

12-1-2009

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Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. Rev. 1079 (2009).
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Just Go Away: Representation, Due Process, and Preclusion in Class Actions

*Debra Lyn Bassett**

A number of commentators have argued for an expansion of the preclusion doctrines in the class action context, thereby limiting the ability to challenge a class judgment through subsequent litigation. The preclusion doctrines apply when one's interests have already been represented and litigated, and thus, as a general matter, the preclusion doctrines do not apply to nonparties; the class action is one of several limited exceptions. In this Article, I conclude that the class action exception is notably and distinctively inconsistent with the underlying construct that gives cohesion to the preclusion doctrines and their exceptions—a construct with both theoretical and practical dimensions: the foundational prerequisite of direct representation in litigation.

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I. INTRODUCTION

Mention *res judicata* to almost any lawyer or law student, and one of two responses is typical: either the listener will react with a stricken, deer-in-the-headlights expression, or with a stifled yawn. The oft-cited quote by Judge Clark that the preclusion doctrines are “universally respected, but actually not very well liked”¹ continues to hold true more than sixty years later. However, despite the fear and loathing that the preclusion doctrines tend to evoke, preclusion-related issues continue to arise and the doctrines carry potentially serious repercussions by virtue of their ability to bar subsequent litigation.² Indeed, an ongoing, high-profile exchange over the application of the preclusion doctrines in the class action context has generated vociferous commentary on both sides of the issue, with some commentators arguing in favor of expanding the reach of the preclusion doctrines so as to bar subsequent litigation more broadly

1. *Riordan v. Ferguson*, 147 F.2d 983, 988 (2d Cir. 1945) (Clark, J., dissenting).

2. In the parlance of the preclusion doctrines, subsequent litigation is said to be “barred.” In a literal sense, however, this is untrue. A subsequent lawsuit can always initially be filed; the issue is whether it may proceed to a determination on the merits. Pursuant to Federal Rule 8, *res judicata* is an affirmative defense, meaning that it must be raised affirmatively by the party seeking to invoke it, or the defense will be deemed waived. FED. R. CIV. P. 8(c). In the specific context of class actions, a class member who wishes to file a subsequent lawsuit is limited to mounting a collateral attack against the prior class judgment. The collateral attack is initially confined to challenging the adequacy of the representation provided in the class lawsuit, and the plaintiff bears the burden of demonstrating that her interests were not adequately represented in the class litigation. Only if the plaintiff satisfies this burden can she then proceed to arguments on the merits. Thus, preclusion in class actions, in a practical sense, functions in the same basic manner as preclusion in non-class actions: the subsequent litigant must demonstrate to the court’s satisfaction that the preclusion doctrines do not apply before she will be permitted to pursue her claim on the merits and attempt to distinguish her circumstances from prior precedent.

following a class judgment or settlement.³ The supporting arguments for this more expansive approach suggest that its proponents want such subsequent litigation to “just go away” and are even willing to compromise due process considerations to attain that goal.

After a brief lull in the commentary, a recent Supreme Court decision seems poised to prompt a resurgence of interest in the issue of the application of the preclusion doctrines in class actions. The Court’s 2008 decision in *Taylor v. Sturgell*⁴ disapproved the use of “virtual representation” as a theory of preclusion, and in so doing, offered some discussion and analysis of the preclusion doctrines that apply both directly and indirectly to the class action context. This decision and an analysis of existing doctrine can serve as a springboard to other, more theoretical, considerations arising in connection with the application of the preclusion doctrines, both generally and in the specific context of class actions. In particular, in this Article, I will argue that the concept of “representation in litigation” plays a central role in—and is, in fact, a fundamental prerequisite to—the application of the preclusion doctrines. I will further argue that attention to this “representation in litigation” concept unearths inconsistencies in the application of the preclusion doctrines—inconsistencies suggesting that a more expansive approach to preclusion in the class action context is misguided and analytically unsound.

3. See, e.g., 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, 774–75, 788–89 (1998) [hereinafter Kahan & Silberman, *Inadequate Search*] (arguing that, among other class action “process features,” the ability to opt out at the time of class certification and again at settlement provide adequate protection to unnamed class members); see also *infra* note 59 (citing other commentators who have argued for an expansive reach of preclusion in class actions). But see Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOESTRA L. REV. 129, 156–67 (2001) (urging the availability of broad collateral attacks when representation appears to have been inadequate in the initial proceeding); see also *infra* notes 69–70 (citing other courts and commentators who have argued for a narrow reach of preclusion in class actions). See generally Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 718 (2005) (“For years, courts and commentators have engaged in a fierce debate over the circumstances under which a class action judgment should have binding effect upon absent class members.”).

4. 128 S. Ct. 2161 (2008).

II. A BRIEF HISTORY OF THE USE OF PRECLUSION IN COLLECTIVE LITIGATION

When the preclusion doctrines (specifically collateral estoppel⁵) are applied in the class action context, some unique and difficult considerations come into play. To better understand these issues first requires a brief background of the class action device and the historical use of preclusion in that context, which is the subject of this Part.

A. *Early Development in the Age of Law and Equity*

Group (or collective) litigation has a long and rich history.⁶ Professor Yeazell has traced the earliest published group litigation case to the year 1199.⁷ In short, class actions developed in 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.”⁸ The class action device in the United States has operated with a representative component and focus, whereby “questions common to all the

5. Collateral estoppel, rather than *res judicata*, is the preclusion doctrine that potentially applies when an unnamed class member brings subsequent litigation following a class judgment, such as a collateral attack challenging the class judgment for lacking adequacy of representation.

6. See Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 687–88 (1997) [hereinafter Yeazell, *Past and Future*]; see also 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3:3, at 219 (4th ed. 2002) (“Class actions trace their beginning to the English common law of equity.” (citation omitted)). 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, Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514, 523–35 (1980) (noting the emergence of new group litigants during the industrialization of eighteenth and 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).

7. Yeazell, *Past and Future*, *supra* note 6, at 688.

8. *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948). 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, *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928–29 (1957) (discussing devices enabling classes of individuals to sue or be sued).

members of the class [could be decided] in one proceeding without the necessity of all the members appearing in court.”⁹

Historically, confusion has reigned with respect to whether the preclusion doctrines applied to nonparty class members in the class action context. As one prominent treatise observes, “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.”¹⁰ Indeed, the precursor to Federal Rule of Civil Procedure 23—Equity Rule 48—expressly disavowed any preclusive effect for “absent parties.”¹¹ Despite its language, from time to time federal courts held that the results of cases brought pursuant to Equity Rule 48 could bind absent parties.¹²

Equity Rule 48 governed representative litigation in the federal courts from 1833 to 1912; Equity Rule 38 was substituted in 1912. Equity Rule 38 omitted its predecessor’s express guidance as to the intended preclusive effect of representative suits, instead stating simply, “When 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.”¹³

Equity Rule 38’s deletion of the statement that the preclusion doctrines did not apply to class actions was not the same, of course, as directly and affirmatively stating that the preclusion doctrines would apply. As a result, confusion remained with respect to whether

9. Note, *supra* note 8, at 934 (citing *Hansberry v. Lee*, 311 U.S. 32, 41–42 (1940)). See generally Debra Lyn Bassett, *Constructing Class Action Reality*, 2006 BYU L. REV. 1415 (discussing the “representative” and “aggregation” components of class actions).

10. 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1751, at 15 (3d ed. 2005).

11. 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 the 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.* (emphasis added).

12. See, e.g., *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853) (stating that “the decree binds all of them the same as if all were before the court,” without mentioning Equity Rule 48); see also DEBORAH R. HENSLER ET AL., *RAND INST. OF CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* 10–11 (2000).

13. FED. R. EQ. 38 (1912).

the outcome of a class action carried any preclusive effect for individuals who came within the class definition, but who were not specifically named as parties in the class litigation.¹⁴ Even the Supreme Court's decisions were inconsistent on this point.¹⁵

This unsettled interplay between class actions and preclusion continued with the promulgation of the Federal Rules of Civil Procedure in 1938. The 1938 Federal Rules, which merged law and equity,¹⁶ were "primarily an attempt to codify, not to reform" existing class action practice and procedures.¹⁷

B. The 1938 Federal Rules

Rule 23 of the 1938 Federal Rules did not discuss the intended preclusive effect of class actions.¹⁸ However, the Rule reflected three class action categories: (a)(1) class actions (also called "true" class actions); (a)(2) class actions (also called "hybrid" class actions); and (a)(3) class actions (also called "spurious" class actions).¹⁹ The rule

14. See 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.").

15. Compare *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921) (the class action decree "must bind all of the class properly represented"), with *Christopher v. Brusselback*, 302 U.S. 500, 505 (1938) (finding no preclusive effect and observing that Equity Rule 38 was not intended to "enlarge [the federal courts'] jurisdiction").

16. FED. R. CIV. P. 1 (1938) ("These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity . . ."); FED. R. CIV. P. 2 (1938) ("There shall be one form of action to be known as 'civil action.'").

17. John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705, 705–06 (1997).

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).

18. See Geoffrey C. Hazard, Jr., et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1848, 1938 (1998) ("[The original] Rule 23 itself did not discuss *res judicata*.").

19. See Harkins, *supra* note 17, 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.").

“proved to be a source of confusion almost from its date of promulgation.”²⁰ The differences among these three types of class actions extended to the preclusive effect of the judgment—in other words, whether the outcome of class action litigation carried preclusive effect for both named and unnamed class members depended on its type.²¹ The judgment in “true” class actions was deemed to bind all class members, and the judgment in “hybrid” class actions bound all “parties and privies to the proceeding” as well as any other claims that did, or might, “affect specific property.”²²

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.

Id. at 707 (footnotes omitted).

20. Note, *Developments in the Law: Class Action*, 89 HARV. L. REV. 1318, 1321 (1976).

21. See Note, *Aggregation of Claims in Class Actions*, 83 HARV. L. REV. 202, 207–08 (1969) [hereinafter Note, *Aggregation of Claims*] (“Placement in a category [under original Rule 23] . . . determined the scope of the binding effect of the judgment.”). The type determined its preclusive effect even though the rule itself did not mention the intended preclusive effect. See Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 705 (1941) (“At one time the draft of the rule contained a section on the effect of judgment which was subsequently omitted only because the draftsmen were afraid that the effect of judgments is so substantive in character as to go beyond the Congressional warrant to draft rules of procedure.”); *id.* at 706 (“[W]hatever the draftsmen may in fact have intended, the rule does not say anything about res judicata. . . . Hence, as a res judicata rule it is utterly meaningless, since the courts are as free ‘under’ the rule as they would be without it.” (italics omitted)).

22. Kalven & Rosenfield, *supra* note 21, at 705 (quoting 2 JAMES W. MOORE, FEDERAL PRACTICE 2294–95 (1938)).

The judgment rendered in . . . [the true class action . . .] is conclusive upon the class; in . . . [the hybrid class action . . .] it is conclusive upon all parties and privies to the proceeding, and upon all claims, whether presented in the proceeding or not,

However, the judgment in “spurious” class actions carried no preclusive effect for nonparty class members.²³ The names ascribed to the class action types were indicators of the preclusive effect:

The true class suit is true because the decree is one hundred per cent res judicata as to absentees; the hybrid class suit is hybrid because the decree is only about fifty per cent res judicata, and the spurious class suit is spurious because the decree is not res judicata on absentees at all.²⁴

Not surprisingly, due to the confusing nature of the three class action types²⁵ and, in turn, the type of class action determining its

insofar as they do or may affect specific property, unless such property is transferred to or retained by the debtor affected by the proceeding

Id. (quoting 2 JAMES W. MOORE, FEDERAL PRACTICE 2294-95 (1938)) (alterations in original).

23. Note, *Aggregation of Claims*, *supra* note 21, 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.”); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 630, 632 (1965) [hereinafter Note, *Proposed Rule 23*] (noting that Professor Moore was “the chief architect of [original] rule 23,” that Moore’s “commentaries thereupon have been accepted almost as if they were part and parcel of the rule,” and that “[m]ost courts . . . accepted Moore’s postulate that a judgment in a ‘true’ or ‘hybrid’ class suit [wa]s binding on all class members but that a judgment in a ‘spurious’ class action [could] not conclude potential class members unless they [were] actually before the court.”); *see also* Hazard et al., *supra* note 18, at 1937 (“The tripartite classification scheme adopted in [original] Rule 23 was based on Moore’s position that differences in the ‘jural relationships’ among class members required different treatment and entailed different consequences so far as res judicata is concerned.”); *id.* at 1938-39 (“Although [original] Rule 23 itself 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, although they could elect to take advantage of a judgment favorable to the class by intervening in the action, even after judgment. . . . Most federal courts adopted Moore’s statements on res judicata” (footnotes omitted)).

24. Kalven & Rosenfield, *supra* note 21, at 706.

25. *See* Deckert v. Independence Shares Corp., 27 F. Supp. 763 (E.D. Pa.), *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, 983-85 (3d Cir. 1941) (reflecting confusion as to which of the class action categories should apply); 39 F.R.D. 98, 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* Arthur John Keeffe, Stanley M. Levy & Richard P. Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 335 n.22 (1948) (noting that “the courts themselves have been unable to differentiate clearly between the various classifications of class suits”); Yeazell, *Past and Future*, *supra* note 6, at 696 n.41 (describing original Rule 23’s

preclusive effect, the inconsistency in applying the preclusion doctrines in class actions continued.²⁶

C. Preclusion Issues in Class Actions Today

In 1966, Federal Rule 23 underwent substantial revision, and the labels “true,” “hybrid,” and “spurious” were abandoned in favor of more practical terms.²⁷ In addition to clarifying the types of class actions authorized by Rule 23, the 1966 revisions also attempted to clarify the preclusive reach of such class actions. Unlike the previous fractured application of the preclusion doctrines, in which preclusive effect depended on difficult and obscure classifications, the 1966 rule’s drafters intended that all class actions would have preclusive effect on all class members except those who opted out from (b)(3) class actions.²⁸ However, despite the attempted clarifications, not

categories as “a taxonomy that few professed to understand, and by which courts confessed themselves baffled”).

26. See Monaghan, *supra* note 14, at 1163 (“This disarray [concerning the preclusive effect of class actions] continued even after the codes took over the equity practice.”).

27. See Charles W. Joiner, *The New Civil Rules: A Substantial Improvement*, 40 F.R.D. 359, 365 (1966) (“One of the major problems with [original] Rule 23 [wa]s that the superficial simplicity of the rule . . . created all sorts of problems. . . . [S]tandards are set forth in the amended rule, rather than glib category handles of . . . ‘true,’ ‘hybrid,’ ‘spurious’ class actions that each lawyer and judge likes to mouth, but which mean different things to different persons.”); Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1213 (1966) (noting that in the 1966 amendments to Federal Rule 23, “overly formal classifications have been rejected for pragmatic considerations”).

28. See FED. R. CIV. P. 23 advisory committee’s note, *reprinted in Proposed Amendments to the Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 105–06 (1966) (“Under proposed subdivision (c) (3), . . . the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class”); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (“The 1966 amendments [to Federal Rule 23] were designed, in part, specifically . . . to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.”); see also 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.”); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967) (noting that the 1966 revision “makes clear that the judgment in any class action maintained as such extends to the class (excluding opters-out in (b)(3) cases), whether or not favorable to the class”); Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1009 (2003) (“It is abundantly clear that the Advisory Committee [for the 1966 amendments to Federal Rule 23] intended that unnamed members

only has precedent on the issue of preclusion in class actions historically been “equivocal and confused, [but] it remains somewhat so today.”²⁹

In particular, recent commentary concerning preclusion in class actions has focused on whether a nonparty class member should be permitted to lodge a collateral attack against the class judgment.³⁰ As a general matter, class actions are an exception to the general rule of preclusion.³¹

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.³²

Class actions are an authorized exception to this general rule, but such lawsuits do not automatically invoke a different approach to preclusion merely by being filed on behalf of others similarly situated. As an initial matter, a court cannot predetermine the binding effect of its own judgment.³³ This leads to two uncertainties that undermine the preclusive effect of a class judgment. First, “the court’s decree should define and describe the members of the class in order to aid in any future determination of the judgment’s binding effect.”³⁴ Accordingly, initial ambiguities may arise as to whether the nonparty falls within the definition of the class such that the class judgment should bind her. In addition, an unnamed class member may only be bound by the class judgment “if she was adequately

be bound when a class has been accurately certified and properly maintained throughout the suit.”).

29. Hazard et al., *supra* note 18, at 1849.

30. *See supra* note 3; *infra* note 58.

31. *See infra* notes 32–40, 136–41 and accompanying text.

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

33. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (“[A] court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment”); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (“A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action.” (citing 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789, at 245 (2d ed. 1986))). *But see Wolff*, *supra* note 3, at 752–67 (arguing that the court rendering the judgment in fact possesses some limited ability to shape its preclusive effect).

34. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.8, at 794 (4th ed. 2005).

represented by a party who actively participated in the litigation.”³⁵ Thus, so long as the nonparty comes within the class definition, the essential inquiry in ascertaining whether a class member is bound by a prior judgment is whether that class member’s interests were adequately represented in the previous lawsuit.

1. Adequate representation as a due process prerequisite

“Adequate representation” is a prerequisite to maintaining a class action under Federal Rule 23,³⁶ and the Supreme Court has repeatedly affirmed its significance. Indeed, not only is adequate representation central to the class action concept under Federal Rule 23, but adequate representation rises to a constitutional dimension. In *Hansberry v. Lee*,³⁷ the Supreme Court specifically equated adequate representation with due process as a prerequisite to a binding class judgment. The *Hansberry* Court observed that “there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is res judicata as to members of the class who are not formal parties to the suit.”³⁸ However, the Court did not hold that any lawsuit denominated as a class action was automatically entitled to preclusive effect. Rather, the Court emphasized that “members of a class . . . may be bound by the judgment where they are in fact adequately represented by parties who are present”³⁹ In the *Hansberry* case itself, the Court found that the prior class judgment proffered as precluding the *Hansberry* lawsuit had not adequately represented the “dual and potentially conflicting interests” of the class, that the interests of the Hansberrys had not been adequately represented, and thus that the previous class judgment could not bind the Hansberrys.⁴⁰

35. Taylor v. Sturgell, 128 S. Ct. 2161, 2167 (2008) (citing *Hansberry v. Lee*, 311 U.S. 32, 41 (1940)).

36. FED. R. CIV. P. 23(a)(4) (“[T]he representative parties will fairly and adequately protect the interests of the class.”).

37. 311 U.S. 32 (1940).

38. *Id.* at 42 (italics omitted).

39. *Id.* at 42–43.

40. *Id.* at 44.

Subsequent Supreme Court decisions have continued to equate adequate representation with due process.⁴¹ In the late 1990s, despite a tide of scholarly commentary critical of collateral attacks against class judgments, the Court held firm in its insistence on adequate representation in two prominent decisions: *Amchem Products, Inc. v. Windsor*⁴² and *Ortiz v. Fibreboard Corp.*⁴³ Both *Amchem* and *Ortiz* involved attempts to settle massive asbestos class actions, but in both instances the Court refused to subordinate adequate representation to the desirability of a class-wide settlement.

Amchem was a settlement class action—it was filed and certified as such, with no intention to litigate the matter.⁴⁴ 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.⁴⁵ 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.⁴⁶

Similarly, in *Ortiz*, the Supreme Court insisted on the primacy of the adequacy of representation inquiry⁴⁷ and expressly rejected the perceived overall fairness of the settlement’s terms as a substitute for adequate representation.⁴⁸ In particular, the *Ortiz* Court condemned the district and circuit courts’ “uncritical adoption . . . of figures agreed upon by the parties”⁴⁹ The Court emphasized that

41. See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part) (“[T]he centrality of the procedural due process protection of adequate representation in class-action lawsuits, emphatically including those resolved by settlement.”); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (reiterating the necessity of adequate representation to due process).

42. 521 U.S. 591 (1997).

43. 527 U.S. 815 (1999).

44. *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.”).

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

46. *Id.*

47. *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.”).

48. *Id.* at 857–59, 863–64.

49. *Id.* at 848 (footnote omitted).

courts must “rigorous[ly] adhere[] to those provisions of the Rule ‘designed to protect absentees,’”⁵⁰ and also noted that “the moment of certification requires ‘heightene[d] attention’ to the justifications for binding the class members.”⁵¹ Thus, when presented with a settlement, even one with seemingly desirable terms that efficiently resolved thousands of claims, the Supreme Court held that the district court must nevertheless rigorously scrutinize whether the adequacy of representation⁵² necessary to bind the absent class members has been provided.⁵³

Despite the Court’s insistence on “adequate representation” as a prerequisite, the actual meaning and scope of the term remains surprisingly elusive.⁵⁴ Although it is clear that adequate representation may be challenged at any stage of a class action,⁵⁵ and

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

51. *Id.* (quoting *Amchem*, 521 U.S. at 620) (alteration in original).

52. 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 6, § 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 generally* Debra Lyn Bassett, *The Defendant’s Obligation to Ensure Adequate Representation in Class Actions*, 74 U. MO. L. REV. 511 (2006).

53. *Ortiz*, 527 U.S. at 848–49; *see also* Alan B. Morrison, *The Inadequate Search for “Adequacy” in Class Actions: A Brief Reply to Professors Kaban 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.”).

54. *See, e.g.*, Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More than Merely “Adequate” Representation in Class Actions*, 38 GA. L. REV. 927, 932–33 (2004) (“[T]he ‘adequacy of representation’ required by Rule 23 is not well defined. Neither Rule 23 itself nor case law provides an effective definition”); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 288 (2003) (“For all the agreement on the centrality of adequate representation to the modern class action—indeed, on its constitutional status—there remains remarkably little agreement on the content of that concept or how to enforce it.”); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 387 (2000) (“[T]he law remains remarkably unsettled with respect to what qualifies as inadequate representation.”).

55. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (“[T]he Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members.”); *see also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring in part and dissenting in part) (“As the *Shutts*

that adequate representation is a prerequisite both for class certification⁵⁶ and for a binding judgment,⁵⁷ the meaning of the term itself is unclear. Perhaps necessarily, most of the Supreme Court's guidance on adequate representation addresses failure—what is insufficient to constitute adequate representation. The Court has found adequate representation lacking in situations involving intra-class conflicts of interest, as illustrated in *Hansberry*, *Amchem*, and *Ortiz*. And the Court has found adequate representation lacking when courts have not rigorously scrutinized class actions to ensure that the protections of Rule 23 have been satisfied.⁵⁸

2. Preclusion, finality, and adequate representation

With respect to class actions and the specific issue of preclusion, some commentators have urged greater finality to class judgments.⁵⁹

Court's phrase 'at all times' indicates, the class representative's duty to represent absent class members adequately is a continuing one."); Woolley, *supra* note 54, at 399 ("[C]ourts are obliged to monitor the adequacy of representation throughout the proceedings . . .").

56. See *Shutts*, 472 U.S. at 809 ("A plaintiff class . . . cannot first be certified unless the judge . . . conducts an inquiry into . . . the adequacy of representation . . ."); see also John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 427–28 (2000) ("[A]dequate representation' is a prerequisite before a class action can be certified or absent class members may be bound by the judgment . . .").

57. See *Matsushita*, 516 U.S. at 396 (Ginsburg, J., concurring in part and dissenting in part) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement."); see also RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. a, at 394 (1982) ("[T]he represented person may avoid being bound either by appearing in the action before rendition of the judgment or by attacking the judgment by subsequent proceedings."); Woolley, *supra* note 54, at 384 ("May an absent class member who has been inadequately represented attack the class judgment in subsequent litigation? The traditional answer . . . has been a clear 'yes.'").

58. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999) (emphasizing that courts must "rigorous[ly] adhere[] to those provisions of [Rule 23] 'designed to protect absentees'" (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 620 (1996))); *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").

59. 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) (arguing that class action judgments should carry final preclusive effect when class members do not opt out and the court found compliance with Rule 23 in an adversarial proceeding); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) (arguing for a broader approach to nonparty preclusion); Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 264 [hereinafter Kahan & Silberman, *Matsushita*]

Arguments proffered in support of greater finality have included observing that adequate representation is a Rule 23 prerequisite to a class action and therefore judges necessarily find adequate representation exists when certifying a class,⁶⁰ and noting that dissatisfied class members could lodge an appeal from the class judgment; and observing that Rule 23 provides some opportunities for unnamed class members, at least in some instances, to opt out of the class litigation, to hire their own individual lawyer, and to attend fairness hearings and object to proposed settlements.⁶¹ Note, as an initial matter, that all of these justifications are eminently practical rather than theoretical in nature. I will briefly examine the flaws of each of these justifications in turn.

First, with respect to the necessity of a finding of adequate representation as a prerequisite to class certification, the statement in the abstract is certainly correct. Indeed, in *Taylor v. Sturgell*, the Supreme Court emphasized the protections accorded to unnamed class members through Rule 23 of the Federal Rules of Civil Procedure, including the prerequisite of adequate representation.⁶² If the mandates of Rule 23 were followed strictly, perhaps according

(“[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.”); Kahan & Silberman, *Inadequate Search*, *supra* note 3, 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); Nagareda, *supra* note 54, 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).

60. Kahan & Silberman, *Matsushita*, *supra* note 59, at 264 (“[A] court entertaining a proposed class action is charged with the responsibility of assuring ‘adequacy’ before a class action is permitted. In a contested case, the issue of adequacy will usually be litigated, and the court will have the arguments of counsel to aid it in deciding the matter. In a settlement, where there may be no adversarial litigation of adequacy, the court itself has the obligation to make the finding of adequate representation. The court’s determination, like other issues litigated by class representatives, is binding on absent class members. These arguments suggest that, as long as the court entertaining a proposed class action affords class members fair opportunity to raise the issue, adequacy of representation should be raised directly, and not be permitted to be raised collaterally.” (footnotes omitted)).

61. *See id.* at 262–66; *see also id.* at 268 (“When class members have an opportunity to object to the settlement and to opt out of it, there is little reason to allow a party who refuses to avail itself of these opportunities to attack the settlement collaterally.”); Kahan & Silberman, *Inadequate Search*, *supra* note 3, at 782–86, 788–89.

62. 128 S. Ct. 2161, 2176 (2008).

both precedential and preclusive effect to a class judgment would indeed seem fair. However, ensuring adequate representation can be difficult. For those who are the formal representatives of the unnamed class members—the class representatives and class counsel—it is difficult as a practical matter to take into consideration all of the varied interests of all of the unnamed class members.⁶³ For the district court judge, who is the individual ultimately responsible for protecting the unnamed class members,⁶⁴ the information presented may be incomplete and it is difficult as a practical matter to probe into—and behind—the parties’ positions, especially when class counsel and defense counsel have agreed to a proposed settlement.⁶⁵ Recall that the global class settlements in both *Amchem* and *Ortiz* had been endorsed by counsel for both sides and by the respective district court judges before being unraveled by the Supreme Court for lack of adequate representation.⁶⁶ Accordingly, the fact that there was an initial finding of adequate representation does not ensure the actual existence of adequate representation for all unnamed class members.

With respect to the notion that unnamed class members should be required to mount any challenges in the original proceedings or in a direct appeal, the Supreme Court’s decision in *Phillips Petroleum Co. v. Shutts*⁶⁷ directly counters this argument. In *Shutts*, the Court expressly stated that due to the representative nature of class actions, unnamed class members are “not required to do anything.”⁶⁸ As a

63. See Note, *Developments in the Law—Class Action: Fundamental Requirements for Class Suit*, 89 HARV. L. REV. 1454, 1490–93 (1976) (noting the potential for differences within a class pertaining to “factual circumstances underlying class members’ claims” and disagreements “as to the proper theory of liability,” “the type of relief which should be sought,” “whether the class opponent ought to be held liable at all,” and even “[o]bjection to the very fact of class suit itself”).

64. See Bassett, *supra* note 54, at 982 (“[T]he ultimate responsibility for adequacy lies at the final stop: the judiciary.”); Lilly, *supra* note 28, at 1027 (“Judicial oversight of class litigation is the critical procedural check to keep class suits within the outlines of the representative model and the bounds of due process. . . . [C]lass litigation calls upon the judge to actively manage the suit in order to protect the rights of absentees.”).

65. Woolley, *supra* note 54, at 412 (“[T]rial courts may simply lack information to make an informed evaluation” (quoting Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 45–47 (1991))).

66. See *supra* notes 42–53 and accompanying text.

67. 472 U.S. 797 (1985).

68. *Id.* at 810. In a related context, the Supreme Court has held that the failure to intervene cannot bar a collateral attack. See *Martin v. Wilks*, 490 U.S. 755, 762–63 (1989)

number of courts and commentators have observed, class actions are specifically structured so as not to require unnamed class members to monitor the class proceedings.⁶⁹

[A]t its core, [requiring unnamed class members to raise all challenges during the original proceedings 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.⁷⁰

Accordingly, requiring unnamed class members to monitor the class litigation and appear as needed to raise any and all objections would run directly contrary to the class action rules and statutes.

Finally, the proffered justification that Rule 23 permits unnamed class members to take a more active role ignores the realities of class litigation. In many class lawsuits, the unnamed class members are unaware of the existence of the lawsuit.⁷¹ Even when class members have received notice of the class litigation, other practical impediments may hinder class members from taking action, such as

(rejecting the contention that a collateral attack was not permitted because the challengers had failed to intervene in the initial proceedings), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1074, 1076-77.

69. 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.”); see also William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 816-17 (2007) (“[T]he Supreme Court’s decision in *Martin v. Wilks*, [490 U.S. 755 (1989)] if not *Phillips Petroleum Co. v. Shutts*, [472 U.S. 797 (1985)], suggests that potentially affected civil litigants may simply sit on the sidelines without relinquishing any rights.”); Woolley, *supra* note 54, at 432 (“[C]urrent class action rules impose no . . . obligation [upon unnamed 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.”).

70. Susan P. Koniak, *How Like A Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1851 (2004) (footnote omitted).

71. See Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 389 (2002) (“Unnamed class members may have never met class counsel; they may have no idea that a lawsuit has been filed or that such a lawsuit was even contemplated; they may have no idea they are potential members of a class . . .”).

the failure to understand the class notice provisions, distance from the litigation's location, fear of the legal system, or lack of financial resources to retain counsel.⁷²

In sum, the practical reasons proffered for a more expansive use of the preclusion doctrines in class actions are unpersuasive.⁷³ Accordingly, at this point, I will turn to considerations of a more theoretical nature. What does it mean to adequately represent another, such that it is fair to bind that other to the court's judgment? And under what circumstances is it fair not only to bind that other to the court's judgment in the sense of precedent, but also to preclude that other from bringing her own lawsuit? These inquiries are much more interesting, and much more difficult, than they sound—and are the subject of the next Part.

III. FOUNDATIONAL CONCEPTS WITHIN THE PRECLUSION DOCTRINES

A. A Brief Summary of the Preclusion Doctrines

The preclusion doctrines include both *res judicata* (or claim preclusion) and collateral estoppel (or issue preclusion), although the term *res judicata* is often used as a synonym encompassing both doctrines.⁷⁴ *Res judicata* provides that when a valid and final personal

72. See Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41, 64–66 (2003) (discussing practical reasons for a recipient's failure to respond to a class action notice); *id.* at 67 (“Retaining counsel in the location where the class litigation is proceeding can be both difficult and expensive . . .”).

73. Both the volume and the intensity of the reaction against a more limited use of preclusion in class actions is curious in light of the relative rarity of subsequent challenges to the class judgment. See Koniak, *supra* note 70, at 1857 (“[T]here is no evidence whatsoever that absent class members are clogging the courts with collateral attacks anywhere. And they never have.” (citation omitted)); 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 . . .”); Rubenstein, *supra* note 69, at 833 (“[T]here are but a small number of reported cases challenging class action settlements, particularly small when juxtaposed with the thousands of such actions filed annually.”); Woolley, *supra* note 54, at 443 & n.268 (noting that “[n]otwithstanding the longstanding availability of collateral attack, such attacks have not been common” and reporting that between 1966 and 2000, only forty-four federal and state cases involved a collateral attack against a class action judgment or settlement based on inadequate representation).

74. FRIEDENTHAL ET AL., *supra* note 34, § 14.1, at 647 (“The terminology in this area is by no means uniform. The Restatement Second of Judgments, for example, uses ‘res judicata’ as a general term, the equivalent of former adjudication.”).

judgment is rendered in favor of a party, concepts of merger and bar preclude relitigation of the claims that were, or that could have been, litigated in the original lawsuit.⁷⁵ Collateral estoppel provides that “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”⁷⁶ In short, “[r]es judicata prevents relitigation of claims; collateral estoppel ends controversy over issues.”⁷⁷ The general purposes motivating the preclusion doctrines include finality, judicial economy, minimizing the possibility of inconsistent decisions, and avoiding duplicative and vexatious litigation.⁷⁸

In deciding when the preclusion doctrines may be applied, a concern for due process plays a pivotal role.⁷⁹ Although secondary sources commonly emphasize a general policy “that there be an end to litigation” as motivating the preclusion doctrines,⁸⁰ most courts have been cognizant that the preclusion doctrines may only be applied under circumstances that comport with constitutional due process.⁸¹ In other words, although it might promote judicial

75. *Id.* § 14.1, at 646 (“When a claimant wins a judgment, all possible grounds for the cause of action asserted by the claimant are said to be merged into that judgment and are not available for further litigation. A party who loses the first suit is said to be barred by the adverse judgment from ever raising the same cause of action again, even if that losing party can present new grounds for recovery.”).

76. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). For an historical perspective of collateral estoppel, see Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 426–34 (1983).

77. FRIEDENTHAL ET AL., *supra* note 34, § 14.2, at 651.

78. Perschbacher, *supra* note 76, at 425.

79. See *Hansberry v. Lee*, 311 U.S. 32, 37, 43–45 (1940) (focusing on due process in determining whether a prior class judgment should be accorded preclusive effect); *id.* at 45 (“[A] 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.”).

80. See, e.g., FRIEDENTHAL ET AL., *supra* note 34, § 14.3, at 653 (“The interest of the judicial system in preventing relitigation of the same dispute recognizes that judicial resources are finite and the number of cases that can be heard by the courts is limited. Every dispute that is reheard means that another will be delayed. As modern court dockets are filled to overflowing, this concern is of critical importance. Res judicata thus conserves scarce judicial resources and promotes efficiency in the interest of the public at large.”).

81. See, e.g., *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 805 (1996) (“Because petitioners received neither notice of, nor sufficient representation in, the [prior] litigation, that adjudication, as a matter of federal due process, may not bind them . . .”); *Ferrell v. West*

efficiency to preclude all subsequent lawsuits involving the same parties or the same issues, such subsequent litigation is only barred under specific circumstances aimed at protecting one's "day in court"⁸² and ensuring fundamental fairness.⁸³

B. Representation in Litigation

In deciding whether the preclusion doctrines apply to a given situation, the analysis tends to focus on the "elements" as discerned from each doctrine's definition. However, this elemental framework tends, at least in some circumstances, to obscure a more fundamental prerequisite.

In preclusion analysis, we have often been missing the forest for the trees. The typical focus on the elements of *res judicata* and collateral estoppel has obscured a broader and more analytically valuable prerequisite to the preclusion doctrines: representation in litigation. Focusing on this broader prerequisite brings a fresh perspective to how we approach the preclusion doctrines generally, and exposes some largely unexamined assumptions. It is to this broader prerequisite of representation in litigation, and the accompanying underlying assumptions, that I next turn.

Bend Mut. Ins. Co., 393 F.3d 786, 793 (8th Cir. 2005) (under Wisconsin law, "the litigant against whom issue preclusion is asserted [must have been] in privity with, or had sufficient identity of interests with, a party to the prior proceeding, such that issue preclusion would comport with due process."); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998) ("Before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consistent with due process . . ."); *Foster v. St. Jude Medical, Inc.*, 229 F.R.D. 599, 604 (D. Minn. 2005) ("Because the judgment in a class action has claim preclusion (*res judicata*) implications . . . for the absent class members, due process requires that the interests of absent members be adequately represented by the named class members." (alteration in original)); *Morgan v. Ward*, 699 F. Supp. 1025, 1034 (N.D.N.Y. 1988) (limitations on the preclusive effect of a class action "are necessitated . . . by the due process problems raised when the judgment preclusion doctrines are applied to class members who were unaware that their membership in the class could foreclose subsequent actions to recover money damages").

82. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1035 (2003) ("[C]oncern over how the expansion of judgments might affect a litigant's right to a 'day in court' is a consistent theme in the case law and literature of preclusion.").

83. Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 348 (1948) ("The final justification of the usual rule of *res judicata*, the saving in court time, is peculiarly unconvincing. Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. Decision solely in terms of the convenience of the court approaches the theory that the individual exists for the state.").

Notice and an opportunity to be heard lie at the foundation of due process,⁸⁴ but in making the determination as to whether a subsequent lawsuit is barred by the preclusion doctrines, these requirements are set within the context of representation in litigation. We can make this assertion with great confidence both because the practical purpose of the preclusion doctrines is to determine whom is bound by a prior “judgment,” and because the elements of the preclusion doctrines include discussions of “parties,” issues “actually litigated,” and “valid and final judgments.”⁸⁵ Thus, although notice and an opportunity to be heard absolutely are central and crucial to the due process calculus, the application of the preclusion doctrines requires more.

Only persons who were parties or who are in privity with persons who were parties in the first action may be bound [by the preclusion doctrines]. Our notions of due process require this result because individuals who are tied to a judgment in a suit in which they had no opportunity to be heard rightly could claim that there had been a denial of due process. Indeed, in order to ensure that each person has a full opportunity to be heard on issues in which he has an interest, it also is held that issue preclusion may be asserted only against someone who was an adverse party in the prior action. . . . By requiring that an adversarial relationship be found between parties before issue preclusion may be used, the courts ensure that the parties specifically and knowingly litigated the issues in controversy.⁸⁶

On one level, this broader and underlying prerequisite of representation in litigation may seem obvious due to the definitions and elements of *res judicata* and collateral estoppel. Even if arguably obvious, however, its significance has continually been understated, if not outright ignored. When is it that one has been sufficiently “represented” by another so that he or she should be bound by the

84. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (“The core of due process is the right to notice and a meaningful opportunity to be heard.”); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962) (“[T]he fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” (quoting *Anderson Nat’l Bank v. Lockett*, 321 U.S. 233, 246 (1944))).

85. See *supra* notes 75–76 and accompanying text (defining *res judicata* and collateral estoppel).

86. FRIEDENTHAL ET AL., *supra* note 34, § 14.13, at 718–19 (footnotes and citations omitted).

result in that other's litigation? And, in what I will describe as a distinctive and next step, when is it that one has been sufficiently "represented" by another so that he or she not only should be bound by the result in that other's litigation, but also should be precluded from bringing suit?

1. Traditional concepts of representation

"Representation" has a broad range of meanings, even when limited to the legal arena. Not only do we speak of congressional representation⁸⁷ and legal representation,⁸⁸ but we also speak of issues within representation, such as ineffective assistance of counsel,⁸⁹ the formation of the attorney-client relationship,⁹⁰ and principles of agency.⁹¹ As a general matter, to "represent" is defined as "to act or stand in place of; be an agent, proxy, or substitute for";⁹² and is also defined as "to be the equivalent of."⁹³ In the legal context, to "represent" is defined as "[t]o represent a person is to stand in his place; to speak or act with authority on behalf of such person; to supply his place; to act as his substitute or agent."⁹⁴

In traditional civil litigation, when a plaintiff sues a defendant, the plaintiff selects an attorney or elects to proceed in pro se. In either instance, the plaintiff has directly chosen her representative—either the lawyer she picked, or herself. Due to the directness and intentionality of that choice, we have little pause about ascribing a

87. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (congressional representation must be based on population as nearly as is practicable).

88. See, e.g., MODEL RULES OF PROF'L CONDUCT, Rule 1.2 cmt ("[T]he client [has] the ultimate authority to determine the purposes to be served by legal representation . . .").

89. See, e.g., Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1653 (2008) ("Claims alleging ineffective assistance of counsel represent the preferred conduit through which a defendant may attack a failure by counsel to adequately investigate or competently present mitigation evidence at trial. Ineffective assistance claims derive from the Sixth Amendment, which confers upon criminal defendants a right to counsel.").

90. See, e.g., Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113, 1127 (2007) ("[T]he Model Rules do not expressly address the formation of attorney-client relationships . . .").

91. See, e.g., Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1016 (1997) (lawyers are governed by principles of agency law).

92. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1216 (4th ed. 1999).

93. *Id.*

94. BLACK'S LAW DICTIONARY 1169 (5th ed. 1979).

form of agency to the attorney-client relationship.⁹⁵ The attorney represents the interests of the client, and we assume that the attorney follows the ethical rules by consulting and communicating with the client and providing competent representation.⁹⁶ If the client is unhappy with how the lawyer is handling the representation, in most instances the client can fire that lawyer and hire another.⁹⁷ Accordingly, when a litigant in the foregoing circumstances litigates her claims to a valid and final judgment and loses, we have little hesitation about barring her from attempting a second bite at the apple by bringing a subsequent identical suit.⁹⁸

Similarly, an unsuccessful litigant may not hire an agent as her representative to relitigate the case in an attempt to obtain a different outcome.⁹⁹ In such an instance, the representative nature is direct—the litigant herself selected the agent and hired the agent for that specific purpose. To allow the agent to proceed under such circumstances would permit the unsuccessful original litigant to try her lawsuit twice. Again, we have no intellectual struggle with barring an agent from relitigating a case already tried to a valid and final judgment.

Indeed, in preclusion analysis, the significance of representation in litigation can be seen in the emphasis on the status of the litigants as parties or nonparties. The general rule is that the preclusion doctrines apply to those who were parties in the first lawsuit, and do not apply to those who were nonparties in the first lawsuit.¹⁰⁰ As a result of these general rules, “the ability to bind a nonparty to a

95. See Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 965 (1997) (noting that the model of “the attorney-client relationship as an agency contract” is “standard in the literature”).

96. See ABA MODEL RULES OF PROF’L CONDUCT, Rules 1.1 (competence), 1.2 (allocation of authority between lawyer and client), and 1.4 (communication).

97. See *id.* Rule 1.16 (terminating representation).

98. See, e.g., *Medina v. INS*, 993 F.2d 499, 504 (1993) (finding that *res judicata* precluded a subsequent lawsuit by the INS against the same party on an issue previously litigated to a judgment). See generally Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 306 (1979) (“It does not seem unfair to say, for example, that if Jones sues Acme Appliances for selling him a defective refrigerator and loses, he is foreclosed from suing later on the same set of facts.”).

99. See *Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 620, 623 (1926); 18A WRIGHT ET AL., *supra* note 10, § 4449, at 335, § 4454, at 433–34.

100. FRIEDENTHAL ET AL., *supra* note 34, § 14.13, at 718–19 (“Only persons who were parties or who are in privity with persons who were parties in the first action may be bound.” (footnote omitted)).

judgment typically is tied to a determination that the nonparty is in privity with a party.”¹⁰¹ Historically, privity had a very narrow, limited reach. “In its initial formulation, privity connected only those persons with successive property interests; it thus prevented a grantee from relitigating an issue already settled as to the grantor.”¹⁰² Although the concept of privity has expanded over time, privity originally carried a very limited meaning that required a direct relationship between the parties; a third party did not come within such a relationship.

2. *Nonparty preclusion exceptions*

In fact, the determining factor in applying the preclusion doctrines to those who were not parties to the first lawsuit turns on a consideration of representation in litigation. The U.S. Supreme Court has identified six exceptions to the general rule against nonparty preclusion.¹⁰³ One exception involves representative suits, including the class action exception.¹⁰⁴ The remaining five exceptions are remarkably similar:

First, a person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement.¹⁰⁵

Second, . . . a variety of pre-existing ‘substantive legal relationship[s]’ between the person to be bound and a party to the judgment, [such as] preceding and succeeding owners of property, bailee and bailor, and assignee and assignor” justifies nonparty preclusion.¹⁰⁶

101. *Id.* at 719.

102. Jack L. Johnson, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty’s Claim*, 68 TUL. L. REV. 1303, 1316 (1994) (footnote omitted). Similarly, privity of contract originally limited recovery to the contracting parties. See *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (Ex. 1842) (holding that an injured passenger could not sue the individual responsible for maintaining the coach, because that individual owed a duty only to the party with whom he had contracted, and stating that, “[t]he only safe rule is to confine the right to recover to those who enter into the contract”).

103. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2172–73 (2008).

104. The exception for class actions is discussed *supra* notes 32–40 and accompanying text, and *infra* notes 136–41 and accompanying text.

105. *Taylor*, 128 S. Ct. at 2172 (alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 40 (1980)).

106. *Id.*

[Third], a nonparty is bound by a judgment if she ‘assume[d] control’ over the litigation in which that judgment was rendered. Because such a person has had ‘the opportunity to present proofs and argument,’ he has already ‘had his day in court’ even though he was not a formal party to the litigation.¹⁰⁷

[Fourth], a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication. And although our decisions have not addressed the issue directly, it also seems clear that preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by the judgment.¹⁰⁸

[Fifth], in certain circumstances a special statutory scheme may ‘expressly foreclos[e] successive litigation by nonlitigants . . . if the scheme is otherwise consistent with due process [such as] bankruptcy and probate proceedings.’¹⁰⁹

Thus, there are some limited instances where a nonparty is treated as if she had been a party to the first lawsuit, with the result that the nonparty will be bound by the outcome and precluded from filing a subsequent lawsuit.

All of the above situations—in which a nonparty to the first lawsuit may nevertheless be barred from bringing her own subsequent lawsuit—focus on either relationship-forming actions undertaken directly by the parties themselves or a preexisting legal relationship between the parties. These exceptions to the general rule against nonparty preclusion, for all practical purposes, require not only that the *interests* of the nonparty were represented and litigated in the first lawsuit, but also that the nonparty *herself* was directly represented and litigated in the first lawsuit. The overlap of “represented” and “litigated” is important—just one or the other is not enough. Thus, in nonclass litigation, the use of nonparty preclusion requires not only representation in litigation, but a connection sufficient to constitute direct representation in litigation. In other words, representation in litigation need not be absent

107. *Id.* at 2173 (citations omitted).

108. *Id.* (citation omitted).

109. *Id.*

altogether to prevent application of the preclusion doctrines—it need only be insufficiently direct.

If individuals (and entities) could only be bound when they were parties to the first lawsuit or in privity with a party to the first lawsuit, the preclusion doctrines would be much easier to apply and would cause far less consternation. But this is not the case. Not only do we authorize the use of preclusion in more attenuated circumstances, but we also bind others to judgments resulting from lawsuits with which they had no connection, much less representation, on a regular and ongoing basis.

3. *The representation outlier: stare decisis*

Despite the necessity for representation in litigation as a prerequisite to res judicata and collateral estoppel, individuals and entities are bound by prior judgments all the time—without any showing of direct representation—under the doctrine of stare decisis.¹¹⁰ Stare decisis is often mentioned briefly at the outset of discussions of the preclusion doctrines, along with a similarly brief mention of law of the case.¹¹¹ Typically, any mention of stare decisis and law of the case is included primarily to distinguish them from the traditional preclusion doctrines of res judicata and collateral estoppel.¹¹² In short, stare decisis is precedent¹¹³—one of the bedrock

110. See Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 651–52 (1992) (“The personal stake requirement is said to assure that the litigant will adequately represent the interests of nonlitigants who will be bound by the stare decisis effect of the judgment.”).

111. FRIEDENTHAL ET AL., *supra* note 34, § 14.1, at 648–50. “Law of the case refers to the principle that issues once decided in a case that recur in later stages of the same case are not to be redetermined.” *Id.* at 650.

112. See, e.g., *id.* § 14.1, at 648 (“Before turning to an examination of the workings and scope of issue and claim preclusion, it is important to distinguish these doctrines from [the] related, but different, concepts [of] stare decisis . . . and law of the case.” (footnote omitted)).

113. See MARGARET Z. JOHNS & REX R. PERSCHBACHER, *THE UNITED STATES LEGAL SYSTEM: AN INTRODUCTION* 92 (2002) (explaining that stare decisis means “to stand by precedents and not to disturb settled points”); Note, *Stare Decisis*, 20 YALE L.J. 221, 223 (1911) (“The rule stare decisis means generally that when a point has once been settled by judicial decision, it forms a precedent for the guidance of courts in similar cases.”). For a history of the use of precedent, see Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1190–239 (2007); Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771.

foundational principles of our legal system, and perhaps one of the least challenged.¹¹⁴

The doctrine of stare decisis (or precedent—I will use the terms interchangeably) “dictate[s] that like cases should be decided alike by courts in a single jurisdiction.”¹¹⁵ The quest for consistency reflected in stare decisis is largely accepted without reflection, despite the breadth of its reach and the arguably unfair nature of its application.¹¹⁶ This passive acceptance of stare decisis is somewhat intriguing, because stare decisis is applied far more often and therefore carries far greater impact than the preclusion doctrines.¹¹⁷ Yet the preclusion doctrines have stimulated much more analysis, many more writings, and much greater hand-wringing, both by commentators and courts.

Our rights are often determined by other litigants due to these doctrines of precedent and stare decisis.¹¹⁸ The issue may be one that is significant, such as the right to abortion or the right to free speech. Or the issue may seem more minor, such as the interpretation of a specific clause within an insurance policy, or the

114. See Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence*, 81 N.Y.U. L. REV. 1137, 1141 (2006) (“Stare decisis is a well-established and widely accepted core principle of American jurisprudence.”); see also Barrett, *supra* note 82, at 1028–29 (“[Although c]ourts and scholars have given the topic of stare decisis serious attention[,] . . . with very few exceptions, they have not paid attention to the preclusive effect of precedent on individual litigants, much less to whether this preclusion implicates due process.” (footnotes omitted)). As Professor Barrett has noted, the legal literature pertaining to stare decisis has addressed the kinds of errors that justify overturning precedent; the efficiency of stare decisis; whether stare decisis is a constitutional doctrine or a matter of judicial discretion; whether Congress can abrogate stare decisis by statute; the reliance interests that justify retaining erroneous precedent; and the degree of flexibility that should exist in stare decisis. Barrett, *supra* note 82, at 1011–12.

115. FRIEDENTHAL ET AL., *supra* note 34, § 14.1, at 648; see BLACK’S LAW DICTIONARY 1443 (8th ed. 2004) (defining “stare decisis” as “to stand by things decided”).

116. See Barrett, *supra* note 82, at 1041 (noting that stare decisis is “broad in impact, reaching strangers to the earlier litigation”).

117. See *id.* at 1034–35 (noting that stare decisis “reaches a group as large as the jurisdiction of the deciding court,” whereas preclusion acts on “a smaller scale”).

118. See Brilmayer, *supra* note 98, at 307. Professor Brilmayer observes:

In general, of course, the impact of stare decisis is less dramatic than that of res judicata. It is not quite as serious to tell Smith that a ten-year-old precedent resolves the determinative legal issue. Since the factual determinations from that case would not be binding, Smith could try to show that the facts—and therefore the legal issues—of that precedent are somewhat different, and therefore not controlling. . . . If he cannot do this, however, because the situations are “indistinguishable,” he will be bound.

Id.

interpretation of a condominium complex's conditions, covenants, and restrictions. Or the issue may only have the potential to become relevant to a particular individual in the future, if that individual should face similar circumstances, such as the appropriate standard of proof in a particular type of case. In each instance, assuming that the case is decided by a jurisdictionally relevant court, the doctrine of precedent renders that judgment binding upon others who face the same or related issues in the future.¹¹⁹

Precedent binds future litigants even though those future litigants were not afforded the opportunity to select the representative in the original, precedent-setting lawsuit; were not provided with notice of that original litigation; and were not afforded the opportunity to participate in that original litigation.¹²⁰ Under the doctrines of precedent and stare decisis, despite the absence of the traditional due process protections of notice, opportunity to be heard, and representation in litigation, the outcome of the original case ordinarily will control subsequent litigation unless a basis for distinguishing the subsequent case can be demonstrated.¹²¹

Thus, under the doctrine of precedent, subsequent litigants are bound by a prior judgment even though the original litigant took no particular steps to act as a representative on behalf of those who, now or in the future, might have the same claim. The use of the term "bound" in explaining the effects of both stare decisis and the preclusion doctrines is quite appropriate, because the courts have long recognized that the ultimate result of these doctrines often is the same.¹²² The one distinction between the two doctrines is that

119. See William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 57–58 (stating that stare decisis has both vertical and horizontal components and thus encompasses both the principle that "lower courts [must] apply the decisions of the higher courts to cases presenting indistinguishable factual scenarios," as well as "that a court must follow its own precedents").

120. See *EEOC v. Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986) ("We have found no case . . . that supports [the] contention that a weak or ineffective presentation in a prior case deprives the ruling of precedential effect."); see also Barrett, *supra* note 82, at 1038 ("From the perspective of a litigant, stare decisis and issue preclusion overlap in effect, yet diverge in due process protection.").

121. See Barrett, *supra* note 82, at 1012 ("[S]tare decisis often functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases.").

122. See, e.g., *People ex rel. Watchtower Bible Soc'y v. Haring*, 146 N.Y.S.2d 151, 158 (N.Y. App. Div. 1955). ("It is argued by the respondents that the refusal to apply the doctrine

stare decisis does not bar a subsequent action.¹²³ Nonetheless, the precedent created by others has the ability to control the case's outcome.¹²⁴

Although precedent operates in a manner that does indeed potentially bind future litigants,¹²⁵ precedent focuses on issues that have previously been litigated—and renders the first litigant a “representative” for future cases. However, subsequent litigants who were not parties to the first lawsuit are permitted to file their own lawsuits—the lawsuits of subsequent litigants are not barred, and they are permitted to (at least attempt to) distinguish their lawsuits from prior precedents.¹²⁶ However, this doesn't explain why we focus so intently on the preclusion doctrines in specific contexts, while we don't even think about it in others. And this is particularly curious in

of res judicata or collateral estoppel to questions of the type here under consideration will result in putting the public authorities to the expense and trouble of needless relitigation of issues which were once decided and which have not been affected by any change of facts. But the doctrine of stare decisis will be applicable even if it is held that the doctrine of res judicata is inapplicable. The essential difference between stare decisis and res judicata is, of course, that the stare decisis doctrine is an elastic one allowing the litigant to challenge the soundness of an outstanding decision whereas, under the doctrine of res judicata, the decision is binding even though it is plainly wrong.”)

123. See Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 379 n.123 (1988) (“Res judicata forecloses all argument and all evidence. Stare decisis affects only issues of law and even then permits resort to a court parallel with or above that rendering the first decision.”).

124. See Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1197 (1982) (“In much litigation involving private plaintiffs, . . . the parties before the court will not adequately represent the views of all individuals potentially affected by the judgment. To be sure, those individuals, unlike class members, will not be bound directly by the court's decree and can challenge application of a prior decision to their own circumstances. But given the force of stare decisis, the practical consequences for unrepresented constituencies are often the same, whether or not they are part of a certified class.”); see also Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 1017 n.186 (1986) (“[E]ven without binding effect, stare decisis can determine the outcome of cases.”).

125. A number of commentators have suggested that precedent is not burdensome to litigants because courts will simply distinguish worthy cases from undesirable precedents. See, e.g., Motomura, *supra* note 124, at 1017 n.186 (“Stare decisis is not binding because cases can always be distinguished.”). However, despite attempts to belittle the force of precedent, “[t]he undesirability of having an adverse precedent on the books is unquestionable.” Lee, *supra* note 110, at 652; see also Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 722–23 (2001) (“[B]ecause of the binding force given to circuit court precedents, early decisions rendered in . . . imperfect settings may and often will establish how all future cases raising the particular legal issue are litigated and decided.”).

126. See Lee, *supra* note 110, at 652 (“[N]onparties merely face the obstacle of stare decisis, which will not apply if they can distinguish themselves from the prior case . . .”).

light of the unknown risks at play in both litigation generally and preclusion specifically. We are unable to predict the future, and some effects of litigation are unknown. Was it wise to file the lawsuit in the first instance? Which strategies are good choices? Is my lawyer a good one? Any particular litigant can make poor choices that will have an impact on the ultimate outcome of the case, but we ascribe that risk to the individual litigant. If the litigant chose an incompetent lawyer, or chose a lawyer who made some bad choices, or chose to pursue a claim that was flawed, we hold the litigant to the outcome because she had those choices and made those choices. And perhaps that seems fair. But, due to our system of precedent, we also continue to carry the impact of those choices into the future—others will be bound by the precedent created by this original litigant’s case, even though they had no input into the choices made.¹²⁷ And aside from the old adage that “hard cases make bad law,” we shrug.¹²⁸

The traditional justification for the doctrines of precedent and stare decisis, of course, in addition to consistency and the undesirable alternative of approaching each lawsuit anew, is that precedent accords predictability by enabling individuals and entities to tailor their behavior according to the standards announced in the case law.¹²⁹ None of these justifications rankles our intellectual scrutiny—indeed, all of these justifications seem reasonable and desirable. The interesting and largely unexamined point goes to the missing

127. See Barrett, *supra* note 82, at 1017 (“[P]recedent . . . operate[s] to preclude litigants in the mainstream of cases. Once a court decides an issue in a published opinion, a later litigant may debate whether the earlier case applies, but she typically may not debate whether the court correctly decided it. . . . First-in-time litigants usually receive the only opportunity to air arguments on the merits of a legal issue.”).

128. See Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 94 (2007) (“Exposure to bad law created by prior litigants is part of the common law system. Even enforced to the hilt, justiciability doctrines leave highly interested parties exposed to bad law created by strangers who may be only trivially interested, or who may be no more than busybodies who deliberately got themselves injured for the purposes of litigation.”).

129. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“Stare decisis . . . promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”); Consovoy, *supra* note 119, at 54–55, 60–64 (explaining that the functions of stare decisis include efficiency, judicial economy, reliance, predictability, and legitimizing judicial institutions); Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1305 (2008) (noting that the justifications for stare decisis include stability, guidance, and “sav[ing] time and effort” so that issues are not “up for grabs anew in every case”).

component of representation, and why we do not find it troubling that these unknown litigants in unknown lawsuits are creating binding precedent.¹³⁰ After all, at least in some circumstances, the fact that precedent does not formally bar a subsequent lawsuit affords little solace, such as when precedent forms the basis for granting summary judgment to the opposing party.¹³¹

4. The distinctive inconsistency of preclusion in class actions

The “representation in litigation” issue within the operation and intersection of precedent and preclusion becomes even more interesting—and inconsistent—when applied to class, rather than individual litigation. Recall that in individual litigation, the individual typically retains her own lawyer as her agent and retains some measure of control over both her lawyer and the course of the litigation.¹³² The outcome of the litigation is binding on the litigating parties, and claim preclusion bars relitigation of the claims.¹³³ With respect to nonparties—those who were not the named parties in the first lawsuit—the outcome of the litigation creates precedent, so it is possible that the outcome will dictate the result of a subsequent case.¹³⁴ However, nonparties (other than those who consented, or who essentially were parties-in-fact by virtue of controlling the first lawsuit or using a proxy) cannot generally use

130. It appears that a nonparty’s ability to pursue her own subsequent lawsuit—that is, the lack of *res judicata* effect—serves as the sole justification for *stare decisis*’s lack of due process protections. See Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 *BUFF L. REV.* 433, 446 (1959) (“It is an anomalous but accepted characteristic of our system that a decision on the law effectively binds non-parties without upsetting our assurance that due process has been done and without the court’s feeling any need to assure adequate representation of a legal point.”).

131. See Lea Brilmayer, *A Reply*, 93 *HARV. L. REV.* 1727, 1728 (1980) (“Neither the cliché that any two cases are potentially distinguishable nor the characterization of some precedents as formative or tentative solves the problem. If taken literally, these seem to suggest that it would not make any difference whether adverse precedents were established. Regardless of whether one perceives the proper role of *stare decisis* as strong or weak, in the real world of litigation, precedents do have some binding force.”).

132. Moreover, in nonclass litigation, the individual has the availability of a potential legal malpractice action against her attorney for the failure to protect her interests, which provides an additional protection for the individual litigant. However, there is no malpractice backstop to protect absent class members in class litigation.

133. See *supra* notes 86, 96–100 and accompanying text.

134. See *supra* notes 110, 118–21 and accompanying text.

the outcome to preclude a subsequent case entirely, because everyone is entitled to his or her day in court.¹³⁵

The remaining nonparty exception encompasses representative suits, including class actions as well as litigation filed by a guardian, trustee, or other fiduciary.¹³⁶ The class action is the most attenuated of all the nonparty exceptions and is distinctive even within the representative suit exception. Some of these distinctions have been noted by Professor Lilly, including, in a nonclass representative suit, the direct relationship between the represented individual and the fiduciary.

[In p]rototypical representative suits, [such as those by trustees and guardians,]. . . . [t]he representative usually sues not on behalf of herself, but only on behalf of the represented party. . . . Moreover, the representative usually is not bound personally by the judgment issued for or against her charge because she asserts no personal claim or defense in the action. Next, most representative relationships originate in preexisting relationships between the representatives and the represented. The presence of such relationships suggests common interests and, perhaps in many instances, prelitigation knowledge that is mutually shared. Furthermore, the nature of these relationships is, broadly speaking, consensual.¹³⁷

Thus, such “prototypical representative suits” continue to closely resemble the other nonparty exceptions and reflect a direct representation in litigation. Class actions, however, are distinctively different.

In a class action, the “parties” are the named class representatives (typically plaintiffs); the remaining class members are unnamed and are not considered formal parties to the lawsuit.¹³⁸ The unnamed

135. *See supra* notes 101–03 and accompanying text.

136. *See Taylor v. Sturgell*, 128 S. Ct. 2161, 2172–73 (2008) (“[I]n certain limited circumstances, a nonparty may be bound by a judgment because she was ‘adequately represented by someone with the same interests who [wa]s a party’ to the suit. Representative suits with preclusive effect on nonparties include properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries.” (second alteration in original) (citations omitted)).

137. Lilly, *supra* note 28, at 1019–20.

138. *See Taylor*, 128 S. Ct. at 2172 (unnamed class members are nonparties, but can be bound by a class judgment by a named class representative with the same interests who provides adequate representation); Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1074, 1076–77 (1991); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (same), *superseded by statute on other grounds*.

class members play no role in selecting class counsel, and have no power to fire class counsel if they are dissatisfied with counsel's work.¹³⁹ Unnamed class members have no control over the strategy or the development of the litigation.¹⁴⁰ Yet, if the unnamed class members were adequately represented by the class representatives and class counsel, the class judgment will both bind the class members and preclude them from filing subsequent lawsuits involving the same claims.

The class action exception to the general rule against nonparty preclusion is different from the other five preclusion exceptions—and even from the rest of the representative suit exception—in several important respects. First, the class action preclusion exception is the only exception that is based on a procedural joinder device rather than focusing on either relationship-forming actions undertaken directly by the parties themselves or a preexisting legal relationship between the parties. This distinction is significant. When a class action lawsuit is filed on behalf of all individuals who purchased a particular product, there is typically no relationship among the class members—there was no contractual agreement to be bound by the outcome; there was no preexisting legal relationship; the class members did not assume control over the litigation. The only tie connecting the class members is the product purchase. This “tie” more closely resembles that found in traditional, non-preclusion-exception litigation, where a lawsuit by one individual binds other individuals in similar circumstances in the future through the doctrines of precedent and *stare decisis*. In such non-preclusion-exception litigation, there is no relationship-forming action and no preexisting legal relationship; the nonparty exercised no control in the first lawsuit; indeed, the nonparty typically was completely unaware of the prior litigant and the prior litigation. The only

139. See *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077–79 (2d Cir. 1995) (decision to discharge class counsel rests with the court); see also Bassett, *supra* note 72, at 71 (noting that absent class members cannot fire class counsel; only the court can discharge class counsel).

140. See Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1586 (2007) (“Not only is the litigant’s choice of timing and forum controlled by external forces, but his control of the actual conduct of the litigation is also severely restricted. . . . Even if an absent class member wishes to intervene in the action, his ability to make strategic choices concerning the control of the litigation is usually so diluted by the influence and control of other named parties as to be almost non-existent.”).

connection between the original party and the subsequent nonparty is that they faced the same legal issue. However, when an individual is bound only by precedent, she may still file a lawsuit and attempt to distinguish her situation from the existing precedent. In contrast, when the individual comes within a class definition in a class judgment, that class judgment bars her from bringing an individual lawsuit in an attempt to distinguish her own individual circumstances from the class judgment precedent. Indeed, the current preclusive effect of class judgments often reaches far beyond traditional notions of precedent, not only because class judgments preclude class members from pursuing their own individual lawsuits, but also because such preclusion potentially can operate under circumstances that, in individual litigation, would not even constitute relevant precedent. For example, if an individual lawsuit is filed in Tuscaloosa, Alabama, the result of that lawsuit, as a matter of precedent, would likely have a narrow geographical reach. However, if that same lawsuit is filed as a class action, the result of that class lawsuit has the potential to bind class members within a much broader, and perhaps even a nationwide, geographical reach.

Second, and building on the first, in the class action preclusion exception, there is no direct and actual relationship between the class representatives and the absent class members. Neither class counsel nor the named class representative is selected by the rest of the class. Instead, the requirement of “adequate representation” is substituted for the lack of an actual relationship.¹⁴¹ The distinctive nature of the class action preclusion exception is evident from the Supreme Court’s refusal to broaden the adequate representation exception to preclusion. In the Supreme Court’s recent *Taylor v. Sturgell* decision, the Court disapproved a preclusion exception for “virtual representation” based on an expansion of the “adequate representation” exception. Three circuits—the Eighth, Ninth, and D.C. Circuits—had developed multi-factor tests for a virtual representation exception.¹⁴² Four circuits—the Fourth, Fifth, Sixth, and Eleventh—had approved a virtual representation exception, but only when a legal relationship existed between the purported

141. *Taylor*, 128 S. Ct. at 2172 (“[I]n certain limited circumstances, a nonparty may be bound by a judgment because she was ‘adequately represented by someone with the same interests who [wa]s a party’ to the suit. Representative suits with preclusive effect on nonparties include properly conducted class actions” (alteration in original) (citations omitted)).

142. *Id.* at 2169–70 & n.3.

representative and the nonparty who would be bound.¹⁴³ And one circuit—the Seventh Circuit—had addressed, but had refused to endorse, a virtual representation exception.¹⁴⁴

The Supreme Court’s refusal to approve a virtual representation exception—even when a legal relationship existed between the representative and the nonparty—suggests the uniqueness and the significance of the class action exception. After all, at least in some respects, the virtual representation exception provided far greater litigant protection. The D.C. Circuit’s virtual representation test, which was the test applied in the underlying *Taylor v. Sturgell* proceedings, required both (1) identity of interests and (2) adequate representation, and then further required one of the following three factors: (1) “a close relationship between the present party and his putative representative,” (2) “substantial participation by the present party in the first case,” or (3) “tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment.”¹⁴⁵ Yet, the Supreme Court rejected the virtual representation exception as an insufficient basis for preclusion. What is it that makes being “represented” in an individual litigation context, where there is greater direct control, appropriate only for the creation of binding precedent, but not for preclusive effect—whereas a class judgment, where there is almost no direct control, both binds others and carries preclusive effect?

IV. CLASS ACTION PRECLUSION THEORY

The preclusion doctrines do not fit well theoretically as applied to class actions. Although the underlying purposes of the preclusion doctrines—finality, judicial economy, and avoiding duplicative or vexatious litigation—generally support their application, this is not a case where the ends justify the means. In terms of due process, in terms of ensuring one’s “day in court,” in terms of fundamental fairness, and in terms of representation in litigation, preclusion in the class action context consistently comes up short.

For unnamed class members, every purported due process protection is a substituted or constructive form of due process rather than a direct protection. In part, of course, this substituted or

143. *Id.* at 2170 n.3.

144. *Id.*

145. *Id.* at 2169–70.

constructive due process is a result of the particular nature of class actions, in which unnamed class members are not expected to take an active participatory role in the litigation. However, the consistently more attenuated due process protections are potentially problematic. After all, a class judgment or settlement, if given preclusive effect, means the class member has had no “day in court”; she is bound to the class judgment, and she is barred from bringing her own individual lawsuit. Recall that we do not typically do this to nonparties—as a general matter, nonparties are bound to a prior judgment only through the doctrine of precedent, and preclusion will not apply. The limited circumstances in which preclusion applies to a nonparty are consent, or proxy or alter ego situations where the nonparty directly controlled the original litigation.¹⁴⁶ Recall further that in nonclass litigation the Supreme Court has refused to authorize preclusion on a virtual representation theory that would have accorded far greater assurances of genuine due process protections by requiring adequate representation, identity of interests, and a close relationship or actual control.¹⁴⁷

A. Due Process Issues in Class Actions

The due process protections ostensibly accorded to unnamed class members are adequate representation, notice, an opportunity to be heard, and an opportunity to opt out, all of which are incorporated into Federal Rule 23.¹⁴⁸ Of these four protections, only adequate representation is a prerequisite for all three class action types. The remaining three protections are required in (b)(3) class actions but, pursuant to Federal Rule 23, are optional in (b)(1) and (b)(2) class actions and left to the court’s discretion. Adequate representation, as explained earlier,¹⁴⁹ is filtered through the class representatives and class counsel, none of whom were selected by, or perhaps even known to, the unnamed class members, thus creating a highly indirect form of ostensible representation. Moreover, the adequacy of the representation is often evaluated by reference to a few relatively superficial or incomplete factors, such as conflicts of

146. *See supra* notes 105–09 and accompanying text.

147. *See supra* notes 143–47 and accompanying text.

148. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985); *see also* FED. R. CIV. P. 23.

149. *See supra* note 64 and accompanying text.

interest and counsel's experience—and even then, the scrutiny afforded can be woefully insufficient.¹⁵⁰

The remaining, optional, protections are similarly less than ideal. Notice is only mandated in (b)(3) actions, and even then only after the class has been certified.¹⁵¹ Accordingly, from the very outset, the ability of an unnamed class member to attempt a significant or meaningful role is impaired. Moreover, unlike nonclass litigation in which notice by publication is relatively uncommon, the nature of the claims in many class actions often renders notice by publication necessary, despite its notorious ineffectiveness.

The opportunity to be heard is dependent in the first instance on effective notice.¹⁵² Even assuming actual and effective notice, the burden of exercising the right to be heard often itself suggests a lack of actual due process. Being heard may require personal travel to, or retaining counsel in, a distant location where the class member's contacts would be insufficient to confer personal jurisdiction in a nonclass lawsuit.

Finally, the opportunity to opt out—again dependent on effective notice¹⁵³—by its nature requires exactly the opposite of that required in nonclass litigation: the unnamed class member must take specific affirmative steps within a specified period of time to withdraw from litigation that she did not institute and did not control, and which typically was filed without her knowledge, without her participation, and without her consent.

In sum, the due process protections accorded to unnamed class members are limited, and their attenuated nature creates a striking contrast to the more vigilant protections provided in nonclass litigation. Generally, when the representation prerequisite in litigation is insufficient, we accord only precedential value to a prior judgment, not preclusive effect. In class actions, although unnamed class members are represented in the class litigation in a formal sense by the class representatives and class counsel, the direct

150. *See generally* Bassett, *supra* note 54.

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

152. *See id.* at 23(c)(2)(B) (mandating notice only in (b)(3) actions, and, within that notice, requiring a statement “that a class member may enter an appearance through an attorney if the member so desires”).

153. *See id.* (requiring that the notice in a (b)(3) action contain a statement “that the court will exclude from the class any member who requests exclusion” as well as “the time and manner for requesting exclusion”).

representation required in nonclass litigation is absent. Unnamed class members do not select class counsel or the class representatives, and do not direct or control the class litigation—they are, as their name implies, “absent” in a very real sense.

In one respect, of course, the absence of direct representation in class action litigation is unremarkable—class actions were developed for the specific purpose of permitting the unnamed class members to take a largely inactive role. The indirect and attenuated representation of unnamed class members makes a class judgment wholly appropriate for its precedential value, but provides a highly questionable basis for full preclusion as applied to unnamed class members.¹⁵⁴

As a procedural device, class actions would likely suffer an immediate decline in utility if a class judgment carried only precedential value without preclusive effect. Potential class members might watch from the sidelines while similar cases were being litigated, waiting to file their own lawsuits (or even subsequent class actions) only after someone else had pursued the claim successfully. The precedent created by other lawsuits, both favorable and unfavorable, would have value, certainly, by potentially narrowing the issues and available challenges. According only precedential value would likely have no impact on some class actions, particularly those where the amount at stake was sufficiently small that the individuals

154. Some commentators have analogized class actions to administrative proceedings. *See, e.g.*, EDWARD L. RUBIN & MALCOLM M. FEELEY, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 1–4, 20–25 (1998) (arguing that the judicial handling of public-interest class actions and constitutional law should borrow ideas from the judicial handling of administrative law); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *YALE L.J.* 27, 94–96 (2003) (noting parallels between class actions and administrative law, but also noting that there are “important differences between the two”); Nagareda, *supra* note 54, 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.”). Professor Nagareda’s proposal would deny an individualized opportunity to be heard in class actions and would substitute a “[r]easoned explanation” for the settlement reached, relying on “market discipline” to subject defective settlements “to criticism by potential competitors within the plaintiffs’ bar.” *Id.* at 359, 363, 365. Professor Nagareda stated that he agrees with commentators who have called for limits on the ability to collaterally attack class judgments. *Id.* at 366. However, even if Professor Nagareda’s analogy of class actions to administrative proceedings were theoretically valid, as a general matter, the use of the preclusion doctrines in the administrative proceeding context raises additional fairness concerns. *See* Perschbacher, *supra* note 76, at 441 (noting “the resulting mischief caused by too casually applying collateral estoppel to administrative determinations”).

affected would have no serious interest in pursuing the claim, and counsel would have no financial incentive to take the case on contingency. However, at least in some instances, there would seem to be a very real danger that potential class members would wait for an initial lawsuit—essentially a test case—which, if decided favorably, could generate numerous subsequent lawsuits, and, at least in some instances, some of those subsequent lawsuits could involve the same defendant. These potential circumstances raise the very concerns that motivate the preclusion doctrines: finality, judicial economy, and avoiding duplicative litigation.¹⁵⁵

As I observed earlier, however, the desire for achieving these goals—all connected to bringing an end to the litigation—does not, in and of itself, serve as a sufficient justification,¹⁵⁶ much less authorize an end run around due process. Due process, as a constitutional mandate, requires more than is currently afforded in the class action context, and the objection that defendants will only settle on global terms¹⁵⁷ is an inadequate response. Thus, rather than

155. Eliminating preclusion altogether in the class action context, and relying instead solely on *stare decisis*, would carry some, but not all, of the same effect. See Weinstein, *supra* note 130, at 446 (“Where a question of law is decisive in a case or where a mixed question of law and fact has been and will be tried by a judge, the concept of *stare decisis* furnishes almost the same advantages as a class action.”). In particular, permitting preclusion, with additional due process protections, could create an effective compromise that potentially limits subsequent litigation to a greater degree than the operation of *stare decisis* alone. For this reason, according preclusive effect in class actions, at least under some circumstances, seems desirable.

156. Indeed, 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”).

157. 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.”); Rubenstein, *supra* note 69, at 832 (“Defendants will pay less—or perhaps nothing—for settlements that do not produce global resolution.”). This argument seems, at a minimum, overstated. Not only has the Supreme Court repeatedly reaffirmed the ability to bring a collateral attack against a class judgment or settlement, but, in addition, Federal Rule 23 expressly accords unnamed class members the ability to opt out of (b)(3) class actions. Accordingly, defendants cannot, and have never been able to, reasonably expect ironclad class-wide resolutions in (b)(3) actions. See generally Bassett, *supra* note 9, at 1462–63 (“[C]lass judgments do not ‘capture’ all potential class members in any event, due to the ability of class members to ‘opt out’ of most class actions.”). Moreover, assuring the *opportunity* to challenge a class resolution on due process grounds is not the equivalent of actually *pursuing* such

expanding the preclusive effect of class judgments, which serves to further stretch the frayed due process protections accorded in class actions, I am urging a return to a more limited preclusive effect in the class action context.

*B. Achieving Both Direct Representation and Adequate Due Process:
The Opt-In Procedure*

Direct representation in litigation—the foundational prerequisite for preclusion in nonclass litigation—can be achieved in class litigation in a manner that both renders the application of the preclusion doctrines more consistent and accords genuine due process protections. The solution is not profound. The solution is not even novel, because it requires merely returning to a previous practice that was in place before the 1966 amendments to Federal Rule 23,¹⁵⁸ and is still required by statute in some class litigation today.¹⁵⁹ The solution is opt-in participation.¹⁶⁰

Opt-in and opt-out procedures are two sides of the same coin, carrying different pros and cons. Both opt-in and opt-out procedures have their respective benefits and shortcomings. These advantages

challenges. *See supra* note 73 (reporting the low incidence of collateral attacks against class judgments and settlements).

158. *See* Bassett, *supra* note 72, at 87 (“The opting in procedure is not unknown to the class action process. Prior to 1966, in non-mandatory class actions, class members could only participate in the class litigation if they affirmatively opted into the lawsuit.”); *see also* John E. Kennedy, *The Supreme Court Meets the Bride of Frankenstein: Phillips Petroleum Co. v. Shutts and the State Multistate Class Action*, 34 U. KAN. L. REV. 255, 256 (1985) (“[P]ermissive class members prior to 1966 had the duty affirmatively to ‘opt in.’”); Bassett, *supra* note 72, at 87–88 (“The articulated purpose of changing the ‘opt-in’ provision to an ‘opt-out’ provision ‘was to negate the unfairness of possible ‘one-way intervention.’ This procedure allows a potential class member, who does not join before trial and therefore is not bound by an adverse judgment, to intervene after a favorable judgment to invoke its benefit.’ This expressed concern, however, was subsequently reduced in light of modifications to the law of collateral estoppel.”).

159. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 216(b) (2006); PA. R. CIV. P. 1711(b) (providing optional opt-in classes for large claim groups or other special circumstances).

160. Some courts have certified Rule 23 class actions on an opt-in basis. *See, e.g.*, *Doe v. United States*, 44 F. App’x 499, 500 (Fed. Cir. 2002); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001); *Male v. Grand Rapids Educ. Ass’n*, 295 N.W.2d 918, 921–22 (Mich. Ct. App. 1980); *see generally* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 74 (1986) (“In appropriate circumstances, Rule 23(d) may give the court discretion to require that claimants opt in rather than out, as a means of insuring the fair conduct of the action . . .”).

and disadvantages were the subject of commentary in 1966 when Federal Rule 23 substituted opting out for opting in,¹⁶¹ and the relative merits are still debated today,¹⁶² due, among other reasons, to the opt-in requirement for collective actions under the Fair Labor Standards Act and the Age Discrimination in Employment Act.¹⁶³

One of the major differences between opting in and opting out is the ultimate size of the class. Both opting in and opting out place a burden on unnamed class members to take affirmative action if they do not desire the default result. With an opt-in procedure, the default result (the result if the class member does not opt in) is that

161. See Kaplan, *supra* note 28, at 397–98; see also Cohn, *supra* note 27, at 1220 (“Under the old rules, a class member [was] outside the bounds of the spurious-action judgment unless he opt[ed] in However, the scheme of the new rule leaves all members of the class within the judgment unless they opt out.”). Although some commentators expressed support for the change to an opt-out procedure, others were less enthusiastic. Compare Cohn, *supra* note 27, at 1223 (“The mere fact that an absent member must now take the initiative to exclude himself, rather than being excluded unless he opts into the litigation, will result in a much greater range of effectiveness for class actions.”), and Joiner, *supra* note 27, at 366–67 (explaining the opt-out provision and stating that “[t]hus, persons are protected to a much greater degree than under [original Rule 23]”), with Comm. on Fed. Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Supplemental Report*, 37 F.R.D. 71, 76 (1965) (expressing disapproval of the change to an opt-out procedure and stating, “The Committee feels strongly that it is undesirable . . . to bind persons who have not chosen to make themselves parties to a litigation. The proposed rule places the members of the class under an obligation to investigate their causes of action, and the adequacy of the representation provided by the plaintiffs of record, and take affirmative action to withdraw from the case, otherwise they will be forever foreclosed from prosecuting and defending the suit either individually or in a group of their own choice.”).

162. See, e.g., John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 903 (proposing a change in the “default rule so that class settlements include only those who . . . opt[] in”); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 935 (1998) (suggesting, among other alternatives to current class action practice, that 23(b)(3) “classes . . . be limited to members who affirmatively opt in”); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Litigation*, 2003 U. CHI. LEGAL F. 519, 555–57 (discussing opt-in and opt-out procedures in the context of protecting client autonomy); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 146 (2001) (“Returning to an opt-in requirement for damage class actions would leave in place a vehicle for collective litigation, but the vehicle would be substantially under-powered in comparison to the current model.”); Redish & Larsen, *supra* note 140, at 1612 (“[A] process that requires absent claimants to affirmatively opt into a class proceeding is preferable to an opt-out procedure, purely as a matter of democratic theory.”).

163. See Fair Labor Standards Act, 29 U.S.C. § 216(b) (2000 & Supp. V 2005); Age Discrimination in Employment Act, 29 U.S.C. § 626 (2000); see generally James M. Fraser, *Opt-in Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be “Similarly Situated”?*, 38 SUFFOLK U. L. REV. 95 (2004).

the unnamed class member is not a member of the class, and thus is neither bound by the class judgment nor precluded from bringing a subsequent lawsuit. To avoid that result and participate in the class judgment, she must affirmatively opt in. With an opt-out procedure, the default result is that the unnamed class member is deemed a member of the class, bound by the class judgment, and precluded from bringing a subsequent lawsuit on the same claims. To avoid that result, she must affirmatively opt out. For many reasons, inaction is a common response to a class action notice.¹⁶⁴ As a result, an opt-out procedure tends to yield a larger class, while an opt-in procedure tends to yield a smaller class, simply by virtue of the human disposition toward inaction.¹⁶⁵

From the perspective of counsel—both class counsel and defense counsel—the ultimate size of the class is a significant issue. Both defense counsel and class counsel typically wish to include as many potential class members as possible in the class judgment or settlement—defense counsel to minimize the risk of subsequent litigation on the same issues, and class counsel as a justification for a higher attorney’s fees award.¹⁶⁶ Opt-in procedures create more work for counsel on both sides because both sides have significant motivation to encourage unnamed class members to opt into, and thereby participate in, the class litigation. This is exactly the opposite of opt-out class actions, where inaction by the unnamed class members results in higher participatory levels.¹⁶⁷ Thus, it is

164. See Bassett, *supra* note 72, at 86 (“[Inaction] can be the result of not receiving the class notice, receiving but not understanding the class notice, setting the notice aside and losing it, completing but then forgetting to mail the . . . form, and variants on these themes” as well as “laziness, procrastination, . . . confusion and lack of comprehension”).

165. See Thomas M. Byrne, *Class Actions*, 59 MERCER L. REV. 1117, 1134 (2008) (“The effect of the difference [between an opt-in and opt-out class action] is to reduce the size of collective actions because, for a variety of reasons, many eligible class members elect not to opt in.”); Catherine K. Ruckelshaus, *Labor’s Wage War*, 35 FORDHAM URB. L.J. 373, 387 (2008) (“[I]ndividuals typically do not respond to notices of collective action by taking affirmative steps to opt-in or opt-out of class action lawsuits. This means that an opt-in rule . . . tends to produce low participation rates while an opt-out rule tends to produce high participation rates relative to potential class size.”); see also Bronsteen, *supra* note 163, at 906 (opining that an “opt-in rule would drastically reduce the number of class members in any settlement”).

166. See Bronsteen, *supra* note 162, at 906.

167. Indeed, an empirical study by Professors Eisenberg and Miller found astonishingly few unnamed class members elect to opt out from class litigation. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (“Opt-outs from class participation

unsurprising that counsel generally would prefer to retain the current opt-out procedure. To the extent that an opt-in procedure would ordinarily be expected to reduce the size of the class, counsel may need to develop innovative techniques for locating potential class members and motivating those class members to opt into the class litigation. However, the transaction costs today are very different than they were in 1966, when Federal Rule 23 adopted an opt-out procedure. Although Rule 23 continues to require “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort” for (b)(3) classes,¹⁶⁸ class members today are not limited to responding by mail, but instead could respond through a Web site.¹⁶⁹

One potential concern is whether defendants would refuse to settle under an opt-in regime due to a fear of potentially continuing litigation by those who did not opt into the class. However, defendants settled cases before the current opt-out procedure was adopted, and defendants settle cases today, even though some class members elect to opt out and thereby preserve their ability to pursue their own separate, individual lawsuits. It seems both appropriate and desirable to shift the burden of securing sufficient numbers of class members to counsel, when counsel for both sides ultimately hold a greater financial interest in the case, especially in light of today’s lower transaction costs as discussed above. Moreover, it seems likely that the ultimate net impact of an opt-in versus an opt-out procedure, in terms of the actual filing of subsequent litigation, would remain much the same. The individuals who, under current procedures, opt out of class litigation in order to pursue their own actions will similarly elect not to opt in. These individuals are, in both instances, the ones most likely to possess high value claims. Indeed, the high value claims are the only ones likely to be pursued outside the class action; the high cost of litigation would tend to inhibit numerous individual lawsuits.

and objections to class resolutions are rare: on average, less than 1 percent of class members . . . object to classwide settlements.”).

168. FED. R. CIV. P. 23(c)(2)(B).

169. For example, the Web site could contain detailed information about the class litigation, including a posting of the class action notice mailed to class members. At the end of the class notice, a “click here to opt in” button could appear. To prevent potential fraud, clicking on the button could take the user to a password-protected screen, requiring the user to log in (with a user name and password provided in the original, individually mailed notice) before proceeding to a subsequent screen asking for identifying information.

From the perspective of unnamed class members, the benefits and shortcomings of opt-in versus opt-out procedures are more mixed. It has often been said that, from the perspective of the unnamed class members, it is more desirable to use an opt-out procedure, so that the default is inclusion in the class litigation. However, an erroneous assumption underlies that view: an assumption that the class litigation result will be favorable to the class. As is true of litigation generally, however, the outcome is not guaranteed. In some class litigation, the outcome will favor the class; in other class lawsuits, the outcome will favor the defendant. Moreover, even when counsel have agreed to a settlement, it cannot be assumed that all, or even most, class members will find the settlement provisions attractive. Thus, an opt-out, inclusive, approach will not always benefit class members.

If we set this faulty assumption aside, there are two general situations where an opt-out, inclusive, procedure will benefit unnamed class members: (1) when the class litigation culminates in a judgment or settlement favorable to the class, and the outcome is better than the class member could have achieved on her own; and (2) when the class litigation culminates in a judgment or settlement favorable to the class, and although the outcome is less favorable than the class member could have achieved by bringing her own lawsuit, she was unwilling to file an independent lawsuit.

I have already identified one particular risk of the opt-out procedure: the failure to act results in unnamed class members being held to a class judgment and precluded from challenging the result in subsequent litigation. The basis for this result is the presumption of consent when an unnamed class member fails to opt out.¹⁷⁰ However, inaction often does not reflect actual intent; the failure to act does not necessarily constitute consent.¹⁷¹ For example, an

170. The Supreme Court has suggested that the failure to opt out of a class action constitutes consent. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) (stating that a class member is “presumed to consent” if she fails to opt out of the class litigation).

171. A number of commentators have pointed out the fallacy of interpreting silence as consent in the class action context. *See, e.g.*, Bassett, *supra* note 72, at 85–89 (discussing the “potentially invalid assumptions” in interpreting the failure to opt out as consent, and stating that “[t]he notion of failing to opt out as constituting consent is largely fictitious”); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 609–10 (1987) (“An inference of consent to be sued from a failure to return an opt-out form is so far from the knowing, voluntary type of consent that the Court usually requires to support adjudicatory jurisdiction, and so contrary to normal assumptions about human nature in lawsuits, that an argument to the contrary is close to absurd.”); *see also* 3 HERBERT NEWBERG & ALBA CONTE,

unnamed class member may receive a class action notice, but might not understand the notice generally or might not understand the opt-out provisions specifically. The failure to opt-out can also be the result of, among other things, procrastination, mail misdelivery, or inadvertent loss of the instructions.¹⁷² In each instance, however, consent is presumed and the effect of the class judgment or settlement can only be avoided if the unnamed class member files a subsequent lawsuit and argues successfully that she was not accorded adequate representation in the original action.

If we change the default to exclusion, unnamed class members cannot partake of the class judgment or settlement unless they affirmatively opt in. This exclusion default generally benefits unnamed class members in two situations: (1) when the class litigation culminates in a judgment or settlement favorable to the defendant; or (2) when the class litigation culminates in a judgment or settlement favorable to the class, but the individual outcome is less than the class member could have achieved by bringing her own lawsuit, and she has the motivation and resources to file such a lawsuit. One particular risk of the opt-in procedure is that, due to the noted human tendency toward inaction, unnamed class members who could have received a favorable and desirable outcome under the class judgment or settlement may receive nothing due to their failure to act.

In addition to the scenarios explored above,¹⁷³ there are other potential scenarios in which neither an opt-in nor an opt-out procedure can claim superiority. One example is when the motivation for participating, or not participating, in a class action is not financial gain—such as class members angry with an employer

NEWBERG ON CLASS ACTIONS § 13.37, at 13–105 (3d ed. 1992) (stating that the “suggest[ion] that the failure of class members to opt out of the suit equals consent to jurisdiction . . . does not withstand analysis”); Eisenberg & Miller, *supra* note 168, at 1561 (“Common sense indicates that apathy, not decision, is the basis for inaction.”); Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 OR. L. REV. 199, 202 (2001) (“By its very nature, silence is ambiguous”); Geoffrey P. Miller, *Rethinking Certification and Notice in Opt-Out Class Actions*, 74 UMKC L. REV. 637, 642 (2006) (“It boggles credibility to suggest that [absent class members] consent to anything at all when they throw the class notice in the waste basket.”).

172. See *supra* note 164 (providing examples of circumstances where inaction does not constitute actual consent).

173. It is not possible, of course, to explore every conceivable scenario and its potential permutations. Accordingly, I am here merely exploring some of the more common, and therefore more readily anticipated, scenarios.

(and therefore desiring to sue the employer regardless of the likelihood of prevailing in the lawsuit) or class members devoted to an employer (and therefore unwilling to sue the employer regardless of the likely outcome). Another scenario is when the class litigation culminates in a judgment or settlement favorable to the class in name only, and worthless to the unnamed class members in practical effect, both in terms of the alleged harm suffered and the remedy achieved. Perhaps the most prominent example of this scenario involves coupons that are only redeemable toward purchases or services rendered from the same defendant who caused the injuries sued upon. Under such circumstances, if the coupon has no cash value and is not transferable, then neither an opt-in nor an opt-out approach carries any particular benefit or detriment because essentially there was nothing to gain and nothing to lose.

My scenarios and examples have assumed that the unnamed class members had full and perfect information about their potential alternatives. But, of course, this is not always (maybe never) the case. When class litigation does not settle but instead goes to trial, the unnamed class members are not facing a choice between two specific, fully known alternatives. They cannot know the trial outcome in advance, and therefore cannot determine whether the better choice is to participate or not participate in the class litigation. This same predicament is true anytime unnamed class members must make a decision regarding whether to participate in the class litigation before the outcome is certain.

As the foregoing discussion makes clear, neither an opt-in nor an opt-out procedure offers a perfect solution. Thus far, the tallies of the benefits and shortcomings of opting in versus opting out largely suggest a tie. However, there are two particular benefits that are exclusive to the opt-in procedure: opting in accords greater due process protections and a more consistent approach to nonparty preclusion. With an opt-in procedure, consent is no longer implied or fictitious because the class member has affirmatively and expressly elected and consented to join the existing class litigation. The potentially erroneous assumptions underlying the interpretation of silence as a form of consent do not arise when consent is manifested affirmatively.¹⁷⁴ Applying the preclusion doctrines only to those class

174. *See supra* note 171 (discussing the potential fallacy of interpreting silence as consent).

members who have affirmatively opted into a class action lawsuit provides a legitimate basis for concluding that the class member was, in fact, accorded notice and an opportunity to be heard, and that the class member consented both to the actual representation of her interests in the lawsuit and to being bound by the outcome. Such express consent provides a firm foundation for due process and comes fully within the traditional exceptions to nonparty preclusion because opting into the class litigation constitutes, in fact, an express agreement to be bound. Perhaps an opt-in procedure is not necessary for every class action,¹⁷⁵ however, to the extent that a court can reasonably anticipate the potential for attempting to ascribe preclusive effect to a class judgment or settlement, the opt-in procedure affords more individual control,¹⁷⁶ greater due process protections, and a consistent approach to nonparty preclusion.

V. CONCLUSION

A number of commentators have proposed an expansion of the application of the preclusion doctrines in the class action context to restrict potential challenges to class judgments—and thus, to deprive dissatisfied class members of any remedy, thereby forcing them to “just go away.” Generally the preclusion doctrines do not apply to nonparties; the class action is one of several limited exceptions. In examining the preclusion doctrines generally and their exceptions specifically, the class action exception is notably and distinctively inconsistent with the theory and underlying construct that gives cohesion to the preclusion doctrines and their exceptions—the foundational prerequisite of direct representation in litigation. The lack of a direct relationship between absent class members and the named class representatives, combined with the use of an opt-out

175. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court rejected the defendant’s argument that due process required an opt-in procedure. However, that argument was proffered in the context of whether personal jurisdiction existed over the class plaintiffs, and at least arguably the Court’s holding does not apply beyond that context. 472 U.S. 797, 807–13 (1985).

176. See Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 510 (“[T]he control of one’s own litigation cannot be regarded as a small detail within the overall scheme of civil procedure.”); Erichson, *supra* note 162, at 555 (“[A]n opt-in process protects client autonomy more fully than the opt-out process”); Redish & Larsen, *supra* note 140, at 1615 (“[T]he presumption of inclusion that adheres in the opt-out rule is inconsistent with both the autonomy model of procedural due process and the traditional precepts of constitutional waiver.”).

procedure, which provides an insufficient indication of class members' actual consent to be bound by the class litigation, takes class actions outside the bounds of every other preclusion exception and does not afford adequate due process protections to unnamed class members. Proposals to expand the use of the preclusion doctrines in class actions would even further undermine due process. There is, however, an available solution that both increases due process protections and comports with the preclusion prerequisite of direct representation in litigation. Accordingly, this Article calls for that solution: the use of an opt-in procedure for unnamed class members as a prerequisite to applying the preclusion doctrines.