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## DEMISESQUICENTENNIAL

### **Class Actions in the Administrative State: Kalven and Rosenfield Revisited**

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#### INTRODUCTION

“First movers” in many enterprises gain an advantage simply by being first. Published in 1941, Harry Kalven, Jr., and Maurice Rosenfield’s Article, *The Contemporary Function of the Class Suit*,<sup>1</sup> offered the first major analysis of the class action device in institutional terms. The Article would occupy the field for more than a decade, until the emergence of a new generation of commentary spurred by the adoption in 1966 of Rule 23 of the Federal Rules of Civil Procedure in its modern form. That the Article should have become one of the most cited in the annals of both class action scholarship and *The University of Chicago Law Review* is not merely the product of first-mover status, however. Writing amid the emergence of the New Deal administrative state, Kalven and Rosenfield captured the relationship between two central features of the civil litigation landscape that continue to shape debates today: the notion of negative-value claims and the limited enforcement capacity of public administrative agencies.

Modern regulatory statutes defined new kinds of wrongs in mass society beyond those familiar to the common law. Yet, those wrongs—

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<sup>1</sup> 8 U Chi L Rev 684 (1941).

say, the fraud in securities markets or the monopolization of a given trade mentioned on Kalven and Rosenfield's first page<sup>2</sup>—combine the need for development of complex facts on the merits with payouts to individual victims in amounts unlikely to induce them to sue. The administrative state might undertake enforcement action to vindicate the kinds of broadly dispersed rights recognized by regulatory statutes and, in so doing, potentially exert a measure of deterrence for the future. But, even as viewed from the confident heights of the New Deal zeitgeist, the administrative state remained limited as an enforcement vehicle—at the very least, by the budgetary resources realistically available for its use. In such a world, Kalven and Rosenfield anticipated what would emerge in the last half of the twentieth century as among the most distinctive features of the American civil justice system: the “side by side” development of private class action litigation and public enforcement “to check and complement each other.”<sup>3</sup>

On Kalven and Rosenfield's account, the “contemporary function” of the class action lay in facilitating private litigation by aggregating claims otherwise unmarketable on an individual basis. It is hard to gainsay the triumph of this rationale. Even while rejecting the most adventuresome elaborations of the class action device in the late 1990s, the Supreme Court agreed: the making marketable of otherwise unmarketable claims comprises nothing less than “[t]he policy at the very core of the class action mechanism.”<sup>4</sup>

For all their prescience, however, Kalven and Rosenfield substantially underplayed two features of the litigation landscape, the implications of which were only beginning to come into focus: the divisions of governmental authority in the civil justice system and the dominance of settlements over trials in civil litigation generally. Both features stem from themes in the 1938 overhaul of the Federal Rules of Civil Procedure (“1938 Rules”) that was the signal achievement of Kalven and Rosenfield's generation for civil litigation. In the decades since, both features have assumed considerable importance for the capacity of class actions to operate in tandem with the administrative state.

Whereas Kalven and Rosenfield's agenda consisted of delineating the “contemporary function” of the class action, the agenda for the law today consists of resolving two contemporary dilemmas to which that function has given rise. The first dilemma speaks to the tension

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<sup>2</sup> See *id.* at 684.

<sup>3</sup> *Id.* at 721. On the distinctiveness of the American approach by comparison to that of other Western industrial democracies, see generally Robert A. Kagan, *Adversarial Legalism: The American Way of Law* ch 1 (Harvard 2001).

<sup>4</sup> *Amchem Products, Inc v Windsor*, 521 US 591, 617 (1997), quoting *Mace v Van Ru Credit Corp.*, 109 F3d 338, 344 (7th Cir 1997).

between the class action device as a vehicle for privatized enforcement of legal rights and the allocation of authority in the United States along both federal-versus-state and public-versus-private lines. The question here is: if the function of the class action today is indeed to operate in parallel with public regulation, then can that function achieve fruition without supplanting the institutional boundaries on regulatory power?

The second dilemma stems from the recognition that settlements, not adversarial trials, stand as the endgame for actions certified to proceed on a classwide basis and not otherwise resolved by dispositive motion.<sup>5</sup> Class settlement agreements today involve a kind of business transaction in which the commodity “bought and sold” consists of the preclusive effect that the judgment in the class action stands to exert vis-à-vis class members’ claims.<sup>6</sup> Kalven and Rosenfield were far from unaware of prospects for class settlements.<sup>7</sup> But, as I shall elaborate, the parameters of the class action device in their time—constraints that they defended at some length in their Article<sup>8</sup>—enabled them to sidestep what has emerged as a central question today: how to harness the capacity of the class action to facilitate privatized enforcement by way of settlements while, at the same, setting boundaries on the preclusive effect that such deals properly may exert on class members.

Any assessment of Kalven and Rosenfield’s Article nonetheless should not dwell on developments unanticipated or only narrowly perceived at the time. The two Parts of this Article discuss how Kalven and Rosenfield’s fundamental move to situate the class action in parallel with the administrative state can help us to understand more clearly the dilemmas of today. Part I traces the outgrowth of Kalven and Rosenfield’s vision of class actions for a world of settlement within a system of regulatory authority. Here, the challenges for the law today consist of addressing two situations that are the converse of each other. The first consists of what one might describe as a class in search of a settlement; the second involves a settlement in search of a class.

Settlement as the anticipated endgame of class action litigation puts tremendous pressure on the class certification determination as

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<sup>5</sup> See Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 NYU L Rev 74, 143 (1996) (demonstrating that “certified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified”).

<sup>6</sup> William B. Rubenstein, *A Transactional Model of Adjudication*, 89 Georgetown L J 371, 419 (2001).

<sup>7</sup> See Kalven and Rosenfield, 8 U Chi L Rev at 720 (cited in note 1) (recognizing the possibility of class settlements but stating, in passing, that “the controls which currently exist under the federal rule, namely, notice and court approval, are sufficient to regulate suits which reach the courts”).

<sup>8</sup> See text accompanying notes 125–28 (discussing Kalven and Rosenfield’s defense of one-way intervention pursuant to the federal class action rule at the time).

the first, and probably last, judicial checkpoint on the road from adversarial litigation to collaborative dealmaking. One layer of institutional awkwardness here concerns the division of power between the federal government and the states. Class actions portend a kind of federalization by indirection—for example, the move in the Class Action Fairness Act of 2005<sup>9</sup> (CAFA) to expand the federal forum for contested certifications of nationwide class actions involving state law claims and, beyond that, efforts to recast state law claims as federal statutory violations. These developments carry forth, however partially and awkwardly, the inclination of the New Deal in Kalven and Rosenfield's time to cast regulatory problems national in scope as the appropriate business of national governmental institutions.

Another layer of institutional difficulty concerning class certification speaks to the differences between public and private law enforcement in the civil justice system. One may see the oft-voiced concerns over the settlement pressure exerted by class certification in terms of an understandable skepticism about the notion that all laws warrant enforcement to the letter in all instances. Such concerns might form the proper subject for consideration by an administrative agency when setting its enforcement priorities, but they are much more awkward for judicial consideration as brakes on class certification. Other concerns about proper institutional roles attend the casting, in recent years, of the court's preliminary, procedural ruling on class certification as the occasion for a kind of minitrial of factual disputes that may overlap with the underlying merits. The much-discussed employment discrimination class action certified on behalf of female workers against the largest private employer in the world, Wal-Mart, illustrates the overlap between class certification and the substantive merits.<sup>10</sup>

Contested class certifications, however, are not the only difficult matters raised by class settlements within a system of divided authority. The converse situation of a settlement in search of a class captures the theme of the Supreme Court's encounters with the class action device in the late 1990s: *Amchem Products, Inc v Windsor*<sup>11</sup> and *Ortiz v Fibreboard Corp.*<sup>12</sup> There, the Court struck down as inconsistent with Rule 23 ambitious efforts to use class settlements, effectively, to re-

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<sup>9</sup> Pub L No 109-2, 119 Stat 4, codified in various sections of Title 28. In my rhetoric here, I draw on two commentators' description of the jurisdictional reform in CAFA as a form of "backdoor federalization." See Samuel Issacharoff and Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L Rev 1353, 1415–20 (2006).

<sup>10</sup> See generally *Dukes v Wal-Mart, Inc*, 509 F3d 1168 (9th Cir 2007) (upholding, in substantial part, the certification of a nationwide plaintiff class for alleged sex discrimination concerning salary and promotion).

<sup>11</sup> 521 US 591 (1997).

<sup>12</sup> 527 US 815 (1999).

place the tort system prospectively with private administrative compensation schemes for asbestos-exposed industrial workers. The Court's move to halt the use of the class action device to lend binding effect to privatized workers' compensation plans in the asbestos context, however, has not abated the search for some viable method to achieve peace in mass tort litigation. An institutional perspective inspired by Kalven and Rosenfield helps us to discern how limitation of the class action as a peace mechanism simply has transferred the hard problem of achieving closure in mass litigation to other devices that one may situate on a continuum between private and public means.

Part II takes up the second of the dilemmas that confront the law of class actions: the need for finality by way of class settlements but with respect for the process due to absent class members. Here, the comparison of class actions and the administrative state initiated by Kalven and Rosenfield has the potential to set longstanding debates over due process for absent class members on a new path. Current doctrine casts the basis for preclusion of class members in terms of a mixture of protections in the nature of individual autonomy (rights to participate and to opt out) and fiduciary oversight (from both class counsel and, primarily, the rendering court).<sup>13</sup> Since the early twentieth century, however, due process in connection with the regulatory programs of the administrative state has consisted less of the individual autonomy familiar to one-on-one litigation and more of measures to hew—if only roughly—the loyalties of regulators over time to the interests of those whom they purport to serve.<sup>14</sup> In an era when empirical research has documented the rarity with which rights of individual autonomy are actually exercised in class actions,<sup>15</sup> the law of due process in that sphere would benefit from redirection along lines familiar to the administrative state. Part II notes the beginnings of steps along these lines—what one might see as the elaboration of Kalven and

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<sup>13</sup> See *Phillips Petroleum Co v Shutts*, 472 US 797, 812 (1985):

The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . Additionally, we hold that 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. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

<sup>14</sup> See *Bi-Metallic Investment Co v State Board of Equalization*, 239 US 441, 445 (1915) (holding that the recourse for persons affected by agency rulemaking does not consist of “a chance to be heard” in the manner of a town meeting but, rather, that “[t]heir rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule”).

<sup>15</sup> See Theodore Eisenberg and Geoffrey Miller, *The Role of Opt-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand L Rev 1529, 1532–33 (2004).

Rosenfield's vision in due process terms. Here, the efforts of positive political theory to shed light on the institutions of the administrative state find rough counterparts in the current generation of scholarship on class action lawyering.

## I. SETTLEMENT WITHIN THE SCHEME OF GOVERNMENT

Divided authority along federal-state and public-private lines stands as an enduring feature of the American legal system and was far from unknown in Kalven and Rosenfield's time. Part I.A situates in context the "contemporary function" that they envisioned for class actions, explaining how themes sounded in the larger 1938 overhaul of the Rules anticipated to a surprising degree the major features of the domain in which the law of class actions now finds itself. Parts I.B and I.C then discuss the difficulties presented in our time, an era in which class actions operate largely as settlement vehicles. Specifically, Parts I.B and I.C speak, in turn, to how class actions and class settlements—like the proverbial chicken and the egg—each might be thought to yield the other and how that recognition helps to situate in continuity what otherwise might seem disparate debates surrounding the operation of class actions today.

### A. The Legacy of 1938

Key features of the landscape for class actions today are the by-products of larger changes wrought by the 1938 Rules. Drawing from equity practice, the 1938 Rules famously substituted a regime of notice pleading for the predecessor system that had employed the forms of action to link pleading standards with the substance of the particular claim advanced.<sup>16</sup> The comparatively modest demand for "a short and plain statement of the claim"<sup>17</sup> implemented the broader aspiration of the rule drafters to create a trans-substantive regime of civil procedure. But this trans-substantive aspiration meant that class actions—as facilitated considerably by the further 1966 Amendments that cast the device in its modern form—could not be cabined in any categorical way to the kinds of federal statutory claims of primary concern to Kalven and Rosenfield. A trans-substantive class action rule would in-

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<sup>16</sup> See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U Pa L Rev 909, 914–18 (1987).

<sup>17</sup> FRCP 8(a)(2). The quoted language from the current Rule 8 dates from the 1938 overhaul, but even that generous language has outer limits. See *Bell Atlantic Corp v Twombly*, 127 S Ct 1955, 1974 (2007) (upholding dismissal of an antitrust complaint for failure to provide "enough facts to state a claim to relief that is plausible on its face"), 1976 (Stevens dissenting) (discussing the drafting history of Rule 8).

vite attempts at application to state law claims—to this day, the province of actions in tort or contract, for example, even in the face of a federal regulatory overlay for many mass-marketed goods or services.

The influence of the 1938 Rules on state civil procedure—for some progressive jurisdictions, perhaps more of the converse dynamic<sup>18</sup>—injects another layer of federalism, one of court structure rather than substantive lawmaking power. Recognition of the class action, in both the Rules and ultimately the counterpart rules of virtually every state, brings the federalist structure of the American judiciary into play for many subjects of litigation. Where the dispute concerns the kind of national-market activity most suited for the administrative state—say, the marketing across the country of undifferentiated goods or services—the potential fora for a class action might embrace not only the federal courts but also most any state court across the land where members of the class might find themselves. The class action might function in parallel with administrative regulation alright, just at a level of the judiciary seemingly incommensurate with the notion of nationwide activity in need of redress.

A substantial literature, moreover, discusses the ways in which central features of the 1938 Rules—especially their emphasis on factual development through potentially costly discovery<sup>19</sup>—gave rise to a litigation environment geared toward settlement rather than trial.<sup>20</sup> Part II shall explore the problem of legitimacy posed by class settlements, where the consent of absent class members does not take the form of the autonomous meeting of the minds envisioned in the common law of contracts or, for that matter, in settlements of conventional, one-on-one litigation. For present purposes, the point is that the function of the class action today largely as a settlement vehicle is much in keeping with the general impact—if not necessarily the intended one—of reforms initiated in Kalven and Rosenfield's time.

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<sup>18</sup> The 1938 Rules postdated reforms previously implemented by the Field Code in New York, among other examples. See Suzanna Sherry and Jay Tidmarsh, *Civil Procedure: Essentials* 25–27 (Aspen 2007).

<sup>19</sup> See *Twombly*, 127 S Ct at 1967 (noting that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings”). Formal models similarly note the role of litigation costs as important determinants of settlement. See, for example, Joseph A. Grundfest and Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 *Stan L Rev* 1267, 1279 (2006) (finance model); Steven Shavell, *Foundations of Economic Analysis of Law* 392–93 (Harvard 2004) (economic model).

<sup>20</sup> See, for example, Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 *Wis L Rev* 631, 639 (“We have moved from a trial-based procedure to one centered on the events that occur instead of trial and which typically head off trial.”).

## B. A Class in Search of a Settlement

One set of challenges for the law of class actions today proceeds from the observation that class certification generates considerable pressure on the defendant to settle, quite apart from other features of the litigation environment. This pressure stems from the increase in the variance of outcomes in a single, classwide proceeding—in colloquial terms, its “all-or-nothing” aspect—as well as, in many instances, an increase in the absolute number of claims brought into the legal system against the defendant.<sup>21</sup> Indeed, Kalven and Rosenfield celebrate the latter effect in arguing for class treatment of otherwise unmarketable claims. Notions of class settlement pressure continue to elicit controversy, but it is crucial to note that the disagreement centers on the normative implication advanced by some that class settlement pressure is a bad thing, not on the underlying positive observation that such pressure exists.<sup>22</sup>

Given the consequential nature of the class certification determination, it comes as little surprise that much of the ferment surrounding class actions today centers on that phase. In practical effect, the class certification determination serves as the judicial checkpoint for whether a settlement of some sort will likely emerge. As such, that determination stands to affect dramatically the real-world impact of the class action as a privatized counterpart to agency enforcement. A vision of the class action along the lines sketched by Kalven and Rosenfield casts each of three major controversies concerning class certification ultimately as problems of institutional authority.

### 1. Class certification in a system of federalism.

One controversy flows from the trans-substantive aspiration of the Rules as a whole and the consequent attempts to use the class action to encompass state law claims. Simply as a matter of rule application, class certification outside the unusual settings for mandatory class treatment requires a judicial finding that “questions of law or fact

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<sup>21</sup> See Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 Colum L Rev 1872, 1881 (2006).

<sup>22</sup> One famous judicial statement is that of then-Chief Judge Richard Posner in *In re Rhone-Poulenc Rorer, Inc.*, 51 F3d 1293, 1298 (7th Cir 1995) (“[With class certification, defendants] might . . . easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.”). Compare, for example, Robert G. Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L J 1251, 1302 (2002) (characterizing class settlement pressure as undesirable), with Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 NYU L Rev 1357, 1429–30 (2003) (finding concerns about class settlement pressure overblown).

common to class members predominate over any questions affecting only individual members.”<sup>23</sup> Class actions involving state law claims often run aground on this required finding of predominance. The notion of predominance itself entails a fair degree of judicial discretion, calling not for a mere body count of common issues and individual issues but, rather, for a qualitative assessment of their relative importance in the litigation.<sup>24</sup> Apart from the latitude for discretion within the predominance requirement itself, one significant barrier to certification lies in choice-of-law principles that, as applied, call for use of the substantive law of the place where each class member finds herself.<sup>25</sup> The need to juggle a multiplicity of laws—if not necessarily fifty radically different bodies of law, then at least a multitude of variations in substance—usually will defeat any viable notion of predominant legal issues across the class as a whole. The important point is that choice-of-law principles, too, often admit of substantial judicial discretion in application. The influential approach of the Restatement (Second) of Conflict of Laws, for example, calls for the court to engage in context-specific, multifactor balancing in order to select the governing law from among the various contending sources.<sup>26</sup>

All of this is not to say that class certification is a kind of legal realist theme park, where judges always can reach whatever result they wish. It is simply to note the nontrivial latitude for discretion involved and the consequent importance of who is positioned to wield it. In this

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<sup>23</sup> FRCP 23(b)(3).

<sup>24</sup> On the degree of indeterminacy associated with the predominance analysis, see Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 Vand L Rev 995, 1058–59 (2005) (criticizing the predominance inquiry in Rule 23(b)(3) as “needlessly vague” and “incoherent”).

<sup>25</sup> See, for example, *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 288 F3d 1012, 1016 (7th Cir 2002):

[The plaintiffs’ financial loss . . . was suffered in the places where the [defendants’] vehicles and tires were purchased at excessive prices or resold at depressed prices. Those injuries occurred in all 50 states, the District of Columbia, Puerto Rico, and U.S. territories such as Guam. The *lex loci delicti* principle points to the places of these injuries, not the defendants’ corporate headquarters, as the source of law.

Choice-of-law principles track the location of the court, with state courts naturally applying the principles of the state in which they sit and federal courts obliged by the principles of *Erie Railroad Co v Tompkins*, 304 US 64, 74–77 (1938), to do the same in diversity cases, per *Klaxon Co v Stentor Electric Manufacturing Co*, 313 US 487, 1021–22 (1941).

<sup>26</sup> See Restatement (Second) of Conflict of Laws § 145 (1971). See also Stephen R. Bough and Andrea G. Bough, *Conflict of Laws and Multi-state Class Actions: How Variations in State Law Affect the Predominance Requirement of Rule 23(b)(3)*, 68 UMKC L Rev 1, 3–5 (1999) (categorizing the choice-of-law principles used by the various states); Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act*, 106 Colum L Rev 1839, 1846–50 (2006) (criticizing the degree of indeterminacy in the Second Restatement’s approach).

regard, the structure of the judicial system introduces an additional dimension of federalism pertinent here. A proposed nationwide class action involving state law claims might be filed in virtually any court across the country where class members are located. Each state has discretion to apply its own class action rule in a manner different even from identically phrased rules in other states or the federal system.<sup>27</sup> The same goes for state choice-of-law principles as the gatekeeper for a finding of predominance—particularly where those principles call for discretionary balancing. The upshot is that any given court’s refusal to certify would be unlikely to exert an issue-preclusive effect with respect to attempted certifications elsewhere, even of the identical proposed class.<sup>28</sup>

Many state court judges hold office, moreover, not on the basis of appointment but, instead, as the result of judicial elections.<sup>29</sup> It bears emphasis that empirical research has yet to explore systematically the relationship, if any, between class certification and the involvement in state judicial elections of interest groups—whether the local plaintiffs’ bar or business-side interests—for whom such rulings might well be a major topic of concern.<sup>30</sup> That gap in the literature aside, it is enough

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<sup>27</sup> See *J.R. Clearwater, Inc v Ashland Chemical Co*, 93 F3d 176, 180 (5th Cir 1996):

While Texas Rule of Civil Procedure 42 is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the Texas class action rule, . . . a Texas court might well exercise this discretion in a different manner. It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that each court—or at least each jurisdiction—be free to make its own determination in this regard.

See also *In re General Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 134 F3d 133, 146 (3d Cir 1998) (similarly holding that the federal court’s “construction of Rule 23 and application to the provisional settlement class is not controlling on the Louisiana court”).

<sup>28</sup> The absence of the same legal issue across class certification proceedings generally would defeat issue preclusion. One exception might arise when the basis for decertification sounds in constraints of federal constitutional due process. See Kara M. Moorcroft, Note, *The Path to Preclusion: Federal Injunctive Relief against Nationwide Classes in State Court*, 54 Duke L J 221, 243–44, 250 (2004) (noting that issues concerning federal due process constraints on class certification would satisfy the same-issue requirement for issue preclusion even in other court systems with their own class action rules).

<sup>29</sup> See Michael Richard Dimino, Sr., *Counter-majoritarian Power and Judges’ Political Speech*, 58 Fla L Rev 53, 54 n 1 (2006) (“Judges in thirty-nine states, comprising 87 percent of all judges in the United States, are elected.”).

<sup>30</sup> Research by one defense-side organization documents substantial political contributions from the local plaintiffs’ bar to state judges in Madison County, Illinois, a jurisdiction often dubbed a “magnet” for nationwide class actions. See Illinois Lawsuit Abuse Watch and Illinois Civil Justice League, *Justice for Sale: The Judges of Madison County* (Oct 3, 2002), online at [http://www.icjl.org/images/pdfs/021003\\_JusticeforSaleReport.pdf](http://www.icjl.org/images/pdfs/021003_JusticeforSaleReport.pdf) (visited Apr 16, 2008); Illinois Lawsuit Abuse Watch and Illinois Civil Justice League, *Justice for Sale II: Half-million from Five Trial Lawyers Flood Campaign Coffers* (July 26, 2004), online at [http://www.icjl.org/images/pdfs/040726\\_JusticeForSaleII.pdf](http://www.icjl.org/images/pdfs/040726_JusticeForSaleII.pdf) (visited Apr 16, 2008).

simply to observe the dynamics that flowed, prior to CAFA, from the sheer number of courts. Class actions for state law claims became a game of finding the one state court inclined to certify, even though the vast majority of federal courts, other states' courts, and perhaps even other courts within the same state would not do so. On the class certification question, as Judge Frank Easterbrook has observed, "[a] single positive trumps all the negatives."<sup>31</sup>

Cast in its best light, CAFA seeks to solve the problem of the anomalous state court unwittingly empowered to govern the nation. The title of a prominent article by defense-side proponents of CAFA captured this notion of mismatch, lamenting that *They're Making a Federal Case out of It . . . in State Court*.<sup>32</sup> The solution offered by CAFA nonetheless is indirect. CAFA amends the federal diversity jurisdiction statute to make it much easier for defendants to remove class actions involving state law claims to federal court.<sup>33</sup> The expectation of CAFA proponents was that, once in the federal system, such proposed class actions generally would not be certified based on the exercise of discretion by federal judges above the electoral fray.<sup>34</sup> This is not to deny the possibility of disagreement among federal courts, but only to note the plausible expectation that the degree of variance in class certification within the federal system would be markedly less than across all courts in the nation. The indirection of CAFA lies in its use of a change in forum to drive a difference in result on the class certification question.

A second kind of indirection arises from the legal engine for decertification: often, the choice-of-law barrier to a finding of predomi-

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The name of the county is ironic, to say the least, given James Madison's famous account of how factions might capture the governing apparatus of localities more easily than that of a national government. See Federalist 10 (Madison), in *The Federalist* 56, 63–64 (Wesleyan 1961) (Jacob E. Cooke, ed). Within the political science literature, however, the link between political contributions and judicial behavior remains contested. See generally Damon M. Cann, *Campaign Contributions and Judicial Behavior*, 23 *Am Rev Polit* 261 (2002) (providing an empirical study of the Wisconsin Supreme Court). On the similarity between arguments about state court behavior in connection with CAFA and debates over diversity jurisdiction as a whole around the time of *Erie*, see David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 *Wm & Mary L Rev* 1247, 1262–63 (2007).

<sup>31</sup> *In re Bridgestone/Firestone, Inc, Tires Products Liability Litigation*, 333 F3d 763, 766–67 (7th Cir 2003).

<sup>32</sup> John H. Beisner and Jessica Davidson Miller, *They're Making a Federal Case out of It . . . in State Court*, 25 *Harv J L & Pub Policy* 143 (2001). The Senate Report on CAFA cites this analysis favorably—not surprisingly, given Beisner's widely recognized role as an architect of the legislation. See Class Action Fairness Act of 2005, S Rep No 109-14, 109th Cong, 1st Sess 13 n 42, reprinted in 2005 USCCAN 3.

<sup>33</sup> See CAFA § 4, 119 Stat at 9, codified at 28 USCA § 1332(d)(2) (2007) (requiring only minimal diversity of citizenship and \$5 million in controversy in the aggregate).

<sup>34</sup> See S Rep No 109-14 at 24–26 (cited in note 32) (discussing examples of state court class certifications that CAFA would prevent).

nance. A gatekeeping role for choice-of-law principles with regard to class certification makes a certain superficial degree of sense, for those principles aspire to sort out the competing claims of multiple sovereigns to govern a dispute presented for decision by some underlying lawsuit. But choice-of-law principles take the fact of litigation as given. As applied in connection with the predominance requirement, choice-of-law principles effectively govern an antecedent question: whether the class action will exist at all. At the very least, this role is an uncomfortable one for choice-of-law principles in precisely the situation of concern to Kalven and Rosenfield: where the proposed class would encompass claims not otherwise marketable individually and, quite possibly, not even on a statewide aggregate basis in many instances. Here, decertification based on choice-of-law principles crafted for litigation already in the civil justice system effectively may determine whether claims come into the system at all. In institutional terms, principles crafted to mediate the authority of competing state sovereigns turn out to sort the parallel roles of class action litigation and the administrative state—of private and public—potentially leaving only the latter.

A second outgrowth of the choice-of-law barrier leads to uncomfortable applications of a different sort. Even prior to CAFA and certainly after, class actions concerning national-market activity might seek to invoke federal substantive law, rather than state law, to avoid the need for a choice-of-law analysis. One significant direction of gravitation has involved efforts to recast allegations of wrongdoing that sound most immediately in tort or contract—say, failure to warn claims in products liability or breach of contract claims—as civilly actionable violations of the federal Racketeering Influenced and Corrupt Organizations Act<sup>35</sup> (RICO). The treble-damage remedy available under RICO, no doubt, adds to the attraction.<sup>36</sup>

In a multibillion-dollar class action against the entire managed care industry concerning its reimbursement practices for medical services, the Eleventh Circuit upheld the certification of the civil RICO claims brought by the plaintiff class comprised of doctors nationwide, even while decertifying state law claims sounding in breach of contract.<sup>37</sup> But, in the aftermath of efforts at nationwide class action litigation against the tobacco industry in tort that foundered on choice-of-law grounds, among others,<sup>38</sup> the Second Circuit recently decertified a nationwide class for the civil RICO claims of smokers with respect to

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<sup>35</sup> 18 USC §§ 1961–68 (2000).

<sup>36</sup> See 18 USC § 1964(c).

<sup>37</sup> See *Klay v Humana, Inc.*, 382 F3d 1241, 1276 (11th Cir 2004).

<sup>38</sup> See *Castano v American Tobacco Co.*, 84 F3d 734, 753 (5th Cir 1996).

an alleged industry-wide conspiracy to mislead consumers about the risks of “light” cigarettes.<sup>39</sup> Whatever the proper parameters of RICO, however, it seems safe to say that it was not crafted as a piece of national tort or managed care legislation.

Assimilation of such national-market players as the managed care industry or the tobacco industry to the classic sorts of RICO defendants—organized crime rings and the sham businesses under their control—remains a matter of considerable debate as a rhetorical matter. My point here is simply to note the similarity to the uncomfortable role played by choice-of-law principles. The role of both choice-of-law analysis and civil RICO in the post-CAFA era entails the deployment of legal principles to address matters for which those principles were not designed. And the reason why the law finds itself in this situation harks back to Kalven and Rosenfield’s core insight. If one function of the class action is indeed to serve as a complement to the administrative state at the federal level, then the capacity of the class action to fulfill that role will remain beholden to the divisions of authority in our federalist system. The impulse of CAFA to get national-market class actions into the courts of the national government and the push to recharacterize state law claims as federal statutory violations both seek to implement indirectly, by awkward bits and pieces, the central thrust of the New Deal: to assert national regulatory authority over problems that are national in scope.<sup>40</sup>

## 2. The problem of enforcement discretion.

To see class actions in parallel with the administrative state is also to lend insight on the normative debate over class settlement pressure—and not merely in the scenario of state law claims. Cast in its best light, the central normative concern about class settlement pressure is one of overkill. One version of this concern speaks of the possibility that class certification will place the defendant at risk of firm-ending liability, even though the probability of success on the merits for the plaintiff class might be quite low.<sup>41</sup> I shall turn momentarily to exactly how courts now determine whether a proposed class satisfies the

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<sup>39</sup> See *McLaughlin v American Tobacco Co*, 2008 WL 878627, \*1 (2d Cir).

<sup>40</sup> The analysis here is in keeping with the observation of others that the prescription of CAFA—getting nationwide class actions involving state law claims into federal court but without federalizing the underlying substantive law—represents a solution likely to be unstable over the long run. See Issacharoff and Sharkey, 53 *UCLA L Rev* at 1418–20 (cited in note 9).

<sup>41</sup> See, for example, *In re Rhone-Poulenc*, 51 F3d at 1298–1300 (expressing concern that “these defendants [will be compelled] to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability”).

procedural requirements for certification.<sup>42</sup> One thing remains clear under the Supreme Court's 1974 decision in *Eisen v Carlisle & Jacquelin*:<sup>43</sup> the certification determination is not to include a preliminary injunction-like assessment of the plaintiff class's likelihood of success on the merits.<sup>44</sup> Some critics have argued that such an assessment is precisely what the law of class certification needs.<sup>45</sup> My aim here is to cast the existence of that debate itself in terms that resonate in Kalven and Rosenfield's account. Arguments for assessment of the plaintiff class's likelihood of success as a precondition for the garnering of class settlement pressure call, in effect, for a kind of cost-benefit analysis for class certification—precisely the kind of analysis now seen on a bipartisan basis as an integral part of regulatory policymaking in the administrative state.<sup>46</sup>

A second, related version of the normative argument against class settlement pressure also finds an analogue in administration. Here, the notion is that not all laws warrant enforcement to the letter in all instances but, rather, that many laws benefit from the kind of discretionary prioritization in enforcement routinely exercised by regulatory agencies. Class actions that seek statutory damages set on a per violation basis as a means to enable individual claiming—typically, for technical violations of regulatory statutes that do not produce much, if any, actual losses for consumers—present this problem in its starkest form. The concern, again, sounds in notions of overkill—here, the totaling up of statutory damages across the entire proposed class in order to make for a whopping liability exposure in the aggregate.<sup>47</sup> Out-

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<sup>42</sup> See Part I.B.3.

<sup>43</sup> 417 US 156 (1974).

<sup>44</sup> See *id.* at 177.

<sup>45</sup> See, for example, Bone and Evans, 51 Duke L J at 1254 (cited in note 22); Geoffrey C. Hazard, Jr., *Class Certification Based on the Merits of the Claims*, 69 Tenn L Rev 1, 3–4 (2001).

<sup>46</sup> Their policy differences aside, both Republican and Democratic administrations for more than a quarter century have insisted on some form of White House cost-benefit analysis for proposed regulatory programs. See Executive Order 12291 § 2, 3 CFR § 127 (1981) (Reagan order) (providing that “[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society”); Executive Order 12866 § 1, 3 CFR § 638 (1993) (Clinton order) (providing that “[i]n deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating”); Executive Order 13258, 3 CFR § 204 (2002) (Bush order) (amending Executive Order 12866 but retaining the language requiring a cost-benefit assessment).

<sup>47</sup> See *Parker v Time Warner Entertainment Co*, 331 F3d 13, 22 (2d Cir 2003) (discussing the potential for overkill through class certification of statutory damage claims under the Cable Communications Policy Act of 1984). Some statutes provide for statutory damages on a per violation basis but also impose an aggregate dollar limit. See, for example, 15 USC § 1640(a)(2)(B) (2000) (providing that statutory damages “in any class action or series of class actions arising out of the same failure to comply by the same creditor [under the Truth in Lending Act] shall not be more than the lesser of \$500,000 or 1 per centum of the net worth of the creditor”).

side the specific setting of statutory damages, moreover, one bedrock point of modern administrative law holds that regulatory statutes frequently take the form of broad delegations that call for gap filling by agencies.<sup>48</sup> When coupled with private rights of action on an aggregate basis, however, the sorts of statutes characteristic of the administrative state might well call for enforcement that stops short of fastidiousness for every miniscule violation.

Kalven and Rosenfield's Article enables one to see calls for enforcement discretion in class action litigation within a larger framework. Their account positioned class actions to operate in parallel with the administrative state—to do privately what was not otherwise done via public enforcement. Demands for a kind of enforcement discretion in class actions underscore that the connection to the administrative state runs in both directions. If one function of the class action is to act as a kind of privatized regulation, then it should not surprise us that notions familiar to public regulation—cost-benefit analysis and enforcement discretion more generally—should find expression in the class action setting. For their part, Kalven and Rosenfield were far from unaware of this concern, noting the potential for private litigation by way of class actions to “result in an insistence upon the harshest results and the most technical interpretations.”<sup>49</sup>

The hard point for the law of class actions lies in grounding notions of enforcement discretion in some applicable source of law rather than in an impressionistic sense on the judge's part that a given class certification somehow would exert “too much” settlement pressure.<sup>50</sup> Here, too, comparison in the manner of Kalven and Rosenfield is helpful, revealing how parallels between class actions and the administrative state also must account for institutional differences between the two. Agency refusals to undertake enforcement action are thought so infused with discretion of an essentially political nature as to be presumptively not amenable to judicial review, even to insist on an articulation of the agency's reasons for inaction.<sup>51</sup> The language

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<sup>48</sup> Writing for the Supreme Court, Justice Scalia—hardly someone squishy on the separation of powers or disinclined to find clear meaning in text—readily noted the need for gap filling by agencies and, hence, an inevitable degree of lawmaking on their part as a basis for rejection of efforts to resuscitate the pre-New Deal nondelegation doctrine. See *Whitman v American Trucking Associations, Inc.*, 531 US 457, 475 (2001).

<sup>49</sup> Kalven and Rosenfield, 8 U Chi L Rev at 719 (cited in note 1).

<sup>50</sup> See Nagareda, 106 Colum L Rev at 1884–87 (cited in note 21) (suggesting that it generally is difficult to ground concerns of excessive class settlement pressure in applicable law but that class actions seeking to aggregate statutory damage claims present a special case where decertification can be grounded in proper statutory interpretation).

<sup>51</sup> See *Heckler v Chaney*, 470 US 821, 831 (1985). For criticism of the *Heckler* Court's inclination to embrace highly deferential judicial review of agency nonenforcement, see *id.* at 840 (Marshall concurring) (calling the majority's presumption of unreviewability, among other

from the legislative history of the Administrative Procedure Act<sup>52</sup> on which the Supreme Court grounded this stance—foreclosing judicial review where there is “no law to apply”—underscores this characterization of agency refusals to enforce.<sup>53</sup> By contrast, the discretion involved in class certification does not admit of the same breadth or of the same political dimension, as evidenced by the prospect of interlocutory appellate review of such rulings under Rule 23(f). Agencies may temper the effects of broadly written statutes in a way that courts generally may not—particularly in the course of applying a procedural rule that the Rules Enabling Act says may not “abridge” substantive law any more than it may “enlarge” it.<sup>54</sup>

### 3. Class certification and the merits in aggregate.

A final issue confronting the law of class certification today speaks to the nature of the wrongdoing that both the administrative state and class actions might address. Where that wrongdoing hinges on an underlying decision to evaluate the dispute from an aggregate perspective, the parallel drawn by Kalven and Rosenfield tends to break down in a revealing way. The largest employment discrimination class action in history, brought by female employees against Wal-Mart, starkly illustrates this phenomenon.<sup>55</sup> At the outset, some introductory words are in order on the parameters for the judicial inquiry at the class certification stage, before one may turn to the specifics of the Wal-Mart class action.

Recent decisions from the federal courts of appeals—most strikingly, the Second Circuit’s 2006 decision in *In re IPO Securities Litigation*<sup>56</sup>—have clarified that the prohibition in *Eisen* against judicial con-

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things, “fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence”); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 NYU L Rev 1657, 1667–69 (2004) (explaining how the Court “insulate[d]” agency inaction from judicial review through its decision in *Heckler*).

<sup>52</sup> 5 USC § 551 et seq (2000).

<sup>53</sup> See *Heckler*, 470 US at 830. The “no law to apply” language stems from the Senate Report on the Administrative Procedure Act, S Rep No 79-752, 79th Cong, 1st Sess 26 (1945) (explaining the meaning of the exception to the general right to review under the Act for agency action “committed to agency discretion” by law, ultimately codified at 5 USC § 701(a)(2)).

<sup>54</sup> 28 USC § 2072(b) (2000). For a comprehensive account of the Act, see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U Pa L Rev 1015 (1982).

<sup>55</sup> See *Dukes v Wal-Mart, Inc*, 509 F3d 1168, 1190 (9th Cir 2007). A district court within the Ninth Circuit subsequently certified a similar class action involving allegations of a company-wide policy of discrimination against female employees on the part of another prominent discount retailer. See *Ellis v Costco Wholesale Corp*, 240 FRD 627, 651–52 (ND Cal 2007).

<sup>56</sup> 471 F3d 24 (2d Cir 2006). The Second Circuit built on earlier decisions from other circuits along similar lines—most notably, Judge Easterbrook’s analysis for the Seventh Circuit in *Szabo v Bridgeport Machines, Inc*, 249 F3d 672, 677 (7th Cir 2001):

sideration of the plaintiff class's likelihood of success on the merits does not somehow mean that the court must limit itself to the pleadings when determining whether a proposed class action satisfies the Rule 23 requirements for certification.<sup>57</sup> Rather, the court must make a "definitive assessment" that each applicable certification requirement is met, an undertaking that presents a mixed question of fact and law.<sup>58</sup> And the court must do so even when that question "overlap[s] with merits issues."<sup>59</sup> The factual dimension of the inquiry, in particular, warrants judicial assessment of competing evidence that bears on the satisfaction of a certification requirement, including evidence by way of expert reports proffered by the contending sides.<sup>60</sup>

*In re IPO* and its cohorts in appellate case law represent a welcome move to prune back the most excessive overreadings of the *Eisen* rule. Class certifications in a post-*In re IPO* world nonetheless present open questions of their own. Recognition of the factual component of the certification inquiry virtually necessitates some substantial degree of factual development by way of discovery in preparation for the class certification motion.<sup>61</sup> But, at the same time, the court must avoid turning the proceedings on that motion—supposedly preliminary in nature and exclusively for the judge, not a jury—into a "protracted

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[N]othing in the 1966 amendments to Rule 23, or the opinion in *Eisen*, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers. Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification.

For similar approaches, see generally, for example, *Gariety v Grant Thornton, LLP*, 368 F3d 356 (4th Cir 2004); *Newton v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F3d 154 (3d Cir 2001). The Second Circuit's decision nonetheless stands as the most notable of all in that the court expressly disavowed the more lenient approach to class certification embraced in two of its own earlier decisions authored, no less, by members of the *In re IPO* panel. See *In re IPO*, 471 F3d at 40, disavowing *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F3d 124 (2d Cir 2001) (Sotomayor, subsequently a member of the *In re IPO* panel), and *Caridad v Metro-North Commuter Railroad*, 191 F3d 283 (2d Cir 1999) (Newman, subsequently the author of *In re IPO*). To explain its disavowal of circuit precedent—something supposedly possible only on review en banc—the *In re IPO* court invoked the fig leaf that the intervening 2003 Amendments to Rule 23 warranted such a reassessment. See *In re IPO*, 471 F3d at 39.

<sup>57</sup> The Supreme Court said as much in a post-*Eisen* decision. See *General Telephone Co of the Southwest v Falcon*, 457 US 147, 160–61 (1982) (noting that "it may be necessary for the court to probe behind the pleadings" as part of its class certification analysis). *Szabo* and *In re IPO* add the insight that class certification requirements are broadly similar to jurisdictional questions, as to which the court likewise does not need to accept the allegations in the complaint at face value. See *Szabo*, 249 F3d at 676; *In re IPO*, 471 F3d at 40.

<sup>58</sup> *In re IPO*, 471 F3d at 40–41.

<sup>59</sup> *Id.* at 41.

<sup>60</sup> *Id.* at 42.

<sup>61</sup> *Id.* at 41. Rule 23(c)(1)(A) itself calls for the court to make its class certification ruling "[a]t an early practicable time," a linguistic formulation built on recognition of the potential need for "controlled discovery" on the certification question, in the words of the Advisory Committee. FRCP 23(c)(1)(A), Advisory Committee Notes (2003 Amendments).

mini-trial of substantial portions of the underlying litigation.”<sup>62</sup> Nowhere is this problem more acute than in employment discrimination class actions centered on statistical analysis of an aggregate nature.

*Dukes v Wal-Mart, Inc*<sup>63</sup> illustrates this point. In doctrinal terms, the basic allegation on the merits in *Dukes* takes a commonplace form. The *Dukes* class alleged a pattern and practice of disparate treatment on the basis of sex—specifically, the existence of a company-wide policy of discrimination against female employees across Wal-Mart’s 3,400 stores in forty-one regions with respect to salary and promotion to management positions.<sup>64</sup> Wal-Mart had set forth no such policy in an express manner for its stores across the country. If anything, its nationwide “policy” consisted of not having a nationwide policy—of delegating broad, subjective discretion concerning salaries and promotions to its various (predominantly male) store managers.<sup>65</sup> In keeping with the usual approach in pattern-or-practice cases, the plaintiff class in *Dukes* accordingly sought to invite the inference of a company-wide policy of discrimination principally from its expert statistician’s analysis of Wal-Mart’s salary and promotion structure. Looking at that structure on a region-by-region basis, the plaintiffs’ expert found statistically significant differences in salaries and promotions “wide-spread across regions” along the dimension of sex.<sup>66</sup>

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<sup>62</sup> *In re IPO*, 471 F3d at 41.

<sup>63</sup> 509 F3d 1168 (9th Cir 2007).

<sup>64</sup> See *id* at 1175. The existence of a company-wide policy of disparate treatment is highly significant in a pattern-and-practice case, even though it does not take the plaintiffs all the way to a finding of liability to any or all class members. Under the framework set forth by the Supreme Court for pattern-and-practice cases, such a policy entitles the individual employees to a presumption that the adverse employment actions in their particular cases were the result of unlawful discrimination. See *International Brotherhood of Teamsters v United States*, 431 US 324, 360 (1977).

Liability for unlawful discrimination on a theory of disparate treatment differs, moreover, from liability on a theory of disparate impact—that is, for a facially neutral employment policy or practice that nonetheless has an unjustified adverse impact on the members of a Title VII-protected class. True enough, the disputed statistical evidence in *Dukes* might seem, at first glance, to lend itself equally to contentions of disparate treatment and disparate impact. But Title VII authorizes punitive damages—a remedy sought by the *Dukes* class—only for certain specified forms of disparate treatment, not on the basis of liability on a disparate impact theory, which does not entail a finding of intentional discrimination. See *Kolstad v American Dental Association*, 527 US 526, 534 (1999). The claim for punitive damages in *Dukes* adds to the variance of outcomes in the litigation beyond that generated simply by aggregation. See Grundfest and Huang, 58 Stan L Rev at 1268 (cited in note 19) (emphasizing the significant role of variance in litigation as an inducement to settlement).

<sup>65</sup> See *Dukes v Wal-Mart Stores, Inc*, 222 FRD 137, 149 (ND Cal 2004) (characterizing the “deliberate and routine use of excessive subjectivity” by store managers with respect to salary and promotion as an employment practice attributable to Wal-Mart at the national level), affirmed, 509 F3d 1168.

<sup>66</sup> *Dukes*, 509 F3d at 1180.

To be sure, the statistical analysis was not the only evidence the plaintiffs offered to support an inference of a discriminatory policy against women. Supreme Court guidance for pattern-and-practice cases contemplates the supplementation of statistical analysis with anecdotal evidence of animus expressed vis-à-vis particular employees.<sup>67</sup> This the *Dukes* class proffered, along with other circumstantial evidence in the form of an additional expert report said to show a susceptibility to discrimination at a company-wide level based on sociological analysis of Wal-Mart's "corporate culture."<sup>68</sup> Still, it is difficult to believe that these sorts of supplementary evidence would be sufficient, in themselves, to demonstrate the existence of a company-wide policy of discrimination, as distinct from simply lending real-life context to the plaintiffs' allegation of such. The statistics were the lynchpin, with Wal-Mart challenging the methodological soundness of the analysis by plaintiffs' expert and proffering its own expert report that—shockingly enough—revealed no patterns on the basis of sex with regard to salaries or promotions.<sup>69</sup>

The important point here is not the familiar one that pattern-and-practice cases often come down to dueling statistical experts but, rather, that the duel on the merits here overlaps entirely with the central question for class certification: is the proposed nationwide class the appropriate unit for litigation? In the parlance of Rule 23, the alleged company-wide policy supplied the common thread said to join together what otherwise would be individual, or perhaps store-specific, salary and promotion decisions.<sup>70</sup>

The Supreme Court has long recognized that employment discrimination "is by definition class discrimination" in the limited sense that the strictures of Title VII of the Civil Rights Act—sex, race, and

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<sup>67</sup> See *Teamsters*, 431 US at 339 (noting that testimony from individual employees "about their personal experiences with the company brought the cold numbers [in the statistical analysis] convincingly to life").

<sup>68</sup> See *Dukes*, 509 F3d at 1178, 1182.

<sup>69</sup> See *id.* at 1181–82.

<sup>70</sup> The class certification question in *Dukes* concerned the applicability of Rule 23(b)(2), which, at the time, authorized mandatory class treatment where the defendant "has acted . . . on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FRCP 23(b)(2) (2003), cited in *Dukes*, 509 F3d at 1185. The restyled version of Rule 23(b)(2) that went in effect as of December 2007 contains only modest changes to this wording designed to make the rule's text more readable. See FRCP 23(b)(2) (authorizing a mandatory class action where "the party opposing the class has acted . . . on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"). As a formal matter, there was no finding of predominant common issues required within the meaning of Rule 23(b)(3) for opt-out classes. The alleged company-wide policy of discrimination nonetheless was critical to any finding of generally applicable conduct on Wal-Mart's part across its female employees nationwide.

the like—speak in terms of particular classifications.<sup>71</sup> “But,” the Court has cautioned, “the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified.”<sup>72</sup> Separating the nature of the alleged discrimination from the class certification question often is easy enough. An allegation of prohibited discrimination by an individual employee does not, in itself, warrant the certification of a class comprised of all those who share that person’s sex or race, for example.<sup>73</sup> But separation of the alleged discrimination from the class certification question is less easy when the allegation itself involves an aggregate perspective.

To task the court at the class certification stage here with the making of a “definitive assessment” of compliance with Rule 23 would be to call, as a practical matter, for an assessment of which side is right on the merits with regard to the existence of a company-wide policy.<sup>74</sup> To be sure, the court’s determination of that factual question for purposes of class certification would not bind the factfinder at trial.<sup>75</sup> More precisely, neither the plaintiff class nor the defendant could succeed in invoking any issue-preclusive effect at trial as to the existence of a company-wide policy. Formal preclusion aside, however, such a determination made in order to certify the class would be far from inconsequential to the defendant. It almost certainly would mean that no trial would occur. The litigation would settle, such that the class certification determination effectively would be the whole ballgame in terms of considered evaluation of the factual basis for aggregation.

A lesser demand—say, to ensure that plaintiffs’ proffered statistical analysis passes a light-touch version of the familiar standard for the admissibility of expert testimony under *Daubert v Merrell Dow Pharmaceuticals*<sup>76</sup> or merely is not so glaringly flawed as to be inad-

<sup>71</sup> See *General Telephone*, 457 US at 157.

<sup>72</sup> *Id.*

<sup>73</sup> See *id.* at 158–59 (holding that one Mexican-American employee’s allegation of discrimination against him on the basis of national origin with respect to promotion does not warrant certification of a class action to challenge the defendant employer’s treatment of Mexican-Americans “across-the-board,” including with respect to initial hiring decisions).

<sup>74</sup> For its part, the Ninth Circuit in *Dukes* sought to cast its inquiry on this point simply as asking whether the district court had abused its discretion “in finding that, based on all the evidence presented, there existed common questions of fact sufficient to justify class certification.” 509 F3d at 1181. This formulation marked a shift from an earlier, superseded opinion in *Dukes* in which the Ninth Circuit had voiced agreement with the pre-*In re IPO* Second Circuit decisions that viewed the resolution of factual disputes between expert witnesses as inappropriate at the class certification stage. See *Dukes v Wal-Mart, Inc.*, 474 F3d 1214, 1229 (9th Cir 2007), citing favorably *Caridad*, 191 F3d at 292–93, and *In re Visa Check*, 280 F3d at 135.

<sup>75</sup> See *In re IPO*, 471 F3d at 41.

<sup>76</sup> 509 US 579 (1993). For commentary recommending such an approach, see generally Alan B. Morrison, *Determining Class Certification: What Should the Courts Have to Decide?*, 8

missible as a matter of law<sup>77</sup>—also would be problematic. It would come dangerously close to certifying first and only later asking hard questions about the propriety of the proposed aggregate unit. But “later” probably would mean “never,” for, again, the class action in all likelihood would settle once certified. This, of course, is the converse problem to the one generated by full-bore insistence on a “definitive assessment” by the court at the certification stage. Settlement would flow from too little, rather than too much, judicial scrutiny at the one realistic checkpoint before litigation turns into dealmaking.

A further nuance attends any prescription for class certification analysis in situations of overlap with the underlying merits. Cases and commentary have yet to frame the point, but it seems likely to emerge over time, at the very least as a topic for potential law reform. Where the court declines to certify because it does not find the facts said to link the proposed class members into a cohesive unit—particularly when the court so declines only after a near-minitrial supported by discovery, as *In re IPO* contemplates—it is far from clear that the law of class actions ought to attach no issue-preclusive effect whatsoever on that factual question vis-à-vis the members of the would-be class.

As a formal matter, the answer under current doctrine seems clear enough. Rule 23 requires notice to class members only upon class certification by the court,<sup>78</sup> not upon the mere filing of the class complaint. As a result, members of a proposed class that the court ultimately declines to certify will have received no notice of the class certification proceedings and, on that ground, surely would contend that no issue-preclusive effect could arise therefrom. And, again, had the court come out in their favor on the factual question, the plaintiff class would have garnered no issue-preclusive effect for purposes of trial. Still, the lack of issue preclusion from a loss by the class is discomfiting in practical terms. The members of the would-be class would stand to garner a considerable upside (class certification that, in all likelihood, precipitates a class settlement that will moot any further testing of the basis for aggregation) with little potential downside (where decertification would leave the underlying factual question to be relitigated by would-be class members as if no class action had been filed).

One can put the foregoing concern in more general terms. Even as to a class not ultimately certified, the question whether the pro-

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BNA Class Action Litig Rep 541 (2007) (arguing for a class certification standard for issues of fact similar to that used for summary judgment).

<sup>77</sup> The pre-*In re IPO* case law of the Second Circuit so specified. See, for example, *In re Visa Check*, 280 F3d at 135 (emphasizing that at the class certification stage, the court must only conclude that the plaintiffs have met Rule 23’s requirements with a showing of evidence “based on methodology that [i]s not fatally flawed”).

<sup>78</sup> See FRCP 23(c)(2)(A)–(B).

posed class is a proper unit for litigation amounts to a question that inherently seeks a decision on a classwide basis. As such, the nature of the class certification question virtually invites arguments to accord a commensurately classwide scope of preclusion to any answer reached by the court. The more that the class certification stage becomes the whole ballgame—with discovery, genuinely adversarial testing of evidence, factfinding, and the like—the more that preclusion principles developed for the conventional ballgame of trial will gain traction. And the more that related matters such as the timing of notice may warrant revisiting—ironically enough, at the behest of defendants seeking to equalize the practical upsides and downsides from a contested class certification.

A full-scale sorting out of class certification in the post-*In re IPO* era, even one confined to the employment discrimination setting, would occupy an entire article. My point here is that the difficulties presented in a case like *Dukes* highlight a dimension largely overlooked in Kalven and Rosenfield's account of class actions in parallel with the administrative state. The Equal Employment Opportunity Commission (EEOC) might undertake enforcement action against an employer based on allegations of unlawful discrimination on a nationwide basis.<sup>79</sup> In fact, at least as a formal matter, Title VII prioritizes public over private enforcement in the sense of conditioning the latter on the issuance by the EEOC of a right-to-sue letter.<sup>80</sup> And any EEOC enforcement in a *Dukes*-type situation would involve much the same sorts of contested expert analyses of the defendant company's workforce from both the enforcing agency and the defendant.

The key difference, however, is that the EEOC would not have to tarry with the strictures of Rule 23.<sup>81</sup> The administrative state is aggregate by its nature and need not continually justify its status in that

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<sup>79</sup> Empirical research has yet to ask, with appropriate controls for selection bias, whether settlement rates in EEOC enforcement actions differ in statistically significant ways from settlement rates in certified class actions.

<sup>80</sup> The right-to-sue letter also might come from a state or local agency. See 42 USC § 2000e-5(f)(1) (2000).

<sup>81</sup> The Supreme Court has emphasized that “the EEOC is not merely a proxy for the victims of discrimination and that the EEOC's enforcement suits should not be considered representative actions subject to Rule 23.” *General Telephone Co of the Northwest v EEOC*, 446 US 318, 326 (1980). Noting specifically the inapplicability of the Rule 23(a)(4) requirement of adequate class representation to EEOC enforcement actions, the Court added that

unlike the Rule 23 class representative, the EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged. . . . The EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choices where conflicts of interest exist.

Id at 331.

regard. And the regulatory statutes that form the grist for the administrative state might partake of contestable aggregate evidence without turning the contest from a question of fact on the merits into a question of the agency's authority to act at all.

Class certification, by contrast, is all about the legitimacy of the assertion that the proposed aggregate unit is an appropriate unit for inquiry. And the reason why the law of class actions must address that question as one of authority and legitimacy, whereas the administrative state need not, is this: the administrative state operates based on an ongoing delegation of authority that stems ultimately from the polity in the aggregate, whereas the delegation of authority effected by class certification is of a temporary, one-shot nature.<sup>82</sup> One result is that, where the underlying dispute on the merits centers on the propriety of the aggregate unit, the supposedly preliminary ruling on the same point for purposes of class certification hardly can help but become the whole ballgame, or nearly so, in practical effect. I shall return in Part II to some further implications from the observation that class actions involve one-shot delegations of a kind of governing power. But, prior to that discussion, it is worthwhile to fill out the proverbial chicken-and-the-egg relationship between class certification and class settlements.

### C. A Settlement in Search of a Class

The discussion thus far in this Part has centered on the constraints under which a proposed class may gain the settlement pressure that certification brings, for good or ill. But the sequence need not proceed in that way. A separate set of issues surrounding the relationship between the class action and the administrative state concerns class certification almost as an afterthought to settlement. One aspect of this phenomenon forms a coda to the enactment of CAFA. The other concerns the operation of the class action device outside the setting of unmarketable claims on which Kalven and Rosenfield focused—in particular, the potential for class settlements to undertake law reform in a manner to rival public legislation.

#### 1. The anomalous court revisited for settlement.

As suggested earlier, CAFA seeks to address what its proponents saw as the improper garnering of class settlement pressure through a search for the anomalous certifying court. In its expansion of the lati-

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<sup>82</sup> See Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U Ill L Rev 43, 45–46 (emphasizing the one-shot character of class actions).

tude available for defendants to remove nationwide class actions to the federal system, however, CAFA notably leaves the power of removal where it rests in ordinary litigation: as a matter of choice for the defendant.<sup>83</sup> This creates considerable potential for replication of the anomalous court problem, not with respect to contested certifications over the defendant's objection but, rather, with regard to the approval of class settlements at the joint instigation of class counsel and the settling defendant. From the standpoint of defendants, the anomalous court—to take the extreme case, one politically captured by the local plaintiffs' bar—might be perfectly fine for purposes of garnering preclusive effect for a desired deal with such lawyers. Instead of a class in search of a settlement, the settlement might go in search of a class, so as to gain preclusive effect.<sup>84</sup>

Here, again, the federalism of the judicial system comes into play. A class settlement approved in state court remains susceptible to collateral attack—that is, subsequent litigation by members of the class, typically in another forum, seeking to escape the preclusive effect of the settlement. In the usual sequence, the defendant attempts to interpose claim preclusion as a defense, which the collateral-attack plaintiff then seeks to defeat by alleging a federal constitutional defect in the judgment that approved the class settlement—characteristically, a due process violation in the form of inadequate class representation.<sup>85</sup> Indeed, the choice of forum for the collateral attack may involve still another replication of the anomalous court problem—this time, a court perceived as anomalously inclined to bust the deal, perhaps one that most other courts would not take to exceed constitutional strictures.<sup>86</sup>

Both case law and commentary remain deeply divided over the proper scope for collateral attacks, a matter that I address in other

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<sup>83</sup> See CAFA § 5, 119 Stat at 12, codified at 28 USC § 1453(b) (2000) (crossreferencing the general removal statute, 28 USC § 1446 (2000), under which the defendant retains the option to remove). For criticism of CAFA on this ground, see Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U Pa L Rev (forthcoming 2008).

<sup>84</sup> For much the same reasons that class decertification is unlikely to exert an issue-preclusive effect on efforts to garner certification from another court, see note 28, so too are disapprovals of proposed class settlements unlikely to be issue preclusive on the fairness question in other fora.

<sup>85</sup> See generally, for example, *Wolfert v Transamerica Home First, Inc.*, 439 F3d 165 (2d Cir 2006) (rejecting a collateral attack on a California state court class settlement predicated on an alleged due process violation in the form of inadequate class representation).

<sup>86</sup> Here, too, a kind of Madisonian local capture may come into play. See note 30. As a strategic matter, the effect of a successful collateral attack can be to force the defendant to strike a separate deal with the proponents of the attack. In this way, competitive rivals of class counsel within the plaintiffs' bar might seek to garner a portion of the financial reward from a given litigation by undermining the preclusive effect of the class settlement as a way to reopen negotiations, with themselves now a force with which the defendant must reckon at the bargaining table.

writing.<sup>87</sup> The important point for purposes of Kalven and Rosenfield's vision consists of how the persistence of controversy over collateral attacks, in itself, has the potential to reinforce a kind of federalizing impulse here. Class settlements effected in state court remain vulnerable to collateral attack because the rendering state court generally lacks authority to enjoin litigation elsewhere that would seek to escape the preclusive effect of the class judgment. By contrast, the upshot of the current law of federal courts is that a class settlement effected in federal court gives rise to federal injunctive power to "protect or effectuate" the class judgment.<sup>88</sup> Rather than cast the preclusion question in terms of the "full faith and credit" due from other court systems to a state court class judgment,<sup>89</sup> a federal court class settlement effectively positions the rendering federal court itself to address the preclusion question as one that concerns its own injunctive power under the Anti-Injunction Act. In a circuitous way, then, the law of federal courts effectively treats collateral attacks on federal court class settlements like efforts to reopen all manner of civil judgments in the federal system under Rule 60(b).<sup>90</sup> To reopen the judgment, one must ask the rendering court, not some potentially anomalous court elsewhere.

Notice how the dynamic for attacks on class settlements parallels the federalization of contested class certifications post-CAFA, whether as a matter for analysis by a federal court under Rule 23 or as a question about the reach of a federal statute such as RICO. In a world where the parameters for collateral attacks remain unsettled, class settlements in search of preclusion are best directed to the courts of the national government. The point here, however, goes beyond the judiciary to the class action bar.

Kalven and Rosenfield end their Article with the remark that "not all young men go to Washington."<sup>91</sup> Playing on the title of a fa-

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<sup>87</sup> See Samuel Issacharoff and Richard A. Nagareda, *Class Settlements under Attack*, 156 U Pa L Rev (forthcoming 2008) (surveying the ongoing debate over the appropriate parameters for collateral attacks and urging adoption of an approach that would differentiate based on, among other considerations, the forum for the attack and the precise nature of the representational inadequacy alleged).

<sup>88</sup> See 28 USC § 2283 (2000) (turning off the general prohibition of the Anti-Injunction Act against federal court injunctions of state court proceedings where the injunction would "protect or effectuate" the federal court's judgment). See also All-Writs Act, 28 USC § 1651(a) (2000) (affirmatively granting the federal courts power to issue "all writs"—including those in the nature of an injunction—"necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law").

<sup>89</sup> See US Const, Art IV, § 1; Full Faith and Credit Act, 28 USC § 1738 (2000) (extending the principle of the Full Faith and Credit Clause to the effect of state court judgments in federal court).

<sup>90</sup> See FRCP 60(b) (providing standards for relief from judgment by the rendering court).

<sup>91</sup> Kalven and Rosenfield, 8 U Chi L Rev at 721 (cited in note 1).

mous work by Felix Frankfurter that captured the heady attraction of the administrative state for the best and the brightest of the New Deal generation,<sup>92</sup> Kalven and Rosenfield sought to elaborate on the implications for the practicing bar of class actions as a parallel vehicle for civil law enforcement. On their account, class actions likewise would call for the emergence of a new breed of regulators with a national perspective and an ability to grapple with complex facts, just in the form of plaintiffs' class action lawyers in the private bar rather than the "prophets of regulation"<sup>93</sup> in the federal government.

Taken together, CAFA's expansion of the federal forum for class certification and the attractiveness of that same forum as a protection against collateral attack effectively empower an elite segment of the plaintiffs' class action bar. Those best positioned to fund, investigate, and litigate complex class actions in the federal courts involving national-market conduct effectively become those who, in addition, are best positioned to tender to defendants the prospect of genuine national peace—and, with it, to reap the financial benefits of peacemaking by way of class counsel fee awards. As Kalven and Rosenfield anticipated, the role of class actions in parallel with the administrative state is not a role that requires a presence in the capital of the national government. And the revealed preferences of leaders within the plaintiffs' class action bar today bear out this insight. There simply is no need to "go to Washington" when a location like Mount Pleasant, South Carolina; Armonk, New York; or San Francisco, California will do just fine as a home base.<sup>94</sup> And the weather is nicer anyway.

## 2. Class settlements as law reform.

The kinds of class actions touted by Kalven and Rosenfield—say, for securities fraud or price fixing—are notable not just because they involve claims unlikely to be marketable on an individual basis. Class actions of this sort also tend to call for settlement through a relatively quick process of cashing out. In Kalven and Rosenfield's words, "the various members are simply notified that a complete recovery is available for them" and "are simply asked to 'come and get it.'"<sup>95</sup> Em-

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<sup>92</sup> See *id.* at 718 n 100, citing Felix Frankfurter, *The Young Men Go to Washington*, in Archibald MacLeish and E.F. Prichard, Jr., eds, *Law and Politics: Occasional Papers of Felix Frankfurter 1913–1938* 238 (Harcourt, Brace 1939).

<sup>93</sup> See Thomas K. McCraw, *Prophets of Regulation* 81–82, 153 (Harvard 1984) (profiling major figures in the rise of the administrative state in the twentieth century).

<sup>94</sup> The references here are to the home offices of three leading firms within the class action plaintiffs' bar at a national level: Motley Rice LLC in Mount Pleasant; Boies, Schiller & Flexner LLP in Armonk; and Lief Cabraser Heimann & Bernstein, LLP in San Francisco.

<sup>95</sup> Kalven and Rosenfield, 8 *U Chi L Rev* at 691 (cited in note 1).

pirical research in recent years, however, has raised questions about the inclination of class members actually to “come and get it,” even in such familiar settings as securities class settlements where large institutional investors might own the affected shares in substantial quantities.<sup>96</sup>

The take-up rate for class members aside, class settlements often operate in parallel with the administrative state in a manner broadly consistent with the one-shot character of the former. They often have no need to create ongoing regimes that might begin to approach the ongoing character of the administrative state. But efforts to employ class actions—in particular, to use them as enforcement mechanisms for programs of prospective law reform—have not remained so cabined. Rather, the trans-substantive aspiration of the class action rule invites attempts to craft class settlements to function not in the absence of conventional individual litigation but, instead, in lieu of it—to deal not so much with claims that are otherwise unmarketable but, rather, with those that some might regard as all too marketable.

So it is that the Supreme Court’s two most significant class action decisions in recent decades—*Amchem* and *Ortiz*—involved ambitious efforts to replace tort litigation over asbestos-containing products with privatized compensation regimes. The class definitions in *Amchem* and *Ortiz* were purely prospective, encompassing only asbestos-exposed persons who did not already have tort claims on file against the respective settling defendants.<sup>97</sup> Neither class counsel nor the settling defendants, moreover, had any desire actually to litigate the actions on a classwide basis. Rather, class counsel filed the class complaints simultaneously with proposed settlements to resolve them.<sup>98</sup> The dealmaking lawyers then sought to elicit court-issued judgments to do the one essential thing that they could not do themselves: to bind class members in the future to seek recourse not in the tort system but, instead, under the private administrative compensation schemes established by the respective settlements. Here is the vision of the class action as an institutional rival of the administrative state writ large. The deals in *Amchem* and *Ortiz* effectively sought to achieve by way of class settlements what the process of public legislation, to this day, has not yielded in the way of asbestos litigation reform.

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<sup>96</sup> See, for example, James D. Cox and Randall S. Thomas, *Letting Billions Slip through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 *Stan L Rev* 411, 412–13 (2005) (finding that less than 30 percent of institutional investors with provable losses actually claimed the money to which they were entitled by securities class settlements).

<sup>97</sup> See *Ortiz*, 527 US at 826 n 5; *Amchem*, 521 US at 601.

<sup>98</sup> See *Ortiz*, 527 US at 825; *Amchem*, 521 US at 600–01.

In both instances, the Supreme Court grounded squarely in Rule 23 the bases for invalidating the underlying class certifications: in *Amchem*, the district court's erroneous view that the proposed deal there could supply a predominant common issue to warrant certification of a Rule 23(b)(3) opt-out class;<sup>99</sup> and, in *Ortiz*, the district court's inclination to accept on its face the settling parties' assertion that the resources they chose to commit to the deal represented a limited fund that warranted certification of a Rule 23(b)(1)(B) mandatory class.<sup>100</sup> The deeper insight of the Court's decisions, however, speaks not to the procedural technicalities of Rule 23 but more in terms that resonate in Kalven and Rosenfield's institutional comparison.

The class actions in *Amchem* and *Ortiz* both involved the same fatal circularity in their accounts of their own purported authority to govern the future.<sup>101</sup> Both sought to legitimize that authority by reference to something that did not preexist the respective class actions but, instead, that was the byproduct of aggregate treatment, the legitimacy of which comprised the class certification question: in *Amchem*, the class settlement agreement negotiated upon the assertion of authority by class counsel to bargain on behalf of the class in the aggregate; and, in *Ortiz*, the faux limited fund created by the settling parties' desire to confine future tort claimants to Fibreboard's insurance coverage, a substantial resource that nonetheless fell markedly short of the company's net worth.<sup>102</sup> The class actions were flawed regimes of governance, in short, for they sought to justify their power to engage in prospective law reform by way of self-reference. One can understand the Court's decisions to say that such self-referential justifications should fare no better to legitimize class actions than they would fare to justify authority in the administrative state.

Still, *Amchem* and *Ortiz* did not mark the end of the search for some legitimate means to achieve closure in mass tort litigation involving allegations of latent disease. Quite the opposite: the Court's decisions cast efforts in two directions that further reveal the insightfulness of Kalven and Rosenfield. Some might find perplexing the persistence of the search for comprehensive peace in areas of mass tort litigation. It should not be so. Litigation of a potentially firm-threatening scope and involving claims expected to extend years or decades hence has continued to elicit efforts to fashion broadly encom-

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<sup>99</sup> See 521 US at 607.

<sup>100</sup> See 527 US at 848.

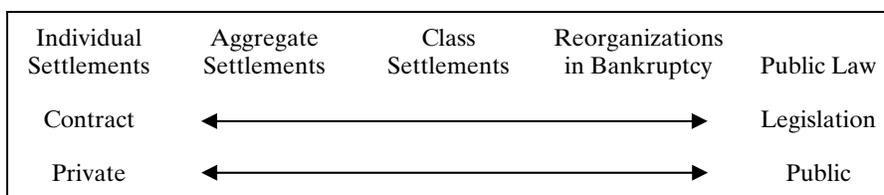
<sup>101</sup> For a more detailed presentation of this interpretation, see Richard A. Nagareda, *Mass Torts in a World of Settlement* 80–94 (Chicago 2007).

<sup>102</sup> See 527 US at 859 (noting that “Fibreboard was allowed to retain virtually its entire net worth”).

passing peace arrangements for the future. And the reason is that such arrangements hold the promise not only of reducing transaction costs<sup>103</sup> but also of bringing into existence additional resources—for instance, through improved market capitalization of the defendant<sup>104</sup>—that would not otherwise exist in a world of ongoing litigation. Creating a viable peace can mean creating value. Instead of continuing to battle over an ever-dwindling pie, lawyers might seek to expand the pie itself—but also, perhaps, to bite off an inordinate piece for themselves or their clients.

Taking a cue from Kalven and Rosenfield's basic distinction between public and private institutions in civil law enforcement, one might arrange the potential vehicles for peacemaking along roughly the following continuum:

FIGURE 1



On the left edge are arrangements that draw their binding authority from notions of individual autonomy and consent under the private law of contracts. Conventional, individual settlements in litigation are the paradigm here, and the level of judicial scrutiny accorded to such settlements—none—aligns with the premise that they simply are matters of private contract. On the right edge is public law—say, asbestos reform legislation of the sort recently considered by Congress based roughly on the *Amchem* model<sup>105</sup> or the federal compensation fund legislation actually enacted as an alternative to litigation against the air-

<sup>103</sup> Transaction costs can be far from trivial. See, for example, *Amchem*, 521 US at 632 (Breyer dissenting) (crediting the estimate of the RAND Institute for Civil Justice that sixty-one cents out of every asbestos litigation dollar were consumed in transaction costs, leaving only thirty-nine cents for asbestos victims).

<sup>104</sup> See, for example, *Georgine v Amchem Products, Inc.*, 157 FRD 246, 291 (ED Pa 1994) (finding as a factual matter that the class settlement would enhance the settling defendants' capacity to tap the capital markets and thereby add to the security of the settlement compensation regime), reversed on other grounds, 83 F3d 610 (3d Cir 1996), affirmed, 521 US 591; John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum L Rev 1343, 1402 (1995) (noting the jump in market capitalization of Fibreboard upon initial disclosure of the *Ortiz* class settlement).

<sup>105</sup> See Fairness in Asbestos Injury Resolution Act of 2005, S 852, 109th Cong, 1st Sess (Apr 19, 2005), in 152 Cong Rec S 786 (Feb 8, 2006).

lines that operated the ill-fated flights of September 11, 2001.<sup>106</sup> There is scant debate at a fundamental level about the binding authority of public law (or administrative regulations issued under its auspices), just as there is little debate over the binding authority of a conventional, individual settlement. The authority of public law also rests on notions of consent, just at the much more abstract, collective level of legislation than in the private law of contracts.

The public-private continuum helps to pinpoint that the arrangements most interesting and, at the same time, most problematic consist of those between the two poles of contract and legislation. Moving from left to right among these middle-range options, one might locate what are known as “aggregate settlements.” These may take a variety of forms.<sup>107</sup> A prototype in the mass tort setting involves the resolution of large numbers of cases—dozens or even hundreds, each nominally separate—represented by the same plaintiffs’ law firm. The notion that supplies binding authority here is, again, one of private contract, with the additional overlay of the aggregate settlement rule in the law of professional conduct.<sup>108</sup> In effect, the rule calls for unanimous consent to the aggregate settlement on the part of all claimants upon disclosure by their lawyer of the basic parameters of the deal for those concerned.<sup>109</sup> Claimants may not contract *ex ante* among themselves for an arrangement that would bind all based on less than unanimity.<sup>110</sup> This feature of current doctrine has the predictable potential to generate holdout problems and, in recent years, reform proposals have sought to authorize at least some modest degree of cramdown pursuant to *ex ante* agreements.<sup>111</sup>

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<sup>106</sup> See Air Transportation Safety and System Stabilization Act, Pub L No 107-42, 115 Stat 230 (2001), codified in various sections of Title 49.

<sup>107</sup> See generally Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 Notre Dame L Rev 1769, 1770 (2005).

<sup>108</sup> See ABA Model Rules of Professional Conduct (MRPC) 1.8(g) (2007) (requiring lawyers representing multiple clients to obtain “informed consent” from each client, in writing signed by the client, before making an aggregate settlement of the claims, and requiring that the lawyers’ disclosures include “the existence and nature of all the claims or pleas involved and the participation of each person in the settlement”). For an illustration of the rancor that aggregate settlements can elicit in the asbestos setting, see *Huber v Taylor*, 469 F3d 67, 69–73 (3d Cir 2006) (detailing the circumstances of a lawsuit against the settling counsel for breach of fiduciary duty predicated on an alleged violation of the aggregate settlement rule).

<sup>109</sup> For the basics of the aggregate settlement rule in current law, see Charles Silver and Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L Rev 733, 734–38 (1997) (arguing that clients and their lawyers should be permitted to agree on alternatives to MRPC 1.8(g)’s disclosure and consent requirements).

<sup>110</sup> See, for example, *The Tax Authority, Inc v Jackson Hewitt, Inc*, 898 A2d 512, 522 (NJ 2006).

<sup>111</sup> See ALI, *Principles of the Law of Aggregate Litigation: Council Draft No 1* § 3.17 (Nov 19, 2007). I serve as one of the reporters for this project, which remains in the draft stage and, as such, does not necessarily reflect the position of the ALI.

Class actions dispense with notions of contractual consent in private law, an observation that Part II shall develop further in connection with due process in the administrative state. Moving still further to the right from class actions, one might place bankruptcy proceedings—in particular, the binding resolution of claims—as part of a reorganization of the defendant under Chapter 11 of the Bankruptcy Code.<sup>112</sup> Unlike class actions that take the form of Article III cases,<sup>113</sup> bankruptcy proceedings garner much of their authority to bind from an express grant of federal regulatory power to Congress in Article I.<sup>114</sup> Unlike the most common form of class action, bankruptcy brooks no opt-outs. Rather, it approaches public legislation in its capacity to enforce on all creditors the terms of the reorganization plan upon judicial confirmation.

A public-private continuum of arrangements in the spirit of Kalven and Rosenfield helps one to situate together two seemingly disparate developments in the aftermath of *Amchem* and *Ortiz*. With the prospects for class settlements in the mass tort area dimmed, if not entirely extinguished,<sup>115</sup> by the Court's decisions, the new terrain for peacemaking predictably has shifted outward in both directions—to aggregate settlements on the immediate left and to Chapter 11 reorganizations on the immediate right. Peace for consolidated federal lawsuits in tort concerning the safety of the prescription drug Zyprexa has taken the form of aggregate settlements that encompass cases by the hundreds, with the practical effect of sending claimants to an administrative compensation regime overseen by court-appointed special masters for the cashing out of their claims. One can find the basics of these aggregate settlements described in opinions of District Judge Jack Weinstein,<sup>116</sup> opinions that owe their existence to a revealing

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<sup>112</sup> 11 USC § 1101 et seq (2000). The alternative approach described in Chapter 7 of the Bankruptcy Code involves liquidation of the debtor. See 11 USC § 701 et seq (2000).

<sup>113</sup> Some commentators question whether class actions brought simply for the purpose of settlement violate the case or controversy requirement of Article III. See, for example, Martin H. Redish and Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U Chi L Rev 545, 547–48 (2006) (arguing that a settlement class action is “inherently unconstitutional” because it lacks the essential adversarial elements making it a case or controversy for purposes of Article III).

<sup>114</sup> See US Const, Art I, § 8.

<sup>115</sup> See generally *In re Diet Drugs Products Liability Litigation*, 2000 WL 1222042 (ED Pa) (certifying a nationwide settlement class in fen-phen diet drug litigation and approving the proposed class settlement pursuant to Rule 23), affirmed without opinion, 275 F3d 34 (3d Cir 2001); *In re Diet Drugs Products Liability Litigation*, 226 FRD 498 (ED Pa 2005) (discussing significant practical problems in operation of the fen-phen class settlement in the course of approving the seventh amendment to its terms).

<sup>116</sup> See generally, among other opinions, *In re Zyprexa Products Liability Litigation*, 433 F Supp 2d 268 (EDNY 2006) (discussing the basis for judicial oversight of fees in consolidated federal product liability litigation).

point of insistence on his part. Judge Weinstein recognized that these nominally individual settlements of nominally individual cases consolidated in his court<sup>117</sup> amount, in large part, to a “quasi-class action”<sup>118</sup> and, as such, warrant court oversight in a manner beyond the nonexistent judicial review that characterizes conventional settlement in the nature of a purely private contract. The aggregate settlements in the Zyprexa litigation, in short, were sufficiently “public” in character as to make appropriate some degree of judicial care on the class action model.

Another development moves rightward from class actions along the continuum. In the particular area of mass tort litigation at issue in *Amchem* and *Ortiz*, the signal development since the Court’s decisions has consisted of a spate of proceedings under the provision—§ 524(g)<sup>119</sup>—added to Chapter 11 of the Bankruptcy Code by Congress in 1994 specifically for asbestos-related reorganizations. Interestingly enough, the most controversial of these proceedings have involved “prepackaged” reorganization plans, whereby the debtor company negotiates with leading national players within the asbestos plaintiffs’ bar to ensure the requisite voting margin from their clients—a significant block of the company’s creditors—in favor of plan confirmation, all in advance of the actual filing of any bankruptcy petition.<sup>120</sup> Given the striking similarity in process to the class actions brought simply for purposes of settlement in *Amchem* and *Ortiz*, it comes as little surprise that courts in recent years—most notably, the Third Circuit in two pathbreaking decisions<sup>121</sup>—have undertaken scrutiny for collusion

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<sup>117</sup> The consolidation of pending federal Zyprexa lawsuits by the Judicial Panel on Multidistrict Litigation defined the reach of the aggregate settlements, thereby making unnecessary a nexus to particular plaintiffs’ law firms in the manner of such settlements in the absence of judicial consolidation.

<sup>118</sup> See *In re Zyprexa*, 433 F Supp 2d at 271 (“While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action; it may be characterized properly as a quasi-class action subject to the general equitable power of the court.”).

<sup>119</sup> 11 USC § 524(g) (2000).

<sup>120</sup> For criticism of these § 524(g) prepackaged reorganizations, see Mark D. Plevin, Leslie A. Epley, and Clifton S. Elgarten, *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Courts*, 62 NYU Ann Surv Am L 271, 273 (2006) (arguing that the court-appointed future claimants’ representative under § 524(g) generally lacks independence and is “ beholden to the debtor and current claimants”).

<sup>121</sup> See *In re Congoleum Corp.*, 426 F3d 675, 679 (3d Cir 2005) (overturning, on conflict of interest grounds, the use of a law firm as special counsel for the debtor corporation in a prepackaged reorganization plan); *In re Combustion Engineering, Inc.*, 391 F3d 190, 233–38 (3d Cir 2005) (overturning the confirmation of a prepackaged reorganization plan for lack of compliance with limitations of the Bankruptcy Code concerning the extension of channeling injunctions to non-debtor corporations).

in the voting process by which § 524(g) reorganization plans seek to wield their governing authority. In one such case, the Third Circuit pointed specifically to reasoning from *Amchem*, thus implicitly underscoring the proximity of class settlements and § 524(g) prepackaged reorganizations along the continuum.<sup>122</sup>

These developments, together, elaborate Kalven and Rosenfield's institutional account of class actions in the administrative state along the public-private divide. The important insight here is that the law should not regard the institutional questions surrounding class actions simply as class action questions. In a world where the continuum of arrangements for peacemaking ranges from the purely private realm of contract to the fully public domain of legislation, the challenge for the law lies in developing a suitably mixed account of how those arrangements may achieve closure with legitimacy.<sup>123</sup> The comparison to the administrative state is far from accidental in this regard. As Part II shall discuss, Kalven and Rosenfield's comparison of class actions with the administrative state suggests how such an account necessarily must look beyond the vocabulary and conceptual categories familiar to civil litigation today.

## II. PRECLUSION BY THE CONSENT OF THE GOVERNED

Like all civil settlements, class settlements are nominally contracts. But, as the preceding Part has suggested, the underlying notion of mutual consent in a class settlement differs markedly from that in contract law. Consent does not take the form of the individual, autonomous meeting of the minds envisioned at common law or, for that matter, in a conventional, one-on-one lawsuit. Consent on the part of absent class members instead takes place at a much more ephemeral level and, usually, only by implication from inaction: a failure to opt out of the class action upon notice of its pendency. Insofar as consent occurs in a more conventional form, that consent flows not from absent

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<sup>122</sup> See *In re Combustion Engineering*, 391 F3d at 245 (“In the resolution of future asbestos liability, under bankruptcy or otherwise, future claimants must be adequately represented throughout the process.”), citing *Amchem*, 521 US at 625–28.

<sup>123</sup> The continuum sketched here suggests that the results of *Amchem* and *Ortiz* in the asbestos context specifically have been quite peculiar in institutional terms. By circumscribing dramatically the use of class settlements in Article III courts, the Supreme Court's decisions have had the effect of pushing efforts at comprehensive settlement toward institutional arrangements that are, if anything, even less suitable: aggregate settlements, subject to no judicial review (absent the kind of “quasi-class action” in consolidated litigation seen in the *In re Zyprexa* example from outside the asbestos setting), or reorganizations in bankruptcy, handled in the first instance by Article I courts and only thereafter subject to Article III oversight. It is hard to imagine that an institutional designer would come up with such a menu of options for the law if asked to consider as an initial matter how to organize peacemaking in asbestos litigation.

class members themselves but, rather, from class counsel—lawyers who assert the authority to bargain for the class as a unit but whom the vast majority of its members have neither retained as their lawyers nor, for that matter, even met. The “contemporary function” ascribed to class actions by Kalven and Rosenfield has given rise to a second major dilemma for the law today: how to harness the capacity of the class action to facilitate the private enforcement of legal rights chiefly by way of settlements while, at the same time, setting limits on the preclusion of class members in the absence of conventional consent. Mass tort class settlements present this dilemma in its starkest form. But tension between the latitude for creativity in settlement designed to unlock mutual gains and the need for limits on preclusion inheres in class settlements of all sorts.

At the outset, this Part identifies the feature of the procedural landscape in 1941 that led Kalven and Rosenfield largely to miss the dominance of settlement as the endgame of class action litigation and the consequent centrality of preclusion to its real-world operation today. This Part then shows how Kalven and Rosenfield’s comparison of class actions to the administrative state nonetheless serves to frame developments in class action scholarship in recent decades as well as avenues for fresh thinking about preclusion and due process. The tension between latitude and limits for class settlements bears a striking resemblance to the enterprise traditionally prescribed for administrative law: to afford latitude for administrative agencies to engage in sound governance under broad delegations of power while simultaneously enforcing limits that hew agencies to the rule of law.<sup>124</sup> It therefore should not surprise us that an account of due process grounded in some very basic principles from the administrative realm might bear on the dilemma of preclusion for class actions.

#### A. From One-way Intervention to Exit, Voice, and Loyalty Rights

Rightly invoked today for the account of class actions and administrative enforcement set forth in its beginning and end, Kalven and Rosenfield’s Article spends much of its middle pages endorsing one-way intervention in class actions: the notion, embraced by the Rules at the time, that absent class members could choose to benefit from a judgment in their favor but would not suffer the preclusive detriment

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<sup>124</sup> See, for example, Christopher F. Edley, Jr., *Administrative Law: Rethinking Judicial Control of Bureaucracy* 6–7 (Yale 1990) (“[T]he continuing dilemma for administrative law has been that the effort to impose Rule of Law constraints on agencies must contend with the critique that judicial review simply replaces the *objectionable discretion of the administrator* with the *objectionable discretion of the judge*.”).

of a judgment for the defendant.<sup>125</sup> The crux of Kalven and Rosenfield's embrace of one-way intervention lay in their concern that absent class members, unlike the defendant as a conventional party to the action, would not have had their "day in court to a comparable degree" and therefore could not fairly be precluded by a class judgment absent affirmative, individualized consent.<sup>126</sup> The image of a proverbial "day in court" bespeaks the focus of procedural thinking at the time on trial, rather than settlement, as the endgame for civil litigation. Settlement, in any event, posed little difficulty on Kalven and Rosenfield's account, for class members would opt into the deal affirmatively, if at all.

The most significant change made by the 1966 Amendments to the federal class action rule consisted of their replacement of one-way intervention<sup>127</sup> with the modern opt-out class action that now dominates the use of the device in practice.<sup>128</sup> Where class members no longer would opt affirmatively into a class judgment, a different account of consent became necessary. In its 1985 decision in *Phillips Petroleum Co v Shutts*,<sup>129</sup> the Supreme Court offered a version of consent for the modern opt-out class action. The context of the dispute in *Shutts*, however, raised the consent question in a somewhat circuitous fashion.

*Shutts* involved an opt-out class action for damages in Kansas state court that purported to bind class members sprinkled across the country, the vast majority of whom lacked the "minimum contacts" necessary for the assertion of personal jurisdiction over a civil defendant in keeping with federal constitutional due process.<sup>130</sup> The *Shutts* Court famously rejected traditional minimum contacts analysis as the touchstone for personal jurisdiction over absent class members, emphasizing that the intrusiveness of the proceedings on them was less in kind than that for a party haled into court to defend itself.<sup>131</sup> What made the Kansas court's assertion of personal jurisdiction over the plaintiff

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<sup>125</sup> See Kalven and Rosenfield, 8 U Chi L Rev at 691–707 (cited in note 1).

<sup>126</sup> See *id* at 713.

<sup>127</sup> See FRCP 23(b)(3), Advisory Committee Notes (1966 Amendments) (noting that Rule 23(b)(3) excludes one-way intervention).

<sup>128</sup> See Willging, Hooper, and Niemic, 71 NYU L Rev at 93–94 (cited in note 5) (documenting the prevalent use of opt-out classes under Rule 23(b)(3) and the comparatively rare use of Rule 23(b)(1) or (b)(2) mandatory classes).

<sup>129</sup> 472 US 797 (1985).

<sup>130</sup> See *id* at 806 (referencing the minimum contacts standard as a means of establishing personal jurisdiction over out-of-state defendants), citing *International Shoe Co v Washington*, 326 US 310 (1945) (explaining that a defendant need only have "certain minimum contacts" with a state to confer personal jurisdiction, even if the defendant is not physically present in that state).

<sup>131</sup> See 472 US at 808–09 ("In sharp contrast to the predicament of a defendant haled into an out-of-state forum, the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment.").

class fundamentally fair consisted not of any territorial notion of authority grounded in minimum contacts with the forum but, instead, of an array of what commentators accurately label as “exit,” “voice,” and “loyalty” rights: the opportunity to opt out and thereby escape the preclusive effect of any class judgment; the right to notice and to participate in the action; and the right to adequate representation in the proceedings.<sup>132</sup> On the Court’s account, the law fairly may take inaction by class members in the face of this array of rights to constitute consent to jurisdiction over their persons, even by a remote forum.

The literature on *Shutts* is considerable, including an important recent symposium that traces its continued significance after two decades.<sup>133</sup> Two points help to link the account of implied consent in *Shutts* to Kalven and Rosenfield’s notion of the class action in parallel with the administrative state. The first point concerns the exit-voice-and-loyalty typology itself. As commentators readily note, the typology is far from one unique to the law of class actions.<sup>134</sup> The array of rights that underlie the inference of consent in *Shutts* parallels the array that individuals might have within a variety of other governing arrangements—say, shareholders within a private corporation or citizens within a public regime of government, such as the administrative state.<sup>135</sup>

The second point speaks to the relative use of exit, voice, and loyalty rights, picking up an implication from the comparison to other kinds of governing arrangements. The relative roles of the three types of rights need not be the same in all regimes of governance. In the corporate setting, for example, shareholders have a relatively easy exit

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<sup>132</sup> See *id.* at 812 (rejecting the contention that the Due Process Clause requires that absent plaintiffs affirmatively “opt in” to the class rather than be deemed members of the class if they fail to “opt out”). Application of the exit, voice, and loyalty labels stems from Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup Ct Rev 337, 366 (presenting various strategies to guarantee faithful representation “along the familiar pathways of exit, voice, and loyalty as the framework for institutional design”), and John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum L Rev 370, 376–77 (2000) (analogizing the class action to an organizational form involving a principal-agent relationship and assessing “exit,” “voice,” and “loyalty” as alternative mechanisms by which to modify behavior within the organization).

<sup>133</sup> See *Class Action Symposium: The Twentieth Anniversary of Phillips Petroleum Co. v. Shutts*, 74 UMKC L Rev 487 (2006). For an assessment shortly after the Court’s decision, see generally Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L J 1 (1986).

<sup>134</sup> The class action literature appropriately traces the typology to a classic of political theory: Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard 1970). See Issacharoff, 1999 Sup Ct Rev at 366 n 104 (cited in note 132); Coffee, 100 Colum L Rev at 376 n 17 (cited in note 132).

<sup>135</sup> It thus is not by happenstance that the commentators who highlight the kinship with Hirschman—Issacharoff and Coffee—should also be leading scholars, respectively, of the political process in public law and the corporation in private law.

option (to sell their shares) and benefit from measures to induce loyalty on the part of corporate managers but, at the same time, have voice rights that are relatively circumscribed within the firm.<sup>136</sup> In the class action context, empirical research in recent years has underscored the rarity with which absent class members exercise exit and voice rights in practice.<sup>137</sup> For all the significance that those rights might assume in a theory of consent as a way to legitimize preclusion, it seems clear that any such legitimacy grounded in a positive account of how class actions actually work cannot plausibly place great weight on those rights. In positive terms, consent as a basis for legitimacy must stem primarily from notions of loyalty. It is here that the parallel to the administrative state has a potential significance that the law is only starting to recognize.

#### B. Due Process as Loyalty over Time

That the preceding discussion should speak in terms of a positive account of class actions is no accident. As I now explain, one may read much of class action scholarship in recent years as pursuing a positive agenda analogous to that emerging in administrative law scholarship at proximate times. Like all cross-subject matter comparisons, this one carries the usual risks of overgeneralization and suppression of nuance. In the spirit of Kalven and Rosenfield's overtly crosscutting analysis, nonetheless, I venture to suggest that administrative law scholarship yields a larger perspective within which to situate recent insights on class actions in a way that can advance our thinking about the problem of preclusion.

##### 1. The contributions of positive theory.

An increasingly important addition to the literature on the administrative state in recent years draws on positive political theory. Whereas "administrative law has typically been seen as an antidote to politics," scholars influenced by positive political theory posit that the "dichotomy between administrative law and administrative politics is a false one."<sup>138</sup> As one prominent figure in this literature explains, "Con-

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<sup>136</sup> See generally Henry Hansmann and Reinier Kraakman, *Agency Problems and Legal Strategies*, in Reinier Kraakman, et al, eds, *The Anatomy of Corporate Law: A Comparative and Functional Approach* 21, 23–28 (Oxford 2004).

<sup>137</sup> See note 15.

<sup>138</sup> Daniel B. Rodriguez, *Administrative Law*, in Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, eds, *The Oxford Handbook of Law and Politics* 340, 351 (Oxford forthcoming 2008), summarizing Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*,

gress creates . . . administrative organizations in order to fulfill and further political agendas; and legislators will structure internal administrative procedures (for example, ‘notice and comment rulemaking’) in order to improve the capacity for legislators to govern.”<sup>139</sup> The “essential insight” is that “agencies will make choices in the shadow of Congressional and judicial preferences and strategies and the other relevant institutions will act purposively as well.”<sup>140</sup> Positive political accounts, in short, situate the administrative state and administrative law doctrine as the byproducts of institutions pursuing their own self-interested, political ends. Those institutions, the officials that run them, and their motivations comprise the starting points, and administrative law the ending point, not vice versa. Positive political accounts nonetheless do not proceed from a single methodology but, rather, encompass formal modeling<sup>141</sup> and case studies,<sup>142</sup> among other approaches, in addition to theoretical analysis.

In recognizing the turn toward positive political theory in administrative law scholarship, I do not mean to anoint it above other longstanding accounts that emphasize the role of agency expertise,<sup>143</sup> judicial review at the behest of concerned interest groups,<sup>144</sup> or presidential supervision.<sup>145</sup> Nor should one fall into the trap of caricaturing positive political theory as wholly unconcerned with law or questions of legitimacy in the administrative state. To the contrary, thoughtful recent commentary envisions the possibility of integrating the insights of positive political theory with existing perspectives so as to enrich the discussion of longstanding questions about legality and legitimacy—

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75 Va L Rev 431 (1989), and Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J L, Econ, & Org 243 (1987).

<sup>139</sup> Rodriguez, *Administrative Law* at 352 (cited in note 138).

<sup>140</sup> *Id.* at 353.

<sup>141</sup> See generally, for example, Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 Harv L Rev 1035 (2006) (modeling when a rational legislator would prefer to delegate interpretive authority over an ambiguous statute to an administrative agency or to a court).

<sup>142</sup> See for example, McCubbins, Noll, and Weingast, 75 Va L Rev at 445–81 (cited in note 138) (providing a case study of air pollution regulation).

<sup>143</sup> The classic account is James M. Landis, *The Administrative Process* (Yale 1938) (emphasizing the latitude needed for administrative agencies to bring to bear expertise on complex regulatory problems).

<sup>144</sup> See generally, for example, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv L Rev 1669 (1975) (explaining how broad participatory rights within agencies and expanded opportunities for judicial review, among other developments during the 1960s and 1970s, enable concerned interest groups to influence and to constrain the administrative state).

<sup>145</sup> See generally, for example, Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245 (2001) (arguing that the president is well suited on pragmatic grounds to play a coordinating role across the multiplicity of agencies); Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L J 541 (1994) (presenting an originalist account of agencies under a unitary executive).

to construct richer accounts of those concepts based on an unsentimental, positive understanding of the administrative state.<sup>146</sup> If measures to enhance legitimacy must, in some sense, be layered atop strategic behavior by political institutions, then one surely should develop a detailed sense of the stratum on which such layering must occur.

My point here is to highlight the affinity between positive political accounts of the administrative state and the thrust of much thinking about class actions over the past decade or so. On this view, one may situate together the concerns voiced about such things as “reverse auctions” for class settlements,<sup>147</sup> abuse of coupon settlements,<sup>148</sup> and the design of class settlement terms to suit the desired calculation of the fee award for class counsel.<sup>149</sup> Broadly stated, much class action scholarship sees such lawsuits—especially class settlements—primarily as the byproducts of lawyers for both plaintiffs and defendants who are pursuing their own self-interested business ends. These actors and the financial parameters in which they operate comprise the starting point and class settlements the ending point. If administrative law scholarship has pursued a positive political theory of administration, then so, too, has class action scholarship pursued a similarly positive account of class action lawyering. Here, again, the point is not that law

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<sup>146</sup> See, for example, Rodriguez, *Administrative Law* at 355 (cited in note 138) (“At base, a richer understanding of the political foundations of administrative law and attention to the role of politics and political strategy in regulatory decisionmaking better explains certain patterns in contemporary administrative law.”); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 *Colum L Rev* 1749, 1753 (2007) (synthesizing the legal scholarship on administrative law and positive political theory to argue that “the Court has produced rules that bring agencies in line with the constitutional structure by negotiating the political forces in the administrative process”).

<sup>147</sup> The term “reverse auction” refers to the process by which the defendant chooses to negotiate the class settlement with the firm within the plaintiffs’ bar prepared to offer the most advantageous settlement terms by comparison to competitors for the class representation. See *Reynolds v Beneficial National Bank*, 288 F3d 277, 282 (7th Cir 2002); Coffee, 95 *Colum L Rev* at 1370 (cited in note 104) (citing “reverse auctions” as an “old form of collusion” used in class actions with large claimant groups).

<sup>148</sup> See *In re General Motors Corp Pick-up Truck Fuel Tank Product Liability Litigation*, 55 F3d 768, 803 (3d Cir 1995) (noting that class settlements involving “only non-cash relief” may suggest that the interests of class members were not adequately vindicated). See generally Geoffrey P. Miller and Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 *L & Contemp Probs* 97 (1997) (seeking to “replace some of the recent hysteria about coupon and other nonpecuniary settlements with a more balanced account that identifies the benefits, as well as the costs, of such agreements”).

<sup>149</sup> This is a particular concern for employment discrimination class settlements that embrace injunctive measures of minimal benefit to the class—say, measures that the defendant already is planning to implement or that primarily enhance its public relations—but to which class counsel nonetheless ascribe a dollar figure for the purpose of their fee request for a percentage of the overall class recovery. See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 *Tex L Rev* 1249, 1268–97 (2003) (discussing illustrative cases).

and legitimacy somehow do not matter, only that a richly textured law of class actions—like its counterpart for the administrative state—should proceed from an unsentimental, positive story about what and whom it ultimately must regulate. Both positive political accounts of the administrative state and class action scholarship in recent years characterize their respective subject matter as presenting some version of a principal-agent problem—for administration, the concern that agencies will drift from the preferences of their legislative creators<sup>150</sup> and, for class actions, the fear that lawyers will serve themselves while disserving the members of the class.

The focus on class action lawyering is by no means unique within the annals of scholarship on civil litigation generally. Perhaps the major development within that broader genre in recent decades has consisted of a shift from the traditional attention to procedural doctrine as developed by appellate courts—something that the justly famous treatise *Federal Practice and Procedure*<sup>151</sup> carries forward to the present day—to efforts to explain what cases get litigated, which ones get settled, and why.<sup>152</sup> In civil litigation scholarship generally, attention to what real litigators do has come to enrich the previous focus on what appellate judges do. And here, too, different methodologies coexist, ranging across formal economic models,<sup>153</sup> finance,<sup>154</sup> empirical analysis,<sup>155</sup> and narrative accounts drawn from field experience,<sup>156</sup> among other approaches.

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<sup>150</sup> See, for example, Terry M. Moe, *Political Control and the Power of the Agent*, 22 *J. L., Econ. & Org.* 1, 3 (2005) (describing the “primordial act of organization” in the administrative state in terms of the creation of a “built-in” principal-agent problem).

<sup>151</sup> Charles Alan Wright and Arthur R. Miller, 4 *Federal Practice and Procedure* (West 3d ed 2002), and subsequent numbered volumes on civil procedure.

<sup>152</sup> For overviews of the literature, see generally Bruce L. Hay and Kathryn E. Spier, *Settlement of Litigation*, in Peter Newman, ed, 3 *The New Palgrave Dictionary of Economics and the Law* 442 (Macmillan 1998) (providing an overview of the law and economics literature on civil settlements); Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 *Fla. St. U. L. Rev.* 1265 (2002) (summarizing the law and economics model of why cases are litigated and discussing some limitations that the model faces in accounting for observed real-world behavior).

<sup>153</sup> See, for example, Shavell, *Foundations of Economic Analysis* ch 17 (cited in note 19).

<sup>154</sup> See, for example, Grundfest and Huang, 58 *Stan. L. Rev.* 1267, 1279 (cited in note 19).

<sup>155</sup> See generally, for example, Kathryn Zeiler, et al, *Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims, 1990–2003*, 36 *J. Legal Stud.* S9 (2007) (documenting significant influence of insurance coverage limits on settlements in medical malpractice litigation).

<sup>156</sup> See, for example, Herbert M. Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* 1–9 (Stanford 2004).

## 2. Implications for due process.

Now, take a fresh look at the notion of loyalty in class representation as a central component of what legitimizes the class action. The recognition that exit and voice rights have only a limited capacity to act as significant constraints on class action lawyers in most instances is not accidental. Exit and voice rights in the nature of self-help flow from conventional notions of individual litigant autonomy, notions that the mass, aggregate nature of the class action belies virtually by necessity. Turning away from notions of self-help beholden to the autonomy enjoyed in conventional civil actions is a step that should be as welcome as it is discomfoting. Turning away from individual autonomy only highlights the hard question: to what do we now turn? Class action scholarship is pressing toward an account of lawyering in its sphere on the order of what positive political theory promises for the administrative state. One need not await a complete elaboration of that account, however, in order to see, even at this very early juncture, how some basic ideas about due process in the administrative state might begin to form new kinds of answers to the loyalty question.

As an initial matter, it bears emphasis that the developments sketched here are tentative and incomplete. They do not form, by any stretch of argument, a comprehensive prescription for the dilemmas of the class action today. Still, there are hints. In procedural terms, the dominant mode of administrative agency action since the New Deal has shifted from policymaking through case-by-case adjudication to the use of prospective rulemaking.<sup>157</sup> Class settlements involve a mixture of these two modes, using what is literally an adjudication (though usually not an adversarial one) to substitute prospectively a new set of rules (the class settlement terms) for the rights of action previously retained by class members. This observation, appropriately enough, is in keeping with the position of the class action midway along the continuum sketched in Part I. The point of the nominal adjudication by the public institution of the court is to bind class members to a problematic kind of private contract.

The revealing point from the law of the administrative state is this: due process for agency rulemaking has long consisted not of the kind of individualized autonomy in the nature of self-help, on which empirical research has cast doubt for class actions. What makes it fundamentally fair as a constitutional matter for agency rules to rule, so

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<sup>157</sup> See Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup Ct Rev 345, 407 (noting that the Supreme Court itself countenanced this shift by casting the choice between rulemaking and adjudication in *SEC v Chenery Corp*, 332 US 194 (1947), as one generally within the unfettered discretion of the agency).

to speak, consists of measures to tie the long-term self-interest of the rulemakers in retention of office to the welfare of those whom they govern. As Justice Oliver Wendell Holmes, Jr., bluntly stated for the Court in *Bi-Metallic Investment Co v State Board of Equalization*<sup>158</sup> at the outset of the twentieth century, the recourse for persons affected by agency rulemaking does not lie in giving them “a chance to be heard” in any sense familiar to the adjudicatory process; rather, “[t]heir rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”<sup>159</sup>

Seen from an administrative perspective, the difficulty that attends preclusion for class actions is not that those proceedings extend too broadly but, rather, that they do not extend broadly enough in one crucial sense: they tend toward one-shot transactions that do not extend the relationship between the governors and the governed in such a way as to make credible a threat of the latter “over those who make the rule.” An account of the binding quality of class actions not beholden to notions of individual litigant autonomy would be an account that builds a governing structure for that device along the lines of the one long considered to legitimize the binding quality of administrative rules. Here, an unsentimental, positive theory of class action lawyering has a productive role to play by highlighting the connection between behavior and matters of litigation finance.

One small step along these lines consists of decoupling the fee award for class counsel from their initial creation of the “common fund” for class members with respect to class settlements that involve the use of coupons. What rightly matters in this corner of the class settlement world is not the overall value of the coupons made available to class members but, rather, the value of those actually redeemed.<sup>160</sup> But the point is not one confined to the narrow context of coupon settlements. As suggested earlier by reference to empirical work on securities class actions,<sup>161</sup> concerns surrounding class settlement take-up rates are by no means unique to deals that pay class members in scrip. They also attend familiar sorts of class settlements that leave

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<sup>158</sup> 239 US 441 (1915).

<sup>159</sup> *Id.* at 445. Some scholars read *Bi-Metallic* as a declaration that constitutional due process simply does not apply in agency rulemaking rather than as a statement that the process due in that setting consists of the political process. See, for example, Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Action Affecting the Community*, 39 UCLA L Rev 1251, 1256 (1992). Whatever the semantic formulation, however, the shared point remains that due process in rulemaking does not consist of the kind of individual autonomy that continues to dominate discussions of civil litigation.

<sup>160</sup> See 28 USCA § 1712(a) (2007).

<sup>161</sup> See text accompanying note 96.

class members to “come and get it,” even when “it” would take the usual form of a check.

One can see a similar move made after the fact in class settlements that contemplate a process of claims administration expected to remain ongoing for some period of time. Here, too, courts have delayed final fee awards to class counsel pending real-world experience with the workings of the claims administration process.<sup>162</sup> At the broadest level, efforts to use the fee award process to extend—if only modestly—the relationship between the governors and the governed would warrant a rethinking of *Boeing Co v Van Gemert*,<sup>163</sup> a 1980 decision in which the Supreme Court held that the common fund for purposes of a fee award to class counsel on restitutionary principles consists of the fund made available to class members rather than the portion actually claimed.<sup>164</sup> *Boeing* points the law of class counsel fee awards in precisely the wrong direction by enhancing the one-shot nature of the class action.

For that matter, quite apart from what courts might do by way of fee doctrines, class counsel might choose to link their fee award request to the actual operation of the deal for the benefit of class members—essentially, as a vouching mechanism that a reviewing court then might take into consideration in its loyalty analysis. Class settlements that effectively extend over time the relationship between class counsel and class members might fairly be taken to demand less in the way of other assurances of representational adequacy—say, less in the way of subclassing to account for differences within the proposed class. Such an approach effectively would create a direct link to class counsel’s well-being to substitute, in part, for the circuitous link thought to flow from the supervision of the class litigation by a class representative who is like absent class members in relevant respects. The latter idea, too, is an offshoot of conventional litigant autonomy—a kind of autonomy by way of solipsism, of having the class litigation nominally headed by someone just like one’s self.

More dramatic innovations would look beyond the parameters of a particular class action. Appointment as class counsel—something that Rule 23(g) casts as a matter for judicial determination as part of

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<sup>162</sup> See Memorandum and Pretrial Order No 2622, *In re Diet Drugs Products Liability Litigation*, Civ No 99-20593, \*25 (ED Pa filed Oct 3, 2002), available at <http://fenphencentral.com/feeaward.pdf> (visited Apr 16, 2008) (delaying a fee award to class counsel for the fen-phen class settlement in light of formidable problems encountered in claims administration); *Bowling v Pfizer, Inc.*, 922 F Supp 1261, 1283–84 (SD Ohio 1996) (delaying a fee award for class counsel in the Björk-Shiley heart valve class settlement in order to account for claims experience).

<sup>163</sup> 444 US 472 (1980).

<sup>164</sup> See *id* at 480.

class certification<sup>165</sup>—might take into consideration the firm’s track record in prior class settlements. Here, the law might draw a useful lesson from the observed internecine warfare within the securities plaintiffs’ bar in recent years, whereby competitors have sought to displace the prominent firm of Milberg Weiss as class counsel in pending litigation by pointing to federal prosecutors’ indictment of the firm for kickbacks paid by its lawyers to class representatives in previous securities class actions.<sup>166</sup> Whether one views the Milberg Weiss indictment as a breakthrough or a politicized outrage,<sup>167</sup> the competitive dynamics it has unleashed have the potential to serve loyalty in class actions generally. Whatever one’s view on kickbacks to class representatives said to come from class counsel’s credenza of cash,<sup>168</sup> there is broad agreement that the terms of class settlements for class members are a proper subject of concern on loyalty grounds.<sup>169</sup>

Interestingly enough, CAFA might have a beneficial effect here, albeit an unanticipated one. In keeping with Kalven and Rosenfield’s account of class actions as a parallel means of civil law enforcement, CAFA requires the providing of notice concerning proposed class settlements under its auspices to pertinent public officials—ostensibly, to enable them to object to deals that they perceive as contrary to the public interest.<sup>170</sup> Apart from whether these notices elicit the desired

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<sup>165</sup> FRCP 23(g)(1)(A) (“Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.”).

<sup>166</sup> See *In re Organogenesis Securities Litigation*, 241 FRD 397, 409–10 nn 73–74 (D Mass 2007) (canvassing decisions both ways with respect to motions to disqualify Milberg Weiss).

<sup>167</sup> For an assessment between these two extremes, see Richard A. Nagareda, *Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards*, 53 UCLA L Rev 1483, 1494–95 (2006) (noting that securities law itself positions the class representative as a gatekeeper who stands between plaintiffs’ law firms and the financial rewards of class representation and, as such, virtually invites efforts at rent extraction by the gatekeeper vis-à-vis such firms).

<sup>168</sup> The existence of such a credenza is among the allegations leveled against Milberg Weiss. See Peter Elkind, *The Law Firm of Hubris Hypocrisy & Greed*, *Fortune* 154, 164 (Nov 13, 2006). On the various methods of apportionment among the Milberg Weiss partners for these payments, see Statement of Facts in Support of David J. Bershaw Plea Agreement and Information, *United States v Milberg Weiss Bershaw & Schulman LLP*, No CR 05-587(B)-JFW, \*5–7 (CD Cal filed July 9, 2007), available at <http://fortunelegalpad.files.wordpress.com/2007/07/milberg-bernhard-statement-of-facts.pdf> (visited Apr 16, 2008).

<sup>169</sup> The suggestion here builds on earlier efforts to reposition voice rights not as avenues for individual litigant autonomy in class actions but, instead, as a means by which competitive rivals to class counsel might object to unfair class settlements, with the prospect of the court thereupon replacing incumbent class counsel with the successful objecting rival. See Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 Hofstra L Rev 633, 639–43 (2003) (suggesting that courts evaluating class settlements could allow objectors to file ex post bids for the right to represent the class).

<sup>170</sup> See CAFA § 3, 119 Stat at 7, codified at 28 USCA § 1715 (2007) (explaining the required notifications to appropriate federal and state officials and the consequences of noncompliance). On the rationale for this notice requirement, see S Rep No 109-14 at 32 (cited in note 32) (“28 USC [§] 1715 ... is designed to ensure that a responsible state and/or federal official receives

objections or simply amount to paper pushing, they might form the beginnings of a public database on high-stakes, national class action settlements<sup>171</sup> — at the very least, grist for empirical research and, perhaps, more broadly, a resource with which to assess would-be class counsel's track record. This database notion also would benefit from an existing scholarly proposal, within the parameters of the class settlement fairness hearing, to push toward a greater degree of uniformity in the presentation of notice information.<sup>172</sup>

The effect of such measures within the class action plaintiffs' bar would run in a direction similar to the unintended outgrowth of CAFA's federalizing impulse. In all likelihood, the effect would be to enhance the competitive position of major, nationally oriented firms with the capital to establish and maintain a strong track record. Class action law, in other words, might enhance the reputational constraint on such firms in the market for class representation as a way to enhance loyalty in a manner separate from notions of individual litigant autonomy.

Administrative law scholarship nonetheless offers a major cautionary note for this enterprise. A now-familiar observation in the literature voices concern over the ossification of agencies by administrative law itself<sup>173</sup> — a disinclination to pursue ambitious, cutting-edge initiatives to advance the objectives of public legislation due to the demands of process and judicial review accumulated in administrative law doctrine over the years. A similar ossification of the class action plaintiffs' bar would disserve rather than refine Kalven and Rosenfield's vision. That such a concern should now occupy the law of class actions, nonetheless, is further testament to the continued vitality of their Article. If anything, the positive account of class action lawyering that is the current scholarly generation's primary achievement in the area underscores that a convincing account of legitimacy cannot be one that undermines the basis for such lawyering itself.

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information about proposed class action settlements and is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies.”).

<sup>171</sup> I am grateful to Brian Fitzpatrick for suggesting the database possibility.

<sup>172</sup> See William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L Rev 1435, 1461 (2006) (drawing an analogy between class settlement notices and labeling of consumer food products).

<sup>173</sup> For an assessment of the ossification literature, see William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals through Informal Rulemaking?*, 94 Nw U L Rev 393, 396 (2000) (concluding that judicial review under the hard look doctrine did not tend to impede significantly the pursuit of policy goals by regulatory agencies during the decade under review).

## CONCLUSION

The period since Kalven and Rosenfield's 1941 Article has witnessed the elaboration in practice of the class action in parallel with the administrative state. Far from making the Article seem quaint or dated, that elaboration underscores its prescience. The "contemporary function" that Kalven and Rosenfield envisioned for class actions in their time has given rise to contemporary dilemmas for the device today—to its awkward operation within the structure of government in the United States and to an ongoing search for the source of its binding authority in the absence of conventional, individualized consent. If the dilemmas of today are the intellectual grandchildren of Kalven and Rosenfield, then it is only fitting that resolution of those dilemmas should draw on that same lineage. What is needed for the class action today is, once again, an account of its place within the administrative state—a sorting out of its simultaneously public and private dimensions—just one now informed by the rich, positive accounts of class action lawyering and the administrative enterprise itself that are the hallmarks of scholarship in the present generation.