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The Case Against Constitutionalized Commonality Standards for Collective Civil Litigation

*Joshua A. Rosenthal**

INTRODUCTION

It is no secret that the current Supreme Court is hostile to class actions and other forms of group litigation.[1] One area that has received considerable attention from the Court is the requirement that "there [be] questions of law or fact common to the class,"[2] and, in most class action suits for damages, that "common questions of law or fact . . . predominate over any questions affecting only individual members."[3] In *Wal-Mart Stores, Inc. v. Dukes*, the Court held that, under the statutory burdens of proof in Title VII, an employer is entitled to individualized determinations before backpay can be awarded.[4] The Court further disparaged judicial efforts to facilitate such class suits as "Trial by Formula."[5] This year,

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1. *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011). Recent cases which limited the availability of class litigation include *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010).
2. FED. R. CIV. P. 23(a)(2).
3. *Id.* 23(b)(3).
4. 131 S. Ct. 2541, 2561 (2011).
5. *Id.* ("The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. . . . We disapprove that novel project.").

the Court further indicated its skepticism of claims to commonality in *Comcast Corp. v. Behrend*.[6]

Although the Supreme Court has so far limited access to collective litigation on statutory grounds, the rulings have lent credence to a novel argument from the class action defense bar: that commonality requirements reflect a constitutional, due process guarantee.[7] These due process claims are different from the classic due process objections to class actions. Traditional due process challenges to class actions were concerned with the rights of absent class members and issues of res judicata and claim preclusion.[8] Instead, the new argument addresses supposed denials of due process to *defendants* in class action suits. On this theory, defendants have a due process right to individualized adjudication of liability when plaintiffs differ in any meaningful way. Lower courts have already begun to accept and consider this argument.[9] The California Supreme Court is currently reviewing a defendant's due process claim under their state class action statute.[10] Since this due process right would require completely common issues for all

6. 133 S. Ct. 1426, 1433-35 (2013).

7. For one formulation of the argument, see John C. Massaro, *The Emerging Federal Class Action Brand*, 59 CLEV. ST. L. REV. 645, 676-77 (2011). For a more critical description of the argument and a collection of briefs and cases where the argument appears, see Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319, 330-34 (2012).

8. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 847 (1999) ("The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary."); Hansberry v. Lee, 311 U.S. 32, 40-41 (1940); MARTIN H. REDISH, WHOLESALE JUSTICE 135-75 (2009) (discussing concerns about the representation of absent class members and proposing "litigant autonomy" as a due process goal).

9. *See, e.g.*, Jacob v. Duane Reade, Inc., No. 11 CIV. 160, 2013 WL 4028147, at *10 (S.D.N.Y. Aug. 8, 2013) (Federal Rules decision noting that, when "reading *Dukes* and *Comcast* together, it appears that there are due process implications for defendants, which render the so-called 'trial by formula' approach, whereby representative testimony is utilized to determine damages for an entire class, inappropriate where individualized issues of proof overwhelm damages calculations"); George v. Nat'l Water Main Cleaning Co., 286 F.R.D. 168, 181 (D. Mass. 2012) ("[T]o the extent that there are relevant individual issues, the Corporate Defendants will be entitled, as due process requires, later in these proceedings to show that they were in fact not liable to a particular plaintiff under the wage laws."); *see also* In re Chevron U.S.A., Inc., 109 F.3d 1016, 1023 (5th Cir. 1997) (Jones, J., dissenting) ("Essential to due process for litigants, including both the plaintiffs and Chevron in this non-class action context, is their right to the opportunity for an individual assessment of liability and damages in each case.").

10. Duran v. U.S. Bank Nat'l Ass'n, 137 Cal. Rptr. 3d 391 (Ct. App.), *petition for review granted*, 275 P.3d 1266 (Cal. 2012).

plaintiffs before claims could be aggregated, I refer to the idea as "constitutionalized commonality."

In this Comment, I argue that constitutionalized commonality draws on principles similar to those that drove the Court's recent shift on Confrontation Clause jurisprudence. I then address the potential consequences of an enthusiastic embrace of constitutionalized commonality. I close with three reasons that the Court should not follow those Confrontation Clause intuitions and embrace constitutionalized commonality.

I. The Constitutionalized Commonality Claim and Confrontation Clause Intuitions

In aggregate litigation, members of the aggregate are often differently situated in at least some minor way.[11] However, common issues are often more relevant than the minor differences. Trial courts have developed several mechanisms to address that circumstance, including expert statistical analysis,[12] representative testimony,[13] bifurcated liability and damages phases,[14] fluid recovery,[15] and bellwether trials.[16]

The constitutionalized commonality argument draws on the due process principle, derived from several early twentieth century cases, that a defendant is entitled to "an opportunity to present every available defense" against liability.[17] Proponents of constitutionalized commonality argue that adjudicating a claim in the aggregate necessarily threatens this principle.[18] The constitutionalized com-

11. Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1016 (2005).

12. *See* 3 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 10:3 (4th ed. 2002); *see also In re* Scrap Metal Antitrust Litig., 527 F.3d 517, 532-34 (6th Cir. 2008) (discussing use of statistical analysis to determine damages for an antitrust class).

13. *See, e.g.*, Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1276-80 (11th Cir. 2010) (approving of the use of representative testimony in a Fair Labor Standards Act collective action and noting the common use of representative testimony in such actions).

14. *See, e.g.*, Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 626-27 (5th Cir. 1999).

15. *See, e.g.*, State v. Levi Strauss & Co., 715 P.2d 564, 570 (Cal. 1986).

16. *See, e.g.*, Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 140 (1972) (describing the use of bellwether trials by the district court).

17. Linsey v. Normet, 405 U.S. 56, 66 (1972) (citing Am. Sur. Co. v. Baldwin, 287 U.S. 156, 168 (1932)).

18. *See, e.g.*, Reply Brief for Petitioner at 17-18, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277); Answer Brief on the Merits at 100-01, Duran v. U.S. Bank Nat'l Ass'n, No. S200923 (Cal. Dec. 28, 2012).

monality camp insists that these mechanisms deny defendants the right to present individualized defenses to liability that may exist against specific plaintiffs.[19] Supporters contend that it is insufficient to argue individualized defenses in the aggregate—defendants must have a right to determine the exact liability arising from each plaintiff, or even from each alleged bad act.[20] Therefore, adjudication in the aggregate is permissible only for issues in which the relevant questions have either identical or indisputable answers for each member of the aggregate.

Some in the defense bar began arguing for constitutionalized commonality shortly after the modern Rule 23 was drafted.[21] The idea has persisted, and has experienced a resurgence in recent years. Two leading class action treatises disagree about the constitutionality of aggregate adjudication.[22] Most notably, the argument has even made an appearance in the *Supreme Court Reporter*. In *Philip Morris USA, Inc. v. Scott*,[23] Justice Scalia stayed a Louisiana state court judgment, noting a "strong possibility" that the constitutionalized commonality argument would prevail at the Supreme Court.[24] Justice Scalia's apparent embrace of the argument, both in *Philip Morris* and in his dicta on class actions elsewhere, provides some insight into the intuitions behind constitutionalized commonality. Constitutionalized commonality echoes the revolution in Confrontation Clause jurisprudence that Justice Scalia led.[25]

At the core of the constitutionalized commonality claim is an imagined form of the defendant's "day in court" ideal.[26] According to this ideal, liability attaches to a defendant when an individual plaintiff establishes that she has been injured by a wrong committed by that defendant.[27] The class action mechanism merely

19. Answer Brief on the Merits, *supra* note 18, at 100-01; Erbsen, *supra* note 11, at 1039-41; Saby Ghoshray, *Hijacked by Statistics, Rescued by* Wal-Mart v. Dukes*: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 LOY. U. CHI. L.J. 467, 509 n.161 (2012).

20. 1 JOSEPH MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 5:43 (9th ed. 2012).

21. *See, e.g.*, W. Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) (applying the "every available defense" due process argument to class action litigation).

22. *Compare* 2 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 10:3 (5th ed. 2011), *with* 1 MCLAUGHLIN, *supra* note 20, § 5:43.

23. 131 S. Ct. 1 (2010) (Scalia, Circuit Justice).

24. *Id.* at 3-4.

25. The foundational case of this revolution was *Crawford v. Washington*, 541 U.S. 36 (2004). *See infra* Part II.

26. *Cf.* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) (discussing the "day in court" ideal in the context of nonparty preclusion).

27. *See* David Marcus, *A History of the Class Action System, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 594 (2013) (describing an "adjectival" conception of class actions which asserts that, "since a class action is no more than an aggregate

acts in an "adjectival" way, almost as a mass joinder of individual plaintiffs bringing claims.[28] The aggregate liability that may attach in a class action could be disaggregated into individualized quanta of liability—one for each member of the plaintiff class. Proponents of constitutionalized commonality argue that it would be unjust for any one of these quanta of liability to attach to a defendant without the defendant's ability to challenge whether each plaintiff fully meets all of the elements of the claim. Any judicial intervention to manage the proof of liability or to reduce cumulative evidence that interferes with a defendant's right to individually dispute each plaintiff's circumstances thus becomes suspect.

This vision of the "day in court" echoes the doctrinal shift with regard to the Confrontation Clause. Throughout the twentieth century, prosecutors were permitted to introduce hearsay testimony against criminal defendants. In *Crawford v. Washington*, the Court rejected years of precedent supporting this practice.[29] Now, criminal defendants must have the opportunity to cross-examine a declarant before her testimonial statements can be admitted. Justice Scalia's majority opinion presents a detailed originalist argument about the true purpose of the Confrontation Clause. At the core of his argument is a "day in court" ideal about American procedure.

The *Crawford* Court contrasts American visions of procedural fairness with European inquisitorial norms. "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[30] The opinion recounts the excesses of the Spanish Inquisition and politically motivated persecutions.[31] Against these excesses, the Confrontation Clause sets a simple right—the right of a defendant to fully challenge the charges that are brought against him by cross-examining any and all witnesses, both present and absent.[32] At the core of the post-*Crawford* Confrontation Clause is the "day in court" and the adversarial ideal.

On first glance, the Confrontation Clause rationales seem tempting to import to the civil context. The Anglo-American understanding of due process is founded on the adversarial, as opposed to the inquisitorial, system. However, as I discuss in the next two Parts, the Supreme Court (and lower courts who are dealing with constitutionalized commonality arguments) would be wrong to succumb to this temptation.

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of individual claims, the court that manages it should minimize, to the extent possible, its procedural deviation from ordinary processes of dispute resolution").

28. *See id.* at 592-98 (contrasting this adjectival approach to a regulatory conception of the class action).

29. *See Crawford*, 541 U.S. 36.

30. *Id.* at 50.

31. *Id.* at 42-50.

32. *Id.* at 54-57.

II. The Stakes of Adopting Constitutionalized Commonality

Defendants have already begun to raise the constitutionalized commonality argument in a wide range of cases. In the context of fraud, for example, defendants have claimed that plaintiffs were differently situated with regard to whether they believed the defendant's false statement.[33] In the context of antitrust, defendants have claimed that the collusive activity differentially affected the price that plaintiffs paid.[34]

Generally, the constitutionalized commonality argument piggy-backs on an argument under Rule 23, obscuring the potential impact of constitutionalizing the argument. If the common issues shared by purported class members do not predominate over their individual differences, then courts may rightfully deny class certification under Rule 23(b)(3). However, once defendants have a constitutional right to a "day in court" on every fact specific to one class member, the line for certification will necessarily shift. Even a case in which the major issues were shared among the class would soon become overwhelmed by small individual issues—and common issues would no longer predominate.

A constitutionalized commonality standard could go even further than Rule 23 class actions. Constitutionalized commonality would also create problems for other federal statutes which allow for aggregate litigation. For example, the Fair Labor Standards Act (FLSA) established a form of collective action which requires potential plaintiffs to opt-in.[35] The form was created to facilitate the substantive legislative goals of the Act.[36] However, there may still be individualized defenses that would eradicate collective action under a constitutionalized commonality standard; for example, in disputes about whether workers were accurately classified as exempt from the FLSA's requirements, defendants sometimes seek to defend the classification of each individual employee.[37]

Furthermore, a constitutionalized commonality standard would preclude states from developing their own approaches to aggregate litigation, either through adopting different procedural rules for class actions or by developing different interpretations of their rules in state courts. In fact, the California Supreme Court is currently considering an argument from an employer that individual bank officers' duties were too varied for the court to determine whether

33. *See, e.g.*, Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at 5-8, Philip Morris USA, Inc. v. Jackson, 131 S. Ct. 3057 (2011) (No. 10-735).

34. *See, e.g.*, Phillip Morris, Inc. v. Angeletti, 752 A.2d 200, 234-36 (Md. 2000).

35. 29 U.S.C. § 216(b) (2006).

36. O'Brien v. Ed Donnelly Enter., 575 F.3d 567, 586 (6th Cir. 2009) (citing Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989)).

37. Brief of Appellant at 47-49, Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233 (11th Cir. 2008) (Nos. 07-12398-DD & 07-13061-DD).

the officers were appropriately exempted from state wage and hour laws.[38] While it is unclear how California will address the issue, defendants are turning to the United States Supreme Court to invalidate aggregation-friendly class action regimes in other states.[39]

III. Why Confrontation Clause Intuitions are Misplaced in Civil Suits Between Private Litigants

There are three main reasons why the Court would be wrong to impose constitutionalized commonality on the basis of Confrontation Clause intuitions: doctrine, structure, and history.

A. *Doctrine: Constitutionalized Commonality and Due Process*

In *Connecticut v. Doehr*,[40] the Supreme Court defined the test for due process in the context of a civil suit between private parties. Drawing on the balancing test that the Court first articulated in *Mathews v. Eldridge*,[41] the Court identified several factors that must be balanced to determine whether a civil procedure denies due process: the interest of the defendant(s), the interest of the plaintiff(s), any state interest in the litigation, and the risk of error.[42]

By examining each of the *Doehr* factors in the context of aggregate litigation, it becomes clear that a proper determination of the aggregate liability that a defendant owes to a set of plaintiffs can satisfy the requirements of due process, even without an individualized examination of each plaintiff.

First, a defendant's sole constitutionally recognized interest is a property interest in minimizing the final, and full, amount for which they are found liable.[43]

38. Duran v. U.S. Bank Nat'l Ass'n, 137 Cal. Rptr. 3d 391 (Ct. App.), *petition for review granted*, 275 P.3d 1266 (Cal. 2012).

39. *See, e.g.*, Petition for Writ of Certiorari, Kia Motors Am., Inc. v. Samuel-Bassett, 133 S. Ct. 51 (2012) (No. 11-1257) (challenging Pennsylvania's class action regime).

40. 501 U.S. 1 (1991).

41. 424 U.S. 319 (1976).

42. *See Doehr*, 501 U.S. at 11.

43. Defendants sometimes argue that there is an interest in accurately determining liability or in confronting accusers. These interests are not "life, liberty, and property" interests protected by the Fourteenth Amendment. There is no constitutional interest in reputational harms, such as the bare fact of being found liable (as opposed to the financial consequences of such a finding). Paul v. Davis, 424 U.S. 693 (1976). Therefore, these purported interests collapse into the protected interest of financial liability at the end or are concerns about the procedure used to find that liability. They are better addressed when considering "risk of error." Finding a due process liberty or property interest in the procedure itself would turn the *Mathews/Doehr* framework in on itself. How do you determine the procedure that must be completed before you can take away an aspect of the procedure?

By contrast, class action plaintiffs generally have an interest in determining liability in the aggregate: individual class action claims are often relatively small—too small to offset the cost of prosecuting each claim individually. However, if the interests of the defendant and plaintiffs seem balanced, the other two factors tip the scales toward aggregate adjudication.

On the risk of error factor, there is little reason to believe that a large number of small adjudications will reach a result that is more accurate than a carefully managed process that determines liability in the aggregate using statistical techniques.[44] Finally, the government has an interest in ensuring that plaintiffs can access their common law and statutory rights. Often, aggregate litigation—or the threat of it—attempts to serve the government interest in deterring unlawful behavior by would-be defendants.[45] Thus, a proper application of the current due process doctrine would find aggregate determinations of liability to be appropriate.

B. Structure: Criminal Procedure Protections in Civil Contexts

Even if the Court decided to disregard its due process jurisprudence, it would still be imprudent to apply Confrontation Clause principles from the criminal law. To show why the application of criminal due process concerns to the civil context would be so strange, consider the application of two criminal due process rights to civil contexts in which liberty, rather than property, interests are at stake. One would think that liberty interests would be more carefully protected by the Court.

First, the Court has not established a categorical right to counsel in civil cases involving deprivations of liberty, instead requiring only a showing that procedures meet the standard of fundamental fairness.[46] Similarly, a wide range of evidentiary protections, including the exclusionary rule and the Fifth Amendment privilege against self-incrimination, do not apply in civil contexts. These issues have been most fully litigated in the immigration context.[47]

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44. Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 612-18 (2012).

45. *Cf.* State v. Levi Strauss & Co., 715 P.2d 564, 570-71 (Cal. 1986).

46. *See* Turner v. Rogers, 131 S. Ct. 2507 (2011) (civil contempt); Travis Silva, Note, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227, 266-68 (2012) (immigration courts).

47. United States v. Balsys, 524 U.S. 666, 672 (1998); INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984).

C. *History: The American Tradition of Judicial Flexibility*

Of course, current doctrine and the applications of other categorical criminal procedure rules would be irrelevant if there was a strong argument that the Framers clearly opposed the kind of judicial management that aggregate liability requires. However, there is no such history. Including in the years immediately after the Founding, judges were understood to have a certain amount of flexibility in determining how to try a case. That flexibility applied both to the evidentiary standards required to prove liability and to certain forms of group litigation.

Legal historians have recently uncovered a number of inquisitorial approaches to evidence gathering and evidentiary standards that were in place at the moments that the Framers established constitutional due process. Before ratification, courts frequently relied on "conclusive presumptions" to restrict the facts and defenses that a party could present and carefully restricted oral testimony by parties to litigation in favor of written evidence.[48] In the nineteenth century, courts continued to apply judicial and legislative presumptions to limit the defenses available to litigants.[49] Courts of equity used procedures that resembled inquisitorial approaches into the late nineteenth century.[50] It was only in the late nineteenth century that the American bar embraced adversarial process as the driving ideology of civil litigation.[51] Once the adversarial hearing became the mark of procedural fairness, it became more important for litigants to determine which facts to present. The Supreme Court, at the turn of the century, began to critically analyze evidentiary presumptions to ensure that defendants had "a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue."[52] However, these "all available defenses" principles arose long after both the Framing and the Reconstruction.

The history of group litigation in English and American courts is even better documented. Anglo-American courts determined rights in the aggregate as far back as the Middle Ages.[53] Ironically, many of the classes involved aggregates on the defendant side, determining the rights of absent parties who were not able to

48. Moller, *supra* note 7, at 342-48.

49. *Id.* at 348-65.

50. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and a Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1231-33 (2005).

51. Moller, *supra* note 7, at 370-71.

52. Mobile, Jackson, & Kansas City R.R. v. Turnipseed, 219 U.S. 35, 43 (1910); *see* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 82 (1911) (declaring the statute at issue "establishes a rebuttable presumption, but neither prevents the presentation of other evidence to overcome it nor cuts off the right to make a full defense").

53. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 72-99 (1987).

present the defenses they might have preferred.[54] Justice Story himself addressed the possibility of aggregate litigation: "[A]s to parties . . . where they are exceedingly numerous, and it would be impracticable to join them without almost interminable delays and other inconveniences . . . . In such cases, the Court . . . will dispense with them . . . if it can be done without injury to the persons not actually before the Court."[55] Thus, early authorities recognized that judges should have leeway to manage cases in order to adjudicate fairly without unnecessarily encumbering the process.

CONCLUSION

It is extremely likely that the Supreme Court will address the constitutionalized commonality claim in the coming years. When the Court considers it, the "day in court" ideal and corresponding Confrontation Clause principles will likely tempt the Court into adopting constitutionalized commonality. Since the due process argument for constitutionalized commonality fails on doctrinal, structural, and originalist grounds, one would hope that the Court would reject the claim. However, scholars should further investigate and analyze the constitutionalized commonality claim to ensure that plaintiffs will continue to have access to the procedural mechanisms that are necessary for them to fully vindicate their rights.

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54. Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1862-82 (1998) (discussing three forms of aggregate litigation in the eighteenth century, with examples of defendant aggregates: bills of peace, creditor and legatee bills, and suits against unincorporated associations).

55. *Id.* at 1878-79 (quoting JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 94 (2d ed. 1840)).