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We, the Class: What the Founding Generation Can Tell Us About Adequate Representation in Class Action Litigation

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“What is true of every member of the society individually is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of the individuals.”¹

Modern class actions rely on interest representation. This principle is closely tied with the doctrine of virtual representation used by the British Parliament to justify taxing the American colonists before the Revolutionary War. Although the Founding Fathers fought against this authority to tax, interest representation is not antithetical to the beliefs of the Founders. Rather, the class action device serves principles the Founders considered vital to free society, such as providing a mechanism for the fair and efficient adjudication of private wrongs. This Article considers the ways in which the class action device can be used to achieve adequate representation and civil justice in a way consistent with the interests of the Founders.

The Founders’ ends of adequate representation grew from colonial

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1. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 THE FOUNDERS’ CONSTITUTION 68 (Philip B. Kurland & Ralph Lerner eds., 1987).

Americans' reaction to British rule. How could Parliament maintain authority to tax American colonists without granting representation anointed with the colonists' consent? Prime Minister George Grenville's answer was simple: American colonists were represented "virtually," and therefore, adequately because Britain looked out and provided for the interests of the colonists.²

Following the American Revolution, the Founders deliberated over a form of government that derived its authority from popular consent. During this process the Founders confronted pragmatic challenges in providing a near approximation to direct consent. Following the Revolution and the founding of the original thirteen colonies, it became necessary to adequately define this concept of representation. Consequently, is the quality of representation proportional to the degree to which the system adequately represents the interests of the represented? The answer to this inquiry can be applied equally to political systems and class litigation.³ If adequate representation is the objective, efficiency and fairness are two principles guiding its achievement.

While there is no evidence the Founders overtly discussed the challenge of group litigation, they were in almost unanimous agreement regarding the importance of citizens' access to civil courts to seek redress.⁴ Many of the Founders believed the absolute right to a civil jury trial was necessary to protect against tyranny and corruption because juries represent the laymen's perspective and reflect the community's beliefs.⁵ While Alexander Hamilton agreed that access to civil courts was important, he also foresaw the value that courts of equity could provide in fashioning flexible procedural solutions to complex judicial challenges.⁶ As discussed below, many years later, United

2. See *infra* Part I (detailing British "virtual representation" of colonists).

3. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 174-75 (1987).

Over the past 250 years English and American societies have sought new justifications both for their political systems and for group litigation. In both cases the justification that has emerged rests on a conception of representation, a belief that A may be legitimately bound by the action or consent of B if B can be said to represent A.

Id.

4. See *id.*

5. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979) (Rehnquist, C.J., dissenting) (discussing Founders' belief in importance of juries in civil trials).

6. See THE FEDERALIST NO. 83 (Alexander Hamilton). Alexander Hamilton's pronouncements in the Federalist Papers supports this interpretation:

The circumstances that constitute cases proper for courts of equity are in many instances so . . . intricate that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing character of [the jury] mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery [equity] frequently comprehend a long train of minute and independent particulars . . . the attempt to

States Supreme Court Justice Joseph Story would adapt an English procedural device from courts of equity to facilitate the fair representation of many similarly situated individuals while maintaining judicial economy.⁷ Today's class action is the end result of this ingenuity.

While traditional, multi-party procedural devices, such as joinder and interpleader, assume that parties are present before the court, large class actions often include multitudes of unnamed members who do not participate in, nor even attend, the very proceedings in which the members' rights are adjudicated finally. Thus, class actions diverge from the traditional concept of the American system of justice: individual parties before a judge and jury.

Increasingly, critics of the class action mechanism argue that too often class members receive trifling recoveries, such as "coupon settlements," amounting to pennies on the dollar of their loss.⁸ In contrast, class counsels' fees, based either on a percentage of the aggregate settlement, or a loadstar method, is often a considerable amount.⁹ On the surface, the public unease with class actions focuses primarily on the discrepancy between settlement for individual class members and payment of attorneys' fees for class counsel. It has become commonplace to read in publications of general circulation that large numbers of class members are paid coupons, while the class counsel is paid millions.¹⁰ More problematic, however, is grasping the idea that a class member can be bound by the result achieved by a single plaintiff on behalf of any number of absent class members. How is *this* adequate representation?

This article proposes that an informed assessment of the adequacy of representation offered through today's class actions may be traced back to the Founders' response to Parliament's doctrine of virtual representation. The

extend the jurisdiction of the courts of law to matters of equity will . . . tend gradually to change the nature of the courts of law and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

Id.

7. See *infra* Part I.B (discussing Justice Story's implementation of modern class action).

8. See *infra* note 10 and accompanying text (describing "coupon settlements").

9. See DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 21.7 (4th ed. 2014) (discussing diversity of methods for awarding compensation to class counsel). Methods for awarding compensation include the loadstar method, which takes into account factors such as uniqueness, novelty, experience of lawyers, and the financial expense of taking the case. *See id.*

10. See Barry Meier, *Court Rejects Coupon Settlement in Suit Over G.M. Pickup Trucks*, N.Y. TIMES (Apr. 18, 1995), <http://www.nytimes.com/1995/04/18/us/court-rejects-coupon-settlement-in-suit-over-gmpickup-trucks.html>, archived at <http://perma.cc/9S5A-ZXL5> (discussing coupon settlement suits); Michelle Singletary, *Class-Action Coupon Settlements Are a No-Win for Consumers*, WASH. POST (Apr. 27, 2011), http://www.washingtonpost.com/business/economy/class-action-coupon-settlements-are-a-no-win-for-consumers/2011/04/27/AFJITL1E_story.html, archived at <http://perma.cc/C5PV-UCNC> (explaining coupon settlements "coupon, credit or certificate toward the purchase of future products or services"); Ameet Sachdev, *Coupon Awards Reward Whom?*, CHI. TRIB. (Feb. 29, 2004), http://articles.chicagotribune.com/2004-02-29/business/0402290522_1_coupon-settlements-class-action-class-fairness-act, archived at <http://perma.cc/LX33-EY3U>.

immediate discussion sets out to describe the British doctrine of virtual representation before turning to describe the colonists' criticism of the doctrine, and further examines how this criticism informed the construction of the Constitution.¹¹ Thereafter, the examination leads into a brief account of the equitable roots of the class action that first appeared in England before arriving in America.¹² Finally, this paper turns to an analysis of the modern instrument designed to serve the adequacy of representation in the modern class action.¹³

In the end, this Article seeks not to provide a narrow "fix" for class action litigation, but instead argues that the same principles guiding the Founding Fathers' attempt at adequate representation should inform what can be considered adequate representation in class action litigation today. Specifically, fair and efficient class litigation demands that today's courts continue to shape procedural devices that safeguard absent class members, thereby fulfilling what Hamilton foresaw as the value of judicial flexibility, and simultaneously carrying through Justice Story's invocation of equitable principles.

I. FOUNDING THE LIMITS OF ADEQUATE REPRESENTATION

Commentators have evaluated the position of the class plaintiff in describing the pre-Revolutionary War British doctrine of virtual representation as Parliament's justification to meet the criticisms of representation afforded to those not qualified to vote, including British non-electors and American colonists.¹⁴ Still, proponents of this view of constitutionalism contended: "[T]hough nonelectors were not *actually* represented in the British legislature they were represented *virtually*."¹⁵ The importance the Founders placed on adequate representation was informed by their experience with virtual representation prior to the Revolutionary War.

A. Virtual Adequacy

Long before the American Revolution began, American colonists took pride in their English constitutional heritage.¹⁶ In the years between 1765 and 1776, this pride gave way to disbelief in the wake of British colonial policy, leaving

11. See *infra* Part I.A (describing foundation for adequate representation in class action suits).

12. See *infra* Part I.B (explaining class action representation in colonial America).

13. See *infra* Part II (focusing on class action coming of modern age).

14. See JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 7 (Univ. of Chicago Press 1989). Invoking both the public interest and class action litigation, John Phillip Reid posits: "The strange twisting of American government by judiciary in the late twentieth century may be lending new respectability to a British constitutionalism that we had thought was discarded in disgrace long ago." *Id.* He continued, asking, "[t]o what extent has the virtual, vicarious, nonelected representative of eighteenth-century Great Britain been reincarnated in the twentieth-century United States in the function of the public interest litigator or even the instigator of a class-action lawsuit?" *Id.*

15. *Id.* at 50.

16. See R. B. BERNSTEIN, THE FOUNDING FATHERS RECONSIDERED 27 (2009).

American colonists asking: “How did the English constitution apply to Britain’s exercise of authority over her American colonies?”¹⁷

Britain forged its policy in the practical realities of managing a transcontinental empire.¹⁸ Britain’s engagement in the colonial wars waged with France incurred a heavy financial toll.¹⁹ As a result, Prime Minister George Grenville sought remuneration from the American colonists, believing the British bore the cost of protecting colonists’ interests from the French.²⁰ In 1765, Grenville presented a series of taxes with the intent of achieving remuneration, the best known, of course, being the Stamp Act.²¹ The Stamp Act imposed taxes or “stamp duties on almost every form of paper used in the everyday life of the colonists: licenses and documents used in court . . . all private contracts; pamphlets, almanacs, and newspapers; and every individual advertisement in the newspapers.”²²

A month before the Stamp Act became law, George Grenville argued from the floor of Parliament that “the Parliament of Great Britain virtually represents the whole kingdom.”²³ Grenville contended: “[C]olonists were virtually represented in Parliament, as were the people of England who could not vote.”²⁴ Almost immediately, bellows of dissent resounded in the halls of Parliament. Among the most vociferous, William Pitt’s protest was immediate.²⁵ Taking on Grenville, he argued:

[T]his kingdom has no right to lay a tax upon the colonists . . . [who are] the subjects of this kingdom, equally entitled with yourselves to all the natural rights of mankind and the peculiar privileges of Englishmen. Equally bound by its laws, and equally participating of the constitution of this free country.²⁶

Grenville’s allies were just as swift to respond.²⁷ Proponents of the virtual representation doctrine argued the American colonists’ interests were represented by the king’s provincial agents and Great Britain’s shared

17. *Id.*

18. *See id.* (discussing trials and tribulations experienced by British Parliament).

19. *See id.* (explaining British financial suffering in colonial era).

20. *See BERNSTEIN, supra* note 16, at 27 (describing desires for payment by British government).

21. *See id.* at 27-29 (introducing Stamp Act).

22. MERRILL JENSEN, THE FOUNDING OF A NATION: A HISTORY OF THE AMERICAN REVOLUTION, 1763-1776 65 (1968).

23. REID, *supra* note 14, at 50.

24. *See JENSEN, supra* note 22, at 63.

25. *See REID, supra* note 14, at 53. “William Pitt was among the first members of the Commons to ask whether the doctrine of virtual representation in Parliament could be constitutionally applied to Americans.” *Id.*

26. JENSEN, *supra* note 22, at 166.

27. *See REID, supra* note 14, at 50-51 (discussing supporters of idea of virtual representation).

economic interests in the American colonies.²⁸ Adherents to the doctrine also pointed to the fact that there were three American-born members of the House of Commons, and that the wealth of England, Scotland, and Wales were subject to the same form of representation.²⁹

Dissenting American colonists also made their voices heard. British educator and political writer James Burgh sums up the discontent surrounding the doctrine this way:

According to the commonly received doctrine, that servants, and those who receive alms, have no right to vote for members of parliament, an immense multitude of the people are utterly deprived of all power in determining who shall be the protectors of their lives, their personal liberty, their little property . . .³⁰

Despite the protests, the Stamp Act became law on March 22, 1765.³¹ Many years later, James Madison found the Stamp Act “produced a radical examination of the subject,” referring to whether the power to tax was necessarily inherent in the Colonial Legislature.³² Thomas Jefferson provides a telling recount of the years leading into the Revolution in the wake of the Stamp Act: “The colonies were taxed internally and externally; their essential interests sacrificed to individuals in Great-Britain; their legislatures suspended; charters annulled; *trials by juries taken away*; their persons subjected to transportation across the Atlantic, and to trial before foreign judicatories; their supplications for redress thought beneath answers . . .”³³ Thus, the Stamp Act came to represent the inequity of virtual representation generally. Also, colonists were clear to point out that representation was not limited to legislative forms of government.

Adequate representation also demanded equal access to impartial courts. Lawyer James Otis bemoaned the need for an independent judiciary: “The necessity of a common, indifferent and impartial judge, makes all men seek one tho’ few find him in the *sovereign power*, of their respective states or any

28. See *id.* at 51 (listing several theories how virtual representation operated).

29. See *id.* (explaining two theories of virtual representation).

30. JAMES BURGH, POLITICAL DISQUISITIONS (1774), reprinted in 1 THE FOUNDERS' CONSTITUTION 393 (Philip B. Kurland & Ralph Lerner eds., 1987). “[W]e have a *right* to remonstrate, inform, and direct them. By which means, we become the regulators of our *own* conduct, and the institutors of our *own* laws, and nothing material can be done but by *our* authority and consent.” *Id.* at 55.

31. See JENSEN, *supra* note 22, at 59 (describing enactment of Stamp Act measure of Grenville administration).

32. Letter from James Madison to Joseph Cabell (Sept. 18, 1828), in JAMES MADISON: WRITINGS 815 (Jack N. Rakove ed., 1999).

33. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY XIII (1785), reprinted in THOMAS JEFFERSON: WRITINGS 242-43 (Merrill D. Peterson ed., 1984) (emphasis added).

where else in *subordination* to it.”³⁴ The obstruction of access to a fair adjudication of an individual’s rights was cited as justification for independence within the Declaration of Independence itself, which accused England of: “depriving [the colonists] in many cases, of the benefits of trial by jury.”³⁵

With each passing year, dissent grew louder among the colonists. As the call for adequate representation became deafening, the loudest voices, perhaps, were the men who would become the Founders. In 1774, Jefferson asks, “Can any one reason be assigned why 160,000 electors in the island of Great Britain should give law to four millions in the states of America, every individual of whom is equal to every individual of them, in virtue, in understanding, and in bodily strength?”³⁶ Jefferson leveled his criticism at virtual representation.

At the center of this growing fissure was the basis for the power to tax. For the Founders, the legitimacy of authority to tax relied upon consent. Alexander Hamilton expressed fundamental disagreement with the proposition of taxation without representation, explaining: “Besides the clear voice of natural justice in this respect, the fundamental principles of the English constitution are in our favor. It has been repeatedly demonstrated, that the idea of legislation, or taxation, when subject is not represented, is inconsistent with that.”³⁷ Hamilton believed authority assumed consent. Jefferson agreed, stating: “The true ground on which we declare these acts void is, that the British parliament has no right to exercise authority over us.”³⁸ For American colonists, representation was only as good as the adequacy of the class of representation to which the colonists were afforded.

The stage for a revolution was set, and with it an opportunity to assemble a government that would remedy the faults and inadequacies of virtual representation. This bore a promise for adequate representation that the colonists desired.

34. JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 53 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis in original). Otis continues: “In solitude men would perish; and yet they cannot live together without contests.” *Id.* These contests require some arbitrator to determine them. *See id.*

35. THE DECLARATION OF INDEPENDENCE (U.S. 1776), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 10 (Philip B. Kurland & Ralph Lerner eds., 1987).

36. THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), *reprinted in* THOMAS JEFFERSON: WRITINGS 111-12 (Merrill D. Peterson ed., 1984).

37. ALEXANDER HAMILTON, A FULL VINDICATION OF THE MEASURES OF THE CONGRESS (1774), *reprinted in* ALEXANDER HAMILTON: WRITINGS 12 (Joanne B. Freeman ed., 2001). Similarly, Alexander Hamilton, addressing “Friends and Countrymen” in 1774, found that the exercise of authority in the absence of consent was what distinguished freedom from slavery: “The only distinction between freedom and slavery consists in this: In the former state, a man is governed by the laws to which he has given his consent, either in person, or by his representative: In the latter, he is governed by the will of another.” *Id.* at 11.

38. JEFFERSON, *supra* note 33, at 110.

B. Post-Revolution: Righting the Wrongs

In the aftermath of the revolution, the Founders set out to frame the document that would provide a solid foundation upon which to build their superstructure: the American government. The resulting debates over the organization and implementation of this nascent nation capture the values and principles sanctifying its foundation.

Asked to define the term “republic,” Jefferson explains: “[I]t means a government by its citizens in mass, acting directly and personally according to rules established by the majority.”³⁹ In practice, however, Jefferson knew his definition would fail to operate beyond a small township.⁴⁰ Therefore, he declared the following principle: “[G]overnments are more or less republican as they have more or less of the element of popular election and control in their composition.”⁴¹ For Jefferson, the nearest approximation of a pure republic would be that in which the “powers of the government, being divided, [are] exercised by representatives chosen either *pro hac vice*, or for such short terms as should render secure the duty of expressing the will of their constituents.”⁴²

Still, virtual representation’s echo can be heard when Jefferson requests:

Those so chosen by the people a second choice themselves, and they generally will chuse wise men. For this reason it was that I proposed the representatives (and not the people) should chuse the Senate, and thought I had notwithstanding that made the Senators (when chosen) perfectly independent of their electors.⁴³

39. Letter from Thomas Jefferson to John Taylor (May 28, 1816), in THOMAS JEFFERSON: WRITINGS 1395 (Merrill D. Peterson ed., 1984). In particular, Jefferson believed:

[T]he mass of the citizens is the safest depository of their own rights, especially that the evils flowing from the duperies of the people, are less injurious than those from the egoism of their agents, I am a friend to that composition of government which has in it the most of this ingredient.

Id.

40. *See id.* at 1392 (“I doubt it would be practicable beyond the extent of a New England township.”).

41. *Id.* at 1395.

42. *Id.* at 1392-93. He continues:

Such a government is evidently restrained to very narrow limits of space and population . . . [T]he further the departure from direct and constant control by the citizens, the less has the government of the ingredient of republicanism . . . The purest republican feature in the government of [Virginia], is the House of Representatives.

Id. Reflecting back, Thomas Jefferson concedes that “it must be agreed that our governments have much less of republicanism than ought to have been expected; in other words, that the people have less regular control over their agents, than their rights and interests require.” Letter from Thomas Jefferson to John Taylor (May 28, 1816), in THOMAS JEFFERSON: WRITINGS 1394 (Merrill D. Peterson ed., 1984).

43. Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 THE FOUNDERS’ CONSTITUTION 56 (Philip B. Kurland & Ralph Lerner eds., 1987).

Thomas Jefferson understood that adequate representation did not mean direct representation: “I have ever observed that a choice by the people themselves is not generally distinguished for [its] wisdom.”⁴⁴ Far from it, in fact, since “[t]he people cannot assemble themselves. Their representation is unequal and vicious.”⁴⁵

But for Madison, adequate representation demanded proportionate representation. “[N]o proper superstructure would be raised,” he pleaded, “by substituting an equal in place of a proportional [r]epresentation.”⁴⁶ He continued, stating: “In all cases where the Gen[era]l Government is to act on the people, let the people be represented the votes proportional. In all cases where the Govern[men]t is to act on the States as such, in like manner as Cong[ress] now act on them, let the States be represented [and] the votes equal.”⁴⁷ As John Adams believed, the practicality and inefficiency had a direct bearing on the people’s liberties. Here, Adams denotes the principles of fairness and efficiency that continue to shape class action litigation:

If by *the people* is meant the whole body of a great nation, it should never be forgotten, that they can never act, consult, or reason together, because they cannot march five hundred miles, nor spaire the time, nor find a space to meet; and, therefore, the proposition, that they are the best keepers of their own liberties, is not true.⁴⁸

Thus, to some extent, adequacy of representation, if not overtly provided for, could fall prey to the practicalities of establishing an efficient democracy.

For the Founders, adequacy of representation extended beyond the legislature. The Founders were also concerned with the adequacy of citizens’ representation within the Judiciary. Although class actions did not exist at the time of this country’s founding, this concern of representation is the same today as it was then, though in different contexts. In *Federalist No. 17*, Hamilton deems the “ordinary administration of criminal and civil justice” as the “most powerful, most universal and most attractive source of popular obedience and attachment.”⁴⁹ He also called courts “the immediate and visible guardian of

44. *Id.*

45. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 THE FOUNDERS’ CONSTITUTION 69 (Philip B. Kurland & Ralph Lerner eds., 1987).

46. Speech in the Federal Convention Opposing Equal Representation in the Senate (July 14, 1787), in JAMES MADISON: WRITINGS 123 (Jack N. Rakove ed., 1999).

47. *Id.* at 124.

48. JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1787), in 1 THE FOUNDERS’ CONSTITUTION 59 (Philip B. Kurland & Ralph Lerner eds., 1987).

49. THE FEDERALIST NO. 17 (Alexander Hamilton), reprinted in 1 THE FOUNDERS’ CONSTITUTION 271, 105-08 (Philip B. Kurland & Ralph Lerner eds., 1987).

life and property.”⁵⁰ Therefore, access to the Judiciary was fundamental, in consideration of the strictures inhibiting American colonists’ access to fair adjudication of their rights before the revolution.

Access to this system, then, is a guidepost to achieving adequacy of representation. For Hamilton, the courts provided a forum for representation of those individuals whose rights were in conflict with the majority, as represented by the legislature. In *Federalist No. 78*, Hamilton sought a judiciary that provided “inflexible and uniform adherence to the rights of the constitution and of individuals.”⁵¹ As Hamilton indicates, the courts are among the most direct systems through which to assert one’s rights. During the Constitutional Convention, measures were debated to ensure the independence of the Judiciary. As was ultimately adopted, Federal Judges, “both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”⁵²

The Federalists, however, did not hold a monopoly on the issue of whether individuals should have broad access to the courts. Anti-Federalists also believed justice demanded a fair adjudication of an individual’s rights. Yet, Anti-Federalist concern went further, believing the potential expansion of the jurisdiction of federal courts would deny litigants fair representation before a local jury, which would have the most familiarity with the context of the asserted rights. Anti-Federalist authors feared the federal courts—the scope of which was left to a future legislature—would abolish the opportunity to receive a fair, local trial. As Brutus demanded:

[I]t ought to be left to the state governments to provide for the protection and defense of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other—[P]rotection and defense against the murderer, the robber, the thief, the cheat, and the unjust person, is to be derived from the respective state governments.⁵³

Similarly, discussing the Judiciary on the floor of the House of

It is that, which—being the immediate and visible guardian of life and property—having its benefits and its terrors in constant activity before the public eye—regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake—contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government.

Id.

50. *Id.*

51. THE FEDERALIST NO. 17 (Alexander Hamilton), *reprinted in* ALEXANDER HAMILTON: WRITINGS 426 (Joanne B. Freeman ed., 2001) (emphasis added).

52. U.S. CONST. art. III, § 1. The insulation of judges from the political process by appointment is now echoed in the process in which class counsel is appointed by the judge. See FED. R. CIV. P. 23(g) (providing framework for appointing class counsel).

53. BRUTUS, NO. 7 (Jan. 3, 1788), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 273 (Philip B. Kurland & Ralph Lerner eds., 1987).

Representatives, William Smith, a South Carolina representative, explained that the “[c]onstant control of the Supreme Federal Court over the adjudication of the State courts, would dissatisfy the people, and weaken the importance and authority of the State judges.”⁵⁴ Recalling the colonists’ pre-Revolution anxieties, he feared the right of a fair trial where “[a]n offender is dragged from his house, friends, and connexions, to a distant spot.”⁵⁵

While Federalists and Anti-Federalists agreed the jury trial was an important aspect of a fair trial, Hamilton hesitated on whether the jury trial should become an absolute right in civil litigation given the value chancellors served.⁵⁶ By judging Hamilton’s response in *Federalist No. 83*, however, this fear must have been widely held.⁵⁷ Hamilton acknowledged that “the mere silence of the constitution in regard to *civil causes*” was an objection raised during the Constitutional Convention that was met with most success.⁵⁸ Hamilton ameliorates:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury. Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.⁵⁹

As Hamilton articulated, consensus was reached on the importance of promising a fair adjudication of one’s rights. The method, however, was less clear.

In defending “the value chancellors [serve],” Hamilton predicted the need for flexibility and invention within the Judiciary. He believed the “great and primary use of a court of equity is to give relief in *extraordinary cases*, which are *exceptions* to general rules.”⁶⁰ Many years later, Justice Story would balance the demand for a fair trial with the practical requirement of judicial economy, fashioning a procedural device from English courts of equity that could accommodate multitudes of similarly situated litigants.⁶¹ This device would become the modern class action.

54. “House of Representatives, The Judiciary” (Aug. 29, 1789), in 3 THE FOUNDERS’ CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987), available at http://presspubs.uchicago.edu/founders/documents/a3_ls13.html, archived at <http://perma.cc/CZP9-7P4G>.

55. *Id.*

56. See THE FEDERALIST NO. 83 (Alexander Hamilton), reprinted in ALEXANDER HAMILTON: WRITINGS 452 (Joanne B. Freeman ed., 2001) (emphasis added).

57. *See id.*

58. *Id.*

59. *Id.* at 455.

60. THE FEDERALIST NO. 83 (Alexander Hamilton), reprinted in ALEXANDER HAMILTON: WRITINGS 461 (Joanne B. Freeman ed., 2001) (emphasis added).

61. See *infra* Part II.A (describing Justice Story’s imposition of class action litigation standards).

Finally, the Founders understood the plight of the individual within the imbalance and inequities of a growing society. To this end, courts provide an impartial venue, vital to the fair representation of the politically powerless. The following excerpt from Madison's notes on the federal convention predicts this imbalance:

In every community where industry is encouraged, there will be a division of it into the few [and] the many. Hence separate interests will arise. There will be debtors [and] [c]reditors. Give all power to the many, they will oppress the few. Give all power to the few they will oppress the many. Both therefore ought to have power, that each may defend itself against the other.⁶²

Although the class action device had yet to make it across the Atlantic, these imbalances underscore the need for broad access to courts. As would later be found, however, achieving such broad access would require judicial innovation.

The class action device would later be adopted as a measure to ensure broad access to an impartial court for fair adjudication of the rights of many individuals similarly situated in a group, which the law has come to define as a class. Truly understanding the extent to which this abstract form of representation achieves adequacy of representation requires an understanding of the development and function of the modern class action.

II. PROCEDURAL PROBLEMS

Like political systems, group litigation functions on the concept of representation. As Professor Yeazell indicates, the justification for representation is perceived in two ways. First, in actual consent representation, "the treatment of the group as a group was appropriate because all the members consented to be treated so."⁶³ The second justification, "interest representation," operates without consent to representation, since all members share identical interests.⁶⁴ Here, "[i]t becomes crucially important . . . that the interests of the represented and the representative match, because only their congruence guides the invisible hand and keeps the representative loyal."⁶⁵

The class action's jurisprudence mechanism arose organically from medieval society's collective social and political structure.⁶⁶ In medieval England, two types of courts existed—ecclesiastical and secular (lay) courts.⁶⁷

62. James Madison, Records of the Federal Convention (June 18, 1789), reprinted in 1 THE FOUNDERS' CONSTITUTION 122, 1:288 (Philip B. Kurland & Ralph Lerner eds., 1987).

63. See YEAZELL, *supra* note 3, at 175.

64. *Id.*

65. *Id.*

66. *See id.* at 174-220.

67. *See* R. Jason Richards, *A Primer on the Origins and Implications of the Thomas Becket Affair*, 1 LINCOLN MEM'L U. L. REV. 145, 147 (2014) (describing Medieval England's court system).

At that time, group status defined society, which stemmed from one's membership in entities like villages, guilds, parishes, and manors.⁶⁸ A group's status defined the duties and obligations common to all members. When disputes arose and litigation affecting the entire group became necessary, chosen representatives spoke before the relevant legal or religious courts on behalf of their group.⁶⁹ Therefore, representative or group litigation was a necessary and inevitable outgrowth of group society.

Between the years 1400 and 1700, the ushering in of the modern European state saw important social, economic, and legal changes. The legal recognition of the corporate entity, such as the parish's corporate status, was important to the evolution of group litigation.⁷⁰ In many cases this legal recognition became the primary basis for a group's right to bring grievances to the royal court; lack of corporate status, however, often hindered such legal recognition.⁷¹ Thus, to avoid multiple suits and provide for the issuance of complete decrees to bind all interested parties, England's equity courts, or Courts of Chancery, imposed a compulsory joinder rule.⁷² "Realizing the administrative problems inherent in bringing all interested parties before the court, Chancery developed the Bill of Peace, a class or representative action by which one person could sue on behalf of others similarly situated. A subsequent decree would be binding on the entire class."⁷³

It was against this Parliamentary backdrop, and the sea of discontent in the colonies over the fairness of taxation based on virtual representation, that the Founders considered the formation of our constitutional form of government. Indeed, it is the position of this paper that the Founders' early struggles with the tenants of virtual representation have continued to shape the procedural and substantive developments of class litigation in our courts. Efficiency and fairness still serve as key rationales to American courts' adoption of such procedure.⁷⁴ Given the ad hoc invocations of this equitable administration of justice over centuries, however, the creation and evolution of today's class action has been slow and difficult to track.⁷⁵ Still, trends emerge as the courts develop procedural safeguards meant to ensure the principles of fairness and efficiency.

68. See Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 871-88 (1977).

69. See *id.* at 878 (explaining chosen group representatives' duties and obligations).

70. See YEAZELL, *supra* note 3, at 130-31.

71. See *id.*

72. See 3 HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 1.09 (3d ed. 1992).

73. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 803-04 (Bankr. E.D.N.Y. & S.D.N.Y. 1991) (citing 1 POMEROY, *EQUITY JURISPRUDENCE* §§ 252, 253 (1918)).

74. See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." *Id.*

75. YEAZELL, *supra* note 3, at 175.

“One of the ways in which group litigation in the modern era has been special is its confinement to a narrow substantive range, a range dictated by the concerns of the particular groups momentarily occupying social and judicial interests.”⁷⁶ In seventeenth century cases, for example, these interests were represented by tenants or parishioners who shared identical interests in lower rents or tithes, *and* they consented to their representation by the named parties in the suit.⁷⁷ Modern day class actions have developed from the framework set by historical trial and error. The next section of this paper sets forth the development of the class action in current American jurisprudence.

A. Taking Up the Baton: Class Action Comes of Age in America

American group litigation has its roots in Supreme Court Justice Joseph Story’s mid-century *Equity Jurisprudence*, authored at a time when America’s economy was settling into the long, often painful, transition from its agrarian roots to the industrial force it became leading into the late nineteenth century.⁷⁸ Professor Yeazell identifies American courts’ initial adoption of class litigation as a protracted, and often ad hoc, reaction to procedural problems raised by particular groups.⁷⁹

American courts first grappled with class litigation in 1820, with Justice Story’s opinion in *West v. Randall*.⁸⁰ In *West*, Justice Story presided over a claim brought in equity under diversity jurisdiction by a Massachusetts resident claiming that trustees, residents of Rhode Island, wrongfully denied his inheritance.⁸¹ Story focused on the possibility of whether the other heirs—Rhode Island residents—had to be joined as plaintiffs, thereby defeating diversity jurisdiction.⁸² Justice Story framed his discussion of joinder in terms of group litigation. As Yeazell puts it, “Story identified a category of cases in which the suit could go forward without joinder of all interested parties.”⁸³ Story affirmed the court was “enabled to make a complete decree between the parties, may prevent future litigation by taking away the necessity of a multiplicity of suits, and may make it perfectly certain, that no injustice shall be done, either to the parties before the court, or to others.”⁸⁴ The twin

76. *Id.* at 195.

77. *See id.* at 176.

78. *See id.* at 214-16.

79. *See YEAZELL, supra* note 3, at 213-20.

80. 29 F. Cas. 718 (C.C.D.R.I. 1820); *see also YEAZELL, supra* note 3, at 217.

81. 29 F. Cas. at 722 (discussing case back-story).

82. *See id.* “The other heirs . . . are not made parties to the bill And no reason is assigned in the bill for the omission. The answer . . . names all the other heirs, and alleges them to be within the jurisdiction of the court, and insists upon their being necessary parties.” *Id.* at 721. “For [Story] the problem was not representation but whether the suit could go forward without joining *either* the nonparties *or* their representative.” YEAZELL, *supra* note 3, at 217.

83. YEAZELL, *supra* note 3, at 217.

84. *West*, 29 F. Cas. at 721. “It is a general rule in equity, that all persons materially interested, either as

rationales—fairness and efficiency—would continue to shape what future courts would deem as adequate representation in group litigation.⁸⁵

In 1836, Justice Story returned to the subject of group litigation in his treatise titled *Commentaries on Equity Jurisprudence*, wherein he addressed the challenge raised in situations where multiple suits are brought to litigate the same questions between the same parties.⁸⁶ Stated simply, “where there is one general right to be established against a great number of persons,” too often “perpetual” and “fruitless litigation” results.⁸⁷ In these instances, Story proposed applying a form of equity pleading dating back to seventeenth-century English Chancery court cases known as a Bill of Peace, “brought by a person to establish and perpetuate a right which he claims and which from its nature may be controverted by different persons, at different times . . . and justice requires that the party should be quieted in the right if it is already sufficiently established.”⁸⁸ Story felt the Bill of Peace ensured court efficiency and litigant finality.⁸⁹ Story was so confident in the idea that he dedicated an entire section describing the “use of bill of peace to prevent multiplicity of suits.”⁹⁰

Less than a decade later, in 1842, the United States Supreme Court provided

plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be.” *Id.* Justice Story’s opinion continues to frame courts’ grapple with aggregate litigation. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999) (discussing fairness and efficiency rationales underlying group litigation).

85. *See Ortiz*, 527 U.S. at 833 (describing fairness and efficiency motives). Justice Story further provides:

[W]here the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or whether the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree.

29 F. Cas. at 722.

86. *See* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 542 (Bos. 1836).

87. *Id.* Justice Story presents the fundamental question of class action litigation:

[W]hether the function of the class is to consolidate suits that would otherwise be brought (and thus to reduce the caseload of the Judiciary) or to facilitate the bringing of suits that would otherwise not be brought because the individual stakes are too small (and thus to increase the accessibility of adjudication).

YEAZELL, *supra* note 3, at 218.

88. STORY, *supra* note 86, at 543. Justice Story “described the old group-litigation suits as examples of bills of peace, in which the ‘obvious ground of the jurisdiction of Courts of Equity . . . is to suppress useless litigation, and to prevent multiplicity of suits.’” YEAZELL, *supra* note 3, at 218.

89. *See* STORY, *supra* note 86, at 543.

90. *Id.*

Rule of Practice for the Courts of Equity, Rule 48, adopting the same rational and interests expressed in Justice Story's treatise.⁹¹ The rule centered on achieving efficient resolution through group litigation, as long as there were "sufficient parties before [the court] to represent all the adverse interests of the plaintiffs" and pending accomplishment "without prejudice to the rights and claims of all the absent parties."⁹² Application of the rule centered on the number of parties and the impracticality of joinder.⁹³

In 1853, the Supreme Court expanded this analysis to include the similarities among class members' claims.⁹⁴ The Supreme Court would exercise this ability in 1912 when it promulgated Rule 38 to replace Rule 48, which Professor Yeazell describes as: "where the parties were too numerous for joinder, a few could sue or defend on behalf of the rest."⁹⁵ Still, the lack of procedural structure left judges without a sturdy framework to provide for adequate representation of absent class members. Nevertheless, class actions were binding on those absent parties, though in narrow and specific circumstances.⁹⁶

In 1938, Rule 23 appeared, representing the Rules Committee's attempt at providing an alternative for the procedural deficiency of Rule 38.⁹⁷ Rule 23 created three categories of class actions.⁹⁸ The "true" form of class action included class actions in which the "unity of interest" was shared among all members of the class.⁹⁹ "Hybrid" class actions were those in which the interest was "several" among plaintiffs but related to the same property interest.¹⁰⁰ The last form, "spurious" class actions, even included instances where the class's interest was several, as long as a "common question of law or fact" influenced those several interests and common reprieve was sought.¹⁰¹ These class actions were binding on unnamed class members in the first two categories, but not for spurious class cases.¹⁰² Adequate representation was the condition precedent to achieving a binding effect on absent class members.¹⁰³ Thus, "[a]s in England,

91. See FED. R. EQ. 48 (1842) (repealed 1912), quoted in 42 U.S. (1 How.) lvi (1843) (outlining equity rules).

92. *Id.*

93. See Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach To Regulating Class Actions*, 58 VAND. L. REV. 995, 1052 (2005) (discussing emphasis of early class action cases).

94. Smith v. Swormstedt, 57 U.S. (1 How.) 288, 311 (1853) (establishing members of same concern beneficiaries to same extent).

95. YEAZELL, *supra* note 3, at 225 (recognizing Supreme Court introduction of modern day class action).

96. See *id.* at 225 (explaining absent parties bound by disposition of represented case).

97. See Debra Lyn Bassett, *Constructing Class Action Reality*, 2006 BYU L. REV. 1415, 1433-34 (2006) (providing history of original Rule 23).

98. See *id.* at 1434-35 (classifying Rule 23 into three subsections).

99. *Id.* at 1434-36, 1434 n.76 (explaining true class claims).

100. *Id.* at 1434 n.76 (describing hybrid class claims including several and not joint rights).

101. Bassett, *supra* note 97, at 1433-34, 1434 n.74 (explaining ability for class action suits).

102. See *id.* at 1436 (describing parties bound by class actions except spurious cases).

103. See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (explaining adequate representation necessary to bind parties to adjudication). In *Hansberry*, the Supreme Court provided: "It is familiar doctrine of the federal

the class action in the United States evolved from the court's equitable jurisdiction over bills of peace and in response to the equitable rule of compulsory joinder.”¹⁰⁴

B. Modern American Class Action

Rule 23 was amended and took its current form in 1966.¹⁰⁵ With this revision, the committee adopted a more structured framework in place of the 1938 version’s inflexible standard. The rule makers sought, in connection with Rule 23 and other joinder rules, “to turn federal jurisprudence from abstract inquiries to functional analysis—analysis that considers the practical, as well as the formal legal, effects of litigation.”¹⁰⁶ Judicial efficiency and procedural fairness to both defendants and class members thus lie at the center of the class action.

If the goal is fair and adequate representation and efficient adjudication of class members’ rights, then Rule 23 is the means to achieve it. It does so by establishing procedural elements effective from the initial certification process through a court’s strict oversight and approval of settlement. These high stakes demand judicial vigilance because absent class members will have their rights adjudicated *in abstentia*, binding them to the results regardless of the outcome.

1. Class Certification

Rule 23(a)(4) requires that “representative parties will fairly and adequately protect the interests of the class.”¹⁰⁷ In turn, judicial oversight protects absent class members from the potential conflicts arising between the class counsel, representative parties, and the defense counsel. The court must be convinced the proponent of the class has satisfied their burden to show that class certification is appropriate.¹⁰⁸ Further, classes formed under Rule 23(b)(3) must be carefully scrutinized, because these are classes in which “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹⁰⁹ This type of class action has the potential to bind unidentified,

courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented” *Id.* at 42–43.

104. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 804 (explaining trial court use of equitable “powers”).

105. See *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997) (noting 1966 amendments created Rule 23 in its current form); see also FED. R. CIV. P. 23.

106. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1485 (2008).

107. FED. R. CIV. P. 23(a)(4).

108. See HERR, *supra* note 9, § 21.131; see also WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 7:24 (5th ed.) (discussing requirements for class certification).

109. FED. R. CIV. P. 23(b)(1)(B)(3).

absent class members.

In turn, as one court observed, “[t]he purpose of the adequate representation requirement of class certification analysis is merely to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in presentation of the claim.”¹¹⁰ In any event, the following four class prerequisites must be satisfied: the “class is so numerous that joinder of all members is impracticable . . . there are questions of law or fact common to the class . . . the claims or defenses of the representative parties are typical of the claims or defenses of the class . . .” and “the representative parties will fairly and adequately protect the interests of the class.”¹¹¹ The adversarial tension built into the hearing ensures vigorous and diligent advocacy for class members. This tension exists because class members are entitled to present evidence, cross-examine witnesses, object to the fairness, adequacy, and reasonableness of the settlement, and present arguments of denial of fundamental rights of due process.

The court must be satisfied the proponent has met the burden of two issues: first, the representative parties, through their attorneys, will vigorously litigate the overall claims, and second, that there must exist no conflict or antagonism between the interests of those named plaintiffs and the other, potential unknown, members of the proposed class.¹¹²

The requirement of fair and adequate representation also extends to court appointment of class counsel.¹¹³ The court must consider the diligence and involvement that the putative class counsel has exhibited while investigating and structuring the assumed class.¹¹⁴ This inquiry extends into putative counsel’s experience handling similar claims and other forms of complex litigation, as well as knowledge of the applicable law.¹¹⁵ Finally, the court must be convinced that class counsel has the resources to vigorously prosecute the class claim.¹¹⁶

110. P.J.’s Concrete Pumping Serv., Inc. v. Nextel W. Corp., 803 N.E.2d 1020, 1030 (Ill. App. Ct. 2004).

111. FED. R. CIV. P. 23(a). To determine whether “the questions of law or fact common to class members predominate over any questions affecting only individual members,” and whether “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy,” the court considers four relevant factors: “the class members’ interests in individually controlling the prosecution or defense of separate actions . . . the extent and nature of any litigation concerning the controversy already begun by or against class members . . . the desirability or undesirability of concentrating the litigation of the claims in the particular forum” and “the likely difficulties in managing a class action.” FED. R. CIV. P. 23(b)(3)(A)-(D).

112. See RUBENSTEIN, *supra* note 108, § 13:18. The factors affecting this determination include: the sufficiency of counsel, possible interest conflicts, the virtue of individual plaintiffs, the representatives’ familiarity with the case and its processes, and the representative’s belief in the validity of the matter sought, along with geographic limitations, and plaintiffs’ ability to finance the class action. *Id.*

113. See FED. R. CIV. P. 23(g).

114. See HERR, *supra* note 9, § 21 (analyzing author’s comment).

115. See *id.* (discussing experience required of class action counsel).

116. See FED. R. CIV. P. 23(g)(4) (describing duties of class action counsel).

2. Notice

Courts are wary to bind absent class members to the outcome of a judgment. To meet this concern, Rule 23 contains notice requirements for attempts to accomplish the objective that the class action reaches the “broadest possible binding effect of any judgment that is reached.”¹¹⁷ In the interest of protecting class members and fairness, Rule 23(d)(1)(b) allows the court to issue orders that require “giving appropriate notice to some or all class members of: (i) any step in the action; (ii) the proposed extent of the judgment; or (iii) the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action.”¹¹⁸ This notice allows class members to opt-out, perhaps engaging in their own litigation.

While Rule 23(c)(2)(A) provides the court with the authority to direct notice of certification to a Rule 23(b)(1) or (b)(2) class, courts have increasingly limited the due process requirement of mandatory notice to actions brought under Rule 23(b)(3).¹¹⁹ Further, Rule 23(b)(3) classes must receive “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”¹²⁰ For absent class members who cannot be identified, “notice must be ‘reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”¹²¹ Still, notice is only one of several instruments meant to ensure the meticulous judicial oversight over absent, unidentified class members.

3. Settlement

Judicial oversight extends to settlement agreements reached between named class representatives, which are represented by counsel, and their opponents,

117. 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1786 (3d ed. 2014).

118. FED. R. CIV. P. 23(d)(1)(b).

119. See WRIGHT & MILLER, *supra* note 117 (describing direct notice of certification). Wright and Miller also recognize that most courts have “expressly limited the mandatory notice provided in the rule to actions brought under Rule 23(b)(3).” *Id.*

120. FED. R. CIV. P. 23(c)(2)(B).

The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Id.

121. WRIGHT & MILLER, *supra* note 117 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950)).

whether represented or not.¹²² Due process requires all members of a class receive notice of a proposed settlement and, when applicable, of the right to opt out.¹²³ The class members are entitled to reasonable notice of a proposed settlement of a class action or, in the alternative, the best practicable notice under the circumstances.¹²⁴ Adequate notice of a proposed settlement must be sufficiently detailed as to allow absent class members to assess the related potential costs and benefits.¹²⁵

The fairness and adequacy of representation is further ensured through a process in which objectors can oppose the fairness and adequacy of a class settlement.¹²⁶ Of course, all class members and any other party to the settlement proceeding has standing to object to the proposed settlement.¹²⁷ Although objectors can lend to the protection of unnamed class members, there exists a cottage industry of professional objectors whose motives are purely financial, hoping to be “bought off” by counsels of either party who wish to reach a timely resolution. Courts have found that non-class members lack standing to object, although interjection of opposing views of non-class members can proceed through intervention under Rule 24.¹²⁸

In discussing objectors, *Shaw v. Toshiba America Information Systems, Inc.*,¹²⁹ provides an exemplary account of the conflicted roles objectors can serve.¹³⁰ On one hand, the *Shaw* court recognized some objections were evidently “canned,” filed by “professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests.”¹³¹ On the other hand, objectors raising merit based objections can lend to the fairness of the settlement. For example, as seen in *Shaw*, an objector succeeded in extending the redemption period for coupons that were to be distributed in settlement.¹³²

122. See HERR, *supra* note 9, § 13.14.

123. See *In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834, 843 (10th Cir. 1974). Class certification under Rule 23(b)(1) and (b)(2) is considered mandatory, but the rules do not provide class members with an automatic opt-out right. See FED. R. CIV. P. 23(b)(1)-(2); FED. R. CIV. P. 23(c)(2)(A) (permitting certification of classes under Rules 23(b)(1) and (b)(2)).

124. See *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979) (noting courts have discretion to determine adequate notice limited only by reasonableness standard).

125. See *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 622 (D. Col. 1974).

126. See RUBENSTEIN, *supra* note 108, § 13:18 (discussing preliminary approval phase for requirements of class certification); see also HERR, *supra* note 9, § 21.643 (discussing role of objectors in settlement proceedings).

127. See HERR, *supra* note 9, § 21.643 (explaining any party to settlement may object).

128. See *id.* “In order to guard against an objector who is using the strategic power of objecting for private advantage, the court should examine and consider disapproving the proposed withdrawal of an objection if the objector is receiving payment or other more favorable than those available to other similarly situational class members.” *Id.*

129. 91 F. Supp. 2d 942 (E.D. Tex. 2000).

130. See RUBENSTEIN, *supra* note 108, § 13:21.

131. *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000).

132. See *id.* at 974. “The court here found that counsel for objectors, by extending the coupon redemption period from one hundred eighty days to one year has doubled the length of time available for class members to redeem their coupons and has thereby conferred a substantial benefit on the class.” *Id.* at 974 (holding

Thus, objectors provide another measure of protection, bolstering the adequacy of representation afforded to those absent, unidentified class members.

Despite modern efforts to balance fairness with efficiency in class action litigation, the Founders' concerns about the adequacy of representation and the potential for abuse remain with us today. This potential is most often seen when a myopic focus on judicial efficiency inspires extreme applications of nonparty preclusion, something the Founders recognized as the doctrine of virtual representation. As discussed above, the British Parliament used the doctrine to justify its authority to tax American colonists before the Revolutionary War, but its attempted enforcement served as a lightning rod for political revolution.¹³³ The use of extreme applications of preclusion principles to bar absent class members from having their constitutionally guaranteed day in court has remained an area of contention in American jurisprudence ever since.

4. *Hansberry v. Lee*

The Supreme Court established the foundational prerequisite of due process in modern class actions in the seminal case of *Hansberry v. Lee*.¹³⁴ In *Hansberry*, the Court held that the constitutional validity of claim preclusion depends on whether the party to be precluded was "afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."¹³⁵ Thus the key to binding absent class members to an action is to ensure the nonparty's interests have been adequately represented.¹³⁶ Absent adequate representation, the doctrine of res judicata may not be used to deny a litigant his or her due process right to be heard.¹³⁷

In *Hansberry*, Chicago landowners sought to enforce a racially restrictive covenant upheld in an earlier lawsuit, which provided that no portion of the owners' land should be sold, leased, or occupied by African Americans.¹³⁸ This covenant was only effective upon the signature of ninety-five percent of the landowners affected.¹³⁹ The *Hansberry* Court found the covenant invalid, as only fifty-four percent of landowners signed it.¹⁴⁰ The *Hansberry* petitioners

objecting doubled coupon redemption period thereby conferred substantial benefit on class).

133. See *supra* Part I (describing British Parliament virtual representation of colonists).

134. 311 U.S. 32 (1940).

135. *Id.* at 40.

136. See R. Jason Richards, *Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata*, 38 SANTA CLARA L. REV. 691, 704 (1998).

137. See *id.* "Res judicata" is a common-law, judge-made doctrine of preclusion meaning "'the thing has been adjudicated.'" *Id.* at 691 n.3 (quoting *Barrett v. Town of Guernsey*, 652 P.2d 395, 398 (Wyo. 1982)).

138. See 311 U.S. at 37-38.

139. See *id.* at 38.

140. See *id.* "To the defense that the agreement had never become effective because owners of 95 percent of the frontage had not signed it, respondents pleaded that the issue was res judicata by the decree in an earlier suit." *Id.*

raised a due process argument, claiming they were not parties to the prior suit and thus should not be bound by its decree.¹⁴¹ Both the trial court and the Illinois Supreme Court agreed with the *Hansberry* petitioners that only fifty-four percent signed the agreement, but upheld the landowner agreement since the issue was res judicata and could not be attacked.¹⁴² The Supreme Court granted certiorari.¹⁴³

In reversing, Justice Stone explained: “It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”¹⁴⁴ He continued: “[A] judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe . . .”¹⁴⁵ Yet, class actions were the exception to the rule, since “the judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.”¹⁴⁶ Even in class actions, there exists a failure of due process “only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.”¹⁴⁷ The Supreme Court found this was such a case, holding that class representatives “whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.”¹⁴⁸ With *Hansberry*, the Supreme Court recognized an important procedural safeguard in class action litigation, that due process, at a minimum, requires that nonparties have “notice and opportunity to be heard.”¹⁴⁹ Without meeting this fundamental due process requirement, the conclusive effect of a prior judgment against an absent class is subject to attack.

5. Richards v. Jefferson County

Over fifty years after *Hansberry*, the Supreme Court would once again confront and condemn what it called “extreme applications” of state law preclusion principles in the class action setting.¹⁵⁰ *Richards v. Jefferson*

141. See 311 U.S. at 38.

142. See *id.* (describing lower court decision).

143. See *id.* (explaining why Court granted certiorari in *Hansberry*).

144. See *id.* at 40.

145. *Hansberry*, 311 U.S. at 40 (internal citations omitted).

146. *Id.* at 41.

147. *Id.* at 42.

148. *Id.* at 45.

149. *Hansberry*, 311 U.S. at 40.

150. See *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996) (recognizing potential conflict between state application of res judicata and adjudication of federal rights).

*County*¹⁵¹ involved a taxpayer challenge to a state-imposed occupational tax.¹⁵² The Alabama Supreme Court held the doctrine of res judicata prevented the *Richards* taxpayers from challenging a tax, which the Alabama Supreme Court previously upheld in an earlier case brought by different taxpayers.¹⁵³ The Supreme Court noted that the Alabama Supreme Court decided as such even though the prior case was not brought as a class action, “their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties.”¹⁵⁴ The Court held the Fourteenth Amendment did not authorize such “extreme” application of state law preclusion (res judicata) principles because the plaintiffs were “mere ‘strangers’” to the earlier proceedings and judgment.¹⁵⁵

In writing the Court’s unanimous decision, Justice Stevens addressed the limits on a state’s power to enforce preclusion rules, stating a party is generally not “bound by a judgment” if it has not been “designated as a party” or “made a party by service of process.”¹⁵⁶ Justice Stevens further stated, “[t]his rule is part of our ‘deep-rooted historic tradition that everyone should have his own day in court.’”¹⁵⁷ Thus the Court concluded: “[b]ecause petitioners received neither notice of, nor sufficient representation in, the [prior] litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property.”¹⁵⁸

Although the Court in *Richards* never explicitly used the phrase “virtual representation” to strike the lower court’s decision and instead relied upon the well-established precedent of adequate representation, commentators soon criticized this rejection of “extreme applications” of preclusion principles to bind nonparties as incompatible with the preclusion theory by “virtual representation.”¹⁵⁹ Such commentators further argued that the virtual representation doctrine should be discarded altogether because there was often no meaningful distinction between adequate and virtual representation as applied by the courts. For instance, in discussing the Fifth Circuit’s attempt to distinguish the two doctrines in *Freeman v. Lester Coggins Trucking, Inc.*,¹⁶⁰ one commentator explains:

151. 517 U.S. 793, 797 (1996).

152. See *id.* at 794-95 (challenging occupational tax on Due Process and Equal Protection grounds).

153. See *id.* at 795 (discussing prior action decided in Alabama courts).

154. *Id.* at 801 (distinguishing prior state court case from federal case at hand).

155. *Richards*, 517 U.S. at 802, 804.

156. *Id.* at 798 (quoting *Hansberry*, 311 U.S. at 40).

157. *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996).

158. *Id.* at 805.

159. *Richards*, *supra* note 136, at 740 (explaining commentators’ criticisms of *Richards* decision).

160. 771 F.2d 860 (5th Cir. 1985).

The Freeman court further diluted any attempt at making a meaningful distinction between adequate and virtual representation when it observed that the cases cited by Southwest ‘in support of its adequate representation’ proposition were in fact ‘virtual representation decisions.’

Therefore, it is fair to say that the difference between adequate and virtual representation is really no difference at all. Virtual representation is an eighteenth-century probate ‘doctrine searching in vain for a twentieth century justification.’ There is just no need for it as a supplement to adequate representation: both doctrines are extensions of privity and both invoke due process concerns. Adding unnecessary terminology to an already adequate privity doctrine only serves to muddy the water of the turbulent sea of res judicata. Such a distinction may be even less desirable given that the Supreme Court has never expressly endorsed the use of the doctrine of virtual representation as a substitute for the more familiar notion of adequate representation.¹⁶¹

6. Taylor v. Sturgell

In *Taylor v. Sturgell*,¹⁶² the Supreme Court weighed in on the permissibility and scope of nonparty preclusion under the doctrine of “virtual representation” for the first time since its creation by the Founders.¹⁶³ The Court unanimously vacated the lower court’s finding that the plaintiffs’ suit against the Federal Aviation Administration under the Freedom of Information Act (FOIA) was barred by a prior judgment issued against the plaintiffs’ friend who had sought the same FOIA records.¹⁶⁴ Although not a party to the prior suit, the lower court found the plaintiff’s friend “virtual[ly] represented” him and thus his claims were precluded.¹⁶⁵ The Supreme Court, however, rejected this reasoning, holding that extending the preclusive effect of a judgment to a nonparty “runs up against the ‘deep-rooted historic tradition that everyone should have his own day in court.’”¹⁶⁶ As the Court explained:

An expansive doctrine of virtual representation, however, would ‘recogniz[e], in effect, a common-law kind of class action.’ That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections

161. Richards, *supra* note 136, at 710-11 (internal citations omitted).

162. 553 U.S. 880 (2008).

163. *Id.* at 884. “In this case, we consider for the first time whether there is a ‘virtual representation’ exception to the general rule against precluding nonparties.” *Id.* The Court further stated, “Taylor’s case presents an issue of first impression in this sense: [u]ntil now, we have never addressed the doctrine of ‘virtual representation’ adopted (in varying forms) by several Circuits and relied upon by the courts below.” *Id.* at 892.

164. *See id.* at 885.

165. *Id.* at 888.

166. *Taylor*, 553 U.S. at 892-93 (quoting *Richards*, 517 U.S. at 798).

prescribed in *Hansberry*, *Richards*, and *Rule 23*. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed ‘courts to create *de facto* class actions at will.’¹⁶⁷

Accordingly, the Court announced, “We disapprove the doctrine of preclusion by ‘virtual representation’....”¹⁶⁸ The *Taylor* opinion seems to close the door to the continued application of the doctrine of virtual representation, at least in federal question cases. In many ways, this outcome was expected. As one commentator forecasted after the Court’s opinion in *Richards*, the *Richards* case stood for the proposition that “procedural fairness can no longer be discounted as an inconsequential aspect of our judicial system. No longer can the concerns for judicial efficiency alone justify ‘extreme applications’ of preclusion principles” such as those based on virtual representation.¹⁶⁹

III. CONCLUSION

In many ways, Justice Story’s Bill of Peace stands as the keystone between the Founders’ demands for a fair trial, and later courts’ struggles to preserve judicial economy and fairness in class actions. Years before Justice Story’s *Commentaries on Equity Jurisprudence*, Hamilton argued that courts of equity provided relief “in extraordinary cases, which are exceptions to general rules.”¹⁷⁰ Hamilton’s insistence on the value of chancellors foretells the flexibility future courts would require in accommodating class action litigation, especially where absent class members’ rights are adjudicated.

Class actions provide the access to the Judiciary the Founding generation desired. Yet, class actions involving absent class members provide this access using a theory of representation emblematic of that which the Founders rejected in the British governance of American colonies. Despite its air of virtual representation, class actions relieve the tension between efficient administration of justice and the fair adjudication of litigants’ rights. By the very nature of class actions, the underlying claims can only exist but for the procedure itself. Therefore, class actions provide the keys to the courthouse door for the multitude of plaintiffs who perceive themselves victims of large, diffuse wrongs.

Still, the Founders’ apprehension of Parliaments’ claims of virtual representation should inform the extent to which non-identified, absent class members—like those in *Hansberry*, *Richards*, and *Taylor*—should be bound to

167. *Id.* at 901 (internal quotations and citations omitted) (quoting *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 972-73 (7th Cir. 1998)).

168. *Id.* at 885.

169. *Richards*, *supra* note 136, at 733.

170. THE FEDERALIST NO. 83, at 403 (Alexander Hamilton).

the adjudication of their rights in their absence. Indeed, if the attenuation is too “extreme,” there exists a failure of due process, regardless of whatever efficiency is achieved. The procedural safeguards prescribed in *Hansberry*, *Richards*, *Taylor*, and Rule 23 must be applied to serve the twin rationales of fairness and efficiency. Over two centuries ago, the Founders enshrined the right to receive a fair adjudication of one’s rights. As Hamilton predicted, courts need flexibility to ensure this objective was met. Today’s courts should continue Justice Story’s tradition, using innovative procedural methods to ensure efficiency *and* fairness, no matter the context.

Therefore, courts must now situate themselves in the narrow, distinct role of impartial judicial overseers envisioned by the Founders. The Founders enshrined the independence of federal judges away from the capricious sways of majority will by requiring that judges maintain office in times of good behavior. In the class action context, judges become the appointers, selecting class counsel based on impartial factors such as experience and expertise, all the while protecting and maintaining the adequacy of representation of class members.

Hamilton’s insistence on the need for judicial flexibility, as implemented by Justice Story, should carry through with today’s judiciary. Consequently, courts must now take up the baton, applying—and sometimes adapting—Rule 23 safeguards in a way that negotiates the difficult balance between efficiency *and* fairness. It is only then that courts can ultimately achieve adequate representation in the adjudication of non-identified, absent class members.