

AGGREGATE LITIGATION GOES PUBLIC:
REPRESENTATIVE SUITS
BY STATE ATTORNEYS GENERAL

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AGGREGATE LITIGATION GOES PUBLIC: REPRESENTATIVE SUITS BY STATE ATTORNEYS GENERAL

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State attorneys general represent their citizens in aggregate litigation that bears a striking resemblance to the much-maligned damages class action. Yet while private class actions are subject to a raft of procedural rules designed to protect absent class members, equivalent suits in the public sphere are largely free from constraint. The procedural disconnect between the two categories of aggregate litigation reflects a widespread assumption that attorneys general will adequately represent the interests of their respective states' citizens, obviating any need for case-specific mechanisms for assuring the loyalty of lawyer to client.

This Article challenges the presumption of adequate public representation. By conflating consent of the governed with consent of the client, the conventional wisdom ignores the important differences between political and adjudicative representation. Class action scholars have produced mountains of commentary detailing the agency costs of aggregate litigation, including substantial conflicts between the interests of class counsel and the members of the plaintiff class. I show that the same risks are present in state suits. Attorneys general may not be driven by the pursuit of attorney's fees, but their status as political representatives means that they must balance the interests of the public at large with those of the individuals they purport to represent in an adjudicative capacity. The potential for conflicted representation would not be troubling if citizens could easily monitor and control the work of the attorney general, but, as in the class context, they cannot. If anything, the costs of monitoring and control are higher in the public sphere because the only way to "fire" the attorney general is to vote her out of office — hardly a viable solution when the attorney general's political responsiveness is the source of the conflict. Thus, far from solving the problems that scholars have emphasized in the class action context, the fact that the attorney general may be an elected official should provide cause for heightened concern. That concern assumes a constitutional character when state litigation bars subsequent private claims for damages or other monetary relief. In order to protect the due process rights of the individuals whose interests are at stake in public aggregate litigation, courts must either ramp up the procedural requirements for state suits, or — better yet — hold that public suits cannot bind private claimants.

* Professor, Duke University School of Law. Thanks to Rick Bierschbach, Myriam Gilles, Bill Marshall, Max Minzner, Alex Reinert, Dana Remus, Neil Siegel, Alex Stein, Jim Tierney, Ernie Young, Adam Zimmerman, and participants in the New Voices in Civil Justice workshop at Vanderbilt University Law School, particularly Kevin Stack, Susanna Sherry, and Jay Tidmarsh, for helpful comments on earlier drafts. Thanks as well to Larry Adler, Amy Ballard, Kara Eyre, Mark Irlando, Eric Katz, Greg Mann, and David Zuares for invaluable research assistance.

INTRODUCTION

Few aspects of contemporary civil litigation have attracted as much scholarly attention as the damages class action.¹ Commentators have criticized class actions as either too powerful or not powerful enough,² and have exposed significant gaps between the interests of class counsel and those of the class. For their part, courts and rulemakers have erected procedural hurdles at multiple steps in the path of the private class action.³ The ever-expanding procedural requirements for damages class actions reflect the unique capacity of class actions to bind an individual to the results of litigation to which she was, for all practical purposes, a stranger.⁴

But damages class actions are not unique; they have an analogue in the public sphere. Public litigation by government actors plays a role similar to that of the private class action, collecting many claims into one suit and pursuing recovery for all. Although many public suits seek injunctive relief and other remedies that are unavoidably aggregate, others seek damages or restitution for identifiable individuals who have been injured by unlawful conduct. Such monetary recoveries are particularly common at the state level, as state attorneys general possess broad authority under both state and federal law to represent citizens' interests — including their financial interests — in court.⁵

¹ See, e.g., Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guardians*, 2003 U. CHI. LEGAL F. 403, 403–04 (“The class action concept is under assault. Critics seem to have won the day. . . . In this climate, it is difficult to find a positive spin on either Rule 23 or the class action mechanism itself.”); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 121–22 & nn.71–74 (2006) (“Law library shelves sag with . . . critiques of nearly every aspect of class action practice, including the rules for approving settlements, particularly coupon-based settlements; compensating lead plaintiffs; and certifying classes, among many other matters.” *Id.* at 121–22 (footnotes omitted).); Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy: Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 496 (2001) (“Damage class actions . . . have been a lightning [sic] rod for controversy over the past decade.”).

² See Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 514–15 (1996) (“[T]he class action . . . has been subjected to harsh criticism for alleged favoritism towards one or another of the interested parties: plaintiffs who extort excessive settlements by threatening defendants with ruinous liability, defendants who play off competing groups of plaintiffs in order to buy cheap protection against liability, or plaintiffs’ attorneys who favor their own interests over everyone else’s.” (footnotes omitted)).

³ See *infra* section I.B, pp. 499–510.

⁴ See Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 805 (1997) (“Class actions occupy an uncertain position in Anglo-American law. Nowhere else do we find such a clear departure from the premise that no one should be bound to a judgment in personam absent the personal security offered by notice and a full opportunity to participate in the underlying litigation.”).

⁵ Some federal agencies have similar authority to seek monetary recoveries for citizens. See generally Verity Winship, *Fair Funds and the SEC’s Compensation of Injured Investors*, 60 FLA.

Suits by state attorneys general raise intriguing questions about the meaning of “representation” in the context of public aggregate litigation. Private class actions employ a host of procedural protections designed to ensure that the named plaintiffs and class counsel vigorously promote the interests of the class, and absent class members can be bound by the judgment in a private aggregate action only if they were adequately represented in that case. Most of those procedural protections fall by the wayside, however, when aggregate litigation moves from the private to the public sphere. Rather than grappling directly with the question whether the attorney general will adequately represent the interests of the citizens for whom she seeks recovery, courts tend to presume enthusiastic and loyal representation on the part of public attorneys.⁶ After all, attorneys general plainly are “representatives” of the states’ citizens in a broader sense: most are popularly elected,⁷ and all are duty-bound to serve the public interest. Yet few courts pause to consider whether these two concepts of representation — one focused on the members of the putative class, the other on the public at large — are interchangeable, or whether the attorney general’s electoral accountability serves the same function as measures designed to make attorneys accountable to their clients in particular cases.

Judges’ uncritical acceptance of state litigation is not exceptional; suits by state attorneys general also have flown largely beneath the academic radar. While class action scholars have heaped critical attention on private damages class actions, only a handful have recognized

L. REV. 1103 (2008) (discussing efforts by the Securities and Exchange Commission (SEC) to distribute financial recoveries to injured individuals); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500 (2011) (finding an equivalent power vested with the SEC, Federal Trade Commission (FTC), and Food and Drug Administration). This Article focuses on state suits for several reasons. First, public suits seeking to compensate injured citizens are far more common at the state level, as state attorneys general long have understood their role to include a compensatory function. See, e.g., Harry First, *Delivering Remedies: The Role of States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1039 (2000) (“If there is one consistent thread to state antitrust enforcement in the past sixty years, it is the effort to collect money damages for violations of the antitrust laws.”). By contrast, powers of compensation are lodged in only a handful of agencies at the federal level, and those powers lay dormant until quite recently. See Zimmerman, *supra*, at 520 (“In the 1990s, . . . [federal] regulatory agencies aggressively began to use their enforcement power to compensate victims rather than solely to punish wrongdoers.”). Second, the questions of adjudicative representation explored here are important — and difficult — precisely because attorneys general are elected or appointed representatives of state citizens generally. Federal agencies are accountable to the people by virtue of their relationships with the President, but few if any citizens think of the SEC or the FTC as their “representatives.”

⁶ See *infra* section I.B, pp. 499–510.

⁷ Forty-three states provide for popular election of the attorney general. In the remaining states, the attorney general is appointed by the legislature (Maine), by the state supreme court (Tennessee), or by the governor (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming). William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006).

that public suits may share many of the same features.⁸ And, while a few commentators have noted that procedural advantages may allow states to proceed where private litigants would fail,⁹ none has examined whether the procedural disconnect between public and private aggregate actions makes sense as a matter of law or policy.

The failure of class action law and scholarship to contend with public aggregate litigation is unfortunate, but it is not surprising. Leading critiques of private class action practice are rooted in the financial and professional incentives that shape the behavior of private attorneys.¹⁰ Shifting authority to a very different type of attorney — an elected official who works for a salary rather than a contingency fee — might well be expected to solve the familiar problems with class representation. And who better, one might ask, than an attorney general? Class action critics long have complained that aggregate litigation assumes (perhaps usurps) essentially *public* functions of deterrence, regulation, and redress¹¹ — a thrust that defenders parry by describing entrepreneurial class counsel as “private attorneys gener-

⁸ See, e.g., John H. Beisner et al., *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1452–57 (2005) (discussing overlap and difference between public and private aggregate litigation); Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1922 (2000) (“[T]here now exists a blueprint for states to consider filing class-like lawsuits for injuries to their citizens’ health and overall economic well-being.”); William H. Pryor Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1898 (2000) (describing how “multigovernment lawsuits” have expanded “[a]s federal courts have retreated from the use of sprawling class actions”); Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1847–49 (2000) (recommending an expanded role for *parens patriae* cases involving damages that would otherwise be the subject of a private class action).

⁹ See Brunet, *supra* note 8, at 1938 (arguing that a *parens patriae* suit can “pack a significant deterrent wallop . . . particularly because of the ease or comparatively low transaction costs associated with initiating such a suit”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 660 (2012) (arguing that state attorneys general can and should “fill the void left by class actions” because “[p]arens patriae suits are not subject to Rule 23 or contractual waiver provisions, and so avoid the majority of impediments to contemporary class actions”). See generally Ratliff, *supra* note 8 (extolling the potential of *parens patriae* actions to take the place of private class actions).

¹⁰ See Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 641 (2008) (“[M]uch class action scholarship sees such lawsuits — especially class settlements — primarily as the byproducts of lawyers for both plaintiffs and defendants who are pursuing their own self-interested business ends. These actors and the financial parameters in which they operate comprise the starting point and class settlements the ending point.”).

¹¹ See, e.g., *id.* at 629 (arguing that the deals at issue in notable asbestos cases *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), “effectively sought to achieve by way of class settlements what the process of public legislation, to this day, has not yielded in the way of asbestos litigation reform”); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77 (arguing that many class actions feature “private attorneys acting as bounty hunters, protecting the public interest by enforcing the public policies embodied in controlling statutes”).

al.”¹² If both the promise and the peril of the private class action stem from its quasi-governmental nature, it may seem hard to argue with substituting an actual attorney general for a metaphorical one.¹³

This Article turns a critical lens on representative suits by state attorneys general. I show that the principal critiques of class actions translate readily into the public realm. Like class counsel, public attorneys have ample incentives to accept settlements that are quick and easy — and may be inadequate from the perspectives of both compensation and deterrence — rather than to fight tooth and nail to extract the largest sanctions possible. If anything, that tendency is exacerbated by the attorney general’s duty to represent the public interest, an interest that will often conflict with that of the represented individuals.

Attention to the potential costs of public aggregate litigation also highlights the need for new thinking about the relationship between electoral and adjudicative representation. To date, courts have conflated consent of the governed with consent of the client, assuming that the attorney general’s status as an elected official automatically translates into the sort of adequate representation that due process requires in aggregate litigation. But the two types of representation are different in both form and function. Those differences render the existing approach unconstitutional to the extent that state suits preclude private damages actions.

Part I begins by sketching the basic contours of public aggregate litigation, emphasizing its similarity to the typical damages class action. The salient differences between public and private actions lie not in what such suits are designed to do, but in the procedural rules that govern their conduct. Even a brief comparison of the requirements for the two categories of litigation reveals a glaring disconnect between the two models. Where private actions are tightly controlled, public actions are largely free from procedural restraint.

The procedural gap separating public and private aggregate litigation would be defensible if state suits avoided the risks that commentators have identified in the class action context. Part II demonstrates that they do not. Class action scholars long have warned of conflicts of interest between counsel and class — conflicts that class members lack the resources and incentives to uncover and that yield settlements

¹² See John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 215–19 (1983) (providing an overview of the “private attorney general” concept).

¹³ Cf. Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL’Y REV. 69, 106 (2004) (explaining that, if one believes that “the class action agency problem originates in the state’s decision to confer upon private legal entrepreneurs the license to sue on behalf of others,” the problem could be solved if states used *parens patriae* actions to “de-privatize the power to initiate and prosecute class actions”).

fully informed class members would reject.¹⁴ Although those agency-cost critiques have been limited to the private sphere, I argue that state suits create similar risks of conflicts of interest and insufficient “client” monitoring and control. As in the private context, asymmetries in the stakes and the resources of plaintiffs and defendants exacerbate those risks. And as in the private context, the result is that public claim aggregation may produce inadequate recoveries that disserve the interests of the affected individuals.

The agency-cost arguments in Part II lay the groundwork for constitutional analysis in Part III. In order for an individual to be bound by a judgment to which she was not a party, due process demands that her interests be adequately represented in the first case. At least in cases in which the attorney general purports to represent private interests in monetary relief, courts have erred in assuming that state representation is always constitutionally adequate as a matter of law or fact. The necessary assurance of adequate representation cannot be found in general notions of governmental authority or electoral accountability. Instead, due process requires case-specific procedures geared toward linking the interests of attorney and client. But ramping up the procedural requirements in state suits would create a new set of problems. A better approach, I suggest, is to leave public aggregate actions largely free from procedural constraint, but hold that state suits cannot preclude subsequent private actions.

I. PUBLIC SUITS AND PRIVATE CLASS ACTIONS

State suits come in a variety of shapes and sizes. This Article focuses on the subset of state litigation that seeks to remedy or prevent unlawful activity by obtaining some form of direct financial relief for injured citizens.¹⁵ The authority for such litigation stems from several sources. Most straightforward are state statutes that empower the attorney general to seek restitution for citizens injured by violations of state consumer protection law.¹⁶ Attorneys general also have authority to sue as *parens patriae* to recover damages for citizens injured by certain violations of state and federal law.¹⁷ The line between the two forms of litigation authority is fuzzy at best, and restitution suits under state consumer protection statutes are sometimes described as *parens*

¹⁴ See, e.g., John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 628–34 (1987) (describing agency-cost problems).

¹⁵ Such relief may be accompanied by other remedies, such as an injunction or civil penalties, but it need not be.

¹⁶ See *infra* notes 46–47 and accompanying text.

¹⁷ See *infra* notes 20, 39–40 and accompanying text.

patriae actions.¹⁸ Much of the confusion stems from the fact that *parens patriae* authority is a category of standing with deep roots in the common law.¹⁹ Its clearest application is in cases where the state attempts to sue without express statutory authorization.²⁰ Today, most authority for *parens patriae* suits comes directly from state and federal statutes, pushing the question of common law standing to the periphery. Nevertheless, courts do not always distinguish neatly between statutory and common law litigation authority, and often use the term “*parens patriae*” loosely to describe any representative litigation by the state.²¹

This Part begins with a brief overview of the common law doctrine of *parens patriae*, and then describes the various statutory bases for attorney general litigation authority today. Whatever the precise source of their power, state attorneys general can and do engage in litigation that bears a striking resemblance to the much-maligned damages class action. Yet public aggregate suits have avoided most of the procedural protections — and the criticisms — that apply to private class actions.

A. Public Aggregate Litigation

In its modern form,²² the common law doctrine of *parens patriae* permits states to sue to vindicate sovereign or quasi-sovereign inter-

¹⁸ See, e.g., *Illinois v. SDS W. Corp.*, 640 F. Supp. 2d 1047, 1050 (C.D. Ill. 2009) (describing suit for restitution as *parens patriae* action); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 386–87 (D.D.C. 2002) (citing statutes and case law authorizing state attorneys general to act as *parens patriae* or “to represent consumers in a capacity which is the functional equivalent of *parens patriae*,” and drawing no distinction between *parens patriae* actions and actions for restitution).

¹⁹ For detailed discussions of the origins and scope of the *parens patriae* concept, see JAY L. HIMES, *STATE PARENS PATRIAE AUTHORITY* 1–14 (2004), available at <http://apps.americanbar.org/antitrust/at-committees/at-state/pdf/publications/other-pubs/parens.pdf>; and Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863–71 (2000).

²⁰ Some attorneys general have authority to exercise all the powers typically vested in the office under the common law, which includes the power to sue as *parens patriae* whenever necessary to promote the public interest — and without any subject matter-specific statutory authorization. See 7 AM. JUR. 2D *Attorney General* §§ 6–7 (2004). In such states, the *parens patriae* authority may or may not be limited along the lines suggested in text below, depending on how state courts have interpreted the scope of the power.

²¹ See *supra* note 18.

²² The concept of *parens patriae* authority derives from early English practice, in which the King exercised certain royal prerogatives as “father of the country.” See Michael Malina & Michael D. Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U. L. REV. 193, 197 (1970) (describing early conception). In that early form, the *parens patriae* power enabled the King to act on behalf of “infants, idiots, and lunatics” — that is, those who could not represent themselves. See *id.* at 197–202 (quoting 3 WILLIAM BLACKSTONE, *COMMENTARIES* *46). American courts recognized a similar authority “inherent in the supreme power of every State,” *Mormon Church v. United States*, 136 U.S. 1, 57 (1890), but soon expanded it to its present form.

ests.²³ The state's sovereign interests include "the power to create and enforce a legal code, both civil and criminal."²⁴ Quasi-sovereign interests are harder to define,²⁵ but include the state's "interest in the health and well-being — both physical and economic — of its residents in general."²⁶

Plainly, a state's interest in the well-being of its residents might overlap with the personal interests of the residents themselves, raising difficult questions about the relationship between public and private standing. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*²⁷ — the leading modern case on the scope of *parens patriae* power — the Supreme Court stated that in order to establish common law standing as *parens patriae*, "the [s]tate must articulate an interest apart from the interests of particular private parties, *i.e.*, the [s]tate must be more than a nominal party."²⁸ Thus, the *state itself* must have an interest in the case.²⁹ Some courts have interpreted *Snapp* to preclude states from using *parens patriae* authority to pursue damages that could be recovered through private litigation, on the view that the state in such cases is not the real party in interest.³⁰ Properly understood, however, *Snapp* supports the majority view that the state's interest may be parasitic on the interests of individual citizens.³¹ The Court explained

²³ The discussion in the text outlines the basic requirements for *parens patriae* standing as developed by the federal courts. See generally Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273, 294–321 (2007) (discussing state standing generally); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995) (same). It bears emphasis, however, that the precise contours of *parens patriae* authority in any given state will be defined by state constitutional and statutory law. See Ieyoub & Eisenberg, *supra* note 19, at 1882 ("Legal limits on *parens patriae* are foremost a question of state law. Within a state's own courts, and subject to federal and state constitutional limitations, state legislatures can authorize as broad a scope for the use of *parens patriae* as they wish.")

²⁴ *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982).

²⁵ See *id.* (acknowledging that the category of "quasi-sovereign" interest . . . is a judicial construct that does not lend itself to a simple or exact definition").

²⁶ *Id.* at 607.

²⁷ 458 U.S. 592.

²⁸ *Id.* at 607.

²⁹ See Ieyoub & Eisenberg, *supra* note 19, at 1882 ("[S]tates cannot be acting simply as enforcement agencies for small collections of private individuals. There must be a state interest beyond that of private parties to warrant a *parens patriae* action.")

³⁰ See, e.g., *New York v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982) ("*Parens patriae* standing also requires a finding that individuals could not obtain complete relief through a private suit."), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc). The Third Circuit has reversed itself on the question. Compare *Pennsylvania v. Nat'l Ass'n of Flood Insurers*, 520 F.2d 11, 23 (3d Cir. 1975) (suggesting that state cannot establish standing as *parens patriae* in circumstances where citizens can pursue private actions), with *Pennsylvania v. Porter*, 659 F.2d 306, 317–18 & nn.15–16 (3d Cir. 1981) (disapproving the relevant portions of *National Ass'n of Flood Insurers*).

³¹ See Wildermuth, *supra* note 23, at 300 (noting that *Snapp* "says nothing about limiting quasi-sovereign interest suits" to "those instances in which it would be unlikely for individuals to bring their own suits").

that *parens patriae* authority will lie if the state acts on behalf of “its residents in general”³² rather than “particular individuals,”³³ and asserts a “general interest”³⁴ in the welfare of its citizens of the sort that a state might try “to address through its sovereign lawmaking powers.”³⁵ In other words, private interests can rise to the level of a quasi-sovereign *state* interest when sufficiently aggregated. The operative question is whether the injury in question affects a “sufficiently substantial segment of [the state’s] population.”³⁶ The Court has not sought to specify the necessary proportion, but the cases make clear that the affected population need not account for all or even most of the state’s residents. *Snapp* itself “involved ‘787 [temporary] job opportunities’ for residents of Puerto Rico, which had a population at the time of about 3 million.”³⁷

Even if the restrictive reading of *Snapp* were correct, it would have little bearing on the majority of cases, where the state’s litigation authority derives not from the common law doctrine of *parens patriae* but from state or federal statutes that explicitly authorize the attorney general to sue on behalf of the state’s citizens to redress particular wrongs.³⁸ Modern federal consumer protection statutes frequently

³² *Snapp*, 458 U.S. at 607.

³³ *Id.* at 607 n.14.

³⁴ *Id.*

³⁵ *Id.* at 607.

³⁶ *Id.* (emphasizing that “the indirect effects of the injury must be considered as well”).

³⁷ Wildermuth, *supra* note 23, at 300 (alteration in original) (quoting *Snapp*, 458 U.S. at 609); *see also* New York v. 11 Cornwell Co., 695 F.2d 34, 39–40 (2d Cir. 1982) (holding that injury to fewer than twelve individuals was sufficient to support *parens patriae* authority where similarly situated persons would be affected in the future), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc); Illinois v. SDS W. Corp., 640 F. Supp. 2d 1047, 1050–51 (C.D. Ill. 2009) (permitting state to proceed as *parens patriae* although “only 250 Illinois consumers were directly injured,” *id.* at 1050, because “the indirect benefits of barring unscrupulous companies from soliciting further business accrues to the population at large,” *id.* at 1051); New York v. Mid Hudson Med. Grp., P.C., 877 F. Supp. 143, 147–48 (S.D.N.Y. 1995) (permitting state to sue as *parens patriae* after identifying one victim, where state’s entire hearing-impaired population was affected); Support Ministries v. Vill. of Waterford, 799 F. Supp. 272, 277–79 (N.D.N.Y. 1992) (permitting state to proceed as *parens patriae* where there were fifteen identified victims, but similarly situated persons would be affected in the future).

³⁸ Indeed, there is reason to believe that the “nominal-party” language in *Snapp* has more to do with *where* a state can pursue a *parens patriae* action than *whether* such an action is available. That is, the nominal-party limitation may apply only where a state relies on the *parens patriae* concept either to qualify for the Supreme Court’s original jurisdiction or to evade Eleventh Amendment limitations on the power of federal courts to hear suits against a state by the citizens of another state. *See* Pennsylvania v. New Jersey, 426 U.S. 660, 665–66 (1976) (“[I]f, by the simple expedient of bringing an action in the name of a State, this Court’s original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, § 2, of the Constitution, between suits brought by ‘Citizens’ and those brought by ‘States’ would evaporate.”); *cf.* *Snapp*, 458 U.S. at 603 n.12 (“Admittedly, the discussion here and in the other cases discussed below focused on the *parens patriae* question in the context of a suit brought in the original jurisdic-

contain provisions empowering state attorneys general to sue as *parens patriae* to recover damages for state citizens injured by violations of federal law.³⁹ Many state statutes, particularly in the area of antitrust, grant similar authority to their attorneys general.⁴⁰ The only courts to

tion of this Court. There may indeed be special considerations that call for a limited exercise of our jurisdiction in such instances; these considerations may not apply to a similar suit brought in federal district court.”); *id.* at 611 (Brennan, J., concurring) (emphasizing that the requirements of the Court’s original jurisdiction and the Eleventh Amendment raise “concerns that might counsel for a restrictive approach to the question of *parens patriae* standing” that are not present when a state sues a private party in federal district court). In both cases, there are special reasons for courts to police the distinction between state litigation and private litigation, ensuring that the state is the real party in interest. Those reasons recede when a state sues a private party in state or federal court. *See* HIMES, *supra* note 19, at 5–6 (“[I]t is questionable whether this ‘nominal party’ consideration should apply at all when a state sues a private party in federal or state trial level court.”).

The question of whether the state is the real party in interest also may have relevance for purposes of diversity jurisdiction because a state is not a “citizen” within the meaning of Article III. *See, e.g.*, *Ind. Port Comm’n v. Bethlehem Steel Corp.*, 702 F.2d 107, 109 (7th Cir. 1983) (citing *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482 (1891)). A similar question has arisen, and has divided the lower courts, in situations where the defendant in a *parens patriae* action seeks to remove the case to federal court under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2006 & Supp. V 2011). *Compare, e.g.*, *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008) (holding that state was not real party in interest in antitrust *parens patriae* suit seeking treble damages on behalf of state citizens, so case was removable under CAFA), *with SDS W.*, 640 F. Supp. 2d at 1052–53 (explaining that “the test is not whether the state alone will benefit, but whether the state has ‘a substantial stake in the outcome of the case,’” and remanding *parens patriae* action for injunctive relief, restitution, and rescission (quoting *Wisconsin v. Abbott Labs., Amgen, Inc.*, 341 F. Supp. 2d 1057, 1061 (W.D. Wis. 2004))). Again, however, even the most restrictive view would affect only the location of the suit — state or federal court — and not the authority of the attorney general to sue at all under the relevant statute.

³⁹ *See, e.g.*, 15 U.S.C. § 15c (2006) (authorizing suit for violations of federal antitrust law); *id.* § 1679h(c)(1) (authorizing suit for violations of federal law governing credit repair organizations); *id.* § 1681s(c) (2006 & Supp. V 2011) (credit reporting agencies); *id.* § 5712 (2006) (pay-per-call services); *id.* § 6103 (2006 & Supp. V 2011) (telemarketers); *id.* § 6309(c) (2006) (professional boxing matches); *id.* § 7804 (sports agents); *id.* § 6504 (children’s online privacy protection); *id.* § 7706(f) (email spam). *See generally* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011).

⁴⁰ There are a number of state statutes authorizing the attorney general to sue as *parens patriae* to recover damages for citizens injured by violations of state antitrust law. *See* ALASKA STAT. § 45.50.577(b) (2011); ARK. CODE ANN. § 4-75-212 (2011); CAL. BUS. & PROF. CODE § 16760 (West 2008); COLO. REV. STAT. § 6-4-111 (2011); CONN. GEN. STAT. § 35-32 (2011); DEL. CODE ANN. tit. 6, § 2108 (1999); FLA. STAT. ANN. § 542.22 (West 2007); HAW. REV. STAT. ANN. § 480-14 (LexisNexis 2011); IDAHO CODE ANN. § 48-108 (2003); 740 ILL. COMP. STAT. 10/7 (2010); MD. CODE ANN., COM. LAW § 11-209 (LexisNexis 2005); NEB. REV. STAT. § 84-212 (2008); NEV. REV. STAT. § 598A.160 (2011); N.H. REV. STAT. ANN. § 356:4-a (2009); OHIO REV. CODE ANN. § 109.81 (West 2012); OKLA. STAT. tit. 79, § 205 (2011); OR. REV. STAT. § 646.775 (2011); R.I. GEN. LAWS § 6-36-12 (2001); S.D. CODIFIED LAWS § 37-1-23 (2004); UTAH CODE ANN. § 76-10-916 (LexisNexis 2008); W. VA. CODE ANN. § 47-18-17 (LexisNexis 2006). Many states also have *parens patriae* statutes in non-antitrust contexts. *See, e.g.*, CONN. GEN. STAT. § 3-129c (2011) (authorizing Connecticut Attorney General to sue as *parens patriae* on behalf of state residents subjected to personal income tax by New York City); D.C. CODE § 28-3909 (LexisNexis 2001) (authorizing *parens patriae* suits for restitution and damages on behalf of consumers for vi-

consider the question have held that state actions under such statutes present cases or controversies that satisfy the irreducible minima of Article III standing in federal court.⁴¹ The federal courts have described *parens patriae* standing requirements as prudential,⁴² meaning that any limitations they contain can be abrogated by Congress.⁴³ And, of course, the intricacies of federal standing doctrine have no bearing on state courts.⁴⁴

Doctrinal puzzles aside, states do use *parens patriae* actions to obtain damages and other monetary remedies for their citizens.⁴⁵ As noted above, most state attorneys general also have statutory authority to pursue restitution on behalf of their citizens. Many states' consumer protection laws explicitly empower the attorney general to seek restitution,⁴⁶ and others have been interpreted to embrace such a pow-

erations of Washington, D.C., consumer protection laws); FLA. STAT. ANN. § 626.909 (West 2012) (authorizing *parens patriae* actions for damages on behalf of Florida victims of unauthorized insurance transactions); N.J. STAT. ANN. § 2A:53A-21(c) (West 2000) (authorizing *parens patriae* actions on behalf of New Jersey victims of bias crimes); P.R. LAWS ANN. tit. 32, § 3341 (2004) (authorizing *parens patriae* actions for damages on behalf of Puerto Rico consumers); R.I. GEN. LAWS § 40-8.2-6 (2001) (authorizing *parens patriae* actions for damages on behalf of Rhode Island victims of medical assistance fraud); WASH. REV. CODE § 19.86.080 (2010) (authorizing *parens patriae* actions for restitution on behalf of Washington victims of consumer protection violations).

⁴¹ See *Tennessee ex rel. Leech v. Highland Mem'l Cemetery, Inc.*, 489 F. Supp. 65, 68 (E.D. Tenn. 1980) (rejecting constitutional challenge to federal law authorizing *parens patriae* antitrust actions because "[t]his case presents a case or controversy under federal law"); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, No. 150 WPG, 1978 WL 1294, at *1 (C.D. Cal. 1978) ("[A]n individual consumer financially injured by an antitrust violation would have a case or controversy against the defendants and would have a right to sue for damages. If Congress passes legislation giving a state attorney general the right to institute an action, as a 'stand-in' or a *parens patriae*, . . . the ensuing litigation presents the same case or controversy." (citation omitted)).

⁴² E.g., *Massachusetts v. EPA*, 549 U.S. 497, 540 n.1 (2007) (Roberts, C.J., dissenting) (describing the requirements for *parens patriae* standing as "prudential"); *Republic of Venezuela v. Philip Morris, Inc.*, 287 F.3d 192, 199 n.* (D.C. Cir. 2002) ("[T]he doctrine of *parens patriae* is merely a species of prudential standing; it is not a substantive element of the plaintiffs' state common law claims." (alteration in original) (citation omitted) (quoting *Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068, 1073 (D.C. Cir. 2001))).

⁴³ *Md. People's Counsel v. Fed. Energy Regulatory Comm'n*, 760 F.2d 318, 321 (D.C. Cir. 1985) (concluding that limitation on *parens patriae* standing is prudential, "i.e., an element that the courts must dispense with if Congress so provides").

⁴⁴ *Republic of Venezuela*, 287 F.3d at 199 n.* ("[O]ur doctrines of prudential standing are of no moment in a state court . . .").

⁴⁵ See Brunet, *supra* note 8, at 1921-22 ("[S]tates have brought *parens patriae* suits against entire industries, including guns, lead paint, and more recently, health maintenance organizations. When combined with older, more traditional uses of the *parens patriae* device in environmental cases, civil rights litigation, and antitrust claims, there now exists a blueprint for states to consider filing class-like lawsuits for injuries to their citizens' health and overall economic well-being." (footnotes omitted)); Ratliff, *supra* note 8, at 1855-57 (discussing *parens patriae* cases in areas of antitrust, civil rights, environmental law, and consumer protection).

⁴⁶ See, e.g., ARIZ. REV. STAT. ANN. §§ 44-1521 to -1534 (2003); CAL. BUS. & PROF. CODE § 17535 (West 2008); CONN. GEN. STAT. §§ 42.110a-110q (2011); 815 ILL. COMP. STAT. 505/7 (2010); IOWA CODE § 714.16 (2007); N.Y. EXEC. LAW § 63(12) (McKinney 2012); OHIO REV.

er.⁴⁷ The differences between restitution and other monetary damages are immaterial for present purposes, and for ease of exposition I will adopt the common shorthand of referring to state suits seeking financial recoveries for identifiable citizens as *parens patriae* actions. Such suits run the gamut from multimillion-dollar, multistate treble-damages antitrust suits⁴⁸ to single-state actions against unscrupulous businesses that bilked residents out of a few hundred dollars.⁴⁹ There is no easy way to identify the universe of relevant cases, in part because they almost always settle. But attorneys general take pains to publicize their litigation successes, and their press releases paint a colorful picture of public attorneys going to bat for the “little guy” against a variety of bad actors.⁵⁰

CODE ANN. § 1345.07 (West 2012). There are also examples outside general consumer protection statutes. See, e.g., ARIZ. REV. STAT. ANN. § 44-1372 (2003) (unsolicited email spam); *id.* § 44-6551 (unauthorized charitable solicitations).

⁴⁷ See, e.g., *Kentucky ex rel. Beshear v. ABAC Pest Control, Inc.*, 621 S.W.2d 705 (Ky. Ct. App. 1981); *cf.* *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 415-16 (Alaska 1982) (holding that attorney general may obtain restitution in representative suit under the Uniform Land Sales Practices Act, ALASKA STAT. § 34.55.020 (2011), which authorizes attorney general to “bring an action in the superior court . . . to enforce compliance with this chapter,” *id.* § 34.55.020(c)).

⁴⁸ See, e.g., *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003) (multistate antitrust action resulting in settlement providing for \$67.375 million in cash payments and \$75.7 million worth of CDs to be distributed to the states based on population).

⁴⁹ See, e.g., John Mariani, *Wedding Photographer Must Complete Work for Old Customers Before Taking on New Ones*, POST-STANDARD (Syracuse, N.Y.) (Apr. 29, 2010), http://www.syracuse.com/news/index.ssf/2010/04/wedding_photographer_must_comp.html (“A local wedding photographer has reached a settlement with the state Attorney General’s office spelling out how he will make good on his contracts with 33 clients to provide them with wedding pictures, albums and DVDs that they paid for but never received. It also orders Harold J. ‘Bud’ Thorpe III to pay \$4,000 in penalties and costs and at least \$500 in restitution.”). See generally Remarks at the Columbia Law School Symposium on the Newest Federalism: State Attorneys General in Cases of National Significance, Panel Two: The State Attorney General and Role of *Parens Patriae* (Dec. 5, 2003) [hereinafter Remarks on the State AG and the Role of *Parens Patriae*], available at http://www.law.columbia.edu/center_program/ag/Past_Conference/CorporateGov/Program?exclusive=filemgr.download&file_id=91242&rtcontentdisposition=filename%3Dpanel%20Two.pdf (remarks of Mike Fisher, Pa. Att’y Gen.) (“As every attorney general knows, the doctrine of *parens patriae* is difficult to define in theory but essential to use in practice. It is really the key doctrine for an attorney general when he or she wants to take affirmative steps on behalf of his or her state’s public interest. In other words, when all else fails you pull out the *parens patriae*!”).

⁵⁰ See, e.g., OHIO ATT’Y GEN., CONSUMER PROTECTION ANNUAL REPORT (2010), available at <http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/c2/c205fbde-7328-4fad-a129-6a12f4af0360.pdf> (describing multiple settlements under Ohio’s Consumer Sales Practices Act, ranging from a suit garnering \$314,557.53 in consumer restitution from a local home builder accused of “shoddy and incomplete work,” *id.* at 8, to a multistate action brought in tandem with the Federal Trade Commission against an Arizona-based identity-theft protection provider, resulting in \$11 million in restitution, *id.* at 13); Press Release, Iowa Dep’t of Justice, Office of the Att’y Gen., Florida Telemarketer Pays Full Restitution to 227 Iowans (Dec. 2, 2008), available at http://www.state.ia.us/government/ag/latest_news/releases/dec_2008/Galaxy_Restitution.html (describing settlement with telemarketers under which \$12,824 will be provided to Iowa citizens in restitution); Press Release, N.Y. State Office of the Att’y Gen., Cuomo Secures an Additional \$8.5 Million in Settlements with Companies that Tricked Consumers into Signing up for Discount

B. Relationship to Class Actions

As others have recognized, *parens patriae* and other public actions that put money in the pockets of state citizens share much in common with damages class actions⁵¹: “The nature of these suits is to achieve broad compensation, to deter wrongful conduct by one or more defendants, and to focus on injuries to a large set of state citizens.”⁵² Indeed, *parens patriae* suits often serve as a substitute for private aggregate litigation.⁵³ In other cases, *parens patriae* and private class actions proceed in tandem, with public and private attorneys working together to seek common remedies.⁵⁴

Clubs with Hidden Fees (Sept. 21, 2010), available at <http://www.ag.ny.gov/press-release/cuomo-secures-additional-85-million-settlements-companies-tricked-consumers-signing> (“Attorney General Andrew M. Cuomo today announced that he has secured an additional \$8.5 million in settlements with companies that tricked countless New York consumers into signing up for discount clubs that charged hidden fees. With today’s settlements, Cuomo’s wide-ranging investigation into the discount club industry has garnered over \$18 million in consumer refunds, penalties, and fees.”); Press Release, Office of Att’y Gen. Terry Goddard, DirecTV to Provide Refunds to Consumers as Part of Deceptive Advertising Settlement (Dec. 28, 2010), available at http://www.azag.gov/press_releases/dec/2010/Press%20Release%20-%20DIRECTV.html (describing multistate consumer fraud settlement with DirecTV worth \$13,250,000 total, with \$185,000 going to Arizona’s consumer fraud revolving fund and to restitution for Arizona consumers); Press Release, State of Mich. Att’y Gen., Cox Announces Michigan Settlement with Mortgage Lender Countrywide (October 6, 2008), available at http://www.michigan.gov/ag/0,1607,7-164-34739_34811-201239-,00.html (discussing multistate settlement with Countrywide Financial for predatory lending, under which Countrywide agreed to refinance as many as 9700 mortgages in Michigan and pay more than \$9.8 million to assist Michigan homeowners who lost their homes to foreclosure).

⁵¹ See, e.g., Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 362 (1999) (describing *parens patriae* actions as “an efficient alternative to consumer class actions”); Pryor, *supra* note 8, at 1899 (“When the attorney general files a *parens patriae* suit, the relief sought by the attorney general on behalf of his citizens may be similar to the ‘aggregate remedies [of] . . . a class action . . .’” (first ellipsis in original) (quoting Beth S. Schipper, Note, *Civil RICO and Parens Patriae: Lowering Litigation Barriers Through State Intervention*, 24 WM. & MARY L. REV. 429, 449 (1983))); Wildermuth, *supra* note 23, at 300 (“[T]he emphasis on harm to a substantial segment of the population suggests that this type of [*parens patriae*] suit is similar to a class action.”); cf. Woolhandler & Collins, *supra* note 23, at 512 (“The *parens patriae* label . . . often merely dresses up actions that private parties could easily bring.”).

⁵² Brunet, *supra* note 8, at 1922.

⁵³ See *infra* notes 79–85 and accompanying text.

⁵⁴ See ROBERT L. HUBBARD, THE ANTITRUST PLAINTIFF’S PERSPECTIVE: PUBLIC AND PRIVATE ENFORCEMENT IN COMPLEX LITIGATION — STATE ATTORNEY GENERAL PERSPECTIVE 9 (2002), available at <http://apps.americanbar.org/antitrust/at-committees/at-state/pdf/publications/other-pubs/parensclass.pdf> (“Not every state attorney general joins every litigation. Usually class counsel will assert claims on behalf of the residents in states not represented by an attorney general.” (citing *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003) (coordinated action by forty-two state attorneys general and class counsel representing residents from remaining eight states)); *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456, 460 (D. Md. 1987) (discussing settlement in case involving several states acting as *parens patriae* and coordinated private class action representing citizens from nonparticipating states).

Like class actions, representative suits by state attorneys general adjudicate the rights of individuals who play no direct role in the conduct of the case. Although the case law on the preclusive effect of public aggregate litigation is surprisingly sparse, the prevailing view is that the judgment in a state case is binding “on every person whom the state represents as *parens patriae*.”⁵⁵ That view rests on the conventional principle that no party should get multiple bites at the apple: if a citizen’s interests are advanced in litigation by the state, then that citizen is a “part[y]” to the . . . suit within the meaning of *res judicata*.⁵⁶

Despite their apparent similarities, damages class actions and *parens patriae* suits are governed by markedly different procedural regimes. As described in more detail below, private class actions are subject to careful controls to safeguard the interests of class members and to ensure adequacy of representation. Scholars have used the terms “exit,” “voice,” and “loyalty” to describe the core procedural requirements for class actions — terms borrowed, quite intentionally, from literature addressing the rights individuals enjoy in more familiar governance schemes, including as citizens of a state.⁵⁷ Perhaps unsur-

⁵⁵ Farmer, *supra* note 51, at 384; see also *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) (“When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment.”); *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549 (Ga. 2006) (holding that punitive damages claim filed by decedent’s estate against tobacco companies was barred by the master settlement between the tobacco companies and the states acting as *parens patriae*); *Bonovich v. Convenient Food Mart, Inc.*, 310 N.E.2d 710, 711 (Ill. App. Ct. 1974) (ruling that defeat of an antitrust action brought by the attorney general under state law barred a similar action by a private party since “the Attorney General’s action . . . was brought on behalf of all the people in the state . . . who were adversely affected by the alleged antitrust violations”); *Fabiano v. Philip Morris Inc.*, 862 N.Y.S.2d 487 (N.Y. App. Div. 2008) (same as *Brown & Williamson*, 627 S.E.2d 549); cf. *United States v. Olin Corp.*, 606 F. Supp. 1301, 1303, 1307–08 (N.D. Ala. 1985) (holding that a private suit was barred by the entry of judgment in a federal *parens patriae* action); *Menzel v. Cnty. Utils. Corp.*, 501 F. Supp. 354, 357 (E.D. Va. 1979) (“[U]nder the doctrine of *parens patriae* [sic], a state is deemed to represent all of its citizens, when the state is a party in a suit involving a matter of sovereign interest. There is a presumption that the state as *parens patriae* [sic] will represent adequately the position of its citizens.” (citations omitted)). Although not phrased in terms of preclusion, the cases cited below denying class certification on the ground of a pending or completed *parens patriae* action, see *infra* notes 79–85 and accompanying text, have the practical effect of barring collective private relief. Those decisions would not preclude subsequent individual actions, but such actions may be impossible as a practical matter if the relevant claims are low value.

⁵⁶ *Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) (“State governments may act in their *parens patriae* capacity as representatives for all their citizens in a suit to recover damages for injury to a sovereign interest. . . . There is a presumption that the state will adequately represent the position of its citizens. . . . Thus, the sportfishers here, as members of the public, were ‘parties’ to the . . . suit within the meaning of *res judicata*.”). I discuss preclusion in more detail in section III.A, *infra* pp. 531–42.

⁵⁷ See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376 & n.17 (2000) (citing ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZA-

prisingly, therefore, most of those procedures have no bearing on suits brought by states themselves.⁵⁸

This section provides an overview of the procedural requirements for public and private aggregate litigation. The rules governing private class actions reflect the uneasy position that aggregate litigation occupies in the modern legal order. Aggregation offers an economical way of resolving multiple related disputes, but it collides with the venerable principle “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.”⁵⁹ Aggregate litigation also stands in tension with traditional notions of affirmative client consent — consent to be represented by a particular attorney, and consent to any settlement that the attorney negotiates.⁶⁰

In the context of private class actions, federal law has struck the balance in favor of claim aggregation, but only where it appears that aggregation is both efficient and fair. To that end, Rule 23(a) of the Federal Rules of Civil Procedure requires judges to scrutinize any proposed class action and to certify the action only if four requirements are satisfied: numerosity, commonality, typicality, and adequacy of representation.⁶¹ The numerosity requirement ensures that there is some benefit to aggregation — that is, resort to the class mechanism should prove to be an economical way of resolving multiple disputes. The remaining requirements promote fairness by demanding that the representative parties share interests in common with, and will vigorously represent, the absent class members.⁶²

TIONS AND STATES (1970)); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341–42, 366 & n.104 (citing same).

⁵⁸ Some state statutes authorize the attorney general to sue as a class representative, thereby triggering state and federal procedural rules governing class actions. See, e.g., Michigan Consumer Protection Act, MICH. COMP. LAWS ANN. § 445.910 (West 2011); Ohio Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.07 (West Supp. 2012).

⁵⁹ *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); accord *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (acknowledging that class actions are an “exception to the rule that one could not be bound by judgment *in personam* unless one was made fully a party in the traditional sense”); see also *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (discussing the “deep-rooted historic tradition that everyone should have his own day in court” (quoting 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449 (1981)) (internal quotation marks omitted)).

⁶⁰ See Issacharoff, *supra* note 4, at 805 (“Nowhere else [but in class actions] do we find so clear a departure from the premise that the attorney-client relationship is achieved through contractual voluntarism, with the terms of the engagement constrained only by the rules of professional conduct.”); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 586 (“[T]he safety valve of client consent is missing, either to authorize the representation of multiple plaintiffs or to justify the settlement.”).

⁶¹ See FED. R. CIV. P. 23(a).

⁶² See Jay Tidmarsh, *The Story of Hansberry: The Rise of the Modern Class Action*, in CIVIL PROCEDURE STORIES 233, 287–88 (Kevin M. Clermont ed., 2d ed. 2008) (describing functions of Rule 23(a) requirements).

Some, but not all, of the Rule 23(a) requirements apply to public aggregate actions by virtue of the basic standing rules outlined above. The common law rules governing *parens patriae* actions effectively incorporate a numerosity requirement by demanding that the state act on behalf of a “sufficiently substantial segment” of its population.⁶³ And, while courts assessing claims of *parens patriae* authority do not make any explicit inquiry into commonality, the fact that the state must assert an injury to the members of the *parens patriae* group — the equivalent of a Rule 23 “class” — effectively ensures that there will be some legal or factual questions common to the group.

Matters become more complicated when one turns to the requirement of typicality, because the state — the equivalent of the representative party in a private class action — may not be asserting a claim that can be analogized to a private plaintiff’s claim. In an antitrust *parens patriae* action, for example, the state need not assert that *it* has suffered antitrust damages, but may simply claim an interest in remedying the antitrust injury suffered by its citizens.⁶⁴ The state is therefore representing the *parens patriae* group in the way that an organization might represent its members, not in the way contemplated by Rule 23. And in cases where the state is asserting proprietary claims in addition to claims on behalf of its citizens, there is no judicial inquiry into whether the former claims are typical of the latter.

Most important for present purposes is the question of adequacy of representation. Rule 23(a) requires the certifying court to determine that “the representative parties will fairly and adequately protect the interests of the class.”⁶⁵ Rule 23(g) demands a similar inquiry regarding class counsel.⁶⁶ These “loyalty” requirements transcend Rule 23, forming the bedrock constitutional protections for absent class members.⁶⁷

⁶³ Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). The same is not necessarily true of suits for restitution under state consumer protection statutes, which may involve a relatively small set of injured citizens. See, e.g., Press Release, N.Y. State Office of the Att’y Gen., Attorney General Cuomo Secures More Than \$100k for Victims of Geneva Car Dealership that Engaged in Fraud (June 22, 2010), available at <http://www.ag.ny.gov/press-release/attorney-general-cuomo-secures-more-100k-victims-geneva-car-dealership-engaged-fraud> (describing judgment ordering car dealership to pay more than \$100,000 in restitution for defrauding thirty-eight customers).

⁶⁴ See Farmer, *supra* note 51, at 381 (noting that, while class actions “typically require[] the class representative and class members to share common claims and interests[,] . . . the state entity that prosecutes a *parens patriae* antitrust action typically has no interest in the claim because it has suffered no direct antitrust damage”).

⁶⁵ FED. R. CIV. P. 23(a)(4).

⁶⁶ See FED. R. CIV. P. 23(g).

⁶⁷ See *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (“It is familiar doctrine of the federal 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 by parties who are present”); David Marcus, *Making Adequacy More Adequate*, 88 TEX. L. REV. SEE ALSO 137, 138 (2010) (“Adequate repre-

Questions of adequate representation recede from view when aggregate litigation moves into the public sphere. Although it seems clear that a public suit should not preclude subsequent private litigation (either individual or aggregate) absent some assurance of adequate representation, there is no mechanism for an inquiry into the adequacy of representation in *parens patriae* suits akin to that mandated by Rule 23. At best, the question of adequacy could be addressed collaterally in a subsequent private suit seeking to relitigate the issues presented in the state action. Yet the available evidence suggests that courts will tend to presume that the attorney general will work diligently to vindicate the interests of the citizens whom he purports to represent.⁶⁸ The Supreme Court has not addressed the issue directly, but it has reserved the question “whether public officials are *always* constitutionally adequate representatives of all persons over whom they have jurisdiction when . . . the underlying right is personal in nature”⁶⁹ — intimating that the litigant seeking to show inadequate representation by a state attorney general will face an uphill battle.

In addition to the certification provisions discussed above, Rule 23 requires the court in any class action to assess whether a proposed settlement is “fair, reasonable, and adequate.”⁷⁰ Although scholars have questioned the efficacy of the approval requirement,⁷¹ the purpose is

sentation . . . is . . . the constitutional prerequisite for the empowered modern class action.”); *infra* section III.A, pp. 531–42.

⁶⁸ See *infra* notes 82–85, 96–102, and accompanying text. Prior to the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended in scattered sections of 15 U.S.C.), which authorizes states to enforce federal antitrust law as *parens patriae*, attorneys general sometimes brought antitrust class actions on behalf of their citizens. The courts in such suits held that the attorneys general easily satisfied the requirement of adequate representation. See, e.g., *In re Ampicillin Antitrust Litig.*, 55 F.R.D. 269, 274 (D.D.C. 1972) (“[T]he states and cities, acting through their attorneys general and chief law officers respectively, are the best representatives of the consumers residing within their jurisdictions.”); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 280 (S.D.N.Y. 1971) (“[I]t is difficult to imagine a better representative of the retail consumers within a state than the state’s attorney general.”).

⁶⁹ *Richards v. Jefferson Cnty.*, 517 U.S. 793, 802 n.6 (1996) (emphasis added). *Richards* held that a previous suit by the acting director of finance for the city of Birmingham challenging a county tax on federal constitutional grounds did not preclude a later taxpayer action raising the same claim. See *id.* at 805. As relevant here, the *Richards* Court explained that, “[e]ven if we were to assume . . . that by suing in his official capacity, the finance director intended to represent the pecuniary interests of all city taxpayers, and not simply the corporate interests of the city itself, he did not purport to represent the pecuniary interests of *county* taxpayers like petitioners.” *Id.* at 801–02. The passage quoted in the text appears in a footnote directly following that statement.

⁷⁰ FED. R. CIV. P. 23(e)(2).

⁷¹ See, e.g., Coffee, *supra* note 12, at 237 (“[B]y most accounts, judicial scrutiny of the settlement’s adequacy has proved to be a weak reed on which to rely.”); Issacharoff, *supra* note 4, at 830 (describing judicial efforts to “polic[e] substantively defective settlements” as an “almost impossible job”).

clear enough. Judicial review of settlements supplements the front-end requirement of adequate representation by adding a second opportunity for scrutiny at the close of the case. As such, it helps ensure that lack-luster or conflicted representation does not saddle absent class members with a judgment that does nothing to advance their interests. Again, the requirement applies only to private actions. Some statutes prescribe a similar approval process for *parens patriae* settlements,⁷² but courts tend to rely heavily on the fact that the litigation is controlled by public rather than private attorneys. As one court put it, “[t]he Court cannot overlook the governmental nature of these *parens patriae* suits in which the primary concern of the Attorneys General is the protection of and compensation for the States’ resident consumers, rather than insuring a fee for themselves.”⁷³ In other contexts, there is no requirement whatsoever of court approval of public aggregate settlements.⁷⁴

The discussion thus far has focused on procedural requirements that apply to all class actions, regardless of type. Damages class actions — which bundle together what might otherwise be autonomous individual claims — must clear an additional set of hurdles.⁷⁵ In order to certify a damages class under Rule 23(b)(3), the court must find 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.”⁷⁶ Both inquiries are designed to ensure that there is good reason to abandon the norm of individualized repre-

⁷² See, e.g., 15 U.S.C. 15c(c) (2006) (providing that federal antitrust *parens patriae* actions “shall not be dismissed or compromised without the approval of the court”). Some state antitrust and unfair trade practices statutes follow the federal antitrust model and require court approval for *parens patriae* settlements. See, e.g., ALASKA STAT. § 45.50.577(g) (2011); CAL. BUS. & PROF. CODE § 16760(c) (West 2008); COLO. REV. STAT. § 6-4-111(3)(b) (2011); FLA. STAT. ANN. § 542.22(3)(c) (West 2007); OR. REV. STAT. § 646.775(3) (2011).

⁷³ *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456, 460 (D. Md. 1987) (applying 15 U.S.C. § 15c(c)); see also *New York v. Reebok Int’l Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) (noting that attorneys general in *parens patriae* actions are motivated by concern for enforcement of the law); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002) (“Opinion of experienced and informed [counsel] should be afforded substantial consideration, and particularly here, the Court may place greater weight on such opinion in addressing a settlement negotiated by government attorneys committed to protecting the public interest.” (citation omitted)); *In re Toys ‘R’ Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) (“[T]he participation of the State Attorneys General furnishes extra assurance that consumers’ interests are protected.”).

⁷⁴ For examples of state antitrust and unfair trade practices statutes that do not require court approval of settlements, see DEL. CODE ANN. tit. 6, § 2108 (1999); HAW. REV. STAT. ANN. § 480-14 (LexisNexis 2011); 740 ILL. COMP. STAT. 10/7 (2011); MASS. GEN. LAWS ch. 93, § 9 (2010); NEB. REV. STAT. § 84-212 (2008); and N.H. REV. STAT. ANN. § 356:4-a (2009).

⁷⁵ See David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 662–70 (2011) (cataloging scholarly efforts to explain why damages class actions trigger additional protections).

⁷⁶ FED. R. CIV. P. 23(b)(3).

sentation in favor of claim aggregation, and “further cement the cohesion between class representative and class members.”⁷⁷

Neither finding is necessary in the typical *parens patriae* action. On the contrary, because the state is technically the sole plaintiff in a *parens patriae* suit, it can avoid difficult questions of predominance that might arise in a class action in which individualized evidence of injury or causation would be necessary.⁷⁸ As for superiority, not only do courts forgo such an inquiry in public aggregate litigation, but they also tend to presume that public adjudication is superior to private alternatives.⁷⁹ Thus, federal courts regularly permit *parens patriae* actions to take the place of class actions, holding that the class mechanism is an “inferior method of adjudication”⁸⁰ if the attorney general is pursuing⁸¹ a *parens patriae* action seeking the same sort of remedies from the same defendant.⁸² The reasoning in the cases is spotty but

⁷⁷ Tidmarsh, *supra* note 62, at 288.

⁷⁸ See Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 VAND. L. REV. 2177, 2190 (2004) (discussing states’ procedural advantages in multistate tobacco litigation and noting that “[c]oncerns over common issues of fact, which doomed earlier class actions to fail the predominance and superiority tests of federal and state class action statutes, would be finessed”).

⁷⁹ As noted above, some courts have suggested that a *parens patriae* action may proceed only if it appears that the interested citizens could not or would not pursue litigation on their own behalf. See *supra* note 30 and accompanying text. If widely adopted, such an approach might come to resemble the “superiority” inquiry demanded by Rule 23(b)(3). But most courts do not condition *parens patriae* standing on a showing that private litigation (whether aggregate or individual) is unavailable, and there is limited support for that proposition in the relevant precedents. See *supra* notes 30–37 and accompanying text.

⁸⁰ 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 23.46[2][c] (3d ed. 2007) [hereinafter MOORE’S FEDERAL PRACTICE].

⁸¹ Some courts have taken the concept further and precluded class action litigation where there is some reason to believe that the attorney general *may* pursue similar relief. See *Freeman Indus. LLC v. Eastman Chem. Co.*, No. E2003-00527-COA-R9-CV, 2004 WL 1102435, at *8 (Tenn. Ct. App. May 18, 2004) (affirming trial court’s ruling that state attorneys general “are the proper people to represent the people in their individual states and under their individual law,” although most of the relevant attorneys general had not actually filed a lawsuit (quoting trial court)), *aff’d in part and rev’d in part*, 172 S.W.3d 512 (Tenn. 2005); *Levine v. 9 Net Ave., Inc.*, No. A1107-00T1, 2001 WL 34013297, at *3 (N.J. Super. Ct. App. Div. June 7, 2001) (noting that a court cannot “ignore the existence of an Attorney General investigation into [the defendant’s conduct]” and affirming the trial court’s denial of class certification based, in part, on the pending attorney general investigation). *But see* *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 312 (D. Mass. 2004) (explaining that, while some federal courts had “denied class certification where the state Attorney General had, in fact, brought a claim on behalf of the consumers in the state,” those cases had no bearing “on whether a court should deny certification simply because the plaintiffs *could* petition the Attorney General to bring suit . . . , but where the Attorney General has not *actually* brought suit”).

⁸² See 5 MOORE’S FEDERAL PRACTICE, *supra* note 80, § 23.46[2][c] (“[I]f a governmental unit has brought suit on the same issue, a court may decide that the proposed private class action is unnecessary and an inferior method of adjudication.”); Farmer, *supra* note 51, at 387–88 (“When confronted with the choice, courts generally have respected Congress’s intentions [in federal anti-trust law], concluding that statutory *parens patriae* actions brought by the state Attorney General on behalf of the natural-person citizens of the state are superior to class actions brought under

tends to run along two lines. Some courts stress that government actions can avoid the difficult procedural requirements that apply to private class actions.⁸³ On that view, public aggregate litigation is superior to a private class action simply because it is easier. Other courts express a preference for public litigation because it is public. They assume that the attorney general will ably represent the interests of the state's citizens.⁸⁴ And, because the attorney general's fee will likely be far

Rule 23." (footnote omitted); Robert L. Hubbard & James Yoon, *How the Antitrust Modernization Commission Should View State Antitrust Enforcement*, 17 LOY. CONSUMER L. REV. 497, 514 (2005) ("Courts have repeatedly recognized the superiority of government actions in a variety of contexts."). The leading case is *Kamm v. California City Development Co.*, 509 F.2d 205, 207-08 (9th Cir. 1975), in which the California Attorney General and Real Estate Commissioner had filed an action in state court that resulted in a settlement and final judgment. The Ninth Circuit affirmed a holding that a separate class action was not "superior," even though "not all members of the class appellants seek to represent will be protected by the California settlement; nor will the class recover an amount that is even close to that sought in the class action." *Id.* at 211; *see also* *New York v. Intercounty Mortgagee Corp.*, 448 N.Y.S.2d 675, 677 (N.Y. App. Div. 1982) (holding without explanation that the New York Attorney General's action for restitution and an injunction prohibiting defendants from collecting mortgage recording taxes was "a superior and more effective device for obtaining restitution than [the pending] class actions"). At least one state mandates such a superiority finding by statute. *See* MD. CODE ANN., COM. LAW § 11-209(c) (LexisNexis 2005) ("An action brought by the Attorney General as *parens patriae* . . . is presumed superior to any class action brought on behalf of the same person."); *cf.* MASS. GEN. LAWS ch. 93, § 12 (2010) (providing that commencement of an antitrust action by the attorney general as *parens patriae* "shall serve to stay any civil action . . . on behalf of said natural persons against the same defendant which is based in whole or in part on any matter complained of in the action commenced by the attorney general").

⁸³ *See* *Pennsylvania v. Budget Fuel Co.*, 122 F.R.D. 184, 185 (E.D. Pa. 1988) ("The superiority of the *parens patriae* action over the class action is evidenced by the lack of any provision or requirement [in federal antitrust law] for court approval or certification of a *parens patriae* action."); *In re Montgomery Cnty. Real Estate Antitrust Litig.*, No. B-77-513, 1988 WL 125789, at *2 (D. Md. July 17, 1988) (citing the lack of certification requirements as evidence that a "*parens patriae* action is plainly superior to the class action as a mode for adjudication of collective claims"); *Barcelo v. Brown*, 78 F.R.D. 531, 534 (D.P.R. 1978) ("The presence of the Commonwealth Plaintiffs in this action is a viable alternative to coping with the difficulties inherent in the class action device. In view of this circumstance, it cannot be said, at this juncture, that the purported class would be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" (citations omitted) (quoting FED. R. CIV. P. 23(b)(3))).

⁸⁴ *See, e.g.,* *Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-cv-00018, 2006 WL 3359482, at *1, *3, *5 (N.D. Ohio Nov. 17, 2006) (denying class certification in view of defendant's settlement with multiple states' attorneys general, and reasoning that "[p]roceedings by the state . . . are presumably taken with the best interests of state residents in mind," *id.* at *3); *Brown v. Blue Cross & Blue Shield of Mich., Inc.*, 167 F.R.D. 40, 42 n.2, 44 (E.D. Mich. 1996) (denying class certification in light of a settlement agreement between the attorney general and the defendant that was contingent on the denial of class certification, reasoning that "the interests of the class would be adequately served by the agreement between defendant and the State of Michigan rendering a class action unnecessary," *id.* at 44); *Sage v. Appalachian Oil Co.*, Nos. 3:92-CV-176, 2:93-CV-229, 1994 WL 637443, at *1-2 (E.D. Tenn. Sept. 7, 1994) ("[T]he State, through the Attorney General, is clearly in a superior position to bring a *parens patriae* action . . . on behalf of all natural persons in this state. . . . [T]he State should be the preferred representative of a class of all persons, including non-natural persons such as business entities . . ."); *Budget Fuel*, 122 F.R.D. at 186 ("As a practical matter, there is no need to have a second class representative when the class is adequate-

smaller than that of private counsel, courts reason that public representation will put more money in the hands of the interested individuals.⁸⁵

Finally, consider Rule 23(c), which mandates that the members of any damages class action be afforded “the best notice [of the class action] that is practicable under the circumstances.”⁸⁶ The purpose of the notice requirement is to inform the class members that the case exists and to give them an opportunity to be heard in the action⁸⁷ or to opt out of it.⁸⁸ As others have explained, the rights of notice and opt-out “serve as ‘procedural safeguards’ of adequate representation” by bringing intraclass conflicts to light, encouraging class representatives to attend to absent class members’ interests, and allowing those with conflicting interests to escape the preclusive effect of the aggregate judgment.⁸⁹ Here, too, the requirements of Rule 23 take on constitutional overtones, as the Court has indicated that absent members of a damages class action may not be bound by the judgment if they do not enjoy rights of “voice” and “exit” — that is, if they are not afforded notice and an opportunity to be heard or to opt out of the class.⁹⁰ And

ly represented by the Attorney General.”); *Lohse v. Dairy Comm’n of Nev.*, 25 Fed. R. Serv. 2d (Callaghan) 1018, 1023 (D. Nev. 1977) (denying motion for class certification because, among other reasons, the Nevada Attorney General took action against and reached settlements with some of the defendants for inflating the price of milk, and holding that “[t]his kind of state action [was] much preferred to a punitive treble damage antitrust private civil remedy the proceeds from which will only slightly benefit any individual plaintiff”); see also *First*, *supra* note 5, at 1039 (arguing that “state attorneys general can be presumed to be acting in the interests of those they represent, the citizens of their state,” and noting that “there may be cases where, because of state *parens patriae* involvement, a class action will not be a ‘superior vehicle’ for resolving the litigation” (citing *Farmer*, *supra* note 51, at 386–90)).

⁸⁵ See *Thornton*, 2006 WL 3359482, at *3 (“[P]otential class members will often recover more [from attorney general litigation] than they would in a private action when costs and attorneys’ fees are factored in.”); *Farmer*, *supra* note 51, at 388 (“Courts have found that the state official is the natural representative of the citizens of the state. In some of these decisions, courts have considered the state Attorney General’s lack of pecuniary interest, contradistinguished from consumer class action suits brought by private counsel, to be a relevant factor in choosing the *parens patriae* action over class actions.” (footnote omitted)); Stephen B. Malech & Robert E. Koosa, *Government Action and the Superiority Requirement: A Potential Bar to Private Class Action Lawsuits*, 18 GEO. J. LEGAL ETHICS 1419, 1422 (2005) (“[T]he vast majority of courts holding that private class actions are not superior to Government Action have apparently done so, in part, simply because of deference to the government and/or a belief that [government] lawsuits . . . provided private plaintiffs with a more economical and manageable method of obtaining relief than a class action lawsuit.”).

⁸⁶ FED. R. CIV. P. 23(c)(2)(B).

⁸⁷ See FED. R. CIV. P. 23(c)(2)(B)(iv) (requiring notice “that a class member may enter an appearance through an attorney if the member so desires”).

⁸⁸ See FED. R. CIV. P. 23(c)(2)(B)(v) (requiring notice “that the court will exclude from the class any member who requests exclusion”).

⁸⁹ *Marcus*, *supra* note 75, at 663.

⁹⁰ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (“[M]inimal procedural due process protection [requires that a] plaintiff must receive notice plus an opportunity to be heard and participate in the litigation Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class

here, too, public aggregate suits are treated differently. Some statutes that authorize state *parens patriae* actions contain provisions for notice to the represented individuals.⁹¹ Notice by publication is the norm, though federal and some state antitrust statutes provide that the court may demand other forms of notice if it concludes that publication is inadequate to satisfy due process.⁹² Other *parens patriae* statutes⁹³ — and all state statutes authorizing attorneys general to seek restitution for injured citizens — omit any requirement of notice.

Once again, the difference in treatment of public and private aggregate litigation seems to stem from a presumption that state attorneys general will protect the interests of the individuals they represent, making it unnecessary for those individuals to take a hand in (or exclude themselves from) the litigation. That presumption has been made explicit in the context of decisions considering whether private individuals may intervene in a public action under federal Rule 24. Proposed intervenors must show, among other things, that existing

by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.”); *see also* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1065 (2002) (explaining the opt-out right for Rule 23(b)(3) class members as “a recognition of at least a formal right to litigant autonomy in cases that could plausibly be cast as stand-alone claims for recompense”). The holding in *Shutts* regarding the right of opt-out applies by its terms only in cases where the court would otherwise lack personal jurisdiction over the absent members of the plaintiff class. *See* 472 U.S. at 811–12. The Supreme Court has since reserved the question whether the rights of notice and opt-out are constitutionally required in all damages class actions, though the strong suggestion is that the answer is “yes.” *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2176 n.11 (2008) (“*Richards* suggested that notice is required in some representative suits, e.g., class actions seeking monetary relief. But we assumed without deciding that a lack of notice might be overcome in some circumstances.” (citations omitted) (citing *Richards v. Jefferson Cnty.*, 517 U.S. 793, 801 (1996))); *Richards*, 517 U.S. at 801 (“Even assuming that our opinion in *Hansberry* may be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice, it may not be read to permit the application of res judicata here.” (citations omitted)). If limited to the realm of personal jurisdiction, *Shutts* would have little application to *parens patriae* cases, which are brought on behalf of residents of the forum state.

⁹¹ *See, e.g.*, Hart-Scott-Rodino Antitrust Improvements Act of 1976 § 301, 15 U.S.C. § 15c(a)–(b) (2006) (authorizing states to sue as *parens patriae* to enforce federal antitrust law and providing that the state attorney general shall give notice to class members); ALASKA STAT. § 45.50.577(e) (2011) (Alaska antitrust statute); Arkansas Unfair Practices Act, ARK. CODE ANN. § 4-75-212(b)(2)(A) (2011); CAL. BUS. & PROF. CODE § 16760(b)(1) (West 2008) (California antitrust statute); Colorado Antitrust Act of 1992, COLO. REV. STAT. § 6-4-111(3)(b) (2011); DEL. CODE ANN. tit. 6, § 2108(e) (1999) (Delaware antitrust statute); Oklahoma Antitrust Reform Act, OKLA. STAT. tit. 79, § 205(A)(2) (2011); OR. REV. STAT. § 646.775(2)(a) (2011) (Oregon antitrust statute); R.I. GEN. LAWS § 6-36-12(c)(1) (2001) (Rhode Island antitrust statute).

⁹² *See, e.g.*, 15 U.S.C. § 15c(b); ARK. CODE ANN. § 4-75-212(b)(2)(B); CAL. BUS. & PROF. CODE § 16760(b)(1); DEL. CODE ANN. tit. 6, § 2108(e); OR. REV. STAT. § 646.775(2)(a).

⁹³ *See, e.g.*, Illinois Antitrust Act § 7(2), 740 ILL. COMP. STAT. 10/7(2) (2010); NEB. REV. STAT. § 84-212 (2008) (Nebraska antitrust statute); N.H. REV. STAT. ANN. § 356:4-a (2009) (New Hampshire antitrust statute); OHIO REV. CODE ANN. § 1345.07 (West Supp. 2012) (Ohio antitrust statute).

parties in the litigation will not adequately represent their interests.⁹⁴ Normally, the movant's burden is "minimal" and "is satisfied if the applicant shows that representation of his interest 'may be' inadequate."⁹⁵ In a *parens patriae* or other representative governmental action, however, "a governmental entity is presumed to represent its citizens adequately."⁹⁶ Although the presumption is rebuttable, most courts have erected a significant hurdle to intervention in such cases, requiring the movant to make "a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant."⁹⁷ That burden cannot be discharged simply by pointing to a disagreement over "litigation strategy"⁹⁸ or the "type or amount of damages to be claimed."⁹⁹ Instead, the movant must show that the governmental party is "ill-equipped or unwilling to protect" the asserted interest,¹⁰⁰ that the "applicant's interest cannot be subsumed within the shared interest of the citizens,"¹⁰¹ or that the "*parens patriae* has committed misfeasance or nonfeasance in protecting the public."¹⁰²

The prevailing approach to private intervention in *parens patriae* litigation stands in sharp contrast to intervention practice in damages

⁹⁴ See FED. R. CIV. P. 24(a) ("On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.").

⁹⁵ *Tbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

⁹⁶ 6 MOORE'S FEDERAL PRACTICE, *supra* note 80, § 24.03[4][a][iv][A].

⁹⁷ *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984); see also *Prete v. Bradbury*, 438 F.3d 949, 956-59 (9th Cir. 2006) (requiring a "very compelling showing" of inadequacy where intervenor and state shared the same ultimate objective, *id.* at 956 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)); *Env'tl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) (*per curiam*) ("[A] state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens. Thus, to intervene in a suit in district court in which a state is already a party, a citizen or subdivision of that state must overcome this presumption of adequate representation. A minimal showing that the representation may be inadequate is not sufficient. The applicant for intervention must demonstrate that its interest is in fact different from that of the state and that that interest will not be represented by the state." (footnote omitted)).

⁹⁸ *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997).

⁹⁹ *Ratliff*, *supra* note 8, at 1849 n.8; see also *State v. City of Dover*, 891 A.2d 524, 531 (N.H. 2006) (holding that cities' separate product liability suits against polluter must yield to state's *parens patriae* action, notwithstanding fact that cities were pursuing different legal theories and seeking different types of compensation, because "[t]here is no reason for the Court to conclude . . . that the State will not seek to obtain full compensation for all communities, including the [c]ities. While the compensation sought may not be the same as that which the cities would desire, a difference of that nature does not demonstrate an interest that is not properly represented by the State." (quoting trial court)).

¹⁰⁰ *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 690 F.2d 1203, 1213 (5th Cir. 1982).

¹⁰¹ *United States v. Union Elec. Co.*, 64 F.3d 1152, 1169 (8th Cir. 1995); accord *Curry v. Regents of the Univ. of Minn.*, 167 F.3d 420, 423 (8th Cir. 1999).

¹⁰² *Chiglo*, 104 F.3d at 188.

class actions. As noted, Rule 23 ensures that absent members of damages class actions receive notice of the action informing them “that a class member may enter an appearance through an attorney if the member so desires,”¹⁰³ and the Court has indicated that the Due Process Clause may demand such notice, together with an opportunity to be heard in the action.¹⁰⁴ The upshot is that members of the class have an *automatic* right to take part in the litigation, and other individuals — those whose rights are not being directly adjudicated in the action — need only satisfy the “minimal” burden of Rule 24 to intervene. Yet when an individual’s interests are represented by the state attorney general rather than another private party (and a private attorney), adequacy of representation is presumed and the individual has no procedural right to be heard.

* * *

Given that *parens patriae* actions serve the same aggregative function as private damages class actions, one might expect the two categories of litigation to labor under similar procedural rules. As we have seen, the reality is quite different. To the extent that courts inquire into the adequacy of public representation, they tend to assume that the attorney general’s “loyalty” to the individuals he represents is assured by his elected status.¹⁰⁵ Therefore, the assumption seems to run, there is no need for a complicated set of procedural rules to protect the purported beneficiaries of aggregate litigation.

The remainder of this Article challenges the assumption of adequate public representation. Part II applies familiar critiques of class actions to *parens patriae* suits, demonstrating that many of the problems thought to bedevil private aggregate actions are present in state suits as well. In short, there is good reason to fear that state attorneys general will not in fact adequately represent the interests of the citizens whose rights are at stake in *parens patriae* suits. Part III returns to the question of procedure. There, I argue that the current state of af-

¹⁰³ FED. R. CIV. P. 23(c)(2)(B)(iv); see also 5 MOORE’S FEDERAL PRACTICE, *supra* note 80, § 23.104[2][a][iii] (“A class member may elect to enter an individual appearance when he or she feels, for any reason, that his or her interest is not being adequately represented by the class representatives or by class counsel . . .”).

¹⁰⁴ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985).

¹⁰⁵ See *supra* notes 68–69, 84–85, 96–102 and accompanying text; see also Remarks on the State AG and the Role of *Parens Patriae*, *supra* note 49, at 18 (remarks of Samuel Issacharoff, Professor, Columbia Law Sch.) (“There should be greater deference, for pecuniary reasons, to the attorney general claiming to speak for the public than for private firms saying they speak for the public. That’s my general position and I think that’s what the courts have done. They say a strong, some say an overwhelming, presumption of adequacy when the attorney general comes in claiming to be a representative.”).

fairs — in which state suits can supplant class actions while avoiding the elaborate procedures that govern private suits — violates fundamental principles of due process.

II. AGENCY COSTS IN AGGREGATE LITIGATION

Most contemporary critiques of class actions stem from the work of Professor John Coffee, who prompted both courts and commentators to question whether aggregate litigation works to the benefit of the members of the class.¹⁰⁶ Coffee's critique builds from the recognition that class actions are not controlled by the individuals who hold the claims at issue, but by the private attorneys who represent the class.¹⁰⁷ Individual class members typically are unable and unwilling to monitor class counsel effectively.¹⁰⁸ The lack of monitoring permits opportunistic behavior by the attorneys, resulting in settlements that are suboptimal from the perspective of the class members but yield handsome fees for class counsel.¹⁰⁹

Although courts have assumed away questions of adequate representation when the attorney general is at the helm of aggregate litigation, many of the agency-cost problems that Coffee exposed in the private sphere extend into the public realm. The attorney general is beholden to interests that diverge in important ways from those of the individuals whose claims are at stake in *parens patriae* actions, and those individuals lack any effective means to monitor and control the attorney general's conduct in the litigation. Resource limitations at the state level exacerbate the risk that public suits will generate inadequate recoveries by giving public attorneys incentives to agree to the same sorts of settlements that have drawn fire in the class action context.

The goal of this Part is to expose the dangers of facile assumptions about the attorney general's "loyalty" to the members of the *parens*

¹⁰⁶ See Brunet, *supra* note 1, at 403–04 (“The law and economics critiques of Professor John Coffee and others have had a huge influence on courts and commentators.” (footnote omitted)); Gilles & Friedman, *supra* note 1, at 104 (asserting that Coffee’s “insights have become canonical”).

¹⁰⁷ John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677–84 (1986) (describing class counsel as “independent entrepreneur,” *id.* at 681).

¹⁰⁸ Coffee, *supra* note 14, at 629 (“Obviously, the members of the plaintiff class usually have very little capacity to monitor their agents.”).

¹⁰⁹ See *id.* at 633 (“The existence of high agency costs implies the likelihood of ‘opportunistic behavior.’ . . . At its simplest, the classic form of opportunism in class actions is the ‘sweetheart’ settlement, namely one in which the plaintiff’s attorney trades a high fee award for a low recovery.”); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991) (arguing that “the single most salient characteristic of class and derivative litigation is the existence of ‘entrepreneurial’ plaintiffs’ attorneys [who, because they] are not subject to monitoring by their putative clients, . . . operate largely according to their own self-interest . . .”).

patriae group. It bears emphasis at the outset, however, that nothing here turns on a jaundiced view of the incentives or capabilities of state attorneys general. Others, writing from the perspective of the business interests that may be the targets of state action, have argued that attorneys general care about little more than their electoral prospects and that their litigation choices are driven primarily by political considerations.¹¹⁰ I have suggested elsewhere that such claims about “political” attorneys general are overstated,¹¹¹ and I do not repeat that analysis here. As I explain in this Part, those who see attorneys general as political marionettes should be deeply suspicious of any suggestion that state litigation offers a cure for the ills of the private class action. The important point for present purposes is that the risks detailed here obtain even if (indeed, *especially* if) all attorneys general are motivated solely by the pursuit of the public interest.

A. Conflicts of Interest

Class action critiques focus heavily on conflicts of interest between class counsel and class members. Critics emphasize class counsel’s incentive to maximize his fee — an interest that diverges in important ways from the class members’ interest in maximizing their recoveries.¹¹² Seizing on the fact that attorneys general are paid a flat salary and do not profit personally even if the court awards a fee,¹¹³ those commentators and judges who have considered the issue have tended to assume that conflicts between counsel and class evaporate when aggregate litigation goes public.¹¹⁴ After all, the attorney general is

¹¹⁰ For example, Professor Donald Gifford argues:

[M]any attorneys general exercise their increased policy discretion by focusing the blame for creating costly social problems on those manufacturers who possess considerable resources, in order to avoid politically costly tax increases. Not coincidentally, some political observers claim that the abbreviation for the attorneys general, “AG,” stands for “aspiring governor.”

Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 967–68 (2008). Gifford acknowledges that he worked on behalf of the National Paint and Coatings Association and E.I. du Pont de Nemours & Co. to “urge[] public officials to forego *parens patriae* litigation against manufacturers and instead adopt legislative proposals.” *Id.* at 913 n.*.

¹¹¹ Lemos, *supra* note 39, at 722.

¹¹² See Coffee, *supra* note 107, at 686–90 (using economic analysis to demonstrate why class counsel’s focus on fees may lead to premature settlements when counsel will receive a percentage of the total recovery); see also Coffee, *supra* note 14, at 630 (noting additional problems when counsel is compensated pursuant to the lodestar formula).

¹¹³ See William B. Rubenstein, *On What a “Private Attorney General” Is — And Why It Matters*, 57 VAND. L. REV. 2129, 2139 (2004) (“Private attorneys work for individual clients and those clients pay them for their services. . . . By contrast, public attorneys work for the public and are paid a salary to do so. The amount of time they invest in an issue, the amount of sanction they recover, or the amount of harm they deter, has no bearing on their fee.”).

¹¹⁴ See Brunet, *supra* note 1, at 454–55 (“Government attorneys have different incentives than class action counsel. . . . Rather than aspire to monetary rewards, the . . . prototypical agency

charged with representing the public interest. Thus, the argument goes, there is no conflict between the interests of the public attorney and the interests of those he represents.

In fact, conflicts of interest are all but unavoidable in public aggregate litigation. First, there may be intraclass conflicts in a *parens patriae* action just as there are in private class litigation.¹¹⁵ Consider a case in which a state asserts a proprietary claim on behalf of certain state agencies as well as a claim for damages to consumers; for example, both public and private purchasers may have overpaid for a product because of the seller's anticompetitive conduct.¹¹⁶ State agencies and state residents will share in any recovery, but will they share evenly? Should they? And if relatively few consumers go to the trouble of claiming the available damages, what should become of the unclaimed funds?¹¹⁷ Leaving aside the attorney general's own interests, it may be impossible for him to faithfully represent the interests of the *parens patriae* group members without doing violence to the other state interests he is charged with promoting — and vice versa. The impossibility of adequately representing competing interests is precisely why courts insist on subdividing private classes and appointing separate counsel to represent warring interests within a putative class.¹¹⁸ Yet no such procedure applies in the typical *parens patriae* action.

The problem is not limited to cases in which the attorney general effectively serves two different clients, but extends to those in which she asserts only a representative claim on behalf of injured citizens. The attorney general has a duty to represent the public interest — the interest of the state qua state and the collective interests of the state's citizens. It should be clear, however, that the public interest may clash with the rather more narrow interests of the members of the *parens*

attorney may be motivated by a culture that seeks adherence to a particular mission. . . . Motivation should come from the agency's public service mission itself."); *see also supra* section I.B, pp. 499–510.

¹¹⁵ Indeed, the very structure of *parens patriae* authority creates the potential for such conflict, as "the claim must be one in which both the state and the individual have an interest." Ratliff, *supra* note 8, at 1857 ("But if the state is interested in recovering for itself as well as the class, conflicts of interest may emerge."). Those interests may be aligned — as when the state's interest derives from the collective interests of its residents — but they need not be.

¹¹⁶ *See* Remarks on the State AG and the Role of *Parens Patriae*, *supra* note 49, at 26 (remarks of Jay L. Himes, N.Y. Assistant Att'y Gen.) ("You can have conflicts between *parens patriae* and state proprietary claims."); *id.* at 22 (remarks of Mike Fisher, Pa. Att'y Gen.) ("Sometimes we have too many hats in these cases. If we're seeking damages where the state has a proprietary interest, we represent the state. In that same case we may represent consumers.").

¹¹⁷ *Id.* at 27 (remarks of Jay L. Himes, N.Y. Assistant Att'y Gen.) ("[O]ur *parens patriae* claim response is not 100%, or anything close to it. Given that, you can encounter situations where there is *parens patriae* money left over, and you have the question of whether that money ought to be distributed to *parens patriae* beneficiaries in a kind of *cy pres* distribution, or whether it ought to go to the proprietary claim, which is getting less than 100% recovery.").

¹¹⁸ *See id.* at 23 (remarks of Samuel Issacharoff, Professor, Columbia Law Sch.).

patriae group.¹¹⁹ Consider an antitrust suit on behalf of consumers against a local firm that employs hundreds of local workers. The consumers who populate the *parens patriae* group will have an interest in maximizing the amount of recovery. But suppose that the attorney general concludes that a large recovery would risk putting the defendant out of business, with a resulting loss of jobs and tax revenue. One need not adopt a cynical view of the motivations (political or otherwise) of attorneys general in order to appreciate the potential for a conflict of interest. The difficulty is that the attorney general may have to sacrifice the interests of the individuals whom she represents in order to vindicate the larger public interest — or vice versa. Even if one assumes that each attorney general will always act unselfishly and in good faith, it is hardly clear how she should negotiate the tension between the interests of injured citizens and the interests of *other* citizens, or of the public more broadly.¹²⁰

Matters look significantly worse if one relaxes the assumption that each attorney general will always act unselfishly. Most attorneys general are elected and many have aspirations to higher office.¹²¹ It stands to reason that electoral politics may exert some influence on the litigating behavior of attorneys general, though no one knows exactly how or how much.¹²² If that assumption is correct, it suggests yet another set of interests at play in state suits: those of the individuals and firms whose votes or contributions the attorney general hopes to secure in the next election. That set of interests is unlikely to map

¹¹⁹ See *id.* at 17 (remarks of Samuel Issacharoff, Professor, Columbia Law Sch.) (“[T]he AG can never be unconflicted because he always represents the public interest. And the private interest is never fully aligned with the public interest.”).

¹²⁰ Commentators have raised a similar concern about private attorneys who work in the public interest. As Professor Geoffrey Miller explains:

[The] public interest motivation may induce counsel to act out of political or ideological beliefs that can come into conflict with the interests of the class. The reasonable plaintiff will prefer that counsel not seek to further her own political or ideological objectives if the outcome is not optimal for the class.

Miller, *supra* note 60, at 618; see also Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2091 (2004) (“In a mass tort case for money damages, if the plaintiffs’ lawyers are driven partly by social change objectives and not solely by maximizing each client’s recovery, and if different strategies would serve each of those goals, should that cause concern as a conflict of interest between the lawyers and their clients?”).

¹²¹ See Marshall, *supra* note 7, at 2453 (“[T]he Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor’s office”); Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS 37, 40 (2003) (“[O]f the 166 attorneys general who served at least two years between 1980 and 1999, more than 70 ran for a governorship or a U.S. Senate seat. Another 20 ran for or were appointed to a lower court seat, a federal agency post, or another position in state government.”).

¹²² See Lemos, *supra* note 39, at 729 & n.143 (discussing risk that state enforcers will be “capture[d] by local business[es] or other interests,” *id.* at 729, in ways that affect their enforcement efforts).

neatly onto either the interests of the individuals represented in the case or the interests of the general public.

Indeed, the individuals and groups most likely to closely monitor, and to devote funds to, attorney general elections may well be the potential *targets* of state litigation.¹²³ Particularly in the wake of the Supreme Court's decision in *Citizens United v. FEC*,¹²⁴ corporate money has flooded into attorney general elections.¹²⁵ Corporate donors rarely want attorneys general to maximize recoveries for injured citizens; instead, the politically savvy move will often be a slap on the wrist. Where that is true, the attorney general's political incentives will run directly counter to the interests of the *parens patriae* group members.

Far from solving the problem, the attorney general's lack of pecuniary interest may exacerbate these conflicts of interest between counsel and class. As class action scholars have argued, the percentage-fee arrangement under which most private class counsel work has the advantage of linking the interests of attorney and clients: the attorney's fee increases as the clients' recovery grows.¹²⁶ Private class counsel

¹²³ Debates over the multistate mortgage foreclosure settlement illustrate this dynamic. See *infra* notes 178–182 and accompanying text. Critics argue that “mere pursuit of newspaper headlines by politically-ambitious politicians . . . should not come at the expense of the rest of us and the economy at large.” Todd J. Zywicki, *The “Robo-Signing” Settlement: Seeds of Recovery, or Chaos?*, FORBES (Feb. 20, 2012, 9:37 PM), <http://www.forbes.com/sites/realspin/2012/02/20/the-robo-signing-settlement-seeds-of-recovery-or-chaos/>. It is unclear whether action by state attorneys general on behalf of homeowners will be rewarded by votes or other forms of political support, however. Instead, the strongest political response may well be from the defendant banks and other corporations that share their interests. See Matt Sledge, *Democratic Attorney General Candidates Talk Foreclosure, Republican Rivals Remain Silent*, HUFFINGTON POST (May 18, 2012, 3:08 PM), http://www.huffingtonpost.com/2012/05/18/foreclosures-state-attorneys-general-campaign-issue_n_1527395.html (“The corporations, they’re the ones who remember. . . I expect the financial community to be active in AG races.” (quoting James Tierney, former Attorney General of Maine and director of the National State Attorneys General Program at Columbia Law School) (internal quotation marks omitted)).

¹²⁴ 130 S. Ct. 876 (2010) (holding that the First Amendment prevents the government from prohibiting independent campaign contributions by corporations and unions).

¹²⁵ See, e.g., Wendy Leonard, *Race for Utah's Attorney General Heats up with Super PAC's Attack Ad*, DESERET NEWS (June 21, 2012, 10:16 PM), www.deseretnews.com/article/765585091/Race-for-Utahs-attorney-general-heats-up-with-super-pacs-attack-ad.html?pg=all (reporting that a Nevada-based Super PAC spent \$140,000 in one week on ads attacking a candidate in the Republican primary election for Utah attorney general); Matt Sledge, *Montana Attorney General Race Rocked by Out-of-State Corporate Donations in Wake of Citizens United*, HUFFINGTON POST (May 22, 2012, 5:46 PM), http://www.huffingtonpost.com/2012/05/22/montana-attorney-general_n_1537034.html (reporting that a Virginia-based Super PAC, funded by “some of the country's most well-connected firms,” including Altria (formerly known as Philip Morris) and the Pharmaceutical Research and Manufacturers of America (PhRMA), spent \$108,217 in two weeks in the Montana Republican primary for attorney general).

¹²⁶ See Issacharoff, *supra* note 4, at 829 (“The attorneys’ recovery should be tied to that of the class; to the extent the attorneys hope to prosper in the representation, that reward should be a direct product of what they return to the class.”); Miller, *supra* note 60, at 616 (“In money damages cases, the reasonable plaintiff would prefer that counsel be compensated under the percentage-of-recovery method. Because this method aligns the attorney’s interests with those of the class, the

therefore has a personal incentive to maximize the recovery for the class. A public attorney lacks an equivalent personal incentive. The attorney general will not take home a higher salary if he recovers more money for the *parens patriae* group members. That is not necessarily a good thing from the perspective of the injured citizens, who may prefer to be represented by an attorney with every reason — both personal and professional — for pushing for a large financial award.

To be sure, the contingency-fee mechanism is far from perfect. One of the major difficulties is that counsel's interest in maximizing his fee must be weighed against the costs of spending time on the case. In many cases the rational goal for class counsel is not to get the biggest fee possible, but to maximize the fee-to-effort ratio.¹²⁷ As a result, private counsel may accept "premature" settlements (that is, settlements that properly informed clients would reject).¹²⁸ Though the attorney will receive a lower fee, a quick settlement may be more attractive than the prospect of drawn-out and risky litigation that promises only a slightly higher reward. The temptation to accept a premature settlement will be particularly strong when class counsel has been forced to make a considerable investment in the litigation: "the more substantial his investment, the greater his probable level of risk aversion and the higher his vulnerability to a settlement offer which would be rejected by a risk-neutral decision-maker."¹²⁹

A similar risk exists in public litigation, though the cause is somewhat different. Attorneys general and their staffs often do recover attorneys' fees and costs for their work in public aggregate litigation, and there is some anecdotal evidence that they may seek fees that are excessive relative to the amount of work they have contributed to the case.¹³⁰ But a public attorney's incentive to maximize his fee is differ-

percentage approach creates an incentive for counsel to generate the best recovery for the class . . .").

¹²⁷ See Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1042 (2002) ("The self-interested attorney seeks to maximize the return on her involvement in the litigation while minimizing the resources expended. Such an attorney prefers an early settlement when it 'bear[s] a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal.'" (alteration in original) (quoting *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972))).

¹²⁸ Coffee, *supra* note 14, at 630.

¹²⁹ Coffee, *supra* note 12, at 231.

¹³⁰ See, e.g., PETER J. BRANN, STATE ATTORNEYS GENERAL CONSUMER PROTECTION UNDER A NEW ADMINISTRATION 9 (2008), available at http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=55833&rtcontentdispositi (discussing the "perception that States would not drop a case without some payment"); STEPHEN D. HOUCK, TRANSITION REPORT: THE STATE OF STATE ANTITRUST ENFORCEMENT 15-16 (2009), available at http://www.naag.org/assets/files/pdf/nagtri/20091007_Antitrust_Columbia/20091007.antitrust_columbia.TRANSITION_REPORT.pdf (discussing the possibility that "state antitrust bureaus that must support themselves financially through recovery of costs become involved [in litigation], at least in

ent in both degree and kind from that of a private attorney who will pocket the fee as a direct profit. Public attorneys' fees typically represent a much smaller percentage of the total recovery than would be true for private attorneys.¹³¹ Moreover, public attorneys are compensated on a salary basis; they do not retain their fees as personal profit. At best, the fees go to fund future enforcement efforts by the attorney general's office. Thus, while it is misleading to suggest that public attorneys do not "care" about fees at all, they do not share private counsels' strong incentives to maximize their fees.

While the attorney general may not be driven by the prospect of recovering a hefty fee, it does not follow that public attorneys do not hope to gain anything from successful litigation or that they have nothing to lose if the litigation fails. Ideally, the attorney general will be motivated by a desire to advance the public interest and to redress any injuries that have been suffered by her citizens. Attorneys general may sometimes be motivated by more personal interests as well, such as an interest in building their professional reputations or in pleasing powerful political contributors or constituencies.¹³² Contrary to popular assumptions, moreover, attorneys general often have a vested interest in using their litigation authority to obtain financial recoveries. As I have argued elsewhere, state attorneys general can use big recoveries to "build their reputations" and "garner electoral support."¹³³ And, depending on state law, the office of the attorney general itself may retain some or all of the funds recovered in aggregate litigation in order to finance future enforcement efforts.¹³⁴

The key point for present purposes is that, whatever their motivations, be they professional or political, ideological or financial, attorneys general must balance their goals in one case against other cases they are pursuing or could pursue. Like their private counterparts, public attorneys may prefer a moderate settlement that can be won at

part, to obtain attorneys' fees," *id.*, and noting complaints from the defense bar that state litigators requested attorneys' fees "even though the state may not have obtained divestitures or other relief" and did not indicate the number of hours worked, *id.* at 16).

¹³¹ See First, *supra* note 5, at 1018 tbl.5 (reporting on recoveries and fee awards in multistate antitrust actions and suggesting that states' attorneys' fees and costs represented less than four percent of total recoveries).

¹³² See Dru Stevenson, *Special Solitude for State Standing: Massachusetts v. EPA*, 112 PENN. ST. L. REV. 1, 13-14 (2007) ("The replacement of the private activist groups with the state AG's [in environmental litigation] could alter the nature of the litigation, as the AG's have a broader range of constituents to appease — including large numbers of moderates who prefer less radical policy changes, or demands for reform, than the stereotypical member of an activist group like the [Natural Resources Defense Council].").

¹³³ Lemos, *supra* note 39, at 732.

¹³⁴ *Id.* at 734-35; see also Rubenstein, *supra* note 113, at 2139 ("[P]ublic attorneys may actually directly benefit from their lawsuit if, for instance, their agency is permitted to retain the proceeds of their efforts.").

relatively low cost over a more onerous set of demands that the defendant strongly opposes. Even the best-intentioned attorney general may make a rational judgment that the public interest would be better served if he agreed to a modest settlement in Case 1, leaving time and resources for the state to pursue Case 2, instead of going to the mat to maximize the recovery in the first case.¹³⁵

Thus, there is little reason to believe that public and private attorneys differ in their incentives to maximize their *total* rewards from litigation — however those rewards are conceived — rather than to devote the maximum time and resources to any one case. The results may be tolerable, even desirable, from the perspective of the voting public. Nevertheless, the result is a classic conflict of interest between the attorney general and the individuals he represents in each case. Neither the attorney general's reduced financial stake in the litigation, nor his duty to serve the public interest, nor his elected status, alleviate the conflict. In fact, they may sharpen it.

B. *Lack of Client Monitoring and Control*

The conflicts of interest described above might not be worrisome if the members of the *parens patriae* group had meaningful opportunities to monitor and control the behavior of the attorney general. Here too, however, lurks a set of problems familiar to class action critics. In traditional, individual litigation, the attorney acts as an agent for his client.¹³⁶ The attorney stands to gain from success in the litigation, of course, but the client's stake is higher — often significantly so.¹³⁷ The client thus has ample incentive to monitor the attorney's work. And while many clients are at an informational disadvantage given their lack of legal expertise, the fact that they control the employment relationship with the attorney helps make monitoring effective.¹³⁸ An at-

¹³⁵ Cf. Coffee, *supra* note 14, at 633 (“[A]nother form of opportunistic behavior [by private class counsel] may involve linkages between unrelated cases — such as putting aside, or cheaply settling, one case in order to pursue more lucrative opportunities.”).

¹³⁶ See MODEL RULES OF PROF'L CONDUCT pmbl., para. 2 (2011). For an analysis of this conception of the attorney-client relationship, see generally Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346 (2007).

¹³⁷ A rational plaintiff would not opt to sue unless she predicted a net gain from the litigation — that is, that the expected recovery would be higher than the expected costs, including attorneys' fees.

¹³⁸ See Lester Brickman, *Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 EMORY L.J. 367, 393–97 (1992) (discussing the incentive effect of client discharge in light of existing schemes for compensating attorneys in the event of their termination). But see Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 N.Y.L. SCH. L. REV. 773, 795–97 (2009–2010) (cataloging several approaches to compensating discharged lawyers, some of which perversely incentivize attorneys to seek their own discharge).

torney who does not give his client what she wants risks being replaced by one who will.

Class litigation is different, as the attorney's stake (usually fifteen to thirty percent of the overall class recovery¹³⁹) vastly outweighs the expected recovery of any individual class member, sharply reducing the client's incentive to monitor her attorney.¹⁴⁰ The costs of monitoring are also higher, even for the representative party or parties who are in contact with class counsel, given the greater size and complexity of aggregate actions. Matters are worse for absent class members, who may live far away from the seat of the litigation, and — in many cases and notwithstanding the requirement of notice — may not be aware of or fully understand the litigation.¹⁴¹ Moreover, given that the attorney represents the class as a whole, individual class members cannot make a credible threat to fire the attorney if they are displeased with his conduct.¹⁴² As a result, "class actions are characterized by a rent-seeking entrepreneur pursuing her own interests with little oversight by her principals."¹⁴³

If anything, this gloomy picture of client monitoring gets even darker when one moves to the public sphere. Like class members, members of a *parens patriae* group may have relatively little at stake in public aggregate litigation, and hence relatively little incentive to invest in monitoring the conduct of the attorney general. Unlike class members, *parens patriae* group members have *no* immediate means of replacing the attorney general as their legal representative if they are

¹³⁹ See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 292 (2010).

¹⁴⁰ See *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 834 F.2d 677, 678 (7th Cir. 1987) ("Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest."); 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, 2088 (1995) ("Most critiques of class actions assume that substantial agency costs are unavoidable because no class member has a stake in the litigation large enough to justify monitoring the attorneys who represent the class.")

¹⁴¹ See Leslie, *supra* note 127, at 1046 ("In many cases, because of their attenuated relationship to the litigation, individual class members 'may not know whether a compromise favors greater attorneys' fees and lesser benefits for them.'" (quoting Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 395 (1987))); see also Redish, *supra* note 11, at 95 (arguing that class action procedures "virtually invite[] the creation of a class in which, as a practical matter, numerous class members have not only not assented to suit, but are completely unaware that they are even suing").

¹⁴² See Coffee, *supra* note 139, at 297 n.22 ("The removal of class counsel is also at the discretion of the court, and even the lead plaintiff in securities litigation does not have the power to remove class counsel."); see also Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 58 (1975) ("[T]he institutional arrangements in the class action are such that for many questions the lawyer has no greater responsibility to the representative plaintiff than to any other member of the class.")

¹⁴³ Rubenstein, *supra* note 113, at 2162-63.

displeased with his work. Nor can individuals easily intervene in a public case to make their views heard.¹⁴⁴ And, given the lack of any requirement for notice in many state cases,¹⁴⁵ the risk that group members will be wholly unaware of the litigation proceeding on their behalf is even greater than it is in the private class context.¹⁴⁶

To be sure, state citizens can — at least in theory — monitor and replace the attorney general as their *political* representative. Arguably, the oversight provided by periodic elections obviates any need for case-specific monitoring and control, because the desire to secure reelection or election to higher office gives attorneys general ample incentive to represent the interests of citizens on whose behalf they sue.¹⁴⁷ Elections are no doubt important in shaping the behavior of attorneys general. But it is a mistake to assume that periodic elections can serve as proxies for client monitoring and control in the individual case.

To begin with, it is far from clear that the broader form of political monitoring is any easier than monitoring in a specific case. The primary sources of information about the work of attorneys general are the attorneys general themselves. Attorneys general publicize their litigation successes, but it is difficult to find information on failures — investigations that come up empty, or cases that are dropped or dis-

¹⁴⁴ See *supra* notes 96–102 and accompanying text.

¹⁴⁵ See *supra* notes 91–93 and accompanying text.

¹⁴⁶ One commentator has suggested that the agency-cost problem, so prominent in the class action literature, dissolves in a *parens patriae* action because “those who administer the state attorneys general office would be capable of monitoring those counsel assigned to the action. . . . Such attorney-to-attorney monitoring is a far cry from the situation in which a lay class client with little at stake tries or fails to monitor his attorney.” Brunet, *supra* note 8, at 1931–32. That analysis fundamentally misconceives the relevant problem. It is probably correct to assume that “the state” (or, more accurately, the individuals who work for the state) can monitor the conduct of the attorney general. And it is true that the state is the plaintiff in a *parens patriae* action. But just as the named plaintiffs in a class action represent a class of similarly situated claimants, the state in a *parens patriae* action acts on behalf of its residents, or some significant subset of them. Analyses of the agency-cost problem in private class actions focus on the relationship between class counsel and all of the individuals whose interests he purports to serve. That latter group includes the entire class, not just the representative parties. Thus, when commentators hold up *parens patriae* litigation as an attractive alternative to private class litigation — and when courts hold that *parens patriae* suits are “superior” to private class actions, see *supra* note 82 — the inquiry necessarily must embrace the interests of the individuals whom the state represents. The operative question is whether those individuals can monitor the attorney general’s office. And the answer to *that* question seems clearly to be “no.”

¹⁴⁷ See Farmer, *supra* note 51, at 404–05 (acknowledging that “statutory *parens patriae* actions . . . lack some of the Rule 23 checks of exercise of discretion by the class representative,” *id.* at 404, but arguing that any problems are “mitigated because State Attorneys General are elected in most states, thus they are subject to the control of the very consumer-voters whom they represent in *parens patriae* actions,” *id.* at 405); Gilles & Friedman, *supra* note 9, at 630 (“It is the lack of effective monitoring — the ‘agency’ problem — that underlies virtually all of the criticisms of class practice. The active presence of a responsible elected official [in *parens patriae* actions], as both cocounsel and client, vanquishes the agency critique in our view.”).

missed. As a result, voters may get a decidedly one-sided view of the attorney general's work product. Elections ameliorate the problem somewhat, as competitors have every incentive to poke holes in the incumbent's record of apparent successes. Yet it may be difficult for political opponents (or anyone else, for that matter) to gauge whether the attorney general's work on a given case was good *enough*, or whether someone else might have recovered more for the interested individuals. It is hardly uncommon for settlement amounts to fall short of initial demands, so comparing claims to outcomes is of little help. Absent a fairly detailed and nuanced understanding of the law and facts of each case, it may be impossible to determine whether each settlement publicized by the attorney general signifies a meaningful victory for the represented citizens.¹⁴⁸

Even if members of the *parens patriae* group were able to gather useful information concerning the attorney general's performance as their adjudicative representative — in other words, even if *monitoring* were a meaningful possibility — the question would remain whether the represented citizens could use periodic elections to *control* the attorney general's conduct in their case. Most attorneys general are elected to four-year terms.¹⁴⁹ During their terms, attorneys general undertake a wide range of initiatives, from criminal law enforcement to legislative lobbying to constitutional litigation and beyond. Citizens may base their votes, and their campaign contributions, on any of those myriad activities — or on other factors entirely unrelated to job performance. Given that *parens patriae* cases tend to aggregate relatively small claims, it is unlikely that most members of a *parens patriae* group will opt to base their votes for attorney general on their perceptions of the attorney general's performance in that one case. Voting can hardly operate as a mechanism for “client” control if citizens do not use their votes that way.

More fundamentally, *parens patriae* group members will typically lack the political clout to control their representative's litigation conduct in any meaningful way. This point recalls the problem of conflicts of interest discussed in the previous section. The attorney general is politically accountable to *all* of the state's citizens — or at least all of those who vote in, contribute to, or otherwise participate in elections. Plainly, there may be variations between the interests of the voting public and the interests of the individuals who are represented in any one case. Although the attorney general's immediate “clients” will want to maximize their own recoveries, others will have different

¹⁴⁸ Cf. Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1266–86 (1995) (detailing the difficulties of measuring the adequacy of settlements).

¹⁴⁹ See, e.g., *Attorney General Election Updates*, NAT'L ASS'N ATT'YS GEN., <http://www.naag.org/attorney-general-election-updates.php> (last visited Oct. 27, 2012).

priorities. One group of citizens may favor aggressive enforcement of laws against elder fraud, for example, while another may believe that the attorney general should be focusing on abuses in mortgage foreclosures. Accordingly, even if voters were able to form an accurate assessment of the vigor of the attorney general's representation in any given case, they would likely draw different conclusions about whether the attorney general did a good or bad job. Unless the citizens whose interests are represented in the given case represent a majority of voters, or can reliably be expected to form part of a majority coalition, they will find it difficult to translate their feelings of satisfaction or dismay into anything approaching "control."

In sum, to the extent that periodic elections influence the choices attorneys general make in litigation, it does not follow that the influence works to the benefit of the individuals represented in *parens patriae* suits, or that electoral accountability is an effective substitute for case-specific client monitoring and control. Elections may serve an important function, making the attorney general accountable to the public. But the point of monitoring and control is to make attorneys accountable to the individuals they are representing in the instant case — a very different goal.

C. *Asymmetric Stakes and Resources*

Resource considerations exacerbate the risk that the attorney general will agree to settlements that informed and empowered "clients" would reject. Again, a comparison with damages class actions is instructive. Class action critics have argued that asymmetric stakes between the defendant and the plaintiff class drive down settlement amounts, resulting in inadequate recoveries for class members.¹⁵⁰ Since the potential loss for the defendant represents the sum of all the class members' claims — and since class counsel stands to recover only a fraction of that sum — the defendant will necessarily have far more to lose from the litigation than any class member, or class counsel, has to gain. As a result, class action defendants typically are "willing to litigate more vigorously, expend more resources, pursue more collateral matters, and in general to seek to exploit this differential in their relative willingness to invest in the action."¹⁵¹ The best bet for class counsel, unwilling or unable to keep pace with the defendant's investments, is often to settle the case quickly on terms amenable to the defendant.

At first blush, this objection may seem muted in the context of public litigation, as there is only one plaintiff: the state. But to say that

¹⁵⁰ See, e.g., Coffee, *supra* note 14, at 635–36.

¹⁵¹ *Id.* at 636.

the state stands to reap the financial rewards of the litigation is misleading. First, the state often will not recover the full value of a *parens patriae* suit because damages will be distributed to injured individuals or, perhaps, representative charitable groups.¹⁵² Second, even if some arm of the state will retain all or most of the proceeds of litigation, no state actor — and certainly not the attorney general or his staff — stands to profit directly in the way a private plaintiff does.¹⁵³ Third, to the extent the attorney general anticipates political or public policy benefits as the result of successful litigation, it is unlikely that those benefits are “worth” as much to her as the total prospective loss is worth to the defendant. As in private class actions, then, it appears that the targets of *parens patriae* litigation have a greater incentive than the state to invest time and other resources in the litigation. If asymmetric stakes decrease the value of private class actions, the same would seem to be true of public aggregate litigation.

Incentives aside, one might reasonably ask whether states have *access* to the resources necessary to vigorously prosecute an aggregate action against a powerful and highly motivated defendant. Attorneys general have limited budgets and small staffs.¹⁵⁴ They cannot borrow, either literally or figuratively, against the prospect of a successful suit and a large recovery. To be sure, states can achieve some economies of scale by banding together in multistate actions, creating what may amount to a nationwide class of claimants.¹⁵⁵ Multistate suits may be consolidated into one action, particularly when states sue under federal law. Alternatively, states may employ a strategy one attorney general has described as “rolling thunder,” filing separate lawsuits across the country and pooling their resources while forcing the defendant to respond to a multitude of actions.¹⁵⁶ But private counsel can pool re-

¹⁵² See Farmer, *supra* note 51, at 391–403 (discussing the application of the doctrine of *cy pres* in *parens patriae* actions).

¹⁵³ Cf. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 926 (2005) (“Democratic representatives . . . have no obvious personal incentive to engorge governmental coffers since, absent the most blatant forms of corruption, they derive no immediate benefit from money flowing through the treasury.”).

¹⁵⁴ HOUCK, *supra* note 130, at 18 (noting “lack of adequate resources” as an “overriding problem” with state antitrust enforcement); see also Remarks on the State AG and the Role of *Parens Patriae*, *supra* note 49, at 8 (remarks of Tom Miller, Iowa Att’y Gen.) (discussing “instances where states were outgunned by large corporations [and] there was substantial pressure to settle on terms that were not desirable and not in the public interest”).

¹⁵⁵ See Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 LAW & POL’Y 429, 430 (2003) (“Acting together, the [state attorneys general] have won legal settlements or concessions from tobacco companies, auto manufacturers, toy makers, paint producers, and others, agreements that would have been quite unlikely if sought by individual [state attorneys general] acting alone.”).

¹⁵⁶ Remarks on the State AG and the Role of *Parens Patriae*, *supra* note 49, at 8 (remarks of Tom Miller, Iowa Att’y Gen.) (explaining that “what started as essentially a defensive strategy

sources too; indeed, “[t]he dominant class action model is a pyramid-shaped structure comprised of numerous small law firms,”¹⁵⁷ a structure that “allows the consortium to finance and effectively prosecute the class action, bringing to bear resources that rival those of the mammoth corporate law firms that are retained to defend significant class action litigations.”¹⁵⁸ States can rarely keep pace with such private-sector spending. That is why attorneys general sometimes hire private counsel to litigate state cases on a contingency basis.¹⁵⁹ Such arrangements have come under increasing fire of late, as critics argue (among other things) that they offer attorneys general an end run around the state appropriations process.¹⁶⁰ Whatever the force of that charge as a question of state constitutional law, the fact that states feel the need to make use of private contingency-fee counsel highlights the difficult trade-offs attorneys general must make with limited time, money, and expertise.

Resource constraints not only prevent states from undertaking certain litigation projects but also may influence how attorneys general conduct the cases they begin. A recent survey of multistate consumer protection cases found that “two [s]tates with well-regarded consumer protection divisions had not tried a consumer case in seven and twelve years, respectively.”¹⁶¹ None of the responding states “had ever litigated a multistate case through trial, and no [s]tate had more than five cases in their entire division go to trial each year.”¹⁶² And those were the “more active [s]tates” in the consumer protection field — in other words, the states that would be most likely to mount a credible threat of litigation.¹⁶³ Other states tend to take a more passive approach, joining large multistate settlements but rarely taking on a lead role.

born of necessity evolved into a method for the states to aggregate their resources to effectively enforce their laws, even against the most powerful companies in the world”).

¹⁵⁷ Gilles & Friedman, *supra* note 1, at 148; see also Richard A. Epstein, *One Stop Law Shop*, LEGAL AFF., Mar.–Apr. 2006, at 34, 37 (“Many large class-actions involving antitrust and consumer-fraud issues . . . are handled by ad hoc alliances among multiple firms that split their labor and share the rewards of the litigation.”).

¹⁵⁸ Gilles & Friedman, *supra* note 1, at 151.

¹⁵⁹ See, e.g., Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. TIMES, July 9, 2007, at A10 (discussing the Oklahoma Attorney General’s decision to outsource a lawsuit against poultry companies to three law firms); Jim Malewitz, *Mississippi Republicans Challenge Powers of Attorney General*, STATELINE (Feb. 3, 2012), <http://stateline.org/live/details/story?contentid=629384> (discussing the Mississippi Attorney General’s practice of outsourcing cases to private attorneys on a contingency-fee basis).

¹⁶⁰ See, e.g., Leah Godesky, Note, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COLUM. J.L. & SOC. PROBS. 587, 596 (2009) (discussing the argument that, “[b]y entering into a contingency fee arrangement, . . . the attorney general appropriates state resources, a role reserved for the legislature”).

¹⁶¹ BRANN, *supra* note 130, at 11.

¹⁶² *Id.*

¹⁶³ *Id.*

Such free-rider states typically are even “less willing to litigate or take aggressive positions.”¹⁶⁴

As the author of the survey recognized, if “[s]tates do not have a realistic threat of litigating a multistate case, then their ability to negotiate settlements diminishes dramatically. Indeed, several defense counsel mentioned this inability of [s]tates to try cases as a factor they take into consideration in evaluating multistate cases”¹⁶⁵ Although the survey focused on multistate cases, there is little reason to believe that matters are different for single-state litigation. If anything, the prospect of pooling resources should make multistate cases easier for states to litigate than those in which a single state must go head-to-head with a potentially powerful defendant. The study is limited, but it stands as a sobering reminder of how resource constraints can reduce the efficacy of state litigation.

D. Inadequate Settlements

The problems identified in this Part — conflicts of interest between the attorney general and the individuals she represents, lack of “client” monitoring and control, and financial imbalances between states and defendants — contribute to a common result: inadequate recoveries for members of the *parens patriae* group. That conclusion should not surprise any student of aggregate litigation. Class action skeptics long have argued that these same problems lead private class counsel to settle damages class actions on terms that fully informed clients would not accept.¹⁶⁶ The settlement amount may simply be too low; or the settlement may be structured in a way that puts money in the pockets of class counsel while leaving the class members with near-worthless coupons or the like; or the settlement may provide for a financial award but direct the money to easily identifiable groups rather than the injured individuals.

Similar outcomes are likely in state suits. As I have explained, attorneys general lack a strong incentive to maximize the monetary recovery for members of the *parens patriae* group, at least when doing so will drain resources from other enforcement initiatives or will conflict with the interests of the state or the public generally. More pessimistically, attorneys general — particularly those who are popularly elected or who aspire to elective office — may have political incentives to pull their punches in settlement negotiations, particularly when facing

¹⁶⁴ *Id.* at 10.

¹⁶⁵ *Id.* at 11–12.

¹⁶⁶ See Coffee, *supra* note 14, at 633 (“The existence of high agency costs implies the likelihood of ‘opportunistic behavior.’ . . . At its simplest, the classic form of opportunism in class actions is the ‘sweetheart’ settlement, namely one in which the plaintiff’s attorney trades a high fee award for a low recovery.”).

powerful corporate defendants. And *parens patriae* group members have neither the incentive nor the ability to monitor public attorneys effectively.

Predictably, state settlements are often criticized as too small.¹⁶⁷ The \$25 billion settlement between forty-nine states, the federal government, and the nation's largest mortgage-servicing banks in February 2012 provides a recent example.¹⁶⁸ The settlement arose out of widespread reports of bank misconduct in connection with mortgage servicing and, especially, foreclosures.¹⁶⁹ It requires the banks to pay up to \$17 billion for principal reduction and other forms of loan modification for struggling borrowers; another \$3 billion in financing relief for borrowers who are current on their mortgages but who owe more than their houses are worth; and \$1.5 billion to borrowers who lost their homes to foreclosure.¹⁷⁰ The settlement promises another \$2.5 billion to the states themselves.¹⁷¹

Although the settlement is one of the largest in history, critics described it as a "wrist slap" and a "sweet deal" for the banks, given the vast "economic damage wrought by the banks . . . and the hardships faced by the 4 million homeowners who have lost their homes and the 3.3 million more who are in or close to foreclosure."¹⁷² Such claims are understandable when one considers that direct payments from the settlement are slated to reach only 750,000 borrowers who lost their

¹⁶⁷ See, e.g., First, *supra* note 5, at 1040 (noting that state antitrust "settlements are sometimes criticized for being inadequate"); Editorial, *Too Many Unanswered Questions, and Too Little Relief*, N.Y. TIMES, Feb. 12, 2012, at SR10 (describing mortgage foreclosure settlement between big banks, state attorneys general, and federal officials as a "wrist slap"); David J. Morrow, *Transporting Lawsuits Across State Lines*, N.Y. TIMES, Nov. 9, 1997, at BU16 ("[C]ritics say the settlements often don't live up to their billing and hardly warrant all the political hay some of the state officials make of them in news conferences or at election time. In too many cases, the critics say, a company is allowed to settle by paying a small amount — with nothing at all going to consumers — instead of possibly being dealt a larger penalty, and risking a nasty precedent, at a trial."); see also Michael Totty, *Insurance Commissioner Ruffles Consumer Activists*, WALL ST. J., Feb. 18, 1998, at T1 (discussing cases in which Texas's insurance commissioner intervened in class actions or preempted class actions by settling first, though consumer groups argued they could have done better). For similar claims in the context of federal enforcement of civil rights law, see Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998), which notes that "on average, the government seeks and obtains less monetary relief for plaintiffs than does the private bar and fails to address cutting edge issues, choosing instead to concentrate its efforts on small, routine [civil rights] cases."

¹⁶⁸ See generally PHILIP A. LEHMAN, CONSUMER PROT. DIV., N.C. DEP'T OF JUSTICE, NATIONAL MORTGAGE SETTLEMENT EXECUTIVE SUMMARY OF MULTISTATE/FEDERAL SETTLEMENT OF FORECLOSURE MISCONDUCT CLAIMS (2012), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=natsetexecsum%282%29.pdf>.

¹⁶⁹ See *id.* at 1.

¹⁷⁰ *Id.* at 2–4.

¹⁷¹ *Id.* at 4.

¹⁷² Editorial, *supra* note 167, at SR10.

homes to foreclosure,¹⁷³ and top out at \$2000 per person.¹⁷⁴ But it is far from clear that financial recoveries were — or should have been — at the top of the attorney general wish list. Although most media coverage focused on the price tag, the settlement contains extensive non-monetary requirements designed to reform how the big banks interact with borrowers.¹⁷⁵ Similar provisions for nonmonetary relief, focused on reforming how the defendant does business, are common in state settlements, even when the state is also seeking damages or restitution for injured individuals.¹⁷⁶ Such injunctive remedies may be critically important as a matter of public policy and may matter a great deal to the defendant.¹⁷⁷ Yet, from the perspective of individuals who have already been injured by the defendant's wrongdoing, a settlement that focuses on prospective injunctive relief while promising relatively small individual payments may well seem inadequate.

The multistate mortgage settlement also illustrates a second deficiency in state settlements, concerning the ultimate *destination* of recovered funds. As noted above, the settlement provides for approximately \$2.5 billion in payments to the states. Those funds were not

¹⁷³ See *Help for Homeowners*, NAT'L MORTGAGE SETTLEMENT, <http://www.nationalmortgagesettlement.com/help> (last visited Oct. 27, 2012) (“\$1.5 billion is expected to be distributed nationwide to some 750,000 borrowers.”).

¹⁷⁴ See LEHMAN, *supra* note 168, at 4 (“Borrowers who were not properly offered loss mitigation or who were otherwise improperly foreclosed on will be eligible for a uniform payment, which will be approximately \$2000 per borrower depending on level of response.”).

¹⁷⁵ *Id.* at 3 (describing new servicing standards).

¹⁷⁶ See, e.g., Press Release, Office of the Ariz. Att’y Gen., Attorney General Tom Horne Announces Settlement Agreement with Principal Reduction Group, LLC (Mar. 11, 2011), *available at* http://www.azag.gov/press_releases/march/2011/PRINCIPAL%20REDUCTION%20GROUP%203-11-11.html (describing settlement under which defendant agreed to pay full restitution to consumers who filed complaints with the Arizona attorney general’s office, and to “no longer engage in any activity, directly or on behalf of any third party, that involves originating, closing, or modifying any term of a consumer’s mortgage loan, or obtaining a reduction on a consumer’s debt, of any kind, while in the State of Arizona or on behalf of any Arizona consumer”); Press Release, Office of the Iowa Att’y Gen., Miller Settles with DIRECTV (Dec. 15, 2010), *available at* http://www.state.ia.us/government/ag/latest_news/releases/dec_2010/DIRECTV%20settlement.html (describing \$13.25 million, forty-nine-state settlement under which DIRECTV agreed to pay restitution to customers and to change its business practices in accordance with detailed provisions of consent decree); Press Release, Office of the Mich. Att’y Gen., Cox Announces Major Consumer Protection Win; Settlement with Vonage (Nov. 16, 2009), *available at* http://www.michigan.gov/ag/0,1607,7-164-34739_34811-226267--,00.html (describing thirty-two-state settlement requiring Vonage to offer refunds to customers, change its marketing practices, honor consumer cancellation requests, and record and verify phone calls of consumers trying to terminate their service); Press Release, Office of the Mich. Att’y Gen., Schuette Announces \$2 Million Settlement with Drug Manufacturer AstraZeneca (Mar. 10, 2011), *available at* http://www.michigan.gov/ag/0,1607,7-164-34739_34811-252548--,00.html (describing multistate settlement imposing new marketing requirements for antipsychotic drug Seroquel).

¹⁷⁷ See Gilles & Friedman, *supra* note 1, at 160–61 (arguing that injunctive relief will often be of central concern to defendants “since it will end [the defendants’] ability to continue the lucrative but unlawful practice,” *id.* at 161).

intended for individual claimants but were supposed to “help fund consumer protection and state foreclosure protection efforts.”¹⁷⁸ Within months of the settlement, however, nearly fifteen states had announced that “they will use all or most of the money for other purposes.”¹⁷⁹ Georgia’s Governor, for example, “believes that the best way to prevent foreclosures amongst honest homeowners who have experienced hard times is to create jobs [in the] state,” and the state plans to use its \$99 million share of the settlement to attract companies to Georgia.¹⁸⁰ An Alabama legislative committee proposed using that state’s share of the settlement to supply the budget for the Attorney General’s office.¹⁸¹ And Virginia has stated that it will use most of its \$67 million to help cash-starved local governments.¹⁸²

While these may be extreme examples of states diverting funds from their intended uses, it is not uncommon in aggregate litigation for financial recoveries to be routed away from the individuals on whose behalf class counsel or the attorney general purports to act. The problem stems in large part from the cost and difficulty of notifying potential claimants, and the cost and difficulty to those individuals of filing claims for recovery. In some cases, the consequence is that only a small percentage of affected individuals claim the damages owed to them.¹⁸³

A common response to the possibility of low recovery rates is to resort to a fluid or *cy pres* recovery, under which settlement funds are distributed to charitable groups that serve as rough proxies for the interests of the injured individuals. Class action scholars have looked askance at *cy pres* distributions, in part because they suggest that “the class attorney has abandoned . . . the interests of one group of clients

¹⁷⁸ *About the Settlement*, NAT’L MORTGAGE SETTLEMENT, <http://www.nationalmortgage-settlement.com/about> (last visited Oct. 27, 2012).

¹⁷⁹ Shaila Dewan, *Needy States Use Housing Aid Cash to Plug Budgets*, N.Y. TIMES, May 16, 2012, at A1.

¹⁸⁰ *Id.*

¹⁸¹ *Attorney General’s Office May Not Receive State Funding for 2013*, WAFF-TV (Apr. 9, 2012, 7:10 PM), <http://www.waff.com/story/17368740/attorney-generals-office-may-not-receive-state-funding-for-2013> (reporting that Alabama legislative committee proposed budget plan under which the Attorney General’s office would receive no budget from the legislature and would fund itself with \$26 million settlement from national mortgage-fraud case).

¹⁸² Dewan, *supra* note 179, at A1. Similar diversions followed the multistate tobacco settlement, in which tobacco companies promised to pay states more than \$200 billion. *See* Lemos, *supra* note 39, at 734 (“Though the money was intended for health- and smoking-related initiatives, several states announced that they would use it to balance their general budgets.”).

¹⁸³ *See* Remarks on the State AG and the Role of *Parens Patriae*, *supra* note 49, at 27 (remarks of Jay L. Himes, N.Y. Assistant Att’y Gen.) (“[O]ur parens patriae claim response rate is not 100%, or anything close to it.”); Stephen Calkins, *An Enforcement Official’s Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 436 (1997) (discussing multistate antitrust settlement in which approximately 70,000 out of a total of 340,000 eligible individuals received refund checks (citing *In re* Minolta Camera Prods. Antitrust Litig., 668 F. Supp. 456 (D. Md. 1987))).

to benefit another group of people *that are not even clients*.”¹⁸⁴ While many settlements stir doubts about whether class members are receiving adequate compensation, *cy pres* settlements erase any ambiguity: direct compensation will not even be attempted.

Cy pres distributions are common in public aggregate litigation.¹⁸⁵ In many cases, the attorney general will have discretion to determine the recipients of the funds, which tend to be either charitable organizations or arms of the state.¹⁸⁶ Critics have charged that attorneys general use *cy pres* distributions to further their political aims, channeling money to groups that have supported (or may in the future support) the attorney general’s political campaigns.¹⁸⁷ Even if that strong charge is overblown, the fact remains that state attorneys general can make political hay out of recoveries that help the state and its citizens — even if the consequence is to deny recovery to the individuals on whose behalf the *parens patriae* suit was brought.¹⁸⁸

¹⁸⁴ Rubenstein, *supra* note 113, at 2166 n.131; see also Pryor, *supra* note 8, at 1892 (describing *cy pres* settlements as a “form of collusion” (citing John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1368 (1995))).

¹⁸⁵ See Calkins, *supra* note 183, at 436–37 (explaining that “[m]ost of the monetary damage awards recovered [in state antitrust *parens patriae* cases] usually help fund charitable causes”); see generally Farmer, *supra* note 51.

¹⁸⁶ See Farmer, *supra* note 51, at 400–01 (providing examples of *cy pres* distributions); Susan M. Palmatier, *Compact Disc Minimum-Advertised Price Antitrust Litigation*, 40 GRANITE ST. LIBR. 10, 10 (Apr./May/June 2004), available at www.nh.gov/nhsl/services/librarians/gsl/documents/gsl402.pdf (explaining that New Hampshire would receive 24,259 CDs as result of multistate antitrust settlement and that “the lion’s share will go to public schools and libraries”).

¹⁸⁷ See Ann Davis, *To Some, Santa Has a New Name: Spitzer*, WALL ST. J., Dec. 24, 2003, at C1 (noting that “the groups receiving the windfall [from then–Attorney General Eliot Spitzer’s civil settlements] also represent voter constituencies that could be key to Mr. Spitzer’s widely expected Democratic run for governor in 2006”); Todd A. Heywood, *Cox Shifts Countrywide Settlement Funds Away From Controversial Grand Rapids Parks Plan*, MICH. MESSENGER (Mar. 23, 2009, 3:19 PM), <http://michiganmessenger.com/15145/cox-shifts-countrywide-settlement-funds-away-from-controversial-grand-rapids-parks-plan> (reporting that Michigan Attorney General Mike Cox was criticized for allocating \$500,000 of the proceeds from a settlement with Countrywide Financial for predatory lending in the market for subprime mortgages to two local parks, one of which had been “championed by a top Republican donor”); Kevin O’Hanlon, *Senator Wants to Tighten Control over Money in Fund Used by Bruning*, LINCOLN J. STAR (Dec. 28, 2011, 3:45 PM), http://journalstar.com/news/state-and-regional/govt-and-politics/senator-wants-to-tighten-control-over-money-in-fund-used/article_16d3927b-b16d-5b84-b295-115fcoadofof.html (reporting criticism of Nebraska Attorney General Jon Bruning, who used \$100,000 of settlement funds from environmental cases to support the We Support Agriculture coalition, a lobbying group seeking to defend livestock farmers against challenges by the Humane Society and other animal rights groups).

¹⁸⁸ Some scholars maintain that there is “no legitimate utilitarian reason to care whether class members with small claims get compensated at all.” Gilles & Friedman, *supra* note 1, at 105. For those scholars, the only sensible rationale for permitting the aggregation of small claims is to force the defendant to internalize the costs of its wrongdoing. *Id.* (“All that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions. . . . [C]ompensation is not really an important goal in small-claims class actions.”). If one understands the primary value of aggregate litigation in terms of deterrence rather than compensation, the fact

In sum, the *public* nature of public aggregate litigation does not erase the concerns that scholars have emphasized in the context of private class actions. Although attorneys general face a different set of incentives than do private class counsel, many of the distortions that class action critics have identified extend to the public sphere. Indeed, in some respects the agency-cost problem is more stark in state cases, because a core source of conflict — divergence between the interests of the *parens patriae* group and the larger public interest — will be present in every case. The consequence is that, even when it can be lauded on public policy grounds, *parens patriae* litigation may fail to serve the interests of the citizens most affected.

III. PUBLIC REPRESENTATION RECONSIDERED

Parens patriae and related state actions hold the same promise as private class actions. Both categories of aggregate litigation offer mechanisms for bringing together related claims and compensating injured individuals more cheaply and efficiently than seriatim individual suits would allow. As Part II shows, however, state suits also present many of the same perils as damages class actions. Public representation may be conflicted, just as private representation may be. The elected status of the attorney general does not make client monitoring and control any easier — indeed, it may make both more difficult. As with private class actions, public aggregate actions may result in premature and inadequate settlements, leaving individuals worse off than they would have been in individual litigation. Importantly, individuals may also be worse off in state suits than they would have been in private class actions. Yet to the extent that our law recognizes the parallel between the two forms of aggregate litigation, it heavily favors public over private suits.¹⁸⁹

Recognizing the similarities between the two categories of aggregate litigation brings into glaring relief the procedural divide that separates them. While private aggregate actions are subject to careful procedural controls designed to minimize the risks to the represented individuals, those constraints fall away when claim aggregation moves

that funds recovered in *parens patriae* suits may not find their way into the pockets of the represented individuals is largely irrelevant. From a deterrence perspective, what matters is how much the defendant has to pay, not who cashes the check. Dam, *supra* note 142, at 60 (“The principle of deterrence requires that the wrongdoer pay, but says nothing about who shall receive the payment.”). But, while *cy pres* distributions are less troubling on the deterrence view, the problems described in the preceding sections cannot be brushed aside so easily. If, as I have argued, the attorney general has inadequate incentives and resources to maximize the recovery for the *parens patriae* group, the result is not only under-compensation but also under-deterrence.

¹⁸⁹ See *supra* section I.B, pp. 499–510.

into the public sphere. That procedural disconnect becomes difficult to defend once one understands that state suits pose similar risks.

The current state of affairs is not just incoherent; it is also unconstitutional to the extent that *parens patriae* suits preclude private litigation (whether individual or aggregate). Case law on *parens patriae* preclusion is remarkably thin, but the consensus view seems to be that public suits preclude all private actions raising the same claims.¹⁹⁰ This Part builds on the functional analysis in Part II to demonstrate the formal constitutional problem with preclusion by public representation. Courts could solve the problem by imposing heightened procedural requirements on state suits. Alternatively, they could make clear that *parens patriae* actions cannot preclude subsequent private suits for monetary relief. This Part sketches out both possibilities and explains why the latter approach is superior.

A. Due Process and Aggregate Litigation

Due process generally requires that individuals receive notice and an opportunity to be heard before a state may deprive them of interests in property.¹⁹¹ “[A] cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause.”¹⁹² Thus, the default rule is that individuals are not bound by judgments to which they were not parties.¹⁹³

The rule against nonparty preclusion is grounded in “our ‘deep-rooted historic tradition that everyone should have his own day in court.’”¹⁹⁴ Despite its “fundamental nature,”¹⁹⁵ the rule is not absolute. The Supreme Court has recognized that a nonparty may be bound by a judgment when she was “adequately represented by someone with the same interests who [wa]s a party” to the suit.¹⁹⁶ Courts sometimes describe representative preclusion in terms of privity, referring to the longstanding principle that claim preclusion (or *res judica-*

¹⁹⁰ See *supra* notes 55–56 and accompanying text.

¹⁹¹ See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

¹⁹² *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

¹⁹³ See *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (“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.”).

¹⁹⁴ *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 WRIGHT, MILLER, & COOPER, *supra* note 59, § 4449, at 417).

¹⁹⁵ *Taylor v. Sturgell*, 128 S. Ct. 2161, 2175 (2008) (describing “the general rule that a litigant is not bound by a judgment to which she was not a party”).

¹⁹⁶ *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) (quoting *Wilks*, 490 U.S. at 762 n.2).

ta) applies only to parties and those in privity with them.¹⁹⁷ Whatever the precise terminology, the core concept is the same: in appropriate circumstances, a claimant may be bound by the judgment in an earlier case on the ground that her interests were adequately represented by someone else.¹⁹⁸ As the Supreme Court explained in *Taylor v. Sturgell*,¹⁹⁹ “[a] party’s representation of a nonparty is ‘adequate’ for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the nonparty’s interests.”²⁰⁰

The clearest case for preclusion by representation is a “properly conducted class action[.]”²⁰¹ But it is equally clear that government litigation can serve to adjudicate the interests of individuals who are not formally parties.²⁰² Whether government suits can properly preclude subsequent private actions depends on the nature of the rights at issue and the relationship between the public and private actors. This section explores those issues.

1. *Parens Patriae Preclusion and Public vs. Private Rights.* — The easiest cases for preclusion by government representation are those involving diffuse or common public interests — interests that individuals may not even have standing to pursue.²⁰³ In such circumstances, courts have no difficulty concluding that private parties are bound by

¹⁹⁷ See *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918) (“The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction.”); see also *Taylor*, 128 S. Ct. at 2172 n.8 (“The substantive legal relationships justifying preclusion are sometimes collectively referred to as ‘privity.’ The term ‘privity,’ however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground.” (citations omitted)).

¹⁹⁸ *Richards*, 517 U.S. at 797 n.4 (“[A]s a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.” (citations omitted) (quoting *Postal Tel. Cable Co.*, 247 U.S. at 476)).

¹⁹⁹ 128 S. Ct. 2161.

²⁰⁰ *Id.* at 2176 (citation omitted).

²⁰¹ *Id.* at 2172.

²⁰² See *id.* at 2172–73 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982)). The Restatement explains that “[a] person is represented by a party who is,” among other things, “[a]n official or agency invested by law with authority to represent the person’s interests.” RESTATEMENT (SECOND) OF JUDGMENTS § 41.

²⁰³ See *Richards*, 517 U.S. at 803 (reasoning that, in “cases in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds, or about other public action that has only an indirect impact on his interests . . . we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all” (citations omitted)).

the results of state litigation.²⁰⁴ Cases involving taxpayer claims are ready examples. Consider the Supreme Court's decision in *City of Tacoma v. Taxpayers of Tacoma*.²⁰⁵ In earlier litigation, the State of Washington had unsuccessfully opposed the issuance of a Federal Power Commission dam license to the City of Tacoma on the ground that the proposed dam project violated state law.²⁰⁶ The Court held that the judgment in the state case precluded a later suit by Tacoma taxpayers who challenged the validity of bonds to finance the dam project.²⁰⁷ It explained that the judgment "was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, *in their common public rights as citizens of the State*, were represented by the State in those proceedings, and, like it, were bound by the judgment."²⁰⁸

Equally straightforward are cases in which private parties assert distinctly private interests that the state did not represent in the government suit.²⁰⁹ As *Taylor v. Sturgell* makes clear, if the court does not take care to protect the interests of nonparties, a prerequisite to preclusion by representation is that the litigating party in the first case "understood herself to be acting in a representative capacity."²¹⁰ When a later suit involves interests that the state did not even purport to represent, barring the action would stretch the notion of preclusion by representation beyond its constitutional breaking point.²¹¹

The distinction between these two categories of easy cases is illustrated by the litigation stemming from the 1989 *Exxon Valdez* oil spill in Prince William Sound, Alaska. The United States and the State of Alaska filed suit against Exxon in their capacities as "trustees for the public"²¹²

²⁰⁴ See RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. d ("Where the interest to be protected is one held by members of the public at large, an action by a public official in behalf of that interest may be held preemptive of private remedies and preclusive effects accordingly given to a judgment in an action involving the official." (citing cases)).

²⁰⁵ 357 U.S. 320 (1958).

²⁰⁶ *Id.* at 328.

²⁰⁷ *Id.* at 340-41.

²⁰⁸ *Id.* (emphasis added).

²⁰⁹ See, e.g., *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) (holding that state litigation did not bar later adjudication of "injuries to purely private interests" that the state could not have raised).

²¹⁰ *Taylor v. Sturgell*, 128 S. Ct. 2161, 2176 (2008).

²¹¹ See *Richards v. Jefferson Cnty.*, 517 U.S. 793, 802 (1996) (explaining that, where there was no reason to suppose that plaintiffs in the first suit understood their suit to be on behalf of absent county taxpayers, "to contend that the plaintiffs [in the first suit] somehow represented [the taxpayers], let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise'" (quoting *Hansberry v. Lee*, 311 U.S. 32, 46 (1940))).

²¹² *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 771 (9th Cir. 1994) (per curiam) (internal quotation marks omitted).

under the Clean Water Act²¹³ and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.²¹⁴ The governments sought damages for restoration of the environment and compensation for lost public use of natural resources.²¹⁵ Exxon eventually agreed to a settlement and Consent Decree under which it would “pay the governments at least \$900 million . . . for natural resource and other damages. In return, the governments released Exxon . . . ‘with respect to any and all civil claims,’ including all claims for natural resource damages.”²¹⁶

Facing hundreds of private suits arising from the oil spill, Exxon argued that all private claims were barred by the Consent Decree in the government suit.²¹⁷ The Ninth Circuit, in which most of the cases were filed, responded by invoking the distinction between public and private interests. It held, for example, that a class action on behalf of recreational sportfishers seeking damages for the public’s loss of use and enjoyment of Prince William Sound was precluded by the government suit because the governments “ha[d] already recovered damages on behalf of the public” for those harms.²¹⁸ On the other hand, the court permitted a class of commercial fishers, Native Americans, and landowners to pursue compensatory and punitive damages for harm to their private land and to their ability to fish commercially and for subsistence. The court reasoned that the individual claims regarding lost harvests and lower incomes were distinct from the public interest in protecting natural resources.²¹⁹ Because the latter category of private claims was not at issue in the government suit, the claimants could not be considered “parties” to the Consent Decree and could not be bound by it.²²⁰

Alaska’s suit in the *Exxon Valdez* litigation involved the state’s “sovereign interest in natural resources within its boundaries”²²¹ — a public interest that the state and all of its citizens hold in common. But other *parens patriae* actions involve interests that fall on the other

²¹³ 33 U.S.C. §§ 1251–1387 (2006); see also *id.* § 1321(f)(5) (authorizing representative suits).

²¹⁴ 42 U.S.C. §§ 9601–9675, 26 U.S.C. §§ 2611–2662 (2006); see also 42 U.S.C. § 9607(f)(1) (authorizing representative suits).

²¹⁵ *Alaska Sport Fishing Ass’n*, 34 F.3d at 771. For a detailed description of the oil spill and the resulting litigation, see generally *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001).

²¹⁶ *Alaska Sport Fishing Ass’n*, 34 F.3d at 771 (quoting Consent Decree at 3).

²¹⁷ *Id.*

²¹⁸ *Id.* at 774. “Under the *parens patriae* doctrine,” the court explained, “‘a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens.’ There is a presumption that the state will adequately represent the position of its citizens.” *Id.* at 773 (citation omitted) (quoting *Env’tl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979)).

²¹⁹ See *Exxon Valdez*, 270 F.3d at 1225, 1227–28.

²²⁰ See *id.*

²²¹ *Alaska Sport Fishing Ass’n*, 34 F.3d at 773.

side of the public/private line. Recall that *parens patriae* standing extends to states' "quasi-sovereign" interests in the physical and economic well-being of their citizens.²²² As explained in Part I, a state may sue as *parens patriae* to advance the private interests of individuals within the state, provided that the injury in question affects "a sufficiently substantial segment of [the state's] population."²²³ Such suits blur the line between public and private, raising difficult questions about their effect on subsequent private litigation. The difficulty stems from the fact that the state clearly *does* purport to represent private interests when it seeks damages or restitution on behalf of injured citizens. The operative question for preclusion purposes is thus not whether the state "understood [itself] to be acting in a representative capacity"²²⁴ — plainly it did. Instead, the validity of preclusion turns on whether the state representation was constitutionally "adequate."²²⁵

2. *Adequate Public Representation.* — What does the constitutional guarantee of adequate representation mean in the context of state suits involving private interests? The Supreme Court has yet to address that question squarely. Its closest encounter was in *Richards v. Jefferson County*,²²⁶ which held that a previous suit by the acting director of finance for the city of Birmingham challenging a county tax on federal constitutional grounds did not preclude a later challenge by county taxpayers.²²⁷ The Court observed that the *city* finance director could not, and did not claim to, represent the pecuniary interests of *county* taxpayers.²²⁸ Hence, the Court had no need to decide "whether public officials are always constitutionally adequate representatives of all persons over whom they have jurisdiction when, as here, the underlying right is personal in nature."²²⁹

The quoted language from *Richards* leaves open the possibility that state representation is always — as a matter of law — adequate for due process purposes. But other aspects of the opinion, and of the Court's larger due process jurisprudence, expose the problems with such a bright-line rule. States are under no obligation to create property interests in private rights of action. However, when such rights exist under state or federal law, state attorneys general cannot settle them away without confronting at least *some* constitutional constraints on the nature and quality of the state representation.

²²² Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

²²³ *Id.*

²²⁴ Taylor v. Sturgell, 128 S. Ct. 2161, 2176 (2008).

²²⁵ *Id.*

²²⁶ 517 U.S. 793 (1996).

²²⁷ See *id.* at 803–05.

²²⁸ See *id.* at 801–02.

²²⁹ *Id.* at 802 n.6.

As *Richards* recognized, the demands of due process may depend on the nature of the rights at issue. In holding that the county taxpayers were not precluded by the earlier public action, the Court distinguished between two types of actions brought by taxpayers. In the first category are cases involving public interests — those “in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds, or about other public action that has only an indirect impact on his interests.”²³⁰ As to that category of claims, the Court reasoned that “States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all.”²³¹ But, the Court continued, matters are different with respect to *private* taxpayer challenges:

Because the guarantee of due process is not a mere form, . . . there obviously exists another category of taxpayer cases in which the State may not deprive individual litigants of their own day in court. By virtue of presenting a federal constitutional challenge to a State’s attempt to levy personal funds, petitioners clearly bring an action of this latter type. Indeed, we have previously struck down as a violation of due process a state court’s decision denying an individual taxpayer any practicable opportunity to contest a tax on federal constitutional grounds. . . . “ . . . Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.”²³²

The plaintiffs in *Richards* invoked rights grounded in the Federal Constitution — rights that the State plainly “has no power to destroy.” At least as to federal constitutional rights, then, it would seem that state representation cannot be considered constitutionally adequate simply by virtue of its governmental status. Otherwise, states could extinguish private claims at will, simply by agreeing with the defendant to release the claims. That possibility would be particularly perverse when the rights at issue involved protections against unlawful *state* action. It would fly in the face of conventional notions of due process to say that the state attorney general could absolve a state university of liability for unlawful racial discrimination — thereby depriving the injured individuals of “all existing remedies for the enforcement of [their constitutional] right[s]”²³³ — by the simple expedient of suing the university as *parens patriae* and then settling the claims for a

²³⁰ *Id.* at 803 (citations omitted).

²³¹ *Id.*

²³² *Id.* at 803–04 (citations omitted) (quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930)).

²³³ *Id.* at 804 (quoting *Brinkerhoff-Faris*, 281 U.S. at 682).

pittance. The promise of adequate representation must mean something more than a rubber stamp where state suits are concerned.

The same logic applies to federal *statutory* rights, which are frequently the subject of state *parens patriae* litigation by virtue of the many federal statutes that authorize states to sue in a representative capacity.²³⁴ To be sure, it would be possible for Congress to limit the individual's statutory rights in the event of litigation by a state attorney general or some other government official. For example, the Age Discrimination in Employment Act of 1967²³⁵ (ADEA) provides that an employee's right to sue under the statute "shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission [EEOC]."²³⁶ Courts have upheld that provision against due process challenges, reasoning that the property rights created by the statute are limited by the express conditions concerning action by the EEOC.²³⁷ Thus, a settlement or judgment in an EEOC suit can preclude private action on the same claims because, "[o]nce the EEOC commences a[] . . . suit, the right to commence a private action . . . ceases to exist."²³⁸

²³⁴ See *supra* note 39 and accompanying text.

²³⁵ 29 U.S.C. §§ 621–634 (2006).

²³⁶ *Id.* § 626(c)(1); see also Fair Labor Standards Act of 1938 (FLSA) § 1(b), 29 U.S.C. § 216(b) (2006) ("The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor . . ."). Several environmental statutes contain similar limitations on the provisions for citizen suits. See Clean Water Act § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A) (2006) (providing that a violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection . . . shall not be the subject of a civil penalty action under . . . section 1365 of this title [the citizen suit provision]"); Solid Waste Disposal Act § 7002(b)(1)(B), 42 U.S.C. § 6972(b)(1)(B) (2006) (barring a private suit "[i]f the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order"); Clean Air Act § 304(b), 42 U.S.C. § 7604(b) (2006) ("No action may be commenced . . . [i]f the Administrator or State has commenced and is diligently prosecuting a civil action . . . to require compliance . . .").

²³⁷ See, e.g., *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1506–07 (9th Cir. 1990) (holding that due process permits EEOC action to preclude private ADEA action); *Donovan v. Univ. of Tex. at El Paso*, 643 F.2d 1201, 1208 (5th Cir. 1981) (holding that due process does not require notice or opt-out rights for private claimants because employees' right to sue is extinguished as soon as the government files suit); see also *Jones v. Am. Window Cleaning Corp.*, 210 F. Supp. 921, 923 (E.D. Va. 1962) (rejecting due process challenge to FLSA provision).

²³⁸ *Pan Am. World Airways*, 897 F.2d at 1505. Even in the face of explicit statutory limitations on private rights of action, some courts have held that preclusion demands an inquiry into the adequacy of the EEOC's representation, on the ground that "[a] person is not bound by a judgment for or against a party who purports to represent him if . . . [t]he representative failed to prosecute or defend the action with due diligence and reasonable prudence." *Vines v. Univ. of La. at Monroe*, 398 F.3d 700, 712 n.12 (5th Cir. 2005) (first alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 42 (1982)) (internal quotation marks omitted); *accord Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 759 (7th Cir. 2004) (relying on the "due diligence and reasonable prudence" requirement from the Restatement

The federal statutes that authorize state attorneys general to represent their citizens as *parens patriae* do not contain any analogous limitations on private actions. Such statutes more closely resemble Title VII, which authorizes suits by private parties and the EEOC without giving priority to either category of litigation.²³⁹ Notably, the Supreme Court has held that a suit by the EEOC under Title VII does *not* automatically preclude subsequent private action on the same claim, "given the possible differences between the public and private interests involved."²⁴⁰

The question is somewhat more complicated, but the logic of *Richards* extends to statutory and common law rights recognized under state law, even though the state legislature may have the power to "destroy" those rights. First, the Court has "considered and rejected" an approach to due process that "would allow the State to destroy at will virtually any state-created property interest."²⁴¹ Accordingly, while the state legislature "may elect not to confer a property interest,"²⁴² it "may not constitutionally authorize the deprivation of such an interest, once

in determining whether state suit under the Clean Water Act precluded later private action). Others have refused to preclude private damages actions where the EEOC sought only injunctive relief. See *AARP v. Farmers Grp., Inc.*, 943 F.2d 996, 1006 (9th Cir. 1991); *Victa v. Merle Norman Cosmetics, Inc.*, 24 Cal. Rptr. 2d 117, 125 (Cal. Ct. App. 1993) (refusing to preclude private ADEA suit where, "by the time it agreed to the judgment the EEOC had dispensed with plaintiff's particular interest, and was content to dismiss the case in exchange for [defendant's] submission to a general injunction"); cf. *In re Exxon Valdez*, 270 F.3d 1215, 1231 (9th Cir. 2001) (refusing to preclude private damages action where earlier government suit under the Clean Water Act had adjudicated only common public interests).

²³⁹ See 42 U.S.C. § 2000e-5 (2006 & Supp. V 2011).

²⁴⁰ *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 333 (1980); see also *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 689 (1961) ("We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it."). The *Sam Fox* case involved an antitrust suit by the United States that resulted in a consent decree prescribing certain injunctive relief. *Id.* at 686. The government was not suing in a representative capacity, and earlier cases had made clear that "[t]he scheme of the [antitrust] statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." *Id.* at 689 (quoting *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954)) (internal quotation mark omitted).

The lower courts are divided on the preclusive effect of EEOC action under Title VII on behalf of a particular employee (rather than a large class of employees, as was the case in *General Telephone Co.*). Compare *Riddle v. Cerro Wire & Cable Grp., Inc.*, 902 F.2d 918, 922 (11th Cir. 1990) (holding that EEOC action did not preclude private suit because "Riddle and the EEOC did not have the same interests in pursuing litigation against Cerro"), with *Jones v. Bell Helicopter Co.*, 614 F.2d 1389, 1390 (5th Cir. 1980) (holding that individual's Title VII action was barred by resolution of earlier EEOC action because individual was in privity with the EEOC). Cf. *Adams v. Proctor & Gamble Mfg. Co.*, 697 F.2d 582, 583 (4th Cir. 1983) (en banc) (holding that consent decree in EEOC action precluded suit by individuals who were charging parties but did not intervene in the EEOC's action on their behalf).

²⁴¹ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982).

²⁴² *Id.* (quoting *Vitek v. Jones*, 445 U.S. 480, 490 n.6 (1980)).

conferred, without appropriate procedural safeguards.”²⁴³ Reasonable minds can disagree, of course, on what procedural safeguards are “appropriate” in circumstances where a state official adjudicates private claims in a representative capacity. But it strains reason to suggest that the core requirement of adequate representation — a condition the Supreme Court has described as the irreducible minimum of preclusion by representation²⁴⁴ — can be ignored completely whenever the representative is a state actor.

Second, the fact that the state legislature could limit or abolish a statutory or common law right tells us very little about the authority of the attorney general to resolve the claims of particular individuals in a particular case. Due process doctrine regularly distinguishes between government action that takes the form of legislation and government action that takes the form of adjudication, even when the same government official or institution is acting in both cases.²⁴⁵ Witness the vastly different procedural requirements governing agency rulemaking and adjudications.²⁴⁶ The reason for the distinction is that generally applicable rules and statutes apply to the citizenry at large, making it both impracticable and unnecessary to give each citizen a procedural right to predeprivation notice and an opportunity to be heard. Recognizing those rights would be impracticable in the case of legislation because of the sheer number of people affected.²⁴⁷ As the Supreme Court put it long ago, “[t]here must be a limit to individual argument in . . . matters [affecting the general population] if government is to go on.”²⁴⁸ And heightened procedural protections are unnecessary in the legislative context because generally applicable rules are unlikely to target particular disfavored individuals or groups for arbitrary or malicious treatment. The Constitution explicitly prohibits state legislatures from enacting “any Bill of Attainder” penalizing particular indi-

²⁴³ *Id.* (quoting *Vitek*, 445 U.S. at 490 n.6).

²⁴⁴ See *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940).

²⁴⁵ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 579–80 (3d ed. 2006). Compare *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”), with *Londoner v. Denver*, 210 U.S. 373, 385 (1908) (“[D]ue process of law requires that at some stage of the proceedings [assessing taxpayers for costs of local improvements] before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice . . .”).

²⁴⁶ See *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973) (discussing “a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other”).

²⁴⁷ See *Bi-Metallic*, 239 U.S. at 445 (“Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption.”).

²⁴⁸ *Id.*

viduals,²⁴⁹ though states remain free to pass private bills *favoring* specific individuals or groups. There is an important difference, politically speaking, between a statutory amendment that restricts operation of a state law across the board, and a decision that the state law shall not apply to a given dispute between identifiable individuals or groups. Both decisions favor certain interests over others. But, precisely because it is generally applicable, the former (legislative) decision can be expected to stimulate lobbying and other political activity by the various interest groups that may be affected by a statutory change. By contrast, the latter (adjudicative) decision singles out a specific case for special treatment, thereby isolating the affected individuals from the usual currents of political pressure and persuasion. Such targeted government action, concerning how the law applies to a particular individual or group, triggers unique concerns about fairness and accuracy.²⁵⁰ Thus, due process requires that individuals have notice and an opportunity to be heard — or, at a minimum, that their interests are adequately represented by a party to the decisionmaking process.

An attorney general's decision to litigate, settle, or otherwise resolve particular claims plainly qualifies as the sort of adjudicative action to which basic due process protections attach. The decision may involve a large number of citizens, but so do private class actions. No court has ever suggested that class actions qualify for lesser due process protections because resolution of such large-scale cases qualifies as a legislative rather than adjudicative act. Regardless of the number of citizens affected, state suits and similar class actions involve a single case — a particular incident or set of incidents — rather than a general rule. That difference between rule definition and rule application lies at the heart of the due process distinction between legislation and adjudication.

In sum, the notion that state representation of private interests is constitutionally adequate *as a matter of law* finds no support in due process doctrine or theory. There is a second possibility, however — one suggested by the smattering of lower court decisions addressing the interaction between public and private aggregate litigation. As Part I details, courts have tended to assume that the attorney general is an adequate representative of the *parens patriae* group members *as a matter of fact*. Those courts have reasoned that the attorney general's duty to act in the public interest and his lack of pecuniary interest in the outcome of the case ensure that state litigation will serve the in-

²⁴⁹ U.S. CONST. art. I, § 10, cl. 1.

²⁵⁰ See CHEMERINSKY, *supra* note 245, at 580 (“[P]rocedural protections are required under the due process clause when there is a possible issue about how the law applies to a specific person.”).

terests of the affected citizens.²⁵¹ If those factual assumptions were correct, it might follow that courts could safely presume that public representation is constitutionally adequate.

The analysis in Part II should make clear why an assumption of adequate public representation is a mistake. Adequate representation must, at a minimum, be unconflicted.²⁵² Yet, as Part II shows, conflicts of interest are unavoidable in public aggregate litigation, given the difference between the public interest and the interests of the *parens patriae* group members. The attorney general's duty to represent the interests of the public at large may lead him to prioritize goals that run counter to the narrower interests of the injured individuals. For example, the attorney general may emphasize injunctive relief over damages, or take care to ensure that the defendant is not forced out of business, while the affected individuals would prefer to maximize their monetary recovery. The point is not that the attorney general is a bad actor; his choices may well be optimal from the perspective of the larger public interest. But, to the extent the attorney general is motivated by interests at odds with those of the *parens patriae* group, he cannot be said to adequately represent those absent individuals.

Courts have recognized similar risks in cases concerning the EEOC, which has authority to adjudicate private claims under Title VII and other federal employment-related statutes. As noted above, the Supreme Court has indicated that EEOC actions will not always preclude subsequent private litigation on the same Title VII claims. The Court explained:

Although the EEOC can secure specific relief . . . on behalf of discrimination victims, the agency is guided by "the overriding public interest in equal employment opportunity . . ." When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.²⁵³

Or, as the Eleventh Circuit put it:

The EEOC is primarily interested in securing equal employment opportunity in the workplace. That interest is often most completely advanced through conciliation agreements or consent decrees . . . where the employer agrees to take broad remedial steps to eradicate discrimination. The aggrieved individual, on the other hand, is primarily interested in securing specific personal relief The differing interests of the EEOC and of the aggrieved individual are not necessarily compatible.²⁵⁴

²⁵¹ See *supra* Part I.B, pp. 499–510.

²⁵² Taylor v. Sturgell, 128 S. Ct. 2161, 2176 (2008) ("A party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum[,] . . . the interests of the nonparty and her representative are aligned . . .").

²⁵³ Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 326 (1980) (citation omitted) (quoting 118 CONG. REC. 4941 (1972)).

²⁵⁴ Riddle v. Cerro Wire & Cable Grp., Inc., 902 F.2d 918, 922–23 (11th Cir. 1990).

Potential conflicts between public and private interests are sharpened in the context of state suits by the transsubstantive nature of the interests served by the attorney general. In contrast to a single-issue agency like the EEOC, the attorney general must balance the goals of the individual case against wholly unrelated priorities in other areas of the law. When deciding how to ration her limited resources, or what remedies to seek in settlement negotiations, the attorney general must weigh antidiscrimination goals against antitrust goals against product safety goals and so on. Again, one need not disapprove of the attorney general's choices in order to appreciate how her broader duty to serve the public interest may detract from her representation of a particular set of injured individuals.

These concerns cannot be brushed aside with assurances of electoral accountability. On the contrary, it is precisely because the attorney general is an elected official that she may not reliably represent the private interests at stake in a given case. Periodic elections secure the attorney general's accountability to the public at large — or at least to that segment of the voting public that forms an electoral majority or otherwise participates in the political process through contributions and similar support. Far from serving as mechanisms for “client” control and monitoring, statewide elections (or political appointments) reinforce the attorney general's ethical and political obligations to citizens *outside* the *parens patriae* group.

B. *Two Paths Forward*

I have argued that aggregate public litigation may disserve the interests of the individuals the attorney general purports to represent, and, in doing so, run afoul of the constitutional guarantee of adequate representation in cases involving private claims. Courts could address those concerns in two ways. Courts could ramp up the procedural requirements for *parens patriae* and similar state suits. Alternatively, courts could leave in place the existing procedural regimes for public and private aggregate litigation but hold that state suits cannot preclude later private actions for monetary relief. This section offers a brief sketch of each approach. The goal here is not to develop a comprehensive procedural “fix” for the problems with *parens patriae* preclusion, but to shine some light on possible paths forward.

1. *Procedural Convergence: Class Action-Style Rules for State Suits.* — One way to address the formal and functional problems with *parens patriae* actions would be to subject such suits to some of the procedural requirements that govern damages class actions — at least when those suits seek to terminate individual claims for damages or other monetary relief. The core requirement of adequate representation is an obvious starting point. Rather than assuming that public representation is always constitutionally adequate, courts could under-

take a meaningful inquiry into whether the attorney general has both the resources and the incentives to pursue the relevant claims vigorously.²⁵⁵ That inquiry could occur in the state case itself,²⁵⁶ or it could occur in the context of a later private action by members of the *parens patriae* group. The key reform is that courts would abandon the simplistic view that the attorney general's status as an elected representative of the state's citizens automatically translates into adequate representation of a subgroup of citizens in an adjudicative context.²⁵⁷

The difficulty with this proposal, of course, is that it puts courts in the unenviable position of second-guessing the attorney general's choices with respect to policy tradeoffs and other matters in which judges are unlikely to be expert. The concept of adequate representation is undertheorized even in the class action context, and class action scholars disagree over just what adequate representation means and how best to secure it.²⁵⁸ I argued above that conflicted representation

²⁵⁵ Cf. Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1151 (2009) (explaining that adequate representation in class actions protects against "incompetence" and "indifference" of class counsel and class representatives).

²⁵⁶ Some state and federal statutes require courts to approve state settlements. See *supra* note 72 and accompanying text. Most courts discharge that duty by asking whether the settlement is "fair, reasonable, and adequate" — an inquiry that could embrace analysis of the attorney general's performance. E.g., *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 680 (S.D.N.Y. 1991) ("While the [federal antitrust] statute does not state the standard to use in approving a *parens patriae* settlement, courts have adopted the standard used in class actions."); *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1383 (D. Md. 1983) ("Similar standards should govern judicial review of proposed settlements in both *parens patriae* actions and private class actions.").

²⁵⁷ Abandoning the assumption of adequate public representation also would have implications for current judicial practices with respect to superiority and intervention. Courts need not ignore the possibility of a public action when ruling on superiority under Rule 23, nor should they categorically limit the state's *parens patriae* authority to cases in which private class actions are unavailable or infeasible. If, as I have argued, private class actions and *parens patriae* suits raise similar concerns about adequate representation, courts should assess those concerns as they arise on a case-by-case basis rather than adopting an across-the-board preference for either model.

Where state suits will preclude subsequent private litigation, courts should also abandon the heavy presumption of adequate representation they currently apply when private parties seek to intervene in *parens patriae* litigation. Instead, courts should apply the standard "minimal burden" requirement for intervention, demanding some showing that the existing parties may not adequately represent the movant's interests. See *supra* notes 94–104 and accompanying text. Concededly, intervention may complicate or delay the conclusion of some cases, and — as in the class action context — there are risks that greedy private attorneys will use the opportunity to fish for undeserved fees. See Brunet, *supra* note 1, at 409 (discussing "problems [that] plague the process of objecting into class actions"). But those concerns hardly justify denying intervention on the very different ground that the attorney general can be presumed to adequately represent the interests of the *parens patriae* group. If delay and interference are independently sufficient reasons to refuse intervention, they should be addressed on their own terms and not hidden behind assurances of adequate representation.

²⁵⁸ See Marcus, *supra* note 67, at 138 ("Given its importance, it is remarkable that the adequacy concept has little doctrinal or theoretical coherence."); Tidmarsh, *supra* note 255, at 1137–38 ("Despite the allure of the principle, we have very little sense of what adequate representation means, how we can measure it, or how we can guarantee it.").

is constitutionally inadequate²⁵⁹ — but avoiding glaring conflicts of interest is a floor, not a ceiling. In the class action context, courts inquire into the capacities as well as the incentives of class counsel, weeding out “class representatives and class counsel who sincerely . . . want to represent the interests of class members, but are incapable of effectively doing so because of insufficient financing, experience, talent, probity, or mental capacity.”²⁶⁰ Searching for possible conflicts between public and private interests is hard enough; assessing whether the attorney general is capable of effectively representing the interests of the *parens patriae* group members is even more difficult. And matters may be more difficult still if courts understand the requirement of adequate representation to demand an inquiry into the actual performance of the attorney general.²⁶¹ The Supreme Court recognized the problems with such an inquiry decades ago when it held that antitrust litigation by the United States (which does not purport to represent private interests) does not preclude subsequent private litigation against the same defendant.²⁶² “Apart from anything else,” the Court explained, “sound policy would strongly lead us to decline [the] invitation to assess the wisdom of the Government’s judgment in negotiating and accepting [a] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting.”²⁶³ The same concerns may help explain the lower courts’ tendency to assume away questions of adequate public representation rather than addressing them head-on.²⁶⁴

Moreover, while it seems clear that a rigorous inquiry into the adequacy of representation is necessary before public aggregate litigation can bind individual claimants, the question remains whether it is sufficient. Arguably, due process also requires that members of the *parens patriae* group be given notice of the public action and an opportunity

²⁵⁹ See *supra* section III.A.2, pp. 535–42.

²⁶⁰ Tidmarsh, *supra* note 255, at 1151.

²⁶¹ See Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917, 927–30 (2010) (arguing that constitutional adequacy includes considerations of attorney performance).

²⁶² See *Sam Fox Publ’g Co. v. United States*, 366 U.S. 683, 689 (1961).

²⁶³ *Id.*

²⁶⁴ For example, the Seventh Circuit, having concluded that action by the state under the Clean Water Act could preclude a subsequent private suit only if the state had pursued the relevant claims with “due diligence,” put it this way:

[D]iligence on the part of the State is presumed. We surmise that this presumption is due not only to the intended role of the State as the primary enforcer of the Clean Water Act, but also to the fact that courts are not in the business of designing, constructing or maintaining sewage treatment systems.

Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 760 (7th Cir. 2004) (citations omitted); see also *id.* at 758–60.

to opt out.²⁶⁵ The answer turns on a careful balance of the costs and benefits of those additional procedures — issues that have divided scholars in the class action field.²⁶⁶ As in the private context, the value of the rights of notice and opt-out in state suits depends on the types of claims at issue. In cases where the individual claims are relatively large, so that concerns about fairness to individual claimants have real bite, notice and opt-out rights can provide important protections for individuals who would prefer to sue separately, or who wish to keep a close eye on the conduct of the aggregate litigation before deciding whether to join in the judgment. In such circumstances, due process probably requires that interested individuals receive notice of the state action and an opportunity to exclude themselves from any judgment that might preclude their private claims. In small-claims cases, however, the costs of providing notice to all the individuals affected may exceed the expected recovery, and the likelihood that the individuals affected would respond to the notice is quite low. In such circumstances, the costs of the procedure may well outweigh the benefits.²⁶⁷

If *parens patriae* suits are to preclude private suits for damages, then, it would seem that one of two additional procedural innovations is necessary. Either courts must provide *parens patriae* group members notice and an opportunity to opt out in every case, as Rule 23 requires of damages class actions, or courts must undertake a more flexible inquiry into the probable costs and benefits of notice and opt-out rights in each case.²⁶⁸ Neither approach is ideal. The first is over-

²⁶⁵ See *supra* note 90 and accompanying text. Some statutes create rights to opt out of *parens patriae* actions, but coverage is spotty. Compare, e.g., ALASKA STAT. § 45.50.577(b) (2011) (Alaska antitrust statute providing for notice by publication and right to opt out of *parens patriae* action by filing notice with court), ARK. CODE ANN. § 4-75-212 (2011) (same, for Arkansas Unfair Practices Act), and CAL. BUS. & PROF. CODE § 16760 (West 2008) (same, for California antitrust statute), with CONN. GEN. STAT. §§ 35-24 to 35-46 (2011) (Connecticut antitrust statute lacking provisions for notice and opt-out), 740 ILL. COMP. STAT. 10/7 (2010) (same, for Illinois antitrust statute), and NEB. REV. STAT. § 84-212 (2008) (same, for Nebraska antitrust statute).

²⁶⁶ Compare, e.g., Macey & Miller, *supra* note 109, at 27–28 (arguing that the benefits of notice in large-scale, small-claims class actions “appear minimal at best” while the costs “can be substantial,” *id.* at 28, and concluding that “notice has little realistic value to class members” in such cases, *id.*), with Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 573–76 (1997) (emphasizing notice as a prerequisite to the right to be heard).

²⁶⁷ Cf. Macey & Miller, *supra* note 109, at 30 (“The Supreme Court has made quite clear that in the notice-of-litigation context, as in other due process clause analysis, the relevant analysis involves a balancing of costs and benefits.”).

²⁶⁸ Some statutes that authorize states to sue as *parens patriae* demand just such an inquiry with respect to notice. For example, the federal antitrust statute requires courts to give notice of a state action by publication, with the caveat that the court may order further individualized notice if due process requires it. See 15 U.S.C. § 15c(b)(1) (2006). Some, but by no means all, state antitrust statutes currently resemble the federal model. See *supra* notes 91–93 and accompanying text.

inclusive, requiring costly notice even in cases where the practical payoff is minimal. The second approach trades that problem for a more difficult judicial inquiry.

A final difficulty deserves mention here. The goal of the procedural requirements discussed in this section — a judicial inquiry into the adequacy of the attorney general's representation, and the addition of rights of notice and opt-out — is to ensure the attorney general's "loyalty" to the members of the *parens patriae* group. One might sensibly question whether that is a desirable goal for public aggregate litigation. The argument here is that additional procedural protections are *necessary* if state suits are to preclude private actions. But it is not clear that harnessing state actions more tightly to the interests of the injured individuals would yield a net benefit for our legal system as a whole. As I have emphasized throughout this Article, attorneys general are charged with representing the public interest. Their litigation behavior is likely to reflect that orientation with an emphasis on securing broad programmatic reforms rather than imposing crippling financial liability on important businesses. Although a public-interest orientation may be problematic from the perspective of individual claimants, the broader public may benefit in important ways from the unique perspective the attorney general brings to litigation.

2. *Limiting Parens Patriae Preclusion.* — Happily, states need not choose between representing public and private interests. Courts can avoid the constitutional problems identified in this Part by holding that state suits cannot preclude private actions for damages (whether individual or aggregate). Rather than remaking state suits in the image of private class actions, a no-preclusion approach would embrace the differences between public and private aggregate litigation. It would make sense of the procedural divide that currently separates the two categories of cases by deemphasizing the representative aspect of *parens patriae* suits and emphasizing the state's distinctly public interest in promoting compliance with applicable law. If one focuses on the state as plaintiff, it hardly seems odd to forego an inquiry into the adequacy of the attorney general's representation, or to dispense with notice to particular individuals. But that model works — both as a theory of state suits and as a matter of due process — only if individuals remain free to pursue their private interests in separate litigation.

Of course, in order for a no-preclusion approach to work as a practical matter, defendants must be assured some protection against duplicative recoveries. Absent such protections, defendants would likely refuse to settle with state attorneys general, and *parens patriae* actions would be robbed of much of their potential value. Thus, as the Supreme Court has instructed with respect to Title VII litigation by the

EEOC, “courts can and should preclude double recovery by an individual.”²⁶⁹ One option is to adopt what is effectively an opt-in regime, under which any individuals who accept funds through a state suit relinquish their right to pursue private remedies.²⁷⁰ Alternatively, courts could deduct any payments made in a state suit from the recovery in a subsequent private class action.

Admittedly, an exhortation to courts to avoid “double dipping”²⁷¹ is not a perfect solution. The difficulty is that states rarely distribute one hundred percent of settlement funds to the injured individuals, because many of those individuals fail to claim what is owed to them.²⁷² Unless the state settlement is structured so that any unclaimed funds revert to the defendant,²⁷³ a judicial policy against allowing the same claimant to recover twice from the same defendant will not protect the defendant from paying twice for the same harm. The problem is exacerbated in cases involving *cy pres* distributions, where none of the individuals represented by the attorney general actually recovers funds. If courts focus on preventing double *recoveries*, it would seem that the defendant has no protection against subsequent private suits. And if courts focus instead on preventing double *payments* for the same harms — even if the injured individuals collected nothing in the state suit — then we are largely back where we started, with individuals being bound by a judgment from which they gained little or nothing at all.

These challenges are real, but they should not be overstated. It is not uncommon for state settlements explicitly to preserve private actions, yet defendants continue to agree to those settlements and the sky has not fallen.²⁷⁴ After all, the cases in which protections against

²⁶⁹ Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 333 (1980).

²⁷⁰ See *id.* (“[W]here the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action.”).

²⁷¹ See Steven Malech & Seth Huttner, *What is Superiority? The Role of Completed, Pending, and Anticipated Government Activity in Certifying a Class Action*, ANTITRUST SOURCE, Apr. 2010, art. 6, at 2, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Apr10_FullSource.authcheckdam.pdf (expressing concerns about duplicative recoveries in government cases and class actions).

²⁷² See *supra* note 183.

²⁷³ That solution would create its own set of problems, as it would negate any incentives the defendant otherwise might have to identify claimants.

²⁷⁴ For example, the \$25 billion mortgage foreclosure settlement described in Part II explicitly preserves private suits. See LEHMAN, *supra* note 168, at 4; see also, e.g., Joint Motion to Enter Consent Judgment, Arizona v. Quik Cash, No. C20099397 (Ariz. Super. Ct. Mar. 8, 2011), available at http://www.azag.gov/press_releases/march/2011/QuikCash_3-8-11.pdf (consent judgment providing that defendant will pay up to \$170,000 in restitution to eligible consumers, *id.* at 3, and noting that “nothing in this consent judgment restricts any person or entity from pursuing a private action or asserting any available right or remedy against Quik Cash,” *id.* at 2); Consent Judgment, Arizona v. DirecTV, Inc., No. CV2010-033208 (Ariz. Super. Ct. Dec. 28, 2010), avail-

double payments are most problematic — those involving small claims — are also the least likely to inspire private litigation. If private suits are a practical impossibility because the claims at issue are too small to justify an individual action or to attract class counsel, the theoretical possibility of duplicative payments should not prevent effective settlement of the state action. The effects on settlement should be particularly insignificant when any individuals who are sufficiently motivated to claim funds under the state action must affirmatively agree to give up their private rights to sue.

Finally, it bears emphasis that the alternate paths sketched here need not be mutually exclusive. In cases where precluding subsequent litigation is critical to the success of a state suit, attorneys general remain free to proceed as class representatives under Rule 23 and state-law equivalents. Even when states proceed under the *parens patriae* banner, courts can satisfy the demands of due process by assessing the adequacy of the attorney general's representation of private interests and providing appropriate notice and opt-out rights to claimants, as suggested above. Courts already engage in some of these inquiries when states sue alongside private class counsel, so the Rule 23 requirements of notice, opt-out, and judicial oversight are unavoidable.²⁷⁵ The difference — and it is important — is that courts currently give undue weight to the attorney general's participation in the case, reasoning that the requirement of adequate representation is easily met because states are the “best representatives of the consumers residing within their jurisdictions.”²⁷⁶ As this Part has explained, due process requires a more meaningful assessment of the adequacy of the state's representation of private interests when *parens patriae* litigation stands as a bar to private action. That inquiry may not be easy, but it is the price of preclusion.

CONCLUSION

Case law and commentary on aggregate litigation suffer from a nirvana fallacy: both compare a realistic — even cynical — view of damages class actions to a utopian vision of state suits. I have sought to show that many of the critiques that scholars and judges have le-

able at http://www.azag.gov/press_releases/dec/2010/DirecTV%20consent%20judgment.pdf (consent judgment providing that defendant will pay restitution to eligible customers, and noting that “[n]othing in this judgment shall be construed to create, waive, or limit any private right of action,” *id.* para. 9.14).

²⁷⁵ For an example, see *In re Remeron End-Payor Antitrust Litigation*, Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314 (D.N.J. Sept. 13, 2005), which scrutinized under Rule 23 a settlement-only class action involving states as well as private parties.

²⁷⁶ *Id.* at *11 (quoting *In re Ampicillin Antitrust Litig.*, 55 F.R.D. 269, 274 (D.D.C. 1972)) (internal quotation marks omitted).

vied against damages class actions translate easily to the public sphere. Public and private aggregate suits raise similar concerns about fairness to the individuals whose interests are at stake. Yet we treat the two types of representative litigation differently, based on unfounded assumptions about the litigation behavior of state attorneys general.

Once one recognizes that public and private aggregate suits create similar risks of conflicted or otherwise lackluster representation, it becomes clear that the core due process requirement of adequate representation is not satisfied simply because the state attorney general is an elected (or appointed) government official. Consent of the governed may legitimize many government actions, but it cannot substitute for consent of the client. One response would be to close the procedural gap that currently separates public and private aggregate suits. But if we force state litigation into the class action mold, we may lose the benefits of *parens patriae* suits as unique mechanisms for public policy reform. A better solution, and certainly an easier one, would be to accept the divergence between public and private interests and deny preclusive effect to public suits involving private claims.