

Preclusion and the Denial of Class Certification: Avoiding the “Death by a Thousand Cuts”

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INTRODUCTION

Professor Martin H. Redish has transformed our understanding of the class action.¹ He has demonstrated that this procedural aggregation device can be used in ways that alter the application of substantive law, and thus raises fundamental questions of constitutional and political legitimacy. Among Redish’s insights is the unique “guardianship” relationship between the class lawyer and his “clients.” The lawyer, not the representative or class

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1. See Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 512 (2013) (“No one has written as passionately and well about the democratic theory of class action litigation than Professor Martin H. Redish.”).

members, is the motivating (and motivated) force in pursuing class status. The lawyer has the primary financial interest in the case and usually acts without oversight from (or interaction with) members of the class. The lawyer is the de facto real party in interest.

In *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*,² Professor Redish and Megan Kiernan apply this insight to the question of whether a court's denial of class certification can prohibit successive efforts to have the same class certified. Repetitive litigation of class certification can impose significant costs on the defendant and expose the defendant to the daunting reality that a single loss will undo previous wins—that is, plaintiffs need succeed only once to subject the defendant to the possibility of aggregate liability. Without preclusion against multiple certification efforts, the defendant faces inexorable pressure to settle even anemic claims. In Redish and Kiernan's vivid language, such a defendant faces “death by a thousand cuts.”³

Courts and commentators have disagreed about whether the putative class members whose class status was denied can be bound by principles of issue preclusion. In 2011, the Supreme Court rejected preclusion in *Smith v. Bayer Corporation*.⁴ Now, Redish and Kiernan assert that judges and scholars have been focusing on the wrong target. As the class lawyer is the practical real party in interest, it is counsel—and not the putative class members—who should be estopped from multiple bites at the certification apple.

The argument is audacious, even radical.⁵ After all, preclusion doctrine applies to litigants and persons in privity with them, not to their lawyers. Preclusion flows from final judgments, which determine the rights of litigants, not their lawyers. Nonetheless, the Redish/Kiernan proposal—something we might call “in the nature of preclusion”—is consistent with the reality that the class lawyer is the locus of decision-making authority and financial interest. While the proposal is bold, it is at the same time narrow, because it applies only to sequential efforts at certification by the same lawyer. It would not have applied, for instance, in *Smith*, in which different counsel filed separate class suits.⁶

In this Essay, after briefly setting the factual context, I offer three reactions to the proposal. First, I take the opportunity to flesh out the source

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

3. Redish & Kiernan, *supra* note 2, at 1665–67.

4. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2373 (2011).

5. Before *Smith*, some courts cited lawyerly gamesmanship as a factor in approving the application of issue preclusion against putative class members, but no court had suggested imposing preclusion against counsel. See Kevin M. Clermont, Essay, *Class Certification's Preclusive Effects*, 159 U. PA. L. REV. PENUMBRA 203, 208 (2011); see also Redish & Kiernan, *supra* note 2, at 1669.

6. See Redish & Kiernan, *supra* note 2, at 1676–77.

of the defendant's dilemma. Specifically, the "death by a thousand cuts" looms because of the asymmetry between the requirement that one may not be bound without having had a "day in court," on the one hand, and preclusion doctrine, on the other. Second, I disagree with the assumption, implicit in the Redish/Kiernan article, that *Smith* ended the possibility of applying issue preclusion against putative class members. There is room to argue that these non-parties can be bound because they are in privity with the class representative, so long as the court expressly found that the class representative was adequate under Rule 23(a)(4). Third, I argue that issue preclusion is problematic not because of *Smith*, but because of more prosaic doctrinal concerns, principally the requirement that multiple cases present the same "issue." This problem will also thwart the Redish/Kiernan proposal, at least if it is to be implemented by case law along the lines of traditional preclusion. Implementation in a rule, however, could avoid these doctrinal restrictions. Because preclusion of a lawyer would not implicate "day in court" issues, the scope of preclusion can be broadened. A lawyer, then, might be barred from filing a second class action that bears significant resemblance to the first.

I. SETTING THE STAGE

We deal with this fact pattern: In Case 1, Representative 1 ("Rep-1") brings a class action against Defendant ("D") in federal court. Personal jurisdiction, subject matter jurisdiction, and venue are satisfied and the complaint states a claim. After appropriate discovery, Rep-1 moves to certify the class. The court denies certification for a reason unrelated to adequacy of representation—say, for lack of manageability, or of commonality under Rule 23(a)(2), or of predominant common questions under Rule 23(b)(3).⁷ Now Representative 2 ("Rep-2") files Case 2, seeking certification of the same class, asserting the same claim against D. Rep-2 was a member of the putative class in Case 1. D asserts that Rep-2 and his class are estopped to deny the findings from Case 1 that the class lacked manageability or commonality or predominance of common questions.

Commentators addressing this question reached varied conclusions. Some opined that the class in Case 2 was estopped,⁸ while others found preclusion improper because it would be imposed upon non-parties.⁹ Some proposed that the matter be handled through doctrines of law-of-the case or stare decisis.¹⁰ The American Law Institute suggested that the rejection of certification in Case 1 should create a rebuttable presumption against

7. FED. R. CIV. P. 23(a)(2); FED. R. CIV. P. 23(b)(3).

8. See, e.g., Clermont, *supra* note 5, at 220–27 (based upon analogy to the doctrine that a court has jurisdiction to determine that it has no jurisdiction).

9. See, e.g., Antonio Gidi, *Issue Preclusion Effect of Class Certification Orders*, 63 HASTINGS L.J. 1023, 1040–47 (2012).

10. See generally, e.g., 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4455 (2008).

certification in subsequent cases.¹¹ The Advisory Committee on the Civil Rules proposed that the court in Case 1 should be permitted to declare that its holding on certification would be binding in subsequent actions.¹²

The courts also failed to agree, though most federal courts appear to have applied issue preclusion (so long as Rep-1 had adequately represented the interests of class members in Case 1).¹³ In *Smith*, however, the Supreme Court went the other way.¹⁴ The Court concluded that because the court in Case 1 did not certify a class, neither Rep-2 nor putative class members could be bound by that court's findings.¹⁵ As a result, D can be the target of serial motions for class certification.¹⁶ And because of an asymmetry in the two competing legal doctrines, D cannot afford to lose on even one of those multiple motions.

II. SOURCE OF THE “DEATH BY A THOUSAND CUTS”: THE ASYMMETRY OF THE “DAY IN COURT” PRINCIPLE AND PRECLUSION DOCTRINE

The problem of the “death by a thousand cuts” is reminiscent of Professor Brainerd Currie’s concerns about nonmutual issue preclusion.¹⁷ Nonmutual preclusion is asserted by a litigant in Case 2 who was a stranger to Case 1. She seeks to take advantage of a finding made in Case 1. Once courts allowed nonmutual *defensive* preclusion (that is, used by the defendant in Case 2), Professor Currie foresaw problems if the rejection of mutuality were extended to the *offensive* context (that is, used by the plaintiff in Case 2).¹⁸ Currie’s concerns flowed from the asymmetry concerning (1) who is bound by a judgment and (2) who can take advantage of a judgment.

11. AMERICAN LAW INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 2.11 (2010).

12. COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 44 (2001).

13. The leading case applying issue preclusion in this context was *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), abrogated by *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). See Clermont, *supra* note 5, at 204 (“[T]he courts generally answer ‘yes,’ based on the idea that no reasons sufficiently justify retrying the same issue as long as the class representative adequately represented the absentee in the certification attempt.”) (footnote omitted).

14. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380–82 (2011).

15. *Id.*

16. While recognizing that its holding leaves defendants open to repeated attempts at class certification, the Court in *Smith* suggested that defendants may find protection through comity and stare decisis. *Id.* at 2381–82. The Redish/Kiernan criticism of the Court’s reliance on comity and stare decisis is wholly convincing and I do not repeat it. See Redish & Kiernan, *supra* note 2, at 1681–87. Professor Gidi also concludes that such doctrines are ineffective to protect defendants in this situation. See Gidi, *supra* note 9, at 1059–63. The Court in *Smith* also noted expanded federal subject matter jurisdiction under the Class Action Fairness Act. *Smith*, 131 S. Ct. at 2382. With more cases in federal court, the Court implies, federal mechanisms of coordination, such as multidistrict litigation, could facilitate consistent decisions on certification of similar cases. *Id.*

17. Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 289–96 (1957).

18. *Id.* at 322.

A. WHO IS BOUND BY A JUDGMENT?

This question implicates the fundamental American tenet that one cannot be burdened by a judgment unless he has been afforded a “day in court.” Everyone agrees that the day-in-court requirement is met if the one to be bound was formally joined as a party in Case 1.¹⁹ Everyone also agrees that there are circumstances in which a non-party to Case 1 can be bound.²⁰ Non-party preclusion is summed up generically in the term “privity,” so preclusion may be used only *against* one who was joined as a party in Case 1 or who was in privity with a party in Case 1. Ultimately, this day-in-court principle is rooted in due process, although current privity doctrine does not exhaust the circumstances in which binding a non-party would be constitutional.²¹

B. WHO MAY TAKE ADVANTAGE OF A JUDGMENT?

This very different question is governed by preclusion law, with no grounding in due process. The ancient doctrine of mutuality dictates that one may gain the benefit of preclusion in Case 2 only if he was a party (or was in privity with a party) in Case 1. However, because mutuality is not based on any constitutional precept, courts may reject it. Interestingly, they have done so, but only with safeguards. Courts have recognized that the operation of the day-in-court principle in tandem with unfettered nonmutual preclusion would simply stack the deck too heavily against defendants.²²

To take a modified version of Currie’s famous example, assume a train wreck that injures 100 people, each of whom will sue Railroad individually. Plaintiff 1’s (“P-1”) case against Railroad goes to trial and the jury finds that Railroad was not negligent. Judgment is entered for Railroad. Now Plaintiff 2 (“P-2”) sues Railroad. Railroad cannot take advantage of the finding in Case 1 that Railroad was not negligent. P-2 was neither a party nor in privity with a party to Case 1, and therefore cannot be bound by the judgment in that case. Because of the day-in-court principle, each successive plaintiff may relitigate the issue of whether Railroad was negligent.

19. See *infra* note 21 for a discussion of *Taylor v. Sturgell*, 553 U.S. 880 (2008) (recognizing that non-parties can be bound).

20. See *infra* note 21.

21. Due process permits binding a non-party who was adequately represented by a party to Case 1. In *Taylor*, 553 U.S. at 893–95, the Court listed six scenarios in which non-parties to Case 1 may be bound by a judgment. The Court’s effort is not a delineation of the due process limits on non-party preclusion, but is a sub-constitutional definition of what constitutes privity. Stated another way, due process would permit a binding effect in situations beyond the six scenarios outlined in *Taylor*. Clermont, *supra* note 5, at 213 (“Our law on a judgment’s preclusive reach as to non-parties does not come close to raising due process concerns.”).

22. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (holding that offensive use of collateral estoppel is unfair to defendant where plaintiff could have easily joined in the earlier action or where the use would be too unfair to defendant).

Suppose, however, that P-1 won, based upon a finding that Railroad was negligent. Now P-2 through P-100 sue Railroad (individually or in a class action) and assert issue preclusion against Railroad. There is no day-in-court problem, because the judgment is being used against Railroad, which was a party in P-1's case. There is a mutuality problem, however, because persons who were not parties (or in privity with a party) in P-1's case are using preclusion. If courts reject mutuality, P-2 through P-100 may take advantage of P-1's victory by estopping Railroad from denying its liability.

It is worth noting that we deal here with preclusion of factual issues establishing the *merits* of the substantive claim. Railroad will be estopped to deny that it was negligent. With nonmutual offensive issue preclusion, Railroad could be held liable in all 100 cases because it lost the first case.²³ In essence, P-2 through P-100 would gain the advantages of a class action without any of the burdens or risks of bringing a class action.²⁴

Professor Currie noted an even more worrisome possibility.²⁵ Suppose Railroad won the first five cases, all because the fact-finder concluded that Railroad was not negligent. Now P-6 wins, based upon of a finding that Railroad was negligent. If we reject mutuality, what is to stop P-7 through P-100 from taking advantage of P-6's victory by asserting issue preclusion in their (individual or class) case(s)? Here, the prospect of nonmutual offensive preclusion would do more than establish Railroad's liability on the merits of 93 claims. It could threaten the integrity of the judicial system by giving determinative effect to what obviously was an aberrational result.

Without some limitation on the use of nonmutual preclusion, then, defendants would be in an untenable position. Losing a single case would subject them to liability to each plaintiff in the queue, while avoiding liability would require them to litigate and win 100 out of 100 cases. In an effort to moderate this harsh asymmetry, the Supreme Court was careful in *Parklane Hosiery Co. v. Shore*, to permit nonmutual offensive issue preclusion only when it would be "fair."²⁶

One factor that would indicate unfairness is inconsistent findings in different but factually similar cases.²⁷ So if the jury in Case 1 found that Railroad was not negligent and the jury in Case 2 found that Railroad was negligent, subsequent plaintiffs could not use the favorable finding. Stated

23. There may be litigation of individual issues relating to each passenger, such as damages and perhaps defenses such as assumption of the risk. But the core issues of liability on the merits would be established through the finding that Railroad was negligent.

24. It is better than a class action because the passengers were not required to demonstrate compliance with Rule 23(a) and Rule 23(b)(3) and escaped the burden and expense of giving notice and allowing opt-outs. They also did not risk being bound by an adverse decision on the merits.

25. See Currie, *supra* note 17, at 310 (noting the *Bernhard* doctrines does not apply because the railroad could not rely on 25 favorable judgments in defending the 26th).

26. *Parklane*, 439 U.S. at 331-33.

27. See *id.* at 332.

in systemic terms, with inconsistent results, the pro-plaintiff finding could be aberrational and therefore not worthy of preclusive effect.²⁸

Now, let us return to the class action. The court in Case 1 denies class certification (for lack of manageability or of commonality or of predominant common questions). If those findings are not preclusive, 99 other potential representatives may line up to try again to have the class certified. Suppose after five rejections, Rep-6's class is certified. At this point, D will face aggregate liability for the claims by P-6 through P-100 in P-6's class action. D is in the same position as Railroad—it will face aggregate liability if it loses a single motion and can escape that exposure only if it wins 100 times out of 100. It is even worse because, as Redish and Kiernan point out, repetitive litigation over certification drains the defendant's coffers. Indeed, class certification is increasingly expensive because it often requires the court to consider facts related to the underlying merits. This, in turn, frequently requires extensive discovery and retention of expert witnesses.²⁹

In the nonmutual preclusion scenario, D was protected to a degree by *Parklane*, because the inconsistent results would obviate the use of estoppel. Here, *Parklane* does not help D. We are dealing not with mutuality, but with the day-in-court principle. *Parklane* concerned P-2's ability to take advantage of a plaintiff-side victory on the merits in Case 1.³⁰ There, someone who was not a party (or in privity with a party) to Case 1 wanted to be treated as though he was a party to Case 1. In the class action fact pattern, Rep-2 wants to avoid a plaintiff-side loss on a procedural issue in Case 1. Rep-2 and his putative class want to be treated as though they were not parties (or in privity with a party) in Case 1.

In my view, it is unfair to allow putative class members to claim non-party status if the court in Case 1 found Rep-1 to be adequate under Rule 23(a)(4).³¹ In that instance, Rep-2 and his class members have had their day in court on issues relating to certification of the class and ought to be bound. In my opinion, *Smith* does rule out this argument.

28. *Parklane* puts a premium on winning Case 1. If the plaintiff does so, because there are no inconsistent findings on the record, P-2 through P-100 may be able to use preclusion against Railroad. The plaintiff side has an advantage in that it holds most of the cards regarding selecting the forum for where Case 1 will be litigated. It also can "plaintiff shop," meaning that plaintiffs' counsel may consult to ensure that the case with the best chance of winning goes to judgment first.

29. Redish & Kiernan, *supra* note 2, at 1661, 1668–69. The Supreme Court has increasingly front-loaded certification litigation by permitting consideration of the merits. See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433–35 (2013) (insufficient validation of plaintiffs' damages model); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52 (2011) (consideration of facts relating to merits).

30. *Parklane*, 439 U.S. at 332–33.

31. See FED. R. CIV. P. 23(a)(4).

III. PUTATIVE CLASS MEMBERS CAN HAVE THEIR DAY IN COURT (EVEN AFTER SMITH)

In *Smith*, Rep-1 brought a class action in state court against Bayer, alleging state law product liability claims.³² Bayer removed the case to federal court, invoking diversity of citizenship.³³ The federal court denied certification under Federal Rule 23(b)(3) because individual issues predominated.³⁴ The court then dismissed Rep-1's claims on the merits and entered final judgment for Bayer.³⁵ Concurrently, a state court class action was pending, brought by Rep-2 against multiple defendants, including Bayer.³⁶ The state class action alleged the same basic state law claims as the case in federal court. Bayer could not remove this case to federal court because a co-defendant defeated complete diversity.³⁷

The federal court in Rep-1's case entered an anti-suit injunction to stop Rep-2 from proceeding with class certification in the state court case.³⁸ It concluded that the injunction satisfied the "relitigation" exception of the Anti-Injunction Act.³⁹ That exception allows federal injunctions against state court proceedings that threaten to undo the claim- or issue-preclusive effect of a federal case.⁴⁰ The Supreme Court reversed. The relitigation exception did not apply because the federal court finding on lack of predominance of common questions under Rule 23(b)(3) was not entitled to preclusive effect.⁴¹

Preclusion was not justified, the Court held, because the federal and state courts did not address the same issue. Though the state had adopted the operative language of Federal Rule 23 as its class action provision, state courts interpreted the provision differently from federal courts. Indeed, they expressly rejected the federal-court approach to predominance.⁴² Thus, the issue litigated in federal court was different from the one to be litigated at state court, which made issue preclusion impossible.

32. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2373 (2011). I refer to the representative in the removed case as "Rep-1" not because his case was filed first (it was not) but because the court in that case ruled first on certification.

33. *Id.* at 2373.

34. *Id.* at 2374.

35. *Id.*

36. *Id.* at 2373-2374.

37. The case was filed before the effective date of the Class Action Fairness Act, under which it would have been removable. *See infra* note 44.

38. *Smith*, 131 S. Ct. at 2373-2375.

39. The U.S. Code permits a federal court to issue "an injunction to stay proceedings in a State court" only in exceptional circumstances. 28 U.S.C. § 2283 (2012). One of these (the relitigation exception) is "to protect or effectuate its judgments." *Id.*

40. *Smith*, 131 S. Ct. at 2375 (relitigation exception is "designed to implement" concepts of claim and issue preclusion).

41. *See id.* at 2376.

42. *Id.* at 2382.

The Court went on, however, to conclude that preclusion was also inappropriate because the class members in state court (represented by Rep-2) were not parties (and were not in privity with any party) in the federal case.⁴³ This part of *Smith*, however, is an alternative holding; arguably, it is dictum. Once the Court held that the two cases involved different issues of fact, there could be no issue preclusion *even if there were complete mutuality of parties in both cases*. The Court's discussion of privity and the day-in-court principle was irrelevant.

Moreover, *Smith* involved the extraordinary specter of a federal anti-suit injunction to halt litigation in state court. Today, for two reasons, few cases will present this complication. First, as *Smith* demonstrates, issue preclusion may be problematic when overlapping litigation is pending in state and federal courts; notwithstanding the widespread adoption of language from Federal Rule 23, state court interpretations may differ from federal. Second, under the Class Action Fairness Act ("CAFA"), there will rarely be overlapping class suits in federal and state courts.⁴⁴ The issue-preclusive effect I suggest, then, should arise almost exclusively in overlapping federal litigation, which presents no Anti-Injunction Act concerns.

Because *Smith* involved an anti-suit injunction, it also presented the procedural anomaly of having the court in Case 1 purport to dictate the preclusive effect of its own judgment. The Court decried this effort and, in light of the facts, bent over backward to avoid issue preclusion:

Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court. . . . So issuing an injunction under the relitigation exception is resorting to heavy artillery. For that reason, every benefit of the doubt goes toward the state court . . . an injunction can issue only if preclusion is clear beyond peradventure.⁴⁵

Moreover, the Court expressly declined to base its decision on due process grounds.⁴⁶ Its conclusion rested upon sub-constitutional grounds that in no way plumb the constitutional limit of non-party preclusion.

On the facts, the refusal to push the limits of due process was appropriate. In *Smith*, Bayer argued that class members in Case 1 should be

43. *Id.* at 2379–80.

44. CAFA makes it easy to remove class actions from state to federal court. The only requirements are that one class member be of diverse citizenship from one defendant and the aggregate class claims exceed \$5,000,000. 28 U.S.C. §§ 1332(d) (2), 1453 (2012). Moreover, only one defendant need seek removal. *Id.* § 1453. CAFA contains complicated provisions attempting to steer back to state court cases in which the principal defendants and a sizeable percentage of class members are citizens of the forum. *See id.* § 1332(d). It seems unlikely that a class will qualify to proceed in both federal and state court. And, of course, if the classes in the two cases are not the same, issue preclusion will not be appropriate because the questions of commonality and predominance, for example, will not be the same in both.

45. *Smith*, 131 S. Ct. at 2375–76 (internal citations omitted).

46. *Id.* at 2376 n.7.

bound because their interests were “aligned with” those of Rep-1.⁴⁷ The argument is a non-starter. It is exactly the sort of “virtual representation” rejected in *Taylor v. Sturgell*.⁴⁸

I speak of a distinguishable fact pattern, one in which the court in Case 1 expressly found Rep-1 to be adequate under Rule 23(a)(4). Because there was no such finding in *Smith*, the Court did not have to deal with a procedural reality of class litigation: the representative who files a putative class action plays two roles and potentially litigates two sets of facts. First, he seeks class certification, for which he litigates the requirements of Rules 23(a) and (b). Second, if successful on certification, he litigates on behalf of class members on the merits of the substantive claims. If class certification is rejected, class members cannot be bound concerning their substantive claims; the representative has no right to litigate the merits on their behalf. On the merits, then, if certification is denied, class members are strangers to Case 1.

But they might not be strangers to Case 1 regarding the procedural propriety of class certification. Rep-1 sought to vindicate, on behalf of the putative class members, the procedural right to litigate as a class. Certification is a step removed from decisions on the merits. It involves a procedural issue on which class members have a right to their day in court. That day in court can be afforded by providing them with adequate representation on their procedural interest in suing en masse. The class representative was their fiduciary and provided actual (not virtual) representation on these issues. To have this binding effect, the parties must have litigated and the court must have found expressly that the representative was adequate for the purpose.⁴⁹

To me, all that is required on this score is the court’s determination, in the course of the certification litigation, that the representative is adequate under Rule 23(a)(4). If he is, he should be adequate to bind class members. After all, had the decision on issues of manageability, commonality and predominance gone the other way, the very same representative, with no other qualification, would have had the power to bind class members on the merits of their substantive claims. If I am wrong, and a finding on Rule 23(a)(4) does not suffice, it seems the matter can be handled by amending Rule 23 to permit litigation and findings on the specific issue of whether the representative is adequate to litigate matters of certification on behalf of class members.⁵⁰ Essentially, once the representative is deemed adequate, he

47. *Id.* at 2374, 2380.

48. *See supra* note 21.

49. Some of the lower court opinions before *Smith* appear to employ issue preclusion in the absence of an express finding that the representative satisfied Rule 23(a)(4). Adequacy is the sine qua non of a binding effect, and simply cannot be presumed. Thus, my proposal is limited to cases in which the court in Case 1 expressly finds the representative adequate. Such a finding might not rule out collateral attack of the adequacy finding in another proceeding.

50. Some may argue that class members should receive notice and even opt-out rights

has the authority to litigate certification on behalf of the putative class. The decision that he is adequate for that purpose is separate from certification itself and is entitled to its own preclusive effect.

Preclusion as suggested here avoids the “death by a thousand cuts,” the burden of duplicative litigation, and the risk of inconsistent outcomes. Though such considerations cannot trump the day-in-court principle, they ought to be relevant in drawing the line at which that principle applies. Just as nonmutual offensive issue preclusion can be used unfairly (as recognized in *Parklane*),⁵¹ so the day-in-court principle can be invoked unfairly. The putative class members in Case 1 are not complete strangers to Case 1. Their interests were not simply “aligned” with Rep-1. Instead, Rep-1 sought to litigate on their behalf and the court determined that he was adequate to the task. The class members have had their day in court on matters of certification. Diffidence is especially inappropriate because preclusion as suggested here does not deprive class members of their substantive claims. Preclusion, if applicable, relates to a procedural issue, and would bar a second bite at the apple of class certification. Rule 23 is a procedural vehicle. It creates no substantive rights.

On the other hand, as Redish and Kiernan note, as a practical matter, the rejection of class status often means that no claims will be asserted.⁵² Negative-value claims might be pursued only if they can be aggregated. Thus, preclusion that bars class litigation may thwart any effort to vindicate claims. I am sympathetic to this argument, but it is a tough one to make after *AT&T Mobility L.L.C. v. Concepcion*⁵³ and *American Express Co. v. Italian Colors Restaurant*.⁵⁴ In those cases, the Court upheld contractual clauses that required arbitration of disputes but forbade aggregate assertion of claims.⁵⁵ Both cases involved negative-value claims (one a consumer-law claim of \$30 and the other an antitrust claim in which the cost of retaining necessary economic experts dwarfed the value of the cause of action).⁵⁶ In both, the plaintiffs argued that their inability to proceed en masse thwarted their ability to vindicate the relevant law.⁵⁷ The Court rejected the argument in

regarding the adequacy finding. I don't think notice and opt-out would be required to litigate this procedural matter. The Court has said “that individuals whose property interests are at stake are entitled to ‘notice and an opportunity to be heard.’” *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993)). The putative class members do not have a property right at stake in the class certification hearing.

51. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

52. *See* Redish & Kiernan, *supra* note 2, at 1680–81.

53. *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011).

54. *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

55. *Id.* at 2309–12; *AT&T*, 131 S. Ct. at 1750–53.

56. *American Express*, 133 S. Ct. at 2308; *AT&T*, 131 S. Ct. at 1744.

57. *American Express*, 133 S. Ct. at 2308–09; *AT&T*, 131 S. Ct. at 1747–48.

both cases, and emphasized that the lack of a procedural vehicle did not affect the substantive claims.⁵⁸

In our context, the argument is further diluted because the class has had the opportunity to seek certification. Preclusion is possible only because certifiability has been litigated and determined on behalf of the class by an adequate representative. To be sure, applying issue preclusion here puts a premium on the outcome of the first certification motion—just as nonmutual preclusion puts a premium on the merits determination in the first case. Bluntly, if the plaintiff side wants to avoid being precluded on this procedural issue, it should win the first certification motion—just as defendants wanting to avoid substantive liability in 100 cases should win the first case that goes to judgment.

For all these reasons, putative class members can be accorded their day in court on matters of class certification. Unfortunately, that does not end the matter. Other, more prosaic, requirements for preclusion create problems—not only for preclusion against class members, but for the Redish/Kiernan proposal as well.

IV. DOCTRINAL ROADBLOCKS TO THE USE OF PRECLUSION: THE ROLE FOR A RULE

Though we may have navigated past *Smith*, efforts to use issue preclusion face at least three other doctrinal hurdles. First, preclusion flows from final judgments on the merits, which seems not to encompass a ruling on the interlocutory procedural issue of class certification.⁵⁹ Notwithstanding, there is authority that interlocutory orders carry preclusive effect if they are sufficiently final. The Restatement (Second) of Judgments accords issue-preclusive effect to interlocutory findings that are “sufficiently firm to be accorded conclusive effect.”⁶⁰ If the argument is ever to apply, it should be with regard to *denials* of class certification, which a court is unlikely to reconsider (at least not without new facts, in which case preclusion could not apply anyway). Grants of certification, in contrast, are always subject to revision. The case for treating certification denials as final judgments is strengthened by the availability of discretionary appellate

58. *American Express*, 133 S. Ct. at 2309 (“[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”). The unavailability of class relief “no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938.” *Id.* at 2311 (citations omitted).

59. *Smith* was atypical because the district court dismissed Rep-1’s individual claim in the same order in which it denied class certification. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2374 (2011). Thus, the certification ruling and the final judgment were entered at the same time. *Id.* In addition to the final judgment issue, some courts are reluctant to apply issue preclusion regarding discretionary orders. See Gidi, *supra* note 9, at 1052.

60. RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982). See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003), abrogated by *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). For a thorough discussion, see Gidi, *supra* note 9, at 1033–39.

review under Rule 23(f). That provision was promulgated in recognition that the class certification ruling is the watershed event in the litigation—a grant leads almost always to settlement while a denial leaves only the representative’s (frequently small) claim in play.

Second, issue preclusion is proper only for issues that are “essential” to the judgment. The ruling on class certification has nothing to do with the ultimate outcome on the merits. On the other hand, the purpose of the essentiality requirement is to ensure that the parties and the fact-finder had an incentive to consider the issue seriously. As just noted, certification is the key event in most class cases, so there is no question that the parties have every incentive to put forward their best efforts. And, again, Rule 23(f) provides the possibility of appellate review.⁶¹ So, as some have concluded, findings on certification might be shoehorned within the requirement of essentiality.⁶²

Third, preclusion is proper only if Case 1 and Case 2 present litigation of the same issue(s). This is the Achilles heel. How difficult can it be for a good lawyer to define the class somewhat differently or to modify claims so the two cases present different issues of manageability, commonality, predominance, and the like? What is needed is a broader *scope of preclusion*, one that estops not simply certification of the same class, but of one that is substantially similar to the class in Case 1. What is needed is something more akin to claim preclusion than to issue preclusion, to bar not just what was attempted but what could have been attempted in the certification motion in Case 1.

There is support for a flexible approach to what constitutes “the issue” that was determined in Case 1. Specifically, courts are willing to impose a broader preclusive effect on plaintiffs than on defendants. The concept is embraced by the Restatement (Second) of Judgments.⁶³ Suppose P sues D for injuries from a car crash, alleging that D was negligent because he failed to keep a proper lookout. The jury finds D was not negligent. In subsequent litigation between the two, P will not be allowed to argue that D was negligent because D was driving too fast for the road conditions. Courts treat “the issue” litigated and decided as the broad question of whether D was negligent, and not the specific activity that might have constituted

61. One interesting complication is appellate review of the finding of adequacy when the court denies certification. The representative has an incentive to appeal under Rule 23(f) to seek reversal of the denial of certification. If the court of appeals does not reverse on that issue, however, the plaintiff side would have an interest in gaining reversal of the finding that the representative was adequate. This might lead to intervention by a class member to appeal the adequacy finding.

62. “As to the precise meaning of essential, one must look to the policies of res judicata—and especially to whether the issue received active litigation and careful determination and to whether the loser on the issue had the opportunity to appeal—rather than to the literalism of essentiality.” ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 128 (2001). See also Gidi, *supra* note 9, at 1052–53.

63. RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 60, § 27 cmt. c, illus. 4.

negligence. They do so because plaintiffs can be expected to put all their cards on the table in Case 1. By like token, in the context of class certification, courts might find that Case 2 presents the same issues of manageability, commonality, and superiority as Case 1, notwithstanding differences in class definition or claims asserted.

Defendants can be protected from the “death by a thousand cuts” only with a consistently liberal judicial approach regarding what constitutes a final judgment, essentiality, and scope of the issues determined in Case 1. There is no reason to expect such a consensus. To the extent the Redish/Kiernan proposal is based upon common law preclusion, it is imperiled by the same doctrinal problems. Redish and Kiernan are agnostic about how their proposal is adopted. It seems unthinkable, though, that courts would readily apply preclusion—a doctrine aimed at litigants—to lawyers. Their proposal, which may be called “in the nature of preclusion,” would best be adopted by rule. Congress is unlikely to tackle the issue efficaciously, so the proposal, if it is to be made, should come from the Advisory Committee.

A Civil Rule could avoid the doctrinal limitations encountered in common law issue preclusion. Most importantly, a Rule “in the nature of preclusion” could prescribe a broad scope of preclusion. Issue preclusion requires that the same issues be litigated in Case 1 and Case 2 because the litigants to be bound have had their day in court only on those issues. At some point, binding parties beyond what they litigated violates due process. But we should not be chary about invoking a broader scope of preclusion against the *lawyer*. It is the litigant, not the lawyer, who is guaranteed a day in court. It is the litigant (if anyone), and not the lawyer, who would have any “right” to seek class vindication of claims. Though the lawyer was not a party to Case 1, in the Redish/Kiernan proposal, that lawyer was the driving force in bringing that case, made all the strategic decisions without meaningful oversight by litigants, and held the largest financial stake in the case. The lawyer had the opportunity to craft the class definition and claims, and could be precluded not only from trying a reprise, but regarding classes and claims that could have been asserted in Case 1.

The job should go to the Advisory Committee, and not simply by process of elimination. The Committee has already done something similar. With Rule 23(f), which permits discretionary appellate review of orders granting or denying class certification, the Committee responded to the litigation reality that a ruling on certification *de facto* determines the outcome of the case. Because settled doctrine on interlocutory appeal had not forged consensus, the Committee acted. The present issue is similar. As Professor Redish has long shown, litigation reality is that the class representative’s lawyer is the *de facto* real party in interest. Courts have failed to find a consistent way to avoid serial litigation of class certification. To be sure, there are practical problems (such as what qualifies as the same lawyer in each case), but a Rule could avoid the fragility of preclusion

doctrine—such as the requirements of essentiality and final judgment— and could prescribe an appropriately broad scope of estoppel.⁶⁴

V. CONCLUSION

Professor Rick Marcus has said that Professor Redish “shake[s] up the academic and, sometimes, the judicial establishment.”⁶⁵ Certainly, he has done so with his seminal work on class actions. In their article, Redish and Kiernan challenge orthodoxy by suggesting that preclusion concerning class certification should be aimed at lawyers, not litigants. One’s immediate reaction is “that cannot be right, can it?” But after wrestling with the problem, however, one is left with the impression that it very well may be right.

64. Should the Redish/Kiernan proposal of binding lawyers simply prove too radical for political acceptance, another possibility, as discussed above, is a separate finding on adequacy that would empower the representative to speak for putative class members on the certification motion.

65. Richard Marcus, *Bomb Throwing, Democratic Theory, and Basic Values—A New Path to Procedural Harmonization?*, 107 NW. U. L. REV. 475, 476 (2013).