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## Constructing Class Action Reality

*Debra Lyn Bassett\**

### I. INTRODUCTION

Class actions have become quite controversial.<sup>1</sup> We regularly hear class actions criticized as a form of “extortion”<sup>2</sup> or “legalized blackmail.”<sup>3</sup> Politicians and some commentators routinely denounce law, lawyers, and class actions all in the same breath, as if all were uniformly and universally unfair, unethical, and out of control<sup>4</sup>—all

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1. John H. Beisner et al., *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 *STAN. L. REV.* 1441, 1442 (2005) (“Recent surveys indicate growing public distrust of the class action device. . . . [C]lass actions are now widely perceived as little more than a money generator for attorneys.”); Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 *NOTRE DAME L. REV.* 1377, 1377 (2000) (stating that class settlements are “the most controversial subject in the civil process today”).

2. See, e.g., Greg Burns & Michael J. Berens, *The Class Action Game*, *CHI. TRIB.*, Mar. 7, 2004, at C1 (stating that large corporations refer to class actions as “a legal extortion racket”); Michael J. Flaherty, *Debt Collection: Know the Fair Debt Law and Follow It*, *A.B.A. J.*, May 1999, at 73 (stating that class action settlements can “become exercises in extortion”); Michael Katz, *Hush Money*, *FORBES*, Mar. 19, 2001, at 52 (describing a proposed—but subsequently withdrawn—class action settlement as “extortion”).

3. See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (“[C]lass actions create the opportunity for a kind of legalized blackmail . . . .”); Michelle Singletary, *In Class Actions, a Litany of Frustrations*, *WASH. POST*, Nov. 14, 1999, at A20 (quoting a press release from DaimlerChrysler Vice President Lew Goldfarb as stating that class actions were “a form of legalized blackmail”); Donald Young, *Plan Would Enrich Lawyers*, *USA TODAY*, June 20, 2001, at 16A (analogizing “expensive class-action litigation” to “legalized blackmail”). Analogizing class actions to legalized blackmail is not new; the analogy has floated around for at least three decades. See Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 *COLUM. L. REV.* 1, 9 (1971) (characterizing consumer class actions as “legalized blackmail”); Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 *S. CAL. L. REV.* 842, 843 (1974).

4. See, e.g., Juliet Eilperin, *Curbs on Class Action Lawsuits Urged*, *WASH. POST*, June 12, 2003, at A6 (addressing proposal to change the law “to make it harder to file class action

part and parcel of the same litigation “explosion.”<sup>5</sup> Of course, there isn’t any litigation explosion<sup>6</sup>—but that does not stop the allegations or the anti-lawyer, anti-class action sentiment.<sup>7</sup>

lawsuits” and stating that “lawmakers need to limit trial lawyers’ ability to seek courts—generally at the state level—that might be especially sympathetic to class action suits”); Matthew Mosk, *Suits Challenge Retroactive Laws*, WASH. POST, June 7, 2000, at B4 (“Earlier this year, Maryland legislators said the greed of trial lawyers had driven them to support a series of laws that effectively shielded HMOs, cable companies and other corporate interests from potentially huge class-action judgments.”); William Spielberg, *Lawyers, Shakespeare and a Desperate Man*, CHI. TRIB., Mar. 22, 2005, § 1, at 17 (In the last presidential election, “crowds were urged to support tort reform, restrict class actions, limit liability awards, stop ‘frivolous lawsuits,’ roll back civil-rights protections. And who was standing in the way of these reformations of our laws? That’s easy—the trial lawyers!”); William Tucker, *Why We Should Decriminalize Crime*, WKLY. STANDARD, Nov. 27, 1995, at 29 (“There is no Association of the Trial Lawyers of America pushing the interests of civil defendants in Congress. Plaintiff work attracts all the professional excitement, as attorneys constantly mine new ground for malpractice and class-action suits. As usual, the law schools and professional associations follow suit.”); *id.* (noting the “greed . . . of the legal profession”); Jim VandeHei, *GOP Plans New Caps on Court Awards*, WASH. POST, Dec. 29, 2002, at A5 (“President Bush and his congressional allies in the past two years have written into federal law new limits on the public’s ability to sue . . . Sen. Trent Lott . . . said in an interview that trial lawyers, who he likened to a ‘pack of wolves,’ . . . [were bringing] ‘outlandish class-action lawsuits.’”).

5. Claims regarding the litigious nature of American society are asserted both generally and with respect to virtually every sort of specific type of lawsuit imaginable. *See, e.g.*, Thomas Adcock, *Lawyers Without Clients*, LEGAL TIMES, June 9, 2003, at 43 (referring to the United States as “perhaps the most litigious society the world has ever known”); Christopher S. Burnside et al., *Mold Spores: Bad Science or Bad Dream?*, NAT’L L.J., Feb. 18, 2002, at B13 (asserting that “[m]old is the next litigation explosion”); John C. Coffee, Jr., *Sarbanes-Oxley Act: Coming Litigation Crisis*, NAT’L L.J., Mar. 10, 2003, at B8 (warning that Sarbanes-Oxley Act will result in litigation crisis due to increased securities litigation); *see also* Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More than Merely “Adequate” Representation in Class Actions*, 38 GA. L. REV. 927, 927 n.3 (2004) (providing additional examples).

6. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5 (1983) (noting that “per capita rates of litigation in United States courts fall in the same general range as those of England, Australia, Ontario (Canada) and others”); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 6–7, 38 (1986) (concluding that the empirical data does not support claims of a litigation explosion); Marc S. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (noting that the number of federal and state trials peaked in the mid-1980s and have declined ever since); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 456 (2004) (“Scholars have debunked [the] claim [that the United States is experiencing an escalating epidemic of litigation and has become ‘the world’s most litigious nation’] so often that it is startling how much bunk survives.”); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1154–68 (1998) (stating that the claims of a litigation explosion are anecdotal and overblown).

This controversy regarding class actions has brought calls for reexamination and reform. As one might expect, legislative reforms—both proposed and enacted—have sought “quick fixes” for perceived problems and shortcomings in class action practice.<sup>8</sup> More surprisingly, the calls for reexamination in the academic legal literature have proffered proposals that not only contradict the historical understanding of class actions, but indeed erode and undermine the very foundation of the theoretical justification for class actions—and thus seek not merely innovation or reform, but actually seek to construct a new class action reality. Moreover, these recent proposals seek to construct this new class action reality in a remarkably uniform manner—and one that raises significant constitutional issues. Specifically, this reconstruction of class action reality pits two inherent components of class actions against each other: one that focuses on the representative nature of the class action device, and one that focuses on the aggregate, or efficiency, component of class actions.

Both aggregation and representativeness are inherent to class actions. “Aggregation”—the bringing together of multiple claims in a single lawsuit for reasons of judicial economy—is, of course, the primary underlying rationale for the class action device. A class action permits numerous claims to be adjudicated simultaneously without the need for each individual class member to institute a separate lawsuit. But class actions are more than merely large-scale aggregation devices. As shown in both the historical development of

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7. See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1269–70 (2005).

A persistent and well-funded campaign depicts American civil justice as a pathological system, presided over by arrogant activist judges and driven by greedy trial lawyers, biased juries, and claimants imbued with victim ideology who bring frivolous lawsuits with devastating effects on the nation’s health care system and economic well-being. Although the available evidence overwhelmingly refutes these assertions, this set of beliefs, supported by folklore and powerfully reinforced by media coverage, has become the reigning common sense.

*Id.* (citing WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW* (2004)).

8. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332, 1453, 1711–1715 (2005)) (having a primary purpose of shifting many class actions from state court to federal court); see also Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. (2005), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:h420rh.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h420rh.txt.pdf) (proposed legislation that would render Rule 11 sanctions mandatory and would limit venue options in both state and federal courts).

class actions and the Supreme Court's jurisprudence,<sup>9</sup> as a general matter, a judgment involving aggregated claims binds only the named parties. To bind the entire class—both the named and unnamed class members—a representative component must be satisfied. “Representativeness” is the due process requirement that the interests of the unnamed class members be adequately represented by those participating in the lawsuit. This representative component acts as a constraint on class actions' aggregation component—in recognition of the relinquishment of their day in court, only those unnamed class members who were adequately represented will be bound by the class judgment.

Part II sets out an overview of the core theoretical guideposts of this Article—the linguistic and the accompanying substantive distinctions between a “representative” versus an “aggregate” foundation and focus in constructing class action reality.<sup>10</sup> Part III explores some of the historical underpinnings to the class action device.<sup>11</sup> Part IV examines and analyzes the descriptive terminology used in the United States Supreme Court's class action case law.<sup>12</sup> Finally, Part V analyzes the important distinctions between an “aggregate” and a “representative” construction of class actions, examines some of the proposals from prominent voices in the academy, and explains why the current trend toward an “aggregate” construction—despite leading to some innovative and interesting analytical approaches—would yield a new, and undesirable, class action reality.<sup>13</sup>

## II. OVERVIEW: THE SIGNIFICANCE OF A “REPRESENTATIVE” VERSUS “AGGREGATE” FOCUS

Class actions unquestionably have both a “representative” component and an “aggregate” component. A class action proceeds

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9. See *infra* notes 64–127 and accompanying text (discussing the historical development of class actions and the Supreme Court's class action jurisprudence).

10. See *infra* notes 14–63 and accompanying text (examining distinctions between a “representative” focus and an “aggregate” focus).

11. See *infra* notes 64–89 and accompanying text (reviewing historical background of the class action device).

12. See *infra* notes 90–127 and accompanying text (analyzing the Supreme Court's jurisprudence with respect to a “representative” versus an “aggregate” focus).

13. See *infra* notes 128–222 and accompanying text (analyzing the implications of a new class action reality shifting to an “aggregate” focus).

through the use of one or more named plaintiffs<sup>14</sup> who serve as class representatives and who represent the interests of all class members, both present and absent.<sup>15</sup> A class action also involves claims of individuals that are heard together, or aggregated, into a single lawsuit. Despite the existence of this aggregation component, class actions traditionally have emphasized the representative component, because it is this representative feature that provides the due process basis for binding absent class members to the class judgment.

Indeed, an emphasis on the representative nature has been the hallmark of class actions since their inception.<sup>16</sup> The promulgation of the Federal Rules of Civil Procedure in 1938, followed closely by the 1940 United States Supreme Court decision in *Hansberry v. Lee*,<sup>17</sup> firmly established adequate representation as central to the legitimacy of class actions. Rule 23 of the Federal Rules of Civil Procedure,<sup>18</sup>

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14. Defendant classes are also possible, but are far less common. See FED. R. CIV. P. 23(a) (“One or more members of a class may sue *or be sued* as representative parties . . . .”) (emphasis added); 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3:2, at 215–16 (4th ed. 2002) (“Another type of class is the defendant class. An individual or a class plaintiff may sue a named defendant as representative of a class of other defendants similarly situated.”); see also Robert R. Simpson & Craig Lyle Perra, *Defendant Class Actions*, 32 CONN. L. REV. 1319, 1322–23 (2000) (noting defendant class actions are rare). Indeed, a plaintiff class may sue a defendant class. See 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1770, at 481–86 (3d ed. 1998) (discussing problems that arise when defendant class is being sued by plaintiff class).

15. The Supreme Court has suggested that the adequacy of representation requirement in class actions takes its root from the “historic tradition that everyone should have his own day in court.” *Martin v. Wilks*, 490 U.S. 755, 762 & n.2 (1989) (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 4449, at 417 (1st ed. 1981)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076 *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). Several commentators have expressed disagreement with the “day in court” model as applied to class actions. See Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1855 (2004) (“Virtual representation in a class action, along with others similarly situated, is simply not equivalent to one’s day in court. That’s fine with me.”); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923 (1998) (arguing that the “day in court” model distorts class action analysis). The validity (or invalidity) of the “day in court” model is not necessary to my analysis, and I leave it to another day.

16. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (“[R]epresentative suits have been recognized in various forms since the earliest days of English law.” (citing generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987))); see also BLACK’S LAW DICTIONARY 1328 (8th ed. 2004) (defining “representative action” as “class action”).

17. 311 U.S. 32 (1940).

18. FED. R. CIV. P. 23. Rule 23, of course, is not the exclusive path to class actions, which also can be brought under, for example, the Private Securities Litigation Reform Act of

which authorizes class actions in the federal courts, frames its authorization in terms of adequate representation.<sup>19</sup> In *Hansberry*, the Supreme Court held that adequate representation was not merely one of four prerequisites to maintaining a class action, but instead equated adequate representation with due process.<sup>20</sup> This seminal case served as the critical moment for the emergence of class actions as we know them today. Since *Hansberry*, the Supreme Court repeatedly has reaffirmed adequate representation as the decisive determinant of a class judgment's binding effect.<sup>21</sup> Thus, the theoretical and constitutional underpinnings of class actions are linked to their representative character, a point widely acknowledged by traditional terminology. The leading class action treatise, for example, states, "The fundamental nature of a class suit is its representative status,"<sup>22</sup> and both case law<sup>23</sup> and

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1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. § 78u-4 (2000) and 42 U.S.C. § 1983 (2000)). Class actions are also permitted under state law in almost all states.

19. FED. R. CIV. P. 23(a). ("One or more members of a class may sue or be sued as representative parties . . .").

20. *Hansberry*, 311 U.S. at 45.

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

22. I CONTE & NEWBERG, *supra* note 14, § 1:2, at 14; *see id.* § 1:1, at 2 ("Class actions are representative suits on behalf of groups of persons similarly situated."); *see also* CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 72, at 510 (6th ed. 2002) ("[A class action] provides a means by which, when a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class.").

23. *See, e.g.*, *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261, 264 (8th Cir. 1944) ("This is properly an instance for application of the 'class' or 'representative' action authorized by Rule 23(a)."); *see also* *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853) ("In all cases where . . . a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. . . . The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466, 479-80 & n.29 (S.D. Cal. 1957) (citing *Smith v. Swormstedt, supra*, as "one of the oldest cases on the subject" and stating that in *Swormstedt*, "after referring to the fact that class actions are exceptions to the rule which requires that an action be instituted only on behalf or against persons who are *actually* before the court . . . states that it is the function of the court to insure that the persons before the court *truly* represent the rights to be adjudicated"); *id.* at 479 ("I am of the view that *in any one of the three forms* of actions allowed, (1) the 'true' form of class action, (2) the 'hybrid' form or (3) the 'spurious' class action, the court must be satisfied that the persons before it will *fairly insure adequate representation of all.*").

commentary<sup>24</sup> have traditionally used the term “representative” to describe class actions.

Class actions are also legitimately viewed as a litigation device—perhaps the key litigation device—allowing aggregate resolution of multiple claims, whether brought by plaintiffs or asserted against defendants. Class actions are, in fact and without question, one of the several devices, including joinder, intervention, and interpleader, among others, for bringing multiple claims together in a single lawsuit. Accordingly, we would expect to find the term “aggregate” in the class action case law as well.

Interestingly, however, the term “aggregate” most frequently appears in the class action case law in the limited context of explaining whether a class action lawsuit satisfied the requisite amount in controversy. For example, the basic federal diversity jurisdiction statute currently requires that the matter in controversy exceed “the sum or value of \$75,000, exclusive of interest and costs.”<sup>25</sup> In the class action context, the question has been whether each individual class member was required independently to satisfy

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24. Note, *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 877, 934 (1958) (“The historical function of a class action was to decide questions common to all the members of the class in one proceeding without the necessity of all the members appearing in court. Thus it was properly considered a representative action.” (footnote omitted) (citing *Hansberry*, 311 U.S. at 41–42)).

25. 28 U.S.C. § 1332 (2000). The grant of diversity jurisdiction appeared in the Judiciary Act of 1789, and Congress codified diversity jurisdiction in title 28 of the United States Code in 1940. Act of Apr. 20, 1940, ch. 177, 54 Stat. 143 (codified at 28 U.S.C. § 41(1)(b) (1946)). In 1948, Congress amended title 28 to fashion its current structure. Act of June 25, 1948, Pub. L. No. 80-773, § 1332, 62 Stat. 869, 930 (1948). The Judiciary Act of 1789 required the existence of more than \$500 in controversy, in addition to diversity of citizenship, to invoke diversity jurisdiction. The Judiciary Act of 1789, Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78 (1789). Congress has repeatedly increased the amount necessary to satisfy the amount in controversy, from the original \$500 in the Judiciary Act to \$2,000 in 1887, Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 552 (1887); to \$3,000 in 1911, Act of Mar. 3, 1911, § 24, 36 Stat. 1087, 1091 (1911); to \$10,000 in 1958, Act of July 25, 1958, Pub. L. No. 85-554, § 1332, 72 Stat. 415, 415–16 (1958); to \$50,000 in 1988, The Judicial Improvements and Access to Justice Act, Act of Nov. 19, 1988, § 201, Pub. L. No. 100-702, 102 Stat. 4642, 4646 (1988) (amending 28 U.S.C. § 1332(a)); to \$75,000 in 1996, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (1996) (amending 28 U.S.C. § 1332(a)). The reason articulated for these increases to the amount in controversy has consistently been to reduce the number of diversity cases that may be heard in federal court. See S. REP. NO. 85-1830, at 3 (1958) (stating that the Committee on the Judiciary believed the increased amount in controversy would reduce the federal court workload); see also H.R. REP. NO. 100-889, at 44–45 (1988) (stating that the increased amount in controversy would reduce the number of diversity cases in the federal courts and would adjust for inflation).

the jurisdictional amount, or whether the class members could aggregate—add together—their claims to satisfy the jurisdictional amount in total. The aggregation rule, which originated in 1832,<sup>26</sup> is stingy, and the general rule was that aggregation was not permitted.<sup>27</sup> In the specific context of class actions, the original version of Rule 23 of the Federal Rules of Civil Procedure, discussed in greater detail in Part III below, divided class actions into three types—“true” class actions, “hybrid” class actions, and “spurious” class actions<sup>28</sup>—and aggregation in the jurisdictional sense was permitted for only the “true” class action.<sup>29</sup> When the drafters revised Rule 23 in 1966, a question arose as to whether class

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26. See 14B WRIGHT ET AL., *supra* note 14, § 3704, at 142–43 (citing *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143 (1832)).

27. In individual litigation, the general rule is that aggregation is not permitted, subject to two exceptions: (1) a single plaintiff may aggregate her own claims against a single defendant, and (2) aggregation is permitted when the plaintiffs are “enforc[ing] a single title or right in which they have a common and undivided interest.” *Snyder v. Harris*, 394 U.S. 332, 335 (1969).

If a single plaintiff has two entirely unrelated claims against a single defendant, and each of them is for \$38,000, the two claims may be joined and a single suit may be brought in a federal court, because the aggregate of the two claims exceeds \$75,000. If two plaintiffs each have a \$38,000 claim against a single defendant, however, they may not aggregate their claims in a single action and may not sue in a federal court, no matter how similar the claims may be, so long as the claims are regarded as “separate and distinct.” Only if the claims are based on a common undivided interest may multiple plaintiffs aggregate their claims to satisfy the jurisdictional amount requirement.

14B WRIGHT ET AL., *supra* note 14, § 3704, at 127–28 (citations omitted).

28. See Note, *Developments in the Law: Class Action*, 89 HARV. L. REV. 1318, 1321 (1976) (“In 1966, the Supreme Court promulgated an amended rule 23 of the Federal Rules of Civil Procedure, replacing a rule that had remained unchanged since 1938. The 1938 rule . . . reflect[ed] Professor Moore’s famous distinctions among ‘true,’ ‘hybrid,’ and ‘spurious’ class suits . . . .”); see also *infra* notes 76–83 and accompanying text (discussing the original Rule 23 categories).

29. *Giesecke v. Denver Tramway Corp.*, 81 F. Supp. 957, 960 (D. Del. 1949).

It is well settled that in a “true” class action in the federal courts, whether jurisdiction is based upon diversity of citizenship or upon a federal question arising under the Constitution or laws of the United States, the claims of all the members of the class may be aggregated for the purpose of obtaining the requisite jurisdictional amount.

On the other hand, if the action is either a “hybrid” class suit under Rule 23(a)(2) or a “spurious” class suit under Rule 23(a)(3), then the claims of the several members of the class may not be aggregated to determine jurisdictional amount, but rather the claim of each party-plaintiff must at least equal the requisite jurisdictional amount specified in the statute in order for the court to have jurisdiction as to him.

*Id.* (citation omitted).

members could now aggregate claims as a result of the amendments—an assertion that the Supreme Court rejected.<sup>30</sup> Accordingly, from a historical perspective, aggregation was *not* a feature common to all class actions—but all class actions *were* considered representative suits.

Of greater importance is the fact that the two terms—“representative” and “aggregate”—convey different concepts and have a different emphasis. Representative generally means to act in the place of another; “representative” is defined as “a person or thing that represents another or others[;] . . . an agent.”<sup>31</sup> Aggregate, on the other hand, is to add together; “aggregate” is defined as “formed by the conjunction or collection of particulars into a whole mass or sum; total; combined”; “in the aggregate” is

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30. *Snyder*, 394 U.S. at 338; *see also* *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 292–93 (1973), *superseded by statute*, Judicial Improvements Act of 1990, Pub L. No. 101-650, § 310(a), 104 Stat. 5089, 5113 *as recognized in* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005). *See generally* 14B WRIGHT ET AL., *supra* note 14, § 3704, at 161 (noting that in *Zahn*, *supra*, the Supreme Court “reaffirmed the long-standing rule . . . that the claims of multiple parties, when separate and distinct, cannot be aggregated for jurisdictional amount purposes”); S. R. Shapiro, Annotation, *Right, in Suit Brought as Class Action, To Aggregate Claims or Interests of Members of Class in Order To Satisfy Minimum Jurisdictional Amount Requirement in Federal District Court*, 3 A.L.R. FED. 372, 380 (1970) (“It has been generally held or recognized that the mere fact that those purporting to sue as members of a class have complied with the procedural requirements governing the joinder of claims will not entitle them to aggregate the amounts of their claims for purposes of satisfying the jurisdictional amount requirement.”). Recent developments, however, have rendered many class action aggregation issues moot. *See* Class Action Fairness Act of 2005 § 4(d)(6), 28 U.S.C. § 1332(d)(6) (Supp. 2006) (requiring the court to aggregate “the claims of the individual class members . . . to determine whether the matter in controversy exceeds the sum or value of \$5,000,000”); *Exxon Mobil Corp.*, 545 U.S. 546 (permitting the use of supplemental jurisdiction in class actions to cover individual class members’ claims that do not satisfy the jurisdictional amount).

31. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1635 (2d ed. unabridged 1987) [hereinafter RANDOM HOUSE DICTIONARY]; *see also* THE NEW MERRIAM-WEBSTER POCKET DICTIONARY 425 (1971) [hereinafter MERRIAM-WEBSTER DICTIONARY] (defining “representative” as “standing or acting for another”); WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 728 (1963) [hereinafter WEBSTER’S DICTIONARY] (defining “represent” as “to act in the place of or for usu. by legal right”). *See generally* BLACK’S LAW DICTIONARY, *supra* note 16, at 1328 (defining “representative” as “[o]ne who stands for or acts on behalf of another . . . . See AGENT”).

defined as “taken or considered as a whole.”<sup>32</sup> Accordingly, “aggregate” suggests largeness.<sup>33</sup>

Similarly, neither term is unique to class actions. Adding claims together—aggregate litigation—occurs in a number of contexts, including traditional joinder,<sup>34</sup> consolidation,<sup>35</sup> interpleader,<sup>36</sup> intervention,<sup>37</sup> multidistrict litigation,<sup>38</sup> and bankruptcy.<sup>39</sup> Representative litigation occurs in other contexts as well, including an executor or administrator of an estate,<sup>40</sup> a guardian ad litem

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32. RANDOM HOUSE DICTIONARY, *supra* note 31, at 38; *see also* MERRIAM-WEBSTER DICTIONARY, *supra* note 31, at 10 (defining “aggregate” as “formed by the gathering of units into one mass”); WEBSTER’S DICTIONARY, *supra* note 31, at 18 (defining “aggregate” as “the whole sum or amount: sum total”). *See generally* BLACK’S LAW DICTIONARY, *supra* note 16, at 72 (defining “aggregate” as “[f]ormed by combining into a single whole or total . . . [t]o collect into a whole”).

This notion is also found in the “aggregate theory of partnership.” *See id.* at 10 (defining “aggregate theory of partnership” as “[t]he theory that a partnership does not have a separate legal existence (as does a corporation), but rather is only the totality of the partners who make it up”); *see also* Douglas A. Kahn & Faith Cuenin, *Guaranteed Payments Made in Kind by a Partnership*, 6 FLA. TAX REV. 405, 417 (2004) (noting the “age-old conflict of whether a partnership should be treated as a separate entity or merely as a representative of the aggregate of interests of its partners”). An “entity” approach appears in some of the class action literature in the context of conflict of interest concerns. *See* Bassett, *supra* note 5, at 975 n.232 (arguing against a “class as entity” approach to conflicts of interest); Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477, 1485–86 (proposing that classes should be treated as entity clients for purposes of the ethical rules).

33. Roget’s New Millennium Thesaurus, <http://thesaurus.reference.com/search?q=bulk> (last visited Oct. 21, 2006) (defining “bulk” as “largeness,” and listing “aggregate” as its synonym).

34. *See* FED. R. CIV. P. 18 (permissive joinder of claims); *see also* FED. R. CIV. P. 19 (compulsory joinder of parties); FED. R. CIV. P. 20 (permissive joinder of parties).

35. *See* FED. R. CIV. P. 42(a) (consolidation).

36. *See* FED. R. CIV. P. 22 (rule interpleader); *see also* 28 U.S.C. § 1335 (Supp. 2006) (statutory interpleader).

37. *See* FED. R. CIV. P. 24 (intervention).

38. *See* 28 U.S.C. § 1407 (2000) (multidistrict litigation).

39. *See* 11 U.S.C. § 507 (Supp. 2006) (setting forth the priorities of expenses and claims against the bankruptcy estate); *see also* John D. Ayer, *Debt Abides: A Prolegomena for Any Future Chapter 11*, 78 AM. BANKR. L.J. 427, 452 (2004) (noting that bankruptcy law is “a device for (a) maximizing the value of assets and (b) ‘orchestrating’ creditors’ claims”).

40. *See* HLC Props., Ltd. v. Superior Court, 105 P.3d 560, 567 (Cal. 2005) (“When Crosby died, his privilege transferred to his personal representative, i.e., the executor of his estate.”); *In re Estate of Ramlose*, 801 N.E.2d 76, 77 (Ill. App. Ct. 2003) (“LaSalle Bank was appointed as executor of the estate of Alexander Ramlose, now deceased, and appears in that capacity in this appeal as [Ramlose’s] representative.”); *Dawson v. Ohio Dep’t of Human Servs.*, 588 N.E.2d 217, 218 (Ohio Ct. App. 1990) (“An executor may ordinarily prosecute in his representative capacity any cause which his decedent could have instituted. The executor of

protecting the legal interests of a minor or incapacitated person,<sup>41</sup> and a bankruptcy trustee.<sup>42</sup> However, the distinction between the concepts of representative litigation and aggregation is striking. To aggregate simply involves bringing additional claims within the same lawsuit, while representative litigation invokes concerns beyond mere numbers. In class actions, adequate representation implicates both fiduciary obligations<sup>43</sup> and constitutional due process,<sup>44</sup> and thereby goes to the very legitimacy of the litigation—determining the ultimate validity of the judgment. Moreover, as Professor Mullenix has noted, class actions are the only type of aggregate litigation to require adequate representation of claimants “as a matter of due process.”<sup>45</sup>

Although the traditional construction of class action reality permits the aggregation, or bringing together, of claims, the class judgment binds absent class members only when the class action satisfies the “representative” component. As a prerequisite to due process, the representative nature of the class action necessarily and appropriately serves as the foundation and focus of the class action device. Recent commentary, however, seeks to reconstruct the class action reality by shifting to a focus on the aggregate—a focus, in

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an estate, as a legal representative, settles the decedent’s affairs and ‘stands in [the decedent’s] shoes’ . . . .” (citation omitted)).

41. See *Sarracino v. Superior Court*, 529 P.2d 53, 61–62 (Cal. 1974) (“The guardian ad litem . . . is . . . the incompetent’s representative of record . . . .”); *Keling v. Keling*, 155 S.W.3d 830, 833 (Mo. Ct. App. 2005) (“[By statute,] the appointed guardian ad litem shall be the legal representative of the child at the hearing.”).

42. See *Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 849 (1989) (“The bankruptcy trustee is ‘the representative of the estate [of the debtor].’” (quoting 11 U.S.C. § 323(a) (2000))); *Alvarez v. Alvarez (In re Alvarez)*, 224 F.3d 1273, 1279 (11th Cir. 2000) (“The bankruptcy trustee is the legal representative of the bankruptcy estate . . . .”).

43. *Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001) (“[A]s class representatives, the moving plaintiffs have fiduciary duties towards the other members of the class.” (citing *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 331 (1980))); see also *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 880 (7th Cir. 2000) (“A representative [class] plaintiff acts as fiduciary for the other [members of the class].”); *Becherer v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 193 F.3d 415, 434 (6th Cir. 1999) (noting that “the class representative assumes a fiduciary relationship” to the class).

44. See *infra* notes 96–127 and accompanying text (discussing adequate representation as a prerequisite for due process).

45. Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 436 (1999); see also *Martin v. Wilks*, 490 U.S. 755 (1989) (holding that a consent decree between an employer and African-American employees could not bind the conflicting claims of white employees who did not join in the consent decree).

essence, on the efficiency component of class actions. This recent trend is seen most readily by looking at a recent development in class action terminology.

It has become something of a fad to use the term “aggregate litigation” to describe class actions<sup>46</sup>—in perhaps the most prominent example, the American Law Institute, best known for its “Restatements of the Law,” is currently undertaking a project which addresses class actions and is entitled “*Principles of the Law of Aggregate Litigation*.”<sup>47</sup> The reasoning behind this trend to invoke the “aggregate” label is not entirely clear. One potential reason is mere novelty or variety—essentially seeking an occasional synonym to avoid overuse of the term “class action” within the particular writing. Another potential reason is the seeking of a systematic substitute (rather than an occasional synonym), specifically to avoid the negative connotations associated with the term “class actions.”<sup>48</sup> A third potential, and legitimate, reason is to employ the term “aggregate litigation” to discuss a broad variety of litigation devices for grouping claims together, and thereby encompassing such devices as class actions, interpleader, intervention, joinder, and

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46. See, e.g., Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1478 nn.14–15 (2005); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 400 (2005); Elizabeth J. Goldstein, *Federal Rule of Civil Procedure 23: A Need for Technical Innovation*, 104 DICK. L. REV. 653, 653–55, 675–76, 678 (2000); Samuel Issacharoff, *Preclusion, Due Process, and the Right To Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1067 (2002); Linda S. Mullenix, *Getting to Shutts*, 46 U. KAN. L. REV. 727, 742 (1998); David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 52 n.57; Shapiro, *supra* note 15, at 918; Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 719 n.2 (2005).

47. Am. Law Inst., *American Law Institute—Projects and Participants: Principles of the Law of Aggregate Litigation*, <http://www.ali.org/ali/PP5.asp> (last visited Oct. 21, 2006).

48. Cabraser, *supra* note 46, at 1478 n.14.

Given the recent resistance to expanding the application of Rule 23 itself, and the negative baggage that the term “class action” has accumulated, utilitarian reform efforts focused on providing courts and litigants with clear, fair, and useful procedural mechanisms for deciding common questions in ways that preclude the necessity of endless relitigation have adopted alternative terminology, for both real and symbolic reasons. For example, the American Law Institute has commenced a project dedicated to developing “*Principles of the Law of Aggregate Litigation*,” recognizing that the formal class action is not the only means by which to effectively organize complex litigation, and that previously underutilized mechanisms and principles, including collateral estoppel, voluntary joinder, and interjurisdictional coordination hold promise.

*Id.*

consolidation within a single unifying term.<sup>49</sup> A comprehensive term for such multiple-claim devices can be useful when seeking common themes among those devices but otherwise has little theoretical or practical utility. In a sense, the term “aggregate litigation,” as a general linguistic shorthand for multiple-claim devices, is not significantly more helpful than simply using the term “joinder” or “multiple claims.” Moreover, except in the specific circumstances where class actions are indeed being examined for their similarities to interpleader, intervention, and similar devices, the use of the word “aggregate” seems to impart more than merely a sense of “joinder” or “multiple claims,” but instead seems to connote “large scale.”

Even if this trend is more style than substance, the choice matters. The use of “aggregate litigation” as a synonym or substitute for “class action” is ultimately both inaccurate and damaging, because in such a context the term “aggregate litigation” is historically inaccurate, is only partially accurate today, and is unwise and ultimately unfair to the class action device.

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49. See Judith Resnik, *From “Cases” to “Litigation,”* 54 *LAW & CONTEMP. PROBS.* 5, 26–29 (1991) (discussing class actions, consolidation, interpleader, joinder, intervention, multidistrict litigation, bankruptcy, and the appointment of special masters or experts as forms of “aggregate litigation”). In an early draft, the American Law Institute’s “Principles of the Law of Aggregate Litigation” included mention of class actions, permissive joinder, intervention, in rem actions, interpleader, and consolidation. *AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* §§ 4.01–.04, 6.0, at 5–8, 15–18 (Prelim. Draft No. 2, Apr. 20, 2005). If the project’s focus remains diffuse, this would, of course, warrant the broader “aggregate litigation” title. However, if the project’s genuine focus—and virtually all of its content—becomes class litigation, its title would then be employing “aggregate litigation” as a class action synonym. A more recent ALI draft greatly condensed the discussion of the various types of aggregate proceedings, although most of the general principles still apply to all types of aggregate litigation and not just to class actions. *AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 1.02, at 6–11 (Prelim. Draft No. 4, Sept. 21, 2006).

Terminology matters.<sup>50</sup> Our language is often ambiguous,<sup>51</sup> and words convey both overt and subtle meanings.<sup>52</sup> Words can also

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50. The idea that “words matter” is found frequently in the legal literature. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (2004) (discussing dangers of hate speech); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (discussing unprotected speech); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (discussing harms caused by racial insults); Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645, 682 (1997) (“Words matter and have consequences . . .”); Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 774 (1987) (“[W]ords . . . do not communicate perfectly, but words are all we have. Practical people know that those words matter.”); Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 508 (2005) (“[I]n the practice of law, words matter enormously.”); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 327 (1995) (“It is undeniable that a good deal of speech—and not just pornography or hate speech—does matter; it may construct reality, create stereotypes, or affect attitudes and behavior.”).

51. Derek Auchie, *The Undignified Death of the Casus Omissus Rule*, 25 STATUTE L. REV. 40, 51 (2004) (“The English language is not an instrument of mathematical precision.” (quoting *Seaford Court Estates Ltd. v. Asher*, [1949] 2 K.B. 481, 489–99 (C.A.))); Robert A. Green, *Justice Blackmun’s Federal Tax Jurisprudence*, 26 HASTINGS CONST. L.Q. 109, 139 (1998) (“The limits of the English language ensure ambiguity . . .”); Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 40 TEX. J. BUS. L. 199, 202–04 (2004) (noting the “inherent ambiguities in the English language”); Symposium, *A Matter of Life and Death: New Jersey’s Death Penalty Statute in the 21st Century*, 23 SETON HALL LEGIS. J. 249, 298 (1999) (noting that “we have inadequacies in language” and that “there are inherent ambiguities in the English language”).

52. *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 386 (1948) (“Words generally have different shades of meaning . . .” (quoting *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258 (1937))); LeClercq, *supra* note 51, at 201 (noting “how difficult it can be to achieve clarity using the multifaceted English language”); Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 139–40 (1998) (“Some words lacerate more than others; some words hide more than others. Even when words carry hidden meanings, they can profoundly influence how we think. Language plays an important role in reality control.”); *see also* Samuel P. Hays, *Forest Values, New and Old: Comments on David Clary’s Timber and the Forest Service*, 17 ENVTL. L. 707, 716 (1987) (noting “the more subtle meaning of language”).

For example, in the 1950s the words “multiple use” referred to those new uses of recreation, fish, wildlife, and wilderness in contrast to the earlier dominant commodity uses. In the ensuing years, however, the heavy focus on the wilderness debate reversed the meaning as commodity users, bolstered now by motorized recreationists, took up the banner of multiple use in the face of their single-use wilderness opponents. Now, however, the pendulum is swinging back to the 1950s as the many new types of users identify timber and its associated road building as their “single-use” enemy under the banner of multiple-use.

On an even more subtle level, changes in the real world of debate are giving rise to new meanings not recognized by old terms.

*Id.*

create “spin”—meaning “[t]o provide an interpretation of (a statement or event, for example), especially in a way meant to sway public opinion.”<sup>53</sup> The words we select can emphasize certain aspects or attributes<sup>54</sup> and can downplay others.<sup>55</sup> Accordingly, and particularly in the already politicized area of class actions,<sup>56</sup> terminology deserves attention.<sup>57</sup>

Since class actions are a form of aggregate litigation, there is nothing inherently illegitimate about the “aggregate litigation” label. In fact, as previously noted, the use of the term “aggregate litigation” potentially removes the pejorative associations connected to the term “class action,” and thus may serve to keep the reader’s mind more open to the ensuing discussion. However, there are deeper substantive meanings that accompany this terminology. The term “aggregate litigation” carries a particular “spin” that differs

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53. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://dictionary.reference.com/search?q=spin>.

Both political parties take advantage of the ability of language to influence opinion . . . . To offset the ire of some environmentalists, Frank Luntz, a Republican strategist, has called for “softer, greener language” about the environment—the Republicans’ most vulnerable issue. So he urged Republicans to use the term climate change instead of global warming. They no longer refer to environmental issues; they are now conservationist issues. A Sierra Club consultant acknowledged that the new language has succeeded in blunting the Democratic attack. Gertrude Block, *Language for Lawyers*, FED. LAW., Jun. 2003, at 45.

54. See Ethan Bronner, *Poll Shows Shift Toward Support of Abortion Rights*, BOSTON GLOBE, Dec. 17, 1989, at 1 (reporting on differences in poll results depending on how the pollsters phrased the questions, and noting this “indicate[s] why supporters of abortion rights emphasize so strongly the word ‘choice’ in their campaigns and slogans”); Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19 (When “Democrats or Republicans seek to criticize judges or judicial nominees, they often resort to the same language. They say that the judge is ‘activist.’”).

55. See J.A. BARNES, *A PACK OF LIES: TOWARDS A SOCIOLOGY OF LYING* 115 (1994) (“[A] war may seem less sour if it is called an ‘international armed conflict,’ the Pentagon term for the carnage in Vietnam. . . . Terms such as these anesthetize us more selectively than the simple use of traditional metaphors.”).

56. See Del Jones, *Allstate CEO: Firms Should Be Politically Active*, USA TODAY, Jul. 18, 2005, at 3B (“President Bush signed a bill in February that will send most class-action lawsuits into federal courts. It was regarded as a major victory for business, as was the bankruptcy bill that starting in October will make it more difficult for consumers to avoid paying debt. . . . A key man behind the law is Edward Liddy, CEO of Allstate, who chairs the Business Roundtable’s Civil Justice Reform Task Force. Liddy isn’t finished. Asbestos and medical liability are next on his wish list.”).

57. Patricia A. Tidwell & Peter Linzer, *Colloquy, The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791, 811 (1991) (“[E]very litigator or drafter of legal documents knows the power and importance of each chosen word. Language is a mechanism of power.” (citation omitted)).

from that associated with representative litigation. Using “aggregate litigation” to describe class actions emphasizes numbers or size. This focus on numbers renders a sense of “aggregate litigation” as intimidating and overwhelming, perhaps suggesting unwieldiness—a view consistent with the discredited idea of a litigation explosion. The natural response is to try to make the claims go away—by concentrating on reducing court dockets, attaining global settlements, and preventing subsequent challenges so as to preserve those settlements. These goals often are framed in terms of “efficiency” and “economy”—meaning to dispose of many claims in a single proceeding.<sup>58</sup> Although efficiency and economy certainly are among the goals of class litigation,<sup>59</sup> the term “aggregate litigation,” when used as a synonym for “class action,” has the effect, whether intended or not, of emphasizing these convenience factors—thus detracting from, and undervaluing, the more distinctive and constitutionally-mandated goal of adequate representation.

The class action feature that is both most distinctive and most compelling for the preservation of the class action device is not the ability to aggregate claims—it is the class action’s representative nature. Adding claims together is neither a difficult concept nor difficult to achieve;<sup>60</sup> attaining genuinely adequate representation for all claimants is both. And while adding claims together is convenient, it is merely one advantage of the class action device.<sup>61</sup> Unlike the aggregate feature of class actions—meaning that a class action folds numerous claims into a single lawsuit—the representative nature of class actions is both central to the class action concept and rises to a constitutional dimension. Adequate representation is a due process

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58. Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts To Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531, 542 (2001) (“In the mid-1980s judges began to allow cases to be consolidated because it promoted efficiency and allowed judges to dispose of many cases at once.”).

59. See 1 CONTE & NEWBERG, *supra* note 14, § 3:3, at 220 (noting that judicial economy is one of the objectives of the class action device).

60. William Gaus, *State and Federal Employment Class Actions and Other Representative Actions*, in 31ST ANNUAL INSTITUTE ON EMPLOYMENT LAW 205, 217 (2002) (“Satisfaction of the numerosity requirement is rarely an issue.”).

61. 1 CONTE & NEWBERG, *supra* note 14, § 1:1, at 3 (“One major advantage of class actions to the courts, attorneys, and litigants is the judicial economy and efficiency they can achieve.”).

prerequisite.<sup>62</sup> Thus, “aggregate litigation” is a poor class action synonym because its overinclusiveness<sup>63</sup> necessarily downplays and minimizes the distinctive representative nature of class actions.

The primary significance of this linguistic development is that it reflects an underlying conceptual movement. The use of “aggregate litigation” as a synonym or substitute for “class action” reflects an underlying movement in the legal literature to construct a new class action reality—a movement that, in the name of efficiency, would inherently and necessarily compromise existing due process protections for absent class members. A fuller understanding of the potential impact of this movement requires a fuller understanding of class action reality as originally constructed and, in particular, the significance of its “representative” and “aggregate” components. The original construction of class action reality can be found in the historical background of, and the Supreme Court jurisprudence pertaining to, the class action device. Accordingly, these are the subjects of the next two Parts.

### III. A BRIEF BACKGROUND OF CLASS ACTIONS

Historically, class actions have embraced both a “representative” component and an “aggregate” component. Although laypersons often believe class actions to be a recent development, group litigation extends back for centuries.<sup>64</sup> Indeed, Professor Yeazell has traced the earliest published sources of group litigation to the year 1199.<sup>65</sup> Class actions are a procedural device developed in

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62. *Id.* § 1:7, at 28 (“When adequate representation is present, then the essential adjudicatory characteristic of representative litigation can be realized, to wit, the adjudication of common questions, whether favorable or not, will be binding on class members.”).

63. Some class actions, such as those authorized by Rule 23(b)(1) and (b)(2), may involve large numbers but are unlike traditional “aggregate” litigation—for example, they seek law reform or are part of a constitutional challenge. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78 (1987) (Rule 23 class action involving constitutional claims of prisoners); *Alsina-Ortiz v. LaBoy*, 400 F.3d 77, 80 n.2 (1st Cir. 2005) (discussing consent decree resulting from class action that was “designed to reform conditions and health care in the Puerto Rico prison system”).

64. Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 687–88 (1997); *see also* 1 CONTE & NEWBERG, *supra* note 14, § 3:3, at 219 (“Class actions trace their beginning to the English common law of equity.” (citation omitted)).

65. Yeazell, *supra* note 64, at 688. Professor Yeazell describes this early case entertainingly:

equity,<sup>66</sup> in which the named plaintiffs act as representatives for themselves and for a class of similarly-situated others in pursuing a remedy.<sup>67</sup> The historical purpose “of a class action was to decide questions common to all the members of the class in one proceeding without the necessity of all the members appearing in court.”<sup>68</sup> Thus, the historical conception of the class action was not merely the creation of an “aggregation” device to dispose of multitudinous claims, but also a true “representative” device to facilitate bringing multiple claims to the court.

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On the eve of the thirteenth century, Martin, the rector of a parish, brought suit against four of his parishioners—as representatives of the rest—asserting his right to certain parochial fees. I am sad to say that Father Martin was in part insisting that his parishioners carry the bodies of their dead several miles to a place where he could bury them for a customary fee; alternatively, he was benevolently prepared to let them bury their deceased in a nearby chapel graveyard—so long as they remitted to Martin the same customary burial fee as he would have earned had he conducted the service himself. Not an edifying or happy tale.

*Id.* Professor Yeazell has extensively researched the historical background of class actions. *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (tracing the history of the class action); Stephen C. Yeazell, *From Group Litigation to Class Action*, 27 UCLA L. REV. 514, 523–35 (1980) (noting the emergence of new group litigants after the industrialization of nineteenth-century England); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 876 (1977) (discussing seventeenth-century British antecedents to the class action device).

66. *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948) (“The class action was an invention of equity, mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.” (citation omitted)). *See generally* Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932) (discussing the bill of peace in equity); Note, *supra* note 24, at 928 (discussing devices enabling classes of individuals to sue or be sued).

67. *Oswald v. Gen. Motors Corp. (In re Gen. Motors Corp. Engine Interchange Litig.)*, 594 F.2d 1106, 1127 n.33 (7th Cir. 1979) (describing class action device as primarily vindicating rights of individual class members and also as vehicle for furthering substantive policies behind legislation); *Welmaker v. W.T. Grant Co.*, 365 F. Supp. 531, 553 (N.D. Ga. 1972) (“The traditional purpose of a class action is to generate incentive to litigate claims that would otherwise not be litigated because they are so small as to make it impractical to bring individual suits.”).

68. *See* Note, *supra* note 24, at 934 (citing *Hansberry v. Lee*, 311 U.S. 32, 41–42 (1940)).

From 1833 until 1912, Equity Rule 48<sup>69</sup> governed representative litigation in the federal courts.<sup>70</sup> The Equity Rules were revised in 1912, and Equity Rule 48 was repealed. However, the basic representative litigation device remained, and was incorporated in Equity Rule 38. This rule, which is “probably the most straightforward of all the rules adopted to date to provide for class or representative actions,”<sup>71</sup> provided that “[w]hen the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.”<sup>72</sup> Thus, Equity Rule 38 contained both the “representative” and the “aggregate” components that we continue to associate with class actions.

The 1938 Federal Rules of Civil Procedure, of course, created a single form of civil action, merging together law and equity.<sup>73</sup> Original Rule 23, which was incorporated in the 1938 Rules and addressed class actions,<sup>74</sup> was “primarily an attempt to codify, not to

69. See FED. R. EQ. 48 (1842) (repealed 1912), *quoted in* 42 U.S. (1 How.) lvi (1843).

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

*Id.*

70. See DEBORAH R. HENSLER ET AL., RAND INST. OF CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10–11 (2000).

In 1833, the first provision for group litigation in federal courts was set forth as Equity Rule 48. This rule allowed for a representative suit when the parties on either side were too numerous for convenient administration of the suit; unlike the Bill of Peace, however, at first the outcomes of such group litigation were not binding on similarly situated absent parties. Ten years later, in a case arising out of the pre-Civil War tensions between North and South, the U.S. Supreme Court held that absent parties could be bound by the outcomes of cases brought under Equity Rule 48.

*Id.* (citations omitted).

71. *Id.* at 11.

72. John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705, 705 (1997) (citing JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 231 (1930)).

73. FED. R. CIV. P. 1 (“These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . . .”); FED. R. CIV. P. 2 (“There shall be one form of action to be known as ‘civil action.’”).

74. The original Rule 23 provided, in pertinent part:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is

reform.”<sup>75</sup> The class action categories reflected in original Rule 23 by subsections (a)(1), (a)(2), and (a)(3) were called “true,” “hybrid,” and “spurious” class actions, respectively.<sup>76</sup> In addition to the differences in description,<sup>77</sup> the three types differed both with respect

(1) joint or common, or secondary in the sense that an owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

FED. R. CIV. P. 23(a) (1938), *reprinted in* 39 F.R.D. 94–95 (1966).

75. Harkins, *supra* note 72, at 705–06.

The drafters understood that the rules which they would propose should be rules of procedure only, not rules which would cause changes in substantive rights. In the context of class actions, where the rights of those not before the court might be affected, this principle had obvious importance. The result was said to be an attempt to categorize the types of cases which might proceed as class actions, based on the existing practice.

*Id.* at 705 (footnotes omitted).

76. *See id.* at 706–07 (“A categorization of acceptable classes—described in terms of the character of the interests to be litigated—occurs in the three numbered paragraphs of subdivision (a). . . . The three classes were described by Professor Moore as, respectively, a ‘true’ class, a ‘hybrid’ class and a ‘spurious’ class.”); *see also* Note, *supra* note 28, at 1321 (“The 1938 rule, which was understood to reflect Professor Moore’s famous distinctions among ‘true,’ ‘hybrid,’ and ‘spurious’ class suits, proved to be a source of confusion almost from its date of promulgation . . . .” (footnote omitted)).

In a “true” or (a)(1) class, the rights sought to be enforced were shared rights—the “jural relationship”—and joinder of all members of the class would be required to adjudicate those rights. The (a)(1) class action was thus a substitute for mandatory joinder where the members of the class were so numerous as to make such joinder impracticable. In the case of the “hybrid” or (a)(2) class, while the rights of the class members might be several and not joint, those rights would relate to some specific property, often a fund, over which the court would assume what would be (or at least would be akin to) in rem jurisdiction. The jural relationship would arise from the fact that the members of the class had “several” (rather than joint) interests involving some distinct property and the interests of all of them with respect to that property might be affected by the outcome of the litigation.

In the “spurious” class under (a)(3), if there was any “jural relationship,” it was a fiction created to justify bringing together those who had no prior relationship whatsoever. What would join the members of an (a)(3) class together was the happenstance (and not a relationship) that determination of their “several” rights would depend at least in part on resolution of a common question of law or fact, and then only if it were further supposed that the members would seek common relief. In this case, allowing the action to proceed as a class action would serve (imperfectly) as a kind of permissive joinder mechanism by which strangers might come together to litigate.

Harkins, *supra* note 72, at 707 (footnotes omitted).

77. *See* FED. R. CIV. P. 23 advisory committee note (1966 Amend.).

to the parties' ability to aggregate claims to satisfy the minimum jurisdictional amount and with respect to the preclusive effect<sup>78</sup> of the judgment.<sup>79</sup> Only "true" class actions—not "hybrid" or

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It was thought that the definitions [in original Rule 23] accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors.

*Id.*; Note, *Aggregation of Claims in Class Actions*, 83 HARV. L. REV. 202, 207 n.30 (1969) ("[B]ecause the categories of maintainable class actions in the old [Rule 23] were based on whether the interests involved were 'joint' or 'several,' placement in a category also happened to determine whether the claims could be aggregated. Aggregation was allowed in 'true' class actions, but not in 'hybrid' or 'spurious' ones.").

78. The class judgment in "spurious" class actions did not bind absent class members. *See infra* notes 79–81 and accompanying text (discussing claim aggregation and preclusive effect of "true," "hybrid," and "spurious" class actions under original Rule 23). However, the "spurious" class action's lack of preclusive effect did not eliminate the necessity of adequate representation. *See Carroll v. Associated Musicians of Greater N.Y.*, 206 F. Supp. 462, 465, 470 (S.D.N.Y. 1962) (describing the spurious class action as merely "a congeries of separate suits," but declining to find that the plaintiffs would "fairly insure adequate representation of such class"); *Zachman v. Erwin*, 186 F. Supp. 681, 689 (S.D. Tex. 1959) (noting that "[s]ince a spurious class action is a form of permissive joinder device and binds only the original parties and intervenors, the court does not need to make a searching inquiry into the adequacy of the representation of the class," but nevertheless concluding that because two plaintiffs' interests seemed antagonistic to the interests of other plaintiffs, adequate representation did not exist and a spurious class action could not be maintained); *Canuel v. Oskoian*, 23 F.R.D. 307, 311 (D.R.I. 1959) ("Since the rights of non-appearing members of the plaintiff class cannot be adjudicated herein, I am of the opinion that the named plaintiffs adequately represent the plaintiff class and can be expected to prosecute vigorously the claims asserted in the complaint.").

79. The preclusive effect of class actions had been problematic even before the promulgation of original Rule 23. *See 7A WRIGHT ET AL., supra* note 14, § 1751, at 15 ("Although the English practice was to treat a class-action judgment as binding on everyone in the group, there was considerable uncertainty in the United States as to the res-judicata effect on nonparty class members."); *id.* at 16 (noting that Federal Equity Rule 48 seemed, by its terms, to prohibit any preclusive effect, but "[n]onetheless, since one of the principal purposes of allowing class suits was to prevent the multiplicity of actions involving common questions and to obtain a final determination of the issues raised, this sentence occasionally was ignored and the judgment was declared binding on all members of the group" (footnote omitted)); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1163 (1998) ("[C]onsiderable uncertainty existed in the nineteenth and early twentieth centuries over the preclusive effect of class actions. Sometimes they were allowed to have such effect; sometimes they were not." (footnote omitted)). This uncertainty continued after original Rule 23 took effect. *Id.* ("This disarray continued even after the codes took over the equity practice."); *see* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1937 (1998) ("The tripartite classification scheme adopted in [original] Rule 23 was based on Moore's position

“spurious” class actions—permitted the aggregation of claims to meet the jurisdictional amount;<sup>80</sup> absentees were bound by a class judgment in “true” and “hybrid” class actions, but not in “spurious” ones.<sup>81</sup>

Courts found the “true,” “hybrid,” and “spurious” categories confusing,<sup>82</sup> resulting in amendments to Rule 23 in 1966. The 1966 revisions to Rule 23 abandoned the previous labels, and instead described the types of class actions in practical terms.<sup>83</sup>

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that differences in the ‘jural relationships’ among class members required different treatment and entailed different consequences so far as res judicata is concerned.” (footnote omitted)); *id.* at 1938–39 (“Although [original] Rule 23 did not discuss res judicata, Moore argued that the binding effect of a class suit should depend on the category into which a suit was subsumed. With ‘true’ and ‘hybrid’ class suits, he stated that absentee class members were bound. . . . Both of these categories consisted of cases that, but for the class suit device, would require joinder of absentees as necessary parties. With ‘spurious’ class suits, absentees were not bound . . . . Most federal courts adopted Moore’s statements on res judicata . . . .” (footnotes omitted)).

80. *See* Shapiro, *supra* note 30, at 377 (“In a true class action, in which the members of the class unite to enforce a single title or right in which they have a common or undivided interest, aggregation of their claims or interests is permissible for purposes of satisfying the jurisdictional amount requirement, but in a suit which is merely a spurious or hybrid class action, in which each class member’s claim or interest is separate and distinct from those asserted by the others, such aggregation is not permissible.”).

81. *See* Note, *supra* note 77, at 207–08 (“Placement in a category [under original Rule 23] . . . determined the scope of the binding effect of the judgment.”); *id.* at 208 n.31 (“In ‘true’ class actions under old rule 23, all class members were bound by the judgment. In ‘hybrid’ actions, named parties were bound, and with respect to the property, the remaining class members were also bound. In ‘spurious’ actions only the parties were bound.”).

82. *See* Deckert v. Independence Shares Corp., 27 F. Supp. 763 (E.D. Pa. 1939), *rev’d*, 108 F.2d 51 (3d Cir. 1939), *rev’d*, 311 U.S. 282 (1940), *remanded to* 39 F. Supp. 592 (E.D. Pa. 1941), *rev’d sub nom.* Pa. Co. for Ins. on Lives v. Deckert, 123 F.2d 979 (3d Cir. 1941) (reflecting confusion as to which of the class action categories should apply); 39 F.R.D. 98 advisory committee’s note (1966) (describing the “true,” “hybrid,” and “spurious” classifications as “obscure and uncertain,” and stating that “[t]he courts had considerable difficulty with these terms”); *see also* Yeazell, *supra* note 64, at 696 n.41 (describing original Rule 23’s categories as “a taxonomy that few professed to understand, and by which courts confessed themselves baffled”); Note, *supra* note 28, at 1321 (noting that original Rule 23’s categories “proved to be a source of confusion almost from its date of promulgation”).

83. Revised Rule 23 provides, in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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

Issues related to aggregation and preclusion<sup>84</sup> in class actions have remained, although those issues differ in nature from those under original Rule 23. With respect to aggregation, the Supreme Court held that class members could not aggregate their claims to satisfy the jurisdictional amount.<sup>85</sup> However, two recent developments likely will diminish the need for aggregation in most federal class action lawsuits—the Class Action Fairness Act of 2005, which expressly authorizes aggregation when the amount in controversy would thereby exceed \$5 million,<sup>86</sup> and the Supreme Court’s 2005 *Exxon Mobil Corp. v. Allapattah Services, Inc.* decision, which authorizes the use of supplemental jurisdiction in class actions.<sup>87</sup> With respect to preclusion, the 1966 revisions clarified the

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(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(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; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(a)–(b).

84. See Hazard et al., *supra* note 79, at 1849 (noting that precedent on the issue of preclusion in class actions historically has been “equivocal and confused, and . . . remains somewhat so today”).

85. *Zahn v. Int’l Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332 (1969).

86. 28 U.S.C. § 1332(d)(6) (requiring the court to aggregate the claims of the individual class members to determine whether the matter in controversy exceeds the sum or value of \$5,000,000).

87. 545 U.S. 546, 546 (2005) (“[W]here the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, § 1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same

drafters' intention that all class judgments have preclusive effect.<sup>88</sup> Some limited preclusion issues have remained, however, most notably regarding subsequent collateral attacks against class judgments.<sup>89</sup>

Thus, from a historical perspective, class actions are more than purely aggregate lawsuits. As explored in the next Part, the defining characteristic of the class action—the feature most distinctive and most compelling—is its representative nature. For this reason, to shift to a focus on the aggregate deemphasizes, blurs, and softens the critical central nature of the class action reality.

#### IV. “REPRESENTATIVE” VERSUS “AGGREGATE”: TERMINOLOGY IN THE SUPREME COURT’S CLASS ACTION CASE LAW

In addition to the references to “representative” actions within Rule 23 itself, the United States Supreme Court has regularly and repeatedly invoked the “representative” nature of the device in discussing class actions.<sup>90</sup> In contrast, the phrase “aggregate

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Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction.”).

88. See Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1261–62 (2002) (“[C]lass actions under the 1966 revision were all meant to have full res judicata effect. The 1966 Rule drafters made perfectly clear—and for the first time—that the entire point of the class action procedure was to adjudicate individual claims in one proceeding with full binding effect on each and every class member.”).

89. See Bassett, *supra* note 5, at 936–37 (“As a representative action, a class action thus serves to bind every class member, including similarly situated individuals who did not actually participate in the class action lawsuit. However, unless those who actually participated in the lawsuit were adequate representatives of all of the diverse interests within the purported class, the class action judgment cannot be used to preclude a subsequent action involving the inadequately represented interests.”); William V. Luneburg, *The Opportunity To Be Heard and the Doctrines of Preclusion: Federal Limits on State Law*, 31 VILL. L. REV. 81, 114 (1986) (“The constitutional mandate of an opportunity to be heard requires . . . disregard of the preclusive effect of the judgment” when an absent class member has been inadequately represented); Monaghan, *supra* note 79, at 1200 (“[N]on-party, nonresident class members should remain free to challenge an otherwise preclusive class judgment on due process grounds in a forum of their choosing.”); Wolff, *supra* note 46, at 803 (“It remains a matter of serious dispute whether [a subsequent] court may recognize a full-scale collateral attack and set aside a class judgment on adequacy grounds.”); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 445 (2000) (“The understanding that absent class members may collaterally attack a judgment based on inadequate representation is deeply entrenched in the law.”).

90. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 306 (2002) (Thomas, J., dissenting); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832, 834, 841, 846 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985); *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 549–50 (1974);

litigation,” as such, does not appear in any of the Court’s decisions.<sup>91</sup> The aggregate nature of class actions—the bringing together of numerous parties in one lawsuit for judicial economy—is certainly an integral part of class actions as well as other multiple-claim devices. Although the word “aggregate” (or “aggregation”) does appear in some of the Court’s class action opinions, the Supreme Court has not used “aggregate” as a class action descriptor.<sup>92</sup> Instead, the Supreme Court’s class action decisions referring to “aggregate” (or “aggregation”) discuss either a sum total, such as the “aggregate damages” involved,<sup>93</sup> or the concept of aggregating claims for the purpose of satisfying the minimum jurisdictional amount.<sup>94</sup> This is not to suggest that the Supreme Court neither notices nor cares when a case involves numerous parties. My point, as explored below, is that the Court has declined to emphasize the aggregate over the representative in class actions, despite opportunities to do so.

In sharp contrast to the aggregate feature of class actions—meaning that a class action folds numerous claims into a single

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Hansberry v. Lee, 311 U.S. 32, 41 (1940); Gibbs v. Buck, 307 U.S. 66, 72–73 (1939); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921).

91. A search conducted on Westlaw using the Supreme Court (“SCT”) database and the search term “aggregate litigation” yielded no cases. Searches of the federal district and circuit court decisions fared little better. In the federal circuit court database (“CTA”), the search term “aggregate litigation” yielded five cases, three of which are the same quote from *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831 (2d Cir. 1992). This quote appears in this Article at note 196, *infra*. In the federal district court database (“DCT”), the search term “aggregate litigation” yielded eight cases, five of which again involve this same quote. Of the five cases remaining, one cites a law review article that has the term “aggregate litigation” in its title, and the other four discuss a sum total, such as “aggregate litigation expenses.”

92. See *supra* note 91 and accompanying text.

93. See, e.g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 526 (1967). The leading class action treatise similarly refers to “aggregate” in this sense:

After proof of the defendant’s liability to the class, the issue remains concerning a determination of what damages or other relief class members are entitled to receive. When a declaratory judgment and injunctive relief are sought, the class representative traditionally will obtain this relief in the aggregate for the entire class or, when appropriate, for particular subclasses that compose or are part of the entire class. . . . There are occasions when it is feasible and reasonable to prove aggregate monetary relief for the class . . . .

3 CONTE & NEWBERG, *supra* note 14, § 10:1, at 476; see also *id.* § 10:2, at 477 (“[T]he ultimate goal in class actions is to determine the aggregate sum, which fairly represents the collective value of claims of individual class members.”).

94. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005) (discussing the Class Action Fairness Act); *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 292, 295–301 (1973), *overruled on other grounds by Exxon Mobile Corp.*, 545 U.S. at 566; *Snyder v. Harris*, 394 U.S. 332, 334–35 (1969); *Gibbs v. Buck*, 307 U.S. 66, 88 (1939).

lawsuit—the representative nature of class actions is both central to the class action concept and rises to a constitutional dimension. As the Supreme Court has noted, “selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.”<sup>95</sup>

Again and again, the Supreme Court has emphasized adequate representation as a due process prerequisite to a binding class judgment. The classic adequate representation case is the Supreme Court’s decision in *Hansberry v. Lee*, in which the Supreme Court specifically equated adequacy of representation with due process, and which allowed class actions only when adequate representation existed.<sup>96</sup> *Hansberry* considered Illinois state court practices.<sup>97</sup> An earlier Illinois case, *Burke v. Kleiman*, had successfully enforced a racially restrictive covenant.<sup>98</sup> Subsequently, Anna Lee and others sought to enforce the same covenant against Carl Hansberry, an African-American.<sup>99</sup> Hansberry defended against Lee’s action by arguing that the covenant never became effective because its terms required, as a prerequisite, the signatures of ninety-five percent of the landowners within the designated area and that the requisite number of signatures had never been obtained.<sup>100</sup> Lee pleaded that this issue was precluded by the *Burke* judgment; Hansberry countered that application of the preclusion doctrine against him would violate due process.<sup>101</sup>

The Supreme Court, characterizing *Burke* as a class action, noted that absent actually participating in an action or standing in privity with one actually participating in an action, “members of a class . . . may [only] be bound by the judgment where they are in fact adequately represented by parties who are present . . . .”<sup>102</sup> The

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95. *Hansberry*, 311 U.S. at 45.

96. *Id.*; see Bassett, *supra* note 5, at 938 (“*Hansberry* was notable for equating adequacy of representation with due process, thereby establishing adequacy as a prerequisite to a binding class judgment.”).

97. *Hansberry*, 311 U.S. at 36.

98. 277 Ill. App. 519, 520, 533–34 (1934).

99. *Hansberry*, 311 U.S. at 37–38.

100. *Id.* at 38.

101. *Id.*

102. *Id.* at 42–43.

Court found that the purported class in *Burke* consisted of “dual and potentially conflicting interests.”<sup>103</sup> Due to these conflicts, adequate representation did not exist, and thus the prior *Burke* action could not bind Hansberry.<sup>104</sup> To the Court, the representation issue predominated over the aggregate aspects of the class action.<sup>105</sup> *Hansberry* was pivotal in the history of class actions and was notable for equating adequacy of representation with due process, thereby establishing representativeness as a prerequisite to a binding class judgment.

Since *Hansberry v. Lee*, the two most important class action decisions to meaningfully address adequacy of representation<sup>106</sup> are the Court’s relatively recent opinions in *Amchem Products, Inc. v. Windsor*<sup>107</sup> and *Ortiz v. Fibreboard Corp.*<sup>108</sup> In *Amchem* and *Ortiz*, the Court again emphasized the importance of adequate representation in class actions generally. In both cases, the Court then went a step further by declining the opportunity to subordinate adequate representation to the desirability of a class-wide settlement, and thereby further established the preeminence of representation over aggregation.

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103. *Id.* at 44.

[A]ll those alleged to be bound by the [covenant] would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance . . . .

*Id.*

104. *Id.* at 45–46.

105. *See id.* at 41–42, 44–46.

106. Other Supreme Court decisions have mentioned adequacy of representation, but without much elaboration. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (noting that one of the briefs raised an adequacy of representation issue, but stating that the issue was “outside the scope of the question presented in this Court”); *Id.* at 396, 399 (Ginsburg, J., concurring and dissenting) (emphasizing “the centrality of the procedural due process protection of adequate representation in class-action lawsuits, emphatically including those resolved by settlement,” and noting that “[f]inal judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement”); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (reiterating the necessity of adequate representation to due process and stating that “the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members”); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156, 161 (1982) (noting the Court had “repeatedly held that ‘a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members,’” and noting the necessity of “a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied”).

107. 521 U.S. 591 (1997).

108. 527 U.S. 815 (1999).

*Amchem* and *Ortiz* squarely, strikingly, and compellingly presented the competing notions of representation and aggregation. Both *Amchem* and *Ortiz* were asbestos class actions,<sup>109</sup> described in *Ortiz* as part of the “elephantine mass of asbestos cases,”<sup>110</sup> and both involved issues of adequate representation in a class-wide settlement.<sup>111</sup> If the Court had been inclined to do so, the claims in *Amchem* and *Ortiz* presented the best possible circumstances for the Court to shift its emphasis from a “representative” to an “aggregate” focus.

Indeed, the dissents in both *Amchem* and *Ortiz* focused on the “aggregate” nature of the asbestos litigation involved.<sup>112</sup> Justice Breyer’s separate opinion in *Amchem*, concurring in part and dissenting in part, bluntly stated, “I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court’s opinion suggests.”<sup>113</sup> Justice Breyer again dissented in *Ortiz*, and again focused on the enormous number of asbestos cases.<sup>114</sup> The first sentence of his *Ortiz* dissent noted that “[the] case involve[d] a settlement of an estimated 186,000 potential future asbestos claims against a single company.”<sup>115</sup> His dissent goes on to note that “[i]n the past decade

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109. *Id.*; *Amchem*, 521 U.S. at 597.

110. *Ortiz*, 527 U.S. at 821; *see also Amchem*, 521 U.S. at 598 (quoting *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3* (Mar. 1991)), which states:

[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

*Id.*

111. *Ortiz*, 527 U.S. at 830–31; *Amchem*, 521 U.S. at 613.

112. *Amchem*, 521 U.S. at 629 (Breyer, J., concurring and dissenting); *Ortiz*, 527 U.S. at 866–68 (Breyer, J., dissenting).

113. *Amchem*, 521 U.S. at 629 (Breyer, J., concurring and dissenting).

114. *Ortiz*, 527 U.S. at 866–68 (Breyer, J., dissenting).

115. *Id.* at 865.

nearly 80,000 new federal asbestos cases have been filed; more than 10,000 new federal asbestos cases were filed last year,”<sup>116</sup> and that “asbestos cases on average take almost twice as long as other lawsuits to resolve.”<sup>117</sup> Clearly, “aggregate” concerns were squarely before the Court.

The extraordinary number of potential asbestos claims, and the ongoing nature of asbestos litigation, framed issues of the “aggregate” persuasively. In both *Amchem* and *Ortiz*, a class settlement hung in the balance—settlements which, if upheld, would have disposed of thousands upon thousands of claims and which, if undone, would have put those same thousands upon thousands of claims back into the courts. The opportunity to reconstruct class action reality with a focus on the aggregate was clearly and compellingly presented. Yet the Court rejected both settlements—and an aggregate focus—and came down decisively and unequivocally in favor of a representative emphasis.

*Amchem* was a settlement class action—it was filed as such and certified as such, with no intention to litigate the matter.<sup>118</sup> The *Amchem* settlement purported to encompass both present and future claimants, but the Court stated that the diversity of interests within the class required the use of subclasses.<sup>119</sup> Finding that the proposed class lacked adequacy of representation, the Court observed that the so-called “global compromise” did not fairly represent the various interests within the class.<sup>120</sup>

Similarly, in *Ortiz*, the Supreme Court insisted on the primacy of the adequacy of representation inquiry<sup>121</sup> and expressly rejected the perceived overall fairness of the settlement’s terms as a substitute for

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116. *Id.* at 866.

117. *Id.*

118. *Amchem*, 521 U.S. at 601–02 (“The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, . . . the settling parties . . . presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.”).

119. *Id.* at 626–28 (discussing subclasses).

120. *Id.*

121. *Ortiz*, 527 U.S. at 831–32.

[T]he District Court took no steps at the outset to ensure that the potentially conflicting interests of easily identifiable categories of claimants be protected by provisional certification of subclasses under Rule 23(c)(4), relying instead on its post hoc findings at the fairness hearing that these subclasses in fact had been adequately represented.

*Id.*

adequate representation.<sup>122</sup> In particular, the *Ortiz* Court condemned the district and circuit courts' "uncritical adoption . . . of figures agreed upon by the parties."<sup>123</sup> The Court emphasized that courts must "rigorous[ly] adhere[] to those provisions of the Rule 'designed to protect absentees,'"<sup>124</sup> and also noted that "the moment of certification requires 'heightene[d] attention' . . . to the justifications for binding the class members."<sup>125</sup> Thus, when presented with a settlement, even one with seemingly desirable terms that efficiently resolves many thousands of claims, a court must nevertheless rigorously scrutinize whether the adequacy of representation<sup>126</sup> necessary to bind the absent class members has been provided.<sup>127</sup>

Large-scale "aggregate litigation" may be possible and desirable in many cases. But class actions are not merely large-scale "aggregate litigation"—class actions are something more and something different. The representative nature of class litigation renders class actions distinctive, goes to the core of the purpose of class litigation, and implicates constitutional due process concerns. Unfortunately, however, as explored in the next Part, a number of recent proposals in the legal commentary seek to reconstruct class action reality in a

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122. *Id.* at 857–59, 863–64.

123. *Id.* at 848.

124. *Id.* at 849 (quoting *Amchem*, 521 U.S. at 620).

125. *Id.*

126. Relying on the language of Rule 23(a), courts and commentators often ascribe the burden of providing adequate representation to class counsel and class representatives. *See* I CONTE & NEWBERG, *supra* note 14, § 3:21, at 408 (noting that, with respect to adequacy of representation, "the representatives must not possess interests which are antagonistic to the interests of the class," and "the representatives' counsel must be qualified, experienced, and generally able to conduct the litigation"). However, the burdens of adequate representation, while falling most directly on class counsel and the class representatives, are also shared by defense counsel, the defendant, and the court. *See* Debra Lyn Bassett, *The Defendant's Obligation To Ensure Adequate Representation in Class Actions*, 74 UMKC L. REV. 511 (2006).

127. *See* Alan B. Morrison, *The Inadequate Search for "Adequacy" in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1179, 1187 (1998).

Far from being a nice addition if it is available, adequate representation, along with notice and an opportunity to participate (and in some cases the right to opt out), are the essential elements that legitimize the class action and entitle the defendant to use a prior class judgment or settlement as a bar to future litigation by everyone who is part of the certified class.

*Id.*

manner that ignores the representative nature of class actions in favor of an exclusively aggregate focus.

#### V. THE DRAWBACKS OF AN “AGGREGATE” FOCUS: PROPOSALS TO CONSTRUCT A NEW CLASS ACTION REALITY

Despite the Supreme Court’s repeated emphasis on adequate representation as essential to constitutional due process, and thus to the validity of class judgments, there is a clear push in the legal literature to undermine that concept. In light of some of the highly publicized difficulties and issues in class action practice, it is not surprising that legal commentators would offer proposals that attempt to address these difficulties and issues. But the number of prominent proposals that would reconstruct class action reality with an aggregate foundation and focus—as a method of mere claim disposal and at the expense of constitutional due process safeguards—is remarkable, if not astonishing.

If evidence suggested that the “adequate representation” prerequisite required such a high threshold that many potential class members were being excluded from a class-wide remedy, perhaps this would warrant an increased emphasis on the aggregate. But this is not the case. Accordingly, a shift away from the representative nature of class actions—a shift that would lower constitutional due process protections—should require especially careful scrutiny before recommendation. Yet precisely such a shift in approach and emphasis appears frequently in the legal literature. For example, prominent proposals have advocated (1) treating the class as an “entity client,” (2) incorporating economic perspectives and administrative law concepts to class action practice, and (3) sharply restricting the availability of collateral attacks of class judgments. All of these innovative proposals share a common net effect: to reconstruct the class action reality with an aggregate foundation and focus. I examine each of these examples in turn.

##### *A. Example One: Class as an “Entity Client”*

One proposal in the legal literature would recast class actions using an “entity client” model. The notion of the class as an “entity client” envisions the entity—meaning the class—“[as both] the

litigant and the client.”<sup>128</sup> Thus, the class itself becomes the lawyer’s client, rather than the individuals who comprise the class. According to its major proponent, under this entity approach, “the class (like other litigating entities [such as trade unions, corporations, municipalities and other governmental entities<sup>129</sup>]) is the client, and its members should play a role not as clients themselves but as representatives of the client.”<sup>130</sup>

[In an entity approach,] the broader social interests at stake need to be recognized . . . , since the measure of efficiency and due process does require a balancing of the interest of the individual against the other social concerns that are affected. In this case, the [entity] model seems preferable both for the administration of the civil justice system and for the interests of litigants other than the plaintiff class.<sup>131</sup>

Treating the class as the client eliminates several issues that currently arise in class litigation. In the “class as client” model, potential conflicts of interest among the class members are no longer disqualifying and, in fact, are no longer relevant. Similarly, because the class is the client, rather than the individuals comprising the class, a large number of opt-outs is no longer a concern—because class members would no longer be permitted to opt out of the class litigation.<sup>132</sup>

By shifting the focus to the class as a whole, an entity client approach to class actions adopts an aggregate foundation and focus.<sup>133</sup> Indeed, the entity client proposal would adversely affect two

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128. Shapiro, *supra* note 15, at 919.

129. *See id.* at 921.

130. *Id.* at 940.

131. *Id.* at 933.

132. *Id.* at 918–19.

[T]he aggregation model . . . allow[s] individuals to achieve the benefits of pooling resources against a common adversary. . . . [In the entity model,] the *entity* is the litigant and the client. Moreover, in the situations in which class action treatment is warranted, the individual who is a member of the class, for whatever purpose, is and must remain a member of that class, and as a result must tie his fortunes to those of the group with respect to the litigation, its progress, and its outcome.

*Id.*

133. Although Professor Shapiro draws a distinction between an entity model and an aggregation model, the entity model ultimately emphasizes the bringing together of claims (albeit as an entity) rather than emphasizing the due process, fiduciary, and agency concepts that are central to the representative approach to class actions. *See id.* at 918–19 (distinguishing between the “aggregation” and “entity” models).

of the “minimal procedural due process protections” required in class actions:<sup>134</sup> it would eliminate outright the right to opt out<sup>135</sup> and it would limit the necessity of notice.<sup>136</sup>

The entity client proposal has far-reaching ramifications. In addition to eliminating opt-outs and limiting notice requirements, an entity approach would alter the application of the ethical rules to class actions.<sup>137</sup> Other consequences to jurisdiction<sup>138</sup> and choice of law<sup>139</sup> would also appear to follow. In other words, an entity approach to class actions would permit procedural streamlining, but at the expense of limiting or even eliminating rights and options that currently protect class members, including due process safeguards.<sup>140</sup>

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134. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985).

135. See Shapiro, *supra* note 15, at 957 (“[A]n absolute opt-out right in [(b)(3) classes] would undermine the validity of class treatment itself [under an entity approach].”).

136. See *id.* at 936–37 (discussing notice under an entity approach).

If [the cost of notice is high], then the arguments for viewing the class as the litigant militate in favor of more selective notice, so long as an adequately representative group of the class (or of each potential subclass) is notified. . . . In the case of the “small claim” class action, requiring notice to all those members whose whereabouts are reasonably accessible seems even less sensible. The interest of the individual in the case is relatively low, as is the corresponding likelihood that any member of the class will wish to spend the time and energy to monitor the action or will object to the very idea of class treatment. In these circumstances, to insist on the widest possible notice is to use “due process” notions as a method of effectively defeating the claim at the threshold and depriving the polity of any social value it might have. It is far better to provide for sufficient notice to make a representative group aware of the action, so that the opportunity to object either to certification or to the progress or handling of the action is not lost, while keeping the cost of such notice within manageable bounds.

*Id.* (emphasis omitted).

137. An “entity” approach appears in some of the class-action literature in the context of conflict of interest concerns. See Bassett, *supra* note 5, at 975 n.232 (arguing against a “class as entity” approach to conflicts of interest); Moore, *supra* note 32, at 1477 (proposing that classes should be treated as entity clients for purposes of the ethical rules); see also Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1484–91 (1998) (discussing differences between treating class members as a single unit rather than individuals for conflict of interest purposes).

138. See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 28–29 (1996) (discussing implications of treating the class as an entity in the areas of subject-matter and personal jurisdiction).

139. See *id.* at 29 (discussing implications of treating the class as an entity for choice of law considerations).

140. The entity client proposal is susceptible to some serious challenges even aside from its aggregate focus. For example, each of the other entity-clients listed as analogous examples—trade unions, corporations, municipalities, and other governmental entities—has an existence and an organizational structure independent of litigation, whereas the class in a class action is

In short, the entity client proposal shifts the focus from the individual class members to the class as a whole, and in doing so, distances the adequacy evaluation from the individual class members. To assert that such an individual may be lumped together with others against her will, with no right to opt out and limited rights to notice—*simply because it is more efficient*—is indeed to reconstruct class action reality away from a representative approach and toward a view that values efficiency more than due process.

*B. Example Two: Economic Perspectives and Analogies to Administrative Proceedings*

A second example of a recent attempt to reconstruct class action reality involves proposals that have attempted to import administrative law processes and law-and-economics approaches to the class action arena.<sup>141</sup> The recent popularity of law and economics,<sup>142</sup> and the application of economic principles to a broad variety of topics in the legal literature,<sup>143</sup> renders proposals for similar extensions to the class action context unsurprising. Equally unsurprising, in light of the centrality of efficiency to the wealth maximization and Kaldor-Hicks efficiency concepts of law-and-economics theory,<sup>144</sup> such approaches would reconstruct class action reality with an aggregate focus.

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created for the sole and exclusive purpose of litigation. This reality, I would suggest, renders it much more difficult to treat the class as an entity when there is no separate entity existence.

141. These proposals overlap with each other. Daphne Barak-Erez, *The Administrative Process as a Domain of Conflicting Interests*, 6 THEORETICAL INQUIRIES L. 193, 199 (2005) (“There is a growing tendency to consider administrative law in light of the economic and social justifications of regulation.”). They also overlap with the previous “entity client” example. See Silver & Baker, *supra* note 137, at 1465 (“From an economic perspective, [mass actions and class actions] . . . resemble corporations.”).

142. See Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 434 (“Law and economics has been one of the most successful innovations in the legal academy in the last century.”).

143. See Jay S. Marks, *An Economic Analysis of Agency Behavior*, 5 ADMIN. L.J. 127, 139 (1991) (“Today, there are literally hundreds of articles applying economic analysis to the law in numerous fields . . .”).

144. See Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 779 (2005) (“[T]he normative premise . . . motivating law and economics scholarship . . . [is] efficiency.”); Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 MD. L. REV. 220, 224 (2005) (“[L]aw and economics [is] an approach to legal reasoning grounded in efficiency concerns.”); Gary Minda, *Reflections*, 26 CARDOZO L. REV. 2397, 2399 (2005) (noting “[t]he efficiency hypothesis of the law and economics movement”); Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 SUP.

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*Constructing Class Action Reality*

One proposal brings both themes together to view class actions “more along the lines of representation in other lawmaking processes—the most closely analogous being that of administrative agencies,”<sup>145</sup> explaining that “the law may advance regulatory objectives through the structuring and facilitation of markets.”<sup>146</sup> This proposal then goes on to analogize administrative agencies to class counsel,<sup>147</sup> and to import administrative law and regulatory policy to class actions.<sup>148</sup>

The time has come for a conception of the modern class action less as a cousin of ordinary civil litigation and more as that device actually operates today, as a rival regime of governance. . . . [I]n parsing the process due to absent class members, the law should draw upon the lessons that have emerged in the modern administrative state and the regulatory enterprise that it oversees.<sup>149</sup>

This proposal acknowledges that under administrative law, “[a]ffected persons are entitled as a matter of constitutional due process to an individualized ‘opportunity to be heard’ in adjudication but not in rulemaking.”<sup>150</sup> However, the proposal

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CT. ECON. REV. 19, 19 (2005) (“Efficiency is the key organizing principle behind law and economics.”); *see also* Reza Dibadj, *Weasel Numbers*, 27 CARDOZO L. REV. 1325, 1330 (2006) (“Unable to equate ‘efficiency’ or ‘wealth maximization’ with Pareto optimality, the standard trick in the law and economics repertoire has been to devolve to the Kaldor-Hicks standard.”). *See generally* Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 509-15 (1980) (discussing wealth maximization and Kaldor-Hicks efficiency concepts).

145. Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 292 (2003) [hereinafter Nagareda, *Administering Adequacy*]. Professor Nagareda’s previous work has made similar arguments. *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149 (2003); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899 (1996) [hereinafter Nagareda, *Tort to Administration*]. Professor Molot has also drawn an administrative law analogy to the judicial review of class action settlements. *See* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 112 (2003). *But see* Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1025-32 (2001) (noting the shortcomings of administrative procedures and arguing that negotiated rulemaking by agencies should draw upon the procedures of class action law).

146. Nagareda, *Administering Adequacy*, *supra* note 145, at 348.

147. *Id.* at 350-51.

148. *Id.* at 350-69.

149. *Id.* at 380.

150. *Id.* at 354 (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 244-45 (1973)).

would deny an individualized opportunity to be heard in class actions and would substitute a “reasoned explanation” for the settlement reached,<sup>151</sup> relying on “market discipline”<sup>152</sup> to subject defective settlements “to criticism by potential competitors within the plaintiffs’ bar.”<sup>153</sup>

Determining the propriety of an administrative law analogy to class actions requires an examination of the administrative law process. Administrative proceedings differ significantly from traditional litigation in a number of respects, all of which are less protective of individual rights<sup>154</sup>—including less restrictive evidentiary rules, the absence of an Article III judge, in some instances the absence of counsel, and, most relevant to this article, lessened due process protections.<sup>155</sup> As one commentator recently explained, “administrative decision-making should be understood as devoted to balancing between conflicting interests of individuals or groups, usually *when none of the affected parties has predefined legal rights* that are relevant to the substantial content of the administrative decision.”<sup>156</sup> However, the reason for the filing of a class action is precisely because the class members have predefined, but as yet undetermined, legal rights: the class members already possess a property right, and the class action serves as the process for

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151. *Id.* at 359.

152. *Id.* at 365.

153. *Id.* at 363.

154. See John G. White, *ICANN's Uniform Domain Name Dispute Resolution Policy in Action*, 16 BERKELEY TECH. L.J. 229, 239 (2001) (noting, with respect to administrative proceedings, the “highly expedited nature of administrative proceedings,” the “relative lack of formal due process,” and the “relative difficulty in assessing complex factual questions”) (quoting *Raj Vasant Pandit v. Vishal Bhuta*, DeC, No. AF-0224 (July 10, 2000), available at <http://www.disputes.org/decisions/0224.htm>). See generally Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 452–55 (1983) (noting the informality of administrative proceedings).

155. See Nagareda, *Administering Adequacy*, *supra* note 145, at 380 (“[I]n parsing the process due to absent class members, the law should draw upon the lessons that have emerged in the modern administrative state and the regulatory enterprises that it oversees.”).

156. Barak-Erez, *supra* note 141, at 193 (emphasis added). Barak-Erez provides examples of appropriate regulations and regulatory decisions, including acceptable levels of pollution and the allocation of educational resources, such as the number of students per classroom. *Id.* at 194–95. But see ROBERT PAUL WOLFF, *THE POVERTY OF LIBERALISM* (1968) (arguing that the definition of the common good is not necessarily an aggregation of individual preferences); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (same).

securing the remedy to which they legally are entitled (or determining they have none).

The task of balancing between conflicting interests is characteristic of the legislative process. Legislation is a process aimed at balancing between the interests of various groups. No one can claim a right to the legislation of a statute favorable to his or her interests. In contrast, the judicial process is based on the premise that the court has to decide on the proper application of a legal right to the facts of the case. In so doing, the court takes into consideration competing social interests, but the underlying assumption is that rights, and not only interests, govern the decision . . . .

With this in mind, the resemblance of the administrative regulatory process to the legislative process becomes evident. Both processes are aimed at balancing between conflicting interests, and both are clearly distributive.<sup>157</sup>

The analogy of class actions to administrative proceedings does fit, but only in a narrow set of circumstances. Most commonly, after the conclusion of traditional litigation to establish liability, some courts have employed procedures resembling administrative proceedings—such as individualized claim hearings—to determine individualized remedies.<sup>158</sup> And a few distinctive class action settlements have proposed what has been described as “a private administrative compensation scheme—a kind of miniature administrative agency, if you will.”<sup>159</sup> However, one of the cases cited for this proposition<sup>160</sup> was the lower court decision in what ultimately became *Amchem Products, Inc. v. Windsor*,<sup>161</sup> in which the Supreme Court ultimately rejected the proposed settlement for lack

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157. Barak-Erez, *supra* note 141, at 195–96 (footnotes omitted).

158. See, e.g., *Kraszewski v. State Farm Gen. Ins. Co.*, Civ. A. No. C-70-1261 TEH, 1986 WL 11746, at \*1 (N.D. Cal. July 17, 1986) (“After a bifurcated trial on liability, . . . this court found defendants liable under Title VII for sex discrimination on a class-wide basis. Now, at Stage II of the proceedings, the court must determine the appropriate relief to compensate the plaintiff class members.”); *id.* at \*3 (“[T]he court hereby orders individual hearings for the Stage II proceedings in this case.”).

159. Nagareda, *Tort to Administration*, *supra* note 145, at 921.

160. *Georgine v. Amchem Prods.*, 157 F.R.D. 246 (D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff’d*, 521 U.S. 591 (1997); see Nagareda, *Tort to Administration*, *supra* note 145, at 921 n.83.

161. 521 U.S. 591 (1997).

of adequate representation.<sup>162</sup> Thus, from the Supreme Court's perspective and from a representative focus, the administrative law analogy is of a more limited utility than some scholars seem to suggest. To extend this narrow analogy to the infinitely broader area of adequate representation—the sine qua non of the representative nature of class actions—is to substitute an aggregate focus.

Analogizing class actions to administrative proceedings is a reconstruction of class action reality, and one with an indisputably “aggregate” focus. “In the most general terms, the rationale underlying the existence and operation of administrative agencies is that they serve the so-called ‘public interest.’ This public interest is, however, an aggregation of interests of individuals and groups that form society.”<sup>163</sup> Indeed, “[t]he aggregation of interests has sometimes been considered a primary purpose of administrative law.”<sup>164</sup> Thus, under an administrative model, the purpose of class actions would shift from a goal of according appropriate relief to each class member, to instead reaching a decision that is merely distributive by balancing among the conflicting interests of the class as a whole. The reconstruction is more dramatic than it might initially appear. The Supreme Court has previously noted that, for absent class members, adequate representation substitutes for the class member's “day in court.”<sup>165</sup> This “day in court” approach is reflected in the Court's approach to the collateral attack of a class judgment, whereby a class member who was inadequately represented will not be bound by the class judgment.<sup>166</sup> To reconstruct class action reality using an administrative law model would treat the conglomerate class as a whole, thereby substituting a “good enough” or “close enough” perspective for adequate representation—deeming a resolution sufficient so long as overall, rather than individual, fairness was achieved.

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162. *Id.* at 625.

163. Barak-Erez, *supra* note 141, at 197.

164. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1331 (1997) (citing Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975)).

165. *See* *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 WRIGHT ET AL., *supra* note 14, § 4449), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076–77 (codified as amended at 42 U.S.C. § 2000e-2 (2000)).

166. *See* *Hansberry v. Lee*, 311 U.S. 32 (1940).

*C. Example Three: Limiting Collateral Attacks  
Against Class Judgments*

The third example of a recent attempt to reconstruct class action reality involves proposals to limit collateral attacks against class judgments. The calls to limit collateral attacks on class judgments undermine the importance of the class action's representative nature by overemphasizing the aggregate element and raising attendant dangers.

A collateral attack is “[a]n attack on a judgment in a proceeding other than a direct appeal; [especially] an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective.”<sup>167</sup> Since a class judgment ordinarily will bind all class members to that result,<sup>168</sup> the ability to collaterally attack a class action judgment largely depends on whether the challenger's interests were adequately represented in the first lawsuit.<sup>169</sup> The Supreme Court has assured the availability of a collateral attack to

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167. BLACK'S LAW DICTIONARY, *supra* note 16, at 278.

168. See *Hansberry*, 311 U.S. at 42–43 (“It is familiar doctrine in the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . .”); Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1009 (2003) (“American law generally holds that when a properly structured class action is resolved by a judicial judgment, the entire class is bound.”); see also *id.* at 1019 (“[T]hroughout the history of the modern class action in the United States, the Supreme Court has accepted the binding effect of the class judgment on absentees.”). See generally 18A WRIGHT ET AL., *supra* note 14, § 4455, at 448 (“Preclusion by representation lies at the heart of the modern class action developed by such procedural rules as Civil Rule 23. The central purpose of each of the various forms of class action is to establish a judgment that will bind not only the representative parties but also all nonparticipating members of the class certified by the court.”).

169. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring and dissenting) (“Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement.”); see also 18A WRIGHT ET AL., *supra* note 14, § 4455, at 448 (“The most important requirement of preclusion is that the named parties afford adequate representation.”). Lilly similarly notes,

[T]he basic constitutional principle has been to permit unnamed class members to challenge the adequacy of their representation in a collateral trial. If the court finds that the class (or certain members within it) was inadequately represented, the judgment as to the class (or individual within it) will be invalidated under the Due Process Clause.

Lilly, *supra* note 168, at 1037 (citations omitted).

safeguard due process for absent class members for more than sixty-five years—ever since *Hansberry v. Lee*.<sup>170</sup>

*Stephenson v. Dow Chemical Co.*<sup>171</sup> provides an example of a collateral attack against a class action judgment—specifically, the class action settlement in *In re “Agent Orange” Products Liability Litigation*.<sup>172</sup> In *Agent Orange*, the court took an aggregate approach, certifying a class that included those who served in the military “from 1961 to 1972 who were injured while in or near Vietnam by exposure to ‘Agent Orange’” as well as their families.<sup>173</sup> The court-approved settlement in *Agent Orange* provided that the defendants would create a \$180 million settlement fund.<sup>174</sup> Three-quarters of the fund monies were distributed directly “to exposed veterans who suffer[ed] from long-term total disabilities and to the surviving spouses or children of exposed veterans who have died.”<sup>175</sup> The remaining one-quarter of the fund monies was allocated primarily to the “Agent Orange Class Assistance Program,” aimed at providing grants to agencies serving Vietnam veterans and their families.<sup>176</sup> After these allocations, \$10 million remained as a reserve for future claims.<sup>177</sup>

The *Agent Orange* settlement expressly stated that the class “specifically includes persons who have not yet manifested injury,”<sup>178</sup>

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170. 311 U.S. at 41–42.

171. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff’d by an equally divided Court*, 539 U.S. 111 (2003) (per curiam).

172. *In re “Agent Orange” Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980), *modified*, 597 F. Supp. 740, 756 (E.D.N.Y. 1984), *aff’d*, 818 F.2d 145 (2d Cir. 1987).

173. *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 756 (E.D.N.Y. 1984), *aff’d*, 818 F.2d 145 (2d Cir. 1987).

174. *See id.* app. A, at 863.

175. *Stephenson*, 273 F.3d at 253.

176. *Id.*; *see also* *Ryan v. Dow Chem. Co. (In re “Agent Orange” Prod. Liab. Litig.)*, 611 F. Supp. 1396, 1432 (E.D.N.Y. 1985), *rev’d in part*, 818 F.2d 179 (2d Cir. 1987) (noting that the priorities of the Agent Orange Class Assistance Program included “the establishment of legal and social service projects to benefit Vietnam veterans exposed to Agent Orange and suffering some disability and their families,” and that the first funding priority should be “[c]hildren with birth defects born to class member veterans”).

177. *See In re “Agent Orange,”* 597 F. Supp. at 870 app. B (stating, in the class action settlement notice, that a portion of the settlement fund “will be set aside for future payment to those class members who have not, as yet, manifested adverse health effects but who may manifest such effects in the future”); *see also Stephenson*, 273 F.3d at 252 (“The settlement provided that defendants would pay \$180 million into a settlement fund, \$10 million of which would indemnify defendants against future state court actions alleging the same claims.”).

178. *In re “Agent Orange,”* 597 F. Supp. app. A, at 865.

yet set aside only \$10 million to pay such claims. This \$10 million was subsequently transferred to the “Agent Orange Class Assistance Program” rather than kept as a reserve for future claimants.<sup>179</sup> Moreover, the settlement “only provided for recovery for those whose death or disability was discovered prior to 1994. . . . No provision was made for post-1994 claimants, and the settlement fund was permitted to terminate in 1994.”<sup>180</sup> In a challenge to the *Agent Orange* settlement filed before the expiration of the settlement fund, the court justified the 1994 cutoff by noting that “[t]he relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.”<sup>181</sup>

Future claimants were not a separate subclass in the *Agent Orange* case; indeed, there were no subclasses of any type.<sup>182</sup> The adequacy of representation issue is obvious; the expectation of fewer claims after 1994 would justify maintaining a smaller post-1994 reserve, rather than eliminating the reserve altogether.<sup>183</sup> Having been intentionally and specifically swept within the class settlement, the future claimants who became ill after 1994 had the right to adequate representation.<sup>184</sup> But by approaching the *Agent Orange* class action from a purely aggregate perspective, both the litigants and the court were focused on disposing of the claims—a focus which, as in *Amchem*, came at the expense of neglecting the key requirement of adequate representation.

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179. See Koniak, *supra* note 15, at 1820 n.193.

180. *Stephenson*, 273 F.3d at 260–61; see also *id.* at 253 (noting that no payments for “death or disability occurring after December 31, 1994” were permitted under the settlement (citing *In re “Agent Orange,”* 611 F. Supp. at 1417).

181. *In re “Agent Orange” Prod. Liab. Litig.*, 781 F. Supp. 902, 919 (E.D.N.Y. 1991).

182. See *Stephenson*, 273 F.3d at 252, 259–60.

183. In a subsequent law review article, Judge Weinstein, the district court judge who approved the *Agent Orange* settlement, stated his belief that the claims in the *Agent Orange* lawsuit lacked merit. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 *Nw. U. L. REV.* 469, 543 (1994) (stating that, with respect to the *Agent Orange* litigation, “the law and science, in my view, did not support a viable cause of action”). Professor Koniak has opined that if the court believed the claims lacked merit, the proper result would have been to dismiss the entire lawsuit; a belief that the claims lacked merit would not excuse or justify inadequate representation. See Koniak, *supra* note 15, at 1826 n.217, 1826–28.

184. See Koniak, *supra* note 15, at 1821 (“[I]f the post-1994s . . . had been adequately represented, this deal would have provided something of substance for them—or their lawyer would have insisted that they be left out of it altogether. Put another way, such blatant bias for the presents, the near-futures and the non-injured—at the expense of people like Stephenson—demonstrates that Stephenson was not adequately represented.”).

Enter Daniel Stephenson, who was exposed to Agent Orange during his tour of duty in Vietnam, but who was not diagnosed with cancer from that exposure until 1998—after the 1994 termination of the settlement fund.<sup>185</sup> Stephenson sued the manufacturers of Agent Orange, who argued that the *Agent Orange* settlement precluded Stephenson's suit. Although the district court dismissed Stephenson's suit,<sup>186</sup> the Second Circuit concluded that Stephenson had been denied adequate representation and thus had been denied due process<sup>187</sup>—a result affirmed when the Supreme Court split by a 4-4 vote.<sup>188</sup>

The legal literature reflects a rich debate over the propriety of collaterally attacking a class judgment as a general matter<sup>189</sup> and of

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185. See *Stephenson*, 273 F.3d at 255 (noting that Stephenson “served in Vietnam from 1965 to 1970, serving both on the ground in Vietnam and as a helicopter pilot in Vietnam. . . . On February 19, 1998, he was diagnosed with multiple myeloma . . . .”); see also Koniak, *supra* note 15, at 1818 (“In 1998, Stephenson was diagnosed with multiple myeloma, a deadly cancer that some studies connect to Agent Orange exposure.”).

186. See *Stephenson*, 273 F.3d at 251 (vacating “the district court’s dismissal”).

187. *Id.* at 261 (“Because these plaintiffs were inadequately represented in the prior litigation, they were not proper parties and cannot be bound by the settlement.”).

188. *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003) (per curiam).

189. See, e.g., William T. Allen, *Finality of Judgments in Class Actions: A Comment on Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 1149, 1163–64 (1998) (criticizing the suggestion that class members should be able to attack adequacy of counsel collaterally); Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 262–66 (“[A]dequacy of representation should be raised directly, and not be permitted to be raised collaterally” when class members had a “fair opportunity to raise the issue.”); Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 779–83 (1998) [hereinafter Kahan & Silberman, *Inadequate Search*] (criticizing broad right to mount collateral attack upon adequacy of representation); Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 N.Y.U. L. REV. 1193 (1998) (responding to previous articles regarding the ability to collaterally attack a class judgment by arguing that those positions are inconsistent with the language and effect of existing case law); Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1167, 1175 (1998) (calling for counsel “to establish a full record on adequacy in the fairness hearing”); Nagareda, *Administering Adequacy*, *supra* note 145, at 366 (stating that he “share[s] the inclination” of commentators who have called for limits on the ability to collaterally attack class judgments); Kevin R. Bernier, Note, *The Inadequacy of the Broad Collateral Attack: Stephenson v. Dow Chemical Company and Its Effect on Class Action Settlements*, 84 B.U. L. REV. 1023 (2004) (arguing that the Supreme Court should adopt a limited standard for collateral attacks against class judgments). *But see* Koniak, *supra* note 15, at 1794 (“Those who argue against an unfettered right of absentees to mount a collateral attack based on inadequacy of representation bemoan the lack of finality to class action settlements that right creates. Due process is, however, always in tension with efficiency, speed

Daniel Stephenson's collateral attack specifically.<sup>190</sup> Indeed, this debate has drawn a number of influential voices, many of whom urge an aggregate-oriented outcome, albeit through different approaches.

Some prominent voices within this debate assert that the trial court necessarily determines the existence (or lack) of adequate representation as part of the class suit, and thus any challenges to the trial court's adequacy of representation determination should be limited to direct appeal.<sup>191</sup> In other words, advocates of this approach contend that since absent class members conceivably could have shown up to contest adequacy of representation during the trial court hearing, their failure to do so should preclude any collateral challenge.

It is perhaps hard to imagine an argument any more diametrically opposed to the idea of the representative nature of class actions than the one proffered in the preceding paragraph, and this territory has been fiercely contested.<sup>192</sup> In particular, the notion that absent class

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and finality."); Monaghan, *supra* note 79, at 1200 (supporting the right to collaterally attack class judgments based on inadequate representation); Woolley, *supra* note 89, at 433–38 (arguing that the ability to mount a collateral attack on a judgment is an important safeguard to ensure that class members receive a hearing on the merits of a case).

190. See, e.g., Nagareda, *Administering Adequacy*, *supra* note 145, at 316–20 (criticizing the Second Circuit's decision in *Stephenson* and characterizing the Supreme Court's deadlock as a "missed opportunity"); Bernier, *supra* note 189, at 1024 (arguing that by deadlocking in *Stephenson*, the Supreme Court "missed an opportunity" and should adopt a limited standard for collateral attacks against class judgments).

191. See, e.g., Kahan & Silberman, *Inadequate Search*, *supra* note 189, at 782–86, 788–89 (contending that collateral attacks should not be permitted to challenge the adequacy of representation if the original forum made a finding of adequacy based on appropriate procedures). Other commentators have explored the shortcomings of this approach in detail. See Woolley, *supra* note 89, at 390–422 (refuting the arguments of Professors Kahan and Silberman).

192. Commentators have explored the shortcomings of this approach in detail. See Woolley, *supra* note 89, at 383, 390–422 (refuting the arguments of Professors Kahan and Silberman); see also *id.* at 397 (observing that to require absent class members to raise adequacy objections in the class suit itself "would be inconsistent with the representative nature of class suits, a fact underlined by the lack of authority for such an approach under Federal Rule of Civil Procedure 23"). For example, Professor Koniak notes:

[A]t its core, [Professors Kahan and Silberman's argument is] a form of waiver argument. You chose not to object; you have waived your chance to contest adequacy. And for that reason it is disingenuous at its core: absent class members are not supposed to all show up and contest matters. Notices, in fact, make clear that staying away is a perfectly appropriate response. Having invited passivity, indeed depending upon just such passivity, what kind of legal system would then penalize it? Not one committed to "due process."

members must challenge adequacy of representation at the fairness hearing or in a direct appeal is undermined by language from the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, which expressly states that due to the very representative nature of class actions, absent class members are "not required to do anything."<sup>193</sup>

Rule 23 itself, through the responsibilities imposed on the class representative, similarly undermines the argument that absent class members must participate in either the fairness hearing or a direct appeal in order to challenge adequacy of representation.<sup>194</sup> Thus, the suggestion that absent class members must raise any adequacy challenge in the initial proceedings or on direct appeal is inconsistent with the understanding of both Rule 23 and the case law regarding

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Koniak, *supra* note 15, at 1851. Other relatively recent Supreme Court decisions also suggest the continued vitality of collateral attacks against class judgments. See *Richards v. Jefferson County*, 517 U.S. 793 (1996) (permitting a collateral attack in a taxpayer class action where the challengers were not adequately represented in the first lawsuit); *Martin v. Wilks*, 490 U.S. 755, 762–63 (1989) (rejecting the contention that a collateral attack was not permitted because the challengers had failed to intervene in the initial proceedings), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1074, 1076–77. The Supreme Court recently held that an unnamed class member who objected at the fairness hearing should be considered a "party" for purposes of appealing the court's approval of the settlement. *Devlin v. Scardelletti*, 536 U.S. 1, 7, 10 (2002). However, the Court cast *Devlin* very narrowly and the case would appear to deal only with direct appeals, adding nothing to arguments concerning the ability of an unnamed class member to launch a collateral attack. See *id.* at 15 (Scalia, J., dissenting) (stating conclusion in narrow terms); see also Koniak, *supra* note 15, at 1856–57 (concluding that *Devlin* should be read narrowly).

193. 472 U.S. 797, 810 (1985) ("[A]bsent plaintiff class members . . . need not hire counsel or appear. . . . [A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."). In a related context, the Supreme Court has held that the failure to intervene cannot prohibit a collateral attack. See *Martin*, 490 U.S. at 763 (1989) ("[A] party seeking a judgment binding on another cannot obligate that person to intervene . . .").

194. See *Gonzales v. Cassidy*, 474 F.2d 67, 76 (5th Cir. 1973).

The purpose of Rule 23 would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected; this is not his responsibility—it is the responsibility of the class representative to protect the interests of all class members.

*Id.*; see also Woolley, *supra* note 89, at 432 ("[V]irtually all avenues for precluding or limiting absent class members from collaterally attacking a judgment are foreclosed by the Constitution[;] . . . current class action rules impose no . . . obligation [upon absent class members to intervene if they wish to object to inadequate representation, and instead] permit all absent class members to collaterally attack a judgment for inadequate representation, even if they could have raised their objection in the class proceedings.").

the role and responsibilities of absent class members and with the fundamental representative nature of class actions.<sup>195</sup>

Another voice in the commentary posits that any challenges to adequacy of representation must be founded in information known at the time of the class judgment—meaning that collateral attacks based on post-judgment information, such as Stephenson’s illness after expiration of the *Agent Orange* settlement fund, should not be permitted.<sup>196</sup> This argument, too, has been vigorously criticized.<sup>197</sup> As Professor Koniak has observed:

If the defendant wanted to be released from all liability to those who might get sick after 1994, those claims were worth something—and that something belonged to anyone who got sick after 1994. To have one lawyer who represents everyone in the class agree to transfer the value of the post-1994 releases to those who got sick before 1994 is to accept a lawyer operating with a conflict that actually adversely affects a segment of the class. If the post-1994 claims were worthless, the defendant should have been willing to exempt those claims from the class settlement. A lawyer adequately representing the post-1994 interests would have demanded something for the release from liability or demanded any such claims be excised from the class settlement.<sup>198</sup>

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195. See Woolley, *supra* note 89, at 394 (“[C]lass action rules and statutes do not require absent class members to raise adequacy objections in the class suit itself. Thus, absent class members may collaterally attack a judgment based on inadequate representation.”).

196. See Nagareda, *Administering Adequacy*, *supra* note 145, at 297 (“[T]he interests of class members may be aligned, if at all, only pre-judgment, not post-judgment. Divergence of interest within the class that emerges only post-judgment—that does not preexist the class—cannot serve as a basis on which to deny preclusive effect to a class judgment, else the law would make finality well nigh impossible to achieve in any class settlement.”).

197. See Koniak, *supra* note 15, at 1822 n.198 (discussing problems raised by Professor Nagareda’s approach).

198. *Id.* The theoretical basis for the use of only pre-judgment information relies on an analogy of class actions to administrative proceedings. The commentator advocating this approach acknowledges that his “crucial insight . . . that the interests of class members may be aligned, if at all, only pre-judgment, not post-judgment” is not an insight shared by the Supreme Court. Nagareda, *Administering Adequacy*, *supra* note 145, at 297 (stating that this insight “eluded the Court in *Hansberry* and . . . continues to elude the law to present day”). Professor Nagareda criticizes “three ill-chosen words in *Shutts*”—the Court’s reference to the Due Process Clause as requiring adequate representation of absent class members’ interests “at all times”—as “hav[ing] led astray an entire line of academic commentary on adequate class representation.” *Id.* Interestingly, Professor Nagareda’s own argument is subject to precisely the same criticism, because his proposal is based on an isolated phrase in *Shutts*—identified as a quote from Moore’s Federal Practice treatise—stating that a class action can resemble a “quasi-administrative proceeding,” but providing no further comment, explanation, endorsement, or

The arguments proffered in favor of limiting collateral attacks uniformly include the aggregate-oriented goal of finality of judgments and the impact of the ability to collaterally attack a class judgment upon class action settlements—and a necessarily concomitant discounting of the constitutionally-mandated due process prerequisite of adequate representation.<sup>199</sup>

Those seeking to limit the ability of absent class members to collaterally attack a class judgment argue that, in effect, other aggregate-oriented considerations—judicial economy, court congestion, the promotion of settlements, and the desirability of finality—should outweigh the adequate representation of absent class members.<sup>200</sup> These arguments, of course, are consistent with the view of class actions as mere “aggregate litigation,” with a focus on disposing of numerous claims in an expedient manner, and are inconsistent with a representative focus.<sup>201</sup>

The emphasis on the aggregate in these recent proposals is more than just a shift in emphasis; it presages a reconstruction of class action reality. The Supreme Court has expressly rejected an aggregate approach to class actions (as contrasted with a

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edification. See *Shutts*, 472 U.S. at 809 (quoting 3B J. MOORE & J. KENNEDY, MOORE’S FEDERAL PRACTICE ¶ 23.45 (1984)). Nearly 40 years ago, in discussing an opt-in procedure for class actions, a law review article posited a narrow analogy between class actions and administrative proceedings, but importantly, drew this analogy only with respect to certain types of class actions—and did not attempt to generalize such a notion to class actions as a whole. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendment of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397–98 (1967) (Expressing concern that an opt-in procedure “would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. . . . For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government.”).

199. See *Sara Maurer, Dow Chemical Co. v. Stephenson: Class Action Catch 22*, 55 S.C. L. REV. 467, 480 (2004) (“Efficiency and judicial administration are not served when any class member can question the finality of a judgment. Also, defendants will be less likely to settle if there exists the possibility that the settlement will not end the litigation with finality.”).

200. See *Koniak, supra* note 15, at 1794.

201. The volume—in terms of both number and intensity—of the reaction against collateral attacks of class judgments is curious in light of its relative rarity. See *Koniak, supra* note 15, at 1857 (“[T]here is no evidence whatsoever that absent class members are clogging the courts with collateral attacks anywhere. And they never have.”); Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 U. KAN. L. REV. 413, 469 (1999) (“Collateral attack has been used relatively sparingly to attack . . . adequacy of representation . . . .”); Woolley, *supra* note 89, at 443 (“Notwithstanding the longstanding availability of collateral attack, such attacks have not been common . . . .”).

representative approach) and has instead repeatedly insisted on the adequate representation of absent class members at the expense of global settlements and court dockets. An emphasis on the aggregate distorts the viewing lens. Judicial economy, resolution, and finality are laudable goals as a general matter. But when the impetus to dispose of the aggregated claims becomes the focus, “tunnel vision” almost necessarily results, leading to the neglect of claimants’ interests and the denial of due process. Imposing limits on the ability to collaterally attack a class judgment means removing the safeguard for someone who was not provided adequate representation—and binding her to a judgment even when rendered as the result of proceedings that denied her constitutional due process and basic fairness.

*D. Conclusion: The Hazards of Reconstructing Class Action Reality with an “Aggregate” Foundation and Focus*

Influential voices have proposed to reconstruct our image of class actions to focus on the aggregate nature of class actions, with a concomitant emphasis on clearing court dockets, reaching global settlements, and limiting collateral attacks on class judgments.<sup>202</sup> Such an approach employs a constricted view of class actions as simply one means of disposing of a large number of claims—indeed, as merely “aggregate” litigation.<sup>203</sup> Unfortunately, however, viewing class actions merely as “aggregate litigation” interjects genuine dangers into class litigation—including truncated court review and oversight of class settlements, diminished attention to adequate representation as a general matter, and ultimately, an increased risk that class members are denied constitutional due process and basic fairness, which raises the possibility of more collateral attacks.

Why would commentators propose a reconstruction of class action reality that adopts an aggregate foundation and focus? One reason is that this aggregate focus is part of a larger trend. The trend toward viewing the primary goal of the class action as claim disposal—the aggregate view of efficiency—is also seen in the law

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202. See *supra* notes 128–140, 145–53, 163–166, 191, 196, 200–201 and accompanying text (providing examples).

203. An undue emphasis on the expeditious disposal of claims has ramifications beyond the class action context. See Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 8 (2004) (arguing that the attempts “to streamline and expedite litigation . . . are drastically obscuring and reducing both the visibility and the application of legal norms”).

more generally and broadly. Indeed, the notion of “dispute resolution” is often seen as the primary focus of, and perhaps even a synonym for, law itself.<sup>204</sup> Accordingly, a similar emphasis on the efficiency of the class action device—the inherent ability of a class action to dispose of numerous claims within a single proceeding—perhaps should come as no surprise. However, treating law and litigation generally, and treating class actions specifically, as mere mechanisms for “dispute resolution” is an erroneous, harmful, and simplistic approach, permitting other purposes and goals to be disregarded and discarded.<sup>205</sup> The courts already face an inherent temptation to treat class actions in an aggregate manner,<sup>206</sup> and such an aggregate approach often lies behind court approvals of class settlements without rigorous scrutiny. As the Second Circuit has warned, “The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff’s—and defendant’s—cause not be lost in the shadow of a towering mass of litigation.”<sup>207</sup>

Another potential reason motivating these recent proposals appears to be undue deference to defendants. For example, proposals to limit the ability to collaterally attack a class judgment routinely claim that without such restrictions, defendants will refuse to settle. Certainly the adequate representation prerequisite creates additional burdens for both litigation and settlement, and thus can hinder prompt settlement in some cases. However, the adequate representation prerequisite is not aimed at streamlining settlements; it is intended to ensure due process. Moreover, it is not self-evident that defendants will decline to settle absent prohibitions against collateral attack. Not only are collateral attacks against class judgments uncommon,<sup>208</sup> but class judgments do not “capture” all potential class members in any event, due to the ability of class

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204. *Id.* at 13–14.

205. *See id.*

206. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1062 (2002) (noting that full dockets, combined with judicial resources required of class actions and praise judges receive for concluding cases quickly, conspire to “suppress[] judicial scrutiny of proposed [class action] settlements”).

207. *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992).

208. *See supra* note 201 (discussing the rarity of collateral attacks against class judgments).

members to “opt out” of most class actions.<sup>209</sup> The rule-mandated ability to opt out has not prevented defendants from entering into settlement agreements over the past four decades, and the rare collateral attack seems similarly unlikely to impede settlements.

In effect, recent commentary has tended to use one component of the aggregate construct to justify the other aggregate component. The aggregate nature of class actions presents two underlying concerns—numbers (“numerous” parties) and judicial economy. Recent commentary has used the numbers concern as the means to an end—as a justification for proposing measures with a judicial economy focus. But this emphasis on judicial economy has overshadowed the more compelling argument: the argument that the aggregate nature of class actions—meaning the presence of numerous parties—is the reason why adequate representation matters. Precisely because a class action involves numerous parties, representation issues are more challenging and adequate representation is more difficult to achieve. The emphasis on judicial economy glosses over the more interesting, more challenging, and constitutionally-based problem of achieving adequate representation in the context of numerous parties.

Reconstructing the class action reality as one of mere “aggregate litigation,” with single-minded goals of clearing court dockets and reaching global settlements, can lead judges to approve settlements too readily, relying on counsel’s assertions regarding the settlement’s desirability instead of undertaking close examination and scrutiny.<sup>210</sup> An aggregate focus will almost inevitably curtail the adequacy of the representation in the eager quest for resolution.<sup>211</sup> One prominent example involved *Amchem Products, Inc. v. Windsor*, in which attorneys filed, and the district court approved, a class action seeking a global settlement of all current and future asbestos-related claims

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209. See FED. R. CIV. P. 23(c)(2)(B) (requiring that the individual notice in (b)(3) class actions state, among other things, “that the court will exclude from the class any member who requests exclusion”).

210. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999) (reproaching the lower courts’ “uncritical adoption . . . of figures agreed upon by the parties”).

211. Professor Koniak has chronicled some of the problems arising in this area. See, e.g., Koniak, *supra* note 15, at 1800–36 (discussing *Epstein*, *BancBoston*, and *Stephenson* cases); see also Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1056 (1995) [hereinafter Koniak, *Widow Weeps*] (discussing *Amchem* case).

for twenty manufacturers of asbestos products.<sup>212</sup> As Professor Koniak has so powerfully described,<sup>213</sup> the lawyers involved in the settlement—both class counsel and defense counsel—crafted two deals. One deal was the global settlement for which they sought court approval in the *Amchem* case; the other deal involved pre-existing clients—the clients whom class counsel and others were representing at the time defense counsel approached them about a global settlement. The two deals had different terms, and the pre-existing clients received the better deal.<sup>214</sup> Adequate representation, of course, is a prerequisite to maintaining a class action, even one initially filed as a settlement class action<sup>215</sup>—yet class counsel and

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212. 521 U.S. 591, 597, 601–02 (1997).

213. See generally Koniak, *Widow Weeps*, *supra* note 211 (describing the events in the *Georgine* case, which was the subject of the Supreme Court’s ultimate decision in *Amchem*).

214. Professor Koniak outlines the deals as follows:

Both deals covered people with a wide range of diseases caused by asbestos: mesothelioma, lung cancer, and the full range of nonmalignant asbestos diseases—from disease that seriously affects one’s ability to breathe to disease that leaves marks on the lungs but does not result in severe breathing impairment. Although the deals covered the same sorts of people with the same sorts of diseases, the deals had different terms. For example, it appears that the people covered by the class action got considerably less money than the people with the same diseases who were covered by the other deal. . . .

[The class] excluded over fourteen thousand of [class counsel’s] clients and many, if not most, of the clients of other asbestos lawyers. These clients—and their lawyers—got the deal with more money. . . .

[The defendant asbestos companies] refused to settle the bulk of the existing cases without some guarantee about the future. . . . They also wanted control over the number of cases they would face each year and, preferably, control over how much money they would have to pay out each year. They determined that the best way to get what they wanted was through a “settlement class action”—a class action put together solely for the purpose of achieving settlement.

*Id.* at 1052–53.

215. See *Amchem*, 521 U.S. at 621 (“Subdivisions (a) and (b) [of Rule 23] focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.”).

defense counsel proffered,<sup>216</sup> and the trial court approved,<sup>217</sup> the proposed settlement.

The challenge to the global settlement proceeded all the way to the United States Supreme Court, where the parties offered arguments based on an aggregate focus, including the burden on court dockets caused by asbestos-related litigation and the desirability of a global settlement.<sup>218</sup> Yet despite the strain on court dockets caused by asbestos-related litigation, and despite the reluctance of defense counsel to settle without protection against future lawsuits, the Supreme Court refused to uphold the global settlement, finding adequacy of representation lacking.<sup>219</sup> In particular, the Court noted that the diversity of interests within the class required the use of subclasses:

In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the

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216. Professor Koniak explains:

Why did [the defendants] agree to treat class counsel's clients and the clients of other asbestos lawyers more generously than the class? This generosity was simply part of the price [the defendants] had to pay to get the class settlement [they] wanted. [The defendants] needed two deals to accomplish [their] goal because plaintiffs' lawyers, including class counsel, would not accept for their own clients the terms [the defense] was prepared to offer the largest group of asbestos victims, the future claimants.

Why would class counsel and [defense counsel] define a class that excluded the clients of *other* asbestos lawyers? Because by offering more generous terms to the clients of other asbestos lawyers [the defense] could buy third-party support for the settlement among the asbestos bar. The more members of the asbestos bar who supported the class settlement, the better [the defendants'] chances would be of getting the resolution [they] wanted. The gerrymandered class, the separate client settlements, and the substantial differences between the class settlement and the inventory settlements can all be explained in this way: [The defense] paid class counsel on the side, by which I mean outside the class action proceeding through the client settlements, for agreeing to support the class settlement. Or to put it even more bluntly, [the defendants] bought off the class lawyers.

Koniak, *Widow Weeps*, *supra* note 211, at 1054–55.

217. *Id.* at 1056 (“Why would a district court accept such a tainted settlement on behalf of so many absent class members? To help rid the court system of the terrible burden imposed by what appears to be interminable asbestos litigation.”).

218. *See Amchem*, 521 U.S. at 629 (Breyer, J., concurring and dissenting) (“[T]he need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court’s opinion suggests.”); *see also id.* (suggesting that adequacy of representation problems are unavoidable and that a well-balanced settlement is less important than a comprehensive one).

219. *Id.* at 625.

interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. . . . The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.<sup>220</sup>

As *Amchem* so dramatically illustrated, when a class action lacks adequate representation, lawyers control the lawsuit unchecked, with defense lawyers often having disproportionate power and control, and with class members often the ultimate losers.<sup>221</sup> Without adequate representation, “everyone” benefits—everyone, that is, except the parties in whose name the action was brought. An aggregate approach to class actions places a distorted emphasis on convenience and efficiency—on clearing court dockets and reaching global settlements—at the expense of basic fairness concerns and constitutional due process. The Supreme Court has refused to indulge these distractions, repeatedly rejecting an aggregate focus in favor of a representative emphasis.

In rejecting an aggregate focus, and in encouraging the use of subclasses, the Supreme Court has insisted on a more individual-focused approach. Such an individual-focused approach, with its emphasis on the representative nature of class actions, may suggest the propriety not only of subclasses, but of smaller classes generally. Although defendants often prefer global settlements, a less comprehensive class definition (or at least more subclasses) greatly enhances the likelihood of achieving adequacy of representation—and seems to have been the *Amchem* Court’s basic message.

If class action reality is reconstructed so that the goals of class litigation are defined exclusively as judicial economy, resolution, and finality, then adequacy of representation will necessarily become secondary and expendable. There is no question that, at least under some circumstances, rigorous attention to the adequate representation of absent class members disrupts, hinders, and delays settlement—or may partially unravel an existing settlement. And

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220. *Id.* at 626–27.

221. See Mullenix, *supra* note 45, at 439 (noting that when class representatives are mere figureheads, “plaintiff and defense attorneys . . . become private brokers of private disputes without meaningful client input or interaction” and that “most courts simply look the other way”).

there is no question that judicial economy and efficiency concerns are among the ultimate objectives of all litigation, including class litigation.<sup>222</sup> It is precisely for this reason, however, that the focus is so important. An overemphasis on the aggregate nature of class actions elevates judicial economy, resolution, and finality to the same level as due process—permitting discussions to be framed in terms of fairness to defendants. However, the issue is not defendants’ rights versus plaintiffs’ rights. Adequate representation is an absolute due process prerequisite—without it, there is no valid, binding judgment for either plaintiffs or defendants to rely on and enforce. Only a representative construction of class action reality maintains this focus.

In sum, the recent use of the term “aggregate litigation” as a synonym-substitute for “class actions” reflects a deeper and more troubling trend in the legal literature—a trend that attempts to reconstruct class action reality. The difference is more than mere word choice—“aggregate litigation” focuses on numbers and expediency, whereas adequate representation is the soul of class actions, embodying constitutional due process and basic fairness. Similarly, recent proposals in the legal literature have emphasized the aggregate nature of class actions—despite the fact that an aggregate focus undermines the representative nature of class actions. Authentic class actions protect absent claimants’ interests and thus should distinctly be preserved as a middle ground between the extremes of individual adjudication versus a mere aggregate resolution. By lumping class actions with other methods that involve the disposition of many claims—by rendering class actions just another type of “aggregate litigation”—class actions’ unique value and unique character as representative actions are lost.

## VI. CONCLUSION

The most compelling feature of the class action is its representative nature, enforced through the constitutional due process prerequisite of adequate representation. Although the efficiencies of aggregation are one part of the class action story—many class actions indeed bring together large numbers of claims into a single lawsuit—efficiency is far from the whole story. Thus,

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222. 1 CONTE & NEWBERG, *supra* note 14, § 1:6, at 27–28.

this aggregate characteristic is not the distinctive hallmark of the class action device.

Reconstructing class action reality to focus on the aggregate—and thereby focus on the efficiency concerns of class litigation—is an overinclusive approach that detracts from the representative emphasis traditionally associated with class actions. Focusing on the aggregate emphasizes size and numbers and suggests unwieldiness, leading to an undue focus on reducing court dockets, promoting global settlements, and limiting the ability to collaterally attack class judgments, all of which tend to undermine the rigorous scrutiny of adequate representation.

Reconstructing class action reality to shift the focus from representative to aggregate further marginalizes absent class members, obscuring and minimizing their role by downplaying the fairness integral to a binding class action judgment and by emphasizing the disposal of claims. No one questions that clearing court dockets, settling cases, and encouraging finality are desirable goals. The problem is that a shift to an aggregate focus, despite its benefits, gains those benefits at the direct expense of the class members for whom ostensibly the litigation was begun.