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Revisiting the Government as Plaintiff

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Fundamental questions about various governmental branches’ respective authority within our system of checks and balances tend to plague Americans with each new judicial, legislative, or executive innovation. For example, when administrative agencies gained popularity, they prompted questions about the degree to which administrative courts could adjudicate disputes; when courts faced mass harms, they questioned the extent to which they (as opposed to the legislature) were equipped to redress those wrongs; and when states’ attorneys general sued tobacco and lead paint industries, their actions raised questions about whether it was appropriate for settlements to regulate defendants’ conduct prospectively. As these examples show, there are no neat dividing lines dictating or allocating permissible regulatory and enforcement powers between government branches.

One can see this most clearly in the work of the late Richard Nagareda, the honoree of this symposium and a dear mentor to me. Problems arising from the comingling of government functions became a prominent chapter entitled “The Government as Plaintiff” in his book, Mass Torts as a World of Settlement, and later in his casebook, The Law of Class Actions and Other Aggregate Litigation. Having the honor of responding to Professor Adam Zimmerman’s contribution to this symposium, The Corrective Justice State, prompted me to revisit Richard’s work on the subject. The enduring relevance of Richard’s scholarship surprises me not at all and I think he would be pleased by the continued debate it sparks among a new generation of scholars.

As Professor Zimmerman identifies in The Corrective Justice State, the debate over this regulatory and enforcement bleed between governmental branches
must shift once again. As executive officials regulate pressing social and economic concerns prospectively through large monetary settlements and justify those deals with corrective justice rhetoric, they circumvent traditional law making through the legislature and often fail to satisfy basic due process concerns such as notice, participation, and adequate representation. Relying on corrective justice principles as a critical lens, Professor Zimmerman first argues that those principles are mismatched with public regulation aims. Corrective justice, he explains, “is inherently retrospective, intrapersonal and incremental,” whereas public law promotes the public interest “by creating or enforcing comprehensive legislation.” When case-by-case adjudication regulates prospectively in lieu of public legislation, executive officials’ actions may rob the public of transparency, expertise, legislative solutions, and democratic accountability checks. Yet, these executive actors—prosecutors, federal agencies, and states’ attorneys general—can respond more quickly than a legislature, overcome legislative or regulatory stalemates, and reach flexible solutions. Zimmerman thus devotes the bulk of his article to identifying and exploring the benefits, limits, and origins of this “Corrective Justice State,” where policymakers favor publically brokered settlements because of their general skepticism about the efficacy of prospective regulation through other means. He concludes by briefly proposing some guidelines for moving beyond the “Corrective Justice State,” and improving settlement administration.

Given the comparative ease with which executive officials can act and the increasing difficulty private attorneys face in certifying a class action, Zimmerman’s proposals for moving beyond the “Corrective Justice State” focus less on disentangling regulatory and enforcement functions and more on bolstering procedural protections within executive enforcement. In particular, he is concerned that: (1) public restitution funds may include broad public notice, but deny affected individuals the ability to participate by intervening or challenging award allocations; (2) victims may be dissimilarly situated yet lack separate representation; and (3) agency capture and officials’ self-interest can tempt executive actors away from serving victims’ best interests.

To allay these concerns when allocating settlement proceeds, Professor Zimmerman proposes importing two private law safeguards to enhance public participation and impose judicial quality control measures. First, to devise a settlement distribution plan, he suggests implementing negotiated rulemaking procedures where the governmental entity appoints a neutral facilitator who identifies interested parties, gives those stakeholders an opportunity to

participate in creating the plan, and encourages them to reach a consensus subject to review by an executive official. Second, he advocates that judges use “hard-look” review to address and limit conflicts of interest. Judges should conduct their review on a sliding scale that defers to executive officials in cases with more public impact, such as those with negative values and uniform injuries, but affords officials less deference and discretion in cases that principally affect private interests, such as those where private claims have high monetary value and victims are dissimilarly situated. This latter category would thus entail more judicial scrutiny, increased victim participation, and carefully tailored allocation guidelines.

Zimmerman writes with such clarity and accessibility that one might miss the careful ambition behind his thesis: he injects a novel twist into the existing regulatory debate over executive actors brokering settlements that bear on (some might say circumvent) legislative functions. Specifically, he identifies a new controversy over how state actors justify and perform their allocative function when divvying up compensatory settlement proceeds to constituents and uses corrective justice principles as his critical lens. As such, the article’s break from traditional scholarship on the topic is refreshing and its many contributions are readily apparent.

Still, certain concerns and questions linger over whether Zimmerman’s proposed solutions alleviate the problems he identifies. First, his recommendations focus on the second-order question of allocation, even though he raises and reluctantly accepts first-order concerns over whether executive officials are properly acting within the scope of their authority and whether the regulatory solutions they generate through litigation are legitimate and optimal. Shoring up back-end allocation procedures, however, does not alleviate first-order legitimacy questions or regulatory concerns. Second, Zimmerman opts not to iron out overarching systemic problems like legislative stalemates or mounting difficulty in certifying class actions, preferring instead (or perhaps more realistically) to work within the circumstances that prompt executive action. Yet, truly legitimizing process would require tackling systemic concerns about who should litigate, who should regulate, and whether multiple entities should share those responsibilities. Finally, given concerns that judges already “rubber stamp” class-action settlements and that parties tend to find innovative ways to gerrymander votes and stakeholder input in areas like bankruptcy, one might question the effectiveness of Zimmerman’s proposals for enhancing institutional design when allocating state recovery to affected citizens.

As Professor Zimmerman recognizes, the debate over governments acting as plaintiffs and “regulating by deal” has shifted from initial questions over whether litigation produces the best public policy and whether executive officials are acting within the scope of their authority to how government actors should pursue and allocate settlements. Yet, as this first wave of controversy suggests, the slate upon which executive officials currently write is neither clean nor uncontroversial. Instead, this new debate is playing out in an unsettled landscape where those first-order questions about legitimacy remain unresolved.3

Richard Nagareda’s contributions to the debate over the government’s intermingling of regulatory and proprietary dimensions likewise muddy the line that Zimmerman draws between executive officials’ impact on regulation versus victims’ procedural justice rights.4 Governments, Nagareda explained:

do two things. They act to advance the public welfare, with health and safety being the most salient components. In addition, governments have a legal existence in themselves as proprietors. They own property. They enter contracts. They can sue and be sued in their own name, apart from the natural persons that run them.5

To these regulatory and proprietary functions, Zimmerman adds an allocative dimension: executive officials allocate restitution to victims.

When layered atop the existing controversy over the intermingling of government functions, executive officials’ relatively new allocative role may put their actions even further at odds with their traditional regulatory and proprietary functions, particularly when the action yielding the compensation is a public substitute for a private right of action. What principles should guide officials in this new role: traditional tort law, social welfare, or political equality principles such as one person one vote? More specifically, should executive officials look to tort law precepts to govern the allocation and retain concepts such as economic loss and the collateral source rule, or employ a governmental

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5 Id. at 185. To be sure, administrative and criminal actions do not involve the government’s proprietary interest per se, but they do pit the government’s broad interests in criminal and regulatory enforcement against its interests in criminal and regulatory policy.
aid aspect, which would suggest a principal of equality that would not vary based on one’s income but would consider collateral sources of compensation?6

Zimmerman argues that officials have attempted to justify both their regulatory and allocative decisions with ill-suited corrective justice principles that translate poorly from the private to the public sphere. Despite reservations about whether regulation through litigation results in the best policies or offers democratic checks, he is reluctantly willing to accept executive officials’ increased litigation role in the wake of Congressional failings and the difficulty of certifying a private class action. He thus tailors his reform proposals to target the government’s allocative function, suggesting ways to improve legitimacy and transparency in distributing recoveries, whatever the guiding principle might be.

Still, Zimmerman’s approach to shoring up procedural protections through added participation rights and judicial checks does not paper over similar due process problems in the regulatory function. The two concerns are related, but distinct. To illustrate, consider an analogy to the two roles that adequate representation plays in the class-action context. First, when a judge decides whether to certify a class, she determines whether there are structural conflicts of interest either among the putative class members or between class counsel and the class. When conducted properly, this certification decision means that no wedge exists among class members or between class members and class counsel that might tempt attorneys to skew litigation or settlement decisions so as to unreasonably favor some class members over others.7 But this does not protect class members from the subsequent danger that counsel will sell them all short through a paltry settlement, whether due to incompetence or attorney self-interest. Thus, there is a need for Rule 23(e), which introduces the second role for adequate representation as a means to assess whether a settlement is fair, reasonable, and adequate. The two inquiries are not coextensive: A conflict-free class could result in a poor or unfair settlement and a conflict-filled class could yield a stellar outcome. Yet, adequate representation must be met at both stages for due process.

It is the adequate representation component that lies at the heart of many of the debates surrounding what Richard Nagareda collectively dubbed

6 Critiques along these lines have been made against the government in setting up and administering the September 11 Fund. E.g., Matthew Diller, Tort and Social Welfare Principles in the Victim Compensation Fund, 53 DePaul L. Rev. 719, 731 (2003); Tom R. Tyler & Hulda Thorisdottir, A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund, 53 DePaul L. Rev. 355, 370–74 (2003).

“government as plaintiff,”8 others regarded as “regulation through litigation,”9 and Zimmerman identifies as “regulat[jion] by deal.”10 But as is the case in class actions, adequate representation wears many hats and takes on different meanings depending on whether the government is acting in a regulatory, proprietary, or allocative role. Fixing adequate representation concerns at one stage of the process does not alleviate those concerns uniformly. For example, satisfying adequate representation when divvying up compensation tells us nothing about whether the government illegitimately intermingled its various roles, such as by acting in its self-interested proprietary role, when initiating the litigation. Enhancing procedural protections for private victims during settlement says little about whether executive officials pursued the best regulatory policy, acted legitimately within the scope of their power, or adequately represented all victims throughout the litigation process.

As in class actions, when executive officials sue on the public’s behalf, sometimes fair representation concerns operate as a process-based critique that questions the means and procedures used to reach settlements, particularly when the settlement regulates conduct prospectively. Litigation is typically retrospective and corrects past injustices.11 So, when an executive official negotiates a settlement that regulates behavior prospectively, it might be viewed as impinging on legislative channels or solutions. Process-based critiques likewise include hiring private attorneys on a contingent-fee basis to pursue the litigation on the public’s behalf. Retaining private attorneys may allow executive officials to evade budgetary constraints—an effective inter-branch check that would allow the legislature to stop funding questionable litigation. Other times, adequate representation operates as an outcome-based critique of the settlement itself. This is particularly true if the settlement is seen as selling out the public in favor of a collusive deal that furthers the government’s proprietary interests.

Critiques of the Master Settlement Agreement between the states and big tobacco provide one example of both process- and outcome-based critiques. First, to pursue the tobacco industry, states turned to the private bar, hiring noted attorneys such as Joe Rice and Dickie Scruggs to represent them. The settlement that those lawyers eventually negotiated with tobacco companies involved a tradeoff between the government’s proprietary and regulatory

8 Nagareda, supra note 4, at 183.
11 Of course, injunctions would fall into a prospective category.
functions, but landed them $1 billion in legal fees. Second, the attorneys general claimed that tobacco companies owed states money for the additional costs that smoking placed on taxpayers through funding Medicaid. This so-called reimbursement litigation positioned the government as a proprietor in administering social welfare like Medicaid. But the solution did not simply remedy alleged losses to the public fisc; it encompassed prospective changes to states’ regulatory policy in the wake of failed federal legislation. The regulatory change authorized nothing short of cartel creation and protection. It permitted cigarette price increases, which would fund big tobacco’s payment obligation to the states. And it insulated tobacco companies from future competition that might undercut those price increases by adjusting settling companies’ principal payments downward if new market entrants impinged on their market share.

Filtering the tobacco litigation through the lens of process- and outcome-based adequate representation critiques illustrates their separate concerns. The process-based critique is two-fold. First, hiring private attorneys like Joe Rice and Dickie Scruggs allowed state attorneys to avoid legislative budgetary constraints and thereby bypass an inter-branch check. Second, states reached the Master Settlement Agreement after Congress declined to adopt “the McCain Bill,” which would have subjected the industry to far more draconian measures. As such, “regulation by litigation” produced an outcome that circumvented the more transparent and analytical legislative process. To be sure, as in class litigation, structural conflicts that exist at class certification may still yield a fair result, but that end result does not retroactively authorize an improperly constituted class. Similarly, even if the tobacco settlement netted an all around win for the public, that outcome would not appease these process-based qualms.

13 Nagareda, supra note 4, at 197–98; Michael DeBow, The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage, 31 Seton Hall L. Rev. 563, 576 (2001) (questioning why state legislatures would wait for the attorney general to sue tobacco companies when they could simply regulate them through increased taxes).
17 W. Kip Viscusi, Smoke-Filled Rooms 217 (2002).
The tobacco litigation also suffered from outcome-based fair representation critiques. Evading the traditional regulatory process (a process-based critique) produced an outcome that channeled some funds into tobacco-related programs as opposed to the general public fisc and aligned the states as partners with the tobacco industry. Absent that partnership, the settlement would never have survived antitrust scrutiny. Moreover, one might argue that the best outcome in terms of regulatory policy would be to gradually shut down the tobacco industry, not to ensure its longevity through cartel protection.18

So, it is against this existing landscape that one can best understand Professor Zimmerman’s contribution and its limits as a means for improving the government’s role in allocating settlement proceeds. Zimmerman resigns himself to the shift toward executive branch litigation and thus urges us to consider proposals for improving officials’ allocation procedures to stakeholders when they negotiate settlements affecting those stakeholders’ rights. But even though the current debate may have shifted to this new problem, the debates of the past—over whether state officials are acting within the scope of their authority and producing the best regulatory solutions—have yet to be resolved. So, addressing states’ compensatory function may improve the legitimacy of allocative procedures, but the first-order legitimacy questions persist. Like the adequate representation problem in class actions, fixing claim-processing deficiencies when allocating settlement proceeds does not legitimate the representation in the face of structural conflicts.

A devil’s advocate might parlay this critique into a grander scale by arguing that Professor Zimmerman is too accepting of legislative inaction and the move away from certifying private class actions. In this way, one might best view Zimmerman’s proposal as a stopgap measure for enhancing procedures within a flawed system. Yet, as Professor Myriam Gilles and Gary Friedman have pointed out, parens patriae actions may be one of the last possibilities for enforcing consumer protection, antitrust, and employment laws in the wake of AT&T Mobility LLC v. Concepcion and Wal-Mart Stores, Inc. v. Dukes.19 They thus advocate allowing attorneys general to “redress the injuries of consumers and employees who would otherwise have no recourse in a post-Concepcion world.”20 The problem, as Zimmerman identifies, is that if attorneys general are allowed to collect damages on behalf of individuals, there is often no requirement that they actually distribute those damages and, if they do, no guidelines for doing so. He thus adopts a pragmatic view, eschewing

18 NAGAREDA, supra note 4, at 199–210.
19 Gilles & Friedman, supra note 3.
20 Id.
romanticized notions about a class-action renaissance or a reversion to individual litigation that ignores the impact of recent procedural shifts.

The remaining question then is how well Professor Zimmerman’s proposal for enhancing the allocation process might work. He suggests allowing interested parties to develop a settlement distribution plan under a negotiated rulemaking process and subjecting public settlements to hard-look judicial review. From a procedural justice perspective, these proposals enhance legitimacy by increasing participation options and error-correction mechanisms before dispensing with what could be a valuable private claim.

Yet, given that commentators often critique judges for too readily rubber-stamping class settlements, particularly in state court, one wonders how effective hard-look review might be. Tasking elected state-court judges with questioning whether their state’s attorney general used a reasonable process and whether she justified her decision-making may depend more on political considerations than identifiable conflicts or appropriate judicial scrutiny.

The value of increased participation is at risk, too in light of attorneys’ innovative means of manipulating similar proposals in the past. Take the confirmation vote under Chapter 11 bankruptcy, for example. The basic idea is that a specified portion of creditors—75% under the relevant provision for asbestos litigation—must vote to confirm the debtor’s reorganization plan before it is submitted for judicial approval, a process described as “plan confirmation.” Once approved, the reorganization plan binds all creditors, regardless of how they voted. In Combustion Engineering’s bankruptcy proceeding, the debtor hired prominent asbestos plaintiffs’ attorney Joe Rice to leverage his credibility among asbestos victims into a positive vote. To put the matter bluntly, he gerrymandered the vote by flooding the voting pool with relatively unimpaired asbestos claimants who would vote for the plan over the objections of the more seriously injured ones. Nevertheless, the bankruptcy court recommended that the district judge confirm the plan. While recognizing the plan was “not perfect,” the district-court judge made a few minor non-substantive modifications and confirmed it.

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22 In re Combustion Eng’g, 391 F.3d 190 (3d Cir. 2004); NAGAREDA, supra note 4, at 168–73.
23 NAGAREDA, supra note 4, at 168–73. This is not to say that the risk in negotiated rulemaking is identical to that posed by bankruptcy. But when the executive official has discretion to ignore contrary interests, additional procedures’ limited value may not outweigh their costs.
the plan into question, the parties modified it slightly, but left the main structural defect intact.\footnote{In re Combustion Eng’g, No. 03-10495-JKF, at 17 (Bankr. D. Del. Dec. 19, 2005), aff’d Misc. No. 06-21(JEI) (D. De. Mar. 1, 2006); NAGAREDA, supra note 4, at 173–74.}

Zimmerman’s proposals for safeguarding private interests in a public settlement are substantially less stringent than bankruptcy protections for asbestos claimants. First, despite potential conflicts between “politically ambitious prosecutors” who “may prioritize a rapid resolution and big headlines at the expense of victims’ different interests in compensation,”\footnote{Zimmerman, supra note 1, at 5 J. TORT LAW 217 (2012).} the executive official still has final authority over the settlement distribution plan under negotiated rulemaking. Second, Zimmerman suggests two levels of judicial scrutiny to limit conflicts of interest between states and affected individuals. Judges should afford more searching review to settlements that likely preclude subsequent private litigation, affect numerous interests, and involve more valuable claims, but less review (and thus more deference) in negative-value cases with uniform injuries.\footnote{Id at 31.} These variables, however, are not always known or knowable at the settlement stage. As in settlement class actions, the parties have become “friends” of the deal and thus have little incentive to present the judge with information that might endanger the settlement or the allocation plan. And other information, such as the scope of preclusion, is not knowable with any certainty; neither a judge nor the parties can reliably dictate the settlement’s prospective preclusive effect.\footnote{See Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 243 (W.D. Tex. 1999); Coleman v. Gen. Motors Acceptance Corp., 220 F.R.D. 64, 80 (M.D. Tenn. 2004) (“Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action.”) (quoting Fed. R. Civ. P. 23 (c)(3) advisory committee’s note)); compare Brown & Williamson Tobacco Corp. v. Gault, 280 Ga. 420, 551–52 (2006) (prohibiting a private litigant’s claim for punitive damages in the wake of the states’ master settlement agreement with tobacco defendants) with Bullock v. Phillip Morris USA, Inc., 131 Cal. Rptr. 3d 382, 392 (Cal. Ct. App. 2011) (permitting a private litigant’s claim for punitive damages in the wake of the states’ master settlement agreement with defendants). Granted, it is easier to pinpoint preclusion’s scope in criminal and administrative cases since parties typically have to opt-in or sign waivers. Plus, in some cases, different officials or offices would oversee and administer any settlement distribution.}

Given these difficulties, why use an ex ante solution at all? One alternative is to build the discretionary aspects of Zimmerman’s proposal into an ex post challenge by allowing affected individuals to collaterally attack the executive
official’s suit. Individual lawsuits could then prompt the defendant to argue that the previous public litigation should preclude the private suit. As I have argued in more detail elsewhere,29 if the individual then responds that the executive official failed to adequately represent her interests or allocated compensation unfairly, the judge should examine the underlying right at stake to determine whether it is an aggregate or individual right.

If the underlying right arises from an aggregate harm—a harm that affects a group of people equally and collectively—and demands an indivisible remedy, then courts have and should tolerate greater conflicts and preclude subsequent individual claims. When attorneys general litigate aggregate harms, they typically demand indivisible remedies or statutory penalties that treat affected victims uniformly. Thus, when aggregate rights are at stake, the judge should presume that the attorney general is an adequate representative and tolerate greater conflicts.

Conversely, when executive officials pursue private, individual rights—as they might do under their quasi-sovereign interests—courts should not preclude affected individuals from pursuing their own claim if: a structural conflict existed; there was an inequitable allocation of divisible remedies; the attorney general lacked a sufficient motive to pursue the case; or the prosecution was completely inept.30 This allows attorneys general the latitude to pursue a wide array of harms, but preserves citizens’ individual right to sue where the harm or relief requested eclipsed private rights and the attorney general failed to adequately represent those rights.

Granted, this approach has imperfections and uncertainty too: it demands some uniformity in subsequent judicial review, requires victims to hire counsel, necessitates a private right to sue, and may discount the value added by getting process right the first time. But it also has benefits. It uses tools already available to judges, allows negative-value and difficult procedural cases to proceed without class-certification impediments, gives the attorney general an opportunity to pursue public questions and related private rights in tandem, and offers citizens a chance to pursue their claims if executive action proves inadequate.

Regardless of where one falls on the appropriate procedures, Professor Zimmerman’s work stands as a testament to the endurance of Richard Nagareda’s scholarly insights and should be credited for drawing our attention to the newest dimension of the “Government-as-Plaintiff” debate. Identifying and systematizing the theoretical and doctrinal holes that stem from the government’s foray into corrective justice is an important new wrinkle that deserves the

30 See Principles of the Law of Aggregate Litigation § 1.02 cmt. b(1)(B).
exploration of such an attentive and careful scholar. My only concern, however, is that we not let new wrinkles crowd out critical but unresolved questions over whether executive officials are acting within the scope of their authority and whether the regulatory solutions they generate through litigation are legitimate and optimal.

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