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Governing Securities Class Actions

Elizabeth Chamblee Burch
University of Georgia School of Law, eburch@uga.edu

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I. INTRODUCTION

If you ask most corporate law scholars about adequate representation in securities class actions they will suggest, implicitly or explicitly, that it, and other due process rights have little or no relevance. Securities cases are all about deterrence, they explain. After all, if private class actions supplement public enforcement and aim principally to deter fraud, then a private plaintiff serves merely as a placeholder, one that could be easily interchanged with someone else as long as either would pursue the lawsuit.[1]

But this freewheeling, quasi-bounty hunter model is not what Congress intended.[2] Once Congress enables private attorneys to act on the class's behalf and pursue its property interests, judges must ensure that class members are treated equitably and that the institutional arrangement is legitimate. When class actions involve monetary compensation, such as securities-fraud class actions, they trigger the "property" portion of the Due Process Clause's protection against deprivation of "life, liberty, or property without due process of law."[3] Due process for class actions includes adequate representation, notice, an opportunity to be heard, and an opportunity to opt out.[4] The representative relationship is thus one of constitutional proportions. The Supreme Court explained as much when it pinpointed "adequate representation at all times" as part of absent class members' due process rights in *Phillips Petroleum v. Shutts*,[5] though the doctrine's roots

* Associate Professor, University of Georgia School of Law. This short essay expands on an idea that I first discussed in *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109 (2011).

1. The Supreme Court recently rejected a related argument in *Taylor v. Sturgell*, where it rejected the government's argument that nonparty preclusion more broadly in "public law" litigation. 533 U.S. 880, 902 (2008).

2. The SEC has, however, paid whistleblowers for information that the SEC can use in its public enforcement scheme. *See* Diane Francis, *SEC and Bounty Hunters*, HUFFINGTON POST, (Aug. 11, 2010), http://www.huffingtonpost.com/diane-francis/sec-and-bounty-hunters_b_676696.html.

3. U.S. CONST. amends. V & XIV, § 1.

4. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 6235–26 (1996) (concerning adequate representation); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985) (concerning opt out); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 317 (1950) (concerning notice); Hansberry v. Lee, 311 U.S. 32, 42–45 (1940) (concerning adequate representation); Londoner v. City and Cnty. of Denver, 210 U.S. 373, 385–86 (1908) (concerning opportunity to be heard); *see generally* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (discussing the importance of giving class members an opportunity to be heard). These due process requirements apply to Rule 23(b)(3) class actions.

5. *Phillips Petroleum Co.*, 472 U.S. at 798.

extend back to *Hansberry v. Lee*.[6]

This short essay, written for a symposium on *The Principles and Politics of Aggregate Litigation: CAFA, PSLRA, and Beyond*, decouples due process from a proceduralist's intuition and explains why it matters in securities class actions. It begins by exploring several analytical models that shed light on the representative relationship in class actions, including a public law analogy to the administrative state, a private law analogy to corporate law, and another, more modern public law analogy to political governance. After finding that the political–governance model best addresses both sources of inadequate representation in securities class actions—rifts between class members and class counsel, and between class members and their lead plaintiff—this Essay argues that incorporating qualified class members into securities class action governance will improve due process and legitimacy in securities litigation just as it does in the political sphere.

Courts currently tend to appoint one institution to serve as lead plaintiff for a diverse class filled with multiple institutions and individual investors, which threatens due process and legitimacy through inadequate representation. Because the Private Securities Litigation Reform Act (PSLRA) calls for judges to appoint institutions as lead plaintiffs, this inadequate-representation problem is pervasive. As I have elaborated elsewhere, a divide often exists between institutional and individual investors such that the former, when acting alone, cannot adequately represent the latter.[7] To briefly explain this divide, institutions are more likely than individuals to:

> (1) trade in derivatives, which means that the institution may not rigorously pursue the litigation because even though it has a large voting stake in the defendant corporation, it lacks the risk of economic exposure;8
> (2) continue to own stock in the defendant corporation, which means the institution may exchange corporate-governance reforms for lower monetary settlements, whereas former shareholders would prefer to maximize their compensation;
> (3) take litigation risks because less money is at risk vis-à-vis its overall wealth than would an individual who has lost her life savings (the so-called "peanuts effect"); and
> (4) think that, because they own heavily diversified portfolios, fraud is just as likely to benefit them as it is to harm them over time and reason that it makes sense to avoid significant time investments and transaction

6. Hansberry v. Lee, 311 U.S. 32, 42–45 (1940).

7. Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1162 (2011); *see also* Taylor v. Sturgell, 553 U.S. 880, 900 (2008) (reaffirming that adequate representation exists only where, at a minimum, "the interests of the nonparty and her representatives are aligned").

8. Burch, *supra* note 7, at 1124.

costs in pursuing wrongdoing.[9]

Plaintiffs' attorneys might lessen these concerns if they had a stronger economic incentive to protect the whole class, but unfortunately that's not the case. To maintain their competitive advantage after the PSLRA, plaintiffs' law firms began courting large institutions, suggesting they serve as lead plaintiff, and encouraging them to select their law firm as lead counsel. To perform these functions, plaintiffs' law firms monitor institutions' investment portfolios for "free," notify the institution when a significant loss occurs, and encourage the institution (usually a pension fund) to become a contender for lead plaintiff. Courting institutional investors does not end with these preexisting contractual relationships for portfolio monitoring. Rather, it may continue in more surreptitious ways, such as employing lobbyists to encourage the fund to select the lobbyist's employer as class counsel or engaging in pay-to-play practices.[10]

Because the lead plaintiff typically selects class counsel,[11] once selected, counsel has every incentive to placate the institution in exchange for repeat business. But the attorney has few incentives to represent other institutions or individual investors, and even fewer incentives to notice rifts between class members that would require sub-classing and separate representation since alternative representation would mean having to share the attorney's fee award.

The solution to this adequate-representation problem lies not in refusing to certify securities class actions, which would lessen their deterrent effect, but in further developing the political-governance analogy. Once we stop viewing inadequate representation as an isolated

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9. *Id.* at 1124, 1162.

10. Stephen J. Choi, Drew T. Johnson-Skinner & A. C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, J. EMPIRICAL LEGAL STUD. (forthcoming), *available at* http://ssrn.com/abstract=1527047; Drew T. Johnson-Skinner, *Paying-to-Play in Securities Class Actions: A Look at Lawyers' Campaign Contributions*, 84 N.Y.U. L. REV. 1725 (2009). *But see* David H. Webber, *Is "Pay-to-Play" Driving Public Pension Fund Activism in Securities Class Actions? An Empirical Study*, 90 B.U. L. REV. 2031, 2032 (2010) (casting doubt on the pay-to-play theory and finding "no support for the theory that unions drive beneficiary board members to obtain lead plaintiff appointments"). The *Cendant* litigation is one of the best-known examples. *See In re* Cendant Corp.: Litig., 243 F. Supp. 2d 166, 174 (D.N.J. 2003), *aff'd*, 404 F.3d 173 (3d Cir. 2005). A search by Jim Cox and Randall Thomas for the sixteen law firms regularly engaged in shareholder litigation found that six states where three of the best-known law firms disclosed hiring lobbyists, including Milberg Weiss, Abbey Gardy & Squitieri, and Bernstein, Liebhard & Lifshiz. Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 186–87 (2004).

11. 15 U.S.C. § 77z-1(a)(3) (2006); 15 U.S.C. § 78u-4(a)(3)(B)(v) (2006) ("[T]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class."); *In re* Cendant Corp. Litig., 264 F.3d 201, 274 (3d Cir. 2001) ("[T]he court should generally employ a deferential standard in reviewing the lead plaintiff's choices [of counsel]."); *In re* Flight Safety Techs., Inc. Sec. Litig., 231 F.R.D. 124, 132 (D. Conn. 2005).

problem and situate it within our broader knowledge about representative relationships in the political context, alternative solutions become apparent. Just as a decision-making body like Congress includes members from politically diverse districts who each represent their constituents, so too should the decision-making body in a securities class action reflect class members' diverse viewpoints. This solution requires (1) that courts appoint a truly representative lead-plaintiff group based on class members' heterogeneous interests and (2) that lead counsel defer to that group's decision-making authority.

II. ANALOGIZING THE REPRESENTATIVE RELATIONSHIP

Representative relationships exist in a number of contexts, each with unique degrees of separation, control, incentives, and constraints. Consider three different examples. First, when a government agency like the SEC prosecutes fraudulent behavior, it represents the public's interest. This representative relationship, however, is liberal in that accountability is layered: the public elects the President of the United States, who then appoints five commissioners from various political parties, who then oversee 3,500 staff and eleven regional offices.[12] As a second example, when shareholders select a board of directors to oversee a company's activities, that board represents the corporation and its shareholders. The board thus owes them duties of care and loyalty. This representative relationship is more exclusive than the SEC's relationship to the public; it runs to a smaller segment of the population, but depending on how the board is selected and retained, representation may lack direct accountability. As a final example of representative relationships, when we go to the polls each year, we elect members to local, state, and federal governments to represent us at each level. In some ways, this representative relationship is as attenuated as the SEC's relationship to the public in that the elected representative has duties as a United States citizen. But the elected official must work principally to protect the interests of her constituents, which constrains and controls the relationship in a more direct way so long as the official seeks reelection.

Scholars have analogized adequate representation in class actions to each of the relationships in these three examples in an effort to understand, improve, legitimize, and theorize the connection between class representatives (class counsel and the named plaintiff) and class members. This Section briefly highlights and summarizes the analytical

12. *How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, http://www.sec.gov/about/whatwedo.shtml (last visited May 20, 2012).

move from vast administrative analogies, to corporate law principal–agent concerns, to, more recently, governance in political theory. Though the coverage provided here is but a snapshot of each analogy, it highlights the historical lineage of our efforts to contextualize and comprehend adequate representation. Sifting through these models also allows us to consider each analogy's limits when contrasted with modern practice.

First, in their seminal 1941 article, *The Contemporary Function of the Class Suit*, Harry Kalven and Maurice Rosenfield provided one of the first administrative models for understanding the class's relationship to its representative.[13] They viewed privately enforcing securities laws as an outcropping of or complement to the SEC.[14] As such, they implicitly defined interests broadly and thus had an expansive notion of when a litigant could act on someone else's behalf.[15] As Steve Yeazell explains it, the Kalven–Rosenfield view essentially weds two ideas: "First, it embraces the interest definition of the class, requiring no more than an (assumedly) shared interest in recouping losses. Second, it links that concept of the interest class not to any particular social group but to the general task of law enforcement."[16]

According to the Kalven–Rosenfield view, the divide between institutions and individual investors is less troubling—both have a basic interest in recovering their losses and enforcing substantive rights.[17] The difficulty here, however, is distinguishing the interests of the class representative and the class from the public at large. Without that distinction, the ability to prevent repetitive litigation through preclusion is in jeopardy and the representative's fiduciary obligations are too amorphous to enforce. Yet, remember that in 1941, before modern Rule 23 was adopted in 1966, plaintiffs opted into rather than out of the class and thus actually consented to the representation. Thus, affirmative consent counterbalanced this expansive view of the representative relationship.[18]

Second, the private, corporate law model analogizes the relationship

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13. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686–88, 699 (1941).

14. *Id.*

15. *Id.* at 691–93, 699.

16. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 232 (1987).

17. *Id.* at 710, 717–19. One commentator has argued that adequate representation should not be a concern so long as class members are not made worse off than they would have been by individually controlling their cases. Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1151–58 (2009). In response, I have argued that this may create problems of its own including questions about procedural legitimacy. Elizabeth Chamblee Burch, *Response Procedural Adequacy*, 88 TEX. L. REV. 55 (2010).

18. Kalven, *supra* note 13, at 692–94 n.33, 711.

between the class members and their representatives to the relationship between shareholders and management.[19] In particular, it views the class members' relationship to their agents as a fundamental problem inherent in separating ownership from control. Class members, like shareholders, bear the benefit and the burden of having someone else control both the day-to-day decisions and the litigation's settlement terms.[20] When owners employ managers to control their assets, as in a shareholder–director relationship, the managers may lack the incentive to maximize owners' assets. Actors within securities class actions are subject to the same economic pressures: the attorneys act as financiers, but the class members truly own the claim.

Suppose, for instance, that a defendant offers to settle a case for nominal value either before a complaint is ever filed, or soon after. The clients may not be inclined to accept the offer, particularly if their goals are to reveal cover-ups or reform corporate practices. But the lawyer might see the settlement as more attractive, particularly if she is working on a contingency fee. She gets roughly one-third of the settlement as a fee rather quickly and can then work on other cases. Granted, more work could lead to a larger payout for the attorney but it involves more risk and only marginal increases.[21] For example, assume the attorney thinks that working on the case for another year might produce a settlement offer of $300,000 more than whatever the current offer is, but that work would cost her $150,000. Assuming a one-third contingent fee, she would receive only $100,000, but the clients' settlement value would still be greater. This conflict arises because of the attorney's dual role: she is not simply acting as the client's agent, she is also financing the litigation, making her a creditor and the litigation a joint venture of sorts.[22] Agency rules encompass the former relationship and the agency itself, but ignore and even eschew the other roles.[23]

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19. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04, at 14–22 (Prelim. Draft No. 3, 2005).

20. *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000). Sam Issacharoff has also applied the labels exit, voice, and loyalty to the class context. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 366.

21. *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 190 (1987).

22. *See* Milton C. Regan, Jr., *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197 (2000) (observing the same phenomenon in the class action context); Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301, 302 (2003) (positing that Coffee's argument applies with equal force to mass tort representations because "[t]he plaintiffs' attorneys provide crucial financing").

23. Silver, *supra* note 22, at 303.

Corporate governance and securities scholars have long been concerned about this divide between agents and their principles and the contexts in which that relationship unfolds, such as between boards of directors and shareholders or attorneys and their clients. This problem is exacerbated when repeat relationships between class counsel and the institutional lead plaintiff tempt counsel to favor the institution over other class members. To be sure, after the Supreme Court reprimanded plaintiffs' attorneys in *Amchem Products, Inc. v. Windsor* for favoring their own inventory of clients over future claimants with whom they had no direct relationship,[24] attorneys have been careful not to flaunt these differences. This does not mean, however, that favoritism has disappeared. It could easily seep into the claims filing process, for example. After settlement, attorneys might make recovery difficult for noninstitutional investors who keep less meticulous records and then have the remaining funds revert to class members who did file claims, likely the institutions themselves.[25]

The shortcoming with the corporate law model is that it principally focuses on the principal–agent relationship between class counsel and class members. This relationship, while vital to understanding the potential wedge between attorneys and their clients, tells us little about the relationship between lead plaintiffs and class members. The adequacy and typicality requirements in Rule 23 are concerned about both the principal–agent problem and the relationship between class members and named plaintiffs. Remedying the principal-agent problem does not cure the issues with unrepresentative lead plaintiffs. For example, the lead plaintiff may vigorously monitor class counsel, but care only about her own self-interest. When this self-interest diverges in significant ways from class members' interests, the lead plaintiff's vigilance becomes a tool for oppressing class members who have alternative preferences.

The public law analogy to political governance holds the most promise for addressing both the principal-agent and the class member-lead plaintiff relationship. After all, monitoring the attorney is simply a more specific adequate-representation requirement: the faithful lead plaintiff, as an agent for the class, should not hire another agent on her principal's behalf without ensuring that the second agent—the attorney—performs as promised. This governance analogy also weds core ideas from both the Kalven–Rosenfield administrative law analogy and the corporate law analogy. As articulated by Sam Issacharoff and Richard Nagareda, the governance model views the relationship

24. 521 U.S. 591, 627–28 (1997).

25. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 326–27 (2010).

between class members and class representatives as one between the representatives (the governors) and the members (the governed).[26]

In his article, *Governance and Legitimacy in the Law of Class Actions*, Professor Issacharoff frames the class certification inquiry as two distinct questions: "the necessity of class treatment to overcome collective action barriers to the prosecution of perceived group harms, and the question of who should control the class action and under what terms."[27] The first question dovetails with the administrative model and the second points to the principal–agent relationship. Just as the government steps in to provide public goods, the class action incentivizes private attorneys to supplement enforcement. Therein lies the historical, collective action link to the administrative law model. The second question narrows the diffuse representative relationship that Kalven and Rosenfield envisioned to the kind of class member-class counsel relationship that the corporate law model depicts in principal–agent terms.

But the political governance model is not simply a wedding of two preexisting ideas. It adds a third, critical dimension: the demand for legitimacy in the institutional arrangement. Just as a government's legitimacy rests on "the ability to curb oppressive, abusive, or self-serving behavior that may emerge from within the newly created governing class," the class action serves in part to tax the class members and appoint an agent on their behalf.[28] Put differently, both political governments and class actions must act on behalf of a group of people in a legitimate way. Recognizing the need for an agent tells us little about whether that agent acts legitimately on behalf of those she represents.[29]

Legitimacy speaks most directly to the ability to generate preclusion. Absent the ability to tender finality through preclusion, a class action is worth little economically. But a class action's legitimacy also hinges on due process rights: class counsel sends class members notice of the action; by not opting out, class members consent to the relationship; and the representative relationship itself must be adequate. Because a class-action judgment is entitled to full faith and credit only if it satisfies these due process requirements, preclusion hinges on the representative relationship's legitimacy.[30]

The PSLRA's lead-plaintiff provision adds a new twist to the

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26. *See, e.g.*, Issacharoff, *supra* note 20, at 366; Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 638 (2008) (parenthetical).

27. Issacharoff, *supra* note 20, at 337; *see also* Nagareda, *supra* note 26, at 638.

28. Issacharoff, *supra* note 20, at 339.

29. *Id.* at 340.

30. *See* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 (1982); *accord* Hansberry v. Lee, 311 U.S. 32 (1940).

representative relationship that makes sense only when explored within the governance analogy. Unlike many other class actions, the named plaintiff in securities class actions is more than just a silent partner. Because the lead plaintiff has experienced the largest financial loss, we expect it will vigilantly monitor class counsel to maximize her recovery.[31] Indeed, this is precisely what Elliott Weiss and John Beckerman intended in their seminal article that formed the blueprint for the PSLRA.[32] According to the administrative law model, the lead plaintiff is just another member of the public who would opt into the class. And, according to the corporate law model, the lead plaintiff is just another principal to whom class counsel owes a duty. But, in the political governance model, lead plaintiffs—like legislators—serve a key function as the mouthpiece for class members. Giving voice to members' concerns, loyally representing their interests, and monitoring class attorneys helps legitimize the institutional arrangement.

III. THE LEAD PLAINTIFF'S ROLE IN GOVERNANCE AND DUE PROCESS

At the heart of the representative relationship lies a core question: how can the state, through the auspices of the judiciary, incentivize and legitimize the actions of a private actor to act on behalf of numerous, often disaggregated individuals in a way that fairly binds those individuals? In short, the relationship presents a question of procedural legitimacy. It is the governance account more so than any other that recognizes the pervasiveness and importance of this question.

What the governance model has lacked and what this Essay adds is the need to incorporate qualified class members into securities class action governance where the economics and members' expertise justify it. After all, the idea of a representative democracy is that a legislator is part and parcel of the community, knowledgeable about local interests and problems, and concerned with the affairs of the people.[33] Consequently, legislators must reside in the districts they serve. According to the Supreme Court in *Reynolds v. Sims*, our representative government also requires that "each citizen [have] an equally effective voice in the election of members of his state legislature," a right that is "unconstitutionally impaired when its weight is in a substantial fashion

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31. *See* Berger v. Compaq Computer Corp., 257 F.3d 475, 483 (5th Cir. 2001) ("Any lingering uncertainty, with respect to the adequacy standard in securities fraud class actions, has been conclusively resolved by the PSLRA's requirement that securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation. In this way, the PSLRA raises the standard adequacy threshold.").

32. 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 (1995).

33. *See, e.g.*, Campbell v. Tunny, 764 N.Y.S.2d 163, 864–65 (N.Y. Sup. Ct. 2003).

diluted when compared with votes of citizens living in other parts of the State. . . ."[34] When judges appoint a single institution to serve as lead plaintiff, that institution is unfamiliar and unconcerned with the risk preferences and the remedies desired by individual class members. Given these differences, an individual could argue that her say in these matters has been diluted or ignored.

These concerns are not the only threat to the class action's institutional legitimacy; rather, there are two additional concerns. First, in a democracy, the legitimizing mechanism is a fair political contest (without diluting or discounting votes) where a community elects representatives to serve its constituency. And second, by choosing to live in a particular polity, community members consent to be governed by those laws. But class actions have no direct equivalent in either sense: lead plaintiffs are self-nominated, not democratically elected, and class members do not consent to being included in a class in any meaningful way.[35]

Unless a class member requests to serve as the lead plaintiff, she has no say in who acts as lead plaintiff or class counsel. Phrased in governance terms, class representatives lack direct electoral accountability. Two imperfect checks come to mind. First, members have an opportunity to object during the Rule 23(e) fairness hearing. Class action objectors, however, typically target the attorneys' fees and occasionally contest the settlement terms. Rarely do objectors speak to the representative's qualifications or job performance as an election would. Second, like political party elections, adversarial litigation during the lead-plaintiff selection process may reveal information about why a putative lead plaintiff is unrepresentative. But the PSLRA restricts discovery aimed at the lead plaintiff's adequacy to prevent the process from becoming "an expensive and abusive sideshow."[36] Thus, neither class objectors nor adversarial litigation constrains representatives' behavior or provides class members with disqualifying information the way an election would.

Moreover, class members learn of their membership status by receiving a class notice. They have no say in the class definition and only a threadbare notion of consent justifies their inclusion.[37] To be sure, class members can opt out, as dissatisfied institutions often do in

34. 377 U.S. 533, 565, 568 (1964).

35. Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 101 (2003).

36. Weiss & Beckerman, *supra* note 32, at 2109; 15 U.S.C. § 78u-4(a)(3)(B)(iv) (2006).

37. As the Supreme Court reasoned in *Phillips Petroleum Co. v. Shutts*, when class members do not opt out of a class, they are presumed to have consented to the representation. 472 U.S. 797, 812–14 (1985). Of course, because opting out requires affirmative action by the class members, the default is to remain in the class, which makes this notion of consent a thin construct.

securities class actions,[38] but opting out is a realistic option only for institutions and the special few receiving individual legal advice. For smaller, individual investors, the economics of opting out often make it cost prohibitive.

What authorizes lead plaintiffs and lead counsel to act on behalf of the class members is neither electoral accountability nor actual consent, but judicial appointment. Judges are the only gatekeepers standing between the self-nominated, self-interested would-be class representatives and the governed. In governance terms, Rule 23(a)'s adequacy and typicality requirements set forth the representative's necessary qualifications. Absent typical claims and similar interests, the voice and loyalty rights that authorize the securities class action's institutional arrangement collapse. When judges broadly define interests not only in certifying the class, but also in appointing the lead plaintiff, they miss the importance of their legitimizing role in incorporating qualified putative class members into class governance. It is the lead plaintiff's truly representative character—defined by typicality and adequacy—that gives voice to the governed. And because that lead plaintiff shares the problems, interests, and desires of the class members, she loyally represents them by pursuing her own interests.

Therein lies the distinction between most class actions and securities class actions: the real source of legitimacy in securities class actions is not just faithful representation by class counsel,[39] but appointing representative lead plaintiffs to speak on behalf of other members' unique interests. This is, in part, the PSLRA's mandate: incorporate qualified class members into class governance to both monitor the class attorneys and represent the class members. In securities class actions, the choice is not simply "between the uninformed democracy of class members versus the often self-interested professionalism of plaintiffs' attorneys."[40] Rather, because investors and institutions tend to be sophisticated, knowledgeable, and incentivized when they have suffered large losses, there are reasons to incorporate them into the process.

Although plaintiffs' law firms continue to recruit institutions to serve as lead plaintiff, institutions do have the largest amount of money at stake, which gives them ample incentive to play a significant role.[41]

38. *See* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 CARDOZO L. REV. 407, 416 (2008).

39. *See* Issacharoff, *supra* note 20, at 354 ("To the extent that the Rules direct courts to focus on the named class parties, they provide what is at best a distraction from the real source of legitimacy in class actions: the incentives for faithful representation by class counsel.").

40. Coffee, *Class Action Accountability*, *supra* note 20, at 406.

41. 15 U.S.C. § 78u-4(a)(3)(B)(iii) (2006); *In re* Initial Pub. Offering Sec. Litig. (*In re IPO*), 214 F.R.D. 117, 120 (S.D.N.Y. 2002); *see also* Hevesi v. Citigroup, Inc., 366 F.3d 70, 81–82 (2d Cir. 2004). Courts designate lead plaintiffs based primarily on which plaintiff has the largest financial interest. *In*

This is what Congress counted on in passing the PSLRA. Because Congress was skeptical of plaintiffs' attorneys, it enacted the lead-plaintiff provision to instill client monitors as checks on unbridled opportunism. But, because class members' interests differ, appointing lead plaintiffs based on their representative characteristics will frequently require the judge to appoint a lead-plaintiff group.[42]

Appointing a lead-plaintiff group solves the problem that *Reynolds v. Sims* paints starkly in political context: each citizen has a right to participate fully in state government and that right is "unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State. . . ."[43] Rule 23 assumes that a representative's self-interest overlaps with the interests of those she represents so that when she pursues her own interests, she benefits the class. Consequently, appointing a diverse, representative group with both individuals and institutions ensures equal access to voice opportunities, adequate representation, and due process in securities classes just as voting rights do in the political context.[44]

The appointment itself, however, does not solve the complementary problem of decisional control. Deborah Rhode raised the main question: should named plaintiffs "serve primarily as 'instructed delegates,' pursuing objectives to which a majority of class members subscribe" or "track Edmund Burke's notion of an 'enlightened trustee,' who makes an independent assessment of class concerns?"[45] And how much paternalism should a representative exercise in making decisions? [46] Rhode concludes, "[o]n the rare occasions where courts have confronted the issue, they have done little more than acknowledge the absence of any 'clear principles governing the allocation of decisionmaking authority between the attorney and the class.'"[47]

Part of the problem is that there is no congressional equivalent of the attorney-client relationship. The closest, albeit largely imperfect, analogy would be the way in which newly elected congressional representatives rely heavily on well-trained and knowledgeable staffers,

re IPO, 214 F.R.D. at 121; *see also In re* Crayfish Co. Sec. Litig., No. 00 Civ. 6766IDAB, 2002 U.S. Dist. LEXIS 10134, at *13 (S.D.N.Y. June 6, 2002).

42. Burch, *supra* note 7, at 1155–73.

43. Reynolds v. Sims, 377 U.S. 533, 565, 568 (1964). Appointing a lead-plaintiff group also raises a host of questions about how lead plaintiffs should decide these matters as well as criticisms about group decision-making. I have addressed these questions and criticisms elsewhere, so I will not rehash them here. Burch, *supra* note 7, at 1146–55, 1180–83.

44. For more about these diverse points of view and which require representation, see *id.* at 1160–73.

45. Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1192–93 (1982).

46. *Id.*

47. *Id.* at 1193.

effectively ceding them control.[48] The trouble in securities class actions is that lead plaintiffs have little decisional control in the first place.[49] Even the unseasoned-but-representative congress member who relies heavily on staffers ultimately makes the final call and bears responsibility for those decisions. Conversely, lead plaintiffs' authority is limited to selecting class counsel and negotiating counsel's attorneys' fee, all of which is still subject to court approval.[50]

When representative decision-making truly counts, as it does when reaching a settlement agreement, lead plaintiffs' authority is far from certain. When confronted with this issue in the *BankAmerica Corp. Securities Litigation*, the Eighth Circuit lamented the lack of statutory guidance and fell back on general principles of deferring to the district court's discretion to approve settlements under Rule 23.[51] Reaffirming the district court's obligation to independently review the fairness of a class settlement, however, tells us nothing about how the lead plaintiff can adequately represent the class without any corresponding power. Just because the judge must act as an added check to prevent unfairness does not mean that she serves as a substitute for representation in the settlement process.

Once courts begin appointing truly representative lead-plaintiff groups, lead counsel should likewise allocate lead plaintiffs more decision-making autonomy and give their input more weight. Class counsel should consult and take direction from a richly representative lead-plaintiff group in much the same way that an attorney consults with her client in individual litigation. Usually, lawyers must discuss their client's litigation objectives, keep their clients reasonably informed,

48. *See* Robert H. Salisbury & Kenneth A. Shepsle, *Congressional Staff Turnover and the Ties-That-Bind*, 75 AM. POL. SCI. REV. 381, 318, 395 (1981) (likening each member of Congress to an "enterprise manager" and concluding that "[f]ormer staffers provide a significant body of individuals who 'know the system' at a relatively complex level and can serve as guides and counselors to those who do not yet possess that competence.").

49. Given the number of responsibilities some courts ask class counsel to perform, one wonders what is left for the lead plaintiff to do. *See, e.g.*, Cortese v. Radian Group Inc., No. 07-3375, 2008 WL 269473, at *8 (E.D. Pa. Jan. 30, 2008) (requiring counsel to coordinate briefing and arguing motions, written discovery, and witnesses examination as well as appointing a spokesperson, calling meetings of plaintiffs' counsel, conducting settlement negotiations, directing trial preparation, transmitting correspondence to plaintiffs, and supervising "any other matters"); *In re* Sterling Fin. Corp. Sec. Class Action, MDL No. 07-1879, 2007 WL 4570729, *7–8 (E.D. Pa. Dec. 21, 2007) (same); *In re* Flight Safety Techs., Inc. Sec. Litig., 231 F.R.D. 124, 133 (D. Conn. 2005) (same); *In re* Catalina Mktg. Corp. Sec. Litig., 225 F.R.D. 684, 687–88 (M.D. Fla. 2003) (same); *In re* Cell Pathways, Inc., Sec. Litig. II, 203 F.R.D. 189, 194 (E.D. Pa. 2001) (same).

50. *See* 15 U.S.C. §§ 78u-4(a)(2), 78u-4(3)(B)(v) (2006); *In re* Cendant Corp. Sec. Litig., 404 F.3d 173, 199–200 (3d Cir. 2005); *In re* Network Assocs, Inc. Sec. Litig., 76 F. Supp. 2d 1017, 1033 (N.D. Cal. 1999) ("The lead plaintiff owes a fiduciary duty to obtain the highest quality representation at the lowest price."). The court still oversees these responsibilities, however. FED. R. CIV. P. 23(f); *In re* UnitedHealth Grp. Inc. PSLRA Litig., 643 F. Supp. 2d 1094, 1102 (D. Minn. 2009).

51. *In re* BankAmerica Corp. Sec. Litig., 350 F.3d 747, 751–52 (8th Cir. 2003).

ensure that clients "have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued," "explain the general strategy and prospects of success," and "consult the client on tactics that are likely to result in significant expense or to injure or coerce others."[52] Clients have the right to make decisions that affect the case's merits, such as whether to waive the right to plead an affirmative defense.[53] Given the divide between class counsel's interests and class members' interests, lead plaintiffs should also review and make critical decisions about pretrial motions and discovery.[54] In short, if lead plaintiffs are to adequately represent class members' interests, monitor the lawyers, and minimize agency costs, then, consistent with the PSLRA's goal of increasing client control, they should have authority over decisions that implicate their values and litigation objectives.[55]

Giving a lead-plaintiff group autonomy over conducting the litigation does not displace counsel's obligation to act in the class's best interests or the judge's obligation to ensure that the settlement is fair, reasonable, and adequate.[56] Even apart from ensuring fairness to class members, judges have an independent reason to avoid judicially enforcing an unfair settlement. As Seana Shiffrin explained in a different context, a court's "refusal to enforce need not represent an effort to supplant the judgment or action of the contracting parties" but "may reasonably be a self-regarding concern not to facilitate or assist harmful, exploitative, or immoral action."[57] Put differently, just because the parties have the right to propose settlement agreements does not mean that the government should assist them in carrying them out if the terms are unduly harsh toward absent class members.[58]

In any class action, due process is concerned with both process-based

52. MODEL RULES OF PROF'L CONDUCT R. 1.4, cmt. 5 (2006).

53. *See id.* at R. 1.2(a); CANON OF PROF'L ETHICS 7-7.

54. Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 124 (1979).

55. *See id.* at 125; *see generally* Koehler v. Green, No. CV 405-367-JFN, 2006 WL 5605002, at *5 (E.D. Mo. Apr. 20, 2006) (noting that the plaintiff played an active role in the previous suit by participating "with class counsel in discovery and the development of legal theories and strategy" as well as in "the mediation with class counsel"). Granted, just because lead counsel should consult the lead plaintiff group on certain decisions, the group can still decide to forgo discussion on tangential matters.

56. FED. R. CIV. P. 23; *see In re* BankAmerica Corp. Sec. Litig., 350 F.3d 747, 751 (8th Cir. 2003); Laskey v. Int'l Union, 638 F.2d 954 (6th Cir. 1981); Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1176 (5th Cir. 1978); *Koehler*, 2006 WL 5605002, at *5; Thomas v. Albright, 77 F. Supp. 2d 114 (D.D.C. 1999).

57. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFS. 205, 224 (2000).

58. *See id.*

defects and substantive defects. Although the two are related—when one's viewpoint is not represented during the litigation process, it is more likely to result in an unfair settlement—they are distinct.[59] But incorporating a representative lead-plaintiff group into class governance and giving voice to people and entities with alternative perspectives, heuristics, and opinions legitimizes the process itself, which in turn lends legitimacy to the resulting settlement. Including dissent in the process also makes for a more meaningful objector since, if one of the lead plaintiffs remains in the minority, she will already be informed and can infuse the fairness proceeding with a healthy dose of adversarial legalism.[60] Of course, asking simply whether the *process* was fair is not the end of the inquiry. At the fairness hearing, the judge must ask the further question, "Is it fair what [these parties] have agreed to?"[61] Just as the judicial branch serves as a check on unconstitutional behavior by a duly elected legislative and executive branch, it also serves as a control if a representative lead-plaintiff group produces unfair results.

IV. CONCLUSION

Corporate law scholars may be right that securities class actions are principally about deterrence,[62] but adopting process-based solutions that view lead plaintiffs as easily interchangeable undermines the legitimacy of the system that generates that deterrent effect. For the public to view the class action as fair and abide by decisions made in that context, both the process (including the representative quality of those in charge), and the outcome must be fair. After all, we could efficiently resolve disputes with the flip of a coin and, by chance, reach the same outcome that a jury would reach, but no one would contend that such an arbitrary

59. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 106 (2d ed., 1998).

60. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001).

61. SANDEL, *supra* note 59, at 112; *see also* FED. R. CIV. P. 23(e).

62. Compensating injured investors actually bolsters the deterrence rationale. Jill Fisch explains the link between deterrence and compensation as follows: "For shareholders and directors to use the disclosed information to monitor [companies], it must be incorporated into equity prices," which, in efficient markets, "occurs through informed secondary trading." Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation*, 2009 WIS. L. REV. 333, 345–47 (2009). As I've observed elsewhere: Even though many investors diversify their holdings to eliminate firm-specific risk, informed-secondary-market traders heavily research particular corporations, use that information to invest, and thus limit their diversification to profit from their research. It is these investors who make secondary markets more efficient by relying on disclosed information, but who are likewise disproportionately saddled with the cost of securities fraud. Consequently, compensating these investors encourages them to continue to provide a public good (efficient markets), which, in turn, enhances company monitoring and deterrence. Thus, this explains one link between compensation and deterrence and suggests that focusing purely on achieving deterrence through corporate-governance reforms misses the complementary role that compensation might play by enforcing mandatory-disclosure obligations. Burch, *supra* note 7, at 1117.

procedure is legitimate or that it promotes deterrence. Accordingly, to ensure adequate representation and legitimacy in securities class actions and address the divide between institutions and investors, the judge should incorporate various "constituents'" interests into class governance by appointing a small, representative group to serve as lead plaintiff.