The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions

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INTRODUCTION

Adequacy of representation is a central concept in the law of case aggregation. Not surprisingly, it plays an important role in the final report of the American Law Institute's ("ALI") *Principles of the Law of Aggregate Litigation* ("*Principles*") project.[1] Ever since the seminal case of *Hansberry v. Lee*,[2] the conventional wisdom has been that a nonparty (*B*) can sometimes be bound to the results of litigation choices made by a party (*A*) if *A* adequately represents *B*'s interests in the litigation.[3] This principle forms the cornerstone of the modern class action and also supports some forms of nonparty preclusion in nonclass suits.[4] Moreover, it influences case aggregation indirectly. The fact that adequacy of representation is applied only narrowly as a basis for preclusion of nonparties in individual suits makes aggregation all the more important as a way to resolve common issues and adjudicate related suits efficiently. As a result, courts and legislators have developed a complex body of case aggregation law, and the *Principles* do a heroic job of organizing and rationalizing it.

Yet, as I argue in this Article, proceduralists today—some seventy years after *Hansberry v. Lee*—still lack a clear understanding of what representation means in adjudication and why a nonparty can be bound on a representation theory. The result is normative confusion and doctrinal muddle, problems that plague the *Principles* as well. Even so, the *Principles* are a remarkable achievement. Perhaps most

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1 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §§ 1.01, 1.05 (2010).

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

3 *See id.* at 42–43.

4 *See* Taylor v. Sturgell, 553 U.S. 880, 894 (2008) (stating that the "'limited circumstances'" in which "a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interest who [wa]s a party' to the suit" include class actions and suits brought by certain fiduciaries (alteration in original) (citation omitted)).

important, they recognize the centrality of normative analysis to any effort at doctrinal reconstruction.[5] Moreover, their focus on settlement[6] reflects an important principle: procedural rules should take account of what is most likely to happen in practice. Last, but hardly least, the *Principles* go beyond restating the law; they propose and defend significant reforms, some of which, like the aggregate settlement rule and collateral attack rule, are quite controversial.[7]

Despite these virtues, the *Principles* suffer from three shortcomings shared by most scholarly treatments of adjudicative representation today: they focus mainly on outcome quality, they assume that representation has limited application outside the class action setting, and they fail to take careful account of the distinction between rights-based and utilitarian modes of justification.[8]

As for the first point, although designing procedures to ensure good outcomes is no easy task, the main obstacle to class treatment historically has not so much been fear of bad outcomes, but concern about depriving absent class members of their own day in court.[9] Guaranteeing a personal day in court is partly about outcome quality, but what makes the day-in-court right such a problem for the class action is its connection to process-based values, such as legitimacy and respect for the dignity of individual litigants. Any normative account of adequate representation, therefore, must explain how representation can substitute for a personal day in court and satisfy process-based values.

Furthermore, the *Principles* make a mistake in following the conventional view—which I call "class action exceptionalism"—that binding absentees on a representation theory should be limited mainly to the class action.[10] Class action exceptionalism makes the class action seem less problematic and nonparty preclusion outside the class setting more problematic than either actually is.

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5 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §§ 1.01–.05 (2010) (outlining the general principles and objectives governing aggregate proceedings).

6 *See id.* §§ 3.01–.18.

7 For the new aggregate settlement rule, see *id.* § 3.17(b). For the narrow collateral attack rule, see *id.* § 3.14.

8 Of course, the *Principles*, as an ALI project, reflect a rough compromise among different points of view in the academy, the judiciary, and the practicing bar. As such, they are not likely to embody the ideal approach of any of the authors.

9 *See, e.g.*, Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996) (describing the "'deep-rooted historic tradition that everyone should have his own day in court'" (citation omitted)).

10 *See, e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. c, at 58 (2010).

Finally, the normative analysis tends to wash over the distinction between utilitarian and rights-based modes of justification. At times the *Principles* frame the policy stakes in a manner all too common in procedure scholarship, as a relatively ad hoc and pragmatic compromise or balance among competing values.[11] This approach overlooks the crucial distinction between rights-based and utilitarian balancing and, in so doing, overly simplifies the analysis. A utilitarian balance can take account of social costs to limit procedure even at the margin, whereas a rights balance makes room for social costs only when they are very substantial (and even then not in an entirely consistent way).[12] This distinction matters for how we should conceive adequate representation from both process-based and outcome-based perspectives.[13]

This Article draws on and extends my previous work on nonparty preclusion, class action history, and statistical modes of adjudicating aggregate litigation.[14] Part I describes the puzzle of adjudicative representation. It shows that representation has no distinctive role to play in precluding absentees when outcome quality is the only goal, and, as a result, it is possible to justify a body of preclusion doctrine that extends well beyond current limits. Representation does have a special role to play when process-based participation is added to the mix, but the body of nonparty preclusion law it supports is so limited

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11 *See, e.g.*, *id.* § 1.03 cmt. a, at 38.

12 For a discussion of the difference between rights-based and utilitarian approaches to outcome-based procedural analysis in general, see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 495–519 (2003).

13 I take the process-based perspective in this Article, but it is important to recognize that the presence of rights—either moral rights underlying the substantive law or legal rights that act as *rights*—complicates an outcome-quality analysis as well. A utilitarian metric can justify even substantial deviations from ideal outcomes when they minimize social costs. But a rights-based metric is not nearly so forgiving. This difference is important because no set of procedural reforms completely eliminates the risk of skewed settlements, and some even increase the risk. The *Principles*, for example, justify the damage averaging that is inevitable in aggregate settlements by noting that "rough justice" is the best that even individual lawsuits can achieve. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04 cmt. f (2010). This is correct as far as it goes, but the quality of even rough justice varies with the type of litigation, and these differences have different normative implications depending on whether one uses a rights-based or utilitarian approach. *See* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 595–600 (1993).

14 *See, e.g.*, Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) (book review) [hereinafter Bone, *History of Adjudicative Representation*]; Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) [hereinafter Bone, *Rethinking*]; Bone, *supra* note 13.

that even the class action has trouble fitting in. The result is a serious mismatch between justification and doctrine: outcome-based justifications go too far, and process-based justifications do not go far enough.

Part II examines three approaches to restoring the fit between doctrine and justification. All three accept the standard account of the process-based day-in-court right and try to restore the fit by defending some form of class action exceptionalism. One approach, which I call "mixed theory," relies on a combination of features that supposedly make the class action a distinctive preclusion device. The second approach recharacterizes the class action with an administrative agency analogy that arguably removes process-based constraints. The third approach relies on a contractarian theory to argue that parties would agree to the class action (and not much else) in a suitably defined hypothetical bargaining situation. As Part II shows, none of these approaches work.

Part III approaches the puzzle in a different way. It takes the mismatch between justification and doctrine as reason to rethink justification and, in particular, to critically examine the conventional account of the process-based day-in-court right. Part III reconstructs the right to make it a better version of what the Supreme Court actually means it to be. The result is a process-based day-in-court right that rejects class action exceptionalism and is flexible enough to accommodate some forms of case aggregation and broader nonparty preclusion.

Part IV briefly sketches the implications of Part III's analysis for one of the most difficult and controversial problems in class action practice today—the problem of limiting collateral attack on class settlements. In particular, process-based day-in-court constraints pose less of a challenge to a limited collateral attack rule when the day-in-court right is conceived as it should be—as a flexible right that accommodates competing concerns at its core.

I. THE PUZZLE

One can easily imagine a litigation system that would routinely bind *B* to the results of litigation choices made by *A* even when *A* is a complete stranger, as long as *A* litigates vigorously and has no reason to harm *B*.[15] The American system of litigation is different.[16] *B* is seldom bound in these circumstances, and when she is, the binding

15 Pressed to justify the practice, a lawyer or judge might reason that the litigation system aims to produce optimally accurate decisions, and vigorous litigation by *A* yields as accurate a decision as the system can possibly achieve. Hence, there is no value in allowing *B* to litigate

effect must be justified. This frames the central question: when and why is it permissible to bind *B* to the results of litigation choices made by *A*?[17] At least since *Hansberry v. Lee*, most lawyers, judges, and scholars agree on at least one answer to this question: *B* can sometimes be bound when *A* "adequately represents" *B*'s interests.[18] The challenge is to explain why.

There are two general ways to approach this challenge: one is outcome-based and the other is process-based.[19] The following discussion shows that representation is not necessary in outcome-based approaches and that it is hard to reconcile with standard process-based approaches. Moreover, neither approach fits current nonparty preclusion doctrine very well.

A. Outcome-Based

An outcome-based approach assumes that the primary purpose of adjudication is to produce quality outcomes, where outcomes include trial judgments, settlements, and formal decisions during the course of the litigation. Outcome quality can be measured in different ways, depending on one's view of adjudication. The standard approach evaluates quality by reference to the parties' substantive entitlements.[20] Under this view, adjudicative outcomes should fit the entitlements the substantive law creates.[21]

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anew because there is no reason to believe that litigation by *B* will enhance the accuracy of the result in *A*'s suit.

16 Of course, *B* is bound to the choices made by her lawyer, but *B* has the right to choose that lawyer, and the lawyer she chooses owes a fiduciary duty to act in her best interests. Due to this combination of consent and fiduciary obligation, it is possible to conceive of *B* and her attorney as a single litigating unit and the attorney as, in effect, a litigating substitute for *B*. This account of the lawyer-client relationship is, of course, highly idealized, but it is the ideal that matters for this analysis.

17 For example, *A* might litigate issues that *B*'s suit shares, in which case the question is whether and why *B* can be bound to the determination of those issues in *A*'s suit. Or *A* might litigate and lose a claim for injunctive or declaratory relief identical to *B*'s, in which case the question is whether and why *B* can be bound to the adverse judgment and barred from litigating her claim later. *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880 (2008) (examining whether a litigant seeking records from the Federal Aviation Administration was bound by an adverse judgment in a similar suit). Or, as in the class action, *A* might settle on terms that provide relief for both *B* and *A*, in which case the question is whether and why *B* must accept that settlement rather than litigate on her own seeking a different result.

18 *See id.* at 894; Hansberry v. Lee, 311 U.S. 32, 42–43 (1940).

19 For an account of the difference between outcome-based and process-based theories, see Bone, *supra* note 12, at 508–16, and Bone, *Rethinking*, *supra* note 14, at 201–02.

20 Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 329–30 (2008).

21 I bracket the question whether the fit must be with the substantive legal rights as de-

Judges and scholars often measure outcome quality in terms of accuracy.[22] According to this view, *B* should be allowed to litigate anew only if doing so is likely to reduce the error risk compared with *A*'s suit.[23] It is important to recognize that this has nothing to do with whether *B* might win if allowed to litigate on his own. Even if it is likely that *B* would win, it would still be perfectly proper to bind *B* to *A*'s loss if there is no reason to believe that *B*'s litigation choices would produce a more accurate result.[24]

It follows that there is no convincing outcome-based justification for allowing *B* to relitigate when there is no reason to believe that the result of relitigation will be any better than the result already produced by *A*'s suit. In that case, the cost savings from preclusion should be enough to justify binding *B*.[25] Doing so is neither unfair nor illegitimate when *B* gets a result just as good from a social point of view as any she could obtain on her own.

The outcome-based approach is quite popular in the literature on representation. Scholars argue that the purpose of requiring representational adequacy is to assure that the result in *A*'s suit is not skewed in a direction harmful to *B*.[26] There is, however, something puzzling about these outcome-based accounts. Proceduralists assume that it is precisely the adequate representation of *B*'s interests by *A* that justifies binding *B* (or at least makes it more legitimate to bind *B*). But this is not the case for outcome-based theories. Adequate

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fined or with the underlying policies those rights are meant to promote. For a brief discussion of this question, see Bone, *supra* note 20, at 329–34. I also bracket the question of how tight the fit should be. For example, Professor Woolley demands a relatively tight fit between class action settlements and substantive legal claims. *See, e.g.*, Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917, 923, 943–47 (2010). Professor Nagareda, by contrast, seems willing to accept a much looser fit—one that, roughly speaking, approves settlements if they are supported by sound reasons and negotiated in good faith. *See* Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 362–80 (2003).

22 Bone, *supra* note 12, at 510; Bone, *Rethinking*, *supra* note 14, at 201.

23 Although this is the central insight, a thorough analysis must consider other factors as well, including the effects of risk aversion and asymmetric litigation stakes. *See* Bone, *Rethinking*, *supra* note 14, at 240–64.

24 *See id.* at 238–41.

25 *See id.* at 240–47.

26 *See, e.g.*, Nagareda, *supra* note 21, at 333–80 (arguing that representation is adequate only if the class action has structural protections that guard against attorney self-dealing and bad settlements); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1176 (2009) (arguing that "[t]he representation provided to a class member is adequate if and only if the actions of the class representative and class counsel can reasonably be expected to place that class member in no worse a position than that class member would have enjoyed had she retained control of her own case").

representation of *B* by *A* is *not* the real reason why it is justifiable to bind *B*. The reason is that *A*'s litigation choices produce a result that is socially optimal for *B*, too. In other words, while representation might help ensure a quality outcome, it is the quality of the outcome that justifies binding *B*, not the existence of a representative relationship.

The assumption that adequate representation does the core normative work stems in part, I believe, from a sloppy and ultimately faulty analogy to the legislative process. Since legislation involves judgments of good policy, there is no obvious metric for evaluating the quality of legislative outcomes. For this reason, outcome-based theories of democratic legitimacy rely heavily on good process design. Adjudication is different. Adjudication's close connection to substantive law means there is an independent metric for evaluating outcome quality—namely, how closely the outcome fits the parties' substantive entitlements. Thus, features of process design, such as adequate representation, are not necessary to an outcome-based theory.

The upshot is that there is a serious mismatch between theory and existing nonparty preclusion doctrine. For example, an outcome-based approach does not fit the conventional account of *Hansberry v. Lee*, where the Court held that adequate representation was necessary to constitutionally bind an absent class member.[27] If outcome quality is the metric, then *Hansberry*'s holding makes no sense. There should be no constitutional obstacle to binding *B* even when *A* does not purport in any way to represent *B*'s interests *provided A*'s lawsuit is structured so as to ensure a good enough outcome for *B*.[28] For example, if the quality of an outcome is measured in terms of error risk, it should be sufficient much of the time to bind *B*, at least to the issues decided in *A*'s suit, when *A* litigates vigorously and has no incentive to harm *B*.[29]

This insight also conflicts sharply with much of the Court's nonparty preclusion doctrine outside the class action setting. For example, if outcome quality is the only thing that matters, the Supreme Court made a mistake when it dismissed the theory of virtual repre-

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27 Hansberry v. Lee, 311 U.S. 32, 42–43 (1940). This assumes, of course, that none of the narrower grounds exist, such as that the absentee actually controlled the litigation choices from behind the scenes.

28 The analysis is more complicated, especially within a utilitarian framework, but the essential insight and the ultimate conclusion are the same. *See* Bone, *Rethinking*, *supra* note 14, at 240–64.

29 *See id.* at 241–51.

sentation in the recent case of *Taylor v. Sturgell*.[30] As I explain below, there is no reason in *Taylor* to allow relitigation of issues already decided, even if there might be a reason to allow litigation of issues not litigated in the first suit.[31] Moreover, the Court also made a mistake in demanding notice by mail in the much earlier case of *Mullane v. Central Hanover Bank & Trust Co.*[32]—if outcome quality is all that matters.[33] And statistical sampling should not run afoul of due process, at least when the negative externalities created by individual litigation are severe and the sampling procedure is designed properly.[34]

One might try to defend narrow nonparty preclusion rules on the ground that it is very difficult to evaluate the quality of litigation outcomes and, therefore, best to limit preclusion to traditional devices, like the class action, that have an established pedigree.[35] There are at least three problems with this argument. First, there is no need to measure outcomes directly when vigorous litigation and the absence of hostile interests provide sufficient assurance of quality. Second, evaluating outcome effects is difficult for all procedures. If the outcome-based proponent is willing to reform procedures such as pleading, discovery, and case management, despite uncertainty about effects, she should be willing to do so for nonparty preclusion as well. Greater caution might be warranted if prediction and evaluation were

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30 *See* Taylor v. Sturgell, 553 U.S. 880 (2008).

31 *See infra* notes 153–67 and accompanying text. Although *Taylor* is about claim preclusion, some lower courts and scholars read the opinion to bar the use of virtual representation for both claim and issue preclusion. *See, e.g.*, Lincoln-Dodge, Inc. v. Sullivan, 588 F. Supp. 2d 224, 235 (D.R.I. 2008); Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1878 (2009) (noting that "the Court [in *Taylor*] quite clearly signaled the demise of *all* versions of virtual representation"). However, as I explain later, there is no reason on outcome-quality grounds to deny claim preclusion altogether, *see infra* notes 147–49 and accompanying text, and certainly no reason to deny issue preclusion on the facts of *Taylor* itself, *see infra* notes 166–67 and accompanying text.

32 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

33 *Id.* at 320. In *Mullane*, absent beneficiaries were in fact represented by a special guardian/attorney appointed to litigate on their behalf, and most of those beneficiaries had too little at stake to justify the expense of actually participating. Moreover, the evidence was in the possession of the trustee and it was unlikely that beneficiaries had anything significant to add. *Id.* at 307–08, 310. Thus, giving notice would do little, if anything, to improve the outcome. *See also* Bone, *Rethinking*, *supra* note 14, at 215–18.

34 *See* Bone, *supra* note 13, at 594–617. If the reader is concerned about constraints imposed by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *see* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 312–14 (5th Cir. 1998), imagine that the suit is based on a federal claim.

35 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 841–48 (1999) (arguing that the 23(b)(1)(B) limited-fund class action should hew closely to its traditional form in part because of the uncertain due process implications of preclusion for the day-in-court rights of absent class members).

considerably more difficult for nonparty preclusion than for other procedures, but I know of no reason to believe that this is so. Third, as Part III explains, the modern class action is in fact a relatively novel creation and much different than the traditional representative suit relied on as precedent to support it. In short, there are good reasons to be at least as confident on outcome-quality grounds about nonparty preclusion outside the class action setting as about the class action itself.

B. Process-Based

Despite the general focus on outcome quality, the doctrine of representation, as it has developed historically, has been more about process-based than outcome-based values.[36] Roughly speaking, a process-based approach holds that personal participation is required for the legitimacy of adjudication or to accord respect for the dignity and autonomy of those persons significantly affected by litigation.[37] The process-based dimension of the day-in-court right aims to implement this participation principle, and it does so by guaranteeing personal control over the presentation of evidence, choice of arguments, and other litigation decisions.

Courts have not been completely clear about how much control the day-in-court right guarantees. Dignity and legitimacy by themselves have no necessary implications for the precise level of control.[38] The required level depends on one's theory of adjudication. Nevertheless, the caselaw does offer clues to how courts conceive of the day in court, and those clues suggest that a day in court involves rather broad control over litigation choices. To illustrate, consider how the

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36 *See* Bone, *History of Adjudicative Representation*, *supra* note 14, at 283, 305; Bone, *Rethinking*, *supra* note 14, at 205–06.

37 For different versions of process-based theory, see JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 189–99 (1985) (relying on a Kantian principle of respect for individual dignity); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–7, at 666–67 (2d ed. 1988) (distinguishing instrumental from intrinsic values of participation and associating the latter with respect for persons); Redish & Katt, *supra* note 31, at 1893–94 (anchoring the day-in-court right in a process-based theory of democratic legitimacy); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275–84 (2004) (arguing that "a right of participation is essential for the legitimacy of a final and binding civil proceeding"). It is also worth noting that the Supreme Court has indicated on occasion that procedural due process protects process-based—not just outcome-based—values. *See, e.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Carey v. Piphus, 435 U.S. 247, 261–62 (1978).

38 It might be enough, for example, if the person bound has a chance to appear personally before the decisionmaker and orally relate her story in her own way, or even just provide written input.

day-in-court right affects the scope of nonparty preclusion.[39] Sometimes a person not named as a formal party can be precluded if she was actually involved in the litigation from behind the scenes so that she had a de facto day in court.[40] But to be precluded, the nonparty must have had an opportunity to exercise broad control over litigation choices.[41] It is not enough that she had a chance to testify at trial, make limited presentations to the court in the first suit, or even participate in consolidated pretrial proceedings.[42] She must have had "the actual measure of control or opportunity to control that might reasonably be expected between two formal coparties."[43]

I have argued elsewhere that this broad control can be justified only on process-based grounds.[44] Outcome-based values simply do not require this degree of participation.[45] Other commentators agree. They assume that the day-in-court tradition protects broad litigant autonomy, and they locate the foundation of the right in process-based values.[46]

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39 *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (citing the deep-rooted day-in-court-right tradition as the basis for the broad rule against nonparty preclusion); Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996) (stating that, as a result of the historic day-in-court right, a judgment among parties does not generally bind strangers to the lawsuit); Martin v. Wilks, 490 U.S. 755, 761–62 (1989) (recognizing that the day-in-court right is ingrained in the Court's preclusion jurisprudence); Bone, *Rethinking*, *supra* note 14, at 203–18 (exploring the tension between the day-in-court right and the theory of virtual representation).

40 *See* Bone, *Rethinking*, *supra* note 14, at 204 & n.28.

41 *See id.*

42 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4451, at 376–80 (2d ed. 2002).

43 *Id.* § 4451, at 373; *see also* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 39 cmt. c (1982):

> To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain review. . . . It is not sufficient, however, that the person merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as *amicus curiae*.

Also, in *Taylor v. Sturgell*, the Court emphasized the close connection between a day in court and the kind of litigation opportunity a formal party has:

> A person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court."

Taylor, 553 U.S. at 892–93 (citation omitted).

44 *See* Bone, *Rethinking*, *supra* note 14, at 200–18.

45 *See id.*

46 *See, e.g.*, Redish & Katt, *supra* note 31, at 1890–91 (arguing that due process protects litigant autonomy, which guarantees each individual "the right to choose how to fashion his own representation and to participate in the process as he sees fit, within the prescribed adjudicatory framework"); Tidmarsh, *supra* note 26, at 1140–45 (arguing that the American system of adversary litigation is based on a broad principle of self-interested autonomy); Roger H. Trangsrud,

However, judicial treatment of the day-in-court right is not altogether consistent. For example, parties are bound in large-scale joinders and consolidations even when they have little, if any, personal control as a practical matter.[47] One might argue that these parties still have the participation opportunities feasible in a large aggregation. But the day-in-court right must do more than guarantee what is feasible given the particular procedures in place. Otherwise, the right would have no traction at all against reforms that severely curtail participation opportunities. Thus, there is inconsistency in the way the day-in-court right is applied, and I explore this inconsistency in more detail in Part III.B. It is sufficient for now, however, to recognize that the process-based day-in-court right cashes out in terms of broad personal control over litigation choices.

Before proceeding further, it is important to clarify one point. When I refer to the day-in-court right in this Article, I mean a right that stems not only from constitutional due process requirements, but also from subconstitutional rules and doctrines. In other words, the "day in court," as I use it here, embodies a set of participation values that is both relevant to the design of civil process in general and capable of resisting social-cost-minimization arguments in the way a right is supposed to.

The close connection between the process-based day-in-court right and personal control over litigation choices makes sense of the very narrow nonparty preclusion rules. The clearest cases where binding *B* is consistent with the day-in-court right, as so conceived, are those in which *B* has somehow controlled the litigation choices herself, voluntarily waived her right to do so, or willingly consented to someone else making the choices for her.[48]

Mass Trials in Mass Tort Cases: A Dissent, 1989 U. ILL. L. REV. 69, 74–76 (arguing that natural law, tradition, and pragmatic considerations all support "individual claim autonomy" over substantial personal injury tort claims, which entails a personal right to control litigation of the claim).

47 Large multidistrict litigation proceedings involving litigation committees provide a particularly striking example. *See infra* notes 194–203 and accompanying text. One might argue that the day-in-court right is preserved in multidistrict litigation because the aggregation applies only at the pretrial phase and plaintiffs can try their cases outside the aggregation. *See* 28 U.S.C. § 1407(a) (2006). This argument assumes, however, that the right is limited to exercising control over the presentation of evidence and argument at trial. This assumption does not make sense. For one thing, less than five percent of federal civil cases actually reach trial. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 129 n.54 (2002). Hence a process-based day-in-court right limited to trial would have very little value. More important, it is not clear why the dignity, autonomy, and legitimacy values underlying the process-based day-in-court right apply only at the trial stage, especially when pretrial is critical preparation for trial.

48 These three grounds fit the least problematic doctrinal bases for binding nonparties. *See*

But what if there is no control, waiver, or consent? This is where representation enters the picture. But the fit is very awkward. The intuition is that *A*'s litigation choices can be assigned to *B* when *A* acts as an adequate representative of *B*.[49] For process-based dignitary or legitimacy values to be satisfied, however, the relationship between *A* and *B* must be very close—close enough so that *A*'s choices count as *B*'s as well. This condition is satisfied by a fiduciary relationship in which *A* makes litigation choices exclusively in *B*'s best interests.[50] For example, an attorney acts as a fiduciary for her client and the client is bound, and a trustee acts as a fiduciary for beneficiaries and the beneficiaries are bound.[51] Under these circumstances, it is possible to imagine that *A*, as fiduciary, stands in for *B*. But there is a problem with applying the fiduciary model to ordinary litigation. A fiduciary is supposed to act *exclusively* in the best interests of the principal. This is, after all, what makes it possible to view the fiduciary as a very close litigating substitute. However, in ordinary litigation, *A* has her own lawsuit to litigate and therefore a right to make her own litigation choices. *A* can never be made to attend exclusively to the best interests of *B*, as a pure fiduciary is supposed to. Indeed, if *A* were forced to do so, *A*'s own process-based right would be violated.

One might argue that the fiduciary principle works in the class action setting because the named representative agrees, implicitly if not expressly, to act as a fiduciary when she seeks class certification.[52] However, it is unreasonable to assume that a class representative with a personal stake in her own suit would ever agree to be a pure fiduciary for the class. Moreover, a class representative, at best, acts as a fiduciary for the class as a whole, not for each class member. Yet it is each class member who has a right to control her own suit.

Taylor, 553 U.S. at 893–94. *B* can be bound, for example, if *B* actually makes the litigation choices in *A*'s suit from behind the scenes. *See supra* notes 40–43 and accompanying text. The same is true if *B* agrees to be bound come what may and thus, in effect, waives her day-in-court right. *See* 18A WRIGHT ET AL., *supra* note 42, § 4453, at 420. And *B* is also bound if she clearly agrees that *A* can make the litigation choices for her. *Id.* § 4453, at 424.

49 *See supra* notes 3–4 and accompanying text.

50 *See Taylor*, 553 U.S. at 894.

51 *See id.* (mentioning "suits brought by trustees, guardians, and other fiduciaries" as legitimate for binding nonparties); 1 RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982).

52 Class representatives are often referred to as fiduciaries. *E.g.*, Martens v. Thomann, 273 F.3d 159, 173 n.10 (2d Cir. 2001) (finding that "as class representatives, the moving plaintiffs have fiduciary duties towards the other members of the class"). But it is not clear what this label means. It might simply be descriptive, meant to refer to the fact that representatives owe obligations of loyalty to the class and thus resemble fiduciaries in that respect (with the obligations justified on other grounds). Or it might be normative, meant to denote that representatives should be treated as fiduciaries with all the obligations a fiduciary owes.

To be sure, trustees also act as fiduciaries for the class of beneficiaries as a whole, but there is an important difference between trusts and class actions. As a matter of trust law, beneficiaries do not have individual legal rights that they can pursue separately in lawsuits they control personally.[53] Their substantive rights in the trust exist only collectively, as a group, and the trustee has the legal authority to litigate the group right for all.[54] By contrast, each class member has her own substantive right and her own lawsuit to bring. In this situation, the day-in-court right is supposed to guarantee each class member the opportunity to make her own litigation choices, and it is hard to see how this guarantee is met by someone making litigation choices for the class.

There is a crucial point to notice about this analysis. Unlike the outcome-based approach, the process-based approach relies centrally and heavily on representation to do the normative work.[55] Representation is precisely what justifies attributing *A*'s litigation choices to *B* so that *B* can be fairly bound to the result. The problem is that, outside the pure fiduciary context, representation is not compatible with a strong participation right that guarantees broad individual control. This is the rub. Just when representation is needed normatively, it is not up to the normative task.

II. Failed Solutions

It follows that there is a serious mismatch between doctrine and justification. An outcome-based approach can justify preclusive effects for *B* when *A* represents *B*'s interests, but only by also justifying nonparty preclusion in situations having nothing to do with representation and well beyond the narrow limits of current doctrine. A process-based approach can justify preclusive effects limited to consensual and fiduciary representation, but has trouble accounting for preclusion in the ordinary class action.

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53 *See* 1 Restatement (Second) of Judgments § 41 cmt. a (1982).

54 *See id.* § 41 cmt. b. In fact, beneficiaries normally do not have a right to intervene in a trust-related lawsuit brought by or against the trustee. *See* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1909 (3d ed. 2007).

55 The Court in *Taylor* also mentions three other well-established bases for nonparty preclusion. *Taylor*, 553 U.S. at 894–95. The first includes the special rules dealing with successors-in-interest to property, bailors and bailees, and assignors and assignees, all of which the Court explains by "the needs of property law." *Id.* at 894. The second involves litigation by someone who acts as a proxy for another person who already litigated in the first suit. *Id.* at 895. The third basis includes special statutory schemes, such as bankruptcy, that bind nonparties under certain circumstances. *Id.*

A mismatch like this generates doctrinal instability and spawns incoherence at the level of normative argument. There are two general ways to address this problem. One takes doctrine as fixed and tries to mold justification to fit it. The other adjusts both justification and doctrine in an effort to fit doctrine to a better understanding of justification. In Part III, I pursue the latter strategy; here, in Part II, I explore what can be done with the former. The main challenge in trying to fit justification to doctrine is to explain the most salient features of current doctrine: that the class action is exceptional, and that nonparty preclusion is strictly limited in nonclass settings.

The following discussion critically examines three approaches to this challenge, each of which is constructed from current scholarly accounts of the class action.[56] The first approach assumes that process-based and outcome-based values can be satisfied by a mix of consent, participation, and representation, and then argues that the class action is (virtually) the only procedural device that has the right mix. The second approach treats the class action as analogous to a type of administrative governance in a way that weakens the force of the process-based day-in-court right. The third approach relies on a form of contractarian argument that supposes parties would agree to preclusion in a class action setting if only they could consider the matter under suitable bargaining conditions.

In the end, all three approaches fail, but their failure is instructive. It shows that there is no coherent justification that fits current doctrine. This means that the most promising way to resolve the mismatch between doctrine and justification is to alter doctrine to fit the best account of justification. Part III takes on that task.

A. Mixed Theory

Many courts and commentators assume that class action preclusion is special because of the multiple procedural protections the class action offers class members.[57] The Supreme Court in *Taylor v.*

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56 These three approaches are constructed from my best understanding of how judges and scholars might respond if asked how to justify class action exceptionalism, given what else they say about the class action. I do not claim that specific judges or scholars explicitly address the precise question examined here.

57 *See, e.g.*, Tice v. Am. Airlines, Inc., 162 F.3d 966, 972 (7th Cir. 1998) ("The class action cases allowing preclusion after adequate notice and the opportunity to opt out recognize a form of consent that is enough to justify binding the later parties to the earlier result (again, when the other criteria such as identity of issue and interest are also satisfied)."); 18A WRIGHT ET AL., *supra* note 42, § 4457, at 514 (noting that "class-action procedure provides many explicit safeguards designed to ensure adequate representation"); Howard M. Erichson, *Informal Aggrega-*

Sturgell, for example, refused to expand the doctrine of virtual representation outside the class setting because it feared that doing so would circumvent "the procedural safeguards contained in Federal Rule of Civil Procedure 23."[58] Typically, three main safeguards are cited: (1) notice is given to class members and each has a right to opt out of the class and not be bound, (2) each class member has a right to intervene and be heard both at the liability and settlement review stages, and (3) each class member is represented by named plaintiffs and class attorneys whose representational adequacy is monitored by the judge.[59]

I call this approach a "mixed theory" because it combines representation with other grounds for justifying preclusion.[60] The *Principles* rely in part on a mixed theory. For example, the Reporters' Note to section 1.02 characterizes established forms of representational litigation in terms of four correlated factors that are assumed to vary by degree: interest overlap, consent, participation, and control.[61] When consent to representation is weak, there must be a greater degree of

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tion: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits, 50 DUKE L.J. 381, 458–62 (2000) (arguing that "nonparty preclusion based on informal aggregation should be rejected to avoid circumvention of protections built into formal aggregation mechanisms, especially the class action rule").

58 *Taylor*, 553 U.S. at 901.

59 *See, e.g.*, Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (holding that due process requires notice, a right to intervene, a right to opt out, and adequate representation in order for the court to have personal jurisdiction over class members who lack minimum contacts); *Tice*, 162 F.3d at 972 (focusing on the right to notice and opt out for a type of consent that justifies preclusion when interests are aligned and issues are identical); *see also* Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 607 (2008) (noting that "[c]urrent doctrine casts the basis for preclusion of class members in terms of a mixture of protections," including opt-out, intervention, and representation).

60 As several scholars have noted, the class action combines exit, voice, and loyalty, three elements used to justify modes of governance more generally. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (introducing the "exit, voice, and loyalty" typology as a framework for institutional design). In the class action setting, the right to opt out is exit, the right to intervene is voice, and adequacy of representation assures loyalty. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376–77, 419 (2000) (recommending a focus on exit opportunities to discipline class counsel); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 366–80 (adopting the framework of exit, voice, and loyalty in the class action setting and recommending improvements to check attorney opportunism).

61 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 reporters' note cmt. b(1)(B), at 19 (2010); *see also id.* § 1.02 reporters' note cmt. b(1)(B), at 22 (explaining that preclusion of members in association cases has a stronger basis than preclusion of citizens in parens patriae actions because associational preclusion is more consensual, involves more harmonious interests, and is based on a relationship that offers greater control opportunities to association members).

interest overlap between the representative and the represented (to strengthen the representational nexus) or stronger opportunities for the represented party to participate or control the litigation.[62] In other words, deficiencies in one area can be compensated by strengths in the others. This is the hallmark of a mixed theory.

Those who endorse mixed theory often focus on outcome quality and ignore or give short shrift to process-based values and the day-in-court right. This makes the task too easy. If there is a reason to limit nonparty preclusion narrowly, it is because of process-based values. But the main problem with a mixed theory from a process-based perspective is that the three elements—opt-out, intervention, and representation—are not normatively additive. Because each is insufficient alone, all are insufficient together. To see this point clearly, let us consider each element in turn.

1. Opt-Out

The standard account of opt-out as a basis for preclusion relies on consent: when an absentee chooses not to opt out, she consents to being bound by the class action.[63] With process-based values handled by consent, preclusion is justified as long as the class action is structured to assure quality outcomes.[64] The problem, however, lies with inferring consent from a decision not to opt out.

First, Rule 23 requires neither notice nor a right to opt out for mandatory class actions certified under 23(b)(1) or (b)(2).[65] Accordingly, opting out is not available as a justification for binding class members in these cases.

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62 *See id.* § 1.02 reporters' note cmt. b(1)(B), at 19.

63 *See, e.g.*, *Shutts*, 472 U.S. at 812 (connecting the right to opt-out with consent). Even *Shutts*, however, is ambivalent about opt-out as consent, choosing to rely on opt-out plus both a right to intervene and adequate representation. *Id.*

64 If it is proper to infer consent from a failure to opt out, the consent must be conditioned on the class action being structured to assure a good outcome. It would not be reasonable to assume that an absent class member would consent to be bound by a defectively designed class action that produces a skewed outcome.

65 *Compare* FED. R. CIV. P. 23(c)(2)(A) (requiring only that the court "direct appropriate notice to the class" for class actions certified under 23(b)(1) or (b)(2)), *with id.* 23(c)(2)(B) (requiring "individual notice to all members who can be identified through reasonable effort" for class actions certified under 23(b)(3)). The Due Process Clause might require more, although that is not decisively settled and it is rather unlikely for class suits seeking exclusively injunctive relief. *See Shutts*, 472 U.S. at 811 n.3 (limiting the holding to claims for monetary judgments); *see also* Coppolino v. Total Call Int'l, Inc., 588 F. Supp. 2d 594, 605 (D.N.J. 2008) (determining that due process does not require notification of the right to opt out in actions for injunctive or equitable relief).

Second, class notice does not actually have to be received as long as it is sent properly. A class member is bound whether or not she gets the notice or even knows about her opt-out right.[66]

Third, a class member's choice not to opt out can support consent to be bound only if she understands the consequences of her choice well enough to make an informed decision. Even if a class member understands the content of the notice—itself questionable when the notice includes complicated settlement terms[67]—she is still likely to have problems evaluating the costs and benefits of opting out unless she consults a legal expert.

Fourth, inferring consent makes sense only if the absent class member has a large enough stake to justify the cost of individual litigation.[68] In general, a choice to do *Y* rather than *X* can signal consent to *Y* only when *X* is a feasible option, too. This means that the right to opt out cannot establish consent for small-claim class actions, whatever it can do for other types of cases.

The fifth problem is more fundamental. Each class member begins with a background right to her own day in court.[69] It follows that a decision not to opt out supports an inference of consent only if the class member *must* opt out to preserve her right. But a nonparty has the day-in-court right simply by virtue of possessing a legal claim; she need do nothing extra, such as opting out, to preserve it.[70]

Some of these problems are practical; others are theoretical. Together they mean that the opt-out right is simply not up to the task of justifying the binding effect of class actions.

2. Intervention

The right to intervene is said to justify binding class members because it gives them an opportunity to participate, which is what their day-in-court right guarantees.[71] The argument is attractive, but it is also flawed.

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66 *See* 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.102[2] (3d ed. 2010).

67 The 2003 amendments to Rule 23 imposed stricter requirements for notice, including that "[t]he notice must clearly and concisely state in plain, easily understood language: [certain enumerated matters]." FED. R. CIV. P. 23(c)(2)(B). But problems still remain.

68 *See* Issacharoff, *supra* note 60, at 367–68.

69 *See supra* notes 36–43 and accompanying text.

70 In other words, the inference of consent presupposes a default—that class members are bound unless they opt out—and this default cannot be justified by consent without risking vicious circularity.

71 *See* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 605–06 (1997).

First, in the class action setting, intervention by *all* class members is not a realistic option. One of the prerequisites for class certification is that the class be so numerous that the joinder of all class members is impracticable.[72] But if joinder is impracticable, surely intervention must be, too.

Second, even if it were possible for all class members to intervene and participate individually, each intervenor would have very little, if any, personal control over the class suit. The day-in-court right is supposed to guarantee a substantial measure of personal control, which is virtually impossible when a lawsuit has hundreds or even thousands of intervening parties.[73]

3. Representation

The foregoing analysis leaves representation to do the normative work. But that simply returns us to the puzzle we are trying to solve. It is not clear how representation in the customary class action can justify binding absent class members on a process-based approach. Mixing in opt-out and intervention adds nothing because neither opt-out nor intervention is sufficient to satisfy process-based values on its

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72 FED. R. CIV. P. 23(a)(1).

73 Also, relying on the intervention right to justify preclusion, at least within the current Federal Rules of Civil Procedure, is inconsistent with the Supreme Court's holding in *Martin v. Wilks*, 490 U.S. 755 (1989), *superseded by statute*, Civil Rights Act of 1991 § 108, 42 U.S.C. § 2000e-2(n)(1) (2006). In *Martin*, the Court held that white firefighters could collaterally attack a decree entered in litigation to which they were not parties despite the fact that they knew about the suit and did not intervene. *Id.* at 758–59. The Court stressed the day-in-court right and cited *Chase National Bank v. Norwalk*, 291 U.S. 431 (1934), for the "principle" that "a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined." *Martin*, 490 U.S. at 763. The *Norwalk* principle plainly rules out any approach that would preclude on the basis of a failure to intervene.

The *Martin* Court also relied on the structure of the Federal Rules of Civil Procedure, and in particular Rules 19 and 24. *Id.* at 763–65. By doing so, the Court seemingly left open the possibility that the Federal Rules of Civil Procedure, or perhaps a congressional statute, could constitutionally alter the *Norwalk* principle by making intervention mandatory rather than permissive. For an example of a statute adopting a mandatory intervention rule, see the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n)(1), the constitutionality of which is still an open question.

One might argue that Rule 23 alters the *Norwalk* principle by adopting a mandatory intervention approach, but there is a serious problem with this argument. Rule 23 does not actually state that intervention is mandatory; it merely grants a right to intervene. *See* FED. R. CIV. P. 23(d)(1)(B)(iii). Even if Rule 23 could make failure to intervene a basis for binding absent class members without running afoul of the Rules Enabling Act, 28 U.S.C. § 2072 (2006), current Rule 23 does not do that. Therefore, as the Federal Rules of Civil Procedure stand now, the argument that a right to intervene gives class members an adequate day in court to justify preclusion is inconsistent with *Martin*.

own. In short, three unpersuasive grounds do not add up to a persuasive justification.

B. Reconceiving the Class Action as Private Governance

The second way to fit justification to doctrine is to reconceive the class action in a way that weakens the hold of process-based participation and the day-in-court right. Professor Nagareda's work on mass tort litigation relies on an argument of this sort.[74] He focuses on settlements in damage class actions, mainly mass tort suits, that create complex compensation schemes and distribute settlement proceeds disproportionately based on the substantive rights of class members.[75] Professor Nagareda conceives of these class actions as modes of private governance in which power is delegated to class attorneys to adjust class members' entitlements through settlement. This practice, he argues, makes the class action resemble administrative regulation, which makes it appropriate to evaluate preclusive effects under administrative law principles.[76]

Invoking principles of administrative law helps overcome day-in-court concerns because the broad day-in-court right does not apply to administrative hearings.[77] Moreover, the negotiation and approval of complex settlement schemes more closely resembles agency rulemaking than agency adjudication insofar as the settlement creates general rules for the class as a whole and acts prospectively on future claimants. This similarity calls forth the holding in *Bi-Metallic Investment Co. v. State Board of Equalization*[78] that general rules can be made without giving individualized hearings to those affected.[79] With the

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74 *See* Nagareda, *supra* note 21, at 350–68; Nagareda, *supra* note 59, at 628–47; *see also* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007).

75 *See* Nagareda, *supra* note 21, at 350–68.

76 *Id.*

77 Agencies are subject to constitutional due process constraints, of course, but the demands of due process are more flexible in the administrative setting. *See* Mathews v. Eldridge, 424 U.S. 319, 334–49 (1976) (using a balancing test to determine due process requirements and noting that differences between courts and administrative agencies counsel against importing full-blown trial procedures into the administrative setting). Commentators sometimes assume that the *Mathews v. Eldridge* balancing test applies straightforwardly to adjudication. *See, e.g.*, Redish & Katt, *supra* note 31, at 1880. But this view is too simplistic. The Court's cost-benefit balancing test fits adjudication awkwardly at best and, insofar as it implements a utilitarian approach, is at odds with the day-in-court right. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 47–49 (1976).

78 Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

79 *Id.* at 445; *see also* NAGAREDA, *supra* note 74, at 235–36 (stressing the fact that legislation and administrative rulemaking allow adjustments over time); Nagareda, *supra* note 59, at

process-based right to individual participation handled in this way, the only remaining concern is to ensure outcome quality. This is not easy to do for large class actions, especially settlement class actions, but there are devices suited to the task.[80]

Although there is much of value in this account, it falls short of justifying preclusion. For one thing, it is not enough to identify features of class settlements that resemble regulation and then conclude that administrative regulation is a better framework within which to justify the class action.[81] What is needed is a reason *why* it is legitimate to treat the class action as a form of administrative-type regulation despite the fact that it was developed for and operates within the institution of civil adjudication. It is entirely possible that altering substantive rights is illegitimate because it does not fit our best account of what civil adjudication is supposed to do. Indeed, some critics of broad and liberal class action practice believe exactly that.[82]

In fairness, Professor Nagareda recognizes this legitimacy issue. In his recent book on mass tort litigation, he proposes that the settlement bargaining take place within an agency-type rulemaking committee and that the committee's approval be required before a negotiated settlement has preclusive effect.[83] The idea is to invest the settlement with the legitimacy of agency rulemaking explicitly rather than just by analogy. This is an interesting proposal, but it solves the legitimacy problem by leaving the class action behind.[84]

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607 (arguing that due process in the regulatory context consists of constraints placed on regulators to heed the interests of those whom they serve).

80 Consistent with his private governance and administrative agency themes, Professor Nagareda recommends adapting procedures from administrative law to discipline the class attorney and mitigate the risk of self-dealing. *See* Nagareda, *supra* note 21, at 357–74 (requiring "reasoned explanations" and "hard look" judicial review to evaluate settlements and proposing a scheme of competition among class attorneys inspired by market-based methods of agency regulation). And in *Mass Torts in a World of Settlement*, he proposes a new attorney's-fee rule to force attorneys to take proper account of future claimants in global settlements. NAGAREDA, *supra* note 74, at 236–49.

81 Nor is it sufficient to argue that aggregate treatment is permissible in adjudication because mass tort cases usually settle en masse outside of adjudication anyway. This is relevant to an outcome-based analysis, but it has no bearing on process-based day-in-court concerns.

82 *See* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009).

83 *See* NAGAREDA, *supra* note 74, at 250–68. He also proposes a new attorney's-fee rule that would trump existing contingency-fee contracts between mass tort plaintiffs and their lawyers. *Id.* at 237–41. Transferring settlement bargaining to an administrative process is meant to legitimize this fee rule as well. *See id.* at 254–68.

84 Of course, Professor Nagareda is interested in understanding and improving mass tort litigation, not justifying class action exceptionalism.

There is another problem with the private governance concept as a way to explain the special preclusive effect of class actions. If private governance exists whenever parties or lawyers have the power to alter the substantive rights of nonparties prospectively,[85] ordinary lawsuits might qualify as instances of private governance, too. After all, the common law process delegates power to parties and their attorneys to modify the substantive rights of nonparties prospectively through the operation of stare decisis. To be sure, the power to affect substantive rights is certainly not the same for the common law as it is for class settlements.[86] The point, however, is that the administrative analogy needs a theory to explain why the class action is a unique (or at least rare) form of administrative regulation.

One might argue that governance makes much more sense for the class action than for ordinary litigation because the class is an entity, like a corporation or formal association, capable of having a governance structure.[87] Assuming that administrative-type treatment requires entity status—and it is difficult to understand why that should be so—the premise of the argument still must be justified. Why *should* the class action be treated as an entity rather than simply a collection of individual suits? Again, one needs a general theory of the class action that explains why entity treatment fits adjudication despite the fact that each class member has an individual legal right, an individual right to sue, and a personal right to a day in court.[88]

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85 In *Mass Torts in a World of Settlement*, Professor Nagareda defines governance as the power to alter preexisting rights prospectively and in a binding way. NAGAREDA, *supra* note 74, at ix–x, 57.

86 Professor Nagareda also equates governance with difficult policy tradeoffs. *Id.* at x. If pressed, he might argue that common law rulemaking involves principle rather than policy. However, principled reasoning involves hard tradeoffs, too, and it is not clear why governance should be limited to only tradeoffs involving policies (and Professor Nagareda probably does not mean to limit it in that way).

87 *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923–42 (1998).

88 In some of his writing, Professor Nagareda discounts the day-in-court right for ignoring the fact that most class actions settle and that class members rarely take advantage of their participation rights. *See, e.g.*, Nagareda, *supra* note 59, at 637, 639. This is a mistake. Both observations are true, but neither weakens the salience of the day-in-court right. Settlement is pervasive in civil litigation, so if the day-in-court right does not apply when a case settles, then it does not apply to most ordinary civil cases. As for the second observation, the fact that class members do not exercise their participation rights in large class actions, while interesting empirically, has no necessary normative implications.

C. Contractarianism

The third approach relies on contractarian reasoning to argue that all affected parties would agree to preclusion in the class action if they were able to negotiate together in a properly constructed bargaining situation, such as behind a Rawlsian veil of ignorance. Scholars, at times, have relied on contractarian arguments to justify various features of the class action. Professor Tidmarsh, for example, recently relied on a Rawlsian argument to justify his proposed standard of adequate representation.[89] Others have also used contractarian-type arguments to support representation standards, as well as to evaluate intraclass conflicts.[90]

There are several conceptual and normative problems with contractarian arguments. I have discussed these problems elsewhere and will only summarize them here.[91] In general, there are two main types of contractarian reasoning: ideal contractarianism and egoistic contractarianism.

Ideal contractarianism imagines a hypothetical situation constructed in such a way that the result will have moral force for parties in the real world.[92] The key feature—captured by Rawls's veil-of-ignorance metaphor—is that rational agents bargain without knowledge of facts about themselves and the world that would lead them to pursue their own self-interest without sufficient regard for the interests of others.[93] Stripping agents of knowledge makes an agreement feasible when conflicting interests would scuttle agreement in the real world. More important, it invests the agreement with moral force by providing a moral reason why parties in the real world should accept the results. Defenders of this type of contractarianism argue that its moral force draws in a complex way on a mix of values—autonomy, equality, impartiality, mutual respect, and mutual advantage.[94]

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89 *See* Tidmarsh, *supra* note 26, at 1186–87.

90 *See* David A. Dana, *Adequacy of Representation After* Stephenson*: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 288–300 (2006) (relying in part on a Rawlsian approach to develop standards for assessing adequate representation for class action settlements); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 590–97 (justifying a hypothetical consent standard for evaluating the significance of intraclass conflict). *See generally* Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1843–47 (1997) (using a contractarian veil-of-ignorance argument to justify an ex ante approach to procedural justice in general).

91 *See* Bone, *supra* note 12.

92 *Id.* at 530.

93 *Id.* at 535–38.

94 *Id.* at 532.

Ideal contractarianism works best for the kind of problem Rawls tackled: developing and defending general principles of justice for the basic structure of society.[95] It works poorly at the more concrete level of choosing rules for a specific institution like adjudication. One problem is that the bargaining agents cannot be as ignorant about the real world as they are behind Rawls's veil. If the task is to choose rules or principles for the institution of adjudication, agents must know a great deal about that institution. More important, bargaining agents must know a great deal about the parties and cases they represent in order to be sure that the agreed-upon rules or principles take adequate account of everything relevant to sound procedural design.[96]

The problem is that agents with this much knowledge will find it difficult to agree. For example, those class members with strong cases might reasonably reject a large damages class action that is likely to combine high- and low-value claims. Class settlements in such cases typically average over claim value and can end up providing less than the expected value of above-average claims.[97] This generates incentives for class members at the high end to exit, creating a risk that the class action will unravel. Anticipating this, bargaining agents are not likely to find the class device very attractive.

Even if the class action is coupled with a requirement that each class member be made at least as well off as in individual litigation—a

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95 *Id.* at 533–34.

96 This includes whether the case is strong or weak, whether they are plaintiffs or defendants, and other factors. *Id.* at 535–38. On the other hand, they should be ignorant of their own personal wealth because that factor is not properly relevant to procedural design. *Id.* at 536. Those who make contractarian arguments in procedure rarely even try to justify their information assumptions, and when they do, their justifications are very thin and ultimately unpersuasive. For example, Professor Miller assumes that his bargaining agents know a great deal about their cases and the background facts but are ignorant of the value of their particular claims and other facts bearing on their position in the class. Miller, *supra* note 90, at 591–92. He argues that this particular form of selective ignorance "emulates the actual consent required in ordinary litigation" when actual consent is impossible, produces efficient outcomes, does not "unduly hamstring class action litigation," and recognizes "the reality that most class action litigation is dominated by class counsel." *Id.* at 596–97. None of these arguments work. The argument regarding consent simply fails as an independent justification because hypothetical consent is not real consent. The arguments regarding necessity and class action reality do nothing to respond to the morally based objections of high-end plaintiffs to the damage-averaging inevitable in class action settlements, and they have no purchase at all against the process-based day-in-court right. To be sure, an argument from efficiency can do the justificatory work—as long as rights-based arguments are ignored—but it works on its own without any need for contractarian bargaining or hypothetical consent.

97 John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 917–18 & n.104 (1987).

standard Professor Tidmarsh defends in part with a contractarian argument[98]—agreement is still not likely. Class members with strong cases and high-value claims will often do better joining together as coplaintiffs or forming their own smaller class action. They reap some of the scale economies of the class action while avoiding the leveling effect of adverse selection. Thus, the class action is still likely to unravel.[99]

The difficulties are even more serious when contractarianism is used to deal with the process-based day-in-court right. Rational agents stripped of all knowledge can only weigh the general value of controlling one's own suit against the advantages of aggregate treatment. But this approach misunderstands the process-based day-in-court right. For one thing, it is a mistake to include the right as something to be traded off behind the veil. If the right is essential to legitimacy or respecting individual dignity, it must be part of the institution of adjudication itself. In other words, the day-in-court right, if subject to contractarian bargaining at all, is the product of bargaining at a higher level, when agents choose principles for the general institution of adjudication.[100]

At this point, one might switch from ideal contractarianism to egoistic contractarianism. The latter seeks to replicate the agreement real parties would actually have made before their dispute materialized, had transaction costs and other bargaining obstacles not rendered agreement impossible.[101] The idea is that parties are often better off precommitting to more limited procedure when the cost savings are substantial.[102] Applied to the day-in-court right, one might argue that actual parties in the real world would have consented to limited autonomy had they been able to bargain in advance. After the dispute materializes and the lawsuit is filed, they are unable to agree because at least one side realizes the strategic advantages that litigation control confers.

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98 Tidmarsh, *supra* note 26, at 1186–87.

99 For this reason, and contrary to what Professor Tidmarsh assumes, some class members will actually be worse off in a class action than they would be if they could make their own litigation choices.

100 To be sure, parties often waive or trade their day-in-court rights, but they do so in particular cases with knowledge of the consequences. That is, after all, what the day-in-court right gives them: a right to control their own lawsuit in their own way. It makes no sense for this right to be traded behind a veil of ignorance with agents who do not know enough to make an informed choice.

101 Bone, *supra* note 12, at 519–29.

102 *Id.* at 496–50, 519–21.

The problem with this argument is that any consent is purely hypothetical (since the parties did not in fact agree), and hypothetical consent has no normative force as consent.[103] One might argue that the parties have no ground for complaint because they are better off with the limits. But they are better off only ex ante, before their dispute arises, not ex post, at the time the litigation takes place.[104] The day-in-court right, however, guarantees control over actual litigation and thus applies ex post, not ex ante.[105] To be sure, the fact that the parties are better off in expectation matters to an efficiency analysis, but the day in court as a right is supposed to resist arguments based on efficiency.

Finally, if the contractarian argument worked in its ideal or egoistic form, it would extend beyond the class action. For example, it is easy to see how parties behind the veil might agree to relatively broad nonparty issue preclusion conditional on vigorous advocacy and the absence of hostile interests. After all, each bargaining agent anticipates an equal chance of being the first to litigate, and all know that nonparty preclusion can save substantially on litigation costs. Thus, even if a contractarian argument can justify preclusion in the class action, it cannot justify class action exceptionalism embodied in current doctrine.

III. A More Promising Solution

In sum, these three approaches to fitting justification to doctrine fail in different ways. The mixed approach fails because each of its components fails separately and there is no normative synergy among them. The administrative analogy fails for lack of a convincing reason to treat the class action as a form of administrative governance. And the contractarian argument fails because it is not possible to construct a bargaining situation that fits the task of procedural design, makes agreement feasible, and invests the hypothetical agreement with moral force.

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103 *Id.* at 522–26.

104 Sometimes they can be better off ex post as well, but these are not typical cases. *See id.* at 525.

105 Also, it is not clear that parties would be able to agree given what they must know about their own situations. For example, absent class members who believe they have strong claims and serious damages might not agree to a large class action when the alternative of joining together as coplaintiffs is likely to make them better off. As another example, a large, risk-neutral, and well-financed corporation is not necessarily going to agree ex ante to limitations on strategic control when the corporation believes there is a good chance its opponent will be much weaker than itself.

This means that we should look for a different approach to resolving the mismatch between doctrine and justification. Since it does not work to accept doctrine as it is and mold justification to it, the alternative is to mold doctrine to a different understanding of the underlying justifications. In particular, the following analysis reconstructs the process-based day-in-court right in a way that accommodates a more flexible approach to preclusion. The result is a body of nonparty preclusion law that extends beyond current doctrine. And that is as it should be. The Supreme Court purports to find the broad day-in-court right in "deep-rooted historic tradition,"[106] but the Court misunderstands the traditional practice it invokes. In fact, the best interpretation of procedural practice, both current and traditional, supports only a qualified and limited right—one that allows for much broader nonparty preclusion than the Court is willing to endorse.

Some readers might wonder why litigant control matters so much. Perhaps the best approach to reconciling doctrine with justification is to get rid of the process-based participation right altogether. Parties, after all, seldom exercise much personal control over litigation and glean little satisfaction from adversarial participation for its own sake, independent of outcome.[107] To be sure, the procedural justice literature shows that losing parties feel better about the process and the result when they have a chance to participate, but the level of participation that produces these positive psychological effects falls far short of the robust control guaranteed by a broad day-in-court right.[108]

If this reasoning were enough to discount the process-based day-in-court right, one could focus on outcome values and design the class action and other preclusion devices to satisfy outcome-quality metrics. But the argument misses the point. The dignity- and legitimacy-based reasons for a participation right are normative, and the normative case cannot be countered with descriptive accounts of what parties do.[109] What is important for the day-in-court right is that individuals have an

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106 *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008); Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996).

107 *See, e.g.*, Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92–100; David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 702 (1989).

108 *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 101–06 (1988) (noting that the main factor contributing to party satisfaction is an opportunity to tell one's story to the decisionmaker). Some skeptics claim that most parties would willingly give up a good measure of personal control to save substantial costs or obtain a better chance of obtaining their desired outcome. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 275–80 (2002).

109 There are limits, of course. If virtually everyone cared only about outcome, we might

opportunity to exercise control. What they do with this opportunity does not matter to the existence of the right itself.[110] Nor should it matter whether they gain satisfaction from participation or from the outcome that participation allows them to influence. The right is not about satisfying preferences; it is about respecting individual dignity and supporting adjudicative legitimacy.

The following discussion challenges the broad day-in-court right from a normative rather than a descriptive perspective. It reconstructs the right by developing general principles of participation that fit and justify procedural practice. As it turns out, the best interpretation of how participation actually works in adjudication makes room for situations where parties have no right to a personal day in court and situations where the day-in-court right is limited and qualified.

Before proceeding, I should be clear that I happen to be a skeptic when it comes to the coherence of process-based participation. My reservations have to do with what I believe is a questionable fit between process-based theories and the best account of the purposes of adjudication.[111] However, I put aside these reservations here. For this Article, I assume the existence of a process-based day-in-court right in order to consider what the content and scope of that right should be if, as the Supreme Court assumes, it is supposed to fit settled procedural rules and practices.

A. Learning from the History of the Representative Suit

Many judges and scholars believe that the modern class action has a long history extending, in a more or less continuous way, back to the "representative suit" developed by the courts of equity in England more than three centuries ago.[112] This historical claim, if true, is important because it vests class action doctrine with the legitimacy that derives from a lengthy pedigree. The claim is mistaken, however, and so is the pedigree argument that it supports. The modern class action is, in fact, a very different device than the traditional representative

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have to rethink the process-based day-in-court right as a normative matter, especially if we thought the right was grounded in conventional morality.

110 To be sure, potential plaintiffs in large-scale mass tort aggregations often make poorly informed attorney choices, and mass tort attorneys are, at best, only weakly accountable to their clients. *See* Hensler, *supra* note 107, at 95–96. But it would be a mistake to conclude from this reality that the day-in-court right is meaningless. Indeed, one could just as easily conclude that mass tort aggregation is illegitimate because it undermines the day-in-court right.

111 *See* Bone, *Rethinking*, *supra* note 14, at 279–85.

112 *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 841–48 (1999); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

suit.[113] Moreover, the differences have something to teach us about the day-in-court right itself.

I have written about the history of the representative suit and the modern class action at some length elsewhere.[114] The complete story is complex. This Section summarizes only what is needed to make this Article's argument about the day-in-court right and preclusion, although more detail is provided in footnotes.

In brief, the traditional representative suit, unlike the modern class action, was not a preclusion device and did not necessarily bind absentees.[115] Its purpose was to permit lawsuits to go forward without joining absent necessary parties and to remove certain formal obstacles to granting effective relief.[116] Whether the remedy bound absentees was an entirely different matter. That issue was decided in a later suit if an absentee chose to sue separately.[117] Moreover, the determination of the preclusion issue turned mainly on the type of representative suit and not on whether representation in the first suit was adequate.[118]

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113 Bone, *History of Adjudicative Representation*, *supra* note 14, at 287–304.

114 *Id.*

115 *Id.* at 242, 248.

116 *Id.* at 243–45. A bit more detail will fill in some of the gaps. The typical rule in equity required all persons with an "interest in the subject of the suit" to be joined. *Id.* at 246. Frequently, however, an equity court could not join all necessary parties when they were too numerous. Rather than dismiss the suit, the chancellors developed the representative suit exception. *Id.* at 242. If the "interest" all absentees had in the subject of the suit (i.e., the interest that made them necessary parties) qualified as a "common interest" (which defined a "class"), one of them could sue alone without joining the rest as long as he pleaded that he was suing "on behalf of" himself and others identically situated. This allegation turned the suit into a representative suit, and the plaintiff was allowed to proceed when otherwise his suit would be dismissed. *Id.* at 242–45. Furthermore, the representative suit designation expanded the powers of the equity court. The court could grant a more comprehensive remedy adjudicating the rights of all the absentees. *Id.* at 243–45. Moreover, in representative suits like privateer cases, creditor cases, and other actions involving determination and distribution of a definite fund, the representative suit designation removed formal obstacles to intervention.

There was no need for certification because the representative suit was not designed as a res judicata device. *Id.* at 284. The judge got involved only if the defendant objected to the failure to join necessary parties, and in that case, the judge decided whether the common interest requirement was satisfied. This determination, moreover, had nothing to do with shared goals or preferences or practical stakes in the outcome of the litigation. "Common interest," like the concept of "interest" in the necessary party rules, referred to a particularly tight legal relationship to the suit in which the absent person's legal rights were closely connected to those that the plaintiff was trying to vindicate; in other words, it referred to formal structural relationships among legal rights, duties, and remedies. *Id.* at 245–49.

117 *Id.* at 257.

118 *Id.* at 257–65. Judges sometimes checked to make sure that the plaintiff in the first suit litigated vigorously and had no reason to harm absentees. *See id.* at 284–87. But the plaintiff

The paradigmatic representative suit that bound absentees in the seventeenth and eighteenth centuries involved cases where no one had a strong process-based right to participate personally.[119] The chief example was the general right suit.[120] These were lawsuits in which the plaintiff asserted a legal right that attached to or bound an indefinite group qua group with membership defined by a shared status.[121] Each group member had an individual right that was essentially a clone of the general right.[122] In the seventeenth century, many of the general right cases involved efforts to convert traditional customary practices into formal legal rights or duties. A tenant might sue his lord, for example, to declare the rights of tenants to an area owned in common pursuant to longstanding custom.[123] The tenants' rights to the common area attached to all tenants, an indefinite class, simply by virtue of their status as tenants, and thus qualified as a general right.[124]

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was not treated as a fiduciary for the class; he had absolute dominion and complete control over his own suit. *Id.* at 284–85.

119 *Id.* at 264–65. There was another type of representative suit. *See id.* at 250–54. This second type was mainly a device for distributing a definite fund or property among multiple claimants. Examples include privateer suits in the eighteenth century brought by crew members claiming shares of the booty captured by the ship, and creditor bills in the eighteenth and nineteenth centuries seeking to recover from the debtor's assets. *Id.* at 250–51. In these cases, one of the claimants filed a representative suit on behalf of himself and all others with claims to the fund or property, seeking an accounting and a distribution. The "on behalf of" allegation allowed the plaintiff to proceed without joining other claimants as necessary parties. *Id.* The ensuing litigation proceeded in two stages. *Id.* at 253. In the first stage, the chancellor determined the amount of the fund or property that belonged to the class of claimants as a group, e.g., the total crewshare in the privateer cases or the total assets of the debtor available to satisfy the various debts in the creditor bill cases. This classwide determination was possible only because of the representative suit designation, and it bound all class members on the same theory as the binding representative suit. *Id.* at 265–68. In the second stage, a master invited claimants to intervene so each could prove his entitlement and obtain his share. *Id.* at 253. Here again, the representative suit designation helped in that it allowed the judge to bypass the otherwise narrow intervention rules in equity. Those claimants who did not intervene in the second stage could sue separately, but they could not relitigate the classwide entitlement determined in the first stage. *Id.* at 267.

120 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA §§ 855–856 (Boston, Little, Brown & Co. 13th ed. 1886) (1835) (organizing the general right cases into nine categories).

121 *See* Bone, *History of Adjudicative Representation*, *supra* note 14, at 237–39.

122 *Id.* at 238.

123 2 STORY, *supra* note 120, § 855.

124 *See* Bone, *History of Adjudicative Representation*, *supra* note 14, at 237–39. The indefinite group could be on the defendant's side as well. For example, a parson might sue his parishioners to establish the parson's legal right to tithes based on custom by arguing that he had a general right that required parishioners to pay tithes simply by virtue of their status as parishioners. *See id.*; *see also* 2 STORY, *supra* note 120, § 855. Moreover, general rights were not limited to seventeenth-century feudal arrangements or customary law. A famous eighteenth-century general right case involved a suit by the town of York against riparian landowners to declare the

When one group member sued, he had to bring a representative suit alleging that he sued "on behalf of" all group members, and equity then took jurisdiction to prevent a multiplicity of suits.[125] Besides confirming equity jurisdiction, the "on behalf of" allegation allowed the plaintiff to proceed without joining the rest of the group and to obtain a broad decree adjudicating the general right despite the absence of most right holders.[126] And most important for our purposes, every member of the group was bound to the decree.[127] In the tenant example, for instance, all present and future tenants were bound to the court's determination of rights in the common area.

The "general right" label was abandoned in the nineteenth century, but the general right precedent shaped a body of doctrine that recognized preclusion in a broad range of representative suit cases having nothing to do with custom.[128] The nineteenth-century representative suit with binding effect usually involved a legal right that belonged to an indefinite class qua class and to each class member simply by virtue of his occupying a legally prescribed and fixed status.

The so-called "public right" cases belong to this category. For example, when a taxpayer sued a municipality to enjoin unlawful public action affecting the municipality as a whole, he had to bring his suit as a representative suit on behalf of all taxpayers. This allowed him to proceed without joining all the taxpayers as necessary parties and authorized a judicial decree encompassing the entire class. Moreover, all taxpayers were bound to the decree simply because of their status as taxpayers.[129]

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town's ownership of prescriptive rights to a fishery in the River Ouse. Mayor of York v. Pilkington, (1737) 26 Eng. Rep. 180 (Ch.) 180. Here, as in the parson-parishioners case, the indefinite group is on the defendant's side—all persons who could claim conflicting rights to the fishery by virtue of their status as riparian owners. In other words, the chancellor in effect declared the town of York's in rem property right to the fishery, and an owner of riparian land was bound simply by virtue of his status as a landowner. *See id.* at 181.

125 Bone, *History of Adjudicative Representation*, *supra* note 14, at 237–38, 242–45.

126 *Id.* at 242–45.

127 *Id.* at 264–65 & n.121.

128 *See id.* at 272–84 (collecting many of the examples).

129 *See id.* at 274–75. Another example involved litigation over remainder interests created by a trust. A remainder interest subject to open created an indefinite class, and the rights of the class in the real property conveyed in trust attached to the class qua class. *See, e.g.*, Hale v. Hale, 33 N.E. 858, 868 (Ill. 1893) (stating that the rights of those remaindermen present and those not present are "protected by the decree in precisely the same way"). Accordingly, when a trustee sued for court approval of a sale converting property in the trust to money but preserving the same remainder interest in the proceeds, the trustee sued one or more of the existing remaindermen, denominated the suit a representative suit, and thereby bound all future remaindermen to the decree. *See id.* at 859–61, 868.

All these representative suits shared certain general features in common that, I have argued elsewhere, supported giving the decree broad res judicata effect.[130] Roughly speaking, the lawsuit involved a group right or duty attaching to the group as such, and the group had a legal existence and definition prior to any litigation.[131] Moreover, each member's legal right was simply a clone of the group right and therefore precisely identical to the right of every other member.[132]

This combination of features meant that the judgment did not single out any individual in a personal way. Instead, the court adjudicated the legal incidents of the status that defined the class and the judgment affected class members only indirectly.[133] As I have argued, jurists were comfortable precluding class members because those members had no strong process-based right to make their own litigation choices because the lawsuit and the judgment involved them in only an impersonal way.[134]

It is important to bear in mind that this is an interpretation of the representative suit precedent and commentary. Although some commentators came rather close, no one clearly articulated this theory in express terms.[135] Nevertheless, the idea that process-based participation rights were weak or nonexistent in impersonal, status-based litigation fits the pattern of precedent and explains the sometimes confusing commentary much better than any alternative account. To be sure, courts frequently coupled references to the impersonal nature of the suit with an outcome-based argument that binding absentees was essential to an effective remedy, but the outcome-based argument had the force it did because there was no strong process-based participation right to get in the way.[136]

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130 Bone, *History of Adjudicative Representation*, *supra* note 14, at 279–81.

131 *Id.* at 238, 279. Thus, the representative suit did not create a class, as the class action does today. It merely incorporated a class that was already defined by the substantive law.

132 *Id.* at 279.

133 *Id.* at 263–65.

134 *Id.* The same was true for in rem proceedings, such as actions to quiet title in land or to establish an easement good against the world. One justification for binding everyone to an in rem judgment had to do with the fact that the judgment acted directly on the property and only indirectly on those persons claiming an interest in the property. Thus, the effects on absent claimants were only indirect and impersonal. *Cf.* Pennoyer v. Neff, 95 U.S. 714, 722–23 (1877) (declaring that "no State can exercise direct jurisdiction and authority over persons or property without its territory" but that a state can "affect" out-of-state persons or property as an indirect consequence of a valid exercise of jurisdiction over persons or property within the state).

135 *See* Bone, *History of Adjudicative Representation*, *supra* note 14, at 262–63, 268–70 (discussing Frederic Calvert's views).

136 *See id.* at 265. To ensure outcome quality, judges sometimes checked whether the party to the first suit had litigated vigorously and in good faith. *See id*. at 284–87. But this was not

The 1938 version of Rule 23 incorporated this framework. It defined the class action not in functional terms, as current Rule 23 does (for the most part), but rather in terms of the formal nature of the legal rights at stake.[137] In an important article published the year before the Federal Rules of Civil Procedure went into effect, James William Moore, the chief architect of original Rule 23, mapped the distinct Rule 23 categories into three different types of representative suit reflected in the precedent: true, hybrid, and spurious.[138] Only the true class action had full binding effect on absentees, and Moore traced its roots to the general right, public right, and other binding representative suits of the eighteenth and nineteenth centuries.[139]

It is quite common today to treat *Hansberry v. Lee* as ushering in the modern interest-representation theory of the class action. This theory focuses on intraclass homogeneity of interest in the sense of shared goals or preferences and demands adequate representation of

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done to monitor some fiduciary or similar relationship between the representative and absent class members, for no relationship of that kind was recognized. It was done to make sure that there was no obvious reason to question the quality of the judgment. *See id.*

137 Subsection (a) of the original Rule 23 provided as follows:

> (a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

FED. R. CIV. P. 23(a), 308 U.S. 689 (1939) (amended 1966).

138 James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 314–21 (1937).

139 *See* James Wm. Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 556–62 (1938); *see also* Moore & Cohn, *supra* note 138, at 307, 314 (discussing classification of class actions and origins of representative suits). The hybrid class action mapped into the privateer, creditor bill, and similar representative suits that were used to distribute a definite fund or property among competing claimants. *See supra* note 119. These class actions were called "hybrid" because only part of the litigation bound absentees (that part determining the amount of the fund or fixed property) and the other part did not (that part determining each person's share). *See* Moore & Cohn, *supra* note 138, at 317. Absent class members were bound only with regard to the determination of amount, and they had to intervene to litigate their personal share, just as the privateers, creditors, and the like had to do in the representative suit precedent on which the hybrid class action was modeled. *See supra* note 119. The spurious class action was exclusively an intervention device with no preclusive effect on nonintervenors. *See* Moore & Cohn, *supra* note 138, at 318.

those interests before class members can be bound.[140] The *Hansberry* Court, however, expressed much more ambivalence about interest representation than the conventional account supposes.[141] As I have explained elsewhere, *Hansberry* is best understood as a transitional opinion, influenced by the legal realist attack on nineteenth-century legal formalism but still uncertain about the consequences of uncoupling the representative suit from the rights-based doctrinal structure that kept it contained.[142]

The *Hansberry* Court might have been correct to tread cautiously. When the 1966 revision of Rule 23 jettisoned the formalistic rights-based theory for good and replaced it with a functional approach, the class action was transformed. The new Rule 23 envisioned the class action in all its various forms as first and foremost a res judicata device. It conceived of effective representation in terms of similarity of interests in the sense of goals or preferences and imagined the representative as a fiduciary for the class.[143] Courts and commentators have been trying to explain and justify this new structure ever since.

There are two important points to take away from this brief history. First, the class action, as it is known today, is a relatively new procedural device. The interest-representation theory that lies at its core is radically different than the rights-based conception of common interest that defined the binding representative suits of the eighteenth, nineteenth, and early twentieth centuries. Although federal courts began to rely on modern interest representation in the wake of the *Hansberry* decision, the interest-representation theory did not become firmly entrenched in federal class action law until the revision of Rule 23 in 1966.[144]

The relatively recent advent of the interest-representation theory is important. It means that historical pedigree cannot be used to justify class action exceptionalism. It is simply not correct that the modern class action is the result of incremental development over time, with judges gradually working out the implications of interest representation case by case.[145] It is tempting to translate the earlier rights-

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140 *See* Bone, *Rethinking*, *supra* note 14, at 214–15.

141 In fact, the Court relied heavily on the traditional view of the representative suit based on the formal structure of legal rights. *See id.*

142 *Id.*

143 *See* Bone, *History of Adjudicative Representation*, *supra* note 14, at 290–91.

144 *See id.* (discussing the triumph of the functional approach over the formalistic rights-based approach and its effect on the 1966 revision of Rule 23).

145 *See id.*

based "interest" rhetoric into the language of shared preferences or goals and read the "representative suit" label to refer to representation in the modern sense.[146] But doing so commits the error of anachronism. The concepts of general right, public right, and the rest were not just window dressing; they had meaning to the judges who used them, and their logic was quite different from the logic of representing interests in the modern sense.

The second point to take from my historical account is even more important. Although the traditional representative suit was defined in terms of the formal structure of legal rights, its preclusive effects were based on a general principle that can support nonparty preclusion today beyond the class action. This principle holds that there is no, or at best a very weak, process-based right to participate when the lawsuit and the judgment do not single out any person for individual treatment but instead affect everyone only as a result of adjudicating an impersonal status that they all happen to occupy.[147]

One need not accept the rights-based formalism of earlier law to appreciate this principle. In fact, some jurists use the principle to explain why the Due Process Clause does not require legislatures to give individualized hearings to everyone affected by a statute that operates impersonally.[148] There is, to be sure, a compelling outcome-based reason to relax due process requirements because giving everyone hearings would make legislation impossible.[149] But one must still deal with the process-based right to participate personally, which is independent of outcome-quality effects. One common way to address the process-based objection is to argue that individualized participation is not re-

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146 *See id.* at 245–47.

147 The Supreme Court recognized the germ of this principle in *Richards v. Jefferson County*, 517 U.S. 793 (1996), although without appreciating its full scope or extent. *Richards* involved a challenge to a county's occupation tax. In holding that a second group of taxpayers challenging the tax was not claim precluded by an earlier unsuccessful challenge, the Court distinguished between two different types of taxpayer suits. In one type, the taxpayer challenges "an alleged misuse of public funds . . . or . . . other public action that has only an *indirect* impact on his interests." *Id.* at 803 (emphasis added). In the other type, which *Richards* was, the taxpayer challenges a tax designed "to levy personal funds." *Id.* The Court observed that the state has wide latitude to restrict repetitive litigation in the first type of suit—although without saying anything expressly about preclusion—but that the state must provide a day in court for the second type. *Id.*

148 *See, e.g.*, O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 789 (1980) (Blackmun, J., concurring); TRIBE, *supra* note 37, §§ 10–6 to –7.

149 For example, this is the reason Justice Holmes gave in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915). It is likely that the Court simply assumed that due process does not guarantee individual participation on process-based grounds when a legislature acts generally.

quired when legislation acts on a general class and does not focus on any individual personally.[150]

Indeed, the principle described here can explain why the process-based participation right does not require notice and opt-out for a Rule 23(b)(2) injunction class action. The (b)(2) category applies when the defendant has acted toward a group qua group without singling out any individual for special treatment and the court is asked to grant injunctive or declaratory relief for the group as a whole without needing to adjudicate attributes specific to any member.[151] An example is a civil rights case brought to enjoin discriminatory practices that extend in the same way to everyone in a racial group simply by virtue of their race. When a court grants injunctive or declaratory relief in this situation, it affects individuals only as a result of their possessing the general attributes of group membership.[152]

This principle makes sense once one considers that individuals have no unilateral power to affect the formal incidents of a legally defined status and are affected only as members of the status-based group. Because the lawsuit as a whole, including both the legal right and the remedy, focuses on the group qua group, it is not clear why values of dignity or legitimacy should call for personal participation by each class member. The participation of the group through representatives ought to be enough. Therefore, it is permissible to preclude without any opportunity for the individual to control the suit because the individual has no right to control.

To illustrate, consider the recent case of *Taylor v. Sturgell*. *Taylor* involved a Freedom of Information Act ("FOIA")[153] request seeking technical documents from the Federal Aviation Administration ("FAA") for an antique F-45 airplane.[154] The FAA refused to disclose

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150 Instead, one might argue that the value of an effective legislative process simply outweighs the process-based value of individualized hearings. But this argument assumes that there is some way to compare the moral value of the process-based right to the instrumental value of an effective legislative process. Moreover, it is not at all obvious that the balance comes out against any constitutional hearing obligation. It seems more reasonable to suppose that the balance would support a due process obligation to provide the best hearing reasonably feasible. The fact that legislatures are not subject to such an obligation is strong evidence that existing law, rather than balancing outcome-based and process-based values, instead assumes that there is no process-based participation right in the legislative setting.

151 More precisely, a (b)(2) class action is appropriate when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

152 Bone, *History of Adjudicative Representation*, *supra* note 14, at 293–98.

153 Freedom of Information Act, 5 U.S.C. § 552 (2006).

154 Taylor v. Sturgell, 553 U.S. 880, 885 (2008).

the documents on the ground that they contained the trade secrets of the manufacturer. Greg Herrick, the first plaintiff, sued the FAA and lost.[155] Brent Taylor, a friend and fellow antique airplane enthusiast, brought the same suit again seeking the same documents. The Supreme Court held that Taylor was not claim precluded by Herrick's suit and therefore could litigate his FOIA claim.[156]

At first glance, the Court's holding seems counterintuitive and wasteful. Why should the day-in-court right tolerate repeated litigation by private individuals seeking to vindicate the same public right? The structure of the FOIA right and remedy is not much help in answering this question. The right and remedy are difficult to characterize. On the one hand, FOIA right belongs to the public at large, in the sense that the public is the intended beneficiary.[157] On the other hand, FOIA works by giving each individual a right to sue when requested information is not disclosed, and it imposes no obligation on a successful litigant to pass any information along to the public.[158]

A better way to think about the question is to consider how the FAA decision, and the district court's determination in *Herrick v. Garvey*[159] upholding that decision, affected individuals interested in obtaining the documents. When the FAA refused to disclose, the agency acted for reasons that did not single out Herrick or Taylor for personal treatment. Indeed, the FAA's decision resembles rulemaking or legislation. The decision was based on the general ground that no one was entitled to the technical documents because they contained trade secrets.[160] Moreover, although the legal right is individual, Congress's primary purpose in conferring FOIA rights was to secure the public benefits of enhanced transparency and government accountability.[161] Given this, the best way to interpret the *Herrick* Court's decision is to view it not as acting directly on any individual,

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155 *Id.* at 886.

156 *Id.* at 904–07.

157 *See* U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (noting that FOIA "was designed 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny'" (citation omitted)); EPA v. Mink, 410 U.S. 73, 79–80 (1973) (noting that FOIA was a response to a previous, highly limited agency disclosure regime and that the statute "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands").

158 *See* 5 U.S.C. § 552(a)(3)(A), (4)(B) (2006).

159 Herrick v. Garvey, 200 F. Supp. 2d 1321, 1329 (D. Wyo. 2000).

160 *See Taylor*, 553 U.S. at 886.

161 *See Ray*, 502 U.S. at 173; *Mink*, 410 U.S. at 79–80; *see also* 111 CONG. REC. 26,822 (1965).

but rather as affecting individuals only indirectly by virtue of determining the public's right to the documents in question.[162]

It is important to emphasize that this conclusion does not follow by logical deduction from the inherent nature of the rights, remedies, wrongs, or other formal characteristics of the suit. It follows from the best interpretation of what the agency did, what Congress intended, and how the decision operates. This approach is consistent with the dignitary and legitimacy foundations of the day-in-court right. Whether dignity is offended or legitimacy breached depends on how the government treats the individual and that depends on the best characterization of what the government did. Moreover, violations of dignity or legitimacy turn in part on how government actions are understood by the individuals affected. All these factors are matters for interpretation.[163]

This analysis addresses only the process-based aspects of the day-in-court right.[164] There are still outcome-based reasons that must be considered. In *Taylor*, for example, Herrick, the first plaintiff, failed to raise certain arguments on appeal, which, according to the court of appeals, might have made a difference to the outcome.[165] The lower courts used claim preclusion to bar Taylor from bringing the FOIA claim at all,[166] but one could argue on outcome-based grounds that issue preclusion is more appropriate. Although Taylor should be pre-

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162 In a recent article, Professor Nagareda analyzes *Taylor v. Sturgell* in terms of the inherently aggregate nature of the suit. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1121–28 (2010). However, he focuses on right, remedy, and wrong and misses the significance of the impersonal and status-based character of the FOIA issues at stake. *Id.* Moreover, he reaches the opposite conclusion to mine, reasoning that preclusion was properly denied because virtual representation would create "a vehicle for ad hoc evasion of class certification requirements." *Id.* at 1124. It is hard to understand what is so ad hoc about nonparty preclusion in a case like *Taylor*. Indeed, the theory of nonparty preclusion is the same as the one that supported the binding representative-suit precedent historically. *See supra* notes 131–34 and accompanying text.

163 For example, a different conclusion might be warranted if the best interpretation of FOIA's primary purpose was that Congress intended to give each citizen a right to hold government accountable personally and individually. However, such a purpose is hard to square with the general characterization of FOIA as about assuring *public* accountability and transparency.

164 For those readers who still think that an approach that relies on a distinction between personal and impersonal forms of litigation must be formalistic, recall that the personal/impersonal distinction is part of a process-based analysis that seeks to spin out the implications of respect for individual dignity (and adjudicative legitimacy) independent of outcome quality. This type of analysis has all the earmarks of functionalism: it tries to fit legal rules to the underlying principles and policies; in this case, to the moral principle of respect for dignity.

165 Both arguments had to do with whether trade-secret status was properly restored to the documents. *Taylor*, 553 U.S. at 887–88.

166 *Id.* at 889–90.

cluded from relitigating the issues that Herrick actually litigated and lost, he should be allowed to litigate issues that were omitted from Herrick's suit, especially given the public interest at stake and the slippery slope of extending claim preclusion to all FOIA cases. The Supreme Court decided only the claim preclusion question, but lower courts and commentators assume that the opinion rejects the virtual-representation theory for issue preclusion as well.[167] This is a mistake as far as sound policy is concerned.

B. Lessons from Joinder Law: A Limited Participation Right

In the previous Section, I argued that there are some cases where no one has a process-based day-in-court right to control litigation choices. In this Section, I argue that the day-in-court right, where it applies, is much more limited than the Supreme Court assumes. More precisely, the best interpretation of the way participation actually works in procedural rules and practices supports only a limited and qualified right.[168]

At the outset, it is useful to distinguish between two different ways that the day-in-court right might be limited. One way is to recognize a broad autonomy right granting relatively unfettered freedom to make litigation choices, and then to limit the right to take account of the conflicting autonomy rights of other litigants and (perhaps) particularly strong countervailing interests not implicating rights.[169] The underlying assumption is that it is possible to accommodate rights conflicts by limiting autonomy rights while still preserving a meaning-

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167 *See supra* note 31.

168 Although a legal claim is "property" within the meaning of the Due Process Clause, it is a mistake to conclude that a plaintiff is entitled to the same broad control property owners enjoy over the things they own. At least since the rise of legal realism in the early twentieth century, courts and commentators have understood that the "property" label has no necessary implications for legal rights. For example, an entitlement to government benefits qualifies as "property" within the meaning of the Due Process Clause even though benefit entitlements are heavily regulated. *See* Atkins v. Parker, 472 U.S. 115, 128 (1985).

169 *See* Redish & Katt, *supra* note 31, at 1890–95 (equating the day in court with a very broad "zone of individual autonomy," but recognizing that this "process-based autonomy" can be outweighed by "higher valued competing interests"). In a recent article, Professor Tidmarsh describes a theory of the participation right that seems to fit what I call a "liberty rights model." *See* Tidmarsh, *supra* note 26. He argues that the American adversarial system is based on a "principle of self-interested autonomy" that gives parties the right to make their own litigation choices without regard to the effects on others. *Id*. at 1139–45. He then argues that this freedom ceases when it causes harm to others. *Id*. at 1146. Although he might have the institutional view in mind (as I describe it in the text that follows), his characterization better fits the structure of the "liberty rights model": a right to relatively unfettered freedom is circumscribed when it produces serious "harm" to others.

ful core of unfettered freedom for each right holder.[170] I shall call this the "liberty rights model" of the day in court.

The liberty rights model roughly fits the way the Supreme Court treats the day-in-court right in nonparty preclusion law, where broad freedom of choice for absentees has nearly controlling weight. The problem with the model, however, is that it fits very poorly the way litigant autonomy works in a different but closely related setting: procedural decisions about what actual parties can and cannot do in ongoing litigation. As the following discussion demonstrates, existing procedural rules and practices limit party control for many reasons, including fairness to other litigants, remedial efficacy, and even litigation efficiency in some circumstances. Moreover, there seems to be little concern in these cases about sacrificing some core of unfettered freedom to make litigation choices. To be sure, litigant autonomy is a value, but this value gives way fairly readily to other institutional values that extend beyond respecting the autonomy of other litigants and that, while weighty, need not be particularly compelling.

This pattern fits a different view of the day-in-court right. On this view, there is no such thing as a right to unfettered freedom, even a right that must be limited in scope to accommodate other comparable rights. Instead, the best way to understand the participation right, consistent with the way litigant autonomy works in ongoing litigation, is that it reflects a balance of institutional considerations relevant to assuring the fairness and justness of adjudication. An institutional right of this sort can still qualify as a "right" so long as it somehow resists utilitarian reasons for limiting control based on improving aggregate social welfare. By "resists," I mean that the right need not exclude or wholly trump utilitarian reasons, but it must limit the reasons that count—for example, by demanding that the welfare gains be very large or that appeals to social welfare somehow take account of a right holder's interests.[171] This is a critical condition, but as long as it

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170 This account evokes a picture of spheres of autonomy with radii that contract to prevent overlaps with other autonomy rights. *Cf.* Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101 (1986) (describing a competing rights model of land use conflicts that shaped late nineteenth century nuisance law and that was based on a belief in absolute-dominion property rights, and recounting its demise in the early twentieth century).

171 Clearly, social costs must be relevant to the scope of the process-based right in some way. Quite simply, we do not care enough about litigant control to guarantee it even when doing so is very costly. Figuring out how the definition of procedural rights can take account of social costs is an extremely tricky matter, however, and one that I do not need to delve into here. *See generally* Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1015–18 (2010) (discussing this puzzle). It is also worth noting that my distinction between the liberty

is satisfied, one can speak of a right to participate that adjusts to institutional factors.[172]

My claim, then, is that this institutional view of the day-in-court right better fits and justifies the way well-settled procedural rules and practices deal with party control in ongoing litigation.[173] The argument in this Section, like the argument in the previous one, aims therefore to meet the Supreme Court on its own terms. Insofar as the Court purports to find the day-in-court right in "deep-rooted historic tradition," it cannot ignore evidence from actual practice that supports a different view.

My method is to identify the many ways that party control over litigation is limited and argue that the liberty rights model accounts poorly for the resulting pattern. However, there is a possible threshold objection that challenges the entire enterprise. A knowledgeable reader might agree that litigant autonomy is greatly restricted in actual litigation involving multiple parties, but still argue that formal parties are in a better position than absentees because formal parties have at least a partial day in court.

This is an important point, but it proves too much. If being a formal party makes the difference no matter how much control the party has, it must follow that the day in court guarantees little more than a right to appear and accept whatever meager control opportunities are available. It is clear, however, that the Supreme Court views

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rights model and the institutional view roughly parallels the distinction between actions or decisions that infringe a right but do not violate it because they are justified, and actions or decisions that do not infringe the right at all because they do not fall within the scope of the right's definition. *See, e.g.*, Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 425–30 (1993) (discussing this distinction). In the liberty rights model, limits on control necessarily infringe the right to a day in court because the right guarantees unfettered freedom, but those limits do not violate the right if they are justified by the need to protect other rights or respect compelling interests. In the institutional view, by contrast, limits on control simply do not violate the right to a day in court at all because the right guarantees only those control opportunities that are justified by proper institutional considerations. I am indebted to Mitch Berman for helping me clarify this point.

172 An attentive reader might wonder whether the institutional view is compatible with a day-in-court right that is *process-based*. For example, this Section argues that all litigants owe a duty of fair regard that justifies limiting control opportunities in order to safeguard outcome quality for other litigants. Conditioning process-based control on outcome quality in this way presents some difficult analytic and conceptual problems. However, I have already confessed skepticism about process-based participation, so I am not going to defend its coherence here. *See supra* note 111 and accompanying text.

173 Thus, my approach is constructivist and employs the method of reflective equilibrium. *See generally* RONALD DWORKIN, LAW'S EMPIRE 49–113 (1986) (describing an interpretivist approach); JOHN RAWLS, A THEORY OF JUSTICE 20–22, 48–53 (1971) (describing the method of reflective equilibrium).

the right in much broader terms. Indeed, this narrow a right would have no traction against procedures that drastically limit participation opportunities.[174]

More generally, there is no sharp distinction between being a party with little actual control and being an absentee with none. As the amount of a party's control diminishes, it becomes increasingly difficult to distinguish a party from a nonparty as far as process-based participation is concerned. Indeed, a party with vanishingly little control is not in a significantly different normative position than an absentee with no control at all.

With this background in place, let us examine some procedural rules to see how they treat litigant autonomy and why. A good place to begin is with permissive joinder of parties.[175] Rule 20 gives plaintiffs broad control over initial party structure by allowing joinder of multiple defendants (and coplaintiffs) subject to very weak constraints.[176] This broad control for plaintiffs, however, results in reduced control for defendants. As a plaintiff joins more defendants to the suit, each defendant is constrained by the choices other defendants make.[177] Although the constraints are not likely to be serious when only a few defendants are joined, they can become quite serious when the plaintiff joins large numbers, as has happened in some cases.[178]

The trial judge has discretion to check an overly enthusiastic plaintiff. Rules 42(b) and 20(b) give the judge power to divide up a large lawsuit into smaller litigating units.[179] The judge is supposed to consider a range of institutional factors when making this decision, such as convenience, prejudice, judicial economy, and manageability.[180] Therefore, while the plaintiff's right to control lawsuit structure seems at first glance to be very broad in keeping with a liberty rights model, it is in fact limited by a variety of institutional factors.[181]

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174 In fact, this narrow version of the process-based right would tolerate a rule that limited participation to written input in order to save aggregate litigation costs.

175 *See* FED. R. CIV. P. 20.

176 *See id.* The transaction and common-question limitations are very weak. *See* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1653, at 415 (3d ed. 2001).

177 *See id.* § 1657 (describing examples of defendant joinder).

178 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 reporters' note cmt. b(1)(A) (2010) (recognizing the possibility of permissive joinder of large numbers of defendants).

179 FED. R. CIV. P. 42(b); *see also id.* 20(b).

180 *Id.* 42(b) (allowing the judge to order separate trials "[f]or convenience, to avoid prejudice, or to expedite and economize"). These factors presumably also include the extent to which the defendants' control opportunities are limited.

181 In fact, judges give great weight to the efficiency gains from joinder. *See* 7 WRIGHT ET

The plaintiff's choices regarding lawsuit structure are limited in another way. The mandatory joinder provisions of Rule 19 require a plaintiff to join a person to the suit when, in the person's absence, the litigation is likely to produce a serious negative externality.[182] More specifically, joinder is mandatory when the omitted person is needed to provide complete relief, to protect the absentee herself from an unfair burden, or to protect a defendant from unfairness due to the person's absence.[183]

Like the judge's discretion to carve up a large lawsuit, the requirement that absentees be joined is justified by a balance of institutional considerations. This is a crucial point. There is nothing strictly necessary about joinder in these cases. The litigation system could choose to bear the negative externalities if it valued plaintiffs' autonomy highly enough.[184] However, the plaintiff's freedom to choose is constrained by factors that have to do with making adjudication a just and efficacious institution. Thus, mandatory joinder is best understood as implementing institutional norms of remedial efficacy and fair regard for the interests of other litigants. More generally, plaintiffs—indeed, all parties—have a general duty to conduct litigation with due regard for fairness to other litigants and for the integrity of the institution of adjudication itself. Some types of harm are serious enough to implicate this duty, and those are the harms Rule 19 targets.

It is worth pressing this point a bit further. The day-in-court right is not a background right that applies in all settings, like the right to be free from torture. It is an institutional right and, as such, is subject to and defined by the norms that govern the institution of adjudication itself. For example, if respect for dignity demands individual participation, the kind of participation it demands depends on institutional factors. So too, if individual participation is required for reasons of

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AL., *supra* note 176, § 1660, at 470. This should raise questions about the status of the day-in-court right as a *right*.

182 FED. R. CIV. P. 19; 7 WRIGHT ET AL., *supra* note 176, § 1602.

183 *See* 7 WRIGHT ET AL., *supra* note 176, § 1602. If the plaintiff believes that the person's absence impairs her (the plaintiff's) prospects of obtaining a remedy, she can usually amend her complaint and use Rule 20 to join the absentee. *See* FED. R. CIV. P. 20(a)(2).

184 The remedy might be less effective, the absentee herself might be harmed, or the defendant might suffer hardship. None of these consequences, however, make joinder absolutely necessary. To be sure, omitting a party might raise constitutional due process problems. *See* 7 WRIGHT ET AL., *supra* note 176, § 1602. However, these are extreme cases, and in any event the due process concerns are not exogenously determined but part of the reason why the plaintiff's autonomy should be restrained.

legitimacy, the extent of participation depends on the factors that go into determining adjudicative legitimacy.

The reader might argue at this point that mandatory joinder simply coordinates competing autonomy rights in the way the liberty rights model supposes. According to this view, a person must be joined when the plaintiff's right to control party structure interferes with the control rights of others. But this is not how mandatory joinder works. For one thing, the remedial efficacy strand of mandatory joinder implicates the interests of the judicial system in avoiding piecemeal litigation, and not so much the rights of other litigants.[185] Furthermore, when the plaintiff's omission of a party adversely affects other litigants, the reason for concern is that the plaintiff's choice makes it more difficult for others to obtain a fair result, and not simply that it interferes with their ability to make their own litigation choices.[186]

To continue with examples, a defendant can and sometimes must file a counterclaim in the same suit and can implead third parties under some circumstances.[187] Moreover, the defendant can add new parties to a counterclaim, thereby forcing the plaintiff to share the litigation stage with others.[188] Furthermore, a nonparty has a right to intervene when she stands to suffer unfair prejudice.[189] And judges have wide discretion to allow additional intervention when doing so improves litigation efficiency, enhances remedial efficacy, or contributes to effective litigation in other ways.[190]

It is difficult to justify these rules on the assumption underlying the liberty rights model that each litigant has a large zone of relatively unfettered freedom to choose her own litigation strategy.[191] The constraints are simply too numerous and too intrusive. Moreover, none of these rules is necessary in a strict sense, for there is no reason why a bipolar lawsuit between a single plaintiff and a single defendant could not proceed, at least when only damages are sought. The better justification for these rules assumes that the day-in-court right is defined by institutional factors. These factors include respect for litigant autonomy, but they also include avoiding serious unfairness to other liti-

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185 *See id.* § 1602, at 19–21; *id.* § 1604, at 47.

186 *See id.* § 1602.

187 FED. R. CIV. P. 13(a)–(b), 14(a).

188 *Id.* 13(h). Indeed, the defendant can bring an interpleader claim as a counterclaim and force the plaintiff to litigate against a different adversary.

189 *See id.* 24(a)(2).

190 *See id.* 24(b)(2).

191 *See supra* notes 169–70 and accompanying text.

gants and assuring remedial efficacy—and even to some uncertain extent promoting litigation efficiency.[192]

When one shifts from lawsuit structure to choice of forum, one sees a similar pattern. It is often observed that the plaintiff has broad freedom to choose a federal court subject only to personal jurisdiction and venue constraints. But this is not exactly true. Defendants can trump the plaintiff's forum choice by bringing a motion to transfer under § 1404(a), by bringing a motion to dismiss for forum non conveniens, or by seeking a multidistrict litigation ("MDL") transfer and consolidation under § 1407.[193]

MDL is a particularly striking example.[194] The MDL statute authorizes the Judicial Panel on Multidistrict Litigation ("JPML") to transfer related cases to a single forum for consolidated pretrial treatment when the panel determines that the transfer is "for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[195] MDL transfers force plaintiffs and defendants to share the litigation stage with hundreds and sometimes thousands of other parties.[196] Indeed, MDL proceedings are often so large that the MDL judge creates a litigation committee to coordinate strategy among all the attorneys and designates a lawyer to be committee chair.[197] In these cases, there is not much left of the individual day in court. Indeed, it is more accurate to describe MDL litigation as

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192 Depending on how it operates, including an efficiency factor can pose a challenge to the day in court as a right. *See infra* notes 202–04 and accompanying text.

193 28 U.S.C. §§ 1404(a), 1407 (2006); 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828, at 620 (3d ed. 2007) (noting that the motion to dismiss for forum non conveniens applies in federal court mostly to cases where the superior forum is a foreign country). It is true that a trial judge deciding a 1404(a) transfer or forum non conveniens motion is supposed to give the plaintiff's choice of forum considerable weight and grant the motion only if the defendant has made a strong showing that the alternative forum is substantially better. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249, 252 n.19 (1981) (forum non conveniens); 15 WRIGHT ET AL., *supra*, § 3848 (1404(a) transfer). This principle seems to privilege plaintiff autonomy, but it might do so for outcome-based rather than process-based reasons. For example, many federal courts give greater weight to the plaintiff's choice of forum when the plaintiff sues at home. *See* 15 WRIGHT ET AL., *supra*, § 3848, at 130 & n.15. Although this rule can be justified on outcome grounds, it is difficult to square with a process-based approach. After all, it is not clear why the plaintiff's process-based freedom to choose a forum should depend on which forum the plaintiff chooses.

194 *See* 28 U.S.C. § 1407. For general background on MDL transfers, see 15 WRIGHT ET AL., *supra* note 193, § 3862.

195 28 U.S.C. § 1407(a).

196 *See, e.g.*, 15 WRIGHT ET AL., *supra* note 193, § 3812, at 361–62 (discussing how § 1407 was used "to coordinate an extraordinary number of asbestos cases," resulting in 94,204 cases being transferred to the United States District Court in Philadelphia by April 2002).

197 *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 20.22 (1995).

a group day in court.[198] To be sure, the MDL consolidation is limited to the pretrial phase (mostly discovery), and MDL cases are supposed to be remanded to their home courts for trial.[199] Still, the pretrial phase is critical to litigation, and it is not clear why the dignity and legitimacy values underlying the process-based day-in-court right apply only at the trial stage.[200]

In this situation—as for judicial oversight of permissive joinder decisions, mandatory joinder, and all the rest—the liberty rights model of the day in court simply does not fit. The day in court is not a zone of relatively unconstrained litigant freedom. If it were, it would be hard to justify the severe constraints imposed by MDL. The day in court instead guarantees a measure of personal control compatible with norms of institutional fairness and integrity governing adjudication.[201] It follows that the limited participation opportunities in MDL might be justifiable provided that the MDL procedure is limited to cases of serious unfairness or serious inroads on remedial efficacy.

There is a potential problem with this account. The conventional view conceives of the purpose of MDL procedure primarily in terms of saving the social costs of litigation and promoting efficiency.[202] The problem is that this purpose fits awkwardly with the idea of the day in court as a *right*. A procedural right is supposed to resist reasons for curtailing what the right guarantees that rely on aggregate social gains. If litigant control can be routinely traded for efficiency benefits through MDL transfer and consolidation, it is not clear what is left of litigant autonomy as a strong check on cost-reducing procedural reforms.

One might argue that the MDL procedure in fact aims to correct serious unfairness due to high delay costs for plaintiffs whose suits are located later in the litigation queue. Assuming all plaintiffs have simi-

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198 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 reporters' note cmt. b(2), at 27–30 (2010) (questioning the conventional assumption that consolidations pose little problem for the day in court because parties to consolidations have formal control through individual representation by their own attorneys and noting that "[i]n truth, the difference between consolidations and class actions is less stark").

199 28 U.S.C. § 1407(a).

200 *See supra* note 47 and accompanying text. In any event, there is often such strong pressure from the MDL judge to settle that few cases are ever remanded. *See* Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150–55 (D. Mass. 2006) (criticizing the practice of refusing remands in order to induce global settlements).

201 *See supra* notes 171–72 and accompanying text.

202 This is the view that the *Principles* adopt. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 reporters' note cmt. b(2), at 27 (2010); *see also id.* § 1.03 cmt. b, at 38 ("All forms of aggregation have efficiency as a goal.").

lar cases (as in a mass tort) and that they file at different times because of chance events, there is no reason why the litigation system should favor some over others depending on when they file, and arguably there is good reason to treat all of them equally. Thus, MDL might be justified by a norm of fair regard for other litigants.

The problem with this justification is that the JPML, which decides whether to transfer cases, considers much more than fairness. In fact, it tends to emphasize systemwide litigation costs and global efficiency gains.[203] This approach is in tension with any account of the day in court as a process-based right. Addressing this tension is beyond the scope of this Article.[204] My purpose here is simply to point out that the process-based day-in-court right must be defined carefully in order to square with current procedural rules and practices at a deep level.

I shall conclude this general survey of procedures with a brief foray into the class action, the ultimate aggregation device in federal procedure. Although it is a relatively recent innovation, the modern class action has been in existence for about forty-four years, which might be long enough to qualify it as a source of general principles with implications for nonclass forms of litigation as well.[205] For example, Part III.A above argues that preclusion in the Rule 23(b)(2) class action is justified by a general principle that extends beyond the class action to support issue preclusion in *Taylor v. Sturgell*.[206]

The 23(b)(1)(B) class action can be mined in a similar way. The purpose of 23(b)(1)(B) is to aggregate cases that would generate serious harms to other class members if they were litigated separately.[207]

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203 *See* 15 WRIGHT ET AL., *supra* note 193, § 3863, at 378, 400–02, 407–08 (discussing how the MDL panel focuses mainly on litigation efficiency balanced against potential inconvenience to the parties). If the day in court is not a right, or is, at best, only a very weak right, then the litigant control it promises should yield rather easily to outcome-based reasons for broader nonparty preclusion, more expansive use of the class action, more aggressive aggregation, and the like.

204 There are ways to accommodate a concern about social costs without collapsing completely into utilitarianism. Indeed, social costs must count to some extent, or else we might have to invest far too much in procedure. *See supra* note 171. One might take the position, for example, that a procedural right need not trump all social cost factors to retain its character as a right as long as the social costs that count are serious enough. Moreover, one might be able to justify limiting party control to save litigation costs if the goal is to make the institution of adjudication function better for everyone using it. The equality argument in the text is an example, but the analysis need not be limited to strictly moral arguments of that sort.

205 *See supra* Part III.A.

206 *See supra* notes 151–62 and accompanying text.

207 *See* 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1774, at 24–25 (3d ed. 2005).

The classic example is the limited fund.[208] If a fund is insufficient to satisfy all the potential claims, individual litigation rewards plaintiffs early in the litigation queue at the expense of those who obtain judgments only after the fund is exhausted.[209] By aggregating all claimants, denying opt-out, and binding everyone to the result, the 23(b)(1)(B) class action allows the judge to equitably allocate the fund.[210]

Many people assume that the 23(b)(1)(B) class action and its binding effect are justified by necessity. But there is no strict necessity here anymore than there is for Rule 19 mandatory joinder. The fact that some win and others lose when all are similarly situated is not necessarily a bad thing in itself, nor is it a sufficient reason alone to do something about the result.[211]

In the 23(b)(1)(B) setting, the inequality generated by individual litigation is unfair not simply because people are treated unequally, but also because the inequality is inconsistent with the institutional norms of adjudication. All plaintiffs have formally equivalent substantive rights, and it is unfair (and perhaps also inefficient) to honor some at the expense of others, especially when those who suffer do so because of the bad luck of being late in the litigation queue. Moreover—and of central importance to this Article's argument—all class members are bound to the judgment without any chance to opt out because the principle of fair regard for other litigants defines the scope of their process-based day-in-court rights.[212]

One might argue at this point that preclusion is justified by adequate representation without any need to invoke a principle of fair regard. However, adequate representation is difficult to imagine in the limited-fund class action because the interests of the named plaintiff always conflict with those of other class members. Each class member would like full recovery, not an equitable share of the limited fund, and the named plaintiff, being early in the litigation queue, would much prefer to litigate separately without the albatross of a

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208 *See id.* § 1774, at 30–33.

209 *See id.* § 1774, at 32.

210 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 839–40 (1999).

211 For example, inventors race to be the first to invent a new device, but only the winner of the race gets the prize of a patent. The rest are barred from making, using, and selling the invention during the patent term, no matter how much they invested in trying to discover it.

212 In a recent article, Professor Martin Redish and William Katt recognize that preclusion in cases like this must be justified by an explicit policy balance. Redish & Katt, *supra* note 31, at 1895–908. However, their approach cannot account for existing practice because it fails to appreciate how the day-in-court right itself is internally limited.

class action. The only reason she files a class action is that her suit would be dismissed under Rule 19's mandatory joinder provisions if she did not.[213] Under these circumstances, it is impossible to view representation as satisfying process-based values for absentees.

The principle of fair regard extends to nonclass suits as well. Suppose a mass tort generates such a massive amount of litigation that it clogs the courts and causes serious delay for many plaintiffs. Although this situation does not involve a limited fund, the effects are comparable. Lengthy delay can seriously reduce the real value of recovery for many plaintiffs, just as delayed litigation reduces recovery for the later plaintiffs with claims on the fund. Thus, it is not difficult to see how nonparty issue preclusion for common liability issues might be justified in the absence of a class action by the same principle that justifies 23(b)(1)(B) class treatment.[214]

The main conclusion of the foregoing analysis is that the day-in-court right is best understood as a right to control litigation insofar as relevant institutional considerations support personal control. It is a right insofar as it resists or constrains reasons for limiting control that sound exclusively in improving aggregate welfare or achieving collective social goals. But it does not guarantee a zone of relatively unfettered freedom. Litigation is not a field where adversaries engage in unrestrained combat. Litigation is the way adjudication accomplishes its goals, and the public goals of adjudication shape the procedural rights litigants possess.

IV. A Few Implications—Briefly

The previous analysis has several important implications. First, it points the way to a much broader nonparty preclusion doctrine. If the process-based day-in-court right is shaped by institutional factors, then those factors are available to justify broader nonparty preclusion both within and outside the class action. Second, the analysis shows why there is no sharp distinction, from a process-based perspective, between the class action and MDL or other types of large-scale case aggregation. If special procedural measures are required for the class action on process-based grounds, then those same measures should be

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213 Normally the problem would be handled by mandatory joinder under Rule 19(a)(1)(B)(i), but when there are too many plaintiffs to join under Rule 19, the class action accomplishes the same result through representation.

214 The 23(b)(3) class action might also have implications for nonclass litigation, but given the particularly intense controversy that surrounds (b)(3), *see* Deborah R. Hensler et al., Class Action Dilemmas 49 (2000), its status as a source of general principles is more problematic.

considered for other types of formal aggregation as well. The *Principles* should be commended for moving in this direction.[215]

Third, the analysis has implications for one of the most difficult issues in class action law today: the appropriate limits to place on collateral attack of class action settlements in a subsequent suit brought by an absent class member. Given space constraints, this Article can only sketch the outlines of the analysis, but even a brief sketch shows that a proper understanding of the day-in-court right can make room for substantial limits on collateral attack.

The collateral attack problem is easy to state.[216] In the typical situation, a class action settles and a discontented member of the class brings a separate suit seeking to litigate the same claim. The defendant in the second suit argues claim preclusion, but the plaintiff responds that she was not adequately represented in the class action and therefore cannot constitutionally be bound.[217] The issue is whether the plaintiff should be allowed to litigate and avoid preclusion if he succeeds in convincing the second judge that representation was inadequate in the first suit, even if the first judge already determined it was adequate.

Those who favor limiting collateral attack argue that allowing broad opportunities for challenge will undermine finality and discourage parties from entering into beneficial global settlements.[218] These collateral attack opponents advocate requiring the class action judge to make careful findings of adequate representation. Moreover, they favor forcing class members to raise most challenges in the class action itself, such as by objecting to the settlement at the fairness hearing, seeking relief from judgment under Rule 60, or raising objections on direct appeal.[219]

Those on the other side, who favor allowing broad collateral attack, make two different types of argument. First, some argue that the day-in-court right and its underlying dignity and legitimacy values require that the second court revisit the adequacy of representation issue.[220] Because each class member has a process-based right to her own day in court, neither the class settlement nor the class action

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215 *See, e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 (2010).

216 For a description of the problem and a fine summary of the different arguments for and against, see William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 820–41 (2007).

217 *Id.*

218 *Id.* at 830–33.

219 *See id.* at 821–24.

220 *See id.* at 825.

judge's determination of representational adequacy can have binding effect if representation is, in fact, inadequate.[221] Second, some collateral attack supporters argue that collateral attack helps to police collusion, checks judicial overeagerness to approve classwide settlements, and facilitates consideration of postjudgment developments that render a class settlement unfair to some class members.[222]

The conclusions of this Article have implications for the collateral attack issue. Any collateral attack rule must be analyzed along three dimensions: process-based, outcome-based with a focus on a utilitarian metric, and outcome-based with a focus on a rights-based metric. First, consider the process-based day-in-court right. A limited collateral attack rule is difficult to square with a liberty rights model, but it fits the institutional view of the day-in-court right more easily. Litigant autonomy has a significant place in the mix of institutional factors, but so too do other important considerations, such as fair regard for other litigants, remedial efficacy, and perhaps even reducing social costs if they are serious enough. This is not the place to do a comprehensive analysis. The important point is that the institutional view of the day-in-court right might accommodate a relatively limited collateral attack rule, because it does not depend on adequate representation as a substitute for personal control. Rather, it depends on showing that an absent class member has only a right to limited control in the first place.

Once the process-based right is addressed, the next step is to consider outcome effects. At this stage, it matters whether one adopts a rights-based or a utilitarian approach to evaluating outcomes. The utilitarian approach justifies a limited collateral attack rule in a relatively straightforward way—by showing that the social costs of broad collateral attack exceed the social benefits. The question is more difficult to answer with a rights-based approach because the protection of substantive rights through a broad collateral attack rule cannot, on this view, be easily outweighed by social costs. I have argued elsewhere, however, that the most sensible version of a rights-based, outcome-oriented theory does not give each litigant a procedural right to a maximally accurate outcome, but only a right to a fair distribution of error risk.[223] Thus, limits can be justified if broad collateral attack is likely to skew error risk unfairly.

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221 *See id.* at 834.

222 *See id.* at 835–36.

223 *See* Bone, *supra* note 171, at 1016–17 (2010); *see also* RONALD DWORKIN, A MATTER OF

Conclusion

According to the conventional understanding, adequate representation is essential for justifying the broadest expansions of nonparty preclusion. For this reason, the class action features prominently as the traditional vehicle for implementing adjudicative representation. The conventional understanding, however, is wrong in two ways. Representation is not essential for justifying broad nonparty preclusion, and the class action is not special as a preclusion device. Indeed, representation is unnecessary on outcome-based grounds and inadequate on process-based grounds. This creates a puzzling mismatch between a body of doctrine that focuses on representation and the class action, on the one hand, and a set of justifications based on outcome and process values, on the other.

This Article argues that the way to solve the puzzle is to reconceive the process-based day-in-court right. Doing so reveals that there are cases in which no one has a day-in-court right and cases where parties have only a limited right. Thus, the mismatch between justification and doctrine is reconciled by altering both justification and doctrine: a better understanding of the day-in-court right implies a broader role for nonparty preclusion. It also shows that there is more similarity between class actions and other large-scale case aggregations than is commonly supposed. Finally, it points the way toward a limited collateral attack rule.

The most general lesson of this Article is that we need a clearer understanding of process-based participation in adjudication. The benefits of developing such an understanding are too important to ignore.

Principle 95–97, 100–01 (1985) (arguing for procedural rights based on a fair distribution of error risk).