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CLASS ACTIONS ALL THE WAY DOWN

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Response to: Michael D. Sant’Ambrogio & Adam Zimmerman, The Agency Class Action, 112 Colum. L. Rev. 1992 (2012).

INTRODUCTION

In his review of *Kill Bill Volume 1*, Roger Ebert describes the film as “kind of brilliant,” and then proceeds to quote Manny Farber’s definition of auteur theory: “A bunch of guys standing around trying to catch someone shoving art up into the crevices of dreck.”¹ After reading *The Agency Class Action*,² I felt like I had caught the authors not exactly shoving art up into, but certainly extracting art out of, the crevices of dreck.

The dreck in this case is the class action, arguably the most controversial procedure in civil litigation. The art is the lessons the authors believe the class action can teach us. One of the coauthors, Adam Zimmerman, recently applied the lessons of the class action to the criminal context.³ Here Zimmerman and his coauthor, Michael Sant’Ambrogio, turn their attention to administrative law.⁴ Other scholars have recognized the similarities of the class action to

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1. Roger Ebert, *Kill Bill Volume 1*, *Chicago Trib.* (Oct. 10, 2003), <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20031010/REVIEWS/310100304/1023>.

2. Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 *Colum. L. Rev.* 1992 (2012) [hereinafter Sant’Ambrogio and Zimmerman, *Agency*].

3. Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 *U. Pa. L. Rev.* 1385 (2011).

4. Admittedly, Zimmerman previously analyzed the intersection of class actions and administrative law in the context of large settlement funds. See Adam S. Zimmerman, *Distributing Justice*, 86 *N.Y.U. L. Rev.* 500 (2011). This earlier article resulted in his article applying class action insights to the criminal law context. See Zimmerman & Jaros, *supra* note 3. However, in *The Agency Class Action*, Zimmerman and Sant’Ambrogio apply class action insights directly to administrative law as a whole. Many thanks to Adam Zimmerman for clarifying this.

administrative law, perhaps most famously the late Richard Nagareda.⁵ But Zimmerman and Sant’Ambrogio, unlike Nagareda and others, do not use administrative law to criticize the class action. Instead, they use the class action to suggest reforms to administrative law.⁶ It is an approach that is equal parts creative, audacious, and heretical. This is just a long way of saying that I think the Article is “kind of brilliant.”

This Response first situates *The Agency Class Action* within the literature on the class action. It is not an exaggeration to say that the Article is borderline heretical given the current animosity toward the class action. This is not to say that Zimmerman and Sant’Ambrogio view the class action as a panacea. Instead, they move the debate forward by focusing not on the bad of the class action but the good. Indeed, the Article is a throwback to a view of the class action as an important complement to administrative enforcement.

This Response then suggests that, whether the authors are conscious of it or not (and I think they are), the Article contains a much deeper critique of some basic premises that underlie both the law of civil procedure and administrative law. As I have argued in my own work, the class action is not only a source of wisdom, but it upends many common sense notions that underlie a great deal of legal doctrine on civil procedure, most notably the fetish many courts and scholars have with protecting litigant autonomy.⁷ Here, I want to point out that Sant’Ambrogio and Zimmerman’s description of administrative law’s pathologies, and their suggested reforms, implicitly reject a parallel commonly accepted premise of administrative law—the concern with “replacing individual hearings with a potentially faceless, unresponsive bureaucracy.”⁸ In my view, the Article celebrates the benefits of “faceless . . . bureaucracy.”

I. THE CLASS ACTION IS THE SOLUTION!

Sant’Ambrogio and Zimmerman modestly describe the contribution of their Article as “natural, albeit novel.”⁹ The natural part is easy to understand. The modern class action, like the modern administrative state, is a product of the New Deal. Although class actions, in one form or another, have been

5. See Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich. L. Rev. 899, 945–52 (1996) [hereinafter Nagareda, *Turning*] (arguing “[i]n evaluating the fairness of a mass tort settlement under Rule 23(e), courts should draw upon the . . . framework for judicial review in administrative law”); see also Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. Chi. L. Rev. 603, 605 (2008) [hereinafter Nagareda, *Revisited*] (arguing class actions should be designed consistent with “institutional boundaries on regulatory power” imposed on administrative agencies).

6. Sant’Ambrogio and Zimmerman, *Agency*, supra note 2, at 2002 (recognizing Article “turn[s] the tables to ask what agencies can learn from complex litigation”); id. at 2066 (noting Article’s proposed agency class action “borrow[s] rules from private class action litigation to better resolve disputes within a public agency”).

7. Sergio J. Campos, *Mass Torts and Due Process*, 65 Vand. L. Rev. 1059 (2012) [hereinafter Campos, *Mass Torts*]; Sergio J. Campos, *Proof of Classwide Injury*, 37 Brook. J. Int’l L. 751 (2012) [hereinafter Campos, *Proof*].

8. Sant’Ambrogio and Zimmerman, *Agency*, supra note 2, at 2001.

9. Id. at 2002.

around for centuries,¹⁰ the contemporary class action did not enter the American legal scene until the tail end of the New Deal, roughly around the promulgation of the first Federal Rules of Civil Procedure in 1938.¹¹

As Sant’Ambrogio and Zimmerman point out, “the modern administrative state, like the class action, originally developed in response to intractable disputes involving large groups of people.”¹² For example, in their seminal article *The Contemporary Function of the Class Suit*, published in 1941, Harry Kalven, Jr. and Maurice Rosenfield acknowledged the emergence of administrative law as a means to deal with harm caused to a large number of dispersed persons.¹³ In their words, “[a]dministrative law removes the obstacles of insufficient funds and insufficient knowledge by shifting the responsibility for protecting the interests of the individuals comprising the group to a public body which has ample funds and adequate powers of investigation.”¹⁴ However, Kalven and Rosenfield noted that agencies were limited in providing retrospective relief, and thus, much as Sant’Ambrogio and Zimmerman do in their own Article, Kalven and Rosenfield “explore[d] the possibilities of revitalizing private litigation to fashion an effective means of group redress” through class action procedures.¹⁵

Kalven and Rosenfield’s view of the class action became formally recognized with the 1966 Amendments to Federal Rule of Civil Procedure 23. The Amendments changed Rule 23 to permit class actions involving damage remedies.¹⁶ According to Ben Kaplan, the reporter for the 1966 Amendments, the Rules were amended to help vindicate “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”¹⁷ Shortly after adoption of the 1966 Amendments, the class action became known as a tool to supplement administrative enforcement in a number of subject areas.¹⁸ In fact, “[t]he Supreme Court has long recognized that

10. See Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 8, 10 (1987) (discussing history of class action procedures).

11. See Nagareda, *Revisited*, *supra* note 5, at 608 (“Key features of the landscape for class actions today are the by-products of larger changes wrought by the 1938 Rules.”).

12. Sant’Ambrogio and Zimmerman, *Agency*, *supra* note 2, at 1999 (citing sources).

13. 8 U. Chi. L. Rev. 684 (1941).

14. *Id.* at 686.

15. *Id.* at 687; cf. Sant’Ambrogio and Zimmerman, *Agency*, *supra* note 2, at 2000 (noting “current tools of administrative law—including rulemaking, stare decisis, attorneys’ fees, and federal court class actions—fail groups of people seeking the same kinds of retrospective relief”).

16. Amendments to Rules of Civil Procedure, 39 F.R.D. 69 (1966) (Advisory Committee’s note).

17. Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969) (discussing Rule 23(b)(3) category, which allows for class actions for damage remedies).

18. See, e.g., *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 (1968) (noting in context of class action that “[w]hen the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law”); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (rejecting argument that “allowing class actions to be brought by retail consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal courts,” because “[t]hese private suits provide a significant supplement to the limited

public agencies cannot themselves detect and deter all wrongdoing,” making private suits like the class action “an important complement to public enforcement.”¹⁹

If it is indeed “natural” to view the class action as a supplement to administrative law efforts to deal with harm to large, dispersed groups, then Sant’Ambrogio and Zimmerman’s “novel” contribution should not be novel, at least not in 2013. But over time the class action has transformed from a *complement* to administrative law into a poor *substitute* for it. For whatever reason, we went from Kalven and Rosenfield recognizing the class action as a natural extension of the administrative state to the class action representing, in a sense, the Goofus to administrative law’s Gallant.²⁰

The history of that transformation is certainly beyond the scope of this Response, and I will not attempt it here. But certainly one watershed moment occurred in 1997 when the Supreme Court decided *Amchem Products, Inc. v. Windsor*, a case in which the Court rejected a global class action settlement of tort claims arising from asbestos exposure.²¹ The Court began its majority opinion by describing the lower courts’ efforts “to work with the procedural tools available to improve management of federal asbestos litigation,” but the Court did so almost pejoratively.²² In the Court’s view, the solution to taming asbestos litigation, which involved literally millions of victims exposed to asbestos over several decades,²³ was *not* to use procedural tools like the class action.

Instead, the Court quoted at length from a report prepared by the United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, which proposed “federal legislation creating a national asbestos dispute-resolution scheme.”²⁴ Two years later, in *Ortiz v. Fibreboard Corp.*, which involved a different global class action settlement of asbestos claims, the Court flat out stated that asbestos litigation “defies customary judicial administration and calls for national legislation”²⁵ and noted glumly that “[t]o date Congress has not responded.”²⁶

Amchem and *Ortiz* both brought us a long way from Kalven and Rosenfield’s optimism that the class action could help lighten the load of an

resources available to the Department of Justice for enforcing the antitrust laws and deterring violations”).

19. 2 William B. Rubenstein, *Newberg on Class Actions* § 8 (5th ed. 2011) (citing sources).

20. See, e.g., Anni Matsick, *Goofus and Gallant, Highlights for Children*, Sept. 2004, at 9 (illustrating classic children’s cartoon in which Goofus always demonstrates poor behavior and Gallant demonstrates proper behavior).

21. 521 U.S. 591 (1997).

22. *Id.* at 599.

23. *Id.* at 597 (noting “class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies,” which were defendants in lower courts).

24. *Id.* at 598 (citing Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3, 27–35 (Mar. 1991)).

25. 527 U.S. 815, 821 (1999).

26. *Id.* at 821 n.1.

overextended administrative state. In both opinions the Supreme Court literally asked the administrative state to save us from the sprawling monster that is the class action.

The Court has only grown more annoyed with the class action over time. In *Amchem*, the Court recognized that the “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”²⁷ The Court also suggested that class actions generally should be certified in “cases alleging consumer or securities fraud or violations of the antitrust laws.”²⁸ In the past two years alone, however, the Court has granted certiorari to address the appropriateness of class actions in securities,²⁹ antitrust,³⁰ consumer protection,³¹ and civil rights³² litigation. In fact, these are some of the very areas of the law that Kalven and Rosenfield had hoped would “draw upon” both class actions and administrative enforcement, “permitting both to develop side by side to check and complement each other.”³³

The scholarship on class actions has mirrored the Supreme Court’s increasing distaste for the class action. The giant in this field is the late Richard Nagareda, who made significant and influential contributions to the class action literature.³⁴ Nagareda argued throughout his scholarship that “the

27. *Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

28. *Id.* at 625 (noting “[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws” (citing 1966 Advisory Committee Notes)).

29. E.g., *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 132 S. Ct. 2742 (2012) (No. 11-1085) (granting certiorari in securities fraud class action); see also *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, SCOTUSblog, at <http://www.scotusblog.com/case-files/cases/amgen-inc-v-connecticut-retirement-plans-and-trust-funds/> (on file with the *Columbia Law Review*) (last visited Jan. 17, 2013) (naming issues in case as whether, among other things, “in a misrepresentation case under Securities and Exchange Commission Rule 10b-5, the district court must require proof of materiality before certifying a plaintiff class based on the fraud-on-the-market theory”); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (holding that use of fraud-on-the-market theory in securities class action did not require proof of loss causation).

30. E.g., *Comcast v. Behrend*, 133 S. Ct. 24 (2012) (No. 11-864) (granting certiorari in antitrust class action on issue “whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis”).

31. E.g., *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 90 (2012) (No. 11-1450) (granting certiorari on whether class representative asserting claims insurer underpaid class can avoid removal under the Class Action Fairness Act by stipulating to lower damages); *AT&T Mobility LLC v. Concepción*, 131 S. Ct. 1740 (2011) (affirming validity of class action waivers in arbitration agreements despite finding of unconscionability under state law).

32. E.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (reversing certification of class action asserting gender discrimination claims under Title VII).

33. Kalven & Rosenfield, *supra* note 13, at 684 (discussing securities and antitrust enforcement); *id.* at 721 (noting class actions and administrative law would develop “side by side”).

34. Along with being a reporter to the American Law Institute’s recently completed *Principles of the Law of Aggregate Litigation* (2010), Nagareda was cited heavily in the Supreme

modern class action has come to operate as a rival to public lawmaking rather than a procedural afterthought,” with the class action a decidedly inferior rival.³⁵ Thus, Nagareda, like the Supreme Court, has argued that, ideally, the class actions should be preempted in important respects by administrative law.³⁶ At the very least, Nagareda and others have argued that class actions should be reviewed under the standards judges use to review administrative action.³⁷ Again, the class action and administrative law are not seen as tools “to check and complement each other,”³⁸ but as unequal substitutes.

In *Amchem*, the Court cited approvingly to a dissent to the Ad Hoc Committee report which proposed “passage by Congress of an administrative claims procedure similar to the Black Lung legislation.”³⁹ So imagine my surprise at seeing Sant’Ambrogio and Zimmerman include the Black Lung Benefits Plan within the Article’s parade of horrors that could use some help from the class action.⁴⁰ As Sant’Ambrogio and Zimmerman point out, “many miners do not have the resources to develop sound evidence for their black lung cases, in contrast to mine operators, who have well-financed teams of defense attorneys with highly trained medical experts capable of regularly defeating unrepresented applicants.”⁴¹ They also note that “[p]laintiff’s attorneys frequently refuse miners’ claims because—when adjudicated

Court’s opinion in the *Wal-Mart* case. *Wal-Mart*, 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009)). Nagareda has also written an influential casebook on aggregate litigation. Richard A. Nagareda, *The Law of Class Actions and Other Aggregate Litigation* (2009). Although I criticize his work here, I do so with the utmost respect to his considerable achievements.

35. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 153 (2003).

36. E.g., Richard A. Nagareda, *Mass Torts in a World of Settlement* 254 (2007) [hereinafter Nagareda, *Mass Torts*] (setting forth “leveraging proposal” concerning fee structure of class action attorneys that would be implemented by “administrative state”).

37. E.g., Nagareda, *Turning*, supra note 5, at 945 (arguing that “courts should analyze the creation of private administrative regimes for mass torts in a manner similar to that already developed for scrutiny of their public regulatory counterparts”); see also Mark Moller, *Class Action Lawmaking: An Administrative Law Model*, 11 Tex. Rev. L. & Pol. 39, 45 (2006) (analogizing class actions to private administrative agencies and arguing that question of scope of statute to permit class actions be subject to *Chevron* deference); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L.J. 27, 112–13 (2003) (proposing “judges model their review of class settlements after their review of administrative action,” including hard look at record).

38. Kalven & Rosenfield, supra note 13, at 721.

39. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 42 (Mar. 1991) (Hogan, J., dissenting)).

40. See Sant’Ambrogio and Zimmerman, *Agency*, supra note 2, at 1996 (discussing Black Lung Benefits Program). The Black Lung Benefits Program was established pursuant to the Black Lung Benefits Act of 1973, which provides benefits and an administrative forum for persons “totally disabled due to pneumoconiosis [black lung disease] arising out of employment in one or more of the Nation’s coal mines.” 30 U.S.C. § 901(a) (2006).

41. Sant’Ambrogio and Zimmerman, *Agency*, supra note 2, at 1996 (citing U.S. Gov’t Accountability Office, GAO-10-7, *Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners’ Ability to Pursue Claims* 30, available at <http://www.gao.gov/new.items/d107.pdf> (on file with the *Columbia Law Review*)).

individually—they take too much money and time to resolve.”⁴² Ironically, in the Black Lung context and many others, administrative law looks far from superior to the class action.

One major contribution of the Article is to catalog the numerous pathologies of agency adjudication. The first half of the Article reads like a long-lost Kafka novel. For example, there are literally hundreds of thousands of cases pending in immigration courts, but only 260 immigration administrative law judges (“ALJs”) nationwide.⁴³ The Article also describes wait times of up to four years to have claims resolved.⁴⁴ Perhaps most sadly, the Article points out that some settlement proceeds, which may be in the hundreds of millions of dollars, are sometimes distributed haphazardly with no formal rules, if they are distributed at all.⁴⁵

As the first half of the Article discusses in great and page-turning detail, the lack of class action and similar aggregate procedures causes problems across a broad swath of subject areas, in cases involving what Zimmerman and Sant’Ambrogio call “public rights,” “private rights,” and “agency restitution.”⁴⁶ Indeed, if anyone takes anything from this Article, it is the clear conclusion that administrative law is far from the solution that the Supreme Court and scholars have imagined.

II. IS INDIVIDUALISM THE PROBLEM?

So how did administrative law become both the preferred method of dealing with dispersed harm, at least as compared to the loathsome class action, and yet end up being so dysfunctional? I think that the authors’ proposed reform, the “agency class action,” has embedded within it a critique of premises shared by both class action law and administrative law that have led to this outcome. But to see why, it is worth stepping back to see how the class action facilitates the enforcement of rights that affect a large group of dispersed victims.

As I have argued elsewhere, the class action can be understood as a trust device to deal with disputes involving asymmetric stakes.⁴⁷ Take, for example, litigation involving small claims. In small claims litigation, no individual plaintiff has an incentive to bring suit because the costs outweigh any possible benefit—“only a lunatic or a fanatic sues for \$30.”⁴⁸ In contrast to the numerous plaintiffs, the defendant in small claims litigation has a significant interest in investing in common issues of liability. If the defendant can win on a common issue against one plaintiff, he almost certainly will win against all of

42. *Id.*

43. Sant’Ambrogio and Zimmerman, *Agency*, *supra* note 2, at 1994 & n.6.

44. *Id.* at 1995 (discussing claims for benefits to Department of Veterans Affairs (“VA”).

45. *Id.* at 1996 (discussing settlement to compensate distressed homeowners negotiated by Office of the Comptroller of the Currency (“OCC”).

46. *Id.* at 2002–16.

47. Campos, *Proof*, *supra* note 7, at 776–77; Campos, *Mass Torts*, *supra* note 7, at 1076–79.

48. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.).

the others, thereby reducing or eliminating all of the liability associated with that issue.⁴⁹

In other words, the stakes are asymmetric—the defendant cares more about common issues than any one plaintiff. As a result, you get a situation much like the one Sant’Ambrogio and Zimmerman describe in the Black Lung context, where mine operators invest heavily in common issues to “regularly defeat[] unrepresented applicants.”⁵⁰ The authors, in fact, recognize that aggregation “provides more access by granting plaintiffs the same ‘economies of scale’ as well-financed defendants.”⁵¹

But, as I have argued elsewhere, the class action provides the plaintiffs the same economies of scale as the defendant because the class action, in effect, makes the class attorney the trustee of the claims.⁵² In other words, the class action gives the class attorney, like a trustee, dispositive control over the claims, plus a percentage interest in any recovery, to motivate the attorney to maximize the aggregate recovery for the class.⁵³ If the class as a whole wins, then the class attorney wins, and because the class attorney can spread costs among all of the plaintiffs,⁵⁴ she will have the same incentives to invest in common issues as the defendant.

The fee arrangement, as even Nagareda recognized, is crucial to motivating a class attorney to bring a class action.⁵⁵ But the taking of dispositive control away from the plaintiffs is equally crucial. If the plaintiffs retain control over their individual claims, then collective action problems will prevent the plaintiffs from having the same economies of scale as the defendant. Plaintiffs most likely will fail to aggregate sufficiently to share costs, or they may free-ride on the investments of other plaintiffs.⁵⁶ Thus, allowing the plaintiffs to retain control over their claims is self-defeating. It creates a situation where the mine operators always win and the Black Lung sufferers cannot even get an attorney to work on their individual case.⁵⁷

49. Campos, *Mass Torts*, supra note 7, at 1075–76 (discussing similar example in mass tort litigation) (citing David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 *Harv. J. on Legis.* 393, 399–400 (2000)).

50. Sant’Ambrogio and Zimmerman, *Agency*, supra note 2, at 1996.

51. *Id.* at 2037 (citing sources).

52. Campos, *Proof*, supra note 7, at 772–75; Campos, *Mass Torts*, supra note 7, at 1078–79; see also Sergio J. Campos, *Class Actions and Justiciability* (unpublished draft 2012) (discussing trust function of class action) (on file with *Columbia Law Review*).

53. Campos, *Mass Torts*, supra note 7, at 1078–79; see also Fed. R. Civ. P. 23(e) (providing procedures for attorneys concerning “settlement, voluntary dismissal, or compromise” of class action, which do not require consent of all class members); Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 3.13(a) cmt. b (2010) (noting preference of courts for “percentage method” to compensate class attorneys).

54. See Campos, *Mass Torts*, supra note 7, at 1077 (noting class action attorney can spread costs to class members under common-fund doctrine).

55. Nagareda, *Mass Torts*, supra note 36, at 219–49 (proposing alternative fee structure to avoid conflicts among class members).

56. Campos, *Mass Torts*, supra note 7, at 1079–81 (discussing these collective action problems).

57. In my prior writings I have focused on the deterrence function of the class action, but it is obvious that the scale advantages of the class action greatly improve the compensation

But despite the self-defeating nature of individual control over the claim in cases involving asymmetric stakes, courts and scholars have insisted on protecting that control no matter what. In *Ortiz*, for example, the Court rejected a proposed mandatory class action under Rule 23(b)(1)(B)⁵⁸ to settle the asbestos claims, in part because “objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have *no inherent right to abstain*.”⁵⁹ After all, the Court has repeatedly stated that we have a “deep-rooted historic tradition that everyone should have his own day in court.”⁶⁰

Similarly, Nagareda has criticized all class actions because they inherently diminish a plaintiff’s control over her claim, which is, at the end of the day, the client’s “property.”⁶¹ Indeed, for Nagareda, it is this feature of the class action that gives the procedure its “administrative” character:

Apart from situations of client consent, the administration of mass tort claims stand to act upon an individual’s right to sue not in the manner of a real estate agent retained by contract but, rather, like a local government condemning real property and providing “just compensation” to the property owner.⁶²

But this feature of the class action is also its most problematic because it appropriates each plaintiff’s right to sue without her consent. For Nagareda, “[c]lass members’ preexisting rights to sue truly must be purchased rather than simply appropriated, in keeping with their status as a form of property.”⁶³

Indeed, any form of diminishing the claim without the consent of the plaintiffs is forbidden. For example, Nagareda rejects the use of average awards in class actions to ensure the equitable distribution of damages to the plaintiffs and to prevent assessing excessive punitive damages on the defendant. For Nagareda, “[t]he conception of the right to sue as an individual right . . . commits the tort system to the prospect that some individuals may seek anomalously high recoveries.”⁶⁴

This view of the right to sue as an almost inviolable property right largely explains the preference for administrative law over the class action. Whereas administrative law is public, and administrators are subject to electoral accountability (at least at a remove), there is no such democratic accountability for the class attorney. The class attorney is self-appointed and only cares about the class insofar as doing so will make her more money. Thus, Nagareda, in discussing *Kalven* and *Rosenfield*, noted that both failed to appreciate the

provided by litigation. See Campos, *Mass Torts*, supra note 7, at 1084–85 (noting importance of economies of scale to both compensation and deterrence).

58. Fed. R. Civ. P. 23(b)(1)(B) (permitting mandatory class action if individual litigation would, “as a practical matter . . . be dispositive” of the claims or nonparties).

59. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–47 (1999) (emphasis added).

60. *Id.* at 846; see also *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)) (quoting same language); *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (quoting same language).

61. Nagareda, *Mass Torts*, supra note 36, at 60 (noting “the client’s right to sue is her right”).

62. *Id.*

63. *Id.* at 159.

64. *Id.* at 160.

“tension between the class action device as a vehicle for privatized enforcement of legal rights and the allocation of authority in the United States.”⁶⁵ Indeed, scholars who have not analogized the class action to administrative proceedings nevertheless agree with Nagareda that “the relationship between class members and class representatives” can be understood “as one between the representatives (the governors) and the members (the governed).”⁶⁶

There is a certain appeal to the position of the Court and Nagareda in recognizing the right to sue as an inviolable property right that cannot be taken away without the client’s consent or some other legitimate use of force. But the realities of both administrative enforcement and class action practice show the perverse results of this view. Sant’Ambrogio and Zimmerman point out early in the Article that agencies “routinely ignore group-wide concerns raised in agency adjudication[s]” in part because “the Administrative Procedure Act (APA) . . . as far back as 1946, established rules for individualized administrative hearings.”⁶⁷ Thus, respect for a “day in court” is also protected stringently in the administrative law context, and, as detailed in the Article, the result has been a hellish landscape of inconsistent decisions, protracted proceedings, and duplicative proceedings over common issues that drain agency resources.

This is, in my view, the real bite of the Article. Like in the class action context, administrative law protects the right to a “day in court” almost absolutely,⁶⁸ which is one major cause of the perverse results outlined in the Article. Thus, the same procedural feature that make class actions inappropriate—the taking away of the right of each claimant to use her “day in court” as she sees fit—is equally criticized in administrative law. But more importantly, this very feature of the class action turns out to be the feature that, in Sant’Ambrogio and Zimmerman’s view, is needed to solve the pathologies they describe.

In the second half of the Article, Sant’Ambrogio and Zimmerman propose an “agency class action” that borrows features from current class action law and the law of multidistrict litigation.⁶⁹ In outlining their proposal, the authors are quick to recognize that “large cases create new risks,” which include, among other things, “replacing individual hearings with a potentially faceless, unresponsive bureaucracy” that “stray[s] from democratic ideals.”⁷⁰ Thus, the authors are quick to temper their proposal to protect each claimant’s “day in

65. Nagareda, Revisited, *supra* note 5, at 604–05.

66. Elizabeth Chamblee Burch, *Governing Securities Class Actions*, 80 U. Cin. L. Rev. 299, 305–06 (2011) (citing Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 366; Nagareda, Revisited, *supra* note 5, at 638).

67. Sant’Ambrogio and Zimmerman, *Agency*, *supra* note 2, at 1997–98 (citing sources).

68. Indeed, much of the literature on administrative due process has equally focused on litigant autonomy as an important value. See, e.g., Jerry L. Mashaw, *Due Process in the Administrative State* 158–253 (1985) (discussing importance of protecting claimant’s autonomy in designing administrative procedures).

69. *Id.* at 2035–36 (introducing proposal).

70. *Id.* at 2038–39.

court.”⁷¹ Given the hostility to this very feature of the class action in both the class action and administrative law context, this is a smart move.

But their proposal only works if it “replac[es] individual hearings with a potentially faceless . . . bureaucracy.” For example, Sant’Ambrogio and Zimmerman argue that one crucial benefit of the agency class action is that it would allow agencies to avoid duplicative efforts to resolve common issues. Instead, as in class actions, the agency can resolve the issues in one fell swoop, giving the agency “the first bite at solving categories of common problems that otherwise may never receive a hearing in federal court or—worse yet—reach federal court without counsel capable of developing a factual record that describes the system-wide harm.”⁷² But doesn’t that mean that some claimant’s will not have their day in court? According to Sant’Ambrogio and Zimmerman, “[c]ourts have long recognized that agencies may bind parties to common findings of law or fact without individualized hearings without violating due process.”⁷³

A better example is Sant’Ambrogio and Zimmerman’s proposal to allow for the use of statistical evidence and sampling to determine factual issues. The benefit of using such evidence would mean more consistent factual findings among claimants, but that would also mean that claimants would, particularly in aggregate settlements, receive an average award.⁷⁴ Of course, Sant’Ambrogio and Zimmerman dutifully note, following Nagareda and others, that “aggregate litigation threatens *accuracy* by ‘averaging’ claim values among parties with different injuries or by favoring the interests of some plaintiffs over others.”⁷⁵ But, as they correctly recognize, “[m]ass adjudication already arguably promotes accuracy through the aggregation process itself.”⁷⁶ Not only do you get the benefit of the law of large numbers, which improves accuracy across a population,⁷⁷ but a “rough justice” procedure like sampling “lowers costs, speeds data collection, and, because the sample surveyed is smaller, ensures higher quality and more consistency in the information gathered.”⁷⁸

As I have argued elsewhere, due process may protect a claimant’s property interest in her claim, but it is also flexible enough to give way when protecting that interest would defeat other important interests, such as the right to avoid the unlawful conduct that caused the claim in the first place and the right to timely compensation.⁷⁹ As noted by the old due process chestnut *Mullane v. Central Hanover Bank & Trust Co.*, a right to notice is not required by due process if it “dissipate[s] [the] advantages” of the very thing that notice

71. *Id.* at 2039–40.

72. *Id.* at 2053.

73. *Id.* at 2055 (citing sources).

74. *Id.* at 2060–63.

75. *Id.* at 2060.

76. *Id.*

77. *Id.*

78. *Id.* at 2061.

79. See Campos, *Mass Torts*, *supra* note 7, at 1110–14.

is meant to protect.⁸⁰ Despite Sant’Ambrogio and Zimmerman’s language to the contrary, it is refreshing to see them *not* protect a claimant’s control over a claim when it would not otherwise make sense to do so. The funny thing is that scholars like Nagareda may even go for the proposed “agency class action” in the Article. Unlike the purely private class action, an agency class action is authorized by a publicly accountable agency, which, in Nagareda’s view, legitimizes the taking of each claimant’s autonomy over her day in court.⁸¹

But, arguably, the freedom to diminish litigant autonomy should apply equally in the class action context. After all, it is bizarre to apply democratic principles to litigation, as if democracy must prevail in every context.⁸² The better approach, one exemplified by Sant’Ambrogio and Zimmerman’s fine Article, and one recognized by the law, is to calibrate the procedure to “fairly insure[] the protection of the interests” at stake.⁸³ For me, at least, that is the fundamental lesson class action law teaches us.

CONCLUSION

Both the pathologies in administrative law that Sant’Ambrogio and Zimmerman identify and the benefits of the class action that they propose are based on a sustained examination of the on-the-ground experience of ALJs, agencies, attorneys, and district courts trying to make the most of difficult situations. The Article is a testament to solving legal problems not by looking up to the clouds, but all the way down.

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80. 339 U.S. 306, 317–18 (1950) (holding newspaper publication is sufficient to notify unknown, contingent beneficiaries of trust fund of proceeding to preclude their breach of fiduciary duty claims).

81. Cf. Nagareda, *Mass Torts*, *supra* note 36, at 254 (noting administrative preemption is necessary for his leveraging proposal given impact of proposal on each plaintiff’s right to sue).

82. For an obvious example, consider parents, who, like me, are all benevolent dictators.

83. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (discussing due process standard for class actions).