The Puzzle of Class Actions with Uninjured Members

Joshua P. Davis, Eric L. Cramer,** and Caitlin V. May****

Abstract

A puzzle has developed regarding class action doctrine. A number of recent judicial decisions have reaffirmed that classes may be certified under Federal Rule of Civil Procedure 23(b)(3) even if they contain members who have not suffered cognizable injury. This Article assumes these decisions interpret Rule 23 properly and explores the implications for three doctrines: standing, due process, and the Rules Enabling Act. In doing so, this Article seeks both to clarify the relevant doctrines and to apply them in the class setting.

Although this analysis requires some care, we can briefly summarize the Article's main conclusions. First, as to standing, some courts have suggested that only a named plaintiff needs to have standing to pursue class claims, while others have indicated that all members of a potential class must have standing. The Article attempts to reconcile these apparently conflicting positions, explaining that the precedents make sense if the requirement is that only a named plaintiff must make an individualized showing in support of her claims, while absent class members need merely be in the group that could potentially have viable claims.

Second, as to due process rights, the Article argues that critics of class action doctrine have adopted an overly rigid approach, one incompatible with the flexible cost-benefit analysis integral to the due process standard. Appropriate balancing, this Article contends, suggests that neither the certification of classes containing uninjured members nor the awarding of classwide recoveries to those classes after trial necessarily deprives any litigants of the process they are due.

Finally, the Article contends that, under the Supreme Court's decision in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, including uninjured members in a certified class can be permissible under the Rules Enabling Act as long as it changes only the means by which claims are litigated and not the parties' substantive rights, even if the class process has a significant effect on those substantive rights.*

* Associate Dean for Faculty Scholarship and Professor, University of San Francisco School of Law.

** Managing Shareholder, Berger & Montague, P.C.

*** J.D., 2013, University of San Francisco School of Law.

TABLE OF CONTENTS

INTRODUCTION

Numerous courts have certified plaintiff classes even though the plaintiffs have not been able to use common evidence to show harm to all class members.[1] As a result, the classes the courts certify may include uninjured class members.[2] Indeed, as a matter of practice, in the few antitrust class actions that have gone to trial, courts have asked juries to award damages on an aggregate basis and have not directed

---

1 *See, e.g.*, Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012) (vacating denial of class certification and holding that certification is proper even where individual questions as to injury are present, so long as they do not predominate over common questions affecting the class as a whole); Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010) (affirming class certification in a consumer fraud case despite the possibility that the class could include people who have not been injured by the defendant's conduct); Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672, 677 (7th Cir. 2009) (affirming class certification despite the possibility that a class of treasury note purchasers contained members who were uninjured because they did not actually lose money on their purchase); Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 107–08 (2d Cir. 2007) (finding that common issues may predominate in a case as a whole, even if they do not predominate regarding injury-in-fact, and vacating denial of class certification); Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 310 (D.D.C. 2007) (finding class certification appropriate even though injury could not be shown as to certain class members).

2 *See, e.g.*, *PIMCO*, 571 F.3d at 677.

them to inquire whether each class member suffered the relevant form of injury.[3]

Two of the authors of this Article have in the past defended the certification of classes containing uninjured members.[4] Indeed, the authors have criticized class certification opinions in the antitrust context for implying that class certification is appropriate only where plaintiffs proffer classwide evidence capable of showing harm to all or nearly all members of the class.[5] The authors have argued, inter alia, that under Federal Rule of Civil Procedure 23(b)(3), common issues need merely predominate; not all issues need to be common.[6] Moreover, they have noted that an "all or nearly all" requirement would be inconsistent with plaintiffs' burden at trial, where courts have not required a showing of injury to all class members to obtain a classwide judgment.[7] The authors have further observed that in antitrust cases, where plaintiffs are often able to compute aggregate classwide damages accurately even where classes contain uninjured members, no party is prejudiced by the presence of such members because the defendant's exposure to damages is unaffected.[8]

Certifying classes containing uninjured members also makes sound policy sense. Judge Richard Posner, for example, recently suggested that class certification centers around efficiency.[9] Based on this

---

3 *See* Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. 355, 394–95 & n.124 (2009) [hereinafter Davis & Cramer, *Of Vulnerable Monopolists*] (citing and quoting jury instructions in antitrust class actions).

4 *See, e.g.*, Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 989–96 (2010) [hereinafter Davis & Cramer, *Antitrust*]; Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 391–98.

5 *See, e.g.*, Davis & Cramer, *Antitrust*, *supra* note 4, at 989–1006; Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 391–95.

6 *See* Davis & Cramer, *Antitrust*, *supra* note 4, at 1006–08; Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 389; *see also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1196 (2013) ("Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof. What the rule does require is that common questions *predominate* over any questions affecting only individual [class] members." (alterations in original) (internal quotation marks and citation omitted)).

7 *See* Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 392–93.

8 *See* Davis & Cramer, *Antitrust*, *supra* note 4, at 990–91; Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 393–98; *see also* Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890 (2014) [hereinafter Davis, *Classwide Recoveries*].

9 *See* Butler v. Sears, Roebuck & Co., 702 F.3d 359, 362 (7th Cir. 2012) ("Predominance is a question of efficiency. Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials?" (citations omitted)), *cert. granted, vacated, and remanded*, 133 S. Ct. 2768 (2013) (mem.), *reinstated*, 727 F.3d 796 (7th Cir. 2013).

reasoning, as long as litigating on a class basis provides the most efficient means of resolving a large number of disputes, courts should certify a class under Rule 23.[10] This approach, however, could give rise to some doctrinal concerns.

Of these doctrinal concerns, three relevant issues warrant attention. To put the points somewhat tendentiously, a critic might argue that certifying a class that contains uninjured class members violates standing doctrine, the due process rights of class members and defendants, and the Rules Enabling Act.[11] Each of these points should be taken seriously. This Article argues, however, that none of them ultimately proves persuasive.[12] As a result, courts are free to continue to certify classes—even to award damages to classes—that contain members who suffered no legally cognizable harm.

In addressing these issues, a distinction may be of importance. Sometimes class litigation leaves intact all of the individual issues that would be addressed in individual litigation. A court may adjudicate common issues on a classwide basis and then provide a mechanism for resolving issues that pertain to only some individual class members—through review of the issues by a special master, for example, or a series of individual hearings before the judge or even a jury.[13] In contrast, on other occasions, a court may award a single recovery to a class as a whole—what we will call a "classwide recovery"—and then allocate that recovery in some practical way, such as on a pro rata basis.[14] In the discussion below, we will try to clarify when this distinction may alter our analysis.

I. STANDING

Standing doctrine, as it applies to class actions, at first appears to involve an inconsistency. To have standing, a plaintiff must allege a relevant form of injury as a result of the defendant's conduct.[15] Application of this standard in the class setting has led to some seemingly

---

10 *See id.*

11 Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012).

12 *See infra* Part I (discussing standing doctrine); *infra* Part II (discussing due process); *infra* Part III (discussing the Rules Enabling Act).

13 *See, e.g.*, *Butler*, 702 F.3d at 362 (suggesting that individual hearings to determine damages for each class member would be appropriate).

14 *See, e.g.*, Stewart v. Gen. Motors Corp., 542 F.2d 445, 452–54 (7th Cir. 1976) (discussing how to break down an award of backpay to a class). A court also may preside over a settlement that allocates recoveries in a similar manner. *See id.* (detailing pro rata approach).

15 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 570 (6th Cir. 2005) ("The Article III standing requirements apply equally to class actions.").

contradictory pronouncements. On one hand, courts have asserted that the named plaintiffs need to allege only their own standing, not the standing of absent class members.[16] On the other hand, courts have indicated that a class cannot be certified if it contains members who lack standing.[17] Can these assertions be reconciled? If so, how?

The answer lies in the different types of showings that need to be made regarding the named plaintiffs and the absent class members. As to the named plaintiffs, courts require individualized allegations of standing.[18] The standard that applies to absent class members, in contrast, is more forgiving. The absent members of the class need merely be in the category of parties who would have suffered the relevant form of injury if those parties are able to prove their claims.[19] In other words, it cannot be obvious from the outset that some members of the class *could not possibly* have suffered the relevant form of harm as a result of the defendant's conduct.[20]

An example may prove helpful in framing this issue. Consider a claim for employment discrimination. The named plaintiff is an African-American part-time employee. She asserts that her employer failed to promote her because she is African American. More generally, she seeks to represent a class consisting of all African-American employees, alleging that the employer discriminated against all of its

---

16 *See, e.g.*, DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1197 (10th Cir. 2010) ("[O]nly named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing . . . ."); Doe v. Blum, 729 F.2d 186, 190 n.4 (2d Cir. 1984) ("[N]amed plaintiffs 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class . . . .'" (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975))); *see also* 1 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 2:3 (5th ed. 2011) ("These passive members need not make any individual showing of standing because the standing issue focuses on whether the named plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.").

17 Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010); Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006).

18 *See* Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672, 676–78 (7th Cir. 2009) (distinguishing between named and absent class members).

19 *See Denney*, 443 F.3d at 264–66. For a more complete explanation see *infra* notes 25–68 and accompanying text.

20 *See Denney*, 443 F.3d at 264–66. The Fifth Circuit's reasoning in *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), supports this interpretation, as the court suggested that *Denney* "does not contemplate scrutinizing or weighing any evidence of absent class members' standing or lack of standing during the Rule 23 stage." *Id.* at 801. Rather than reconciling the two approaches discussed in the text, the Fifth Circuit suggested the possibility of rejecting one in favor of the other. *Id.* The court did not resolve the issue, however, because it held that the plaintiffs should prevail on the issue of Article III standing under both approaches. *Id.* at 800–02.

African-American part-time employees on the basis of race. Assume the defendant challenges the named plaintiff's claims and the class allegations, invoking the standing doctrine.

The named plaintiff must make individualized allegations addressing all of the elements of standing, including that the employer's discriminatory conduct deprived her of a promotion.[21] If she makes this showing, she may seek certification of a class including all of the employer's African-American part-time employees who are eligible for a promotion.[22] The named plaintiff need not make individualized allegations for every absent class member.[23] It is in this sense that the standing requirement applies only to the named plaintiff, not to the absent class members.

On the other hand, the named plaintiffs cannot include in the class *full-time* employees. The named plaintiff has alleged discrimination only against part-time employees. Therefore, even if she were to prove her case, the full-time employees would not have suffered a relevant injury. It is in this sense that a class cannot include members who lack standing.[24]

A review of the case law confirms this interpretation. First, note that some cases suggest the need to establish the standing of only the named plaintiffs, not the absent class members. In *Kohen v. Pacific Investment Management Co.* ("*PIMCO*"),[25] the Seventh Circuit held that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."[26] *PIMCO* involved allegations that the defendant violated the Commodity Exchange Act[27] by cornering the market for ten-year treasury notes.[28] The class certified by the district court consisted of all persons who purchased a short position in ten-year treasury notes during a specified date range.[29] The defendant challenged the definition of the class on the ground that it included absent class members who lacked standing to sue, because some of those absent class members did not

---

21 *See PIMCO*, 571 F.3d at 676–78.

22 *See Denney*, 443 F.3d at 264–66.

23 *See id.*

24 *See id.*

25 Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672 (7th Cir. 2009).

26 *Id.* at 676; *see also* DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1197 (10th Cir. 2010) (holding that only named plaintiffs in a class action by foster children against the Department of Human Services must demonstrate standing by establishing they have or will suffer an injury).

27 Commodity Exchange Act, 7 U.S.C. §§ 1–27f (2012).

28 *PIMCO*, 571 F.3d at 674.

29 *Id.* at 676.

actually lose money.[30] For example, some members of the class may have hedged their bets by purchasing both short and long positions and may have ultimately made more money on the long positions than they lost on the short positions.[31]

Judge Posner, writing for the Seventh Circuit, rejected the argument that district courts must determine which class members were injured for certification.[32] A suit can proceed, he reasoned, even if some class representatives later prove to lack injury, so long as at least one named plaintiff has standing.[33] He noted that the inclusion of class members who lack injury "is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown."[34]

The Seventh Circuit thus indicated that the standing requirement applies only to named plaintiffs, at least in any strong form.[35] All members of a proposed class need not establish that they suffered harm to support class certification. *PIMCO*, however, did not answer the more difficult question: what if a proposed class includes members who could not possibly have suffered the relevant form of harm? Judge Posner did not address how to proceed, for example, if plaintiffs proposed a class that comprised members who did not buy ten-year treasury notes at all.[36]

The analysis of some courts suggests that a class should include members only if they could have meritorious claims based on the class allegations. Otherwise, absent members of a proposed class may lack standing in a way that poses a problem for class certification. *Denney v. Deutsche Bank AG*[37] is illustrative in this regard.

---

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 676–77.

34 *Id.* at 677.

35 *Id*. at 677–78. The Fifth Circuit in *In re Deepwater Horizon* recently characterized this approach as "the *Kohen* test," in reference to the *PIMCO* case. *In re* Deepwater Horizon, 739 F.3d 790, 801 (5th Cir. 2014).

36 At one point, Judge Posner does reference this issue, stating: "A related point is that a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant . . . ." *PIMCO*, 571 F.3d at 677. Judge Posner, however, does not address what qualifies as "a great many" or how to analyze the issue generally. For the most part, he discusses the issue as it relates to an overbroad class definition. *See id.* at 678.

37 Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006).

Denney involved allegations under the Racketeer Influenced and Corrupt Organizations Act ("RICO")[38] by taxpayers who purchased foreign currency options based on tax strategies purportedly devised by a bank and law firm and then marketed by an accounting firm.[39] The tax strategies allegedly violated the law.[40] The district court certified a class and approved a classwide settlement against the law firm defendants.[41] The primary challenge on appeal was that the class included members who had not suffered injury-in-fact at the time of certification and who therefore lacked standing.[42]

The class in *Denney* was defined as all persons who, during the relevant time period, "consulted with, relied upon, or received oral or written opinions or advice from" the defendants regarding tax strategy that was allegedly negligent.[43] The complaint further alleged that plaintiffs paid excessive fees for this negligent or fraudulent tax advice, had and would continue to incur costs, and forewent legitimate tax savings opportunities.[44] The argument for lack of standing was that the class included two groups whose members had not suffered and were not likely to suffer any injury.[45] Members of the first group employed the tax strategies during the relevant period, but were not audited after filing their tax returns.[46] Members of the second group began but did not complete a tax strategy transaction and did not receive a tax opinion.[47]

The Second Circuit rejected the challenge to class certification, holding that the absent class members met the requirements for standing.[48] The court emphasized that each class member is *not* required to submit individualized evidence of standing.[49] However, "no class may be certified that contains members lacking Article III standing."[50] As the Second Circuit put the matter, the class must be defined "in such a

---

38 Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961–1968 (2012).

39 *Denney*, 443 F.3d at 260.

40 *Id.*

41 *Id.* at 262.

42 *Id.* at 259, 262.

43 *Id.* at 264 n.4.

44 *Id.* at 265.

45 *Id.* at 264.

46 *Id.*

47 *Id.*

48 *See id.* at 265.

49 *Id.* at 263.

50 *Id.* at 264.

way that anyone within it *would* have standing."[51] In other words, the class must include only individuals who could *potentially* have viable claims.

The Second Circuit's conclusion that the unnamed plaintiffs had standing was based on the fact that members who had not been audited still ran the *risk* of being assessed penalties and had taken expensive and time-consuming steps to fix their tax filings.[52] Further, the members who did not complete their tax transactions still took steps in reliance on the advice, which the complaint alleged included the use of time and money.[53] Based on the assertions in the complaint and the class definition, each class member *could* have suffered an injury.[54] Essentially, *Denney* makes clear that unnamed plaintiffs have standing unless the class is defined in a way to include members who could not possibly recover.

In contrast to this understanding of *Denney*, some cases seem to imply that all absent class members must prove standing.[55] Upon analysis, however, these apparently divergent approaches can be reconciled. Take, for example, *Avritt v. Reliastar Life Insurance Co.*,[56] in which the Eighth Circuit seemingly indicated that absent class members lack standing if they are uninjured.[57] *Avritt* involved allegations by purchasers against a seller of fixed deferred retirement annuities.[58] The plaintiffs alleged that the seller engaged in unfair interest crediting practices by systematically crediting higher interest to the most recent deposits and lower interest to older deposits.[59] Accordingly, this led plaintiffs to purchase the annuities on the false assumption that the initial higher rate would continue over time.[60] The district court denied class certification.[61]

On appeal, the court discussed standing in assessing whether plaintiffs met the predominance requirement of Rule 23(b)(3) for their California Unfair Competition Law ("UCL")[62] claim.[63] The

---

51 *Id.* (emphasis added).

52 *Id.* at 265.

53 *Id.*

54 *Id. In re Deepwater Horizon* labeled this approach as "the *Denney* test." *In re* Deepwater Horizon, 739 F.3d 790, 801 (5th Cir. 2014).

55 *See, e.g.*, Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010).

56 Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023 (8th Cir. 2010).

57 *Id.* at 1034.

58 *Id.* at 1026.

59 *Id.*

60 *Id.*

61 *Id.* at 1028–29.

62 CAL. BUS. & PROF. CODE §§ 17200–17209 (West 2008).

court analyzed the statutory standing requirements of the UCL claim based on California Supreme Court case law and noted that those requirements were "inconsistent with the doctrine of standing as applied by federal courts."[64] Although the UCL allows uninjured parties to join a class so long as there is a lone representative with statutory standing, the Eighth Circuit noted that under federal constitutional standing requirements, "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves."[65] Those who could not have been injured would not be able to bring a suit themselves, but those who could have suffered an injury could pursue their case.[66]

The Eighth Circuit, similar to the Second Circuit in *Denney*, expressed concerns about classes including unnamed plaintiffs who *could not* have possibly suffered the relevant form of injury, not absent plaintiffs who *might not* have suffered that *particular* injury.[67] *Avritt* thus confirms the interpretation that absent class members lack standing only if they could not have been injured. Other cases expressing similar concerns come to the same conclusion.[68]

These cases confirm the relevant conclusion for present purposes. Standing doctrine does not prevent a court from certifying a class that contains members who will ultimately turn out not to have meritorious claims. As long as the court cannot determine in advance that the class members *could not* be entitled to recover, a class may include them. To put the same point more simply—without the double negative—a court may certify a class provided that each absent member *may* have suffered the relevant form of harm.

---

63 *Avritt*, 615 F.3d at 1029, 1033.

64 *Avritt*, 615 F.3d at 1033–34.

65 *Id.* at 1034.

66 *Id.*

67 *See id.* at 1033–34.

68 *See, e.g.*, *In re* Light Cigarettes Mktg. Sales Practices Litig., 271 F.R.D. 402, 419–20 (D. Me. 2010) (acknowledging that individualized showings of standing are not necessary for absent class members, but finding, in a suit against cigarette manufacturers for falsely advertising the health risks of light cigarettes, that certain unnamed class members lacked standing because some knew the risks of light cigarettes and therefore could not have been injured); *cf.* Mazza v. Am. Honda Motor Co., 666 F.3d 581, 594–95 (9th Cir. 2012) (holding that members of a class in a consumer protection case have Article III standing when the class is defined in a way to include only those who were exposed to the misleading advertisements); Webb v. Carter's, Inc., 272 F.R.D. 489, 498–500 (C.D. Cal. 2011) (denying certification of a class of purchasers who bought tagless children's clothing that caused skin irritation in some consumers because plaintiffs had not alleged that all of the class members actually developed the irritation, and the class members who were not injured could not possibly have been injured by the product at issue).

II. Due Process Doctrine

In addition to standing issues, certifying a class containing uninjured members has the potential to raise procedural due process concerns from the perspectives of both absent class members and defendants. As a practical matter, class actions must limit the autonomy rights of individual litigants.[69] Not every member of a class can control every decision regarding litigation strategy, including whether to settle and, if so, on what terms. Uninjured class members could, in theory, have different concerns or desires than injured class members. Certifying classes with uninjured members poses a risk, then, to the ideal of affording each litigant her day in court.[70] For this reason, Martin Redish has gone so far as to argue that various common procedures in the class context can violate class members' due process rights.[71]

Allowing class actions to proceed with uninjured members could also clash with the individual due process rights of class members in another way. Courts at times award damages on a class basis, rather than an individual basis—a process that can affect the amount of money that each class member receives.[72] A court granting a classwide recovery may choose not to attempt to tailor the remedy to the individual circumstances of each class member, possibly opting instead in appropriate circumstances to allocate the recovery in some formulaic way, perhaps on a pro rata basis.[73] An argument could be made that such classwide recoveries involving classes with *uninjured* members can deprive injured class members of full compensation, violating their due process rights.

Finally, defendants may also argue that the inclusion of uninjured class members in an action against them would violate *their* due process rights. Presumably, the argument would be that including uninjured plaintiffs in a class could require a defendant to pay damages to parties who lack valid claims.

---

69 *See* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 266 (1992).

70 *See generally id.* (outlining the "day in court" ideal and litigative autonomy in class action suits).

71 Martin H. Redish, Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit 135–37 (2009).

72 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 921–22.

73 *See, e.g.*, Stewart v. Gen. Motors Corp., 542 F.2d 445, 452–54 (7th Cir. 1976) (discussing the pro rata approach in relation to awarding a class backpay).

A. Due Process and Class Member Rights

The concern about class member rights could give rise to the claim that including uninjured members in a class violates some class members' constitutional right to due process. This argument could derive either from the compromise of class member autonomy that generally occurs in class litigation or from the potential loss in compensation to some class members when a court awards a classwide recovery.

The Supreme Court has taken a pragmatic approach to these sorts of issues. Consider, for example, notice in class actions.[74] Due process potentially could have required that every class member receive actual notice to be bound by class litigation.[75] That, however, is not what the Court has concluded. It has ruled instead that class members are entitled only to the best notice practicable.[76] This standard generally can be satisfied if class counsel provides notice by U.S. mail to those class members whose identities and addresses are known and makes reasonable efforts to inform other class members that their rights may be affected by pending litigation.[77]

The failure to require actual notice has implications for both autonomy and compensation. A class member cannot exercise choice in class litigation—she cannot decide whether to opt out of litigation or object to any proposed settlement—if she does not know it is occurring.[78] Further, a class member is unlikely to receive compensation from litigation if she does not know she is eligible for a recovery and the class lawyers do not know how to contact her.[79] The notice standard the Court has imposed, then, implies a pragmatic approach for assessing the process that is required to protect class member autonomy and compensation.

As with due process generally, a class member's rights depend upon a cost-benefit analysis.[80] From this practical perspective, in most

---

74 *See generally* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

75 *See Eisen*, 417 U.S. at 165 (discussing the lower court's ruling that due process required individual notice).

76 *Id.* at 173; *Mullane*, 339 U.S. at 317.

77 *Eisen*, 417 U.S. at 175; *Mullane*, 339 U.S. at 318–19.

78 *Cf.* Juris v. Inamed Corp., 685 F.3d 1294, 1302–10 (11th Cir. 2012) (providing a factual example of how the constructive notice requirements can negatively affect an absent class member).

79 *Cf. id.*

80 *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976); *Eisen*, 417 U.S. 156; *Mullane*, 339 U.S. 306.

class litigation—at least where class members have relatively little at stake and class litigation is likely to be the best way to serve their interests—denying class certification or classwide recoveries based on highly abstract concerns about autonomy and compensation would be inappropriate.[81] The approach that is more consistent with precedent is to consider the realities of class litigation.

1. Autonomy and the Class Device

For several reasons, concerns about class member autonomy would seem not to provide a persuasive reason to limit class actions, at least when class members have small-value claims. First, the class device tends to increase the meaningful choices available to class members. Second, given that class members will not always make a choice, but will often accede to whatever the default is, class litigation can promote autonomy by serving class members' interests—putting in place the result that class members would be apt to choose. Third, the best the courts will likely be able to do is honor the choices and interests of the vast majority of class members, recognizing that compromise of some of the members' autonomy and interests may be inevitable.

a. Meaningful Choice

In the abstract, class certification appears, at times, to restrict the autonomy of class members. After all, unless a potential class mem-

---

[81] *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 10–12 (1991); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–14 (1985); *Eldridge*, 424 U.S. at 334–35. Indeed, Martin Redish, a proponent of a strong form of autonomy rights for individual class members—a form of rights that would greatly undermine class litigation—finds much of extant constitutional law unacceptable. REDISH, *supra* note 71, at 135–72.

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), both asbestos cases, are distinguishable and therefore consistent with the argument made here. The individual class members in those cases had substantial claims at stake, so that any compromise to due process threatened a meaningful ability to pursue litigation on an individualized basis. *See Ortiz*, 527 U.S. at 821–29; *Amchem*, 521 U.S. at 597–602. *Amchem* involved relatively large individual claims, but some class members had only been exposed to asbestos and had not had injuries manifest yet. *Amchem*, 521 U.S. at 598, 628–29. These class members would therefore be bound by a settlement that would likely not fully compensate them. *See id. Ortiz* involved a proposed class under Rule 23(b)(1)(B), which does not allow plaintiffs to opt out and instead would bind all class members to a limited fund settlement, including those whose injuries had not yet manifested. *Ortiz*, 527 U.S. at 831–32. In both of these cases, the monetary claims were large, and class members ran the risk of being undercompensated or having their claims extinguished. *See Ortiz*, 527 U.S. at 821–32; *Amchem*, 521 U.S. at 597–602, 628–29. Neither case invoked due process to protect rights that were valuable in theory but worthless in practice.

ber opts out of litigation—assuming the class member has that right—she will be bound by the result in litigation.[82] Furthermore, if there is a class settlement, she can object to its terms, and even appeal, but doing so is likely to have limited influence.[83]

To be sure, class members with large claims, particularly if they are sophisticated litigators, may be capable of opting out of class proceedings and litigating on an individual basis.[84] To that extent, if they do not like classwide recoveries, they may avoid them. Class members with small claims, however, generally will not opt out of a class action or object to how it proceeds.[85] These absent class members are apt to lack the understanding, time, or resources to engage actively in litigation. Inertia reigns. One might conclude that class actions in effect deprive these class members of their rights.

As a practical matter, however, class litigation is likely to expand—not contract—a potential class member's options. Excessive fastidiousness in protecting class members' autonomy can render the class device ineffective and narrow class members' real choices. Consider, for example, opt-out and opt-in classes. As noted above, the reality is that the majority of absent class members will neither opt in nor opt out, but will rather accept whichever is the default. In part for this reason, Martin Redish argues that an opt-in class is more respectful of class members' rights than an opt-out class.[86] A class member should be included in a class, he reasons, only after so electing.[87]

---

82 *See* Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590, 594–95 (1982).

83 *See generally, e.g.*, Officers for Justice v. Civil Serv. Comm'n of S.F., 688 F.2d 615 (9th Cir. 1982).

84 For a discussion of a recent wave of opt-out settlements in securities litigation, see Kevin M. LaCroix, *Opt-Outs: A Worrisome Trend in Securities Class Action Litigation*, INSIGHTS (OakBridge Ins. Servs., Bloomfield, Conn.), Apr. 2007, at 1–6, *available at* http://www.rt-specialty.com/rtproexec/insights/Insights_VolumeIIIssue3.pdf. For a publication recommending consideration of opting out of antitrust class actions for businesses with more than $10 million in purchases, see James A. Morsch & Jason S. Dubner, *Don't Throw Away That Class Action Notice: Opting Out of Antitrust Class Litigation*, CORPORATE COUNSEL, Dec. 2003, at A5–A6, *available at* http://www.butlerrubin.com/wp-content/uploads/Dont-Throw-Away-That-Class-Action-Notice-Opting-Out-of-Antitrust-Class-Litigation-Corporate-Counsel-December-2003-1.pdf. *See also* REDISH, *supra* note 71, at 131 (noting likely inverse correlation between the size of a claim of a class member and the member's willingness to consent to participation in a class action).

85 *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1533, 1545–57 (2004) (studying the opt out and objection rates of class members across different types of litigation).

86 REDISH, *supra* note 71, at 137, 147–48, 173–75.

87 *Id.*

This opt-in approach, however, could actually restrict class member autonomy. An opt-in procedure would be fatal to many class actions. Too few potential class members might act to create the economies of scale necessary for effective litigation.[88] The procedure would cause some proposed class actions to fail and, as a consequence, discourage others.[89] The opt-in class, then, would deprive potential class members of a meaningful choice whether to participate in class litigation. The result would be that these potential class members would have only *two* options: to pursue litigation individually or not to pursue it at all.

An opt-out class, in contrast, may well permit class litigation to proceed.[90] If so, it gives potential class members *three* choices: to participate in class litigation,[91] to opt out and initiate individual litigation, or to opt out and not sue. In this way, an opt-out class has the potential to provide class members more options than an opt-in class. Thus, altering the structure of class litigation in an effort to enhance class member autonomy could actually restrict that autonomy.

Of course, individual litigation is often not a meaningful choice. For example, a plaintiff who suffers harm from an antitrust violation of $100—or, realistically, even of $10,000—generally cannot afford to hire the attorneys, experts, and the like that are necessary to prosecute a claim,[92] or at least the sorts of complicated claims so often at issue in class cases.[93] In these circumstances, an opt-out class affords a claimant two choices—participating in the lawsuit or opting out and not suing. An opt-in class leaves the claimant with no meaningful choice at all.[94]

---

88 Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States 9 (2000) (unpublished manuscript), *available at* http://law.duke.edu/grouplit/papers/classactionalexander.pdf.

89 *See* Eisenberg & Miller, *supra* note 85, at 1530–38 (discussing how mass opt-outs can destroy litigation and the negative effects of opt-out campaigns).

90 *Cf.* Alexander, *supra* note 88, at 9 (discussing the incentives not to opt out of a class and how these incentives maintain small-claims classes).

91 In a sense, participation could involve two options: remaining in a class passively or remaining in the class and objecting.

92 *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923–24 (1998).

93 *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) ("No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount.").

94 Moreover, class members have some options within a class proceeding. They may object, for instance, if they do not like how class counsel are conducting class litigation. *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 72–73 (2007). The power of this choice should not be exaggerated. The right to object most often will not alter the course of litigation. *See id.* at 72–73,

b. Interest as a Proxy for Choice

As previously noted, many class members will not make a choice at all. The default has great power. Under these circumstances, one way to respect the rights of class members is to anticipate their preferences.[95] To be sure, that is an imperfect means. Still, a notion along these lines explains the veil of ignorance in John Rawls's *A Theory of Justice*, where he suggested a thought experiment in which we contemplate how we would view justice if we did not know our actual circumstances or beliefs.[96] Similarly, just as we may respect the autonomy of people who are terminally ill and unable to communicate their desires—by taking the medical measures they *would have* wanted[97]—we may do the same for class members. In other words, we might attempt to construe class members' likely preferences. A plausible inference is that most victims of legal violations would prefer to obtain some recovery through a class action—and to have the prospect of a class action deter similar illegal conduct in the future[98]—than to have no viable claim at all. An opt-out class honors class members' likely preferences understood in this way.

c. The Many Versus the Few

Finally, it is important to recognize that in some instances a class member may not have a chance to opt out of a class action or to object

---

84–110 (detailing the limitations to objecting, the lack of effect of objections, and the incentives not to object). Most objections are unsuccessful, in part because individual class members rarely have the means or incentive to pursue their objections—including on appeal—given the small amount they have at stake in the litigation. *See id.* That point, however, only emphasizes how constrained class members' choices would be if there were no class action at all. A class member who lacks the means to object to a class action settlement—which can require nothing more than writing a letter to a court—almost certainly would be unable to pursue individual litigation on his or her own.

95 *Cf.* Shapiro, *supra* note 92, at 917–19 (discussing how the class should operate as an aggregate entity, working for the good of the class as a whole rather than the wants of individual members).

96 JOHN RAWLS, A THEORY OF JUSTICE, 193–94 (rev. ed. 1999).

97 *See* Kathy L. Cerminara, *Tracking the Storm: The Far-Reaching Power of the Forces Propelling the* Schiavo *Cases*, 35 STETSON L. REV. 147, 150–57 (2005) (detailing the background of the Schiavo cases, involving a patient in a "persistent vegetative state because of brain damage," and showing how the parties shaped their arguments around what the patient would have wanted if she were able to express her desires).

98 Indeed, the prospect of class litigation may deter illegal conduct and protect potential class members in advance. *See* Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 137–38 (2001). One way to frame the issue about members' preferences is in terms of whether they would want that protection.

to how class counsel are prosecuting it.[99] A class member cannot opt out of or object to a class proceeding if, for example, she does not learn about it, which, as noted above, could occur if she receives constitutionally sufficient constructive notice but not actual notice.[100] Some of these class members may prefer not to participate in the litigation—perhaps out of an ideological opposition to class actions or perhaps out of a desire to exercise control over the litigation.[101] However, it is an odd notion of rights that would privilege the autonomy of this small minority—who may or may not be present in any particular case—over the autonomy and interests of the likely majority of class members. Under these circumstances, the default of excluding someone from a class because she did not opt in can restrict autonomy just as much as including her because she did not opt out.

What seems to animate the argument based on class member autonomy is a highly abstract conception of rights. According to that conception, a system of litigation leaves the rights of victims of legal violations intact as long as they have the formal opportunity to file suit, even if they have no meaningful prospect of doing so.[102] On the other hand—again, according to this highly abstract conception—a system of litigation violates legal rights if it places some practical constraints on litigant autonomy, even if it holds the only realistic prospect for compensation, vindication, or deterrence.[103]

Acting on excessive concern for class members' potential and abstract autonomy rights can cause significant harm to their actual autonomy and interests. We should be careful not to deprive people of meaningful choice, and allow wrongdoers to violate legal rights with

---

99 A class member cannot remove herself, for instance, from a mandatory class under Rule 23(b)(1) or 23(b)(2). Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 178–80 (2003). However, if there is a classwide recovery, the members of the class normally have the right to opt out. *See, e.g.*, Eubanks v. Billington, 110 F.3d 87, 88, 93–94 (D.C. Cir. 1997) (holding that a court has the discretion to grant a class member's request to opt out of a settlement despite the mandatory nature of the class under Rule 23).

100 *See supra* notes 74–81 and accompanying text. Even in that situation, however, the class device would not seem to deprive the class member of any significant choice she otherwise would have had. After all, if she does not learn that her rights may have been violated even when class action attorneys attempt to inform her of pending litigation—perhaps by mail, by email, and through an internet site—she would be very unlikely to discover the potential rights violation on her own. In reality, then, without the class device she would have lost her legal rights without any meaningful opportunity to act on them.

101 *See* REDISH, *supra* note 71, at 131.

102 *See id.* at 135–37.

103 *See id.* (arguing that mandatory class actions, and in most circumstances class opt-out procedures, should be found unconstitutional).

impunity, in the guise of preserving options for people—options they are unlikely to want or to be able to pursue. The risk is that the real beneficiaries of these safeguards will be those who violate the law and escape liability because of the practical difficulties of prosecuting litigation. The Constitution need not be read as this sort of a trap for ordinary citizens.

Nothing about constitutional rights requires courts to interpret them in this rigid way—as requiring judges to harm the very citizens whose rights they are supposed to protect. Indeed, as noted above, the practice in the due process context is the opposite: to be practical, not purely theoretical, in defining rights.[104] None of this is to say that the interests and autonomy of class members are unimportant. They are not. In particular situations, concern for class members should restrict the options that are available as part of a class action.[105] It is simply that an abstract and artificial notion of choice should not bar class action procedures that would in reality benefit the vast majority of class members.

2. The Right to Full Compensation

Another potential objection to the inclusion of uninjured parties in a class is that it can compromise the rights of some class members to a full recovery. After all, as proponents of this objection argue, courts awarding or presiding over classwide recoveries may at times engage, for example, in a pro rata allocation of an overall award—depriving some injured class members of the full measure of compensation they might otherwise have received had uninjured members not been included in the class.[106] This concern has some force. Some class members could in theory receive a larger recovery in individual litigation than in class litigation resulting in a classwide recovery.[107]

On the other hand, courts routinely adjust the amount plaintiffs may recover, or deprive them of any recovery at all, for various policy reasons. They do so in a variety of areas of the law—from the substantive to the procedural, and in the gray areas in between. Countless examples make this point.

---

104 *See supra* Part II.A.

105 *See generally* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

106 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 894, 922–25; *see also, e.g.*, Stewart v. Gen. Motors Corp., 542 F.2d 445, 452–54 (7th Cir. 1976).

107 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 922–25, 945–46.

For instance, consider antitrust litigation. Federal antitrust law speaks in very general terms about creating a private right of action for anyone injured by anticompetitive behavior.[108] A straightforward reading of federal antitrust law could make for great complexity in litigating antitrust disputes.[109] Even if a court concluded that conduct harmed competition and raised prices above competitive levels, it can be difficult to trace the effect of those increased prices down the chain of distribution.[110] The initial purchaser of the good or service at issue may recoup some of its losses by raising its prices to its customers, who, in turn, may do the same.[111]

Faced with the prospect of complex and costly economic analysis, the Supreme Court adjusted who may recover damages under federal antitrust law and how their recovery is calculated.[112] The Court held that only those purchasers who bought goods directly—not indirectly—from violators of the antitrust laws may seek damages[113] and that those "direct purchasers" may recover the full overcharge they pay, even if they pass some of it along to their customers.[114] As a result, under federal antitrust law, direct purchasers may receive compensation that is greater than the harm they suffer while indirect purchasers recover nothing at all, even if they suffered harm.[115]

In addition to antitrust litigation, the adjustment of plaintiffs' recoveries due to policy considerations is also apparent in various procedural and quasi-procedural doctrines. The Court's adjustment to the

---

108 Ill. Brick Co. v. Illinois, 431 U.S. 720, 724 n.1 (1977) (noting federal antitrust law permits recovery by "'[a]ny person who shall be injured in his business or property'" as a result of a violation of federal antitrust law (quoting Clayton Act § 4, 15 U.S.C. § 15 (2012))).

109 *Id.* at 731–32.

110 *Id.* at 732–33 ("The demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands . . . .").

111 *See id.* (discussing the "passing on" of heightened concrete block costs from masonry contractors to general contractors to those purchasing finished buildings).

112 *See id.* at 729–35.

113 *Id.*

114 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487–94 (1968).

115 The text oversimplifies. A complete analysis of the correlation between actual harm and damages is full of twists and turns. For a discussion of issues regarding the compensation of actual victims of antitrust violations see Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013). Note that competitors may bring claims for damages under federal antitrust law. *See* Clayton Act § 4, 15 U.S.C. § 15 (2012) (allowing suits by all those injured by a violation of federal antitrust law). Also note that some states allow indirect purchasers to recover under state law, so these purchasers may not be entirely deprived of an opportunity to recover. *See, e.g.*, California v. ARC Am. Corp., 490 U.S. 93, 101–06 (1989) (holding that states may enact statutes allowing for recovery by indirect purchasers).

pleading standard in *Bell Atlantic Corp. v. Twombly*[116] and *Ashcroft v. Iqbal*,[117] for example, made it harder for plaintiffs to survive a motion to dismiss for failure to state a claim.[118] That means that the Court made a trade off: it increased the number of plaintiffs with meritorious claims who will recover nothing in order to increase the number of defendants with meritorious defenses who will escape liability entirely.[119]

Similar policy considerations inform numerous doctrines that shape awards to plaintiffs.[120] Thus, nothing is particularly unusual about using the class device in a way that benefits some class members—even if it harms others—to promote the good of the class as a whole.[121]

To be sure, courts at times have resisted doctrines that seem to allocate recoveries to promote policy goals.[122] Perhaps the most pertinent example is fluid recovery. In fluid recovery, a court awards compensation to a group that approximates the original group that suffered harm.[123] For example, if a taxicab operator overcharges its customers, a fluid recovery might involve a court ordering the operator to offer discounts to its customers in the future.[124] The members of

---

116 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

117 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

118 *See id.* at 677–78; *Twombly*, 550 U.S. at 555–57.

119 *See, e.g.*, *Iqbal*, 556 U.S. at 677–78; *Twombly*, 550 U.S. at 555–57.

120 A list would include countless limitations on damages, including, among others, those based on uncertainty, speculativeness, and the economic loss rule.

The cy pres doctrine provides a particularly pertinent example. Numerous federal courts have recognized in class actions that they may allocate any residual recovery that does not reach class members to other worthwhile causes, ordinarily ones related somehow to the underlying litigation. *See* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 619–20 (2010). Borrowing from a doctrine that developed in the context of trusts, courts use the French phrase *cy pres* when taking this measure. *Id.* at 624. The notion is that it is better to make some productive use of funds than to return ill-gotten gains to wrongdoers. *Id.* at 618–21.

Much like classwide recoveries, cy pres may increase a defendant's liability beyond the cumulative individual recoveries that would occur without the class device and it may alter the recipients of the compensation a defendant pays. *See id.* at 622–23, 633–38 (detailing the rise of cy pres in class actions and its mechanics). Yet courts have not condemned the cy pres doctrine on this basis. *See id.* at 634–39 (discussing how courts have developed the modern theory of cy pres). The cy pres doctrine provides a basis, by analogy, for classwide recoveries in the class context. For an article criticizing cy pres on that basis, see generally *id.*

121 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 912–15.

122 *See, e.g.*, Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 993–97 (2012) (discussing tradeoffs in rules generally).

123 *See* 5 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 23.46[2][e] (3d ed. 2013).

124 *See, e.g.*, Daar v. Yellow Cab Co., 433 P.2d 732, 746 (Cal. 1967); *see also* 5 MOORE, *supra* note 123, § 23.46[2][e] n.54 (listing cases).

the group receiving compensation—the new customers—are not the same as the members who were originally harmed—the past customers—although there may be some overlap between the two.[125] Instead, there is a kind of identity at the group level.

A distinctive aspect of fluid recovery, at least in many cases, is that it awards a recovery to class members that the court knows *could not possibly have been harmed*.[126] For example, a first-time passenger in a taxicab may receive compensation even though she could not possibly have paid too much on an earlier trip. In part for this reason, federal courts have been skeptical of fluid recovery in general, although they have at times approved its use when it allocates funds only to members of a group who *may* have been injured.[127]

Recovery by plaintiffs who could not possibly have been harmed does *not* generally occur under the direct purchaser rule in antitrust, the civil pleading standards, or, for that matter, classwide recoveries. As to direct purchasers, they must prove that they paid an overcharge, even if the damages measure allows the court to avoid figuring out exactly how much harm, if any, they actually suffered.[128] Similarly, the standards for pleading or proving a claim require each plaintiff to cross some threshold between a weak claim and a strong one, even though some meritless claims will be able to meet that standard and some meritorious ones will not.[129]

The same is true of classwide recoveries. Classes generally are defined to include only those members who have characteristics suggesting that they *may* have been harmed by the conduct at issue, e.g., they were a member of a protected group, potentially eligible for a promotion, and allegedly suffered from illegal discrimination; they bought a product or service at the relevant time from a participant in alleged anticompetitive conduct; or they bought a service or product that was the subject of fraud.[130] Indeed, as discussed above, standing doctrine tends to ensure that all class members *could have been* harmed.[131] To be sure, like fluid recovery, each of these other doc-

---

125 *See* Daar, 433 P.2d at 746; 5 MOORE, *supra* note 123, § 23.46[2][e] n.54.

126 *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 179, 183–84 (2d Cir. 1987) (affirming settlement fund involving fluid recovery without requiring proof by class members of individual causation and injuries).

127 *See id.*

128 *See id.*; 5 MOORE, *supra* note 123, § 23.46[2][e] & n.54.

129 *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–57 (2007).

130 *See supra* Part I.

131 *See supra* Part I.

trines has the potential to allow uninjured plaintiffs to recover. Unlike the suspect use of fluid recovery, however, the other doctrines are designed to benefit only those plaintiffs who could *potentially* have been harmed.

In sum, using a classwide recovery to achieve proper levels of deterrence and compensation should not offend class members' due process rights. That form of recovery is merely a reasonable means of litigating legal rights, just as individual litigation is.

B. Due Process and Defendant Rights

Certifying classes that contain uninjured class members could also compromise the due process rights of defendants. Judge Posner has worried, for example, that such an approach could potentially magnify the exposure of a defendant to damages.[132] This argument, however, loses most—if not all—of its force when the total amount of harm for which a defendant is liable is not affected by the presence of uninjured members in a class.[133]

Consider, for example, an antitrust case in which plaintiffs conduct a multivariate regression analysis to determine the total harm caused by an allegedly anticompetitive practice, such as price fixing. Assume, as may occur, that the regression analysis enables a court to assess with a high degree of confidence the total harm caused by the conduct (e.g., the dollar amount in overcharges paid by the class as a whole), but not with equal confidence the allocation of that harm among class members.[134] Eliminating uninjured members from the class would not affect the total exposure of the defendant to damages. Subtracting a class member with no damages would not decrease that total. Instead, it would simply involve a shift of recoveries from one class member to another (an issue addressed above).[135]

---

132 Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672, 677–78 (7th Cir. 2009).

133 An intriguing recent example of this phenomenon occurred in *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555 (N.D. Cal. 2013). The court found that the plaintiffs were able to provide a reliable means for calculating damages to the class as a whole but expressed reservations about whether they had shown that the conduct had harmed "all or nearly all" class members. *Id.* at 577–82.

134 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 913–14.

135 *See id.* Actually, as a technical matter, it may be that a regression analysis indicates some class members *benefited* from the allegedly illegal conduct, i.e., *paid less* than they would have without the illegal conduct, and, as a result, eliminating them from the analysis might *increase* the total amount of computed damages and thus increase a defendant's total liability. *See, e.g.*, *PIMCO*, 571 F.3d at 676 (describing the defendant's argument that some class members likely benefitted from his scheme); Davis, *Classwide Recoveries*, *supra* note 8, at 940–41.

A defendant may nonetheless make a more technical argument, to wit, that the inclusion of uninjured class members would result in payment of damages to parties the defendant did not harm, something that should not occur as a matter of principle.[136] As long as the amount of damages is unaffected by the presence of uninjured members in a class, however, this argument remains weak. Again, the due process inquiry should be practical.[137] A defendant suffers little, if any, meaningful harm when it is forced to pay the right amount of damages, though not necessarily all of it to the right parties. In contrast, class members—and society as a whole—may suffer a very real and significant harm if a court refuses to certify a class because plaintiffs cannot show precisely which members suffered the relevant form of injury.[138] Many of them—or all of them—may not be able to pursue their claims at all.[139]

This is particularly likely to be true in cases where damages are small enough that bringing an individual suit is simply not feasible.[140] Many class members would be completely deprived of the benefits of litigation if defendants were allowed to claim that the inclusion of uninjured class members violates their due process rights.[141] Due pro-

---

136 *Compare In re* Deepwater Horizon, 732 F.3d 326, 340–44 (5th Cir. 2013) (suggesting in dicta that a class certified for purposes of settlement cannot compensate uninjured class members), *with id.* at 358–60 (Dennis, J., concurring in part and dissenting in part) (arguing that a class action settlement may include uninjured members based on Article III standing doctrine and the Rules Enabling Act). Judge Dennis would seem to have the better argument, in that outside of the class context parties may settle their claims regardless of whether they have Article III standing; but discussion of that issue is beyond the scope of this Article.

137 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950). The Supreme Court has laid out a balancing test to determine how rigorously due process requirements should be applied in any particular instance, in which three factors are considered: (1) the private interest affected by the prejudgment measure; (2) the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and (3) the interests of the party seeking the prejudgment remedy. Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (adopting the original *Mathews* balancing test for lawsuits between private individuals, in addition to those between private individuals and the government). Essentially, this test reinforces that due process rights depend on a cost-benefit analysis. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (defining the balancing test for the application of due process requirements to government action depriving a party of a benefit); Eisen v. Carlisle, 417 U.S. 156, 176 (1974) (holding that due process can require that practicable steps be taken to make individual notification to class members, even if such notification would be costly or burdensome); *Mullane*, 339 U.S. at 314–15. For an historical argument that defendants' due process rights in class actions are properly assessed through this sort of cost-benefit analysis see Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319.

138 *See supra* notes 82–94 and accompanying text.

139 *See supra* notes 82–94 and accompanying text.

140 *See supra* notes 82–94 and accompanying text.

141 *See supra* notes 82–94 and accompanying text.

cess does not support an outcome that effectively makes plaintiffs lose regardless of the merits.[142]

III. Federal Rules Enabling Act

Another possible objection to certifying classes with uninjured members, and especially awarding damages on a classwide basis, is that doing so would alter the substantive rights of the parties. Courts cannot apply Rule 23 in a way that would change substantive law. The Rules Enabling Act[143] gives the Supreme Court the power to prescribe general rules of procedure for cases in U.S. district courts.[144] However, "such rules may not abridge, enlarge or modify any substantive right."[145] Rule 23 therefore cannot abridge, enlarge, or modify a substantive right.[146]

In response to this objection, a key task is drawing the distinction between substance and procedure. Although the decision whether to certify a class with uninjured members appears to be clearly procedural—as clarified by the Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[147]—the choice between awarding classwide or individual recoveries presents a more subtle problem. To be sure, the Rules Enabling Act should create little or no barrier to awarding classwide damages based on federal substantive law because federal courts may adapt federal substantive rights to procedural realities. On the other hand, cases arising from substantive rights outside of this power are more vexing. This Section suggests that one way to address these cases is to recognize that neither an individualized nor a classwide approach to awarding damages is built into the substantive law. They merely provide competing ways to litigate disputes. Under this view, classwide recoveries do not violate the Rules Enabling Act.

A. Certification of Classes with Uninjured Members

In light of the Supreme Court's recent decision in *Shady Grove*, allowing certification of a class with uninjured members would seem

---

142 *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (noting that states have the freedom to regulate the procedure of their courts, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

143 Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012).

144 *Id.* § 2072(a).

145 *Id.* § 2072(b).

146 Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999).

147 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010).

to be a procedural choice under the Rules Enabling Act.[148] There, the Supreme Court found that rules allowing multiple claims to be litigated together, such as Rule 23, "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights."[149] Instead, these rules alter only the method in which claims are processed.[150] Thus, they do not violate the Rules Enabling Act.[151]

At issue in *Shady Grove* was a New York statute that barred class actions in suits seeking penalties.[152] Despite the statute, the plaintiff sought to pursue its New York state law claims—including seeking penalties—on a class basis in federal court.[153] After the Court determined that Rule 23 conflicted with the New York state law, the issue arose whether Rule 23 violated the Rules Enabling Act.[154] The Court concluded that it did not.[155] After all, the Court reasoned, "[a] class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. . . . [I]t leaves the parties' legal rights and duties intact and the rules of decision unchanged."[156]

Even if a class is certified with potentially uninjured members, a court will address the same claims and defenses. It will simply litigate common issues in a common—and therefore more expeditious—manner. If individual issues need to be addressed, the court can adjudicate them on an individual basis. Under *Shady Grove*, the difference in procedure should not present a problem under the Rules Enabling Act.

B. The Choice Between Individual and Classwide Recoveries

Matters become more complicated when the choice of procedures for adjudicating claims may influence the amount of recovery of class members. In this regard, it is important to keep in mind two circumstances. The first involves the setting of the claim—a federal court with the power to interpret federal law. In that setting, the Rules Enabling Act should not prevent a federal court from adapting federal substantive rights to procedural realities. The result is that a

148 *See id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.* at 397–98.
153 *Id.*
154 *Id.* at 398, 404–06.
155 *Id.* at 408.
156 *Id.*

federal court adjudicating a class action based on federal substantive rights may make various decisions—including choosing how to calculate damages—without contravening the Rules Enabling Act. In the end, the Rules Enabling Act is simply not implicated.

A more difficult issue arises when federal courts have little or no power to interpret the substantive law at issue in a case. For example, consider a federal court adjudicating a state law claim. In that situation, the options available to the federal court—including whether to measure and award damages on a class basis—will depend on the scope of what counts as procedural.[157] While the line between substance and procedure remains somewhat vague under *Shady Grove*, that decision provides some basis for concluding that awarding damages to a class as a whole may be procedural, even if it affects which litigants may recover or how much they may recover.[158]

1. Federal Courts May Adapt Federal Substantive Law to Procedural Realities

Although Rule 23 cannot itself modify substantive legal rights, federal courts can do so in interpreting federal substantive law, including to exploit procedural opportunities and adapt to procedural realities.[159] Just as Congress can craft substantive law with procedure in mind,[160] so may federal courts.[161] As federal judges modify the law through a common law process, the Rules Enabling Act should not bar them from considering the procedural ramifications of the substantive standards they devise.

Indeed, federal courts have often taken practical procedural considerations into account in developing substantive rights under federal law. Antitrust is rife with examples. Consider again the rule that, generally speaking, direct purchasers are the only entities in the chain of distribution that may seek damages for violations of federal antitrust law.[162] Consider also the rule that direct purchasers may recover the full overcharge they pay as a result of a violation of federal antitrust law, regardless of whether they are able to pass on some of the

---

157 *See id.* at 408; Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938).

158 *See Shady Grove*, 559 U.S. at 408.

159 *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 472 (1965).

160 *See Shady Grove*, 559 U.S. at 406.

161 *See, e.g.*, *Hanna*, 380 U.S. at 472.

162 Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1977) ("[A]n indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use a pass-on defense in a suit by a direct purchaser.").

overcharge to their customers.[163] These rules do not derive from the relevant statutory language or history. They are the product of pragmatic policymaking by the federal courts in light of the cost and difficulty of tracing the effects of antitrust violations, policymaking that specifically considered procedural context.[164]

Similarly, the federal courts have held that the filing of a class action complaint tolls the statute of limitations for the members of the proposed class.[165] One way to understand this rule is as modifying substantive law. At times courts consider a statute of limitations to be substantive.[166] Thus, for federal causes of action at least, one might read the tolling of a statute of limitations as a change in substantive law to adjust it to the class context.[167] If so, similarly adjusting the measure of recovery to adapt it to the class context also seems appropriate.

2. Awarding Classwide Recoveries May Be Procedural

A more problematic situation arises when federal courts cannot adapt substantive rights to a class context, such as cases based on state substantive law. In these situations, the Rules Enabling Act governs and classwide recoveries may be employed only if they do not alter substantive rights.[168] Distinguishing substance from procedure is difficult, but changing the method for calculating the class recovery arguably falls into the procedure category.

True, permitting classwide recoveries could have a profound effect on the outcome of litigation. But so do pleading standards. Yet the Supreme Court has recently made significant changes to pleading requirements, apparently without running afoul of the Rules Enabling Act.[169] Like pleading standards, allowing claims to proceed on a class

---

163 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489, 494 (1968).

164 *See, e.g.*, *id.* at 492–94 (discussing the difficulty of calculating the impact of monopolistic behavior on a company's pricing policy after the fact, therefore making a pass-on defense an impracticality that would "often require additional long and complicated proceedings").

165 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552–53, 561 (1974).

166 *See, e.g.*, Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) (holding that state law governed whether filing or service of complaint tolled statute of limitations in federal court diversity action); *cf.* Chardon v. Fumero Soto, 462 U.S. 650, 661–62 (1983) (applying state law to decide effect of filing of class action on tolling of statute of limitations).

167 *See, e.g.*, *Am. Pipe & Constr. Co.*, 414 U.S. at 552–55.

168 *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co, 559 U.S. 393, 398 (2010) (limiting the application of *Erie* in the Court's analysis).

169 *See* Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007).

basis also profoundly affects litigation.[170] Yet the Supreme Court held in *Shady Grove* that no violation of the Rules Enabling Act occurs when a federal court adjudicates a state claim on a class basis that would have to be litigated on an individual basis in state court.[171] Given this background, there is a good argument that classwide recoveries for classes including uninjured members do not alter substantive legal rights, but rather simply provide an alternative method of adjudicating those rights—indeed, a method that in some circumstances may be more respectful of substantive rights than litigating one individual claim at a time.

Herein lies what is likely the crux in determining whether classwide recoveries violate the Rules Enabling Act. If the incidents of individual litigation are part of the substantive law, then any variation from them can be understood to effect a change in the substantive law. A different perspective, however, is also possible. Individual litigation and classwide litigation may simply be *alternative* procedural options. And neither may itself be part of the substantive law. According to this view, just because classwide adjudication may yield outcomes that are not precisely the same as individual litigation does not mean that the class proceedings violate the Rules Enabling Act. Individual litigation may be the norm in the sense that it occurs with the greatest frequency, but that does not necessarily mean that the Rules Enabling Act mandates imposition of the same requirements for prevailing on a claim and obtaining relief in class litigation as in individual litigation.

In this regard, it is important to note that neither individual nor class proceedings a priori honors substantive legal rights more effectively. Mark Geistfeld has made a point along these lines in discussing market share liability.[172] He claims that a goal of tort law is to minimize error costs, and courts should be flexible about when they pursue this goal on an individual or aggregate basis.[173] The same point might be made in assessing procedure.[174] Just as in tort law, the decision of which procedure to adopt could be based on the merits of each option.[175]

---

170 *See Shady Grove*, 559 U.S. at 455–58 (Ginsburg, J., dissenting).

171 *See id.* at 400–02.

172 *See* Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 453 (2006).

173 *See id.*

174 *See id.* at 462.

175 For further discussion of this point, see Davis, *Classwide Recoveries*, *supra* note 8, at

To invoke another analogy, the massive changes in federal procedure that occurred in 1938 fundamentally altered how parties litigate, and no doubt in many cases altered which parties won and lost.[176] That profound impact, however, did not render the changes substantive. One system of procedure simply displaced another. And the new system—it is hoped—sought to remain true to substantive law in much the same way as the old system.[177] The same may well be true—albeit on a more modest scale—when courts use collective actions to award classwide recoveries.

Thus, *Shady Grove* can be interpreted to support the view that individual and class litigation are simply competing alternatives. As discussed above, the Supreme Court held that the choice whether to allow a case to go forward on a class basis is a procedural one.[178] True, some of its reasoning suggests that class litigation must produce just the same entitlements as individual litigation.[179] On the other hand, the New York law at issue in *Shady Grove* seemed an extreme case of a legislature attempting to build the individual litigation norm into the fabric of the law.[180] Yet the Supreme Court held the contrary approach under Rule 23 to be permissible under the Rules Enabling Act.[181] A broad reading of *Shady Grove* supports the proposition that class and individual litigation should be treated as having equal footing—as alternative means to implement the substantive law as effectively as possible.[182]

Classwide recoveries in some circumstances may provide a more efficient and accurate system for adjudicating substantive rights than individual recoveries. As discussed in another article that is part of this Symposium, classwide recoveries can sometimes produce signifi-

---

897–902, 936–38 (contrasting classwide and individualized recovery approaches and the concerns associated with each).

176 *See generally* Alexander Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155 (1953) (analyzing the effect of the Federal Rules adopted in 1938 over the course of their first fifteen years in existence).

177 *See id.* at 173–74 (declaring the Federal Rules a success because they removed the extremely technical barriers of the past while retaining the purpose of the law).

178 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010).

179 *See, e.g.*, *id.* (noting joinder rules "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed").

180 *See id.* at 397–98.

181 *See id.* at 408.

182 Note that the Court has at times indicated that some statutes create legal rights that a party may demand be adjudicated on an individual basis. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (discussing defendant's statutory right to raise certain individualized defenses). That does not mean, however, that all substantive rights have this nature.

cantly lower error costs than individualized litigation.[183] As a result, classwide recoveries may actually honor substantive rights more effectively than an individualized approach.

The fact that classwide recoveries may show greater fidelity to substantive rights than individual litigation does, at least in appropriate cases, provides a strong reason to understand those recoveries as procedural. After all, one might think as a matter of substantive law that a defendant should be held liable, where possible, for only the legally cognizable harm that it causes and for all of the legally cognizable harm that it causes.[184] As discussed in *Classwide Recoveries*, individual litigation at times achieves this aim highly imperfectly.[185] When classwide recoveries provide a more effective means to vindicate substantive rights, it is odd to think of them as changing the substantive law. To the contrary, they seem to realize substantive law more fully. In comparison, it is individual litigation that seems to compromise substantive rights. Any contrary view seems to treat individual procedures as part of the substantive law itself. An assumption that the substantive law instantiates an individualized assessment of claims requires at least some justification, particularly after *Shady Grove*.

This analysis provides a useful context for assessing the Court's analysis in *Wal-Mart Stores, Inc. v. Dukes*.[186] Before the Court was a nationwide class of female Wal-Mart employees alleging sex discrimination.[187] In addition to reversing certification of the class for lack of commonality,[188] the Court raised concerns under the Rules Enabling Act about the Ninth Circuit's recommendation for "Trial by Formula."[189] According to the Court, the Ninth Circuit planned to use sampling to determine the percentage of valid claims and then, without opportunity for Wal-Mart to present individual defenses, to calcu-

---

183 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 916–28 (analyzing error costs across classwide and individual litigation).

184 *See, e.g.*, Benjamin C. Zipursky, *Evidence, Unfairness, and Market-Share Liability: A Comment on Geistfeld*, 156 U. PA. L. REV. PENNUMBRA 126, 134–35 (2007) (arguing that defendants should not be liable for harms they likely did not cause). Use of the phrase "legally cognizable" may seem to beg the key question here, but it is necessary because the law, for various policy reasons, often allows a greater or lesser recovery than the harm a defendant causes. *See, e.g.*, Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 346–47 (2004) (describing how courts have separated what constitutes a legally cognizable harm from the amount awarded in damages in wrongful life actions).

185 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 897–98, 916–21.

186 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

187 *Id.* at 2549.

188 *Id.* at 2556–57.

189 *Id.* at 2561.

late Wal-Mart's total liability based on extrapolation of the sampling data.[190] Under this approach, Wal-Mart would lose the chance to prove, for example, that individual applicants were denied employment opportunities for lawful reasons, a defense provided by statute.[191] The Court rejected this approach: "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[192]

The Court's pronouncement can be interpreted in several ways. First, the Court may have been suggesting that the Rules Enabling Act always requires that a defendant have the right to litigate defenses on an individual basis.[193] Second, it may have been indicating that the federal employment discrimination statute in particular entitles a defendant to litigate defenses individually.[194] These interpretations, however, seem overly broad—at the least mere dicta. After all, according to the Court, the Ninth Circuit did not provide means for adjudicating Wal-Mart's defense that there were lawful reasons for how particular women were treated.[195] Moreover, elsewhere in its opinion, the Court noted that the plaintiffs' expert could not "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart."[196] As the Court pointed out, the plaintiffs' expert "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[197] With these considerations, *Dukes* may simply stand for the proposition, then, that the Rules Enabling Act prevents a classwide approach from depriving a defendant of any opportunity to assert its legal defenses. Likewise, it does not necessarily mean the Rules Enabling Act always requires courts to litigate defenses on an individual basis.[198]

---

190 *Id.*

191 *See id.*

192 *Id.* (citations omitted) (quoting 28 U.S.C. § 2072(b) (2012)).

193 *See id.*

194 The Court's discussion of the standard approach to "pattern-or-practice" cases hints at this possibility. *See id.* at 2560–61.

195 *Id.*

196 *Id.* at 2553 (internal quotation marks omitted).

197 *Id.* (internal quotation marks omitted).

198 It is noteworthy that the Court in other cases has assessed claims and defenses on a classwide basis, suggesting the propriety of doing so. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328–32 (1977); Frontiero v. Richardson, 411 U.S. 677, 682–91 (1973). We are grateful to Sam Issacharoff for making this point at the proceedings of the conference at which this paper

Conclusion

In sum, the presence of uninjured members in a class does not by itself run afoul of Article III, due process, or the Rules Enabling Act. Matters are somewhat more complicated when it comes to awarding a recovery on a classwide basis if a class includes uninjured members. However, we believe that a classwide award even under such circumstances does not necessarily violate standing doctrine, due process rights, or the Rules Enabling Act. Jurisdictions that have certified classes containing uninjured members should be free to continue that practice.

---

was presented. Also noteworthy, in *Dukes*, the lack of a clear sense of the percentage of women harmed could have meant that the presence of uninjured members of the class could have increased Wal-Mart's total exposure to damages. *See supra* notes 8, 134–35 and accompanying text.