Essay

Codifying the Agency Class Action

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Abstract

Through devices like class actions and other consolidation procedures, agencies have developed several tools to manage large numbers of cases involving similar claims. While this effort to create more effective agency class actions is in its nascent stages, some form of codification is appropriate to strike a balance between flexibility and predictability, and to reduce the costs of agencies creating their own procedures. Congress, the President, or the Administrative Conference of the United States can and should take immediate steps toward codification. No matter who codifies the agency class action, any effort needs to account for procedural differences between administrative agencies and the courts and distinctions between cases involving private litigants and cases involving entitlement to a government benefit.

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Introduction

The modern administrative agency arose during the New Deal era in response to the demands of mass society.[1] As industry grew in new and further-reaching ways, so too did the agencies in charge of industry regulation.[2] During the New Deal, this meant centralized agencies with tremendous power to detect fraud, distribute licenses, and prosecute violations of the law.[3] This centralized effort gave way to a decentralized one in the 1960s.[4] In the Civil Rights Act of 1964,[5] the Freedom of Information Act,[6] and consumer protection statutes

1 *See* Harry Kalven, Jr. & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 686 (1941).

2 *See id.*

3 *See id.*

4 *See* Stephen B. Burbank & Sean Farhang, Rights and Retrenchment 7–16 (2017).

5 Pub. L. 88-352, 78 Stat. 241.

6 5 U.S.C. § 552 (2012).

like the Fair Credit Reporting Act,[7] Congress empowered decentralized private litigants to enforce the law.[8] The modern class action gave these advances in substantive law teeth.[9] The drafters of the modern Rule 23 of the Federal Rules of Civil Procedure imagined it as "something like the function of an administrative proceeding where scattered individual interests are represented by the Government."[10]

These two eras—the New Deal and the Great Society—reflected differences in views on the efficacy and fairness of centralization. The architects of the New Deal trusted centralized, independent, and powerful agencies. Rule 23's drafters wanted to empower mass groups of "small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step."[11]

While the underlying philosophies of these eras come from different places, it is perhaps inevitable that centralized agencies would eventually embrace some form of aggregate adjudication. Administrative courts are overloaded and often ineffective at adjudicating individual disputes.[12] As the Supreme Court creates more hurdles for aggregate litigation generally and class actions in particular, Article III courts are less able to resolve disputes involving large numbers of people.[13] Aggregate actions in administrative agencies could reduce duplicative dockets and streamline administrative proceedings by consolidating cases where common issues predominate.[14] They could also help to vindicate rights that are not aggregable in Article III courts because of something like an arbitration agreement.[15]

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7 15 U.S.C. § 1681 (2012).

8 *See* BURBANK & FARHANG, *supra* note 4, at 10–12.

9 *See* David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 599–600 (2013). Regardless of whether Rule 23's drafters foresaw its application in civil rights, antitrust, or securities suits, the substantive and procedural law of this era dovetailed.

10 Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 398 (1967).

11 *Id.*

12 Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1994 n.1 (2012) (collecting assessments of adjudication across agencies).

13 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624–26 (2018) (holding that right to concerted activities is not protected under the National Labor Relations Act, so class action waivers do not violate the law); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011) (heightening commonality standard for class actions).

14 *See* Sant'Ambrogio & Zimmerman, *supra* note 12, at 2010–11.

15 *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013) (holding that arbitration agreement and class action waiver was valid in part because Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights"). To the extent

This Essay argues that the agency class action should be codified in some form and outlines some key decisions that drafters would have to make in codification. Part One surveys the current landscape of aggregate litigation and its place within administrative agencies. Part Two weighs the relative benefits and downsides of ad hoc procedure versus codification. Part Three determines who could create a cross-agency aggregation procedure, what that procedure could look like, and the key decisions that drafters of an agency class action procedure would have to make.

I. What Is the Agency Class Action?

The agency class action arose at a moment of crisis for administrative courts.[16] Both to deal with crushing caseloads and achieve procedural goals like consistency, efficiency, and fairness, administrative agencies have looked to federal courts for models to better adjudicate claims with common factual or legal issues.[17]

A. What Is the Class Action?

Aggregate litigation "encompasses claims or defenses held by multiple parties or represented persons."[18] There are many kinds of aggregation in courts. One of the most prominent and powerful kind is the Rule 23 class action, but it is not the only means of aggregation. On the spectrum between the most and least powerful forms of aggregation in federal courts, class actions represent the apex of what some call "formal" aggregation because of its power to bind large numbers of absent parties.[19] At the other end are less formal, less binding procedures that still bring different claims and parties together.

1. Codified and Binding Aggregation Procedures

Three Federal Rules of Civil Procedure represent the "purest versions of formal aggregation" in their power to combine claims and bind "those not named as parties."[20] Two, joinder and intervention,

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that class actions are limited on these grounds, they also serve to limit one of the main benefits of class actions: vindicating policies that Congress considers in the public interest. *See* Marcus, *supra* note 9, at 639–40. Depending on the mechanisms agencies use for an agency class action, they may not have similar limitations.

16 *See* Sant'Ambrogio & Zimmerman, *supra* note 12, at 1994–97.

17 *See id.* at 2007–14.

18 Principles of the Law of Aggregate Litigation § 1.02(a) (Am. Law Inst. 2010).

19 *See, e.g.*, Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. 1634, 1647 (2017).

20 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal

rarely do so on a mass basis, but are still powerful procedural devices.[21] At common law, parties needed a shared property or other interest to join their claims.[22] With the first iteration of the Federal Rules of Civil Procedure, the drafters wanted to avoid the frustration, delay, and confusion that often resulted from adjudicating similar claims resulting from the same alleged harms in separate actions.[23] Consequently, the drafters created permissive joinder to allow parties to efficiently bundle claims and compulsive joinder to allow parties necessary to the resolution of a suit to be joined.[24] For similar reasons, the Rules allow a party to join as an intervenor even if no party seeks that intervention.[25]

In 1966, the Advisory Committee for the Federal Rules of Civil Procedure expanded the ability to aggregate causes of action by creating the modern class action device in Rule 23.[26] A prior version of Rule 23 only applied to particular causes of action where parties had "joint" or "common" interests.[27] The real innovation in 1966 was to introduce class actions based on a "common question" where joinder was impracticable and parties had an interest in the outcome, even if the parties did not have a shared legal interest like joint ownership of property.[28]

Collectively, these rules give four means of bringing absent parties into litigation: (1) they can be joined by a named party through permissive joinder, (2) they can be joined by a court through compulsory joinder, (3) they can join themselves through intervention, or (4) they can be joined in a sense through class certification by a class representative.[29] Among these devices, the class action is distinct in heightening the stakes of aggregation more than joinder or intervention.[30] Few lawsuits involving joinder or intervention involve

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PRACTICE AND PROCEDURE § 1901 (3d ed. 2002); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 409 (2000).

21 *See* 7C WRIGHT, MILLER & KANE, *supra* note 20.

22 *See* Charles E. Clark & Herbert Brownell, Jr., *Joinder of Parties*, 37 YALE L.J. 28, 30 (1927) (collecting cases).

23 *See* Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 448–49 (1936).

24 *See id.*

25 *See* FED. R. CIV. P. 24.

26 *See* Marcus, *supra* note 9, at 599.

27 *See* Kaplan, *supra* note 10, at 380.

28 *Id.* at 386–87.

29 *See* 7C WRIGHT, MILLER & KANE, *supra* note 20; Clark, *supra* note 23, at 448.

30 *See* Marcus, *supra* note 9, at 593–94.

thousands of parties. In class actions, the whole purpose is to provide a mechanism for binding aggregation where joinder is impracticable.[31]

2. *Informal Aggregation*

Informal aggregation is more flexible and less binding on absent parties.[32] It also tends to be more "ad hoc" in the sense that procedures can be written for a particular case or set of cases after they arise.[33] Informal aggregation here is defined as either not codified through a rule or statute or not binding on parties who are not part of the initial litigation.[34]

The most powerful and common means of informal aggregation today is multidistrict litigation ("MDL").[35] MDL was created by statute in 1968 after being used earlier in the decade to deal with a wave of price-fixing antitrust cases against the electrical equipment industry.[36] Its drafters had similar ambitions to Rule 23's drafters to devise an efficient, effective way to handle mass disputes.[37] Instead of entrusting class representatives to efficiently and diligently resolve claims on behalf of the class, however, the MDL statute's drafters sought to "centralize power over large, complex cases in the hands of individual judges . . . to a conclusion."[38] The ultimate statute did not sweep as far as initially imagined because MDL judges cannot bring a

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

32 *See* Sant'Ambrogio & Zimmerman, *supra* note 19, at 1647–48.

33 *See* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 772–73 (2017) (distinguishing between traditional rulemaking, which is prospective, and ad hoc rulemaking, which is "applied retroactively" to deal with a particular case). Ad hoc procedure exists in many forms and can be "formal" and binding as well. *See id.* at 790–92 (categorizing Prison Litigation Reform Act, which was motivated by a desire to limit prison litigation, as ad hoc even though it is binding, codified, and applies prospectively).

34 *See id.* at 784–87.

35 *See* U.S. Judicial Panel on Multidistrict Litig., CALENDAR YEAR STATISTICS (2017), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2017_0.pdf [https://perma.cc/9DJY-5842] (reporting that 3,025 cases were transferred through the MDL process in 2017); *see also* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (citing DUKE LAW CTR. FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES (2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf [https://perma.cc/5SXR-TGG8]; U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., 2015 YEAR-END REPORT 1 (2015) (calculating that by 2015, 39% of cases in federal courts were part of an MDL)). Other rules provide for similar but less powerful informal aggregation in consolidating cases within one docket without combining those cases into one action. *See* FED. R. CIV. P. 42; 28 U.S.C. § 1404 (2012).

36 *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1199–200 (2018).

37 *See id.* at 1201–02.

38 *Id.* at 1201.

case to trial, but it did enable litigants to petition to the Judicial Panel on Multidistrict Litigation, which can then transfer dozens or even thousands of cases to one court for "coordinated or consolidated pretrial proceedings."[39] Though judges in such cases wield the power to resolve dispositive motions, they lack several powers that create a more formal, binding kind of aggregation in class actions.[40] First, they can only aggregate and resolve disputes at the pretrial stage.[41] Second, MDL proceedings are not class actions, so an order can only bind the parties before the court.[42] Lastly, even if cases are transferred and consolidated before one court, they are still technically separate cases.[43]

B. What is the Agency Class Action?

Aggregation takes many forms within administrative agencies as well, but these procedures are less varied and less frequently utilized than in federal courts.[44] Only nine agencies have procedures analogous to class actions, and only three among the nine regularly use class action procedures.[45] By contrast, 69 agencies allow consolidation or joinder that would allow something like agency MDL.[46]

Agencies do provide some less powerful means of bringing parties together within an administrative proceeding. Like federal courts, agencies allow intervention, particularly in agency adjudication that involves some form of policymaking.[47] Moreover, even if a party does not formally join the action through intervention, an agency may allow parties to submit evidence if they are an "interested party."[48] This can take the form of allowing amicus briefs or any other means within the agency's discretion.[49] Except for intervention, none of these proce-

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39 *See id.* at 1205 (quoting 28 U.S.C. § 1407(a) (2012)).

40 *See* 28 U.S.C. § 1407(a)–(b).

41 *See id.* § 1407(a).

42 *See* Herbert B. Newberg, *Preclusive Effect of Orders in Multidistrict Litigations (MDLs)*, *in* 6 NEWBERG ON CLASS ACTIONS § 18:47 (5th ed. 2011).

43 *See id.*

44 *See* Sant'Ambrogio & Zimmerman, *supra* note 19, at 1658–61. It bears noting at this point that without Sant'Ambrogio and Zimmerman's pathbreaking scholarship in defining and surveying the Agency Class Action, this Essay would not be possible.

45 *See id.* at 1659.

46 *Id.*

47 *See* Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 616–17 (2d Cir. 1965).

48 5 U.S.C. § 554(c)(1) (2012).

49 *See* Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1150 (2005).

dures bind or consolidate in the same way that the agency class action or MDL does.

Among procedures analogous to class actions within agencies, the Equal Employment Opportunity Commission's ("EEOC") class action device for actions against federal government employers is the most frequently utilized and most powerful.[50] If anything, the EEOC's procedures may be even more powerful than Rule 23 because federal employees may not "opt out."[51] In most other respects though, including the requirements for class certification and motions practice, the EEOC tracks Rule 23(b)(2) class actions.[52]

Among the MDL-like procedures, the Office of Medicare Hearings and Appeals ("OMHA") stands out as an example of how agencies can use common evidence across multiple claims and aggregate settlement.[53] Just as MDL procedures allow consolidation if there are one or more "common questions of law or fact" among many cases, OMHA regulations allow a party or Administrative Law Judge ("ALJ") to move to consolidate cases involving the "same issues" with Medicare payments.[54] As in MDL, judges exercise significant discretion to issue "a consolidated decision and record or a separate decision and record on each claim."[55] OMHA ALJs can actually exercise greater power than MDL judges in federal court because MDL procedures do not allow for trials and final orders.[56]

1. What Kinds of Cases Are Most Appropriate for Aggregation?

Agencies aggregate when they have a large number of similar cases and a potentially duplicative backlog.[57] These cases share several characteristics. First, the facts to be determined are the kind traditionally resolved through adjudication as opposed to rulemaking.[58] Second, the common factual issues to be determined predominate over individual ones.[59] The National Vaccine Injury Compensation Program ("NVICP") provides an example. There, special masters within

50 *See* Sant'Ambrogio & Zimmerman, *supra* note 19, at 1666.

51 *See id.* at 1668.

52 *See id.* at 1669. Another notable deviation is that the EEOC does not require that common issues predominate over individual ones. *See id.* at 1668.

53 *See id.* at 1676–77.

54 *See id.*

55 *Id.* at 1677 (quoting 42 C.F.R. § 405.1044(e) (2016)).

56 *See* 28 U.S.C. § 1407(a) (2012).

57 Sant'Ambrogio & Zimmerman, *supra* note 19, at 1681–82.

58 *Id.* at 1682.

59 *Id.*

the U.S. Court of Federal Claims determine whether a person was injured by a vaccine.[60] These proceedings mirror typical pharmaceutical product liability MDL litigation by focusing on whether an injury was caused by a drug.[61] Such a determination is impossible to do in a rulemaking—to, for example, prospectively rule that a particular vaccine caused a particular injury—and the tools of tort law are readily available to help adjudicators.[62] Because vaccines are often given to countless people and the relevant factual overlap is greater than the differences (*e.g.*, did a person receive the vaccine? Do they show injuries similar to others? What does the vaccine do?), it makes sense for the agency to consolidate these cases into something resembling an issue class action.[63]

Mirroring how aggregation generally happens in the courts, aggregative procedures also typically involve cases where the agency is serving as an arbiter between two parties, one of whom is not the agency itself. In EEOC class actions, for example, the EEOC mimics a federal court in determining whether a federal government employer violated Title VII to the detriment of employees.[64] In mimicking a federal court judging a dispute between two outside parties, the Federal Rules of Civil Procedure tend to be helpful so that agencies do not have to reinvent the procedural wheel. There are, however, several contexts that differ from litigation in courts where a right to a government benefit is determined on an aggregate basis before the agency administering those benefits. In the wake of several high-profile failures of for-profit colleges, the Department of Education established a process for federal student loan borrowers to seek relief as a group if they shared "common facts and claims."[65] Still, the vast majority of agencies that provide permits, benefits, or some other kind of public benefit do not generally take advantage of aggregation.[66]

Social security disability benefits provide an illustration of a kind of case that agencies do not aggregate because none of the factors above apply. First, the process of determining benefits involves factfinding by the Bureau of Labor Statistics and other agencies re-

60 *Id.* at 1670.

61 *Id.*

62 *Id.* at 1670–71.

63 *See id.* at 1671–72.

64 *See* 42 C.F.R. § 405.1044 (2018).

65 34 C.F.R. § 685.222(e)(6) (2018).

66 *See* Sant'Ambrogio & Zimmerman, *supra* note 12, at 2003–04. Sant'Ambrogio and Zimmerman observe, before the Department of Education regulations, that no agencies enabled aggregation in public rights cases. *See id.*

garding whether certain work is available to a claimant.[67] Such a determination is based on public, nationally relevant information in all cases, not on facts to be determined in every case through adjudication. As a result, few of the factual issues to be determined at a hearing involving an individual's work activity, medical severity, functional capacity, and capacity for work are capable of class-wide treatment.[68] Theoretically, a class of people with the same disability could litigate a Social Security Administration ("SSA") appeal because they were treated the same by the SSA. Typically, however, the question is not whether someone has a disability, but how it affects their individual ability to do particular work.[69] These questions are necessarily individualized. Moreover, there is little precedent for applying cases involving government benefits in future adjudications.[70] Even if it is appropriate or efficient for the SSA to aggregate, there is little precedent and few examples of enabling such aggregation, so the SSA may be hesitant to do so.

For a different reason, cases for injunctive relief affecting agency action tend not to be aggregated. If one person is successful in ending a practice, no aggregation is needed. For example, a landowner next to a hazardous waste site could bring a petition to the EPA to terminate a permit granted by the EPA under the Resource Conservation and Recovery Act,[71] but it makes little sense for such a landowner to seek relief on behalf of a class of similarly affected landowners because relief for one is the same as relief for all. While plenty of class actions pursue injunctive relief against private parties,[72] few if any agency adjudications involve classes of people seeking injunctive relief against the agency.[73]

II. Should Agency Aggregation Be Ad Hoc or Codified?

Today, most aggregative procedures within agencies are ad hoc. That is, they are formed after the need for aggregation arises to more efficiently deal with a particular backlog or other problem.[74] Except

67 *See* 20 C.F.R. § 404.1566(d) (2018); *see also* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445 (1915).

68 *See* 20 C.F.R. § 404.1520 (2018) (explaining the five-step process for determining eligibility for Social Security benefits).

69 *See id.*

70 *See* Sant'Ambrogio & Zimmerman, *supra* note 12, at 2004 n.52.

71 42 U.S.C. §§ 6901–6992 (2012); *see* 40 C.F.R. § 124.5(d) (2018).

72 *See* Fed. R. Civ. P. 23(b)(2).

73 *See* Sant'Ambrogio & Zimmerman, *supra* note 19, at 1663.

74 *See supra* Section I.B.1.

for the EEOC's class action device,[75] these procedures are reactive to particular issues within particular agencies. Consequently, agencies differ in whether they implement any aggregative procedures and then, if these procedures exist, the extent to which they consolidate actions, try common issues, and bind parties. Some scholars have attempted to outline Rule 23 for administrative agencies.[76] This Essay will join in that effort shortly. In the meantime, a question remains: Should administrative agencies continue to operate in an aggregation Wild West where rules and procedures are written on the fly?[77] Or, should these procedures be codified in some form?

A. Would Codification Restrain or Embolden the Administrative State?

For critics of both class actions and administrative agencies, a combination of the two may resemble a terrifying Frankenstein.[78] Codification, however, does not necessarily mean an emboldening of administrative agencies. For example, the Administrative Procedure Act ("APA")[79] arose as a conservative reaction to "administrative absolutism," which critics of the administrative state viewed as a "Marxian idea much in vogue just now among a type of American writers."[80] Though some critics at the time "viewed reform as a means to implement abstract scientific principles of administrative and legal theory," the bill's original proponents viewed the debate not as one between efficient and inefficient procedures, but rather one between a world where agencies maintained unchecked power and one where more conservative judges could provide meaningful checks on them.[81] Although the APA's passage ultimately involved compromise between technocratic and more purely anti-agency forces, administrative re-

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75 *See* Sant'Ambrogio & Zimmerman, *supra* note 19, at 1661–63.

76 *See generally* Sant'Ambrogio & Zimmerman, *supra* note 12 (providing one possible outline).

77 This Wild West analogy may be less applicable after the Administrative Conference of the United States adopted recommendations on aggregative adjudication. *See* Adoption of Recommendations, 81 Fed. Reg. 40,259, 40,260 (June 21, 2016). Still, these recommendations do not propose government-wide rules. *See id.*

78 *See* Sant'Ambrogio & Zimmerman, *supra* note 12, at 2063 (explaining the risks that agency class actions could limit participation and increase bureaucracy).

79 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

80 *Report of the Special Committee on Administrative Law*, 63 A.B.A. ANN. REP. 331, 340 (1938).

81 *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557, 1595–97 (1996).

form has its foundations in fundamentally limiting the power of agencies.[82]

The class action device, like the APA, also came to be seen as a response to failures of the administrative state. Unlike the APA, however, it was a response to the inactivity, rather than overactivity, of agencies.[83] The creation of the class action device was "an evolutionary response to the existence of injuries unremedied by the regulatory action of government."[84]

Codification would restrain agencies in some ways. At a minimum, it could, like the APA, provide a baseline for procedural protection for litigants.[85] It would also allow litigants to use the agencies' Article I courts as an enforcement mechanism. While agencies routinely pursue restitution relief on behalf of, for example, defrauded investors and consumers, a class action mechanism could allow litigants to pursue such relief on their own, which may mean that agencies' prosecutorial discretion to decline enforcement would have less practical effect.[86]

By codifying the agency class action, Congress would also embolden agencies by removing any doubt that agencies have the power to adjudicate in the aggregate.[87] This off-the-shelf aggregation procedure could theoretically embolden agencies who are now too burdened with other rulemaking to create it themselves. Codification, therefore, will both embolden and restrain agencies.

B. Would Codification Strike a Balance Between Flexibility and Predictability?

Rules are generally supposed to be forward looking and prospective so that they are predictable and fair to those affected.[88] Creating procedural rules for a particular case or set of cases "seems to violate

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82 *See id.* at 1678.

83 *See* Deposit Guar. Nat'l Bank of Jackson v. Roper, 445 U.S. 326, 339 (1980).

84 *Id.*

85 5 U.S.C. §§ 554, 556–558 (2012). In the class action context, a procedural baseline means, among other things, ensuring notice and adequate representation for the class. *See* FED. R. CIV. P. 23(a)(4), (e).

86 *See* Sant'Ambrogio & Zimmerman, *supra* note 12, at 2005–06.

87 *See* Monk v. McDonald, No. 15-1280, 2015 WL 3407451, at *3 (Vet. App. May 27, 2015) (rejecting Veterans Courts' ability to hear class proceedings without explicit statutory authorization). Though this decision was ultimately overruled, it suggests that agencies in other situations may at least have lingering doubts about their ability to hear class proceedings. *See* Monk v. Shulkin, 855 F.3d 1312, 1320 (Fed. Cir. 2017).

88 *See* Bookman & Noll, *supra* note 33, at 773.

basic tenets of the rule of law" by creating a rule retroactively.[89] In the administrative law context, creating rules during an adjudication that apply only to a set of cases blurs lines between definitions of adjudication and rulemaking.[90] A rule is supposed to be of "future effect."[91] An adjudication is the application of a rule to a limited set of especially affected people.[92] By creating rules with retroactive effect, parties' expectations and a broader sense of fairness may be compromised.[93]

On the other hand, there is often a great need for flexibility, particularly where agencies face huge backlogs in cases that "the administrative agency could not reasonably foresee."[94] In 1992, for example, a Special Master within the U.S. Court of Federal Claims overseeing cases through the NVICP sought to consolidate 130 cases alleging that a rubella vaccination caused arthritis and other joint problems.[95] The Special Master, using his inherent powers, consolidated the cases and laid out procedures that resembled the modern day issue class action.[96] This flexible approach bore fruit. Both sides of the dispute had adequate means of presenting evidence and the court did not have to needlessly duplicate 130 battles of experts.[97] Since this first case, special masters have continued to use their inherent powers to apply similar procedures in similar situations.[98]

Additionally, in situations where the nature of the adjudication will be unpredictable, "the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective."[99] There is a benefit to enabling a bottom-up approach because it allows for a "case-by-case evolution" so that the administrative process becomes more refined each time.[100] These benefits of flexibility, however, need not be compromised by codification if the

89 *Id.* at 774.

90 *See* 5 U.S.C. § 551.

91 *Id.* § 551(4).

92 *See, e.g.*, Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445–46 (1915) (providing an example of the definition of an adjudication).

93 Bookman & Noll, *supra* note 33, at 778–79.

94 SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202 (1947) (discussing the necessity in enabling agencies to determine policy flexibly on a case-by-case basis).

95 *See In re* Ahern, No. 90-1029V, 1993 WL 179430, at *1 (Fed. Cl. Jan. 11, 1993); Sant'Ambrogio & Zimmerman, *supra* note 19, at 1672.

96 *See Ahern*, 1993 WL 179430, at *2.

97 *See id.* at *2–3.

98 *See* Sant'Ambrogio & Zimmerman, *supra* note 19, at 1674 (noting its adoption in the Omnibus Autism Proceeding).

99 *Chenery II*, 332 U.S. at 203.

100 *Id.* at 194.

codification enables flexibility. The APA has a readymade mechanism that enables agencies to create "additional requirements" in the form of procedures.[101] The same balance between predictability and flexibility could be accommodated through a similar provision in a future codification of the agency class action.[102]

C. *Are the Costs of Agency-Specific Precedents Worth the Benefit of Acknowledging Differences Between Agencies?*

Administrative law generally attempts to be transsubstantive while also accounting for real differences among agencies.[103] Today, all precedent concerning aggregate actions within agencies is agency-specific.[104] Whether this is a good or bad development depends on whether the costs of agency-specific rules outweigh the benefits of acknowledging differences between agencies. There are real costs to the creation of rules specific to an agency and differentiated rulings across agencies. Specifically, there are "agency costs, transaction costs, and information costs."[105] Agency costs arise when agencies develop their policies in a way that advances their interests as opposed to the interests of the principal, the U.S. Government.[106] There are transaction costs for agencies in creating, then potentially litigating, their own agency-specific procedures.[107] Those transaction costs would be lessened if the agency class action were codified because one ruling on one set of procedures would apply across all agencies. Relatedly, agency-specific procedures tend to increase information costs.[108] Agencies and interested parties must expend time and energy to understand and implement these procedures, whereas codification could lead to greater transparency.[109]

There is, however, an upside in acknowledging differences among agencies. An SSA claim is different from a Commodities Futures Trading Commission ("CFTC") complaint against a broker-dealer,

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101 5 U.S.C. § 559 (2012).

102 *See infra* Section III.B. Codification could include an amendment to the APA or an Executive Order. *See infra* notes 126–33 and accompanying text.

103 *See* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 512 (2011).

104 *See id.* at 509–10, 512.

105 *Id.* at 512.

106 *See id.* at 512–13. "Agency" costs in this context refers to the costs inherent in principal-agent relationships. *See id.* at 512. An "agent" may have interests distinct from the principal, which may include a desire for a bigger budget or more authority. *Id.*

107 *See id.* at 513.

108 *See id.*

109 *See id.*

which is different from a claim for Medicare payments. For example, a statistical sampling initiative makes sense in OMHA aggregate actions, but statistical sampling makes little sense in an EEOC class action. The nature of these claims is so different that the procedures for adjudicating them should perhaps be different, as well.

Ultimately, the choice between centralized rulemaking and a decentralized process of letting agencies experiment may be a false choice depending on the nature of the centralized rulemaking because agencies can go above and beyond the requirements of the APA.[110] The APA imposes minimal procedural requirements from which transsubstantive precedent can derive,[111] and thus enables creativity and difference among agencies. Whether codification occurs by amending the APA or through other means, some form of codification would strike a balance between restraining and emboldening agencies, flexibility and predictability, and costs and benefits of acknowledging differences.

III. The President or Congress Can and Should Create an Aggregation Mechanism Resembling Rule 23

The answer to whether codification would have a net positive or negative effect on agencies depends on the nature of the "floor" provided by a rule. Such a floor would ideally set protections for government beneficiaries, private parties bringing or defending an administrative action, and the government agencies themselves while giving agencies some leeway to create rules that fit their particular mandates. This leads to several key questions: What form or forms of aggregation would be codified? Who would codify? If a particular form of aggregation should be codified, how similar or different should it be from its analog in the federal courts?

A. Codification Should Resemble Rule 23

Drafters of a cross-agency aggregative procedure have several models from which to draw. Agencies themselves provide several possibilities.[112] Drafters could also look to the federal courts for several models. Additionally, Michael Sant'Ambrogio and Adam Zimmerman suggest a model that provides for both MDL and class action proceedings.[113] As sensible as it may be for an individual agency to

110 *See* 5 U.S.C. § 559 (2012).

111 For the APA's minimal procedural requirements, see generally *id.* §§ 554, 556–558.

112 *See supra* Section I.B.

113 *See* Sant'Ambrogio & Zimmerman, *supra* note 12, at 2042–43.

adopt one or both, codification poses a different question: What procedures need to be uniform and more frequently utilized?

Codification of an MDL-like procedure may not be necessary, and agencies already regularly use procedures resembling MDL. The All Writs Act[114] enables agencies to use any "procedural instruments designed to achieve 'the rational ends of law.'"[115] There is little doubt that agencies can use this power to consolidate actions in whatever form makes the most sense.[116] Moreover, 69 agencies and Article I courts already have a rule allowing MDL-like consolidation in some form.[117]

There is more doubt as to how and whether agencies can utilize the class action device.[118] Codification of a procedure like Rule 23 would remove such doubts and appropriately delineate the limits of a class action device in a way that cuts across agencies. It would also spare agencies the costs of determining these questions in a piecemeal fashion.[119]

B. Congress, the President, or the Administrative Conference of the United States Can Take Steps to Codify

Agencies do not have the benefit of a Rules Enabling Act to empower an advisory committee to create Rules of Administrative Civil Procedure.[120] This has left procedural experts on these questions to recommend against codification,[121] which leaves it up to the President or Congress.

Amending the APA is perhaps the most obvious means of codification, but the least likely to come to fruition. Congress has amended the APA only a handful of times since its passage.[122] Only two of those amendments, the Freedom of Information Act and the Government in

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114 28 U.S.C. § 1651 (2012).

115 United States v. New York Tel. Co., 434 U.S. 159, 172 (1977) (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)).

116 *See* Monk v. Shulkin, 855 F.3d 1312, 1319 (Fed. Cir. 2017).

117 Sant'Ambrogio & Zimmerman, *supra* note 19, at 1659.

118 *See Monk*, 855 F.3d at 1320 (describing past Veterans Courts decisions where class actions were held inappropriate).

119 *See supra* Section II.C.

120 *See* 28 U.S.C. § 2072(a) (2012). The Rules Enabling Act limits its application to the federal judiciary alone. *See id.*

121 *See generally* ADMIN. CONF. OF THE U.S., AGGREGATE AGENCY ADJUDICATION (2016) (recommending various rules administrative agencies can utilize for claim aggregation).

122 *See* Pub. L. No. 111-350, § 5(a)(2), 124 Stat. 3677, 3841 (2011); Pub. L. 103-272, § 5(a), 108 Stat. 1373, 1373 (1994); Pub. L. No. 94-409, § 4(b), 90 Stat. 1241, 1247 (1976); Pub. L. No. 89-554, 80 Stat. 378, 381 (1966).

the Sunshine Act, have had a substantial impact on how agencies function.[123] Moreover, the effect of its original passage and every subsequent amendment has been to weaken administrative agencies rather than provide them new tools with which they may have a greater impact.[124] It may, therefore, be unrealistic to expect Congress to hand new transsubstantive powers to agencies with such a track record.[125]

Alternatively, codification could take the form of an Executive Order ("EO") enforced by the Office of Information and Regulatory Affairs ("OIRA"). Though much of OIRA's power derives from Congress, most of its practical power comes from two Executive Orders.[126] The combined effect of these Executive Orders, EO 12,291 issued by President Reagan and EO 12,866 issued by President Clinton, is that agencies must now engage in a rigorous cost-benefit analysis before issuing any substantial regulation.[127] These EOs, on their face, serve to manage the internal affairs of the Executive Branch and are not "intended to create any right or benefit, substantive or procedural, enforceable at law."[128] Despite not having the force of law per se, both EOs operate as powerful restraints on how agencies operate.[129]

A similar EO could serve as a procedural baseline for the agency class action. To balance the need for a common rule with the substantive differences among the cases agencies hear, such an EO could require agencies to assess whether a particular procedure would result in efficient, effective adjudications.[130] Under this EO, agencies could opt out with a demonstration that the provisions do not make sense for them. Absent such a showing, agencies would be required to adopt the core procedures outlined in the EO and be allowed to add to them. The resulting adjudicative procedures would be agency-specific, but would share characteristics across agencies, so the costs of creat-

123 80 Stat. at 383; 90 Stat. at 1241.

124 *See id.*

125 *See generally* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017) (providing an overview of past Congressional action and proposed new limits on agencies).

126 *See* Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1098–99 (2006).

127 *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

128 Exec. Order No. 12,291, 46 Fed. Reg. at 13198.

129 *See* Heinzerling, *supra* note 126, at 1100.

130 It would only affect nonindependent agencies. *See* Exec. Order No. 12,866, 58 Fed. Reg. at 51,737. Because OIRA does not reach independent agencies, they would not be subject to the EO. *Id.*

ing, tweaking, and determining the best procedures would be dispersed and less agency-specific.[131]

To the extent that class actions and other aggregative tools increase efficiency, such an EO would be well within OIRA's mandate. Congress empowered OIRA's director to "oversee the use of information resources to improve the efficiency and effectiveness of governmental operations to serve agency missions . . . ."[132] The President subsequently empowered OIRA to approve agency regulations only if those regulations' costs exceed their benefits.[133] It follows that OIRA can use its information resources capabilities to gather best practices on aggregative adjudication, then ask agencies to adopt them, provided they make sense to the specific agency.

Absent congressional or presidential action, the Administrative Conference of the United States can go one step beyond its recommendations to create a model rule.[134] The Administrative Conference has already outlined how individual agencies can take advantage of aggregation.[135] Development of actual model rules in a variety of agency contexts could spare agencies the transaction and information costs of adopting these existing recommendations.[136] The result would be less transsubstantive than if Congress or the President created such model rules, but it is better than nothing.

C. What Should the Procedural Baseline Be?

Rule 23 does not graft perfectly onto administrative proceedings. The Federal Rules of Civil Procedure are interconnected, transsubstantive, and uniform across federal courts.[137] Agencies, by contrast, maintain their own, separate rules of administrative procedure. Any successful codification would have to overcome this lack of uniformity. The below considerations are a starting point to potential codifica-

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131 *See supra* Section II.C.

132 44 U.S.C. § 3504(a)(1) (2012).

133 Exec. Order No. 12,291, 46 Fed. Reg. at 13,193; *see* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32397, FEDERAL RULEMAKING 4 (2009), https://fas.org/sgp/crs/misc/RL32397.pdf [https://perma.cc/6UKF-UA2M].

134 *See* Adoption of Recommendations, 81 Fed. Reg. 40,259, 40,260 (June 21, 2016).

135 *See* ADMIN. CONF. OF THE U.S., AGGREGATE AGENCY ADJUDICATION 67–85 (2016).

136 *See supra* Section II.C.

137 *See* 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1004 (4th ed. 2002) (describing efforts to make the rules uniform across law and equity); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 395–99 (2010) (describing transsubstantivity as a goal of the Rules' drafters).

tion. Given the complexity of class actions and differences among agencies, this is not an exhaustive list of suggestions.

1. Petition Versus Filing a Complaint

Filing a complaint is the only way to commence a class action in federal court. Within the complaint or "[a]t an early practicable time," a plaintiff can move for class certification, which is determined at the district court level.[138] There are countless ways to initiate an action within agencies. A customer seeking restitution from their broker-dealer before the CFTC may file a "complaint" that includes much the same information as a complaint in federal court.[139] A Medicare recipient disputing a coverage decision before the OMHA must file multiple levels of appeals.[140]

Sant'Ambrogio and Zimmerman propose a mechanism under which a petition could be made at any point during agency proceedings to a panel in charge of determining whether class action criteria are met.[141] This approach has the benefit of empowering a panel of procedural experts rather than an ALJ who may only have expertise in administering a statutory scheme.[142] An alternative, however, would be to mirror the federal rules in allowing a motion—rather than a petition—at the ALJ level, followed by a potential appeal to such a panel. This would enable an ALJ who may know the record better to form a preliminary opinion and build a record from which a panel could issue a final ruling. This motion would also be uniform across agencies and would not have to be made at the outset of an action so that agencies could maintain the various forms of how litigants may initiate a proceeding.

2. Distinctions Between Cases Involving Private Parties and Cases Involving Government Benefits

Adjudicating an action involving disputes between private parties in the agency setting requires little imagination. For the EEOC, aggre-

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138 FED. R. CIV. P. 23(c)(1)(a); *see* FED. R. CIV. P. 23 (advisory committee's notes to 2003 Amendment).

139 *See* U.S. Commodity Futures Trading Comm'n, *Reparations Program*, https://www.cftc.gov/ConsumerProtection/reparationsprogram/index.htm#_Voluntary_Proceedings [https://perma.cc/JP9A-S3YK].

140 *See* Off. of Medicare Hearings and Appeals, HHS.GOV, *The Appeals Process*, https://www.hhs.gov/about/agencies/omha/the-appeals-process/index.html [https://perma.cc/EZ5N-3DLK].

141 *See* Sant'Ambrogio & Zimmerman, *supra* note 12, at 2041.

142 *See id.*

gation of Title VII complaints resembles a Title VII class action in the federal courts.[143]

Adjudicating government benefits in the aggregate poses a little more difficulty. The usual procedure is, by its nature, more individualized because entitlement to a government-provided right often turns on more individualized factors. Consider a Social Security claimant who fills out a form, is denied benefits because her impairment is insufficiently severe, then appeals a denial.[144] It is difficult to implement a class action mechanism on the front end because when the claimant first files for benefits, she has no way of knowing whether or how her claim will be denied.[145] The only way to pursue class-wide relief is to wait until after an individual has exhausted her administrative appeals, then discovers class-wide issues.[146]

There are still two situations where a class action may arise within agencies—where there are significant class-wide issues in denial of a government benefit, and where a class is deprived of a benefit they already receive. For the former category, the history of *Dixon v. Shalala*[147] provides a helpful example. There, the court found that a class of 220,000 disability claimants were wrongfully denied benefits because of a "systematic and clandestine misapplication of disability regulations" from 1976 to 1983.[148] For reasons already explained, the claimants could not pursue this class claim at the time of their original denial.[149] An agency class action was also not necessary to litigate many of the common issues because the federal courts were available.[150] An agency class action would have been extremely useful, however, in the subsequent task that the SSA faced—adjudicating 220,000 decades-old claims for benefits.[151] The SSA had no mechanism enabling something like a class settlement, so it had to reconstruct and readjudicate each case, a prospect that neither the SSA nor any claimant likely enjoyed.[152]

The class action may also make sense where a class is already receiving a government benefit and some intervening event deprives

143 *See* 29 C.F.R. § 1614.204 (2018).

144 *See, e.g.*, Dixon v. Shalala, 54 F.3d 1019, 1023 (2d Cir. 1995).

145 *See id.* at 1027.

146 *See id.* at 1023.

147 54 F.3d 1019 (2d Cir. 1995).

148 *Id*. at 1020–21, 1034.

149 *See supra* notes 67–70 and accompanying text.

150 *See Dixon*, 54 F.3d at 1020–21.

151 *See id.* at 1034.

152 *See id.* at 1037–38.

them of the ability to enjoy the benefit. This is the case with the Department of Education's procedures for debt relief, where a class of people receiving a benefit—a federally subsidized loan—were deprived of its benefits by the intervening event—the collapse of their for-profit college.[153] As with the Social Security example, student loan recipients have some recourse within federal courts, but if there is no analogous class mechanism within agencies and each adjudication proceeds one by one, the ultimate determination of their benefit may be needlessly duplicative and costly.[154]

While government-benefit cases may not be the kind usually determined via class actions, these examples demonstrate that class actions may still be effective and useful in at least the above two scenarios. In each scenario, the determination of class suitability would never be at the outset of the claims process. It would only occur after a denial or disruption of benefits on a class-wide basis.

Conclusion

In its early stages, the agency class action shows promise in efficiently managing complex disputes. While it takes many forms, codification in some form could reduce costs and strike the appropriate balance between flexibility and predictability. The devil will be in the details, of course. Depending on who codifies the agency class action and the extent to which codification takes into account real differences among agencies, the agency class action may prove to be an effective tool in fixing current problems of agency adjudication and vindicating rights.

153 *See* Bauer v. DeVos, 325 F. Supp. 3d 74, 78–79 (D.D.C. 2018); Student Assistance General Provisions for Loan Programs, 81 Fed. Reg. 75,926 (Nov. 1, 2016).

154 *See Bauer*, 325 F. Supp. 3d at 80–81.