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The Governance Problem in Aggregate Litigation

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THE GOVERNANCE PROBLEM IN AGGREGATE LITIGATION

*Samuel Issacharoff**

Recent developments in class action law and scholarship have forced new attention on the question of how class representation should be assessed. This Article begins with an examination of the governance problem in class action analyzed from the perspective of the customary political theories that would justify legitimate government in public and private domains. Customary accounts of democratic legitimacy or contractual voluntarism poorly capture the distinct world of the one-time aggregation of a class under court-assigned leadership. What emerges is an assessment of how various class action doctrines serve to fill the void in customary indications of legitimacy in governance. The Article concludes with a review of alternative efforts to structure class governance to avoid the agency problems inherent in the power to manage the affairs of others.

TABLE OF CONTENTS

INTRODUCTION.....	3165
I. GOVERNANCE OUTSIDE POLITICS.....	3169
A. <i>The Single Term</i>	3169
B. <i>Voice and the Epistemic Moment</i>	3172
C. <i>The Right To Exit</i>	3175
D. <i>Intermediaries</i>	3177
E. <i>Rivals for Leadership</i>	3180
II. AGENTS WITHOUT AGENCY COSTS?	3181
A. <i>Transcending Private Agent Incentives</i>	3182
B. <i>Public Choice in the Public Domain</i>	3186
CONCLUSION	3191

INTRODUCTION

Legal disputes over class actions operate at two distinct levels. The immediate question before any court confronting an issue of class certification is relatively straightforward: Should the class be certified or not? In a contested certification for purposes of establishing liability, the

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plaintiffs will be proponents, and the defendants will object for entirely comprehensible reasons of self-interest. When class certification is sought following settlement, plaintiffs and defendants embrace the putative class action, and the objections arise from those outside the operative command of the case.

Framed as a dispute over certification, class actions quickly descend into a ritualized review of the applicable factors under Rule 23. Beginning at least with the Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*¹ and *Ortiz v. Fibreboard Corp.*,² the adequacy of class representation became one of the most promising routes to challenge the appropriateness of class certification. In contested class certification proceedings, representational adequacy became a focus of litigation, joining with the predominance question under Rule 23(b)(3) and, more recently in the aftermath of *Wal-Mart Stores v. Dukes*,³ the existence of common issues under Rule 23(a)(2). For both defendants seeking to resist the creation of a litigation class and for objectors challenging a proposed settlement, the question of the "structural assurance of fair and adequate representation,"⁴ as formulated in *Amchem*, became a central litigation issue. And, in each setting, the objection to the stewardship of the class became grounds to attack the viability of the aggregate proceeding.

Challenges to the adequacy of the representation are thus offered for strategic reasons in the certification context. The case law offers a gambit for opposition, and lawyers, unsurprisingly, frame their litigation aims in the doctrinal language available. Nonetheless, the strategic context should not obscure that assigning the right of representation to a binding class resolution of a dispute is a serious question, independent of whether a particular dispute should or should not proceed as a class. Put another way, whether a dispute is proper for collective resolution is analytically distinct from the question of what safeguards should be in place to ensure proper representation.

In order to disentangle the case specific strategic challenges from the underlying problem of leadership in representative actions, a return to a few basics is required. A class action overcomes a host of collective action problems, ranging from the inadequacy of individual claimants' resources to potential holdout problems and can secure a premium for complete settlement with a defendant.⁵ Across decades of case law, the gains from collective resolution of disputes are the defining feature of why there must be aggregative procedures in the litigation arsenal. But the fact that an action has the attributes of an aggregated claim does not by itself ensure

1. 521 U.S. 591 (1997).

2. 527 U.S. 815 (1999).

3. 131 S. Ct. 2541 (2011).

4. *Amchem*, 521 U.S. at 627.

5. See generally D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol/papers.cfm?abstract_id=2122877.

that it is properly led. Clearly someone has to be in charge. Who that someone, and by what measure of selection and accountability remain vital questions even after the need for collective resolution is established. Tactical decisions made in the litigation context should not collapse the two inquiries. It is perfectly possible to endorse the need for collective proceedings in a variety of contexts, while full well realizing the agency problems of faithless representatives.

This Article looks to pursue the distinct issue of how to overcome the agency problem in class representation. Two advances in recent scholarship help frame this debate. The first is the concept of a class as an “entity,” as formulated by David Shapiro, having a persona and character distinct from its constituent class members, in the same fashion as we assign a legal persona to a corporation distinct from its individual shareholders.⁶ The second advance, following on central insights of both private and public law, is to consider the governance structure of legally created entities as a distinct problem drawing on basic concepts of democratic theory and representation by agents.⁷

Isolating the governance issue puts to the side the questions of why there need be aggregative structures. Regardless of whether the justification is the negative value of most individual consumer claims, the judicial efficiencies of common discovery, the indivisibility of claims for injunctive relief, or the distribution of a limited corpus, the question of who is in charge remains. When isolated as a question of who should govern, a central concern in the class action case law comes into clearer resolution. Separated from the justification for aggregate treatment, there are questions of how the ruling group is selected, what the accountability mechanisms toward the class members are, what the measures of proper performance in office are, and what normative justification there is for that ability to make decisions for an individual with whom there is no direct bond or agreement.

The modern class action cannot claim significant affirmative acts by class members indicating their acceptance of the terms of representation.⁸ There is no telling act by class members that would look like the realized buy-in of the capital markets,⁹ or any other mechanism that would allow a clear signal of consent to representation. Instead, class action law has to look for substitutes for the legally constructed rights of representation.

6. David L. Shapiro, *Class Actions: The Class As Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998). For an overview of the role of this approach in the literature on class actions, see Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939 (2011).

7. Among the foundational pieces in this approach would be Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337.

8. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812–13 (1985) (describing the limited requirements for class membership and the limited means of participation).

9. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 296 (2010) (“In the corporate governance context, an entrepreneur seeking to raise capital for a business venture must convince investors to opt in and buy the securities of the entrepreneur’s start-up corporation.”).

Once so framed, the governance issues in class action law begin to resemble many of the central debates in political theory concerning the legitimacy of the ruling authority of the state. The comparison is necessarily partial, but the thrust of this Article is to map some of the critical questions of the appointment of class counsel onto broader debates about political leadership. Simply put, the focus is on who should be the head of the class.

To flesh out the analogy to governance problems a bit, we may consider a class action (and to a lesser degree the powers of the multidistrict litigation (MDL) leadership group) as a state-conferred monopoly of representation. Viewed this way, the certification decision serves as a state-conferred subsidy to the representatives to overcome the collective action costs of assembling the group.¹⁰ As with any state-conferred monopoly of representation, there are immediate concerns about the democratic pedigree of the institution. This is an issue that has dominated areas of law where the institutions created by the state have longer life, as with trade unions or corporations. In each, the duty of fair representation and the principles of corporate governance are dominant parts of the law.¹¹ Each is an attempt to establish principles of accountability to the represented parties (union members and shareholders) that combine rights guarantees (e.g., union members' bill of rights), periodic review of managerial performance (corporate elections, Department of Labor supervision of union elections), and strong assertions of fiduciary obligations. These in turn combine with liability for breach of the fiduciary role (e.g., union duty of fair representation, shareholder derivative suits, securities fraud liability). Taken together, corporate and trade union accountability mechanisms try to reproduce in these secondary sectors the characteristics of democratic accountability in the primary governance structure of the state. There are all sorts of arguments on whether some sort of Tieboutian¹² sorting is more available through market exit options in the corporate setting or through labor mobility in the union setting. But at each stage we find an attempt to recreate aspects of the basic governance paradigm.

10. This view of class actions is well presented in Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2127–29 (2000).

11. See generally Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957) (presenting a history of the duties of trade union leaders); see also *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (describing the fiduciary duties of corporate directors).

12. The Tiebout model finds that, given exit mechanisms and complete information, individuals' movements between local governments will establish an equilibrium in which each government's size and provision of goods and services accurately reflects the aggregate preferences of its residents. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); see Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 691 & n.29 (1984) (applying the Tiebout model to corporate governance law); Charles K. Rowley, *Toward a Political Economy of British Labor Law*, 51 U. CHI. L. REV. 1135, 1149 (1984) (applying the Tiebout model to trade unions).

I. GOVERNANCE OUTSIDE POLITICS

There are no recognizable ordinary politics in the domain of class actions. We do not find elections, political parties, limited terms of office, formalized governance mechanisms, or an overriding constitutional commitment to certain forms of liberty and equality, and the list goes on. This alone seems fatal for any attempt to import elements of democratic governance into contemporary mass litigation practice. It is of course true that any aggregation of individuals raises questions of representative integrity that in turn raise questions of institutional design that sound in democratic principles. But the answers that suffice for democratic politics do not easily translate to the litigation setting. In the more confined context of litigation, there are no political parties, no clear rules of candidacy, and no preexisting practices honed over generations of leadership selection. And yet, it is worth pursuing what elements of democratic integrity can—and cannot—be integrated into class action debates.

A. *The Single Term*

In the world of game theory, the key to stable results is repeat play. Robert Axelrod's famous examination of retaliation instructs that the limited response of "tit-for-tat" is only possible among adversaries for whom the ability to measure the proportionality of the reaction offers an institutional barrier to devastating escalation.¹³ In democratic politics, the corollary is the iteration offered by elections¹⁴: the chance for the losers of today to become the winners of tomorrow. For democratic theorists such as Adam Przeworski and his collaborators, the very concept of a democracy is unthinkable until a second election in which the ruling elite is displaced by rivals.¹⁵ Nothing so defines a true democracy as the ability to "throw the rascals out."¹⁶ In turn, the hallmark of the governmental legitimacy of a democratic government comes from the fact that the voting citizens

13. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27–54 (1984).

14. This is the heart of the idea that republican governance is "administered by persons holding their offices during pleasure for a limited period, or during good behavior." *THE FEDERALIST* NO. 39, at 255 (J. Madison) (Issac Kramnick ed., 1987). For example, one standard account of democratic legitimacy centers on "public policies are made, on a majority basis, by representatives subject to effective popular control at periodic elections which are conducted on the principle of political equality and under [general] conditions of political freedom." Jesse Choper, *The Supreme Court and the Democratic Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 811 (1974) (alteration in original) (quoting H. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* 70 (1960)).

15. ADAM PRZEWORSKI, MICHAEL E. ALVAREZ, JOSE ANTONIO CHEIBUB & FERNANDO LIMONGI, *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990*, at 18–25 (2000).

16. The formulation that this is the nub of democracy is from G. BINGHAM POWELL JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS* 47 (2000). The underlying view holds that "the primary function of the electorate" in a democracy is not only creating "a government (directly or through an intermediate body)" but also "evicting it." JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 272 (2d ed. 1975).

returned it to office, a retrospective act of approbation. Without such an after-the-fact ability to rethink leadership, it is hard to legitimate the right to exercise power over and make binding decisions on others.

The central role of retrospective review in democratic theory poses an immediate dilemma for the legitimacy of a governance structure in one-shot enterprises, such as the creation of a class to litigate a defined event. Only the rarest of cases will have such lasting power as to revisit the selected leadership, and even those cases cannot be identified at the outset nor subjected to meaningful periodic review. To the extent that accountability theories of governmental legitimacy turn on the second chance to reject the leadership, such an approach would pose daunting problems for the claims of class actions to assign leadership responsibility to those dubbed “adequate representatives.”¹⁷

A review of class action law and rules reforms over the past twenty years, however, gives a mildly more optimistic account. To understand why, it is necessary to step back a bit into democratic theory. The idea of accountability as the centerpiece of democratic legitimacy was strongly advanced by Joseph Schumpeter who rejected any claim that the fate of democracy turned on either the aggregation of preexisting voter preferences or the participatory deliberation of the populace. Rather, representative democracy necessarily entailed a competition for office by political elites, who would in turn educate, cajole, and entice the citizens to vote for them. As Schumpeter defined the task, “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”¹⁸

Thus, the problem of class governance can be thought of as one of democratic legitimacy in the absence of a robust capacity for retrospective endorsement of the decisions taken by the agent elites, as in mature political democracies. On some accounts, like Martin Redish’s,¹⁹ this simply dooms the enterprise and violates the due process requirements of constitutional legitimacy—an overly simplistic account of due process, political legitimacy, and the myriad institutional arrangements that exist in the modern administrative state. Yet the challenge persists. By what theory of governance-based legitimacy can the modern class action be justified?²⁰

17. See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 379–81 (2001) (highlighting the role of adequacy of representation in leading Supreme Court cases on mass harm class actions).

18. SCHUMPETER, *supra* note 16, at 269.

19. See generally MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009). For a rejoinder focusing on the nuanced forms of accountability found in democratic governance, see Alexandra H. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993 (2011).

20. This argument can be extended as well to the domain of the leadership of the plaintiffs’ steering committee in multidistrict litigation proceedings. See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-district Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010). For present purposes, it is sufficient to focus primarily on the formal mechanisms of class actions.

We can return to the basic insight about political competition in democracy. While most attention is rightfully directed toward the importance of competition in creating the capacity for rotation in office, that competition not only ensured accountability but gave an incentive to political elites to draw the citizens into the process. The Schumpeterian account of democracy shares more than a passing resemblance to the negative value claims amassed in class actions, and to the ensuing “rational apathy” of the ordinary participants to expend huge effort to monitor developments.²¹ Here, per Schumpeter, there is no escaping the brute fact that “collectives act almost exclusively by accepting leadership.”²² But competition produces an antidote to the fact that the masses of the population typically have little interest in the day-to-day affairs of governance. Information is costly and a distraction from overly busy lives. What keeps democracy going is the need of the engaged elites to attempt to secure ongoing support in periodic elections. They must compete for the approbation of the masses, and to do so requires them to educate, cajole, engage, etc., in the rough and tumble of politics—the pull, trade, and haul to which even the Supreme Court has appealed.²³

Retrospective approval serves not only to engage the masses of democratic voters but also to provide the easy organizing principle for assessing the stewardship of elites. When the question is asked about the effectiveness of the prior governors seeking to renew their mandate (e.g., “Are you better off than you were four years ago?”), basic measures—such as the state of the economy, foreign military engagements, security, party affiliation—can provide easy organizing cues for voter decision making, even in the limited period of engagement leading to an election.

A class action by its nature cannot produce rotation in office. Perhaps, however, it can imperfectly recreate some incentives for leadership to engage the absent and generally indifferent class members. One small manifestation comes with the question of the basis for fees for class counsel in a settlement. An older line of cases made the common benefit denominator turn on the potentially available benefit to the class.²⁴ Class counsel’s responsibility ended with the fairness hearing approval of the settlement, with no subsequent requirement that the class’s capacity for recovery be engaged. The sole determinant of the appropriateness of what the class leadership had obtained would be the judge’s assessment of the result. Passive class members, whose limited stake made direct control of the litigation unavailing, would be left out of the process as much in the settlement stage as in the litigation process.

21. Jack Coffee coined this phrase regarding the little reason that most class members had to pay much attention to the activities of class counsel. Coffee, *supra* note 9, at 305.

22. SCHUMPETER, *supra* note 16, at 270.

23. See *Johnson v. De Grandy*, 512 U.S. 997 (1994).

24. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 473 (1980) (“[A] proportionate share of the fees awarded to lawyers who represented the successful class may be assessed against the unclaimed portion of the fund created by a judgment.”).

The lack of responsiveness to the class after settlement led to concern over practices such as coupon settlements in which the face value of the settlement could vary markedly from the actual results for the class. At one level, this is just a question of agency costs resulting from the separation of incentives between lawyers and clients. This prompted legislative rejection of compensating lawyers on the face value of a settlement, regardless of the take-up rate of the benefits by class members. Instead, under the Class Action Fairness Act (CAFA), fees must be based on the realized benefits for the class.²⁵ Similarly, the corresponding proposal by the American Law Institute's *Principles of Aggregate Litigation* (ALI Principles) mandates that "[a]ttorneys' fees in class actions . . . should be based on . . . the actual value of the judgment or settlement to the class . . ."²⁶

As a first-cut matter of governmental legitimacy, the need to engage constituents in order for representative agents to get paid is a fairly poor second-order approximation of democratic engagement. This should raise alarm about the attempt to justify class action supervision in any terms sounding in democratic theory. But it also offers an invitation to buttress this partial (perhaps very partial) defense with other indicators of properly functioning representative governance.

B. Voice and the Epistemic Moment

A long tradition in collective governance posits that the wisdom of the multitude supercedes the capacity of lone decision makers. Whether dressed up as modern Condorcetian theories, drawn from Aristotle,²⁷ or more popularly as the wisdom of crowds,²⁸ many heads lead to truth with surprising regularity. The desire to harness collective wisdom underlies participatory theories of democracy and their justification in theories of epistemic proceduralism.²⁹

As with retrospective judgments, there is no clear approximation in class action law for the capacity of political communities to deliberate, either directly in the Athenian or New England town meeting sense, or indirectly through ongoing debate in a Senate-style institution. There are early indications of attempts to harness new media to allow greater participatory deliberation in the class action arena.³⁰ But in the typical consumer class

25. See Class Action Fairness Act, 28 U.S.C. §§ 1711–1715 (2006).

26. AM. LAW INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.13 (2010).

27. See ARISTOTLE, POLITICS AND POETICS 74 (Benjamin Jowett & Thomas Twining trans., Viking Press 1957) ("The principle that the multitude ought to be supreme rather than the few best is one that is maintained, and, though not free from difficulty, yet seems to contain an element of truth.")

28. JAMES SUROWEICKI, THE WISDOM OF CROWDS 11 (2004).

29. See David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEX. L. REV. 1437 (1993).

30. See Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 509 (2011) ("[P]rocess should foster opportunities for plaintiffs in the aggregate to form groups and to play a significant role in group governance [by] allowing

action or in any case where rational indifference is likely to take hold, the direct mechanisms of participatory engagement are not soon to be realized.

Viewed as an opportunity for deliberative engagement, some aspects of class action practice emerge as helping to fill the governance legitimacy gap. The laundry list factors employed by every circuit court to gauge the propriety of a class action settlement invariably point centrally to the approval of class representatives and class members in the results of the litigation.³¹ The two key avenues of participation are the fairness hearing and the right of appeal, as liberalized in *Devlin v. Scardelletti*.³² The Federal Rules require a public hearing, open to class members, for any proposal to settle a class action—the overwhelming form of resolution of any case in which a class is certified. The same conditions of incentivized indifference may obtain, but at least there is a public forum in which dissident views may be engaged. Similarly, appeals provide a secondary forum for dissident voices. Although there are reasons to suspect that the effectiveness of such voices may be limited, courts nonetheless insist that at least the opportunity to be heard serves as a touchstone for representational legitimacy: “The fundamental requisite of due process of law is the opportunity to be heard.”³³

In practice, the power to object at a fairness hearing and the liberalized ability to appeal are poor mechanisms for actual class member engagement.³⁴ Most often, they are an opportunity for either strategic objectors or the socially marginalized to command a forum for ulterior purposes. These practices are ill-suited to any epistemic search for superior outcomes, but they provide a minor democratic moment for constituent input. At the very least, they are a means of providing an additional capacity to monitor agents in the class setting,³⁵ and they do provide a very

plaintiffs to engineer and implement their own intraclaimant governance procedures . . .”); Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 455 (2012).

31. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (listing factor number two, “the reaction of the class to the settlement”); *see also* *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983) (listing factor number six, “the opinions of the class counsel, class representatives, and absent class members”); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (“It is well settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.” (citation omitted)).

32. 536 U.S. 1 (2002).

33. *Mullane v. Cent. Hanover Bank*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

34. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007) (“For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low. Indeed, objecting is unlikely to confer any benefit on class members because judges routinely approve proposed settlements over the objections of class members.”).

35. Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 573 (1997) (“[A] class member must be allowed to intervene as a full party in a proceeding that will extinguish her claim. Affording class members such a right of

rough calculus of the consent of the absent and generally passive class members to the results of representation.³⁶ But as with any collective undertaking, the mere fact that there are some objections can neither doom the enterprise nor prevent the class resolution from being deemed legitimate.³⁷

Notably, however, the right of participation is directed not at the collective process of group decision making but at the court, the arbiter of outcomes more than process as such. Whereas democratic theory pays tremendous attention to electoral rules and the process for collective action in the political arena,³⁸ the elaborate processes of political organization and reorganization cannot exist in the more limited litigation enterprise. Democratic legitimacy turns heavily on process values, something that is only partially available as a defense of the class action. As a result, the participatory aim in class actions is directed heavily to the mandating judge, a figure who neither is the product of democratic selection among the litigants nor can be replaced at the will of the constituents. Voice in the class action setting is first and foremost about the merits of the results. In the somewhat circular reasoning of the Eighth Circuit: “The adequacy of class representation, however, is ultimately determined by the settlement itself.”³⁹

In the formal tests for approval of class action settlements, for example, the right of participation is invariably coupled with the ultimate benefits achieved through the resolution of the case.⁴⁰ Courts have recognized that the closure afforded by class settlements results in a “peace premium,”

intervention will not render class litigation unmanageable, but rather has the potential to significantly improve the quality of representation afforded even to absent class members.”).

36. Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155, 1193 (1998) (arguing for more robust provisions for individual consent to class action settlement).

37. Issacharoff, *supra* note 7, at 370 (“[I]t cannot be that the failure of individual consent must terminate a class action or prevent a settlement from being approved. Such an approach would run counter to the premise of a class action as being able to discipline an inherently unruly body that is incapable of generating sufficient individual protections through consensual means.”).

38. This is also discussed at length in another work dealing with the political arena proper. See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

39. *White v. Nat’l Football League*, 41 F.3d 402, 408 (8th Cir. 1994).

40. *In re Prudential Ins. Co Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998) (factors include the existence and probable outcome of claims by other classes and subclasses and the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants); *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983) (listing factors number four, “the probability of plaintiffs’ success on the merits”; and five, “the range of possible recovery”); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (listing factors number eight, “the range of reasonableness of the settlement fund in light of the best possible recovery”; and nine, the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation).

improving the collective welfare compared to what individuals might obtain on their own behalf.⁴¹

As with the other efforts to map class leadership onto principles of political legitimacy, the claim to rest the propriety of representation on added value of the underlying legal claims is partial, at best. All forms of government ultimately rest on the ability to return benefits to the governed. Theories of democratic legitimacy generally leave the ultimate outcome measures to the citizens themselves to judge through the exercise of their collective decision making. The lack of individual ability or interest to control class members' individual destiny—as reflected in Rule 23(b)(3)(A)—forces class action law to turn to a non-process based assessment of the merits of the resolution in its place. As with the other approximations of democratic legitimacy in the class context, the forced melding of the process values with the assessment of the benefits of the collective undertaking weakens each strand—inevitable as this fusion of the two might be.

C. *The Right To Exit*

Democracy is ultimately a selection procedure for governance of the polity. Perhaps as a result, democratic theory poorly addresses the question of who should be in the polity, or who belongs outside. We can fill in the gaps with concepts of Tieboutian sorting at the local level. Thus, for example, Charles Tilly posits that the ease of migration between European states proved to be an antidote to government predation over the long term.⁴² But while individuals may exit on occasion, there is no guaranteed right of secession that serves as a formal check to the exercise of state authority. Democracies cannot offer a unilateral right of exit in the form of secession. Thus, when confronted with the question whether democratic legal orders mandate that Quebec be given the right to secede, the Canadian Supreme Court wrote:

The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule The Constitution vouchsafes order and stability, and accordingly secession of a province “under the Constitution” could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.⁴³

41. See *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 339 (3d Cir. 2011) (Scirica, J., concurring) (“A defendant, therefore, may be motivated to pay class members a premium and achieve a global settlement in order to avoid additional lawsuits”); Rave, *supra* note 5 (manuscript at 9–10).

42. See generally CHARLES TILLY, COERCION, CAPITAL, AND EUROPEAN STATES, AD 990–1990 (1990).

43. *In re Secession of Quebec*, [1998] 2 S.C.R. 217, 220 (Can.).

Or, more pithily, “[i]nternational law contains neither a right of unilateral secession nor the explicit denial of such a right”⁴⁴

In order for a democratic state to function, it must be capable of intertemporal trade-offs. Just as political rotation in office offers the losers of today the prospects of becoming part of a victorious coalition tomorrow, so too does the long-term allow for the exercise of governmental powers. The ability to tax and spend means that there is a constant readjustment of the burdens and benefits of inclusion within the state. But without the promise of the long run improvement, no sectors of the society would accept a tax burden that predictably benefits distant projects or responds to nonlocal emergencies. And, while the benefits of being locked in to this exchange remain, so does the problem of how to construct the polity.⁴⁵

By contrast, class action law guarantees not just voice, but the right of exit—following Hirschman’s typology for individuals within institutions. Indeed such an exit option stands as a centerpiece of the ability to bind absent parties in personam to the results of a class judgment: “due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”⁴⁶ In this sense, class action law seems more solicitous of an individual option than does democratic society more broadly. Indeed, the offer of a second option to opt out of a class action from the 2003 amendments to Rule 23, endorsed heartily by the ALI Principles, reinforces the importance of the exit option in constructing the class action collective.⁴⁷

The contrast with political leadership is instructive. To return to Hirschman’s typologies of the relation between the individual and the group, the importance of the exit option exists in relation with the other forms of addressing agency cost in representative groups. Even accepting that there are forms of Tieboutian sorting evident in residential patterns, the costs of relocation include loss of community, separation from family and friends, and other institutional affiliations through churches or civil society organizations. At the same time, class actions typically do not have a preexisting organizational form, and the exit option is far less costly.

Exit is a weak but real form of disciplining the agency risk inherent in class representation. In the first instance, exit diminishes the rewards from representation, especially for class counsel.⁴⁸ More significantly, the

44. *Id.* at 277.

45. This problem is elaborated in Samuel Issacharoff, *Democracy and Collective Decisionmaking*, 6 INT’L J. CONST. L. 231 (2008).

46. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

47. AM. LAW INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.11 (2010).

48. Coffee, *supra* note 9, at 309 (arguing that “exit may be the more powerful tool in litigation governance In the litigation context, when class members opt out, they thereby reduce the total number of claims aggregated in the class action and hence the settlement value of the case. Because fee awards are a function of settlement size, this in turn reduces the likely fee award to class counsel.”). *But see* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and*

exercise of the exit option through significant opt outs signals to reviewing courts the poor performance of the class representatives,⁴⁹ even if the overall absence of massive opt outs should dictate some caution in relying too much on this one factor.⁵⁰

D. Intermediaries

In contrast to democratic theory, once again, class action law turns to outside intervention to check the powers of representation. There is no ultimate measure of approbation from the represented that can form a purely consensual basis for the delegation of power. The fact that the ultimate form of selection is left to the power of another—in this case, the court—means that process-based accounts of representational selection must necessarily be incomplete. This inescapable “democracy deficit” is only partially cured by the power to exit. Somehow this gap needs filling and the primary mechanism to fill the gap is to search for agents to monitor the representative agents, in effect “superagents.”⁵¹ Three strategies emerge.

First, class actions only come into existence by the judicial act of certification. Because the courts formalize the representational relationship, it is possible to impose on the courts themselves a duty to serve as fiduciaries for the act of bringing the class into being.⁵² Class actions routinely, though loosely, invoke the concept of fiduciary obligations to describe the role of class counsel and the courts in addressing the vulnerabilities of absent class members to predation.⁵³ Because class actions are state-created relations designed to protect the welfare of the class members, there is logic to bringing them within the broad ambit of the law of fiduciary obligations.⁵⁴ In its most prominent judicial exposition,

Empirical Issues, 57 VAND. L. REV. 1529, 1560 (2004) (noting the low rate of objection in class action litigation, suggesting that “class members do not highly value these rights that courts and commentators have so widely praised as essential to the justification for group litigation involving absent parties.”).

49. *See id.* at 1536 (“If bad representation triggers opt-outs and objections, counsel will make an effort to provide good representation *ex ante* in order to prevent their deficiencies from being brought to the attention of the court *ex post*.”).

50. *See id.* at 1562 (“The low level of opt-outs and objections also suggests that these procedures do not provide a reliable means for ensuring that class members receive adequate representation from competent and nonconflicted counsel and class representatives.”).

51. This term was first used in Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

52. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995).

53. Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 997–98 (2012).

54. Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1707–08 (2008); Eran B. Taussig, *Broadening the Scope of Judicial Gatekeeping: Adopting the Good Faith Doctrine in Class Action Proceedings*, 83 ST. JOHN’S L. REV. 1275, 1330–33 (2009); Randall S. Thomas & Robert B. Thompson, *A Theory of Shareholder Representative Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1768 (2012); Chris Brummer, Note, *Sharpening the Sword: Class*

Judge Posner asserted quite categorically that a court must serve as “a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”⁵⁵ In turn, the idea of courts serving as fiduciaries underlies arguments for the importance of collateral challenge in class settlements.⁵⁶

The concept of courts as fiduciaries in group litigation follows from the essence of aggregated claims, in any form. The greater the aggregation, the more tenuous the link between principal and agent, and the greater the potential for opportunistic behavior and the associated agency costs. Of recent vintage is the effort to impose this duty beyond the formal act of class certification. As articulated by Judge Jack Weinstein in developing the concept of the fiduciary obligations of courts in the so-named “quasi-class actions”:

The large number of plaintiffs subject to the same settlement matrix approved by the court, the utilization of special masters appointed by the court to control discovery and to assist in reaching and administering a settlement, the court’s order approving and controlling a huge escrow fund, other interventions by the court in controlling discovery for all claimants, the employment of a multidistrict reference, and cooperation among many federal and state courts, reflect a degree of court control that supports the imposition of fiduciary standards to ensure fair treatment to all parties and counsel⁵⁷

The same logic yields to the imposition of mandatory duties to protect “the rights and dignity of an otherwise depersonalized mass of plaintiffs/claimants.”⁵⁸ While the effectiveness of such broad fiduciary principles is subject to ongoing debate,⁵⁹ the need to fill the agency void is well established.

Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits, 104 COLUM. L. REV. 1042, 1062–67 (2004) (detailing the elements of judicial fiduciary scrutiny).

55. *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 280 (7th Cir. 2002) (citations omitted); see also *In re Gen. Motors Corp.*, 55 F.3d at 805 (noting the “fiduciary responsibility” of the court in class-settlement review).

56. See generally Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998); Alan B. Morrison, *The Inadequate Search for “Adequacy” in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. REV. 1179 (1998). For the original article, see Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 782 (1998) (“[T]he collateral attack remedy created by *Matsushita II* is disproportional to the more general problem absent class members face in monitoring the conduct of class counsel. The problem, in our view, is best addressed by a careful review of the adequacy of representation in [the original forum], before a settlement is approved.”).

57. *In re Zyprexa*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006); see also *In re Vioux Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 563–64 (E.D. La. 2009); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *6 (D. Minn. Mar. 7, 2008).

58. Elizabeth J. Cabraser, *The Essentials of Democratic Mass Litigation*, 45 COLUM. J.L. & SOC. PROBS. 499, 521 (2012).

59. See generally Silver & Miller, *supra* note 20.

Second, it is possible to deputize outsiders to the litigation to serve as overseers.⁶⁰ This is the approach taken, in part, by CAFA, which sought to alter the incentives facing lawyers in large, aggregated cases across a variety of axes.⁶¹ Among CAFA's innovations was a requirement of notice to the state attorneys general of consumer class actions involving citizens of their respective states.⁶² At least in theory, engaging the public representatives to monitor the conduct of the private attorneys general may discipline the misbehavior of the self-nominated guardians of class interests, at least in highly visible or particularly egregious instances.

A third approach is to formalize the role of a powerful intermediary with a sufficient incentive to monitor the real agent in all representative actions—class counsel. The leading example is the formalization of the lead plaintiff role under the Private Securities Litigation Reform Act of 1995. Under the “most adequate plaintiff” requirement, the forum court “shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members.”⁶³ As envisioned, the lead plaintiff's self-interest is sufficiently great as to allow other class members a free-ride on the ensuing monitoring function:

The lead plaintiff provision was adopted to encourage a class member with a large financial stake to become the class representative. Congress expected that such a plaintiff would actively monitor the conduct of a securities fraud class action so as to reduce the litigation agency costs that may arise when class counsel's interests diverge from those of the shareholder class.⁶⁴

All three of these approaches may be beneficial in certain contexts, or may be an invitation to meddling by yet other sets of agents with other agendas. Each of these approaches faces difficulties born of improperly aligned incentives: judges may wish to clear their dockets; attorneys

60. Kahan & Silberman, *supra* note 56, at 778 (“One way to reduce undervaluation of class members' claims would be to strengthen the ‘monitoring’ of class counsel by obtaining more effective monitors than ordinary class members, such as state attorneys general, who would be given notice and have the authority to intervene in order to protect the interests of absent class members in nationwide class actions.”).

61. Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1606–26 (2008) (discussing CAFA).

62. 28 U.S.C. § 1715(b) (2006). For an overview of the limited effectiveness of this monitoring device, see generally Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971 (2008).

63. 15 U.S.C. § 77z-1(a)(3)(B)(i) (2006).

64. James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1688 (2006); see also *id.* at 1601 (“Such a heavy hitter is more likely to overcome the personal interests of class counsel who may prefer the certainty of settling the suit quickly for a smaller amount to investing more of the law firm's resources in pursuing a larger settlement that does not yield a proportional increase in counsel fees.”). But see Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 534 (1997) (questioning “the ability of a lead plaintiff provision or other similar procedural reforms to effect a meaningful change in the control of class action litigation”).

general may be passive or may see the rewards of a class action settlement as an opportunity for political gain; lead plaintiffs may seek different returns on their investment than smaller players.⁶⁵ Ultimately, one should be cautious of inviting class members to stake their interests on the strategy outlined by Blanche DuBois: “I have always depended on the kindness of strangers.”⁶⁶

E. Rivals for Leadership

The attempts to find greater and more actionable fiduciary duties bear a marked resemblance to a corresponding trend in corporate law to close the agency gap through fiduciary obligations. Entire generations of students of corporate law were groomed on the decisions of the Delaware courts defining the obligations of officers and directors of publicly traded corporations to the diffuse and atomized shareholders—the class members of the limited liability enterprise as it were. Beginning with trends in scholarship and case law in the 1980s, however, corporate law turned to a new source of restraint on potential agency costs. As with any market in which built-in barriers to entry allow misconduct, one potential antidote is renewed competition. In corporate law this takes the form of challenging poison pills and other barriers to a market for corporate control. Unsurprisingly, a similar impulse can be found in the market for class action governance.⁶⁷

One market import is the effort to auction the rights to class action leadership, presumably to the lowest bidder in terms of class counsel fees.⁶⁸ The arguments over the application of auction principles have been rehearsed at length and need not be repeated here. There are problems in measuring the low bid and the return to the class when higher priced counsel might deliver a higher quality return⁶⁹—even at a higher percentage—and when a low bid might actually signal lawyers with little

65. Fisch, *supra* note 64, at 556–57.

66. TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE 142 (SIGNET 1975) (1947).

67. Coffee, *supra* note 9, at 318 (arguing that participatory reforms “have less impact than anticipated because they fail to encourage competition among counsel”).

68. Judge Vaughn Walker introduced the auction as a means of selecting class counsel in *In re Oracle Secs. Litig.*, 131 F.R.D. 688, 697 (N.D. Cal. 1990). The initial academic proposal comes from Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 105–16 (1991). For a summary of these efforts to reform class counsel selection, see Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650 (2002); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 497 (2000).

69. A prominent example comes with the bidding for leadership in the Auction House antitrust litigation. *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000); see also DAVID BOIES, *COURTING JUSTICE* 320–54 (2004) (discussing the litigation over price-fixing by the major auction houses). For a critical account of this litigation, see Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL’Y REV. 69 (2004).

interest in investing in the litigation and preferring a quick, cheap settlement that maximizes short-term recovery of counsel.

Unfortunately, consideration of competition for leadership returns us to the initial problem of a lack of repeat play. Without repeat play, and without a clearly identifiable system of valuation, the attempt to use price and other proxies for performance are inherently limited. Politics allows the governed to select not only who their leaders shall be, but the criteria for such decision making. Competition for the role of class counsel still leaves the decision to an outside party and to one who is obligated to determine the conditions of the competition for leadership.

II. AGENTS WITHOUT AGENCY COSTS?

The basic analogy to problems of public governance could be extended and could encompass trends in other intermediary institutions of our society. Increasingly, obligations sounding in democratic theory extend not only to the quasi-public domain but to more private institutions directly.⁷⁰ Public conceptions of democratic legitimacy spread from the imposition of nominating primaries on political parties to the chartering requirements for charitable institutions. All intermediary institutions in our society live to some extent by grace of state licensing. This may take the form of tax deductions for contributions to charitable organizations, tax exemption for the land holdings of religious or educational institutions, or the ability of a corporate entity to acquire the legal personhood necessary in order to pledge assets as a bond for economic activity or to enter into legally binding contracts.

In all intermediary institutions there is a misfit between democratic theory and the exclusivity of the state-conferred capacity to act. Intermediary institutions are closed by necessity in order to limit participation to those who share the basic aims or activities of the enterprise. This means that they must be able to restrict rights of participation to those who are inside and exclude others from internal deliberations. While these institutions exist in some sense by grace of recognition and benefits derived from the body politic, they must nonetheless function on a different basis than the overall democratic lines of demarcation of the broader society. The paradox of civil society institutions in a democracy is that their independence shores up democracy as against the state, yet they cannot be held to the full democratic standards demanded for political governance. Civil society institutions function “by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.”⁷¹

70. Once again I must confess to drawing on ideas that I developed responding to a distinct set of problems in the domain of public governance. See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001).

71. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984).

Class actions serve functionally as a short-lived, single-purpose civil society institution. In prior writings I have drawn the analogy to the Venetian grant of legal status to the *commenda*, “a rudimentary type of joint stock company, which formed only for the duration of a single trading mission.”⁷² As described by Daron Acemoglu and James Robinson, the flexibility of a circumscribed venture unleashed tremendous entrepreneurial spirit for the emergent Venetian Republic of the early Renaissance.⁷³ The entrepreneurial class action is the enforcement equivalent to the *commenda*, an alternative to direct state regulation and to the state monopoly of enforcement power. The state confers the exclusive legal personhood to the class and awards exclusive rights of monopoly of representation granted to the designated agents for the entity, in this case, class counsel. This establishes the purpose for the state conferral of the power of class counsel to act as agents for the usually passive absent class members.

But, as the foregoing section described, this new entity fails to meet the standards for democratic legitimacy in critical domains, most notably in the ability of the represented class members to express meaningfully their approval or disapproval through retrospective review. This alone is not surprising as intermediary institutions cannot be held to the full standards operating in the public domain. At the heart of the difficulty is that a litigation class is a short-lived institution, so the Schumpeterian accountability paradigm does not work. Further, there are generally massive transaction problems with even putatively engaging the participants, so that surveying the class, elections, and periodic review are all not often meaningfully available.

A. *Transcending Private Agent Incentives*

Thus far, this Article has suggested that many of the doctrines that have emerged in class action law, and in secondary accounts such as the ALI approach, are an attempt to fill this gap in democratic accountability. In the absence of a more Schumpeterian account of periodic accountability and a robust ability to “throw the bums out,” we can chronicle the institutional substitutes that emerge as an effort to bridge this representational gap. The various requirements for class certification try to temper the incentives of the agent, who is necessarily imperfect as principal-agent tensions can only be tamed, not eliminated. Moreover, they attempt to create mechanisms of outside monitoring (e.g., the judge as fiduciary), examine the justificatory necessity for litigation (an increase in anticipated joint welfare), and consider the absence of realistic alternatives (the Churchillian defense of democracy as worst of all systems except for all others). Finally, they aim to protect some measure of active choice among the represented class

72. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 152 (2012).

73. Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 385 (2012).

members (e.g., right to opt out, second opt out), weigh the results obtained (akin to the epistemological defense of democracy as likelier to lead to superior outcomes), and no doubt attain quite a few other goals. At best, these are all checkpoints for the state conferral of representational authority in the absence of a conventional political accountability. Recognizing this helps understand the fits and starts of much of the highly disputed law of the past two decades, particularly the post-*Amchem/Ortiz* focus on the nature of the representation as the key to proper class action practice.

Where does the governance insight lead? As I mentioned at the outset, there is a tension in the case law in this regard because the question of legitimate governance is almost always raised strategically. Challenges to the adequacy of representation are usually part of the arsenal deployed by defendants to oppose class certification or by objectors seeking either to capture some of the compensatory prospects of a class action settlement or to be able to pursue claims independently in other fora. Isolating who should be in charge of a class action from the reasons for having a class action helps (hopefully) to bring into sharper relief the reasoning behind the case law and the evolved practices on class representation.

Even isolated in this fashion, the issue of the legitimacy of class representation returns as part of the general concern for the extent of agency cost associated with class counsel. Beginning with the hugely influential writings of Professor Coffee twenty-five years ago,⁷⁴ and continuing through the Court's decision in *Amchem*, many of the governance mechanisms are directed to the prospect of agents acting in self-regarding means. What follows from this, however, should not be a rejection of the need for representative actions altogether, but greater attention to the management and diminution of agency cost in class representation.

With all the pressures on legitimacy of representation come questions about the possibility of alternative forms of representation. The search for political legitimacy in class representation, at least in the contemporary American class action, runs up directly against the entrepreneurial motivation that the class action seeks to harness on behalf of the absent class members. Presumably class counsel selected on the basis of an economic commitment to maximize financial returns to the class will be especially likely to succumb to the cross-cutting incentives in any principal-agent relationship.

Perhaps it is possible to consider a form of representation that does not involve these agency costs. At least in theory, it is possible to imagine that class counsel can be selected based on other attributes, such as social reputation, ideological commitments to the welfare of some groups, or even evidence of saintliness. Selecting class representatives on this basis may

74. The articles begin with John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986), and John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987).

substitute for the necessarily imperfect alignment of economic interests in the American class action. Many foreign experiments with class actions try to limit the pull of entrepreneurialism by substituting state officials or nongovernmental organizations (NGOs) for the self-selection of the private attorney general.⁷⁵

Some commentators⁷⁶ posit that it may be possible to avoid the agency costs of the American entrepreneurial class actions by having consumer organizations or social movements lead opt in groups of claimants. There are limited examples of class action in the United States organized on an opt in basis, or more significantly, led by public interest groups committed to issues such as civil rights or environmental protection. While such ideologically committed groups are unlikely to be motivated by the narrower kinds of financial returns that fuel more entrepreneurial private enforcement, representation always introduces a distance between the interests of the principals and the decision making of the agents.⁷⁷ The extensive public economy literature on nonprofits finds that there are often significant agency costs created not by the profit motive of for-profit enterprises, but by the diffuse nature of the missions they seek to achieve and the difficulties of monitoring their performance in the absence of market-based returns.⁷⁸ Further, the need for funding often compromises the effectiveness of nonprofits to take on controversial issues or lead

75. For critical assessments, see Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179 (2009) (reviewing European class action reforms and considering their efforts to promote representative actions without private lawyer initiatives); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 3 (2009) (reviewing European efforts “to embrace civil procedure reforms to authorize aggregate litigation”). For a critical account of the development of mass litigation in South America, focusing on Argentina, see RICARDO LUIS LORENZETTI, *JUSTICIA COLECTIVA* (2010).

76. A recent significant addition to the literature comes with Coffee, *supra* note 9, at 337; see also Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT’L L.J. 141, 177 (2010) (“Representative actions by associations also offer more possibilities to curb principal-agent problems than do other forms of class actions.”); Hans-Bernd Schaefer, *The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions Taken by Associations*, 9 EUR. J.L. & ECON. 183, 199–201 (2000) (“[C]ompared to class action legal actions taken by associations seem to offer more effective possibilities to restrict the principal-agent-problem”); Sarah A. Westby, Note, *Associations to the Rescue: Reviving the Consumer Class Action in the United States and Italy*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 157, 189 (2011) (“[A]ssociational representation decreases agency costs because litigants can be confident that [the] entity has their best interests in mind.”).

77. Economic theory predicts that the lack of profit incentives will make nonprofits slower to expand to meet increased demand and less efficient at using inputs than for-profit firms. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 844 (1980).

78. See, e.g., Mary Kay Gugerty & Aseem Prakash, *Voluntary Regulation of NGOs and Nonprofits: An Introduction to the Club Framework*, in VOLUNTARY REGULATION OF NGOs AND NONPROFITS: AN ACCOUNTABILITY CLUB FRAMEWORK 3, 8–13 (Mary K. Gugerty & Aseem Prakash ed., 2010) (discussing sources of agency costs in nonprofit sector).

beyond where their funders would accept.⁷⁹ Even in the American public interest context, the search for the perfect agents leads to claims of a different kind of agency cost defined by the imposition of institutional objectives over the interests of the putatively represented parties.⁸⁰ At bottom, there is simply no theoretical or empirical basis to suppose that the absence of remuneration to an agent necessarily inures to the benefit of the represented parties.⁸¹

Ironically, the very insight that opened the class action to a more sophisticated scholarly account of agency costs may also now serve as a set of blinders on the range of agency problems in representation. The approach to agency cost suggested by Coffee drew (and still draws) exclusively from the securities and corporate governance literature,⁸² inviting a comparison of the extent to which the governance mechanisms chosen in the private domain could help overcome principal-agent problems. Perhaps this move was inevitable given the sheer weight of securities class actions in the post-1966 world of mass litigation. If securities fraud class actions, especially after *Basic, Inc. v. Levinson*,⁸³ were to serve as the primary vehicle of legal oversight of corporate governance—pushing to the side shareholder derivative suits and other clumsier forms of corporate litigation—then the transposition of the terms of corporate governance to the securities class action would make perfect sense. And, further, if robust capital markets increasingly set the standards for measuring the propriety of actions by corporate managers and directors, then the logic of that governance structure should presumably extend to the regulatory enterprise of the securities class action.

For all the insights offered by the securities context of a large proportion of class actions, however, the class action shares only partially the governance problems of the modern corporation. It is not simply that

79. Debra C. Minkoff & Walter W. Powell, *Nonprofit Mission: Constancy, Responsiveness, or Deflection?*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 591, 592–93 (Walter W. Powell & Richard Steinberg eds., 2006).

80. The classic account comes from Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 505–11 (1976) (arguing for courts to be sensitive to disagreements in black communities over the type of school relief). For efforts to mediate conflicts in public interest representation, see William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623 (1997).

81. In the class context, several commentators have noted that a public interest motivation may not always line up with maximizing the recovery for the class members (or other class interests). See, e.g., Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 *U. CHI. LEGAL F.* 581, 618; Howard M. Erichson, *Doing Good, Doing Well*, 57 *VAND. L. REV.* 2087, 2090–91 (2004).

82. It is striking, for example that Coffee's *Litigation Governance*, *supra* note 9, does not even mention the social welfare concerns of public choice theory in the public sector. By and large, the legal literatures on agency problems in the public sector and in private corporate governance developed largely in splendid isolation from each other, despite the overlapping set of concerns. This point is elaborated in Issacharoff & Pildes, *supra* note 38, at 643.

83. 485 U.S. 224 (1988).

markets in securities bring the shareholders together and, at the same time, offer them a chance of exit through the sale of securities. Rather, it is the persistent role of the court as a state actor operating throughout the period of existence of the class action that separates it from the business firm. The role of the state in licensing and overseeing invites a comparison to a different sort of principal-agent concern: the public choice account of regulatory capture.

B. Public Choice in the Public Domain

Agency costs abound in any system of representation. The inevitable mismatch between the incentive systems operating on the principals and their agents gives rise to all sorts of opportunistic behavior by agents seeking to exploit the dependence of the principals. Agency costs are particularly acute where the principal is diffuse and unable to monitor meaningfully the actions of the agents. In the key formulation of public choice theory, such agency costs are likely to be most acute in the public sector where the beneficiaries of obscure regulation can lobby and prevail over the indifference of the mass of the cost-bearing public.⁸⁴ In particular, the absence of a market in representation (unlike the markets that always operate in the background of private investment matters) means that there is no ultimate competitive discipline on public sector decision making, particularly in the absence of private alternatives.

Certainly membership in a class of negative-value claimants yields a rational indifference on the part of class members. The question, however, is not whether there are risks of agency cost in the private class action organized under American law. Of course there are. Rather, the question is always, compared to what? It is odd to read the literature applying agency cost theory to the class action ignore the broader concerns of the public choice literature about the risks in the public domain. One reads with some bemusement the conclusion of earnest European reformers who insist that having government entities or NGOs perform the representation function eliminates the principal-agent problem. In the romantic and naïve claims of such reformers, having a monopoly on representation somehow protects diffuse class members from any agency cost in representation. As presented in critiques of American class actions, agency cost becomes a matter exclusive to the domain of private actors.

A quick tour of public choice theory should dispel such naïve claims. Large, diffuse groups tend to lose to concentrated self-interest and nowhere more so than in the public domain—the world conventionally understood to be populated with lobbyists, special interests, privileged access, and so

84. The classic formulation of public choice theory is found in JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 3–9 (1962); *see also* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21–33 (1991); MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 42–89 (2009).

forth.⁸⁵ Such agency costs may be present even in the American litigation context when public agencies take on enforcement authority on behalf of affected groups of citizens, as Margaret Lemos well presents.⁸⁶

Just as there are examples of American class actions gone awry and of entrepreneurial lawyers crossing the bounds of what the law permits, so too there are stories of successes in nonprofit or public agency representation.⁸⁷ It would be foolish to claim that there is an exclusive model of representation that best fits all claims by groups who do not or cannot bind their fates together through voluntary contracts. Perhaps the most interesting of the successes of foreign efforts were the use of NGOs to curb rampant corporate fraud during the Asian financial crisis of the late 1990s. People's Solidarity for Participatory Democracy (PSPD), a Korean nonprofit founded in 1994, successfully brought shareholder derivative suits over corporate malfeasance on behalf of minority shareholders, in effect bundling claims to overcome the inability of small shareholders to challenge corporate actions.⁸⁸ Similarly, in 1998, the Taiwanese Securities and Futures Commission created a nonprofit, the Securities and Futures

85. For a particularly compelling case study, see Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83 (1989).

86. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012). The use of *parens patriae* authority to bring claims by the state on behalf of affected citizens does not obviate concerns of conflicts in representation. Attorneys general have a duty to the public at large, whose interests may conflict with the interests of the individuals represented in litigation. Attorneys general may also be motivated by their own political ambitions. Furthermore, the individuals represented in litigation have no power to fire their representative beyond their power as voters in general elections. See generally Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 382 (1999) (discussing limited compensation in AG actions); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 139 (1999) (discussing the risk of capture of exclusive public representatives); William H. Pryor Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1909–11 (2000) (critiquing the AG tobacco settlements). But see Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1932–33 (2000) (suggesting that the media plays an important role in the accountability of public agency litigation).

87. Coffee elsewhere attends to some of the recent and unfortunate high-profile prosecutions and incarcerations of leading class action lawyers to drive home the point about high agency costs in private representation. John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better Than "Voice,"* 30 CARDOZO L. REV. 407, 411–12 (2008) (discussing the prosecution of four senior partners at Milberg Weiss). One could be churlish (and yet still correct) to point out that whatever the legal difficulties of some members of the private bar, they pale before the propensity of governors of Illinois to end up in prison. See, e.g., Roxanne Roberts & Amy Argetsinger, *What's the Matter with Illinois? With Blagojevich Conviction, State Has Most Imprisoned Governors*, WASH. POST, (June 28, 2011, 7:22 PM), http://www.washingtonpost.com/blogs/reliable-source/post/whats-the-matter-with-illinois-with-bлагоjevich-conviction-state-has-most-imprisoned-governors/2011/06/28/AGZVjnpH_blog.html.

88. Curtis J. Milhaupt, *Nonprofit Organizations As Investor Protection: Economic Theory and Evidence from East Asia*, 29 YALE J. INT'L L. 169, 187 (2004) (recounting the 5 percent ownership threshold for prior legal actions).

Institute (SFI), to coordinate individual investors in claims against public companies.⁸⁹ SFI was created as a nonprofit funded by mandatory payments from banks and brokerage firms, which in turn allowed it to acquire 1,000 shares of each public company in Taiwan, giving it standing to assert claims as a shareholder.⁹⁰

The experience of the PSPD in Korea and the SFI in Taiwan show the impact of strongly led nonprofits offering an independent challenge to institutional misconduct. Their successes are all the more striking given the propensity of public enforcers to not have the resources or the will to confront such malfeasance. But there is also a cautionary note even here. These nonprofits tend not to last or to be unable to create an institutional culture that goes beyond the commitment and charisma of its founding leaders. The PSPD's trailblazing in South Korea faded within five years and, once the ownership threshold for initiating legal action was reduced, independent shareholder actions began to emerge and the PSPD passed from the center stage of reform activity.⁹¹

More typically, however, recent efforts to form class actions without private financial incentives have faltered precisely because of the absence of entrepreneurial initiative. For example, Brazil limits class action formation to government agencies and "private associations," which alone have standing to serve as class counsel—and even here, the Attorney General must be notified and invited to intervene as "overseer."⁹² Despite the ease of forming such associations, the fact that they must exist for one year prior to any legal action means they are unable to form in response to a single precipitating event. As a result, relatively few class actions have been filed,⁹³ and most concern professional associations suing on behalf of the direct interests of their members.⁹⁴ The experience is similar in Portugal, home of the "popular action," Europe's oldest opt-out class action

89. Yu-Hsin Lin, Note, *Modeling Securities Class Actions Outside the United States: The Role of Nonprofits in the Case of Taiwan*, 4 N.Y.U. J.L. & BUS. 143, 167–68 (2007).

90. Milhaupt, *supra* note 88, at 177.

91. Patricia Goedde, *From Dissidents to Institution-Builders: The Transformation of Public Interest Lawyers in South Korea*, 4 E. ASIA L. REV. 63, 85–86 (2009). In Japan, a change in the threshold for filing suit gave rise to a shareholder institution not organized as a nonprofit, but playing the same initial role as the PSPD in Korea and the SFI in Taiwan. Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. LEGAL STUD. 351, 369 (2001) (discussing the history of Shareholder Ombudsman (Kabunushi Onbuzuman)); *see also* Milhaupt, *supra* note 88, at 178–81 (same).

92. Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 339, 366 (2003).

93. *See generally* Larissa Clare Pochmann da Silva, *Recent Developments in Collective Process and Mechanisms for Solving Collective Conflicts in Brazil*, CLASSACTIONBLAWG.COM (Aug. 13, 2012), <http://classactionblawg.com/2012/08/13/guest-article-recent-developments-in-collective-process-and-mechanisms-for-solving-collective-conflicts-in-brazil/>.

94. *See, e.g.*, Ángel R. Oquendo, *Upping the Ante: Collective Litigation in Latin America*, 47 COLUM. J. TRANSNAT'L L. 248, 264–66 (2009) (discussing class action suits by Brazilian Federation of Syndicates and Associations of Maintenance and Conservation Companies and the Association of Judges of Rio Grande do Sul).

regime, established in 1995.⁹⁵ Portuguese law allows individuals and associations to file class actions to protect numerous interests, and the largest of these, the Portuguese Association for Consumer Protection (DECO) was founded in 1974 and currently has about 400,000 members, at least nominally.⁹⁶ Between 1995 and 2008, DECO brought a grand total of five damages class actions, of which the only one tried to judgment involved an opera company.⁹⁷

The list of the very limited enforcement successes of the public or NGO model of the class actions could go on⁹⁸ and could be expanded into efforts to police capital markets as well—as with the German Capital Markets Case Act, a largely useless attempt to create representative litigation without class actions or class lawyers.⁹⁹ The current debates over the expansion of class actions, particularly in Latin American countries seeking to break the excesses of state authority, are not about the costs of self-motivated lawyers. They are instead about the ability to unleash independent agents who will challenge the suffocating potential for capture of exclusive state authority. As well expressed by Ricardo Lorenzetti, the President of the Argentine Supreme Court, independent collective actions are critical “because they are mechanisms that the rule of law provides so that civil society participates,” and they allow the possibility of “fewer centralized decisions in a country with a long tradition of centralized decisionmaking.”¹⁰⁰

95. RACHEL MULHERON, REFORM OF COLLECTIVE REDRESS IN ENGLAND AND WALES: A PERSPECTIVE OF NEED 97 (2008), available at <http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FOther+papers%2Freform-of-collective-redress.pdf>; HENRIQUE SOUSA ANTUNES, CLASS ACTIONS, GROUP LITIGATION & OTHER FORMS OF COLLECTIVE LITIGATION (PORTUGUESE REPORT) 8, available at http://globalclassactions.stanford.edu/sites/default/files/documents/Portugal_National_Report.pdf.

96. *Quem Somos*, DECO, Membership information is from <http://www.deco.proteste.pt/informacao/associacao> (last visited Apr. 19, 2013) (listing membership).

97. CIVIC CONSULTING, COUNTRY REPORT PORTUGAL 10 (2008), available at http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf (collecting cases).

98. Coffee’s examples regarding the use of class actions in Europe should introduce somber reflection about the likely prospects of class actions serving any regulatory role in Europe whatsoever. For example, the entire litigation history of the Swedish class action opt-in model, heralded as the most advanced in Europe, generated a total of nine cases in the first five years of practice, all of which would have been considered small stakes, small impact cases in the United States. Coffee, *supra* note 9, at 330–32. There is, of course, no requirement that any country provide class remedies, or even opt for nonpublic enforcement of its laws. It is quite another matter to posit that this experience shows the potential for nonentrepreneurial class actions to fill the regulatory gap that would ensue.

99. For a discussion, see Issacharoff & Miller, *supra* note 75, at 182–83.

100. Ricardo Lorenzetti, *La Acción de Clase Es un Aporte al Diseño Institucional del País*, PORTAL DEL CONSUMIDOR PROTECTORA, <http://www.protectora.org.ar/legislacion/la-accion-de-clase-es-un-aporte-al-diseno-institucional-del-pais/1453/> (last visited Apr. 19, 2012) (“Las acciones colectivas son un gran aporte al diseño institucional del país porque son mecanismos que provee el Estado de Derecho para que la sociedad civil participe. Y si el ciudadano común participa en la vida del país, entonces hay más control, más debate, hay discusión y transparencia, menos oscilaciones pendulares y más equilibrio de fuerzas, menos decisiones centralizadas en un país con una larga tradición de decisiones centralizadas.”).

A recent analysis of class actions in Chile contains well-researched documentation of class actions without entrepreneurial leadership. In 2004, the Chilean legislature sought to create American style opt-out consumer class actions, but without the creation of an entrepreneurial plaintiffs' bar.¹⁰¹ Notably, the Chilean act provided that class counsel is assigned after the class certification stage, meaning that attorneys who ferret out wrongdoing stand to lose control of the class to a rival attorney representing a small number of class members, or to the state consumer protection agency SERNAC, which must approve all settlements and has the option to assume control of any litigation.¹⁰² Combined with the limited range of damages, this means that there is little incentive for attorneys to serve the role of private attorneys general. The result was predictably marginal, at best. Few class actions are ever filed in Chile; the peak was eleven in 2007, and by 2010, only four were filed.¹⁰³ SERNAC and independent consumer associations are the most frequent class action plaintiffs, but chronic funding shortages prevent them from pursuing more than a handful of cases at a time—cases that frequently drag out for years due to the lack of settlement pressure.¹⁰⁴ Class actions financed by small, cohesive groups of plaintiffs or by entrepreneurial lawyers are few in number, and the low financial stakes mean that class counsel is often relatively unsophisticated.¹⁰⁵

To return to the main thesis of this Article, at the end of the day, agency costs result from the fact of needing agents. If our only objective is to avoid the risk of the car mechanic recommending needless repairs or the dentist overtreating then the easiest solution is to never take our cars to the shop and never enter the dentist's office. We would thereby successfully avoid overpaying, though a world of disabled cars and abscessed mouths awaits.

It is easy to focus on the perceived excesses of American class actions. There are no doubt embarrassing cases brought in the zeal for gain, and the lawyers do receive on the order of 25 percent of the proceeds.¹⁰⁶ Both the amount charged and the possible excesses are a form of agency cost that requires both justification and regulation. Less visible, but perhaps more pervasive and damaging, are the agency costs foregone because of a lack of agents who will undertake the work of principals unable to undertake the work themselves. The short run gain of avoiding the mechanic and the dentist is rarely the winning strategy in the long run. Perhaps, in some

101. Agustin Barroilhet, *Class Actions in Chile 1* (Jan. 30, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995906.

102. *Id.* at 8, 12–13.

103. *Id.* at 20–21 & fig.1.

104. *See id.* at 28–33.

105. *See id.* at 42–43.

106. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010).

alternative set of arrangements, all such considerations could be avoided in nonprofit garages and dental cooperatives. Perhaps.

CONCLUSION

It is inevitable in life that we have to rely on others for what we cannot do ourselves. With agency comes costs, a condition that may be managed but never cured. In the public domain, we look to elements of political accountability to justify the ability of some to bind others by their actions. In the private domain, the best indication of fairness comes with the revealed preferences of private exchange. As society becomes more complex, the simpler solutions of town meetings in the public domain and one-to-one contracts in the private domain become unwieldy, and a host of intermediary institutional arrangement needs to be created.

Class actions are the product of complex interactions, and they fall neither fully within nor without the domain of public regulation or private contractual exchange. As with all such intermediary organizations, there needs to be justification for the powers of the governors and for the costs that they will inevitably exact for their governance. The ultimate difficulty is that the justification for the class action ultimately lies neither in the domain of the democratic legitimacy that we may attach to the state nor to the voluntarism that we assign to contracts. Class actions fall somewhere in between and the justifications, largely functional, are cobbled together from a host of considerations, some from the public domain and some from the private domain.

Ever since *Hansberry v. Lee*,¹⁰⁷ the Supreme Court has recognized that class representatives may not faithfully represent the interests of the absent class members.¹⁰⁸ The result has been the increasing formalism in class action law focusing on the requirements for certification and, in particular, on the adequacy of representation. In recent decisions such as *Taylor v. Sturgell*¹⁰⁹ and *Smith v. Bayer*,¹¹⁰ the Court has demanded that the formalities of class certification be honored before any claims of agents to bind their principals might be recognized.¹¹¹ Taken together, these cases signal the Court's tacit recognition that rights of representation are being assigned without many of the safeguards that are usually demanded in granting legitimacy to governmental authority. Although the governance issue in the case law usually plays out as a formal exercise in following Rule 23, there is more at stake. The Court's leading cases stand for the recognition that attentiveness to procedural rigor is the price paid for collective action in the absence of normal political accountability.

107. 311 U.S. 32 (1940).

108. *Id.* at 43–44.

109. 553 U.S. 880 (2008).

110. 131 S. Ct. 2368 (2011).

111. *See id.* at 2380–81; *Taylor*, 553 U.S. at 884–85.