THE AGENCY CLASS ACTION

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The number of claims languishing on administrative dockets has become a "crisis," producing significant backlogs, arbitrary outcomes, and new barriers to justice. Coal miners, disabled employees, and wounded soldiers sit on endless waitlists to appeal similar administrative decisions that frequently result in reversal. Defrauded consumers miss out on fair compensation, as agencies settle their claims with wrongdoers without victim participation or meaningful judicial oversight.

Reformers appropriately call for more resources, administrative law judges, and attorneys' fees. But surprisingly, commentators have ignored tools long used by courts to resolve common claims raised by groups of people: class actions and complex litigation procedures. Almost no administrative agency allows groups to aggregate and resolve common claims in adjudication. Accordingly, in a variety of adjudicatory proceedings, agencies routinely (1) waste resources on repetitive cases, (2) reach inconsistent decisions for similar claims, and (3) deny individuals access to fair representation that aggregate procedures promise. Moreover, procedural hurdles often prevent courts from providing class-wide relief to parties in agency adjudication.

This Article argues that agencies themselves should adopt aggregation procedures, like those under Rule 23 of the Federal Rules of Civil Procedure, to adjudicate common claims. After surveying current tools by which agencies could promote more efficiency, consistency, and legal access, this Article finds that agency class action rules more effectively resolve common disputes by (1) efficiently creating ways to pool information about recurring problems; (2) achieving greater equality in

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outcomes than individual adjudication; and (3) securing legal and expert assistance at a critical stage in the process.

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INTRODUCTION

There is a crisis in administrative law.[1] The elusive promise of individual hearings for deserving claimants has pushed caseloads to the breaking point, producing significant backlogs, disparate decisions, and new barriers to justice in many different agencies. In one year, Veterans Law Judges decided 729 veterans' benefits cases per judge[2] after some veterans waited for over four years to fully adjudicate their claims,[3] often without the benefit of counsel.[4] By the end of June 2012, the number of pending cases in immigration courts reached an all-time high of 314,147,[5] with over 1,000 cases per judge,[6] yielding average wait times of

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1. Over the past several years, problems in many different administrative courts have been alternatively described as a "crisis," "a form of purgatory," "impractical," "a spin at the wheel of fate," and involving "due process violations." See Veterans for Common Sense v. Shinseki, 644 F.3d 845, 887 (9th Cir. 2011) (finding "due process violations in the [Veterans Benefits Administration] claims adjudication process"), vacated en banc, 678 F.3d 1013 (9th Cir. 2012); Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary, 112th Cong. 1 (2011) [hereinafter Ensuring Justice in Immigration] (statement of Karen T. Grisez, Chair, American Bar Association Commission on Immigration) (arguing immigration court system is "in crisis"); Jaya Ramji-Nogales, Andrew I. Schoenholdtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform 6 (2009) [hereinafter Ramji-Nogales et al., Proposals for Reform] (describing asylum applications as "a spin of the wheel of fate"); Erik Eckholm, Disability Cases Last Longer As Backload Rises, N.Y. Times, Dec. 10, 2007, at A1 (describing 500-day waiting periods for Social Security appeals hearings as "purgatory"); Press Release, Office of Senator Jay Rockefeller, Rockefeller Releases GAO Report on Black Lung Benefits (Oct. 30, 2009), available at http://rockefeller.senate.gov/press/record.cfm?id=319537 (on file with the *Columbia Law Review*) (finding barriers to securing benefits through the Black Lung Benefits Program "impractical, harmful and absolutely unacceptable").

2. Am. Bar Ass'n Comm'n on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases 2-37 (2010) [hereinafter ABA, Reforming the Immigration System], available at http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf (on file with the *Columbia Law Review*); Bd. of Veterans' Appeals, Fiscal Year 2008 Report of the Chairman 3 (2009), available at http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf (on file with the *Columbia Law Review*); see also infra note 3 and accompanying text.

3. *Shinseki*, 644 F.3d at 850.

4. Id. at 887.

5. See Immigration Backlog, Wait Times, Keep Rising, Transactional Records Access Clearinghouse (July 12, 2012), http://trac.syr.edu/immigration/reports/286/ [hereinafter Transactional Records Access Clearinghouse, Immigration Backlog] (on file with the *Columbia Law Review*) (tracking number of cases in immigration courts awaiting resolution). In the past decade, the backlog of cases in immigration courts has increased by nearly two-thirds, while the average time it takes to adjudicate those cases has increased by nearly a third. Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow, Transactional Records Access Clearinghouse (June 18, 2009), http://trac.syr.edu/immigration/reports/208/ (on file with the *Columbia Law Review*).

6. There are currently 260 immigration judges nationwide. About the Office of the Chief Immigration Judge, Executive Office for Immigration Review, U.S. Dep't of Justice,

526 days,[7] and producing dramatically different results for identical claims and parties.[8]

Reformers have called for increased resources, new administrative law judges (ALJs), and improved attorney fee arrangements.[9] But the debate has otherwise ignored tools long used by civil courts to handle common claims raised by large groups of people: the class action and other complex civil litigation procedures.[10] Unlike courts, virtually all agencies lack rules to certify class actions or coordinate multiparty disputes. Consequently, in a wide variety of cases—ranging from financial fraud to public benefits to petitions for asylum—agencies waste resources in repetitive adjudication, reach inconsistent outcomes for the same kinds of claims, and deny individuals access to the affordable representation that aggregate procedures promise.[11] Consider the following three examples:

- In the Department of Veterans Affairs (VA), wounded soldiers may wait for over four years just to fully adjudicate a claim for benefits.[12] Although thousands of disabled veterans have suffered from the same system-wide violations of the VA's own policies, many claimants give up benefits,[13] while others elect to have a hearing at their own expense in front of a Board of Veterans' Appeals judge.[14]

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http://www.justice.gov/eoir/ocijinfo.htm (on file with the *Columbia Law Review*) (last visited Sept. 10, 2012).

7. Transactional Records Access Clearinghouse, Immigration Backlog, supra note 5.

8. See Ramji-Nogales et al., Proposals for Reform, supra note 1, at 2 (describing lottery-like nature of outcomes in asylum cases).

9. See, e.g., Ensuring Justice in Immigration, supra note 1, at 2–8 (recommending increasing resources and access to counsel and streamlining claims through prehearing conferences and prosecutorial discretion); Ramji-Nogales et al., Proposals for Reform, supra note 1, at 100–04 (recommending creation of independent Article I court to hear asylum claims); Eckholm, supra note 1 (describing Social Security Administration's plan to hire 150 new administrative appeals judges to "whittle down the backlog"); Office of Senator Jay Rockefeller, supra note 1 (describing proposals to review attorneys' fee arrangements in Black Lung proceedings).

10. See Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 8, 10 (1987) (describing how class action suits, which allow representatives to sue on behalf of others with common claims, have existed for almost three centuries); cf. Administrative Procedure Act § 2(b), 5 U.S.C. § 551(3) (2006) (limiting definition of "party" to "person or agency named or admitted as a party" or affirmatively "seeking" such a role in same proceeding).

11. See infra Part I (demonstrating administrative law's deficiencies with respect to its central goals of efficiency, consistency, accuracy, and legal access).

12 Veterans for Common Sense v. Shinseki, 644 F.3d 845, 850 (9th Cir. 2011), vacated en banc, 678 F.3d 1013 (9th Cir. 2012).

13. Id. at 855.

14. Id. at 858–59.

- Even though Congress created the Black Lung Benefits Program to provide quick relief for coal miners suffering from job-related lung diseases, many miners do not have the resources to develop sound evidence for their black lung cases,[15] in contrast to mine operators, who have well-financed teams of defense attorneys with highly trained medical experts capable of regularly defeating unrepresented applicants.[16] Plaintiff's attorneys frequently refuse miners' claims because—when adjudicated individually—they take too much money and time to resolve.[17]
- In April 2011, the Office of the Comptroller of the Currency (OCC) announced a $394 million settlement with the nation's largest banks to compensate distressed homeowners hurt by widespread "deficient, unsafe and unsound" mortgage foreclosure abuses.[18] Due to the sprawling nature of the abuse, victims sharply contested the settlement distribution plan.[19] Some sought justice from banks that wrongfully forced them out of their homes on the basis of sloppy, forged, or "robo-signed" documents.[20] Others, trapped in homes worth far less than the

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15. See 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 (2009) [hereinafter Black Lung Benefits Program], available at http://www.gao.gov/new.items/d107.pdf (on file with the *Columbia Law Review*) (describing Department of Labor's inability to investigate allegations that "some doctors working for mine companies or their insurers conduct blood gas tests in ways that boost claimants' blood oxygen levels, thereby lowering their disability readings").

16. Id. at 27.

17. Id. at 26–27.

18. Press Release, Office of the Comptroller of the Currency, OCC Settles Civil Money Penalties Against Large National Bank Mortgage Servicers for $394 Million; Penalty Assessment Coordinated with Servicers' Actions and Payments Under Federal-State Settlement (Feb. 9, 2012), available at http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-20.html (on file with the *Columbia Law Review*) (describing settlements reached with large mortgage servicers in April 2011); see also FDIC, Regulatory Actions Related to Foreclosure Activities by Large Servicers and Practical Implications for Community Banks, Supervisory Insights: Special Foreclosure Edition 4 (May 2011), available at http://www.fdic.gov/regulations/examinations/supervisory/insights/sise11/SI_SE2011.pdf 4 (on file with the *Columbia Law Review*) (finding "widespread unsafe or unsound operational practices, including missing documents, execution of documents by unauthorized persons, failure to notarize documents in accordance with local law, inaccurate affidavits, and affidavits signed by persons lacking sufficient knowledge of the underlying mortgage loan transaction").

19. See Nelson D. Schwartz & David Streitfeld, Officials Disagree on Punishment for Mortgage Mess, N.Y. Times, Mar. 3, 2011, at B1 (describing conflict over providing remedies for victims of foreclosure abuses); see also Gretchen Morgenson, Foreclosure Relief? Don't Hold Your Breath, N.Y. Times, Dec. 25, 2011, at BU1 (describing other conflicts of interest in administration of OCC homeowner reparation plan).

20. See Schwartz & Streitfeld, supra note 19 (noting attempts to reach settlement with "robo-signers processing thousands of foreclosures at a time without the required

value of their mortgages, sought new refinancing arrangements.[21] Still other public officials sought broad relief for more indirect victims—like troubled communities hard-hit by unstable real estate markets.[22] But unlike a bankruptcy, class action, or other civil proceeding to distribute limited funds, the OCC lacked any formal rules to hear and resolve competing claims and interests in the mortgage foreclosure settlement.

Had those same parties been able to aggregate their claims before the agency, the result would likely have been very different. Veterans could seek a single determination, through qualified counsel, that VA representatives systematically failed to offer medical treatment required by federal law.[23] A single administrative judge would oversee pretrial motions for coal miners seeking funds from the same mining operator, setting schedules for motion practice, managing common objections to expert testimony, and permitting plaintiffs' counsel to share discovery, at a lower cost.[24] And after notifying interested parties, a decisionmaker would hear and resolve homeowners and officials' competing interests in the mortgage foreclosure settlement.[25]

Existing tools in administrative law routinely ignore group-wide concerns raised in agency adjudication. Part of the reason for this failure is

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legal safeguards"); see also Gretchen Morgenson, The Deal Is Done, but Hold the Applause, N.Y. Times, Feb. 12, 2012, at BU1 (describing attempt by Nevada's attorney general to police terms of OCC settlement); Nelson D. Schwartz & Shaila Dewan, Political Push Moves a Deal on Mortgages Inches Closer, N.Y. Times, Jan. 24, 2012, at B1 (describing potential settlement for victims of improper foreclosure practices).

21. See Schwartz & Streitfeld, supra note 19 (noting "long wait to get a mortgage modification in which the principal or the interest rate of the loan is lowered, easing monthly payments" for mortgage holders whose loan principal exceeds their home's current value).

22. Id. (noting Obama administration's attempt "to stabilize the housing market" and "help bolster the economic recovery"); see also Schwartz & Dewan, supra note 20 (describing internal fights amongst state attorneys general during OCC settlement, including dispute over suggested $8 billion set-aside for homeowners in California). Complaints about the OCC settlement lead state attorneys general from forty-nine jurisdictions to complete a new $25 billion settlement in 2012, overseen by court-approved monitor, Joseph A. Smith. Brady Dennis, Bank Settlement Monitor Faces a Daunting Task, Washington Post, Apr. 19, 2012, at A12; Joe Nocera, Letting Banks Off the Hook, N.Y. Times, Apr. 19, 2011, at A25 (complaining that OCC settlement was insufficient and undercut a more significant deal sought by states attorneys general).

23. See infra Part III.B.1 (proposing that similar administrative claims be aggregated prior to hearing).

24. See infra Part III.B.2 (suggesting adoption of class action procedure in line with Federal Rule of Civil Procedure 23(b)).

25. See infra text accompanying notes 265–266 (recommending rules from aggregate litigation that call for separate attorney representation for different group interests); infra notes 275–279 and accompanying text (recommending rules from aggregate litigation that call for separate attorney representation for fairness hearings).

the Administrative Procedure Act (APA) itself,[26] which, as far back as 1946, established rules for individualized administrative hearings.[27] Before the APA, agencies combined investigation, policymaking, and adjudication in the same department.[28] As a result of a political battle over the implementation of New Deal programs, the APA separated the practice of "adjudication" from the agencies' broad policymaking powers, through the position of the ALJ.[29] Going forward, independent ALJs would ensure that adjudications remained insulated from undue political influence. Few rules existed in the APA, however, for ALJs to resolve cases that fell in between the formal categories of policymaking and adjudication—such as when agency proceedings systematically affected groups of people in the same way.

Although that policy persists today, with a few notable exceptions,[30] there is no reason why ALJs should have any less power to aggregate

26. 5 U.S.C. §§ 551–559 (2006).

27. See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559) (noting APA was originally enacted in 1946).

28. See Walter Gellhorn, The Administrative Procedure Act: The Beginnings, 72 Va. L. Rev. 219, 219–20 (1986) (describing ABA Special Committee on Administrative Law's desire to transfer agency judicial power to independent tribunals); Richard E. Levy & Robert L. Glicksman, Agency-Specific Precedents, 89 Tex. L. Rev. 499, 504 (2011) (describing procedural scholars' incorporation of "emerging science of public administration" into APA).

29. See 5 U.S.C § 7521(a) (providing that actions to remove, suspend, or reduce pay of ALJs may be taken by agency employing ALJ "only for good cause"); see also George B. Shepard, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557, 1680–81 (1996) ("Liberals and conservatives resolved the issue [of New Deal program implementation] politically by means of the partisan battles and negotiations that produced the APA.").

30. Even for those existing exceptions, agencies approach class action rules in an ad hoc manner. The Equal Employment Opportunity Commission (EEOC), for example, created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve "pattern and practice" claims of discrimination by federal employees. See 29 C.F.R. § 1614.204 (2012) (establishing class complaint procedures). No similar procedure, however, exists for private employees. While federal law has authorized consolidated fair hearings in certain programs administered by the states where the sole issue involved is one of federal or state law or policy, no facts may be in dispute, each individual must be permitted to present his or her own case, and hearing officers cannot provide class-wide relief, thus significantly limiting the utility of consolidation. See, e.g., 7 C.F.R. § 273.15(e) (2012) (providing "consolidated hearings" for food stamp-related claims); 42 C.F.R. § 431.222 (2011) (providing "group hearings" for Medicaid-related claims); 45 C.F.R. § 205.10(a)(5)(iv) (2011) (providing "group hearing" to applicants who request hearing because financial assistance was denied); see also Harper Jean Tobin & Rochelle Bobroff, The Continuing Viability of Medicaid Rights After the Deficit Reduction Act of 2005, 118 Yale L.J. Pocket Part 147, 150 (2009), http://yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/the-continuing-viability-of-medicaid-rights-after-the-deficit-reduction-act-of-2005/ (on file with the *Columbia Law Review*) (arguing "use of consolidated group hearings . . . falls far short of equaling federal class actions because ALJs are unable to grant class-wide relief"). Finally, a bill that called upon the Commodity Futures Trading Commission (CFTC) in the early 1990s to adopt

claims than a civil court. For some time, administrative law scholars have described the significant impact agency adjudications have on parties who never directly participate in a proceeding.[31] Moreover, the modern administrative state, like the class action, originally developed in response to intractable disputes involving large groups of people.[32] The Supreme Court has long characterized class actions themselves as "quasi-administrative" proceedings.[33]

This Article argues that agencies should adopt aggregation procedures, like a civil class action, to resolve common claims raised by large groups of people in administrative courts. In such cases, designated ALJs would decide, just like Article III judges, whether or not common questions of law or fact exist and whether class adjudication materially advances a fair resolution more than individualized adjudication. When the answer is "yes," the administrative judge could coordinate common discovery and prehearing motions, resolve factual or legal issues common to the class, and oversee any potential settlement, in a single proceeding. Individual class members then need only show they were part of the same class—and offer proof of their injury—to qualify for the relief sought. And even in cases that involve more individualized issues, groups could

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class actions was rejected by the agency after it received only six comments. See Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 224, 106 Stat. 3590, 3617 (codified at 7 U.S.C. § 18(a)(2)(A)) (granting CFTC power to create rule allowing for class action administrative procedures); Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631 (Mar. 1, 1994) (rejecting such rule).

31. See William D. Araiza, Agency Adjudication: The Importance of Facts, and the Limitations of Labels, 57 Wash. & Lee L. Rev. 351, 383 (2000) (describing reasons why "[a]gency use of adjudication to establish a rule may well deprive subsequent defendants of any meaningful participation right"); Katie R. Eyer, Administrative Adjudication and the Rule of Law, 60 Admin. L. Rev. 647, 649 (2008) (citing academic critiques of "use of administrative adjudication as a significant means of agency lawmaking"); David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 932 (1965) (arguing that many agencies exercise same degree of control over other people in adjudication as they would when making rules or regulations).

32. See Morton J. Horwitz, The Transformation of American Law 1870–1960, at 222 (1992) ("Much of the struggle over administrative justice during the past century has derived from [the] challenge posed by the rise of administration to nineteenth-century conceptions of individually oriented justice." (footnote omitted)); Alexandra D. Lahav, The Law and Large Numbers: Preserving Adjudication in Complex Litigation, 59 Fla. L. Rev. 383, 402 (2007) [hereinafter Lahav, Numbers] (observing that *Lochner*-era challenges to administrative regulations presented "same fears expressed about the rise of administrative structures in the court system").

33. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("[F]rom the plaintiffs' point of view a class action resembles a 'quasi-administrative proceeding, conducted by the judge.'" (quoting 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.45[4–5] (1984))); Richard A. Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 185 (2003) (noting Supreme Court's description of class action as "quasi-administrative proceeding" (citing *Shutts*, 472 U.S. at 809)).

still resolve common questions in a single proceeding before pursuing their unique claims. By adopting aggregate procedures, agencies may produce uniform outcomes more efficiently, provide more fairness for groups that depend upon the administrative state, and offer institutional advantages over aggregation in federal court.

Of course, class action-like procedures will not solve every problem that now plagues the administrative state. Critics have attacked class actions for imposing similar obstacles to legal access, efficiency, and fairness.[34] And many cases undoubtedly involve too many individualized and fact-based determinations to benefit from a class action or aggregate treatment. Nevertheless, courts have long recognized that class actions remain indispensable for resolving cases that repeatedly raise the same issues among large groups of people.[35] In the same way, the agency class action offers agencies another vital tool to address broad claims by those who depend upon the administrative state for relief.

This Article proceeds in three Parts. Part I describes three contexts where aggregated agency adjudications could improve uniformity, efficiency, and access to justice: (1) "public rights cases," which involve common claims between private parties and the government itself; (2) "private rights cases," which involve common claims between purely private parties before the agency; and (3) "agency restitution cases," which involve government actions brought against private parties on behalf of other private parties. In the first two categories of cases, the failure to adopt aggregate procedures produces inconsistent judgments, spawns duplicative litigation, and exacerbates barriers to legal representation for people making common claims in agency adjudication. In the third category, agency actions achieve the same economies of scale as a class action, but without any of the procedural safeguards aggregate litigation provides to ensure fairness to parties.

Part II explains why 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. Accordingly, agency class action rules will resolve many common

34. See, e.g., Robin J. Effron, The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of *Twombly* and *Iqbal*, 51 Wm. & Mary L. Rev. 1997, 2033 (2010) (collecting commentary criticizing class settlements where "plaintiffs' lawyers walk away with hefty fees from a favorable settlement [and] plaintiffs recoup little, if any, of the award"). For an example of how courts consider the fairness, reasonableness, and adequacy of a proposed settlement, see Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) (Friendly, J.).

35. See, e.g., Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (observing class actions eliminate time and expense associated with traditional one-on-one litigation). See generally Jack B. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices 36 (1995) [hereinafter Weinstein, Individual Justice] (noting economies of scale reduce discovery and expert fees).

disputes more effectively than these alternatives by (1) efficiently creating ways to pool information about recurring problems and systemic harms, (2) achieving greater equality in outcomes than individual adjudication, and (3) securing legal and expert assistance at a critical stage in the process.[36]

Part III sets out the proposal. Federal court class actions and other aggregate procedures have long sought consistency, efficiency, and legal access.[37] To that end, the recommended "agency class action" is, in fact, shorthand for three kinds of proceedings. Groups may petition an agency for an "aggregate proceeding" to (1) coordinate related factual allegations and discovery before a formal administrative hearing, (2) provide class-wide relief through an administrative proceeding, or (3) approve an aggregate settlement.

However, aggregating cases also creates new risks. Accordingly, Part III also responds to concerns often raised by critics of the class action. In any aggregate litigation, the sheer number of claims may itself threaten legal access, efficiency, and consistency by (1) stretching administrative courts' capacity to administer justice to many people; (2) replacing individual hearings with a potentially faceless, unresponsive bureaucracy; (3) relying upon representatives tempted by the promise of large fees or power; and (4) increasing the consequences of error in high-stakes cases.[38] Part III thus recommends ways agencies may adopt best practices from aggregate litigation to make group adjudication more feasible, legitimate, loyal, and accurate.

For a long time, scholars of complex litigation have explored ways to import lessons from administrative law to improve procedural fairness and equity in collective litigation—including rules to police against conflicts of interest, ensure effective judicial review, and assess difficult evi-

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36. See infra Part II.D–.E (explaining problems with relying on judicial review and federal class actions to improve uniformity, efficiency, and access in agency proceedings).

37. See, e.g., Am. Law Inst., Principles of the Law of Aggregate Litigation § 1.03 (2010) [hereinafter ALI Report] (describing principles of aggregate litigation); Weinstein, Individual Justice, supra note 35, at 134–43 (discussing advantages and drawbacks of class actions and consolidation); Adam S. Zimmerman, Distributing Justice, 86 N.Y.U. L. Rev. 500, 509–12 (2011) [hereinafter Zimmerman, Distributing Justice] (describing goals of class action settlements); Adam S. Zimmerman, Funding Irrationality, 59 Duke L.J. 1105, 1115–18 (2010) [hereinafter Zimmerman, Funding Irrationality] (describing goals of aggregate litigation).

38. See, e.g., ALI Report, supra note 37, §§ 1.03 cmt. c, 2.02 cmt. c (observing that aggregation should respect "institutional capacity of the courts," protect interests of "represented persons" as well as their "rights" delineated by law, and enable "binding resolutions" as to all claimants). See generally Allan Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995 (2005) (exploring tension between common and individual questions in class actions and suggesting new test for class certification); Lahav, Numbers, supra note 32, at 429 (arguing "[c]ourts should foster a form of administration that allows access to justice, and at the same time is humanizing, thoughtful and deliberative").

dentiary issues through sampling and randomized trials.[39] By turning the tables to ask what agencies can learn from complex litigation, this Article recommends a natural, albeit novel, kind of proceeding for those who depend upon the administrative state for relief.

I. THE CRISIS IN ADMINISTRATIVE LAW

Administrative law has long sought three overlapping goals: (1) efficient processes and institutions; (2) consistent and accurate outcomes; and (3) legal access for those affected by agency decisions.[40] Congress, for example, broadly delegates authority to administrative agencies because their expertise allows them to implement desired policies more efficiently and fairly.[41] Administrative agencies make consistent policies that impact large groups through a quasi-legislative process known as "rulemaking," where the agency invites comments from the general public before passing new regulations.[42] Courts reviewing agency decisionmaking processes have required that agencies give parties meaningful opportunities to be heard on actions that affect them.[43]

As set forth in more detail below, when agencies fail to adopt class action-like procedures in adjudication, they unnecessarily undermine

39. See Lahav, Numbers, supra note 32, at 391 (describing rise of "administrative structure providing non-individualized resolution for mass claims"); Richard A. Nagareda, Turning from Tort to Administration, 94 Mich. L. Rev. 899, 944–52 (1996) [hereinafter Nagareda, Turning from Tort] (arguing courts should use framework of judicial review in administrative law when evaluating fairness of mass tort settlements).

40. See Michael Asimow, The Scope of Judicial Review of Decisions of California Administrative Agencies, 42 UCLA L. Rev. 1157, 1160 (1995) (assessing "fundamental" values of accuracy, efficiency, and acceptability); Jerry L. Mashaw, The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims, 59 Cornell L. Rev. 772, 772–75 (1974) (acknowledging increasing interest in accuracy, fairness, and timeliness for social welfare benefits claims); Paul R. Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 280 (1978) (describing criteria of fairness, efficiency, and satisfaction).

41. See Michael D. Sant'Ambrogio, Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging, 79 Geo. Wash. L. Rev. 1381, 1390–93 (2011) (explaining advantages of delay between delegation and agency action that enable efficient and fair decisions).

42. See 5 U.S.C. § 553 (2006) (establishing standards for rulemaking); see also Heckler v. Campbell, 461 U.S. 458, 467 (1983) (noting "agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration"); United States v. Storer Broad. Co., 351 U.S. 192, 203 (1956) (acknowledging Congress's goal of protecting public interest with rulemaking power).

43. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (establishing criteria for determining procedural safeguards in administrative adjudications for complainants under Due Process Clause); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (requiring pretermination hearing procedures for welfare benefit recipients). See generally Henry J. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1279–95 (1975) (discussing constitutional elements of fair hearing).

administrative law's foundational goals of efficiency, consistency, and fairness. Part I.A below describes three kinds of cases likely to give rise to multiparty disputes. Part I.B describes how the failure to adopt aggregate procedures reduces agencies' capacity to efficiently process duplicative claims, adds to the risk of inconsistent outcomes, and compromises claimants' access to counsel in cases that groups could litigate more affordably and effectively.

A. *Agency Adjudications Involving Multiple Parties*

Agencies routinely adjudicate three different kinds of disputes: (1) "public rights cases" that involve disputes or claims between private parties and the government itself; (2) "private rights cases" that involve disputes between purely private parties before the agency; and (3) "agency restitution cases" that involve disputes commenced by the government against private parties on behalf of other private parties.[44]

1. *Public Rights Cases.* — The most traditional form of agency adjudication involves "public rights" cases between an individual and the government.[45] Public rights cases include a wide range of large administrative screening programs, such as applications for Social Security disability benefits or for a change in immigration status.[46] Today, the sheer number of applications overwhelms administrative judges and agency officials who adjudicate these cases, producing significant and recurring backlogs. Moreover, the same questions of law and fact must be addressed in thousands of similar cases. Does the statute or regulation provide for the relief or right sought? Are disabled veterans entitled to treatment for

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44. The distinction between "private rights" and "public rights" cases made in this Article is slightly different from the one articulated by the Supreme Court, not always consistently, in a line of cases stretching from Crowell v. Benson, 285 U.S. 22, 51 (1932) (describing cases of "private right" as addressing "liability of one individual to another under the law as defined"), to Stern v. Marshall, 131 S. Ct. 2594, 2613 (2011) (explaining "what makes a right 'public' rather than private is that the right is integrally related to particular federal government action"), to police congressional delegations of judicial authority to agencies. For the Article's purposes, only the identities of the parties matters, not the nature of the underlying claim or its relationship to a federal regulatory scheme.

45. See Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 577–83 (2007) (tracing adjudication of public rights cases to nineteenth-century agencies that decided questions involving land grants, customs, and immigration); see also United States v. Ju Toy, 198 U.S. 253, 263 (1905) (indicating Congress could authorize executive officers to make conclusive determinations of would-be entrants' claims to United States citizenship); Lewis v. Lewis, 9 Mo. 183, 188 (1845) (observing Congress could rely on administrative mechanisms to identify land buyers because "[t]he United States is the owner of the public lands").

46. See, e.g., Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 332–33 (6th ed. 2009) (describing and collecting different categories of public rights cases).

post-traumatic stress disorder (PTSD) at outpatient facilities?[47] Does an ethnic minority face persecution in a country with a government that is unable or unwilling to stop the persecution?[48] No procedures, however, permit parties to aggregate these common questions in agency adjudication.

2. *Private Rights Cases.* — In "private rights" cases, an administrative judge or another tribunal adjudicates a dispute between private parties for allegedly violating the statute that created the agency—otherwise known as its "organic" or "enabling" statute—or the agency's own regulations. Such cases may range from compensation for workplace injuries between employees and an insurance carrier,[49] broker-dealer fraud in the futures markets,[50] or allegations of discrimination at ports of entry.[51]

Private rights cases represent a more modern phenomenon in administrative courts.[52] Congress's increasing use of agencies to resolve private disputes reflects a view that the process of adjudication itself supplies the agency with information about unfair practices within the industry

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47. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 850–52 (9th Cir. 2011) (finding denial of suicide prevention services for PTSD at over 800 outpatient facilities inconsistent with federal policy), vacated en banc, 678 F.3d 1013 (9th Cir. 2012); see also John Schwartz, Instead of Helping, Trustee Program Is Hurting Veterans, Families Say, N.Y. Times, Apr. 8, 2011, at A16 (discussing diversion of veterans' payments to trustees who have taken control of such funds).

48. See 8 U.S.C. § 1158(b)(1) (2006) (requiring that applicants for asylum face persecution on basis of race, religion, nationality, political opinion, or membership in particular social group).

49. See Black Lung Benefits Act of 1969, 30 U.S.C. §§ 901–944 (2006 & Supp. IV 2011) (providing rights to benefits for coal miners who are disabled due to respiratory disease, or to surviving dependents in event of miners' deaths); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (2006) (§ 943 repealed 1965; §§ 945–947 repealed 1984) (providing employment injury and occupational disease protection for workers who are injured or contract occupational diseases on navigable waters of United States).

50. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 834 (1986) (recognizing right of CFTC to hear claims and counterclaims in futures trading disputes).

51. See 46 C.F.R. § 502.142 (2001) (listing types of cases in which Federal Maritime Commission shall conduct formal hearings pursuant to 5 U.S.C. § 554 (2002)); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 764 (2002) (describing powers of Federal Maritime Commission to adjudicate disputes of discrimination between private parties).

52. See Nelson, supra note 45, at 563–64 ("[S]cholars and the modern Supreme Court are well aware of nineteenth-century precedents allowing legislatures or their delegates in the executive branch to adjudicate 'public rights,' but insisting that only entities with judicial power can authoritatively declare the loss of an individual's core 'private rights' to life, liberty, or property."); see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63–70 (1982) (observing Framers' view "that Congress would be free to commit [the adjudication of public rights] completely to nonjudicial executive determination," but not private rights); John Harrison, Jurisdiction, Congressional Power, and Constitutional Remedies, 86 Geo. L.J. 2513, 2516 (1998) (describing "exercise of congressional substantive power to establish nonjudicial finality in administrative adjudications and to create causes of action").

that it regulates.[53] Accordingly, since the 1980s, and as early as the 1930s, the Supreme Court has reaffirmed that agencies may adjudicate purely private disputes between parties as part of their regulatory mission.[54]

Like public rights cases, many private rights cases involve the same questions of law or fact. Among other things, private disputes may involve the same pattern and practice of discrimination, scientific questions of causation and exposure, or common questions of liability.[55] In such cases, agencies must repeatedly decide questions about the same futures trader, the same patterns in hiring or promotion, or the same workplace exposure to asbestos or other dangers.

3. *Agency Restitution Cases.* — Finally, agencies will commence actions on behalf of large groups of people against a private party in "restitution cases."[56] Over the past decade, agencies collected over $10 billion from regulatory violators to compensate people hurt by massive frauds, ranging from the national foreclosure crisis,[57] to false advertising,[58] to defec-

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53. See, e.g., Verity Winship, Public Agencies and Investor Compensation: Examples from the SEC and CFTC, 61 Admin. L. Rev. 137, 152–61 (2009) (describing "informational advantages" in CFTC reparation proceedings, including factual information about industry practices and agency's view of relevant law).

54. See, e.g., *Schor*, 478 U.S. at 847, 857 (concluding Commodity Exchange Act empowers CFTC to entertain state law counterclaims in reparations proceedings without violating Article III); Gordon G. Young, Public Rights and the Federal Judicial Power: From *Murray's Lessee* Through *Crowell* to *Schor*, 35 Buff. L. Rev. 765, 767 (1986) (describing development of exceptions to constitutional requirement that federal judicial cases be tried by equal and independent federal judicial branch of government). But see Stern v. Marshall, 131 S. Ct. 2594, 2613 (2011) (rejecting counterclaim in Article I courts, but reaffirming that "it is still the case that what makes a right 'public' rather than private is that the right is integrally related to particular federal government action").

55. See, e.g., U.S. Gov't Accountability Office, GAO-08-628T, Federal Compensation Programs: Perspectives on Four Programs for Individuals Injured by Exposure to Harmful Substances 8 (2008) (observing factors delaying difficult medical claims for disability or death in Black Lung Program, Radiation Exposure Compensation Program (RECP), and Energy Employees Occupational Illness Compensation Program (EEOICP) included common statutory and regulatory eligibility requirements); Press Release, Am. Fed'n of Gov't Emps., Union Decries Retaliatory Tactics, Discrimination in Federal Prisons (July 13, 2011), available at http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=1299 (on file with the *Columbia Law Review*) (alleging systematic pattern and practice of retaliatory discrimination against employees of Bureau of Prisons (BOP) before EEOC, but arguing there was "no process in place for the agency to effectively monitor" BOP discrimination).

56. See Zimmerman, Distributing Justice, supra note 37, at 527–39 (describing trends in federal agencies such as SEC, FTC, and FDA). The SEC sought to distribute $10.7 billion between 2007 and 2011, including $2.8 billion in 2011 alone. SEC, Putting Investors First: 2011 Performance and Accountability Report 66 (2011), available at http://www.sec.gov/about/secpar/secpar2011.pdf (on file with the *Columbia Law Review*).

57. See Gretchen Morgenson, Countrywide To Distribute Settlement to Its Clients, N.Y. Times, July 21, 2011, at B1 (describing unprecedented settlement struck between Federal Trade Commission and Countrywide Home Loan for excessive fees during mortgage crisis); Press Release, FTC, FTC Urges Consumers to Cash Restitution Checks Mailed

tive drugs.[59] Today, the SEC regularly assesses monetary awards against large public companies and distributes the proceeds to injured investors.[60] When the Federal Trade Commission assesses civil awards for false advertising, it often distributes the award to injured consumers.[61] Even the Postal Service sanctions scam artists who commit mail fraud and distributes their ill-gotten gains to potential victims.[62]

In such cases, agencies already achieve some of the same economies of scale as a class action by aggregating individual distributions through a single enforcement proceeding. However, restitution cases fail to include aggregation procedures to ensure that victims participate in their own

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by Wachovia Bank (Jan. 13, 2009) [hereinafter FTC, Restitution Checks], available at http://www.ftc.gov/opa/2009/01/wachovia.shtm (on file with the *Columbia Law Review*) (describing $150 million fund established by FTC and Office of the Comptroller of the Currency settlement with Wachovia Bank for victims of telemarketing fraud); Press Release, SEC, Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (July 15, 2010), available at http://sec.gov/news/press/2010/2010-123.htm (on file with the *Columbia Law Review*) (describing Goldman Sachs settlement details).

58. See FTC, Restitution Checks, supra note 57 (noting $150 million in restitution checks were given to "more than 740,000 consumers who were victims of [Wachovia Bank's] telemarketing fraud").

59. See Consent Decree of Permanent Injunction at 23–24, United States v. Schering-Plough Corp., No. 02-2397 (D.N.J. May 20, 2002), available at http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/UCM095945.pdf (on file with the *Columbia Law Review*) (specifying company's agreement to pay U.S. Treasury $500 million in defective drug case).

60. See Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7246 (2006) (requiring civil penalties be added to disgorgement funds for benefit of victims of securities laws violations); see also Barbara Black, Should the SEC Be a Collection Agency for Defrauded Investors?, 63 Bus. Law. 317, 318 (2008) (describing Fair Fund provision and SEC's new role in investor compensation); Verity Winship, Fair Funds and the SEC's Compensation of Injured Investors, 60 Fla. L. Rev. 1103, 1110–14, 1118–23 (2008) ("The SEC ha[s] two main mechanisms for compensating injured investors: distribution of disgorged funds and . . . distribution of money penalties pursuant to the Fair Fund provision."); Zimmerman, Distributing Justice, supra note 37, at 527–33 (describing SEC authorization to distribute civil penalties to injured investors).

61. See FTC v. Mylan Labs. Inc., 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999) (holding that FTC is able to "pursue monetary relief" in civil actions); Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendants Lifelock and Davis, FTC v. LifeLock, 2:10-cv-00530-MHM (D. Ariz. Mar. 15, 2010) (stipulated final judgment and order awarding $11 million to consumers), available at http://www.ftc.gov/os/caselist/0723069/index.shtm (on file with the *Columbia Law Review*). For criticism of the development of this distribution process, see Peter C. Ward, Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions, 41 Am. U. L. Rev. 1139, 1197 (1992) (arguing such distribution should not be allowed absent explicit congressional approval).

62. The United States Postal Inspection Service enforces approximately 200 federal statutes in an effort to protect the mail system. It seeks restitution primarily in mail fraud investigations, mail theft, and various other crimes in which the Postal Service is financially impacted. See, e.g., 18 U.S.C. § 1341 (2006) (outlawing mail fraud); id. § 1708 (outlawing mail theft).

redress, to police conflicts of interest, or to compensate parties efficiently and consistently with their own injuries, like the case of the Mortgage Foreclosure Settlement discussed above.[63] Despite the increasingly high-profile nature of large settlements forged by agencies, they otherwise lack aggregate procedures to compensate victims with the limited funds collected from regulatory wrongdoers.

B. *Agency Adjudications Lack Consistency, Efficiency, and Fairness*

Public rights, private rights, and agency restitution cases strain the ability of agencies to achieve consistency, efficiency, and access to justice in the adjudication of commonly alleged harm. This section addresses each goal, and how agency adjudication falls short, in turn.

1. *Consistency.* — Public rights caseloads present the greatest challenge to the idea of "equal justice under law."[64] Advocates and academics describe notoriously wide disparities in the ways that different administrative judges resolve similar cases. Recent studies of asylum applications, for example, found extreme differences in grant rates at all levels of the immigration system, even when controlling for the applicant's country of origin.[65] In one regional asylum office, immigration officers were worlds apart, "with some officers granting asylum to no Chinese nationals, while others granted asylum in as many as 68% of their cases."[66] In a Miami immigration court, Colombian asylum applicants had a 5% chance of

63. See supra notes 18–22 and accompanying text (describing $394 million mortgage foreclosure settlement in which victims contested settlement distribution plan but OCC lacked rules to hear and resolve competing claims and interests); see also 17 C.F.R. § 201.1106 (2011) ("[N]o person shall be granted leave to intervene or to participate or otherwise to appear in any agency proceeding or otherwise to challenge [a distribution plan, eligibility determination, or disbursement]."); Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 82–84 (2d Cir. 2006) (limiting judicial review of distribution plans approved by SEC).

64. See Deborah L. Rhode, Access to Justice, 69 Fordham L. Rev. 1785, 1785–86 (2001) (observing that "'[e]qual justice under law' is one of America's most firmly embedded and widely violated legal principles"); see also Jack B. Weinstein, Changing Equalities, 54 N.Y.L. Sch. L. Rev. 421, 426 (2010) ("We have still a long way to go to provide true equality in the courthouse."); Jack B. Weinstein, The Poor's Right to Equal Access to the Courts, 13 Conn. L. Rev. 651, 655 (1981) ("[E]quality of access is in the real world little more than a figment of the jurisprudential imagination.").

65. Jaya Ramji-Nogales, Andrew I. Schoenholdtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 Stan. L. Rev. 295, 301 (2007) [hereinafter Ramji-Nogales et al., Refugee Roulette] (finding large variation in grant rates among similar asylum law cases); see also U.S. Gov't Accountability Office, GAO-08-940, U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges 62 (2008), available at http://www.gao.gov/new.items/d08940.pdf (on file with the *Columbia Law Review*) (listing recommendations to address potentially unwarranted disparities in asylum outcomes among judges); ABA, Reforming the Immigration System, supra note 2, at 1-12 to -14 (citing Department of Homeland Security data on asylum cases).

66. Ramji-Nogales et al., Refugee Roulette, supra note 65, at 296.

prevailing with one of the court's judges and an 88% chance of prevailing with another judge in the same building.[67] According to the same report, half of the Miami judges deviated by "more than 50% from the court's mean grant rate" for all Colombian cases.[68] Asylum outcomes also heavily correlated with factors totally unrelated to the merits of the applicant's claim, including whether the asylum seeker was represented, the number of dependents of the applicant, the judge's gender, and the judge's prior work experience.[69] In some cases, judges in the same courthouse, evaluating claimants with the same country conditions, were 1,820% more likely to grant asylum than another judge in the same building.[70]

Even cases that come down to individual credibility determinations may still raise common legal or factual questions. In many asylum claims, for example, an adjudicator must assess the applicant's account of his or her experience in the applicant's native country or whether the applicant has a well-founded fear of persecution if forced to return—an inquiry that is impossible to resolve in the aggregate.[71] Nevertheless, multiple applicants also routinely raise common questions of law and fact that can be effectively resolved as a group—like whether an identifiable minority group suffers persecution and whether the government actively encourages persecution.[72] Even though such questions arise across large classes of applicants, no procedure currently allows agencies to resolve them consistently in adjudication.

In private rights cases, an agency's individual adjudication of common legal or factual claims also risks inconsistent outcomes, particularly when plaintiffs lack access to common resources or expert information. For example, coal miners seeking compensation from mining companies face very different outcomes in the Black Lung Benefits Program.[73]

67. Id.

68. Id.

69. Id. at 339–49.

70. Ramji-Nogales et al., Proposals for Reform, supra note 1, at 40–44 (tracing differences in New York immigration judges' grant rates for Albanian applicants).

71. Id. at 11 ("Asylum decisions . . . involve both a judgment about whether the applicant's story, if true, would render the applicant eligible for asylum under American law and . . . whether the applicant is telling the truth . . . .").

72. See Duarte de Guinac v. INS, 179 F.3d 1156, 1159–60 n.5 (9th Cir. 1999) (discussing differences between race and ethnicity in "grounds of persecution" analysis); Korablina v. INS, 158 F.3d 1038, 1044–45 (9th Cir. 1998) (reversing Board of Immigration Appeals (BIA) denial of asylum for Ukrainian Jews based upon beatings and disappearance of other Jews in Kiev); M.A. v. U.S. INS, 899 F.2d 304, 322 (4th Cir. 1990) (observing petitioner entitled to asylum when "objective evidence that he or members of his group, which includes those with the same political beliefs of the petitioner, have been, or will be, subjected to persecution").

73. See Black Lung Benefits Program, supra note 15, at 26–27 (discussing disincentives for lawyers to take on black lung cases).

Although the Black Lung Benefits Program approves over $250 million in benefits each year, many complain that the program results in inconsistent outcomes, particularly with average claim approval rates "historically below 15 percent and with reports of some cases that take years to resolve."[74] Among other things, a 2009 Government Accountability Office report found that many benefit determinations often hinged on disparate access to counsel and experts, as well as different adjudicators' views about whether classes of miners were eligible for common forms of lung disease.[75]

Like asylum cases, private rights claims alleging exposure to workplace hazards, damages from fraud, or individual discrimination, will also turn on individual, fact-based determinations. Agencies, however, risk inconsistent access and outcomes by failing to coordinate discovery against the same parties or resolve common factual or legal problems. Among other things, different adjudicators may repeatedly consider whether claimants may or may not recover for the same kind of disease,[76] whether the same employer exposed workers to the same pattern of discrimination,[77] or whether a broker engaged in the same pattern of fraudulent conduct with investors.[78]

Even agency-restitution cases—which already involve a government-sponsored aggregate action against a third party—risk inconsistent outcomes when agencies do not use aggregation procedures to hear from different classes of victims. In a settlement to resolve allegations that the software giant Computer Associates improperly inflated its financial statements, for example, the SEC appointed Kenneth Feinberg as a special master to distribute hundreds of millions to many kinds of victims.[79]

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74. Id. at 1; see also Brian L. Hager, Is There Light at the End of the Tunnel? Balancing Finality and Accuracy for Federal Black Lung Benefits Awards, 60 Wash. & Lee L. Rev. 1561, 1563 (2003) ("The major factors contributing to the marathon-like benefits process include the imbalance in legal resources between coal miners and coal operators and the mountains of medical evidence presented by each party . . . .").

75. See Black Lung Benefits Program, supra note 15, at 22 (noting weight of credentials of physician and comprehensiveness of evidence in determining cause of claimant's disability).

76. See, e.g., id. at 21 (noting how ALJs repeatedly consider appropriate nonclinical factors to establish whether pneumoconiosis is attributable to inhalation of coal dust or tobacco smoking).

77. See, e.g., Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1009–10 (7th Cir. 1988) (involving thirty-nine employees who filed EEOC complaints alleging age discrimination prior to bringing class action in federal court).

78. See, e.g., Kohen v. Pac. Inv. Mgmt. Co. 571 F.3d 672, 674, 680 (7th Cir. 2009) (Posner, J.) (finding class certification appropriate in action against investment firm accused of manipulating Treasury note futures market in violation of Commodity Exchange Act).

79. Gretchen Morgenson, Giving Away Lots of Money Is Easy, Right?, N.Y. Times, Feb. 13, 2005, at BU1 [hereinafter Morgenson, Money] (discussing difficulty of computation of damages for fund dispersal); Press Release, SEC, SEC Files Securities Fraud

Among other things, Special Master Feinberg had to consider who would be eligible to recover from the fund. Some were ineligible to recover in the civil system because their claims were time-barred. Feinberg, however, chose to allow parties with time-barred claims to recover from the restitution fund.[80] Moreover, payments in civil litigation ordinarily reflect the litigation costs and risks associated with different categories of claims.[81] However, Feinberg chose to ignore these factors in his distribution plan.[82] No rules existed then—or now—to permit the agency to "sub-class" parties so that varying interests are represented by separate trustees, class representatives, or counsel.[83] The SEC's failure to address how victims should participate in the formation of such a plan compromises its ability to ensure that like victims are treated in a like manner.

2. *Efficiency.* — The absence of aggregation procedures also aggravates inefficiencies in adjudication—wasting resources in duplicative litigation, requiring frequent remands to address common factual errors, and hampering the efficient development and enforcement of law. In public rights cases, agencies exhaust precious resources by relitigating common questions that arise in applications for government relief or benefits. The Veterans Administration may require defrauded soldiers to file separate petitions to remove the same trustee that wrongfully handled or embezzled their assets.[84] The Department of Homeland Security

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Charges Against Computer Associates International, Inc., Former CEO Sanjay Kumar, and Two Other Former Company Executives (Sept. 22, 2004), available at http://www.sec.gov/news/press/2004-134.htm (on file with the *Columbia Law Review*).

80. Just as in civil litigation, however, the Special Master denied claims by those who only held Computer Associates stock. Putting aside the fact only buyers and sellers are ordinarily entitled to recover in a securities case, the Special Master also cited the difficult valuation questions raised by such claims. See Plan of Allocation for the Restitution Fund at 2 n.2, United States v. Computer Assocs. Int'l, Inc., No. 04-837 (E.D.N.Y. June 28, 2005), available at http://www.computerassociatesrestitutionfund.com/pdf/carfl plan.pdf (on file with the *Columbia Law Review*) (describing disputed claims by holders, purchasers, and sellers of defendant's stock).

81. See, e.g., ALI Report, supra note 37, § 1.04 cmt. f (observing that in conventional and aggregate litigation settlement values reflect "risk aversion, the ability to endure delay, and other arbitrary factors"); Manual for Complex Litigation, Fourth § 21.62 (2004) (establishing criteria for evaluating a proposed settlement).

82. Plan of Allocation for the Restitution Fund, supra note 80, at 4–5 ("[T]he formula proposed here does not discount or weight claims based on litigation risk . . . ."). The Special Master's decision was well-grounded. While courts usually consider such factors in civil class action settlements, regulatory victims, unlike plaintiffs, do not face the same costs and litigation risks when agencies commence actions against defendants. However, agencies still risk inconsistency without some standards for those faced with similar distribution questions in future cases.

83 Compare id., with Fed. R. Civ. P. 23(c)(5) (allowing subclasses in class actions), and 11 U.S.C. § 524(g) (2006) (imposing subclassing and voting requirements in bankruptcy reorganizations involving asbestos liability).

84. See Schwartz, supra note 47 (noting government generally responds to suits by stating decision to appoint a fiduciary is under jurisdiction of VA).

may require hundreds of asylum applicants to prove, in separate proceedings, that the same country persecutes the same ethnic minority.[85] Multiple disabled students may commence separate proceedings before a local educational agency to challenge the same state- or city-wide policy that violates their rights to remain in school under the Individuals with Disabilities Education Act.[86]

The absence of aggregation techniques also creates inefficient fact-finding, as appeals courts frequently remand cases to cure common errors or weaknesses in the record. For example, a federal district court recently found that the Board of Veterans' Appeals only affirmed 40% of the decisions made by "trial level" hearing officers.[87] Almost half of those cases were "avoidable remands" based on common errors and violations that protracted benefit decisions by another 500 days each.[88] Similar remand rates and delays also persist in Social Security and immigration hearings.[89]

Finally, without tools to handle the sheer volume of claims, agencies fail to efficiently develop settled expectations about the law or their own regulations.[90] The shortage of immigration judges to process repeated issues in immigration courts, for example, has forced immigration judges

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85. See supra notes 65–72 and accompanying text (highlighting different treatment by different courts of same ethnic minorities).

86. See Individuals with Disabilities Education Act of 2004 §615, 20 U.S.C. § 1415 (2006) (establishing procedures for parents of child with disability to bring complaint under IDEA); N.D. v. Haw. Dep't of Educ., 469 F. App'x 570, 571 (9th Cir. 2012) (describing how parents of children with disabilities requested individual due process hearings from Hawaii Department of Education regarding potential changes in educational placements due to system-wide furlough program); D.S. ex rel. S.S. v. N.Y.C. Dep't of Educ., 255 F.R.D. 59, 74–75 (E.D.N.Y. 2008) (noting individuals with claims under Individuals with Disabilities Education Act can opt out of class action lawsuits (citing Fed. R. Civ. P. 23)).

87. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 860 (9th Cir. 2011), vacated en banc, 678 F.3d 1013 (9th Cir. 2012).

88. Id.

89. See, e.g., ABA, Reforming the Immigration System, supra note 2, at 3-24 to -25 (describing "withering criticism from some circuit court panels" and reversal rates that in some cases exceed 40%, but finding reversal rates "consistent" with "federal administrative action generally"); Eckholm, supra note 1 (observing that "of the more than 575,000 who go on to file appeals—putting them in the vast line for a hearing before a special federal judge—two-thirds eventually win a reversal").

90. Commentators and courts have long acknowledged that class actions generate important spillover effects that make the interpretation and enforcement of law more efficient. See, e.g., Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) (finding class action waiver would enable unchecked, unlawful market behavior); Kristian v. Comcast Corp., 446 F.3d 25, 61 (1st Cir. 2006) (observing that if class action ban were enforced, "the social goals of . . . antitrust laws [would] . . . be frustrated because of the 'enforcement gap' created by the de facto liability shield"); William B. Rubenstein, Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action, 74 UMKC L. Rev. 709, 710 (2006) (arguing that class actions produce beneficial "spillover effects" not present in individual claims).

to rely upon oral decisions made immediately at the close of the hearing "without sufficient time to conduct legal research or thoroughly analyze the issues and evidence."[91] Current practice stunts the development of law as noncitizens, their counsel, and appellate courts struggle to understand the basis of separate, hurried, unwritten decisions in cases that frequently raise common legal questions.[92]

The absence of aggregation procedures creates similar inefficiencies in "private rights" cases. Appellate bodies in the Black Lung Benefits Program, such as the Veterans Administration, frequently remand cases in which mining operators challenge coal miners' benefits.[93] Many administrative judges blame remands on the limited availability of competent experts and the frequency with which experts misdiagnose of miners' medical conditions or make mistakes as to whether those conditions originate from the same workplace.[94] In other cases, the failure to aggregate cases hampers enforcement efforts. Following a racketeering scheme targeting two of the largest futures markets in the country, organizations petitioned Congress to permit class actions against future speculators in Commodity Futures Trading Commission (CFTC) proceedings.[95] Advocates championed the measure as a "Farmers' Bill of Rights" to stamp out widespread scams that hurt farmers in futures markets but that were otherwise too difficult and costly to litigate individually.[96] Congress approved the measure, yet the CFTC abandoned the

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91. Ensuring Justice in Immigration, supra note 1, at 4; see also ABA, Reforming the Immigration System, supra note 2, at 3-13 to -15 (arguing unreasoned immigration decisions by Board of Immigration Officials have negative impact for Board, reviewing court, and noncitizens).

92. See, e.g., Jill E. Family, A Broader View of the Immigration Adjudication Problem, 23 Geo. Immigr. L.J. 595, 604–05 (2009) (finding "[s]erious problems" now "beset adjudication before the Board of Immigration Appeals" as a result of modified BIA procedures); Shruti Rana, "Streamlining" the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action, 2009 U. Ill. L. Rev. 829, 831–39, 846–49 (arguing written, reasoned decisions "provide assurance . . . that the arguments raised were heard and considered, and facilitate further review by revealing and clarifying the reasoning behind the decisions").

93. See Black Lung Benefits Program, supra note 15, at 15 (reporting that "[i]n addition to the significant number of claims that are appealed, many are remanded back to the prior review stage by [Department of Labor (DOL)] adjudicators").

94. Id. at 16 ("Some administrative law judges said claims are sometimes remanded to [Office of Workers Compensation Program] because medical evidence submitted by DOL's approved doctors was incomplete and required clarification or further development.").

95. S. Rep. No. 102-22, at 2 (1992), reprinted in 1992 U.S.C.C.A.N. 3103, 3104 (noting case for more stringent regulation arose after 1989 law enforcement sting operation against traders at nation's two largest futures exchanges).

96. Id. at 21, reprinted in 1992 U.S.C.C.A.N. at 3123 (summarizing testimony from members of Farmers' Union and National Cattlemen's Association). Advocates raise similar concerns about the veterans' benefit system. See S. Rep. No. 111-265, at 35 (2009) (statement of Professor Michael P. Allen) ("[O]ne cannot avoid concluding that the

proposal after receiving complaints from banks and other traders on the futures market.[97]

Agency-restitution cases raise slightly different efficiency concerns. When an agency collects restitution for a large group of people, the agency actually achieves many of the same efficiencies as a class action, and arguably more efficiency for the victim than if the claim were brought on its own.[98] By denying group-based participation in such settlements, however, agencies risk other inefficiencies, including expensive forms of outreach for victims who are never included in the settlement process.[99]

For example, in the highly touted multimillion dollar settlement between former New York Attorney General Eliot Spitzer, the SEC, and the nation's largest investment banks, the banks agreed to establish a $400 million settlement fund to pay injured investors.[100] The proposed settlement, however, failed to offer any framework for "formulating and implementing a distribution plan."[101] When the court invited the SEC to define the components of the distribution plan, no victims participated. Indeed, while the SEC "professed its interest in restitution," it never identified relevant securities and potential claims of injured investors.[102] Over the six years that the SEC administered the Fair Fund,[103] the cost of the

absence of such authority to address multiple cases at once has an effect on system-wide timeliness of adjudication."). Nevertheless, the Court of Veterans Appeals has held that it lacks power to hear aggregate litigation concerning more generic issues that may affect groups of veterans. See, e.g., Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991) (per curiam) (rejecting contention that court had authority to adjudicate class actions).

97. See Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 224, 106 Stat. 3590, 3617 (codified at 7 U.S.C. § 18(a)(2)(A)) (authorizing CFTC to issue rule permitting class actions); Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631 (Mar. 1, 1994) (declining to adopt Class Action Proposal).

98. See Adam S. Zimmerman & David M. Jaros, The Criminal Class Action, 159 U. Pa. L. Rev. 1385, 1411–14 (2011) (comparing efficiencies of class actions and large criminal restitution funds brokered by prosecutors and agencies); Zimmerman, Distributing Justice, supra note 37, at 540 (observing class action and agency restitution settlements share similar economies of scale).

99. See Zimmerman, Distributing Justice, supra note 37, at 549 ("When agencies limit victim participation in a settlement, they risk compromising their own goals of accountability, efficiency, and equity.").

100. SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 404 (S.D.N.Y. 2009) (describing settlement agreement in detail). For an in-depth accounting of the circumstances surrounding the settlement agreement, see Barbara Moses, They Were Shocked, Shocked: The "Discovery" of Analyst Conflicts on Wall Street, 70 Brook. L. Rev. 89, 100–02 (2004).

101. *Bear, Stearns & Co.*, 626 F. Supp. 2d at 404.

102. Id. at 411. The investment banks and the SEC were more than capable of doing so since "each had trade data permitting [it] to analyze the number of shares purchased or sold for any security through any given investment bank and the relevant market prices for any time period." Id.

103. Black, supra note 60, at 318–19 (2008) (describing Fair Fund provision of Sarbanes-Oxley, which gives SEC greater power to compensate investors (citing Sarbanes-

Fund—including efforts to locate and notify claimants—climbed to over $10 million, and over $79 million remained undistributed.[104] In the end, the court was left with no choice but to return the remaining funds to the U.S. Treasury.[105] By failing to adopt aggregate settlement procedures that account for victims' interests in restitution cases, agencies miss an important opportunity to efficiently calculate damages, identify and uniformly compensate different interests, and, ultimately, force wrongdoers to accurately account for the harm they cause.

3. *Access to Justice.* — Finally, the failure to permit class-wide relief compromises access to competent counsel and to a "just, speedy, and inexpensive" resolution.[106] Parties in public rights and private rights cases may lack access to affordable counsel because of collective action problems. That is, even when a defendant causes a great deal of harm to a large group of people, those cases may be too expensive to litigate separately.[107] Also, for those parties that can afford counsel, delays and repeat litigation costs mean that they may never receive a hearing before an adjudicator.[108]

Many applicants for government benefits, for example, cannot afford to hire a lawyer.[109] Lawyers representing individuals in administra-

Oxley Act of 2002, Pub. L. No. 107-204, § 308, 116 Stat. 745, 784 (codified at 15 U.S.C. § 7246))).

104. *Bear, Stearns & Co.*, 626 F. Supp. 2d at 410–12 (stating first phase of Fund cost $9.3 million and second phase cost $3.8 million, with $79 million remaining unclaimed).

105. Id. at 420 (ordering undistributed funds minus additional remedial payments, costs, and fees be returned to Treasury).

106. Fed. R. Civ. P. 1 ("These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

107. Cf. Black Lung Benefits Program, supra note 15, at 26 (noting lack of financial incentives for lawyers to take black lung claimants' cases due to time and cost of pursuing such claims).

108. It takes an average of nearly four years for a veteran who disputes a decision of the Veterans' Administration to receive a final judgment by the Board of Veterans' Appeals. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 859 (9th Cir. 2011) ("[T]he district court found that it takes on average 1,419 days (3.9 years) from the veteran's initial filing of the [appeal] to the veteran's receiving a decision from the Board [of Veterans' Appeals]."), vacated en banc, 678 F.3d 1013 (9th Cir. 2012). During one six-month period from 2007 to 2008, 1,467 veterans died while their appeals were pending. Id. at 860. On the tragic problem of delay in the processing of claims for veterans' benefits, see James D. Ridgway, Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies, 64 Admin. L. Rev. 57, 65–68 (2011) ("[S]truggles . . . are the norm for . . . agencies rather than the exception.").

109. Cal. Comm'n on Access to Justice, Action Plan for Justice 32 (2007), available at http://cc.calbar.ca.gov/LinkClick.aspx?fileticket=6TCtvZ3Ei4k%3D&tabid=1195 (on file with the *Columbia Law Review*) (discussing ratio of one lawyer for every 8,360 California legal aid clients); Task Force on Access to Civil Justice et al., Am. Bar Ass'n, Report to the House of Delegates 5 (2006), available at http://www.americanbar.org/content/dam/

tive adjudications must rely on billable fees or fees for services rather than contingency fees.[110] Some indigent applicants for benefits may obtain counsel through legal aid or civil legal services.[111] However, non-profit organizations continue to face budget cuts and shortfalls, and legal services cannot represent all of the individuals in adjudicatory proceedings.[112] Only 40% of detained immigrants have lawyers; more than a quarter of immigration defendants who have not been detained also do not have lawyers.[113] In private rights cases, like those involving the Black Lung Benefits Program, few financial incentives exist for lawyers to take black lung claimants' cases or to cover the costs associated with developing evidence needed to support miners' claims.[114]

Yet inadequate access to counsel continues to adversely affect the outcomes of many public benefit and private rights cases. Asylum seekers with legal representation, for example, are granted asylum at a rate of 45.6%, while those without counsel are successful only 16.3% of the time.[115] Mine operators, who, unlike their employees, retain counsel and

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aba/directories/policy/2006_am_112a.pdf (on file with the *Columbia Law Review*) (collecting studies showing that up to 90% of civil legal assistance needs go unmet).

110. In some cases, however, attorneys may be able to recoup attorneys' fees from the government if they are successful. See infra Part II.C (discussing statutory attorneys' fees).

111. The Legal Aid Society, for example, represents low-income families and individuals (defined as having an annual income at or below 125% of the federal poverty level) in legal matters involving housing, benefits, disability, domestic violence, family issues, health, employment, immigration, HIV/AIDS, prisoners' rights, and elder law. Frequently Asked Questions About the Legal Aid Society, Legal Aid Soc'y, http://www.legal-aid.org/en/las/aboutus/legalaidsocietyfaq.aspx (on file with the *Columbia Law Review*) (last visited Oct.. 9, 2012) (describing accepted clientele of Legal Aid Society).

112. See, e.g., Deborah L. Rhode, Public Interest Law: The Movement at Midlife, 60 Stan. L. Rev. 2027, 2042 (2008) ("Direct service providers and human rights organizations face the most obvious and painful reminders of the overwhelming demand and limited capacity to meet it."); Diane Curtis, Economic Downturn Puts a Crimp in Legal Services, Cal. B.J., Feb. 2009, at A1, available at http://archive.calbar.ca.gov/Archive.aspx?articleId=95083&categoryId=95001&month=2&year=2009 (on file with the *Columbia Law Review*) (describing cuts of over half for some California legal aid offices); Economic Woes Threaten Legal Aid Nationwide, Reading Eagle (Pa.), Dec. 8, 2008, at A7, available at http://news.google.com/newspapers?id=EZEjAAAAIBAJ&sjid=u6IFAAAAIBAJ&pg=3888%2C5274820 (on file with the *Columbia Law Review*) (reporting expected drops of up to 50% in earmarks for legal services for poor in some jurisdictions).

113. Sam Dolnick, Improving Immigrant Access to Lawyers: Advocates Gather to Discuss a 'Substantial Threat' to Justice, N.Y. Times, May 4, 2011, at A24 (discussing problems with immigrants obtaining legal representation).

114. See Black Lung Benefits Program, supra note 15, at 26–27 (noting low rate of success and high litigation costs contribute to difficulties miners face in obtaining legal representation).

115. Ramji-Nogales et al., Refugee Roulette, supra note 65, at 340; see also Steering Comm. of the N.Y. Immigrant Representation Study Report, Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings, 33 Cardozo L. Rev. 357, 363 (2011) (describing representation as one of most important variables in obtaining successful outcome in immigration case).

well-credentialed experts, appeal decisions over *five times* more often than coal miners.[116] This should not be surprising. Lawyers speak the language of the court and are familiar with the burdens that the applicant must meet and how to carry those burdens. They are also more likely to find corroborating evidence and experts to testify about country conditions or their client's mental and physical health.[117]

Finally, agency-restitution cases compromise legal access because they lack procedures to ensure aggrieved parties participate in the proceeding or to resolve conflicts of interest in the award. As part of its settlement with the Securities and Exchange Commission, Computer Associates agreed to establish a $225 million restitution fund to compensate shareholders injured by the scandal.[118] Months after the fund was announced, however, not a single shareholder had proposed how to dispense the money in a fair and appropriate manner.[119]

II. EXISTING ADMINISTRATIVE TOOLS INADEQUATELY RESOLVE GROUP CLAIMS

Although agencies possess some tools to improve uniformity, efficiency, and access for groups of people, none is as effective as aggregate adjudication. Agencies currently use rulemaking and stare decisis to enhance efficiency and consistency in individual adjudications. Statutory attorneys' fees provisions improve parties' access to legal representation. When judges review agency decisions and procedures, they also encourage agencies to decide different cases involving similar questions consistently. Finally, quality control measures and informal aggregation techniques may discourage inconsistency and improve efficient case handling. As set forth below, however, all of these tools fail to serve the broader remedial purpose of class actions and procedural aggregation: to remedy systemic violations of rights that otherwise leave groups of claimants without any effective redress in individualized hearings.

116. Black Lung Benefits Program, supra note 15, at 15.

117. See Ramji-Nogales et al., Refugee Roulette, supra note 65, at 340–41 (confirming representation is single most important factor affecting outcome of asylum seeker's case and noting that "[a]sylum seekers whose legal representatives track down corroborating evidence and obtain experts to testify about country conditions as well as about the asylum seeker's mental and physical health are more likely to win").

118. See Plan of Allocation for the Restitution Fund, supra note 80, at 1 (describing setup of restitution fund to compensate current and former shareholders).

119. Morgenson, Money, supra note 79.

A. *Rulemaking*

Most agencies make rules to "resolve certain issues of general applicability"[120] and ensure that adjudicators implement agency policy efficiently and consistently.[121] This is particularly helpful for agencies that must repeatedly address the same questions of law or fact in large numbers of public rights cases, like claims for benefits, immigration and naturalization proceedings, and applications for government licenses. Theoretically, rulemaking can resolve common issues uniformly, while relieving ALJs of the burden of repeatedly addressing the same issues in individual cases.[122] Indeed, since the 1970s, informal rulemaking has been the preferred means of implementing agency policy, instead of individualized agency adjudications.[123] Administrative law scholars have generally approved the trend, finding rulemaking to be (1) more effective at exploring questions of policy, law, and legislative fact; (2) more transparent to the general public; and (3) fairer to the parties affected by the agency's decisions.[124]

Nevertheless, rulemaking has its limits as a tool for addressing inconsistency, inefficiency, and accessibility for groups of people alleging the same kind of harm. First, the law generally disfavors retroactive rulemaking.[125] Retroactive rules unfairly surprise parties and undermine

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120. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 612 (1991). See generally M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1386–90 (2004) (describing range of policymaking tools generally available to agencies).

121. See Jerry L. Mashaw et al., Administrative Law: The American Public Law System 455 (6th ed. 2009) [hereinafter Mashaw et al., Administrative Law] (noting that rulemaking prevents "the disposition of individual cases from altering [the agency's] policies or (which is much the same thing) from implicitly generating policies that agency managers view as undesirable").

122. The Supreme Court approved such use of rulemaking in Heckler v. Campbell, 461 U.S. 458, 467 (1983) (explaining that Social Security Administration could "rely on its rulemaking authority to determine issues that do not require case-by-case consideration").

123. See Michael Asimow & Ronald M. Levin, State and Federal Administrative Law 192 (3d ed. 2009) (describing historical shift from adjudication to rulemaking as primary method by which agencies implement policy); Magill, supra note 120, at 1398 (describing historical evolution of agency choice of procedure); Lumen N. Mulligan & Glen Staszewski, The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law, 59 UCLA L. Rev. 1188, 1207 (2012) (describing advantages of rulemaking model over adjudication model with respect to policymaking); see also Jeffrey J. Rachlinski, Rulemaking Versus Adjudication: A Psychological Perspective, 32 Fla. St. U. L. Rev. 529, 532, 537 (2005) (explaining differing cognitive contexts of adjudication and rulemaking).

124. See Asimow & Levin, supra note 123, at 192–94 (explaining advantages of rulemaking over adjudication as tool for agency lawmaking and policymaking); Magill, supra note 120, at 1403 n.69 (collecting scholarship and noting general preference for rulemaking over adjudication); Mulligan & Staszewski, supra note 123, at 1207–12 (articulating reasons for administrative law scholars' general preference for rulemaking over adjudication).

125. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to

settled expectations.[126] Although the same might be said of retroactive adjudicatory pronouncements,[127] they provoke less concern, in part, because parties enjoy more procedural safeguards in those trial-like settings than in rulemaking.[128]

The prospective nature of rulemaking is a drawback in private rights and restitution cases that operate in a dynamic, constantly changing regulatory environment. As the Supreme Court long ago observed, "problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule."[129] If future regulatory problems are difficult to predict, applicable rules will be difficult to develop. Moreover, because a new rule cannot resolve a pending dispute, rulemaking does little to address the past harms caused by regulatory wrongdoers.[130]

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encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). Indeed, Justice Scalia has argued that APA section 551(4) and the authoritative interpretation of the APA's distinctions contained in the 1947 Attorney General's Manual on the Administrative Procedure Act defined all Rules as having future rather than retroactive effect. Id. at 216–19 (Scalia, J., concurring) ("The only plausible reading [of 5 U.S.C. § 551(4)] is that rules have legal consequences only for the future."). Categorizing rules as retroactive or prospective, however, is not always easy. See Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) ("The general legal principles governing retroactivity are relatively easy to state, although not as easy to apply."); William V. Luneburg, Retroactivity and Administrative Rulemaking, 1991 Duke L.J. 106, 109–10 (providing examples of differing views of retroactivity).

126. Luneburg, supra note 125, at 110 (arguing retroactive regulations "create 'surprise' and a potential for undermining 'reasonable' reliance by affected parties").

127. Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) (considering whether retroactive impact of policy announced in agency adjudication resulted in unfair surprise and disruption of settled expectations).

128. See SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) (approving adjudication with retroactive legal consequences). But see FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012) (holding that fleeting expletives and momentary nudity could not be found actionably indecent by Federal Communications Commission in adjudicatory proceeding because broadcasters did not have fair notice that conduct was actionable prior to broadcasts).

129. *Chenery*, 332 U.S. at 202.

130. For the same reason, rulemaking proceedings cannot substitute for the creative array of coordinated pretrial procedures that this Article recommends—such as joint motions before single adjudicators, common discovery banks, and special settlement masters—that do not require a class action, but are nonetheless staples of multiparty litigation. See Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits, 50 Duke L.J. 381, 386–408 (2000) (describing emergence of coordinated litigation outside of class litigation); Byron G. Stier, Resolving the Class Action Crisis: Mass Tort Litigation as Network, 2005 Utah L. Rev. 863, 892–95 (describing rise of multiparty litigation strategies used to achieve efficiencies in litigation outside of class litigation).

Second, rulemaking often cuts too broadly for groups seeking identical forms of relief.[131] Just like a legislature that passes a new law, agencies that create generally applicable rules may not anticipate how those rules will be applied in a variety of untested individual cases.[132] At the same time, agency rules inevitably leave gaps and ambiguities that must be filled by individual adjudicators, just as statutes leave gaps that must be filled by agencies.[133] For example, the Social Security Administration's medical-vocational guidelines do not address claimants who suffer from some form of mental or psychiatric condition.[134] Twenty-five years after the Secretary issued vocational guidelines, courts and agency adjudicators continue to dispute how they apply to these claimants, undermining the consistency and efficiency that the agency's rules were meant to promote.[135]

Third, individuals most impacted by agency adjudications in public rights cases often have the least access to the rulemaking process. Under the APA, the agency must follow notice and comment procedures before promulgating rules.[136] Theoretically, these procedures should ensure that the agency receives substantive input from the affected parties. The beneficiaries of many administrative programs, however, lack the influence that many regulated private entities have in rulemaking.[137] To

131. See Asimow & Levin, supra note 123, at 194 (noting rulemaking leads to principles that are "sometimes too broad, too narrow, or too rigid, because the agency fails to make allowances for some of the situations to which the rule will ultimately apply").

132. See *Chenery*, 332 U.S. at 202 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule."); Rachlinski, supra note 123, at 532 ("Relative to a rulemaking, . . . an adjudication will focus the decisionmaker's gaze upon the individual case, rather than the sociological, economic, or other structural aspects of the underlying issue.").

133. *Chenery*, 332 U.S. at 202–03 (noting "the agency must retain power to deal with [unforeseeable, new, and specialized] problems on a case-to-case basis if the administrative process is to be effective").

134. See Jon C. Dubin, Overcoming Gridlock: *Campbell* After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs, 62 Admin. L. Rev. 937, 942–43 (2010) (describing *Campbell* Court's recognition of "significant and elusive loophole" in Social Security Administration's medical-vocational guidelines for claimants with nonexertional limitations).

135. Id. at 943–44 (finding courts and agency adjudicators divided on proper methodology for using medical-vocational guidelines and circumstances under which adjudicators may deny claim without additional vocational or labor market evidence).

136. 5 U.S.C. § 553 (2006).

137. See Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups 53–65 (1965) (explaining that small, organized groups are usually more effective than larger groups in shaping policy); Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1684–85 (1975) ("[A]gencies unduly favor organized interests, especially the interests of regulated or client business firms and

be sure, some public interest organizations do lobby on behalf of poor and politically marginalized groups, but such organizations lack the clout and resources of regulated industries that regularly participate in rulemaking.[138] Moreover, public interest organizations have more on their plate than they can handle just representing clients in proceedings.[139]

Fourth, rulemaking costs agencies significant resources and time. Agencies must prepare and issue a Notice of Proposed Rulemaking (NPRM), await comments from interested parties and regulated entities, review and weigh the merits of these public comments, adjust their proposed rule accordingly, resolve the internal debates of policymakers, and clearly explain why they adopted the final rule that they did,[140] all while under the scrutiny of the political branches.[141] One comprehensive study found that the average duration of significant rulemaking proceedings was more than 500 days.[142] The obstacles agencies face when creating new rules capable of surviving judicial and congressional review also may make agency decisionmaking more rigid and inflexible.[143] As a result,

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other organized groups at the expense of . . . comparatively unorganized interests such as consumers, environmentalists, and the poor.").

138. Peter M. Shane, Madison's Nightmare: How Executive Power Threatens American Democracy 162 (2009) ("Industry is far more effectively represented in administrative policy making than the general public."); Stewart, supra note 137, at 1684–87 (listing explanations for perceived biases of agencies, including "'capture' scenario, in which administrations are systematically controlled, sometimes corruptly, by the business firms within their orbit of responsibility").

139. See infra note 176 and accompanying text (discussing organizations' growing caseloads and shrinking budgets).

140. 5 U.S.C. § 553 (describing basic requirements of rulemaking).

141. Indeed, all "significant regulatory actions" must be submitted to the Office of Information and Regulatory Affairs (OIRA) within the White House Office of Management and Budget (OMB), along with a formal cost-benefit analysis, before they are promulgated. See Exec. Order No. 12,866, 3 C.F.R. 638, 646–48 (1993), reprinted in 5 U.S.C. § 601 at 745–49 (2006); see also Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (permitting consideration of "difficult to quantify" values in cost-benefit analysis); Nicholas Bagley & Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 Colum. L. Rev. 1260, 1263–64 (2006) (describing President Reagan's "unprecedented level of control over the administrative apparatus").

142. See Letter from Jacob E. Gersen, Univ. of Chi. Law Sch., & Anne Joseph O'Connell, Berkeley Sch. of Law, to Jessica Hertz, Office of Mgmt. & Budget (Feb. 27, 2009), available at http://www.reginfo.gov/public/jsp/EO/fedRegReview/Anne_Joseph_OConnell.pdf (on file with the *Columbia Law Review*). Some agencies take much longer. The Federal Energy Regulatory Commission, for example, took nearly twenty years to implement some provisions of the National Environmental Policy Act. Cornelius M. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy 105–07 (2d ed. 1999) (describing severe delays in rulemaking by administrative agencies).

143. See Richard J. Pierce, Jr., Judicial Review of Agency Actions in a Period of Diminishing Agency Resources, 49 Admin. L. Rev. 61, 85–87 (1997) ("[L]ooking only at the short-term effects of the alternatives available to the courts, there is little doubt that a flexible, forgiving judicial approach is vastly superior to . . . rigid adherence to doctrine . . . .");

some agencies implement new policies by adjudicating cases and eschew rulemaking altogether;[144] others increasingly rely on informal guidance documents.[145]

To be sure, class actions and other kinds of aggregate litigation may initially consume time and resources, too. Like most forms of rulemaking, aggregated litigation also may require notice to absent parties, followed by a decision that broadly applies to many different people.[146] Even so, aggregation may also yield efficiencies by pooling information and reducing duplicative caseloads.[147] In the long run, aggregation may even save on remands by encouraging better advocacy and record-development in "trial-level" hearings—the absence of which remains a common problem in veterans' benefits, black lung, immigration, and Social Security hearings.[148] In addition, adjudicatory decisions need not

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Mark Seidenfeld, Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking, 75 Tex. L. Rev. 483, 520–21 (1997) (discussing uncertainty resulting from agencies' inability to predict depth of analysis that reviewing court will deem sufficient); Mark Seidenfeld, Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review, 70 Ohio St. L.J. 251, 251–52 (2009) ("[A]dministrative law scholars have identified hard look judicial review of agency action . . . as one of, if not the major, impediment to regulatory flexibility.").

144. Roberta S. Karmel, Regulation by Prosecution: The Securities and Exchange Commission vs. Corporate America 105–06 (1982) (discussing both prosecutorial and promotional SEC regulatory activity); Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety 14 (1990) (describing shift from traditional safety regulation to adjudicatory enforcement and recalls).

145. See Magill, supra note 120, at 1411 (noting "increased reliance on guidance documents"). The FTC and the National Labor Relations Board (NLRB) generally avoid rulemaking and rely solely on adjudication to make policy. See, e.g., Mark H. Grunewald, The NLRB's First Rulemaking: An Exercise in Pragmatism, 41 Duke L.J. 274, 274 (1991) (noting NLRB's almost exclusive reliance upon adjudication); Paul R. Verkuil, The Purposes and Limits of Independent Agencies, 1988 Duke L.J. 257, 263 (noting FTC's heavy reliance upon adjudication). Others, such as the EEOC and the Patent and Trademark Office, are statutorily prohibited from engaging in legislative rulemaking to interpret their enabling statutes. See, e.g., 42 U.S.C. § 2000e-12(a) (2006) (delegating to EEOC merely procedural rulemaking power); Arti K. Rai, Growing Pains in the Administrative State: The Patent Office's Troubled Quest for Managerial Control, 157 U. Pa. L. Rev. 2051, 2053 (2009) ("[T]he PTO lack[s] substantive rulemaking authority.").

146. See infra Part III.B.2, .C.3 (discussing requirements for class certification and tools minimizing notice and representation problems).

147. See, e.g., infra Part III.B.1 (discussing efficiencies yielded by aggregating cases); infra notes 337–347 and accompanying text (same).

148. See, e.g., Bd. of Veterans' Appeals, supra note 2, at 5–6 (acknowledging need to eliminate avoidable remands and citing Board of Veterans' Appeals remand rate of 36.8%); Black Lung Benefits Program, supra note 15, at 31 (describing high remand rate among Black Lung claimants and observing that "many claimants are not equipped with the medical and legal resources they need to develop evidence that will meet the program's requirements"); ABA, Reforming the Immigration System, supra note 2, at 5-10 (finding that "[w]ithout [legal] assistance, the efficiency of the [immigration] proceedings is significantly damaged as noncitizens do not have competent counsel to help prepare testimony, assemble documents, and conduct legal research"); U.S. Gov't Accountability

be as comprehensive as rulemaking, nor resolve every policy disagreement within the agency, leaving secondary or contentious questions to another adjudicatory or rulemaking proceeding.[149]

Moreover, unlike rulemaking—a top-down solution that is often commenced and managed by the head of an agency—aggregation involves a "bottom-up" remedy, where groups of people actually involved in agency proceedings play a role in crafting discrete, retrospective forms of relief. In the process, independent ALJs also provide an important neutral perspective to resolve commonly contested issues of proof, such as untested scientific evidence. Since groups may appeal their collective claims to the head of the agency, aggregated adjudication can offer agencies a different viewpoint about how a particular regulation impacts people on the ground.[150]

Rulemaking indisputably provides advantages over individualized adjudication, particularly when an agency must determine broad, longstanding policies for the general public. Aggregated adjudication, however, provides an effective alternative for frequently recurring narrow, discrete, or retrospective legal and factual questions that impact groups of people otherwise marginalized from the agencies' political rulemaking process. In the process, as discussed more fully below in Part III.D, the agency class action can provide an important signal to the agency and the political branches that large groups of people are being adversely affected in a common way, thus provoking the agency to consider whether a new rule ought to be crafted.

B. *Stare Decisis*

Although the doctrine of "stare decisis" aspires to make administrative decisions more consistent by requiring that administrative judges justify their opinions with precedent, stare decisis does not ensure uniform outcomes in a system where reasoned, published, and binding decisions are in short supply. Moreover, stare decisis may invite additional inefficiencies and obstacles to legal representation.

Stare decisis enhances consistency by requiring adjudicators generally to respect questions of law settled by other adjudicators in the same or a higher tribunal.[151] Stare decisis also enhances efficiency, reducing

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Office, GAO-09-398, Additional Performance Measures and Better Cost Estimates Could Help Improve SSA's Efforts To Eliminate Its Hearings Backlog 13–17 (2009), available at http://www.gao.gov/new.items/d09398.pdf (on file with the *Columbia Law Review*) (describing efforts to reduce Social Security Administration's hearings-level backlogs, including hiring additional administrative law judges and screening potentially favorable claims).

149. Asimow & Levin, supra note 123, at 195.

150. Id. at 194 (noting how adjudication allows agency to observe operation of rules in concrete cases).

151. See Citizens United v. FEC, 130 S. Ct. 876, 911–12 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts

the burden lower courts would suffer if they had to repeatedly decide the same questions of law.[152] Although the APA does not technically require stare decisis in adjudication,[153] some agency tribunals make precedential decisions that bind "trial-level" administrative judges.[154] Centralized reviewing bodies, such as the Social Security Administration's Appeals Council[155] and the Board of Immigration Appeals (BIA),[156] attempt to maintain uniformity and enhance efficiency by deciding issues that repeatedly percolate up from below.

Administrative appellate bodies, however, are poorly positioned to issue well-reasoned, precedential decisions. During the 2011 fiscal year, for example, Social Security's Appeals Council received 173,332 requests for review, processed 126,992 requests for review, and still had 153,004 requests for review pending at the end of the year.[157] The average processing time was approximately one year.[158] Moreover, overworked ALJs barely manage to follow even a fraction of those appellate decisions.[159] Finally, in some cases, an appellate body itself may not even know about its own prior decisions.[160]

Stare decisis also suffers, albeit to a lesser degree, from many of the same drawbacks as individual adjudication. Stare decisis may establish a rule based on the unique characteristics of an individual case, without

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us on a course that is sure error."); Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law . . . .").

152. See Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. Rev. 651, 677–78 (1995) (noting efficiency arguments related to stare decisis).

153. Mashaw et al., Administrative Law, supra note 121, at 436 (describing when agency's refusal to follow prior decisions must be explained).

154. See, e.g., NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969) ("Subject to the qualified role of *stare decisis* in the administrative process, . . . [adjudicated cases] may serve as precedents."); Magill, supra note 120, at 1394 (noting precedential effects of orders concluding NLRB and FERC adjudications).

155. See Charles H. Koch, Jr. & David A. Koplow, The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council, 17 Fla. St. U. L. Rev. 199, 280 (1990) (discussing Social Security's Appeals Council's success in promoting uniform application of relevant laws and policies).

156. See Evelyn H. Cruz, Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures, 16 Stan. L. & Pol'y Rev. 481, 499–500 (2005) (noting BIA's practice of selecting certain opinions for publication as guidelines for lower tribunals based on "the nature of the facts or issues presented").

157. General Appeals Council Statistics, Soc. Sec. Online, http://www.ssa.gov/appeals/ac_statistics.html (on file with the *Columbia Law Review*) (last modified May 25, 2012).

158. Id. (noting average processing time of 360 days).

159. See Mashaw et al., Administrative Law, supra note 121, at 457 (discussing why precedent-based decisions are not realistic for ALJs in Social Security disability cases).

160. Id. at 436–37 (discussing cases when regulatory bodies departed from their own precedents).

regard to the broader implications the decision may have on others.[161] Moreover, the precedential decision may not be the product of the best record, and therefore may cause more problems than it solves.[162]

Finally, stare decisis does little to improve access to representation. In fact, an adjudicatory system that relies on stare decisis creates more work for lawyers, requiring counsel to find relevant precedents, interpret their significance to the case at hand, and advocate how they should be applied.[163] The complexity of a system rooted in case-by-case decision-making makes legal representation even more critical.

In sum, stare decisis is at best a weak tool for ensuring uniformity in administrative proceedings. And in some ways, stare decisis may even aggravate existing inefficiencies and obstacles to legal representation. Aggregate litigation, by contrast, may simultaneously improve uniformity, efficiency, and access to qualified counsel in a single proceeding.

C. *Statutory Attorneys' Fees*

Attorneys' fees statutes and legal services organizations improve access to legal representation in agency adjudications. Many people, however, must forgo counsel when they raise risky or complex legal questions[164] or otherwise fail to qualify for free legal services. In addition, pro bono legal services and fee shifting provisions do little to improve the efficiency or consistency of administrative proceedings.[165]

Unlike defendants in criminal cases, parties in agency adjudications have no constitutional right to legal representation.[166] Thus, if they want

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161. See Magill, supra note 120, at 1396 (suggesting how facts of individual cases may distort evaluation of broader policy questions).

162. See Derek Smith, A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases, 75 Va. L. Rev. 681, 706 (1989) (noting BIA publishes only about thirty decisions per year and went for several years without publishing any decisions sustaining appeal of applicant seeking asylum, allegedly because it did not want to give asylum applicants blueprint for success); see also Magill, supra note 120, at 1396 (noting adjudicatory decisions lack broad public input necessary for developing sound rules); Editorial, Irrationality in Deportation Law, N.Y. Times, Jan. 3, 2012, at A24 (noting how BIA often "rubber-stamps deportation rulings with no written opinion or explanation").

163. See, e.g., 2 Charles H. Koch, Jr., Administrative Law and Practice § 5:67 (3d ed. 2010) (explaining how stare decisis disadvantages unsophisticated claimants who lack resources to be informed of individual decisions in mass justice adjudicatory system).

164. See infra notes 172–176 and accompanying text (discussing bankrolling risky legal challenges).

165. See infra text accompanying note 177 (discussing difficulty of ensuring that different adjudicators resolve cases in same way).

166. See Nees v. SEC, 414 F.2d 211, 221 (9th Cir. 1969) (denying request for new hearing because petitioner had opportunity to appoint counsel, petitioner did not allege deprivation of right to counsel, and government was not obligated to provide counsel); Boruski v. SEC, 340 F.2d 991, 992 (2d Cir. 1965) (holding counsel need not be appointed in administrative proceedings).

an attorney, they generally must pay according to an hourly rate, fee-for-services, or contingency agreement.[167] The Equal Access to Justice Act (EAJA) requires agencies to pay attorneys' fees and other expenses of "prevailing" parties in "adversary" adjudications, unless the position of the agency was "substantially justified or . . . special circumstances make an award unjust."[168] Congress also funds free legal services through the Legal Services Corporation (LSC) for "legal assistance in noncriminal proceedings" to persons "financially unable to afford legal assistance."[169] However, just like in civil litigation, the cost of legal representation in agency adjudication discourages parties from pursuing claims with competent counsel, unless (1) the value of their claims justifies the cost of an attorney, given the likelihood of success;[170] (2) a fee shifting statute requires another party to pay the attorneys' fees of the claimant;[171] or (3) a competent attorney can provide legal representation pro bono or at a reduced rate.[172]

Although fee shifting statutes, like the EAJA, improve access to legal representation, they still may require parties and their attorneys to bankroll risky legal challenges until victory. Attorneys may turn down cases without reasonable confidence of success and, quite rationally, focus their attention on the easiest and most promising cases. While legal services organizations generally rely on government funding, rather than

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167. See How To Hire an Attorney, Legal Connection, http://www.legalconnection.com/hire.htm (on file with the *Columbia Law Review*) (last visited Oct. 8, 2012) (outlining steps to take when hiring attorney).

168. 5 U.S.C. § 504(a)(1) (2006). To be a "prevailing party," the party must be awarded some relief by the court on the merits of its claim. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 & n.5 (2001) ("[The] view that a 'prevailing party' is one who has been awarded some relief by the court can be distilled from our prior cases."). Specific fee shifting provisions also exist in many benefits statutes. See, e.g., Individuals with Disabilities Education Improvement Act of 2004 § 615(i)(3)(B)–(G), 20 U.S.C. § 1415(i)(3)(B)–(G) (2006) (providing attorneys' fees under Individuals with Disabilities Education Act); Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988(b) (2006) (providing attorneys' fees to plaintiffs prevailing in enforcing, inter alia, Religious Freedom Restoration Act of 1993, Religious Land Use and Institutionalized Persons Act of 2000, and Title VI of Civil Rights Act of 1964). See generally Robert V. Percival & Geoffrey P. Miller, The Role of Attorney Fee Shifting in Public Interest Litigation, 47 Law & Contemp. Probs., Winter 1984, at 233, 233 (citing more than 150 federal fee shifting statutes).

169. Legal Services Corporation Act of 1974 § 1003(a), 42 U.S.C. § 2996b(a).

170. See, e.g., Black Lung Benefits Program, supra note 15, at 26–27 (noting reluctance of attorneys to take cases with high costs and low likelihood of success).

171. See supra note 168 and accompanying text (reviewing role of fee shifting provisions in public interest litigation).

172. Legal services organizations sometimes train lawyers to represent individuals pro bono in administrative hearings. See, e.g., Legal Aid Society 2011–2012 Training Series, NYC Pro Bono Center, http://www.probono.net/ny/nyc/las-trainings-2011-2012 (on file with the *Columbia Law Review*) (last visited Oct. 8, 2012) (offering numerous online pro bono training seminars).

legal victories, to cover their operational costs,[173] parties in administrative proceedings may be too wealthy to qualify for LSC representation[174] yet not wealthy enough to afford competent private legal counsel.[175] And for those who are eligible, legal services organizations, just like the administrative courts in which they represent clients, must handle ever-growing caseloads with ever-shrinking budgets.[176]

Moreover, attorneys' fees statutes and LSC funding do little to improve the efficiency or consistency of agency adjudications themselves. Competent counsel can only do so much to ensure that different adjudicators will ultimately resolve cases in the same way.[177] Individualized representation will not cure the redundancy of agency adjudications that repeatedly address the same questions of law and fact.[178]

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173. For example, all but $1 million of Legal Services New York City's $53.5 million in total operating support and revenue came from government grants and private philanthropy in 2011. Legal Servs. NYC, 2011 Annual Report 20 (2011), available at http://www.legalservicesnyc.org/storage/lsny/PDFs/2011%20annual%20report.pdf (on file with the *Columbia Law Review*). Attorneys' fees recovered from adverse parties contributed only $383,769, as compared to $38 million in government grants and contracts. Id.

174. Individuals must generally have incomes at or below 125% of the federal poverty level (an annual income of $28,813 for a family of four) to be eligible for representation by LSC-funded programs. What is LSC?, Legal Services Corp., http://lsc.gov/about/what-is-lsc (on file with the *Columbia Law Review*) (last visited Oct. 8, 2012).

175. The cost of legal representation in Southern California for an adult detained in removal proceedings, for example, is approximately $4,000–$5,000. How to Find Legal Help for Non-Detained Adults, Esperanza Immigrant Rts. Project, http://www.esperanza-la.org/index.php?option=com_content&view=article&catid=9:for-immigrants&id=81:how-to-find-legal-help-for-non-detained-adults (on file with the *Columbia Law Review*) (last visited Sept. 22, 2012). For one firm surveyed by the GAO, the cost of legal representation for miners pursuing claims for black lung disease ranges from $18,000 for a case that takes two to four years to $70,000 for a case that takes seven or more years. Black Lung Benefits Program, supra note 15, at 26–27.

176. See Karen Sloan, Perfect Storm Hits Legal Aid: Struggling Programs Face Grim Forecast as the New Year Opens, Nat'l L.J., Jan. 3, 2011, at 1, available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202476843961 (on file with the *Columbia Law Review*) (discussing sharp declines in funding for legal services organizations); see also Legal Servs. Corp., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 1–3 (2009), available at www.lafla.org/pdf/justice_Gap09.pdf (on file with the *Columbia Law Review*) (finding that LSC-funded programs must turn away half of those who seek help due to resource constraints); Government Falters in Effort To Reduce Massive Backlog of Disability Hearings, Transactional Records Access Clearinghouse (June 20, 2011), http://trac.syr.edu/tracreports/ssa/253/ (on file with the *Columbia Law Review*) (describing decline in number of full-time Social Security ALJs from December 2010 (1,431) to March 2011 (1,396) despite 5% increase in massive backlog of Social Security claims).

177. See supra Part I.B.1 (detailing risks of inconsistency in agency adjudicatory outcomes).

178. See supra Part I.B.2 (detailing inefficiencies of redundant agency adjudications).

As set forth below, the class action was developed to solve just such problems in civil litigation. By aggregating a large number of small claims, attorneys make representation affordable by maximizing economies of scale. Moreover, by resolving common questions of law and fact in a single proceeding, class actions and other aggregate procedures improve efficiency and ensure consistent treatment of similarly situated parties.[179]

D. *Judicial Review*

Judicial review ensures that agencies interpret and apply the law consistently with "a permissible construction" of their organic statute[180] and reduces the chance that agencies will treat similar cases in different ways. Parties must also receive reasonable notice and an opportunity to be heard by a neutral decisionmaker in adjudication.[181] Finally, federal courts can compel agencies to act where adjudication becomes unreasonably delayed.[182] Judicial review thus promotes timely legal access and improves uniform and accurate decisionmaking.

Unfortunately, there are drawbacks to relying exclusively on courts to provide uniformity, efficiency, and access to justice in agency proceedings. First, Congress bars judicial review of many agency decisions. For example, the 1998 Veterans' Judicial Review Act bars courts from reviewing decisions by the Secretary of Veteran Affairs or his delegate on "all questions of law or fact necessary to a decision" involving veterans' benefits.[183] Likewise, not only does the 1996 Illegal Immigration Reform and Immigrant Responsibility Act substantially limit review of immigration and deportation orders,[184] but it also bars class actions for those remaining issues subject to judicial oversight.[185]

Second, the federal judicial system, sometimes for good reason, cannot ensure the consistency of lower court decisions.[186] Different trial

179. See infra Part III.A (reviewing advantages of aggregate litigation).

180. Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984).

181. Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970); see also Mathews v. Eldridge, 424 U.S. 319, 325 n.4 (1976) (reciting *Goldberg*'s holding that parties must receive timely, effective notice and opportunity for hearing).

182. 5 U.S.C. § 706(1) (2006).

183. 38 U.S.C. §§ 511(a), 512 (2006); see also Bates v. Nicholson, 398 F.3d 1355, 1362–65 (Fed. Cir. 2005) (interpreting provision barring federal court review of Secretary's findings of law and fact).

184. 8 U.S.C. § 1252(a)(2)(B)(ii) (2006) (stating "no court shall have jurisdiction to review" decisions "specified . . . to be in the discretion of the Attorney General").

185. Id. § 1252(f)(1) (discussing limits on injunctive relief); see also Gerald L. Neuman, Federal Courts Issues in Immigration Law, 78 Tex. L. Rev. 1661, 1686–87 (2000) (interpreting scope of provision limiting class-wide relief in immigration cases).

186. See, e.g., Jack B. Weinstein, Every Day Is a Good Day for a Judge To Lay Down His Professional Life for Justice, 32 Fordham Urb. L.J. 131, 146–58 (2004) (describing exercise of judicial independence by federal district court judges who opposed racism,

and appellate courts may interpret the same set of laws and facts in very different ways.[187] Unless the United States Supreme Court provides definitive guidance, circuit splits fracture administrative decisionmaking involving the same kind of harm.[188] As appeals from agency decisions work their way through the federal courts, the decisions of federal district courts carry little to no weight in other circuits, undermining the ability of judicial review to impose consistency on agency decisions.[189] Agencies also sometimes choose not to "acquiesce" to the federal courts until the Supreme Court steps in to resolve the disagreement between the agency and one or more courts of appeals.[190]

Even in the rare cases that reach the Supreme Court, judicial review may fail to resolve inconsistencies out of deference to agency fact-finding, policy decisions, and interpretations of broad or ambiguous statutes. For example, in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court held that the Federal Communications Commission was entitled to choose a different con-

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disproportionate sentencing, and other perceived forms of "injustice"); Charles E. Wyzanski, Jr., A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1298–99 (1952) (discussing federal trial judges' motivations for departing from precedent).

187. See Jeffrey C. Dobbins, Structure and Precedent, 108 Mich. L. Rev. 1453, 1460–63 (2010) (discussing binding versus persuasive precedent in federal judicial system).

188. Circuit splits in asylum applications, for example, mean that the following decisions by administrative judges will differ based upon the residence of the applicant: (1) whether the applicant has been convicted of a "particularly serious crime," 8 U.S.C. § 1231(b)(3)(B)(ii); and (2) whether applicants have suffered "extreme cruelty," Id. § 1182(a)(6)(A)(ii)(II)(a). For differing analyses of the reviewability of administrative determination of "serious crime," compare, for example, Villegas v. Mukasey, 523 F.3d 984, 987 (9th Cir. 2008) (holding that determination of "serious crime" is committed to agency discretion and therefore unreviewable (citing 8 U.S.C. § 1231(b)(3)(B)(ii))), with Nethagani v. Mukasey, 532 F.3d 150, 150–55 (2d Cir. 2008) (reaching contrary conclusion). For an analysis of the reviewability of "extreme cruelty," see Wilmore v. Gonzales, 455 F.3d 524, 527 (5th Cir. 2006) (noting circuit split on question whether determination of "extreme cruelty" is discretionary and thus unreviewable in federal court). For further discussion of the impact of an applicant's residence—and, therefore, the circuit to which an applicant may appeal an adverse decision—on the final disposition of his case, see Ramji-Nogales et al., Proposals for Reform, supra note 1, at 77–86 (observing asylum applicants win remands eighteen times more often when appealing decisions to Seventh Circuit than when appealing to Fourth Circuit).

189. See Dobbins, supra note 187, at 1462–63 ("Even an on-point holding may carry little weight with a court of appeals if it was written by a magistrate judge in a district outside that appellate court's geographical circuit.").

190. See Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 681 (1989) ("The selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals—a practice commonly termed agency nonacquiescence—is not new in American law."); Jerry L. Mashaw, Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation, 59 Admin. L. Rev. 889, 902 (2007) ("American administrative agencies have often declined to acquiesce to judicial rulings . . . .").

struction of an ambiguous statute than the Ninth Circuit's "best interpretation."[191] Even as stare decisis constrains the Ninth Circuit from changing its own position, the Supreme Court recognized that the APA allows agencies substantial room to change their interpretation of an ambiguous statute.

Third, the inefficiencies produced by the absence of aggregation in agency adjudication replicate themselves in the federal judiciary as courts must review the same questions in multiple proceedings.[192] Moreover, many cases involve unrepresented parties who lack the skill to develop facts before the agency, much less argue complex legal questions on appeal.[193] More individual adjudicatory proceedings addressing the same underdeveloped questions of law or fact only produce more federal court cases that must review these decisions. The trend overwhelms the federal courts in the same way that the rising tide of public rights cases has overwhelmed the agencies that hear such claims.[194]

E. *Federal Court Class Actions*

Although courts have certified classes of individuals aggrieved by agency adjudications, class actions in federal court often come too late—after a record has been established, sometimes without the aid of counsel—or not at all, because they are foreclosed either by statute or by procedural and substantive hurdles.

First, in many cases, the federal court class action is not available because Congress has barred judicial review.[195] In addition, since 1996, Congress has prohibited the recipients of LSC funds from initiating or participating in class actions, making it much more difficult for poor and

191. 545 U.S. 967, 983 (2005) ("[T]he agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.").

192. See Anna O. Law, Rationing Justice?: The Effect of Caseload Pressures on the U.S. Courts of Appeals in Immigration Cases 32–33 (Aug. 2010) (unpublished manuscript), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=anna_law (on file with the *Columbia Law Review*) (describing how Second and Ninth Circuits have struggled to process surge in appeals from BIA and have begun bundling multiple cases presenting same legal issues).

193. See Nina Bernstein, In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone, N.Y. Times, Mar. 13, 2009, at A21 (noting that while "[s]tudies show immigrants with legal representation are three to four times more likely to win their case . . . only about 35 percent have any kind of lawyer"); see also Black Lung Benefits Program, supra note 15, at 26 ("[F]inding representation is a significant challenge for many [black lung] claimants.").

194. In 2004, appeals from the immigration courts accounted for approximately 17% of all federal appeals cases and nearly 40% of the appeals cases in New York and California. Adam Liptak, Courts Criticize Judges' Handling of Asylum Cases, N.Y. Times, Dec. 26, 2005, at A1.

195. See supra notes 183–185 and accompanying text (highlighting provisions of U.S. Code imposing limitations on reviewing courts).

low-income beneficiaries in public rights cases to obtain class counsel.[196] Even where judicial review is available, in many cases, agency decisions, such as those of the BIA, can be reviewed only by the courts of appeals, which also cannot aggregate claims.[197]

Second, because parties are generally required to exhaust their administrative remedies before going to federal court, plaintiffs may not be able to certify a class during agency adjudications.[198] The class must either present a constitutional claim that the agency cannot adjudicate[199] or allege that the agency is acting toward the class in a uniform manner at odds with its own statute or regulations and that the exhaustion of administrative remedies would be futile.[200] Such claims, however, do not help agencies adjudicate more efficiently, consistently, or fairly. They merely correct the most egregious outcomes.

Finally, reforming agency procedures through the federal court class action deprives agencies of the opportunity to take the first crack at reasoned decisionmaking with the same focused attention and information available to a federal court in a class action. It is inconsistent with the values underlying the doctrines of exhaustion and ripeness, which seek to give agencies the first opportunity to address issues within their

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196. William P. Quigley, The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's, 17 St. Louis U. Pub. L. Rev. 241, 256–61 (1998) (reviewing history of restrictions on LSC programs engaging in funding, lobbying, class action suits, service to immigrants, and training for political activities); David Udell & Rebekah Diller, Brennan Ctr. for Justice, Access to Justice: Opening the Courthouse Door 5 (2007), available at http://brennan.3cdn.net/297f4fabb202470c67_3vm6i6ar9.pdf (on file with the *Columbia Law Review*) (discussing federal limitations prohibiting LSC-funded lawyers from bringing class actions, seeking court-ordered attorneys' fees awards, communicating with policymakers on clients' behalves, and representing certain immigrants, incarcerated people, and drug offenders).

197. As a result, circuit court judges have complained of the deluge of immigration cases they hear on appeal from the BIA. See Tony Mauro, Circuit Judges Decry Immigration Case 'Tsunami,' Nat'l L.J. (Aug. 12, 2008), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202423697849&slreturn=20120624163745 (on file with the *Columbia Law Review*) (quoting Judge M. Margaret McKeown describing surge in immigration cases as "tsunami").

198. See, e.g., United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

199. See, e.g., Bowen v. City of New York, 476 U.S. 467, 486 (1986) (waiving exhaustion of administrative remedies requirement for class action alleging Social Security Administration policies violated Constitution); Haitian Refugee Ctr., Inc. v. Nelson, 872 F.2d 1555, 1561 (11th Cir. 1989) (finding no exhaustion requirement for constitutional claims agency cannot adjudicate), aff'd sub nom. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991).

200. See, e.g., Honig v. Doe, 484 U.S. 305, 326–27 (1988) (holding that plaintiffs are not required to exhaust administrative remedies where it would be utterly futile).

purview.[201] Indeed, one of the criticisms of judicial reform of administrative programs is that the political branches, not the courts, should correct agency errors.[202] Providing agencies with the opportunity to address systemic problems through aggregation mechanisms is respectful of the responsibilities allocated to them by Congress. Moreover, aggregation may provide federal courts with a more fully developed and consolidated record with which to review agency decisionmaking.

F. *Informal Aggregation and Settlement*

In the absence of formal rules on group claims, some agencies have experimented with informal aggregation—coordinating, channeling, and settling cases using managerial control, test cases, and systems of alternative dispute resolution. To date, however, unlike class actions and other forms of procedural aggregation, such half-measures lack the transparency and consistency necessary to remedy systemic violations of claimants' rights.

First, agencies have long sought to adopt practices that centralize the review and management of ALJs to ensure that individualized hearings produce consistent and accurate results.[203] For example, the Department of Justice periodically reviews the work of individual immigration judges and members of the BIA. Nonetheless, it is unlikely that such review does more than cure the most egregious outliers.[204] Moreover, management controls inevitably raise questions concerning the independence of agency adjudicators.[205] Finally, reviewing the outcomes of

201. See McKart v. United States, 395 U.S. 185, 193–94 (1969) (observing that exhaustion doctrine ensures that agencies may apply statutory scheme to novel facts efficiently and autonomously, while reducing need for additional appeals); Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967) (noting that ripeness doctrine "protect[s] . . . agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties").

202. See, e.g., Mark Seidenfeld, Bending the Rules: Flexible Regulation and Constraints on Agency Discretion, 51 Admin. L. Rev. 429, 487 (1999) (arguing reform and review of agency outcomes is "best effectuated by the political branches . . . rather than the courts").

203. See Ronald A. Cass, Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis, 66 B.U. L. Rev. 1, 10–14 (1986) (examining different agency review structures); Margaret H. Taylor, *Refugee Roulette* in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication, 60 Stan. L. Rev. 475, 481 (2007) (observing that "agency heads may exercise supervisory oversight over agency adjudicators, and usually have some degree of control over their decisions as well").

204. See, e.g., Ramji-Nogales et al., Proposals for Reform, supra note 1, at 17–31 (finding dramatic disparities within and among asylum offices despite quality control, training, and multiple layers of supervision).

205. See, e.g., Ass'n of Admin. Law Judges v. Heckler, 594 F. Supp. 1132, 1143 (D.D.C. 1984) (finding Social Security Administration's plan to improve consistency among ALJs by reviewing their decisions to award benefits "created an untenable atmos-

adjudications does nothing to improve their efficiency or the parties' access to justice.

Second, some administrative agencies have used special masters, like courts, to resolve novel issues with broad-ranging effects through test cases and bellwether trials. Within weeks of the September 11 attacks, for example, Congress created the September 11th Victim Compensation Fund of 2001 to provide wrongful death and personal injury benefits to victims and family members.[206] President George W. Bush appointed Kenneth R. Feinberg as a special master to administer the Fund.[207] Feinberg met with representative counsel to identify and decide fourteen "test cases" that would establish the rough boundaries for the sizes of awards and define his manner of handling repeat issues before the Fund.[208] Later cases tested Feinberg's willingness to make awards for high-wage earners, like stockbrokers, who died in the attack,[209] something he had said publicly that he was loath to do.[210] Others helped settle the question of how he handled claims brought by low-wage earners, orphans, or family members who provided unpaid but invaluable services, like taking care of a sick relative or doing household chores.[211] After months of speculation about the mechanics and fairness of the compensation process, the procedure gave claimants and their counsel more certainty and trust in the process.[212]

Since that time, Feinberg and other special masters have used test cases to resolve other kinds of common issues in adjudication, like setting terms for executive compensation in the wake of the global financial crisis,[213] determining eligibility for compensation for the British Petroleum

phere of tension and unfairness" that threatened "decisional independence the APA affords to administrative law judges").

206. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401–407, 115 Stat. 230, 237–40 (2001) (codified at 49 U.S.C. § 40101 note) (stipulating terms of compensation program).

207. See, e.g., September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. pt. 104) (naming Feinberg special master); 1 Kenneth R. Feinberg et al., Dep't of Justice, Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, at 4 (2004) (same).

208. David W. Chen, Fund for Terror Attack Victims Offers Awards in 14 Test Cases, N.Y. Times, Sept. 30, 2002, at B1.

209. See id. (noting forthcoming cases for high-wage earners).

210. See Feinberg et al., supra note 207, at 82 (noting divisiveness of providing higher awards to high-wage earners and stating preference for flat award system).

211. Chen, supra note 208.

212. See Brian H. Bornstein & Susan Poser, Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund, 17 Cornell J.L. & Pub. Pol'y 75, 95 (2007) (finding claimants to September 11th Fund "were more satisfied with procedural than distributive aspects of the Fund and perceptions of justice were correlated with the amount of compensation participants received").

213. Mark Trumbull, Executive Pay: How Much Say Should Obama 'Czar' Receive?, Christian Sci. Monitor, Oct. 28, 2009, at 12 (describing "Feinberg approach" involving

oil spill,[214] evaluating whether thimerosal (a vaccine preservative containing mercury) causes autism in children,[215] and resolving difficult procedural and scientific causation questions raised by the recently passed incarnation of the September 11th Fund.[216] Without formal authority or rules to coordinate such claims, however, some have complained that this kind of informal process invites too much discretion and too little transparency.[217]

Finally, agencies may rely on private dispute resolution systems to settle common disputes. In the 1990s, Congress required administrative agencies to incorporate mediation and private arbitration systems in order to exploit the time savings and predictability that alternative dispute resolution (ADR) offered.[218] The Department of Health and Human Services now uses ADR to manage and settle hundreds of thousands of Medicaid claims with state agencies;[219] the United States Post Office also resolves tens of thousands of workplace disputes through a well-known mediation program, known as "REDRESS;"[220] and the Internal Revenue

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consultation with academics and experts to set pay for top twenty-five executives at firms that received funds through Troubled Asset Relief Program); Editorial, Pay Cuts at Bailout Companies: A Real-Life Test Case, Christian Sci. Monitor, Oct. 22, 2009, at 18.

214. Tim Webb, Brent Coon: Tough Talking Lawyer Going After BP on His Harley, Guardian (June 26, 2010), http://www.guardian.co.uk/business/2010/jun/27/bp-brent-coon-oil-spill-claims (on file with the *Columbia Law Review*) (describing test case for lost business income filed with Gulf Coast Claim Facility on behalf of strip club).

215. Thomas H. Maugh II & Andrew Zajac, Court Rejects Vaccine Link to Autism, L.A. Times, Mar. 13, 2010, at A1 (describing process where special masters determined outcome in three separate test cases out of more than 5,300 thimerosal-related claims).

216. Cf. Raymond Hernandez, In Step to Reopen 9/11 Health Fund, Administrator Is Named, N.Y. Times, May 19, 2011, at A21 (quoting newly appointed special master Sheila Birnbaum as stating "[m]y first priority will be to sit down with the people who will be most affected by the program, and see how we can design a program that is fair, transparent and easy to navigate").

217. See, e.g., Matthew Diller, Tort and Social Welfare Principles in the Victim Compensation Fund, 53 DePaul L. Rev. 719, 763–64 (2003) (claiming informality of test cases created "market" for those attorneys with specialized knowledge of Feinberg himself).

218. See Jeffrey M. Senger, Federal Dispute Resolution 3 (2004) ("ADR reduces . . . delays by sidestepping the adjudicative process and its backlogs."); see also Alternative Dispute Resolution Act of-1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. § 651 note) (covering alternative dispute resolution); Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified at 5 U.S.C. §§ 571–584) (covering alternative means of dispute resolution in administrative process); Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, § 4, 104 Stat. 2736, 2737–45 (codified as amended at 5 U.S.C. §§ 571–584) (same).

219. See Daniel Marcus & Jeffrey M. Senger, ADR and the Federal Government: Not Such Strange Bedfellows After All, 66 Mo. L. Rev. 709, 720–21 (2001) (describing Department of Health and Human Services' use of ADR to manage its dispute process).

220. The REDRESS program is offered to United States Postal Service employees as part of the equal employment opportunity complaint process. See REDRESS, U.S. Postal Service, http://about.usps.com/what-we-are-doing/redress/welcome.htm (on file with the *Columbia Law Review*) (last visited Oct. 8, 2012).

Service (IRS) Appeals Office, which handles over 55,000 cases each year, settles taxpayer disputes before trial in 85% of those cases.[221]

While ADR can and should play a role in streamlining agency adjudication, such programs also lack transparency, produce power imbalances, and may undermine consistency. In Medicare benefit denials, for example, patients often lack the information—not to mention the endurance—to continue protracted disputes with more powerful government authorities over critical questions of medical treatment.[222] The IRS Appeals Court's ADR system may produce unfair results, particularly for complainants with small claims who lack the resources or incentives to litigate fully.[223] Mediation alone simply cannot ensure that the Postmaster General will consistently resolve disputes arising out of a systematic failure to provide "reasonable accommodations" to carriers injured on the job.[224]

Agencies thus have, with modest success, adopted informal techniques in response to system-wide disputes that otherwise would overtax traditional, individualized adjudication. But each tool has shortcomings. Managerial control promotes coordination at the expense of transparency and judicial independence. Agency-based "test cases" may improve information and consistency, but at the expense of formal procedures designed to improve legal access. ADR conserves resources and promotes other forms of private resolution, but lacks controls to balance power differences, ensure consistent outcomes, or promote transparent, binding results.

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221. See Tonya M. Scherer, Alternative Dispute Resolution in the Federal Tax Arena: The Internal Revenue Service Opens Its Doors to Mediation, 1997 J. Disp. Resol. 215, 216 (describing tax disputes and resolution process); Amy S. Wei, Can Mediation Be the Answer to Taxpayers' Woes?: An Examination of the Internal Revenue Service's Mediation Program, 15 Ohio St. J. on Disp. Resol. 549, 550–51 (2000) (discussing IRS's structure for mediation).

222. Phyllis E. Bernard, Mediating with an 800-Pound Gorilla: Medicare and ADR, 60 Wash. & Lee L. Rev. 1417, 1428–31 (2003) (explaining that most patients lack financial or emotional resources to support prolonged litigation); see also Robert Pear, Bush Pushes Plan to Curb Medicare Appeals, N.Y. Times, Mar. 16, 2003, at A1 (describing protests against proposed legislation that would steer Medicare reviews toward ADR).

223. See Gregory P. Mathews, Using Negotiation, Mediation, and Arbitration To Resolve IRS-Taxpayer Disputes, 19 Ohio St. J. on Disp. Resol. 709, 724 n.97 (2004) (observing that while individual taxpayers with small claims are like class action litigants because claims are too small to hire legal representation, "the IRS will not necessarily make a similar economic calculation . . . [and] may vigorously pursue a [small] claim merely for its potential precedential value").

224. See, e.g., McConnell v. Potter, Appeal No. 0270080054, 2010 WL 332083, at *7 (EEOC Jan. 14, 2010) (certifying class of postal employees who alleged failure to provide "reasonable accommodations" under 1973 Rehabilitation Act).

III. THE AGENCY CLASS ACTION

By adopting aggregate procedures, agencies can fulfill the goals of access, efficiency, and consistency for groups more effectively than they can by employing the procedures examined above. Unlike the administrative state, the federal judiciary has long used class actions and coordinated litigation techniques to manage large group-wide harms more efficiently,[225] uniformly,[226] and equitably[227] than is possible through individual litigation.[228] Class actions allow a small group of actors—usually plaintiffs' class counsel—to represent multiple parties with common claims in federal and state courts, as well as in privately negotiated settlements subject to judicial oversight.[229] Multidistrict litigation also allows attorneys to coordinate claims for large groups of plaintiffs before trial, but without the res judicata effect of a class action judgment. In multidistrict litigation, unlike in a class action, every litigant technically retains separate counsel; nevertheless, in multidistrict litigation, a special panel may centralize thousands of individual lawsuits in a single court in the interest of streamlining discovery, sharing expert evidence and work product, and expediting otherwise massive litigation.

To date, there have been only scattered efforts to use class-wide procedures in administrative adjudication in the United States.[230] The Equal

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225. See, e.g., Chardon v. Fumero Soto, 462 U.S. 650, 659 (1983) (describing "efficiency and economy of litigation" as some of the "principal purpose[s]" of Rule 23); see also ALI Report, supra note 37, § 1.03 cmt. b ("All forms of aggregation have efficiency as a goal.").

226. See Fed. R. Civ. P. 23(b)(1)(A) advisory committee's note ("Actions by or against a class provide a ready and fair means of achieving unitary adjudication.").

227. See Fed. R. Civ. P. 23(b)(3) advisory committee's note (observing that Rule 23(b)(3) "encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness").

228. Group litigation in federal court dates back to medieval England. See Yeazell, supra note 10, at 268–69 (describing evolution of Anglo-American group litigation); Charles Alan Wright, Class Actions, 47 F.R.D. 169, 170–73 (1970) (discussing function of class actions in judicial system).

229. Cf. Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996) (finding judgment binding on trustee will also bind beneficiaries of trust); Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989) (recognizing due process requires nonparties in class action be "adequately represented by someone with the same interests who is a party").

230. In contrast, many common law countries like Great Britain, Canada, Australia, and New Zealand empower designated government bodies to convene "public inquiries" for allegations of massive and diffuse harm. "Public inquiries" look a lot like class actions—retaining the same powers to compel mass discovery, witnesses, and public access—but otherwise rest entirely within the executive branch. In Canada, between 1867 and 1977, at least 400 commissions convened pursuant to Part 1 of Canada's Federal Inquiries Act. Helen Grant, Participation Rights of Witnesses Before a Commission of Inquiry, 18 Can. J. Admin. L. & Prac. 89, 90 & n.3 (2005). In Australia, between the time that self-government was established in the nineteenth century and 1990, there were approximately 3,500 inquiries conducted. D.H. Borchardt, Commissions of Inquiry in Australia: A Brief Survey

Employment Opportunity Commission (EEOC), for example, created a detailed administrative class action procedure for resolving "pattern and practice" claims of discrimination by federal employees, including hearings before specialized ALJs and appeals to the EEOC itself.[231] The EEOC deems the process indispensable in light of the volume of claims it processes each year, the potential for inefficient and inconsistent judgments, and the claimants' otherwise limited access to counsel.[232] No similar procedure, however, exists for private employees. Nor does any other federal agency permit class actions in adjudication, although they have been considered in specific contexts.[233]

Accordingly, Part III.A below briefly explains how class actions and other aggregate procedures may better fulfill the foundational goals of access, efficiency, and consistency. Part III.B then sets out a broad proposal for adopting aggregate proceedings in administrative adjudication. Part III.C responds to common concerns about the feasibility, legitimacy, dependability, and accuracy of large scale litigation in the context of agency adjudication. Finally, Part III.D suggests how aggregated administrative proceedings can also enhance agency control over policymaking through adjudication.

A. *The Power and Pitfalls of Aggregate Litigation*

Aggregate procedures seek to provide more access, efficiency, and consistency than individualized litigation. Aggregate litigation in federal and state courts has long sought to provide more *legal access* by enabling the resolution of claims that otherwise would not be brought individu-

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42–43 (1991). Between 1947 and 1971, seventy-seven royal commissions or commissions of inquiry were appointed in New Zealand. E.J. Haughey & E.J.L. Fairway, Royal Commissions and Commissions of Inquiry 80–86 (1974).

231. See Federal Sector Equal Employment Opportunity Rule, 29 C.F.R. § 1614.204 (2012). After an employee files a class complaint, the EEOC assigns the complaint to an ALJ. Id. § 1614.204(d). The ALJ then decides whether to recommend certification of the class, which he or she may do if the proposed class meets the requirements of numerosity, commonality, and typicality, and if the complainant who is the proposed agent for the class will "fairly and adequately protect the interests of the class." Id. § 1614.204(a)(2), (d)(2). If the class agent or any member who has filed a claim for individual relief is unsatisfied with the final action of the agency, he or she may either appeal to the EEOC or file a civil action in federal court. Id. §§ 1614.401(c), 1614.407.

232. See, e.g., Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37,644, 37,651 (July 12, 1999) (codified at 29 C.F.R. pt. 1614) (observing that class actions "are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices"); Federal Sector Equal Employment Opportunity, 57 Fed. Reg. 12,634, 12,639 (Apr. 10, 1992) (codified at 29 C.F.R. pt. 1614) (describing inconsistent judgments resulting from absence of employer class actions).

233. See supra note 97 and accompanying text (describing rejected class action proposal for CFTC reparation proceedings).

ally.[234] Aggregate procedures are thought to enable litigation when damages are too small for individuals to justify the high costs of retaining counsel.[235] In cases involving large damages, aggregation also provides more access by granting plaintiffs the same "economies of scale" as well-financed defendants.[236] Multidistrict litigation also streamlines large-scale litigation, while encouraging parties to participate, through bellwether trials, steering committees of plaintiffs that collect and manage claimant input, and judicial oversight of attorney conduct.[237] These procedures hold defendants accountable for wide and diffuse harms that are too costly to be prosecuted through individual litigation.[238] In so doing, aggregate procedures, at least theoretically, serve an important democratic

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234. David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 Ind. L.J. 561, 564 (1987) (observing that cost of individual, case-by-case adjudication "exclude[s] many mass tort victims from the system and sharply reduce[s] recovery for those who gain access"); ALI Report, supra note 37, § 1.04 (describing central objective of aggregate proceedings as "enabling claimants to voice their concerns and facilitating the rendition of further relief that protects the rights of affected persons"). But see, e.g., Samuel Issacharoff & John F. Witt, The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law, 57 Vand. L. Rev. 1571, 1618 (2004) (observing that for very similar, highly litigated claims, "economies of scale seem to lead to the concentration of market share on both the plaintiff and defense sides into a small number of repeat actors").

235. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("'A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))); Zimmerman, Funding Irrationality, supra note 37, at 1115–17 (describing alternative goals of class action litigation).

236. See David Rosenberg, Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit, 2003 U. Chi. Legal F. 19, 27–30 (2003) [hereinafter Rosenberg, Adding a Second Opt-Out] (arguing for aggregate procedures to allow plaintiffs' counsel to make optimal investment in litigation); David Rosenberg, Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't, 37 Harv. J. on Legis. 393, 397–400 (2000) [hereinafter Rosenberg, Mass Tort Class Actions] (explaining how aggregating classable claims creates economies of scale favorable to plaintiffs).

237. See Manual for Complex Litigation, supra note 81, § 10.1 (collecting procedures for judicial management of complex cases and observing that "investing time in the early stages of the litigation, however, will lead to earlier dispositions, less wasteful activity, shorter trials, and, in the long run, economies of judicial time and fewer judicial burdens").

238. Jack B. Weinstein, The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture, 30 Cardozo L. Rev. 1, 174 (2008) (observing that procedural benefits include substantial reduction in costs of "discovery, retention of experts, legal research and legal fees"); see also Thomas E. Willging, Fed. Judicial Ctr., A Report to the Mass Torts Working Group app. C at 20 (1999) ("Aggregating mass torts may provide an opportunity to correct more systematically the harms that products have caused . . . ."); Rosenberg, Mass Tort Class Actions, supra note 236, at 394 ("With class-wide aggregation of the defense interest, the defendant exploits economies of scale to invest far more cost-effectively in preparing its side of the case . . . .").

function, allowing groups of individuals to collectively petition and redress widespread harm.[239]

Aggregate procedures are also thought to be more *efficient* than individual litigation for group-wide harm. They eliminate the time and expense associated with traditional one-on-one adjudication, which otherwise involves months or years of the "'same witnesses, exhibits and issues from trial to trial.'"[240] In other words, aggregate procedures provide an opportunity to fulfill the compensatory goals of the civil justice system "more consistently and completely," and create a "deterrent effect" that equals the "magnitude of the harm."[241]

Finally, aggregate procedures seek more *uniform* application of law. Although aggregate procedures try to ensure that outcomes reflect the individual claims and interests of the different participants,[242] aggregate proceedings and settlements fundamentally seek uniformity and distributive fairness—to treat like parties in a like manner.[243] Otherwise, in cases involving group-wide harm, the first claimants to bring lawsuits might receive astronomical awards, while other victims receive nothing. And, in cases seeking injunctions or declaratory relief, a court may never hear from plaintiffs with competing interests in the final outcome, or, over time, subject defendants to impossibly conflicting demands.

Nevertheless, large cases create new risks. The sheer number of claims in aggregate litigation threatens legal access, efficiency, and consistency by (1) stretching courts' capacity to administer justice to many people; (2) replacing individual hearings with a potentially faceless, unresponsive bureaucracy; (3) relying upon representatives tempted by the promise of large fees or power; and (4) increasing the consequence of

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239. See Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, Individuals Within the Aggregate: Relationships, Representation, and Fees, 71 N.Y.U. L. Rev. 296, 382 (1996) (summarizing democratic theories involving access to litigation).

240. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (granting certification of class action involving asbestos). See generally Weinstein, Individual Justice, supra note 35, at 136 (noting economies of scale reduce discovery costs and expert fees in class actions); William Schwarzer, Settlement of Mass Tort Class Actions: Order out of Chaos, 80 Cornell L. Rev. 837, 837–38 (1995) (explaining how class actions are seen as remedy to duplicative litigation activity).

241. Willging, supra note 238, at 20.

242. See Nancy Morawetz, Bargaining, Class Representation, and Fairness, 54 Ohio St. L.J. 1, 42–46 (1993) (articulating a "mixed-model" of fairness that balances need to maximize total recovery for class against need to ensure settlement does not unfairly exclude individual members of class).

243. See Fed. R. Civ. P. 23(b)(1)(B) (describing potential of individual adjudications to substantially impair or impede future claimants' "ability to protect their interests"); Arthur R. Miller, An Overview of Federal Class Actions: Past, Present and Future, 4 Just. Sys. J. 197, 211 (1978) (discussing need to convert individual cases into class action to equitably distribute limited resources of defense).

error in high-stakes litigation.[244] In other words, just like many kinds of administrative systems, aggregate litigation struggles to govern many different kinds of constituencies feasibly, legitimately, loyally, and accurately.

First, aggregate litigation may become *unfeasible*, if not properly managed, by imposing cumbersome new costs on adjudication. In aggregate litigation, courts may expend resources to retain special masters, establish expert panels, set up large discovery banks, and screen voluminous filings. Litigation expenses may also increase when both parties believe that there is more at stake to lose, causing some to suggest that class litigation creates "diseconomies of scale."[245] Problems of administrative feasibility mean that courts must try to determine whether methods less drastic than aggregation, like voluntary coordination of discovery or better pretrial processing, can achieve the same benefits of class actions or multidistrict litigation at a lower cost.[246]

Second, aggregate litigation threatens *legitimacy* by replacing formal court hearings with impersonal, top-down bureaucracies that stray from democratic ideals.[247] As judges, lawyers, and special masters together oversee the difficult task of identifying and categorizing people according to their losses, they limit the individual satisfaction many derive from

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244. See, e.g., ALI Report, supra note 37, §§ 1.03 cmt. c, 2.02 cmt. c (observing that aggregation should respect "institutional capacity of the courts," protect interests of "represented persons" as well as their "rights" delineated by law, and enable "binding resolutions" to all claimants); see also Erbsen, supra note 38, at 1024 (proposing new principles to mitigate distortions caused by class actions); Lahav, Numbers, supra note 32, at 429 ("Courts should foster a form of administration that allows access to justice, and at the same time is humanizing, thoughtful and deliberative.").

245. Compare Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & Com. 1, 15–16 (1990) (arguing consolidation may not be very efficient), and Mark C. Weber, Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases, 21 Hastings Const. L.Q. 215, 254–55 (1994) (describing potential for diseconomies of scale when efficiency is "pursued too far"), with Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1196, 1199, 1298 (1982) (describing "diseconomies of scale" in agency proceedings "given multiple layers of decision and review and the temptation to adopt overly rigid norms in order to reduce administrative costs").

246. See ALI Report, supra note 37, § 2.02 cmt. b (observing that courts should consider "realistic procedural alternatives" to aggregation and degree to which they also "advance the resolution" of common claims).

247. Compare, e.g., Max Weber, Bureaucracy, *in* From Max Weber: Essays in Sociology 196, 216 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) ("[T]he more the bureaucracy is 'dehumanized,' the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation."), with Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1198 (1982) ("Respect for individual dignity, autonomy, and self-expression demands that those with rights directly at risk have an adequate means of registering their concerns.").

receiving their "day in court."[248] For others, the large class action transforms the judge from an independent neutral into an interested "manager," creating "opportunities for judges to use—or abuse—their power."[249]

Third, aggregate litigation risks *disloyalty*. Defense counsel may forge collusive or sweetheart deals with plaintiffs' counsel, despite their clients' best interests.[250] Participants in a class settlement also lack rational incentives to monitor class counsel because they have a comparatively small stake in the entire enterprise.[251]

Finally, aggregate litigation threatens *accuracy* by "averaging" claim values among parties with different injuries or by favoring the interests of some plaintiffs over others. Because class actions bind large groups of people in the same way, the accuracy of the decisions becomes even more important than in an individual case. The efficiency with which class actions resolve disputes puts pressure on the ability of the court to achieve accurate decisions in individual cases.

In sum, aggregate litigation seeks the same fundamental goals of access, efficiency, and consistency as administrative law. But, also like

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248. See Willging, supra note 238, at 18 (observing that large settlements involving mass torts "make it more likely that individual cases will be disposed of without trial or hearing, raising questions of procedural unfairness in terms of satisfying litigant interests in participating meaningfully in resolving their cases"); Tom R. Tyler, A Psychological Perspective on the Settlement of Mass Tort Claims, 53 Law & Contemp. Probs. 199, 204 (1990) ("[H]aving one's day in court often leads to a more satisfactory claiming experience than does a swift procedure in which litigants are minimally involved."); Patricia M. Wald, Bureaucracy and the Courts, 92 Yale L.J. 1478, 1483 (1983) (arguing "personalized judiciary" is endangered by growth of bureaucracy in court system).

249. Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 425 (1982).

250. See John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 883–89 (1987) [hereinafter Coffee, Regulation] (describing "conflicts of interest between attorney and client . . . in class action litigation"); Bruce L. Hay, Asymmetric Rewards: Why Class Actions (May) Settle for Too Little, 48 Hastings L.J. 479, 479 (1997) (articulating concerns class counsel may "sell out" and settle for less than reasonably possible); see also In re Oracle Sec. Litig., 136 F.R.D. 639, 645 (N.D. Cal. 1991) ("Class counsel's fee application is presented to the court with the enthusiastic endorsement, or at least acquiescence, of the lawyers on both sides of the litigation, a situation virtually designed to conceal any problems with the settlement not in the interests of the lawyers to disclose.").

251. See Christopher R. Leslie, The Significance of Silence: Collective Action Problems and Class Action Settlements, 59 Fla. L. Rev. 71, 81 (2007) ("[B]ecause some class action litigation is premised on the need to aggregate claims that are too small to litigate individually, no class member may have enough at stake to expend personal resources on monitoring the class counsel."). Others observe that attorneys' incentives to obtain fair outcomes for their clients may be affected by the fact that they can earn large attorneys' fees by settling. See, e.g., Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U. L. Rev. 469, 503 (1994) [hereinafter Weinstein, Ethical Dilemmas] (comparing attorney's financial stake to that of "any single litigant" and noting attorney has "substantial incentive to reach a settlement and collect a contingency fee sooner rather than later").

administrative law, mass dispute resolution may impose unanticipated costs and delays, threaten the legitimacy of individualized access to government, risk creating new conflicts of interest, and increase the importance of accurate outcomes. Thus, any proposal for agency aggregation of administrative proceedings must incorporate tools that can take advantage of the benefits of aggregation while minimizing the potential dangers.

With this in mind, Part III.B describes the proposal. Part III.C then responds to potential concerns of feasibility, legitimacy, loyalty, and accuracy.

B. *The Proposal*

The "agency class action" is, in fact, shorthand for three kinds of aggregate proceedings. Under the proposal, parties could petition a panel within the agency for an "aggregate proceeding" that would (1) coordinate related claims before any trial-like administrative hearing commences, (2) provide class-wide relief to similarly situated parties through an administrative proceeding, or (3) aggregate claims for settlement purposes. As set forth below, the rules for pretrial consolidation, class certification, and aggregate settlement would roughly trace the federal rules that govern multidistrict litigation and complex class actions.

1. *Prehearing Coordination or Consolidation.* — To coordinate proceedings before an administrative hearing, any party—plaintiffs, defendants, or even the enforcement arm of the agency itself—would first petition a panel within the agency to make a threshold decision: that common issues of law or fact require "coordinated or consolidated" prehearing proceedings. For example, veterans who drank contaminated water at the same military base,[252] or lost their hearing while in the same military occupational specialty,[253] could petition the VA to coordinate prehearing proceedings to handle common discovery issues.[254] Similarly, miners

252. Lena H. Sun, Survey Seeks Data on Camp Lejeune Illnesses, Wash. Post, June 27, 2011, at A15 ("As many as 1 million people over three decades may have been exposed to well water that was contaminated by toxins . . . . Some of the toxins may have been present at levels as much as 40 times the current safety standards.").

253. Gregg Zoroya, Soldier's Story Shows Risks of Hearing Loss, USA Today, Aug. 4, 2008, at 1A ("One in four soldiers serving in Iraq or Afghanistan have damaged hearing . . . .").

254. Under the Department's organic statute and regulations, veterans may only challenge problems in proceedings before the agency. See 38 U.S.C. § 511(a) (2006) (granting Secretary final and conclusive power to decide questions of law and fact required to make decisions affecting provision of veterans' benefits); 38 C.F.R. § 20.3(e) (2011) (defining "benefit"); see also S. Rep. No. 111-265, at 35–36 (2009) (statement of Professor Michael P. Allen) (describing unfairness that results because Veteran Court's jurisdiction is "limited to cases in which a veteran challenged a specific, individual Board decision" and because, before reaching Veteran's Court, veterans must participate in "non-adversarial" process where they effectively lack counsel). Veterans must file separate

filing claims against the same mine operator under the Black Lung Benefits Program for exposure to coal dust might seek coordination to ameliorate the resource imbalances they face in litigation with mine owners, providing injured miners with shared resources and the wherewithal to invest in better trained experts. Like in multidistrict litigation, the parties could file their petition after a threshold number of people file common claims.[255] The administrative panel would determine whether to centralize claims by considering (1) whether coordination would avoid duplication of discovery, (2) whether it would prevent inconsistent evidentiary or other prehearing rulings, and (3) whether it would conserve the resources of the parties, their counsel, and the agency.[256] In coordinated proceedings, no representative plaintiff acts on behalf of others. The agency simply aggregates individual cases into a single forum for the sake of convenience and efficiency.

Assuming the petitioner meets the threshold requirements for a "coordinated" action, the agency would then appoint a "transferee" administrative law judge from a specialized core of adjudicators responsible for, and experienced in, complex aggregated proceedings, such as judges and arbitrators appointed in complex arbitration and multidistrict litigation.[257] Among other things, the specialized ALJ would require parties to jointly file a case management order (CMO), which would streamline management of discovery, including expert reports and depositions of

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Freedom of Information Act (FOIA) requests to obtain overlapping discovery and litigate separate appeals and remands involving the same claim for delay without the aid of counsel. See Veterans for Common Sense v. Shinseki, 644 F.3d 845, 855 (9th Cir. 2011) ("The veteran's only way to independently learn the outcome of an external review is to file request under the Freedom of Information Act."), vacated en banc, 678 F.3d 1013 (9th Cir. 2012).

255. Those advocating transfer bear a higher burden of persuasion when there are only a small number of actions. Manual for Complex Litigation, supra note 81, § 20.131; see also Leahy v. Lone Mountain Aviation, Inc. (In re Air Crash at Las Vegas, Nev., on Aug. 28, 2008), 716 F. Supp. 2d 1366, 1367 (J.P.M.L. 2010) (denying centralization and citing "minimal number of actions and parties . . . involved"). Subsequently filed cases raising the same common factual question, also known as "tag-along" cases, are also automatically centralized before the same ALJ. See, e.g., J.P.M.L. Rule 7.2(a) ("Potential tag-along actions filed in the transferee district do not require Panel action.").

256. See 28 U.S.C. § 1407(a) (2006) (allowing actions with common questions of fact to be transferred for convenience and efficiency); Manual for Complex Litigation, supra note 81, § 20.13–.131 ("The objective of transfer is to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts." (citing In re Plumbing Fixture Cases, 298 F. Supp. 484 (J.P.M.L. 1968))).

257. See Manual for Complex Litigation, supra note 81, § 20.131 (considering "experience" and "skill" of available judges for designation); Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 13, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198) (noting "arbitrators presiding over class arbitrations conducted under the Rules are appointed from a select national roster of experienced class action arbitrators").

common witnesses, and scheduling of overlapping motions, as well as other common issues.[258] A joint plaintiffs' steering committee could coordinate scheduling, take responsibility for providing claimants with individual counsel, and share costs and expenses, including fees to pay for scientists and other experts, with a mechanism to split attorneys' fees. Coordinating claims in this way allows plaintiffs to pool their limited resources to introduce similar kinds of proof, and rely upon similar scientific testimony.

2. *Class Actions and Quasi-Class Actions.* — At any time, the parties could also petition for a class action.[259] The ALJ would carefully consider whether or not to certify a class action based on the same factors described in Rule 23 of the Federal Rules of Civil Procedure, including whether the members of the proposed class are sufficiently numerous, whether common questions of fact or law exist, whether the claims of the class representatives are typical, and whether the class representatives and their counsel are adequate to represent the class.[260] In addition to these baseline requirements, the ALJ must also determine that the class action is superior to individual adjudication. The ALJ might consider (1) whether individual relief would impair the ability of other class members to recover, such as where there is a limited fund available;[261] (2) whether the class members are all challenging the same behavior of one or more parties, such as the government;[262] or (3) whether common issues predominate over individual ones and a class action is the most efficient and fairest method of resolving the cases.[263] For example, the ALJ could certify classes where parties seek declaratory relief about a common question, such as whether the Black Lung Benefits Program covers a particular lung disease, or whether a particular "stressor" is sufficient to support a veteran's claim for benefits based on PTSD. In addition, class certification would be appropriate to address disputes arising out of a common question of fact, like a group of veterans who were all wrongfully denied

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258. See Manual for Complex Litigation, supra note 81, § 20.132 (advising that judges deem rulings on some limited but common issues, like statutes of limitations, to apply to other cases and make discovery already taken available to newly filed cases to streamline cases).

259. See, e.g., Fed. R. Civ. P. 23 (describing rules for class action certification).

260. See id. 23(a) (setting forth criteria required for all class actions).

261. See id. 23(b)(1)(B) (providing that if adjudications for individual claimants would impair ability of nonparties to protect their interests, it would be partial grounds for class certification).

262. See id. 23(b)(2) (requiring that party opposing proposed class has acted in way that applies generally to class as whole).

263. See id. 23(b)(3) (requiring court to find that questions of law or fact common to class members predominate over individual questions and that class action is fairest and most efficient way to adjudicate controversy).

treatment for PTSD at the same outpatient facility,[264] or an automated error in the calculation of food stamps, Medicaid, or other public benefits.[265]

When the agency or claimants collectively seek compensation from insolvent defendants or those with "limited funds," the ALJ would certify a mandatory class action, like those described under 23(b)(1) and (2) of the Federal Rules of Civil Procedure, to determine how the fund should be allocated. Such class certification would be appropriate in agency restitution cases, where individual investors, consumers, or homeowners must be compensated from a limited settlement fund. As set forth in Part I, no existing process permits agencies to resolve disputes between different classes of victims. Under a limited fund class action procedure, however, the agency could organize different interests into subclasses of investors, ensure each class has separate and adequate representation, and notify absent parties based on shareholder records. After receiving their comments or objections, the ALJ would determine the categories of people entitled to relief, the amount of that relief, and any evidence required to establish their entitlement to that relief.

Similarly, agencies could resolve public rights litigation through injunctive or declaratory relief class actions, like those under Rule 23(b)(2). Such a rule is particularly appropriate for cases involving immigration, Social Security, veterans' claims, and other public benefits.[266] Unlike class actions for compensation, which may result in a settlement fund overseen by a private administrator to distribute benefits, an injunction could force an already existing administrative structure, like the Social Security Administration, to disburse benefits consistent with the class-wide relief.

Finally, many private rights cases seeking money damages as well as public rights cases involving monetary benefits could be resolved

264. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 878–79 (9th Cir. 2011) (addressing plaintiffs' claim alleging that almost all veteran outpatient offices lacked trained staff members capable of diagnosing veterans with PTSD in violation of federal law and Veterans Administration's own guidelines), vacated en banc, 678 F.3d 1013 (9th Cir. 2012).

265. See, e.g., Danielle Keats Citron, Technological Due Process, 85 Wash. U. L. Rev. 1249, 1256–58 (describing routine, automated mistakes by state and federal agencies in food stamps, Medicaid, and welfare eligibility determinations); Leslie Kaufman, A Bounty of Food Stamps, Harvested from a Lawsuit, N.Y. Times, Nov. 27, 2008, at A31 (describing class action settlement for 9,500 class members illegally denied food stamps).

266. As a practical matter, public rights claims would not involve the kind of class-wide determinations of compensatory relief that the Supreme Court rejected in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (denying class certification in part because certification would create perverse incentive of discouraging potentially valid claims for compensatory damages). And even when the claim involves compensation, like challenges to the routine denial of benefits, injunctive relief may materially advance the litigation.

through "voluntary" class actions like those under Rule 23(b)(3) or "quasi-class actions." Such cases could include compensation when parties are subject to a common fraud, like a commonly assessed overcharge in the marketplace, or the routine denial or erroneous calculation of benefits.[267]

Some cases seeking compensatory relief, however, may present too many individual questions. In the Black Lung cases, for example, issues such as the timing and duration of exposure and evidence of specific causation may make class-wide procedures difficult. In cases where individual issues overwhelm common issues, groups could still rely on two other tools derived from "limited issue" class actions and multidistrict litigation to coordinate adjudication. Under the Federal Rules, parties may certify a class action for a specific issue or element of their claims when the parties raise a common issue of law or fact.[268] These "issue class actions" allow parties to achieve the economies of class actions for a part of the case—like whether a defendant lied to investors,[269] whether Somalia is an appropriate destination for deportation,[270] or whether a military job in a particular theater and time period was likely to result in noise exposures sufficient to damage hearing[271]—even if courts could not manageably try the remaining individual issues of causation and damages as a class.[272]

In cases that do not qualify for an issue class action, parties could still use rules from multidistrict litigation to ensure more efficiency, consistency, and participation than in individual adjudications.[273] At a

267. See, e.g., Kaufman, supra note 265 (describing settlement in which 9,500 class members illegally denied food stamps were automatically credited $12 million through use of electronic benefit cards).

268. Fed. R. Civ. P. 23(c)(4).

269. See Biben v. Card, 789 F. Supp. 1001, 1003 (W.D. Mo. 1992) (splitting trial into class-wide liability phase for alleged shareholder fraud and individual damage phase).

270. See Ali v. Ashcroft, 346 F.3d 873, 886 (9th Cir. 2003) (challenging governmental practice of deportation to Somalia absent functioning government), withdrawn, 421 F.3d 795 (9th Cir. 2005).

271. Zoroya, supra note 253 (noting "[o]ne in four soldiers serving in Iraq or Afghanistan have damaged hearing").

272. Manual for Complex Litigation, supra note 81, § 21.24. Agencies should only grant limited issue classes, however, when they "materially advance" the disposition of the case. That is, they should avoid certifying limited issue classes when the final resolution would still leave open a large number of issues that require individual determinations. See id. § 21.24 nn.835–839 (collecting cases granting and denying limited issue class actions).

273. Some have even characterized coordinated proceedings as "quasi-class actions." See Weinstein, Ethical Dilemmas, supra note 251, at 480–81 (referring to mass consolidations as "quasi-class actions" because "[o]bligations to claimants, defendants, and the public remain much the same"); see also Charles Silver & Geoffrey P. Miller, The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal, 63 Vand. L. Rev. 107, 110–11 (2010) (describing multi-district litigations as "quasi-class actions"

minimum, coordinated litigation would aim to ensure that certain categories of claimants raising fact-intensive issues receive consistent and expedited treatment before the agency. Among other things, administrative adjudicators could do so by encouraging parties to select "lead" or "bellwether" cases that presumptively apply to subsequent similar cases, by convening joint telephonic conferences and establishing joint orders, and by appointing common experts, special masters, and counsel to avoid duplication.[274]

3. *Aggregate Settlement.* — Finally, when the parties are able to reach a settlement, they could jointly petition the ALJ to approve the settlement as "fair, reasonable and adequate."[275] The federal class action exerts pressure on many defendants to settle in order to avoid large losses.[276] The same pressure may induce parties to settle in private rights litigation where significant money damages are at stake. Therefore, an agency would need to adopt rules to ensure that counsel and other representatives fairly represent the interests of the parties in settlement, similar to Article III judges who review attorney representatives for potential conflicts of interest.[277] To do so, as in civil litigation, ALJs may require counsel, mediators, or experts in the litigation to explain their decisions,[278]

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because "a judge presiding over an MDL enjoys the same broad equitable powers as a judge presiding over a class action").

274. See Manual for Complex Litigation, supra note 81, § 20.14 (identifying options for coordinating related cases); Joan A. Steinman, The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be (pt. 2), 42 UCLA L. Rev. 967, 971–78 (1995) (arguing consolidated litigation is representative in practice and discussing merits of appointing lead counsel); see also ALI Report, supra note 37, § 1.02 cmt. b(2) (discussing coordination of separate lawsuits in various types of administrative aggregations, including bellwether trials).

275. Fed. R. Civ. P. 23(e)(2). Federal courts have developed a common set of factors to consider, which include (1) likelihood of recovery, or likelihood of success; (2) amount and nature of discovery or evidence; (3) settlement terms and conditions; (4) recommendation and experience of counsel; (5) future expense and likely duration of litigation; (6) recommendation of neutral parties, if any; (7) the number of objectors and nature of objections; and (8) the presence of good faith and the absence of collusion. 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:43 (4th ed. 2002).

276. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995) (noting threat of huge liability in class actions often creates "intense pressure to settle"); Richard A. Nagareda, Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA, 106 Colum. L. Rev. 1872, 1879–82 (2006) (describing theory behind pressure to settle).

277. See Manual for Complex Litigation, supra note 81, § 21.612 & n.965 (collecting cases supporting argument that "[c]lass actions certified solely for settlement . . . sometimes make meaningful judicial review more difficult and more important").

278. See, e.g., Isby v. Bayh, 75 F.3d 1191, 1199 (7th Cir. 1996) (scrutinizing counsels' conception of plaintiffs' chances of success at trial and approving of district court's consideration that settlement was fair); Murillo v. Tex. A&M Univ. Sys., 921 F. Supp. 443, 445 (S.D. Tex. 1996) (requiring counsel to engage in "sufficient discovery"); Manual for Complex Litigation, supra note 81, § 21.612 & n.965 (collecting cases where courts apply

paying particular attention if mass settlements award more to some class members at the expense of others or are reached before the parties have tested the theories of the case through discovery.[279]

Individuals would have opportunities to object (in writing or, if feasible, in person) at a fairness hearing to determine the final distribution of the award. At the same fairness hearing, the ALJ could hear from representative counsel for different subclasses with interests in the total award, such as creditors, institutional investors, and small investors, in a "limited fund" class action. Finally, the ALJ would approve the categories of people entitled to relief and the amount of relief sought by the parties.

The government may feel less pressure to settle in public rights cases. When the agency itself stands in the shoes of the defendant and the claims do not involve money damages against the government, the agency will not face the same risk of loss. Agencies may even welcome aggregation more than typical defendants because the agency head can generally reverse an ALJ's ruling that is at odds with the agency's mission. In addition, while ALJs enjoy some protections, they do not enjoy the lifetime tenure or institutional authority of Article III judges.[280] Therefore, they may be less willing to second guess the agency head's decision about what would be a fair and appropriate settlement.

Still, agencies often face the prospect of federal judicial review, so this may temper their enthusiasm for sweeping decisions that a federal court might reverse.[281] Moreover, agencies do often settle individual

"closer judicial scrutiny" for potential conflicts of interest, particularly when there has been "little or no discovery" to test strengths and weaknesses of each party's position).

279. See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (observing certification of settlement class requires "undiluted, even heightened, attention"); Synfuel Tech., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 652–54 (7th Cir. 2006) (concluding that district court failed to adequately evaluate fairness of settlement); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) (rejecting settlement when certain class members were settled for no consideration without reasoned explanation); see also John C. Coffee, Jr., Conflicts, Consent, and Allocation After *Amchem Products*—or, Why Attorneys Still Need Consent To Give Away Their Clients' Money, 84 Va. L. Rev. 1541, 1545 (1998) [hereinafter Coffee, Conflicts] (observing occasions where class counsel will have no incentive to "resist an allocation plan favored by the defendant, who often has an interest in preferring one subgroup within the class over another").

280. Compare U.S. Const. art. III, § 1 ("Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."), with 5 U.S.C. § 557(d) (2006) (limiting ex parte communications with administrative law judges), id. § 5372 (prescribing pay decisions for administrative law judges), and id. § 7521 (providing separate adjudicatory proceeding to determine whether "good cause" exists for terminating administrative law judge).

281. See Thomas W. Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 Colum. L. Rev. 939, 940–42 (2011) (describing and critiquing modern American system of judicial review of agency proceedings).

public rights cases when it is compatible with their mission.[282] The agency might be more willing to settle in the context of an agency class action than a federal court action because many agency adjudications are less adversarial and agencies exert greater control over the process and outcome.

4. *Appeal.* — Finally, like in federal court, class members could appeal a final judgment made during the course of a coordinated proceeding, class action, or class settlement to the final Article I tribunal—often the head of the agency—and ultimately to federal court. The advantages of aggregation will continue to bear fruit on appeal. First, because the decision below will affect large groups of individuals and entities in agency proceedings, it will be worthwhile and possible for the agency to devote more time and attention to the appeal. Second, for the same reasons, the agency's decision on appeal is likely to be more transparent than final decisions in individual adjudications, which rarely attract much public attention. Third, because of the more developed and coordinated discovery below, the appellate body will be presented with a fuller record on which to consider the systemic aspects of the issue.

Appeals from aggregated proceedings give agencies more opportunities to resolve systemic problems before they get to federal court. Courts will also benefit from a better record on appeal. Once more, the court may more precisely address the agency's own regulations and governing statute—rather than remanding the action with a potentially vague instruction that the agency design new and improved procedures.

C. *Ensuring Feasibility, Legitimacy, Loyalty, and Accuracy*

Any large representative adjudication must respond to concerns, outlined above in Part III.A, about feasibility, legitimacy, loyalty, and accuracy. Best practices in class actions and other aggregate litigation have long tried to (1) make aggregate litigation *feasible* with threshold requirements to screen out those cases better suited for individual adjudication and to streamline those that are not;[283] (2) make aggregate litigation *legitimate* through safeguards designed to create an impartial forum capable of hearing and resolving claimants' concerns;[284] (3) make aggregate litigation *loyal* to absent class members through internal monitoring

282. See, e.g., Jim Rossi, Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement, 51 Duke L.J. 1015, 1019 (2001) ("[I]t is now commonplace for an agency to offer the opportunity for mediation and settlement to parties to an adjudication . . . .").

283. See infra Part III.C.1 (discussing some problems with aggregate litigation and how threshold requirements would make aggregate litigation more feasible).

284. See infra Part III.C.2 (noting potential for abuse of power and suggesting methods to improve legitimacy of aggregate litigation).

and judicial review;[285] and (4) make aggregate litigation *accurately* reflect the underlying merits of plaintiffs' claims, through minitrials, statistical extrapolation, and other methods.[286]

Accordingly, agencies considering the adoption of complex litigation procedures must take similar steps to ensure feasible, legitimate, loyal, and accurate decisions in mass adjudication. This section describes how agencies may begin to address those concerns.

1. *Feasible Decisionmaking.* — In many ways, aggregate procedures already make large adjudications more feasible by streamlining claims,[287] coordinating discovery, utilizing probabilistic or statistical evidence,[288] and binding parties to final resolutions, fairly and equitably. Expending some resources to encourage more parties to participate in a single proceeding should save costs in the end. Moreover, when sophisticated stakeholders participate in adjudications, they will improve accurate case handling and reduce the rate of reversal on appeal. All of these procedures make aggregate agency adjudication more feasible than processing common cases individually.

But aggregate procedures also impose new costs. Procedures for individualized notice, fairness hearings, as well as set asides for attorney expenses could add strain to already beleaguered agencies. In addition, some argue that class actions add new "process costs"—that is, by lowering the costs of filing claims, they increase their volume, which demands new people to screen out fraudulent claims.[289] Finally, agency class actions create opportunity costs. Devoting a special core of administrative judges to handle class actions or other aggregate claims may divert

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285. See infra Part III.C.3 (observing potential for disloyalty in aggregate litigation and recommending steps to increase loyalty).

286. See infra Part III.C.4 (discussing danger of "averaging" claim values and methods that would increase accuracy of aggregate litigation).

287. See, e.g., Order at 2, In re September 11 Litig., No. 21 MC 97 (AKH) (S.D.N.Y. Sept. 17, 2007), available at http://www.nysd.uscourts.gov/docs/rulings/21MC97_order_091707.pdf (on file with the *Columbia Law Review*) (ordering cases closed due to settlement).

288. See Schwab v. Philip Morris USA., Inc., 449 F. Supp. 2d 992, 1239–40 (E.D.N.Y. 2006) (finding use of statistical evidence to establish liability and damages consistent with due process), rev'd on other grounds sub nom. McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008); Robert G. Bone, Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity, 46 Vand. L. Rev. 561, 650 (1993) (concluding sampling is acceptable form of resolving mass tort cases only in instances where individual adjudication is not feasible because of "process scarcity"); Alexandra D. Lahav, Bellwether Trials, 76 Geo. Wash. L. Rev. 576, 582–89 (2008) [hereinafter Lahav, Bellwether] (describing use of statistical extrapolation in cases ranging from asbestos to human rights abuses).

289. See, e.g., Francis E. McGovern, The Defensive Use of Federal Class Actions in Mass Torts, 39 Ariz. L. Rev. 595, 606 (1997) (observing that "[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings," and "[i]f you build a superhighway, there will be a traffic jam").

resources from other matters, including cases requiring individual adjudication. Problems of administrative feasibility mean that courts must try to determine whether methods less drastic than aggregation, like voluntary coordination of discovery, can achieve the same benefits as class actions or multidistrict litigation at a lower cost.[290]

Agencies can ensure that aggregate litigation is feasible by adopting threshold rules from complex litigation to sort the cases suitable for class treatment from those that are not. Courts weigh the comparative benefits of individual and collective control over the shape of the litigation, the progress of any existing individual litigation, the comparative benefits of concentrating litigation in a single forum, and whether the class-wide proceeding is manageable and materially advances the resolution of those cases.[291] Agencies may take into account similar factors. First, to determine whether the interest in individual control outweighs the benefits of collective treatment, agencies should begin by evaluating the "variability" and "marketability" of potential claims.[292] A group of claims is highly "variable" when the individual claims differ significantly from each other. Claims are less "marketable" when they promise small verdicts or settlement values.[293] Courts often refuse to certify class actions when claims are highly variable.[294]

To some extent, agency adjudications will always raise less varied questions than adjudications in courts of general jurisdiction; by design, agency courts must adjudicate limited sets of issues according to the agencies' organic statute or regulations. However, there will still be cases where agencies must sort out common claims from highly variable, fact-

290. See ALI Report, supra note 37, § 2.02 cmt. b (observing that courts should consider "realistic procedural alternatives" to aggregation and degree to which they also "drive the resolution" of common claims).

291. See, e.g., Fed. R. Civ. P. 23(b)(3)(A)–(D) (describing factors to be considered in class certification).

292. See ALI Report, supra note 37, § 2.02 (laying out general principles for collective treatment of common issues); Samuel Issacharoff, Group Litigation of Consumer Claims: Lessons from the U.S. Experience, 34 Tex. Int'l L.J. 135, 149 (1999) (summarizing effects of variance between claims and value of claims on utility of class actions).

293. See ALI Report, supra note 37, § 2.02 cmt. b (noting that one concern motivating aggregation is prospective claimants' inability to obtain individual representation in market); see also Zimmerman, Distributing Justice, supra note 37, at 516–18 (describing application of ALI principles of claim "variability" and claim "viability" to agency settlements); Zimmerman & Jaros, supra note 98, at 1437–38 (describing application of claim variability and marketability to massive criminal restitution settlements).

294. See ALI Report, supra note 37, § 2.02 reporters' notes cmt. b ("The strength of the justification for class certification in the low-viability and low-variation scenario is well recognized in the law of class actions."); see also Issacharoff, supra note 292, at 149 ("Where the uniformity of the defendant's conduct defines the perimeter of the lawsuit, and where the individual stake in the case is too low to make private enforcement viable, aggregation through a class action is an indispensable mechanism for allowing private enforcement of consumer claims.").

dependent cases. For example, cases involving claims with low variability and low marketability, such as consumer cases that only involve small dollar amounts, can generally be resolved effectively by civil class actions.[295] Conversely, cases that are both highly variable and marketable, like a mass tort case, may be resolved more competently through individual or coordinated litigation.[296] Finally, agency class actions may resolve cases involving low variability and highly valuable claims—like many antitrust, securities, declaratory relief, and structural reform disputes—because of the strong interest in treating like cases in a like manner.[297] Such cases, however, also may provide parties more chances to participate in the action—or to "opt out" of the aggregate adjudication—in light of the strong individual interest parties may have in controlling their own fate.

Second, agencies may also consider the extent to which individual litigation has already progressed. Cases involving highly fact-specific issues over one's potential deportation or pending medical treatment may not be amenable to class-wide relief where the results of aggregation prolong the detention or delay of putative members of the class.[298] On the

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295. Issacharoff, supra note 292, at 149 (collecting examples of "low marketable" claims from consumer law). The Supreme Court has also addressed the issue:

> "The 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. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's . . . labor."

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

296. The cases involving the anti-inflammatory drug Vioxx provide a good example of highly variable and highly marketable claims. Courts rejected a class action because the individual circumstances that gave rise to each claim varied substantially. See In re Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 463 (E.D. La. 2006) (denying class action); Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., 929 A.2d 1076, 1089 (N.J. 2007) ("[W]e cannot escape the vast differences between [the] appropriate use of the class action device and the present inappropriate one."). The high value of each claim, however, ensured that the vast majority (if not all) of the plaintiffs were able to initiate individual suits against the drug manufacturer through coordinated civil litigation. See Silver & Miller, supra note 273, at 138 (observing that over 1,100 law firms participated in *Vioxx* litigation alone).

297. Securities law class actions, for example, comprised the greatest share of class action settlements over the past decade. Almost half of the 5,179 class action claims pending in federal court as of September 2004 were securities class actions. Leonidas Ralph Mecham, Admin. Office of the U.S. Cts., 2004 Judicial Business: Annual Report of the Director 400 tbl.X-4 (2004), available at http://host4.uscourts.gov/judbus2004/appendices/x4.pdf (on file with the *Columbia Law Review*); see also John C. Coffee Jr. & Stefan Paulovic, Class Certification: Developments over the Last Five Years 2002–2007: The Future of Class Actions, *in* Practising Law Inst., Class Action Litigation 2008: Prosecution and Defense Strategies 193, 198 (2008) (describing similar trend). This is because those kinds of actions tend to involve low variability claims.

298. See, e.g., Fed. R. Civ. P. 23(b)(3)(A) (noting that "class members' interests in individually controlling the prosecution or defense of separate actions" may provide basis for

other hand, issues that are repeatedly raised but that, if not addressed, would otherwise evade review may be appropriate candidates for a class action. For example, class litigation to resolve many categories of veterans' claims before the VA would be more feasible than the current system, which ordinarily requires years of individual litigation over common claims.[299]

Third, agencies may assess whether complex or novel issues need time to "percolate" or "mature."[300] For example, in the workers' compensation context, occupational disease cases involving complex questions of causation may require further factual development. On the other hand, in cases involving "signature illnesses" commonly associated with particular agents (like asbestosis, silicosis, and black lung disease) known to be in the same workplace, agencies may reap advantages from concentrating claims. Otherwise, repeated hearings may involve the same witnesses, issues, and exhibits throughout trials over several months or years.[301]

Finally, the adjudicator must consider whether class-wide relief is manageable. Federal courts often deem class actions "unmanageable" when they involve too many different issues of law or fact.[302] Such cases may involve nationwide classes that seek money for workplace discrimination on behalf of different parties under different legal theories, lawsuits that involve highly fact-based decisions of disability before the Social Security Administration, or difficult questions of causation in various locations and times. However, adjudicators should certify cases when questions about defendants' liability are more circumscribed in time and space and when questions of causation and damages overlap substantially.[303] Such questions may include allegations that Social Security

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decertification); In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 856 (9th Cir. 1982) (noting 23(b)(3)(A) concerns and decertifying class in case where each class member had suffered sizeable damages and had emotional stake in litigation).

299. The backlog of unresolved claims is currently around one million and is expected to increase to 2.6 million by 2015. Michael Serota & Michelle Singer, Veterans' Benefits and Due Process, 90 Neb. L. Rev. 388, 390 (2011); see also James D. Ridgway, The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System, 66 N.Y.U. Ann. Surv. Am. L. 251, 268 (2010) (describing steady rise of backlogged claims between 2000 and 2008).

300. Agencies may have less justification than the Supreme Court to permit disparate legal positions to "percolate" among their administrative law judges given their mandate to implement policy and administer uniform programs rather than merely decide disputes as they arise.

301. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (granting certification of class action involving asbestos and discussing benefits of class action, including saved judicial resources and reduced attorneys' fees); Schwarzer, supra note 240, at 837–38 (explaining how class actions are seen as remedy to duplicative litigation activity).

302. E.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct 2541, 2550–57 (2011) (decertifying nationwide class involving 1.5 million employment discrimination claims).

303. See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012) (approving Title VII class action against Merrill Lynch, observing

decisions rest upon an improper policy that screens out claims for disability based on a mental illness,[304] that immigration judges deny claims for asylum by Salvadorans based upon a common assessment of the country's socioeconomic conditions,[305] or of a common plan to corner the futures market from investors in Treasury bills.[306]

Certifying a class at the agency level would give 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.[307] An agency class action could correct systematic errors in an efficient and consistent manner while affording better access to legal representation than a system that requires potential beneficiaries to wait while their individual claims work their way through federal court and often ends with little more than a vague command that the agency do better.

2. *Legitimate Decisionmaking.* — As with civil litigation, agencies should encourage independent oversight and claimant participation to ensure that parties view the aggregating process as legitimate and fair. Large complex cases threaten legitimacy by limiting parties' participation in the proceeding or by transforming the judge from an independent

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that "lawsuits will be more complex if, until issue or claim preclusion sets in, the question whether Merrill Lynch has violated the antidiscrimination statutes must be determined anew in each case"); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003) ("If there are genuinely common issues[,] . . . the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop . . . .").

304. See City of New York v. Heckler, 578 F. Supp. 1109, 1115 (E.D.N.Y.) ("Contrary to legal requirements, the Social Security Administration has consistently followed a policy which presumes that mentally disabled claimants who do not meet or equal the listings necessarily retain sufficient residual functional capacity to do at least 'unskilled work.'"), aff'd, 742 F.2d 729 (2d Cir. 1984), aff'd sub nom. Bowen v. City of New York, 476 U.S. 467 (1985).

305. See Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796, 799–801 (N.D. Cal. 1991) (approving settlement agreement between class of Salvadoran and Guatemalan asylum seekers and government providing for de novo asylum adjudication); Orantes-Hernandez v. Smith, 541 F. Supp. 351, 372 (C.D. Cal. 1982) (certifying provisional class of Salvadorans challenging asylum practices).

306. Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 680 (7th Cir. 2009) (affirming certification of class against PIMCO on behalf of buyers of short positions in ten-year Treasury notes).

307. In 2009, 81% of claimants were represented by veteran service organization lay representatives. Eight percent of claimants were represented by attorneys; 9% lacked any representation at all. See Bd. of Veterans' Appeals, Fiscal Year 2009 Report of the Chairman 21 (2009), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2009AR.pdf (on file with the *Columbia Law Review*). The ban on compensation of attorneys was upheld by the Supreme Court in Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 334–45 (1985) (holding that fee limitation violates neither Fifth nor First Amendment).

neutral into a "manager" interested in saving court resources by brokering a final, global settlement.[308]

Federal courts have long sought to provide a legitimate forum to conduct mass adjudications impartially and meaningfully. To promote impartiality and expertise in multidistrict litigation, a special panel of judges may appoint a judge to centralize and oversee claims, based on that judge's experience in complex litigation.[309] Judges may then appoint magistrates or special masters to handle settlement discussions to avoid becoming overly invested in the parties' proposed resolution.[310] When judges actively participate in forging settlements, they may invite a second judge to review the propriety of the final award or settlement. Finally, judges themselves are reviewed for any abuse of discretion on interlocutory appeal.[311]

Accordingly, as with federal multidistrict litigation, only specialized ALJs should oversee aggregate proceedings, with special provisions for appellate review over the class certification decision and the final judgment. Administrative decisionmakers vary dramatically in their roles and responsibilities. Some conduct hearings akin to full-blown trials, while others are expected to make more routine decisions without the same authority to hear evidence or make policy judgments.[312] One can imagine settings, particularly when the agency itself is the target of aggregate litigation, where adjudicators would feel pressure not to permit aggregate litigation when they otherwise should. Moreover, some agency adjudicators may simply lack the expertise or time to resolve complex multiparty

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308. Resnik, supra note 249, at 425.

309. In re Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1101 (J.P.M.L. 1992) (justifying selection of forum on basis of "experienced multidistrict transferee judge"); see Manual for Complex Litigation, supra note 81, § 22.33 ("[T]he Panel looks for an available and convenient transfer forum, usually one that . . . has a judge with some degree of expertise in handling the issues presented . . . .").

310. See, e.g., Georgine v. Amchem Prods. Inc., 157 F.R.D. 246, 265–67 (E.D. Pa. 1994) (describing negotiations between plaintiff and defense steering committees), vacated, 83 F.3d 610 (3d Cir. 1996); Manual for Complex Litigation, supra note 81, § 22.62 (describing authority of court to appoint lead counsel or committees of counsel); id. § 22.91 (describing use of special masters or settlement judges to oversee or facilitate settlement).

311. See Fed. R. Civ. P. 23(f) (providing interlocutory review of court's decision to certify a class); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (calling for "undiluted, even heightened, attention" to adequacy of representation and other class certification requirements); Manual for Complex Litigation, supra note 81, § 21.612 n.965 (noting courts apply "closer judicial scrutiny" for potential conflicts of interest when "little or no discovery" has taken place to test strengths and weaknesses of each party's position).

312. See, e.g., Ronald A. Cass et al., Administrative Law: Cases and Materials 569 (6th ed. 2011) (collecting examples and observing that in some cases administrative adjudication closely resembles court-like hearings while in other cases the judicial analogy is "less comfortable").

disputes.[313] By assigning specialized ALJs to oversee multiparty disputes, agencies would afford more independence and experience in the initial decision to certify claims for class-wide treatment without overtaxing other kinds of more routine, individualized determinations made by agency hearing officers or judges.

Parties should be able to appeal the agencies' decisions on whether to certify a class action or commence a coordinated proceeding to the respective agency head, in the same manner that they would appeal other ALJ decisions. Interlocutory appeals of class certification decisions in federal court pursuant to Rule 23(f) of the Federal Rules of Civil Procedure limit the discretion of federal district court judges when certifying class actions.[314] An appellate mechanism within the agency could similarly legitimize the decision of whether to certify a class.

Finally, agency mass adjudication must ensure meaningful participation by claimants. Courts have long recognized that agencies may bind parties to common findings of law or fact without individualized hearings without violating due process.[315] Agencies, however, still must provide claimants with "some kind of hearing," particularly in cases that may have dramatic consequences for their ability to seek asylum, disability payments, or medical treatment.[316] Federal and state courts offer parties a chance to be heard within the practical limits of mass adjudication. Aside from providing individual notice of the action to all putative class members,[317] judges hold fairness hearings designed to solicit objections and produce other evidence about the fairness of class certification or settlement.[318]

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313. See, e.g., Liptak, supra note 194 (excoriating immigration judges for biased and incoherent decisions); see also infra note 359 (discussing enormous backlog of cases faced by many ALJs).

314. See Fed. R. Civ. P. 23(f) (requiring petition for permission to appeal to be filed within fourteen days after certification order is entered); see also Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc., 482 F.3d 372, 379 (5th Cir. 2007) (explaining importance of interlocutory appeal in cases where class certification creates significant settlement pressure).

315. Compare, e.g., Heckler v. Campbell, 461 U.S. 458, 468 (1983) (rejecting due process challenge because "the Secretary [must] . . . determine an issue that is not unique to each claimant—the types and numbers of jobs that exist in the national economy"), and Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (rejecting due process challenge because "[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption"), with Londoner v. Denver, 210 U.S. 373, 385–86 (1908) (holding that for individual tax assessment, "due process of law requires that at some stage of the proceedings . . . the taxpayer shall have an opportunity to be heard . . . however informal").

316. Friendly, supra note 43, at 1267–69.

317. Fed. R. Civ. P. 23(c); see also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) (requiring individualized notice in class action settlements that award damages).

318. Of course, parties who do not want to participate may opt out of the settlement, except in limited, well-defined circumstances. See Fed. R. Civ. P. 23(e)(3) & cmt. (e)(3)

Similarly, agencies should attempt to notify parties about the litigation so they can meaningfully participate, opt out of the case, or object. ALJs might also convene fairness hearings to solicit direct input from parties. In so doing, agency class actions may promote more legitimacy, like their federal court counterparts, giving participants at least some chance to have "transformative exchanges about . . . social and moral values."[319]

3. *Loyal Decisionmaking.* — Aggregate adjudication should attempt to ensure that lawyers and other representatives adequately represent the interests of the many people who will not participate directly in the proceeding and any settlement. Otherwise, aggregate litigation risks *disloyalty*. Participants in many class actions lack rational incentives to monitor class counsel when they have comparatively small stakes in the entire enterprise.[320] In such cases, defense counsel may establish collusive or sweetheart deals with plaintiffs' counsel, regardless of their clients' best interests.[321]

Courts seek to make aggregate litigation loyal to absent class members through subclassing, internal monitoring, additional rights to opt out of the litigation, and judicial review. Judges may divide classes of people into specific interest groups—called "subclasses"—represented by separate counsel who can police each other to prevent overreaching or capture by defense counsel.[322] Moreover, they may appoint class representatives with more power to monitor attorneys themselves—like government actors, public interest organizations, or institutional investors.[323]

(noting (e)(3) "authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion").

319. Resnik et al., supra note 239, at 382 (summarizing democratic theories involving access to litigation).

320. See Leslie, supra note 251, at 81 (summarizing reasons why individual litigants with small stakes in complex class actions are unlikely to effectively monitor class counsel). Others observe that attorneys lack rational incentives to obtain fair settlements for their clients because attorneys may earn large attorneys' fees by settling quickly. See, e.g., Weinstein, Ethical Dilemmas, supra note 251, at 503 ("Given the time value of the money the attorney has invested in a case, he or she has a substantial incentive to reach a settlement and collect a contingency fee sooner rather than later.").

321. See Coffee, Regulation, supra note 250, at 883–89 (describing possibility of "sweetheart settlements" arising for benefit of defendant and class counsel); Hay, supra note 250, at 479 (articulating concerns about class counsel "selling out" and settling for less than reasonably possible); see also, e.g., In re Oracle Sec. Litig., 136 F.R.D. 639, 645 (N.D. Cal. 1991) ("Class counsel's fee application is presented to the court with the enthusiastic endorsement, or at least acquiescence, of the lawyers on both sides of the litigation, a situation virtually designed to conceal any problems with the settlement not in the interests of the lawyers to disclose.").

322. Fed. R. Civ. P. 23(c)(5); see Manual for Complex Litigation, supra note 81, § 21.23 ("Subclasses must be created when differences in the positions of class members require separate representatives and separate counsel.").

323. See ALI Report, supra note 37, § 1.05(c)(2) (recommending judges name plaintiffs with "sizable stakes" in charge of litigation when possible); see also James D. Cox &

Recent reforms to class actions and other mass litigation give people more rights to not participate in the class-wide decision, or "opt out," as a way to signal that class counsel may not adequately represent the interests of the parties.[324]

Courts also review settlement decisions, as well as attorneys' fee arrangements, to police potential conflicts of interest between counsel and the represented parties.[325] Judges may also require counsel, mediators, or experts in the settlement to offer detailed explanations for their decisions in order to police against possible collusion.[326] Judges also evaluate conflicts within the class, scrutinizing outcomes that award more to some class members at the expense of others.[327]

Agencies should adopt rules to ensure that counsel and other representatives fairly represent the interests of the parties. When necessary, they could use subclassing, with separate counsel for each subgroup to police each other's interests. Requiring representatives from different

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Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587, 1588–89 (2006) (discussing role of lead plaintiff in securities fraud class actions as monitoring conduct of class counsel); Elliott J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2057–58 (1995) (arguing that institutional investor would be more likely to serve as "litigation monitor" if made lead plaintiff, but claiming judicial practices discourage such assignment).

324. See John Bronsteen & Owen Fiss, The Class Action Rule, 78 Notre Dame L. Rev. 1419, 1441 (2003) (arguing that individuals who opt out are signaling dissatisfaction with suit and protecting their own interests); Rosenberg, Adding a Second Opt-Out, supra note 236, at 22–23 (explaining rationale behind second opt-out opportunity for class action settlements was to provide class members more opportunity to appraise value of settlement).

325. Manual for Complex Litigation, supra note 81, § 21.612 n.965 (collecting cases supporting argument that "[c]lass actions certified solely for settlement . . . sometimes make meaningful judicial review more difficult and more important").

326. See, e.g., Isby v. Bayh, 75 F.3d 1191, 1199–1200 (7th Cir. 1996) (finding district court had not abused discretion in approving settlement and finding collusion unlikely in part because it had properly given weight to qualifications of class counsel); Murillo v. Tex. A&M Univ. Sys., 921 F. Supp. 443, 445 (S.D. Tex. 1996) (requiring that counsel engage in "sufficient discovery" in order to receive "initial presumption of fairness"); Manual for Complex Litigation, supra note 81, § 21.612 (collecting cases where courts applied "closer judicial scrutiny" for potential conflicts of interest, particularly when there has been "limited or no discovery" to test strengths and weaknesses of each party's position).

327. See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–26 (1997) (rejecting class certification in part because class members' interests were not aligned); Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653–54 (7th Cir. 2006) (vacating district court's approval of settlement agreement in part because it was more advantageous to some class members than others); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785–86 (7th Cir. 2004) (rejecting settlement when certain class members' claims were settled for no consideration without reasoned explanation); see also Coffee, Conflicts, supra note 279, at 1545 (observing occasions when class counsel will have no incentive to "resist an allocation plan favored by the defendant, who often has an interest in preferring one subgroup within the class over another").

interest groups to participate in agency decisionmaking is not uncommon, and adopting such a rule in administrative proceedings is not unusual or unfamiliar.[328] Moreover, ALJs, like Article III judges, could review attorney representatives for potential conflicts of interest.[329] To do so, as in civil litigation, ALJs may appoint counsel or class representatives with large stakes in the litigation, such as state pension funds in securities restitution cases or public interest law offices that represent thousands of individuals in Social Security or immigration cases. They could also require counsel, mediators, or experts in the litigation to explain their decisions,[330] paying particular attention if mass settlements award more to some class members at the expense of others.[331] Finally, they may review the rate at which people opt out or object during the fairness hearings described above to check abuses by class counsel or their representatives.

Even in an informally aggregated action, like those involving coal miners or other workplace injury victims, agencies would still need to police against conflicts of interest to ensure that plaintiffs' counsel remain loyal to their clients. Informally aggregated lawsuits involve the same plaintiffs' and defendants' counsel, who, like other "repeat players," may push their clients to accept unreasonable outcomes or settlements to preserve their own working relationship or the promise of fees in subsequent cases. Specialization among plaintiffs' counsel may minimize some conflicts. For example, a steering committee of qualified plaintiffs' counsel would develop common questions about the workplace, common witnesses, and common scientific evidence for trial; individually appointed attorneys for each claimant could then use that common work product, sometimes referred to as a "trial in a box," in individual proceedings.[332]

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328. The Negotiated Rulemaking Act, 5 U.S.C. §§ 561–570 (2006), and the Administrative Dispute Resolution Act, id. §§ 571–583, authorize agencies to directly involve stakeholders in the decisionmaking process. Other agencies, like the EPA, similarly allow such collaborative approaches. See, e.g., Joseph A. Siegel, Collaborative Decision Making on Climate Change in the Federal Government, 27 Pace Envtl. L. Rev. 257, 285–87 (2009) (describing process where EPA conducted extensive outreach and held more than 100 meetings with interested stakeholders including trade associations, industry representatives, and state, local, and tribal government). For an extensive review of such collaborative approaches, see Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 33–36 (1997) (illustrating instances of interest group participation and recommending new "collaborative model" to involve groups in agency decisionmaking).

329. See Manual for Complex Litigation, supra note 81, § 21.612 & n.965 (collecting cases claiming "[c]lass actions certified solely for settlement . . . sometimes make meaningful judicial review more difficult and more important").

330. See supra note 326 (describing courts' scrutiny of class counsel).

331. See supra note 327 (describing judicial responses to outcomes that treat class members differently).

332. See Robert L. Rabin, Tobacco Control Strategies: Past Efficacy and Future Promise, 41 Loy. L.A. L. Rev. 1721, 1742–43 (2008) (describing "trial in a box" process by which plaintiffs' counsel coordinated with each other on "micromanagement issues: which doc-

Agencies may need slightly different tools to police the loyalty of representatives to absent parties or class members in "public rights" cases, where the government itself is the target of the dispute. When such parties and the agency agree to a settlement, an ALJ may not be able to independently evaluate whether the settlement, which was forged by another branch of the agency, was "fair, reasonable, and adequate." In such cases, federal court review may be the only way to ensure that class representatives and counsel remained loyal to the absent parties.

But even in restitution cases, agencies may have different interests from the victims they compensate, thereby warranting another layer of federal court oversight. Agencies may seek quick restitution settlements to resolve embarrassing missteps in regulatory policy;[333] or, most importantly, after reaching a settlement, agencies may lack incentives and input to address victims' interests.[334] Out of respect for the agencies' decisionmaking process and resources, however, federal courts would not examine restitution actions with the same scrutiny. But courts could review agency decisions with a "hard look" to determine whether the agency explained and justified its decisionmaking process and whether the process was reasonable.[335]

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uments to rely on, which lines of argument to pursue, and which expert witnesses to call"); Heather Won Tesoriero, Vioxx 'Trial in a Box' Cuts Cost of Filing Suit, Wall St. J., Apr. 17, 2006, at B1 (explaining logistics and benefits of "premade trial package" created by steering committee of Vioxx plaintiffs' attorneys for Vioxx cases).

333. See SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009) (observing settlement between SEC and Bank of America suggested "a rather cynical relationship between the parties"); SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 412 (S.D.N.Y. 2009) (noting SEC could have saved $79 million if it corrected mistake earlier).

334. See *Bear, Stearns & Co.*, 626 F. Supp. 2d at 411–12 (revealing problems with distribution of funds because "[w]hile the SEC professed its interest in restitution, it did not focus its considerable analytical resources on the identification of relevant securities, time frames and potential claims").

335. Hard look review is already a well-established doctrine in the review of agency decisions. See, e.g., Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451 & n.126 (D.C. Cir. 1980) (discussing roots of hard look review); see also Catherine M. Sharkey, Federalism Accountability: "Agency-Forcing" Measures, 58 Duke L.J. 2125, 2181 (2009) (describing hard look review as tool "to ensure that agencies disclose relevant data and provide reasoned responses to material objections raised during the rulemaking process"). Hard look review requires courts to evaluate whether an agency action was arbitrary or capricious by considering whether the agency engaged in "reasoned decisionmaking." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983). Under hard look review, a court would not scrutinize the compensation terms of a settlement agreement de novo. Agencies would, however, be expected to explain how they calculated victims' losses, how they identified victims shared and conflicting interests, and how they balanced those interests against other regulatory objectives in the settlement, such as the agencies legitimate interest in conserving resources or punishing regulatory violations. Zimmerman, Distributing Justice, supra note 37, at 569–71 (arguing for hard look review of agency restitution settlements).

4. *Accurate Decisionmaking.* — Finally, administrative agencies need evaluative rules to ensure the final resolution in aggregate litigation is appropriately tailored to the strengths and weaknesses of the class members' different legal claims.[336] Otherwise, aggregate litigation threatens *accuracy* by "averaging" claim values among parties with different injuries or by favoring the interests of some plaintiffs over others. Because class actions bind large groups of people in the same way, the accuracy of the decisions becomes even more important than in an individual case. A large proceeding or settlement should at least guarantee that more deserving claimants receive more than less deserving claimants and that like claimants receive similar awards.

Mass adjudication already arguably promotes accuracy through the aggregation process itself. Under the law of large numbers, assessments about similar complaints improve as the sample of any given population increases.[337] Moreover, as attorneys pool resources, large proceedings provide adjudicators with more information about the best ways to craft any kind of final relief. However, large cases may also increase the magnitude of any errors, particularly for marginal cases.[338]

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336. See, e.g., Fed. R. Civ. P. 23(e) (delineating procedures for class action settlement, voluntary dismissal, or compromise); William B. Rubenstein, The Fairness Hearing: Adversarial and Regulatory Approaches, 53 UCLA L. Rev. 1435, 1468 (2006) [hereinafter Rubenstein, Fairness] (interpreting Rule 23(e)).

337. See, e.g., Bone, supra note 288, at 614 ("[W]ith a large enough set of cases, the sample average gives a more accurate estimate of the population mean than an individual trial verdict gives of actual damages for a single case."); Jonathan J. Koehler & Daniel N. Shaviro, Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods, 75 Cornell L. Rev. 247, 248 (1990) (noting that although courts should carefully determine validity of probabilistic evidence, "overtly probabilistic evidence is no less probative of legally material facts than other types of evidence"); Laurens Walker & John Monahan, Sampling Liability, 85 Va. L. Rev. 329, 347 (1999) (explaining that using statistical evidence is practical method for mass trial). To be sure, aggressive aggregation of very diverse claims can distort outcomes, too. See, e.g., Richard A. Epstein, Class Actions: Aggregation, Amplification and Distortion, 2003 U. Chi. Legal F. 475, 509 (2003) ("The need to preserve a class action at all costs drives a court to distort the underlying theory of substantive liability beyond recognition."); Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 104 (2009) (critiquing use of aggregate proof in sprawling nationwide class actions). The potential threat of distortion in highly variable, fact-dependent cases should not prevent agencies from using aggregation techniques in cases raising common questions. Statistical aggregation, however, does require agencies to adopt other techniques this Article recommends to sort out common claims from variable ones—by accounting for, among other things, the extent to which the litigation has progressed, the maturity of the litigation, and whether class-wide relief is manageable. See Part III.C.1 (discussing how to make agency class actions feasible by using threshold requirements to screen out claims better suited for individual adjudication).

338. See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491 (7th Cir. 2012) ("If resisting a class action requires betting one's company on a single jury verdict, a defendant may be forced to settle; and this is an argument against definitively resolving an issue in a single case if enormous consequences ride on that reso-

For that reason, federal rules have long relied upon judicial review, statistical aggregation, and bellwether trials to improve accuracy in mass adjudication. First, federal rules require courts to evaluate whether the settlement reflects the relative merits of plaintiffs' claims.[339] In a large proceeding, the settlement should at least guarantee "vertical equity" (that more deserving claimants receive more than less deserving claimants) and "horizontal equity" (that similarly situated claimants receive similar awards). Courts may also take into account "rough justice" principles.[340] Rough justice means that representatives may adjust or average settlement amounts in light of the practical limitations of compensating many people through a massive settlement scheme.[341]

Courts rely upon sampling or bellwether trials that assess the merits of different categories of claims, class-wide resolutions of declaratory relief, and bureaucratic grids.[342] Sampling uses a subset of individuals from within a population to yield some knowledge about the whole population.[343] Sampling lowers costs, speeds data collection, and, because the sample surveyed is smaller, ensures higher quality and more consistency in the information gathered.[344] Judges may rely upon statistical sampling,

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lution."); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299–1300 (7th Cir. 1995) (noting potential unpredictability and unfairness of allowing single jury to decide class of cases).

339. See Fed. R. Civ. P. 23(e) (guiding class action settlement procedure); Rubenstein, Fairness, supra note 336, at 1468 (explaining that judge's primary concern in determining whether class action settlement is fair is with settlement's substantive terms); see also supra note 275 and accompanying text (exploring criteria of determining fairness of settlement).

340. See, e.g., ALI Report, supra note 37, § 1.04 cmt. f (observing that large compensation funds implicate values of merit, equality, and "[r]ough justice[,] . . . where bargaining allows risk aversion, the ability to endure delay, and other arbitrary factors to affect claim values"); Diller, supra note 217, at 737–38 (describing hybrid principles of compensation in class action settlements).

341. For example, it is not uncommon for a large settlement fund to follow "damage averaging," using grids or compensation schemes that ignore some components of individual claims to expedite payment to many different people. ALI Report, supra note 37, § 1.04 cmt. f; see also In re MetLife Demutualization Litig., 689 F. Supp. 2d 297, 342 (E.D.N.Y. 2010) (gathering cases and explaining "'[f]luid recoveries' of this type, which do not call for direct calculation and distribution of precise recoveries to the class members, can be a fair means of delivering value to class members without undue administrative costs").

342. See In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997) (describing benefits of bellwether trials); Manual for Complex Litigation, supra note 81, § 22.315 (describing function of bellwether trials).

343. See David H. Kaye & David H. Freeman, Fed. Judicial Ctr., Reference Guide on Statistics, *in* Reference Manual on Scientific Evidence 211, 223–25 (3d ed. 2011) (describing common sampling methods).

344. See Manual for Complex Litigation, supra note 81, § 11.493 ("Acceptable sampling techniques, in lieu of discovery and presentation of voluminous data from the entire population, can save substantial time and expense . . . ."); see also supra note 337 (collecting literature supporting use of statistical sampling in mass adjudication).

long used in administrative rulemaking,[345] in different areas of mass adjudication to identify the strengths and weaknesses of high volume cases.[346] Finally, judges may conduct bellwether trials:

> In a bellwether trial procedure, a random sample of cases large enough to yield reliable results is tried to a jury. A judge, jury, or participating lawyers use the resulting verdicts as a basis for resolving the remaining cases. Judges currently use bellwether trials informally in mass tort litigation to assist in valuing cases and to encourage settlement. . . . These trials promote a type of "group typical" justice that is at once participatory and collective.[347]

Agencies could use many of these techniques in private rights and restitution cases.[348] For example, in black lung cases, an ALJ could conduct bellwether trials—using representative test trials of particular kinds of respiratory disease—to streamline other cases. Should the litigation result in a settlement with the mining company or its insurer, aggregated proceedings would afford plaintiffs more leverage at the negotiation table. Similar techniques may improve large restitution settlements sought by agencies against corporate defendants on behalf of large groups of victims, like recent settlements between the SEC, FTC, and OCC and large national banks arising out of the mortgage crisis.[349] To ensure fair determinations about eligibility, awards, and evidentiary standards, the ALJ could accept expert surveys from the parties. Those kinds of submissions are routinely used in federal courts to justify distribution schemes in large shareholder class actions.[350] Statistical techniques may provide more accurate information about the absent plaintiffs' total claims, which in turn may save administrative costs when distributing awards.

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345. See, e.g., United States v. Fior D'Italia, Inc., 536 U.S. 238, 247–48 (2002) (approving IRS's use of aggregate estimation to determine unreported tips by restaurant employees); Mich. Dep't of Educ. v. U.S. Dep't of Educ., 875 F.2d 1196, 1199 (6th Cir. 1989) (allowing use of stratified random sample of 259 out of 66,368 authorizations as representative of larger pool).

346. See Manual for Complex Litigation, supra note 81, § 11.422 (noting that when it is necessary to limit discovery, "statistical sampling techniques [may be used] to measure whether the results of the discovery fairly represent what unrestricted discovery would have been expected to produce"); id. § 11.493 ("Acceptable sampling techniques, in lieu of discovery and presentation of voluminous data from the entire population, can save substantial time and expense . . . .").

347. Lahav, Bellwether, supra note 288, at 577–78 (arguing for collective justice through bellwether trials based on "democratic participation values").

348. They may raise due process concerns, however, in many public rights cases.

349. See infra notes 18–22 and 57–63 (discussing recent settlements and explaining consequences of lack of aggregation procedures).

350. See, e.g., Francis E. McGovern, Distribution of Funds in Class Actions—Claims Administration, 35 J. Corp. L. 123, 132 (2009) (describing efforts to use "state of the art surveys" and other methodologies to improve decisionmaking in class settlement distributions).

By using sampling and bellwether trials for different categories of claimants, agencies may establish presumptive ways to measure claims accurately and consistently, without unduly sacrificing participation by parties directly impacted by the agencies' actions.

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Class actions do not offer the only, or the perfect, model for procedural justice in complex cases. Any solution to relieve overburdened administrative dockets and afford more access to justice should also consider other proposed reforms, like improved attorneys' fee provisions, greater administrative independence and management, more responsive rulemaking procedures, and greater access to federal courts. Moreover, class actions contain risks of their own. Plaintiffs' class counsel may forge collusive settlements for their own financial benefit;[351] expensive procedures, like personalized notice, are not always justified—particularly when the settlement only offers class members very small awards or coupons;[352] and, to the extent class actions settle, they may adopt the very bureaucratic procedures that agencies use—relying upon limited variables and grids to resolve competing claims, with limited direct participation by, or on behalf of, victims.[353]

Nevertheless, agencies can contain the risks associated with aggregate litigation by adopting the best practices outlined above to ensure agency adjudication remains feasible, legitimate, loyal, and accurate. More importantly, without any aggregate procedures to resolve complex, repetitive litigation, administrative agencies risk the foundational goals that class actions were also developed to serve—affordable legal access, efficient decisionmaking, and consistent and fair outcomes.

D. *Enhancing Agency Control of Policymaking*

Not only can aggregated adjudication produce benefits for the nongovernmental parties that depend upon them, the agency class action should also enhance agency control of policymaking through adjudication. This may not seem obvious at first. Empowering independent adju-

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351. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) (acknowledging possibility of collusion in class action settlements); Effron, supra note 34, at 2033 (collecting commentary criticizing class settlements where "plaintiffs' lawyers walk away with hefty fees from a favorable settlement [and] plaintiffs recoup little, if any, of the award").

352. See, e.g., ALI Report, supra note 37, § 3.04 (recommending courts weigh "cost of notice and the likely recovery involved" to determine whether individual notice is necessary); id § 3.04 cmt. a ("In many cases, personal notice may not make economic sense."); Kenneth W. Dam, Class Action Notice: Who Needs It?, 1974 Sup. Ct. Rev. 97, 106–09 (criticizing individual notice requirement).

353. Richard A. Nagareda, Mass Torts in a World of Settlement 57–70 (2007) (describing use of grids in mass tort settlements and other compensation schemes); Weinstein, Individual Justice, supra note 35, at 155–62 (describing examples and critiques of grids used in large settlement funds).

dicators to decide broad questions of law or fact will effectively give ALJs a great deal of policymaking authority. Yet Congress generally vests authority to set agency policy in appointed agency heads,[354] who are accountable to the political branches.[355] Thus, the agency class action might seem to grant ALJs powers beyond their pay grade. Moreover, as discussed above,[356] the APA has attempted to shield ALJs from political pressure within agencies. This independence is an asset when providing individuals in administrative proceedings with a neutral decisionmaker, but it can be a liability when it comes to ensuring effective control of agency policymaking. ALJs imbued with sweeping powers risk undermining the policy goals of the appointed agency heads. Nevertheless, important distinctions between administrative and judicial adjudication should allow aggregation to enhance rather than hinder agency autonomy.

To begin, in most cases the agency head has the power to accept or reject an ALJ's decision. The agency head, or the body granted final agency decisionmaking power, such as the BIA in the case of deportation and removal proceedings, owes the ALJ no deference on questions of law or policy and may substitute its own decision for the ALJ's.[357] The ALJ's fact-finding is somewhat more difficult for the agency to second-guess,

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354. See, e.g., Occupational Health and Safety Act, 29 U.S.C. § 655(a) (2006) (delegating to Secretary of Labor power to set occupational safety or health standards); Clean Air Act, 42 U.S.C. § 7521(a)(1) (2006) (delegating to Administrator of EPA power to set standards applicable to emission of air pollutants from new motor vehicles); Motor Vehicle Safety Act, 49 U.S.C. § 30111(a) (2006) (delegating to Secretary of Transportation power to set motor vehicle safety standards); see also Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2250 (2001) (noting Congress usually delegates decisionmaking authority to head of agency rather than president); Robert V. Percival, Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?, 79 Fordham L. Rev. 2487, 2487 (2011) ("Most regulatory statutes specify that agency heads rather than the President shall make regulatory decisions.").

355. There is a substantial literature discussing the accountability of the administrative state to Congress, see generally Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61, 69–144 (2006) (reviewing congressional control over administrative state), and to the President, see generally Kagan, supra note 354, at 2272–319 (reviewing presidential control of administrative state); Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 Am. U. L. Rev. 443, 462 (1987) (arguing that while president has supervisory responsibility of administrative state, president should not dictate outcome of decisions vested by Congress in agencies); Percival, supra note 354, at 2490–538 (reviewing president's supervisory powers over administrative state).

356. See supra notes 26–29 and accompanying text (discussing ways in which APA protects ALJs from political pressures).

357. See, e.g., 5 U.S.C. § 557(b) (2006) ("On appeal from or review of the initial [ALJ] decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); U.S. Steel Mining Co. v. Dir., OWCP, 386 F.3d 977, 985 (11th Cir. 2004) (noting judicial deference to agency interpretations of Black Lung Benefits Act is specifically owed to director of Office of Workers Compensation, not to ALJ).

but even here the agency can overrule the ALJ's determinations with a good reason derived from its experience and expertise.[358]

The problem that agency heads face is not the lack of formal power to control ALJs, but the lack of practical ability. Put simply, in many agencies ALJs issue far more decisions than the agency heads can adequately review.[359] The agency class action offers relief to overburdened agencies by aggregating multiple cases in a single proceeding, thus reducing the sheer number of cases that the agency must review. Moreover, aggregating cases will inevitably raise their profile in the agency, enabling the agency to allocate its resources for ALJ review where it matters most—in cases that affect large groups of individuals in agency proceedings. Therefore, while aggregation increases the power of ALJs, it also increases the practical ability of agency heads to review ALJ decisions.

Second, the additional time that the agency can spend on aggregated proceedings by eliminating duplicative efforts will enable the agency to publish its decisions in these cases as precedential rulings to guide ALJs in future cases. Thus, the agency head will be able to influence not only the aggregated case on direct review, but future administrative proceedings as well, all with a single decision.

Third, the agency class action will provide the agency head a thoughtful first crack at important questions of law and policy by the agency's most experienced and expert ALJs, with the benefit of a fully developed record and competent counsel. The agency will remain free to modify ALJ policymaking decisions as appropriate, either upon direct review or in a future rulemaking proceeding. If the agency decides to institute notice and comment rulemaking to address an issue arising in aggregated adjudication, it will have the benefit of the ALJ's considered opinion.

Fourth, aggregated cases will be more transparent to the political branches, which are rarely concerned with the outcomes of individual adjudications beyond the provision of constituent services by individual representatives.[360] Thus, in addition to increasing the power of agency

358. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 495–97 (1951) (recognizing that evidence supporting agency's findings of fact on judicial review "may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the [agency's] than when he has reached the same conclusion"); NLRB v. Universal Camera Corp., 190 F.2d 429, 432 (2d Cir. 1951) (noting agency may reach its own "secondary inferences" concerning evidence before ALJ unless inferences are irrational).

359. During the 2011 fiscal year the Social Security Administration Appeals Council processed 126,992 requests for review and still had 153,004 requests for review pending. See supra note 157 and accompanying text. The BIA decided 38,369 appeals in 2008 and still had 28,874 pending. ABA, Reforming the Immigration System, supra note 2, at 3-11 tbl.3-1.

360. See, e.g., INS v. Chadha, 462 U.S. 919, 926–27 (1983) (noting Congress's lack of attention when reviewing order to suspend Chadha's deportation, including inaction for

heads over significant issues that affect large groups of people, the agency class action will also increase the ability of the political branches to ensure agency accountability.[361]

In sum, while the agency class action will undoubtedly increase the stakes in agency adjudications, it will also facilitate agency control over significant cases that affect large groups and implicate important agency policies.

CONCLUSION

Many commentators have described class action hearings and settlements as a form of "private administrative law."[362] Many aggregate settlements in federal court borrow bureaucratic rules from administrative law to streamline the adjudication of claims for individual members of a class. The agency class action, in many ways, represents just the opposite: borrowing rules from private class action litigation to better resolve disputes within a public agency.

In so doing, the agency class action responds to two emerging trends that threaten administrative law's foundational goals of efficiency, consistency, and legal access to government. First, as administrative law expands into new areas of dispute resolution,[363] agencies require more creative solutions to the flood of new cases that demand just and speedy resolution. Second, as the ability of Article III courts to hear class actions and other forms of aggregate litigation is restricted, agencies will feel more pressure to make decisions that involve the same categories of people more accurately and fairly.[364] Current tools in administrative

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year and a half, not exercising veto authority for significant period of time, not printing or distributing resolution denying Chadha permanent residence status when House of Representatives voted, and lack of debate or recorded vote).

361. Of course, in some cases political scrutiny may make it more difficult for the agency to reach an accommodation with injured parties. A federal class action lawsuit may offer a convenient excuse for a settlement that the agency's political masters would find unsatisfactory.

362. See, e.g., Lahav, Numbers, supra note 32, at 390–92 (examining quasi-administrative structure of class action settlement systems); Nagareda, Turning from Tort, supra note 39, at 945–52 (suggesting courts draw from administrative law framework to evaluate fairness of mass tort settlements); Resnik, supra note 249, at 425–30 (discussing role of judge as manager in mass settlement contexts).

363. See supra notes 45–63 and accompanying text (discussing specific areas into which administrative dispute resolution has expanded and potentially could expand).

364. Compare, e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (rejecting nationwide class action for sex discrimination on behalf of Wal-Mart employees), and AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (preempting state rule permitting class actions involving arbitration agreements under Federal Arbitration Act), with Kevin P. McGowan, OFCCP: DOL Taking More Active Enforcement Role on OFCCP Issues, Department Lawyers Say, BNA Daily Lab. Rep., July 28, 2011, at C-1 (describing new Department of Labor enforcement of sex discrimination claims and observing that recent Supreme Court class action decisions do not apply to executive agencies).

law—rulemaking, stare decisis, attorneys' fees statutes, judicial review, federal court class actions, and informal aggregation—cannot by themselves adequately meet these demands. But by adopting procedures from the class action and complex litigation, agencies may provide citizens who depend upon the administrative state more efficiency, consistency, and voice in their own redress.