[97]

Yet the court conveniently failed to recognize that if a significant number of class members exercise their right to opt out of a class action, they would be able to form a class of their own.[98] Moreover, the mere fact that class members cannot opt out of a class certification order does not mean that they must be bound by it.

4. *Absent Class Members Did Not Receive Notice*

Another serious obstacle to granting preclusive effect to the class certification denial is the lack of adequate notice to absent class members.[99] Before class certification, there is generally no notice to the absent class members. Without notice, absent class members have no opportunity to opt out of the class, to participate in the proceeding, or to control the adequacy of the representative.[100]

This issue was raised by respondents and rebuffed in *In re Baycol Products Litigation*.[101] The court found that the procedural due process requirement of adequate notice applies only when the absent class members would be bound to a final judgment on the merits of their claims, not when the class is precluded from bringing a class action, because the absent class members can still bring individual lawsuits.[102]

This reasoning is disingenuous at best. It is common knowledge that many claims on their own are so small that they do not justify the expenses of a judicial proceeding; only collectively, through class actions,

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95. 333 F.3d at 769 ("No one is entitled to opt out of the certification, a decision necessarily made on a class-wide . . . basis . . . .").

96. *Id.* ("And a person who opts out [of a certified class] receives the right to go it alone, not to launch a competing class action.").

97. *Id.*

98. For a case where members who opted out of a federal class action were forced to become part of a mandatory state class action, see *Morgan v. Deere Credit, Inc.*, 889 S.W.2d 360, 366 (Tex. App. 1994).

99. *See* FED. R. CIV. P. 23(c)(2).

100. *Id.*

101. 593 F.3d 716, 725 (8th Cir. 2010).

102. *See id.*; *see also In re Bridgestone/Firestone*, 333 F.3d at 769 (holding that the opportunity to opt-out of a class action can occur only after the certification decision because before that, no class exists). The reasoning in *Baycol Products* was not much different from Martin Redish's comment discussed above. *See supra* note 92 and accompanying text.

can these rights be vindicated in courts.[103] The class certification order is as important as a decision on the merits.[104] Denying class certification operates as a de facto unfavorable decision on the merits.[105]

Quite apart from its constitutional status—which is doubtful to this day, especially for injunctive class actions[106]—adequate notice is a specific requirement of Rule 23 at least in class actions for damages.[107] The Supreme Court stressed (one may even say overly stressed) its importance in *Eisen v. Carlisle & Jacquelin*.[108] In *Eisen*, the Supreme Court stretched the plain language of Rule 23 beyond the limits of reasonableness to require individual notice to all class members who can be identified through reasonable effort.[109] The *Eisen* Court raised notice

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103. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812–13 (1985) (ruling against an opt-in class action because it "would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit"); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) ("A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."). Several other cases illustrate the importance of small claims class actions in the United States. *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980); Hawaii v. Standard Oil Co., 405 U.S. 251 (1972); *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

104. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.1 (1995) ("The decision on whether or not to certify a class . . . can be as important as decisions on the merits of the action . . . .").

105. Much of the case law and scholarship discussing the importance of the certification order was developed when class certification orders were not appealable. Recognizing the importance of the certification order for both parties, in 1998 Rule 23(f) was finally amended to allow immediate appeal. Although only approved in 1998, this proposal had been floating for at least twenty-five years and was enacted only when the defendants realized that it was to their own benefit as well. *See, e.g.*, 124 CONG. REC. 27,860 (1978); U.S. DEP'T OF JUSTICE, *supra* note 61, at 58–59; *see also* John P. Fullam, *Federal Rule 23—An Exercise in Utility*, 38 J. AIR L. & COMMERCE 369, 386–88 (1972); Comment, *supra* note 61, at 921–23; Hinds, *supra* note 61, at 840.

106. *See, e.g.*, *Phillips Petroleum*, 472 U.S. at 812–13 (holding that in money damages class actions, notice is required by due process); *Eisen*, 417 U.S. at 161. It is common to say that adequate notice is a due process guarantee only in (b)(3) class actions and is not required in (b)(1) or (b)(2) class actions because such classes are more cohesive and because there are no opt-out rights. *See generally* 7AA WRIGHT, MILLER & KANE, *supra* note 11, § 1786 (stating that only adequacy of representation is necessary in (b)(1) and (b)(2) class actions, not notice). This is a very old mistake. *See Notes of Advisory Committee on Rules—1966 Amendment*, 39 F.R.D. 69, 104–06 (1966); Arthur R. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 299, 313–15 (1973); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217, 1229–30, 1234–35 (1975). It may be true that the extent of notice might be inversely proportional to the cohesiveness of the class, but this does not mean that notice is not constitutionally mandated in all class actions. *See* Note, *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1403 (1976) (stating that, after *Eisen*, Rule 23 displays a schizophrenic approach, requiring notice at any cost to protect very small pecuniary claims, but not requiring any type of notice to adjudicate constitutional rights).

107. *See* FED. R. CIV. P. 23(c)(2).

108. 417 U.S. at 156.

109. *Id.*; *see* RESTATEMENT (SECOND) OF JUDGMENTS § 42(1)(a) (1982) ("A person is not bound by a judgment for or against a party who purports to represent him if: (a) [n]otice concerning the

to an almost sacred level, even in a case that had a large probability of success for the class and that would not be able to proceed individually.[110]

If the reasoning of the *Baycol Products* court prevails, this would be the only circumstance in which a class judgment would adversely bind absent members in a class action for damages without adequate notice. In short, so long as the absent members will still have the abstract opportunity to litigate their claims individually, they will be bound by the certification denial, regardless of whether they received notice.[111] The only important factor that matters is adequacy of representation. Adequate notice is a fundamental device to control adequacy of representation and is the only possibility that absent class members have to appeal an unfavorable class certification decision.

5. *The Issues May Not Be the Same*

Another major obstacle to issue preclusion is the general principle requiring that the issues be the same in order for preclusion to apply. Indeed, the two class action certifications must involve the same issue, not merely similar ones.[112] While in cases where the issues are exactly or substantially the same there is a legitimate interest in avoiding reopening the matter indefinitely, in those cases in which the issues are not the same, there obviously can be no preclusion.

In some circumstances, the class certification issues are exactly or substantially the same in the two class actions.[113] In others, there is a significant practical disconnect between the identity of the issues.[114]

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representation was required to be given to the represented person . . . and there was no substantial compliance with the requirement."); *see also id.* § 42 cmt. b ("Where such notice requirements, whether imposed by statute or order of court, have not been substantially complied with, the investiture of the representative is defective and the judgment for that reason is not binding on the persons putatively represented.").

110. The vast majority of scholars have expressed dissatisfaction with *Eisen*. Abundant criticism was also directed at the Second Circuit opinion in the case. *See generally* 7AA WRIGHT, MILLER & KANE, *supra* note 11, § 1786, at 201–06; Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97.

111. *See In re* Baycol Prods. Litig., 593 F.3d 716, 725 (8th Cir. 2010) (holding that because absent class members were free to pursue their claims individually, the violation of procedural due process requirements does not affect whether they will be bound by the court's certification decision).

112. *See* FRIEDENTHAL, *supra* note 7, at 699 ("The requirement that issues be identical is construed strictly."); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 cmt. b (2010) ("The same-issue requirement is relatively strict, calling for litigation and determination in the initial proceeding not simply of the same kind of issue concerning the appropriateness of aggregation but, rather, the identical issue.").

113. *See Piper II*, 551 F.2d 213, 219 (8th Cir. 1977) ("[T]he parties and the issues in the individual cases will normally be of sufficient similarity that a factual determination in a fair hearing should be conclusive in companion cases on principles of collateral estoppel."); Daboub v. Bell Gardens Bicycle Club, Inc., No. B200685, 2008 WL 4648797, at *3–4 (Cal. Ct. App. Oct. 22, 2008) (same issue); Alvarez v. May Dep't Stores Co., 49 Cal. Rptr. 3d 892 (Ct. App. 2006) (same issue).

114. *See* Johns v. Rozet, 141 F.R.D. 211, 214–15 (D.D.C. 1992); *In re* Dalkon Shield Punitive Damages Litig., 613 F. Supp. 1112, 1115 (E.D. Va. 1985) (disagreeing that the original order had

There are several instances in which the factual or legal circumstances involved in the certification decision are a moving target or subject to conflicting interpretations. The issues are clearly not the same, for example, when the earlier certification denial was caused by inadequate or atypical representation or by the lack of a common question and the new class action has a different representative or claim. The issues also are not the same whenever the first class or class claim was determined to be too broad and the second one is more restrictive,[115] or when the appellate court might have refused certification simply because "the district court had erred in certifying the settlement class without making factual findings to support class certification."[116]

Indeed, the most poignant criticism of the *Bridgestone/Firestone* opinion was that the court had violated this most basic tenet of the law of issue preclusion. In effect, the original decision that denied class certification was grounded on the fact that Indiana choice-of-law rules dictated that the court applied the laws of the states where the car accidents happened and the application of the laws of all fifty states would be unmanageable.[117] However, the court could not simply assume that the same manageability issues would exist under the choice-of-law rules of every state.[118]

Some certification orders are so fact-specific that they simply cannot apply to a different set of facts, even in a class action filed by the same

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denied certification based only "on the record before it" and that there were substantial changes in factual and legal circumstances that justified a different decision); Johnson v. GlaxoSmithKline, Inc., 83 Cal. Rptr. 3d 607, 620-24 (Ct. App. 2008) (holding that the denial of class certification in a previous case did not preclude determination of class issues in a later case because the legal issues in the two cases were not the same).

115. *See, e.g.*, Wasserman, *supra* note 53, at 841 (citing Yasgur v. Aegis Mortg. Corp., No. 98-CV-121, 1999 U.S. Dist. LEXIS 20989, at *8 (D. Minn. Mar. 9, 1999) (declining to apply issue preclusion because the definitions of the putative classes were not identical)). Denial of certification of a nationwide class action also does not preclude the certification of a statewide class action. *See* Szittai v. Wells Fargo Fin., Inc., No. 5:08-CV-1379, 2008 WL 4647739, at *4 (N.D. Ohio. Oct. 20, 2008) ("[T]hat a much broader class might not have common practices running throughout it does not speak to whether a more narrowly drawn class might have common practices."). *But see* Murray v. Sears, Roebuck & Co., No. 09-05744CW, 2010 WL 2898291, at *4 (N.D. Cal. July 21, 2010) (holding that a denial of certification of a nationwide class action precludes the certification of a statewide class action when the reason for denial is equally applicable to the narrower class).

116. *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998); *see In re* New Motor Vehicles Can. Export Antitrust Litig., 609 F. Supp. 2d 104, 106 n.5 (D. Me. 2009) ("[T]here has been no final decision on whether a class is certifiable; the First Circuit left that question open.").

117. *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1018 (7th Cir. 2002).

118. *See* Note, *supra* note 25, at 2037 ("In a stroke, the court purported to do what it had insisted earlier, in *Firestone I*, that the district court could not—discern and apply the laws of fifty states simultaneously."). *But see* Moorcroft, *supra* note 20, at 248 (asserting that the identity of the issues lies in the due process analysis implicit in the manageability decision).

class and presenting the same cause of action. In all of the examples above, the change in circumstance was enough to evade preclusion.

A more complicated matter arises when the issues of fact are substantially the same, but the procedural laws that the two jurisdictions apply to the class certification are different. For example, the class action law of the state in the second class action lawsuit may have a different or more permissive procedural rule about the prerequisites of certification than the law applied to the earlier class action.[119]

Even if the law is written in the same way in both jurisdictions, one court may interpret a factual situation as complying with its laws while a court in another jurisdiction might not.[120] This argument is consistent

119. *Compare* Cullen v. Margiotta, 811 F.2d 698, 732–33 (2d Cir. 1987) ("For application of principles of collateral estoppel, 'the issue as to which preclusion is sought [must] be identical with the issue decided in the prior proceeding,' . . . but issues are not identical when the standards governing them are significantly different . . . . Since the standards governing the propriety of the suit as a class action in the state court and the federal court differed significantly, the state court ruling did not decide the issue presented in this case, and there is no collateral estoppel." (quoting Capital Tel. Co. v. Pattersonville Tel. Co., 436 N.E.2d 461, 463 (N.Y. 1982)), *with In re* Baycol Products Litig., 593 F.3d 716, 721–23 (8th Cir. 2010) (determining that the state and federal laws were not substantially different and therefore involved the same issue). *See* J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 180 (5th Cir. 1996) ("[Even when a state class action rule] is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the [state] class action rule, [the state] court might well exercise [its] discretion in a different manner." (citations omitted)); Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 365, 368–69 (Tex. App. 1994) (pointing to differences in state and federal class action rules, even when the language of the rules is the same, the state rule is patterned after Rule 23, and federal decisions are persuasive in interpreting the state rule); ADVISORY COMM. REPORT, *supra* note 31, at 45 (same).

120. *See In re Gen. Motors*, 134 F.3d at 146 ("[O]ur construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23. Rather, the Louisiana court properly applied . . . the parallel Louisiana class certification rule."); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 cmt. b (2010) ("Same-issue status is not present when the aggregation question in the first proceeding arose under a procedural rule of the rendering court and the aggregation question in the subsequent proceeding arises under a procedural rule—albeit, perhaps, an identically phrased rule—that need not be interpreted or applied in identical fashion. Issue preclusion is generally not appropriate in such a situation, for the court in the subsequent proceeding must have the opportunity, if it chooses, to construe its procedural rule differently on the aggregation question . . . ."); 18A WRIGHT, MILLER & COOPER, *supra* note 7, § 4455 ("The states remain free . . . to adopt quite different class-action procedures. It goes a long way indeed to assert that a refusal to certify a nationwide class under Rule 23 establishes a substantive right that prevents certification of a nationwide class under a different state procedure."); Moorcroft, *supra* note 20, at 242 ("Most state class action rules are modeled after or are identical to Federal Rule 23, at least before its 1998 and 2003 amendments. A state court may, however, interpret its rule differently, even when its rule is identical to Rule 23."); *see also* Wolff, *supra* note 34, at 2111–12 ("[When] a state . . . has expressly adopted a more permissive standard of class certification . . . . [and] the added weight of CAFA comes into play . . . . [a] federal court's determination that a lawsuit is inappropriate for class treatment should be understood as a final disposition on the certifiability of that lawsuit—a decision with preemptive effect in any subsequent proceedings that seek to pursue the same class configuration. Thus, even if a state does embrace more permissive standards of certification, such that the attempt to refile and certify an identical suit in that state arguably presents a 'different issue' for decision than the one resolved in the earlier federal proceeding, the federal court may still use its injunctive powers to prevent relitigation

with the traditional view that issue preclusion may be avoided whenever the law to be applied to the facts in the second lawsuit is materially different from the one applied in the first.[121]

The Supreme Court, in *Smith v. Bayer Corp.*, resolved the matter in a rather elegant way, stating that it is essential to determine the "applicable legal standard" in both situations.[122] Although the Court recognized that different jurisdictions "can and do apply identically worded procedural provisions in widely varying ways," it stressed that if both courts "follow the same approach," the requisite identity of issues is present.[123] This conclusion, however, seems to contradict the first part of the *Smith* opinion, according to which an absent class member cannot be bound by a decision in a lawsuit that was not certified as a class action.[124] After all, if there is no preclusion without certification, it really does not matter if the "applicable legal standards" are the same.

Under *Smith*'s "same legal standard" approach, the legal standards to be compared are the rules for class certification in both jurisdictions and whether the class at issue is certifiable under those rules. Yet one commentator has raised the issue that sometimes behind a certification

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of the broader issue that it has actually decided—namely, the certifiability of that lawsuit under the federal standard that CAFA has determined to be appropriate for covered cases of national importance.").

121. *See* Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 599–600 (1948) ("[A] change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes . . . . [T]he principle of collateral estoppel . . . is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally . . . . [C]ollateral estoppel must . . . be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged . . . . If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation . . . . [A] judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable."). *Sunnen*, however, may be distinguished from the certification issue because it applies to determinations of issues of law as applied to income tax liability in successive years.

122. 131 S. Ct. 2368, 2377 (2011); *see* Note, *supra* note 25, at 2037 ("[S]tate courts need not, and do not, observe the same standards and procedures for class certification as federal courts; state standards and procedures may differ sharply from the standards and procedures that Federal Rule 23 prescribes.").

123. *Smith*, 131 S. Ct. at 2377; *see* Lee v. Criterion Ins. Co., 659 F. Supp. 813, 822–23 (S.D. Ga. 1987) ("[A] party cannot avoid the preclusive effect of a denial of class certification rendered by a federal court in this jurisdiction by filing suit against the same party in Georgia state court and pointing to largely illusory differences between statutes that are designed for essentially identical purposes."); Moorcroft, *supra* note 20, at 243 ("When state class action rules are interpreted substantially similarly to the federal class action rule, a court may properly issue an injunction, but only to the narrow extent that the state rules are similar.").

124. *See supra* Part III.C.2. (discussing the contradiction and unfairness of giving preclusive effect to a decision in which the representative status was denied); *see Smith*, 131 S. Ct. at 2380 ("Neither a proposed class action nor a rejected class action may bind nonparties.").

decision lies a constitutional argument.[125] In such circumstances, there would be the requisite identity of legal issues.[126]

One may argue that whether the laws are exactly the same, similar, or different should not be controlling on whether issue preclusion is applicable to class certification orders. When an adequate class representative brings a class action in one jurisdiction, it accepts that its procedural, substantive, and choice-of-law rules will be applied to the case to the exclusion of all others. The same way that a plaintiff does not have the right to bring the same lawsuit in another state, arguing that the substantive laws of the second jurisdiction are more favorable, she cannot bring the same class action lawsuit arguing that the procedural rules are not the same. This objection, however, is not convincing. In much the same way that different jurisdictions might have different statute-of-limitation rules, it seems clear that different jurisdictions might have different scopes for class actions and might allow them in different situations. If one jurisdiction does not allow a certain set of facts to be treated collectively for purposes of adjudication, the case must be dismissed without prejudice to the class's substantive right, while other jurisdictions might choose to treat the case collectively.[127]

The identity of legal issues is more likely to be present when the two class actions are brought in the same jurisdiction (that is, in the same state or in the federal courts).[128] However, these cases understandably will be rare in practice because the class naturally will search for another opportunity in a different judicial system. Moreover, the issues of fact might still be different or the proposed class might be narrower.[129] In addition, even when the issues of law and fact are the same, there are still several other policy and doctrinal reasons not to allow preclusion of class certification orders.

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125. *See* Moorcroft, *supra* note 20, at 243–48 (2004) ("Implicit in many denials of certification is a recognition that any decision rendered by class adjudication would not be entitled to enforcement under the Full Faith and Credit and Due Process Clauses. . . . A denial of certification with constitutional underpinnings necessarily involves the same issues as later certification decisions, making the denial proper for injunctive relief regardless of how liberally a state would interpret its own class action requirements.").

126. *Id.*

127. A similar case was presented in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 143 (1988). There, a plaintiff's complaint was dismissed in one jurisdiction for forum non conveniens. *Id.* at 143. That decision had no preclusion effect in a lawsuit brought in another jurisdiction because the second jurisdiction might apply a different forum non conveniens standard. *Id.* at 148–49.

128. *See* Clermont, *supra* note 80, at 205 (stating that the identity of legal issues is more readily available between courts in the same system, but could also arise between federal and state courts or between courts of different states).

129. *See, e.g.*, Bufil v. Dollar Fin. Group, Inc. 76 Cal. Rptr. 3d 804 (Ct. App. 2008) (stating that the class and the claim in the second class action were narrower than in the first class action and, therefore, that the issues of predominance that caused the previous certification denial were not the same).

6. *The Certification Order Is Discretionary*

Another important argument against issue preclusion of a class certification denial is the discretionary character of the certification decision.[130] Some courts have been justifiably hesitant to afford preclusive effect in such a circumstance.[131]

As the *Bridgestone/Firestone* case makes clear, while some courts may not consider that it is worthwhile to proceed on a class wide basis, others "are free to decide for themselves how much effort to invest in [complex litigation]."[132] In that specific case, however, the court ultimately concluded that the denial of certification in a prior class action "was based not simply on a belief that managing national classes would consume too much of a federal court's limited supply of time; it also was based on a conclusion that certification of national classes would compromise the legitimate interests of defendants."[133]

7. *Class Certification Orders Are Not Necessary or Essential to the Judgment*

Another obstacle against the application of issue preclusion of a certification order is that the certification decision is not "necessary or essential" to the final decision on the merits.

According to the traditional doctrine, issue preclusion is applicable only if the decision was essential to the judgment. Decisions that were not a "necessary step" or essential to the final judgment have no binding effect. The rationale for this exclusion is that the parties and the court do not give exhaustive attention to incidental issues. Moreover, these issues, even though actively asserted, litigated, and decided, are not appealable, particularly if decided in favor of the party who ultimately prevailed on the merits. In addition, making these merely incidental decisions binding in future litigation would encourage parties to litigate exhaustively about every small controversy, regardless of its importance to the merits of the

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130. *See* 7AA WRIGHT, MILLER & KANE, *supra* note 11, § 1785, at 370–71 ("The trial court has broad discretion in deciding whether to certify a class action and its decision will be reversed only if an abuse of discretion is shown.").

131. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 n.7 (3d Cir. 1998) (quoting with approval J.R. Clearwater v. Ashland Chem. Co., 93 F.3d 176, 180 (5th Cir. 1996)); *J.R. Clearwater Inc.*, 93 F.3d at 180 ("[T]he wide discretion inherent in the decision as to whether or not to certify a class dictates that each court—or at least each jurisdiction—be free to make its own determination in this regard."); *Piper II*, 551 F.2d 213, 217 (8th Cir. 1977) ("Discretionary orders generally are not suitable for treatment under the collateral order doctrine."); *see also* Note, *supra* note 25, at 2037 (stating that different courts may have different positions on the "desirability" of a class action).

132. *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766 (7th Cir. 2003) ("[A]dvice designed to ward off what a federal court deems an unproductive investment of judicial time does not create a 'judgment' that *forbids* any state tribunal to make the effort.").

133. *Id.* at 768.

case.[134] A class certification order is a procedural, interlocutory, and merely incidental decision that dismisses the proceeding without reaching its merits.

Even though it is true that the certification decision cannot be considered a "necessary step" or essential to the final decision on the merits, it is such an important decision in the context of class action litigation that one can hardly say that the parties or the court did not give exhaustive attention to it.[135] The argument about non-appealability also fails because not only is the certification decision immediately appealable,[136] even if decided in favor of the prevailing party, the certification order can be appealed.

8. Asymmetry of Results

In order to test the fairness of a procedural solution, it is helpful to put it in the proper context and reverse the situation. If the issue preclusion of an order *denying* class certification is to be fair, an order *granting* such certification should also preclude issues to the same extent in the same circumstances. Any interpretation that in practice has a disparate impact on the parties is illegitimate and should be avoided.[137]

Suppose, then, that a class action is duly certified but the lawsuit is later dismissed without prejudice for reasons unrelated to the certification order. If another class representative brings the same class action again in another court, would the prior certification order preclude relitigation of the issues previously decided? Will the second court and the defendant be bound by the previous certification decision? Whatever the rule proposed for an order *denying* class certification, it should be the same as the order *granting* it. Otherwise, the plaintiffs will be systematically disadvantaged.[138]

Not all commentators agree with this symmetrical approach. Some are perfectly content with different preclusion rules for orders *granting* and *denying* class certification. According to Joseph McLaughlin, for

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134. *See* CASAD & CLERMONT, *supra* note 4, at 127–29, 138–39; FRIEDENTHAL, *supra* note 7, at 711–12 (citing Assoc. of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978); Wilson v. Wilson, 607 P.2d 539 (Mont. 1980)).

135. *See supra* Part III.C.1.

136. *See* FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification . . . ."). Rule 23(f) was adopted in 1998 to allow for permissive interlocutory appeals of class certification orders, after decades of public debate. *See* 124 CONG. REC. 27,859 (1978); U.S. DEP'T OF JUSTICE, *supra* note 61, at 58–59; Comment, *supra* note 61, at 921–23; Hinds, *supra* note 61, at 840; *see also* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994).

137. The irony of demanding symmetry of results in an area of law that has not been based on mutuality for several decades was addressed previously. *See supra* note 70 and accompanying text.

138. This situation is to be distinguished from the cases where a class is certified and the class action lawsuit is ultimately decided on the merits. In such situation, the class certification order is precluded and a class member or the defendant cannot later challenge certification.

example, whatever the merits of a rule denying issue preclusion to an order *granting* class certification, "it clearly should not apply to orders *denying* certification, since that would enable plaintiffs, by the simple expedient of discontinuing, to 'shop around' indefinitely until they found a forum that would grant them certification."[139]

Unfortunately, while McLaughlin's theory attempts to protect the interests of defendants, it completely disregards the interests of the plaintiff class. The same fears and risks of forum shopping exist on the part of the defendant, who could easily manipulate procedure to "shop" for a weaker or more disorganized class action counsel and obtain an early order denying class certification before the plaintiff class could muster its force to assemble a more powerful offensive.[140]

As a matter of fact, quite to the contrary, there are plenty of additional reasons, and none of the insurmountable problems, to allow preclusion of an order *granting* but not to one *denying* class certification. Most of the arguments raised against certification preclusion apply only to absent class members who are nonparties to the litigation; they do not apply to a defendant that had a full and fair opportunity to litigate in person the class certification issue and lost. Yet to this day, no court or scholar has made such an argument.

In theory at least, one may say that the second court is bound by a previous court order *granting* certification. However, in practice, there is no such preclusion for the simple fact that the certification order does not have preclusive effect even within the same class proceeding. In *Morgan v. Deere Credit, Inc.*, for example, a party wanted issue preclusive effect applied to an order certifying an opt-out class action.[141] More specifically, the defendant class in a state court mandatory class action argued that the plaintiff could not relitigate the class certification because a federal court had already decided that the same class was to be certified as an opt-out class action. According to the defendant class, the issue preclusive effect of the prior federal court class certification required the state court of the second lawsuit to certify the second class action as an opt-out class action as well.[142]

Predictably enough, the federal court certification order was denied preclusive effect because "[a] class certification order cannot usually be

139. *See* McLaughlin, *supra* note 40, § 3:15 (emphasis added) (commenting on *In re* Livaditis, 132 B.R. 897, 903 (Bankr. N.D. Ill. 1991); *In re* Livaditis, 122 B.R. 330, 334–35 (Bankr. N.D. Ill. 1990) (refusing to apply issue preclusion to an order *granting* class certification).

140. *See* Principles of the Law of Aggregate Litigation § 2.11 cmt. c (2010) ("The subsequent court should guard against the possibility of strategic jockeying by defendants to obtain a favorable determination of the aggregation question in a proceeding in which the lawyers for claimants operate under structural conflicts of interest with a significant potential to skew systematically their incentive to press vigorously the use of aggregation.").

141. 889 S.W.2d 360, 366 (Tex. App. 1994).

142. *Id.* at 366–67.

characterized as final or irrevocable because it is subject to redetermination as the litigation progresses."[143] It is well settled that even the court that originally issued that order may at any time modify it or even decertify the class altogether.[144] It could not be otherwise: If a class certification order proves wrong as the litigation develops, there is no point in forcing class status on a litigation that does not have it.

The equality standard clearly shows that any rule that would preclude certification *denials* but not certification *grants* would systematically affect only the plaintiff class and therefore is extremely unfair. So, a previous decision *denying* class certification should be binding on a second court only to the same extent that a previous decision *granting* certification would also be binding. Since there can be no binding effect to orders granting certification, orders denying certification should have no binding effect either. Yet most commentators and courts that have addressed the issue focus only on the preclusive effect of class certification denial, not on class certification grants.[145]

9. *Summary*

There are some policy considerations in favor of giving a certain level of repose to a decision denying class certification, but there also are several policy and doctrinal considerations against giving preclusive effect to such a decision.

It seems an exaggeration to say that a neutral observer, without political preferences or biases, would not be able to choose between these two options. Indeed, according to Kevin Clermont, "[i]f a court eyed these [options] without a proplaintiff or prodefendant bias, and without any unauthorized policy bias that favors or disfavors class actions, the court could not say with definitiveness which side has the stronger argument."[146] The exercise itself seems futile and of little application to any legal question, as there are no neutral observers and there are no neutral legal rules, but if there were, it seems that the

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143. *Id.* at 367 ("[T]he class certification issue is not procedurally definite; rather, it is subject to change as provided in the rules."). The court also reasoned that the issues were not identical because even identical class action rules sometimes are applied differently in the state court. *Id.* at 368–69.

144. *See* 7AAWRIGHT, MILLER & KANE, *supra* note 11, § 1785.4, at 480–83 ("Courts have modified or decertified classes at the outset of pretrial, the completion of discovery, after summary judgment in favor of plaintiff class's injunctive claims, but before awarding damages, at the close of plaintiff class's case-in-chief, and at the completion of the trial on the merits. The reasons given by the courts for altering certification orders are similarly diffuse and have included lack of numerosity, lack of commonality, the inadequacy of the named plaintiffs as class representatives, inadequacy of counsel and a lack of manageability.").

145. An example of the one-sided view of the subject is in the title and the content of J. Russell Jackson, *Preclusive Effect of Class Certification Denial*, NAT'L L.J., Aug. 16, 2010 (discussing only the preclusive effect of class certification denial).

146. *See* Clermont, *supra* note 80, at 217.

overwhelming force of the argument would disfavor application of issue preclusion to class certification orders.

I also disagree with those commentators who consider the best solution from a policy perspective to be preclusion of the class certification denial issue, and that the only obstacles are mere technical details of the issue preclusion doctrine.[147]

The conflict between the need for repose and the protection of nonparties (absent class members) is indeed a seemingly intractable problem of policy, but it need not be, as long as we avoid the temptation to adopt extreme positions. We should avoid any technical application of the doctrine of issue preclusion and adapt the need of repose to the peculiarities of class action litigation. Ultimately, as with anything in law and in procedure, the solution comes down to a political choice between equally reasonable rules, with pros and cons on both sides. Legal doctrine or policy alone is not enough to solve this conundrum, which demands a much more flexible and less formalistic approach.

IV. The Search for a Solution

As this Article makes abundantly clear, many policy and doctrinal hurdles make it impossible and unwise to give strict preclusive effect to an order denying class certification. The courts that decided to do so had to ignore or bypass the traditional requirements of issue preclusion and, despite language to the contrary, they did not apply the traditional issue preclusion doctrine but instead created a new rule, applying the old canons recklessly to the needs and peculiarities of class action litigation.

Despite the fact that the issue preclusion doctrine is ill suited to the class certification context, some courts and commentators have recognized that, for practical reasons discussed above, a previous class certification decision must have at least "some effect" in future courts or it risks making a mockery of the legal system. Such a broad and abstract rule is difficult to state in terms of issue preclusion or any other traditional procedural device available to courts. Some proposals are very creative but fail to yield a workable solution. Below I discuss the proposals to address the issue.

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147. *See* Wasserman, *supra* note 53, at 839 ("Examined solely as a policy matter, one might expect that a denial of class certification *would* preclude a successive class action filed on behalf of the same class. . . . Even though it appears that the policies underlying preclusion law might well be served by a decision to preclude a successive class action, in fact, the hurdle posed by issue preclusion doctrine to successive class actions is more illusory than real."); *see also Piper II*, 551 F.2d 213, 219 (8th Cir. 1977) (refusing to apply collateral estoppel to a class action determination where a plaintiff was involved in multidistrict litigation, even while acknowledging that strong arguments may be made in support of collateral estoppel); 18A Wright, Miller & Cooper, *supra* note 7, § 4455 at 457–58 ("Some practitioners believe there is a serious problem with repeated efforts to persuade successive courts to certify the same ill-advised class. . . . But substantial doctrinal obstacles make preclusion difficult . . . .").

A. Discretion to Assert Preclusive Effect to a Court's Own Certification Orders

Concern for the risk of duplicative class action litigation has led the Advisory Committee on Civil Rules to study the situation and make a proposal to amend Rule 23.[148] The Committee acknowledged that the preclusion doctrine poses "several obstacles" to the preclusion of certification orders,[149] but decided to bypass decades of experience with preclusion law and proposed adding a new subdivision (c)(1)(D) to Rule 23. The proposed subdivision reads:

> A court that refuses to certify—or decertifies—a class for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b)(1), (2), or (3), may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue.[150]

Such a proposal, allowing the court that denied class certification to give preclusive effect to its own order, goes directly against preclusion practice and doctrine, and against every single objection that has been discussed in this Article so far. It binds absent class members, nonparties that did not receive notice or an opportunity to opt out, to a decision that was not necessary or final and that might involve different legal or factual issues, legal standards, or discretionary considerations.[151] Moreover, this measure is asymmetrical because it gives preclusive effect only to orders that refuse to certify a class action, not to those that grant certification.[152]

The proposed rule imposes three restrictions in order to address some of the above mentioned concerns. First, it limits the preclusive effect to decisions denying certification based on lack of numerosity or commonality or on the standards of Rule 23(b)(1), (2), or (3), therein including decisions on the important but elusive prerequisites of superiority and predominance. Contrary to what the Advisory Committee's proposal tries to convey, commonality, superiority, and predominance are in the eye of the beholder. What is superior and predominant to one court may not be to another, including courts in the

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148. *See* Advisory Comm. Report, *supra* note 31, at 44.

149. *Id.* ("Ordinary res judicata traditions . . . pose several obstacles. These obstacles, grounded in traditional individual litigation, may forestall judicial development of 'common-law' certification preclusion. [But,] [c]ontemporary class-action litigation presents new challenges. Responding to these challenges requires elaboration of res judicata theory to incorporate the conceptual needs and opportunities of class actions."); *see* Redish, *supra* note 34, at 10,985 (arguing that, in the class action context, normal rules of preclusion must be modified and that traditional forms of preclusion will be ineffective in addressing this problem; Redish, however, does not address any of the obstacles).

150. Advisory Comm. Report, *supra* note 31, at 40.

151. *See supra* Part III.C.

152. *See supra* Part III.C.8.

same hierarchy, as can be attested by the several class certification orders that recently have been reversed.[153]

The second limitation is that preclusion would be restricted to the cases where the court that refuses certification "directs" that no other court may certify a substantially similar class. In other words, it is for the rendering court, on its discretion, to dictate whether there will be preclusion of its own decision of denial of class certification. This unprecedented device seems to assume that the rendering court is equipped to know when its own decision deserves to be considered the last word on the subject and when the issues were not fully considered or otherwise deserve to be revisited by another court.[154] However, not only is the rendering court not in the best position to pass a decision on the preclusion of its own decision,[155] it is unlikely that a court will consider that the same issue it took a couple of years to resolve deserves subsequent discussion in another court.

The third limitation is that the possibility of relitigating the certification issue is open whenever a difference of law or a change of fact creates a new certification issue.[156] In principle, this qualification is technically unnecessary because preclusion only attaches if there is identity of issues.[157] However, since the proposal makes revolutionary changes to the doctrine of issue preclusion, it was probably advisable to make this limitation explicit.

Although the proposed rule was to amend the Federal Rules of Civil Procedure to give preclusive effect to federal court decisions, the comments state that the same policies would have applied when a class action in federal court involved the same certification issues previously decided in state court.[158] According to the comments, the federal court should "consider carefully the reasons that led the state court to refuse certification" with the objective of protecting itself against repetitive litigation of the same certification issue.[159]

Whatever the qualifications or limitations, the Advisory Committee proposal goes directly against decades of experience with the doctrine of

153. For an example, see *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), where the district court and the Ninth Circuit certified a nationwide class of 1.5 million female Wal-Mart employees allegedly discriminated against, but the Supreme Court denied certification for lack of commonality.

154. *See* ADVISORY COMM. REPORT, *supra* note 31, at 44 (mentioning "a host of possible considerations" and giving examples).

155. *But see* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 765 (2005) (proposing allowing the trial court to "place constraints upon the preclusive effect of its own judgment that are calibrated to the needs of a particular class proceeding.").

156. *See* ADVISORY COMM. REPORT, *supra* note 31, at 45 (explaining that more information about the facts may mean a change in the facts).

157. *See supra* Part III.C.5.

158. *See* ADVISORY COMM. REPORT, *supra* note 31, at 45.

159. *Id.*

issue preclusion. Therefore, although the three limitations and exceptions discussed above are so broad as to substantially swallow the rule, the proposal was ill advised for the reasons already discussed.[160] Moreover, as shown above, the Supreme Court expressly rejected the notion that the mere fear of repetitive litigation of similar class action issues trumps the rule against nonparty preclusion.[161]

B. Law of the Case and Stare Decisis of the Class Certification Order

An interesting suggestion to address the problem is proposed in the Wright, Miller, and Cooper *Federal Practice and Procedure* treatise. The idea is to adopt "law-of-the-case concepts within the contours of an individual [class] suit, and stare decisis as between separate [class] suits."[162] Unfortunately, the authors do not elaborate on their proposal beyond this general, cryptic comment. Because complex problems generally are not simplified by giving them new labels, it is incumbent on us to try to understand the practical operation of such a proposal.

Generally, under the *law-of-the-case* doctrine, when an issue is decided in a particular case, the same parties cannot relitigate the same issue in the same proceeding.[163] Stare decisis, on the other hand, protects the stability of decisions in future cases and is applicable to any party, not necessarily the same parties of the proceeding.[164] More important, though, is what law of the case and stare decisis have in common: exceptions.[165] This is unlike the principle of res judicata, which as a rule is not subject to departure.[166] Finally, unlike issue preclusion, which requires an issue to be "necessary to the judgment," law of the case may

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160. *See supra* Part III.C.

161. Smith v. Bayer Corp., 131 S. Ct. 2368, 2381 (2011) (citing Taylor v. Sturgell, 553 U.S. 880, 901 (2008)); *see Taylor*, 553 U.S. at 883 ("[B]ecause the number of plaintiffs in public-law cases is potentially limitless, it is theoretically possible for several persons to coordinate a series of vexatious repetitive lawsuits. But this risk does not justify departing from the usual nonparty preclusion rules.").

162. *See* 18A Wright, Miller & Cooper, *supra* note 7, § 4455.

163. *See* Casad & Clermont, *supra* note 4, at 16–17; 18B Wright, Miller & Cooper, *supra* note 7, § 4478.

164. *See* CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2641 (2011) (stating that the doctrine of stare decisis aims to ensure the goals of stability and predictability); *In re* Laudy's Will, 55 N.E. 914, 915–16 (N.Y. Ct. App. 1900) ("The rule of res adjudicata controls the parties, while that of stare decisis guides the courts.").

165. *See* Fed. R. Civ. P. 54(b) ("[A]ny order or other decision . . . that adjudicates fewer than all the claims . . . may be revised at any time before the entry of a [final] judgment . . . ."); Greene v. Rothschild, 414 P.2d 1013, 1015 (Wash. 1966) (en banc) ("Under the doctrine of stare decisis, the court is not obliged to perpetuate its own errors. . . . We see no reason why this principle should not apply where the allegedly erroneous decision is one which was rendered on a prior appeal of the same case.").

166. *See* United States v. U.S. Smelting Ref. & Mining Co., 339 U.S. 186, 199 (1950) (contrasting res judicata, "a uniform rule," with law of the case, "a discretionary rule"); Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833 (9th Cir. 1982) ("The law of the case principle is analogous to, but less absolute a bar than, *res judicata*.").

be applied to any issue.[167] The differentiations above are relevant because the same issue may be subject to preclusion through law of the case, stare decisis, or issue preclusion.[168]

As a principle of adherence to legal precedents, stare decisis does not apply to decisions on issues of fact, the central scope of issue preclusion. Of course, both stare decisis and issue preclusion apply to the application of the law to issues of fact.[169] The second court is bound only by the legal precedent contained in the holding, not by the decisions regarding the facts of the case. Therefore, the second court still must hear all the evidence and factual arguments from scratch and is free to reach a different conclusion. Naturally, this situation means that there will be a new opportunity for performing discovery in the second class action. Further, after deciding the questions of fact, the second court will then have the opportunity to distinguish the facts of the case and avoid the direct application of the precedent.[170]

Whatever the decision on the prior class action lawsuit, the court in the second class action not only is not strictly bound by its precedent (especially if emanated from a court of a different hierarchy), but also the second court may have the opportunity to manipulate the facts to avoid its application. This is a double guarantee to preserve the second court's freedom to decide the issues anew.[171] For example, if the first class action was not certified because the class was not sufficiently numerous, the second court, after further extensive discovery, may find out that the class was larger than the prior court originally determined. Or the second court may define the class differently, magnifying its size to conform to the rule requirement. If the reason for noncertification was lack of manageability, the second court might construct the facts differently and distinguish them from the precedent established in the prior class action

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167. *Compare* Allen v. McCurry, 449 U.S. 90, 94 (1980) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue . . . ."), *with* State v. Loveless, 150 P.2d 1015, 1016 (Nev. 1944) (holding that adjudication of any issue is the law of the case in any subsequent appeals).

168. *See, e.g.*, 18B Wright, Miller & Cooper, *supra* note 7, § 4478.5, at 814 ("[A]ny issue suitable for disposition under the law of the case is likely to be indistinguishable for stare decisis purposes.").

169. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 367–68 (7th Cir. 1987) (refusing to allow an opt-out class member to assert offensive nonmutual issue preclusion against the defendant, but applying the doctrine of stare decisis and stating that "only the gravest reasons should lead the court in the opt-out [individual] suit to come to a conclusion that departs from that in the [prior] class suit").

170. *See id.* at 368 ("We therefore approach the merits of this case with a strong presumption in favor of the Fourth Circuit's disposition [in the prior class action]. The presumption does not eliminate the need for independent analysis, but it does mean that doubts should be resolved in favor of the Fourth Circuit's disposition [in the prior class action].").

171. *See id.*

lawsuit. In any event, the Supreme Court has already made it clear that sometimes stare decisis is the only weapon against repetitive litigation.[172]

The traditional principles of law of the case are not useful to resolve the issue, because its application is traditionally limited to within a single case,[173] whereas the problem we are discussing here is whether a second court is bound by a previous court's decision denying certification. In its traditional formulation, the law-of-the-case doctrine requires that, once a court decides an issue, and that issue is not subject to reexamination, the court may not review the disposition of that issue in the same proceeding.[174] Its main purpose is to encourage cases to move forward by avoiding the continuous discussion of issues that have been settled.[175]

With some creativity, however, one might extrapolate this traditional "same case" usage and suggest the application of a modified "law of the case" in other proceedings and in other courts. This is not a far-fetched proposal, since law of the case has been applied by nonparties in a similar, albeit more limited, way than nonmutual issue preclusion.[176]

If applicable, law of the case might indeed be a slightly better solution than stare decisis. One limitation is that it is controversial to apply law of the case to decisions that are discretionary in nature, such as class certification.[177]

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172. *See* Taylor v. Sturgell, 553 U.S. 880, 883 (2008) ("[B]ecause the number of plaintiffs in public-law cases is potentially limitless, it is theoretically possible for several persons to coordinate a series of vexatious repetitive lawsuits. But this risk does not justify departing from the usual nonparty preclusion rules. *Stare decisis* will allow courts to dispose of repetitive suits in the same circuit, and even when *stare decisis* is not dispositive, the human inclination not to waste money should discourage suits based on claims or issues already decided.").

173. *See* CASAD & CLERMONT, *supra* note 4, at 16 ("[Law of the case] does not apply beyond the parties to the case in which the ruling was rendered. Indeed, the ruling is binding as the law of the case only during the later conduct of the very case in which the ruling was made, that is, within the context of the initial action. It will not bind the parties, or anyone else, in later proceedings that are not part of the same case."); 18B WRIGHT, MILLER & COOPER, *supra* note 7, § 4478, at 637–39 ("Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. They do not apply between separate actions.").

174. *See* CASAD & CLERMONT, *supra* note 4, at 16.

175. *See* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) ("[Law of the case] promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" (quoting 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[1] (1984))).

176. *See* 18B WRIGHT, MILLER & COOPER, *supra* note 7, § 4478.5 at 809–10 ("The most basic proposition is that law of the case ordinarily arises within a single case; a party to one action is not bound by rulings made in a separate action. But just as nonmutual preclusion has won widespread acceptance, so a new party or a co-party may be entitled to invoke law-of-the-case principles against a party who lost an earlier ruling.").

177. *Compare* Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 609 (1987) ("Law of the case is not so clearly applicable, however, when a litigant seeks reconsideration of a discretionary matter."), *with* Allan D. Vestal, *Law of the Case: Single-Suit Preclusion*, 12 UTAH L. REV. 1, 26–27 (1967) (considering that matters of discretion deserve a stronger application of the law of the case). The discretionary nature of class certification orders has been discussed earlier in this Article. *See supra* Part III.C.6.

Although "law-of-the-case . . . does not command obedience," it makes sense for future courts to consider that "the carefully considered views of another court are likely to have some persuasive force."[178] Treating certification decisions of prior courts as the law of the case will make prior rulings highly persuasive, but will not strictly bind future courts in the same way as if the decisions were afforded the status of issue preclusion. Law of the case would not only advance the goal of judicial economy but would leave room for reconsideration and fairness to all parties, especially, but not only, if new evidence is presented.

The decision to reconsider a prior decision is left to the discretion of the court, but most courts view the law of the case with much constraint, particularly in times of crowded dockets like ours.[179] Although the power to review a prior decision is broad, generally courts will be reluctant to reconsider unless there is a supervening change in the law, presentation of new evidence, or a need to correct a clear error or prevent a manifest injustice.[180]

In any event, what makes the proposal to use principles of law of the case or stare decisis unattractive is that if they are not strictly interpreted, as suggested above, and do not give ample opportunity for reconsideration, the end result might be to bind the absent class in much the same way that issue preclusion does. The proposal is simply the same rule with a different name and, worse, without the same traditional constraints. Because of the absence of such constraints, the principles of law of the case or stare decisis, although in principle much weaker, in practice may have a much tougher effect than preclusion itself.

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178. 18B Wright, Miller & Cooper, *supra* note 7, § 4478.4, at 770 (discussing the application of the law-of-the-case doctrine in different courts, when a case moves from one court to another by transfer, removal, remand, etc.). Wright, Miller, and Cooper also add that "[t]he same dispute may instead be framed in formally separate actions, either simultaneously or sequentially, in circumstances that do not support claim preclusion or issue preclusion." *Id.*; *see* Steinman, *supra* note 177, at 622–26, 656–62 (discussing the law-of-the-case doctrine in the context of consolidation and transfer). For an earlier such discussion, see Vestal, *supra* note 177, at 21–26.

179. *See* 18B Wright, Miller & Cooper, *supra* note 7, § 4478.4.

180. *See, e.g.*, White v. Murtha, 377 F.2d 428, 431–32 (5th Cir. 1967) ("While the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice."); *see also* 18B Wright, Miller & Cooper, *supra* note 7, § 4478 (analyzing each of these elements). On the other hand, Robert Casad and Kevin Clermont criticize a rigid application of the law of the case and question "whether the interests of economy of judicial effort served by the doctrine [of the law of the case] are generally of such importance as to justify holding parties to erroneous rulings that could still be corrected within the framework of the same case." Casad & Clermont, *supra* note 4, at 16. Therefore, "courts have not applied it with as much rigor and consistency as they have shown in connection with res judicata." *Id.*

As we have seen, binding absent class members to a class certification order goes against all the criticisms raised in the previous Subpart: binding a nonparty, who did not receive notice or opportunity to opt out, to a decision that was not necessary nor final and might involve different legal or factual issues, legal standards, or discretionary considerations.[181] Moreover, this measure is asymmetrical because it gives preclusive effect only to orders that refuse to certify a class action, not to those that grant certification.[182]

However, if applied in a modified format, with broad flexibility and ample opportunity for reconsideration, these principles might prove relevant in practice. After all, if giving preclusive effect to the prior certification order might be unfair to the class, not giving any effect whatsoever could also prove counterproductive and extremely unfair to the defendants, allowing the plaintiff class in effect to bring the same class action, raising the same claims on behalf of the same class and against the same defendant, in fifty-one jurisdictions: one in each state and one in federal court. The class plaintiff is limited only by the financial capacity of the class counsel and the rules of personal jurisdiction (which is not a negligible limitation).

Yet concern over this proposal is legitimate, especially considering that courts have interpreted the principles of law of the case in disparate ways, with some courts having a "relatively lax attitude," some taking a "tougher stance," and others "still more stringent."[183]

C. Rebuttable Presumption Against Relitigation of the Class Certification Order

On substantively the same lines as the *Federal Practice and Procedure* treatise,[184] the ALI's *Principles of the Law of Aggregate Litigation* gave a firm, albeit minor, step in the right direction when it proposed that "[a] judicial decision to deny aggregate treatment for a common issue or for related claims by way of a class action should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity."[185]

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181. *See supra* Part III.C.

182. *See supra* Part III.C.8.

183. Steinman, *supra* note 177, at 614–15, 617–18 ("[N]o monolithic nation-wide doctrine prevails."); *see* Vestal, *supra* note 177, at 2–4 (discussing conflicting positions between state and within the same state).

184. *See supra* Part IV.B.

185. Principles of the Law of Aggregate Litigation § 2.11, at 178 (2010); *see* Note, *supra* note 25, at 2038 ("States could partially alleviate the problem by adopting incremental reforms, such as class action rules that direct judges to take note of prior denials of certification by other courts."). *The Principles of the Law of Aggregate Litigation* proposed several other innovations, one of which is the novel concept of the indivisibility of the class action remedy (or of the class substantive right) as a criterion to determine the right to opt out. *See* Principles of the Law of Aggregate Litigation

Exactly as was done by the *Federal Practice and Procedure* treatise,[186] this proposal too abandons the idea of preclusion altogether, because of the difficulties related to its application to class certification orders.[187] The difference is that, instead of applying the law of the case or stare decisis, it adopts the standard of comity.[188] This is a healthy departure from the previous versions of the Principles, which not only advocated the traditional issue preclusion effect to the previous decision denying certification, but also stated that whenever the decision did not qualify for preclusive effect, there should be a rebuttable presumption against certification as a matter of comity.[189] The original proposal, therefore, offered a double-kill approach for the plaintiff class: First, the court should try to apply traditional rules of issue preclusion. In case they do not apply, still the relitigation of the same issue must be preempted by a rebuttable presumption.

However, what the ALI proposal gave with one hand, it took away with the other. The comments stated that if the same discussion arises in another jurisdiction, the mere fact that the law was different (even if stated in exactly the same language and interpreted exactly the same way) is enough to avoid the application of issue preclusion because it would be a different legal issue.[190] The issue preclusion effect is limited to situations that involve the exact same legal issue, such as a question of federal due process. Still, when the issues are different, and issue preclusion cannot apply, comity and rebuttable presumption would govern.[191]

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§ 2.04, at 118–29 (2010); *see also* Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 350–54 (2003) (discussing the indivisibility of class claims from a comparative perspective and suggesting that "[r]ecognition of the concept of indivisible class claims would be an important evolution in American class action law. . . . [F]or example, to decide whether there should be a right to 'opt out' of the class or not.").

186. *See supra* Part IV.B.

187. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 cmt. b, at 179–80 (2010). This comment, entitled "Comity in Lieu of Preclusion," discusses the several "difficulties" of using preclusion with respect to a denial of class certification. *But see* Clermont, *supra* note 80, at 213–16 (criticizing the ALI rejection of nonparty preclusion on due process grounds).

188. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 cmt. b, at 179 (2010) ("The basis for this presumption [against class certification] is not preclusion but, rather, comity: the authority of the subsequent court to exercise discretion in its aggregation decision so as to avoid, insofar as is possible, unnecessary friction between judicial systems.").

189. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11, at 212 (Tentative Draft No. 1, 2008) ("Preclusive Effect Of The Aggregation Decision Itself[:] (a) A judicial decision to deny aggregate treatment for a common issue by way of a class action should have issue-preclusive effect in other courts as to the bases for that decision, as determined by reference to the preclusion principles ordinarily applicable in the rendering court. (b) Where a denial of aggregate treatment does not qualify for preclusive effect under subsection (a), that denial should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity.").

190. *See id.* § 2.11 cmt. b illus. 1–2, at 214–15.

191. *See id.*; *see also* Moorcroft, *supra* note 20, at 243–48 (stating that issues of federal due process deserve issue preclusive effect).

The proposed standard of rebuttable presumption as a matter of comity tries to strike a balance between the need for finality of court decisions and the peculiarities of class action litigation. By making the denial of certification a presumption that may be rebutted in the second class action, the Principles preserve the necessary flexibility and at the same time demonstrate a healthy level of comity to the previous decision. The Principles are even careful to propose a more lenient approach to the rebuttable presumption than the one traditionally expected.[192]

Whatever the improvements to the current law brought by the new ALI proposal, however, its advantages were lost in the comments, which missed the opportunity to explain how exactly the new proposed standard of "rebuttable presumption as a matter of comity" differs from the traditional application of the issue preclusion doctrine. The only two examples raised by the Principles as a basis for rebuttal of the presumption are not helpful to understanding the newly proposed system.

One example was lack of adequacy of representation.[193] However, as we have seen above, adequacy of representation is also required by the courts that apply issue preclusion to the denial of certification.[194] And it could not be any different, because no class action order may bind absent members if adequacy is lacking. The requirement of adequacy of representation is particularly relevant in an order denying class certification, which, as we have seen, is issued before class certification without notice to the class and opportunity to be heard.[195]

The other example given in which the presumption could be rebutted was "when the basis for the earlier denial (such as inadequacy of the particular class counsel to represent the proposed class) is no longer present in a subsequent proceeding (due to a change of counsel to one who would adequately represent the proposed class)."[196] This example also represents no departure from the current law because, as seen above, issue preclusion requires the existence of the same issues in

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192. *See* Principles of the Law of Aggregate Litigation § 2.11 cmt. c, at 180 (2010) ("The expectation of this Section is that situations for rebuttal of the presumption stated here may arise more frequently than situations with respect to some other presumptions used in the law, as to which successful rebuttal is relatively rare.").

193. *See id.* ("One important basis for rebuttal of the presumption consists of the affirmative demonstration of inadequate representation in connection with an earlier denial of class certification."). As a matter of fact, the language on adequacy is a leftover from the older versions of the ALI project, when the solution was the application of the traditional issue preclusion doctrine. *See* Principles of the Law of Aggregate Litigation § 2.11 cmt. c., at 216 (Tentative Draft No. 1, 2008) ("The court in the second proceeding also should consider whether the earlier denial of aggregate treatment resulted from inadequate representation on the aggregation question itself.").

194. *See In re* Bridgestone/Firestone Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 769 (7th Cir. 2003).

195. *See supra* Part III.C.2; *see also supra* Part III.C.4.

196. *See* Principles of the Law of Aggregate Litigation § 2.11 cmt. c, at 180 (2010).

both proceedings.[197] If a court determines that class counsel was not adequate, this decision should have no binding effect on the adequacy of a different class member or class counsel.

Judging from these examples alone, the ALI proposal would represent no innovation to the current debate of issue preclusion of class certification orders. In any event, it seems clear that these examples go against the language of the ALI proposal itself, which states that the class certification denial is a rebuttable presumption against "the same aggregate treatment."[198] The language is clearly too broad, because the proposal cannot create a presumption against the aggregate treatment, but only against the issues specifically decided in the previous litigation.[199]

The ALI also missed the opportunity to propose a party-neutral rule. Its proposal is inexplicably limited to a judicial decision to *deny* class certification.[200] It says nothing about the preclusive effect of a decision to *grant* class certification. However, it is reasonable to expect that the best interpretation to this proposal is to give the same effect, whatever that is, to either decision.[201]

D. Analogy to Dismissal for Lack of Jurisdiction

Kevin Clermont has recently tried to address the issue by comparing the denial of class certification with the dismissal for lack of jurisdiction (subject matter or personal).[202] The essence of his theory is that a court has authority to determine that it does not have authority to adjudicate a controversy and that this decision is binding on the parties. Therefore, a denial of class certification should have the same limited preclusive effect as a dismissal for lack of jurisdiction.[203] This analogy led to the conclusion that "[t]he decisions implicit in a no-certification ruling have a binding effect in any attempt to sue again in a court where the exact same issue arises."[204]

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197. *See supra* Part III.C.5.

198. *See* Principles of the Law of Aggregate Litigation § 2.11 cmt. b, at 179 (2010).

199. *See supra* Part III.C.5 (discussing the necessity of same issues of fact).

200. *See* Principles of the Law of Aggregate Litigation § 2.11 (2010).

201. *See supra* Part III.C.8 (discussing the necessity of a preclusion rule that is equally applied to grants and denials of class certification).

202. *See* Clermont, *supra* note 80, at 218–27 (analogizing jurisdictional determination to class certification). Clermont had opportunity to discuss the issue previously, in the context of individual litigation. *See* Casad & Clermont, *supra* note 4, at 263–72 (discussing both jurisdiction to determine jurisdiction as well as jurisdiction to determine no jurisdiction).

203. *See* Clermont, *supra* note 80, at 225–27 ("A denial of personal jurisdiction in an ordinary lawsuit works much the same as denial of class certification, because the latter announces that the court will not exercise personal jurisdiction over the absentees. . . . [T]he analogy may not be perfect, but it seems strong enough to conclude that a finding that no class exists should be as binding as a finding that no jurisdiction exists.").

204. *Id.* at 229 ("[P]reclusion [of the class certification order] may extend to the absentees, who

The analogy is not devoid of academic interest, but is not helpful to solve the practical issues discussed in this Article because it suffers from the same limitations discussed above regarding the issue preclusion doctrine.[205] First of all, as Clermont makes abundantly clear throughout his article, dismissal for lack of jurisdiction (and consequently denial of class certification) is preclusive only if both lawsuits involve the exact same issue.[206] As we have seen, it does not take much for the second class action certification to raise different issues from the first one.[207]

Second, as Clermont also recognizes, a dismissal for lack of jurisdiction is preclusive only to the parties to the suit.[208] Therefore, the analogy does not deal with all the policy and doctrinal hurdles of applying preclusion to nonparties.[209] The issue is not whether a denial of class certification is binding on the parties of the proceeding in which it was issued in the same and in any future class proceeding (until the moment when the class is certified, the party is the putative class representative, not the class).[210] There is no need to resort to the analogy of jurisdiction to determine jurisdiction to answer this question. Rather, the issue is whether absent class members are bound by a denial of class certification, and Clermont's analogy does not help answer this question.[211]

In addition, Clermont's analogy does not deal with any of the other objections raised above: the class certification order is a discretionary

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would thus be in privity with the class representatives for that limited purpose. By analogy to the jurisdiction-to-determine-no-jurisdiction doctrine, the absentees would face preclusion if the exact same issue arose when they sought certification elsewhere."). Because "[t]he denial of certification makes the absentee a stranger to the action for all other purposes," "the decision not to certify should carry no other preclusive effects," and "[t]here should be no preclusion on the merits." *Id*.

205. *See supra* Part III.C.

206. *See* Clermont, *supra* note 80, at 221 ("The initial court's ruling that it lacks authority should prevent a second try *that presents exactly the same issue*. The initial ruling will defeat jurisdiction in any attempt to sue again in a second court where *the same* jurisdictional *issue* arises . . . ." (emphasis added)); *see also id.* at 226 ("[T]he [preclusive] effect [of class certification denials] should be limited to binding only on the factual and legal issues that generated the no-certification ruling if they arise in a repeated attempt to certify."). The same warnings are repeated several times throughout Clermont's paper.

207. *See supra* Part III.C.5 (discussing Smith v. Bayer Corp., 131 S. Ct. 2368 (2011)).

208. *See* Clermont, *supra* note 80, at 218 (stating that dismissal for lack of jurisdiction precludes the same parties); *see also id.* at 226 ("Cutting against the analogy [between a dismissal for lack of jurisdiction and a class certification denial] is that the determination of no jurisdiction over the defendant binds the ordinary plaintiff, over whom the court in fact has personal jurisdiction. In the class action setting, the aim is instead to bind a noncertified class absentee.").

209. Clermont does offer a response, but it is not convincing. *See id.* at 218–19 (presenting a fourfold response).

210. Even in this limited situation, application of preclusion is debatable. The same class representative may bring the same class action representing the same class against the same defendant if the certification issues are not the same or if the defect is corrected. *See supra* Part III.C.5.

211. *See supra* Part III.C.2 (arguing that without class certification, the class and the absent class members are not parties to the class action).

decision; is not a final judgment, necessary, or essential; and absent members did not have an opportunity to opt out or receive notice.[212] Each of these objections independently defeats any preclusion of a class certification order.

Because the analogy to jurisdiction to determine no jurisdiction faces the same doctrinal and policy problems faced by the direct application of issue preclusion of class certification orders, it does not seem to be a relevant or helpful analogy. Perhaps the only interesting lesson here, which reinforces a central thesis in this Article, is that jurisdiction to determine no jurisdiction operates in a perfectly symmetrical way because jurisdiction to determine jurisdiction has the same effect.[213]

Conclusion

In class action litigation, courts are faced with issue preclusion problems that are strikingly different from those encountered in traditional individual civil litigation. The fact that absent class members are not parties to the litigation and have no individual control over it; that they are represented by a self-appointed peer, in reality controlled by the class counsel whose interests are in constant conflict with the class; and that they must receive adequate notice and adequate representation, all conspire to create an extremely complex structure that may require adaptation of the traditional rules of issue preclusion. Adaptation, however, does not mean complete abandonment of the general principles of the preclusion doctrine or due process.

Nowhere is there a more vibrant example of the practical and theoretical problems of issue preclusion than in its application to certification orders. This controversy has generated a great amount of unnecessary disagreement amongst courts and commentators. This Article has discussed the numerous problems with giving preclusive effect to certification orders. It also discussed several proposals that have been advanced to deal with the issue (preclusion, law of the case, stare decisis, rebuttable presumption, and comity). This Article reveals, however, that it is not politically or doctrinally sound to give preclusive effect to class certification orders. Absent class members, therefore, are not bound by class certification orders and may file the same class action in any jurisdiction and litigate the same certification issues again.

The only viable solutions are ones that would give some form of stability to the decision without the definitiveness of preclusion. They represent an interesting beginning to a more serious conversation than the one we have had so far. They are a step in the right direction, but

212. *See supra* Part III.C.
213. *See* Clermont, *supra* note 80, at 218–27; *see also supra* Part III.C.8.

they do not offer an adequate solution to the intractable problems involved in the effects, if any, of a class certification order.

The mere enunciation of a familiar rule, as attractive a solution as it might seem, has no meaning unless followed by reasonable and workable criteria for its practical application. Granted, criteria might be developed by case law, but without previous guidance, the courts might blindly apply the principles of law of the case, stare decisis, rebuttable presumption, or comity without proper regard to the peculiarities of the class certification problem, exactly as they have been doing so far. These solutions also have their own peculiar problems because they do not have the benefit of all the factors and requirements that the preclusion doctrine has slowly built in the past century. A proposal that leaves much of the details of its application to the courts is tantamount to no rule at all.

Whatever the rule, courts need direction on how to apply it, in part because they have not done a very good job in the past few decades. This Article has discussed several concerns in favor of and against the application of preclusion to class certification decisions. Judicial economy and fairness to the defendant favor the application of preclusion, while fairness to the class might counsel a more careful approach. These issues could be addressed if the second court performs an independent analysis of the adequacy of the representative in the first class action and takes into consideration that absent members were not given notice or the opportunity to opt out of the first class action lawsuit. The second court must take into consideration the discretionary nature of the first decision, as well as the fact that it could be modified at any time in the first proceeding. The second court must also be free to apply its own procedural law to the certification issue.

No clear-cut rule can solve this problem. Courts might need to take a balancing approach, addressing all the legitimate interests of the class and the defendant, as well as the expectations of the judicial system. If all these concerns are taken into consideration, the second court may give some precedential or presumptive effect to the prior class certification decision, as long as it reserves also some flexibility to reconsider the analysis of some issues. The basic principle is that certification decisions, both the original as well as the successive ones, must be carefully constructed.

Alternatively, if it is not possible to construct a proper standard, the best rule may be simply not to give any preclusive effect at all to class certification decisions[214] and to let the market decide whether it makes sense for the class to refile a class action and run the risk of wasting time

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214. *See* Note, *supra* note 25, at 2038 ("[S]ome risk of duplication of litigation is an inevitable cost of a system in which federal district court judges have broad discretion to deny class certification and states are free to manage their own judicial systems with their own class action rules.").

and money in pursuing an avenue that most probably will be denied multiple times. Despite the potential impact upon defendants, the limitations that class counsel face are also not negligible: It is not economically viable to keep litigating losing class certification issues.[215]

In deciding that a certification order has no preclusive effect, the Supreme Court, in *Smith v. Bayer Corp.*, was favorably influenced by both proposals described above, but without expressing any critical judgment. As the Court stated, "our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs."[216] The Court did not engage further in the discussion of the issue.

In any event, whatever the rule might be, it must be neutral: The same rule must apply to decisions granting or denying class certification. This is an issue that is so far completely overlooked, but whose time has come.[217]

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215. *Compare* Taylor v. Sturgell, 553 U.S. 880, 883 (2008) (refusing to apply preclusion simply for fear of repetitive litigation and stating that "the human inclination not to waste money should discourage suits based on claims or issues already decided"), *with* Alvarez v. May Dep't Stores Co., 49 Cal. Rptr. 3d 892, 903 (Ct. App. 2006) ("When appellants' counsel was asked in oral argument when the string of unsuccessful lawsuits would end, his answer in essence was—when the pursuit is no longer economically feasible. We disagree. . . . It is manifestly unfair to subject respondent to a revolving door of endless litigation.").

216. Smith v. Bayer Corp., 131 S. Ct. 2368, 2381 (2011) (holding that a certification order has no preclusive effect against absent members because they are not parties to the litigation and because the certification rules are different in different jurisdictions).

217. *See supra* Part III.C.8 (discussing the necessity of a preclusion rule that is equally applied to grants and denials of class certification).