Tiered Certification

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This Article proposes a thought-experiment with regard to the administration of class actions. It is almost axiomatic that class actions are determined through a single "certification." However, class actions can be certified through a tiered certification, e.g., a preliminary certification on a more lenient standard, followed by a full certification. Flattening the certification process allows a richer set of solutions to familiar dilemmas. Currently, a noncertified class does not bar subsequent certification attempts. Focusing on this problem, this Article demonstrates that tiered certification is a superior solution — members of a class that passed the first certification but not the second receive at least minimal procedural protection and thus could be precluded from serial certification attempts. More generally, tiered certification can better handle several species of collective litigation, which can be referred to as semi-class actions. Collective proceedings, whose certification costs are greater than their social benefit, do not justify a comprehensive class treatment. But to the extent that these cases entail some modest social value, they deserve to pass a less onerous, preliminary certification. The Article discusses cases that fit this pattern, for instance prospective, class-wide relief for technical regulatory violations.

Introduction

Class actions serve an important regulatory tool, enabling victims to vindicate rights that are otherwise not worth pursuing. However, the magnified stakes also invite abuse. The success and potential failure of class actions stem from their unique design. In their classic form, class actions enable one

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representative, in exchange for monetary incentives, to enlist the power of the class and litigate on its behalf, binding its members although they are not physically in court. The heart of class actions is the so-called certification stage — at which courts decide which cases are worthy of class adjudication.

The idea of "certification," however, is not self-evident. Modern class actions are a relatively new phenomenon, and the concept of certification is even newer. The original, 1966 version of the relevant American Rule 23 did not refer to "certification" of a class.[1] While courts did use the term, it formally appears in the text of Rule 23 only after the 1998 and the 2003 amendments.[2] Currently, the "certification" terminology appears pervasively in the text of Rule 23.[3] Simultaneously, the certification process has become more rigorous,[4] constituting a sharper border between class actions and regular litigation.

This Article challenges the rigid concept of "certification." Instead, there may be good reasons to "smooth" out the process of certification, in order to break the binarity of the current rules.[5] Along these lines, this Article suggests a thought experiment — a split certification process, which I refer to as "tiered certification" — and shows how this proposal can open up new opportunities to use class actions as a regulatory vehicle.

I focus on the potential of tiered certification to solve the problem of serial certification attempts. According to conventional perceptions, only a certified class precludes class members' rights; the upshot is that a denial of class certification does not prevent class members from subsequent certification attempts. The result is undesirable relitigation. However, this outcome is an artifact of the binary view of class certification. Tiered certification, on the other hand, provides a different, non-binary regime. First, the class is preliminarily certified, under a relaxed standard, at the outset of the litigation, with scaled-back notice and opportunity to opt-out. If the class survives the preliminary certification stage, it proceeds to the second, more rigorous certification phase. A class that has passed both certification stages would bind its members, preventing them from litigating their claims; a class that

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1 Tobias Barrington Wolff, *Multiple Attempts at Class Certification*, 99 Iowa L. Rev. Bull. 137, 139 (2014).

2 *Id.* at 139-41.

3 *Id.* at 141.

4 *Infra* notes 24-28 and accompanying text.

5 Throughout the Article, I describe the move from a single certification stage to a two-tier regime as "smoothing" or "flattening" the certification process. By doing so, I would like to convey the idea of breaking the current, binary certification regime into gradual steps, which entail incremental repercussions. *Cf.* Wolff, *supra* note 1, at 141 (arguing against the "assumption that the 'certification' order under Rule 23 is an all-or-nothing proposition").

passed the first but failed the second stage would only preclude the members' procedural right to litigate as a collective — leaving them free to litigate their individual claims.[6] In essence, the tiered-certification proposal attempts to bar costly relitigation of denials of (full) certification by maintaining minimal procedural safeguards — preliminary certification, scaled-back notice, and early opportunity to opt-out. As a by-product, the early inspection of these procedural safeguards should improve representation from the inception of a case.

Flattening the certification process, then, allows a richer set of solutions to the problem of multiple certification attempts. More generally, a smoother process opens up new directions of handling class litigation. Think of class litigation that entails some, but meager societal value — for instance, a claim that the defendant does not comply with a trivial regulatory rule and/or that the members of the class suffered only nominal damages. The onerous certification process is too heavy a tool for litigating such claims. Moreover, the binary concept of "certification" enables either class- or individual-litigation. The tiered-certification proposal, by contrast, anticipates a new category: cases that pass the preliminary certification but fail the second. This procedural design can fit class actions that entail a modest social value — semi class-actions. I briefly reflect on the application of this idea to injunction-only and statutory-damages class actions — the defendant could cease its wrongful behavior while the members of the class retain their individual (mostly trivial) damages claims. True, vindication of individual rights would be difficult without a full-blown class action; however, in many cases comprehensive class treatment seems unwarranted. A richer concept of certification, then, makes it possible to break the current one-size-fits-all treatment of class litigation.

Before proceeding, two introductory notes are in order. First, this Article focuses on the American law of class actions, which is based on Rule 23 of the Federal Rules of Civil Procedure. Additional examples are taken from the Israeli regime, which is based on the Israeli Class Action Law of 2006 (Class Action Law). The discussion centers in particular on "classic" class actions, which allow class members the right to opt-out of the collective proceedings.[7] However, the Article intends to be more general, with reference to any legal system that uses a designated procedure, "certification," to distinguish between

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6 As I explain later, according to the tiered-certification proposal class members who opted out at the preliminary stage would be able to litigate individually as well as a collective (together with similarly situated opt-outs); class members who opted out at the final stage would be able to litigate only their individual claims.

7 Namely, Rule 23(b)(3) class actions, as opposed to (b)(1)-(2) classes.

class actions and individual litigation.[8] Second, the tiered-certification proposal can be conceived of as a thought-experiment, but the changes it advances are, from another perspective, actual, even old-fashioned. The proposal is timely because the threshold for certification has been raised in recent years, shifting efforts to early stages of litigation and amplifying the importance of adequate representation early on. However, the law has not been modified to ensure, at the outset, that the representatives are adequate; tiered certification provides such a tool, through preliminary certification. Relatedly, the proposal in fact echoes previous practices. As aforementioned, a single "certification" is not obvious; indeed, in the past judges in the United States have experimented with conditional certification — a preliminary approval of class litigation, under a more lenient standard. Furthermore, originally, the federal rules envisioned a relatively low certification threshold, early in the proceedings.[9] Certification has become more fact-intensive, costly, and complex.[10] The idea of preliminary certification restores, to some extent, the original intention of Rule 23. It makes (early) certification simple again.

The Article proceeds as follows. Part I lays out the basic requirements for certifying a class, the trend to raise those standards and to shift litigation efforts to early phases, and the doctrinal importance of certification. Part II sketches the tiered-certification proposal — a preliminary certification on a lenient standard, followed by a complete, rigorous certification, where each stage entails different repercussions. Part III discusses the relitigation problem, i.e., the absence of a preclusive effect of certification denials in the first forum. It analyzes the relevant policy considerations, and surveys the main directions that courts, scholars, and policymakers have offered for

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8 The discussion also assumes that the procedures governing class litigation are trans-substantive, as is by and large true in the United States. The arguments that advance tiered certification as a mechanism to break the one-size-fits-all nature of class litigation are weaker where different procedures govern different types of class actions. *See also infra* note 159 and accompanying text.

9 Indeed, "[p]rior to the [2000s] . . . most courts permitted plaintiffs to seek class certification based on the pleadings or on only minimal evidentiary support . . . ." Robert H. Klonoff, Class Actions and Other Multi-Party Litigation in a Nutshell 167 (4th ed. 2012). Later decisions required more "rigorous analysis," relying in part on "amendments to Rule 23 that took effect in 2003 [and] altered the timing requirement for the class certification decision." *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (3d Cir. 2008); *see also* William Rubenstein et al., Newberg on Class Actions § 7:21 (5th ed. 2011); Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. Pa. L. Rev. 1897, 1913-914 (2014); *infra* note 160 and accompanying text.

10 *See infra* notes 21-28 and accompanying text.

tackling the problem. It then offers tiered certification as a superior solution. Part IV suggests extending tiered certification to address cases that carry small social value, which falls short of complete, rigorous certification. The last Part concludes.

I. Class Certification and Its Effects

Certification is a crucial stage in class litigation. Unlike individual litigation, class proceedings require a preliminary step, in which the court has to "certify" a lawsuit as a class action. The certification requirements are an artifact of the well-known difficulties in conducting class proceedings in general courts. On the one hand, class litigation can fulfill an important role in facilitating claims that are otherwise not worth bringing. On the other hand, class litigation enables a representative — the named plaintiff — to preclude the individual rights of the class of victims, opening up a host of agency problems. Moreover, as class actions typically magnify the monetary stakes, they can be abused to threaten defendants and extract undesired settlements. With these dangers in mind, certification constitutes the gatekeeper to the world of class litigation — or, a minimum threshold to trigger the unconventional weapon of class actions. Indeed, the idea of an intermediate "certification" stage in class actions now seems axiomatic, at least in the United States, Israel, and other legal systems that draw on the American experience.[11] This Part briefly presents the basic certification requirements and their constitutive role.

Broadly, one can identify three types of requirements for plaintiffs to pass the certification threshold — those that relate to adequate representation; the fit between the case to class-wide treatment; and minimal evidentiary limits.

First, to minimize agency problems between the class and its representatives, legal systems seek to guarantee that "the representative parties will fairly and adequately protect the interests of the class."[12] As a certified class binds its members, who are not in court, "adequacy-of-representation" is "the cornerstone of class action litigation."[13] While the capacity of courts to prevent

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11 For a brief description of the parallel "certification" requirements in Canada, for instance, *see* Catherine Piché, *Class Action Value*, 19 Theoretical Inquiries L. 261, 269-71 (2018).

12 Fed. R. Civ. P. 23(a)(4). For similar requirements in Israel, see Class Action Law, 5776-2016, §§ 8(a)(3)-(4), SH No. 2054 p. 264 (Isr.).

13 Antonio Gidi, *Issue Preclusion Effect of Class Certification Orders*, 63 Hastings L.J. 1023, 1035 (2012).

representatives from sacrificing the interests of class members seems limited,[14] courts and policymakers have devised several mechanisms to ensure adequate representation of class members' interests.[15]

Second, at the certification stage courts ask whether, given the inherent difficulties, it is appropriate to adjudicate the case on a class-wide basis. Presumably, class-wide proceedings are futile if there are no "questions of law or fact common to the class."[16] Likewise, class litigation need be "superior to other available methods for . . . adjudicating the controversy."[17] Concerns regarding the excessive scope of class actions have pushed courts to make these inquiries more demanding.[18] To illustrate, a few years ago the U.S. Supreme Court refused to authorize class litigation on behalf of the female employees of Wal-Mart, holding that these women do not have enough in common to join together in a single suit.[19]

Third, and related to the two previous sets of conditions, legal systems also require the class to present at the preliminary certification stage a minimal factual threshold. The Israeli Act specifies that at the certification stage the court should find that there is a "reasonable probability" that the class will

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14 *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 94-96 (1991).

15 The law, for example, limits the range of plaintiffs who can represent the class. See, for example, the requirement that the claims of the representative parties be "typical of the claims . . . of the class," Fed. R. Civ. P. 23(a)(3), and the presumption in the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(bb) (1998), that the plaintiff with the "largest financial interest in the relief sought" — typically, a sophisticated institutional investor — is the appropriate named plaintiff.

16 Fed. R. Civ. P. 23(a)(2); *see also* Class Action Law § 8(a)(1). Similarly, class-wide adjudication is less warranted if "questions affecting only individual members" "predominate over" common questions. Fed. R. Civ. P. 23(b)(3).

17 Fed. R. Civ. P. 23(b)(3); *see also* Class Action Law § 8(a)(2).

18 *E.g.*, Wolff, *supra* note 1, at 151 ("[T]he Court has moved toward a ratcheting up of the commonality standard, a development that could constrain the availability of broadly framed class actions.").

19 Specifically, Wal-Mart conferred pay and promotion discretion on its local managers, and thereby rendered the plaintiffs' claims too individualized to be pursued collectively. Wal-Mart, Inc. v. Dukes, 131 S. Ct. 2541 (2011). Of course, in many other cases courts managed to find sufficient common questions, particularly where the non-common questions pertain to the victims' damages rather than the wrongdoer's liability. *Cf. In re* IKO Roofing Shingle Prod. Liab. Litig., 757 F.3d 599, 602 (7th Cir. 2014).

win.[20] While the federal rules do not contain an explicit factual threshold, it is clear that American courts have required a higher standard in the recent years. Judges are now directed to "rigorously" consider and resolve issues of fact necessary to determine certification, even if the very same issues would be decided on the merits, after certification.[21] As a result, litigation efforts, including experts' opinions, have shifted to the pre-certification stage — "frontloading."[22] Israeli courts have similarly mandated more onerous certification process.[23]

In general, then, one can observe a trend to raise certification standards. This trend has an important impact on class actions. Arthur Miller summarizes: "The certification process has become so arduous that its cost and delay — coupled with the risk of eventual failure — either deter the institution of potentially meritorious class actions or lower their settlement value. Obviously, these developments represent significant inhibitions for even the strong willed."[24]

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20 Class Action Law § 8(a)(2). Presumably, as the probability threshold of winning a lawsuit is fifty percent, the threshold for passing certification lies somewhere between zero percent and fifty percent.

21 *Wal-Mart*, 131 S. Ct. at 2551 (internal quotation marks omitted) ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied . . . . Frequently that rigorous analysis will entail some overlap with the merits."). This ruling apparently deviates from *Eisen v. Carlisle*, 417 U.S. 156 (1974) (holding that trial courts should not look at the merits before certification).

22 Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293, 298 (2014) ("A number of decisions have impregnated the certification determination with an examination of aspects of the merits and established proof burdens that have led to a substantial procedural frontloading."); *see also* Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 Akron L. Rev. 721, 723 (2015) (reviewing case law and concluding that "there is a clear trend toward 'front-loading' class litigation — that is, the need to do more and prove more in the early stages of the case.").

23 For instance, in two recent decisions, the Israeli Supreme Court guided lower courts to conduct a more fact-intensive certification process, including expert opinions, testimonies, and some discovery-proceedings. *See* CA 5378/11 Frank v. Allsale (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); LCA 3489/09 Migdal Ins. Co. Ltd. v. Metal Co. Ltd. Emek Zevulun (Apr. 11, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

24 Miller, *supra* note 22, at 298.

Frontloading burdens plaintiffs and their lawyers,[25] potentially chilling valuable class actions. The wisdom of the doctrinal trend to raise the certification bar is beyond the scope of this Article.[26] It should be noted, though, that the proponents of a more "arduous" certification process stress that an erroneous certification decision entails grave consequences. Defendants who lose on certification often face some chance of paying enormous damages, and thus they are allegedly "under intense pressure to settle,"[27] even anemic cases. In addition to pressing defendants to settle, certification also precludes the rights of absent class members, as discussed below. In short, the heightened certification standards can be seen as a natural response to the growing importance of class litigation and the belief that past courts certified it with "insufficient rigor."[28]

To the extent that its requirements are met, the very act of certification is constitutive of class members' rights. Upon certification, the court should define the class[29] and send a notice to its members. The notice advises class members regarding their opportunity to appear in court and opt-out of the proceedings.[30] These are not mere formalities. Class actions preclude the individual rights of absent class members, infringing "a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment . . . in a litigation in which . . . he has not been made a party."[31] At least doctrinally, the deviation from preclusion principles relies on the notice that the court sends to class members and their opportunity to opt-out without being bound by the decision. As the U.S. Supreme Court explained, minimal procedural due process safeguards are necessary. In order to bind

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25 *E.g.*, Freer, *supra* note 22, at 723 ("Front-loading increases the expense of gaining certification. Though both sides are affected, the burden may fall harder on plaintiffs' counsel, who likely will be working on a contingent fee.").

26 The question of the optimal bar for certification is a highly complex one. While the general arguments are laid out in the text, the certification standards could affect the plaintiffs and the defendant in more intricate ways.

27 *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (determining that defendants "may not wish to roll these dice . . . putting it mildly"); *see also* Gidi, *supra* note 13, at 1038 (discussing the importance of certification in this respect).

28 Wolff, *supra* note 1, at 140.

29 Fed. R. Civ. P. 23(c)(1)(B).

30 Fed. R. Civ. P. 23(c)(2)(B). The notice is mandatory for Rule 23(b)(3) classes, the most important type of class litigation. Other, less frequent types of class actions that this Article does not discuss have different notice and opt-out requirements. Fed. R. Civ. P. 23(b)(1)-(2), 23(c)(2)(A).

31 Hansberry v. Lee, 311 U.S. 32, 40 (1940).

absent class members, they "must receive notice plus an opportunity to be heard and participate in the litigation."[32] These conditions can roughly be summarized as follows: Notice + Opportunity to opt-out + Certification = Preclusion of individual rights.

These are well-known concepts. They guarantee that without a proper certification procedure class members will not lose the right to litigate their individual claims. But as the Introduction showed, the axiomatic idea of a single "certification" stage is not self-evident. To demonstrate an alternative, the following Part briefly sketches a proposal for a two-stage certification process, which, I argue, better tackles familiar class action dilemmas.

II. An Alternative — Tiered Certification

This Part presents the contours of the tiered certification proposal, and briefly discusses its advantages and disadvantages. A tiered process could rely on two "certification" stages. The first is preliminary certification. To be preliminarily certified, the class has to pass some initial threshold — the court, for example, should be convinced that there is a prima facie case for class certification, and that the class is adequately represented. Preliminary certification can resemble a motion to dismiss: in general, courts in the United States are required to dismiss, upon a motion by the defendant and before discovery kicks in, cases that do not present at that stage "enough facts to state a claim to relief that is plausible on its face."[33] The leap between a motion to dismiss under the "plausible on its face" standard, and a prima facie certification, is not too wide.[34] Regardless of the similarity to motions to dismiss, the inquiry at the preliminary certification stage should not be fact-intensive, as opposed to the current certification requirements.

Following the previous discussion, in order for the first certification to have some constitutive effect on the class, a notice to its members is presumably required. Given the low certification requirements at the first stage, the notice could be thinner than the regular notice. If the plaintiffs are easily ascertainable and the defendant can cheaply contact them, for instance via

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32 Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

33 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). No parallel dismissal standard exists under Israeli law.

34 Of course, the proposed preliminary process is not identical to a motion to dismiss. Most importantly, a motion to dismiss is triggered by the defendant, while the preliminary certification I propose is a mandatory threshold. In addition, surviving these two preliminary stages entails different consequences.

email, the notice could be sent individually to all class members. When it is harder to individually contact class members, a relatively cheap, general public announcement can suffice.[35] Whatever form the notice takes, it should presumably provide class members the opportunity to be heard, to plead to replace class counsel, and to remove themselves from the collective at this preliminary stage. As I suggest later, class members who opted out at this preliminary stage would retain the right to bring both their individual cases and a collective action on behalf of similarly situated persons. To the extent that the preliminary stage benefitted the class, e.g., a class-wide injunction that prevented the defendant from further committing its wrongful behavior, the representatives should be awarded their fees, relative to the benefit to the class at that stage.

Following the first, preliminary certification, and after approving the representatives of the class and paying their interim fees, if necessary, the court should proceed to deciding the second, full certification. The full certification under this proposal is similar to existing practices — a fact-intensive process, where the class should meet the more rigorous requirements that the current doctrine mandates. Along these lines, in case the court decides to fully certify, it should notify the class again, and this notice should be more comprehensive than the first, preliminary one. The second, full notice should attempt to locate more members of the class, employing notice mechanisms similar to those that are currently used. As under the current regime, with full certification and comprehensive notice, any decision precludes those who did not opt-out from litigating their individual claims (and by extension, from bringing a collective action on behalf of others). Likewise, any benefit to the class following the second certification should trigger attorneys' fees, calculated based on that benefit.

The tiered certification design could better handle several recurring dilemmas, such as the relitigation problem and quasi class-actions. The value of the two-stage approach stems from its ability to break the current binarity — contemporary class actions are either certified or uncertified. The proposal "flattens," to some extent, the process. It does so by providing some — but not complete — effect to class actions that have passed the first certification but failed the second. I suggest that the first, preliminary certification should preclude class members' rights to litigate as a collective, while the second, full certification also precludes their individual rights. Accordingly, the tiered-certification procedure also generates a new category of class actions — cases that pass the preliminary certification but fail the second. Before going into

35 Israeli law makes a general notice easier — as the judiciary maintains a public, online registry of class actions, a "notice" through this public registry can suffice.

those details, the following briefly highlights additional issues concerning the tiered-certification approach.

Better monitoring of class counsel during early stages. In an era of fact-intensive certification, the proposed tiered certification allows better monitoring of class counsel from the get-go. Adequate representation is perhaps the most important requirement of class litigation. As more efforts are currently being shifted to the pre-certification stage,[36] courts should ensure that adequate representation exists at those early stages.[37] However, under the current regime courts have no formal obligation to do so before certifying.[38]

Tiered certification is a vehicle for such early scrutiny of the representatives. Under this proposal, courts are required to affirmatively hold, at the outset, that adequate representation exists. Moreover, as (scaled-back) notice is sent, class members would have the opportunity to voice their dissatisfaction with their representatives and plead to replace them, enabling courts to select the best ones. In sum, early scrutiny of the representatives is particularly important given the current regime, which on the one hand requires more efforts in the initial stages, but on the other hand provides no adequate safeguards at that time. Tiered certification can fill this gap.[39]

Tiered certification and existing practices. The idea of tiered, scaled-back certification coheres with existing practices. It is based on the capacity of courts, at different points in time, to scrutinize the relevant issues with varying rigor and provide different procedural safeguards, i.e., notice and opt-out.

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36 *Supra* notes 24-28 and accompanying text.

37 Otherwise, inadequate representation can lead to denials of class certification, which, under the current regime, infringe, to some extent, the right of class members to litigate collectively. *See infra* notes 96-105 and accompanying text.

38 Indeed, originally Rule 23 guided courts to ensure early on, through certification, adequate representation. Rubenstein et al., *supra* note 9, § 3:76.

39 To some extent, courts already scrutinize class counsel early on: "If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the . . . class." Fed. R. Civ. P. 23(g)(2); *see also* Class Action Law, 5776-2016, § 7, SH No. 2054 p. 264 (Isr.). However, "[i]n many class actions, a court will not need to be actively involved in designating counsel as there will only be . . . one putative class counsel." Rubenstein et al., *supra* note 9, § 10:9. Even when there are multiple competing attorneys, and the court appoints one of them early on, presumably the court under the current regime only appoints the "best able"; instead, under tiered certification, the court may well decide that no attorney is adequate, denying preliminary certification altogether. Finally, the tiered-certification proposal forces courts to notify class members and involve them in the selection process.

First, courts in general are accustomed to filling a gatekeeping role, i.e., evaluating the merits of a case early, at a lower threshold.[40] Class action judges are specifically asked to decide the same issues according to different legal thresholds — first during certification, and then when deciding the entire case. In particular, multi-certification class actions do exist. Some judges have experimented with conditional certification: e.g., a preliminary approval of a settlement, under a "more relaxed standard,"[41] or "tentative certification,"[42] with or without notice. In fact, until 2003, Rule 23 explicitly enabled a court to conditionally certify a class.[43] Likewise, the practice of certifying class litigation — and then decertifying — is well known.[44] Finally, a close two-tiered certification process exists under the Fair Labor Standards Act (FLSA), which enables opt-in collective litigation.[45] In the first stage, "the district court judge employs a lenient standard and makes an initial determination of whether potential class members should receive notice of the ongoing action," and then, in the second phase, "[c]ourts engage in a 'more stringent' inquiry."[46] Given the experience with tiered decision-making in general, and in class actions in particular, implementing the tiered-certification proposal seems easy.

Second, courts already vary the degree of procedural safeguards given to class members. In particular, "notice" is a fluid concept. Rule 23 mandates "the

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40 In particular, courts are guided to dismiss, at the outset, unmeritorious cases. *Supra* note 33 and accompanying text.

41 Rubenstein et al., *supra* note 9, § 13:17 (internal quotation marks omitted).

42 *E.g.*, Kohne v. IMCO Container Co., 480 F. Supp. 1015, 1018 n.1 (W.D. Va. 1979).

43 Rubenstein et al., *supra* note 9, § 13:17. The 2003 amendments to Rule 23 cast doubt on the practice of conditional certification. *Id.*

44 *Id.* § 7:37-:38. Unlike the proposed scaled certification, the multi-certification examples in the text do not employ scaled notice, and, more importantly, do not use the tiered-certification tool to affect class members' rights, as this Article suggests.

45 29 U.S.C. § 216 (2012) ("An action [under this Act] may be maintained . . . by any one . . . employee[] for and in behalf of himself . . . and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent . . . .").

46 Matthew Hoffman, Comment, *Fast's Four Factors: A Solution to Similarly Situated Discovery Disputes in FLSA Collective Actions*, 49 Hous. L. Rev. 491, 494-95 (2012). FLSA collective proceedings, though, are opt-in class actions, different from the opt-out classes that this Article discusses.

best notice that is practicable under the circumstances,"[47] and leaves it to the judge to fashion the appropriate notice in each case.[48] While Rule 23 clearly prefers individual notice,[49] courts have employed various forms of notice, from direct mail, to publication in media outlets, to more technologically-enhanced mechanisms.[50] Another relevant example is the authorization in Rule 23 to send notice before certification, per the discretion of the presiding judge — exercised by some courts to inform class members regarding the denial of class certification.[51] The Israeli Act employs a similarly flexible conception of notice.[52] As the value of the notice is already balanced against the "practicalities" of each case,[53] scaled-back notice and opportunity to opt-out seem to be easily implemented. Indeed, in a different context, federal courts already use a staged-notification process.[54]

Third, similar to notices, fee-shifting decisions are also very flexible, commonly taking into account the benefit to the class;[55] hence, there is no

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47 Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2)(B) further specifies that the "best notice . . . practicable under the circumstances [includes] individual notice to all members who can be identified through reasonable effort."

48 Notice should be "reasonably calculated, under all the circumstances." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, at 314 (1950). *See generally* Rubenstein et al., *supra* note 9, § 8:8.

49 Fed. R. Civ. P. 23(c)(2)(B); Rubenstein et al., *supra* note 9, §§ 8:6-:8.

50 *E.g.*, D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 Ga. L. Rev. 475, 542-43 (2016) (describing an actual case that deserved less than a "full-blown" notice ("i.e., first class mail to each class member") where the court eventually "approve[d] a notice campaign that included television, radio, internet, and print advertising").

51 *Infra* notes 85-86 and accompanying text.

52 Class Action Law, 5776-2016, § 25(e), SH No. 2054 p. 264 (Isr.) (listing relevant factors to determine notice manner and method).

53 Principles of the Law of Aggregate Litigation § 2.07(a)(3) cmt. f (Am. Law Inst. 2010).

54 After the common fund has been established, courts employ similar scaled-notice processes to locate the plaintiffs and advise them of their entitlements. Specifically, the second notice uses more sophisticated notification mechanisms, in order to reach out to plaintiffs who missed the first notice. For a description and examples of this tiered notification process, which is also recommended by the ALI, see, for example, Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 Geo. Wash. L. Rev. 1065, 1090-92 (2011).

55 For example, when fees are based on the "common fund" doctrine. Rubenstein et al., *supra* note 9, § 15:53

reason to believe that judges cannot decide on attorneys' fees within each certification stage.

"Smoothing" certification. The tiered-certification process can help plaintiffs' attorneys to fund their cases and facilitate settlements. Currently, the certification process requires the class to pass a high threshold. As discussed before, the heightened certification standards may be desirable, but they particularly harm plaintiffs' lawyers, who work on a contingency fee and have to finance, in advance, a costly process.[56] A "smoother" procedure, with two "certifications," can presumably help those lawyers — they can file the case with a smaller investment and secure more funding after passing the preliminary approval. Along the same lines, an additional holding of the judge, early in the life of the case, could reduce the informational gaps between the parties and streamline settlements.[57] Finally, similar to the reasoning behind encouraging defendants to move to dismiss,[58] preliminary certification could better screen out frivolous class actions.[59]

Additional costs. The proposal can be criticized due to the additional costs that the dual certification process entails. Presumably, an additional layer of adjudication generates new expenses, such as the time the judge needs to write another decision, costs associated with another round of notices to class members, etc. These concerns are not insurmountable for the implementation of the tiered-certification procedure.

First, one may wonder who should bear the extra costs of the proposed procedure. At least with respect to the costs related to notifying class members, the solution could be similar to the rule governing regular certification. In many cases, class counsel advance these costs and can be reimbursed should the class win.[60] This solution fits preliminary certification. Moreover, as its name suggests, scaled-back notice should be less expensive than full notice.[61]

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56 *Supra* notes 24-25 and accompanying text.

57 *E.g.*, J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. Rev. 59, 60-61 (2016) ("If the . . . parties to a litigation . . . are well informed . . . settlement is extremely likely.").

58 *Supra* notes 33-34 and accompanying text.

59 *Cf.* Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 443-44 (2014) (discussing proposals to "empower[] [courts] to make a preliminary determination of the merits . . . in order to avert the inefficiencies generated by permitting non-meritorious . . . actions").

60 *E.g.*, *In re* Tripath Tech., Inc., Sec. Litig., No. C 04 4681 SBA, 2006 WL 1009228, at *4 (N.D. Cal. Apr. 18, 2006) (considering costs of notice in the award of attorneys' fees).

61 In particular, where individual notice is cheap there should be no qualms about

A second and related point is the effect of the two-stage certification process on parties' legal expenses. While the precise effects of dual certification are complicated to analyze, there are reasons to believe that the added costs that the parties would bear from preliminary certification are minimal. Under the current doctrine, the plaintiffs in any case need to invest sizeable costs in order to pass certification, and as the foregoing has shown it may be easier for them to defer some of these costs to the second stage (should they pass the first certification).[62] From the defendants' perspective, a preliminary certification can weed out undesirable cases.[63] From both parties' perspectives, an informative judicial holding at the first certification stage should enhance the odds of settlement.[64] Moreover, as shown below, the tiered certification process has other, more particular benefits that the parties could share, such as avoiding the relitigation problem and better handling quasi-class actions.

A third point is the added burden on judges. The preliminary certification stage requires judges to make positive findings, early on, regarding the capacity of the representing attorneys and the merits of their allegations. Moreover, to the extent that absent plaintiffs would like to voice their opinion at the preliminary certification stage, judges would have to spend additional time. Judges, however, face similar problems in the current regime. They already decide dismissals early on, and preliminary certification should not be substantially different.[65] Likewise, judges already regulate the right-to-be-heard of litigious class members. Furthermore, I expect preliminary certification to be a relatively lenient stage, contrary to the fact-intensive full certification. Finally, early certification could save judicial costs, as the parties might settle thereafter.

To summarize, the proposed tiered certification may well add expenses. However, the practical difficulties resemble current practical difficulties, and can likewise be resolved on a case-by-case basis. Preliminary certification should not be a taxing step, and its expenses should be assessed against the benefits, e.g., early monitoring of class counsel. The next Part elaborates on a particular benefit — the utility of tiered certification in addressing the relitigation problem.

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using it as part of the first certification. In many run-of-the-mill cases, individual notice is virtually costless. *E.g.*, *In re* Groupon Mktg. & Sales Practices Litig., No. 3:11-md-02238-DMS-RBB (S.D. Cal. Apr. 23, 2012) (a consumer class action in which several sets of notices were sent to the author via email). These situations are likely to be more prevalent as technology improves.

62 *Supra* text accompanying note 56.

63 *Supra* note 59 and accompanying text.

64 *Supra* note 57 and accompanying text.

65 *Supra* notes 33-34 and accompanying text.

III. The Relitigation Problem — Denials of Class Certification

What are the repercussions of a decision not to certify under the current, single-certification regime? Obviously, without certification class members are free to litigate their own claims. However, in that case, would class members have the right to litigate collectively? Can they mount additional attempts to certify the class? The general rule is that a decision not to certify a class entails no implications. Therefore, when one plaintiff attempts to certify class litigation, but fails, each of the remaining members can mount her own certification attempt. Alternatively put, the class as a whole has multiple bites at the (certification) apple, up to the number of its members. I refer to this situation as the relitigation problem. This Part discusses the general rule, the advantages and disadvantages of relitigation, and the existing directions for coping with the problem as well as their critique. Against this backdrop, this Part shows that the tiered-certification proposal provides a reasonable solution to the problems caused by relitigation.

A. The General Rule in a Single-Certification Regime

A few years ago, in *Smith v. Bayer*,[66] the U.S. Supreme Court clarified the general rule: it unanimously held that a denial of class certification in the first forum does not preclude other class members from seeking certification of the same class.[67] The conclusion that class members are not bound without certification seems to make doctrinal sense: it follows the general rule that nonparties are not precluded, which is "ultimately rooted in due process."[68] After certification, as an exception to the general rule, absent plaintiffs are bound. However, "a nonnamed class member is [not] a party to the class-action

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66 Smith v. Bayer, 131 S. Ct. 2368 (2011).

67 *Id.* at 2380 ("[I]n the absence of a certification . . . the precondition for binding [future plaintiffs that seek certification] [i]s not met."). This holding is possibly a dictum, as the Court had other grounds for denying preclusion: the differences between the legal standards for certification in the first (federal) and second (state) courts. *E.g.*, Rubenstein et al., *supra* note 9, at § 18:30; Richard D. Freer, *Preclusion and the Denial of Class Certification: Avoiding the "Death by a Thousand Cuts,"* 99 Iowa L. Rev. Bull. 85, 93 (2014). While it may be a dictum, this part of *Smith* was later applied in broader contexts, for example to federal-federal certification attempts. *See* Smentek v. Dart, 683 F.3d 373 (7th Cir. 2012).

68 Freer, *supra* note 67, at 89.

litigation *before the class is certified*."[69] The Israeli Supreme Court reached a similar conclusion.[70] However, as shown below, from a broader policy perspective, the non-preclusion rule is problematic. The next paragraphs lay out the policy arguments regarding binding nonparties to certification denials.[71] These for and against policy arguments echo the usual considerations regarding preclusion, and in particular they express the need for finality against the risk of a potentially mistaken judgment.

B. For and Against Policy Considerations

The arguments for preclusion stem from the freedom, under a non-preclusion regime, to relitigate class certification time and again. Such relitigation is inefficient, as different courts have to decide the same issue — class certification — multiple times. With the recent trend to raise the threshold for certification, and presumably more meritorious class actions that fail to pass certification, this problem may be aggravated.

Another argument relates to the unfair burden on the defendant under the rule that allows multiple certification attempts. The non-preclusion rule accords an asymmetrical effect to certification decisions: denial does not prevent other plaintiffs from requesting class certification, but a decision to grant certification

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69 *Smith*, 131 S. Ct. at 2379 (quotation marks omitted); *see also* Principles of the Law of Aggregate Litigation § 2.11 cmt. b (Am. Law Inst. 2010) ("The notion that absent class members could be bound . . . with respect to the seeking of certification in another court . . . runs afoul of existing precedents . . . [as] preclusion [cannot] be extended to reach nonparties."); Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 Iowa L. Rev. 1659, 1666 (2014) ("As a matter of the well-established law of judgments, the [*Smith*] Court was correct."). These sources notwithstanding, and although the holding was unanimous, the result is by no means self-evident. *See, e.g.*, William B. Rubenstein, The Operation of Preclusion in Multidistrict Litigation (MDL) Cases 6 (Apr. 2, 2012) (unpublished manuscript) (on file with author); cases discussed *infra* notes 87-89 and accompanying text.

70 LCA 3973/10 Stern v. Verifone ¶ 32 (Apr. 2, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

71 There are a host of doctrinal requirements for preclusion that may fail any attempt to find that a denial of class certification precludes future certification attempts. *See, e.g.*, Gidi, *supra* note 13, at 1033-56 (discussing various obstacles to preclusion, such as differences between the first and second certification attempts). This Article avoids these issues and discusses only considerations that relate to binding nonparties to certification denials.

binds the defendant.[72] The upshot is that class members can relitigate over and over, until a favorable certification decision is granted: "A single positive trumps all the negatives."[73] This approach leads to an unfair bias against the defendant, which may push it to strike a global settlement with the first class action, paying more than it should.[74] The potential for relitigation, then, over-deters the defendant and invites frivolous class actions.[75] Finally, the non-preclusion rule encourages "inconsistent results that tend to undermine public confidence in the judicial process."[76] In sum, while the extent of the relitigation problem is unclear,[77]

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72 This is, essentially, a non-mutual offensive issue preclusion.

73 *In re Bridgestone/Firestone*, 333 F.3d at 766-67. A related concern is forum shopping. *E.g.*, Principles of the Law of Aggregate Litigation § 2.11 cmt. a (stating that the non-preclusion rule can "turn into a search for one anomalous court willing to certify a class action previously rejected by multiple other courts").

74 The *Smith* court considered this argument to be the heaviest one: "[The defendant's] strongest argument [is] that under our approach class counsel can repeatedly try to certify the same class by [simply] changing the named plaintiff . . . [forcing the defendant] to buy litigation peace by settling." *Smith*, 131 S. Ct. at 2381 (internal quotation marks omitted). Note, though, that to the extent that the defendant is forced to settle, the threat actually saves litigation costs.

75 *Cf.* Note, *Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel*, 105 Harv. L. Rev. 1940 (1992).

76 Gidi, *supra* note 13, at 1032 (internal quotation marks omitted).

77 Preclusion might be impossible due to various doctrinal issues other than binding nonparties. *Supra* note 71. In addition, in actuality, "plaintiffs' attorneys might stop trying after a certain number of failed certification attempts [and] the statute of limitations may run out at some point." Rubenstein et al., *supra* note 9, § 18:30. Relatedly, to the extent that the second class overlaps in time with the first class, and the case involves litigation in a state court, the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, "provide[s] a [partial] remedy," as it "enable[s] defendants to remove to federal court any sizable class action [such that] federal courts . . . consolidate multiple overlapping suits against a single defendant in one court." *Smith*, 131 S. Ct. at 2382. On the other hand, we do observe in actuality serial certification attempts. *Cf. supra* note 69. Moreover, as discussed throughout this Article, the relitigation problem has attracted nontrivial academic and judicial attention. A notable context in which concerns about successive certification attempts have been raised is the possible application of the statute of limitations to follow-on class actions. Deviating from relevant precedents, some courts have ruled that denials of class certification do not toll the running of the statute of limitations, in order to prevent plaintiffs from "engag[ing] in endless rounds of litigation." Rubenstein et al., *supra* note 9, § 9:64 (quotation marks omitted). Finally, the relitigation problem can manifest itself in subtle ways, such as early settlements. *See infra* note 78.

relitigation inflicts costs and creates an unfair settlement pressure on the defendant.[78]

What are, then, the advantages of a *Smith*-style, non-preclusion rule? A general argument against finality is the prospect of more accurate decision-making. This argument, however, seems weak in this context. Preclusion exalts the first decision; no-preclusion confers an authoritative power on the last judge, whose certification decision can trump all previous rulings. There is no a priori reason to trust the last judge more than the first. One may argue that there is some type of learning effect, which improves the quality of the later decisions.[79] To the extent that the passage of time improves the quality of decision-making, e.g., more scientific data is revealed, the problem could be addressed directly, without unfairly pressing the defendant. An appropriate approach would be, for example, to stay litigation. While relitigating the same issues at different times by different judges promotes diversity, there are, again, seemingly better ways to achieve these benefits. If one believes that diverse certification decisions are a value worth promoting, a sensible approach would be to split the class into several subclasses and letting each subclass litigate separately.[80]

A stronger variant of the error-correction claim is that non-preclusion saves the class from the mistakes of its putative lawyer in the first forum, F_1. The law firm that handled the first certification request might not be sufficiently experienced. Alternatively, it was financially constrained, underinvesting in the proceedings. Here, the rising certification standards perhaps make suboptimal representation more likely, due to the greater costs associated with the certification process.[81] In that sense, a non-preclusion rule is another safeguard for adequate representation. However, for this argument to work, one needs to explain why representation in F_1 is worse than in subsequent forums. It may be that a second attempt, perhaps by the same law firm, perhaps by other firms that learned from the mistakes of class counsel in F_1, can improve

78 While actual relitigation is perhaps not pervasive, this does not mean that the problem is extinct; the threat of relitigation could affect, for instance, the defendants' incentives to settle the first class action. *Supra* note 74 and accompanying text.

79 This view echoes, to some extent, the so-called "maturity" requirement in the context of mass torts. *E.g.*, Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941 (1998).

80 Likewise, to the extent that multiple perspectives on the same issue offer a unique advantage, certification decisions could be made by multiple judge panels.

81 *Cf. supra* note 24 and accompanying text.

representation, but to the extent that the judge in F_1 guarantees adequate representation at the certification stage, these problems seem to be minimal.[82]

In sum, the main policy considerations seem to be the following. A non-preclusion rule gives authoritative weight to the first judge who approves certification, generating grave consequences for defendants. The main argument in favor of the rule is that, where the judge in F_1 could not maintain adequate representation, non-preclusion can rectify the problem. Are the benefits of relitigation greater than its costs? While the answer requires more data, it seems that, by and large, judges and academics have raised concerns over the apparent policy disadvantages of the non-preclusion rule.[83]

Regardless of the apparent inefficiencies of the non-preclusion rule, the doctrinal argument against preclusion is evident: the members of the class, except the one who initiated the process, did not participate in the proceedings nor receive notice thereof. Binding absent parties to a decision to deny certification infringes on their procedural rights. Beyond the doctrine, notice and opportunity to be heard seem more than mere formalities. It appears unfair to bind class members to a denial decision, where there was no attempt to actively inform them of the infringement of their rights.[84] Indeed, Rule 23 explicitly allows discretionary notices, unrelated to certification[85] — and courts have relied on this provision to notify class members of certification denials, especially when the limitations period was about to expire.[86]

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82 In addition, one wonders whether there are other vehicles, such as legal malpractice suits, to induce adequate representation without sacrificing the interests of defendants.

83 *See generally infra* Section III.C (surveying proposals to curtail the scope of the non-preclusion rule).

84 *E.g.*, Gidi, *supra* note 13, at 1045-52.

85 Fed. R. Civ. P. 23(d)(1)(B).

86 Puffer v. Allstate Ins. Co., 614 F. Supp. 2d 905, 910 (N.D. Ill. 2009) ("[U]nless putative class members are notified of the denial of class certification, 'they may fail to file their own suits and thus fail to 're-arrest' the statute of limitations, and as a result they may find themselves time barred without knowing it.'") (quoting Culver v. City of Milwaukee, 277 F.3d 908, 915 (7th Cir. 2002)); *see also* Doe v. Lexington-Fayette Urban County Gov't, 407 F.3d 755, 764-65 (6th Cir. 2005) ("[Because] the local media devoted substantial coverage to the [case], [s]uch public attention presumably led putative class-action members to believe that their rights were being adequately represented . . . . Without notice . . . the putative class members were likely lulled into believing that their claims continued to be preserved."); Rubenstein et al., *supra* note 9, § 8:26.

C. Alternative Approaches to the Relitigation Problem

Given the conflicting policy and doctrinal considerations, courts and policymakers have offered several directions for tackling the relitigation problem. The following paragraphs discuss three sets of alternatives to the non-preclusion rule — precluding subsequent certification attempts upon denial; a non-preclusion rule with exceptions; and precluding lawyers rather than plaintiffs.

1. Denials Preclude Future Certification Attempts

Several appellate courts in the U.S. have found that a decision to deny certification precludes additional attempts. These decisions emphasized that, although additional certification attempts are precluded, class members are free to vindicate their rights through individual, but not class, litigation.[87] Likewise, class members who seek another certification attempt had some procedural rights in the first process — for instance, they could have appealed the denial of class certification.[88] Finally, representation in the first forum seemed adequate in those cases.[89]

These decisions seem sensible from a policy perspective, but they entail conceptual difficulties. The main difficulty is binding absentees without proper procedural safeguards, i.e., notice and an opportunity to be heard — in contrast to "well-established principles of both the law of judgments and the constitutional dictates of procedural due process."[90] Class members were indeed entitled, to some extent, to "voice" their concerns in F_1, e.g., to appeal the decision that denied certification. However, "there is no real opportunity to do so because there is no notice to class members before class certification."[91] Be that as it may, the 2011 *Smith* decision reversed this course.

There are other proposals to preclude subsequent certification attempts. In 2001, amendments to the federal rules that enabled preclusion were preliminarily

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87 *E.g.*, *In re* Baycol Prod. Litig., 593 F.3d 716, 725 (8th Cir. 2010). This decision was reversed by *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).

88 *In re* Baycol Prod. Litig., 593 F.3d at 725.

89 *In re* Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig., 333 F.3d 763, 768-69 (7th Cir. 2003).

90 Redish & Kiernan, *supra* note 69, at 1678 (footnote omitted); *see also* Recent Cases, 117 Harv. L. Rev. 2031 (2004). *But cf.* Freer, *supra* note 67, at 94-95 n.50 (suggesting that an affirmative decision that the representatives are adequate, and hence can bind the class, does not require notice and opt-out); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Pa. L. Rev. 2035, 2076 (2008) (same).

91 Gidi, *supra* note 13, at 1041.

considered.[92] Others have proposed different theoretical bases for achieving preclusion. Clermont analogizes denials of class certification to decisions that determine that no jurisdiction exists — just as the latter are binding on the parties, the former should preclude future class members.[93] These (unsuccessful) proposals, again, clash with the basic prohibition against binding nonparties.[94]

2. No-Preclusion, but…

A less controversial approach is to accept the reasoning of the non-preclusion rule, but apply a weaker version thereof. One can observe several variations, from "comity" between forum 2 (F_2) and F_1 to a rebuttable presumption in favor of preclusion.

Comity. Aware of its adverse policy implications, the U.S. Supreme Court nonetheless offered in *Smith* comity among courts as a potential remedy for the relitigation problem. The concept of comity is known in the context of international law, where it encourages cooperation among courts of different states.[95] In the context of certification denials, this idea suggests that later courts should, to some extent, look to F_1 — "apply[ing] principles of comity" to F_1's decision to deny certification.[96] Comity is therefore a weaker form of preclusion — the certification decision in F_1 has a partial binding effect on F_2 and later courts. The Israeli Supreme Court seems to have taken a similar path, holding that denials of class certification do not bind future certification attempts, but simultaneously citing previous appellate courts that maintained that a decision in F_1 has "some implications" for later courts.[97]

The precise preclusive effect of "comity" depends on the willingness of subsequent courts to respect F_1's denial of certification. The more F_2 respects F_1, the likelihood of a certification decision in F_2 diminishes. In that case, the incentives of plaintiffs' attorneys to relitigate are weaker, even if the case has merits, and the unfair pressure on the defendant in F_1 is likewise lower. Along

92 For a short discussion, see Redish & Kiernan, *supra* note 69, at 1689. Interestingly, "[t]he amendment would have lodged the power of preclusion in the first court, giving it the authority to prohibit absent class members from bringing additional motions for certification." *Id.*; *see also* Gidi, *supra* note 13, at 1057-59.

93 Kevin M. Clermont, *Class Certification's Preclusive Effects*, 159 U. Pa. L. Rev. PENNumbra 203 (2011).

94 *E.g.*, Gidi, *supra* note 13, at 1066-68 (criticizing Clermont's proposal along these lines).

95 *E.g.*, Christopher R. Drahozal, *Some Observations on the Economics of Comity*, *in* Economic Analysis of International Law 147 (Thomas Eger et al. eds., 2014).

96 Smith v. Bayer Corp., 131 S. Ct. 2368, 2382 (2011).

97 LCA 3973/10 Stern v. Verifone ¶ 32 (Apr. 2, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

these lines, the idea of "comity" can manifest itself in more subtle ways, as subsequent courts have many mechanisms to respect F_1 and thereby "chill" repetitive class actions. For instance, judges can aggressively sanction lawyers who bring an unsuccessful certification motion in F_2, or award lower fees for repetitive, though successful, class proceedings in F_2.[98]

Given the policy considerations that support preclusion, providing F_1 some preclusive effect, e.g., through discretionary "comity," seems attractive.[99] However, this idea is not devoid of difficulties. First, partial discretionary preclusion mechanisms provide no guidance to courts. To illustrate, comity "permits" but "does not require" preclusion, leaving wide leeway to judges.[100] Indeed, uncertainty seems to abound. American courts have been "struggling to give meaning to the 'principles of comity' discussed in [*Smith*]."[101] Second, it is plausible to expect that comity (and its parallels) means that F_2 should conduct an independent examination, with some deference towards F_1's decision. But in that case, given the fact-intensive certification process, the independent examination in F_2 is also fact-intensive and time-consuming — resulting in de facto relitigation of the same issues.[102]

More generally, the notion that the certification decision in F_1 has *some* preclusive effect again seems to undermine the doctrinal tenets that *Smith* represents. To the extent that F_1's decision affects later courts, the rights of absent class members would be infringed without an appropriate process. For similar reasons, at common law, when preclusion requirements are not met courts cannot infer from the decision of previous courts, as such mutual respect among courts renders "the doctrine of collateral estoppel . . . superfluous."[103] Indeed, while the concept of comity originated in the context of international law, the legal basis for importing comity to the intra-state context is not clear.[104]

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98 *See also* Gidi, *supra* note 13, at 1059-63 (discussing concepts such as stare decisis and law of the case that provide some weight to F_1's certification denial).

99 *Cf. id.* at 1063 (discussing the attractiveness of employing judicial discretion to preclude subsequent certification attempts).

100 Smentek v. Dart, 683 F.3d 373, 376 (7th Cir. 2012).

101 Rubenstein et al., *supra* note 9, § 18:30 (surveying cases).

102 For an argument along these lines, see Redish & Kiernan, *supra* note 69, at 1685.

103 United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994) (discussing the principle that "a court cannot take judicial notice of a fact merely because it has been found to be true in some other action").

104 Accordingly, Judge Posner criticized *Smith*'s reference to comity as a mechanism to achieve partial preclusion as a "cryptic" and "novel" idea, for which "[t]he Supreme Court's opinion cites no authority." *Smentek*, 683 F.3d at 375, 376.

In sum, the concept of comity seems to be either futile, preventing little relitigation, or vulnerable to the same difficulties that full preclusion entails.[105]

A rebuttable presumption in favor of preclusion. A stronger variant of the comity idea is that the first certification denial raises a rebuttable presumption against certification. This is the position expressed by the American Law Institute (ALI)'s *Principles of the Law of Aggregate Litigation*.[106] Specifically, the ALI suggests that "the court in the subsequent proceeding should generally exercise its discretion to avoid unnecessary friction with the court that initially denied class certification."[107] At least one appellate court in Israel has embraced a similar standard.[108]

The rebuttable presumption standard is vulnerable to the same aforementioned difficulties. First, while the ALI's wording provides more guidance to judges, the circumstances in which the preclusion presumption can be rebutted are not clear.[109] Given the fact-intensive inquiry that the judges of F_1 should conduct at the certification stage, a rebuttal, implying that F_1 was mistaken, seems difficult.[110] More importantly, one can again question the doctrinal basis for the preclusion presumption. The relevant section explicitly refrains from recognizing preclusion, with the familiar admonition that "the prospective absent class members have become neither parties to the proposed class

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105 For criticism of discretionary preclusion mechanisms along these lines, see, for example, Gidi, *supra* note 13, at 1062 (arguing that weaker preclusion proposals "might . . . bind the absent class in much the same way that issue preclusion does . . . without the same traditional constraints"). *See also* Redish & Kiernan, *supra* note 69, at 1685.

106 Principles of the Law of Aggregate Litigation § 2.11 (Am. Law Inst. 2010).

107 *Id.* § 2.11 cmt. b.

108 CC (TA) 1043/00 Rosenfeld v. The Org. to Implementation of the Soc. Sec. Treaty ¶ 10 (Oct. 24, 2002), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (determining that unless there is a "substantial and significant difference" between the first, denied certification motion and the current one, the additional certification request should be seen as a "recurrent harassment of the defendant" that should not be "tolerated").

109 The examples in the relevant section relate to inadequate representation in the first forum. Principles of the Law of Aggregate Litigation § 2.11 cmt. c; *see also* Gidi, *supra* note 13, at 1065 (arguing that the ALI proposal "missed the opportunity to explain how exactly the [presumption] differs from the traditional application of the issue preclusion doctrine").

110 *Cf.* Shay Lavie, *Are Judges Tied to the Past? Evidence from Jurisdiction Cases*, 43 Hofstra L. Rev. 337 (2014) (suggesting, based on empirical evidence, that judges tend to stick to previous, heavily-invested decisions).

action nor persons with any attributes of party status."[111] Similarly to the previous discussion, one wonders how the first decision can have any effect on subsequent courts if class members were not parties.[112]

3. Precluding Class Counsel, not Class Members

A different way of looking at these problems is proposed by Martin Redish and Megan Kiernan. Rather than preclude the class, they suggest that the lawyers that brought the first, unsuccessful case should be forbidden from subsequent certification attempts.[113] This proposal is based on the fact that, in typical class actions, "the driving force behind the class action is the class attorneys rather than the class members."[114]

The proposal to preclude class counsel seems intuitive, given the importance of lawyers in class actions. However, its efficacy in solving the relitigation problem is questionable. First, if the same attorneys wished to relitigate under Redish & Kiernan's proposed regime, they could presumably do so by privately referring the case to another law firm, a common practice in class litigation.[115] Second, the proposal does not cover many, arguably most, instances of relitigation — nothing in this proposal prevents other lawyers from waiting for the first certification to be denied and then refiling the case.

* * *

The rule that allows class members additional certification attempts seems inefficient. However, it flows from the deep principles that protect the rights of absentees. Proposals to circumvent these doctrinal problems, such as comity among forums, seem incomplete — they are vague, possibly fail to eliminate relitigation, and appear to contradict the very same doctrinal principles. As one commentator has observed, "[d]espite the importance of issue preclusion in class action litigation, we still do not have . . . any semblance of an adequate

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111 Principles of the Law of Aggregate Litigation § 2.11 cmt. b. Instead, the presumption is justified "as a matter of comity" between courts. *Id.* § 2.11.

112 *See, e.g.*, Redish & Kiernan, *supra* note 69, at 1687 ("[F]or all practical purposes the ALI's proposal [is] guilty of exactly what the ALI condemned others for: extending a type of impermissible [preclusion] of plaintiffs in the second suit by plaintiffs in the initial suit.").

113 *Id.*

114 *Id.* at 1662.

115 *E.g.*, Wolff, *supra* note 1, at 147-50 (discussing practical difficulties with the proposal).

resolution."[116] The next Section attempts to tackle these problems directly, through the tiered-certification proposal.

D. Tiered Certification and Preclusion

The non-preclusion rule that *Smith* represents reflects a binary perception of certification: a class can either be certified (with preclusion) or not-certified (without preclusion). The way out is to loosen this binary, and the procedural vehicle to achieve this goal is a two-stage certification process, as sketched in Part II. The following demonstrates that tiered certification could achieve preclusion and simultaneously raise few due process concerns.

Part I demonstrated that preclusion requires the class to meet the certification standards, including adequate representation, in addition to notice and opportunity to opt-out. This is, of course, a fluid formula. However, its logic suggests that thinner notice, together with lower certification requirements — as with the proposed preliminary certification in Part II — could lead to some, incomplete preclusion.[117] Tiered certification, then, is capable of creating a differential preclusive effect and mitigating the due process problems that bother courts.

The gist of it is the different rights that are precluded. Class litigation precludes class members' individual rights: a judgment (or settlement) after a class is certified prevents class members from litigating their individual claims. Denial of class certification, however, at most eliminates only a procedural right — to commence class proceedings; members of an uncertified class are free to litigate their own individual cases. Policymakers seem to shoehorn these two different preclusive effects into one certification process.[118] However, as the preclusion of individual rights requires a full-blown class certification (and notice), a lesser, scaled-back certification (and thinner notice) is presumably sufficient to preclude procedural rights. Roughly:

> Notice + Opportunity to opt-out + Certification = Preclusion of substantive rights + preclusion of procedural rights
>
> Scaled-back notice + Opportunity to opt-out + Preliminary Certification = Preclusion of procedural rights.[119]

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116 Gidi, *supra* note 13, at 1025.

117 *Cf.* Mathews v. Eldridge, 424 U.S. 319 (1976) (suggesting how to determine the amount of process due, including the interest that will be affected).

118 The *Smith* Court did not elaborate on the differential preclusive effects — precluding individual rights versus precluding only procedural rights — and the presumably different due process requirements.

119 *Cf.* Rave, *supra* note 50, at 478. Rave describes a unique settlement that precluded

These two pairs of procedural safeguards/preclusive effects correspond to the two stages that comprise the tiered-certification proposal. Practically, if under the tiered-certification proposal the court decides that the class survives the preliminary stage, class members would no longer have the right to litigate collectively. Of course, if the class survives the second, full certification, its members would not have the right to litigate either individually or collectively. By contrast, if the court decides that the class did not reach the threshold for preliminary certification, class members are free to litigate in subsequent forums both individually and as a collective.

Recall that the first, preliminary certification should provide, in principle, the same procedural safeguards — but to a lower extent. Given the lower interest at stake at this stage — the elimination of procedural rather than substantive (and procedural) rights — the safeguards are lower, i.e., a more lenient judicial inquiry and scaled-back notice to class members should suffice. Like the full notice, the preliminary notice should inform class members of their capacity to opt-out. To demonstrate, in case the second, full certification is denied, those who did not opt-out at the preliminary certification would be bound by the denial; they would only be able to bring their individual claims. By contrast, class members who did opt-out at the preliminary stage would not be precluded by a denial of full certification, and they would be free to reinitiate class proceedings on behalf of similarly situated plaintiffs (e.g., who likewise opted-out at the preliminary certification stage).[120] Of course, similarly to current practice, should the case pass the second certification,

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class members from litigating collectively but allowed them to bring their individual cases. *In re* Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014). Apparently, such a settlement, that

> purports to leave class members' substantive rights untouched . . . does not trigger all of the cumbersome protections (e.g., individualized notice, the right to opt out, searching inquiries into predominance, etc.) that the class action rules and due process require before absent class members can be precluded from bringing individual damages claims.

Rave, *supra* note 50, at 508; *see also* Wolff, *supra* note 90, at 2076 (arguing that the required "degree of procedural due process in class proceedings . . . varies with the extent to which a court proposes to place class members at risk of an alteration in their legal position").

120 *Cf.* Bay Area Injury Rehab Specialists Holdings, Inc. v. United Serv. Auto. Ass'n, No. 2D14-786, 2015 Fla. App. LEXIS 8772 (Fla. 2d Dist. Ct. App. June 10, 2015) (an example of a class action that comprises those who opted-out of a previous class); Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 366 (Tex. App. 1994) (same).

those who did not opt-out at the first certification, but chose to opt-out at the second certification, are free to litigate their individual claims.

The tiered-certification process seems to be a reasonable solution to the relitigation problem, balancing the need to preclude relitigation and the desire to respect individual rights. Specifically, with the provision of notice and opportunity to opt-out at the first stage, together with a minimal guarantee of adequate representation, the doctrinal hurdles that prevented preclusion dissipate.

The tiered-certification solution is not devoid of difficulties. First, it should be noted that the proposal would not eliminate relitigation — members of putative classes that did not pass the first, preliminary certification would be free to mount future certification attempts. However, the defendant's harm from prospective relitigation following a denial of preliminary certification would plausibly be smaller than under the current regime.[121] Moreover, given the costs of filing a class action, and the incentives of class counsel to pass the preliminary stages, I expect that many cases will cross the preliminary threshold and avoid relitigation.[122] Hence, at the least the proposal seems to reduce the relitigation problem relative to current practice.

The most salient concern regarding the tiered-certification solution, perhaps, lies at its core: precluding absent class members from litigating collectively, in subsequent forums, where the class at F_1 passed the first certification but failed the second. While class members in those cases retain their right to litigate individually, it should be significantly harder for them to vindicate their rights without collective proceedings. Relatedly, the concept of tiered certification as a means to bind the members of the class to a decision to deny full certification seems fictitious. Most class members, even in case they are individually notified, do not bother.[123] The odds that class members would opt-out after the first certification, and then relitigate as a class, are slim.

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121 Prospective relitigation presses the defendant to settle, as the judge in F_2 might certify although the judge in F_1 denied certification. *Supra* notes 73-74 and accompanying text. It is very unlikely, however, that a judge in F_2 would fully certify a case that did not even pass the preliminary certification threshold in F_1. Hence, the prospect of relitigation following a denial of preliminary certification is less threatening to defendants.

122 Indeed, given its preclusive repercussions, one may expect that in many cases the defendant would not vigorously resist preliminary certification.

123 The individual stakes are often too low relative to the costs of intervening in a class action. *See generally* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529 (2004) (providing empirical evidence for the

There are, however, mitigating factors. First, the scaled certification proposal is as much a contrived concept as the current full certification is. In general, class members tend to be oblivious to notices, and if they fail to opt-out they often receive a miniscule portion of their actual injury.[124] Moreover, substantive rights are typically deemed more important than the procedure for vindicating those rights.[125] Of course, the procedure-substance distinction has a formalistic flavor. But it is important to emphasize that the stakes in the preliminary certification are perforce lower — it bars only procedural rights, as class members are free to litigate individually, whereas full certification binds the right to litigate both collectively and individually. Therefore, due process requirements at the preliminary certification stage are presumably weaker. As a side note, even without the right to litigate collectively, with advances in technology it now seems easier for class members who are aware of their rights to bring those rights to court.[126]

Second, as Part II shows, the tiered-certification proposal is designed to improve early monitoring of class counsel, which is all the more important given the trend to frontload efforts. The better monitoring that the proposal seeks to achieve minimizes the infringement of class members' rights to litigate collectively. In this respect, better monitoring can be achieved even if the vast majority of class members ignore the preliminary notice: a few vigilant

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proposition that opt-outs and class members' objections are uncommon in class litigation).

124 Redish & Kiernan, *supra* note 69, at 1673 ("[C]lass proceeding will never reach, much less compensate, the overwhelming majority of the victims.").

125 *Cf.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (rejecting class litigation and determining that the law does "not guarantee an affordable procedural path to the vindication of every claim."); HCJ 2171/06 Cohen v. Knesset Speaker ¶ 34 (Dec. 13, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (the Israeli Supreme Court holding that the constitutional right to access courts does not guarantee the right to class litigation); Rave, *supra* note 50, at 540 (concluding that "as long as a settlement . . . leaves the claimants' substantive claims intact . . . there does not appear to be a due process violation."); Freer, *supra* note 67, at 95-96.

126 *E.g.*, Manuel A. Gómez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as A Litigation Financing Tool*, 49 U.S.F. L. Rev. 307 (2015) (describing the blossoming crowd litigation-funding sector); Rave, *supra* note 50, at 496 (showing that although precluded from bringing another class action due to a prior class action settlement, *In re* Trans Union Privacy Litig., 741 F.3d 811 (7th Cir. 2014), more than 100,000 plaintiffs brought their small claims individually as "lawyers solicited class members who retained their rights to sue . . . individually" "[p]rimarily through Internet advertising").

plaintiffs should suffice to alert the court and provide useful information to competing law firms.[127] Moreover, recall that opting-out at the preliminary stage, according to the proposed tiered certification, maintains the right to litigate collectively anew. Thus, one can envision "proxy fights," in which competing law firms would attempt to sway class members to opt-out during the preliminary certification phase and join a new class action.[128] More aggressive competition among plaintiffs' lawyers should provide more information to the court and eventually improve representation.

Finally, the tiered-certification proposal should be judged against the alternatives. The main alternatives under the current regime are open relitigation after certification denials, a practice that is unfairly harmful to the defendant, or a presumption of preclusion of collective litigation, through comity, without notifying class members and allowing them to voice their concerns. The tiered-certification proposal is a balanced solution that is superior to both alternatives.

IV. Toward Semi-Class Actions

In addition to addressing the relitigation problem, the idea of tiered certification can open up new ways to handle certain types of class actions. While the axiomatic, single certification stage creates a "discontinuity" between certified and uncertified classes, tiered certification offers a richer view of class litigation. In particular, the tiered-certification regime anticipates a new category: cases that pass the preliminary certification but fail the second. This category can include cases that merit some, but not complete, collective treatment — cases that can be referred to as semi-class actions. While a complete treatment of semi-class actions is beyond the scope of the current Article, this Part relies on two unique procedures under the Israeli Law, which resemble preliminary certification, to illustrate this idea.

A. A Richer View of Class Actions

1. Illustrative Procedures

"Ceasing" admissions and litigation against governmental bodies. The Israeli Law creates a unique procedure to handle class actions against governmental

127 Indeed, some class members do regularly intervene in class actions. Eisenberg & Miller, *supra* note 123 (providing empirical evidence).

128 *Cf.* Rave, *supra* note 50, at 506 (showing that in the *Trans Union* settlement class members did not have the option to opt-out, hence there was no "threat of exit to discipline class counsel").

bodies for overcharges.[129] Upon a motion to certify an overcharge class, governmental bodies, typically municipalities, can file a "ceasing admission" in which they commit to stopping overcharging. In such case, the collective proceedings end (and class counsel typically receive a modest fee). However, class members retain their rights to file individual lawsuits.[130] This process can be looked at from a tiered-certification perspective. The class, in essence, passed the preliminary stage, but the municipality's willingness to stop its wrongful behavior renders a second certification superfluous.

Is this unique process valuable, from a policy perspective? On the one hand, the lenient procedure saves the costs of a full-blown class action. In particular, complete class actions would presumably affect the ability of governmental bodies to operate. On the other hand, without collective redress individuals are less likely to vindicate their rights. In this sense, the provisions that shield ceasing governmental bodies from class litigation enable them to pay less than the harm they inflicted, presumably resulting in lower deterrence. In short, the benefits of the "ceasing" procedure, as well as its costs, are lower than a full-blown process.

However, to the extent that governmental bodies generally act in good faith, and the overcharge is an honest mistake, the absence of collective redress would not lead to substantial under-deterrence. Therefore, a second, full certification — a costly process — becomes counterproductive relative to the option of a lenient certification that does not preclude class members' individual rights. In more familiar doctrinal terms, complete class litigation is not a superior method of adjudication.[131]

Voluntary dismissals and food labeling litigation. Another unique procedure in Israel is voluntary dismissals of petty claims, manifested by a wave of food-labeling class actions. In a typical case, the plaintiff claims that the defendant-manufacturer violated relevant food-labeling regulations. The violation often seems small, even trifling.[132] Nonetheless, the defendant may well respond to the certification motion with a commitment to complying, from now on, with the regulation. In that case, the plaintiff (and her lawyer)

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129 Class Action Law, 5776-2016, App. B, § 11, SH No. 2054 p. 264 (Isr.). To demonstrate, consider a municipality that charged local taxes with no proper authorization.

130 *Id.* § 9 (specifying the framework for this arrangement).

131 *See also infra* note 137.

132 Consider the claim that the defendant violated the law because it manufactured granola with nuts without providing a warning that the product is not appropriate for children under the age of five. For this and other representative examples, see CA (TA) 39176-07-13 Levy v. Pasta Nona ¶ 3(e) (Nov. 26, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

may decide that pursuing the remaining claims is not profitable — the damages that class members suffered are questionable, and, in case they exist, causation is at best tenuous. Relatedly, any procedure to adjudicate the class, should the court certify, seems highly cumbersome. The Israeli Law enables a quick resolution. The class's representatives voluntarily dismiss the case and ask the court for a modest award for the induced change in the defendant's behavior; importantly, voluntary dismissals do not bind the members of the class, and they are free to later pursue their individual claims.[133]

This type of cases raises a heated debate.[134] On the one hand, the plaintiff created some social value — it forced the defendant to comply with the relevant regulation. On the other hand, if these cases were to proceed to full-blown class litigation, they would likely lose. Given the difficulty of proving damages, a complete class action seems too heavy a tool to handle these petty violations. Against the backdrop of this binary, this Article suggests a third perspective. These cases pass preliminary certification, but they should fail the regular, comprehensive certification. The parties can structure a settlement along these lines, binding future class actions but leaving class members free to litigate their individual claims. Such a settlement should be judged by the more relaxed standard of preliminary certification. To guarantee minimal procedural safeguards, the court should verify that the more lenient standards, including adequate representation, are met, notify class members, and provide them an opportunity to voice concerns and opt-out of the deal.[135]

2. Modest Procedures for Modest Class Actions

The foregoing two unique procedures can be generalized to a wider group of cases.[136] To better appreciate this group, at least in the abstract, one can

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133 Class Action Law § 16. The court has discretion to reject the voluntary dismissal, and it can decide not to remunerate the representatives for their efforts. Alon Klement & Keren Weinshall-Margel, *Cost-Benefit Analysis of Class Actions: An Israeli Perspective*, 172 J. Inst. & Theoretical Econ. 75 (2016).

134 *E.g.*, CA (TA) 39176-07-13 *Levy*.

135 This perspective bears implications for the Israeli practice of stipulations to voluntarily dismiss in exchange for an agreed award. While the tiered-certification approach precludes subsequent collective proceedings, current remunerated dismissal agreements cannot bind future collective litigation, as the class was not certified (though in actuality subsequent collective litigation in this type of claims is rare). Moreover, contrary to the current practice, tiered certification calls for a public, general notice plus an opportunity to challenge the incumbent representatives (and opt-out of the deal).

136 Rave, *supra* note 50, at 488-93, discusses a unique settlement that reached a somewhat similar solution — class members, who had claims for statutory

denote the costs of certification as C (these costs can represent, for example, the legal expenses of both sides and the costs to the judiciary of having the class certified). The benefits of certification given this process — e.g., in terms of improving defendants' behavior and compensating victims — could be denoted as B. In simplistic terms, judges should certify whenever B>C, or only when it is worth triggering the complex apparatus of class actions.[137] With the recurrent complaints regarding the costs of class litigation,[138] we should expect that many cases would not pass this threshold.

Suppose, however, that courts have at their disposal a more lenient certification process. The costs of employing this process, which can be denoted C_0, are lower than the usual process — for instance, because it entails narrower repercussions for defendants. Likewise, the benefits B_0 of the simpler process are more modest than those of its counterpart, full process (i.e., $C_0<C$ and $B_0<B$). For instance, the new procedure does not fully compensate victims.

The simpler procedure mitigates the one-size-fits-all nature of the regular procedure. While some cases do not justify a comprehensive class treatment (because B<C), it may be that for these cases the benefits of the simpler procedure are higher than its costs (i.e., $B_0>C_0$). There is, then, a group of cases that deserves a lenient certification treatment, but not a full one. In the foregoing stylized terms, this group of cases — semi-class actions — can be defined by $C>B>B_0>C_0$. A court that has the option should, then, certify according to the more lenient terms.

Tiered certification demonstrates one option for conducting such a procedure. Suppose that a given case was preliminarily but not fully certified. Class members in this example cannot litigate collectively, so the benefits of preliminary certification are lower than the benefits of full certification. However, the costs are also smaller — as the repercussions of preliminary certification are narrower than those of full certification, and it is simpler for courts to employ. The foregoing Israeli examples demonstrate this argument.[139]

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violations against the defendant in the range of a hundred to a thousand dollars, were given an in-kind relief with a retail value of sixty dollars. In exchange, class members waived their procedural right to bring a class action — but were free to file their individual claims. *In re* Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014).

137 This is, of course, a simplifying presentation. Nonetheless, the law loosely alludes to a similar, open-ended inquiry. Rule 23, for instance, guides courts to find, as a prerequisite for certification, "that a class action is superior to other available methods for . . . adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). For a similar provision, see Class Action Law § 8(a)(2).

138 *See, e.g.*, *supra* note 27 and accompanying text.

139 *See supra* Subsection IV.A.1.

These procedures avoid the costs of full-blown certification and class action; but they do not compensate the victims (victims are free to litigate individually but presumably will receive a lower amount — if at all — through individual proceedings). However, given the modest benefits of a full class action, e.g., in terms of deterrence, these more lenient procedures could be justified.[140] Small-claims courts provide a simpler track for petty claims that are nonetheless socially valuable — and lenient certification procedures could fulfill a similar role regarding some types of class actions.

In general, then, there are cases that are not worth a full class treatment. Some of these cases, though, deserve preliminary certification. These cases can be referred to as semi-class actions. The following Section illustrates the implementation of tiered certification with respect to semi-class actions, focusing on prospective injunction cases.

B. Applications: Prospective Injunction and Statutory Damages

The preceding discussion provided a general lesson: class actions can be socially valuable, but they implicate a costly apparatus. A class action that generates a modest social value may deserve a modest procedure. The modest procedure, e.g., preliminary certification, could involve minimal safeguards such as notice, opportunity to opt-out, and non-preclusion of individual rights.

This discussion pertains to issues that are currently debated in the United States. In a general and common category of cases, the class receives — through a settlement — an injunction in which the defendant commits to changing its wrongful practices. However, the defendant pays "zero dollars to the millions of absent class members" (beyond attorneys' fees).[141] Importantly, as the class is certified, its members are precluded from bringing their individual claims.[142] No-damages arrangements are a wide phenomenon.[143] They typically stem from regulatory violations that allegedly generated broad damages. However,

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140 *Cf.* Rave, *supra* note 50, at 480 (arguing that without "a realistic opportunity to bring" individual claims, a settlement that bars the right of the class to litigate collectively will not be approved). The foregoing suggests that preliminary certification without a realistic opportunity to bring individual claims may nonetheless be justified, e.g., when it generates some social value and full certification is counter-productive.

141 Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 Harv. J.L. & Pub. Pol'y 769, 770 (2016).

142 Therefore, such settlements achieve "what even the [regulator] cannot: the preclusion of future claims by class members against [the defendant]." *Id.* at 802.

143 *See generally id.*

given the difficulties in certifying a damages class action, the parties settle only for prospective injunction. These settlements were heavily criticized. A prominent line of criticism is that the representing parties "sell" class members' rights to litigate collectively and in exchange receive no monetary compensation (but hefty fees).[144]

From an alternative perspective, injunction-only settlements embody the case for a more lenient procedure. The regulatory violation that the defendant committed is typically trivial, and the damages to the class are expected to be miniscule. Hence a full class action is counter-productive. However, a more modest procedure can achieve some social value. The previous discussion entails several practical lessons with regard to the implementation of such a procedure.

First, to justify a more lenient treatment, these settlements ought to have a smaller impact on class members' rights. As the tiered-certification example suggests, one alternative is a preliminary certification that would preclude class members' rights to litigate collectively, but retain their rights to litigate individually. With no preclusion of individual rights, a strong argument against prospective injunction settlements is eliminated. The capacity of class members to litigate individually also tempers the defendant's desire to strike a deal that "sells" class members' rights cheaply.[145] Of course, the capacity to litigate individually is in many cases nominal; nonetheless, it still improves upon the current practice of injunction-only settlements that completely preclude class members' individual rights.[146] Second, the tiered-certification process insists on notification to class members after the preliminary certification phase (through a scaled-back notice), and allowing them the opportunity to voice concerns and opt-out.[147] An obligation to inform class members and let them voice concerns could provide more information to the court. Particularly, class members who believe that the case for the class is strong could petition to replace the incumbent representatives at this preliminary stage. Third, the semi-class actions perspective should also affect the fees that are awarded in prospective injunction settlements. Semi-class actions, I suggest, require a modest procedure to handle cases of modest societal value. Hence, the fee should be relatively small, and be based, to the extent possible,

144 *E.g.*, *id.* at 808-16.

145 *Cf.* Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014) (settlement leaving intact the individual rights of the members of the class).

146 For a more detailed discussion, see *supra* notes 124-128 and accompanying text.

147 Recall that opting-out at the preliminary stage means having the right to litigate individually as well as collectively (together with others who opted-out).

on the social, regulatory value of the relevant settlement.[148] The prospect of lower fees through preliminary certification should chill at least some abusive injunction-only settlements.

Statutory damages seem to be a particularly good fit for prospective injunction and preliminary certification. In some instances, the law specifies a certain amount of damages, to be awarded without the need to prove actual damages. Statutory damages are typically aimed at "incentiviz[ing] private enforcement where actual damages are small or difficult to establish . . . most often . . . in the context of consumer protection and intellectual property regulation."[149] Class actions that demand (individual) statutory damages seem, on their face, inefficient, potentially resulting in "massive liability . . . and over-deterrence."[150] As statutory damages are detached from actual damages, even a trivial violation of the relevant regulatory scheme is vulnerable to extortionate liability through class litigation.

Given this reality, one would expect a pushback from courts. Some courts indeed refuse to certify statutory damages class actions, relying on the superiority requirement of Rule 23.[151] Others have raised the bar to adjudicating these cases in other ways. In a recent class action case that stemmed from seemingly trivial violations of the Fair Credit Reporting Act, *Spokeo v. Robins*, the Supreme Court held that there was no showing of "concrete" harm.[152] This harsher treatment of statutory damages cases is understandable given the fear of over-deterring class actions. However, it reflects the current, binary view of class actions — they can be either certified or not.

Alternatively, these cases can be approached from the tiered-certification perspective. A complete class action is simply a regulatory overkill, and it may be better to "unbundle" the individual claims from the collective case. This outcome could be achieved through a preliminary certification in which the defendant would cease its wrongdoing, without precluding absent class members from litigating their individual rights.[153] Such an injunction fulfills

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148 For similar, regulatory considerations in the context of approving the *Trans Union* settlement, see Rave, *supra* note 50, at 533-34.

149 Stephen B. Burbank et al., *Private Enforcement*, 17 Lewis & Clark L. Rev. 637, 678 (2013).

150 *Id.* at 678 n.171.

151 Fed. R. Civ. P. 23(b)(3). For a short discussion, see Richard A. Nagareda et al., The Law of Class Actions and Other Aggregate Litigation 66-69 (2d ed. 2013).

152 Spokeo v. Robins, 136 S. Ct. 1540 (2016). While *Spokeo* is a class action, the Court's analysis pertains to all statutory damages cases — individual and class actions alike.

153 *Cf.* Trans Union Corp. Privacy Litig., 741 F.3d 811 (7th Cir. 2014).

a socially desirable goal. Given the ability of individual class members to sue for statutory damages, and the expectation that a nontrivial number of victims would sue individually, due process concerns are minimized.[154]

* * *

The foregoing discussion demonstrates the important features regarding the application of tiered certification to semi class-actions: (a) a relatively lenient scrutiny by the court throughout the preliminary certification stage; (b) preclusion of collective, but not individual, rights at that stage; (c) notice and opportunity to opt-out, such that informed and motivated class members (and their attorneys) have the ability to plead to replace class counsel and litigate collectively; and (d) lower attorneys' fees, which reflect the modest social value (and the weaker judicial scrutiny) of cases that are resolved at the preliminary certification stage.

Short of a structured, tiered-certification process, these principles could easily be integrated into a settlement under the current regime. Most explicitly, settling parties — class counsel and the defendant's attorneys — could choose the certification bar they desire for their settlement: preliminary or full. Preliminary certification offers a quick resolution, under lenient judicial scrutiny and fewer procedural safeguards, but with smaller fees; full certification would require a heavier involvement of the court, but it offers potentially generous fees.[155] Presumably, the settling parties are better positioned to choose the appropriate standard and break the one-size-fits all nature of class certification.[156]

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154 As Rave, *supra* note 50, at 505-06, describes, thousands of individuals with statutory damages for invasion of privacy brought an individual action following the *Trans Union* settlement that precluded them from litigating collectively. Note that under the proposed preliminary certification, class members would also have the right to opt-out and bring their own class action, contrary to the *Trans Union* case. This design further minimizes due process concerns.

155 To prevent the parties from structuring a settlement as a full rather than semi-class action, courts should rigorously ensure that the class, though the parties settle, met the high standard for full certification rather than the lower, preliminary certification standard. *Cf.* Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 Theoretical Inquiries L. 151, 165 (2018) (discussing certification for settlement purposes in the United States).

156 Another option under the current regime is to delegate to judges the responsibility regarding the threshold for certification, on a case-by-case basis. It might be that judges already set lower standards for certification where the social value of the case seems low. In that case, the foregoing proposal could be useful to formalize this procedure and provoke an open discussion of these practices.

Currently, of course, the parties cannot agree to tailor the certification bar to the exigencies of the case.[157]

Tiered certification is not a panacea, and its application to semi-class actions further raises serious questions, beyond the scope of this Article. However, the foregoing adds another option for treating class actions, which could be better than the existing alternatives. Currently, a case that presents a small social value but relatively high adjudication costs could either be denied class treatment[158] or certified as a complete class. The first option misses the opportunity to adjudicate socially valuable cases. The second option is costly, to the parties as well as the judiciary. Sharing the same spirit as other reforms intended to break the uniform nature of the current rules,[159] the tiered-certification option offers a balanced solution, which could better fit certain cases.

Conclusion

The current conception of class actions is binary. Certification is a fact-intensive, tedious stage, and, in terms of precluding absent members, the class is either certified or not. This description calls for a richer view that "flattens" the procedural requirements and repercussions of certification. This Article offers such a thought-experiment, advancing the idea of a tiered certification — a first, preliminary certification, not precluding the right to litigate individually; and a second, complete certification. The tiered-certification mechanism could better address several class action dilemmas.

Relitigation of denials of class certification is one example. Relitigation is a problem, and the heightened certification standards that courts have demanded seem to aggravate it. Current solutions fall short of remedying the problem. They either refuse to relieve the burden of relitigation, due to adherence to the binary concept of class certification; or preclude the right of class members to litigate collectively without appropriate safeguards. The way out of the quandary lies elsewhere. The tiered-certification proposal invokes the same legal fiction that serves to bind absent members to the final outcome

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157 *Cf.* Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (settlement-only class actions "demand undiluted, even heightened, attention in the settlement context").

158 *Cf.* Sheley & Frank, *supra* note 141, at 832 (suggesting "a presumption against approval of [prospective injunction] settlements").

159 *E.g.*, David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. Pa. L. Rev. 1531 (2017) (describing an unsuccessful legislative attempt to create two tracks, for small- and large-claims class actions).

of class litigation — notice and opportunity to participate — to give denials a preclusive effect. Thus, it enables partial class actions for the purpose of denying subsequent class actions. True, the scaled-certification proposal is not devoid of difficulties. However, it uses familiar tools to balance the desire to avoid relitigation with the notion of protecting absent plaintiffs.

More generally, shedding the concept of a single certification stage suggests new directions for handling class actions. In particular, tiered certification envisions "semi-class actions": class actions that should pass a preliminary threshold but fail full certification. Semi-class actions are, in essence, situations in which collective proceedings entail some social value, but triggering the apparatus of modern class litigation is too onerous and not cost-effective. Trivial violations of regulatory schemes are an example. While there is some social value in rectifying the defendant's behavior, current certification requirements are too high to handle these regulatory violations. Instead of either certifying or denying class treatment, a middle ground could be a prospective injunction that forces the defendant to comply with the regulatory scheme without precluding individual proceedings. Tiered certification, then, breaks the one-size-fits-all nature of the current certification requirements and opens new opportunities to regulate class actions — a middle ground between precluding and not precluding, no class litigation and full-fledged proceedings.

The tiered-certification proposal also has some more immediate benefits in the current climate. Originally, the rules in the United States envisioned a process in which certification decisions are made early on, and, as a result, "certification notice [would be] sent to the class prior to the resolution of the case on the merits."[160] However, the trend both in the United States and Israel is front-loading, i.e., shifting efforts to pre-certification phases. As a corollary, pre-certification stages have become longer, and notice is sent later than it used to be. The proposal restores the original intention of Rule 23, as it guarantees minimal procedural safeguards early on. Therefore, it can also improve representation from the inception of a case, filling a gap in the current regime.

160 Rubenstein et al., *supra* note 9, § 8:2.