

2013

Adequately Representing Groups

Elizabeth Chamblee Burch
University of Georgia School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 Fordham L. Rev. 3042 (2013).
Available at: <https://ir.lawnet.fordham.edu/flr/vol81/iss6/2>

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ADEQUATELY REPRESENTING GROUPS

*Elizabeth Chamblee Burch**

INTRODUCTION

Adequate representation and preclusion, the yin and yang of procedural due process, depend on whether the courts treat a litigant as part of a group experiencing an aggregate harm or as a distinct person suffering individual injuries. And though a vast literature about adequate representation exists in the class-action context,¹ it thins dramatically when contemplating other forms of group litigation, such as *parens patriae* actions and multidistrict litigation (MDL).² Yet, the need for adequate representation is ubiquitous. Any time one person seeks to represent another in litigation, two questions arise: Is the representative relationship itself legitimate and, if so, are the representative's decisions and actions adequate? Rule 23 of the Federal Rules of Civil Procedure provides ready answers to both questions. Certifying a class legitimizes the attorney and class representative's relationship with the class members and requiring a judge to approve a settlement confirms that the representative's actions were fair and reasonable.³ But as class actions have gradually fallen into disfavor⁴ and

* Associate Professor, University of Georgia School of Law. My thanks to Howard Erichson, Sam Issacharoff, Nancy Moore, Ben Zipursky, and participants of Fordham University School of Law's Symposium on *Lawyering for Groups: Civil Rights, Mass Torts, and Everything in Between* for their thoughtful comments on an earlier draft.

1. E.g., David A. Dana, *Adequacy of Representation After Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279 (2006); Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1852-59 (1998); Samuel Issacharoff, *Preclusion, Due Process, and the Right To Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002); Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Class Actions*, 57 VAND. L. REV. 1687 (2004); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997).

2. There are a few notable exceptions such as Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985 (2011); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-district Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 109 (2010).

3. FED. R. CIV. P. 23(a), (e). Judges certify a class based on the commonality and typicality of members' claims such that if a class representative selfishly pursues her own interest, the fruits of her labor will inure to absent class members.

attorneys and commentators seek alternative means for resolving group harms, the relative clarity of Rule 23 wanes. How should courts evaluate adequate representation in *parens patriae* actions and in multidistrict litigation? The answer to this question matters immensely since adequate representation is critical to precluding relitigation and achieving finality.

This Article suggests that courts should differentiate between inadequate representation claims based on the underlying right at stake. When the underlying right arises from an aggregate harm—a harm that affects a group of people equally and collectively—and demands an indivisible remedy, courts should tolerate greater conflicts among group members when evaluating a subsequent claim of inadequate representation. Because the harm is aggregate and the remedy is indivisible (typically declaratory or injunctive relief), if one group member receives the remedy, then they all receive the remedy. The litigation operates to group members' benefit or detriment equally, so if one group member is inadequately represented, they are all inadequately represented. Consequently, a subsequent litigant can successfully avoid preclusion only where the lawyers or the named representatives acted contrary to the group's best interests or attempted to represent an overinclusive, noncohesive group where some members required unique relief that the representative had no selfish reason to pursue.

Conversely, when plaintiffs suffer individual injuries at the same defendant's hands and unite their claims for economic or efficiency reasons, that aggregation does not convert their individual injuries into an aggregate harm. When counsel fails to fairly represent her client in vindicating that harm, inadequate representation is an individual injury. In multidistrict litigation and Rule 23(b)(3) class actions, which typically include individuals litigating their individual harms together for systematic and litigant efficiency, courts should look for "structural conflicts" between the claimants themselves as well as between the representatives and the claimants. This means that both initially and on a collateral attack, courts should accept fewer conflicts than in cases involving aggregate rights. Accordingly, judges should assess whether there are reasons the lawyers "might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves."⁵

This Article develops this aggregate-rights framework in three parts. Part I begins with an overview of the consent and identity-of-interest theories that dominate representative litigation. It concludes, however, that these theories fail to explain a number of situations that arise in mandatory

4. See Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. (forthcoming 2013).

5. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1) (2010).

litigation under *parens patriae* statutes or in Rule 23(b)(2) lawsuits, such as school-busing cases and Title IX litigation. Part II.A contends that determining whether the initial underlying right at stake is an aggregate or individual harm better explains these results. This part thus proposes an aggregate-rights framework for distinguishing between collective and individual rights and contends that the right to adequate representation is, likewise, a group or individual right. Accordingly, courts should evaluate allegations concerning inadequate representation differently depending on whether the underlying substantive right being prosecuted is aggregate or individual.

Parts II.B and II.C address two stumbling blocks in this aggregate-rights framework: hybrid claims and procedural legitimacy. First, because the aggregate-rights framework does not always impart easy answers, Part II.B takes up the knotty situation in which the underlying right is aggregate, but the remedies requested include individual, divisible relief. Second, because courts accept greater intragroup conflicts in prosecuting collective rights, Part II.C aims to improve legitimacy in litigating aggregate harms by arguing that courts should send notice to affected absentees and allow them to comment on the proposed remedy. Finally, Part III applies the aggregate-rights framework to *parens patriae* actions and multidistrict litigation.

I. ADEQUATE REPRESENTATION THROUGH THE YEARS

Adequate representation's theoretical underpinnings are murky at best. In his historical work on the class action, Professor Stephen Yeazell identified two theories that explain when one person can represent another in litigation: (1) when the absent litigant consents and (2) when the representative and absent litigant have overlapping interests.⁶ He contends that modern Rule 23 embodies both theories in odd respects, which only serves to confuse the doctrine:

In situations in which the drafters of Rule 23 saw relatively little value in the interests likely to be represented in class litigation [such as negative-value cases], the Rule requires individual notice as an index of interest, even though in many such situations there can be little doubt about where that interest lies. At other times the Rule requires the court to ignore consent, perhaps because it might serve as an embarrassing reminder of conflicting interests . . .⁷

6. Stephen C. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514, 522 (1980) ("Sometimes it has been argued (or assumed) that treatment of the group as a group was appropriate because all members had consented to be treated so. At other times the members' consent has been thought to be unimportant because their identical 'interests' were being represented in the litigation.").

7. Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1108 (1980).

Nevertheless, consent and identity of interests make sense in some cases. For example, in *Amchem Products, Inc. v. Windsor*,⁸ the Supreme Court explained that the district court could not certify a global asbestos class action because the diverse class members had conflicting interests.⁹ Class representatives could not simultaneously represent presently injured plaintiffs and those with injuries that might materialize in the future.¹⁰ Injured plaintiffs would want to receive the largest payout possible immediately, whereas those with injuries that could manifest in the future would want to preserve those funds to compensate them for injuries when and if they arose.¹¹ Consent could not suffice either, even though the Supreme Court interpreted consent quite liberally in *Phillips Petroleum Co. v. Shutts*.¹² There, the Court held that class members who do not opt out of a Rule 23(b)(3) class have, in some amorphous way, consented to the representation.¹³ But, because the global asbestos class in *Amchem* included people who had simply been exposed to asbestos but had no perceptible injury, even this tenuous link to consent was not satisfied: exposure-only plaintiffs might not know of the exposure or might lack the information needed to decide whether to opt out.¹⁴

Litigation initiated by a voluntary membership association also makes sense in terms of consent and identity of interests. When people join an organization like a union or a homeowners association they tend to do so voluntarily (though they might face social pressure or limited housing opportunities that force their hand). This strengthens the claims of consent. Plus, associations litigate only matters that relate to their organization; a labor union would not sue over homeowners association fees and homeowners associations would not sue to vindicate workers' rights. While opinions within the association may vary, differences can be hashed out within the organizational structure. So, union or homeowners association members might vote on whether to litigate a particular matter and that decision would bind the body as a whole. Thus, it is not surprising that courts preclude subsequent suits by individual members and hold that the association's actions prevent them from relitigating.¹⁵

8. 521 U.S. 591 (1997).

9. *Id.* at 626–27.

10. *Id.*

11. *Id.* at 627.

12. *See* 472 U.S. 797, 813 (1985).

13. *Id.* at 812; *see also* Issacharoff, *supra* note 1, at 1064–66; Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1168 (1998).

14. *Amchem*, 521 U.S. at 628.

15. *See, e.g.*, *Bolden v. Pa. State Police*, 578 F.2d 912, 918–19 (3d Cir. 1978) (precluding litigation by nonminority police officers where the fraternal order of police previously agreed to a consent decree); *Ellentuck v. Klein*, 570 F.2d 414, 425–26 (2d Cir. 1978) (finding that, because the plaintiffs were previously represented by a property-owner's association, they could not litigate a due-process issue); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1235–36 (2d Cir. 1977) (preventing members of a trade association from

But not all cases make sense in terms of consent or identity of interests. School desegregation and curfew cases provide a few good examples. In *Waters v. Barry*,¹⁶ the American Civil Liberties Union (ACLU) challenged an 11:00 p.m. curfew that ordered all minors in the District of Columbia to be inside after that time.¹⁷ But many of the class members and their parents were not ACLU members and actually supported the curfew.¹⁸ They preferred to trade their First Amendment rights for public safety.¹⁹ But these conflicting interests did not prevent the court from certifying a Rule 23(b)(2) non-opt out class. Instead, the judge concluded that when a class of that size was involved, “differences of opinion are unavoidable,” but “diversity of opinion within a class does not defeat class certification.”²⁰ Further, the court reasoned that the class representative’s interests were not antagonistic to dissenting class members: those members could still easily abide by the challenged curfew if they so chose—reasoning that seemed beside the point given the dissenters’ public-safety concerns.²¹

The 1970s school desegregation cases faced similar problems: though class members might all prefer to challenge a defendant’s conduct, they disagreed over what relief to request.²² Some wanted to improve local black schools, whereas others wanted integration.²³ Still others were against forced school busing because it required sending their children to poor, but integrated schools and placed their children in violent situations.²⁴ Yet, despite these important disagreements, courts continued to certify mandatory class actions.²⁵

Title IX cases provide an even more recent example. In *Communities for Equity v. Michigan High School Athletic Ass’n*,²⁶ the court recognized the possibility “that members of the class have no desire to pursue this action, and are not unhappy with the status quo.”²⁷ Yet, it reasoned that the defendants would represent that dissenting contingent and that class members who prefer to remain victims cannot have a disqualifying conflict

enjoining deregistration of a training program because the association was involved in previous litigation).

16. 711 F. Supp. 1125 (D.D.C. 1989).

17. *Id.* at 1127.

18. *See id.* at 1131.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See, e.g.,* Thaxton v. Vaughan, 321 F.2d 474, 476 (4th Cir. 1963) (refusing to enjoin a segregated nursing home where no affected resident was a class member).

23. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471, 476–77 (1976).

24. *See generally id.* at 471; Leo Crowley, *Due Process Rights of Absentees in Title VII Class Actions—The Myth of Homogeneity of Interest*, 59 B.U. L. REV. 661, 666–80 (1979) (arguing that the divergent interests in Title VII cases cause inadequate representation).

25. *See* David Marcus, *Making Adequacy More Adequate*, 88 TEX. L. REV. *SEE ALSO* 137, 142–43 (2009), <http://www.texaslrev.com/wp-content/uploads/Marcus-88-TLRSA-137.pdf>.

26. 192 F.R.D. 568 (W.D. Mich. 1999).

27. *Id.* at 574.

on that basis.²⁸ Moreover, to the extent that certain sports would be competing with one another for resources, those conflicts went to the requested relief, not liability.²⁹ Consequently, the court rationalized that it could designate subclasses later if need be.³⁰

In certifying each of these suits under Rule 23(b)(2), courts assumed that when the litigation arose out of a unifying trait that predated the litigation, such as race or gender, cohesion existed through similar interests.³¹ Most courts refused to engage in a debate over conflicting interests at all, preferring instead to gloss over differences with empty conclusions such as, “that the class may have included persons who support the [contested program] does not offend the principles set down in *Hansberry v. Lee*,”³² and “[i]t is not ‘fatal if some members of the class might prefer not to have violations of their rights remedied.’”³³ Other courts have been satisfied if the defendant represented the dissenters’ interest, a result that seems at odds with *Hansberry*.³⁴

These suits are puzzling from the perspective of overlapping interests and consent. Class members’ overarching interests might align—in the school-desegregation cases, all class members wanted what was best for their children—but they may fundamentally disagree over how to implement that common interest. Moreover, Rule 23(b)(2) does not require the representatives to send class members notice of the pending suit, so dissenting class members may not know that they should appear and object. Nor could their failure to opt out be considered implicit consent; opting out is not an option in Rule 23(b)(2) classes.

Results that fail to cohere to the interest-consent theory are not limited to Rule 23(b)(2); *parens patriae* suits yield similar decisions. In *parens patriae* cases, the government—typically a state attorney general—sues to

28. *Id.*

29. *Id.*

30. *Id.*

31. See Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 892–93 (2010).

32. *Lanner v. Wimmer*, 662 F.2d 1349, 1357 (10th Cir. 1981).

33. *Id.* (quoting *U.S. Fid. & Guar. Co. v. Lord*, 585 F.2d 860, 873 (8th Cir. 1978)).

34. *E.g.*, *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 487 (5th Cir. 1982); *Garcia v. Bd. of Educ.*, 573 F.2d 676, 679–80 (10th Cir. 1978); *Dierks v. Thompson*, 414 F.2d 453, 457 (1st Cir. 1969); *Cmtys. for Equity*, 192 F.R.D. at 574; *Messier v. Southbury Training Sch.*, 183 F.R.D. 350, 358 (D. Conn. 1998); *Wyatt v. Poundstone*, 169 F.R.D. 155, 161 (M.D. Ala. 1995); 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1768, at 397 (3d ed. 2005) (“As long as both those seeking to uphold and those desiring to strike the particular regulations are adequately represented, the suit may proceed as a class action.”). In *Hansberry v. Lee*, the Supreme Court held that “[t]hose who sought to secure [the benefits of the agreement] by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance.” 311 U.S. 32, 44 (1940); *cf.* *Sam Fox Publ’g Co. v. United States*, 366 U.S. 683 (1961) (holding that nonparticipating association members could not intervene because they would not be bound by the lawsuit’s result).

protect the public interest.³⁵ In this way, the *parens patriae* action assumes some of a class action's characteristics, and the state attorney general mimics a class representative. This analogy holds for precluding certain subsequent citizen suits, even though most *parens patriae* actions lack the class action's certification procedures, including the adequacy requirement.³⁶

For example, when the Sierra Club sued under the Clean Air Act to enjoin Two Elk Generation Partners from building a coal-fired power plant, the Tenth Circuit barred the suit since a Wyoming district court had already affirmed the Wyoming Environmental Quality Council's administrative order allowing it.³⁷ Similarly, courts have precluded associations and residents from relitigating questions about implementing federal wildlife-management statutes,³⁸ building cell-phone towers,³⁹ establishing a public-recreation easement,⁴⁰ enforcing fugitive-dust emission rules,⁴¹ and removing an abandoned dam.⁴²

In situations like these, the government's interests need not overlap perfectly with the citizens' interests; in fact, the result of a *parens patriae* suit can bind the citizen even if she objects to how the government handles the matter.⁴³ Neither overlapping interests nor consent can explain this outcome. The interest theory fails for obvious reasons: despite conflicting interests, the result still binds the objector. And the consent theory set forth in *Phillips Petroleum v. Shutts* fails, too, since citizens typically cannot opt out of a *parens patriae* action.⁴⁴

35. See, e.g., *Georgia v. Pa. R.R.*, 324 U.S. 439, 450–51 (1945) (permitting the state to attempt to enjoin discriminatory freight rates). The Supreme Court has held that a state “must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party” and must “express a quasi-sovereign interest.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). This interest might include “the health and well-being—both physical and economic—of its residents in general” or it could be an “interest in not being discriminatorily denied its rightful status within the federal system.” *Id.*

36. Some states have built adequacy requirements into their statutory authority for prosecuting actions under *parens patriae*. See 42 U.S.C. § 7604(b)(1)(B) (2006) (barring subsequent citizen suits only “if the Administrator or State has commenced and is diligently prosecuting” an enforcement action).

37. *Sierra Club v. Two Elk Generation Partners, Ltd.*, 646 F.3d 1258, 1265–66 (10th Cir. 2011).

38. *Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19, 23 (D.D.C. 1998).

39. *Lucas v. Planning Bd.*, 7 F. Supp. 2d 310, 328 (S.D.N.Y. 1998).

40. *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 71 Cal. Rptr. 2d 77, 91 (Ct. App. 1998).

41. *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 473–74 (6th Cir. 2004).

42. *Froebel v. Meyer*, 217 F.3d 928, 934 (7th Cir. 2000).

43. See *Lucas*, 7 F. Supp. 2d at 328–29 (precluding objectors from suing to enjoin a town from issuing telecommunications tower construction permits where the government had already entered into a consent judgment with the cellular telephone companies).

44. One might rely on a more abstract social contract theory, however. See generally IMMANUEL KANT, ON THE COMMON SAYING: “THIS MAY BE TRUE IN THEORY, BUT IT DOES NOT APPLY IN PRACTICE” (1793), reprinted in KANT'S POLITICAL WRITINGS 61, 73–74, 79 (Hons Ress ed., H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1970) (imagining that the

How are we to make sense of these inconsistent results? Although threads of both consent and overlapping interests underpin modern-day cases, a doctrinal structure built around these traditional concepts fails to offer a cohesive, explanatory theory. Worse, these concepts hold little promise of providing guiding principles for group litigation that lacks *ex ante* hurdles for adequate representation like those in Rule 23. Thus, something more is needed.

II. INADEQUATE REPRESENTATION: AGGREGATE VERSUS INDIVIDUAL HARM

In commenting on the consent-interest theory, Professor Robert Bone contended that pragmatism has always helped explain representative litigation. Consent and its resulting agency relationship, as well as goal-based interest representation, failed to capture what was best understood as representation's "formal effect on legal rights and duties."⁴⁵ What better explained the late eighteenth and early nineteenth century judicial opinions was whether the litigation was personal or impersonal. If "the remedy acted directly on rights or duties, such as those derived from contract," then litigant autonomy was important, but "if the remedy acted on something impersonal, such as the legal incidents of an impersonal status or rights in an impersonal piece of property," then the judgment could bind an absentee even without an opportunity to participate.⁴⁶

Historically, suits with impersonal qualities like those by a taxpayer challenging an unlawful municipal action and even private law cases that hinged on group rights and duties (such as one by a person who shared a single estate with others) were bound by *res judicata*.⁴⁷ Still, as Professor Bone elaborated, "[a] binding representative suit did not necessarily have to involve status-based rights or duties arising as a matter of law, provided the remedy focused on impersonal rather than personal litigation elements."⁴⁸ For a representative suit to bind a nonparty in impersonal cases, the remedy had to determine class members' rights and duties—the common interest—and each member's interest in that remedy had to be identical.⁴⁹ On the other hand, where the remedy affected a nonlitigant's personal rights or

social contract is not actual but imaginary, yet contending that it can obligate each citizen "as if he had consented"); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 365 (Peter Laslet ed., 2d ed. 1967) (1690) (contending that citizens have given tacit consent to a social contract with the government). For examples of statutes that permit citizens to opt out, see *infra* note 147.

45. Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 258–61 (1990) (reviewing STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987)).

46. *Id.* at 263.

47. *Id.* at 274–77; see, e.g., *McIntosh v. City of Pittsburgh*, 112 F. 705, 707–08 (W.D. Pa. 1901) (binding all property owners affected by a municipal ordinance).

48. Bone, *supra* note 45, at 277.

49. *Id.* at 279–80.

duties as in contract or tort, courts afforded more autonomy and required something much closer to consent.⁵⁰ In these cases, the litigants sent notice to the individuals, which essentially invited them to “opt into” the litigation. If affected individuals chose not to participate (and had justifiable reasons for not doing so), then the suit did not bind them.⁵¹

Although I avoid using the terms personal or impersonal, this Article builds on these foundational concepts to construct an aggregate-rights framework for assessing the preclusive scope of aggregate litigation. This framework is based on the observation that what really drives the result in modern cases is whether the initial injury constitutes an aggregate harm and whether remedying that harm must be accomplished uniformly. When an aggregate harm demands a uniform, unindividuated remedy, it stands to reason that courts should preclude subsequent litigation even when the initial representation included group members with conflicting preferences. The key to legitimacy, however, lies in ensuring that absentees with diverse opinions have notice and the opportunity to be heard, particularly in shaping the relief.

*A. When Is Inadequate Representation an Aggregate
Versus Individual Harm?*

Aggregate harms and indivisible remedies map on to the right to adequate representation and help answer the question of whether and when adequate representation is a group or individual right. If adequate representation is a group right and the group as a whole has been represented well, then preclusion should still attach to the judgment even if a single individual may be disappointed or aggrieved over the outcome. But if adequate representation is truly an individual right, then a would-be litigant could bring a second suit if the representative’s interest fundamentally conflicted with her own.⁵² Characterizing adequate representation as a group or individual right depends on the nature of the underlying injury and the group-based characteristics of the remedy in question. The following sections build an aggregate-rights framework for differentiating between cases in which inadequate representation is a group or an individual harm. Building on Professor Heather Gerken’s doctrinal structure for identifying aggregate harms, this framework relies on the following questions: (1) is representation’s fairness and adequacy measured in group or individual terms, (2) does adequate representation rise and fall vis-à-vis group treatment, and (3) is inadequate representation unindividuated among group members?⁵³

50. *Id.* at 282–83.

51. *Id.* at 282.

52. *See infra* note 100 and accompanying text (defining structural conflicts).

53. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1682–89 (2001).

1. Is Representation's Fairness and Adequacy Measured in Group or Individual Terms?

When the underlying right at stake is an aggregate one, evaluating fairness and adequacy in litigating that right must necessarily differ from the metric used in an individual right.⁵⁴ Thinking of these underlying rights as falling along a continuum is helpful for two reasons.⁵⁵ First, progressing along that continuum, toward an aggregate right, tells us when the group itself is important in understanding and prosecuting the underlying injury.⁵⁶ Second, a continuum identifies the litigation's level of voluntariness. Aggregate harms demand aggregate remedies, thus decreasing the level of voluntariness in any given action.

Commentators, including the American Law Institute (ALI) in its *Principles of the Law of Aggregate Litigation*, claim that voluntariness is important in determining the required degree of overlapping interests.⁵⁷ The idea is that less voluntary actions should demand a higher degree of overlapping interests than those where an individual has more participation or control opportunities.⁵⁸ But this framework demonstrates that voluntariness is indicative for a different reason: people are drawn involuntarily into group litigation and saddled with a case's outcome not necessarily because their interests are harmonious, but because the underlying right is an aggregate one and the subsequent remedy must inure to all or to none. Thus, as this and subsequent sections explain, the right to adequate representation should track these distinctions.

54. *Id.* at 1682. Professor Gerken describes a similar continuum, though its purpose differs from that described here. Unlike Gerken's definition of "group" in which she intends "'a collection of individuals,' not as an entity that exists separate and apart from its members," I intend the far end of the aggregate rights spectrum to mean an entity. In the past, I have used two examples to differentiate between these two poles:

First, two individuals dance by a window to warn a third that the police are coming for her. Both intend to warn and are each morally culpable for their collective action. Contrast that example with a large corporation that has general will. The corporation's long-term interests are more than a sum its officers', directors', or even shareholders' desires and beliefs. In fact, those interests might even conflict. The corporation takes on a life of its own. The dancing individuals are involved in a simple collective and are thus ontologically distinct from a corporate entity. The class action is more akin to a corporation than the dancers.

Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 21 (2009).


55. For an example of a similar, but distinct spectrum, see Hazard et al., *supra* note 1, at 1852–58.

56. Gerken, *supra* note 53, at 1682.

57. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. (b)(1)(B) (2010).

58. *Id.*

Table 1



	Individual Rights						Aggregate Rights
Remedy	Divisible Remedy						Indivisible Remedy
Voluntariness	Voluntary Individual Action						Involuntary Joinder
Joinder Device	None	Rules 20, 42	MDL	Rule 23(b)(3)	Rules 23(B)(1), 23(B)(2)	<i>Parens patriae</i>	
Examples	Individual personal injury or other tort claims	Bus accident involving 20 people	Mass Torts	Securities Class Actions	Desegregation Title VII Employment Discrimination, or Civil Rights Class Actions	Public transit system fares	State vs. State, Corporations ⁵⁹

A purely individual right, such as a negligence claim arising from a run-of-the-mill car accident, can be proven without referencing other car accidents across the state.⁶⁰ That other drivers also have accidents is largely irrelevant. Similarly, in a bus accident involving twenty people, any one of those individuals can prove her negligence claim against the bus company and its driver without including the other passengers. Yet, the passenger might find it economically or pragmatically advantageous for her attorney to represent the other passengers too. Presenting other passengers' injuries could buttress jury sympathies and increase potential settlement value. The judicial system might also determine that consolidating passengers' suits under Rule 42 furthers judicial and litigant economy.⁶¹

As we progress toward the middle of the continuum, values like judicial economy and convenience begin to crowd the traditional emphasis on individual participation and autonomy. So, in a mass-tort case, for example, a single pharmaceutical company manufactures a drug that harms thousands of people by causing heart attacks and strokes and fails to warn them of these risks. Just as in an individual-rights case, a consumer could prove her failure-to-warn claim without referencing other consumers. But as 30,000 other users file suit, collectivization begins to take hold.⁶² The

59. Corporations are treated as a legal entity distinct from the individual members. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 59, at 93 (1982) ("Except as stated in this Section, a judgment in an action to which a corporation is a party has no preclusive effects on a person who is an officer, director, stockholder, or member of a non-stock corporation . . .").

60. *See* Gerken, *supra* note 53, at 1683.

61. FED. R. CIV. P. 42.

62. *See* Hazard et al., *supra* note 1, at 1853 (noting that "persons associated merely by the fact of their common victimization have some legal connections among themselves," such as "being made the beneficiaries of issue preclusion" and being "limited to proportionate recovery where only a limited fund is available to satisfy their claims").

attorneys working on a contingent fee consider it economically advantageous to represent as many consumers as possible. The judicial system regards it far more efficient to coordinate these actions before the same judge through multidistrict litigation. And the defendant, though it may seldom admit it, finds it useful to displace plaintiffs from their chosen fora, defend itself systematically in a single forum, and reach a settlement that encompasses as many consumers as possible.⁶³ Still, no question exists as to who receives the remedy: the consumer herself.

Yet, as the number of litigants increase, an individual cannot participate as effectively; her case is intertwined with many others like it.⁶⁴ A handful of bellwether trials may set a range of settlement values for thousands of cases. And though individuals technically retain the right to accept or reject a settlement, consent is diminished through various settlement clauses that allow the defendant to withdraw the offer if too few claimants agree or that obligate participating attorneys to recommend the deal to one hundred percent of their clients.⁶⁵

Practicality's importance increases the further the continuum progresses toward aggregate rights. Just as litigants establishing general causation against the pharmaceutical company would rely on much of the same evidence in proving their claims, so too would plaintiffs bringing a Rule 23(b)(3) securities-fraud class action. Technically, however, securities-fraud plaintiffs could still bring these suits individually and the remedy still goes directly to the injured party. That is, the remedy is divisible among claimants.⁶⁶ But the claim's value might be too small to litigate individually, meaning that the investor has less interest in prosecuting her own case, and a class might be the only way to make the litigation's economics worth pursuing. Nevertheless, if she wanted to, an investor could opt out of the class and litigate on her own.

Voluntariness wanes and practicality emerges as the guiding tenet as we come to mandatory class actions under Rules 23(b)(1) and (b)(2).⁶⁷ Consider again the 1970s school desegregation cases. Those suits sought

63. See Burch, *supra* note 4; see also, e.g., Julie A. Steinberg, *Pharmacy Supports MDL for Meningitis Suits but Disagrees with Plaintiffs' Forum Choice*, 13 *Class Action Litig. Rep.* (BNA) 1297 (Nov. 23, 2012).

64. See generally Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 *WAKE FOREST L. REV.* 1, 40–43 (2009).

65. See generally Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 *CORNELL L. REV.* 265 (2011).

66. AM. LAW INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 2.04(a) (2010) (“Divisible remedies are those that entail the distribution of relief to one or more claimants individually, without determining in practical effect the application or availability of the same remedy to any other claimant.”).

67. The American Law Institute has treated these two class action categories in much the same way. *Id.* § 2.04 cmt. a, at 123 (“Courts, in short, have not succeeded in giving any distinct meaning to Rule 23(b)(1)(A) by comparison to Rule 23(b)(2).”). Rule 23(b)(1)(B), known as the limited-fund class action, is likewise treated as a mandatory class for equitable reasons.

injunctive relief in the form of integration and busing—relief that would yield a uniform result regardless of whether a single individual or an entire group sued.⁶⁸ In that sense, the relief was indivisible among the class members.⁶⁹ Similarly, in a Title VII employment discrimination class action seeking to enjoin discriminatory behavior, the remedy is collective, at least as to the injunction and the declaratory judgment.⁷⁰ Moreover, proving a discriminatory pattern or practice requires the judge to examine not only a given individual's injury but also how the employer treated that person or that group of persons as compared with other workers. Looking solely at how an individual is treated proves little in the way of a pattern or practice. So, the underlying evidence needed to evaluate the claim arises from the group context.

Now compare a client's dissatisfaction with her attorney in three different scenarios and note how the group matters more or less when that dissatisfaction arises out of an individual car accident versus a failure-to-warn claim in multidistrict litigation versus a Rule 23(b)(2) employment discrimination class action. The way in which counsel represented other group members becomes increasingly relevant as the underlying right at stake increasingly concerns an aggregate harm.

First, in the car-accident case, because individuals control the litigation and can hire and fire their attorneys, client dissatisfaction would typically take the form of a bar complaint or a malpractice action. The client might allege that her attorney engaged in overreaching, exercised undue influence, or failed to discharge procedural or ministerial duties.⁷¹ The evidence she offers would refer solely to the attorney's handling of her particular case; how that or other attorneys had litigated other car accidents would have little relevance.⁷²

Second, in the multidistrict failure-to-warn claim, an individual's grievance against her attorney may reference other cases. She might feel

68. See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1433 (2003).

69. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04(b) ("Indivisible remedies are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.").

70. When Congress enacted Title VII, the remedial menu included a declaratory judgment that the defendant violated the Act and an injunction to prevent the defendant from continuing to discriminate. The Supreme Court added the availability of back pay in 1975 and Congress permitted compensatory and punitive damages in 1991. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A(a)(1), 105 Stat. 1071, 1072; *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

71. See, e.g., *Mavity v. Fraas*, 456 F. Supp. 2d 29, 34 (D.D.C. 2006) (failing to file an exhibit before the trial deadline); *In re Belmar*, 319 B.R. 748, 755 (Bankr. D.D.C. 2004) (failing to file pleadings); *Conklin v. Hannoeh Weisman*, 678 A.2d 1060, 1067–68 (N.J. 1996) (providing erroneous advice). See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (2000).

72. To be sure, the standard of care in a legal malpractice case is the care that a similarly situated lawyer in a similarly situated case would provide.

that she received less than she deserved in a settlement after learning that other plaintiffs received more. Or, she might be upset at the way her case was managed; attorneys might have tried other cases with stronger claims or less difficulty in establishing specific causation before hers.⁷³ Either way, she compares her treatment vis-à-vis others' treatment. Alternatively, a client's representational concern might focus on whom the judge appoints to a plaintiffs' steering committee. Because a steering committee spearheads the litigation and conducts settlement negotiations, it wrests control away from a plaintiff's chosen attorney. But a committee's make-up might not reflect a fair cross-spectrum of the plaintiffs' diverse interests.⁷⁴

Finally, in a gender discrimination class action under Rule 23(b)(2) that seeks injunctive relief, if a class member collaterally attacked the settlement by claiming that the representative failed to adequately portray her interests, the court would necessarily examine how the attorney treated the class as a whole.⁷⁵ After all, a class-action attorney must represent the interests of the entire class and prove "the existence of a class of persons who have suffered the same injury" that reveals a "policy of . . . discrimination" reflected in defendant's employment practices.⁷⁶ The disgruntled employee might have preferred not to litigate at all, to litigate by herself, or to request an entirely different remedy.⁷⁷ But her individual choices have been restricted by practical necessity. She is part of a collective that includes everyone else with similar claims against the company; she has no option to opt out.⁷⁸ Some federal courts even *require* litigants to bring pattern-or-practice cases as class actions.⁷⁹ Thus, a subsequent court should find representation inadequate only if counsel's conduct proved detrimental to the group as a whole. Pragmatically, stifling these conflicts through subsequent group-based preclusion prevents conflicting remedies and ensures two-way preclusion, for both defendants and plaintiffs.⁸⁰ In short, courts measure adequacy and fairness in group terms.

73. See, e.g., Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 98 (2011) (describing Betty Mekdeci's situation in the Bendectin litigation where attorneys refused to relitigate her case so that they could bring stronger cases first).

74. See *infra* Part III.B.2.

75. FED. R. CIV. P. 23(g)(4).

76. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157–58 (1982).

77. See Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619, 632 (1986).

78. See FED. R. CIV. P. 23(c)(2), (3).

79. E.g., *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866–67 n.6 (7th Cir. 1985); *accord Celestine v. Petroleous de Venezuela SA*, 266 F.3d 343, 355 (5th Cir. 2001). The rationale is that injunctive relief is indivisible, thus any litigation inherently affects the group and should be pursued as group litigation. See *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 470 (7th Cir. 2004).

80. See AM. LAW INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 2.04 cmt. A (2010).

In sum, courts should evaluate grievances against attorneys differently depending on whether the underlying substantive right being prosecuted is aggregate or individual. When an individual in a car accident chooses to sue and then feels that her attorney failed to protect her interests, courts evaluate inadequacy purely based on the attorney's conduct in representing that person.⁸¹ How that attorney or another attorney has treated other car-accident victims is largely irrelevant to this victim's malpractice claim. Moreover, because she has the authority to hire and fire her attorney, that step is typically her simplest recourse given the difficulty of proving attorney malpractice.⁸² By contrast, the employee swept up in a Rule 23(b)(2) gender-discrimination suit requesting injunctive relief may not have chosen to sue at all and might not even know that the suit was pending. Her ability to participate in and control the suit is minimal at best. When she attempts to sue later for gender discrimination and the defendant raises preclusion as a defense, the court will likely consider an inadequate representation allegation in group terms. So long as class counsel adequately represented the class members as a whole, she should be prevented from relitigating individually. Fairness and adequacy are necessarily measured in group terms.

2. Does Adequate Representation Rise and Fall Vis-à-vis Group Treatment?

When adequate representation qualifies as a group right—that is, in cases where the underlying cause of action is likewise aggregate—a group member cannot prove she was inadequately represented except by showing that counsel treated the whole group unfairly. Just demonstrating that class members do not have identical interests does not establish inadequate representation so long as “substantially all of plaintiffs’ interests were vigorously presented . . . by the various parties.”⁸³ Thus, courts are unlikely to allow a second action to proceed unless counsel in the first

81. Of course, the standard of care in a legal malpractice case is the care that a similarly situated lawyer in a similarly situated case would provide, but the individual here is not referencing a group of clients that are suing or being represented in concurrent lawsuits.

82. Malpractice claims based on errors in conducting litigation are sometimes difficult to prove because there is an exception for an honest exercise of professional judgment. *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206, 208–09 (Ga. Ct. App. 2004); *see also* *Noske v. Friedberg*, 713 N.W.2d 866, 874 (Minn. Ct. App. 2006). Nevertheless, certainly there can be liability for failure to meet a deadline. The difficulty with encouraging clients to fire their attorneys is that lay clients are often incapable of monitoring their attorney's conduct. So, while hiring and firing an attorney is the simplest recourse to this issue, it is not always a feasible option.

83. *Garcia v. Bd. of Educ.*, 573 F.2d 676, 680 (10th Cir. 1978); *see also* *Brown v. City of Barre*, No. 5:10-cv-81, 2010 WL 5141783, at *7 (D. Vt. Dec. 13, 2010) (noting that even if class member lessees wanted to bring individual suits against their landlords for defaulting on their water bill rather than from the city, all members would benefit from an order barring the city from disconnecting the water service and “speculative disagreement about litigation strategy alone” did not render the class representation inadequate).

action was inept or failed to loyally represent the group. A subsequent claim could also escape preclusion if a class representative secured a better deal for herself than for the rest of the class⁸⁴ or purported to represent a poorly defined class that was either not cohesive or included both alleged victims and aggressors.⁸⁵ In short, a defendant invoking preclusion as a defense in a second case can overcome a claim of inadequate representation by showing that the representatives in the first case treated the rest of the group fairly.⁸⁶ Or, if the court agrees with the plaintiff and finds that counsel inadequately represented the whole group in pursuing an aggregate harm, then any group member—regardless of whether she was satisfied with the initial representation—should be able to sue again.

Precluding subsequent actions where the underlying harm is aggregate makes some sense historically. In tracing the modern-day class action back to its medieval roots where people lived within rural villages and religious parishes comprised the “community of the vill,”⁸⁷ Professor Yeazell found that each community member shared in the duties, privileges, and obligations of villeinage membership.⁸⁸ Community members were jointly liable for any duty that might principally be assigned to just one of them.⁸⁹ Accordingly, manor courts routinely imposed collective liability on villages for shared obligations, often regardless of who was individually responsible for an act like trampling crops.⁹⁰ Although they came to collectivity in a different way, those living in medieval towns voluntarily formed highly cohesive merchant guilds, craft guilds, and boroughs through social

84. See, e.g., *Frank v. United Airlines, Inc.*, 216 F.3d 845, 852 (9th Cir. 2000); *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992); *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 401 (S.D.N.Y. 2008); *Foster v. St. Jude Med., Inc.*, 229 F.R.D. 599, 604 (D. Minn. 2005); cf. *Martin v. Home Depot USA, Inc.*, 225 F.R.D. 198, 203–04 (W.D. Tex. 2004) (finding class representatives inadequate because they failed to bring all potential causes of action available to putative class members).

85. See, e.g., *Moore v. Napolitano*, 269 F.R.D. 21, 34 (D.D.C. 2010) (denying certification because the putative class included both people who alleged discrimination and their supervisors, the alleged discriminators); *King v. Enter. Rent-A-Car Co.*, 231 F.R.D. 255, 264–65 (E.D. Mich. 2004) (denying certification, in part, because supervisory class members could be called to refute other class members’ allegations); *Talley v. ARINC, Inc.*, 222 F.R.D. 260, 269 (D. Md. 2004) (denying certification, in part, because some class members were managers in the human resources division and handled other members’ discrimination complaints); see also *infra* notes 95–97 and accompanying text (discussing *Falcon*).

86. See *Horton v. Goose Creek Indep. Sch. Dist.*, 677 F.2d 471, 489–90 (5th Cir. 1982) (finding that antagonistic interests among the class members did not render representation inadequate); *Williams v. Lane*, 96 F.R.D. 383, 386 (N.D. Ill. 1982) (holding that class members would be adequately represented even if they disagreed as to what relief to request because they all had an interest in having prison conditions declared unlawful and members would have the opportunity to comment on the relief).

87. See YEAZELL, *supra* note 45, at 41–48.

88. *Id.* at 42–52; see also Bone, *supra* note 45, at 219–20.

89. YEAZELL, *supra* note 45, at 48 (quoting PAUL VINOGRADOFF, *THE GROWTH OF THE MANOR* 318–19 (rev. 2d ed. 1932)).

90. *Id.* at 50–51.

bonds.⁹¹ As phrased by Robert Bone, “Obligation and privilege attached to the group *qua* group, with the group allocating the burdens and benefits among its members. Moreover, each group member was individually liable for the entire group obligation and had to resort to internal group mechanisms to spread the burden.”⁹²

Of course, the types of harms that we consider aggregate harms today are quite different from those in medieval times. If someone in a modern-day neighborhood tramples someone else’s garden in another community, the whole neighborhood is not responsible. Yet, the fundamental principle of an aggregate harm remains the same: a collective quality exists in the relief sought. Thus, in both old and new situations involving aggregate rights, a group member cannot subsequently claim that she was inadequately represented in pursuing that right unless she proves that counsel treated the whole group unfairly.

3. Is Inadequate Representation Unindividuated Among Group Members?

Finally, inadequate representation claims differ when the underlying harm is aggregate because a court cannot distinguish those who are harmed by the litigation’s mishandling from those who are not. That is, the injury caused by inadequate representation is unindividuated among those represented. Aggregate harms, like housing-desegregation or school-busing cases, typically necessitate an indivisible remedy such as an injunction or declaratory judgment. Each group member has an equal stake in pursuing an indivisible remedy and each benefits from (or is harmed by) the relief equally. While each member has standing to bring a claim, no member has the right to an individual outcome independent of the other group members.⁹³ It likewise makes sense that when counsel or a class representative spoils that effort, the group experiences inadequate representation equally.⁹⁴ And when the lawyer’s efforts lead to a positive change in policies or practices, then that change—in theory at least—helps all of the group members, regardless of whether they wanted to sue in the first place. By this thinking, in a Rule 23(b)(2) class action, the class representative matters very little; the group members should be interchangeable.

Take, for example, the Supreme Court’s decision in *General Telephone Co. v. Falcon*.⁹⁵ Mariano Falcon, an employee claiming his employer

91. *Id.* at 42–44, 58–60.

92. Bone, *supra* note 45, at 220.

93. Issacharoff, *supra* note 1, at 1059.

94. *See id.* at 1058 (“[I]n cases for injunctive relief against institutional conduct, it is difficult to conceptualize an individual right of autonomy, even where we would no doubt recognize an individual’s ability to bring a claim in court. In such circumstances, an individual may be an exemplar of the harm visited by allegedly wrongful institutional conduct, but that same individual cannot claim an autonomous right to separate control of the outcome of the legal challenge.”).

95. 457 U.S. 147 (1982).

discriminated against him in denying his promotion, could not also represent other Mexican Americans who had not been hired.⁹⁶ The underlying claim could be considered either an aggregate or an individual harm, depending on the allegations. Mr. Falcon could have sued for discrimination individually and his claim would have focused specifically on his failed promotion. There would be no need to reference how General Telephone treated other Mexican Americans to prove that it discriminated against him. Or he could have (as he did) brought a disparate-treatment claim on behalf of all Mexican Americans working at General Telephone Company who were denied promotions. In that case, the evidence would focus on how General Telephone promoted whites compared with Mexican Americans. The baseline for measuring fairness depended on this comparison.

The problem, of course, was that Mr. Falcon tried to represent both Mexican Americans who had been denied promotions and those who had not been hired: two groups that were not sufficiently cohesive. Rule 23 presumes the representative is self-interested and that, because his interests are typical of the group's interests, he will benefit the group by selfishly pursuing his own agenda.⁹⁷ The concern then was that Mr. Falcon, as a current employee, had no self-interested reason to care about hiring. Moreover, the two claims required different facts; evidence as to how General Telephone discriminated in promoting employees would not illuminate facts about how it discriminated in hiring. Thus, "Mexican Americans," as a defined group, were not interchangeable. Remedying discriminatory promotion practices would not necessarily remedy discriminatory hiring practices. Based on this logic, had the overarching class been certified, a Mexican American who was not hired for discriminatory reasons could bring a subsequent suit and allege inadequate representation in the first action. That harm is an aggregate harm that all Mexican Americans who would have been hired, but for the discrimination, share.

By contrast, poor representation in pursuing individual harms can be individuated among group members. Group members are not fungible or interchangeable for liability or remedial purposes.⁹⁸ If a drug company fails to warn patients of the risks of a heart attack or stroke associated with its pain reliever, patients experience that harm differently. Some will have no adverse effects, others will experience a heart attack or stroke and recover, and others will not recover. Though each patient shares common facts with one another based on the labeling, they have different genetic

96. *Id.* at 158–59.

97. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05, cmt. h (2010) ("By acting in ways that help themselves, these parties should help others automatically.").

98. See Gerken, *supra* note 53, at 1687 (contrasting the unindividuated harm in vote dilution cases from the individuated harm in a classic rights suit).

predispositions, may receive unique information from their doctors, and will ultimately have to prove specific causation as well as general causation. Consequently, all group members are not injured equally from the mislabeling and it would not necessarily be inconsistent to award damages to one patient and not another.

When counsel represents numerous tort victims seeking divisible remedies in situations like the failure-to-warn scenario, it is possible for a settlement to benefit some at the expense of others and for some to have a valid grievance against their attorney whereas others do not. This was one of the problems in *Amchem*: attorneys cut a better deal for their “inventory” plaintiffs (their current clients) than for those who had not yet sued.⁹⁹ The inventory plaintiffs were thus better off than their future counterparts and the court could have readily sorted those whom the inadequate representation injured from those whom it did not.

* * * * *

Thus far, we have differentiated between how courts should handle preclusion in subsequent lawsuits depending on whether the underlying injury in the first action was an aggregate harm. When the underlying claim flows from an aggregate harm, it follows that inadequately representing one group member in prosecuting that harm is the same as inadequately representing the whole group. The harm is aggregate and the remedy—typically declaratory or injunctive relief—is likewise indivisible. If one group member receives the remedy, then they all receive the remedy. If one group member is inadequately represented, then they are all inadequately represented. It makes sense practically (if not theoretically) that courts tolerate greater conflicts among group members when evaluating a subsequent inadequate representation claim. Successful claims of this sort tend to be those where the lawyers and, potentially, the named representatives acted contrary to the group’s best interests or, as in *Falcon*, tried to represent an overinclusive group where some members would require a remedy that the representative had no selfish reason to pursue.

Conversely, when litigants each suffer individual harm at the hands of the same defendant and decide to pool their claims together for economic or other functional reasons, that collectivization does not change the nature of the underlying individual harm. When counsel poorly represents an individual in litigating that harm, inadequate representation is an individual injury. Another way to think about this distinction is from a remedial standpoint. When a remedy adheres to the notion “if as to one, then as to all,” as is the case in indivisible remedies, then an inadequate representation claim likewise rises and falls with the group. But divisible remedies tend to be different. Inadequately representing one group member in demanding damages, for example, does not automatically mean that the rest of the

99. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 600–01, 606, 626–27 (1997).

group was harmed. In fact, some members might benefit from others' inadequate representation, as was the case in *Amchem*. Here, courts should look for "structural conflicts" between the claimants themselves, and the representatives and the claimants.¹⁰⁰

There are, however, some stumbling blocks to a dichotomy based on distinguishing between whether the underlying right at stake is aggregate or individual and then characterizing a subsequent inadequate representation claim along similar lines. First, it does not address how courts should handle inadequate representation in circumstances where group members experience an aggregate harm but request both divisible and indivisible remedies. Second, it does not consider the unfairness of a situation in which group members suffer an aggregate harm but receive no notice of the pending suit and may have vastly conflicting opinions about which remedies to request. The next two sections consider each problem in turn.

*B. Inadequate Representation in Hybrid Claims:
Aggregate Harms, Divisible Remedies*

How should a court handle subsequent inadequate representation claims in cases where the underlying harm was aggregate but the requested relief included both indivisible and divisible remedies? For example, when employees file gender discrimination claims under Title VII, they typically request declaratory and injunctive relief to prevent future discrimination. Yet, Title VII also allows them to demand compensatory and punitive damages, damages that are divisible among the class members but flow from the aggregate harm.¹⁰¹ Similarly, if an industrial plant taints a community's groundwater, the harms—the release of the chemical and the potential for future emissions—prompt aggregate remedies of declaratory and injunctive relief. Plaintiffs want an indivisible remedy to enjoin subsequent emissions and a declaration as to the clean up. But some people may experience more harm than others; they might live closer to the plant and face greater personal injuries or property damage as a result.

In both of these examples, the underlying harm is aggregate, but recovering monetary damages for the way in which that harm has affected each individual demands proof of specific causation. If a court evaluated counsel's representation solely in pursuing the aggregate harm—gender discrimination or groundwater contamination—it would allow for greater

100. See generally AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a). A structural conflict is a conflict of interest either between the "claimants and the lawyers who would represent claimants on an aggregate basis" or

among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves.

Id.

101. 28 U.S.C. § 1981(a)(1), (b) (2006).

conflicts within the represented group. A judge would measure fairness in group terms, considering whether counsel treated the rest of the group members fairly and, if not, all group members would have been inadequately represented. By contrast, if a judge looked solely at counsel's work in pursuing divisible remedies and found that class members' interests were antagonistic to one another (counsel represented plaintiffs with present injuries as well as those who had merely been exposed to the contaminated groundwater and might develop future injuries), then she would be more likely to permit a collateral attack.

These scenarios—a Title VII pattern-or-practice case demanding compensatory and punitive damages and a toxic-tort case requesting divisible and indivisible relief—raise several issues for a plaintiff subsequently claiming inadequate representation and for courts using this aggregate-rights framework to decide her claim. First is the problem of characterization. As the punitive damages claim illustrates, it is not always easy to pinpoint whether the underlying claim in question is aggregate. One solution is to subject each questionable claim to the same rubric used here for distinguishing between aggregate and individual rights. As Professor Gerken used to explain the voting-dilution cases and I have refashioned to distinguish between inadequate representation claims, there are at least three differences between aggregate and individual rights. First, when a right is aggregate, “fairness is measured in group terms,” even if the harm itself injures an individual.¹⁰² Second, an aggregate right “rises and falls with the treatment of the group.”¹⁰³ Third, an aggregate right “is unindividuated among members of the group; no [group member] is more or less injured than any other [group member].”¹⁰⁴

Applying this framework requires understanding both the law surrounding the remedy at stake—let's consider punitive damages—and the law governing the underlying right—Title VII, for example. By some reasoning, punitive damages seem to remedy an aggregate harm at least when plaintiffs request them based on the defendant's conduct toward the whole class.¹⁰⁵ Punishing a defendant's pattern of discriminatory behavior toward women, for instance, hinges on whether plaintiffs can establish the underlying wrong to the group as a whole by proving the same

102. Gerken, *supra* note 53, at 1681–84.

103. *Id.* at 1684–86.

104. *Id.* at 1738.

105. *See, e.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 622 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011); *Scott v. Family Dollar Stores, Inc.*, No. 3:08CV540-RJC-DSC, 2010 WL 143725, at *6 (W.D.N.C. Jan. 7, 2010); *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250, 258–59 (M.D.N.C. 2007) (noting that, because plaintiffs requested punitive damages based on “the Defendants' conduct to the putative class as a whole,” there was no need to contemplate “the intangible, subjective differences of each class member's circumstances”); *Brown v. Yellow Transp., Inc.*, No. 08 C 5908, 2011 WL 1838741, at *6–7 (N.D. Ill. May 11, 2011) (certifying a hybrid class, but providing only a cursory explanation of why compensatory and punitive damages do not undermine the predominance of common questions); *Palmer v. Combined Ins. Co. of Am.*, 217 F.R.D. 430, 439–40 (N.D. Ill. 2003).

discriminatory act or series of acts.¹⁰⁶ That necessitates evidence of discriminatory, company-wide practices and policies where the punitive damages claim rises and falls with the way the defendant treated the group.

Yet, even though punitive damages seem instinctively like an aggregate remedy because they address the defendant's conduct toward a protected group, recent Supreme Court cases on punitive damages and Title VII suggest that punitive damages may be individual, divisible remedies.¹⁰⁷ Title VII allows for up to \$300,000 in punitive damages for each employee but requires plaintiffs to show that the employer engaged in a pattern or practice of discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved *individual*."¹⁰⁸ Thus, some have argued that Title VII should be interpreted to preclude punitive damages on a class-wide basis unless plaintiffs show individualized injuries.¹⁰⁹ When courts conduct a fact-specific inquiry into whether each class member would be entitled to those damages, it is entirely possible that some members would receive them and others would not.¹¹⁰ Punitive damages would thus be divisible among the claimants and would not rise and fall with the defendant's treatment of the group. If courts cannot award punitive damages under Title VII without determining whether each employee is eligible and those awards punish the defendant's wrongdoing only as to a particular plaintiff,¹¹¹ this implies that punitive damages remedy an individual harm and count as divisible remedies.

The Supreme Court's punitive damages decisions lend further support to this view. *State Farm Mutual Auto Insurance Co. v. Campbell*,¹¹² *Philip Morris USA v. Williams*,¹¹³ and *Exxon Shipping Co. v. Baker*¹¹⁴ can each be read to suggest that punitive damages remedy individual injuries.¹¹⁵ The upshot of *Williams* is that punitive damage awards can punish the defendant's wrongdoing only as to a particular plaintiff, not as to those similarly situated.¹¹⁶ *Exxon Shipping* and *State Farm* both indicate that punitive damage awards must be tethered to compensatory damages (or, at

106. See, e.g., *Palmer*, 217 F.R.D. at 438 (focusing on the defendant's conduct as opposed to the class members' individualized harms); cf. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417 (5th Cir. 1998) (refusing to decide whether punitive damages are available on a class-wide basis).

107. See, e.g., *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 379–80 (E.D. Ark. 2007).

108. 42 U.S.C. § 1981a(b)(1), (b)(3) (2006) (emphasis added).

109. E.g., *Allison*, 151 F.3d at 417 (noting that the plain language of the Civil Rights Act of 1991 could be interpreted this way, but declining to reach the question).

110. *Nelson*, 245 F.R.D. at 379.

111. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011); *Philip Morris USA v. Williams*, 549 U.S. 346, 353–54 (2007).

112. 538 U.S. 408 (2003).

113. 549 U.S. 346 (2007).

114. 554 U.S. 471 (2008).

115. *Nelson*, 245 F.R.D. at 376.

116. *Williams*, 549 U.S. at 353–54.

the very least, backpay).¹¹⁷ Given that courts can no longer award backpay under Title VII without determining whether each employee is eligible,¹¹⁸ the fairness of awarding punitive damages would be measured in individual terms. Likewise, it is possible to award punitive damages to some group members and not others. Consequently, punitive damage claims could be considered individual claims.

Trying to situate punitive damage claims within the aggregate-rights framework brings up a second problem: How should courts characterize subsequent inadequate representation claims where the initial litigation concerned an indisputably aggregate right, but requested both divisible and indivisible remedies?

There are at least two potential solutions to this complication. First, courts faced with inadequate representation allegations might closely examine the specific facts to pinpoint whether the deficiency turns on the handling of divisible or indivisible remedies. If the claim arose out of how counsel represented the group in litigating indivisible remedies, then intragroup conflicts would be more tolerable. The plaintiff would need to explain either how the representation hurt the group as a whole or how, as in *Falcon*, the initial group was poorly defined and not cohesive.¹¹⁹ Alternatively, if divisible remedies were involved, then plaintiffs must have had an opportunity to exit the litigation¹²⁰ and, as *Amchem* requires, the litigation must have been free both from intragroup conflicts and structural conflicts between the representative and the group.¹²¹

Yet, in practice this *ex post* solution is problematic. The dividing line between types of relief may be clear enough, but when counsel represents plaintiffs in pursuing an aggregate right and requests both divisible and indivisible remedies, the representation itself cannot be segregated so easily. Tradeoffs are inevitable. The defendant might be willing to institute new practices that prevent future aggregate harms like sexual harassment policies, less subjective promotion criteria, or pollution contamination measures in exchange for reduced compensatory or punitive damages.

117. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514 (2008); *State Farm*, 538 U.S. at 423 (2003); see also Linda S. Mullenix, *Nine Lives: The Punitive Damage Class*, 58 U. KAN. L. REV. 845, 882 (2010).

118. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

119. See *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 158–59 (1982).

120. *Dukes*, 131 S. Ct. at 2559 (“While we have never held [that the absence of notice and opt-out rights violate due process] where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.”); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (holding that, where claims are predominately for monetary damages, the Due Process Clause requires the right to notice and opt out); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (holding that the lack of an opportunity for the plaintiff to opt out prevented the use of *res judicata*).

121. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 600–01, 606, 626–27 (1997); see also AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a) (2010).

Thus, identifying where counsel's work fell short and second-guessing those trade-offs may be impractical.

The second possibility for addressing aggregate harms that entail both divisible and indivisible remedies is to limit the representation's scope *ex ante*, such that it includes only aggregate rights seeking indivisible remedies.¹²² This should likewise limit the action's preclusive effect to aggregate harms, which means that a plaintiff seeking to relitigate those questions would have to demonstrate that the inadequate representation harmed the group as a whole. Intragroup conflicts would matter less. Yet, if plaintiffs won the first suit, then subsequent individual suits seeking divisible remedies could use issue preclusion offensively to avoid relitigating questions over aggregate harms.

Granted, there are drawbacks to this *ex ante* approach. These drawbacks center mainly on whether the first court can limit the scope of preclusion in subsequent cases.¹²³ After all, the core of claim preclusion—that plaintiffs should bring all related claims in one action—is antithetical to the idea of addressing only aggregate harms and indivisible relief collectively and then allowing follow-on actions for divisible relief. This approach also runs up against the maxim that a court “cannot conclusively determine the *res judicata* effect of [its own] decision.”¹²⁴ In Rule 23(b)(2) class actions, courts have occasionally held that the class representative's failure to request compensatory damages alongside declaratory or injunctive relief signals inadequate representation.¹²⁵ Other courts have, however, decided that splitting claims between individual and aggregate harms to facilitate class certification of the latter is perfectly permissible.¹²⁶

In his article titled, *Preclusion in Class Action Litigation*, Professor Tobias Wolff has persuasively argued the error of the preclusion maxim

122. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04(c) (suggesting courts “authorize aggregate treatment of common issues concerning an indivisible remedy . . . even though additional divisible remedies are also available that warrant individual treatment or aggregate treatment with the opportunity of claimants to exclude themselves”); Issacharoff, *supra* note 1, at 1073.

123. This is a matter of much confusion in lower court cases based primarily on the Supreme Court's ruling in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984). For a helpful overview of this case as well as the entire problem, see Wolff, *supra* note 1, at 724–31.

124. *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 243 (W.D. Tex. 1999); see also *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 80 (M.D. Tenn. 2004) (“Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action.” (quoting FED. R. CIV. P. 23 (c)(3) advisory committee's note)).

125. *E.g.*, *Colindres v. QuietFlex Mfg.*, 235 F.R.D. 347, 375 (S.D. Tex. 2006); *Zachery*, 185 F.R.D. at 243.

126. See, e.g., *Cameron v. Tomes*, 990 F.2d 14, 17 (1st Cir. 1993); *Sullivan v. Chase Inv. Servs. of Bos., Inc.*, 79 F.R.D. 246, 265 (N.D. Cal. 1978); see also Edward F. Sherman, “Abandoned Claims” in *Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 491–92 (2011).

against a court determining the effect of its own decision.¹²⁷ As he notes, “[t]he most basic reform that is needed in this arena is for rendering fora to recognize and claim their proper role as expositors of positive law in assessing and controlling the preclusive effects of their own judgments.”¹²⁸ Moreover, there is no theoretical basis or logical reason for this controlling maxim.¹²⁹

Although Professor Wolff suggests several tools for courts to employ, the most important is Rule 41, which gives federal courts the ability to dismiss claims without prejudice.¹³⁰ As the Supreme Court recognized in *Semtek International, Inc. v. Lockheed Martin Corp.*, this designation prevents subsequent courts from affording any preclusive force to the dismissed claims.¹³¹ Stated in terms of claim preclusion, dismissing a claim without prejudice is not a dismissal on the merits and is thus not afforded a preclusive effect.¹³² Likewise, in class actions, courts can use their Rule 23(e) authority to approve settlements that place careful constraints on which claims are settled and which could be litigated in the future.¹³³ Still, until courts uniformly recognize the value of collectively litigating only aggregate harms demanding indivisible remedies and leaving divisible remedies to subsequent actions, some danger exists that the initial aggregation will impede and preclude rather than facilitate successive individual cases.¹³⁴

C. Improving Adequacy in Aggregate Harms That Seek Indivisible Remedies: “Notice and Comment”

Even if a rendering court can limit its judgment’s preclusive scope, this framework paints a bleak picture for group members experiencing an aggregate harm demanding an indivisible remedy. On the front end, group members are not entitled to notice or an opportunity to be heard in Rule 23(b)(1) or (b)(2) actions, and most *parens patriae* statutes produce similar results. This means that those affected by the judgment have no chance to influence the litigation, shape the remedy, or participate in decision

127. Wolff, *supra* note 1, at 752–89.

128. *Id.* at 752.

129. *Id.* at 758–65, 767.

130. *Id.* at 758–64.

131. 531 U.S. 497, 506–09 (2001); Wolff, *supra* note 1, at 760–61.

132. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982) (“[T]he general rule [against splitting claims] does not apply [when] . . . [t]he court in the first action has expressly reserved the plaintiff’s right to maintain the second action.”); see Wolff, *supra* note 1, at 762.

133. Wolff, *supra* note 1, at 766 (citing *Trotsky v. L.A. Fed. Sav. & Loan Ass’n*, 121 Cal. Rptr. 637, 646 (Ct. App. 1975)).

134. Issacharoff, *supra* note 1, at 1073 (“But absent a clear doctrine on the res judicata effect of a Rule 23(b)(2) class action, diligent plaintiffs’ counsel would have felt compelled to assert all possible remedies for the class members for fear of waiving valuable individual claims of some of the class members.”).

making—all of which can impair the perception of procedural justice.¹³⁵ On the back end, courts find intragroup conflicts over these matters trifling and conclude that they are not sufficient reasons to unravel the litigation through collateral attack.¹³⁶

Granted, what these decisions lack in theoretical coherence, they make up in pragmatic balancing. In many *parens patriae* and Rule 23(b)(2) cases, the absent parties' rights would be affected regardless of whether they were a formal party to the suit because of the injunctive relief requested. If a city decides to lift a curfew based on one person's lawsuit, that decision affects all residents equally—whether they were an actual party or not. The same is true for school-busing cases, decisions to integrate nursing homes, and remedies aimed at thwarting race and gender discrimination. Thus, these *res judicata* results make sense in terms of real-world consequences and the need to prevent conflicting decisions, though not in terms of consent and identity of interests. Nevertheless, the theoretical shift towards pragmatism seems to have written the Due Process Clause's notion of adequacy out of the equation.

How then can courts improve representational adequacy in pursuing aggregate harms? The answer cannot come through preclusion because tying group members to the result in these cases has clear practical benefits. Otherwise, defendants might be faced with conflicting court opinions with which they cannot possibly comply. So, the answer must lie at the front end of litigation.

Where there can be only one uniform remedy that affects the entire group, the answer must be to permit as many "inputs" as possible in considering and fashioning that remedy.¹³⁷ When the underlying harm is aggregate, those affected by that harm should be notified of the pending litigation and, after the court adjudicates liability, they should have the chance to comment on and potentially influence the court's remedy.¹³⁸ As the Supreme Court has recognized, adequate representation is not a substitute for proper notice;¹³⁹ notice, an opportunity to be heard, and adequate representation are all cornerstones of due process.¹⁴⁰

Notice and the opportunity to be heard have value even if the controlling parties do not ultimately incorporate group members' divergent views into

135. See Burch, *supra* note 64, at 7–11, 37–43.

136. See *supra* notes 75–80 and accompanying text.

137. See, e.g., Williams v. Lane, 96 F.R.D. 383, 386 (N.D. Ill. 1982) ("More important, this Court can afford class members the opportunity to comment on the issue of relief if their views on this subject are truly discordant.").

138. See *id.*; see also Imasuen v. Moyer, No. 91 C 5425, 1992 WL 26705, at *2 (N.D. Ill. Feb. 7, 1992) ("Any differences of opinion within the class concerning the effect of proposed remedies can be dealt with in the remedies aspect of the litigation, after the constitutionality of the INS detention system has been adjudicated.").

139. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

140. Granted, Rule 23(b)(1) and (b)(2) do not require notice before foreclosing class members' rights and the Supreme Court approves those rules.

the litigation's resolution.¹⁴¹ Empirical studies on procedural justice demonstrate that the simple opportunity to state one's position to a decision maker is independently valuable because those bound by the decision regard the outcome as more legitimate.¹⁴² Requiring participation opportunities where aggregate rights are at stake may also improve the outcome. As Howard Reingold's *Smart Mobs*, Jim Surowiecki's *Wisdom of Crowds*, and Scott Page's *The Difference* have demonstrated through social science, groups of diverse people can make accurate predictions, solve problems, improve performance, and aggregate information.¹⁴³ Thus, providing notice and an opportunity to be heard in a mandatory class or *parens patriae* action can lead to forceful advocacy that fosters well-developed arguments, increased legitimacy, and dissenters who are ultimately more willing to accept the outcome.¹⁴⁴ In this sense, conflict and dissonance are beneficial; they encourage novel solutions, diverse ideas, and creative problem solving.¹⁴⁵ As game theorists demonstrate, increased participation and bargaining—more “trades”—promotes more solutions.¹⁴⁶ Accordingly, the more initial disagreement about what is important and how to fashion an appropriate remedy, the better.

The feasibility of allowing notice and comment opportunities vary based on the procedural mechanism used to aggregate claims. Currently, notice is permitted but not required in mandatory classes that proceed under Rule 23(b)(1) or (b)(2). Likewise, some but not all *parens patriae* statutes require notice.¹⁴⁷ California's antitrust statute uses commendable, exemplary language:

In any action brought under this section, the Attorney General shall, at any time, in any manner, and with any content as the court may direct,

141. See Burch, *supra* note 64, at 37–38.

142. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 102–03 (1988); E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); Linda Musante et al., *The Effects of Control on Perceived Fairness of Procedures and Outcomes*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 223, 237–38 (1983).

143. See generally SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2007); HOWARD REINGOLD, SMART MOBS: THE NEXT SOCIAL REVOLUTION (2002); JAMES SUROWIECKI, THE WISDOM OF CROWDS (2004).

144. See W. RUSSELL NEUMAN, THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN THE AMERICAN ELECTORATE 126–27 (1986); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1223–24 (1982).

145. Lisa Troyer & Reef Youngreen, *Conflict and Creativity in Groups*, 65 J. SOC. ISSUES 409, 413 (2009).

146. See generally HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982).

147. See, e.g., 15 U.S.C. § 15c(b)(1) (2006) (federal antitrust statute requiring courts to give notice of *parens patriae* actions by publication); ALASKA STAT. § 45.50.577(e) (2012) (Alaska's version of the *parens patriae* antitrust statute, which requires notice and opt-out rights); ARK. CODE ANN. § 4-75-212 (2011) (requiring notice for Arkansas's Unfair Practices Act); CAL. BUS. & PROF. CODE § 16760(b)(1) (West 2008). Some statutes have also created opt-out rights for *parens patriae* actions. See, e.g., ALASKA STAT. § 45.50.577(e); CAL. BUS. & PROF. CODE § 16760(b)(2).

cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to the person or persons according to the circumstances of the case.¹⁴⁸

This kind of language gives courts the flexibility to ensure that notice is not cost prohibitive, but authorizes them to require additional notice if individual property interests are at stake. In sum, providing notice to affected parties (whether through Rule 23's built in procedures for (b)(1) or (b)(2) claims, or by statute for *parens patriae* suits) increases the legitimacy of the outcome in mandatory actions.

III. APPLYING THE AGGREGATE-RIGHTS FRAMEWORK TO ALTERNATIVE COLLECTIVE PROCEDURES

As we have seen, although threads of both consent and overlapping interests underpin many modern-day cases, those theories fail to explain how courts can legitimately bind dissenters in mandatory litigation, such as a traditional Rule 23(b)(2) class. When class members collaterally attack the class settlement and claim that they were inadequately represented, courts frequently dismiss those allegations without offering a coherent rationale. The aggregate-rights framework set forth in Part II, which suggests that courts should differentiate between inadequate representation claims based on the underlying right at stake, provides an alternative means for courts to evaluate and understand those claims. That framework's use, however, is not limited solely to Rule 23(b)(1) or (b)(2) cases. It can also help alleviate similar dilemmas in class-action alternatives, such as *parens patriae* suits and multidistrict litigation. Accordingly, this part explains this framework's utility in these alternative contexts.

A. *Parens Patriae*

As class actions have become increasingly difficult to certify¹⁴⁹ and courts enforce arbitration clauses that prohibit aggregating claims,¹⁵⁰ scholars have urged states' attorneys general to step in and sue on behalf of their citizens using their *parens patriae* authority.¹⁵¹ This not only avoids arbitration and rigorous class certification standards, but may also prevent private attorneys from siphoning off a hefty chunk of citizens' damages for their attorneys' fees.¹⁵² Yet, *parens patriae* actions, which are not subject

148. CAL. BUS. & PROF. § 16760(b)(1).

149. See Burch, *supra* note 4.

150. See, e.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

151. See, e.g., Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919 (2000); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012).

152. See Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1848–49 (2000). Yet, state attorneys general often hire private class action counsel to bring these

to Rule 23's class certification criteria, are a double-edged sword. Not subjecting these actions to stringent certification standards means that they are easier to bring and may thus be more successful in deterring wrongdoing. But it also means that there is no judicial check on adequate representation as there would be in a class action.¹⁵³ This, in turn, means that the preclusive scope of the judgment is uncertain at best, particularly when an attorney general sues for both indivisible and divisible remedies.

Nevertheless, the aggregate-rights framework can enhance clarity when judging the preclusive force of *parens patriae* actions. Traditional *parens patriae* cases involve aggregate rights where the state sues to vindicate its citizens' public interest. So, for example, when a state sues another state for the right to divert and use water, the resulting judgment binds both the state and its citizens.¹⁵⁴ The same result should be true when a state sues to establish public transit system fares,¹⁵⁵ implement a federal wildlife-management statute,¹⁵⁶ or determine whether a cellular company can build its towers.¹⁵⁷ In *Lucas v. Planning Board*, where citizens sued after the municipality entered into an agreement to permit a cellular company to construct its towers, the court explained that the town adequately represented its residents because "[t]he interests asserted [in the prior litigation] were of an exclusively public character."¹⁵⁸

In many ways, however, these are straightforward cases under the aggregate-rights framework—they involve aggregate rights and request indivisible relief. As the court in *Lucas* put it, the citizens had "no private interests or individual rights that extend[ed] beyond the general public interest asserted by the Town."¹⁵⁹ Thus, there was no reason to doubt the preclusive force of the first case "since 'governments are by their nature representative of the cumulative rights of private citizens.'"¹⁶⁰ The public's interest is diffuse and the rights asserted were clearly aggregate rights. Accordingly, any sort of harm from inadequate representation would be unindividuated among group members, which means that the court properly evaluated the representation in group terms. Because the relief requested is indivisible, pragmatism suggests that multiple actions could lead to conflicting obligations.

actions, so the cost savings for plaintiffs may not be as great as anticipated. *See, e.g.*, Gilles & Friedman, *supra* note 151, at 672.

153. *See* Lemos, *supra* note 2, at 535–42.

154. *Wyoming v. Colorado*, 286 U.S. 494, 506–07, 509 (1932) ("[T]he decree must be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries.").

155. *Berman v. Denver Tramway Corp.*, 197 F.2d 946, 951 (10th Cir. 1952).

156. *Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19, 23 (D.D.C. 1998).

157. *Lucas v. Planning Bd.*, 7 F. Supp. 2d 310, 328–29 (S.D.N.Y. 1998).

158. *Id.* at 328.

159. *Id.* at 329.

160. *Id.* (quoting 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4458, at 521 (1984)).

The preclusive scope of *parens patriae* actions asserting individual rights and seeking damages on behalf of those individuals should be equally clear. Preclusion should not attach to a judgment where: a structural conflict¹⁶¹ exists between the attorney general's and the citizen's interests, the attorney general failed to prosecute the lawsuit, or the attorney general lacked a motive to pursue the case vigorously.¹⁶² In its 1961 ruling in *Sam Fox Publishing Co. v. United States*,¹⁶³ the Supreme Court explained that "[w]e regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it."¹⁶⁴ In the antitrust area in particular, the Court explained, "private and public actions were designed to be cumulative, not mutually exclusive," because "[d]ifferent policy considerations govern each of these."¹⁶⁵ Moreover, when individual rights are at stake, "due-process questions may arise, such as whether citizens are entitled to notice and to exclude themselves and whether a process for distributing damages to individuals must be established."¹⁶⁶

The harder cases are those where the character of the underlying action involves both public questions and private rights. The Supreme Court has been enigmatic in this area. Currently, as *parens patriae*, the state can seek compensation for sovereign or quasi-sovereign claims, but it must have an interest that is distinct from individual citizens' interests.¹⁶⁷ As courts have recognized, the Supreme Court has not defined "quasi-sovereign" interests,¹⁶⁸ but "it is clear that a state may sue to protect its citizens against 'the pollution of the air over its territory; or of interstate waters in which the state has rights.'"¹⁶⁹ Yet, states cannot "sue to assert the rights of private individuals."¹⁷⁰ Nevertheless, states do not limit their authority to well-traveled "quasi-sovereign" interests like environmental and antitrust enforcement. Rather, they have asserted their *parens patriae* authority with varying degrees of success in bringing litigation against tobacco

161. See *supra* note 100 and accompanying text.

162. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. b(1)(B) (2010).

163. 366 U.S. 683, 689 (1961).

164. *Id.* at 689 (quoting *United States v. Borden Co.*, 347 U.S. 514, 518 (1954)).

165. *Id.*

166. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. b(1)(B).

167. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982); 13B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD R. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.11 (3d ed. 2008).

168. As one commentator observed, "'Quasi-sovereign' is one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their moorings and drift off into the ether. It is a meaningless term absolutely bereft of utility." Ratliff, *supra* note 152, at 1851.

169. *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (quoting 12 MOORE'S FEDERAL PRACTICE § 350.02[3], at 3-20 (1993)).

170. *Id.*; see also *Alfred L. Snapp*, 458 U.S. at 600.

companies,¹⁷¹ lead paint manufacturers,¹⁷² gun manufacturers, and health maintenance organizations.¹⁷³

Adequate representation and preclusion in these in-between cases—where the underlying action involves both public questions and private rights—can be addressed by either limiting the scope of attorneys general’s *parens patriae* authority or by not precluding a subsequent citizen suit when the right in question is an individual harm and a structural conflict exists.

First, the Court could clarify the scope of a state’s *parens patriae* authority. By limiting the types of claims a state can assert on behalf of a private individual *ex ante*, the courts would likewise limit the preclusive force of those judgments. If an attorney general could pursue only aggregate rights and she instead litigated claims involving individual harms, then the individual claims should not be precluded in a subsequent case.

But several problems exist with limiting the attorneys general’s authority *ex ante*. First, as Professor Myriam Gilles and Gary Friedman have pointed out, the *parens patriae* action may be one of the last possibilities for enforcing consumer protection, antitrust, and employment laws in the wake of *AT&T Mobility LLC v. Concepcion* and *Wal-Mart Stores, Inc. v. Dukes*.¹⁷⁴ As they advocate, attorneys general should “redress the injuries of consumers and employees who would otherwise have no recourse in a post-*Concepcion* world.”¹⁷⁵

Yet, even if attorneys general are allowed to collect damages on behalf of individuals, there is often no requirement that they distribute those damages to the affected citizens.¹⁷⁶ As Gilles and Friedman note, “[L]iberal use of *cy pres*, escheatment to the public fisc, and the application of rough justice principles in distributing awards are unquestioned hallmarks of *parens patriae* litigation.”¹⁷⁷ Consequently, limiting *parens patriae* authority to the pursuit of purely aggregate rights might strike a fair balance. On one hand, it would allow the state to skirt arbitration provisions and class-certification standards in enforcing aggregate rights, including those private interests that rise to a “quasi-sovereign” level when sufficiently

171. See, e.g., *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997); *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859 (2000).

172. E.g., *State v. Lead Indus. Assoc., Inc.*, 951 A.2d 428, 435 (R.I. 2008) (explaining that the state could not pursue a public-nuisance claim against the defendants because it could not prove that the defendants “interfered with a public right”).

173. Ratliff, *supra* note 152, at 1847.

174. Gilles & Friedman, *supra* note 151, at 623.

175. *Id.*

176. *Id.* at 665 n.193 (citing, for example, California’s Cartwright Act which allows the attorney general to distribute monetary relief “[i]n any manner as the superior court . . . may authorize [so long as] . . . each person be afforded a reasonable opportunity to secure his or her appropriate portion of the monetary relief”).

177. *Id.* at 666.

aggregated.¹⁷⁸ On the other, it would allow individuals to ride on the state's coattails and perhaps even use offensive nonmutual issue preclusion to vindicate their individual rights. The second remaining difficulty with this *ex ante* approach, however, is in defining the limits of *parens patriae* authority in a meaningful way, a problem that we will revisit in exploring the second potential solution.

The second possibility for addressing these in-between cases involving public questions and private rights is to apply the aggregate-rights framework in assessing subsequent claims of inadequate representation. That is, where purely aggregate rights are concerned, the attorney general is presumed an adequate representative and courts should tolerate greater intragroup conflicts.¹⁷⁹ But where individual rights are at stake, plaintiffs should have the chance to collaterally attack the judgment if a structural conflict existed, if the distribution of divisible remedies was inequitable, if the attorney general lacked a sufficient motive to pursue the case vigorously, or if the attorney general performed inadequately in prosecuting the case.¹⁸⁰ This would allow attorneys general to continue to pursue a wide array of actions that might otherwise fall through the cracks in the wake of *Dukes* and *Concepcion*, but would preserve citizens' individual right to sue where the harm or relief requested overlaps with private, individual rights and the attorney general's representation fell short.

To further explain, as the beginning of this section noted, the easy cases are those in which the underlying right is one with a predominately public character, such as implementing a wildlife-management statute or establishing public transit system fares. To return to the notions of consent and interest representation, precluding subsequent litigation in cases involving aggregate rights satisfies both traditional theories. Because most attorneys general are elected and must serve the public's interest,¹⁸¹ consent might be satisfied through any number of social-contract theories focusing

178. Lemos, *supra* note 2, at 493.

179. This approach has the benefit of roughly aligning with current court decisions on preclusion in *parens patriae* actions. See, e.g., *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982); *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1468–70 (10th Cir. 1993); *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 551 (Ga. 2006) (“The State can, as *parens patriae*, maintain an action on behalf of its citizens to seek compensation for sovereign or quasi-sovereign claims, but it may not represent its citizens' private interests. This means that the State and its citizens can be privies only with regard to public claims; they cannot be privies with regard to private claims.”).

180. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. b(1)(B) (2010). This differs from a proposal put forward by Maggie Lemos, which suggested that courts hold “that state suits cannot preclude private actions for damages (whether individual or aggregate).” Lemos, *supra* note 2, at 546. The proposal I set forth would give attorneys general the opportunity to represent private individuals when their claims overlap with collective harms.

181. Lemos, *supra* note 2, at 489 n.7 (“Forty-three states provide for popular election of the attorney general. In the remaining states, the attorney general is appointed by the legislature (Maine), by the state supreme court (Tennessee), or by the governor (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming).”).

on the consent of the governed such as John Locke's tacit consent,¹⁸² Immanuel Kant's hypothetical consent,¹⁸³ or even John Rawls's notion of what we would agree to behind a veil of ignorance.¹⁸⁴ Interests roughly align, too. Serving the public interest is in the attorney general's best interest—the press can easily keep tabs on public actions, ambitious attorneys general eyeing other elected positions must keep the public satisfied, and citizen stakeholders will complain openly if displeased.¹⁸⁵

But when attorneys general bring borderline cases involving “quasi-sovereign” interests with public and private dimensions, we run into essentially the same problem that we faced with limiting the scope of the attorney general's authority *ex ante*: how to define aggregate rights. The difference is that challenging the representation *ex post* has several benefits. First, it allows difficult procedural cases to proceed without the impediments created by class-certification standards or arbitration clauses. Second, it gives the attorney general an opportunity to pursue public questions and related private rights in tandem. Third, if that representation proves lacking, particularly with regard to private rights, it gives citizens a chance to initiate those claims in a subsequent action. Nevertheless, the chief concern is over what constitutes an aggregate right. Here we can rely again on the basic aggregate-rights framework laid out in Part II.A to differentiate between aggregate and individual harms.

Punitive damages once again provide an illustrative example. Instead of examining them in the Title VII context, however, consider their role in the tobacco litigation brought by multiple states' attorneys general. After a number of states' attorneys general sued the tobacco companies for violating various consumer-protection laws, engaging in deceptive and misleading conduct that wronged the public, unjustly enriching themselves with taxpayer money that went to treat smokers' health problems, and wrongfully profiting at the public's expense,¹⁸⁶ they reached a master settlement agreement. The settlement contained a broad release that covered claims by states acting as *parens patriae* as well as private attorneys general and taxpayers to “the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public . . . as opposed to solely private or individual relief for separate and distinct injuries.”¹⁸⁷ It defined “released claims” to include “liabilities of any nature including civil penalties and punitive damages.”¹⁸⁸ So, when private

182. See generally LOCKE, *supra* note 44, at 365.

183. See generally IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 55 (H.J. Paton ed. trans., Hutchinson & Co. Ltd. 1962) (1785).

184. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

185. This is true even when the attorney general hires private counsel to pursue the action. Brunet, *supra* note 151, at 1932–34. *But see* Lemos, *supra* note 2, at 488.

186. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 *DEPAUL L. REV.* 331, 337–40 (2001).

187. *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 551 (Ga. 2006).

188. *Id.*

parties later sued for compensatory and punitive damages, the tobacco companies claimed that punitive damages remedied a public harm and were thus precluded.¹⁸⁹

Not surprisingly, courts considering individuals' subsequent tobacco lawsuits reached conflicting opinions over whether punitive damages were a matter of public interest and thus remedied an aggregate harm.¹⁹⁰ These conflicts centered principally on each state's punitive damage law. On one hand, some courts have reasoned that their state law uses punitive damages to deter wrongful conduct, punish misbehavior for the public good, and thus benefit the general public, not private parties.¹⁹¹ As one court observed in response to a plaintiff's claim that she retained "some private interest in punitive damages," that argument "conflicts with the purpose of punitive damages in New York, since 'enforcement of an award of punitive damages as a purely private remedy would violate strong public policy.'"¹⁹² In that sense, punitive damages do not remedy an individual harm; instead, they punish wrongdoers and deter others from engaging in that conduct—remedies designed to protect the public as a whole. This concept is further reflected in certain state statutes that require a percentage of punitive damages awarded to go to the state's treasury¹⁹³ as well as by some states' criteria that plaintiffs demonstrate "grave misconduct affecting the public generally" as opposed to just an "individually sustained wrong."¹⁹⁴

Other states have reached the opposite conclusion when faced with the same question of whether the tobacco settlement precludes subsequent individual punitive damage claims. California, for instance, uses a "primary rights" test in assessing res judicata, which means that courts examine the harm suffered and bar subsequent actions only when they arise out of "the same injury to the same right."¹⁹⁵ In the tobacco cases, an individual's punitive damage claim arises out of her own personal and emotional injuries, not the economic harms and anticompetitive activities

189. See, e.g., *id.* at 551–52; *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 392 (Ct. App. 2011).

190. Compare *Bullock*, 131 Cal. Rptr. 3d at 392 (permitting an individual plaintiff to recover punitive damages), with *Gault*, 627 S.E.2d at 551–52 (precluding an individual plaintiff from recovering punitive damages). As the Supreme Court has noted, "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

191. *Grill v. Philip Morris USA, Inc.*, 653 F. Supp. 2d 481, 498 (S.D.N.Y. 2009); *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639, 653 (S.D.N.Y. 2007); *Gault*, 627 S.E.2d at 552; *Shea v. Am. Tobacco Co.*, 73 A.D.3d 730, 732 (N.Y. App. Div. 2010); *Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 150 (N.Y. App. Div. 2008).

192. *Clinton*, 498 F. Supp. 2d at 653 (quoting *Garrity v. Lyle Stuart, Inc.* 353 N.E.2d 793, 794 (N.Y. 1976)).

193. See, e.g., GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (requiring 75 percent of punitive damages awarded to be paid into the State treasury).

194. *Fabiano*, 54 A.D.3d at 150.

195. *Bullock*, 131 Cal. Rptr. 3d at 392.

that the attorney general pursued as *parens patriae*.¹⁹⁶ Thus, punitive damage claims arise out of a plaintiff's individual harm.

These two distinct approaches to characterizing punitive damage claims should likewise lead to alternative results if a citizen claimed that the attorney general inadequately represented her in pursuing that claim. When punitive damages benefit the public as a whole by deterring wrongful conduct and punishing wrongdoers, an individual's subsequent claim that the attorney general inadequately represented her in litigating that remedy should fall on deaf ears. In this instance, courts should measure the representation's fairness in group terms since punitive damages are unindividuated among group members. Representation would be inadequate only if the attorney general colluded with the defendant, failed to zealously prosecute the claim, or otherwise injured the group *qua* group.

Conversely, if California had not decided to prohibit preclusion of punitive damages *ex ante*—through its definition of primary rights—then it might reach the same result using the aggregate-rights framework. For example, if punitive damages compensated individual victims of an aggregate harm, the attorney general could still request them (and distribute them among the victims), but citizens would have more latitude and a larger arsenal to demonstrate inadequate representation. Consequently, an individual could relitigate punitive damages if a structural conflict existed, if the monetary distribution was inequitable, if the attorney general lacked a sufficient motive to zealously litigate the case, or if the attorney general failed to competently prosecute the lawsuit.

B. Multidistrict Litigation

The circumstances of multidistrict litigation create unusual litigation relationships that serve to complicate inadequate representation claims. The first relationship is between the attorney and the client, a seemingly traditional pairing based on consent through a retainer agreement. Yet, attorneys typically represent many clients with roughly similar claims against the same defendant to capitalize on economies of scale and recoup their litigation investment.¹⁹⁷ That means that the traditional attorney-client relationship, where the client monitors her attorney's performance is a fiction; her fate is tied to that of many others and learning her own lawsuit's status tells her little about how the litigation as a whole is faring. The second, even more attenuated relationship is between the client and the plaintiffs' steering committee—the court-appointed attorneys who direct and control the litigation for efficiency's sake. The final relationship is

196. *Id.* at 393.

197. Elizabeth Chamblee Burch, *Financiers As Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1288–92 (2012).

between the directly retained attorneys and the plaintiffs' steering committee, a relationship that this Article does not consider.¹⁹⁸

1. Attorney-Client Relationship

Because the first relationship, between the attorney and her clients, is far more attenuated in the context of multidistrict litigation than a conventional attorney-client relationship and the attorney represents many clients who may have conflicting interests, there is a real potential for inadequate representation. As Part II.A explained, in a mass-tort case, just as in an individual-rights case, a plaintiff could prove her underlying malpractice claim without referencing other plaintiffs. Likewise, no question exists as to who receives the remedy: the individual plaintiff. Yet, because of the tendency toward centralization,¹⁹⁹ a subsequent inadequate representation claim (though it tends to take the form of a direct attack via attorney malpractice, breach of fiduciary duty,²⁰⁰ a bar complaint, or even criminal conspiracy to commit fraud²⁰¹) is more likely to rely on evidence of how the attorney treated other clients as proof of malfeasance.

Because this representation falls into the middle of the spectrum of individual versus aggregate rights, it cannot be explained wholly by consent or interest representation. Although clients must give their informed consent when attorneys represent multiple claimants in the same litigation, as I have explored in detail elsewhere, they are sometimes unable to obtain any meaningful information about potential conflicts until a settlement offer is on the table.²⁰² And though the attorney must act in the best interests of the group as a whole, that could mean sacrificing one client's interest to further the others'.²⁰³

Nevertheless, because clients individually retain their attorneys, consent remains the operating principle. Accordingly, most proposals for rectifying inadequate representation focus on shoring up consent at the beginning of the litigation process rather than mending the preclusive effect of a judgment *ex post*. Because I have proposed several reforms in previous articles, I will simply mention them here alongside other commentators'

198. For an in-depth article discussing this relationship between the plaintiffs' steering committee and directly hired ("disabled") attorneys, see Silver, *supra* note 2.

199. Burch, *supra* note 4.

200. See, e.g., Johnson v. Nextel Commc'ns, Inc., 660 F.3d 131, 134 (2d Cir. 2011) (alleging breach of fiduciary duties against the plaintiffs' former law firm for convincing the plaintiffs to waive their claims and entering into an agreement to work for the defendant—a nonwaivable conflict of interest).

201. See, e.g., United States v. Cunningham, 679 F.3d 355, 365–66 (6th Cir. 2012) (involving the government's indictment of three Kentucky lawyers who misallocated settlement funds in the Kentucky fen-phen litigation).

202. Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 514–16 (2011).

203. See, e.g., Burch, *supra* note 73, at 98 (describing Betty Mekdeci's situation in the Bendectin litigation where attorneys refused to relitigate her case so that they could bring stronger cases first).

ideas to situate them in the context of this aggregate-rights framework. Ideas for bolstering informed consent include providing market solutions that allow third-party financiers to play the role of an informed intermediary;²⁰⁴ coaxing attorneys to identify conflicts at the litigation's outset and either limiting the size or diversity of their clients or supplying better information to them;²⁰⁵ encouraging the judge to decipher internal conflicts and appoint alternative counsel when the circumstances warrant it;²⁰⁶ and improving communication between the court and the litigants as well as between the litigants themselves.²⁰⁷ In addition, there have been proposals that would allow attorneys to embed a voting clause in clients' retainer agreements, which would bind all clients to a settlement if a substantial majority agreed to it.²⁰⁸ Others have proposed utilizing intraclaimant governance agreements, which would allow the clients to create a similar voting structure *after* they have the opportunity to communicate with one another and determine if substantial conflicts exist between them.²⁰⁹ Both of these latter proposals include a judicial failsafe, albeit with varying degrees of protection.²¹⁰

2. Client–Lead Attorney Relationships

Although consent dominates the relationship between attorneys and their directly retained clients, the same cannot be said for the relationship between plaintiffs and the plaintiffs' steering committee or other lead lawyers. No individual attorney-client relationship exists between the lead attorneys and most plaintiffs in a multidistrict litigation, so plaintiffs have no say in who is appointed and no way to fire or discipline those who act contrary to their interests.²¹¹ As Professors Silver and Miller have

204. Burch, *supra* note 197.

205. See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-class Collective Representation*, 2003 U. CHI. LEGAL F. 519; Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233 (2013).

206. See, e.g., *In re World Trade Ctr. Disaster Site Litig.*, 769 F. Supp. 2d 650 (S.D.N.Y. 2011) (appointing special counsel for the plaintiffs represented by Napoli Bern because the firm had conflicting obligations to other clients in the aggregate litigation).

207. See, e.g., Burch, *supra* note 73, at 117–21; Kenneth R. Feinberg, *Democratization of Mass Litigation: Empowering the Beneficiaries*, 45 COLUM. J.L. & SOC. PROBS. 481, 485 (2012); Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 457–60 (2012); cf. Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727 (2008).

208. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b) (2010).

209. Burch, *supra* note 73, at 132–34. For a comparison of this proposal with the ALI's proposal, see Burch, *supra* note 202.

210. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.18; Burch, *supra* note 73, at 132–34.

211. Silver, *supra* note 2, at 1986.

observed, “[j]udges appoint the lawyers who run MDLs on the plaintiffs’ side” but “[t]heir choices can be puzzling.”²¹²

[J]udges sometimes give lead positions to lawyers with few or no clients in an MDL, passing over other lawyers whose clients number in the hundreds or thousands. Judges also wield the appointment power with unfettered discretion. They need not explain why they choose some lawyers rather than others, and rarely do. They face no known risk of appellate review or reversal: no appointment decision seems ever to have been challenged, much less reversed.²¹³

The settlements that usually result from multidistrict litigation are likewise unassailable since they rely on plaintiffs’ consent, however coerced it may be.²¹⁴

The insular nature of these lead-counsel assignments is not healthy for judicial legitimacy. Neither consent²¹⁵ nor identity of interests currently justifies these appointments. Despite having a fiduciary duty to the plaintiffs, when an attorney assumes a lead role in a multidistrict litigation and has no actual clients involved in the case, the attorney is likely to feel beholden to the judge.²¹⁶ Certain attorneys gain reputations for building consensus, making trouble, or being patsies. If a judge feels that the lead attorneys are not moving settlement discussions along quickly enough,²¹⁷ then she is not likely to bestow lead positions upon those attorneys in the future and may well communicate their “failings” to other multidistrict litigation judges. Moreover, lead attorneys’ obligations are far from concrete.²¹⁸ Although courts have remarked that lead counsel represent “all

212. See Silver & Miller, *supra* note 2, at 109; see also *In re Aircrash Disaster at Malaga, Spain* on Sept. 13, 1982, 769 F. Supp. 90, 91 (E.D.N.Y. 1991) (“The court has the responsibility of appointing the Committee, authorizing its functions and structure, and supervising its work.”).

213. Silver & Miller, *supra* note 2, at 109.

214. See Burch, *supra* note 4.

215. As Professor Silver describes, attorneys in the *Guidant* and *Vioxx* multidistrict litigation did sign form contracts with the lead attorneys, but those contracts were coerced on the front end and their terms were not enforced after settlement; rather, the judge awarded the lead attorneys more generous fees than those provided for contractually. Silver, *supra* note 2, at 1992. The argument for consent then would be that plaintiffs retained agents to act on their behalf and those agents then entered into contractual agreements, which bound their principals.

216. See *In re Aircrash Disaster*, 769 F. Supp. at 91 (“The court has the responsibility of appointing the Committee, authorizing its functions and structure, and supervising its work. The Committee therefore owes a duty to plaintiffs as well as to the court.”); Silver, *supra* note 2, at 1992 (arguing that a fiduciary duty exists between lead lawyers and the plaintiffs as a whole).

217. Some judges make this requirement explicit. See, e.g., *In re Aircrash Disaster*, 769 F. Supp. at 91 (“Indeed, the May 25 Order signed by Magistrate Caden states that ‘[t]he Plaintiffs Committee and all plaintiffs’ attorneys shall cooperate among themselves and with defense counsel to expeditiously and economically conclude all liability matters and avoid unnecessary motions and Court proceedings.’” (alteration in original)).

218. See Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 931 n.50 (1995).

plaintiffs”²¹⁹ or “owe[] a duty to plaintiffs”²²⁰ and commentators have argued that they are fiduciaries to the claimants,²²¹ even if those propositions were unassailable, they would tell us little about how lead attorneys should approach intragroup conflicts.

Because inadequate representation claims are impractical given the impossibility of appellate review and plaintiffs “consent” to a settlement,²²² one key reform is needed—judges should issue a reasoned opinion appointing attorneys to lead-counsel positions based on their alignment with identifiable interests among the plaintiff class. In particular, judges should look for “structural conflicts.” That is, a conflict of interest either between the “claimants and the lawyers who would represent claimants on an aggregate basis” or “among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves.”²²³ If a structural conflict exists or arises during the litigation, the court should ensure that the subgroup has its own representative on the plaintiffs’ steering committee.

Even though the inevitability of settlement makes the prospect of appealing the order slim, it still has several advantages. An order forces the judge to explain her selection rationale, consider what potential intragroup conflicts might exist, appoint counsel to represent those competing interests (much like an attorney would represent a subclass in a class action), and create a record, should allegations of inadequate representation by lead counsel subsequently arise. Moreover, the opinion-writing process itself acts as a check on decision making: if the reasoning seems dubious when articulated on paper, then perhaps the judge will reconsider.²²⁴

Assuming this change is in place and that a plaintiff is able to have the opinion reviewed by an appellate court—all very difficult assumptions given the inevitability of settlement—how should the appellate court consider these individual challenges? After all, simply claiming that the plaintiffs’ steering committee has a duty to represent all plaintiffs fails to

219. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 888 F.2d 940, 942 (1st Cir. 1989) (“The [Plaintiffs Steering Committee], as the district court observed, represents ‘by its very nature . . . all plaintiffs.’” (quoting the lower court)).

220. *In re Aircrash Disaster*, 769 F. Supp. at 91.

221. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04 reporter’s notes cmt. a (2010); Silver, *supra* note 2, at 1987–91.

222. See Burch, *supra* note 202, at 512–14; Erichson & Zipursky, *supra* note 65.

223. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1).

224. See Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1302 (2008); Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447–48 (1995) (“Reasoning that seemed sound when ‘in the head’ may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he has written will be wondering how an audience would react.”).

account for the very real likelihood of conflicts. For example, although it proceeded as a class action, multidistrict litigation claimants might face similar conflicts to those in the *Bowling v. Pfizer, Inc.* heart valve settlement.²²⁵ In discussing *Bowling*, Professor Jay Tidmarsh explained, “Those in immediate need of [a heart-valve removal] were unlikely to benefit from the research and development fund, and might well have preferred higher payments for [removal] costs,” yet “[n]o special representation was provided.”²²⁶ If a situation like this—where claimants required immediate heart-valve removal—presented itself in multidistrict litigation and no lead lawyer specifically represented those claimants’ unique interests when negotiating an aggregate settlement, those plaintiffs could feel they were inadequately represented.

This is where the aggregate-rights framework can play a role. In general, multidistrict litigations that are not certified as class actions involve individual as opposed to aggregate rights.²²⁷ Nevertheless, in the context of the heart-valve hypothetical, a claim that the steering committee inadequately represented a heart-valve removal plaintiff would have group-based characteristics in that it could not be proven without referencing the representation of other plaintiffs. Yet, counsel cannot disprove the claim simply by showing that she treated the rest of the group fairly. Moreover, not all claimants are harmed equally by the inadequate representation; some benefit. Consequently, the harm is to the individual and the court should assess the representation using the more generous structural conflicts inquiry.

CONCLUSION

As litigants move away from conventional aggregation through class actions, questions about adequate representation and preclusion have proliferated. This confusion is due in part to a muddled, historical thesis for group litigation. Even the class action does not always make sense in terms of consent and identity of interests. Consequently, this Article has endeavored to construct a practical framework that courts can use to address inadequate representation across a variety of aggregate litigation forms—from traditional class actions to *parens patriae* cases to multidistrict litigation.

This aggregate-rights framework recommends that subsequent courts evaluate claims of unfair, inadequate representation differently, depending on whether the underlying substantive right is aggregate or individual.

225. 143 F.R.D. 141 (S.D. Ohio 1992). This kind of litigation would likely proceed as multidistrict litigation rather than a class action if litigated today.

226. JAY TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 43 (1998).

227. If an aggregate right is at stake and litigation is pending in both state and federal courts, then there is a real possibility for conflicting judgments to yield incompatible obligations.

When group litigation adjudicates individual rights, the collectivization is merely a tool for convenience and efficiency; it does not change the nature of the underlying right into a group right. Consequently, the individual must either consent to the conflict (when counsel represents many individuals collectively) or the court must take measures to prevent structural conflicts. If neither condition is fulfilled, then, on collateral attack, courts should evaluate inadequate representation claims to determine whether there was a “significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves.”²²⁸

In contrast, when aggregate rights are at stake, affected individuals should receive notice and the opportunity to voice their opinions about how the court should fashion a remedy. When the underlying claim accrues from an aggregate harm, if counsel inadequately represented one group member, then she failed not just one member, but the whole group. Because each group member benefits from (or is harmed by) indivisible relief equally, no member has the right to an independent judgment.²²⁹ It likewise makes sense that when counsel or a class representative bungles that effort, the group experiences inadequate representation equally.²³⁰ Thus, courts should and do tolerate greater conflicts among group members in these situations. Successful inadequate representation claims tend to be those where the lawyers and, potentially, the named representatives acted contrary to the whole group’s best interests or tried to represent an overinclusive group in which some would require an alternative remedy that the representative had no self-interested reason to litigate.

228. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1)(B).

229. Issacharoff, *supra* note 1, at 1059.

230. *See id.* at 1058 (“[I]n cases for injunctive relief against institutional conduct, it is difficult to conceptualize an individual right of autonomy, even where we would no doubt recognize an individual’s ability to bring a claim in court. In such circumstances, an individual may be an exemplar of the harm visited by allegedly wrongful institutional conduct, but that same individual cannot claim an autonomous right to separate control of the outcome of the legal challenge.”).