

# Publicly Funded Objectors

*Elizabeth Chamblee Burch\**

*On paper, class actions run like clockwork. But practice suggests the need for tune-ups: sometimes judges still approve settlements rife with red flags, and professional objectors may be more concerned with shaking down class counsel than with improving class members' outcomes. The lack of data on the number of opt-outs, objectors, and claims rates fuels debates on both sides, for little is known about how well or poorly class members actually fare. This reveals a ubiquitous problem — information barriers confront judges, objectors, and even reformers. Rule 23's answer is to empower objectors. At best, objectors are a partial fix. They step in as the adversarial process breaks down in an attempt to resurrect the information-generating function that culture creates. And, as the proposed changes to Rule 23's handling of objectors reflect, turmoil exists over how to encourage noble objectors that benefit class members while staving off those that namely seek rents from class counsel. The U.S. class-action scheme is not the only one that relies on private actors to perform public functions: citizens privately fund political campaigns, and private lobbyists provide research and information to lawmakers about public bills and policies. Across disciplines, the best responses to those challenges have often been to level up, not down. This Article therefore proposes a leveling up approach to address judges' information deficit such that they can better perform their monitoring role. By relying on public funds to subsidize data collection efforts and nonprofit objectors' information-gathering function, we can disrupt private class counsel's disproportionate influence.*

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\* Charles H. Kirbo Chair of Law, University of Georgia School of Law. My sincere thanks to Eran Taussig, Alon Klement, Alan Morrison, Theodore Frank, and participants at Tel Aviv University's conference on *Fifty Years of Class Actions — A Global Perspective* for their thoughtful comments on earlier drafts.

## INTRODUCTION

The year 2016 marked the fiftieth anniversary of America's modern-day class action, long enough for us to have witnessed its heyday and its gradual erosion. Judges have toyed with interpretations of commonality and predominance,<sup>1</sup> and now the Advisory Committee on Civil Rules is tinkering with the rule once again.<sup>2</sup> But the same tired principal-agent problems that have developed over the last fifty years have refused to retire. The worry that agents are rationally self-interested and will shirk or sell out their principals if not properly monitored still persists.

To address this problem, Rule 23 installs the judge as the monitor. It gives judges clear policing power throughout the litigation: judges appoint class counsel, certify that counsel and the class representatives fairly and adequately represent the members' interests, ensure that the class settlement is fair, reasonable, and adequate, and award class counsel's fee. And there are checks on the judge, too — opt outs, objections, and appeals. In Rule 23(b) (3) classes, because only class counsel stands to gain attorneys' fees, a host of competing attorneys who are otherwise boxed out of that fee award have incentives to solicit and assist class members in opting out.<sup>3</sup> Objectors can take issue with the settlement's terms or class counsel's fee.<sup>4</sup> And, if objectors face a chilly reception in the district court, then they can appeal. Appellate courts stand ready to reverse collusive deals and chastise self-dealing attorneys.<sup>5</sup>

On paper, things run like clockwork. But practice suggests the need for tune-ups: some judges still approve settlements rife with red flags,<sup>6</sup> and

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1 FED. R. CIV. P. 23(a); *e.g.*, *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997). Now plaintiffs must prove Rule 23's standards by a preponderance of the evidence and district courts must consider the merits before certifying a class — at least insofar as the merits overlap with Rule 23's requirements. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414 (2014); *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008).

2 Advisory Committee on Civil Rules Agenda Book (Nov. 3-4, 2016) [hereinafter Advisory Committee's November Agenda Book].

3 Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 168-69 (2003).

4 FED. R. CIV. P. 23(e)(5), (h)(2).

5 *E.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014); *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014).

6 Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859 (2016).

professional objectors may be more concerned with shaking down class counsel than with improving class members' outcomes. The lack of data on the number of opt-outs, objectors, and claims filing fuels debates on both sides, for little is known about how well or poorly class members actually fare.<sup>7</sup> This reveals a ubiquitous problem — information barriers confront judges, objectors, and even reformers.

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- 7 Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data 2* (RAND Inst. for Civil Justice, Working Paper No. WR-599-ICJ, 2008), [http://www.rand.org/content/dam/rand/pubs/working\\_papers/2008/RAND\\_WR599.pdf](http://www.rand.org/content/dam/rand/pubs/working_papers/2008/RAND_WR599.pdf) (“A veil of secrecy can fall over class action litigation the moment the judge signs off on the agreement and ultimately, little information is available about how many class members actually received compensation and to what degree.”) (published later as William B. Rubenstein & Nicholas M. Pace, *Shedding Light on Outcomes in Class Actions*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20, 22 (Joseph W. Doherty et al. eds., 2012)). Pace and Rubenstein summarize their quest for data as follows:

What we found, quite simply, was virtually nothing: few class action participants responded to our request for data, fewer still provided any; the official case files themselves were similarly sparse. Our two data collection efforts yielded information on fewer than one in five class actions in our sample. The information we were able to glean, however, confirmed that the distribution of benefits to class members in at least some cases fell far short of the ideal, thus underscoring the importance of transparency in this area.

*Id.* at 3. In the years that followed, there has been some headway on data collection. *E.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010) (studying settlements from 2006 and 2007). The Consumer Financial Protection Bureau has collected information on consumer class actions, and found that the average claims rate was twenty-one percent and the median was eight percent. Attorneys' fees' overall percentage was twenty-one percent of cash relief. CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY 326 (2015). Two studies on employee and consumer class actions also exist, but reach conflicting conclusions. Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Executive Summary, 2013), [http://www.instituteforlegalreform.com/uploads/sites/1/Class\\_Action\\_Study.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf) (concluding that class actions “provide little or no benefit to consumers”); NAT'L ASS'N OF CONSUMER ADVOCATES & THE AM. ASS'N FOR JUSTICE, CLASS ACTIONS ARE A CORNERSTONE OF OUR CIVIL JUSTICE SYSTEM: A REVIEW OF CLASS ACTIONS FILED IN 2009 (Feb. 27, 2015), <http://www.consumeradvocates.org/sites/default/files/Class%20Action%20Report%202-27-15.pdf> (concluding that class actions “often provided enormous benefits to consumers”). There is likewise relatively little recent empirical data on objectors. The latest study that I know of is Theodore Eisenberg & Geoffrey Miller, *The*

Accordingly, Part I begins by identifying the information deficit. Part II addresses Rule 23's remedy for this problem: objectors. It shows that at best, objectors are a partial fix. They step in as the adversarial process breaks down in an attempt to resurrect the information-generating function that culture creates. And, as the proposed changes to Rule 23's handling of objectors reflect, turmoil exists over how to encourage noble objectors that benefit class members while staving off those that namely seek rents from class counsel. Yet, this concern about screening the bad from the good has distracted us from both the bigger question and the true challenge. The bigger question is how we ensure that judges have the necessary information (and incentive) to monitor the attorneys and ensure that the settlement is fair when the adversarial system breaks down. And the real challenge is how we confront the intense regulatory struggle that arises anytime private actors perform public functions.

Addressing the public-private challenge can generate possibilities for overcoming information deficits. Our class-action scheme is not the only one that relies on private actors to perform public functions — citizens privately fund political campaigns, and private lobbyists provide research and information to lawmakers about public bills and policies. Across disciplines, the best responses to those challenges have often been to level up, not down. Part III therefore proposes a leveling up approach to address judges' information deficit such that they can better perform their monitoring role. By relying on public funds to subsidize data collection and nonprofit objectors, we can disrupt the disproportionate influence that the settling parties have over the information judges receive about class settlements.

## I. THE INFORMATION DEFICIT

Some change is already on the horizon. Since 2011, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules has been looking under Rule 23's proverbial hood to see what kind of tune-ups it might need. Abandoning an initially ambitious agenda that included a new Rule 23(b)(4) for settlement class actions,<sup>8</sup> the Subcommittee's latest changes are far more modest in scope. Of note, however, are its proposals on "frontloading," and "bad faith" objectors.

Frontloading is shorthand for increasing the information available to judges before certifying the class. The proposal is housed within Rule 23(e), which

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*Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 *VAND. L. REV.* 1529 (2004).

8 *Compare* Advisory Committee on Civil Rules Agenda Book (Apr. 9-10, 2015), with Advisory Committee's November Agenda Book, *supra* note 2.

governs judicial approval of class settlements. The basics are still the same — settlements must be “fair, reasonable, and adequate” — but now, when making that call, judges must explicitly consider whether “the class representatives and class counsel have adequately represented the class;” “the proposal was negotiated at arm’s length;” “the relief provided for the class is adequate;” and “class members are treated equitably relative to each other.”<sup>9</sup> In deciding whether the relief is adequate, judges must consider additional factors such as “the costs, risks, and delay of trial and appeal;” “the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;” “the terms of any proposed award of attorney’s fees, including timing of payment;” and “any agreement required to be identified under Rule 23(e)(3),” which governs objectors.<sup>10</sup> These inquiries reinforce the 1966 Rule 23 drafters’ design choice: judges protect against attorney overreaching.

Protecting against attorney overreaching entails identifying when it occurs. Ordinarily, judges can count on the adversarial system to bring scurrilous behavior to light. Not so in class settlements. Formerly feuding parties are now both friends of the deal, united in seeking a judicial blessing. How then should judges answer these questions? The draft committee note suggests considering a few proxies such as: “the nature and amount of discovery in this or other cases, or the actual outcomes of other cases,” which “may indicate whether counsel negotiating on behalf of the class had an adequate information base;” “other litigation about the same general subject on behalf of class members;” whether the parties used a “court affiliated mediator or facilitator” in settling the claims; and whether the claims-processing procedures are fair.<sup>11</sup> Judges might also consider opt-out rates and “take” rates, which reflect how many class members have filed claims, as a signaling device.<sup>12</sup>

Most of these inquiries beg the same question — as compared to what? Looking internally at the proceeding may tell judges little, particularly if the parties are the primary information sources. When parties consider the nature and amount of discovery in their present case or their other cases, the natural

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9 Committee on Rules of Practice and Procedure Agenda Book 253 (June 6-7, 2016) [hereinafter Advisory Committee’s June Agenda Book]. These proposals have grown out of the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05 (AM. LAW INST. 2010). It is far easier for class objectors to spot deals that exaggerate settlement value or provide a windfall to class counsel, than it is to identify settlements that let the defendant off too cheaply.

10 Advisory Committee’s June Agenda Book, *supra* note 9, at 253.

11 *Id.* at 257-58.

12 *Id.* at 256.

tendency is to inflate their accomplishments.<sup>13</sup> Reporting the outcomes of counsel's other cases is likely to yield information about a fund's "sticker" price, not information about the actual value conferred on class members. As claims administrators fight for business and cozy up to repeat players,<sup>14</sup> they may well capitulate to parties' requests to implement onerous claims-filing procedures such that little compensation finds its way to class members. But none of that may be apparent from the face of the filing procedures. It might come to light only if judges review the numbers on the back end. Here, the advisory committee note's suggestion becomes particularly salient: settlement "[p]rovisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement."<sup>15</sup> Yet, judges are eager to close cases, not to oversee settlement administration.

Looking externally, either at other cases in general or at those over which the same judge presided, may likewise yield little helpful information. If the same judge handled class actions in the past without monitoring them carefully, then that reference point simply gives them license to use the same low bar. And, without any systematic data collection efforts to supply judges with hard facts,<sup>16</sup> looking at other cases will simply be an exercise in anecdote where parties marshal favorable cases to support the deal they've struck.

## II. ENTER OBJECTORS

How then can we solve the information gap such that judges can appropriately police self-interested behavior? After all, the temptation toward self-interest and structural collusion is well documented: because defendants care little about how the money is divvied up among class counsel and class members, class counsel may trade less relief for class members in exchange for higher attorneys' fees for themselves.<sup>17</sup> Moreover, as Sam Issacharoff has explained:

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13 Plus, in an age of electronic filing where document review can be easily outsourced to legal service providers abroad, reviewing millions of pages of documents may drum up billable hours, but it is hardly a good measure of a settlement's worth.

14 Claims administrators like Providio already seem to pay to send the "masters of mass tort" and the federal judges who handle them to the Ritz Carlton in Cancun for continuing legal education. *MASTERS OF MASS TORT*, <http://www.mastersofmasstort.com> (last visited June 28, 2017).

15 Advisory Committee's June Agenda Book, *supra* note 9, at 259.

16 The CFPB report provides one data source in consumer protection class actions. *CONSUMER FIN. PROTECTION BUREAU*, *supra* note 7, at 326.

17 *E.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (noting

“No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members.”<sup>18</sup>

Enter class-action objectors.<sup>19</sup> Rule 23 relies principally on those dissatisfied with the fee or the settlement’s terms to help judges see past the mirage of settlement. Objectors can bring to light new information about structural conflicts of interest within the class or between class members and class counsel, as well as information about unfair outcomes.<sup>20</sup> Of course, objectors are critical to other facets of due process, too, such as the right to participate and the opportunity to be heard.

The trouble, however, is that this system has given rise to a cottage industry of either “good” (read nonprofit public interest organizations) or “bad faith” objectors (often for-profit attorneys), who lodge objections cobbled together from past ones with little informational value for judges.<sup>21</sup> Granted, the lines between good and bad and even between for-profit and nonprofit are not always

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the “dangers of collusion between class counsel and the defendant”); John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 715-16 (1986) (discussing collusion in class settlements); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996) (documenting the ways in which class-action rules fail to protect class members’ interests when they conflict with one another).

18 Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 828 (1997); see also Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 405-06 (noting that trial judges must vigorously scrutinize proposed settlements, but lack the “incentive, information, and practical ability to effectively monitor class counsel”).

19 Numerous courts have praised class objectors’ work in identifying collusive deals. *E.g.*, *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 282-83 (7th Cir. 2002).

20 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a) (AM. LAW INST. 2010); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1677-97 (2008); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 385.

21 Brunet, *supra* note 18, at 472:

These public sector objectors march to the beat of a different drummer in their motivation and they bring to the case specialist attorneys better able to monitor the performance of the attorneys who have negotiated a class action settlement. The normal agency cost criticisms of class action objections seem less severe for these public sector objectors.

clear.<sup>22</sup> Still, so-called “bad” objectors seem to care less about improving the deal and more about extracting payment from the class attorneys by threatening to hold up the deal (and class counsel’s attorneys’ fees) through appeals.<sup>23</sup> Critics often focus on unpopular for-profit objectors who may have similar pending lawsuits and are thus unhappy about losing the attorneys’ fees that class counsel receives as well as those who are otherwise strategically motivated.<sup>24</sup> Of course, one might level the same accusations at class counsel, for the private attorney general model has no “pure heart” requirement.<sup>25</sup> It incentivizes private lawyers to investigate and sue namely because it is profitable to do so.<sup>26</sup>

Nevertheless, much of the Subcommittee’s current report addresses the best way of sorting the bad from the good — even though all objectors are

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22 *E.g., id.* at 438 (noting that Brian Wolfman, then of Public Citizen, “claims to know only one professional objector, and notes that this attorney has made meritorious objections in many cases”); Alison Frankel, *Exposing Class Action Objectors: Lieff Cabraser, Ted Frank in ‘Lurid’ Dispute*, REUTERS (June 22, 2015), <http://blogs.reuters.com/alison-frankel/2015/06/22/exposing-class-action-objectors-lieff-cabraser-ted-frank-in-lurid-dispute/>; Alison Frankel, *The Ted Frank Interview: ‘I Was Doing It for the Greater Good,’* REUTERS (June 25, 2015), <http://blogs.reuters.com/alison-frankel/2015/06/25/the-ted-frank-interview-i-was-doing-it-for-the-greater-good/>.

23 As the Subcommittee notes,

some objectors may be seeking only personal gain, and using objections to gain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors — or their counsel — have sought to extract tribute to withdraw their objections or dismiss appeals from judgments approving class settlements.

Advisory Committee’s June Agenda Book, *supra* note 9, at 259. *But see* Brunet, *supra* note 18, at 471-72 (“Recent developments cast objectors in a more positive light. Both the proposed amendments to Rule 23 and recent case law value the input of class action objectors and seemingly ignore the free-riding extortionist story.”).

24 *E.g.,* Lawrence W. Schonbrun, *The Class Action Con Game*, REGULATION, Fall 1997, at 50 (“[O]bjectors are as welcome in the courtroom as is the guest at a wedding ceremony who responds affirmatively to the minister’s question, ‘Is there anyone here who opposes this marriage?’”).

25 For a helpful typology of private attorneys general and where class actions fall on this spectrum, see William B. Rubenstein, *On What a “Private Attorney General” Is — And Why It Matters*, 57 VAND. L. REV. 2129, 2156 (2004).

26 *See* Issacharoff, *supra* note 18, at 830 (“If the price of private policing of misconduct is a need for plaintiffs’ attorneys, and if the further consequence is that the good ones get rich, so be it.”).

“the proverbial skunk at the garden party” from the parties’ perspective.<sup>27</sup> The report aims to curb bad objectors by requiring all objectors to specify their grounds for objecting, and by banning payment (or other consideration) to objectors unless the district court approves — a requirement that remains in place until the circuit clerk docket the objector’s appeal.<sup>28</sup>

Unfortunately, however, this change does little to improve the central concern about information asymmetries. Turning off the payment spigot may stop payoffs, but it relies on the judge to distinguish between good and bad objectors using information that’s typically gathered from the very parties that objectors are supposed to help judges monitor. Dealing with objectors thus turns into a vicious cycle. Judges must depend on friends of the deal (class counsel and the defendant) to monitor the objectors who are supposed to be monitoring them.

This creates a conundrum under the proposed changes: on one hand, judges would be tasked with making more specific findings under Rule 23(e) as to the adequacy of the settlement and the representation, but, on the other, they would have the same elementary tools that they’ve had for the past fifty years. Not only do these tools rely on the parties themselves (the assumed culprits) to ferret the good police from the bad, but they fail to properly incentivize objectors to identify the worst settlements. Currently, objectors who successfully derail a class settlement receive no fees whatsoever.<sup>29</sup> Incentive-wise, this encourages for-profit objectors to seek settlements that they can adjust at the margins, not highly problematic deals that would need to be scrapped.<sup>30</sup>

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27 Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 GEO. WASH. L. REV. 428, 428 (2011); see also Brunet, *supra* note 18, at 411 (“I have spoken with counsel who described objectors as ‘warts on the class action process,’ and I also found references to objectors as ‘pond scum’ and ‘bottom feeders.’”).

28 Advisory Committee’s November Agenda Book, *supra* note 2, at 32.

29 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.08 cmt. a (AM. LAW INST. 2010) (“Because of this gap, counsel for legitimate objectors have little incentive to object when the result of a successful objection would be to invalidate the entire settlement.”); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 145 (2001); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1448-51 (2006); e.g., *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 1995 WL 222177 (E.D. La. Apr. 12, 1995) (rejecting the proposed class settlement on the basis of Public Citizen’s objections but awarding no fee to the objector).

30 Rubenstein, *supra* note 29, at 1450.

Working within the current system's reliance on objectors as informants suggests two, non-mutually exclusive possibilities for reform. First, we might raise the stakes for for-profit objectors by harnessing the rivalries within the plaintiffs' bar. For example, Richard Nagareda has suggested presumptively removing class counsel when an objector demonstrates that the proposed class settlement is unfair, and presumptively replacing the class attorneys with the competing law firm that demonstrated the inadequacy.<sup>31</sup> Higher stakes make it more attractive for professional objectors to invest resources in uncovering inadequate representation and could even attract a different caliber of for-profit objectors.<sup>32</sup> This likewise eliminates the bar to attorneys' fees for objectors who successfully trash a proposed settlement.<sup>33</sup> Incentive-wise, presumptively replacing class counsel with the successful objector encourages for-profit objectors to pursue highly problematic settlements that they could take over.<sup>34</sup> The trouble, however, is that judges are already reluctant to overturn problematic settlements for fear that doing so will hold up the settlement. Replacing class counsel would cause far more delay, and may actually prompt judges to resolve close questions in class counsel's favor so as to avoid having to engage with the question of replacing counsel.<sup>35</sup>

Second, we might look for ways to encourage more nonprofit objectors to enter the arena. Because profit is not their motive, public interest organizations

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31 Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 347-63 (2003); see also Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633 (2003) (suggesting that objectors should be able to bid for the right to serve as class counsel). For additional proposals, see Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting an inalienability rule that would prohibit objectors from settling appeals unless they prompted class attorneys to modify the settlement); and John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865 (2012) (arguing for increased appellate bonds).

32 Some courts have, for example, awarded incentive payments to class members who conferred a benefit on the class through their objection. *E.g.*, *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373 (D.N.J. 2012) (awarding a nominal incentive payment to objectors).

33 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.08 cmt. a; Koniak & Cohen, *supra* note 29, at 145; Rubenstein, *supra* note 29, at 1448-51.

34 Nagareda, *supra* note 31.

35 Judges have the authority to replace class counsel but rarely do so. *E.g.*, *White v. Experian Info. Sol.*, 993 F. Supp. 2d 1154 (C.D. Cal. 2014) (denying a motion to disqualify class counsel). *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014) is one such rare example.

are more likely to challenge the most egregious settlements and, as repeat players, they develop the expertise to spot problematic settlement provisions and attorneys' fees.<sup>36</sup> A few public interest groups have undertaken this role,<sup>37</sup> but most nonprofit organizations focus on class actions only occasionally.<sup>38</sup> Nonprofits face two constraints: a need to fulfill ideological commitments to remain faithful to their mission (and encourage donors), and limited resources.<sup>39</sup> A steady source of public funds, however, might not only solve the resource deficit, but could encourage such groups to proliferate. This would create what Heather Gerken labels "second-order diversity," where ideologies and goals differ across, but not within, those organizations.<sup>40</sup> Consequently, even if a single nonprofit objector focused only on a subset of class-action issues, if enough nonprofits thrived, then collectively they might police the gamut of class-action abuses.

### III. A LEVELING UP PROPOSAL FOR NONPROFIT OBJECTORS

Class actions in the United States privatize a public function: law enforcement. Paying private lawyers attorneys' fees based on the benefits they confer on class members incentivizes lawyers to act as private attorneys general.<sup>41</sup> After fifty years, Americans feel at home with private class actions. Still, this is a distinctly American choice. And this choice deviates from a world norm: most countries allow public officials to sue on their citizens' behalf — not private actors.<sup>42</sup> Other countries, such as Brazil and Chile, allow for consumer class actions, but only when initiated by a governmental agency or a consumer association.<sup>43</sup> Still others, like Taiwan, use public interest associations as vehicles to drive class actions.<sup>44</sup>

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36 Brunet, *supra* note 18, at 448-49, 462, 472.

37 Several come readily to mind such as Public Citizen, and the Competitive Enterprise Institute's Center for Class Action Fairness. Other public institutes initiate class actions such as Public Justice and the Impact Fund.

38 Rubenstein, *supra* note 29, at 1451.

39 Brunet, *supra* note 18, at 409-10; Rubenstein, *supra* note 29, at 1450.

40 Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1101, 1172-73 (2005).

41 Rubenstein, *supra* note 25, at 2156.

42 Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 13 (2009).

43 Deborah R. Hensler, *The Global Landscape of Collective Litigation*, in CLASS ACTIONS IN CONTEXT 3, 13-15 (Deborah R. Hensler et al. eds., 2016).

44 Kuo-Chang Huang, *Using Associations as a Vehicle for Class Actions: The Case of Taiwan*, in CLASS ACTIONS IN CONTEXT, *supra* note 43, at 70, 90; Robin Hui

This public-private divide plays out in other aspects of American government as well, such as lobbying. Just as class counsel provides judges with information about class settlements and attorneys' fees, lobbyists provide lawmakers with information about bills, electoral implications of supporting a particular bill, and the likely consequences of enacting policies.<sup>45</sup> Put simply, lobbyists and class counsel both trade in information. And the information they supply may distort the political or judicial process in ways that are both troubling and opaque. Moreover, the target audience — judges and legislators — are generalists; many issues compete for their limited time.<sup>46</sup> Accordingly, to further their own ends, both lobbyists and class counsel provide prepackaged information that they hope will ease their proposal's path toward enactment or certification. As Heather Gerken and Alex Tausanovitch point out, when politicians experience substantial demands on their time, "they will have every incentive to take what you might think of as the 'fast food' option provided by lobbyists."<sup>47</sup> Judges, like politicians, have every incentive to like the "Happy Meals" class settlement supply. Settlements clear dockets. And, for once, all the parties agree.

Both lobbyists and class counsel trade, in part, on information that a politician or a judge could find on her own. Legislative staffers could easily drum up nonpolitical publicly available information just as a judicial clerk could unearth information about "the nature and amount of discovery" and "the actual outcomes of other cases," as the proposed amendments to Rule 23 suggest.<sup>48</sup> But judicial clerks, like staffers, have limited time and bandwidth. Why not rely on someone else to do it for them? Plus, the more complex the bill or the case, the more they will need to rely on experts — lobbyists and class counsel. In class actions, even if the judicial clerk has inside access to information about cases that her judge has handled in the past, that information will be limited. Repeat players, on the other hand, specialize not only in litigating class actions, but in litigating particular kinds of class actions —

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Huang, *Rethinking the Relationship Between Public Regulation and Private Litigation: Evidence from Securities Class Action in China*, 19 *THEORETICAL INQUIRIES L.* 333 (2018).

45 ANTHONY J. NOWENS, *TOTAL LOBBYING: WHAT LOBBYISTS WANT (AND HOW THEY TRY TO GET IT)* 29-30 (1998); Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 *ELECTION L.J.* 75, 80 (2014).

46 See Gerken & Tausanovitch, *supra* note 45, at 80.

47 *Id.*

48 Advisory Committee's June Agenda Book, *supra* note 9, at 257-58; Gerken & Tausanovitch, *supra* note 45, at 81.

employment, antitrust, securities, etc. — and may have intimate knowledge about hundreds of previous cases.

Lobbyists, class counsel, and even objectors are all private actors performing a public role. In this way, the United States stands out from all its counterparts who tend to have not only government enforcement, but also public sources of expertise like government-funded think tanks.<sup>49</sup> Regulating class action and lobbying practices is tricky because private actors are “shape shifters,” not fixed legal entities.<sup>50</sup> Repeat actors in both realms are sophisticated, entrepreneurial agents who evolve to capitalize on changing circumstances, act strategically in ways that are sometimes rational and sometimes not, are connected and interdependent, and generate adaptive outcomes that cannot be isolated into their component parts.<sup>51</sup> Consequently, enacting meaningful reform and enhancing functionality is difficult. The question becomes how to implement adjustments that can evolve with the times and provide the key component that the private system needs to function properly: relevant, transparent information.

Drawing parallels with campaign finance reforms, Gerken and Tausanovitch argue that the solution to lobbying is not to inhibit private lobbyists, but to level up: publicly fund policy research consultants — public lobbyists.<sup>52</sup> Campaign finance and lobbying suffer from some of the same ills that plague class actions. When private actors fund campaigns and when legislators depend on private lobbyists for critical information on bills, we worry about the influence private money may have, aim to prevent bribery, and yearn for transparency and disclosure. Just as it’s difficult to differentiate between good and bad class-action objectors, in lobbying and campaign finance it’s hard to distinguish between actors who fulfill public needs as opposed to those who aim solely to advance their own interests (or exercise their First Amendment rights).<sup>53</sup> As such, Gerken and Tausanovitch argue that the lobbying solution

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49 Gerken & Tausanovitch, *supra* note 45, at 78 (“In the United States, much of the funding for legislative information is private. In Europe and elsewhere, the funding is far more likely to be public.”); Hensler, *supra* note 42, at 13.

50 Gerken & Tausanovitch, *supra* note 45, at 77.

51 See JOHN H. MILLER & SCOTT E. PAGE, *COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE* 221 (2007); SCOTT E. PAGE, *DIVERSITY AND COMPLEXITY* 7-8, 38 (2010); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 *CORNELL L. REV.* 1445 (2017); Gerken & Tausanovitch, *supra* note 45, at 82; J.B. Ruhl, *Law’s Complexity: A Primer*, 24 *GA. ST. U. L. REV.* 885, 889 (2008).

52 Gerken & Tausanovitch, *supra* note 45, at 88.

53 *Id.* at 85-86 (noting that in the campaign-finance context, “[o]nce we lose the means to distinguish the little guy from the big guy, we’re stuck in the same place we’re stuck in for lobbying”).

is the same as that in campaign finance: don't clamp down on private activity, "beef up" public competitors.<sup>54</sup> Use matching funds or grants to publicly finance groups that do not enjoy corporate funding or create "research consultants" who might form something akin to a public-interest law firm.<sup>55</sup>

Leveling up could provide the right balance for class-action objectors, too.<sup>56</sup> Currently, however, the Subcommittee's proposal aims to clamp down on parasitic objectors, but does little to improve the informational content of class counsel's "Happy Meals." Leveling up by publicly subsidizing nonprofit objectors may be a complementary solution.<sup>57</sup>

### A. Funding Sources

Recognizing a need to level up to address the information deficit that judges face and filling that need by subsidizing nonprofit objectors with public funds still leaves us with a big question — where might we find the money? Although public funding in a system that has steadfastly depended on financing from private lawyers (and even third-party financiers) may seem peculiar, the United States need not write on an entirely blank slate. Using public funding to supplement private efforts has been a staple of class-action regimes in both Canada and Israel, and each offers lessons about how public subsidies might work within the United States.

Israel funds collective actions, in part, through its general tax base. Its public funding is thus subject to the same budgetary constraints as all government

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54 *Id.* at 85-87.

55 Dorie Apollonio et al., *Access and Lobbying: Looking Beyond the Corruption Problem*, 36 HASTINGS CONST. L.Q. 13, 46-47 (2008) (proposing a "public defender model, with publicly-funded lobbyists for groups that can demonstrate a sufficiently broad membership base and non-corporate funding," and noting that "[t]he funding could be matching or complete subsidy"); Gerken & Tausanovitch, *supra* note 45, at 88-89.

56 Just as funding political candidates allows citizens to exercise free speech rights, objecting to class settlements allows class members to exercise their due process rights to be heard.

57 Subsidizing nonprofit objectors is, of course, but one way to level up. Creating a new "designated objector" position at the Federal Judicial Center, or a type of class-specific ombudsperson would be other options. But like any governmental agent who repeatedly interacts with the same regulated entities, concerns about the potential for capture arise. Public interest organizations, on the other hand, attract donors based on results and genuine change. Plus, there are multiple organizations with interest and expertise spanning the wide range of subject matters that class actions encompass.

projects.<sup>58</sup> In 2006, Israel's new class-action law permitted individuals, nonprofit organizations, and public regulators to initiate class actions and created a public fund to aid individuals in financing cases that the government deems socially and publicly valuable.<sup>59</sup> Even though individual class members have brought over ninety-nine percent of class actions in the past six years, they rarely receive government funding — the fund's \$260,000 budget is too small to be of much use.<sup>60</sup> While the Ministry of Justice's fund has fallen prey to budget restrictions, the separate Israeli Securities Authority (ISA) has had slightly more success in subsidizing securities class actions.<sup>61</sup> The success here, however, is not attributable to the money, which is likewise hampered by limited resources, but by the signal that the ISA sends when it agrees to help finance a case.<sup>62</sup> Funding a case suggests that it is meritorious and socially valuable.<sup>63</sup>

Israel also permits objections from its attorney general and nonprofit organizations.<sup>64</sup> Although Israeli nonprofits suffer from the same setbacks that United States nonprofits do (many lack expertise and resources), Israel has taken steps to encourage legitimate objectors. In 2016, Israel amended its class-action law to allow any "person who acts in the interest of class

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58 Camille Cameron, Jasminka Kalajdzic & Alon Klement, *Economic Enablers*, in CLASS ACTIONS IN CONTEXT, *supra* note 43, at 137, 150.

59 *Id.* at 166. A historical overview of Israel's experience with class actions can be found in Amichai Magen & Peretz Segal, *Israel*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 244, 244-48 (2009).

60 Cameron, Kalajdzic & Klement, *supra* note 58, at 166.

61 *Id.*

62 The ISA received only eight applications between 2008 and 2009 and funded only one of them. *Id.*

63 *Id.*

64 The Israeli Attorney General appears far more effective than attorneys general in the United States. Although the Class Action Fairness Act requires the settling parties to notify the appropriate government official, those officials rarely get involved. 28 U.S.C. § 1715 (2005). In contrast, the Israeli Attorney General has submitted briefs in seventy percent of the proposed class settlements, fifteen percent of which include objections. When it objects, courts listen: courts approved only twenty-five percent of the objectionable settlements without changes. Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 THEORETICAL INQUIRIES L. 151, 183-84 (2018). For a discussion on Israeli objectors, see Orna Rabinovich-Einy & Yair Sagy, *Courts as Organizations: The Drive for Efficiency and the Regulation of Class Action Settlements*, 4 STAN. J. COMPLEX LITIG. 1 (2016).

members” to object — no fishing for a class member is required for standing.<sup>65</sup> Likewise, the amendment enabled nonprofits to intervene in class actions even in their early stages.<sup>66</sup> One common refrain from nonprofit objectors in the United States is that a similar standing exception would help remove barriers to their involvement.

Like Israel, the United States might subsidize nonprofit objectors from its general tax revenue. Policy-wise, this is the first-best solution, for both private plaintiffs’ attorneys and objectors who improve class settlements are performing an essential public function. We are, after all, each better off for not having our cars burst into flames upon impact or turn off while we drive them on the interstate. We can lead better lives when our prescription medicines adequately warn us of risky side effects, when employers prohibit workplace discrimination and harassment, and when medical devices don’t fail inside of us. Class actions help police all of these ills. Private attorneys perform public services for profit. Using the general tax base to publicly subsidize the nonprofit objectors who monitor litigation activities that benefit all of us makes sense.

But, like Israel, the United States faces resource constraints. And Congress has sent mixed messages about class actions in the past. In 1996, Congress prohibited publicly funded Legal Aid from engaging in class actions, which suggested that receiving money from the general tax base may be a nonstarter.<sup>67</sup> In 2005, however, Congress required parties to submit class settlements and a host of accompanying information to the appropriate state or federal official.<sup>68</sup> The officials need not respond, but can object or react if the settlement appears unfair.<sup>69</sup> As one might imagine, however, adding non-mandatory tasks to busy officials’ already overburdened workload often accomplishes little — unless the attorney general is politically motivated.<sup>70</sup> It is possible, however, that legislators might be receptive to supporting nonprofit objectors since those organizations fall on both sides of the political spectrum. Republicans may view the exercise as an extension of tort-reform goals such as shutting down

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65 Klement & Klonoff, *supra* note 64, at 181, 184 (citing Draft Bill Amending the CAL Settlements and Voluntary Dismissals Procedure, 5777-2016, HH (Knesset) No. 637, p. 116, [https://www.nevo.co.il/law\\_word/Law16/knesset-637.pdf](https://www.nevo.co.il/law_word/Law16/knesset-637.pdf) (Isr.)).

66 *Id.* (citing Bill Amending the CAL Settlements and Voluntary Dismissals Procedure § 15).

67 45 U.S.C. § 1617 (2012).

68 28 U.S.C. § 1715 (2012).

69 S. REP. NO. 109-14, at 32 (2005), *reprinted in* 2005 U.S.C.C.A.N. 32.

70 *See, e.g.*, Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971, 1982-88 (2008) (detailing attorney general involvement in class actions).

frivolous claims, whereas democrats may perceive the issue as one of holding companies accountable for the full effects of their conduct and ensuring that class members are appropriately compensated for their injuries. Still, revenue from the general tax base is not the only option. Self-funding models offer second-best solutions, for they tax those who use the system but not everyone who benefits from it. Yet, self-funding may gain more political traction because it doesn't further deplete the general revenue.

Canada offers two such models, one in Ontario and one in Quebec. By taxing successful class-action cases, the availability of public funding in both Ontario and Quebec has grown exponentially.<sup>71</sup> In particular, these funds help ease the financial burden on private litigants in a loser-pays system by absorbing those costs in the face of a loss.<sup>72</sup> Often recognized as more successful than its lesser-used counterpart in Ontario, Quebec's the *Fonds* has funded roughly one-third of all class actions in that province.<sup>73</sup> Although it receives limited revenue from government subsidies, most of its funding comes in the form of reimbursements from successful recipients, percentages of the recoveries it finances, and interest from investments.<sup>74</sup> Its government-appointed administrative board acts as a gatekeeper. The board screens applications based on financial need and proposed claims, decides which applications to fund, and provides out-of-pocket litigation costs (for experts, for instance) as well as a low billable-hour attorneys' fee.<sup>75</sup>

Several features of the *Fonds* stand out: it oversees class actions and challenges class settlements, it does not charge interest to its recipients, it retains a percentage of all class-action proceeds (not just those that it finances), it can recover up to ninety percent of the funds remaining after class members have collected their payouts, and its mission is "to promote recovery and

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71 Cameron, Kalajdzic & Klement, *supra* note 58, at 150 ("Ontario's fund was created in 1993, at the same time that class proceedings legislation was enacted, with seed money of \$500,000. Since then, it has grown exponentially, with no additional government funding, to a balance of over \$19 million at the end of 2014.").

72 Hensler, *supra* note 42, at 24; Catherine Piché, *Public Financiers as Overseers of Class Proceedings*, 12 N.Y.U. J.L. & Bus. 779, 783-84 (2016). Canada allows contingent fees that permit class counsel to receive twenty to forty percent of the recovery. Jasminka Kalajdzic et al., *Canada*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 41, 44 (2009).

73 Piché, *supra* note 72, at 796-98.

74 *Id.*; see also Kalajdzic et al., *supra* note 72.

75 Piché, *supra* note 72, at 803.

provide access to justice.<sup>76</sup> In theory, the *Fonds* also educates the public about the class action's function and collects data on class outcomes, though the educational mission has largely fallen by the wayside and the aggregated statistics are sparse.<sup>77</sup>

Still, this suggests an additional source of information — the United States could level up not only by subsidizing nonprofit objectors, but also by aggregating data that the Subcommittee on Rule 23 identified as critical for comparison purposes. Turning that into a reality, however, means that a successful U.S. statute must not only identify a source of self-funding, but also mandate judicial reporting requirements for class-action data and designate an entity to aggregate that data.

Funding-wise, again, seeking general revenue is the first-best solution. But assuming that is a nonstarter, Congress might consider imposing a very small tax on all class recoveries or a more substantial tax on *cy pres* remedies, either of which would create a sizeable, self-financing fund.<sup>78</sup> To be sure, there are issues with both.<sup>79</sup> For instance, taxing the gross recovery before attorneys' fees are subtracted would tax those that we entrust with public enforcement and may dissuade attorneys from pursuing cases at the margin. On the other hand, taxing only class members' recoveries seems to penalize the victims of wrongdoing to police those who are supposed to represent them. Consequently, taxing *cy pres* recoveries might be the better of the second-best solutions.

Public funding would support two activities. First, it would finance a public office or a position (perhaps within the Federal Judicial Center) that would collect class-action data. Second, it would subsidize grants to nonprofit objectors. The public office would act as a clearinghouse for the grants — accepting applications and making awards.

Creating a workable system for data collection is no easy task. Conversations with claims administrators suggest that hundreds of data points are available and that numbers might easily be skewed through methodology. Housing this position within the auspices of the Federal Judicial Center, however, could

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76 *Id.* at 798-800, 803, 807. As Piché explains, the statute allows the *Fonds* to collect fifty to ninety percent of the funds remaining after class members collect their proceeds, thirty to seventy percent of the total award (minus costs and attorney's fees) if the court prohibits individual claims, and two to ten percent of individual awards if no aggregate award exists. *Id.*

77 *Id.* at 803-06.

78 As I explore in Section III.B below, taxing *cy pres* recoveries may strike the better balance of incentives.

79 I discuss some of the issues with *cy pres* funding *infra* notes 86-88 and accompanying text.

draw on its researchers' substantial expertise to develop uniform reporting requirements.

As for the types of data, several nonpartisan entities have pinpointed critical data needs. First, the Subcommittee on Rule 23 has identified several criteria as points of comparison for judges scrutinizing class settlements: "the actual outcomes of other cases," "other litigation about the same general subject on behalf of class members," the claims-processing procedures, opt-out rates, and "take" rates, which consider how many class members have filed claims.<sup>80</sup> Second, the American Law Institute's *Principles of the Law of Aggregate Litigation* propose that when awarding attorneys' fees, judges should "require the parties to submit . . . a final accounting describing the amount and distribution of all benefits to class members, other beneficiaries, and counsel."<sup>81</sup> Third, the Federal Trade Commission is studying both the effectiveness of class notice and the factors that influence consumers' decisions to object, opt out, or participate in a class settlement.<sup>82</sup> As part of that study, the agency has ordered eight claims administrators to provide information about notice methods and response rates, which could serve both as a current information source for judges and a resource for data collection methods.

Just as resources already exist to guide information collection, models as to how a public fund might subsidize nonprofit objectors are also readily available. The Legal Services Corporation (popularly known as Legal Aid) provides a ready template. It fields applications for grants that support access to justice through legal services, and has developed a toolkit for defining, collecting, and reporting on metrics that describe its recipients' effectiveness.<sup>83</sup> Accordingly, the mechanics of objecting to a class action need not be altered; the grants simply encourage nonprofits to proliferate and devote resources to policing class actions.

## B. Band-Aid Solutions

This leveling up approach to evening out information asymmetries by publicly funding nonprofit objectors and data collection is subject to one primary point

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80 Advisory Committee's June Agenda Book, *supra* note 9, at 257-58.

81 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(e) (AM. LAW INST. 2010).

82 Press Release, Fed. Trade Comm'n, FTC Seeks to Study Class Action Settlements (Nov. 14, 2016), <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-seeks-study-class-action-settlements>.

83 LEGAL SERV. CORP., CIVIL LEGAL OUTCOMES, <http://clo.lsc.gov> (last visited Apr. 18, 2017).

of resistance: it may never happen.<sup>84</sup> The United States government — currently in a period of flux and transition — might never implement it. Accordingly, the question becomes whether we could accomplish both goals (funding nonprofit objectors and collecting data on class actions) without public funding. And the answer is perhaps — but only on an imperfect, ad hoc basis.

Piecemeal solutions exist for both gathering data and funding nonprofit objectors. As for funding, judges might direct cy pres awards to nonprofit objectors, such as Public Citizen or the Competitive Enterprise Institute.<sup>85</sup> Although cy pres awards remain controversial,<sup>86</sup> allocating funds to nonprofit objectors would further the class action's public enforcement mission and could be an appropriate alternative when it is unfeasible to distribute further awards to class members.<sup>87</sup> Routinely using cy pres funds in this way may also curb the abuse of cy pres, for in lieu of the funds going to the parties' (or judge's) favorite charity, the money would subsidize those who seek to hold them accountable.<sup>88</sup>

As for data collection, it would be possible for the Subcommittee on Rule 23 to revise the rule to require parties to disclose the relevant data to the court. Several law professors have set forth a proposal along those lines.<sup>89</sup> Solid data about which notice methods are most effective for different class populations and how class members fare under various settlements is vital to judges, policymakers, and researchers alike.

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84 Congress has made some overtures toward collecting data in a recent House bill. H.R. 985, 115th Cong., Fairness in Class Action Litigation Act of 2017, § 1719 (2017).

85 *E.g.*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=2581> (last visited Apr. 18, 2017), (encouraging and accepting cy pres awards).

86 *E.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

87 The American Law Institute has provided helpful guidance as to when cy pres awards are appropriate. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (AM. LAW INST. 2010).

88 Martin Redish has argued that cy pres awards are unconstitutional. Redish et al., *supra* note 86, at 641-52. I do not undertake to tackle those concerns here, but note that enacting public funding from the general tax base would alleviate worries about using cy pres in this way. As I explain, this Band-Aid solution is an imperfect stopgap, at best.

89 Letter from Brian Wolfman, Alexandra Lahav, Kevin M. Clermont, Geoffrey P. Miller, Brian Fitzpatrick, Nicholas M. Pace, Deborah R. Hensler & Charles Silver, to Professor Richard Marcus, Assoc. Reporter to the Advisory Comm. on Civil Rules (Mar. 17, 2015) (on file with author).

But the current stakeholders have incentives to oppose rule changes that would mandate data reporting. Plaintiffs' attorneys have raised the concern that making claims data public could scuttle settlements that provide significant injunctive (or declaratory) relief or that promote deterrence.<sup>90</sup> That seems unlikely. Surely data forms could account for the type of relief, as the Consumer Financial Protection Bureau did in its empirical study.<sup>91</sup> And given that the burden is on the deal's proponents to justify its fairness, they have ample incentive to identify its equitable or deterrent benefits. The real worry is over those who invoke a public service mantra to shelter deals that reward them handsomely, but that pay class members very little. As such, neither plaintiffs' attorneys nor defendants have any incentive to encourage data collection, for they both profit from the status quo. Likewise, most judges are relieved when parties present them with a settlement, for it means one less time-consuming case on their docket.

There are points of light, however. Even now, some judges recognize the need to review class members' claims rates before approving the settlements, and have requested that information on their own — something that they are well within their power to do.<sup>92</sup> Ad hoc data collection is better than nothing, but it doesn't present judges with aggregated data on the same scale as they might receive if reporting was mandatory and funding existed for an information aggregator.

## CONCLUSION

The United States has long relied on private actors to perform public services, like enforcing laws through class actions. And while the approach has worked relatively well for the past fifty years, it suffers from a crippling weakness: judges tasked with monitoring the attorneys, ensuring that the settlement is fair, and awarding attorneys' fees are ill-equipped to do so when the adversarial system breaks down. They lack the necessary information and, at times, the

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90 Perry Cooper, *More Judges Eying Class Claims Data? If So, Then What?*, BLOOMBERG BNA, Feb. 5, 2016, <https://www.bna.com/judges-eying-class-n57982067030/>.

91 CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY 325 (2015) (defining "behavioral relief" to "refer to class settlements which contained a commitment by the defendant to alter its behavior prospectively").

92 Cooper, *supra* note 90 (reporting that Judge Phyllis J. Hamilton requested a report from the settlement administrator detailing the claims filed and the payouts to class members, then stated: "Where 6.5% of the payout goes to the class members, and 80.2% goes to the attorneys purporting to represent those class members, the tail is clearly wagging the dog.").

necessary incentive. Objectors exist to shake up this paradigm. But the right people need the right resources and the right incentives to do so.

The Subcommittee on Rule 23's leveling down approach does nothing to fill the information deficit that judges face even though it may curtail "bad" objectors temporarily. Like the actors objectors seek to regulate, they too are shape shifters — adaptive and resilient. Leveling up, on the other hand, is different, for it seeks to change the underlying incentives. By publicly funding nonprofit objectors, creating data reporting requirements, and financing data aggregation, leveling up can avoid the kind of regulatory whack-a-mole that leveling down invites.