

Taxing Class Size

Alex A. Parkinson

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TAXING CLASS SIZE

Alex A. Parkinson

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Federal courts have increasingly suggested that class actions can be too big. But how should courts restrict class size? To date, courts have relied upon several provisions within Federal Rule of Civil Procedure 23—principally the Rule 23(a)(2) commonality prerequisite and the

Rule 23(b)(3) predominance and superiority requirements—to deny certification to massive class actions. These tools are regulatory in nature: without stating as much, courts set maxima on class size, and classes crossing that line are rejected as too large. The result is a binary certify-or-not proposition. But regulation comes at a price. Precision cost-benefit analysis is both resource-intensive and exceedingly difficult. Thus, wary of class counsels' incentives, courts are more likely to systematically underestimate optimal class size. And, even if courts achieve precision balancing, denying certification to sub-optimally large classes entails denying relief to a multitude of positive-utility plaintiffs—a classic deadweight loss.

Fortunately, regulation is not the only way. Rule 23 contains a handful of latent tax mechanisms—from Rule 23(c)(2)(B)'s notice requirement to Rule 23(h)'s provisions on attorney's fees—that can also restrict class size. For example, courts using their broad discretion to set attorney's fees under Rule 23(h) can impose a progressive fee structure that awards class counsel less for each marginal class member or group of class members. Like Pigouvian taxes, these hidden Rule 23 taxes allow courts to restrict class size by bending self-interested counsels' marginal cost and benefit curves without denying certification to the class writ large. And, like the Pigouvian alternative to regulation generally, taxing class size promises important advantages: it avoids the deadweight loss that accompanies regulatory decision-making, it is information-forcing, and it is "revenue generating" from the perspective of absent class members.

This Article makes three contributions to class action scholarship. First, it introduces a novel regulation-versus-taxation framework, revealing several heretofore-unexamined tax mechanisms within Rule 23. Second, it explores how the Pigouvian alternative yields welfare-enhancing advantages relative to regulation-by-certification. Finally, it considers how this approach to managing class size might impact quickly evolving areas of doctrine.

INTRODUCTION

Inverting the notion of “too big to fail,”¹ many courts have decided that class actions be too big to certify.² Size matters in this context because big classes, particularly those brought under Federal Rule of Civil Procedure 23(b)(3),³ can be difficult to manage and give rise to the “fatal dissimilarit[ies]” amongst unnamed plaintiffs that militate against certification.⁴ Fortunately, Rule 23 expressly trains its sights on these problems: Rule 23(b)(3)’s superiority requirement polices manageability,⁵ while Rule 23(a)’s commonality prerequisite⁶ and Rule 23(b)(3)’s predominance requirement guard class cohesion.⁷ In short, Rule 23 appears to anticipate the problems size can create.

But to some courts, size is a problem in and of itself. The Fifth Circuit has warned that, because multi-million member classes “dramati-

1. “Too big to fail” refers to the notion that certain large financial institutions and related entities must be protected from insolvency because they are so interconnected to the economy that their failure would portend significant economic distress. See Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 231 n.239 (2008).

2. Compare *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (denying class certification via mandamus in part because certification of the putative class seeking billions of dollars in damages would put the defendants “under intense pressure to settle”), with *Klay v. Humana, Inc.*, 382 F.3d 1241, 1274–75 (11th Cir. 2004) (“Mere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit.”). For discussion of whether a class can be too big to certify, see, for example, Alexandra D. Lahav, *The Curse of Bigness and the Optimal Size of Class Actions*, 63 VAND. L. REV. EN BANC 117, 118 (2010) (“Are some classes so big that they *must* fail? Some argue that there is so much at stake for the plaintiffs and the defendants that the class ought not to be certified. If courts refuse to certify classes based on size, either formally or by more stringent application of procedural requirements, then big class actions will fail. Or perhaps big class actions must fall apart because of their own weight; such a large group of plaintiffs can never be sufficiently homogenous to sustain class treatment.”).

3. FED. R. CIV. P. 23(b)(3). This Article concerns only Rule 23(b)(3) and so-called damages class actions. So-called “injunction class actions,” brought under Rule 23(b)(2), generally do not present a similar size. FED. R. CIV. P. 23(b)(2). The nature of an injunction typically does not vary whether a putative class contains 100 or 100,000 members. And while Rule 23(b)(2) classes can also seek damages, they cannot be certified under that provision if that “monetary relief is not incidental to the injunctive or declaratory relief” sought. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

4. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 107 (2009)).

5. FED. R. CIV. P. 23(b)(3); see *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (“While Rule 23(b)(3) sets out four individual factors for courts to consider [for the superiority inquiry], manageability is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication.” (internal quotation marks omitted)); *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“A class action has to be unwieldy indeed before it can be pronounced an inferior alternative.”).

6. FED. R. CIV. P. 23(a).

7. FED. R. CIV. P. 23(b)(3); see *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (predominance “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation”).

cally affect[] the stakes for defendants . . . certification of mass tort litigation classes has been disfavored.”⁸ More directly, the Third Circuit has stated that “the size of the class and number of claims . . . is a factor we weigh in our certification calculus.”⁹ And while other courts have been coy, size often looms in the background.¹⁰ The Eleventh Circuit opined that, “[i]n cases where the defendants’ potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff, we are likely to find that individual suits, rather than a single class action, are the superior method of adjudication.”¹¹ Further, nearly every federal court of appeals permits interlocutory review of a certification order that would sound a “death knell” on the litigation by pressuring the defendants to settle.¹² In other words, class actions are more likely to attract appellate scrutiny if—and merely because—they are big.

The concern is not misplaced. Even ostensibly certifiable class actions—those without manageability concerns and comprised of unquestionably cohesive members—can yield negative externalities. Massive classes typically seek astronomical damages, bringing potentially unbearable settlement pressure upon defendants, which risks over-detering net-beneficial activities.¹³ And, owing in part to their

8. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

9. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 n.8 (3d Cir. 2001).

10. *See, e.g., Parker v. Time Warner Entm’t Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (“It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions.”); *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350–51 (N.D. Ill. 2002) (“approval of a class action could result in statutory minimum damages of over \$19 billion, which is grossly disproportionate to any actual damage”); *Griffin v. GK Intelligent Sys., Inc.*, 196 F.R.D. 298, 305 (S.D. Tex. 2000) (“The Court also concludes that a class action is not the superior procedure for this securities fraud lawsuit because class certification skews trial outcomes and creates insurmountable pressure on defendants to settle, whereas individual trials would not.” (internal quotation marks omitted)).

11. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004) (quoting *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003)).

12. *See, e.g., Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001); *Newton*, 259 F.3d at 162–63 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 145 (4th Cir. 2001); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005); *Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009); *Prado v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99 (D.C. Cir. 2002).

13. *See Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1378 (2000) (“the defendant [will be] bludgeoned into settling [class claims] for more than they are worth” because “class counsel is able to threaten the defendant with a costly and risky trial”); Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003). *But see In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001), *superseded by statute on other grounds*, FED. R. CIV. P. 23(g) (amended 2003), *as recognized in Mazzei v. Money Store*, 829 F.3d 260, 267 n.7 (2d Cir. 2016) (“The effect of certification on parties’ leverage in

size, these classes can be difficult to monitor, raising the specter of agency costs.¹⁴ Nothing in Rule 23, however, expressly directs courts to monitor whether a class is too big.¹⁵

And yet courts routinely lament class size.¹⁶ The class action canon is replete with case law warning against certifying big classes, particularly in light of blackmail settlements and agency costs.¹⁷ Lacking express textual authorization to tackle the “curse of bigness,”¹⁸ courts make do with the tools available. To date, that has entailed tightening the screws on certification by restricting what it means for an issue to be common, for a common issue to predominate, and for a class action to be superior to litigation alternatives.¹⁹ Courts frequently trace the increasingly unforgiving doctrines that animate these textual hooks to

settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification.”).

14. See *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 78 (S.D.N.Y. 2000) (stating that agency costs “often can be far more severe in the class action context, primarily because classes tend to be large, dispersed and disorganized and therefore suffer from a collective action dilemma not faced by individual litigants,” which contributes to “significantly less monitoring of the attorney by the class and consequential[ly] higher agency costs”).

15. Many courts, however, address blackmail settlements and agency costs as issues related to superiority under Rule 23(b)(3). See 2 NEWBERG ON CLASS ACTIONS § 4:81 (“Occasionally, courts will deny class certification on superiority grounds because of the financial consequences of certification.”).

16. See *supra* notes 8–10.

17. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342 (2011) (“We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs . . .”); *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008) (“The class members are interested in relief for the class but the lawyers are interested in their fees, and the class members’ stakes in the litigation are too small to motivate them to supervise the lawyers in an effort to make sure that the lawyers will act in their best interests.”); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 n.8 (3d Cir. 2001) (“Although finding the hydraulic pressure to settle should not dispositively affect a certification decision . . . it should be balanced against the benefits of a class action.”); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (“In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not.”).

18. See generally Lahav, *supra* note 2.

19. See *infra* Part I.B; see also Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 773, 799 (2013) (describing a “heightened scrutiny of commonality” following the Court’s decision in *Wal-Mart*, and an elevated predominance inquiry after the Court’s decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013)).

class size,²⁰ and, where courts are less direct, observant commentators fill in the gaps.²¹

All of this is an unspoken exercise in regulation. Courts establish a rough numerical threshold above which class size is unreasonable. To attain certification, class actions must fit under the limit, which (ideally) represents the point at which the social costs of certification outweigh the benefits. The same process—setting a numerical threshold for the output of a certain product that is (ideally) keyed to cost-benefit analysis and regulating accordingly—is commonplace in the administrative state. Consider, for example, regulations governing the release of polyvinyl chloride (PVC) plastic emissions.²² PVC is socially useful—it is lightweight, flexible, and durable; manufacturers use it to make products that carry water, deliver medicine, and transfer credit through slim cards that fit in our pockets. But PVC emissions are carcinogenic. The Environmental Protection Agency (EPA) has therefore decided that above certain production thresholds the negative externality of air pollution outweighs the social benefits of production; it therefore caps vinyl chloride emissions through various regulatory tools.²³

20. See, e.g., *Comcast*, 569 U.S. at 38 (“The permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless. In light of the model’s inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.”); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) (“The plaintiffs might intend to use their damages model to prove both fact of damages and the measure of those damages. If so, the district court would need enough information to evaluate preliminarily whether the proposed model will be able to establish, without need for individual determinations for the many millions of potential class members, which consumers were impacted by the alleged antitrust violation and which were not.”); *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 174 F.R.D. 332, 351 (D.N.J. 1997) (“Viewing these variations in the context of a case involving five state-law causes of action, the laws of fifty states, and over twenty-three millions plaintiffs, the court must conclude that this suit cannot be practically and efficiently tried as a class action because plaintiffs have not established a predominance of common legal issues as required by Rule 23(b)(3).”).

21. See Lahav, *supra* note 2, at 118 (“Many opponents of the decision to certify the [*Wal-Mart*] class present their arguments as a function of size.”); William H.J. Hubbard, *Optimal Class Size, Dukes, and the Funny Thing About Shady Grove*, 62 DEPAUL L. REV. 693, 693 (2013) (“Can a class be too big to be certified? This question lurks in the background of *Wal-Mart Stores, Inc. v. Dukes*, given that the class as certified by the district court was composed of approximately 1.5 million members.”).

22. See, e.g., *Mexichem Specialty Resins, Inc. v. Env’t Prot. Agency*, 787 F.3d 544, 549 (D.C. Cir. 2015) (discussing an EPA rule that regulates the emission of hazardous air pollutants during the production of polyvinyl chloride, a “versatile” plastic “used in everything from water pipes to credit cards,” the production of which “results in the emission of more than a dozen known or suspected carcinogens”).

23. *Id.* at 550.

Courts similarly cap class size because, at some point, the negative externalities of certification outweigh the accompanying social benefits. But in policing bigness, courts are no more limited to regulation than the government. Just as the federal government can eschew regulations and instead impose tax emissions,²⁴ so too can courts tax class size. In making that case, this Article does not dispute *whether* courts should restrict class size, or even whether class size in fact generates negative externalities that often outweigh the social benefits of certification. Rather, it takes courts' observed preference for smaller classes as a starting point, and from there explores the optimal process for *how* to best restrict class size.

As already discussed, Rule 23 contains latent regulatory mechanisms. It also houses a number of heretofore-unexplored taxes. For example, Rule 23(h) provides that "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."²⁵ This amorphous fee provision affords courts concerned with bigness the discretion to impose a progressive tax on class counsels' fees—entitling counsel to less for each marginal class member. This, in turn, combats counsels' incentive to boost class size by decreasing the marginal benefit of each incremental class member from counsels' perspective. Similarly, courts facing massive classes might deploy a heightened version of the comparably malleable Rule 23(c)(2) notice requirement²⁶—perhaps by requiring greater response rates or additional proof of receipt as class size grows—to increase the marginal cost of the incremental class member from counsels' perspective. The court can use these and other taxes to conform counsels' preferences to its own assessment of optimal class size.

This Article contends that these taxes are often superior to regulation: both approaches restrict class size, but taxing class size does so while better avoiding collateral damage, namely the deadweight loss that accompanies denying certification to the class writ large. To make this argument, Part I presents a model for conceptualizing optimal class size and, importantly, the marginal costs and benefits that result from including the incremental member in a class action. This model builds upon existing class action scholarship in order to illustrate the

24. Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93, 95 (2015) ("A Pigouvian tax is a tax equal to the harm that the firm imposes on third parties. For example, if a manufacturer pollutes, and the pollution causes a harm of \$100 per unit of pollution to people who live in the area, then the firm should pay a tax of \$100 per unit of pollution. This ensures that the manufacturer pollutes only if the value of the pollution-generating activities exceeds the harm, such that the social value of those activities is positive.").

25. FED. R. CIV. P. 23(h) (concerning attorneys' fees).

26. FED. R. CIV. P. 23(c)(2) (concerning class notice).

choices class counsel faces when deciding whether to include an additional plaintiff in a class, as well as the decisions courts must make when reviewing the prudence of counsels' choices. Having established this framework, Part I shows how courts tame bigness by regulating class size.

Part II presents the taxation alternative. In particular, it canvasses Rule 23's latent tax mechanisms, which fall into two categories: some increase the marginal cost of class size, while others decrease the marginal benefit of class size (in both cases from counsels' perspective). Then, relying on the framework set forth in Part I, this Part demonstrates the efficacy of both types of taxes in restricting class size. Part II concludes with the affirmative case for taxing class size: first, compared to regulation-by-certification, taxation avoids the deadweight loss of denying certification to thousands or even millions of net-beneficial class members; second, taxation is information-forcing, allowing courts to precision-calibrate class size with fewer resources; and third, from the perspective of absent class members, taxation is revenue-generating, enabling certification to act as a force multiplier that better realizes the aims of the class device.

Finally, Parts III and IV are forward-looking. The former outlines obstacles and objections to taxing class size and explains how courts might navigate around them. The latter discusses some of the doctrinal consequences that might follow from taxing class size. Most obviously, courts concerned with class size—but unconcerned by a putative class's cohesiveness—should certify and tax. That, in turn, suggests a loosening of prevailing doctrinal standards that govern commonality and predominance in particular.

I. OPTIMAL CLASS SIZE

Class size comes at a cost, but not all costs are not evenly distributed amongst the key players. The asymmetric allocation of costs and benefits explains much of the tug-of-war between counsel and courts over optimal class size. Self-interested attorneys typically prefer bigger classes—each incremental class member carries marginal costs, such as the cost of notice or litigating individualized defenses, but also promises additional settlement leverage and fees. Courts tend to prefer smaller classes—each incremental class member promises the marginal benefit of greater deterrence, but also risks over-deterrence and additional administrative burden. This decoupling of private and social cost-benefit analyses causes counsel to propose classes that courts often deem too big to certify. Courts regulate accordingly.

In making these points, this Part proceeds in three moves: First, Section I.A establishes a model for conceptualizing class size. This framework illustrates the aforementioned decoupling of private and social costs and benefits. Second, Section I.B maps the courts' command-and-control response to this decoupling. Specifically, this Section describes how some courts have used contemporary commonality, predominance, and superiority doctrines to regulate bigness where the social costs of class size outweigh the social benefits. Third, Section I.C argues that this regulation is not itself costless. As in any field of administration, regulation carries its own costs and benefits. And even in the best case, regulating class size—which entails denying certification to overpopulated classes—risks costly under-deterrence and administrative errors.

A. Modeling Class Size

1. Conceptualizing Class Size: Private Costs and Benefits

The model begins with an uncontroversial assumption: attorneys build class actions.²⁷ The composition of a class therefore reflects counsels' self-interested cost-benefit analysis. When building a class, counsel must make numerous decisions—not least among them, how to define the class, which determines class size.²⁸ For example, a class might include all customers allegedly injured by a defective product before July 1, 2017, or before July 1, 2018; an antitrust class action might include only direct purchasers, or also downstream customers; a securities class action could include all shareholders who purchased stock between September 1 and September 6, or September 1 and October 6; a mass-tort class might include claimants from just one state, or from several. Each of these decisions, big and small, affect class size.

27. See John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice"*, 30 *CARDOZO L. REV.* 407, 411 (2008) ("the plaintiff's attorney can behave less as an agent serving a principal and more as an independent entrepreneur, one who in fact often hired the client"); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 *U. CHI. L. REV.* 877, 885 (1987) ("[T]he most basic characteristic of a market is lacking within the context of entrepreneurial litigation because the buyer does not shop for legal services. Rather than the 'principal' hiring the 'agent,' the reverse often occurs with the attorney finding the client after the attorney first researches and prepares the action.").

28. See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 *COLUM. L. REV.* 288, 296–97 (2010) ("in the typical class action in the United States, a plaintiffs' attorney will file a complaint that may broadly define the class to consist of thousands of persons and entities, without the attorney having the prior consent of more than the attorney's individual client").

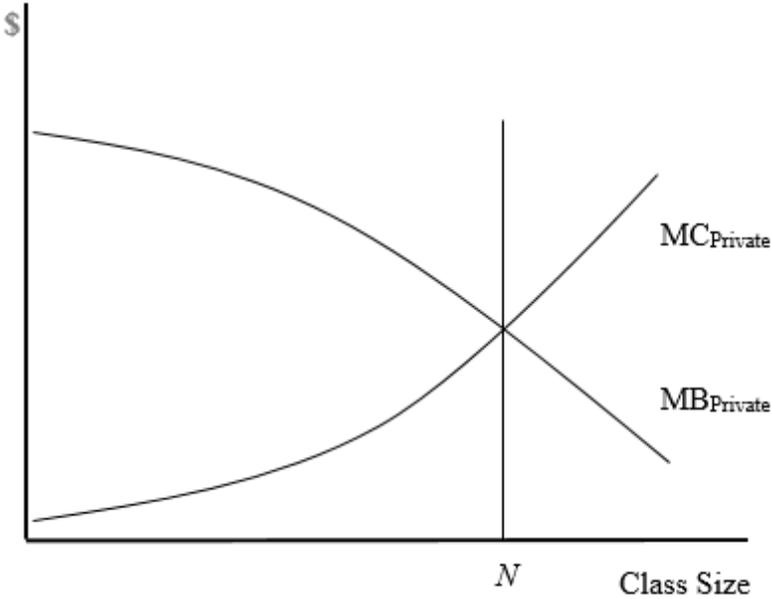
Rational class counsel will define the class to include every claimant for whom the marginal benefit of inclusion outweighs the marginal cost. From counsel's perspective, the marginal benefit of the incremental class member is counsel's fee from (or attributable to) that claimant. Costs are more complicated. Excluded are certain *fixed costs* that do not vary with class size—for example, the costs of litigating common issues or filing a complaint. Whether a class alleging violations of antitrust law contains 100 or 100,000 members, the cost of proving the existence of a conspiracy will not vary significantly; nor will the filing fee charged by the court.²⁹ Other costs, however, vary with class size—for instance, the cost of litigating an individualized defense or issuing notice to a remote and hard-to-locate plaintiff. These are *marginal costs*.

The model next assumes that rational class counsel will—if armed with perfect information—seek to include plaintiffs with higher associated marginal benefits and lower associated marginal costs before including lower-value claimants. This can be represented graphically by arraying potential class members along a spectrum beginning with those carrying the highest marginal benefits and lowest marginal costs, proceeding to those with dwindling marginal benefits and escalating marginal costs.³⁰ From counsel's perspective, ideal class members have significant damages, present minimal individualized defenses, and are easy to locate. Counsel must then decide whether to add incremental class members to this high-value core:

29. See *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) (existence of antitrust conspiracy is common across the class); *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 335 (E.D. Pa. 1976) (“[P]rice-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy.”); see also 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1781 (3d ed. 2014) (“whether a conspiracy exists is a common question”).

30. The ensuing discussion borrows from Professor Hubbard's excellent essay, *Optimal Class Size, Dukes, and the Funny Thing About Shady Grove*, which explains: “One can therefore array the potential class members in the order that they would be added to a class. When searching for claimants to form a class, one would initially choose to add those claimants with the highest marginal benefits and lowest marginal costs.” Hubbard, *supra* note 21, at 697. Professor Hubbard's model builds upon one developed by Professors David Betson and Jay Tidmarsh in *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 GEO. WASH. L. REV. 542 (2011), from which the ensuing discussion also borrows.

FIGURE 1: Marginal Private Costs and Benefits of Class Size



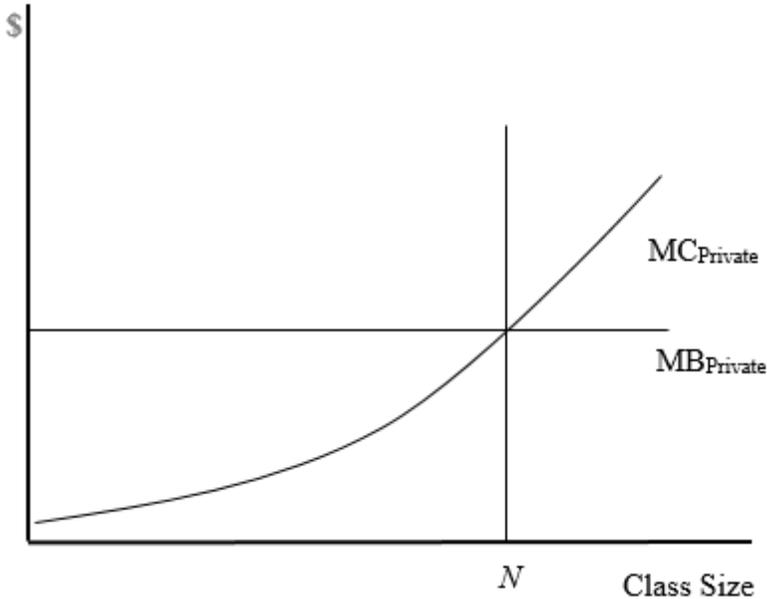
In Figure 1, the marginal cost curve increases because, as mentioned, counsel will build the class around highly similar, readily identifiable plaintiffs who risk minimal individualized defenses.³¹ Each incremental class member carries greater litigation costs, notice costs, and so forth. Meanwhile, the marginal benefit curve decreases because counsel will simultaneously build the class around plaintiffs with significant damages claims—and thus fees—relative to anticipated litigation costs. Counsel will cease adding to the class at point N , where, from counsel’s perspective, the marginal cost of the incremental class member outweighs that individual’s anticipated marginal benefit.³²

31. There is, surprisingly, a dispute in the optimal-class-size literature over whether marginal costs increase or decrease. Contrary to conventional economic wisdom, Betson and Tidmarsh “assume that the marginal cost of adding new class members is generally falling.” Betson & Tidmarsh, *supra* note 30, at 551. They explain: “A principal component of the cost of litigating the action is the cost of the initial discovery, which is the same whether the case involves one or N plaintiffs. Although costs might increase somewhat as the size of the class increases . . . economies of scale are likely to offset these increases.” *Id.* at 552. Hubbard, by contrast, argues that “[o]nce fixed costs are separate from marginal costs, we should expect that the marginal cost associated with adding additional plaintiffs should rise (or at least not fall) as the size of the class increases.” Hubbard, *supra* note 21, at 698 n.19. Professor Hubbard is correct. What Professors Betson and Tidmarsh identify as declining marginal costs are in fact declining average total costs, a calculus that includes the fixed costs of initial filing, discovery, and so forth.

32. See Betson & Tidmarsh, *supra* note 30, at 554 (“Once we have created a group of size X , a class should continue to add members as long as the benefit of adding another class member exceeds the cost of doing so It should stop adding class members once the cost of adding another class member exceeds the benefit from doing so”).

Certainly, marginal benefit does not always decrease. For class actions alleging statutory damages in particular, marginal benefit does not vary:

FIGURE 2: Marginal Private Costs and Benefits of Class Size (Statutory Damages)



But, as Figure 2 illustrates, the outcome is the same: counsel will add to the class until the marginal cost of the incremental class member outweighs that individual's marginal benefit—again, all from counsel's perspective (i.e., balancing fees against litigation costs). The intersection of these curves, N , is counsel's optimal class size.

2. The Courts' View: Social Costs and Benefits

Where attorneys build, courts review. And the judiciary balances markedly different costs and benefits than counsel.³³ In particular, courts weigh the *social* costs and benefits of certification, many of which are, like their *private* cousins, marginal and vary with class size.

33. Some courts construe the Rule 23(b)(3) superiority requirement as a pseudo cost-benefit analysis requirement. *See, e.g.*, *Singleton v. United States*, 92 Fed. Cl. 78, 86 (2010) ("The court essentially conducts a cost-benefit analysis, weighing any potential problems with the manageability or fairness of a class action against the benefits to the system and the individual members likely to be derived from maintaining such an action.") (internal quotation marks omitted); *In re Netbank, Inc., Sec. Litig.*, 259 F.R.D. 656, 667 (N.D. Ga. 2009) ("The key to certification of a class under Rule 23(b)(3) is whether the efficiency and economy of class adjudication outweighs the difficulties and complexity of individual adjudication.").

Before turning to those social costs and benefits, note that the ensuing discussion excludes from consideration the amount that class members (and their counsel) might recover from defendants. These recoveries do not represent a social cost or benefit; they are a wealth transfer between private parties.³⁴ Other costs and benefits, however, are shared by society writ large.

a. Marginal Social Benefits

The principal social benefit of class size is deterrence.³⁵ Incremental claimants add damages to the aggregate claim, making it more likely that defendants will internalize the full social costs of their behavior.³⁶ Assuming the accuracy of the underlying cost-benefit analysis, this is to society's benefit. For example, absent regulation, a PVC factory that pollutes the air at a social cost of $2x$ in order to realize a private gain of x will cease its welfare-reducing behavior only if it faces liability equal to or greater than x . The larger a class of injured plaintiffs—perhaps individuals who inhaled polluted air and developed some sickness or other injury—the greater the probability that the factory faces liability at or beyond x . That, in turn, benefits members of society who lack a sufficient claim, but who are affected by the factory's negative externalities.

Each class member's contribution to this social good varies. The deterrent effect of the 1000th class member is not equal to that of the 2,000th class member. Returning to the PVC factory, optimal deterrence depends upon forming a class with expected damages that equal or exceed x . Deterrence is thus achieved by a class that attains damages of x or $x+1$. Beyond that point, each marginal class member dwindles in deterrent value. Although a would-be wrongdoer is perhaps more likely to restrain itself as prospective class size swells from 10,000 to 10,001, it is even more likely to restrain itself as prospective

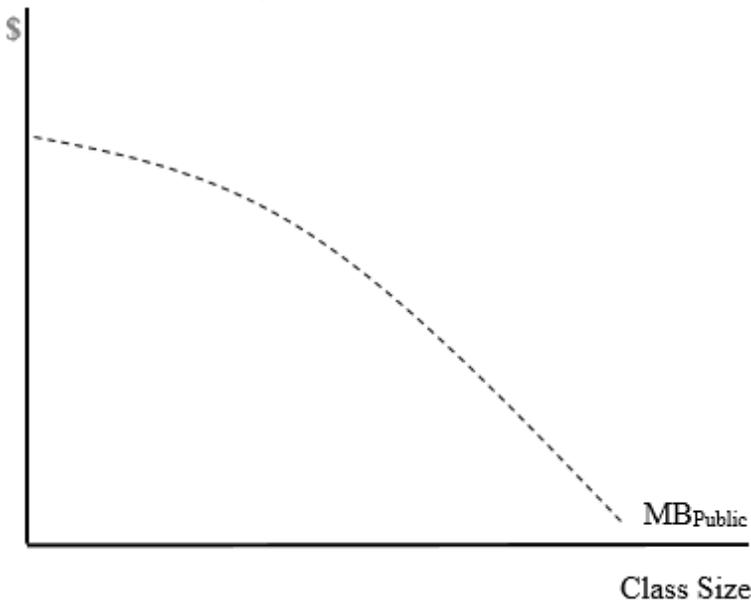
34. Although one could argue that retributivism carries an inherent social benefit, such a benefit—could it be measured—would be closer to a fixed benefit that does not vary by class member. Cf. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) (discussing this view of the class device and arguing that “[a]ll that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions”).

35. See *id.* at 139 (arguing that “the primary goal in small-claims class actions is deterrence, and that the only question we should ask with respect to any rule or reform proposal in this area is whether it promotes or optimizes deterrence”); RICHARD A POSNER, *ECONOMIC ANALYSIS OF LAW* 626–27 (5th ed. 1998) (“the most important point [of a class action] from an economic standpoint is that the violator be confronted with the costs of his violation—this achieves the allocative purpose of the suit—not that he pays them to his victims”).

36. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

class size swells from 1 to 10,000. In other words, incremental class members afford declining deterrent weight:

FIGURE 3: Marginal Social Benefits of Class Size



Missing from this deterrence-centric analysis are administrative benefits. In addition to deterrence, class actions yield certain judicial efficiencies.³⁷ As class actions aggregate more and more claims into a single proceeding, courts avoid the costs of overseeing a multitude of individual trials. That, in turn, frees courts to administer justice in unrelated cases more expeditiously. But this docket-clearing social benefit also declines with each incremental class member. Recall that rational counsel includes high-value claims in its class before low-value claims. As a result, each incremental claim is less likely than the one before it to be economically viable absent certification.³⁸ Society

37. See *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (noting that the “class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting [many parties] to be litigated in an economical fashion under Rule 23”); *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 307 (1973) (“Class actions were born of necessity. The alternatives were joinder of the entire class, or redundant litigation of the common issues. The cost to the litigants and the drain on the resources of the judiciary resulting from either alternative would have been intolerable.”).

38. See *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”); see also Jay Tidmarsh, *Superiority as Unity*, 107 Nw. U. L. REV. 565, 570 n.19 (2013) (“In a negative-value—or large-scale, small-claim—case, the costs of individual litigation for a plaintiff exceed the value of the claim, essentially making the claim

does not realize judicial-efficiency gains by aggregating claims that would be too small to clog courts on their own.

b. Marginal Social Costs

Class actions also generate negative externalities on society writ large. A review of the case law shows that courts frequently consider three marginal social costs attendant to class size: over-deterrence, agency costs, and administrative costs—each reviewed in detail in the pages that follow. As was the case with counsels' cost curve, each of these social costs increases with the incremental class member.

First, large class actions risk over-deterrence.³⁹ As classes grow, defendants are more likely to settle unmeritorious claims to avoid ruinous liability.⁴⁰ Such *in terrorem* settlements can be welfare-reducing: settlement pressure unmoored from the merits deters would-be defendants from engaging in welfare-enhancing or net-beneficial behavior that risks inviting such pressure in the first instance.⁴¹ For example, the PVC factory might decline to pollute at a social cost of x to generate $5x$ in wealth if it would face a class claiming $10x$ in damages. But society would be better off by allowing the factory to generate $5x$, and then taxing it x or $x+1$ to cover cleanup and other remedial costs. Eschewing this first-best solution yields over-deterrence. Certainly, would-be defendants are properly deterred if the risk of meritorious claims influences their actions. Society is better off when these actors

worthless. Class actions, which aggregate many such claims, can make the case financially worthwhile.”); Brian Wolfman & Alan B. Morrison, *What the Shutts Opt-Out Right Is and What It Ought to Be*, 74 UMKC L. REV. 729, 743 (2006) (“In ‘negative-value,’ small-claims damages class actions, class members rarely opt out because litigating individually would be economically irrational.”).

39. See Noah Smith-Drelich, *Curing the Mass Tort Settlement Malaise*, 48 LOY. L.A. L. REV. 1, 19 (2014) (“[O]ver-deterrence will result if plaintiffs are permitted to craft classes that include unlike claims, compelling defendants (who lose) to pay for the claims of class members whom they may not have wronged.”).

40. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (“Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action ‘blackmail settlements.’”); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784–85 (3d Cir. 1995) (vacating a certification order and observing that “class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims’ actual worth”).

41. See *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167–68 & n.8 (3d Cir. 2001) (“The Supreme Court has also recognized the dynamic pressure certification sets in motion. The Court has observed that certification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense. Certifying this class raises a similar concern because the size of the class and number of claims may place acute and unwarranted pressure on defendants to settle.”) (internal quotation marks, citation, and brackets omitted).

internalize the costs they would owe as damages in individual litigation. But would-be defendants that are compelled to act or not to act in a certain manner owing to the risk of unmeritorious claims can become sub-optimally over-deterred.

This social cost increases with each incremental class member. Recall that counsel—acting rationally—includes strong and meritorious claims in its class before claims that are more difficult and costly to prove. In other words, each incremental class member is less likely to hold a meritorious claim against the defendant than the one before it. Yet, at the same time, each incremental class member also increases aggregate damages.⁴² Thus, incremental class members simultaneously reduce the overall merit of the class and increase its aggregate damages—the twin components of over-deterrence.

Second, agency costs increase with class size.⁴³ As a class grows, counsel can devote less time to each individual claimant, group of plaintiffs, theory of the case, and so forth. At the same time, growth makes it more difficult for any single plaintiff to monitor class counsels' conduct and representation of the class.⁴⁴ Indeed, incremental class members are incentivized to free ride on each other's monitoring capabilities.⁴⁵ These factors together foster principal-agent problems. And those problems represent a greater social ill than a mere wealth transfer from the class to counsel. In particular, as a class sprawls and counsel becomes more difficult to monitor, it becomes easier for defendants to negotiate collusive settlements.⁴⁶ This other side of the

42. Although, as previously mentioned, not evenly so.

43. See, e.g., *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 446 (3d Cir. 2016) (“A primary concern about class action settlements is that unmonitored class counsel may have incentives to sell out the class's interests in return for a large fee.” (internal quotation marks and brackets omitted)); *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 745 (7th Cir. 2008) (“The judge who presides over the class action and must approve any settlement is charged with responsibility for preventing the class lawyers from selling out the class, but it is a responsibility difficult to discharge when the judge confronts a phalanx of colluding counsel.”).

44. See *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 78 (S.D.N.Y. 2000) (stating that agency costs “often can be far more severe in the class action context, primarily because classes tend to be large, dispersed and disorganized and therefore suffer from a collective action dilemma not faced by individual litigants,” which contributes to “significantly less monitoring of the attorney by the class and consequential[ly] higher agency costs”).

45. See Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1636 (2008) (“The lawyer acts as a faithless agent when she pursues her own interests at the expense of her client's. This is a particular problem in class action litigation because there are so many putative principals This sometimes results in, for example, class counsel negotiating low settlements in exchange for defendants' payment of relatively high attorneys' fees.”).

46. See *Thorogood*, 627 F.3d at 294 (“The defendant wants to minimize outflow of expenditures and the class counsel wants to increase inflow of attorneys' fees. Both can achieve their goals if they collude to sacrifice the interests of the class.” (internal quotation marks omitted));

blackmail-settlement coin—sweetheart settlements—can also harm society writ large by selling out meritorious claims and fostering under-deterrence. Our now-familiar PVC factory will cause $5x$ in social harm to generate a mere x in wealth as long as it can settle related litigation for less than x . The risk of this outcome increases with each incremental class member: each new claimant dilutes monitoring and augments claim diversity at a greater rate than the immediately preceding claimant.

Third, class actions can drain certain judicial resources. Although aggregate litigation promises efficiencies, it can also be burdensome on the courts—class actions demand considerable time and decisional power, straining a court’s ability to promptly resolve other cases before it.⁴⁷ This cost, which class actions impose on society as a whole,⁴⁸ also increases with each incremental class member. It is more likely that class members comprising the initial nucleus of the class action—those with very strong claims for significant damages—would have sought judicial relief in individual proceedings than each incremental class member, who likely would not demand the judiciary’s attention but for their inclusion in a class.⁴⁹ From the perspective of judicial efficiency, these claims are more cost than benefit.

These three increasing marginal social costs yield the following cost-benefit relationship, where n is the socially optimal class size:

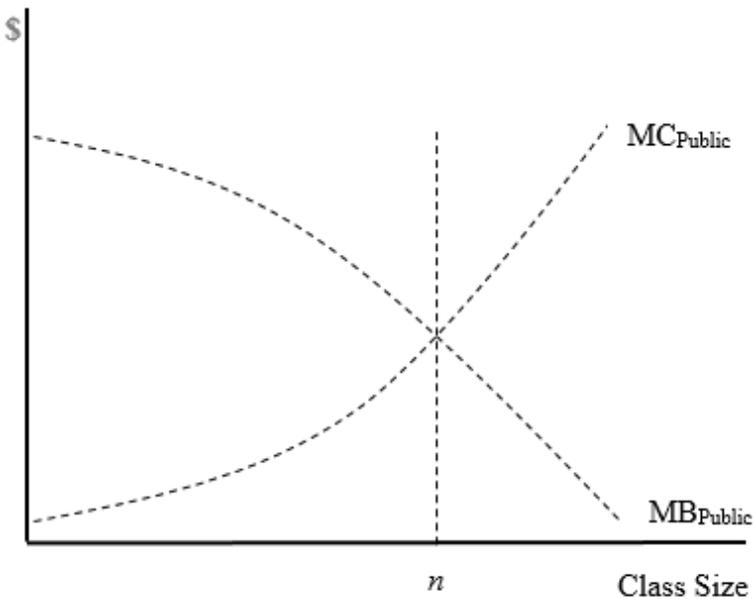
Hay & Rosenberg, *supra* note 13, at 1390 (“the defendant and the class counsel have a joint incentive to negotiate a settlement that gives the class counsel a generous attorney’s fee, but gives the class members less than the fair value of their claims”).

47. See *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 313 (7th Cir. 1980) (discussing “the strain [class] litigation imposes upon already scarce judicial resources”); *Austin v. Pennsylvania Dep’t of Corr.*, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995) (discussing “the extraordinary amount of judicial and private resources consumed by massive class action litigation”).

48. *Cf. New York State Teachers’ Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 241 (E.D. Mich. 2016), *aff’d sub nom. Marro v. New York State Teachers’ Ret. Sys.* No. 16-1821, 2017 WL 6398014 (6th Cir. Nov. 27, 2017) (“there is a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources”).

49. See *supra* note 38.

FIGURE 4: Marginal Social Costs and Benefits of Class Size

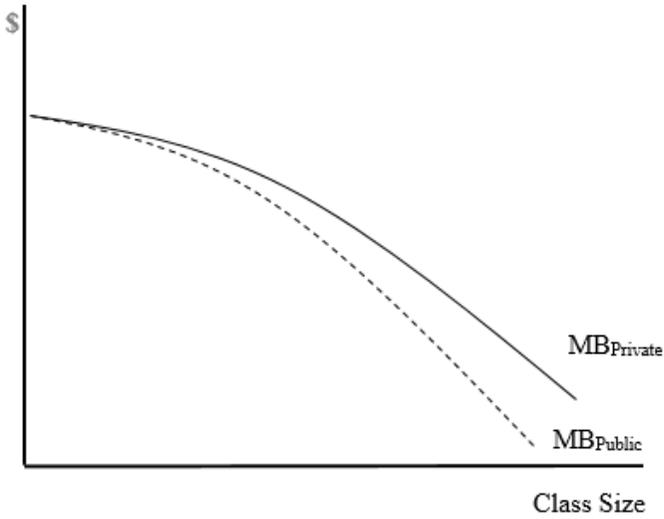


As with counsels' cost-benefit analysis, society's optimal class size lies where the marginal cost and benefit curves intersect. Beyond this point, n , the incremental class member imposes greater costs on society than it offers benefits in return.

3. *Private vs. Social Cost-Benefit Analysis*

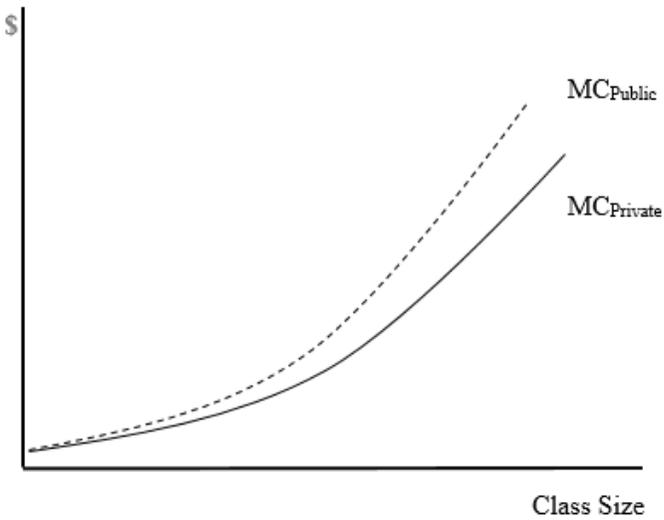
The foregoing cost-benefit analyses are facially similar—both yield increasing marginal costs and decreasing marginal benefits—but their inputs bear little overlap. This discrepancy explains why counsel often proffers larger classes than courts prefer to certify: the marginal benefits of class size fall at a slower rate from counsel's perspective than they do from society's perspective. Importantly, counsel benefits when society benefits—class litigators, like everyone else, are better off when would-be bad actors are deterred. But society does not capture counsels' private benefit in the form of fees. Accordingly, counsels' marginal private benefit curve outpaces courts' marginal social benefit curve:

FIGURE 5: Comparative Marginal Private and Social Benefits of Class Size



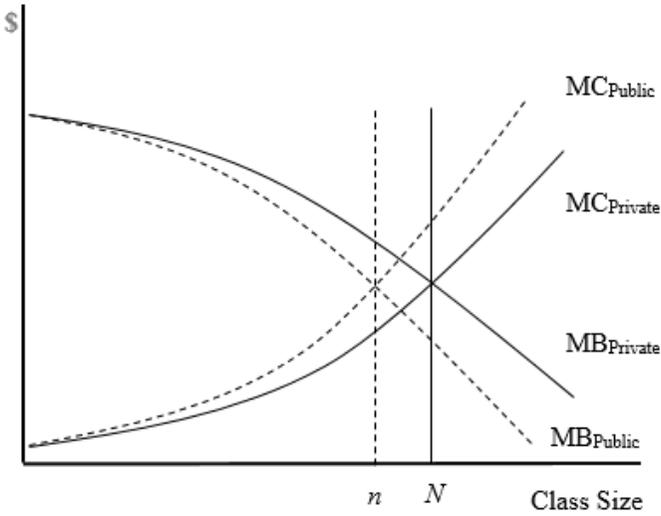
Similarly, the marginal costs of class size increase at a greater rate from society’s perspective than they do from counsels’ perspective. Both shoulder the burden of litigating increasingly remote and hard-to-prove claims, but class counsel does not share in the agency costs from which it is, instead, a direct beneficiary. As a result, the judiciary’s marginal cost curve systematically outpaces counsels’ marginal cost curve:

FIGURE 6: Comparative Marginal Private and Social Costs of Class Size



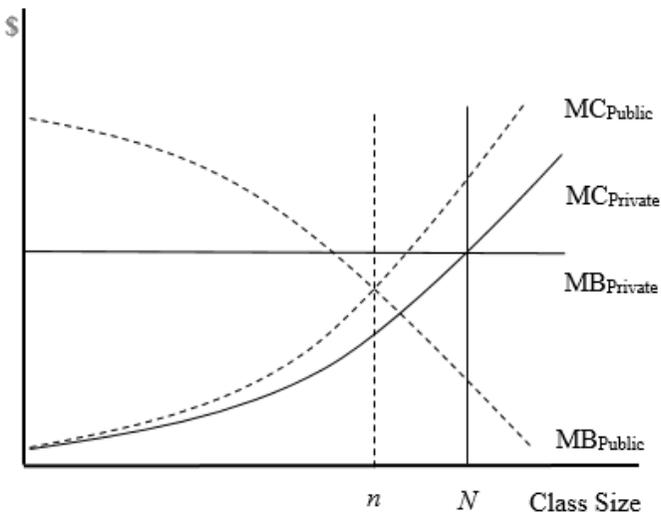
Overlaying these utility curves yields the following relationship between counsels' optimal class size (N) and the judiciary's optimal class size (n):

FIGURE 7: Private (N) and Social (n) Optimal Class Size



The resultant gap in optimal class size is often even wider in the context of statutory damages, where marginal private benefits do not decrease:

FIGURE 8: Private (N) and Social (n) Optimal Class Size (Statutory Damages)



This helps explain why, from the judiciary's perspective, class size is often particularly exaggerated in the context of class seeking statutory damages. Although other factors are at play, counsels' static marginal benefit is part of the story.

In any event, counsels' preferred class size is typically greater than the judiciary's optimum. Of course, courts frequently agree to certify even very large class actions—suggesting some rough alignment between counsels' preference and the reviewing court's optimal class size—just as they occasionally decline to certify classes that are too small.⁵⁰ But experience confirms the foregoing graphical delta—the gulf between N and n in Figures 7 and 8—as a general proposition. One need not comb the federal reporters or scholarly annals to locate critiques of class counsel as interested primarily in accruing greater fees by amassing enormous classes at the expense of absent class members.⁵¹ Regardless of whether this is in fact the case, courts act as though it is with sufficient frequency to merit an investigation into how they respond.

B. *Command-and-Control Regulation*

Courts regulate class size using a variety of tools within Rule 23 that can cap class size at the judiciary's optimum. This Section considers three: the Rule 23(a) commonality prerequisite,⁵² and the Rule 23(b)(3) predominance and superiority requirements.⁵³ Each provision affords courts the opportunity to tighten certification standards

50. See FED. R. CIV. P. 23(a)(1); see also *Gen. Tel. Co. of the N.W., Inc. v. EEOC*, 446 U.S. 318, 330 (1980); *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1051–52 (9th Cir. 2003) (“The Supreme Court has held fifteen is too small.”).

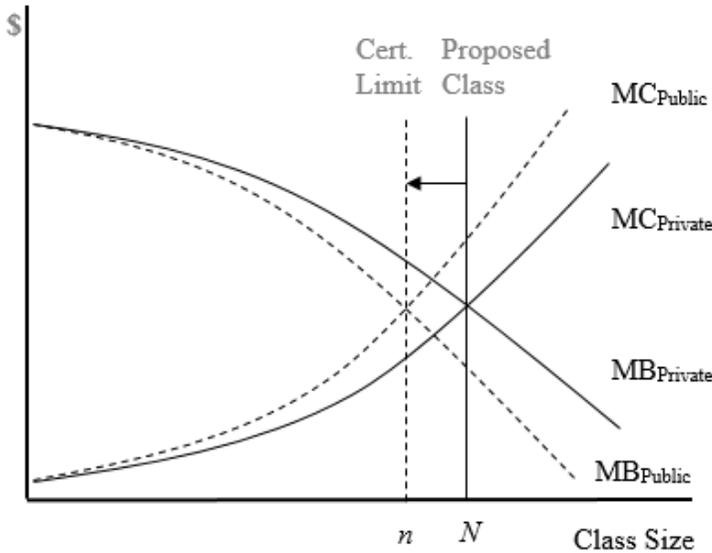
51. See, e.g., *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014) (declining to approve class settlement and observing that “[u]nheeded was our warning that because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole” (internal quotation marks omitted)); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1170 (2009) (“When self-interested class representatives and self-interested class counsel seek class status, however, their interests are not the interests that society hopes to vindicate through the (b)(3) class action. The class representative seeks to maximize the value of the claim, and class counsel seeks to maximize the value of the fee. Neither the representative nor the counsel has the goal of achieving optimal deterrence or reducing litigation costs as such.”).

52. FED. R. CIV. P. 23(a) (conditioning certification on the presence of “questions of law or fact common to the class”).

53. FED. R. CIV. P. 23(b)(3) (providing for certification of damages class only where “the questions of law or fact common to the class predominate over any questions affecting only individual members”).

through doctrinal pronouncements that—directly or indirectly—target class size by setting rough certification limits:

FIGURE 9: Regulating Class Size



In Figure 9, the court tethers the certification limit to its assessment of the socially optimal class size (n). It denies certification to classes that exceed this threshold, e.g., counsels’ preferred class size in this stylized example (N), on commonality, predominance, or superiority grounds. Counsel is therefore required to seek certification on behalf of a smaller class (less than or equal to n) or abandon the effort altogether. Courts achieve this result by tightening the commonality, predominance, and superiority standards, pulling—or even setting—the certification limit closer to n (and away from N).

1. Commonality

Rule 23(a) limits certification to class actions that raise “questions of law or fact common to the class.”⁵⁴ Without teeth, nearly every class action would satisfy a weak-form of commonality merely by raising the common question of whether the defendant caused each class member’s alleged injury.⁵⁵ But contemporary jurisprudence of course gives commonality more bite. In *Wal-Mart Stores, Inc. v. Dukes*⁵⁶ the

54. FED. R. CIV. P. 23(a)(2).

55. See Nagareda, *supra* note 4, at 131–32 (“Any competently crafted class complaint literally raises common ‘questions.’”).

56. 564 U.S. 338 (2011).

Supreme Court gave that bite force, instructing that commonality requires a “common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”⁵⁷ Therefore, under *Wal-Mart*, what matters is not raising common questions, but posing questions capable of generating common answers central to the litigation.⁵⁸

Although not explicit, much of *Wal-Mart* can be read as a rebuke of class size. Justice Antonin Scalia, writing for the Court, opened with a commentary on the sprawling scope of the multi-million-member class.⁵⁹ This echoed Judge Sandra S. Ikuta’s concern—expressed in her dissent from the Ninth Circuit’s decision affirming the certification order below—that the *Wal-Mart* class was uncommonly big.⁶⁰ This background concern might shed light on why the *Wal-Mart* majority began with Rule 23(a)—or even addressed it at all⁶¹—given the Court’s unanimous agreement that the class independently failed on Rule 23(b)(2) grounds.⁶² Only the commonality holding allowed the majority to tighten certification standards for large class actions to come.⁶³

In any event, and regardless of the Court’s motives, *Wal-Mart* raises the commonality bar for large class actions in particular. As a class grows, the common questions that ostensibly unite its members are

57. *Id.* at 350.

58. *Id.* (“What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”).

59. *Id.* at 342 (“We are presented with one of the most expansive class actions ever.”).

60. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 628 (9th Cir. 2010) (Ikuta, J., dissenting), *rev’d*, *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011) (“No court has ever certified a class like this one, until now. And with good reason. In this case, six women who have worked in thirteen of Wal-Mart’s 3,400 stores seek to represent every woman who has worked in those stores over the course of the last decade—a class estimated in 2001 to include more than 1.5 million women.”).

61. See Klonoff, *supra* note 19, at 774 (noting that “the Court’s resolution of the (b)(2) issue made it unnecessary for the Court to consider commonality”).

62. See *Wal-Mart*, 564 U.S. at 367–68 (Ginsburg, J., dissenting in part and concurring in part) (“The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available.”).

63. Klonoff, *supra* note 19, at 775 (“Thus, under the *Dukes* formulation, it is not enough that the question is common; rather, the question must be essential to the outcome of the case.”); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 463 (2013) (“Prior to *Dukes*, federal courts had embraced a view of commonality . . . seen as easy to satisfy, with the necessary showing begin characterized as ‘minimal’ and permissively construed.”).

less likely to “be of such a nature that it is capable of classwide resolution” so that “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”⁶⁴ As the Court recognized, more claimants means more variety—both with respect to the nature of the injury alleged and individualized defenses, among other things.⁶⁵ Punishing variety by tightening commonality incentivizes counsel to craft smaller class actions or risk sacrificing certification altogether.

2. *Predominance*

Similarly, the Court has raised the hurdle for finding “that the questions of law or fact common to class members predominate over any questions affecting only individual members.”⁶⁶ In *Comcast Corp. v. Behrend* the Supreme Court advised that “Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a)” and the “rigorous analysis” inherent to the commonality inquiry.⁶⁷ Once again, Justice Scalia, writing for the majority, expressly acknowledged the size of the multi-million-member class.⁶⁸ And, as commentators and courts remarked in the wake of *Comcast*, the Court appears to have gone out of its way to avoid deciding the predominance issue on narrow antitrust grounds.⁶⁹

Indeed, it appears that whether to certify the *Comcast* class—which alleged that the defendant cable provider had engaged in anticompetitive clustering of network assets in violation of federal antitrust law⁷⁰—could have been decided on the ground that the class had

64. *Wal-Mart*, 564 U.S. at 350.

65. *Id.* at 349–50 (“Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor.” (internal quotation marks and citation omitted)).

66. FED. R. CIV. P. 23(b)(3).

67. 569 U.S. 27, 34 (2013).

68. *Id.* at 29 (“The District Court and the Court of Appeals approved certification of a class of more than 2 million current and former Comcast subscribers who seek damages for alleged violations of the federal antitrust laws.”).

69. *See, e.g.,* *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) (holding that *Comcast* did not affect certification of a consumer class action and distinguishing the Court’s holding on the ground that “*Comcast* was an antitrust suit”).

70. *Comcast*, 569 U.S. at 29–30.

failed to establish common antitrust injury.⁷¹ Picking up on this point, the dissent approached the case as one that turned on basic principles of antitrust law, not class action doctrine.⁷² The majority, however, came close to holding that individualized damages issues preclude class certification in all instances, antitrust or not.⁷³ Although several courts have since cabined *Comcast* to the antitrust context,⁷⁴ others have credited it as tightening predominance across the board.⁷⁵

71. The Court need not have opined on predominance *generally* in order to reach its preferred disposition. Traditionally, predominance entails a two-step inquiry: first, the court must “characterize the issues in the case as common or individual”; second, the court must “weigh which [issues] predominate.” 2 NEWBERG ON CLASS ACTIONS § 4:50. This process entails scrutinizing the plaintiffs’ causes of action to determine whether the common issues are likely to predominate at trial. See *McCarthy v. Kleindienst*, 741 F.2d 1406, 1412–13 (D.C. Cir. 1984). For example, in the context of a class action alleging fraud, the reliance element typically predominates. 2 NEWBERG ON CLASS ACTIONS § 4:58 (collecting cases). In the antitrust context, antitrust injury—whether the alleged antitrust violation in fact caused the alleged injury, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)—typically predominates. See, e.g., *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) (“In antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.”); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815–16 (7th Cir. 2012); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 328 (5th Cir. 1978). The Court therefore could have limited *Comcast* to the antitrust context—holding, for instance, that the plaintiffs failed to produce a common method of establishing antitrust injury across the class, which is fatal because antitrust injury predominates. Instead, the Court opined on “damages” generally. *Comcast*, 569 U.S. at 34 (“[Plaintiffs] cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.”). And, as the dissent observed: “Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well-nigh universal.” *Id.* at 42 (Ginsburg, J., and Breyer, J., dissenting).

72. *Comcast*, 569 U.S. at 34 (“This case thus turns on the straightforward application of class-certification principles; it provides no occasion for the dissent’s extended discussion of substantive antitrust law.” (internal citation omitted)).

73. *Id.* at 38 (“In light of the model’s inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.”).

74. See, e.g., *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013); *Barbosa v. Cargill Meat Solutions Corp.*, 2013 WL 3340939, at *9 n.2 (E.D. Cal. July 2, 2013) (“Plaintiffs assert that *Behrend* is distinguishable from a wage-and-hour class action case such as this, and is not applicable to the certification of the settlement class at issue here. Specifically, Plaintiffs assert that this case is susceptible to awarding damages on a classwide basis and unlike in *Behrend*, there is no damages model that improperly measures a broader pool of damages that conflict with a more narrowly defined class. The Court finds that Plaintiffs have adequately distinguished *Behrend*, and its holding does not preclude certification of a settlement class under the circumstances of this case.”).

75. See, e.g., *Smith v. Family Video Movie Club, Inc.*, 2013 WL 1628176, at *10 (N.D. Ill. 2013) (declining to certify a non-antitrust class because, after *Comcast*, “damages must be susceptible to measurement across the entire class, and individual damage calculations cannot overwhelm questions common to the class”); *Bright v. Asset Acceptance, LLC*, 292 F.R.D. 190, 202 (D. N.J. 2013); *Verma v. 3001 Castor, Inc.*, 2014 WL 2957453, at *15 (E.D. Pa. June 30, 2014); see also *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013) (“Before *Behrend*, the case law was far more accommodating to class certification under Rule 23(b)(3).”).

Following *Comcast*, the predominance requirement affords courts another mechanism with which to regulate class size. Even more so than commonality, predominance offers courts a means to regulate class actions for which defendants might plausibly offer individualized defenses—a phenomenon more likely as class size increases. True to form, *Comcast* is frequently cited in decisions denying certification to some of the very largest class actions filed to date.⁷⁶ At a minimum, *Comcast* provides courts a regulatory tool to deploy hydraulically in response to class size. In other words, the Court's holding is sufficiently ambiguous vis-à-vis individualized damages that it can be strategically deployed where class size raises concerns. As the Seventh Circuit opined following (and citing) *Comcast*:

Predominance of issues common to all class members, like the other requirements for certification of a suit as a class action, goes to the efficiency of a class action as an alternative to individual suits. If resolving a common issue will not greatly simplify the litigation to judgment or settlement of claims of hundreds or thousands of claimants, the complications, the unwieldiness, the delay, and the danger that class treatment would expose the defendant or defendants to settlement-enforcement risk are not costs worth incurring.⁷⁷

Comcast thus affords concerned courts a plausible means to regulate size for its own sake.

3. Superiority

Finally, courts have long turned to the Rule 23(b)(3) superiority requirement to regulate class size. These efforts are particularly salient in the context of class actions that seek statutory damages.⁷⁸ In *Ratner v. Chemical Bank New York Trust Co.*, for example, the Southern District of New York confronted a class action claiming statutory damages under the Truth in Lending Act (TILA),⁷⁹ related to the

76. See, e.g., *In re Rail Freight Fuel Surcharge*, 725 F.3d at 382 (vacating and remanding order certifying class of more than 15,000 rail-freight customers for reconsideration in light of *Comcast*); *In re Processed Egg Prod. Antitrust Litig.*, 312 F.R.D. 124, 133 (E.D. Pa. 2015) (denying certification to “tens of thousands” of direct purchasers on predominance grounds in light of *Comcast*).

77. *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014).

78. See, e.g., *Anderson v. Capital One Bank*, 224 F.R.D. 444, 453 (W.D. Wis. 2004) (denying certification where “[t]he potential damages for such a class are wholly out of proportion to the harm done to any of the class members”); *Vasquez-Torres v. McGrath’s Publick Fish House, Inc.*, 2007 WL 4812289, at *6 (C.D. Cal. 2007) (denying certification to a class with millions of plaintiffs alleging statutory damages under FACTA for more than \$54.14 million); *Price v. Lucky Strike Entm’t, Inc.*, 2007 WL 4812281 (C.D. Cal. 2007); see also *Parker v. Time Warner Entm’t Co., L.P.*, 331 F.3d 13, 55 (2d Cir. 2003) (“It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions.”).

79. 15 U.S.C. § 1640(e) (2012).

defendant's alleged failure to disclose certain interest rates to its cardholders.⁸⁰ Each of the 130,000 plaintiffs sought \$100—plus fees and costs—in statutory damages.⁸¹ The court declined to certify the class, reasoning that Rule 23(b)(3) calls for a “pragmatic” assessment of whether certification would yield an “annihilating punishment, unrelated to any damage to the purported class or to any benefit to [the] defendant.”⁸²

As the Southern District observed in *Ratner*, the superiority requirement is “broad and open-ended.”⁸³ But, as other courts have noted, it does not call for the court to deny certification to an otherwise-cohesive class merely because it would devastate the defendant.⁸⁴ In fact, the requirement appears to call for certification in exactly these circumstances because aggregation “is superior to other available methods for fairly and efficiently adjudicating the controversy.”⁸⁵ In the case of nominal statutory damages, individual litigation would either flood the courts or, far more likely, never commence.⁸⁶ “Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate.”⁸⁷

Nonetheless, *Ratner* and its progeny have kept pace with the proliferation of federal statutes including mandatory damage provisions. For example, courts have relied upon superiority to deny certification to putative classes alleging violations of the Fair and Accurate Credit Transactions Act (FACTA),⁸⁸ which provides for statutory

80. 54 F.R.D. 412, 413–14 (S.D.N.Y. 1972).

81. *Id.*

82. *Id.* at 416.

83. *Id.*

84. *See, e.g.,* *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004) (“Mere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit.”); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001) (holding size “alone cannot defeat an otherwise proper certification”); *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 722–23 (9th Cir. 2010) (“In the absence of such affirmative steps to limit liability, we must assume that Congress intended FACTA’s remedial scheme to operate as it was written. To limit class availability merely on the basis of ‘enormous’ potential liability that Congress explicitly provided for would subvert congressional intent.”).

85. FED. R. CIV. P. 23(b)(3).

86. *See* *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014) (“The district court might conclude on remand that the class device is superior, because no rational individual plaintiff would be willing to bear the costs of this lawsuit.”).

87. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (vacating and remanding an order denying certification to a class alleging statutory damages under the FRCA on superiority grounds).

88. 15 U.S.C. § 1681n(a)(1)(A) (2012) (“Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . . . any actual damages sustained by the consumer as a result of the

damages between \$100 and \$1,000 per plaintiff.⁸⁹ And courts have similarly denied certification on superiority grounds to massive classes alleging violations of the Telephone Consumer Protection Act (TCPA),⁹⁰ which provides for statutory damages of \$500 (subject to trebling) per call.⁹¹ For each of TILA, FACTA, and the TCPA, among others,⁹² courts deny certification to otherwise-cohesive classes because they risk ruinous liability.⁹³ This is direct regulation of class size: putative classes fail Rule 23 because the social costs of over-deterrence outweigh the social benefits attendant to certification.

C. *The Costs of Regulation*

Regulation is not costless. Courts must invest substantial decisional resources to make even rough approximations of optimal class size. In particular, accurate regulation requires a reviewing court to obtain information about the costs and benefits of certification, including likely deterrent outcomes throughout the affected industry or field, effects on administrative efficiency, and so forth. Therefore, in addition to the various inquiries that Rule 23 expressly requires—e.g., the internal cohesion of each class,⁹⁴ the adequacy of counsel,⁹⁵ the viability of alter-

failure [actual damages] or damages of not less than \$100 and not more than \$1,000 [statutory damages]”).

89. *See, e.g.,* *Leysoto v. Mama Mia I, Inc.*, 255 F.R.D. 693, 698 (S.D. Fla. 2009) (denying certification to a class of 46,000 customers, each alleging between \$100 and \$1,000 in statutory damages, because the defendant “would face almost certain insolvency, despite the fact that its conduct caused no actual damages,” and “[i]t is difficult to ascertain the benefit to potential class members under the circumstances of this case”).

90. 47 U.S.C. § 227(b)(3) (2012) (“A person or entity may . . . bring . . . an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available . . .”).

91. *See* *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) (denying class certification in part for want of superiority on the ground that the TCPA “provides for a minimum recovery of \$500 for each violation as well as treble damages if the plaintiff can prove willful or knowing violation,” which “most likely exceeds any actual monetary loss in paper, ink or lost facsimile time suffered by most plaintiffs in such a case . . .”).

92. *See, e.g.,* *Legge v. Nextel Commc'ns*, 2004 WL 5235587, at *13 (C.D. Cal. June 25, 2004) (denying certification to a class of 1.5 million plaintiffs alleging statutory damages under the Fair Credit Reporting Act because, notwithstanding the presence of common questions of law or fact, “defendants liability would be enormous and completely out of proportion to any harm suffered by the plaintiff”); *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350–51 (N.D. Ill. 2002) (same, with respect to a putative class seeking to represent 190 million consumers).

93. *See, e.g.,* *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003) (reversing grant of certification to class alleging statutory damages under the TILA and observing, albeit in dicta, that consideration of “economic harm . . . may be required for superiority”).

94. FED. R. CIV. P. 23(a)(2) (requiring commonality).

95. FED. R. CIV. P. 23(g) (governing class counsel).

natives to class aggregation,⁹⁶ and more—courts concerned with class size must also look beyond the confines of the litigation to consider the dynamic effects of certification on business practices and the federal docket as a whole.

This is a time-consuming and resource-intensive process. Courts will do their best to accumulate the most information possible and diligently determine optimal class size. But even that diverts judicial attention and resources—however marginal—from other potentially worthwhile endeavors. The cost of attaining precision thus develops a feedback loop: the more courts invest in ascertaining optimal class size to avoid welfare-deteriorating decisional mistakes, the greater the welfare-deteriorating administrative costs.

Even assuming, perhaps unrealistically, that courts are able to adequately source and accurately process the scores of inputs that determine optimal class size, perfect regulation carries another cost: deadweight loss. Owing to the uncertainty inherent in regulating by squishy doctrinal pronouncements—and the inherently risk-accepting nature of those invested in pursuing class litigation—counsel continue to proffer larger classes than courts prefer to satisfy, notwithstanding tightening certification standards.⁹⁷ Courts have lamented and will continue to lament class size long after *Wal-Mart* and *Comcast*, calling upon those and other precedents in district court orders denying certification. In this context, regulation is a blunt instrument ill-suited to precision decision-making. Specifically, even perfect regulation entails denying certification to thousands or millions of positive-utility plaintiffs tainted by the presence of even one negative-utility claimant.

Imagine, for example, that a court accurately determines that the optimal size of a putative class with 10,000 plaintiffs is in fact 9,000 plaintiffs. Granting certification would require the court to knowingly proceed with a sub-optimally large class containing 1,000 negative-utility claims. But denying certification entails sacrificing the vast majority of the class—in this example, 90% of plaintiffs—with positive-utility claims. In either case—the latter more likely than the former following *Wal-Mart*, *Comcast*, and *Ratner*—society suffers.

II. TAXING CLASS SIZE

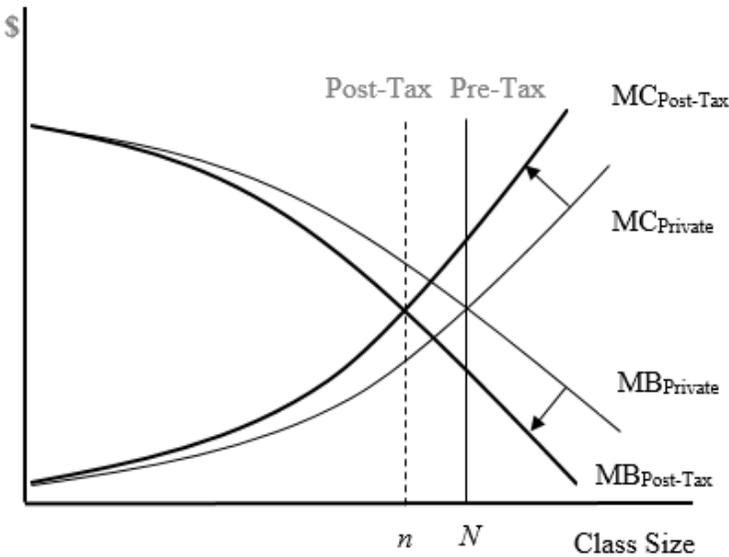
Fortunately, Rule 23 offers more than regulation. It also harbors a handful of tax mechanisms that can, properly deployed, enable courts

96. FED. R. CIV. P. 23(b)(3) (requiring superiority).

97. There is nothing inherently irrational about this behavior. Class counsel might, for instance, assess that by filing suit on behalf of a larger putative class, there is a greater chance of obtaining a favorable settlement before the court reaches a decision on certification.

to precision modulate class size without the deadweight loss of regulation. Taxing the negative externalities of class size compels counsel to internalize social costs, thereby bending counsels' marginal cost and benefit curves—rather than drawing a hard and fast line in the sand:

FIGURE 10: Taxing Class Size



Although counsel prefers a larger class size (N) than the social optimum (n), counsels' marginal cost and benefit curves are malleable. Shifting the latter up, or the former down—both illustrated in Figure 10—realigns counsels' cost and benefit curves, respectively, with the social optimum.

Proceeding from that observation, this Part makes three moves: First, Section II.A contends that this is possible; indeed, Rule 23 embeds a unique tax mechanism that can decrease the marginal private benefit of bigness: a progressive tax on attorneys' fees, drawn from Rule 23(h). Second, Section II.B posits that another tax—similarly available within Rule 23 and not requiring judicial acrobatics—can increase the marginal private cost of bigness: an escalating notice requirement, drawn from Rule 23(c)(2). These initial forays show that both taxes are textually available and can be as effective at restricting class size as regulating by commonality, predominance, and superiority doctrines. Finally, Section II.C argues that taxing class size is often superior to regulation-by-certification because it avoids the deadweight loss of regulation, is information-forcing, and generates “revenue” (or surplus) from the perspective of the class.

A. *Decreasing the Marginal Private Benefit of Bigness*

Courts can first align private and social optima by decreasing the marginal private benefit of size. This is a familiar exercise to the administrative state. For example, taxing by x the over-active PVC factory that generates an extra x in negative externalities deters the factory's welfare-reducing behavior by depressing the factory's marginal benefit of production by an amount equal to the cost of its negative externalities.

Rule 23 supplies mechanisms by which to similarly tax class size. For instance, Rule 23(h) provides: "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."⁹⁸ As every federal appellate court has recognized, this fee provision affords district courts considerable flexibility and discretion in both awarding attorneys' fees and designing fee structures.⁹⁹ And while the propriety of a district court's fee structure is reviewed *de novo*,¹⁰⁰ appellate courts

98. FED. R. CIV. P. 23(h).

99. See *Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016) ("[A] fee determination will be set aside only if it clearly appears that the trial court ignored a factor deserving significant weight, relied upon an improper factor, or evaluated all the proper factors (and no improper ones), but made a serious mistake in weighing them."); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) ("What constitutes a reasonable fee is properly committed to the sound discretion of the district court, and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding.") (internal citations omitted); *In re Diet Drugs*, 582 F.3d 524, 538 (3rd Cir. 2009); *Berry v. Schulman*, 807 F.3d 600, 617 (4th Cir. 2015) ("We review attorneys' fee awards for abuse of discretion only. That review is 'sharply circumscribed,' and a fee award 'must not be overturned unless it is clearly wrong.'" (internal citations omitted)); *Strong v. BellSouth Telecomm., Inc.*, 137 F.3d 844, 850 (5th Cir. 1998); *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) ("In applying the abuse-of-discretion standard to an award of attorney's fees, the trial court is entitled to substantial deference because the rationale for the award is predominantly fact-driven." (internal quotation marks omitted)); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999) ("Decisions of the district court regarding attorney fees in a class action settlement will generally be set aside only upon a showing that the action amounted to an abuse of discretion."); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) ("We require only that fee awards be reasonable in the circumstances, and our review is for abuse of discretion. The district court may award fees pursuant to either a lodestar or a straight percentage of the settlement fund." (internal citations omitted)); *Anchondo v. Anderson, Crenshaw & Assocs., L.L.C.*, 616 F.3d 1098, 1101 (10th Cir. 2010); *Faught v. Am. Home Shield Corp.*, 616 F.3d 1233, 1242 (11th Cir. 2011) ("The district court has great latitude in formulating attorney's fees awards subject only to the necessity of explaining its reasoning so that we can undertake our review." (internal quotation marks omitted)); *Salazar v. District of Columbia*, 809 F.3d 58, 63 (D.C. Cir. 2015) ("This limited standard of review is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.").

100. See, e.g., *Sutton v. Bernard*, 504 F.3d 688, 691 (7th Cir. 2007) ("We review the district court's methodology *de novo* to determine whether it reflects procedure approved for calculating awards." (internal quotation marks omitted)).

have authorized dozens of unique methodologies, from percentage-of-the-fund awards to lodestar models,¹⁰¹ with varying enhancements and multipliers in between.¹⁰²

Rule 23(h)'s flexible language encourages such experimentation.¹⁰³ Yet few courts have employed a progressive fee structure—and none expressly to tax class size. But that does not mean the option is not available. Consider, for example, a fee structure that awards counsel less for each incremental class member or group of class members (i.e., brackets of claimants).¹⁰⁴ A court might implement this method by literally counting noses, or by beginning with a percentage-of-the-fund model and awarding counsel a dwindling percentage of the fund by brackets of plaintiffs:

TABLE 1: Progressive Fee Structure

Plaintiff Brackets Sorted by Recovery Amounts	Counsel's Percentage-of-Recovery Award
First Quartile	x
Second Quartile	$x/1.33x$
Third Quartile	$x/2x$
Fourth Quartile	$x/4x$

101. See 5 NEWBERG ON CLASS ACTIONS § 15:63 (“Courts generally employ one of two methods in determining fee awards in common fund class action cases: the percentage method (which awards counsel a fee in relation to the benefit achieved for the class) or the lodestar method (which awards counsel a fee in relation to their hours and hourly billing rates).”).

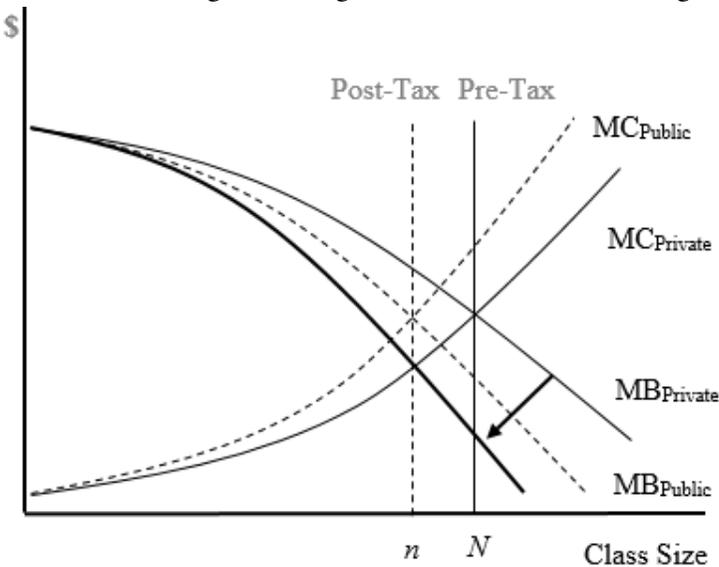
102. *Id.* § 15:89 (collecting circuit-level empirical data on multipliers).

103. See FED. R. CIV. P. 23(h) advisory committee’s notes to the 2003 adoption (“This subdivision authorizes an award of ‘reasonable’ attorney fees and nontaxable costs. . . . Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in ‘common fund’ cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.”).

104. Instead, courts occasionally “award a lower percentage of the fund to counsel as the size of the fund increases.” 5 NEWBERG ON CLASS ACTIONS § 15:80. This aggregate method is distinct from the approach advocated here, whereby fees are adjusted on a per-claimant (or group of claimants) basis. And even this approach “has not been widely adopted” and has “few proponents.” *Id.*

In this example, counsel receives the jurisdiction's typical percent-of-the-fund award (x) for the quartile of the class with the largest recovery. This recognizes the high value of these claims, as well as the greater likelihood that they would have been the subject of individual litigation. The fee award then progressively declines for each ensuing quartile, such that counsel ultimately receives only one fourth of the jurisdiction's typical percent-of-the-fund award for the final quarter of the class.¹⁰⁵ The tax causes counsels' marginal private benefit curve to slope downward at a greater rate, moving it past the courts' marginal social benefit curve to yield a smaller class in line with the social optimum:

FIGURE 11: Taxing the Marginal Private Benefit of Bigness



This progressive fee structure preserves counsels' incentive to include the highest-value claims in the class—where value is a function of both merit (lower marginal cost) and damages (higher marginal

105. This is distinct from the so-called “sliding scale” model, which awards counsel a declining amount as the class grows in size. *Id.* That approach “can create perverse incentives: if class counsel receives less of each next dollar that they secure for the class, they may have an incentive to settle when their percentage drops from 25% to 20%, for example, thereby encouraging quick settlements at sub-optimal levels.” *Id.*; see also *In re Cendant Corp. Litig.*, 264 F.3d 201, 284 n.55 (3rd Cir. 2001) (stating that this approach “has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply”). Taxing class size, by contrast, encourages counsel to obtain the largest amount for every class member because counsel is awarded a full percent-of-the-fund fee for the highest-value claims. Settling quick at a sub-optimal level would reduce counsels' expected returns on those claims.

benefit)—while simultaneously reducing the incentive to populate the class with low-value, low-merit claims. The progressive tax also combats sweetheart settlements: The tax is operative even after counsel removes low-value, low-merit claims; counsel is therefore poised to receive a smaller fee for back-of-the-class, yet net higher quality (more value and superior merit) claims. In this way, counsel sells out *itself*, not just the class, by negotiating a sweetheart settlement for these claims. In short, taxing class size leaves all wheat, no chaff.

Courts need not tax in every instance—it is unlikely that a putative class of only 1,000 or even 10,000 plaintiffs would be too big to certify, even for the most wary of courts. Instead, courts should tax the marginal private benefit of bigness only where size is such a problem that it would otherwise independently jeopardize certification. Ideal candidates are massive class actions that appear sufficiently cohesive to merit certification under a lighter-touch approach to commonality and predominance, but for which the court is rightly concerned about superiority because of blackmail settlements, agency costs, and the like. Statutory damage class actions, among others, fit the bill.

While this Article principally considers taxing fees, Rule 23 contains other latent—even if indirect—tax mechanisms. For example, courts might direct that counsel will receive a share of the common fund for only some percentage of the class, while the remainder of what would be awarded in attorneys' fees will instead be dedicated to cy pres relief on behalf of the class.¹⁰⁶ As with taxing fees, counsel would be less incentivized to form a massive class action and yet, unlike the regulatory alternative, a cohesive class would not be denied certification at the outset.

B. Increasing the Marginal Private Cost of Bigness

Courts also can tax class size by increasing the marginal private cost of the incremental class member. This tax has the same effect on class size as decreasing marginal private benefits, but it accomplishes that feat by bending counsels' cost curve upward, leaving counsels' benefit curve untouched. As each incremental class member becomes more

106. Courts occasionally deploy cy pres distribution in the event of unclaimed money from the settlement fund. *See, e.g., In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 30 (1st Cir. 2012). The doctrine requires that the unclaimed funds be channeled to a purpose that would benefit the class as a whole. *See In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002) (“the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of the class members, and the interests of those similarly situated”).

expensive, on a marginal basis, counsel is less incentivized to expand the class.

Courts might, for example, deploy Rule 23(c)(2)—which governs class notice—in response to class size by requiring greater proof of receipt or response rates as class size increases.¹⁰⁷ Like Rule 23(h), Rule 23(c)(2) uses broad terms that afford reviewing courts considerable discretion: “[T]he court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”¹⁰⁸ Courts might vary their interpretation of the phrases “practicable under the circumstances” and “reasonable effort” with class size.

More specifically, a “notice tax” could entail adopting tiers of scrutiny that modulate with class size. For smaller classes, courts would afford counsel a greater measure of deference when reviewing the form of notice, its contents, and response rates.¹⁰⁹ For larger classes, by contrast, courts would require expert submissions or reports validating the merits of notice delivery and verifying the contents thereof, as well as active monitoring of—and efforts to encourage greater—response rates amongst the class.¹¹⁰ These measures would increase counsels’ costs,¹¹¹ making it more expensive to include remote and hard-to-identify class members in particular. This tax, in other words, causes counsels’ marginal private cost curve to slope upward at a

107. See *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (“It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.” (internal quotation marks and citation omitted)); see also *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (stating that “the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings” (internal quotation marks omitted)); *In re Prudential Ins. Co. Am. Sales Litig.*, 148 F.3d 283, 317 (3d Cir. 1998) (identifying “the reaction of the class to the settlement” as one of the “appropriate factors to be considered when determining the fairness of a proposed settlement” (quoting *Girsh v. Jepson*, 521 F.2d 153, 156–57 (3d Cir. 1975))).

108. FED. R. CIV. P. 23(c)(2).

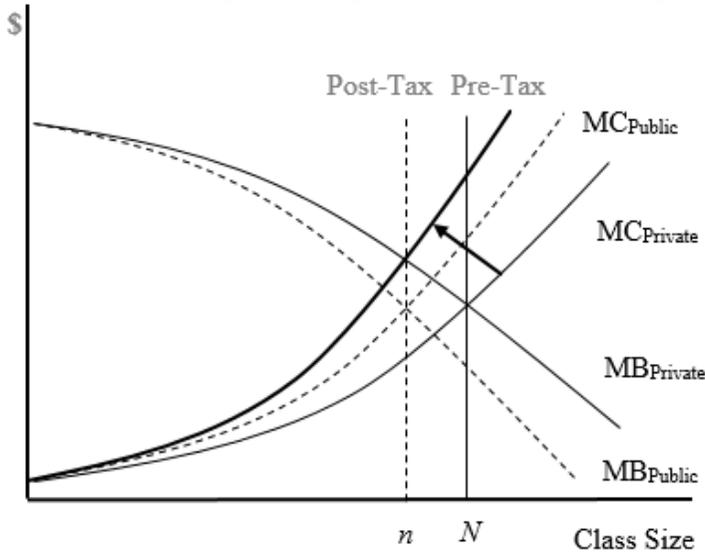
109. See, e.g., *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007) (approving a settlement notice that declined to inform class members of a potential conflict of interest between the settling parties because Rule 23 “does not require the notice to set forth every ground on which class members might object to the settlement” as long as it contains “the terms of the proposed settlement so that class members may come to their own conclusions about whether the settlement serves their interests” (internal quotation marks omitted)).

110. See, e.g., *Kaufman v. Am. Express Travel Related Servs., Inc.*, Case No 07 CV 1707, at *8 (N.D. Ill. 2012) (ordering “the appointment of an expert in class action notification”); see also 1 MCLAUGHLIN ON CLASS ACTIONS § 5:80 (“The district court has discretion to appoint an expert in class notification when serious questions about the effectiveness of a notice campaign exist.”).

111. The Supreme Court held in *Eisen v. Carlisle & Jacquelin* that “a plaintiff must initially bear the cost of notice to the class.” 417 U.S. 156, 178 (1974). That, of course, reduces the size of the overall fund from which counsel draws its fees.

greater rate, better aligning counsels' preferred class size with the social optimum:

FIGURE 12: Taxing the Marginal Private Cost of Bigness



There are, however, reasons to prefer decreasing the marginal benefit of class size by taxing attorneys' fees over this notice-centric approach. As an initial matter, it is easier to drag counsels' benefit curve past society's benefit curve by cutting into the fee award than it is to drag counsels' cost curve past society's cost curve by merely making notice more expensive. Even an exorbitant notice regime would be unlikely to exceed the social costs of over-deterrence and principal-agent problems. Moreover, the notice tax—which does not cut into counsels' fee award—might perversely encourage sweetheart settlements by incentivizing counsel to settle quickly before engaging in successive rounds of notice. Finally, and perhaps most important, taxing fees is far easier to monitor and modulate than the cost of class notice.

Fortunately, Rule 23 hides other taxes that could, when properly deployed, increase the marginal private cost of the incremental class member. One intriguing candidate is ascertainability—an inconsistently recognized, quasi-textual certification requirement that “insists that a proposed class be defined in ‘objective’ terms and that an ‘administratively feasible’ method exist for identifying individual class members and ascertaining their class membership.”¹¹² Courts might

112. Geoffrey C. Shaw, *Class Ascertainability*, 124 *YALE L.J.* 2354, 2354 (2015).

require notably large class actions to demonstrate ascertainability before certification,¹¹³ thereby increasing counsels' cost of including incremental claimants in the class. Ascertainability is particularly useful as a size tax precisely because it is atextual, thereby enabling selective deployment only in cases of very large class actions. Enumerated certification requirements, by contrast, are not so discretionary.¹¹⁴

C. *Advantages to Taxation*

In the nearly 100 years since Arthur Pigou authored his seminal work on externalities, *The Economics of Welfare*,¹¹⁵ scores of economists have posited the advantages of Pigouvian taxes over regulation.¹¹⁶ This Section argues that several of those advantages attend to taxing class size as an alternative to regulation-by-certification. In particular, taxing class size: (1) avoids the deadweight loss of regulation; (2) is information-forcing, allowing courts to act with greater precision at a lower cost; and (3) generates revenue or surplus for the class. Courts concerned with bigness should, therefore, give serious consideration to taxing, not regulating, class size.

1. *Deadweight Loss*

As previously mentioned, even perfect regulation entails deadweight loss in this all-or-nothing context. If counsel presents the court with anything short of the social optimum, then the court must either certify a class that is too big or deny certification to thousands—perhaps millions—of positive-utility class members. To illustrate, assume that counsel presents the court with a sub-optimally large class, reflecting both counsels' incentive to overpopulate large classes and the difficulty that courts are likely to encounter in quantifying abstract

113. See, e.g., *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (“Before a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable.” (internal quotation marks omitted)).

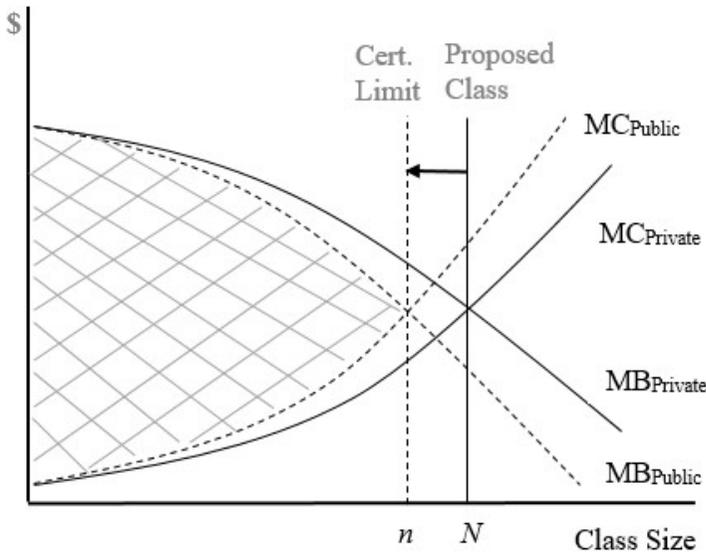
114. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (Rule 23 “states that ‘[a] class action may be maintained’ if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b). Fed. Rule Civ. Proc. 23(b). By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.”).

115. ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* §§ 6–7 (4th ed. 1932).

116. See, e.g., Steven Shavell, *Corrective Taxation Versus Liability as a Solution to the Problem of Harmful Externalities*, 54 J.L. & ECON. S249, S249 (2011) (“The corrective tax has long been viewed by most economists as a, or the, theoretically preferred remedy for the problem of harmful externalities.”).

social benefits like deterrence. Together, these factors yield a putative class that exceeds the court's preferred size:

FIGURE 13: Judicial Estimation of Optimal Class Size



The shaded area in Figure 13 represents the deadweight loss of regulating in this case. In the foregoing graphic illustration of this example, putative class size (N) exceeds the social optimum (n). By adhering to its regulatory cap, however, the court denies class treatment to the vast majority of the class offering greater social benefits than costs (the shaded area in Figure 13 *supra*).

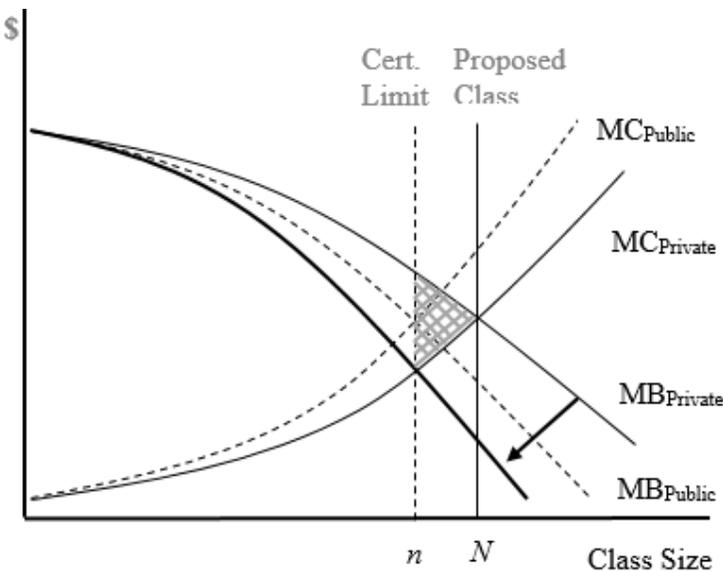
Perhaps counsel will, over time, respond to regulation by proposing systematically smaller classes that safely fit within the certification limit. That is an empirical question beyond the scope of this inquiry, but recent experience does not suggest counsel is likely to so respond. Courts have warned against class size for decades. Yet, as *Wal-Mart*, *Comcast*, and a litany of other cases illustrate, counsel continues to proffer massive class actions.¹¹⁷ This is itself a consequence of regulating by doctrine—an inherently uncertain, case-by-case exercise—and, in part, a result of forum shopping for favorable certification standards. Clever class counsel will poke and prod the circuits, looking for a soft spot with comparatively forgiving certification standards. Moreover, even assuming counsel systematically proposed classes within every court's certification limit—a dubious proposition at best—the

117. See *supra* Part I.B.

result would be sub-optimally small classes that would leave positive-utility claims on the table and without representation.

All of this is to say that regulation by certification is a hatchet. Even if the court pinpoints the social optimum—another dubious proposition to which this Section will return—regulation inevitably entails deadweight loss. Taxation, by contrast, is a scalpel. Consider, for example, a fee-award structure that decreases with each incremental class member. This tax, when properly implemented, avoids the deadweight loss of regulation by preserving class certification for all positive-utility plaintiffs:

FIGURE 14: Regulation Deadweight Loss



The shaded area in Figure 14 represents the size tax. Here, the court realigns counsel's initial preferred class size (N) with the social optimum (n) and where the court would place its certification limit were it in the business of regulation-by-certification. Taxing class size is welfare enhancing because it targets negative externalities—the shaded triangle in Figure 14 *supra*—with minimal collateral damage.¹¹⁸

118. See Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 232 (2012) (“The Pigouvian tax is often regarded in theory as an effective form of regulation, because, unlike the command-and-control alternative, the Pigouvian tax allows the regulated party to choose whether, how much, and how to engage in the regulated activity.”).

2. *Information-Forcing*

As previously mentioned, regulation is administratively expensive. Courts must collect and assess complex and difficult-to-process information about the social costs and benefits of marginal class members. Then they must synthesize that hard-to-come-by information in a manner that lends itself to forward-looking assessments about how the regulated or affected industry or field will respond. All of this is a tall order. This process is even more difficult than is typically the case for administrative agencies, because courts—unlike, for example, EPA staff attorneys—receive information from self-interested advocates, not from first-hand research in the field.

Pigouvian taxes are easier.¹¹⁹ As an initial matter, the court need only determine the social cost of the incremental class member and price the size tax accordingly. Regulation, by contrast, requires the court to ascertain both the social cost *and* social benefit on a marginal basis. Moreover, taxing class size is information-forcing. The progressive fee structure, for example, compels counsel to internalize the social cost of its decision to include the marginal plaintiff in the class. That opens a dynamic information exchange between counsel and the court: counsel responds to the tax by altering, or not, the class definition; the court can then respond by increasing or decreasing the tax to achieve its desired class size. This exchange of information—supplied entirely by counsels' reaction to the tax—can better lead courts to the social optimum.

3. *Revenue Generation*

Finally, like Pigouvian taxes generally, taxing class size is revenue generating from the perspective of absent class members.¹²⁰ Size taxes transfer wealth within the litigation from class counsel to class members—providing the latter more of the surplus. For example, decreasing counsels' marginal benefit by progressively reducing fee awards transfers wealth to the plaintiffs, who retain a greater share of any recovery. This particular tax has the salutary benefit of reinforcing the principles that underlie Rule 23. A progressive fee structure, like that

119. See Masur & Posner, *supra* note 24, at 101 (“The problem with cost-benefit analysis is that the regulator must know both the benefits and the costs of production. By contrast, to set Pigouvian taxes, the regulator only needs to know the costs. Thus, Pigouvian taxation should produce fewer errors.”).

120. See Kyle D. Logue & Joel Slemrod, *Of Coase, Calabresi, and Optimal Tax Liability*, 63 TAX L. REV. 797, 829 (2010) (“The Pigouvian tax reduces the private utility of the parties involved in the market, but produces an offsetting social benefit to the extent the collected revenue is spent on public goods.”).

considered above, would permit those class members with the smallest recoveries to keep a greater share of their damages. These are individuals for whom aggregation might be the only means of securing a positive return.¹²¹ The Supreme Court has repeatedly recognized that these are precisely the claims that Rule 23 was designed to vindicate.¹²²

Other size taxes are also revenue generating, even if indirectly so. Consider a tax that dedicates a portion of counsels' fees to cy pres relief if the class exceeds a certain size. This tax benefits not only the class writ large but also would-be plaintiffs—excluded from the class because of the tax—owing to the nature of cy pres relief. In *Lane v. Facebook*,¹²³ for example, plaintiffs sought class certification on behalf of “millions” of the website’s users who had allegedly suffered privacy invasions in violation of state and federal consumer protection law.¹²⁴ A proposed settlement stipulated that millions of dollars in undistributed funds would be channeled to a consumer advocacy non-profit dedicated to advancing and policing Internet privacy.¹²⁵ This effort, ultimately approved by the Ninth Circuit on appeal, benefitted both the plaintiffs—Facebook users who allegedly suffered privacy invasions—and the millions of Facebook and Internet users not included in the class yet at risk of comparable privacy violations.¹²⁶

121. See *supra* note 38; see also Hubbard, *supra* note 21, at 701 (discussing “the so-called ‘negative expected value’ or ‘NEV’ lawsuit—an individual lawsuit for which the plaintiff’s cost of litigating the claim is greater than her expected recovery”).

122. See *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (“A critical fact in this litigation is that petitioner’s individual stake in the damages award he seeks is only \$70. No competent attorney would undertake this complex anti-trust action to recover so inconsequential an amount. Economic reality dictates that petitioner’s suit proceed as a class action or not at all.”); *Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”).

123. 696 F.3d 811 (9th Cir. 2012).

124. See *id.* at 816–17, 830 (Kleinfeld, J., dissenting) (“The defendant, Facebook, has obtained a judgment that bars claims by millions of people victimized by its conduct.”).

125. *Id.* at 817–18 (describing the non-profit).

126. *Id.* at 821 (determining that the “distribution of settlement funds to entities that promote the causes of online privacy and security will benefit absent class members and further the purposes of the privacy statutes that form the basis for the class-plaintiffs’ lawsuit.”).

Regulation, by contrast, is revenue-destructive for putative class members. Indeed, the rational marginal class member—particularly one with a negative-value claim—should, if given the choice *ex ante*, prefer exclusion by taxation to exclusion by non-certification. The would-be class member will not recover in either scenario, but the latter eliminates any potential deterrence gains that benefit the would-be claimant as a member of society. Moreover, owing to the nature of modern commerce, the marginal class member is likely to be included in future class actions—possibly even as a high-value claimant who will directly benefit from future revenue generation.

III. OBSTACLES AND OBJECTIONS

Although “most economists believe that Pigouvian taxes are the best means of regulating a wide variety of harms across a wide variety of contexts,”¹²⁷ they are uncommon for a reason (or several). The most frequently cited impediment is political opposition:¹²⁸ Even where regulation has the same effect on the general population as taxation—because, for example, prices are passed down to consumers—taxes can be a political lightning rod.¹²⁹ Legislators therefore often delegate regulatory authority to the administrative state, rather than endorse a tax themselves. This impediment has no bearing in the class context. The federal judiciary, imbued with all the protections that Article III lifetime tenure affords,¹³⁰ interprets Rule 23 independent of political pressure.

But political opposition is not the only reason that the state regulates instead of taxes. There are other obstacles and objections to Pigouvian taxes, several of which have salience in the class context. This Part considers three: (1) the practical difficulty of signaling the tax *ex ante*; (2) the costly exercise of accurately “pricing” the tax; and (3) the risk of incentivizing forum-shopping for lower taxes. While these impediments should not be overlooked, none counsel against taxing class size as an occasional alternative to regulation-by-certification.

A. *Signaling the Tax*

Taxing class size works only if counsel is aware of the tax *ex ante*. Transparency is necessary to ensure that counsels’ incentives are re-

127. Masur & Posner, *supra* note 24, at 137.

128. *See id.* at 141–43.

129. *See generally* Christopher C. Fennell & Lee Anne Fennell, *Fear & Greed in Tax Policy: A Qualitative Research Agenda*, 13 WASH. U. J. L. & POL’Y 75 (2003).

130. U.S. Const. art. III.

aligned while it is in the process of defining the class—in other words, very early in the litigation, and certainly before counsel moves for certification, counsel must be in a position to respond to the tax if it is to have any prophylactic value. Short of this, counsel will continue to propose overbroad classes, obviating the purpose of the tax altogether.

Fortunately, Rule 23 supplies a comprehensive tax regime, including mechanisms by which to alert counsel to the size tax *ex ante*. Rule 23(g) provides that, when appointing class counsel, courts “may include in the appointing order provisions about the award of attorney’s fees.”¹³¹ In fact, the Advisory Committee’s notes to the 2003 amendments state that this provision “may afford an opportunity for the court to provide an early framework for an eventual fee award.”¹³² Rule 23(g) also expressly permits the court to make these decisions “before determining whether to certify the action as a class action.”¹³³ Rule 23(g) therefore contains a ready framework for setting a fee structure *ex ante* via standing order well before certification.¹³⁴

Indeed, and in the spirit of taxing class size, Judge Easterbrook, writing for the Seventh Circuit in *In re Synthroid Marketing Litigation*, explained that the *ex ante* approach better mimics market transactions and aligns counsels’ and class members’ interests:

[A] district court must estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed). The best time to determine this rate is the beginning of the case, not the end (when hindsight alters the perception of the suit’s riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers never wait until after recovery is secured to contract for fees. They strike their bargains before work begins Timing is more important than the choice between negotiation and auction, or between percentage and

131. FED. R. CIV. P. 23(g)(1)(D).

132. FED. R. CIV. P. 23(h) advisory committee’s notes to the 2003 adoption.

133. FED. R. CIV. P. 23(g)(3).

134. See 5 NEWBERG ON CLASS ACTIONS § 15:7 (“[M]any courts establish attorney fee procedures at the outset of the lawsuit, in anticipation of a fee request at the suit’s conclusion. Some courts also establish substantive fee provisions at the outset of the lawsuit. Such substantive provisions run the spectrum from a court merely identifying a fee method it will use at the conclusion of the lawsuit (percentage or lodestar) to a court actually setting the total fee up front.”); 2 McLAUGHLIN ON CLASS ACTIONS § 6:24 (“Courts have discretion to apply a sliding scale approach to substantial fee awards, under which class counsel obtains a decreasing percentage of the higher tiers of recovery (e.g., 30 percent of the first \$xyz, 25 percent of the next \$xyz, and 20 percent of additional amounts, etc.). This ensures class counsel recover the principal costs of litigation from the first tiers of the award, while allowing the class member clients to secure more of the benefit at the margin.”).

hourly rates, for all of these systems have their shortcomings. Only *ex ante* can bargaining occur in the shadow of the litigation's uncertainty; only *ex ante* can the costs and benefits of particular systems and risk multipliers be assessed intelligently. Before the litigation occurs, a judge can design a fee structure that emulates the incentives a private client would put in place. At the same time, both counsel and class members can decide whether it is worthwhile to proceed with that compensation system in place.¹³⁵

Signaling a fee structure is thus more than an academic exercise. In addition to the Seventh Circuit, other courts have issued a variety of appointment orders establishing a fee structure at the outset of the class action.¹³⁶ For example, courts occasionally determine fees *ex ante* via "auctions,"¹³⁷ in which "law firms competing to represent the class tell the judge how much they will accept, and the judge picks the low bidder."¹³⁸ Although different from the size tax, *ex ante* auctions operate by similar mechanics: prior to deciding on a motion for class certification, and concurrent with appointing class counsel, the reviewing court establishes a progressive fee structure by standing order.

This feature of the Rule 23 tax regime turns the critique on its head. Taxing class size is *more* likely than regulation-by-certification to shape counsels' incentives early in the litigation precisely because it can be signaled *ex ante*. Certification standards, by contrast, are shrouded in hazy doctrine to be applied case-by-case on an as-applied basis after exhaustive briefing, attempts to distinguish case law, and oral argument.¹³⁹ Although counsel can glean information about a district court's predilections from its prior decisions or controlling prece-

135. 264 F.3d 712, 718–19 (7th Cir. 2001). *But see* *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 53 (2d Cir. 2000) (stating that a court "cannot know precisely what fees common fund plaintiffs in an efficient market for legal services would agree to").

136. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) ("Many district judges have begun to follow the private model by setting fee schedules at the outset of class litigation—sometimes by auction, sometimes by negotiation, sometimes for a percentage of recovery, sometimes for a lodestar hourly rate and a multiplier for riskbearing."); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 758 (S.D. Ohio 2007) ("So long as lead plaintiff and lead counsel are of equal bargaining power and they negotiate at arm's length, an ex-ante agreement can more accurately reflect the market value of an attorney's services as applied to the particular facts of the case."); *see also* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION FOURTH § 14.211 (2004) ("Judges should consider advising the parties at the outset of the litigation about the method to be used for calculating fees and, if using the percentage method, about the likely range of percentages.").

137. *See, e.g., In re Iowa Ready-Mix Concrete Antitrust Litig.*, 768 F. Supp. 2d 961, 968 (N.D. Iowa 2011).

138. *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 957 (7th Cir. 2013).

139. *See Physicians Healthsource, Inc. v. A-S Medication Solutions, LLC*, 318 F.R.D. 712, 725 (N.D. Ill. 2016) ("Courts determine whether issues of individualized consent defeat commonality and predominance in . . . TCPA cases on a case-by-case basis after evaluating the specific evidence available to prove consent.").

dent, it will be difficult to determine with any meaningful precision whether a putative class is too big to satisfy commonality, predominance, and superiority.

B. *Setting the Tax*

Signaling the tax is one thing; setting it is harder. Critics of Pigouvian taxes have long drawn attention to the difficulty of pricing the social cost of negative externalities.¹⁴⁰ In this context, courts cannot reliably tax class size if they cannot first accurately quantify the social cost of the marginal class member.¹⁴¹ And, of course, many of the foregoing social costs are not subject to ready quantification.¹⁴² Over-deterrence is better described as a qualitative concept than a quantifiable or empirically observable event.

This concern, though well-founded, applies equally to the regulatory alternative. In fact, unlike taxing class size, regulation-by-certification requires quantification of both social costs and benefits to yield an accurate optimum. And unlike taxation, regulation is unforgiving: the decision to certify a class, or not, is a one-off, binary proposition that requires precision. Two distinguishing features of the taxation alternative make the point.

First, taxation “impose[s] a lower informational burden than command-and-control regulation and will generally be easier to implement.”¹⁴³ The court need only price social costs, not costs and benefits. Moreover, the court is better positioned to ascertain difficult-

140. See, e.g., Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1269 (1998) (“The difficulty that the Pigouvian tax presents to the regulator lies hidden in the choice of the optimal tax rate. For the regulator to arrive at the efficient tax rate, she must first determine what the efficient activity levels and care levels are. Imagine how the regulator would determine what the optimal Pigouvian tax rate would be for cigarettes for a given year. It would almost certainly not be exactly \$7.00 per pack. At best, the \$7.00 per pack figure represents a very rough approximation of the average annual external cost of a pack of cigarettes at roughly the current level of production and assuming essentially the current design of cigarettes.”).

141. See Masur & Posner, *supra* note 24, at 138 (“If the regulator cannot reliably determine the social cost of an activity, it cannot calculate the optimal Pigouvian tax.”).

142. See Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1189 (2011) (“measuring deterrence and thus quantifying optimal deterrence is nearly impossible”); Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 VAND. L. REV. 1295, 1328–29 (2016) (“Strict cost-benefit analyses generate different questions than rough efficiency. Which variables count, and what trade-offs still align with fairness and justice? Should the judicial resources expended depend on the case’s value? If so, how should value be defined: Do only monetary judgments count, or should other potential gains, such as information sharing, be included even if harder to quantify? What about tradeoffs in terms of other cases the court cannot hear during the pendency of the claim? Even if these initial hurdles are cleared, how much benefit must exceed cost is unclear: Is one cent enough?”).

143. Masur & Posner, *supra* note 24, at 138.

to-quantify costs than even-more-difficult-to-quantify benefits. At least two of the social costs attendant to class size—agency and administrative costs—are well within the courts’ bailiwick. Courts regularly monitor principal-agent relations and adjudicate the propriety of principals’ behavior as part of corporate, trust, and estate law, to name a few. And no actor is better positioned to weigh the costs of judicial efficiency and how class certification might impact the overall docket than courts themselves. In contrast, deterrence—which affects both sides of the ledger when weighing the costs and benefits of certification—is more difficult to measure. But at least the defendant can attest to when it will be *over*-deterred by ceasing to engage in specific activities (a cost). Defendants named in very large putative class actions have warned courts, for example, that certification risks bankruptcy and a cessation of all socially beneficial activity. By contrast, the court has little means of divining the precise social value of net-beneficial deterrence.

Second, taxation can be iterative.¹⁴⁴ A district court might initially determine after reviewing a complaint that a putative class of 100,000 plaintiffs is sufficiently cohesive to provisionally warrant certification, but also sufficiently large to merit taxation. It therefore issues a Rule 23(g) standing order that establishes a fee schedule awarding counsel only one-fourth of the typical percent-of-the-fund award for the lowest-damage quartile of the class.¹⁴⁵ If counsel is unresponsive, and the class definition unchanging, the court can hike the tax; alternatively, if counsel begins to make deeper cuts to the class definition than the court anticipated, the court can ease the tax burden.

Taxation is thus more flexible than regulation. In fact, some Pigouvian advocates, recognizing the difficulty of ascertaining the equilibrium price or social optimum of any activity, have suggested setting a minimum standard of acceptability—a floor, not dissimilar from a regulatory ceiling—and structuring taxes to achieve that minimum standard.¹⁴⁶ In the class context, for example, a court might sim-

144. *Id.* at 101–02 (“Pigouvian taxes are dynamic and technology-forcing in a way that command-and-control regulation, coupled with cost-benefit analysis, can rarely be. Regulators can only perform a cost-benefit analysis with respect to extant technology, materials, and processes—a regulator cannot estimate the cost of a technology that has not yet been invented. Proposed regulation might fail a cost-benefit test based on the state of existing technology, whereas a Pigouvian tax could give firms incentives to develop new technologies that would control pollution or other externalities more cheaply.”).

145. FED. R. CIV. P. 23(g).

146. See William J. Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307, 318 (1972) (“There is an alternative approach to the matter that seems perfectly natural. On issues as important as those we are discussing, given the limited information at our disposal, it is perfectly reasonable to act on the basis of a set of minimum standards of acceptability. If, say, we

ply determine as a matter of course that any class exceeding 100,000 members per se warrants a size tax; any figure below that threshold is acceptable sans tax. Although this approach sacrifices precision, it would be easier to administer and—in any event—avoid the dead-weight loss of the all-or-nothing regulation.¹⁴⁷

C. *Forum-Shopping for Lower-Taxes*

It is exceedingly unlikely that courts would settle on a uniform tax structure. Nor should they be encouraged to do so; taxing class size should be reactive to each particular class. But savvy counsel might prey on this intended discrepancy by bringing class actions before courts with that have previously imposed lower taxes.¹⁴⁸ Once again, however, this is true of the regulatory alternative. Insofar as counsel has discretion to file nationwide class actions in one of several federal circuits,¹⁴⁹ there are already powerful incentives to file in forums with favorable commonality, predominance, and superiority doctrines.¹⁵⁰ Forum-shopping is the status quo.

treat the sulphur content of the atmosphere as one of the outputs of the economic system, it is not unreasonable to select some maximal level of this pollutant that is considered satisfactory and to seek to determine a tax on the offending inputs or outputs capable of achieving the chosen standard. This is precisely the approach employed in the formulation of stabilization policy, where it is decided that an employment rate exceeding w percent and a rate of inflation exceeding v percent per year are simply unacceptable, and fiscal and monetary measures are then designed accordingly.”).

147. *Id.* at 319 (advocating that the minimum-standard approach, “unlike any system of direct controls, it promises, at least in principle, to achieve decreases in pollution or other types of damage to the environment at minimum cost to society”).

148. See Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 775 (1998) (“In the class action context, however, forum shopping takes a different, and more sinister, form. It entails the ability of class counsel to commence an action in a forum that is most favorable to counsel’s own (rather than the class members’) interests.”)

149. Controlling, e.g., for personal jurisdiction, venue, and so forth. See, e.g., *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *6 (E.D.N.Y. 2017) (“[P]laintiffs’ claim cannot arise from [defendant’s] sales to New York dentists because [defendant] did not make any sales to any named plaintiff in New York.”); *Henderson v. United Student Aid Funds, Inc.*, 2015 WL 12658485, at *4 (S.D. Cal. 2015) (“Specific personal jurisdiction in a class action is based only on the named plaintiffs and may not be based on allegations about the residency of unnamed putative class members.”); *Spiciarich v. Mexican Radio Corp.*, 2015 WL 4191532, at *4 (S.D.N.Y. 2015) (“Therefore, the analysis of where a substantial part of the events took place, in a class action, looks to the events concerning the named plaintiffs’ claims, not all of the class members’ claims.”).

150. See Shrey Sharma, Note, *Do the Second Circuit’s Legal Standards on Class Certification Incentivize Forum Shopping?: A Comparative Analysis of the Second Circuit’s Class Certification Jurisprudence*, 85 FORDHAM L. REV. 877, 879 (2016); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 57 (2017) (observing that “forum shopping for courts hospitable to class actions is also common”).

Indeed, there is a compelling case to be made that it will be more difficult to forum shop for lower taxes than for favorable certification standards. The meaning and scope of commonality, predominance, and superiority are questions of law enshrined in precedential decisions, often issued by the Supreme Court. By contrast, fee awards—not to be confused with fee structures—are questions of fact that are reviewed on appeal for abuse of discretion. The only precedent that an appellate court can set with respect to taxing class size is whether a progressive fee structure is appropriate—a question that several courts have already answered in the affirmative. The particular fees awarded within that structure, however, are not the subject of precedential decision-making. Courts could not, therefore, predictably impose lower taxes *as a matter of law*. That makes forum-shopping for lower taxes a risky proposition—riskier, at least, than forum-shopping for favorable regulatory treatment.

IV. DOCTRINAL CONSEQUENCES

This final Part briefly considers some of the doctrinal consequences that might follow from taxing class size. Importantly, courts should not tax in a vacuum. Rather, taxing class size affects class procedure generally and certification standards in particular. Accordingly, Section IV.A discusses the consequences for commonality and predominance doctrine. Because courts need not regulate and tax to restrict class size, courts that tax can simultaneously loosen the strictures on commonality and predominance—returning those standards to their roots in class cohesion. Apart from commonality and predominance, Section IV.B considers the implications for a burgeoning area of class action doctrine that has split federal appellate courts: ascertainability.

A. *Cabining Commonality and Predominance*

Courts need not—and should not—simultaneously regulate and tax. As the foregoing illustrates, either is up to the task of restricting class size. Employing both, however, is at best redundant and at worst welfare-reducing. Accordingly, courts concerned with size can tax and refocus commonality and predominance on class cohesion.¹⁵¹ This approach adheres to the stated purpose of these certification standards, which call “upon courts to give careful scrutiny to the relation between common and individual questions in a case.”¹⁵² Commonality

151. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (“[The] predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”).

152. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016).

and predominance do not, however, call upon courts to prune class size by means of seeking out “common answers” (*Wal-Mart*)¹⁵³ or uniform damages (*Comcast*).¹⁵⁴

Vacating class size from the commonality and predominance inquiries would entail not only revisiting recent submissions to the class action canon, but also reconsidering recent decisions concerning appellate standards of review. Indeed, the recent tightening of—and ensuing confusion over¹⁵⁵—commonality and predominance might be explained in part by the deference typically afforded to trial courts’ certification orders. On one hand, “[i]t is widely recognized that the class certification decision is committed to the discretion of the district court and is reviewed on appeal for abuse of discretion.”¹⁵⁶ Yet neither *Wal-Mart* nor *Comcast* addressed the standard of review on appeal, much to the ire of the respective dissents.¹⁵⁷ Instead, these opinions were authored in the shadow of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,¹⁵⁸ ostensibly an *Erie* case in which Justice Scalia wrote for the Court:

Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court “to certify a class in each and every case” where the Rule’s criteria are met. But that is exactly what Rule 23 does: It says that if the prescribed preconditions are satisfied “[a] class action may be maintained” (emphasis added)—not “a class action may be permitted.” (emphasis added) Courts do not maintain actions; litigants do. The discretion suggested by Rule 23’s “may” is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 automatically applies “in all civil actions and proceedings in the United States district courts.”¹⁵⁹

153. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–52 (2011).

154. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35–36 (2013).

155. *See* Andrew J. Trask, *The Curious Case of Tyson Foods v. Bouaphakeo*, 2016 CATO SUP. CT. REV. 279, 291 (“[A] number of appellate courts have walked back the Court’s pronouncements about predominance where they could, while others have attempted to follow its holdings. *Comcast*’s mixed reception was obvious enough that reporters and scholars alike have noticed the war over predominance. The end result of this ‘chaos on the ground’ has been confusion over the proper application of the predominance requirement. Given this confusion, class-action plaintiffs have pushed to certify sprawling classes based on less rigorous predominance requirements. Defendants have pushed back as hard as possible for categorical rules that confine predominance findings to only a few specific cases.”).

156. Hubbard, *supra* note 21, at 706.

157. *Wal-Mart*, 564 U.S. at 369–75 (Ginsburg, J., dissenting) (“Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court’s finding of commonality.”).

158. 559 U.S. 393 (2010).

159. *Id.* at 399–400.

This holding, the only one to command a majority of the Court in the fractious case,¹⁶⁰ stakes out the position that certification is mandatory where the Rule 23 prerequisites and requirements are satisfied.¹⁶¹ In other words, trial courts do not have discretion to deny certification to putative classes that satisfy the commonality and predominance requirements. That, coupled with ostensibly deferential appellate review, leaves courts concerned with class size little recourse other than to tighten what it means for those prerequisites and requirements to be satisfied *as a matter of law*.

Taxing class size presents another way. It encourages district courts to actively monitor class size pre-certification, separate and apart from the certification requirements. That, in turn, affords appellate courts greater latitude to loosen the reigns on commonality and predominance without inviting a deluge of massive class actions. This alternative approach to size management better coheres with the structure and apparent purpose of Rule 23. Commonality and predominance were added to Rule 23 to ensure that class actions—vehicles designed to secure representation for every meritorious claimant, no matter how small the individual stakes¹⁶²—do not sacrifice judicial efficiency along the way.¹⁶³ These certification requirements accomplish that task by screening for cohesion: where the class is cohesive, post-certification proceedings are unlikely to mire the court in droves of mini-trials.¹⁶⁴ These blunt certification standards are ill-suited, however, to address size. And there is little in Rule 23 itself or the Advisory Committee's notes to the Rule's many amendments to suggest that a class

160. *See id.* at 417 (Stevens, J., concurring in part and concurring in the judgment).

161. *Id.* at 399–400.

162. *See Amchem v. Windsor*, 521 U.S. 591, 617 (1997); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

163. *See* FED. R. CIV. P. 23(b)(3) advisory committee's notes to the 1946 adoption ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote, uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."); FED. R. CIV. P. 23(b)(3) advisory committee's notes to the 1966 adoption ("The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device.").

164. *Amchem*, 521 U.S. at 624 (reviewing individualized issues undermining "class cohesion"); *Shook v. Bd. of Cnty. Comm'rs of Cnty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) (no class cohesion "if redressing the class members' injuries requires time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members"); *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011) ("The disparate factual circumstances of class members may prevent a class from being cohesive" (internal quotation marks omitted)).

can be too big to certify.¹⁶⁵ Instead, commonality and predominance are appropriately focused on the class itself, not the external consequences of certification.

Finally, it is worth observing that cabining commonality and predominance to class cohesion might—paradoxically—bolster the Supreme Court’s conception of those standards. Using these certification standards to target size provides skeptical lower courts an easy target. Consider the Seventh Circuit’s description of the *Wal-Mart* holding:

Wal-Mart holds that if employment discrimination is practiced by the employing company’s local managers, exercising discretion granted them by top management (granted them as a matter of necessity, in *Wal-Mart*’s case, because the company has 1.4 million U.S. employees), rather than implementing a uniform policy established by top management to govern the local managers, a class action by more than a million current and former employees is unmanageable; the incidents of discrimination complained of do not present a common issue that could be resolved efficiently in a single proceeding.¹⁶⁶

In this passage from *McReynolds v. Merrill Lynch*, decided less than one year after *Wal-Mart*, the Seventh Circuit expressly attributes concerns regarding the manageability of a million-member class to the Court’s holding, notwithstanding the absence of such express language in *Wal-Mart* itself. And, unsurprisingly, the Seventh Circuit in that case reversed an order denying certification to a 700-member class alleging employment discrimination, notwithstanding “an undoubted resemblance” to the *Wal-Mart* class denied certification.¹⁶⁷ Bringing the analysis full circle, the court concluded: “Merrill Lynch is in no danger of being destroyed by a binding class-wide determination that it has committed disparate impact discrimination against 700 brokers.”¹⁶⁸ Thus, at least in this case, one skeptical court was able to largely confine *Wal-Mart* to a question of class size—and perhaps avoid much of its holding accordingly.

165. The closest the Advisory Committee comes to endorsing this kind of cost-benefit analysis is in the notes to the 1966 Amendments, which state:

To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is “superior” to the others in the particular circumstances.

FED. R. CIV. P. 23(b)(3) advisory committee’s notes to the 1966 adoption.

166. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488 (7th Cir. 2012).

167. *Id.* at 489.

168. *Id.* at 491.

B. *Incentivizing Ascertainability*

Remarking on the rise of progressive income taxes at the turn of the twentieth century, French economist Thomas Piketty observed: “Taxation is not only a way of requiring all citizens to contribute to the financing of public expenditures and projects and to distribute the tax burden as fairly as possible; it is also useful for establishing classifications and promoting knowledge as well as democratic transparency.”¹⁶⁹ So too here. Taxing class size will all but require counsel to (1) obtain greater information about the contours of any putative class and (2) reveal that information to the court in the course of structuring the class definition to minimize its tax burden. Ignoring the tax by simply filing a class definition without some sense—perhaps, even, a very specific sense—of class composition would be dangerous. Counsel facing a tax can therefore be expected to proffer classes whose members are more ascertainable, obviating much of the hand-wringing over whether Rule 23 incorporates an ascertainability requirement.¹⁷⁰

The doctrinal consequences that follow from this shift in focus should not be underestimated. Many of the consequences will dictate the choice among several possible tax mechanisms. For example, courts typically afford counsel considerable discretion in crafting and distributing settlement notice.¹⁷¹ Taxing class size, by contrast, entails

169. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 15 (Arthur Goldhammer trans., Éditions de Seuil 2013) (Harvard 2017).

170. *See* *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (“The ascertainability requirement serves several important objectives. First, it eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members. Second, it protects absent class members by facilitating the best notice practicable under Rule 23(c)(2) in a Rule 23(b)(3) action. Third, it protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable.” (internal quotations marks and citations omitted)); *Bakalar v. Vavra*, 237 F.R.D. 59, 64 (S.D.N.Y. 2006) (“Class membership must be readily identifiable such that a court can determine who is in the class and bound by its ruling without engaging in numerous fact-intensive inquiries.”); *Rose v. Saginaw Cnty.*, 232 F.R.D. 267, 271 (E.D. Mich. 2005) (“A precise definition allows the Court to determine who would be entitled to relief, who would be bound by a judgment, and who is entitled to notice of the action.”); *Cunningham Charter Corp. v. Learjet, Inc.*, 258 F.R.D. 320, 325 (S.D. Ill. 2009) (“A sufficiently precise class definition enables the court to weigh whether trying the lawsuit through the class mechanism would be burdensome and inefficient.”).

171. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113-14 (2d Cir. 2005) (“The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness. There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings. Notice is adequate if it may be understood by the average class member.” (internal

clear, *ex ante* direction and active monitoring upfront.¹⁷² And it would be difficult for the court to monitor class notice and accurately gauge distribution and response rates if the class is not ascertainable *ex ante*. This suggests, at a minimum, that ascertainability factors into courts' analysis. But, as previously mentioned, ascertainability is a fraught issue; whether counsel must present an administratively feasible mechanism for identifying putative class members before certification is subject to a burgeoning circuit split.¹⁷³ Even those courts that have demanded ascertainability are divided as to whether the atextual requirement springs from the Rule 23(b)(3) superiority requirement, Rule 23(a)'s reference to "a class," or somewhere else entirely.¹⁷⁴ This is infirm grounding at best for taxing class size.

Given these difficulties, progressively taxing fees is a likely candidate for adoption. But even this approach calls for greater scrutiny of the class composition as counsel adjusts the class definition in response to the tax. Again, tradeoffs abound. Whereas the certification requirements typically operate to screen out flimsy class actions that do not merit the court's attention to issues like attorneys' fees, taxing class size entails *ex ante* assessment of attorneys' fees for the largest class actions, merit aside.

quotation marks and citations omitted)); *see also In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 263, 295 (D. Kan. 2010) ("Regarding notice of class certification, subsection (c)(2) imposes more stringent requirements than subsection (e) imposes with regard to class settlement. With respect to a proposed class settlement, subsection (e) requires only that the Court direct notice 'in a reasonable manner to all class members who would be bound by the proposal.'").

172. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536 (3d Cir. 2004) ("Of the 1.8 million potential class members, 136 consumers and ten TPP claimants opted out of the settlement, and 11 consumers or groups of consumers and two TPP claimants objected to the proposed settlement. As of June 3, 2002, 48,305 consumer and 1,055 TPP claims had been received and processed by the administrator. The District Court concluded that the insignificant number of objections filed weighed in favor of approving the settlement. Although we have previously noted that the district court should be cautious about inferring support from a small number of objectors in a sophisticated settlement, we agree with the District Court that the small number of TPP objectors is particularly telling as they are sophisticated businesses with very large potential claims." (internal quotation marks and citation omitted)).

173. *Compare Carrera v. Bayer Corp.*, 727 F.3d 300, 306–07 (3d Cir. 2013) (requiring ascertainability), *with Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124–25 (9th Cir. 2017) (dismissing ascertainability as unsupported by the text of Rule 23).

174. Some courts draw support for ascertainability from Rule 23(a)'s reference to "a class." *See, e.g., Robinson v. Gillespie*, 219 F.R.D. 179, 183 (D. Kan. 2003). Some point to the Rule 23(b)(3) superiority requirement. *See, e.g., Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663–64 (7th Cir. 2015). And others ground the requirement in policy rationale, acknowledging the absence of express textual support in the Rule. *See, e.g., In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 30, 33–35 (2d Cir. 2006).

CONCLUSION

Perhaps courts should not concern themselves with class size. In that case, taxing class size is a solution in search of a problem. But time and again, through an array of different standards and doctrines, courts appear to deny certification to massive classes because they are massive. Setting aside the normative merits of this endeavor, certification-by-regulation is not the only path. Instead, Rule 23 supplies the courts with a handful of tax mechanisms that can not only restrict class size, but also avoid the deadweight loss of denying certification to otherwise cohesive classes. Courts concerned with class size should actively pursue this alternative to the inflexible certification-by-regulation alternative.