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Bryant G. Garth
Indiana University School of Law - Bloomington

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CONFLICT AND DISSENT IN CLASS ACTIONS: A SUGGESTED PERSPECTIVE

Bryant G. Garth*

Class action litigation often promotes the legal and political interests of those whose interests might not be promoted at all were it not for the class action device—disadvantaged or deprived groups or even large segments of the public. Nonetheless, while forming a convenient construct for facilitating litigation in the public interest, the class often contains individuals with differing purposes and views. Thus, when class actions in practice lead to neglect of the perceived interests of class members, we face a dilemma. The extent to which the class action device ought to be used to promote civil rights despite the opposition of various class members remains an unresolved question.1 At one level, the problem of class conflict and dissent2 is narrow and technical. At

* Associate Professor, Indiana University School of Law (Bloomington); B.A. Yale 1972; J.D. Stanford 1975; Ph.D. (European Doctorate) European University Institute, Florence, 1979.

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1 See infra note 68, which lists examples of treatise writers' views on certification of a class when some members prefer to leave violations of their rights unremedied. For a useful historical assessment of the class action and its ambiguous nature, see Yeazell, From Group Litigation to Class Action Part I: The Industrialization of Group Litigation, 27 U.C.L.A. L. REV. 514 (1980) [hereinafter cited as Yeazell, Part I]; Yeazell, From Group Litigation to Class Action Part II: Interest, Class and Representation, 27 U.C.L.A. L. REV. 1067 (1980) [hereinafter cited as Yeazell, Part II]. Issues of the representativeness of class actions recently have been raised in Note, Reconsidering Union Class Representation in Title VII Suits, 95 HARV. L. REV. 1627 (1982) (favoring a presumption that unions are inadequate representatives of members in title VII class actions); Note, Conflicts in Class Actions and Protection of Absent Class Members, 91 YALE L.J. 590 (1982) (advocating more communication between class lawyers and class members) [hereinafter cited as YALE Note, Conflicts]. For an interesting and instructive recent account of policies involved in shareholder's derivative actions under Rule 23.1 and state analogues, see Coffee & Schwartz, The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform, 81 COLUM. L. REV. 261 (1981) (the failure to balance successfully the policy favoring enforcement of laws with that favoring corporate self-governance accounts in part for the fact that the shareholder suit is facing extinction).

2 I have chosen to refer to “conflict and dissent” in this Article for several reasons. First, I am concerned not only about disagreements that have ripened to the point of “conflict” among class members or between lawyers and class members. I wish to consider also those disagreements that can be viewed as class “dissent” but that courts generally have ignored or not seen. Moreover, the literature on intraclass conflict has tended to focus only on objective, material conflict, and I want to emphasize my concern with conflicts of views about the lawsuit and perceptions of interest as well. Hence, I refer to “dissent” in order to encompass the full range of possible disagreements among class members and lawyers in class action litigation.
another level, the problem forces consideration of the nature, role, and legitimacy of the modern class action.

This Article begins by discussing whether class conflict and dissent in fact present a problem. From one perspective, conflict and dissent simply do not matter; what matters is that the courts enforce the law. If a problem exists, however, the question remains whether Rule 23 of the Federal Rules of Civil Procedure addresses that problem. Rule 23, it will be seen, does indeed direct us to the relevant concerns. While Rule 23 permits class certification without unanimous class consent, it does not permit class members' attitudes simply to be ignored. The difficulty thus lies in accommodating those attitudes within the structure of Rule 23. Rule 23 jurisprudence does not provide sufficient guidance.

Reinterpreting Rule 23 as it applies to conflict and dissent, this Article promotes a participatory view of class action litigation. It advocates an extension of Professor Yeazell's "town meeting" idea by arguing that class dissent ought to be explored and considered at each stage of the lawsuit. Next, it demonstrates that a realistic approach to the dissent problem promises to enhance the effectiveness as well as the accountability of class litigation. Finally, the Article discusses the legitimacy of the apparent politicalization of courts in the context of class actions. The approach developed here does not depart radically from that already taken by conscientious courts. Moreover, by making class actions more responsive and effective, this approach should enhance, not undermine, their legitimacy.

INTRACLASS CONFLICTS AND CONTROL OF THE CLASS ACTION DEVICE

It is tempting to evaluate class actions by their substantive results. That is, if class actions most often lead to results that comport with our notions of good public policy, we arguably need not worry about occasional conflicts among class members or between lawyers and class members, even if those conflicts are not satisfactorily resolved. Taking a balanced view of the class action, we might simply point out that sometimes its results are contrary to the perceived interests and wishes of class members. Class actions are institutions of representation, and

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3 See infra notes 10-36 and accompanying text.
4 See infra notes 37-58 and accompanying text.
5 See infra notes 59-158 and accompanying text.
7 See infra notes 159-214 and accompanying text.
8 See infra notes 215-21 and accompanying text.
9 See infra notes 222-30 and accompanying text.
10 See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976). See also Kirp & Babcock, Judge and Company: Court-
such institutions never translate perfectly the views of the represented into reality. Moreover, lawyers are well suited to enforce class rights. Not only can lawyers recognize those rights, they can also take action consistent with attaining them.

The foregoing view, however, has only superficial appeal. The class action is a unique legal device that can be employed to promote and enforce the rights of large groups of people, especially the disadvantaged. It is not surprising that those who are particularly concerned about the rights of the disadvantaged tend to favor class actions, while those who are not so concerned tend to oppose class actions. Nonetheless, even those who generally favor legal rights enforcement through the class action need to rethink their position on class conflict and dissent. Such enforcement can do considerable harm to the group it is intended to benefit. As we increasingly recognize, rights do not come without costs, even to those in whose interests the rights ostensibly were created. The thesis of this Article is that decisions which have a great deal of impact on individuals, such as whether to bring suit to enforce certain laws, require some measure of accountability to the supposed beneficiaries. Class action suits currently do not fit within either of the traditional models of accountability in civil litigation.

The “conflict resolution” and “behavior modification” models constitute the traditional models of accountability in civil litigation. Under the conflict resolution model, a lawsuit is a form of property that the holder of a legal right is free to purchase or not, depending on his own calculations of the suit’s costs and benefits. For example, in the event of a contract breach an individual may take one of three possible courses of action: he may sue for a contractual remedy, he may seek a mutually satisfactory adjustment with the breaching party, or he may simply ignore the breach. If he brings a lawsuit, it is because he has determined that the benefits of the suit outweigh its cost. Thus, he has chosen to vindicate his rights through litigation. According to this model, litigation is the purely private affair of an autonomous party. Accountability, therefore, poses no problem in this case.

It is theoretically possible to apply the conflict resolution model to the class action to resolve the accountability problem. Under this model, the class action would be merely a means to permit the efficient joinder of numerous private claims. In order to be class members, individuals would be required to consent to having their rights vindicated


12 Black has characterized the reliance on self-interested private individuals to vindicate their rights as “reactive” mobilization of the law, in contrast to the “proactive” approach suggested in the “behavior modification” model. Black, The Mobilization of the Law, 2 J. LEGAL STUD. 125 (1973).
with the class. In other words, each class member’s potential claim would be viewed as a property right either to be asserted by joining the class or to be waived by not joining the class. This model is embodied in the Age Discrimination in Employment Act, for example, which requires class members to opt into the class action suit. Class members who do not opt into the suit cannot be compelled to participate. As will be discussed later, however, this model cannot be applied to class action litigation under Rule 23.

The second model of the civil process, the behavior modification model, focuses on the role of litigation in facilitating public enforcement of the law. According to this model, society’s interest in making conduct conform to legal norms outweighs the interests of individuals affected by the illegal conduct. Suits brought by public agencies represent the behavior modification model. For instance, if the United States Department of Justice chooses to bring a civil antitrust action, the views of the victims of the challenged conduct are not determinative. Similarly, if the Equal Employment Opportunity Commission desires to bring an action charging an employer with discrimination, it need not consider the wishes of the employees discriminated against. In other words, if the public agency decides to sue in the interests of law enforcement, it can proceed without consulting the affected individuals.

At least since Kalven and Rosenfield’s 1941 article, there has been a tendency to justify private class actions on the basis of their use in aiding public agencies responsible for enforcing federal rights.


14 See infra text accompanying notes 52-55.

15 See supra notes 11 & 12.

16 See Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1982) (discussing discretion traditionally given to administrative agencies and the executive branch). No one has yet suggested that victims can prevent executive or agency enforcement action.

17 General Tel. Co. v. EEOC, 446 U.S. 318 (1979). The Court held that the EEOC need not comply with the requirements of Rule 23. It noted that “unlike the Rule 23 class representative, the EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged.” Id. at 331.

18 Analogously, the public prosecutor can enforce the criminal law even if individual victims would prefer to leave matters alone.


20 For an oft-cited Harvard Law Review study of class actions that echoes this theme, see Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318 (1976) [hereinafter cited as HARVARD Study]. See also Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Eisenberg & Yeazell, The Ordinary and Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980); Fiss, Foreword—The Forms of Justice, 93 Harv. L. Rev. 1 (1979);
Kalven and Rosenfield argued that the class action would serve as "a vehicle for paying lawyers handsomely to be the champions of semi-public rights." More recently, Judge Jerome Frank's term, "private attorney general," has been used in the class action context.

The expanding use of civil rights legislation to bring about social reform makes private enforcement correspondingly more important. Concurrently with the proliferation of civil rights laws, standing rules have been liberalized, rules against attorney advertising and solicitation have been relaxed, and a number of statutes have been passed allowing the recovery of attorneys' fees by successful plaintiffs. These


21 Kalven & Rosenfield, supra note 19, at 717.
22 Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943). Judge Frank applied the term to the individual litigant, but realistically the lawyer may be the interested individual behind the lawsuit. For a discussion of private attorneys general, see Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1257, 1457-61 (1981) [hereinafter cited as HARVARD Developments]. It is interesting to note that at the same time as the development of private attorneys general is increasing and concern regarding the public interest in law enforcement is growing, greater solicitude for the rights and autonomy of clients in their dealings with their lawyer is also emerging. See, e.g., Spiegel, Lawyering and Client Decision-Making: Informed Consent and the Legal Profession, 128 U. PA. L. REV. 41 (1979). It is difficult to reconcile these trends. See id. at 76.
23 See Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 HARV. L. REV. 849 (1975) ("[p]rivate litigation has come to be used increasingly as an instrument for furthering broad social and political objectives"). For a critique of this legal "purposivism", see Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. REV. 29, 63-81. See also Y. DROR, VENTURES IN POLICY SCIENCES: CONCEPTS AND APPLICATIONS 181 (1971) ("[t]he growing use of law as an instrument of organized societal direction seems to be one of the characteristics of modern society"). See generally P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION (1978); R. UNGER, LAW IN MODERN SOCIETY (1976).
24 See Miller, On Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 HARV. L. REV. 664, 670-71 (1979) (attributing the proliferation of new rights and class actions to enforce those rights to a succession of laws beginning with the Civil Rights Act of 1964 and the Voting Rights Act of 1965). See also Bellow & Kettleson, From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice, 47 B.U.L. REV. 337, 337-38 (1978) ("[w]e are living in a time when social forces are producing expanded entitlements and lessened enforcement"). While the expansion of entitlements most likely will slow in the current decade, it is doubtful that many entitlements can be eliminated at this point.
28 The Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 (1976), is the most notable of these statutes. See generally A. MILLER, ATTORNEYS' FEES IN CLASS ACTIONS (1980). These statutes, in addition, have been interpreted to eliminate any real concern that losing plaintiffs will have to pay the defendants' attorneys' fees. See Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). For a discussion of the Supreme Court's liberalism in allowing fees, see Note,
Class Actions

changes enhance the ability of lawyers to bring enforcement class actions. Now a private lawyer can, with relative ease, find a client with only a small stake in the outcome of the lawsuit, enlist the client as a class representative, file suit on behalf of the class, and win attorneys' fees from the defendant. The power of the private attorney general thus approximates that of the public attorney general. The central role of private class action lawyers in enforcing employment discrimination legislation, for example, is clear.

Two arguments justify class actions brought by private attorneys general against the wishes and interests of class members. The first argument is that society's interest in law enforcement is simply more important than the individual's interests. This argument rests on the notion that, because the Constitution or Congress created rights, those rights ought to be enforced. The argument is perhaps strongest when Congress has specifically directed that defendants pay attorneys' fees to prevailing plaintiffs in civil rights actions. If Congress favors widespread private as well as public enforcement, it arguably does not matter whether the victims of discrimination would choose to sue.

The second argument is that class actions are necessary to overcome structural factors that inhibit the enforcement of laws intended to benefit relatively disadvantaged groups. Public agencies are overworked and underfunded, and individual beneficiaries are unable to sue on their own and unlikely to take steps to organize and aggregate their claims. "Underenforced" laws thus necessitate increased use of class actions. An army of private attorneys general should be enlisted


29 See generally Stewart & Sunstein, supra note 16 (suggesting ways of determining when private enforcement of federal laws should be permitted).


32 According to Senator DeConcini, who opened the Senate hearings on the 1978 class action bill, "[t]he principle that must underlie our discussion is that we are dealing with federal laws that have often gone under-enforced for lack of manpower and other resources." Reform of Class Action Litigation Procedures: Hearings Before the Subcomm. on Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 1 (1978). See 3 H. NEWBERG, CLASS ACTIONS § 7340, at 1761 (1977) ("[t]he gap between the demand and supply for legal services is ever widening"). See generally Tate, Access to Justice, 65 A.B.A. J. 904 (1979).

For a discussion of the role of the ideas of "legal needs" and "underenforcement" in the legal services movement of the 1960's and 1970's, see B. GARTH, NEIGHBORHOOD LAW FIRMS FOR THE
in the cause of public enforcement.33

While not without some force, the preceding arguments in defense of the system of private attorneys general are unconvincing because the private attorney general ultimately lacks sufficient political accountability to warrant possession of this political power. The public attorney is held accountable through the political process for how he exercises his discretion to sue.34 Therefore, before filing any civil action, the public attorney general considers whether the action furthers public policy enough to warrant the commitment of limited social resources. He also weighs competing concerns such as the benefits to be gained by enforcement as against the harmful effects of the action on its supposed beneficiaries. In contrast, the private attorney general bases his decision to file an action on such factors as whether he can find a plaintiff willing to represent the class, whether the plaintiffs can win the lawsuit, and, if so, whether he can obtain attorneys' fees.35 The private attorney is not specifically accountable either to the public interest or to the interests and wishes of the class members who are supposed to benefit from the lawsuit. Political accountability occurs, if at all, only at a very remote level: if private law enforcement through class actions becomes sufficiently unpopular, Congress might withdraw the right being sued upon or the award of legal fees.

As the preceding discussion shows, neither the conflict resolution model nor the behavior modification model of the civil litigation process is sufficient for the modern class action. The ideal class action model accounts for both the views and interests of class members—as

Poort: A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession (1980).

33 Newberg has thus noted the general evolution toward private attorneys general as follows: "The federal courts of appeals have delivered their verdict: the policies and purposes underlying fee awards are achieved equally as well whether the litigant is represented by private counsel on the one hand, or by a private or publicly funded organization on the other." 3 H. Newberg, supra note 32, § 7330h, at 1759 (1977).

34 A public attorney's accountability to society is not only guaranteed through the political process, but is also rooted in his duty to uphold social institutions:

The government attorney's duty is not to a client but to the set of institutions through which society is governed and the public interest is pursued. Thus, in choosing a course of action, the government lawyer must ask himself not only: "How will my behavior affect the performance of my job in government?" but also: "How will my behavior affect the performance of government in general?" . . . When there is a conflict, however, it is the lawyer's duty, not just as a lawyer, but also as a public citizen, to choose the path more beneficial to the latter goal.

Harvard Developments, supra note 22, at 1415. For a discussion on the means of ensuring that the public discretion is exercised reasonably, see Stewart & Sunstein, supra note 16, at 1267-89.

35 In a recent survey of federal judges, two-thirds of the judges responding (63 of 84) either agreed or strongly agreed with the statement that "classes are often formed by attorneys mainly to increase the eventual fee award." A. Miller, supra note 28, at 299.

the conflict resolution model does—and the public interest in law enforcement—as the behavior modification model does. A model must be found that makes class action lawyers accountable to class members but does not impose the limitations of class consent. The key to this model lies in the manner in which the courts handle intraclass conflicts and conflicts between lawyers and class members. The model developed below applies primarily to class actions for injunction brought under Rule 23(b)(2).36

**Rule 23 as a Framework Within Which to Balance the Interests of the Public and Those of Class Members**

Two objections to the preceding characterization of the class action problem are immediately apparent. First, the problem with lack of accountability is not limited to class action litigation. One person represented by a private attorney may seek broad injunctive relief affecting numerous individuals and the public interest. Any injunction action challenging employment discrimination, for example, is a class action, in effect if not in form, that does not take account of the views and perceived interests of all concerned employees. Arguably, those employees may as well participate in the lawsuit as class members. Thus, the primary cause for concern may be the lack of accountability of so-called public interest litigation in general, rather than the class action in particular. Second, the ease with which plaintiffs can form an ad hoc litigating organization to obtain many of the same practical benefits as a class action may minimize the significance of the accountability problem in class actions.

Addressing the second objection first, when organizational lawsuits serve merely to circumvent class action requirements, the concerns are identical. Indeed, Rule 23.2 specifically notes the connection

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36 **FED. R. CIV. P. 23(b)(2):**

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

... (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.


39 Furthermore, as a practical matter class actions represent a much larger proportion of public interest litigation than organizations.
between class actions and organizational lawsuits. Rule 23.2 provides that the class action doctrine on representation should apply to lawsuits brought by unincorporated associations. If the ad hoc organization is really the class, the "leadership" must be adequate in the same sense that class representatives must be adequate. Moreover, concern about the level of accountability and responsiveness in organizational lawsuits has been increasing.

In short, organizational lawsuits are similar enough to class actions that focusing only on the problems of class actions under Rule 23 is not an unduly restricted endeavor. Thus, the important question, which is applicable to both organizational lawsuits and class actions, is why this discussion of accountability is limited to injunction actions in which the individuals are aggregated, when the effects of injunction actions on those individuals are potentially the same whether or not they are aggregated.

As a practical matter, it often makes a difference to the success of the suit for injunction whether it proceeds as a class action. The existence of a class whose interests are clearly represented by the lawsuit may help substantially to persuade the judge of popular support behind a particular remedy. In some cases, even an assumption of representativeness may serve the same purpose. Injunction is an equitable remedy, and the balance may tip more towards that relief when it is sought on behalf of a class certified under Rule 23 than when it is brought on behalf of an individual. One commentator who analyzed environmental litigation concluded, for example, that "[i]n a very practical

40 Fed. R. Civ. P. 23.2 (added in 1966 along with revised Rule 23) provides:
An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).


Organizations present fewer responsiveness problems than do class actions. The organization ordinarily must obtain support from its purported beneficiaries, and organizations usually have means for uncovering conflict and resolving it. See, e.g., Zacharias, Standing of Public Interest Litigating Groups to Sue on Behalf of their Members, 39 U. Pitt. L. Rev. 453 (1978). The class action, in contrast, may more easily proceed on the basis of goals set by a few key individuals or lawyers. It may be, however, that greater scrutiny of "association actions" also ought to be required to ensure that associations are in fact representative.

42 The existence of an active litigating organization also may help persuade the judge to grant an injunction.

43 In Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978), the plaintiff made the similar argument that denial of class certification should be reviewable in an action for an injunction because it amounts in effect to a denial of the injunction. While the Court refused to allow
sense, having a class of plaintiffs may well determine the outcome of an injunctive action where the court must weigh the equities of the opposing parties in deciding whether to grant the requested relief.\textsuperscript{44} Nonetheless, class certification will not always be important in judicial consideration of the equities involved. If the remedy sought is absolute and affects extremely diverse interests—enjoining the building of a dam, for example—so that the court simply does not know the class members’ reactions to the proposed remedy, certification becomes a formality that has no impact on court discretion.

In injunction actions in which the relief sought is not so drastic nor the interests affected so diverse, however, the impact of class certification becomes more pronounced. An employment discrimination class action provides a typical example. First, if the complaint is brought on behalf of an individual, defendants can settle more easily without changing their general discriminatory practices. In an individual action, the defendant can settle by promoting, paying, or otherwise mollifying the plaintiff, while in a class action the defendant can settle only with court approval.\textsuperscript{45} Second, the defendant can moot the individual action by giving the plaintiff what he seeks. A class action, on the other hand, continues to present a live controversy even if the named representatives no longer have claims.\textsuperscript{46} Third, class actions sometimes result in broader discovery than individual actions, since discovery cannot be limited to facts and documents linked to the claims of the individual plaintiff. In addition, class actions lead to larger attorneys’ fees because they are bigger and more complicated. Therefore, a lawyer is more likely to agree to represent a class than an individual.\textsuperscript{47}

Furthermore, in an employment discrimination lawsuit, the remedy is more complex than in a suit to stop construction of a dam. The result in a successful antidiscrimination action often will be a plan to root out discrimination, involving goals, timetables, seniority rights, qualifications, and recruitment procedures.\textsuperscript{48} The design of such a plan will differ significantly if the plan addresses the situation of a few individuals rather than the situation of a class. The court typically will have considerable discretion in formulating the remedy; the remedy’s

\textsuperscript{44} Note, The Viability of Class Actions in Environmental Litigation, 2 Ecology L.Q. 533, 563 (1972). See 1 H. Newberg, supra note 32, § 1010.1; Columbia Special Project, supra note 20, at 876.


\textsuperscript{47} See supra note 35 and accompanying text.

\textsuperscript{48} Such an obvious observation is noticeably missing from the advisory committee’s discussion of Rule 23(b)(2). See Federal R. Civ. P. 23 Advisory Committee Note, 3 F.R.D. 98, 102 (1966). For elaboration and criticism of the Advisory Committee Notes, see Boston Note, supra note 37.
scope and shape inevitably will depend on who is before the court.\textsuperscript{49} Thus, although an individual may obtain a broad remedy affecting a number of fellow employees, a class action is more likely to result in a comprehensive effort to eliminate discrimination.

For the reasons discussed above—first, that judges are more disposed to grant injunctions in class actions than individual actions, and second, that the existence of a class affects the content of the remedy—it clearly does matter whether a suit for an injunction is brought on behalf of one person or on behalf of a class. Moreover, it also matters which member of the class argues what before the court. This raises the more general question of whether courts seriously must confront conflict and dissent in the class. This Article argues that, in making the decision whether to certify a class, the court must attempt to discover conflict within the class.

If conflict does exist, the next question is what the effect of that conflict ought to be on the action. Sometimes conflict may be significant enough that the court should prevent the action from proceeding on behalf of a class. This would deny several advantages to plaintiffs and their counsel and perhaps affect the court in formulating a remedy, as discussed earlier.\textsuperscript{50} Thus, more often than not, the court should allow the action to proceed on behalf of a class. Yet, the court should consider the dissenters’ views and interests as the action proceeds.\textsuperscript{51} If the court has a full and accurate picture of the class throughout, it can make the class action lawsuit a much more accountable institution.

The “bland terms of Rule 23,”\textsuperscript{52} in fact, compel a search for an acceptable balance between the public interest in law enforcement and the private interests and views of class members. The law enforcement concern most obviously emerges in injunction actions, which are brought under Rule 23(b)(2). Rule 23(b)(2) class members generally are unable to opt out of the lawsuit and may be bound even if they receive no notice of the action.\textsuperscript{53} Thus, under the terms of the Rule, class actions for injunctions must, at the very least, be allowed to pro-

\textsuperscript{49} Cf. Black Faculty Ass'n v. San Diego Community College Dist., 664 F.2d 1153 (9th Cir. 1981) (classwide relief could not be ordered in the absence of valid certification of the class).
\textsuperscript{50} See supra text accompanying notes 48 & 49.
\textsuperscript{51} For instance, a court can frame a remedy in an injunction proceeding, such as one attacking employment discrimination, in countless ways. How it frames that remedy should depend on the views and interests of class members. Knowledge of conflicting opinions among class members about the appropriate way to modify a promotion requirement, for example, would enable the court to render the most appropriate and equitable remedy. See infra notes 148-58 & 210-14 and accompanying text. See also Weinstein, Litigation Seeking Changes in Public Behavior and Institutions—Some Views on Participation, 13 U.C. DAVIS L. REV. 231, 235 (1980) (“in litigation [seeking changes in public behavior and institutions], there is brought home to the court the need to protect present and future interests of diffuse heterogeneous groups with varied concerns and capacities”).
\textsuperscript{52} Yeazell, Part II, supra note 1, at 1120.
\textsuperscript{53} See generally 3B J. MOORE, supra note 45, § 23.72, at 486-87 nn.8-10. The problems of Rule 23(b)(2) actions as discussed here would also apply to actions brought under Rule 23(b)(1). Since
ceed without the \textit{active} support of class members. As the Advisory Committee suggests, although perhaps a bit too sanguinely, Rule 23(b)(2) does encourage such actions as civil rights class actions for injunctive relief.\footnote{54 Federal R. Civ. P. 23 Advisory Committee Note, 39 F.R.D. 98, 102 (1966).}

Rule 23 by its terms also favors class actions for damages, even if not all members affirmatively support the litigation. As amended in 1966, Rule 23(b)(3) allows actions to proceed on behalf of any class member who fails to opt in, while prior to that amendment class members had to opt out to be bound by judgment.\footnote{55 FED. R. CIV. P. 23(c)(2). See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). See also HARVARD Study, supra note 20, at 1488-89 (criticizing the opt out provisions).} The focus of Rule 23(b)(3) thus has shifted to encourage law enforcement.

At the same time, however, the interest in allowing class litigation to proceed is balanced by the requirement of Rule 23 that representatives be "adequate" and "typical".\footnote{56 While those words are vague,\footnote{57 damages class actions have attracted more attention than injunction actions because of the huge awards and the sizeable attorneys' fees available in such actions. For an oft-cited article attacking such litigation, see Simon, \textit{Class Action: Useful Tool or Engine of Destruction}, 55 F.R.D. 373 (1972).} While those words are vague,\footnote{57} they strongly suggest that the class representatives must, in fact, \textit{represent}. If ensuring the enforcement of legal rights were the primary purpose of Rule 23, as some commentators have contended, the representativeness of the class representatives would not matter.\footnote{58 The only concern would be whether the class representatives and their counsel were vigorous and competent.} The only concern would be whether the class representatives and their counsel were vigorous and competent.

Thus, while Rule 23 does not require the affirmative consent of all class members, neither does it allow the views and interests of class members to be neglected. Both the politico-legal role of the class action

\begin{itemize}
\item most of these class actions are of the Rule 23(b)(2) variety, this Article has focused the discussion on them.
\item \footnote{54 Federal R. Civ. P. 23 Advisory Committee Note, 39 F.R.D. 98, 102 (1966).}
\item \footnote{55 FED. R. CIV. P. 23(c)(2). See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). See also HARVARD Study, supra note 20, at 1488-89 (criticizing the opt out provisions).}
\item Damages class actions have attracted more attention than injunction actions because of the huge awards and the sizeable attorneys' fees available in such actions. For an oft-cited article attacking such litigation, see Simon, \textit{Class Action: Useful Tool or Engine of Destruction}, 55 F.R.D. 373 (1972).
\item The previous rule for "spurious" class actions is discussed at 3B J. MOORE, supra note 45, app. § 23.10. Miller, supra note 24, at 667-76, rightly points out that Rule 23 is not "responsible for the great increase in federal civil litigation."
\item \footnote{56 FED. R. CIV. P. 23(a). See generally Degnan, Forward: Adequacy of Representation in Class Actions, 60 CALIF. L. REV. 705 (1972); Note, The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23, 123 U. PA. L. REV. 1217 (1975); HARVARD Study, supra note 20, at 1471-98. Applications of the rule are provided in 3B J. MOORE, supra note 45, § 23.07; 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1764-69 (1972). "Typicality", it should be noted, is required by Rule 23(a)(3), but the modern trend is to consider typicality along with the adequacy of representation required by Rule 23(a)(4). 3B J. MOORE, supra note 45, § 23.06-2.}
\item \footnote{57 For a suggested approach in determining adequacy and typicality, see infra text accompanying notes 165-200.}
\item \footnote{58 See Comment, Recent Developments in Class Action Mootness and Attorney Fees Doctrine: Giving Recognition to the Enforcement Rationale of Class Actions, 28 WAYNE L. REV. 343 (1981). See also infra notes 99-104 and accompanying text. Ensuring the enforcement of legal rights, of course, is the province of the public attorney general. See supra note 34 and accompanying text.}
\end{itemize}
today and the language of Rule 23 necessitate an approach to class conflicts that is sensitive to the public interest in law enforcement without ignoring the concerns of the class members.

**Doctrinal Approaches to Conflict and Dissent in Class Actions**

The court may confront conflict at a number of key stages in the conduct of the class action lawsuit. The decisions (1) whether to certify a class or subclass,\(^{59}\) (2) what, if any, notice to send to class members,\(^ {60}\) (3) whether to approve a proposed settlement,\(^ {61}\) (4) whether to allow intervention,\(^ {62}\) (5) how to structure a remedy,\(^ {63}\) and (6) what the res judicata effect of the judgment will be,\(^ {64}\) may all require the court to investigate conflict and consider its relevance.

The types of conflict that may arise vary considerably, ranging from cases in which the "victims" of prohibited action simply prefer not to sue\(^ {65}\) or favor a particular outcome of the lawsuit,\(^ {66}\) to cases in

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\(^{59}\) Class certification must take place under one of three subdivisions of Rule 23(b). This Article is limited to discussion of "primarily injunctive" actions under Rule 23(b)(2) or "common question" damage actions under Rule 23(b)(3). Under either subdivision, the provisions of 23(a) also must be met, which require that the class be sufficiently numerous, that there be common questions of law or fact, that the class representatives and their attorneys be "adequate", and that the claim or defenses of named plaintiffs be "typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)*. The Supreme Court recently discussed the prerequisite for certification in *General Tel. Co. v. Falcon*, 102 S. Ct. 2364 (1982) (overturning "across-the-board" certification in a title VII suit).

\(^{60}\) Notice to members of the class is required for all class actions certified under Rule 23(b)(3), "including individual notice to all members who can be identified through reasonable effort." *Fed. R. Civ. P. 23(c)(2)*. Responses to notice may indicate conflict in the class. See infra notes 78-158 and accompanying text (discussing the disagreement about how courts should treat such conflict). Notice is generally not held to be required for actions under Rule 23(b)(2), see, e.g., *3B J. Moore, supra* note 45, § 23.72, though the court has broad discretion to order it at any time. *Fed. R. Civ. P. 23(d)(2)*. Indeed, Rule 23(d)(2) suggests that notice is appropriate in order to inquire whether class members "consider the representation fair and adequate." The responses of notice may be used to assess the adequacy or typicality of the representative parties. See generally infra notes 122-29 and accompanying text.

\(^{61}\) A class action cannot be dismissed or compromised without the approval of the court, and notice to class members and a hearing are required prior to approval. *Fed. R. Civ. P. 23(e)*; *3B J. Moore, supra* note 45, § 23.80[3]. Conflict that surfaces at this stage may convince a court not to approve a settlement negotiated by the representative parties. See, e.g., *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). Dissent, however, does not necessarily preclude judicial approval of a settlement; indeed, even the objections of named class members may be rejected. See, e.g., *Officers for Justice v. Civil Serv. Comm’n*, 473 F. Supp. 801, 805-09 (N.D. Cal. 1979).


\(^{63}\) See, e.g., *Columbia Special Project, supra* note 20, at 790-813.

\(^{64}\) See, e.g., *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973).

\(^{65}\) See, e.g., *Doe v. Renfrew*, 475 F. Supp. 1012 (N.D. Ind. 1979) (some students favored dog
which members of the victim-class actually obtain material benefits from the prohibited practice or a practice that some particular remedy might affect.67

The courts to date have not taken a consistent approach to problems of conflict, and it would be pointless to search for a unifying principle.68 The cases reveal considerable discretion at the federal dis-

searches for drugs in student lockers); Driver v. Helms, 74 F.R.D. 382 (D.R.I. 1977) (some persons whose mail was opened by the CIA actually favored the practice). The situation could also arise in a reverse race discrimination suit if white class members were to favor affirmative action. See generally Germann v. Kipp, 429 F. Supp. 1323 (W.D. Mo. 1977), vacated on other grounds, 572 F.2d 1258 (8th Cir. 1978).

Opposition to suit may be based on class members' differing perceptions of their long-term interests. This type of opposition has arisen in several common areas of litigation, such as class actions to stop construction of highways, see, e.g., Swain v. Brinegar, 517 F.2d 766 (7th Cir. 1975); Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971), class actions to require due process hearings for consumers, see, e.g., Ilrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972); Koger v. Guarino, 412 F. Supp. 1375 (E.D. Pa. 1976), aff'd, 549 F.2d 795 (3d Cir. 1977); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972), class actions to eliminate maximum-hours legislation for women, see, e.g., Ward v. Luttrell, 292 F. Supp. 165 (E.D. La. 1968), and class actions to integrate schools, see Bell, supra note 10.

66 This is likely to occur in cases that seek to reform institutions, such as those that seek construction or closing of schools, prisons, hospitals, and mental institutions. See, e.g., Coffin, The Frontier of Remedies: A Call for Exploration, 67 CALIF. L. REV. 983 (1979); Fiss, supra note 20; Reynolds, The Mechanics of Institutional Reform Litigation, 8 FORDHAM URB. L.J. 695 (1979-1980); COLUMBIA Special Project, supra note 20. This is also likely to occur in cases that seek the revision of employment practices.


67 Class members opposed to a lawsuit or a particular remedy may fear, for example, that the result will be to ruin an otherwise advantageous business relationship. Franchisees may oppose an antitrust class action. See, e.g., Martino v. McDonalds Sys., 81 F.R.D. 81 (N.D. Ill. 1979); Southern Snack Foods v. J & J Snack Foods Corp., 79 F.R.D. 678 (D.N.J. 1978). Stockholders may oppose securities fraud class actions. See, e.g., Herbst v. ITT Corp., 495 F.2d 1308 (2d Cir. 1974); Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972); Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir. 1970), cert. denied, 400 U.S. 826 (1970). Landowners may resist a class action compelling full disclosure. See, e.g., Bryan v. Amrep Corp., 429 F. Supp. 313 (S.D.N.Y. 1977); Lukenas v. Bryce's Mountain Resort, 66 F.R.D. 69 (W.D. Va. 1975), aff'd, 538 F.2d 594 (4th Cir. 1976). In an extreme case, employees may wish to resist the enforcement of federal safety or environmental rules if such enforcement might destroy the business defendant and thus leave the employees jobless. See generally Reserve Mining Co. v. United States, 514 F.2d 492 (8th Cir. 1975), modified sub nom. Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976).

68 It is interesting to note how the commentators have discussed judicial treatment of conflicts within classes. Moore, for example, specifically discusses these conflicts only under "typicality,"
District court level in identifying what constitutes a serious conflict within a class, who has the burden of proving a conflict, what kind of evidence is necessary or relevant, and the appropriate action for the court once actual or potential conflict is brought to its attention. Supreme Court authority on the issue is lacking, and the lower courts seem to agree only on the rather vague standard that "[a]ntagonism that defeats a class action must go to the subject matter of the suit." If substantial conflict appears, the court deems the class representative "inadequate" or, less frequently, not "typical".

This section of the Article discusses three lines of case law and commentary on class conflict and dissent. The first line takes an

stating that, "'typicalness' is not a subjective test, authorizing a judge to dismiss a class action based on a substantial legal claim where he thinks some member of the class may prefer to leave the violation of their right unremedied." 3B J. Moore, supra note 45, § 23.06, at 197. He then criticizes cases that treat such conflict as being relevant to class certification. Id. § 23.06, at 197-98 n.29.

Wright and Miller, on the other hand, cite Hansberry v. Lee, 311 U.S. 32 (1940), see infra notes 78-84 and accompanying text, for the holding that "an action to enforce an agreement cannot be brought on a class basis on behalf of persons allegedly bound by the agreement if some of them do not wish to have it enforced." 7 C. Wright & A. Miller, supra note 56, § 1768, at 639. In the supplement, however, the footnote to Hansberry is transformed into a reference to cases holding that some opposition to enforcement should not preclude a class action, with a "but compare" reference to cases that support the Hansberry statement. Id. § 1768 n.94 (Supp. 1980). See also id. § 1765.

Newberg is in accordance with the Wright & Miller supplement:

As a general rule, disapproval of the action by some class members should not be sufficient to preclude a class action. Most courts that have faced the issue have held that this kind of disagreement will not prevent class litigation; but some have focused on such dissension to deny a class action.

1 H. Newberg, supra note 32, § 1120h, at 206.

69 Compare infra notes 78-98 and accompanying text with infra notes 99-129 and accompanying text.

70 Compare, e.g., Peterson v. Oklahoma City Hous. Auth., 545 F.2d 1270 (10th Cir. 1976) (see infra text accompanying note 85) with Elliot v. Sperry Rand Corp., 79 F.R.D. 580 (D. Minn. 1978) (see infra text accompanying notes 105-12).


72 Compare infra notes 130-41 and accompanying text with infra notes 142-58 and accompanying text.


74 While a consensus seems to be emerging about the "substantial conflict" formula, it has been employed mainly by courts that decide that the conflict is insufficient to prevent class certification. See supra note 73. Courts that have refused to certify the class have tended not to articulate a specific test beyond the requirements of adequacy and typicality. See infra notes 78-98 and accompanying text.
approach resembling the pure "consent" theory of class action, while the second line adopts an approach similar to the pure "law enforcement" theory. Precedents that follow each approach can be found, and, unfortunately, federal district court judges currently choose from either, depending on their views of a particular lawsuit. The third line of authority urges an approach sensitive to the concerns of the other two. It seeks to take the issue of conflict seriously and to develop clearer guidelines for district court discretion. This approach, while more promising than the others, also has some serious limitations, discussion of which leads to the approach suggested in this Article.

Class Homogeneity or Consent as a Requirement for Class Certification

Leading Supreme Court cases on conflict and dissent in class actions are ambiguous, but they suggest that any significant conflict permits a denial of class action status. In *Hansberry v. Lee*, decided in 1940, the Court reversed an Illinois Supreme Court decision which held that owners who brought a class action to enforce a racially restrictive covenant adequately represented owners who opposed the covenant. If representation had been adequate, those who opposed the covenant would have been precluded on res judicata grounds from attacking its validity in a second suit. The Court found that the class representatives enforcing the covenant in the first action were in conflict with those class members who wished to avoid enforcement and to sell to whoever they chose. Due process, therefore, dictated that the class dissenters be permitted to challenge the covenant. One possible interpretation of *Hansberry* is that intraclass opposition to the result of a lawsuit—in this case, the enforcement of the restrictive covenant—precludes the use of a class action on behalf of dissenters. The facts of *Hansberry*, however, are unique. It is peculiar to have a class action on behalf of landowners against landowners who otherwise also would have been members of the class, and the conflict could be seen as a material one. Nonetheless, a number of courts have used *Hansberry* to deny class status in other conflict situations.

The Supreme Court's 1977 decision in *East Texas Motor Freight System v. Rodriguez*, another case with very unusual facts, may reinforce a limited interpretation of *Hansberry*. The Court there unanimously overturned a decision from the United States Court of Appeals

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75 See *supra* notes 11-14 and accompanying text.
76 See *supra* notes 15-35 and accompanying text.
77 See *infra* notes 159-214 and accompanying text.
78 311 U.S. 32 (1940).
79 See *infra* notes 84-91 and accompanying text.
for the Fifth Circuit that allowed post-trial class certification in an employment discrimination lawsuit. In his opinion for the Court, Justice Stewart said that the named plaintiffs failed to achieve representative status for two reasons: lack of membership in the proposed class and inadequacy of representation. The Court based its finding of inadequate representation on the failure of plaintiffs' attorney to move for class certification prior to trial and, more important here, on a vote by plaintiffs' union local that overwhelmingly rejected the class relief sought by the plaintiffs. The Court cited Hansberry without explanation and found that, even though the union was not entirely coextensive with the class, the plaintiffs were inadequate class representatives because of the antagonism shown through the union vote. Again, however, there were several bases for the Court's holding, and delay in the decision to certify the class may have made it more difficult to use such devices as subclassing to cope with the apparent conflict.

It is not clear whether East Texas Motor Freight is an accurate indication of current Supreme Court thinking, but it undoubtedly bolsters the series of lower court cases that already have interpreted Hansberry and Rule 23 as meaning that class actions cannot proceed when there is evidence of conflict between class representatives and named plaintiffs. In Peterson v. Oklahoma City Housing Authority, for example, 811 of the 850 residents of a housing project for the elderly paid a maintenance deposit that was contested on their behalf in a

81 Rodriguez v. East Texas Motor Freight Sys., 505 F.2d 40 (5th Cir. 1974).
82 431 U.S. at 403-06. Three named plaintiffs brought an action challenging a freight operator's practice of maintaining separate lists of city drivers and over-the-road drivers. The plaintiffs' city drivers complained of their inability to transfer to the over-the-road list, claiming that the no-transfer rule discriminated against Black and Hispanic city drivers. The Supreme Court held that plaintiffs could not bring a class action because they were not members of the class eligible for transfer or hire as over-the-road drivers.
83 See generally HARVARD CIVIL RIGHTS-CIVIL LIBERTIES Comment, supra note 30. The Court's determination to be strict in following Rule 23 requirements is evident, however, in General Tel. Co. v. Falcon, 102 S. Ct. 2364 (1982) (allegation that racial discrimination has occurred does not determine whether Rule 23 requirements for class actions will be met, nor does it define the class that may be certified).
85 545 F.2d 1270 (10th Cir. 1976).
Rule 23(b)(2) class action. The federal trial court refused to certify a class of housing tenants, and the United States Court of Appeals for the Tenth Circuit affirmed in a two to one decision. The Tenth Circuit opinions, however, did not state whether there was any real dispute among class members about the propriety of the action or the desired remedy—presumably the return of the deposits—and it is unclear whether payment evidenced support for the mandatory deposit or merely indicated acquiescence in what appeared to be inevitable. Furthermore, it was not at all clear that those who paid would suffer in any way if the lawsuit proceeded as a class action. The case probably can best be explained as the result of hostility towards the merits, but the holding stands for a particularly restrictive approach to class action certification.

Two Fifth Circuit cases illustrate situations in which class dissent was established on the record more clearly than in Peterson. In both cases, the court of appeals affirmed lower court decisions denying certification in Rule 23(b)(2) suits. In Bailey v. Ryan Stevedoring Co.,86 an employment race discrimination action, 204 of the 230 members of the proposed class signed a petition opposing both the action and the class representatives. In a race and sex discrimination action, Davis v. Roadway Express, Inc.,87 the court decertified the class when seventeen of the twenty-three employee class members responded to notice by indicating a desire not to participate. While these factual settings indicate overwhelming class opposition, the opinions give little guidance to future courts faced with class dissent. In Bailey, the court stated that "[i]t appears . . . that the views of a majority of the black longshoremen are antagonistic with those of . . . the would-be standard bearer for the proposed class,"88 while the court in Davis only affirmed the vague district court finding that "this overwhelming vote of opposition indicated a lack of common interests and perhaps even genuine antagonism."89

In light of the many courts that have used evidence of dissent to deny class certification in Rule 23(b)(2) actions,90 some lower court decisions simply apply a result oriented test. For example, one federal district court that recently refused to certify a class of students in a challenge to in-school searches bolstered its conclusion by stating simply that "[i]t is also very clear from the record that some students in this high school are not in sympathy with the claims and contentions of this

86 528 F.2d 551 (5th Cir. 1976).
87 590 F.2d 140 (5th Cir. 1979), aff'd on rehearing, 621 F.2d 775 (1980).
88 528 F.2d at 553.
89 590 F.2d at 144.
90 See supra notes 84-89 and accompanying text. In one recent case that rejected the suggestion that conflict should preclude certification, the court commented that, "[t]hough wholly without merit, defendant's argument was not wholly without legal support." Glover v. Johnson, 85 F.R.D. 1, 5 n.3 (E.D. Mich. 1977) (action for prison reform).
plaintiff."\(^{91}\)

In analyzing class actions for damages under Rule 23(b)(3), courts have applied a similar analysis to that used in the Rule 23(b)(2) injunction actions previously discussed. Unlike members in Rule 23(b)(2) actions, members in Rule 23(b)(3) actions can opt out and avoid being bound by the judgment. This option prompted the United States Court of Appeals for the Second Circuit, in *Eisen v. Carlisle & Jacquelin*, to deemphasize class dissent.\(^{92}\) Other courts have tended to follow that lead.\(^{93}\) Nevertheless, some lower courts still fail to distinguish between actions in which opting out is permitted and those in which it is not.\(^{94}\)

In *Phillips v. Klassen*,\(^{95}\) a leading Rule 23(b)(3) decision, the United States Court of Appeals for the District of Columbia Circuit failed to consider significant the ability to opt out. The court affirmed a holding that postal employees challenging an early retirement plan could not represent a class of all those who retired under that plan, stating:

> In view of the likelihood that there will be divergent views among the employees who pursued the voluntary retirement route, as to whether they have been injured or benefited we cannot say the District Court erred in concluding that plaintiffs cannot fairly maintain the action they have brought on behalf of more than 1,500 former employees.\(^{96}\)

This extreme view of the importance of dissent among class members is especially difficult to justify in a Rule 23(b)(3) action.\(^{97}\)

Cases such as *Phillips*, whether decided under Rule 23(b)(2) or Rule 23(b)(3), have inspired almost uniform criticism among commentators.\(^{98}\) As the commentators correctly point out, these decisions often

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\(^{91}\) Doe v. Renfrow, 475 F. Supp. 1012, 1028 (N.D. Ind. 1979) (challenge to dog searches of students for drugs).

\(^{92}\) FED. R. CIV. P. 23(b)(3). Prior to the 1966 revisions, members who failed to opt in were not bound by the judgment.

\(^{93}\) 391 F.2d 555, 563 (2d Cir. 1968). See, e.g., Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1179 (9th Cir. 1977). Prior to the 1966 revisions, however, courts did refuse to certify “where a substantial part of the alleged class did not desire to be represented by the plaintiff-representative or where the representatives were antagonistic to the class.” 3B J. MOORE, supra note 45, app. § 23.10[7].


\(^{96}\) Id. at 367.

\(^{97}\) Possibly, the court really saw the case as one that in effect involved injunctive relief which, if granted, would force all former employees to give up the benefits that induced their retirement. There is, however, no explanation as to why this necessarily would be the result.

\(^{98}\) See, e.g., I H. NEWBERG, supra note 32, § 1120h, at 206 n.126, § 1120i, at 210; HARVARD Study, supra note 20, at 1492 & n.194.
fail to explore other means of controlling class conflict, are inconsistent with other decisions, and may simply manifest a hostility to class action law enforcement litigation. An increasing number of authorities on class actions go further in their criticisms. They assert that the existence of class members who favor the status quo or a moderate remedy should not prevent an action from proceeding on behalf of the class. That position will be examined next.

**Ignoring Conflict in the Interest of Legal Rights Enforcement**

Most of the commentators and an increasing number of courts have slighted or even ignored the problem of class conflict or dissent as it relates to the desirability of the lawsuit or a particular remedy. Those authorities prefer instead to focus on the suitability of the class action device as a means for vindicating rights. They dismiss the subjective concerns and perceived interests of class members on the philosophy that rights which have been violated ought to be remedied. In Professor Moore's view, for instance, "the (b)(2) suit is not limited to situations in which each member of the class is aggrieved or wishes to challenge the defendant's conduct, but it does require that the defendant's conduct or lack of it be premised on a ground that is applicable to the whole class."99 Newberg presents this position cogently: "[T]he class member who wishes to remain a victim of unlawful conduct does not have legally cognizable conflict with the named representative."100 Furthermore, "[a]ctual or potential disagreement regarding the nature of relief sought need not prevent a finding of adequate representation."101 This approach finds its strongest statement in a recent Columbia Law Review Special Project: "[Class members'] interest in the status quo is legally irrelevant if in fact the defendant has been acting in an illegal manner: the court will require that the status quo be modified to conform to the law regardless of the class membership's wishes."102

A few courts have taken this extreme position as well. One federal district court, for example, indicated that "a judge may not refuse to certify a class simply because some class members may prefer to leave the violation of their rights unremedied."103 Another stated that "the fact that some members of the class are satisfied with the action com-

100 1 H. Newberg, supra note 32, § 1120h, at 208.
101 Id. § 1120h, at 55 (Supp. 1980).
102 Columbia Special Project, supra note 20, at 893.
plained of is irrelevant.” Nonetheless, the commentators have not convinced most courts that Rule 23 lends itself to this very liberal interpretation.

Elliot v. Sperry Rand Corp. provides a particularly interesting contrast to East Texas Motor Freight, in its view of the relevance of intraclass dissent. In Elliot v. Sperry Rand, the plaintiff brought a class action against Sperry Rand Corporation and its local and international unions and charged sex discrimination in employment. As in East Texas Motor Freight, the members of the local union indicated a strong hostility towards the suit. They voted eighty-three to zero, with 101 members present, not to support the class action, and at least forty-two of those voting were female. The local’s business manager then received a number of unsolicited petitions against the suit, containing 372 signatures, of which “some” were male. Nevertheless, the United States District Court for the District of Minnesota certified the class. Relying in part on the Fifth Circuit’s opinion in East Texas Motor Freight, which the Supreme Court had not yet overruled, the court examined the vote and the petitions very carefully and found the evidence of dissent “a good deal less than clear and convincing.” It suggested, moreover, that the test of conflicts “relating to the subject matter of the litigation” refers primarily, perhaps exclusively, to antagonistic material conflicts. Unless the class action would harm material, objective interests of one part of the class, dissent could be ignored. The court’s only concession to the evidence of conflict was to order notice to the class members.

Defendant sought review by mandamus, but the United States Court of Appeals for the Eighth Circuit refused to overturn the lower court’s class certification decision. Although emphasizing the narrowness of its review on mandamus, the appellate court nonetheless specifically approved the lower court’s analysis. The Supreme Court’s subsequent decision overruling the Fifth Circuit’s decision in East Texas Motor Freight prompted the defendant to renew his attack on class certification, but the district court again refused to credit the evidence of class members’ opposition. While the district court carefully argued that the dissenting members should be accommodated and

108 Id. at 1571-72.
109 Sperry Rand Corp. v. Larson, 554 F.2d 868 (8th Cir. 1977).
should not be used as a basis for decertification, it is difficult to reconcile such reasoning with the Supreme Court’s decision in East Texas Motor Freight.\textsuperscript{112}

\textit{Lerwill v. Inflight Motion Pictures, Inc.},\textsuperscript{113} a class action by some union members on behalf of other members, represents a recent and fairly sophisticated appellate discussion of intraclass conflict from a strong legal rights enforcement perspective.\textsuperscript{114} The plaintiffs in \textit{Lerwill} sought, through a Rule 23(b)(3) action, to recover overtime wages that union members were not being paid. Defendant claimed “that the bulk of the class members favored a waiver of overtime provisions and would not support a suit to enforce the contract terms.”\textsuperscript{115} The members feared that, if the class prevailed in the suit, the employer would simply hire more employees rather than pay overtime, and the result would be less total pay for current union members. The United States Court of Appeals for the Ninth Circuit affirmed the district court’s certification of the class, stating as its rationale the fact that the dissenters could opt out and a presumption “that it was in the general class interest to assert these rights.”\textsuperscript{116} Moreover, the court stated in a footnote that “there is a substantial question whether employees can be deemed to oppose rights which are not only the product of a collective bargaining agreement but also are mandated by statute.”\textsuperscript{117} The court thus suggested that it favored rights enforcement through the class action device, even though contrary to the wishes of most, or perhaps nearly all, class members. This contrasts strongly with the District of Columbia Circuit’s approach and holding in \textit{Phillips v. Klassen}.\textsuperscript{118}

In these rights-oriented cases, the actual views of class members are subordinate to the overriding interest in rights vindication—the presumed interest of class members. The cases also recognize, however, that if there is a certain threshold showing of dissent in a Rule 23(b)(2) action, the trial court should order that notice be sent to the class. In an

\textsuperscript{112} The district court’s attempt to reconcile \textit{Rodriguez} with \textit{Sperry Rand} failed to distinguish the two cases:

The court notes that its previous decision did not rely on \textit{Rodriguez} alone, but on principles drawn from other cases as well... Moreover, the Supreme Court opinion cannot be viewed as holding that as a matter of law any vote by class members or putative members contrary to some expressed view of named plaintiffs makes certification improper. That determination necessarily turns on the facts of each case.

\textit{Id.} at 583.

\textsuperscript{113} \textit{582 F.2d} 507 (9th Cir. 1978).

\textsuperscript{114} One reason for the disproportionate number of reported cases of conflict and dissent involving unions is that there are mechanisms within unions—union meetings, for example—for uncovering conflict. Such mechanisms do not exist within most classes. That is not to say that there is more conflict in unions, only that it tends to be discovered more often.

\textit{Id.} at 512.

\textsuperscript{115} \textit{582 F.2d} at 512.

\textsuperscript{116} \textit{Id.} The court did note, however, that opting out might not always protect dissident employees.

\textsuperscript{117} \textit{Id.} at 512 n.4.

\textsuperscript{118} \textit{502 F.2d} at 362. \textit{See supra} notes 95-98 and accompanying text.
extreme case, the class members’ responses to the notice in either a Rule 23(b)(2) or (b)(3) action may dictate that the court must decertify the class. Thus, the court in Elliot v. Sperry Rand, a Rule 23(b)(2) action, ordered the class representatives to send notice to the class.119 Presumably, the court would have decertified the class if the class had responded negatively and if it could not resolve the conflict by redefining the class or creating subclasses.120 Similarly, the court in Lerwill might have confronted directly the issue of decertification if it had determined that opting out was not a complete solution to “[protect] the interests of any dissident employees.”121

The legal community has given considerable support to the approaches to class conflict taken in the cases just discussed. Commentators often agree that notice in Rule 23(b)(2) actions and opting out122 in Rule 23(b)(3) actions solve the problem of class conflict.123 Not many courts, however, have chosen thus far to follow those approaches. Notice is still generally discretionary in Rule 23(b)(2) actions,124 and there is little appellate scrutiny of how lower courts exercise that discretion. Trial courts are reluctant to order such notice in Rule 23(b)(2) actions since they are not specifically required to do so.125 They often proceed according to the theory that, by definition, “a (b)(2) class is... homogeneous without any conflicting interests between the members of the class.”126 Indeed, Elliot v. Sperry Rand is one of only a few reported decisions ordering discretionary notice.127

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119 The court sought through notice to obtain, *inter alia*, the following information from recipients:

(1) [W]hether the recipient is opposed to this lawsuit; (2) if there is opposition, what the source of that opposition is; (3) whether the recipient would desire to intervene in this case either with her own counsel or with counsel presently representing the class; and (4) if there is opposition and if the recipient does not wish to intervene, whether the recipient would wish to see other class members intervene, and, if so, whom the recipient feels would be appropriate intervenors.


120 The court did not specifically state, however, that it was contemplating decertification. It suggested only that the court might fashion remedies to reduce any antagonism. *Id.*

121 Lerwill v. Inflight Motion Pictures, 582 F.2d at 512.

122 The Harvard Study, however, takes the position that “provision of any opt-out right whatsoever is difficult to defend” for either 23(b)(2) or (b)(3) class actions. *See* Harvard Study, *supra* note 20, at 1488-89.


124 *See* supra note 60.

125 This is one reason for judicial preference for 23(b)(2) over 23(b)(3) certification in civil rights cases. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 255-57 (3d Cir.), cert. denied, 421 U.S. 1011 (1975).

126 *Id.* at 256.

127 *See* supra note 119 and accompanying text. *See also* Rosen, *Title VII Classes and Due Process: To (b)(2) or Not to (b)(3)*, 25 Wayne L. Rev. 919, 946-49 (1980); Boston Note, *supra* note 37, at 689-70. Advocates of more widespread notice admittedly received a boost from Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979). Johnson, however, required notice to
Furthermore, notice, even when sent, is not necessarily designed to ferret out any dissent or conflict. Notice is usually very general; in Rule 23(b)(2) actions, it asks only if the recipient wishes to participate, and in Rule 23(b)(3) actions, it asks only if the recipient wishes to opt out. For example, discretionary notice in a recent sex discrimination class action brought in the United States District Court for the District of Massachusetts did not mention potential conflicts, nor did it address the questions of adequacy of representation or typicality.\textsuperscript{128}

Moreover, the question remains of just how the court should handle class members' responses to a suitable form of notice. Opt out requests in Rule 23(b)(3) actions present no problem, but the court in a Rule 23(b)(2) action may be faced with a confusing array of responses that preclude an easy solution. Indeed, one or more prudent members of a Rule 23(b)(3) class may point out that despite their opposition to class certification, they will be forced to participate if the action goes ahead in order to ensure that they receive the recovery to which each member of the class is entitled.\textsuperscript{129} The court, in any event, will have to face the issues of whether to decertify, restructure, or otherwise modify the class. More generally, the court will have to determine what the impact of the dissent should be on the outcome of the lawsuit. The court could simply refuse to certify the class, thereby preventing rights enforcement, or it could ignore the dissent in favor of rights enforcement, or it could try to accommodate the conflict while allowing the class action to proceed. Obviously, the third approach is the one that offers the most promise, and it merits close attention.

\textit{Getting the Issues Before the Court}

Commentators such as Professors Chayes and Fiss have developed the principle that the trial court has a \textit{duty} to uncover conflict and to handle it creatively.\textsuperscript{130} In his recent careful study of "structural reform" lawsuits, Professor Fiss discusses in large part the type of law class members only where backpay awards are sought in 23(b)(2) actions brought under title VII. See Note, Class Actions: Certification and Notice Requirements, 68 Geo. L.J. 1009 (1980); Note, Notice in Rule 23(b)(2) Class Actions for Monetary Relief: Johnson v. General Motors Corp., 128 U. Pa. L. Rev. 1236 (1980). Notice need not be particularly expensive, since it would not have to be individualized. Class members may be reached by other means that are just as effective, such as notices at the work place in some title VII actions or even "sampling notice" where a large class is involved. \textit{Boston Note}, supra note 37, at 691-94.


\textsuperscript{129} As the Harvard Study suggests: "Each class member, fearful that other class members will claim their recovery, may conclude that forgiving the class opponent will have little practical effect, and take the 'second best' course of seeking relief." \textit{Harvard Study}, supra note 20, at 1493.

\textsuperscript{130} This Article focuses on Chayes, \textit{supra} note 20, and Fiss, \textit{supra} note 20, because they have written the leading analyses of this type of litigation, which Chayes generally calls "public law" litigation and a portion of which Fiss terms "structural reform" litigation. This position is also consistent with \textit{Harvard Study}, \textit{supra} note 20, \textit{Harvard Developments}, \textit{supra} note 22, and \textit{Columbia Special Project}, \textit{supra} note 20. Other generally favorable perspectives on this litigation...
enforcement litigation discussed here. He argues that it "seems almost absurd to rely on the initiatives of those persons or agencies who happen to be named plaintiff and defendant." Therefore, he suggests, "[t]he more appropriate response, and the one typically employed in the structural context is for the judge—often acting on his own—to construct a broader representational framework." Because the court's decision in such cases will have an impact on a large number of persons, a fair decision requires that the court "tolerates, or even invites, a multiplicity of spokesmen ... each perhaps representing different views as to what is the interest of the victim group." According to Professor Fiss, the touchstone for a good judicial decision or approved settlement is whether the court has considered all the relevant interests. This does not mean that class actions will not vindicate rights, but rather that courts should use discretion in deciding precisely how to structure the relief.

Several school desegregation cases appear to have adopted this thoughtful approach. For example, the three judge panel in Evans v. Buchanan stated that disagreements over the remedy sought would not prevent the Wilmington school desegregation action from proceeding on behalf of a class. The court emphasized that all the positions were before the court and all the arguments presented. Relief, therefore, could be structured to accommodate the various positions. Litigation thus becomes very much like an administrative hearing or even a town meeting, as Professor Yeazell suggested when discussing the Los Angeles school desegregation litigation. As Yeazell notes, the litigation may be expanded to the point that "anyone who can articu-
late an interest shared by some significant number of persons and not
already represented in the litigation can participate, at least to the ex-
tent of submitting briefs.\footnote{Yeazell, \textit{supra} note 6, at 260 n.69.}

This approach is attractive as a general solution to class conflict
and dissent. The court may hear all the arguments, consider all the
interests, and develop a form of relief that binds everyone, protects
interests to the greatest extent possible, and still remedies violations of
the law. Indeed, this solution seems far superior to traditional notions
of litigation.\footnote{See Cavanagh & Sarat, \textit{Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence}, 14 \textit{Law & Soc'y Rev.} 371 (1980); Eisenberg & Yeazell, \textit{supra} note 20. See also infra notes 222-30 and accompanying text.} Yet, one may argue that this solution is both too radical
and not radical enough. While no doubt preferable to approaches that
overemphasize or underemphasize the significance of class dissent, it
suffers from defects that limit its effectiveness both in coping with con-
lict and in producing fair and lasting results.

First, the approach relies too much on the unfettered discretion of
trial court judges, both in deciding whether to widen the scope of the
litigation and in structuring the remedy.\footnote{There are good reasons for investing trial courts with some discretion in this area, see generally Rosenberg, \textit{Judicial Discretion in the Trial Court—Viewed From Above}, 22 \textit{Syracuse L. Rev.} 635 (1971), but the suggested approach leaves too much opportunity for judges to rule without even considering the relevant factors.} Ideally, the trial court
judge should be careful to ensure that all potential viewpoints are rep-
resented, but little guidance is provided to assist the trial court in that
endeavor or to assist the appellate court in reviewing the trial court’s
actions. Notice is discretionary in 23(b)(2) actions, as are subclassing,
redefinition of the class, and intervention—the other tools for broaden-
ing representation. Discretion may be reviewed when the existence of
conflict or dissent is clear on the record, but the record may obscure
relatively long range material conflicts or conflicts that reflect only dif-
fering perceptions of similar interests. Many conflicts are no doubt
hidden from the trial court. Under this approach, judges do not have a
duty, subject to review, to probe beyond named representatives into the
nature of the class.

Trial court discretion permits thoughtful and creative procedures,
but it does not maximize their utilization. “Structural reform” law-
suits\footnote{See supra note 131.} implicate strongly felt political values, and broad trial court dis-
cretion is an invitation to a result-oriented jurisprudence, which may
not work justice in these often complicated and controversial actions.\footnote{Indeed, one commentator has stated that divergent decisions on class actions in title VII cases can be explained only by the preferences of individual judges. 2 A. \textit{Larson, Employment Discrimination} § 49.51 (1975).} An approach must be found that both provides guidance for the consci-
entious trial judge and ensures that trial courts focus on the appropriate concerns.

A second problem with the town meeting approach is that it does not guide trial courts in determining whether and under what circumstances class dissent or conflict should preclude class certification. Rule 23 requires more than a common violation of a group’s legal rights, and, therefore, situations must exist in which dissent is sufficient to prevent the action from proceeding on behalf of a class. If conflict should sometimes prevent class certification, then standards must be articulated that will limit the circumstances in which non-certification is required.

In addition, since this approach will allow many class actions to proceed even though there is evidence of class dissent, conflict at later stages of the lawsuit—especially the settlement or remedy stages—must also be accommodated. If courts are the appropriate forums in which to handle these non-traditional actions which, as noted before, may resemble town meetings, then court procedures must adapt to fit such actions more accurately. It is not sufficient for a court merely to hear all the arguments and viewpoints of those affected by the lawsuit. The court’s discretion in shaping the remedy must be informed by knowledge of the actual constituencies supporting each of the various arguments.

A series of cases involving Hispanic interests in school desegregation illustrate this point. Hispanic parents sought to intervene in Cisneros v. Corpus Christi Independent School District and Bradley v. Milliken, school desegregation class actions. The parents in Cisneros wished to prevent a settlement and to litigate on the merits; the parents in Bradley sought to intervene on the grounds that bilingual education in Detroit would be threatened if Hispanic students were dispersed to different schools in order to facilitate desegregation. The trial courts denied intervention and were upheld on appeal on the grounds that the

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145 It has been suggested, for example, that courts should limit denial of class status to relatively rare situations, including some clear material conflicts of interest ("Hobbesian classes"), and some cases where there is such opposition to the lawsuit that the lawsuit may “discourage unduly the conduct regulated” by a statutory scheme. HARVARD Study, supra note 20, at 1495-98. According to this view, “there is room to wonder why a court would ever terminate a class suit for fear that the interests of class members would not be adequately represented.” Id. at 1489.

146 One might suspect, for example, that even many strong supporters of class actions to enforce civil rights might be willing to use intraclass dissent to prevent a “reverse discrimination” class action. Cf. Germann v. Kipp, 429 F. Supp. 1323, 1330 (W.D. Mo. 1977) (refusing to certify a class on the ground that some minority fire fighters benefited from the challenged affirmative action plan, although the class evidently could have proceeded on behalf of all non-minority fire fighters).

147 560 F.2d 190 (5th Cir. 1977).

school board previously had made all the relevant arguments.\textsuperscript{149}

The trial courts, however, could have invoked their discretion so as to give more attention to the Hispanic interests. Those interests clearly would have been presented more sympathetically by Hispanic intervenors than by a school board.\textsuperscript{150} The trial courts also might have been more disposed to formulate remedies in line with the Hispanics' arguments had they been aware of the Hispanics' constituencies. By the nature of these cases, the trial courts had to pick and choose among various more or less political arguments, and Hispanics have a political significance quite different from the school board. These cases thus show that it is inadequate, even dangerous, for a court to refuse intervention just because one party already has voiced a particular argument.

A recent opinion from the United States Court of Appeals for the Ninth Circuit, \textit{Mendoza v. United States},\textsuperscript{151} illustrates a similar problem and also points out the "political" significance of constituencies. In this case, the trial court refused to allow a group of Hispanics to form a subclass in order to make its own argument in favor of keeping certain Tucson schools open. As in \textit{Cisneros} and \textit{Bradley}, the court determined that it had heard all the arguments and it denied the subclass.\textsuperscript{152}

In upholding the trial court's rejection of the subclass, and in approving a settlement opposed by the Hispanic groups, the Ninth Circuit referred to a leading Fifth Circuit opinion, \textit{Pettway v. American Cast Iron Pipe Co.},\textsuperscript{153} in which the number of dissenters in the class clearly had helped to persuade the court to reject a proposed settlement in a title VII class action. The Ninth Circuit in \textit{Mendoza} distinguished \textit{Pettway} on its facts: "While we do not suggest that the quantity of objectors will determine whether the settlement proposal should be rejected, that factor . . . renders \textit{Pettway} a poor factual analogue . . . ."\textsuperscript{154} As a practical matter, the number of dissenters is important in the decision whether to approve or modify a proposed settlement,\textsuperscript{155} but the Ninth Circuit refused to admit that the number of people desiring a subclass

\textsuperscript{149} Bradley v. Milliken, 620 F.2d at 1142; Cisneros v. Corpus Christi Ind. School Dist., 560 F.2d at 191.
\textsuperscript{150} Although the result might have been the same if the court had allowed the Hispanics to intervene, one might contend that the trial court deprived itself of the input of a group with a serious personal stake in the outcome. That group's argument would have had a different quality, if not a different legal substance, than the school board's.
\textsuperscript{151} 623 F.2d 1338 (9th Cir. 1980).
\textsuperscript{152} \textit{Id.} at 1350. The court also noted that it was "not clear" how the subclass stood with respect to issues other than the closing of the schools. Unfortunately, the creation of a subclass was probably the only way to make those feelings clear in the context of this lawsuit.
\textsuperscript{153} 576 F.2d 1157 (5th Cir. 1978), \textit{cert. denied}, 439 U.S. 1115 (1979).
\textsuperscript{154} Mendoza v. United States, 623 F.2d at 1349 n.12.
\textsuperscript{155} See, e.g., Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975), \textit{cert. denied}, 424 U.S. 967 (1976); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir. 1974), \textit{cert. denied}, 419 U.S. 900 (1975). These cases stand for the proposition that the degree of opposition or support is rele-
might also be important in deciding whether to allow it. According to the court, the proposed subclass did not need to be established since its arguments had been made. As a result, the trial court had no practical means of probing the depth of the Hispanics’ opposition to the settlement.\textsuperscript{156}

Numbers and actual constituencies do influence the court, and it is disingenuous to hold that only “arguments” are relevant. For example, in \textit{Calhoun v. Cook},\textsuperscript{157} an earlier school desegregation lawsuit, a three judge panel of the United States District Court for the Northern District of Georgia rejected a plan favored by national lawyers for the NAACP that would have resulted in considerable busing. The court clearly was persuaded not merely by the cogency of the defendant school board’s arguments. Rather, the court was influenced by the local NAACP and a number of unsolicited petitions that supported a remedy involving less busing. The national NAACP appealed the decision, but the Fifth Circuit upheld the trial court’s remedy.\textsuperscript{158}

Courts ought to consider actual constituencies, not merely arguments, while shaping a decree. One problem with the emerging town meeting view of litigation is that a court presented only with arguments, not with the representatives of real constituencies, might ignore the interests and views of what might be a majority of a lawsuit’s beneficiaries. Any solution to the problem of ideological conflict in class actions must recognize that not only rights are at stake and not only legal arguments are relevant to the outcome.

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\textsuperscript{156} Plaintiffs in \textit{Mendoza} initiated the school desegregation action in Tucson on behalf of a class of Mexican-Americans in 1974. It was consolidated with a similar action on behalf of black children and tried in January, 1977. After trial and prior to the resolution of post-trial motions, plaintiffs in both actions informed the court that they were discussing settlement. The settlement plan was filed July 17, 1978, and Sanchez, a member of the Mexican-American class, took exception to part of it. He requested a substitution of counsel on July 27, and received new counsel on August 3. On August 4, he moved to create a subclass of parents and children in the attendance areas of schools sought to be closed. He also moved to continue the hearings on the plan, which were set to begin on August 8. Sanchez then presented testimony at the hearings on August 8 and 9. On August 11, the court tentatively approved the plan for the purpose of giving notice to class members and denied the motion to create a subclass. Sanchez then filed his own opposition at the final settlement hearing on August 30 and 31, but the court rejected his objections.

A subclass would have allowed Sanchez to argue on behalf of others in addition to himself. Class support clearly would have enhanced the persuasive power of his argument. The court unfortunately did not explore fully whether there was indeed a “subclass” of persons who shared Sanchez’s opposition to the closing of three schools.


\textsuperscript{158} \textit{Calhoun v. Cook}, 522 F.2d 717 (5th Cir. 1975).
A Suggested Approach

As Professors Cover and Fiss suggest, it is necessary "to consider whether the continued use of a formal construct [the class] may have an ultimately dehumanizing effect if it is imbued with a life of its own, apart from the natural persons for whom it was once a tool." A proper approach to intraclass conflict must take into account the virtues of class actions as well as the problems that may arise from ignoring the "natural persons" who comprise formal classes.

The class action device facilitates the creation of a unit with some of the attributes of an organization: an identifiable membership, enhanced bargaining power from aggregation of claims, and leaders who speak for the group. It is extremely difficult to organize many of the groups whose rights are violated. Absent the class action device, therefore, it might be impossible or, at the least, very expensive to enforce a group's rights. As one commentator has said, "the class action may . . . be thought of as a device for securing the benefits of scale without undergoing the outlay for organizing."

Courts, therefore, should not require that all class members consent to a lawsuit. Instead, courts should encourage lawyers and others interested in rights enforcement to seek out, inform, and mobilize those who stand to be affected by class actions. As Professor Bell said, courts should not allow the class action device to be used as a "barrier to expression of dissent." The courts should ensure that "private attorneys general" and class representatives seek out dissent and attempt to persuade class members that the action is indeed in their best interest.

The Basic Test for Certification

The court must explore the issue of class conflict in depth at the certification stage as well as at later stages of the lawsuit. The court should apply the same criteria to both the certification decision and a decision to decertify after it obtains further information. The key issue to the court is whether, in the given circumstances, the lawsuit should proceed as a class action with the named plaintiffs as representatives.

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162 Bell, supra note 10, at 505.
163 See supra notes 19-22 and accompanying text.
164 The Supreme Court's decision in Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), suggests that courts must permit this discussion. See also Yale Note, Conflicts, supra note 1. In the past, courts have often prohibited communication conducted without court consent.
165 Certification here means the decision to allow an action to proceed on behalf of the class.
The plaintiff class representatives already bear the burden of establishing that the action meets all the requirements of Rule 23, including adequacy of representation and typicality. In addition, the plaintiff and class attorney should have a duty to bring to the court’s attention any conflicts that they anticipate or that they have discovered through prior contact with class members. This requirement is consistent with decisions stating that the class attorney owes a fiduciary duty to all members of the class. In addition, the court must ascertain through discussion with the parties and communications with the class just how serious conflicts and dissent are or might be. If the court fails to conduct an adequate inquiry, an appellate court may reverse its certification decision, or the lawsuit may be subject to collateral attack by a class member whose interests were not represented.

The test that the trial court should apply if it discovers dissent can be expressed in terms consistent with prevailing federal case law: class representatives are not adequate under Rule 23(a)(4) if there is substantial conflict within the class going to the subject matter of the lawsuit. While this formulation does not differ from that which courts currently apply, a more precise statement of the appropriate analysis within the framework of Rule 23 is needed to guide district court discretion.

The purpose here is to provide that statement. A preliminary concern, however, is to ensure that the trial court provides a record of its investigation and consideration of any potential conflicts. This will enable a reviewing court or a court faced with a collateral challenge to the adequacy of representation to ascertain what conflicts came to the court’s attention and how it treated them. In making its findings, the

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166 See, e.g., 3B J. Moore, supra note 45, § 23.02-2.

167 Such a duty could be reviewed by a collateral attack on the class action judgment. See Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 Harv. L. Rev. 589 (1974).

168 See, e.g., Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); National Ass’n of Regional Medical Programs, Inc. v. Mathews, 551 F.2d 340 (D.C. Cir. 1977), cert. denied, 431 U.S. 954 (1977). As stated by the Harvard Study, “the first obligation of the class attorney, therefore, should be to discover the range of interests held by class members. He ought also to report conflicts of interest among class members to the judge.” Harvard Study, supra note 20, at 1595. See also Bellow & Kettleson, supra note 24, at 361; Harvard Developments, supra note 22, at 1456.

While the defense has an incentive to seek out potential conflicts and bring them to the attention of the court, its ability to contact class members is limited. See, e.g., Federal Judicial Center, Manual for Complex Litigation, pt. I, § 1.41 (1978). A recent case of abuses by defendants is Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978).

169 This standard is favored by courts that do not wish to find sufficient conflict to prevent certification. See supra notes 73 & 74.

170 Courts often make such findings when they approve class action settlements and accept guilty pleas. See, e.g., Mandujano v. Basic Vegetable Prods., 541 F.2d 832 (9th Cir. 1976); Officers for Justice v. Civil Serv. Comm’n, 473 F. Supp. 801, 805-09 (N.D. Cal. 1978); 3B J. Moore, supra note 45, § 23.80[4]. For judicial findings on issues of voluntariness when accepting guilty pleas, see Fed. R. Crim. P. 11.
trial court must recognize and consider interests not before it, such as those of absent class members. It is useful, therefore, to place a burden on the court not only to make findings, but also to explain its findings and the bases on which it made them. The court certifying a class should explain, for example, why it made a finding of no conflict, why it thought notice unnecessary, and why it believed it could consider and control any potential conflict or dissent through the existing or proposed representational structure. This requirement alone might reduce considerably the problem of conflict simply by forcing judges to focus on the appropriate issues and reminding them of the need to exercise discretion carefully.

The trial court should apply the "substantial opposition" test according to a three-part analysis. First, the court should ascertain whether all the members of the proposed class stand in the same objective position with respect to the alleged violation of the law. This inquiry is now a matter of course; the issue here is whether such an inquiry alone is sufficient. Second, the court must reach a conclusion, even if tentative, as to the scope of conflict and dissent within the class. Third, the court should determine whether any conflicts are substantial enough to preclude certification of the class. This method of analysis is consistent with the approach that a thoughtful court already might follow.

The third part of the test, however, should be made more concrete. The court should concentrate on three basic factors in deciding whether existing conflict ought to prevent certification: (1) whether the litigants and their attorneys are appropriate law enforcers; (2) the general characteristics of the class; and (3) the potential impact on the class of the relief sought. These factors will determine whether the court should certify the class, what, if any, notice should be sent to class members, and how the court should treat responses to the notice. In considering these factors, the court should be reluctant to deny the benefits of the class action device to a truly representative plaintiff or accountable attorney general surrogate. Finally, the court should apply its knowledge of class members' interests and views to such discretionary decisions as how to structure the remedy.

Qualifications of class representatives and their attorneys. — Courts routinely inquire into the qualifications, skill, and experience of class attorneys. They also consider the named plaintiffs' responsibility

171 Similarly, a court examining a class action settlement discusses and disposes of each objection to a proposed settlement.
172 Accordingly, reviewing courts should recognize the need for trial discretion, but they should still exert some control over it.
173 See 3B J. Moore, supra note 45, § 23.04.
174 See id., § 23.07[1].
and commitment to the litigation. The first inquiry into adequacy of representation under this test should build on these investigations. Initially, the court should focus on the lawyers and representatives as a "legal rights entity." If the court finds that the representatives and their lawyers are accountable to the group ostensibly benefiting from the lawsuit—particularly if they represent a relatively broad-based, ongoing organization—and if the court finds that the lawsuit bears some relationship to the organization’s goals, the court should find the representatives to be adequate, even if there exists some class dissent. To the extent that the class representatives and their lawyers are supported by an organization that seeks to protect the interests of those whom the class action is intended to benefit, concern over the lack of accountability is diminished. The court may assume that the representatives’ lawyers will conduct the lawsuit with sensitivity to the views of the organization. In contrast, where class representatives and their lawyers have no organizational support, the accountability problem looms larger. In those cases, the court should apply a higher standard in determining whether the class representative is adequate. Analogous Supreme Court precedents support a dual standard. The Court in In re Primus and Ohralik v. Ohio State Bar Association stated that bona fide legal rights organizations have greater freedom to promote their law enforcement services than self-interested and relatively unaccountable private attorneys.

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176 See supra note 41. If the legal rights entity shares in the political accountability of a public attorney general, then the court can also be less concerned with class dissent. See supra text accompanying note 34. Thus, for example, it was reported in 1970 that California Rural Legal Assistance (CRLA), a federally funded legal aid organization, brought class actions only: (1) when the client had more than a nominal interest in the suit; (2) after CRLA had consulted with relevant poverty organizations to see if they favored the action and relief sought; and (3) after general discussion with client groups about the particular class action. See YALE Note, Public Interest, supra note 38, at 1125. Because public legal services organizations such as CRLA are accountable to the general public, courts should defer to the organizations’ decisions regarding what rights to enforce through class actions. The public continually scrutinized CRLA’s activities and funded their activities, although not without some controversy. Furthermore, CRLA did not depend solely upon its public status to legitimate its law enforcement; it consulted with relevant constituencies before proceeding with class actions. Other methods to assure responsiveness and accountability were discussed recently in YALE Note, In Defense, supra note 38, at 1455-56. See also Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 STAN. L. REV. 207 (1976).


179 See Comment, In-Person Solicitation by Public Interest Law Firms: A Look at the ABA Code Provisions in Light of Primus and Ohralik, 49 GEO. WASH. L. REV. 309 (1981). A double standard between legal rights organizations and private attorneys is made explicit in the Kutak
Bona fide legal rights organizations, however, should not automatically obtain class certification. Indeed, in his article arguing that class actions are nonrepresentative, Professor Bell attacks precisely the organization that has achieved the most legitimacy in the courts—the NAACP.\(^\text{180}\) Professor Bell contends that the NAACP has pushed for integrated schools through class actions against the wishes of class members who would prefer to concentrate primarily on improving local school quality. He thus calls for courts to “apply carefully the standard tests for determining the validity of class action allegations and the standard procedures for protecting the interests of unnamed class members.”\(^\text{181}\) He does not demand refusal to certify or decertification of all classes in the face of dissent, but the forcefulness of his critique suggests the need for elaboration of the argument favoring deference to organizations like the NAACP.

The NAACP does not necessarily represent the perceived interests of the parents and children who are members of a class. It thus lacks the perfect accountability of an organization litigating for its own membership only. However, the NAACP and similar public interest organizations have distinct advantages over legal rights entities composed, for example, solely of a private lawyer and a nominal client. Organizations like the NAACP are subject to much more scrutiny than a private lawyer acting on behalf of an individual. The NAACP, for example, represents a large group of people who are deeply involved in the issue of school desegregation. The organization must justify its strategic choices to the group that its actions are intended to benefit. If enough members of the group disagree with the organization’s choices—to favor widespread busing, for example—those members will reassess or even withdraw their support.

As previously suggested, therefore, courts should inquire into whether a class action brought by an organization is the product of a decisionmaking process that guarantees some accountability to the organization’s membership.\(^\text{182}\) Rule 23.2 explicitly gives courts the power to make this inquiry in lawsuits brought by unincorporated associations, presumably to prevent easy circumvention of the requirements of Rule 23. The same kind of inquiry can be undertaken for incorporated associations such as the NAACP. Unless representativeness is demonstrated, courts should not permit expansion of the lawsuit beyond the specific individuals who initiated it.

Characteristics of the class.—Next, the court should explore the

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\(^\text{180}\) See Bell, supra note 10.

\(^\text{181}\) Id. at 508.

\(^\text{182}\) See supra notes 40 & 41 and accompanying text.
general characteristics of the class, again with a view to ensuring maximum accountability consistent with the purpose of class actions—that purpose being the aggregation of claims that might not be presented otherwise. Particularly if the class is small and centralized—thus allowing members to be contacted and mobilized into an active organization fairly easily—the court should pay close attention to evidence of conflict and dissent. In this situation, the court should expect the class representatives and their lawyers to take the initiative in responding to class opposition. If the court finds that the class lawyers and representatives are sensitive enough to class dissent that the class takes on the traits of an organization, the court should find that the class representatives are adequate.

On the other hand, if the class is large and diffuse, making it difficult and expensive even to communicate with class members, much less to transform the class into an entity resembling an ongoing organization, the court should be less concerned with evidence of conflict and dissent. As Professor Stewart suggests, "the efforts that would be involved in identifying the individual preferences of class members would reintroduce many of the crippling transaction costs which public interest representation is designed to circumvent." In order to encourage these actions, therefore, the court should expect class representatives and their lawyers to be less sensitive to class opposition. Nonetheless, not all large and diffuse classes should be certified on the assumption that they cannot be organized.

Impact of the action and the proposed remedy on the class.—The third factor the court should assess, and the one most often treated in the legal literature, is the impact of the action on the class. Impact can be discussed according to whether the remedy sought is "one-shot" or "structural". The one-shot remedy is self-explanatory. Examples include an injunction prohibiting enforcement of an unconstitutional law or practice, such as CIA surveillance of mail or a university's policy against communist speakers on campus. The one-shot rem-

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183 Other commentators who have recognized the desirability of organizational advocacy have rendered a similar conclusion. See, e.g., Brilmayer, supra note 41 (discussing case and controversy requirements and standing requirements); Trubek, Public Advocacy: Administrative Government and the Representation of Diffuse Interests, in ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES 445 (M. Cappelletti & B. Garth eds. 1979) (volume three of the Florence Access-to-Justice Project series) (discussing the institution of "public advocate").


185 See infra text accompanying notes 197-200.

186 See, e.g., COLUMBIA Special Project, supra note 20, at 899-901; HARVARD Study, supra note 20, at 149-93.

187 The term "structural" is borrowed from Fiss, supra note 20.


edy may also consist of a rule of disclosure, a due process hearing, or even an award of damages, all of which the court may implement with a simple decree or judgment.\(^{190}\)

In contrast, the structural remedy, which frequently requires the court to choose among many possible means of redressing a particular wrong, involves institutional reform.\(^{191}\) Consequently, this remedy necessitates more court participation than the one-shot remedy. The successful antidiscrimination action, for example, does not result in a simple order not to discriminate; rather, it results in a plan to root out discrimination. Similarly, suits against schools, prisons, and mental hospitals often result in massive institutional changes.

Structural remedy cases which, unlike one-shot remedy cases, necessitate substantial court involvement,\(^{192}\) require the use of such devices as subclasses, redefined classes, and intervention—either permitted or invited. Accordingly, to the extent that these devices allow the court to channel conflict and dissent into a representational framework that gives the court an accurate picture of the class, the court need not deny class certification. A denial may even prevent the court from ascertaining the information relevant to the informed exercise of equitable discretion.

In addition to subclassing, redefining classes, and allowing intervention, the court must consider the precise effect of the proposed decree on the class. To the extent that the decree might impose substantial costs in addition to conferring benefits, the court should give dissent greater weight.

**Combining the Factors: Certifying or Refusing to Certify the Class**

The preceding section began by stating that courts should be required to seek out and evaluate the nature and scope of class dissent. Next, it defined three factors relevant to the decision whether to certify the class. Courts should prefer certification, but not automatically grant it, when an accountable legal rights entity represents the class, the class is too diffuse to enforce its rights by any other means, or the court can manage dissent through such mechanisms as subclassing, redefining the class, permitting intervention, and structuring the remedy. This analysis applies primarily to injunction actions brought under Rule 23(b)(2). As a practical matter, in damages actions brought under Rule 23(b)(3), in which a dissenting member may opt out, it is unlikely that a


\(^{192}\) See, e.g., COLUMBIA Special Project, supra note 20, at 877-901. See also supra notes 130-41 and accompanying text.
court will refuse to certify or will decertify the class. This section explains how these factors specifically relate to the "substantial conflict" test.\textsuperscript{193} Opposition is substantial when the concern with accountability under the circumstances is sufficient to outweigh the interest in law enforcement through the class action.

The easy case for denial occurs when opposition to the action is so great that, in effect, no "class" of individuals supports the aims of class representatives and their lawyers. \textit{Bailey v. Ryan Stevedoring, Inc.}\textsuperscript{194} exemplifies this degree of opposition. The court denied class status in \textit{Bailey} because 204 of 230 class members repudiated the class representative. Similarly, in \textit{Davis v. Roadway Express, Inc.},\textsuperscript{195} seventeen of twenty-three class members did not wish to be represented in an anti-discrimination class action. The court in \textit{Davis} explained its denial of certification on the grounds of both opposition to the lawsuit and lack of numerosity.\textsuperscript{196} The latter reason technically did not apply, however, since the seventeen could not opt out under Rule 23.

Cases like \textit{Bailey} and \textit{Davis} require no real sensitivity to the other factors identified here. Where class opposition is not so overwhelming, however, courts must apply considerable discretion. The following examples will illustrate the kind of close attention that courts should pay to class dissent.

The first example involves a class action to enjoin construction of a dam that would cut off recreational opportunities in a river. The action is brought on behalf of all those who would engage in recreational activities on the river—a group difficult to identify but presumably numbering in the thousands. That group would include individuals who live near the river and who expect their communities to develop and prosper with the additional electrical power which the dam would make available. Those individuals would prefer that the action not proceed at all or, at least, that it not proceed on their behalf.\textsuperscript{197}

Assuming that the court is able to ascertain class attitudes, it should take class dissent into account.\textsuperscript{198} If the dissent is apparent but not overwhelming, the court should balance it with the other factors

\textsuperscript{193} \textit{See supra} text accompanying note 169.
\textsuperscript{194} 528 F.2d 551 (5th Cir. 1976). \textit{See supra} notes 86-89 and accompanying text.
\textsuperscript{195} 590 F.2d 140 (5th Cir. 1979), aff'd on rehearing, 621 F.2d 775 (1980). \textit{See supra} notes 86-89 and accompanying text.
\textsuperscript{196} 590 F.2d at 144.
\textsuperscript{197} Sometimes the court may not have enough information to identify class preferences even as generally as they have been identified in this example. Obviously, the court then only can enforce the general requirements of Rule 23.
\textsuperscript{198} Methods of ensuring adequate representation of the attitudes of all class members include the following: requiring notice to absent members, \textit{see supra} notes 119-29 and accompanying text, and permitting intervention by class members, \textit{see supra} notes 147-50 and accompanying text. \textit{See also Columbia} Special Project, \textit{supra} note 20, at 878-83.
that have been outlined previously. Militating against certification is the fact that since the lawsuit, if successful, will prevent the dam from being built—the injunction is an absolute remedy—it will have a fairly serious long-term impact on dissenters. Furthermore, the class lawyer and named plaintiff have no particular claim to legitimacy as legal rights enforcers. Arguing in favor of certification is the presumed difficulty of organizing and communicating with the members of a class this large and diffuse. The question is whether such difficulty outweighs the evidence of strongly felt and legitimate dissent.

If evidence shows "substantial" dissent—that is, more than a majority of the class members oppose the class action—the court should deny certification. To the extent that the class action provides some advantage in obtaining the injunction, the court should not grant that advantage. The interest in law enforcement in this case is not sufficient in itself to dictate class certification, and the remedy cannot be shaped to account for the views and perceived interests of class dissenters. In addition, no reason exists to favor the particular lawyer and representative as a law enforcement entity. The diffuseness of the class is not a sufficient reason here to approve the class. Individuals or ad hoc organizations could certainly bring suit and seek the same remedy. Thus, by denying the class, the court is not denying anyone's rights. Furthermore, the court is recognizing dissenters' views by not forcing them to be a part of the litigation.

Moreover, as will be emphasized below, the certification decision may not be crucial in any event. Whether or not the court certifies the class in the situation just described, by seeking out class dissent the court will obtain a full picture of the constituency whose interests the lawsuit will affect. That picture may influence whether the court grants a remedy as extreme as an injunction if the plaintiffs prove a violation of the substantive law. Consequently, while the certification decision itself is significant, its importance should not be exaggerated.

A sex discrimination injunction action brought on behalf of all female employees of a business organization provides a second example. Again, the lawyer and named plaintiffs have no special status as a legal rights entity. The class numbers several hundred and some significant, but not overwhelming, percentage of the members indicate through

199 See supra notes 174-92 and accompanying text.
200 The relator action provides an interesting middle ground between private and public suits on behalf of diffuse interests. In relator actions, the private attorney general obtains permission to sue “on the relation of” the public attorney general. See generally Cappelletti, supra note 20. It is significant that the Justice Department's proposed revisions of the class action damage sections of Rule 23, which emphasize the law enforcement or deterrent role of class actions brought for a large number of individual small claimants, relied in great part on the relator idea. See, e.g., Berry, Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action, 80 COLUM. L. REV. 229, 326-34 (1980).
201 See infra note 209 and accompanying text.
credible evidence that they do not believe they are victims of discrimination and that they are content with their current positions. Even though the class is relatively small and easy to organize, and no particular legitimacy attaches to the parties and their attorneys, this suit should proceed as a class action for two reasons. First, the plaintiffs seek a structural rather than a one-shot remedy, and thus the court can consider the interests of dissenters in shaping the remedy. Second, the court can shape the remedy so as not to harm the women who are content with the status quo. Those women need not apply for promotions and presumably will not object to raises. Thus, the effect will be the same as if they were able to opt out. In similar situations, the court should not deny class status if there is more than majority, but not overwhelming, class opposition.

As a final example, consider school desegregation litigation brought on behalf of all black children in a particular school system. This discussion will treat two possible suits: one in which the plaintiffs are represented by the NAACP (or the Legal Defense Fund), and one in which the plaintiffs are represented by an independent private lawyer. The litigants in both suits seek a decree that would involve considerable busing from neighborhood schools to integrate the school system. As in the previous example, the remedy sought is structural and, therefore, can be shaped to some extent to accommodate the concerns of parents who oppose busing. The class here is not diffuse; its members are easily identifiable and can be reached without great difficulty. The major difference between this action and the sex discrimination action is that this remedy will not, in practice, be voluntary. The children of parents opposed to busing will probably be bused, and that is a substantial cost to impose. Under these facts, the court should deny certification if a documented majority opposes the suit brought by the private attorney.²⁰²

Once again, the private attorney can proceed with the action on behalf of individuals or an organization created by busing proponents for litigation purposes, but there is no reason why the pro-busing litigants should enjoy the law enforcement advantages that attend class certification.²⁰³ Those individuals, after all, form merely one private faction among many. If they are successful, opposing factions will suffer heavy burdens.

If the NAACP institutes the litigation, however, the balance should tip in favor of certification in a close case. An established, bona fide interest group responsive to a broad constituency that is interested in the issues raised by the lawsuit has a strong claim to the advantages

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²⁰² In some instances, the court may consider other factors, such as the problem of mootness, that may make class status essential even to get the case into court. See Sosna v. Iowa, 419 U.S. 393, 397-403 (1975).

²⁰³ See supra notes 42-47 and accompanying text.
that come with class certification.\textsuperscript{204} The NAACP does not represent one faction among many; rather, it is an organization with some degree of accountability and sanctions to enforce the legal rights of the constituency that supports it. Some class members may disagree with the approach the NAACP takes to school desegregation litigation, but there is no danger that the NAACP will decide to litigate based on a desire for pecuniary gain, personal ambitions, or the ideological aims of a lawyer and client isolated from the constituency that the action is supposed to benefit. The court, therefore, should err in the direction of class certification and law enforcement in situations similar to this.

These examples illustrate the kind of analysis that the court should undertake in determining whether to certify a class. The purpose here, however, is to suggest how the court should address and weigh the key factors, not to develop a simple test. The results of seemingly inconsistent cases such as \textit{East Texas Motor Freight}\textsuperscript{205} and \textit{Elliot v. Sperry Rand}\textsuperscript{206} perhaps can be rationalized within this type of analysis.\textsuperscript{207} It is essential that the court apply the appropriate analysis and weigh the various factors before concluding that there is or is not “substantial conflict going to the subject matter of the lawsuit.”\textsuperscript{208} At present, unfortunately, the substantial conflict test is merely an invitation for the court to reach an unprincipled decision.

\textit{Discretionary Orders in Class Actions}

The purpose of this Article is not limited to finding a way for courts to approach the class certification decision. It also encourages courts to search for class conflict and dissent in order to gain an accurate picture of the interests and desires of class members. Indeed, the certification decision itself matters less if the class construct is not used as a device to conceal full information about class members from the court. Certification provides certain advantages in injunction actions, but it is not a prerequisite to bringing suit or to securing the remedy.\textsuperscript{209} In addition, the inquiry that the court undertakes for certification will provide information which helps it decide other discretionary orders in class action litigation and in other actions for injunctions.

\textsuperscript{204} Other forms of accountability, such as a decisionmaking process within the organization, may substitute for a broad organizational constituency. See supra text accompanying note 182.

\textsuperscript{205} See supra notes 80-82 and accompanying text.

\textsuperscript{206} See supra notes 105-12 and accompanying text.

\textsuperscript{207} It might be, for example, that in \textit{East Texas Motor Freight} the trial court's only realistic choice was either to eliminate the no-transfer rule, see supra note 82, or to allow it, especially given that class certification was sought after the trial on the merits. It appears that in \textit{Elliot} the court could have structured any decree to account for women who did not wish to claim that they had been discriminated against in employment.

\textsuperscript{208} See supra note 73 and accompanying text. See also supra text accompanying note 169.

\textsuperscript{209} For example, despite a refusal to certify the class, the court still issued an injunction in \textit{Bailey v. Ryan Stevedoring}, 528 F.2d at 551.
The goal, moreover, is not just to ensure that the court hears all legal positions within the class, but also that the court has a complete understanding of the class members' responses to those positions, including the position favoring nonenforcement of rights. It may sometimes be useful for the court to hold elections, either indirectly through notice provisions or, in smaller class actions, through a real "town meeting." Near the end of a lengthy sex and race discrimination action against the San Francisco police force, for example, a federal magistrate conducted a courtroom election to decide how many class members thought their interests would best be protected by Officers for Justice, the original plaintiffs' group, and how many preferred the Police Officers' Association, which had intervened originally on the defendants' side.\textsuperscript{210} While not strictly relevant to the legal arguments in the case, the class members' preferences did influence how the court exercised its discretion. A court may resolve a lawsuit in any number of ways, and one remedy is not necessarily more correct than another. In formulating a remedy, however, the court must consider not only the requirements of the law, but also the views and interests of class members.\textsuperscript{211}

It is certainly possible for a court to tailor a remedy to the particular characteristics and interests of class members or intervenors.\textsuperscript{212} If a central problem in class action litigation is, as Professors Kirp and Babcock recently observed, that "particular points of view are predictably and systematically undervalued,"\textsuperscript{213} the analysis suggested here can help to overcome this deficiency. Professor Fiss, in his studies of injunctions, has emphasized that the court possesses considerable discretion in devising a remedy.\textsuperscript{214} This Article encourages courts to add information to that discretion.

\textsuperscript{210} The final settlement is reported in Officers for Justice v. Civil Serv. Comm'n, 473 F. Supp. 801 (N.D. Cal. 1979).

\textsuperscript{211} For discussion of how the court uses its discretion in framing a remedy, see Diver, \textit{The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions}, 65 VA. L. REV. 43 (1979); Starr, \textit{Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees}, 32 ALA. L. REV. 399 (1980); \textit{Columbia Special Project}, supra note 20, at 790-813.

\textsuperscript{212} See, e.g., United States v. Reserve Mining Co., 514 F.2d 492 (8th Cir. 1974), \textit{modified sub nom.} Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976) (in order to protect the jobs of union members the union intervened in an action and prevented the closing of a polluting plant); Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976) (\textit{see supra} text accompanying notes 135-37).

\textsuperscript{213} \textit{See generally} O. Fiss, \textit{The Civil Rights Injunction} (1978). Indeed, Fiss suggests that the choice before the court is not simply \textit{which} remedy, but whether there be \textit{any} remedy, even assuming a substantive right was violated. The injunction may be the only remedy available, or it may be vastly superior to any other, and yet there may be good reasons not to grant it. \textit{Id.} at 171. A similar theme is developed in \textit{Parker & Stone}, supra note 25. \textit{See also} J. Vining, \textit{Legal Identity} 171 (1978) (justice in certain circumstances may be conceived "as something more than legality").
THE EFFECTIVENESS OF CLASS ACTIONS AND THE PROBLEM OF CLASS INDIFFERENCE

This Article has focused on class conflict and dissent, not on class indifference, which is closely related and probably more pervasive. Class actions frequently are brought on behalf of individuals who simply do not care whether their legal rights are enforced. The class attorney who is motivated by ideology or a desire for attorneys' fees may be the individual most interested in a particular lawsuit. Such a case presents both the problem of accountability and the problem of effectiveness.

Accountability is not a serious problem when class members are indifferent rather than opposed to the action. When class members are indifferent, the action at least does not proceed against their wishes and perceived interests.\(^{215}\) The question, then, is whether the court should nevertheless deny class status if it discerns widespread class indifference. I suggest that it should not. The law enforcement interest embodied in Rule 23 is great enough to overcome indifference.\(^{216}\) No representative institution can fulfill its responsibilities unless it can act despite a passive membership.

Effectiveness is a problem which, although not raised before, has important general implications here. Empirical research makes clear that class action "victories" can become long-term defeats\(^{217}\) if no one monitors the decision to enforce rights and ensures compliance with both the spirit and the letter of the decision.\(^{218}\) Effective monitoring requires the presence of an active organization interested in the task, or at least a group of sufficiently motivated individuals.\(^{219}\) A class of dissenters or even an indifferent class may fail to monitor, and the litigation victory then may turn out to be hollow.\(^{220}\)

\(^{215}\) The concern here goes to the whole phenomenon of public interest law and private attorneys general. See, e.g., Harvard Developments, supra note 22, at 1457-61. See generally Bellow & Kettleson, supra note 24. Given that my proposal will result in the discovery of latent class conflict, the likelihood of an indifferent class will in any event be reduced.

\(^{216}\) See supra notes 52-58 and accompanying text. See also Yeazell, Part II, supra note 1, at 1115-20.


\(^{218}\) Monitoring requires "persistent followup and constant surveillance." R. Marshall, C. Knapp, M. Liggett & R. Glover, Employment Discrimination: The Impact of Legal and Administrative Remedies 144 (1978) [hereinafter cited as EMPLOYMENT DISCRIMINATION]. See also J. Handler, supra note 160, at 208 ("[t]he importance of building on permanent technical and professional resources to make participation effective is so obvious, yet it seems so often neglected by law reformers and social reform groups").

\(^{219}\) EMPLOYMENT DISCRIMINATION, supra note 218, at 150 ("change in minority employment pattern is more likely when the minorities themselves are organized to bring pressure for change and when litigation is accompanied by an outreach effort to recruit, train, and place qualified minorities").

\(^{220}\) Attorneys tend to rely on reports prepared by the defendants to monitor results: "Most
Without entirely resolving the practical problem raised by class indifference, it is evident that the system suggested in this Article for discovering and coping with class dissent and conflict will reduce the likelihood of lawyers' class actions on behalf of purely abstract and indifferent classes. Knowing that the court will probe the class for dissent, the class lawyer and representatives will try to minimize dissent by informing class members of the lawsuit's advantages. This effort should minimize class indifference by involving class members in the lawsuit. In short, once class attorneys learn that the court will treat the class as more than a merely formal entity, they will try to obtain class members' support, and this should make class action litigation both more accountable and more effective.

A Further Problem of Legitimacy: Courts and Participation

A lengthy debate has taken place about the legitimacy of litigation that forces judges to make apparently political and administrative decisions involving injunctions—that is, decisions based not on neutral legal principles, but on political and instrumental considerations. This debate over "public law," "polycentric," or "structural reform" litigation has been based on differing perceptions as to the litigation's novelty, its appropriateness, and its effectiveness. I have argued in this Article that the purpose of Rule 23 and the existing law enforcement role of class actions leads to an even more participatory view of class litigation than has generally been thought necessary. In order to achieve the basic goal of efficient law enforcement with accountability, either to class members or to any other relevant constituency, courts must pay greater attention to conflict and dissent in the class. This view expands the town meeting metaphor from one where only legal arguments are important to one where constituencies participate and debate on both political and legal grounds. I even have suggested that elections have a place in this modern litigation.

attorneys admit that these reports are not a satisfactory monitoring mechanism but that neither they nor the clients have the resources (and, in the case of the attorneys, the interest) to pursue the matter further." J. HANDLER, supra note 160, at 148.

221 The general problem of enforcement of rights possessed by disadvantaged groups must ultimately be related to questions of political and economic power. See, e.g., Cappelletti & Garth, Foreword: Access to Justice as a Focus of Research, 1 WINDSOR Y.B. ACCESS JUST. ix, xvi-xxii (1981).


223 See generally Chayes, supra note 20.

224 See generally Fuller, supra note 222.

225 See generally Fiss, supra note 20.

226 See supra note 210 and accompanying text.
It might be argued that this kind of litigation is inconsistent with the accepted view of what courts can and cannot do. In fact, this analysis might be seen to carry illegitimacy of the courts a step further than it has been carried before. The traditional views of judicial legitimacy, however, may not serve us well in evaluating structural reform litigation. Certainly, as Kirp and Babcock state in a recent contribution to this debate: "Institutional reform cases force the judiciary to relate constitutional values to particulars of the cases and to test the degree to which it can effectively adapt itself to the task of reform without becoming merely a political institution."\textsuperscript{227} It is indeed becoming increasingly more difficult to argue that the judiciary is not a political institution, but the current debate fails to explain precisely how this affects the "legitimacy" of the courts.

Scholarship about the legitimacy of the courts tends to revolve around the nineteenth century ideal of impartial judges, neutral legal principles, and judicial decisions determining that one party is right and another wrong.\textsuperscript{228} Scholars such as Professor Martin Shapiro recently have shown, however, that this ideal probably has never been realized in any country.\textsuperscript{229} Courts always have been involved in a variety of functions, including mediation and negotiation, social control on behalf of the state, and administration. The amount of time courts devote to each of these functions may be distributed differently now than in the past, but courts always have been "political" institutions.\textsuperscript{230} We can thus take one of two approaches to the question of legitimacy: we can seek to move more towards the nineteenth century ideal, or we can develop criteria for legitimacy consistent with what courts really do. While I favor the latter approach, acceptance of the analysis presented here requires only one step in that direction. This discussion shows how courts can make class action litigation both more accountable and more effective in enforcing the law. Regardless of whether the modern class action corresponds to an ideal, this proposal can at least improve the institution we have.

\textsuperscript{227} See Kirp & Babcock, supra note 10, at 397.

\textsuperscript{228} See, e.g., R. Ungder, supra note 23, at 176-223 (describing the development and decline of legal formalism in procedural and substantive law); M. Weber, Law in Economy and Society 227-28 (Rheinstein ed. 1954) (describing "judicial formalism").

\textsuperscript{229} See M. Shapiro, Courts: A Comparative and Political Analysis (1981).

\textsuperscript{230} Id. at 63 ("[l]ike most other major political institutions, courts tend to be loaded with multiple political functions, ranging under various circumstances from bolstering the legitimacy of the political regime to allocating scarce economic resources or setting major social policies").