Class Action in the Age of Twitter: A Dispute Systems Approach

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ABSTRACT

Supreme Court decisions in recent years have threatened the availability of aggregate litigation processes, and caused scholars and practitioners to wonder if the class action might soon be a thing of the past. This article takes another perspective on class actions' possible obsolescence, and argues that, notwithstanding recent legal changes, class actions in their current form are becoming outdated as technological changes undermine the original rationale for the modern Rule 23 class action and the procedures through which it is executed.

While scholars and practitioners have discussed the Internet's ability to enhance the aims of class action lawsuits, little of the literature addresses how the Internet, social networking, and so-called Web 2.0 are dislodging basic assumptions about the appropriate use and conduct of class action lawsuits. Changes in social organization mediated by technology warrant a re-examination of the bipolar view embodied by existing doctrine that the relevant parties are either a bonded group of individual litigants or a homogenous entity, with no room for more nuanced distinctions. Aggregate litigation processes should be designed to engage a greater number of distinct groups in the modern world where individuals can accomplish what could only be done by collectives in a previous generation, and collectives can better accommodate individuality without sacrificing group welfare.

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By engaging groups at different levels, more democratic and effective mass dispute resolution can be achieved, and some of the doctrinal challenges facing mass dispute resolution can be better addressed. Research on dispute systems design could provide guidance for engaging different groups of disputants in light of its focus on creating systems to provide aggregate dispute resolution alternatives encompassing both group and individual interests.

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I. INTRODUCTION

For several years now, members of the academy, bench, and bar have sounded the alarm on the creeping demise of the modern class action.[1] Their worries are, understandably, the result of a number of decisions by the U.S Supreme Court as well as several lower federal courts that would appear to seriously curtail the availability of class actions. Most notably, the Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion*[2] and *American Express Co. v. Italian Colors Restaurant*[3] have paved the way for a rise in mandatory arbitration where class treatment is precluded. Similarly, the *Wal-Mart Stores v. Dukes*[4] decision created a higher bar for class certification. This article agrees that the class action is in danger of becoming outdated, but

1. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Wal-Mart v. Dukes *and* AT&T Mobility v. Conception, 7 DUKE J. CONST. LAW PUBLIC POLICY 73 (2011); Robert Klonoff, *The Decline of Class Actions* [hereinafter *Decline*], 90 WASH. U. L. REV., 1–6 (2013) (describing limitations on class certification in the wake of recent court precedent).

2. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2012) (limiting the availability of unconscionability challenges to class action waiver clauses in arbitration agreements); *see also* Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 703–05 (2011) (explaining the potential claim suppressing effects of the *AT&T* decision).

3. 133 S. Ct. 2304 (2013).

4. *See* Wal-Mart Stores v. Dukes, 131 S. Ct. 2541 (2011); *see also,* Klonoff, *Decline*, *supra* note 1 at 1–6.

the doctrinal limitations set out in recent court decisions are not the only or even biggest reason for its obsolescence. Rather, dramatic changes in the way people communicate, interact, and take action in groups via social media, the Internet, and other networking technologies are undermining the ideas that produced the rationale for class actions — as well as its aggregate litigation progeny — and provide the basis for their form and structure.

Although recent legal developments have chipped away at the use of class actions, they have faced — and survived — numerous reforms and efforts to curtail their use since the modern Rule 23 was drafted in 1966. There are many reasons to think it will also survive the challenges posed in recent years.[5] Evidence to date shows no sign of class actions disappearing as dispute resolution devices.[6] And would-be class action defendants, now given the power to preclude class actions through pre-dispute arbitration contracts have, at least in some cases, bowed to public pressure to continue permitting aggregate litigation.[7] For now, it appears that the class action and other forms of aggregate litigation will continue to have important consequences, providing deterrence for firms from engaging in wrongdoing, prompting sweeping changes in industries, and often providing the sole source of compensation for vast numbers of wronged individuals.[8]

But, if the class action and other forms of aggregate litigation remain in use, they will continue to present vexing problems. On the one hand, collectivization of claims is sometimes necessary to make

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5. For a discussion of the class action's resilience in the face of many near death experiences, see Linda S. Mullenix, *Civil Procedure: Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 511–38 (2013). *See also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008).

6. *See* Robert J. Herrington, *The Numbers Game:* Dukes *and* Concepcion*, Class Actions & Derivative Suits*, AMERICAN BAR ASSOCIATION, (Nov. 20, 2012), http://apps.americanbar.org/litigation/committees/classactions/articles/fall2012-1112-numbers-game-dukes-concepcion.html (last visited Dec. 12, 2013).

7. *See, e.g.*, Brett Philbin, *Schwab Eliminates Class-Action Waiver Requirement for Clients*, WALL STREET JOURNAL (May 16, 2013 6:44 PM), http://online.wsj.com/article/BT-CO-20130516-714723.html.

8. *See* Max Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 BUFF. L. REV. 749, 785–87 (2012) (describing class actions' broad societal impacts); William B. Rubenstein, *Why Enable Litigation: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 709–11 (2005) [hereinafter *Positive Externatlities*] (describing externalities of class actions for compensating plaintiffs and forcing firms to internalize the cost of wrongdoing); Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 303 (1996) (surveying court views about the impact of mass tort class actions for firms and industries).

litigation manageable, economical, and effective in achieving the aims of the law. For instance, those with very small value claims may never get legal assistance or recourse unless their claims can be aggregated. On the other hand, aggregating individual claims runs contrary to the American legal system's values of individual autonomy and due process, while raising derivative problems of process design and legal ethics. After all, hundreds of scattered individuals whose claims are aggregated have little hope of interacting meaningfully with their lawyers or the court, never mind influencing the outcome of the case. At least, that is the presumption upon which many consumer class actions proceed.[9]

However, the idea that collective dispute resolution is inherently at odds with individuality and autonomy is quickly becoming outdated. The means by which large, diffuse groups of people can participate in a collective dispute resolution are changing dramatically, and with these changes comes a need to reexamine the assumptions embedded in the class action procedure about what tradeoffs are truly warranted for resolving disputes involving large, dispersed groups of people. With the proliferation of high-speed social interaction, collaboration, and information exchange facilitated by Internet and cellular technology, groups in a mass dispute can now provide space for individuality and heterogeneity with much greater ease than in previous eras, and individuals can now wield the type of influence in a dispute that was once rarely available without a court-created procedural subsidy. To the extent that the Internet has been employed as a tool for reaching and connecting claimants, it has largely been grafted onto the pre-existing structure of representative litigation. But new means of communication cast doubt on the legitimacy of those pre-existing forms and provide avenues for addressing the due process and autonomy problems they raise. At the same time, technological change is raising problems of its own for aggregate dispute resolution

9. *See* Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1939–45 (2010) (describing the dichotomy between the individual and the class "entity" in class litigation in relation to class litigation); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 218 (1990) ("The central point of continuity in representative suit history has been the search for 'impersonal' forms of litigation — lawsuits that do not focus on the individual at all but instead subsume litigative individuality in the anonymity of an impersonal class."); *see also* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 811 (1997) [hereinafter *Conflicts*] (noting in the context of class settlement that "since these are class actions, there is of necessity no meaningful capacity of individual plaintiffs to participate in the settlement process").

which have yet to be adequately addressed. In effect, recent technological developments provoke the question: is the modern class action procedure becoming outdated? This article offers reasons to think that it is, and begins to explore ways in which a better designed system could enhance individual autonomy, and address both old and new problems with class actions and aggregate litigation writ large.

To illustrate, consider the following examples:

In December 2011, the cellular telephone provider Verizon Wireless announced that it would begin issuing a "convenience fee" for one time bill payments made by telephone or the Internet.[10] The move sparked an enormous protest on social networking sites like Twitter as well as other new media outlets.[11] The huge volume of complaints drew the attention of regulators, who issued a statement saying that they may investigate the action under consumer protection laws.[12] The day after it had announced its policy, Verizon Wireless issued a statement that it was dropping its policy. Its major competitors, AT&T and Sprint, issued statements saying that they would not engage in similar practices.[13]

In a second example, the car manufacturer Honda proposed a settlement in early 2012 to class members in a lawsuit involving deceptive marketing practices for its hybrid Civic.[14] One class member, Heather Peters, rejected the settlement offer of $100–200 and brought an action in small claims court where she was awarded $9867.[15] Social media and Internet-based discussion of the victory spread awareness of the settlement, and prompted several state attorneys general to consider objecting to the proposed settlement.[16] Ms. Peters created a website and posted instructions and draft documents that class members could use to file small claims action of

10. Ron Lieber & Brian X. Chen, *An Uproar on the Web Over $2 Fee by Verizon*, N.Y. TIMES (Dec. 29, 2011), http://www.nytimes.com/2011/12/30/business/media/an-uproar-on-the-web-over-2-fee-by-verizon.html.

11. *See id.*

12. *See* Greg Bensinger, *UPDATE: Verizon Backs off $2 Fee Plan After User Complaints*, WALL ST. J., http://online.wj.com/article/BT-CO-20111230-707071.html.

13. *See id.*

14. *See* True v. American Honda Motor Co., Inc., 749 F. Supp. 2d 1052 (C.D. Cal 2009); *see also* Michael Winter, *Calif. Honda Owner Wins Small-Claims Suit over Gas Mileage*, USATODAY.COM (Feb. 1, 2012), http://content.usatoday.com/communities/ondeadline/post/2012/02/calif-honda-driver-wins-small-claims-suit-over-gas-mileage/1.

15. *See* Winter, *supra* note 14.

16. *See* Chris Woodyard, *Five States Weigh Joining Honda Gas-Mileage Class Action*, USATODAY.COM (Feb. 15, 2012), http://content.usatoday.com/communities/driveon/post/2012/02/five-states-weigh-joining-honda-gas-mileage-class-action/1.

their own.[17] As a result of a stream of inquiries by members of the class, the court extended the opt-out deadline, which allowed a total of 1708 people out of 200,000 to leave the suit. Those who opted out were able to express their reasons for leaving, and they were hardly homogenous: some predictably stated that they wanted to attempt to get more money from small claims court; some began to attempt a separate class action; others objected to the high attorneys' fees; and still others reportedly opted out because they were happy with the performance of the car and objected to the idea of the suit altogether.[18]

These examples highlight a number of changes in the dynamics of group disputes in light of the Internet and so-called new media[19] technology. The first example demonstrates how groups of individuals can collectivize to vindicate low value grievances in ways that were unrealistic or impossible when the modern Rule 23 was written in 1966.[20] In this way, even loosely organized groups can provide non-legal sanctions for violating perceived societal norms, whether or not such norms are rooted in the law. The second example illustrates how technology-mediated communication and information dissemination can provide avenues for litigants to become informed, engaged, and influential in the process, thereby enhancing their autonomy. New communication media can also provide means to account for heterogeneity of important preferences in the class beyond what would traditionally be possible and facilitate the creation of intermediate groups around those interests. At the same time, the new media can create problems for courts trying to manage complex litigation and balance the interests of vocal litigants with those of other parties.

The changing collective action dynamics described above and their impact on dispute resolution can be analyzed in the context of a growing body of research referred to as "dispute systems design"

17. Heather Peters, DON'T SETTLE WITH HONDA, http://www.dontsettlewithhonda.org (last visited Aug 4, 2012).

18. Elliot Spagat, *Judge in California OKs Honda Mileage Settlement*, YAHOO! NEWS (Mar. 16, 2012), http://news.yahoo.com/judge-california-oks-honda-mileage-settlement-001321456.html; *see also* Adam Zimmerman, *Flash Mob Litigation*, PRAWFSBLAWG (Jan. 3, 2012, 9:33 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/01/class-actions-v-flash-mob-litigation.html.

19. As used throughout this article, the term "new media" refers to technologies for providing immediate access to content, interactive user feedback, creative participation and community formation, as well as publication, distribution and consumption of media content.

20. *See* Fed. R. Civ. P. 23, advisory committee's notes 1966.

("DSD"), gathered from experience using so-called alternative methods to resolve systemic conflicts in a variety of contexts. The word "alternative" refers to the fact that these methods often involve less formal processes that frequently occur outside of the courts and other official dispute resolution forums and employ a range of processes beyond adjudication by a third party. The contexts in which alternative dispute systems are used range from recurring problems arising in organizational settings, such as persistent complaints of discrimination arising at a large company, to ad-hoc situations following dispute-causing events, such as the large number of claims for compensation following the September 11, 2001 terrorist attacks or the 2009 British Petroleum oil spill in the Gulf of Mexico. The goals of so-called dispute systems are similar to those of class-wide litigation — to provide an orderly means of calculating the cost of the harms committed, to provide deterrence and corrective justice, and to compensate victims appropriately.

Dispute systems may seem quite different from mass litigation procedures, but many differences disappear if one acknowledges that modern class actions are essentially negotiated transactions conducted in the framework of litigation,[21] resulting in a range of settlement outcomes beyond what a traditional adjudication might produce.[22] The key difference is the identity of the main participants in the negotiation. In contrast to large-scale litigation, which conceives of the class of disputants largely in the abstract, often serves to facilitate a deal amongst lawyers, and is mediated by a judge, the products of DSD place paramount importance on the individuality and autonomy of those involved on both sides of the dispute.[23] And, while certain features of the litigation system enable a class action "transaction" to take place, technological innovation is altering the extent to which courts and lawyers are needed to set up and monitor the bargaining process or act as surrogates for the claimants. Indeed, in both the Verizon and Honda litigation examples, technology was able to facilitate the emergence of a system that performed some of the functions of the court.

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21. William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 371–73 (2001) [hereinafter *Transactional Model*] (describing the ways in which modern class actions bear more resemblance to financial transactions than to traditional litigation).

22. *Cf.* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366–71 (1978) (exploring the sine qua non of adjudication).

23. Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 1–4 (2007).

In the area of mass dispute resolution, DSD offers promise, but not without challenges of its own. First, as in many "alternative" dispute resolution systems where the endpoint is settlement, mass dispute systems may lack the power to address far-reaching societal problems that adjudication possesses.[24] Second, though DSD has been effective in certain large-scale situations, the private nature of many systems can exacerbate social inequalities as the scale of the system increases.[25] Nonetheless, innovations in systems design, as well as changes in communication technology, provide avenues for dealing with larger systems in a way that can provide space for the individuality of disputants while addressing important societal and systemic issues better than the existing class litigation system.

If class-wide dispute resolution survives the legal currents undermining it — and there are many reasons to believe that it will — then we must address the technological currents changing mass dispute resolution and supporting a challenge to its basic rationale. To do so, legal procedure must find ways to incorporate more robust avenues of participation and improve existing procedure's fit with democratic value of individual autonomy. Lawyers must find ways to engage and counsel clients across new media. And the system must find ways to deal with extrajudicial processes so that it can work with court-based dispute resolution instead of undermining it. Although the creation of a mass dispute resolution procedure permitting greater participation would raise many challenges and questions, experience to date designing dispute systems offers guidance for implementation. A gradual but deliberate approach to incorporating new procedures into those currently in existence would provide a means of feasibly expanding individual participation in both litigative and negotiated parts of the process.

This paper addresses the possible future of class actions in light of new media technology, proceeding in three parts. The first Part describes the underlying theories about collective action and the nature of groups reflected in the federal class action rules that are becoming increasingly obsolete. The second Part discusses changes that technology is bringing about for group dynamics and information flow and how those changes are relevant to mass dispute resolution generally, and class actions specifically. It also provides an argument for why we should re-examine modern procedure in light of technological change. The third Part of the paper discusses dispute system design

24. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

25. *See generally* Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009).

theory and processes and their potential to help channel technology to improve mass dispute resolution.

II. The Individual-Collective Dichotomy in Class Action Procedure

In order to understand how technology impacts class actions, and why a systems approach would be useful in changing them, it is helpful to describe class action theory and the procedures that follow from it.

Class actions encompass a range of procedures, most of which minimize participation by individual members of the class. In the federal system, class action procedure is largely governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23 sets out basic requirements for certifying classes and outlines specific circumstances in which they are appropriate. The first category, often called "limited fund" class actions, involves a number of legal claims on a single fund or asset not large enough to satisfy all the claims. The limited nature of the asset means that no single individual's claims can be adjudicated without prejudicing every other individual with a similar legal claim. The second category comprises class actions where injunctive relief in sought on behalf of a class of persons suffering a violation of the law. These actions usually arise in the context of civil rights cases and are thought to be suitable for class treatment because the remedy is indivisible and affects every member of the class. The third and most controversial category is the class action seeking monetary damages on behalf of a large number of individuals who suffer a common legal injury. This third type of class action, sometimes called "damages class actions," has been the subject of tremendous controversy, debate, and attempts at reform. It is also the principal focus of the arguments in this paper, although the arguments could be applied to the other types of actions as well.

Damages class actions were created to deal with small value consumer claims, on the rationale that no single claim could individually justify legal pursuit or provide incentives for a lawyer to take the case.[26] From the vantage point of the drafters of Rule 23, "[t]he barriers to collective action — the transaction costs of organizing the dispersed parties affected by all manner of decisions in mass society —

26. *See* Stephen C. Yeazall, From Medieval Group Litigation to the Modern Class Action 240 (1987) (noting that the 1966 Advisory Committee was influenced by two specific situations when it drafted Rule 23: the plight of racial minorities seeking injunctions prohibiting class-wide discrimination, particularly in the context of school desegregation, and environmental and consumer movements advocating for

require[d] that an organizing solution be found, and that such a solution have the force of law."[27] It has been widely accepted that, for most plaintiffs to vindicate a claim of small economic value, some type of aggregation, usually in the form of a class action, is required to incentivize suit and proffer benefits from economies of scale in marshaling resources to pursue the suit.[28] Damages class actions did not remain limited to small value consumer disputes, however. In the decades following their creation, they expanded to include securities fraud, product liability, toxic torts, and other types of widespread legal harms, often involving large recoveries for individual plaintiffs.

Throughout the first few decades of their existence, damages class actions followed the same course as other types of litigation, with an orderly progression of discrete steps from the filing of suit to the resolution by settlement or adjudication.[29] In the 1990s and early 21st century, however, so-called settlement classes began to emerge. Settlement classes involved parties to the action (chiefly putative class counsel and defendants) negotiating a settlement privately and then filing the lawsuit, requesting that the class be certified and the settlement approved all at once. This development was aided by the rise in enthusiasm for multidistrict litigation ("MDL") proceedings. The MDL statute allows consolidation of lawsuits in different federal judicial districts for the resolution of common questions. They thus function in a manner similar to class actions, but without the standards set out in Rule 23. Attorneys for plaintiffs and defendants in any widespread litigation could use the MDL process to consolidate claims and broker a deal, then certify a settlement class, all with little or no involvement from any plaintiff. A further development in this process involved the removal of any certification process at all, through the use of non-class aggregate settlement. Such settlements

large numbers of wronged individuals for whom the cost of suit would exceed recovery). *See generally* Arthur H. Travers Jr. & Jonathan M. Landers, *The Consumer Class Action,* 18 U. KAN. L. REV. 811 (1969) (describing the class action as a proposed remedy to consumer injury).

27. Issacharoff, *Conflicts*, *supra* note 9, at 805–06; *see also* Rubenstein, *Positive Externalities*, *supra* note 8, at 709–20 (questioning the coherence of the collective action explanation for class actions and offering a rationale based on their positive externalities).

28. According to the Supreme Court, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)). *See also* Phillips Petrol. Co v. Shutts, 472 U.S. 797, 809 (1985) (stating that class actions "permit the plaintiffs to pool claims which would be uneconomical to litigate individually").

29. *See* Mullenix, *supra* note 5, at 536–37.

involve plaintiffs negotiating a resolution and agreeing by contract to dismissal of the lawsuit on behalf of would-be class members.

Thus, what might be thought of as class actions today encompass a range of procedural moves and devices. These different devices all share certain features. They have developed from a court-supervised litigation to a process of negotiating a deal.[30] And, although litigation is the impetus for the deal, the plaintiffs whose claims are truly at stake are largely cut out of any meaningful participation or input. Importance is placed on the issues at stake and how quickly they can be resolved, as opposed to the individuals whose claims are being adjudicated. Actors outside the plaintiff group (such as the lawyer and judge) are relied upon to invent an articulation of what the plaintiffs want and make decisions on their behalf. Where procedure is concerned with individuals, it attempts to satisfy autonomy values by inducing fidelity of agents and ensuring uniformity of interests with a representative party.[31] The subordination of the individual autonomy of the plaintiffs in these processes can be seen as the natural outgrowth of a theory of representative litigation underlying Rule 23, accompanying assumptions about groups and large-scale participation.

A. *The Class as Entity*

Seeking to resolve complex systemic issues involving multiple parties, the creators of the modern class action procedure understandably felt compelled to simplify the processes for achieving resolution. In order to devise a workable system, they embraced a model of large-scale litigation in which the class is treated as a homogenous and unitary collection of rights and interests — something that would come to be described as an "entity,"[32] into which individual plaintiffs are transformed through "judicial alchemy."[33] The entity is

30. This was first recognized by William Rubenstein. For a more thorough explanation of how litigation has largely become transactional, see Rubenstein, *Transactional Model*, *supra* note 21, at 371–77.

31. *See* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 756 (2001) [hereinafter *Put Options*].

32. *See* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 16 (1996); *see also* Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1941–46 (2010); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1997) [hereinafter *The Class*].

33. The term "alchemy," has been used to describe the conversion of individual plaintiffs into distinct litigants. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 599 U.S. 393, 436 (2010) (Ginsburg, J., dissenting) ("The Court today approves Shady Grove's attempt to transform a $500 case into a $5,000,000 award, although

a fiction, but it is easier to deal with as a participant in a complex dispute resolution process than large numbers of individual claimants. In addition to the entity model of the class, a parallel concept of the class exists — the collection of individual claimants pulled together in a process akin to a giant joinder proceeding.[34] Both concepts are useful: the entity is easier and more efficient to manage, while the joined individuals retain some of their autonomy. However, the two concepts pull in different and sometimes inconsistent directions, giving rise to internal tension in class action doctrine.[35] The extent and form of those inconsistencies has been described elsewhere and is outside the scope of this article, but the important point is that no single conceptual model captured the idea of the class in a way that satisfied both group and individual interests completely.

Means of trying to reconcile individual and group interests reflected other familiar forms of social organization that existed in 1966 and afterward. As Professor Coffee has summarized, "[f]rom a governance perspective, a class action is an organization, often with thousands of members, that persists for an indefinite period, usually several years from the case's filing to its resolution."[36] The problem with this perspective is that existing court procedures were — and are — more suited to dealing with parties and their representatives than with various levels of a complex organization. Thus the class action procedure and the aggregate litigation progeny that developed from it treats the class "organization" as an abstract body, to be governed and handled through proxies and surrogates. Individual plaintiffs are largely assumed to be unable to participate in any significant way, and unnecessary to the process.[37]

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the State creating the right to recover has proscribed this alchemy."); *see also* Bone, *supra* note 9, at 218.

34. *See* Lahav, *supra* note 9, at 1939–40. The conceptual division is apparent even among members of the current Supreme Court.

35. *See id.* at 1943–44 (2010) (describing the different views of class actions as entities or aggregations of individuals, and discussing the Rules' inconsistent treatment of the class); *cf.* Sturm & Gadlin, *supra* note 23, at 6 (making a broader but parallel point that "[d]ispute resolution scholarship and practice frequently assign different approaches, and even different conflict resolution systems, to individual and systemic problems"); Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 15–24 (2009) (noting in the context of group litigation a false dichotomy between group-oriented individuals and individuals within the group).

36. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 306 (2010).

37. *See, e.g.*, Issacharoff, *Conflicts*, *supra* note 9, at 811 (noting, in the context of class settlement, that "since these are class actions, there is of necessity no meaningful capacity of individual plaintiffs to participate in the settlement process"); *see also*

B. *Individual Interests by Proxy*

Rule 23 sets out a representation and governance structure for the class "organization," vesting most of the control in the traditional actors with whom courts deal: lawyers, judges, and to a lesser extent, the class representative, objectors, and occasionally judicial ancillaries, such as special masters.[38] Rule 23 tasks these parties with determining the membership of the entity, developing its rights and interests, and ensuring that it is treated fairly in the aggregate sense.[39] The mechanisms for regulating these actors have been described using the institutional design terms frequently used for organizational governance: "exit," "voice" and "loyalty."[40] The "exit" feature provides a rough proxy for choice by allowing members to leave the class if they so desire. "Voice" technically encompasses the ability of group members to wield influence through their class representative, or by articulating their views by objection, which seldom has much effect. "Loyalty" is a proxy for the lawyer-client relationship that is presumed to exist between the collective and the agents who represent its sole means of acting. Examining the actors and rights that comprise class governance reveal numerous ways in which exit, voice, and loyalty are poor substitutes for individual autonomy in the class action context, and even where they might suffice, existing litigation norms and procedures fail to serve them well.

1. *The Judge*

The most influential guardian of, and stand-in for, plaintiff interests in a class action is the judge.[41] In the class action context, the judge's role migrates from adjudicating the legal rights in question to

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Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions* 77 NOTRE DAME L. REV. 1057, 1060 (2002).

38. *See* FED. R. CIV. P. 23.

39. *See* Lahav, *supra note* 9, at 1940–45 (descrining the class as a product of the lawyers' imagination).

40. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (introducing the "exit, voice, and loyalty" typology). *See also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376–77, 419 (2000) (recommending a focus on exit opportunities to discipline class counsel); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 366–80 (1999) (adopting the framework of exit, voice, and loyalty in the class action setting and recommending improvements to check attorney opportunism).

41. *See generally* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L.J. 27 (2003); Judith Resnik, *Courts: In and out of Sight, Site, and Cite*, 53 VILL. L. REV. 771 (2008); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

ensuring the appropriate conditions for representation brokering settlement and managing the entire trial process. This complex task is quite different from the one a judge traditionally performs. What has been described as "managerial judging"[42] puts the judge into a central role — or as explained below, a number of central roles — in the litigation process, already departing significantly from the simple task of being a neutral referee. Arguably in some cases, judges are forced to go beyond even the structure contemplated by Rule 23 to accomplish the task required of them. But even if a judge remains within the explicit language of Rule 23, he or she will wield a tremendous degree of control over what plaintiff interests are ultimately be articulated.

The motion for class certification is the judge's first opportunity to weigh in on behalf of absent litigants. In order for a class to be certified, the conditions of Rule 23(a) must apply, roughly assuring that class treatment is both appropriate and possible. In that respect, the Rule requires the judge to assess numerosity,[43] requiring that the plaintiff class be so numerous as to make the bringing of individual claims infeasible. The rule also imposes a requirement of commonality[44] to ensure homogeneity among the class members, so that an aggregate proceeding might deal with the interests of a large number of people as though they were uniform.[45] These rules ensure the sameness of legal claims and the facts and circumstances surrounding them, such that the interests of the group can be fairly represented (at least in theory) by one or a few.[46] Moreover, for damages class actions,[47] the explicit predominance and superiority requirements of Rule 23(b)(3) mandate that the judge weigh whether or not common

42. Alvin K. Hellerstein, James A. Henderson Jr & Aaron Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, SSRN ELIBRARY (Brooklyn Law Sch. Legal Studies Research Papers Accepted Paper Series, Paper No. 298, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033944 (last visited Oct 3, 2012).

43. *See* FED. R. CIV. P. 23(a)(1).

44. *See* FED. R. CIV. P. 23(a)(2).

45. *Cf.* Lahav, *supra* note 9, at 1940–46 (describing treatment of the class as a singular "entity").

46. To the extent that the judge perceives materially different interests among different groups, the judge can create sub-classes. *See* FED. R. CIV. P. 23(c)(5). This adds to the granularity of the understanding and treatment of class interests. Such decisions about what subgroups share common interests are similarly ultimately determined by the judge, and invariably will include individuals with varying sets of interests.

47. These are class actions seeking monetary relief under FED. R. CIV. P. 23(b)(3).

questions predominate the action (as opposed to merely being present) and whether aggregation is indeed the best of all possible dispute resolution mechanisms for vindicating the claims at issue.[48] Part of this calculus is the "the class members' interest in independently controlling the prosecution or defense of separate actions."[49]

Once a judge determines that the group's interests can be effectively represented, he or she makes sure that those actors charged with representing the class' interests have adequate incentives to do so. The judge must ensure that the class representative has claims and defenses that are "typical of the claims and defenses of the class"[50] such that those representatives will understand those interests. Not only should these interests be the same, but the judge must ensure that "the representative parties will fairly and adequately protect the interests of the class."[51] In other words, not only must the judge ensure that the representatives' interests are aligned with those of the class, but that the representatives can and will adequately represent those interests. The judge also appoints the class counsel,[52] inherently deciding the adequacy and desirability of using particular attorneys on behalf of the absent class members. In addition, the judge oversees perhaps one of the most important aspects of hiring counsel — the awarding and approval of fees.[53] These functions in theory give the judge leverage to ensure loyalty and adequacy of representation by class counsel.

The judge's role is central with respect to settlement, which is the predominant means by which class actions are resolved. Rule 23(e) directs that the judge approve any settlement, usually after a fairness hearing to determine if the proposed settlement would meet

48. FED. R. CIV. P. 23(b)(3). There is a question in the wake of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556–59 (2011), as to whether commonality now requires that common questions must predominate for any type of class action.

49. FED. R. CIV. P. 23(b)(3)(A).

50. FED. R. CIV. P. 23(a)(3).

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

52. *See* FED. R. CIV. P. 23(g); FED. R. CIV. P 23(c)(1)(B).

53. This may encompass a wide variety of arrangements, from a contingency fee to a lodestar method, although the availability of some fee arrangements has been limited by statute. *See* Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2013) (limiting contingency fee awards in coupon settlements to the amount of coupons actually redeemed).

the interests of the class members.[54] Here again the judge must sit in place of the class members, with input from the other proxies.[55]

Though judges capably exercise their function to protect litigant interests, there are limitations on the extent to which any third party, no matter how neutral or competent, can adequately determine what those interests are. First, whether or not a group of litigants are similar enough to each other to be treated as effectively identical is itself an inquiry subject to the predispositions and biases of any third party decision-maker. For example, the issues of numerosity, commonality, and typicality are malleable, and determining whether or not they exist inherently depends largely upon how the lawyers and the judge generalize or particularize the facts of the case.

The *Dukes* case illustrates how the extent to which judges focus on similarities versus dissimilarities in the putative class can lead to different determinations of whether the plaintiffs (and their claims) are uniform enough to warrant class treatment. In that case, plaintiff, Betty Dukes, attempted to certify a nationwide class to bring a Title VII employment discrimination claim on behalf of women affected by a demonstrated pattern and practice of gender discrimination in promotion and compensation decisions at Wal-Mart stores. The majority and dissent in that case give contrasting descriptions of the "questions of law or fact common to the class," which they use to justify their different conclusions about whether Rule 23(a)(2) commonality exists.[56] The majority described the key question for purposes of the Title VII claim in the *Dukes* case as one involving the details of "literally millions of employment decisions at once."[57] The Court went on to explain that "[w]ithout some glue holding the alleged *reasons* for all of those decisions together, it will be impossible to say that examination of all class members' claims for relief [would] produce a common answer to the crucial question *why was I disfavored*."[58] Framing the relevant inquiry around the individual acts of

54. *See* FED. R. CIV. P. 23(e). For an overview of the forms and functions of fairness hearings, see generally William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435 (2006)

55. *See generally* Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 224 (2009).

56. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2508–13 (2011). The *Dukes* certification petition was brought under Rule 23(b)(2). Although this paper largely focuses on consumer claims and class actions brought under Rule 23(b)(3), the case is still instructive.

57. *Id.* at 2552.

58. *Id.* (emphasis in original).

discretion of Wal-Mart's managers, the majority atomized the legal claims and framed them as inappropriate for common treatment. The dissent took the opposite approach, framing the primary legal question (as did the lower court that granted certification) as "whether Wal-Mart's pay and promotion practices give rise to discrimination . . . ."[59] Generalizing the inquiry in this way, the dissent could argue that common questions existed as to whether Wal-Mart's implicit practices, general culture, or failure to enforce its explicit antidiscrimination led to the observed gender disparity.[60]

The conflicting framing of the question reflects the inherent problem with creating an "entity" out of a group of individuals who are inherently unique and whose claims could all theoretically be distinguished from one another. Whether aggregation is appropriate or not has the potential to become a question resolved by artful framing than by consideration of what plaintiffs want, how they consider themselves to be similar, or cohesive as a class, and how their claims would best be treated. But the *Dukes* case also provides an example of how greater plaintiff participation could help to remedy the problem. The majority in *Dukes* rejects the plaintiffs' anecdotal evidence of discrimination on the grounds that the number of incidents is too few to draw any inference of widespread discrimination.[61] In doing so, the majority, citing precedent, implies that greater numbers of anecdotes could have sufficed to indicate the existence of a common question.[62] One implication of these *dicta* is that the members of a putative class could give meaningful input into the extent and scope of concepts like typicality and commonality. In this way they could help the courts to understand their own interests, not as an "entity," but as a group of individuals informing whether common treatment is appropriate and wanted.

Moreover, while judges by and large do extraordinary work to protect plaintiff interests, there is an inherent problem with delegating such a large portion of this task because the judge's duty to efficiently manage the case and act as a neutral may conflict with a duty to effectively help create and protect the class. The judge's conception of the nature of the class may affect his or her assessment of what its best interests are. For example, it has been argued that a judge who conceives of the class as an "entity" would be less likely to care about

59. *Id.* at 2564. The dissenting opinion agreed with the final result, but contested the majority's analysis of Rule 23(a)(2)'s commonality requirement.

60. *Id.* at 2564–65.

61. *Id.* at 2555–56.

62. *Id.* (citing *Teamsters v. United States*, 431 U.S. 324 (1977)).

the objections of a few individuals for whom class treatment is unfair, since they would be irrelevant to the good of the collective.[63] The Honda litigation described in the introduction is an example of a judge struggling to resolve conflicting information about what is best for the class members. In a similar example, discussed more fully below, a judge in a class action lawsuit against a McDonald's franchise in Michigan in 2013 made headlines when one class member started a Facebook page objecting to the class settlement.[64] Despite support from class members for the objection, the judge issued an injunction ordering the comments to be removed from the Facebook page. Ultimately, the injunction was lifted, and the original settlement was approved despite a large number of objections. The judge in that case faced a difficult challenge attempting to reconcile the interests of the abstract class-as-entity with the voiced concerns of actual members of the class.

In addition, a number of other factors may make it difficult for a judge to adequately account for the interests of absent complainants. Heavy workloads and pressure to move through the docket may cause a judge to approve a settlement without fully considering the absent plaintiffs' interests.[65] The already difficult task of trying to assess critical points in the litigation through an absent party's lens is further complicated by the judge's duty to consider the interests of the other parties to the litigation. This may cut in the direction of bias in favor of class members if the judge is overly focused on protecting the interests of parties unable to participate in the litigation. Or a heightened concern for fairness may lead to overcorrection in favor of defendants. In either case, it is difficult to know how accurately a judge is able to formulate the interests of absent class members. Rule 23 brings in other actors to assist with this process and ensure adequate representation, but as the following discussion highlights, relying on these actors brings its own problems.

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63. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 941–42 (1997).

64. *See* Daniel Fisher, *Facebook User Challenges Order to Take Down Criticism of McDonald's Class Action*, FORBES (Feb. 23, 2013, 10:04 AM), http://www.forbes.com/sites/danielfisher/2013/02/23/facebook-user-challenges-order-to-take-down-criticism-of-mcdonalds-class-action/.

65. *See, e.g.*, Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 S. CT. REV. 4, 17 (2007) ("All judges face real-world pressures. For many judges, volume creates pressure to move cases in assembly-line fashion — a method that obviously lacks in opportunities for the people involved in that proceeding to feel that they were listened to and treated with respect.").

2. *Class Counsel*

The lawyers appointed to represent a class perform a crucial function in representing class members' interests in a dispute. However, class treatment means that the counsels' obligations, practices, and incentives often diverge from what they would be in non-aggregate litigation. The class lawyers effectively create the class in the sense that they frame the cause of action, identify the characteristics of the individuals harmed, and take primary responsibility for formulating the interests of the class members.[66] They are largely responsible for choosing the class representative and defining the contours and membership of the class. The lawyers theoretically act as agents for the plaintiffs, although there is often little or no relationship between principal and agent. It is frequently observed that, "the reality [is] that most class action litigation is dominated by class counsel."[67]

In a class action, the point of contact between counsel and client is reduced and simplified to something resembling a mere formality. That reality sits at odds with the basic idea of litigant autonomy.[68] At the beginning of an action, the class action procedure turns the traditional model of the lawyer-client relationship on its head — instead of the client approaching the lawyer for representation, the lawyer does the work of finding the cause of action, locating a suitable lead plaintiff, and then bringing the other plaintiffs along for the ride.[69] It has even been suggested that the class is, in reality, a product of its counsel's imagination because it involves legal ideas more than it does actual people.[70] There is little or no mechanism in many cases (with certain exceptions such as opt-out rights, as discussed below) for plaintiffs in the class to express any approval or disapproval of the action. Moreover, although plaintiffs technically have rights to lodge objections to a settlement and have their views heard in court, in practice most plaintiffs (other than special interest groups or professional objectors) will never understand the significance of the action or know how to have an impact in it.

In addition to posing problems for autonomy, the lack of lawyer-client interaction and monitoring creates risks of a moral hazard or

66. *See* Lahav, *supra* note 9, at 1940.

67. *See* Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 597 (2003).

68. *See* Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1587 (2007).

69. *See* Lahav, *supra* note 9, at 1939.

70. *See id.*

at least a misapprehension of the class members' interests.[71] These issues manifest in various ways that have been the subject of policy concern: lawyers settling too early to curtail the cost of litigation for both sides, but before an adequate assessment of issues or remedies can be completed;[72] settlements involving inadequate compensation to plaintiffs, such as so called "coupon settlements" involving discounts for the defendant's goods or services, which are cheap to defendants and often underused by plaintiffs;[73] or settlements involving future classes of plaintiffs, which have been controversial in terms of their adequacy and fairness to plaintiffs not yet identified.[74] Not all of these problems are present in every class action. Nor are they all exclusive to litigation involving aggregations of plaintiffs. However, the attenuation of the lawyer-client relationship enhances the likelihood that such can arise. And while judges perform substantial duties to ensure that these abuses do not occur, they can be burdensome and difficult to address. Moreover, leaving all monitoring duties in the hands of unelected neutrals creates further tension with ideas of democratic legitimacy. Rule 23 provides steps to address the democratic legitimacy and monitoring problems just described by providing for the appointment of one or a number of representative plaintiffs. As the next Part discusses, however, the representative(s) are frequently inadequate to address these problems.

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71. This is especially true in the context of settlement, which is the primary resolution mechanism for these actions.

72. *See* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1657 (2008) (describing the interest of class counsel in quickly achieving settlement).

73. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 991–95 (2001) (discussing coupon settlements and their practical uses). One study concluded that a very small percentage of such coupons are ever redeemed, and makes the point that consumers may not want to support a defendant who they feel wronged them in the past. *Id.* at 1005.

74. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 598 (1997); *see also* Nagareda, *Put Options*, *supra* note 31, at 752. The American Law Institute's Principles of Aggregate Litigation also grapple with these issues in the related context of settlements in non-class aggregate litigation. The American Law Institute's proposed rule confers greater leeway to class counsel to settle on behalf of multiple joined plaintiffs, but not class plaintiffs. *See generally* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). This has been described as problematic for similar reasons as those stated here: potential for conflicting interests and moral hazard dilemmas. *See* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. Rev. 628, 634–36 (2011).

3. *The Class Representative*

The representative as proxy is both a key feature and key source of problems in class litigation. The class representative is meant to be the embodiment of the absent class, advocating for its interests before the court and ensuring lawyer loyalty.[75] As such, the representative has frequently been characterized as the "voice" of the class members in such litigation. The presence of an adequate representative is a key component of the due process justification for applying preclusive effects to judgments involving absent parties.[76] Central to the idea of effective representation is the uniformity and "cohesiveness" of the class,[77] a factor determined by the judge, as previously discussed. The idea of the adequacy of representation is the primary basis for claim preclusion.[78]

Despite his or her theoretical centrality to the class action's preclusive effect,[79] the class representative is rarely able to represent

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75. It should be noted that some scholars differ as to the proper theoretical rationale for allowing a preclusive effect on absent class members when adequate representation is involved. *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 625–266 (2010) [hereinafter *Puzzling Idea*]. I note that the existence of the debate is a result of an underlying need to find a theoretical justification for representative litigation that is consistent with the values of the American justice system. The debate is evidence that the current justifications do not fit well with these values, and suggests the desirability of changing the system, rather than formulating ever more elaborate justifications for the existing system.

76. *See* Klonoff, *Decline*, *supra* note 1, at 37 ("Because class actions are representative actions, 'adequacy' is the glue that holds a class together and ensures due process for absent class members."). *But see* Bone, *Puzzling Idea*, *supra* note 75, at 626 ("[T]he institutional view of the day-in-court right might accommodate a relatively limited collateral attack rule, because it does not depend on adequate representation as a substitute for personal control. Rather, it depends on showing that an absent class member has only a right to limited control in the first place.").

77. Coffee, *Class Action Accountability*, *supra* note 40, at 435.

78. *See, e.g.*, David A. Dana, *Adequacy of Representation After Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 288–300 (2006) (relying in part on a Rawlsian approach to develop standards for assessing adequate representation for class action settlements); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 590–97 (2003) (justifying a hypothetical consent standard for evaluating the significance of conflicts of interest). *See generally* Bruce L. Hay, *Procedural Justice — Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1843–47 (1997) (using a Rawlsian veil-of-ignorance argument to justify an ex ante contracting approach to procedural justice with respect to representative action).

79. *See* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4457, at 514 (2d ed. 2012) (2002) (noting that "class-action procedure provides many explicit safeguards designed to ensure adequate representation"); Klonoff, *Decline*, *supra* note 1 at 37 ("The system [of class representation] breaks down — and potential due process issues arise — if either the class representative or class counsel is

the class for several reasons. First, the representative frequently plays almost no material part in the litigation or settlement negotiations.[80] Although a lot of attention goes into selecting the representative and determining his or her adequacy, he or she is often ignored when attempting to affect the litigation.[81]

Second, even if the representative could play a greater role, the individual's incentives frequently become misaligned with those of other class members. This is because the representative often stands to gain much more from a negotiated settlement than the average class member, as these people are usually paid a much larger award for their service and thus have very different stakes in the outcome. Yet, this is not seen by courts as casting doubt on the representative's ability to represent or the resultant due process analysis. In addition, in some instances law firms have kept potential representatives on retainer, raising clear issues with regard to their loyalties.[82] Though not all representatives face such issues, many of them have relationships with class counsel that differ greatly from those of the other class members, and it is doubtful that representatives can independent and vigorous on behalf of an abstract group of people when dealing with the very real and concrete counsel. Moreover, this person is unelected, unaccountable, and has little or no contact with those he or she represents, casting further doubt on his or her ability adequately represent the group's interests.

Third, even if the class representative participated materially in the litigation or settlement negotiations and had no conflicts of interest, it would be difficult for one individual to represent the various interests of class members, especially as a class grows large. Plaintiffs in litigation cannot be assumed to be homogeneous, although the structure of class litigation forces them to be treated as such. Individuals who make up a class may want different things. Some may want to feel that they are fairly compensated. Some want revenge. Some

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incompetent, suffers from a conflict of interest, fails to assert claims with sufficient vigor, or suffers from other flaws that will detract from a full presentation of the merits.").

80. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements,* 59 FLA. L. REV. 71, 109 (2007) [hereinafter *Significance*].

81. *See id.* at 110.

82. *See* Lester Brickman, *Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics*, 79 GEO. WASH. L. REV. 700, 705 (2010).

want to see justice done. Still others simply want closure or an apology, or to ensure that whatever gave rise to the lawsuit never happens again. Some will not care at all.[83] The Honda litigation example above demonstrates this, as does the McDonald's litigation, briefly touched on above and described in more detail below. An unelected representative with no contact with class members has little way of knowing how to effectively represent them.

It is tempting to conclude that such a divergence of interests is largely irrelevant, because the important interests are only those relevant to the questions to be adjudicated in court. As long as the facts and circumstances of the cause of action are the same, the individual wants and desires of class members should not make a difference in a class proceeding. However, this argument ignores the fact that class action settlements frequently result in outcomes that are unrelated to the common facts and circumstances of causes of action. Nonetheless, these settlements impact class members and therefore would benefit from real input.[84]

4. *Intervenors*

A final proxy is the intervening party or objector. These are typically members of the class (or those purporting to represent their interests) who decide to object to a given decision, settlement terms or other aspect of the litigation. Whether or not intervenors play a large role in any given litigation varies depending on factors such as the size of the class, the societal importance of the issues at stake, and the value of any potential award resulting from the suit.

Intervenors or objectors can play a crucial role in certain circumstances, such as where such parties raise concerns on behalf of the class members or serve as a check on class counsel's ability to enter

83. *See* Tamara Relis, *"It's Not about the Money!" A Theory of Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 723 (2006) ("Plaintiffs' articulated litigation aims were largely composed of extra-legal objectives of principle, with 41% not mentioning monetary compensation at all, 35% saying it was of secondary importance, 18% describing money as their primary objective in suing, and only one person (6%) saying it was money alone.")

84. In another recent example, a class settlement over Facebook Inc.'s alleged sale of user data to third party customers, cuts the class members entirely out of both any monetary distribution, and includes no promise on the part of Facebook to refrain from such practices in the future. *See* Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012), *rehearing denied*, 709 F.3d 791 (9th Cir. 2013). This case in particular would have been ripe for class member input, given their status as users of Facebook. A petition for *certiorari* in the case has been filed in the United States Supreme Court. *See Marek v. Lane,* No. 13-136 (2013).

into settlements that are not in the best interests of the class.[85] Allowing for such objections and interventions provides a measure of "voice," the practical effect of which amounts to the creation of self-appointed proxies to speak for the other members of the class.

However, as a means to represent the class as a whole, intervenors and objectors have similar limitations to truly representing the class' interests that other proxies do. Moreover, the way in which the Rules and consequently the courts treat such objectors — essentially as outside non-parties — erects unnecessary procedural hurdles to utilizing the intervention mechanism,[86] meaning that only savvy and well organized plaintiffs can usually effectively object or intervene. And, although the objectors do not necessarily speak for all other class members, other constituents of the supposed entity have little opportunity to affirm or take issue with objections raised. That is potentially problematic, given that such intervenors sometimes lodge objections for parochial reasons that may or may not align with the interests of the class. Indeed, in some class lawsuits, the presence of "professional objectors" who intervene solely to blackmail the lead counsel into giving them a cut of the award has been problematic.[87] Such problems place additional monitoring and policing burdens on judges and lawyers who must act without much, if any, input from a significant portion of the class members.

5. *Protection of Individuality: Opt-out Rights*

Each of the types of actors just described plays a role in class action governance by serving as proxies for absent class members. The fifth type of governance structure, the opt-out rights described below, is the only one that purportedly gathers input from the class members themselves.

Civil actions based on Rule 23(b)(3) (the part of Rule 23 governing class actions in which monetary damages are to be awarded) entail a requirement that notice and an opportunity to "opt-out" be available to allow litigants to take themselves out of the class before

85. *See, e.g.*, Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 GEO. WASH. L. REV. 428, 428–35 (2010) (recounting a prominent attorney's attempt to represent a class member who wished to object to a settlement).

86. *See* Lahav, *supra* note 9, at 1943–44 (discussing the intervention mechanism, and the fact that class members are forced to proceed as non-parties, as an example of the tension between the individual and entity model).

87. *See* Leslie, *Significance*, *supra* note 80, at 109.

being subject to a preclusive judgment.[88] For certain actions, plaintiffs have two such opportunities — one at the certification stage and one before a settlement is reached.[89] In the case of the opt-out, class members theoretically have an opportunity to exercise autonomy.[90]

Although allowing for opt-out is a relatively straightforward and simplified solution, it is a crude substitute for autonomy for two reasons: first, it presents the action (and any attendant settlement) as a take-it-or leave-it proposition, and second, it provides only one alternative to the action as designed by class counsel — exit. In many cases, leaving the action means no recourse at all for putative class members, and therefore exercising this option is highly costly. In cases where any potential recovery would be less than the cost of suit — so-called negative value claims — exit makes sense only if there is a substantial coalition of exiting litigants to pool resources and bring a separate collective action. However, opt-out rights do little to identify and connect claimants who may wish to bring a separate action. For all practical purposes therefore, most claimants can benefit from court-created collective action only by accepting a process that he or she had no part in shaping.

It can be argued that preventing claimants from exercising much autonomy is justified by necessity, especially in the context of negative value claims, because there is no realistic alternative. Even beyond negative value claims, such a tradeoff could be justified by the fact that class counsel takes on the risk and expenditure of carrying out the lawsuit. These justifications, however valid, do not require that any optionality be as binary and un-nuanced as simply accepting or rejecting pre-shaped litigation. Nor does such a process serve the goal of procedural fairness very well, since a binary choice is likely to provide little satisfaction or feeling of control.[91] Claimants could be

88. *See* Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011) (discussing the certification requirements under Rule 23(b)(3)). This option is only available for class actions where money damages are primarily sought. Typically, class actions under Rule 23 (b)(1)(A), (b)(l)(B), or (b)(2) are "mandatory," meaning that once the class is certified, absent class members may not withdraw from the action.

89. The provision of an opt-out right at the settlement stage was adopted in 2003 and came out of an era of reflection on settlement problems marked most notably by the *Amchem* and *Ortiz* cases. *See* FED. R. CIV. P. advisory committee's note (2003).

90. *See* Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 106 (1997); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1538 (2004).

91. *Cf.* Michal Krawczyk, *A Model of Procedural and Distributive Fairness*, 70 THEORY AND DECISION 111 (2011) (describing negative reactions to lack of control over process in ultimatum game experiments).

given choices about what parts of the dispute are most important and what components of a settlement would be most satisfactory, instead of being asked to accept or reject whole packages of claims and demands. And even where complete exit is the only workable option to provide putative class members, exit need not leave a potential plaintiff completely out of the process. It could instead lead to a different process by which those who exit could provide feedback with respect to their priorities to facilitate sorting themselves according to their interests and connecting with others to other to more easily organize litigation or some other action to better suit their needs.

Another defense of opt-out rights argues that exit in large numbers provides a signal to judges and other actors that there is a problem with the action of the settlement, and that therefore exit is better than voice as a governance mechanism.[92] This may be true in certain circumstances. However, relying on simple opt-out rights *per se* to act as a signal is unreliable at best. In order to effectively protest, a large number of individuals would usually have to exit to send a strong a signal. While this may be less difficult in securities and other types of actions where a relatively small number of decision makers form the class, it presents a problem for giving effective voice to dissenters when large number of plaintiffs are involved.[93] A more balanced collective action approach could provide for more meaningful signaling, if not more meaningful participation.

The forgoing discussion of class action procedures highlights some of the problems arising from a simplified view of the class reflected in its governance structures. Procedures that deal largely with an abstract entity governed by a small number of actors predominate over procedures designed to tap individual interests or create space for autonomy. This approach to mass dispute processing, while at times controversial, was entirely reasonable in 1966 when there were no realistic alternatives. However, in an era in which technological advances provide avenues for greater levels of engagement, more expansive ideas of plaintiff participation can be accommodated without detracting unreasonably from efficiency. The means

92. John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 CARDOZO L. REV. 407, 409 (2008) (arguing in the context of securities litigation that exit rights promote better alignment of incentives).

93. *See* Leslie, *Significance, supra* note 80, at 112 (discussing objections in class action law suits as collective action problems, for which the facilitation of intra-class communication could be helpful).

by which groups of people can engage both en masse and as individuals are beginning to make themselves evident and worth exploration.

III. Web 2.0's Impact on Collective Action Dynamics

The technologies of social networking are providing a model of social organization that is relevant to aggregate dispute resolution. So-called "Web 2.0" technologies[94] have facilitated the formation of new types of groups, changed the ways that individuals can interact within groups, and enhanced the level of impact that single individuals can have on a group or an entire system, using relatively few resources. However, these technologies have their drawbacks, and it is far from obvious that the tools of mass communication can provide a compelling basis for a change in the legal norms governing class actions. Determining whether such tools can and should be incorporated requires examining the impact of technology on group and collective behavior in relation to disputes that class actions are meant to address and the means by which class actions operate.

The discussion and examples below show how technology allows people to participate in dispute resolution — both in and out of formalized processes. These examples also illustrate how technology is facilitating formation and action by groups which are more dynamic than those imagined in traditional class action theory. In doing so, it is revealing a more nuanced set of recognizable actors within a large groups of disputants, instead of a dispute landscape populated only by individuals requiring individualized solutions or an abstract amalgamation of represented interests.[95] These emerging realities suggest both rationale and means of improving existing processes, if such procedures are to remain useful and relevant.

A. *General Dynamics of Social Media and Internet-Based Group Behavior*

The Internet, social networking technology, and new media have changed people's ability to interact with the world and with each other. These networks allow users to go beyond traditional forms of

94. Web 2.0 commonly refers to interactive and collaborative means of communicating via the Internet, using a variety of technologies including computes, smartphones, and tablets.

95. *Cf.* Burch, *supra* note 35, at 99 n.43 (making a similar observation in non-class aggregate lawsuits that "group-oriented individuals and individuals within the collective are best conceived not as a dichotomy, but as points along a spectrum of group cohesion"); Sturm & Gadlin, *supra* note 23, at 6 (observing that different conflict resolution systems exist unnecessarily for individual and systemic problems).

Internet communication such as e-mail to establish online personas and portals into their individual worlds, which they can open or close to others as they choose. These networks allow people to connect in ways that were not possible before — creating communities of people sharing friendship, common experiences, or support of special causes across the world. Applications like Facebook and Twitter, which are usually as easy to access as reaching into one's pocket, allow people to find like-minded others, communicate with thousands or even millions of people at once, and form social groups despite barriers that may have once existed. These tools have been game changers in the way that individuals interact with each other, larger social groups, governments, and the rest of society.

Three changes facilitated by social networking technology are worth noting for purposes of this analysis. Such changes, described further below, are: (1) aiding individuals to create collective action, or at the very least leverage the threat of collective action, at a very low cost; (2) enhancing people's ability to amplify their individual presence and influence in groups and in society more broadly; and (3) increasing individuals' ability to find and form groups around a broader range of different types of interest, and expanding individuals' participation in those groups.

1. *Aiding and Changing Collective Action*

Social networking technology and communication technology have been useful in lowering cost barriers to certain types of collective action. Typically, collective action requires at minimum two elements: (1) that the cost of individual group members' participation be low relative to the benefits gained, and (2) that group members have the ability to coordinate among each other.[96] Technology affects both requirements.

Technology has the potential to change the cost-benefit calculus by increasing the impact of simple low-cost actions while at the same time reducing the time, effort, and resources required for participation in those actions. For example, protesting an Internet company's change in its privacy policies could take the form of sending or posting a message to the company, giving indications of support for the actions of the protest group on discussion forums or outlets like Facebook and Twitter, or more maliciously, directing large amounts of Internet traffic to the company's website to burden its servers and cause nuisance. One can participate in such a protest with relatively

96. *See* Leslie, *Significance*, *supra* note 80, at 97.

little effort, without even leaving one's house or seeing another human being. The actions needed are easy to take for individuals, but for a firm that values image and public perception, the collective impact can be high.

Technology also facilitates coordination by allowing for easier multidirectional communication and information flow, potentially enabling collective action even where the cost is high. Efforts borne by a few members can be more easily communicated and adopted by others in the group, giving those efforts critical mass without the expenditure of time and energy traditionally required. A vivid example of technology's impact on coordination is the "Arab Spring" in 2011, which saw the overthrow of longstanding governmental regimes throughout Northern Africa.[97] In these uprisings, online social networks were used heavily to organize widespread protests and gather critical mass, drawing ever more people despite the potential risks for participants.[98] Less pronounced, but no less impactful examples have been seen in online protests related to social issues like climate change and consumer complaints.

In addition, there is evidence that online media is changing the way that groups engage individuals involved in collective efforts. Although it is a nascent area of research, early studies indicate that traditional bases of social solidarity, such as churches, political parties, or community groups are no longer required for involving people in collective processes[99] and that individuals' own narratives are becoming prominent in such efforts. The new prominence of individual voices comes at a cost however, in that organizations that formerly maintained strong and clear messages, struggle to do so while accommodating so many diverse voices. Despite this disadvantage, more personalized forms of collective action, such as those facilitated by online media, appear to maintain higher levels of engagement, focus on ultimate goals, and strength among the network of individuals than traditional types of organizations.[100]

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97. *See* Ashraf M. Attia et al., *Commentary: The Impact of Social Networking Tools on Political Change in Egypt's "Revolution 2.0,"* 10 ELECTRONIC COM. RES. & APPLICATIONS 369 (2011); Bruce Etling et al., *Mapping the Arabic Blogosphere: Politics and Dissent Online*, 12 NEW MEDIA SOC'Y 1225 (2010).

98. *See, e.g.*, Marko M. Skoric et al., *Online Organization of an Offline Protest: From Social to Traditional Media and Back*, 44TH HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES (HICSS) 1, 1–8 (2011).

99. *See* W. Lance Bennett & Alexandra Segerberg, *Digital Media and the Personalization of Collective Action*, 14 INF. COMMUN. SOC. 770, 771 (2011).

100. *Id.*

2. *Enhancing Individual Presence and Influence*

Beyond extending people's ability to communicate and share ideas, social networking the Internet have the potential to amplify the impact of individuals' messages and actions throughout the world[101] and, in effect, enhance their influence. This is because such technologies greatly lower the cost of disseminating one's thoughts, opinions, ideas, actions, and interests, as well as minimize the barriers to others of receiving such information. Using older media, uptake of a particular message depended heavily on who happened to see or hear the message at the moment it was available and whether it seemed persuasive at the time. With new media, messages, videos, and other forms of expression can be repeated and passed along by others who are sympathetic (for example, by "re-tweeting") continuously and via a medium that many people can and do access from anywhere. Thus, the chances that a persistently broadcast idea will reach large numbers of people, particularly those paying attention to issues related to the message, are far greater than the chances were even a few years ago. Of course, such a proliferation of communiqués in the Internet space can also have the effect of drowning an individual's voice in a sea of others. Some forms of social media, networking sites, and other modalities filter the Internet noise based upon an individual's social connections, demographics and selected criteria, thus limiting the scope of transmission and enhancing an individual's ability to be present within a group relevant to him or her.

3. *Enhancing Individual Voice Within Collectives, While Maintaining the Characteristics of the Collective*

Social networking and similar activities increase a person's ability to express him or herself in a collective setting, while developing greater affinity for the collective and commitment to its shared endeavors.[102] At the same time, groups are able to maintain cohesion.

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101. For a more in-depth articulation of this contention, see MANUEL CASTELLS, COMMUNICATION POWER 53–71 (2009) (arguing that the Web 2.0 platforms have created the "mass communication of the self," a form of communication where messages created by individuals can reach global audiences, allow audiences to take charge of their communicative practices, and give rise to unprecedented levels of autonomy).

102. Akshay Java et al., *Why We Twitter: Understanding Microblogging Usage and Communities*, PROC. OF THE 9TH WEBKDD & 1ST SNA-KDD 2007 WORKSHOP ON WEB MINING AND SOCIAL NETWORK ANALYSIS 56, 64, http://doi.acm.org/10.1145/1348549.1348556 (last visited July 11, 2012).

While this dynamic is not unique to online interaction,[103] the Internet is able to greatly facilitate it.

Internet-based communication facilitates participation in groups for many of the same reasons it facilitates collective action: by lowering the required resources, time, and effort. It also frequently encourages group member contribution by increasing his or her sense of psychological security and lowering the perception of social risk.[104] Simply put, many people feel far more comfortable typing a message — even if the message will be seen by thousands — than they would delivering their opinions in front of dozens. Moreover, it has been theorized that increased social networking enhances the process of individuation, a process that occurs through social interaction.[105]

At the same time, the social aspect of online communication, and the ease with which people can find like-minded others, increase the chance that individuals will develop feelings of affiliation with those in their chosen networks.[106] This, in turn, can result in greater feelings of responsibility and social cohesion toward members of those networks.[107]

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103. *Cf.* Burch, *supra* note 35, at 16 (describing a similar process in mass tort litigation: "Simply put, a plural subject is an instance where multiple individuals — several 'I's' — become a single, plural subject — a 'we.' As an umbrella term, what makes plaintiffs a plural subject can vary greatly: litigants might knowingly share similar desires, interests, intentions, goals, or commitments concerning the litigation; they might collectively participate in a litigation-related activity; or they might design a group policy concerning the litigation").

104. *See* John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAVIOR, 321, 321 (2004) (discussing people's increased feeling of psychological security participating in online settings).

105. Bernard Stiegler, *Teleologics of the Snail: The Errant Self Wired to a WiMax Network*. 26 THEORY, CULTURE AND SOC'Y 33, 42–48 (2009) (arguing that, because individuation is caused through the act of speaking out, the use of social networking sites constitutes original processes of psychological and collective individuation and construction of a "digital singularity," a process that can lead to the growth of individual expression and creativity).

106. Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 119 n.141 (2011) ("Mass tort litigants already form connections with one another through these social networking sites. For examples, see "Equal Treatment for Non-US Vioxx Victims" Facebook group, which petitioned for compensation on behalf of British victims, the "Agent Orange Lawsuit Filed by Vietnamese Victims" Facebook group, and the "Merck Settlement Group" on Yahoo!'s groups page. Facebook, Equal Treatment for Non-US Vioxx Victims, http://www.facebook.com/groupphp?sid=7eef156f24dacee8951038d54df30e2e&gid=86112 02842; Facebook, Agent Orange Lawsuit Filed by Vietnamese Victims, http://www.facebook.com/group.php?sid=0&gid=2619520859; Merck Settlement Group page, http://groups.yahoo.com/group/MerckSettlement/.").

107. Kwok Leung, Kwok-Kit Tong & E. Allan Lind, *Realpolitik Versus Fair Process: Moderating Effects of Group Identification on Acceptance of Political Decisions*, 3 J. PERSONALITY & SOC. PSYCHOL. 476, 476–77 (2007); Burch, *supra* note 35, at 15–24

Moreover, new and social media can facilitate collaborative projects and further formation of group identity. For instance, messages and information need not be confined to their own original content. They can be approved or disapproved by others (e.g., by "liking" content on Facebook), commented upon, or even amended. While this may not always serve the ends of accuracy,[108] it illustrates the possibility for groups collectively to process ideas, and provides space for both aggregate sentiment and individual viewpoints.

B. *Experience of Internet-Based Collective Dispute Resolution*

The Internet's ability to enhance individual autonomy while preserving the value of groups can be observed both in and out of the litigation context, as the following subparts illustrate. These examples suggest that there are a number of roles litigants and litigant groups can play using social media and the Internet that they have seldom been able to play in the past.

1. *Consumer Disputes*

Consumer disputes supply useful examples of how Internet-based group dynamics are affecting dispute resolution. These disputes are instructive because consumer-facing industries are among the most experienced with Internet-based disputes and dispute resolution. Consumer disputes also provide an interesting foil to class actions in part because consumer collective action was one of the salient problems that the writers of the modern Rule 23 sought to address when they designed the existing process.[109]

In the sphere of consumer relations, social networking works as a tool to increase the leverage that an individual disputant can apply in dispute resolution. Complaints in this context work because companies value their reputations, and social networking allows for the reputational effects of even one complaint to become amplified.[110] Individuals are able to disseminate information quickly and easily about poor treatment by a company, adding transparency and greater

(noting that group-oriented individuals and individuals-within-the-collective are best conceived not as a dichotomy, but as points along a spectrum of group cohesion).

108. *But see* Jim Giles, *Internet Encyclopedias Go Head to Head*, 438 NATURE 900, 901 (comparing Wikipedia to Encyclopedia Britannica and finding Wikipedia to be more accurate).

109. *See supra* note 27 and accompanying text.

110. *See* T.M. Tripp & Y. Gregoire, *When Unhappy Customers Strike Back on the Internet*, 52 SLOAN MGMT. REV. 37, 37–38. Some of the deterrent effect of class action lawsuits is thought to operate in a similar way, through the operation of the reputational markets.

accountability to what would otherwise be isolated and unknown occurrences. This ability gives individuals a potentially great amount of influence, and companies have learned that this influence can cut in both positive and negative directions. By employing entire teams dedicated to social networking issues, many companies now actively monitor Twitter and other social networking outlets for evidence of grievances, in the hope of resolving problems quickly and avoiding an exponential growth in complaints via social media.[111]

Social media protests are a significant potential sanction against firms and provide incentives for them to change their behavior. Airlines in particular have experienced the damage that can be caused by vociferous consumers with particular complaints. A few notable examples illustrate how social media can resolve complaints and even induce firms to change their behavior. In one prominent case, consumer outcry forced Delta Airlines to change its policy and waive baggage fees for soldiers returning from Iraq and Afghanistan.[112] In another well-publicized example, United Airlines suffered a public relations crisis when a musician whose guitar was damaged by baggage handlers posted a song about it on YouTube.[113] The airline was forced to pay for the damage and consequently implemented new procedures to deal with similar issues. Other prominent examples have occurred with companies such as PayPal[114] and ChapStick.[115]

In addition to giving individuals leverage, social media is sometimes used to draw in disputants who were formerly outside of the dispute resolution process. Unlike traditional complaint handling mechanisms, networking technologies allow firms to find customer grievances even when not directed at the firms. Because of the searchable nature of Internet communications, companies can monitor chatter for signs of discontent with their products, services, or the

111. *See* Lisa Bachelor, *Complain on Twitter for an Instant Response*, THE OBSERVER (May 12, 2012) http://www.theguardian.com/money/2012/may/12/complaint-air-on-twitter.

112. Rogene F. Jacquette, *Delta Apologizes for Charging Returning Troops $2,800 Baggage Fee*, N.Y. TIMES AT WAR BLOG (June 8, 2011), http://atwar.blogs.nytimes.com/2011/06/08/delta-apologies-for-charging-returning-troops-2800-baggage-fee/.

113. Brett Snyder, *United Aggressively Responds to "United Breaks Guitars Part 2,"* CBS NEWS (Aug. 24, 2009), http://www.cbsnews.com/8301-505123_162-43641055/united-aggressively-responds-to-united-breaks-guitars-part-2/.

114. Shannon McKarney, *PayPal: You Can Help Cats, Not People* CARE2.COM (Dec. 6, 2011, 3:30 PM), http://www.care2.com/causes/paypal-you-can-help-cats-not-people.html.

115. Tim Nudd, *ChapStick Gets Itself in a Social Media Death Spiral*, ADWEEK (Oct. 26, 2011), http://www.adweek.com/adfreak/chapstick-gets-itself-social-media-death-spiral-136097.

handling of a certain situation, and respond accordingly.[116] Moreover, customer problems can be resolved much more quickly through new Internet technologies than through traditional mechanisms.[117] The use of such technologies can allow for a more proactive and perhaps preventive form of dispute processing.

The forgoing examples illustrate interesting trends in how individuals can impact disputes in ways that were traditionally possible only through court-sponsored mechanisms. Admittedly, these examples arise from a relatively narrow set of disputes involving claims that would not be cognizable in court and would-be defendants who have an interest in keeping complaining customers happy. Nonetheless, they demonstrate the potential for providing signaling, compensation, and deterrence in low value disputes involving systemic issues that might once have only been possible through aggregation.

2. *New Collective Elements in Litigation*

Social media and the Internet have facilitated new types of group participation in formal litigation processes as well. Three types of examples described below illustrate how. One set of examples demonstrates how Web 2.0 technologies can bring about some of the functions of class actions without involving the legal system. They show how Internet organizing or social media-based protests can perform the signaling function of class litigation by raising the awareness of the public and regulators about unfair consumer practices. Social media's ability to disseminate information quickly about alleged wrongdoing can in turn perform some of the deterrent function of class litigation because the firm in question will react to public outcry and the threat of regulatory action arising from its behavior.

Another set of examples shows how Internet activity might inform and shape litigation from the ground up. This can happen either by tipping off lawyers to invidious, illegal practices and allowing them to locate plaintiffs, or by giving individuals the tools they need to more easily bring individual or collective actions in court.

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116. *See, e.g.*, *A Day in the Life: Social Media*, JETBLUE BLUE TALES BLOG (Jan. 19, 2012), http://blog.jetblue.com/index.php/2012/01/19/a-day-in-the-life-social-media/.

117. *See, e.g.*, Lisa Bachelor, *supra* note 111 ("Companies as diverse as banks, gym chains, travel agencies and large retailers are using Twitter and, to a lesser extent, Facebook, to resolve consumer complaints in hours or even minutes rather than the usual days, weeks, or months."); David K. Israel, *Twitter: The New Old Customer Service?*, WIRED.COM (Sept. 16, 2012), http://www.wired.com/geekdad/2012/09/twitter-the-new-old-customer-service/.

A third category of examples demonstrates how litigants in a class action can communicate with each other and organize and sort themselves, independently of the actions of the court or the class counsel, and how important communication relevant to litigation can be effected among class members. These examples demonstrate how litigants can have a greater level of involvement in collective processes.

3. *Web 2.0 Dispute Resolution Outside the Legal System — Verizon Wireless and Bank of America*

In December 2011, Verizon Wireless announced that, beginning the following month, it would be charging its customers an additional $2 "convenience fee" for one-time bill payments made by phone and online.[118] The company claimed that the fee was intended to make up for costs associated with processing credit and debit card payments. The move sparked an enormous protest via Twitter, with a massive volume of customers issuing complaints, some threatening to terminate their contracts,[119] and others launching an online petition to have the practice changed.[120] The attention brought to the issue stirred the Federal Communications Commission, whose chairman issued a statement questioning the necessity of such fees and stating that the Commission would look into it. In the end, Verizon announced that it was dropping its plans to institute the new policy due to consumer outrage.[121] Verizon's main competitors, AT&T and Sprint, issued statements saying that they did not engage in similar practices.[122]

Bank of America faced a similar dispute in late 2011 when it attempted to impose a $5 monthly fee on accounts using debit cards for

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118. Ron Lieber & Brian X. Chen, *An Uproar on the Web Over $2 Fee by Verizon*, THE N.Y. TIMES (Dec. 29, 2011), http://www.nytimes.com/2011/12/30/business/media/an-uproar-on-the-web-over-2-fee-by-verizon.html.

119. *See* Sinead Carew, *Verizon Ditches $2 Fee After Customer Uproar*, REUTERS, (Dec. 30, 2011), http://www.reuters.com/article/2011/12/30/us-verizon-fcc-idUSTRE7BT13I20111230.

120. To view the petition, see Molly Katchpole, *Tell Verizon: Drop the Fee for Paying Bills Online*, CHANGE.ORG (Dec. 2011), http://www.change.org/petitions/tell-verizon-drop-the-fee-for-paying-bills-online.

121. *See* Carew, *supra* note 119; *see also* Greg Bensinger, *UPDATE: Verizon Backs Off $2 Fee Plan After User Complaints*, WALL ST. J. (Dec. 30, 2011), http://online.wj.com/article/BT-CO-20111230-707071.html.

122. *See* Carew, *supra* note 119; *see also* Greg Bensinger, *UPDATE: Verizon Backs Off $2 Fee Plan After User Complaints*, WALL ST. J. (Dec. 30, 2011), http://online.wj.com/article/BT-CO-20111230-707071.html.

transactions.[123] The new fee led to a change.org petition and an online protest instituted by underemployed, recent college graduate, Molly Katchpole.[124] The petition sparked an online protest, gathering over 200,000 people. In the process, watchdog groups such as Consumers Union reached out to 780,000 of its members and managed to have 40,000 people send letters asking for a Congressional investigation of the fees.[125] A few weeks after Bank of America announced its policy, it issued a statement that it would be dropping the fees. Its major competitors, all of which had announced plans to charge similar fees, promptly followed suit.[126]

Both of these examples are instances of what might have been class actions: a wrong committed against a large number of people for a relatively small amount of money. No lawyer would ever take an individual's case in such an instance, and aggregation would be the only way to have recourse. Using the Internet and social networking, consumers were able to pressure a "settlement" that resulted in the offending firms changing their behavior before the harm had even taken effect.

How often would such an approach work? While it is difficult to know, it is unlikely that such processes have the consistency and predictability to replace collective litigation altogether (although it may obviate the need for some actions).[127] At the very least, these dynamics must be taken into account when one considers the role of collective litigation, particularly in the consumer context.

123. Ann Carrns, *Petition on Debit Card Fee Attracts 200,000 Supporters*, N.Y. TIMES BUCKS BLOG (Oct. 13, 2011), http://bucks.blogs.nytimes.com/2011/10/13/petition-on-debit-card-fee-attracts-200000-supporters/.

124. *The Woman Behind the Bank of America Fee Protest*, CBS NEWS (Nov. 2, 2011), http://www.cbsnews.com/8301-500202_162-20128896/the-woman-behind-the-bank-of-america-fee-protest.

125. Bruce Horovitz, *Bank of America Fee Retraction Shows Effect of Consumer Rage*, USA TODAY (Nov. 1, 2011), http://www.usatoday.com/money/industries/retail/story/2011-11-01/consumer-backlash/51032364/1.

126. *See id.*

127. However, it might be argued that such alternative means of resolving mass disputes could weigh against class certification, at least in Rule 23(b)(3) actions, where superiority must be satisfied. *See* Eric P. Voigt, *A Company's Voluntary Refund Program for Consumer's Can Be a Fair and Efficient Alternative to a Class Action*, 31 REV. LITIG. 617, 618–21 (2012) (arguing that the superiority requirement of Rule 23(b)(3) actions could mean that voluntary compensation programs instituted by defendants could preclude certification of a class).

4. *Web 2.0 Dispute Resolution Within the Legal System From the Bottom Up — the AT&T "Throttling" Dispute*

Another dispute that became an Internet phenomenon involved AT&T's wireless 3G Internet service. In late 2011, AT&T announced that it would begin to limit data usage for high volume users of its so-called "unlimited" data plans. The level of the cap was unspecified, unlike the caps of other carriers whose policies were less discretionary. AT&T was only clear that the top five percent of users on unlimited plans would be subject to the practice. While the company claimed that this would not affect most consumers, subscribers were nonetheless outraged by the idea that an "unlimited" plan would be suddenly subject to such caps.[128] The Internet uproar prompted one user, Matt Spaccarell, to bring action in court.[129] Since a class action was not a possibility after the *Concepcion* decision, which upheld AT&T's pre-dispute arbitration clause effectively precluding any kind of collective proceeding, Mr. Spaccarell's only option was arbitration or small claims court. He decided to pursue his claim in small claims court where he won and was awarded the $850 for the difference in fee he would have paid for the no-longer-quite-so-unlimited plan. AT&T's initial reaction was to threaten to appeal the judgment unless Mr. Spaccarell accepted a settlement that contained a promise of confidentiality about the outcome of the suit.[130] Mr. Spaccarell refused, and instead created a webpage devoted to giving other subscribers the tools to bring their own suits. His story went viral, and shortly thereafter, AT&T backed down from its threats to appeal and issued a statement "clarifying" its throttling policy, setting a defined amount of data at which it would begin to limit data usage.

This example, a putative class action in a post-*Concepcion* world, also illustrates how the typical power equation in small-value litigation might be turned on its head. No class action was available to the plaintiff, yet some, albeit small, systemic change was accomplished. And an individual plaintiff was able to effectively intimidate a large corporation into dropping its appeal and making even a slight mollifying gesture despite its apparent belief that it had done nothing

128. Peter Svensson, *AT&T Customers Surprised by Data Speed Limits*, USA TODAY (Feb. 13, 2012), http://www.usatoday.com/tech/news/story/2012-02-13/atampt-data-slowdown/53071798/1.

129. Mark Raby, *AT&T Fires Back at Data Throttling Lawsuit*, TG DAILY (Mar. 14, 2012), http://www.tgdaily.com/mobility-brief/62071-att-fires-back-at-data-throttling-lawsuit; Dan Graziano, *iPhone User Who Sued AT&T Receives New Settlement Offer*, BGR (Mar. 13, 2012), http://www.bgr.com/2012/03/13/iphone-user-who-sued-att-receives-new-settlement-offer/.

130. *See* Graziano, *supra* note 129.

wrong. Functionally speaking, this outcome mimics a non-monetary settlement of what could have been a class action claim.

5. *Web 2.0 Dispute Resolution Within the Legal System From the Top Down — The Honda Hybrid Civic Class Action*

Within the context of class litigation, social networking has demonstrated an ability to enhance participation by plaintiffs, facilitate greater sorting among them and expression of interests, as well as develop alternative means of bringing litigation outside the class. However, it has also created problems for courts trying to manage and control mass litigation. The example from the introduction is illustrative. The carmaker Honda proposed a settlement in early 2012 to class members in a lawsuit involving deceptive marketing practices for its hybrid Civic.[131] One class member, Heather Peters, rejected the settlement of $100–200 and a discount on a new car. Instead she brought an action in small claims court, where she was awarded $9867.[132] Media attention on the victory and a website started by the plaintiff spread awareness of the settlement and caused several state attorneys general to announce plans to object to the proposed settlement on fairness grounds.[133] Ms. Peters added documents to her website that individuals could use to bring small claims actions on their own.[134] As a result, the court allowed class members more time to consider their options, and a larger number of people opted out, ultimately totaling 1708 people out of a class of 200,000. Those who opted out reported a variety of motives for doing so. Some stated that they wanted to attempt to get more money from small claims court. A group led by Ms. Peters began a separate class action suit.[135] Others objected to the high attorneys' fees, while

131. *See* True v. American Honda Motor Co., Inc., 749 F. Supp. 2d 1052 (C.D. Cal 2010); *see also* Winter, *supra* note 14.

132. *See* True v. American Honda Motor Co., Inc., 749 F. Supp. 2d 1052 (C.D. Cal 2010); *see also* Winter, *supra* note 14.

133. Chris Woodyard, *Five States Weigh Joining Honda Gas-Mileage Class Action*, USA TODAY (Feb. 15, 2012), http://content.usatoday.com/communities/driveon/post/2012/02/five-states-weigh-joining-honda-gas-mileage-class-action/1.

134. Peters, *supra* note 17.

135. *See* Adam Zimmerman, *Flash Mob Litigation*, PRAWFSBLAWG (Jan. 3, 2012, 9:33 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/01/class-actions-v-flash-mob-litigation.html (discussing a case in which a large number of plaintiffs opted out of a class action lawsuit and attempted to form a separate action through self-motivated aggregation).

others opted out because they were happy with the performance of the car and objected to the idea of the suit altogether.[136]

This example illustrates how Internet-based networking can facilitate participation and expression of autonomy in class actions, and enhance the power of objectors, in ways which have previously been much more difficult to accomplish. In the example one objector was able significantly to impact a class action lawsuit despite procedural obstacles because she could communicate and network with other class members. While Ms. Peters' actions did not ultimately affect the fairness determination of the judge,[137] it raised the attention of a number of state attorneys general who considered intervening, adding to all the objecting plaintiffs' bargaining power. The example also illustrates how an objection can raise awareness of some class members who might not have otherwise known about the suit, including those who did not want to be part of the suit in the first place. The ultimate number of opt-outs was small relative to the class size, but the example nonetheless illustrates how greater information about the case can lead to better sorting and communication of individual litigant preferences and potentially greater exercise of opt-out rights.

As these examples point out, social networks can be empowering for group litigants, but they also have drawbacks and raise difficult issues for judges trying to manage litigation and for legal system's ability to provide predictability in the dispute resolution process. The class action against a McDonald's restaurant franchise in Michigan in 2013 provides an illustration. The action was brought alleging the use of non-hallal meat in purportedly hallal food in an area of southeastern Michigan, which is home to a large Muslim community. A proposed settlement was announced that would award significant sums to the class counsel and representative, but nothing to the class members.[138] Instead of being distributed to plaintiffs, the money would be donated to a local charity. In response, a small group of plaintiffs created a Facebook page to raise awareness and try to persuade less-informed members of the class to opt out of what the page

136. Elliot Spagat, *Judge in California OKs Honda Mileage Settlement*, YAHOO! NEWS (Mar. 16, 2012), http://news.yahoo.com/judge-california-oks-honda-mileage-settlement-001321456.html.

137. Ms. Peters's victory was reversed on appeal. *See* Heather Peters v. Honda American Motors Co. Inc., Case No. 11S002156 (Super. Ct. Cal. 2012). Honda had litigated six small claims cases and had lost only one. *See id.*

138. Fisher, *supra* note 64.

argued was an unfair settlement. The judge issued an injunction ordering the plaintiffs to remove the Facebook page, stating that only the court could provide notice and instructions for opt-out, and that any competing source of such information could be misleading and cause confusion. This example highlights both the potential for the Internet to give voice to members of a plaintiff class as well as a broader religious and cultural community directly affected by the class litigation. It also shows how social networking can create complications for a judge attempting to mange litigation.[139]

C. *New Media-Based Dispute Resolution and Its Implications for Formal Litigation Processes*

While Twitter, social media, and Internet-based collective dispute resolution may not provide a substitute for court-based actions, they are changing collective and individual interaction in ways that make class action governance structures seem anachronistic. Members of the bench and the academy have made similar observations and called for greater democratization of class processes, in some cases highlighting the potential of the Internet and other communication modalities to facilitate greater participation.[140] Technology could go even further to improve class actions than what has been done to date. The examples in this Part provide a starting point for considering how this might be done. But changing class action to engage with large numbers of individuals might cause upheaval in time-tested processes by introducing practices that are unfamiliar to the legal system. That type of change and experimentation is at odds with a system that ordinarily changes slowly, dealing with reform retrospectively, and with the benefit of hindsight. Nonetheless, concerns for democracy, due process, and procedural justice provide compelling reasons to avoid complacency and explore ways to improve the current system in line with technological possibilities, as further elaborated in the subparts below.

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139. After several public volleys, and an attempt by Public Citizen to intervene, lawyers for the plaintiffs and the defendant persuaded the judge to lift the injunction. *See McDonald's Drops Halal Items from U.S. Menu After Problems in Dearborn*, DETROIT FREE PRESS (June 24, 2013), http://www.freep.com/article/20130624/NEWS02/306240012/McDonald-s-halal-stop-Dearborn.

140. *See, e.g.*, Robert H. Klonoff, Mark Herrmann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727 (2007); Jack Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J. L. & SOC. PROBS. 451 (2012).

1. *Alignment with Democratic Norms and Due Process*

Individual autonomy and self-determination are core democratic values, and designing procedures that recognize their fundamental role should be a primary goal of any system designer.[141] Allowing individuals to take greater part in adjudication of collective claims would fit more squarely with the democratic values underlying the American legal system. It would also arguably better satisfy norms of due process as they are understood to operate in litigation.[142]

Class action governance is representative, but not democratic in two basic respects.[143] First, the procedure works to deprive those with claims from having any material input into how the claims are resolved, as has been described in Part II. Second, class actions undermine democratic norms by taking disputes that often involve huge swaths of society and deal with issues that would benefit from community input and depriving all but a few unaccountable individuals of the power to decide them. The result is that existing procedure has the potential to over-simplify large public disputes by eliding differences between disputants, masking a complex array of sub-conflicts, and attempting to deal with them in ways that circumvent democratic processes that would more appropriately address them.

American democracy espouses a normative commitment to individual autonomy and self-determination. Autonomy has been described as important in the legal system for a number reasons: to

141. *Cf.* Redish & Larsen, *supra* note 68, at 1574 ("The individual's autonomy to advance his interests in the manner he deems most advisable through resort to governmental processes — either political or judicial — grows out of the precepts of liberal democratic theory that appropriately underlie our nation's normative commitment to self-determination and individual rights."). *See also* Bone, *Puzzling Idea*, *supra* note 75, at 578 ("Guaranteeing a personal day in court is partly about outcome quality, but what makes the day-in-court right such a problem for the class action is its connection to process-based values, such as legitimacy and respect for the dignity of individual litigants. Any normative account of adequate representation, therefore, must explain how representation can substitute for a personal day in court and satisfy process-based values.").

142. I recognize that the concepts of "democracy" and "due process," while related, are distinct. Each covers a vast territory and a full discussion of how either idea relates to class actions could fill many articles. For the sake of simplicity and economy of space, this discussion deals with them in a relatively summary discussion that cannot hope to completely do these concepts justice. However, a complete treatment of these topics is not necessary to comprehend the basic arguments in this Part with respect to either.

143. *See* Redish & Larsen, *supra* note 68, at 1574.

validate the intrinsic dignity and respect of individuals,[144] to enhance the legitimacy of governmental involvement in a dispute,[145] to improve the instrumental ends of the law,[146] and to provide means for educating and informing those affected by decisions about a dispute and its remedy.[147] Autonomy and self-determination with respect to one's legal rights are in turn understood to be manifest through the ability to make decisions about the dispositions of those rights.[148] As Professors Redish and Larsen have argued, the ability to make such decisions is presumably protected by the Constitution's Due Process Clauses,[149] which have been construed to mean that an individual's legal rights cannot be adjudicated without giving that person the ability to participate by way of having a day in court.[150]

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144. *See, e.g.*, Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV., 965, 968 (1993) [hereinafter *Allure*]; Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 271 (1991) [hereinafter *Conceiving*].

145. *Cf.* Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 996 (1993) [hereinafter *Promise*].

146. *See e.g.*, Fiss, *Allure, supra* note 144, at 965; *Conceiving, supra* note 144, at 271. Professor Farina suggests that participation by individuals in an interactive exchange with the court in which "knowledge, desires and values are created" serves both instrumental and intrinsic values because "[i]f knowledge is situated in context and contingent upon perspective, then a decisionmaker cannot learn to use her power wisely unless she listens to those who are affected by her decisions." *Id.*

147. *Cf.* Sturm, *Promise, supra* note 145, at 997.

148. *See id.* at 1581 ("At its definitional core, democratic theory is grounded in a societal commitment to the notion of self-determination.").

149. *See* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

150. *See* Redish and Larsen, *supra* note 68, at 1573 ("Because the Constitution's Due Process Clauses are generally construed to assure that an individual's legally protected rights cannot be adjudicated without providing her with a day in court, there would seem to exist at least a prima facie conflict between the dictates of procedural due process and the collectivist goals of the class action procedure."); Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 10–7, at 666–67 (2d ed. 1988) (distinguishing instrumental from intrinsic values of participation and associating the latter with respect for persons); Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1893–94 (anchoring the day-in-court ideal in a process-based theory of democratic legitimacy); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275–84 (2004) (arguing that "a right of participation is essential for the legitimacy of a final and binding civil proceeding," *id.* at 275). It is also worth noting that the Supreme Court has indicated on occasion that procedural due process protects process-based — not just outcome-based — values. *See, e.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Carey v. Piphus, 435 U.S. 247, 261–62 (1978); *see also* Steven T.O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480 (1998) (arguing that non-opt out class actions are violations of due process rights).

Thus, the basis of the Due Process guarantees are rooted in the centrality of autonomy rights to democratic theory.[151]

Even if one accepts that autonomy is important, however, it does not follow that autonomy can never be limited or curtailed when justifications exist for doing so, and procedural protection are put into place. In class actions, both justifications and procedural protections are advanced to rationalize depriving plaintiffs of the usual right to participate in the adjudication of their claims. The justification part of the rationale for plaintiff disenfranchisement in class actions (and by association other types of aggregate litigation) is the lack of a viable alternative model.[152] There are many important reasons to provide a viable route for mass litigation, including providing compensation to victims and creating deterrents against widespread harms.[153] But doing so has been assumed to require minimizing the importance of autonomy when dealing with groups.[154] As it has been described in the context of mass tort class actions, "the choice is not so much between two workable models [of mass litigation] as between

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151. For an explanation of how autonomy forms a central part of the due process calculus in a class action, *see* Redish and Larsen *supra* note 68, at 1578 ("It is, ultimately, the interest in self-determination and individual control that must stand, at the very least, as the presumptive normative foundation of procedural due process."); *see also id.* at 1582 ("The procedural due process guarantee is appropriately viewed as a constitutional outgrowth of democracy's normative commitment to such process-based political autonomy."). For a more general discussion of liberal political theory's commitment to individual autonomy, see generally Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753 (2007).

152. *See* Shapiro, *The Class, supra* note 32, at 933–34 ("A related point bears on the question of individual choice and autonomy. Limits not only on individual resources, but on public resources as well may mean that the possibility of litigation by each victim of a mass tort, leading to a reasonably prompt disposition of each such case, represents more a dream than a reality for many members of the class."); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (*quoting* Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'"); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 809 (1985)

153. *See* William B. Rubenstein, *Why Enable Litigation: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709 (2005); William B. Rubenstein, *On What a Private Attorney General Is — and Why It Matters*, 57 VAND. L. REV. 2127 (2004); Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517 (2008).

154. *See, e.g.*, ROBERT M. COVER, OWEN FISS & JUDITH RESNIK, PROCEDURE viii (1988) (questioning the sensibility of "traditions of individuality and autonomy" that shape how we understand parties to legal disputes "in a world full of injuries suffered by groups — users of desecrated environments, consumers of illegally priced goods, patients confined to hospitals that provide no care").

a model that offers some hope of a reasonably prompt and fair disposition and one that does not."[155]

However, as the examples in this Part illustrate, another workable model is now possible. Participatory online endeavors provide possible means for both enhancing democracy and allowing for engagement of different points along the spectrum between the individual and the entity, even where very large and dispersed groups of people are concerned. Examples of such endeavors illustrate how even when dealing with large numbers, procedures could be better aligned with the ideal of participation and the self-determination value it is meant to vindicate.[156]

With regard to the procedural rationales behind class actions, most explanations focus on the role of the class representative and, in some instances, the ability of plaintiffs to opt out.[157] The prevailing theories rationalizing representative litigation conclude that adequate representation of class members — and full litigation of their claims — is sufficient to bind the class to a judgment and preclude future litigation.[158] While there is no consensus as to the correct theoretical justification,[159] a great deal of energy has been devoted to formulating the precise rationale or why this is so, and scholars differ as to what it should be. To summarize briefly, some proceduralists take an outcome-focused view: that preclusion is appropriate because the representative can fairly address absent class members' interests and thereby ensure a socially optimal outcome for all of them.[160] Others take a more process-oriented view: that the legitimacy of adjudicative outcomes stems from the ability to adequately participate in the process and that the preclusive effect stems from the representative's interests being so closely aligned with the represented parties

155. *Id.* at 934.

156. *Cf.* Sturm, *Promise*, *supra* note 145, at 998 (making a parallel point in the context of structural injunctions that "a central challenge confronting theorists and practitioners [is] how to recognize and respect the dignity and diversity of individual group members and yet acknowledge commonalities in perspective, status, and interests. Most process theorists treat autonomy and dignity as pertaining solely to the individual. When individuals are defined in relation to groups, autonomy concerns disappear. This analysis distorts the nature of the relationship between individuals and groups and the role of group membership in defining and preserving individuals' autonomy and sense of self.").

157. *See, e.g.*, Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 288–90 (2003).

158. *See* Bone, *supra* note 9, at 203–18 (exploring the tension between the day-in-court right and the theory of virtual representation, and discussing various attempts to justify the tension).

159. *See* Bone, *Puzzling Idea*, *supra* note 75, at 624.

160. *See* Bone, *supra* note 9, at 216–18.

that his or her participation satisfies this value as if those parties were present themselves.[161] Others take a hybrid approach, arguing that the procedure is designed to satisfy both outcome-focused and procedural values where and when it can.[162]

These explanations each suffer from similar flaws. The outcome-based view is problematic for a few reasons. First, because class action outcomes are ultimately negotiated in most cases and rarely litigated, and because the representative is rarely very involved in those negotiations, it is difficult to see how their participation could ensure the best outcome. Second, the "correctness" of an outcome has subjective as well as objective components, and it can be difficult to say with certainty that the correct outcome is reached without asking those affected by it. Even if one assumes that an objectively optimal outcome can be determined (for example, by reference to monetary distribution), whether or not an optimal outcome is reached is an empirical question, the answer to which cannot be assumed. Moreover, it has been suggested as an empirical matter that, even assuming a faithful representative, litigants get better outcomes outside of the class action than they would in representative litigation.[163]

The process-based view also is also questionable because the representative does not usually participate in the negotiations that constitute the majority of the process in class litigation. In addition, even if the representative does participate, it is questionable that any representative's interest would be so closely aligned with those of other class members as to be an effective substitute for them. The interests of the representative may diverge with those of class members because of simple divergence of preferences with respect to various approaches and decisions to be taken. This has been observed and documented in a number of instances.[164] Since negotiated settlement, and not legal adjudication, often determines the outcome of the action, simply possessing similar legal entitlements is not sufficient to presume similarity of interests in the action. Moreover, in the course of an action, internal divergence may appear between members of the class that are difficult for a representative to adequately

161. *See id.*

162. *See id.*

163. *See* Coffee, *supra* note 92, at 407 (discussing a recent study of securities class actions in which the largest institutional shareholders were chosen as class representatives).

164. *See, e.g.*, Tamara Relis, *It's Not About the Money: A Theory of Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 701–04 (2006). .

speak to.[165] The hybrid explanations are vulnerable to critiques of both outcome- and process- based explanations.

All of these explanations also depart fundamentally from typical democratic methods by which representatives are selected. Instead of any sort of choice by those whose rights will be determined, as is the typical democratic paradigm, the representative in class actions is chosen and constrained paternalistically by the court and class counsel. The right to opt out of an action, which exists for class members in Rule 23(b)(3) class action where monetary damages are sought, is sometimes seen as remedying this problem. If a class member does not like the representative or any of the choices being made on his or her behalf, he or she has the option to leave the suit. However, opting out is an extreme substitute for basic democratic mechanisms such as being able to interface with or choose a representative, voice one' own concerns, or have one's lawyers take one's interests seriously in a settlement negotiation. The existing level of choice stands in tension with democratic ideals as well as the principles that underlie most types of litigation.[166]

Moreover, the existence of the various rationalizations for representative litigation is noteworthy in the sense that they demonstrate the discomfort with the procedural treatment of individual class members and struggle to explain how this treatment is consistent with the court system's underlying values. The different explanations for why existing procedure adequately protects due process rights effectively collapse back into the justification for having representative litigation in the first place: the lack of a viable alternative. But if the

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165. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (decertifying a settlement class under Rule 23(b)(3) on the grounds that certain members of the class — future claimants — had inherently different interests than present claimants and therefore could not form part of the same class nor be represented by the same counsel).

166. *See* Redish and Larsen, *supra* note 68, at 1574 ("No one could reasonably doubt this autonomy principle in the political realm: Government may not paternalistically choose a candidate to support on behalf of a citizen; nor may it determine for an individual what he will and will not say on behalf of his political positions. Governmentally imposed paternalism should be no less acceptable when it comes to the individual's ability to resort to the judicial process in order to protect his interests."). *But see* Bone, *Puzzling Idea, supra* note 75, at 624 ("[T]he day-in-court right is best understood as a right to control litigation insofar as relevant institutional considerations support personal control. It is a right insofar as it resists or constrains reasons for limiting control that sound exclusively in improving aggregate welfare or achieving collective social goals. But it does not guarantee a zone of relatively unfettered freedom. Litigation is not a field where adversaries engage in unrestrained combat. Litigation is the way adjudication accomplishes its goals, and the public goals of adjudication shape the procedural rights litigants possess.").

fundamental explanation is, "this is the best we can do," then it stands to reason that we should push the boundaries of what our "best" is.

In addition, the larger the number of people involved in a litigation, the more that even "private" litigation becomes effectively like public litigation. The court's decisions affect more than just the litigants before the court; societal norms are implicated, and societal buy-in may be needed to ensure compliance with the result. The court's decisions come to resemble something akin to legislative or regulatory processes of the type that usually involve opportunities for input from the public.[167] Moreover, since trial is rare in large class actions, the usual process for obtaining public input — the jury — is absent. Although trials and juries are rarely seen in class actions, it is no less true that "many legal norms need community input for the decisions applying them to be accepted by that community. Issues such as negligence, intentional discrimination, material breach of contract, and unfair competition are not facts capable of scientific demonstration. Nor are these issues pure questions of law."[168] This is particularly true when class actions involve such large classes of plaintiffs that they have repercussions for society as a whole. For this reason, there have been a number of calls for an expanded approach to democratic participation in mass litigation.[169]

An argument can be made that allowing greater participation would make no practical difference with respect to litigants' autonomy because class members do not and would not exercise any real control in litigation anyway. Nonetheless, whether individuals use a right or not is not relevant to whether the right exists or whether avenues for pursuing it should be provided.[170] The values that underlie our democratic system militate that any possibility of enhancing

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167. *See* Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICHIGAN LAW REVIEW 899, 899–910 (1996).

168. Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011).

169. Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 511–20 (2013); Judith Resnik, *Compared to What?*, 79 GEO. WASH. L. REV. 628, 636, 693–95 (2011.

170. MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 143 (2009) ("It might be argued that the concern with the need to preserve litigant autonomy is greatly overdone, because as a practical matter a litigant will influence day-to-day strategic litigation choices, at most, only rarely. Instead, it is the litigant's chosen representative, far more than the litigant herself, who makes such decisions. Thus, the argument might proceed, to take those choices away from the litigant would actually undermine litigant autonomy very little. While of course there is much practical truth in the insight, it would be a serious mistake, from the perspective of liberal democratic thought, to glean from the

individual participation, while maintaining the workability of the system, should be implemented. Moreover, with trial becoming a rare species, greater participation restores a democratic feature of the system that the absence of trial removes — the input of the community in the shaping of legal norms and rules.[171]

2. *Procedural Justice*

Procedural justice concerns also suggest that incorporating more participatory framework into class processes is warranted. Procedural justice research examines litigants' preferences regarding system design, including what features produce greater satisfaction and greater durability in outcomes, as well as what characteristics lead to greater legitimacy of the system.[172] This research suggests that, in an adjudication context, litigants experience more satisfying and durable outcomes under primarily three conditions, none of which turn on the actual outcome but instead on what process was followed: (1) where a matter is decided in an adversary system involving an impartial third party decision-maker constrained by mechanisms for error correction, such as appellate review and new trials; (2) either established and consistent court rules applied equally to all participants or the opportunity to participate in designing dispute resolution procedures themselves; and (3) the opportunity to be heard and to participate in the adjudicatory or deliberation process.[173] Concern

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absence of such direct litigant involvement in strategic decision making a finding that the values of individual autonomy embodied in the due process clause are therefore irrelevant in the context of litigation control.").

171. *See* Burbank & Subrin, *supra* note 168, at 400 ("[T]he citizenry at large, acting through jury representatives, decides what the community deems acceptable. In addition, a public trial reminds the decision maker — judge or jury — that the lives of real human beings may be deeply affected by the decision.").

172. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); *see also* Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 889–90 (1997); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y Rev. 513, 517 (2003).

173. *See* LIND & TYLER, *supra* note 172, at v ("Although winners were more satisfied with their experiences than losers, the litigants' satisfaction with their experiences had less to do with actual case outcomes, costs, and delay than with how the litigants' experiences with the system compared with their expectations."); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 306 (1996) ("[T]ort litigants share judicial and legal theorists' beliefs that process matters."); Tom R. Tyler & E. Allan Lind, *Procedural Justice, in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 68 (Joseph Sanders & V. Lee Hamilton eds., 2001) ("While lawyers and judges often think that people's reactions to their experiences are driven by whether or not

for procedural justice is in part what animates the idea that each individual should have his or her own day-in-court — a right that has been found to be present even alongside the availability of representative adjudication.[174]

To be sure, the class action is an adjudicative process subject to error correction; however, as previously noted, it seldom bears out all of the features of adjudication, ending more often in negotiated settlement than in decisions on the law and facts.[175] This weakens the traditional procedural justice benefits of trial by removing the third-party decision maker from much of the process and diminishing the impact of court rules.[176] Thus, procedural justice requires a greater emphasis on those other procedural components that confer satisfaction on the parties: greater participation, the ability to be heard, and the opportunity to take part in designing the process themselves.

One objection to this line of reasoning is that having control in a class action does not matter much to plaintiffs, since in most types of litigation the plaintiff has little control over the process and in fact would rather delegate most responsibility to the lawyers.[177] Procedural justice is highly context dependent, and disputants' expectations

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they 'win' their case, that position is not supported by empirical research on disputing."); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 69–70 (1984). For a helpful summary and discussion of procedural justice research, see Burch, *supra* note 35, at 29–43.

174. *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (citing the deep-rooted day-in-court right tradition as the basis for the broad rule against nonparty preclusion); Richards v. Jefferson Cnty., Ala., 517 U.S. 793, 798 (1996) (stating that, as a result of the historic day-in-court right, a judgment among parties does not generally bind strangers to the lawsuit); Martin v. Wilks, 490 U.S. 755, 761–62 (1989) (recognizing that the day-in-court right is ingrained in the Court's preclusion jurisprudence).

175. *See* Rubenstein, *Transaction Model*, *supra* note 21, at 371–77; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004); *see also* Burbank & Subrin, *supra* note 168, at 399–402 (noting the decline in trials).

176. *See* Burbank & Subrin, *supra* note 168, at 401 ("Without the realistic possibility of a trial, settlements in large measure reflect and discount the costs of discovery and trial. As a result, some plaintiffs receive less than the value of their cases if tried on the merits, while some defendants settle non-meritorious cases in order to avoid transaction costs.").

177. *See* Bone, *Puzzling Idea*, *supra* note 75, at 602, 617 ("Parties, after all, seldom exercise much personal control over litigation and glean little satisfaction from adversarial participation for its own sake, independent of outcome . . . More generally, there is no sharp distinction between being a party with little actual control and being an absentee with none. As the amount of a party's control diminishes, it becomes increasingly difficult to distinguish a party from a nonparty as far as process-based participation is concerned. Indeed, a party with vanishingly little control is not in a significantly different normative position than an absentee with no control at all.").

of what sort of process they should be afforded plays a large role in their satisfaction. The reasoning is that if the parties do not expect a great deal of control, then an absence of control will not affect their perception of the process or the outcome.

A problem with this argument is that it assumes static expectations on the part of disputants. As already noted, changes in what is possible in the context of litigation have already been seen, and there is no reason to expect parties' perception of their role in mass litigation to remain detached from the realities of what is possible. The historical practice of denying individuals a participation right, when participation is easily possible, is likely to appear less legitimate over time.

It could be argued that the level of participation needed to satisfy procedural justice concerns can be far less involved than having one's full day in court.[178] This paper does not suggest that participation must be calibrated precisely to a certain level that would satisfy a procedural justice interest, since finding the correct level of participation an individual would need to feel satisfied ultimately requires empirical analysis and would vary depending on circumstances. Nor does this analysis contend that individuals need a comprehensive participation right in every element of the dispute resolution process. However, the "correct" amount of control and participation can be approximated by disputants' reactions when it is absent. The Honda and McDonald's examples above illustrate how class members can become angry when disenfranchised from participation in decisions involving them. This is true even when, as in the McDonald's example, the class members had no reasonable expectation of receiving any individual payouts for their claims because of the large numbers of potential claimants and the difficulties of providing receipts or other proof of claims. Despite the lack of any real pecuniary interest, many class members demonstrated a strong desire to influence how the settlement monies were spent.

For these reasons, the procedural justice argument presses for allowing a greater degree of participation, as far as can be accomplished with available technology, as opposed to maintaining a status quo that is based on older ideas of what is possible. Procedural justice may have been satisfied to a degree when the system was doing the best it could and potential claimants had little or no knowledge of the

178. *See id.* at 602 ("To be sure, the procedural justice literature shows that losing parties feel better about the process and the result when they have a chance to participate, but the level of participation that produces these positive psychological effects falls far short of the robust control guaranteed by a broad day-in-court right.").

process or expectation of participating in it. However, when it could clearly do more, the system risks undermining itself by failing to find ways to do so.

3. *Inevitability*

One final reason for re-thinking class actions is the fact that, absent any proactive effort to accommodate social networking technology in the litigation system, such technology will continue to insinuate itself in ways that may thwart the goals of existing processes. The examples discussed in this Part demonstrate how this could occur. The Honda and McDonald's examples demonstrate how social media can force judges and parties to the litigation to deal with other interested parties. The AT&T and Bank of America examples illustrate how large groups of aggrieved individuals can wield decisive influence in a dispute, whether or not the dispute is tethered to legal claims. The type of sentiment seen in those examples can easily be inflamed if interested individuals are kept out of the process. In the context of a legal claim, it is easy to imagine how excluding large numbers of plaintiffs (and potentially others) from any formal role in a dispute resolution process could effectively undermine that process by encouraging online mobilization aimed at influencing the defendants or the court or both. Outside of legal claims, it is easy to see how large groups could become like vigilantes, overtaking the traditional role of the courts in enforcing their view of social norms. Courts can no longer ignore the impact of technology-mediated communication on collective dispute processes. Although the legal system is traditionally slow to respond to change and maintains a norm of incremental, backward looking change, by refusing to take an active role in shaping how social media will impact litigation, the system would be passing up an opportunity to shape the use of technology in ways that would help achieve its ends. By taking a wait-and-see approach, the court system risks allowing itself to be carried away by the currents of technology and losing the ability to keep control of its processes.

IV. Class Actions, Mass Disputes, and Systems Design

In the social networking space, collectivization need not be inconsistent with the promotion of individual interests or the fulfillment of democratic and procedural values. But even if one is persuaded of the importance of incorporating new means of participation and more expansive concepts of groups into class action procedures, many questions remain about how to accomplish this. While it would be difficult to address every question in the scope of this article, I nonetheless

attempt to provide a basic framework for procedural reforms that would begin to address the issues raised by technological innovation. In the effort to formulate prescriptions, the study of DSD is particularly useful. Practitioners and scholars of what has become known as DSD offer guidance for how disputing processes can be successfully employed to preserve individual voice while simultaneously recognizing group interests. These experiences are increasingly shaping the practice of mass dispute resolution processes, including class actions. These processes have begun to demonstrate the potential for procedure to account for "individuals within [an] aggregate"[179] and different subgroups of common interest within a class.

Moving from a model where the class is an entity governed by outside surrogates to one that recognizes a spectrum between the entity and individual would require reforms along a number of dimensions. First, given that groups of disputants can sometimes form on their own and resolve their disputes without court involvement, the boundaries for judicial aggregation in mass disputes would have to be re-considered. Practically speaking, this would mean re-thinking the threshold requirements for class certification. Second, if judicial aggregation is warranted a new balance between representation and individual expression needs to be found. This would need to include protocols for how to identify the individuals eligible to participate, to what extent they should be involved, and whether such participation would be restricted to formal court-controlled channels or if informal actions would be sanctioned. This would also include new ways of engaging large groups of claimants with their counsel. In that regard, any procedure would need to retain appropriate incentives for counsel to act on behalf of groups of plaintiffs. Third, allowing large-scale participation would magnify the effects of intra-class conflict, a secondary dimension of conflict beyond the dispute with the defendant, that would need to be managed.

These changes would involve some reform of the structure of Rule 23 itself, but Rule changes alone would likely not be adequate to address various types of circumstances that could arise. Instead, a more effective process would entail an explicit recognition of the court's power to engage in the kind of "managerial judging" that already takes place, but with certain procedural norms and boundaries built in. This would allow courts to create ad hoc solutions with prescribed baselines. Additionally, any Rule changes would need to include an overarching recognition that different sizes of class can and

179. Burch, *supra* note 35, at 15.

should be handled differently. Finally, it would include a subsidy for would-be defendants to employ monitoring and self-correction mechanisms. Each of these dimensions is discussed below.

A. *DSD and Application to Mass Disputes*

For readers unfamiliar with DSD, a brief survey of the field and its literature may be useful. DSD has its roots in the alternative dispute resolution movement, drawing from a diverse set of disciplines and seeking to provide a framework for designing conflict management systems that "cut the cost of conflict."[180] Its origins stem from early work on multi-door courthouses,[181] and resolution of systemic disputes in the context of labor relations. This literature grew to encompass the study of systemic conflicts in organizations generally,[182] including the idea of looking for patterns in repetitive disputes to determine and fix their "root cause." This research grew to embrace new thinking about how public institutions[183] and international organizations[184] could devise systems to handle widespread systemic problems. Related branches of research and practice began to emerge

180. *See* WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988). Measuring the "cost of conflict" and any reduction is, of course, incredibly difficult and methods are open to interpretation. As the literature claims, however, structuring a dispute resolution system in certain ways can reduce the recidivism of conflict and lead to greater satisfaction for all parties involved, thus reducing the overall social costs. *Id.*

181. *See, e.g.*, Frank EA Sander, *The Multi-Door Courthouse*, 3 BARRISTER 18 (1976).

182. *See, e.g.*, CATHY A. COSTANTINO, CHRISTINA SICKLES-MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996); Cathy A. Costantino, *Second Generation Organizational Conflict Management Systems Design: A Practitioner's Perspective on Emerging Issues*, 14 HARV. NEGOT. L. REV. 81 (2009).

183. *See, e.g.*, Cathy A. Costantino, *Can Private Parties "Get to the Government?" Advice for Using ADR with Federal Agencies*, 11 ALTS. TO HIGH COST LITIG. 135 (1993); Andrea Kupfer Schneider & Natalie C. Fleury, *There's No Place Like Home: Applying Dispute Systems Design Theory to Create a Foreclosure Mediation System*, 11 NEV. L.J. 368 (2010).

184. *See, e.g.*, Andrea Kupfer Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587 (1998); Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697 (1999).

concerning the resolution of public disputes[185] and consensus building,[186] while research developed on resolving disputes using technology and over the Internet.[187] At the same time that the study of organizational and public conflict resolution systems was developing, mass litigation and the problems associated with it led to a significant amount of experimentation and scholarly study of novel mass dispute resolution systems. In a number of high profile class action lawsuits, judges worked with dispute resolution experts to create more individualized ways of processing claims.[188] This in turn led to the development of fund-based compensation schemes for mass tort situations, operating completely outside the court system.[189] Each of these systems offered alternative ways to deal with large number of potential claimants with less involvement by the courts than traditional processes, but still used the "shadow of law"[190] to varying degrees as impetus and guidance. Taken together, these experiments and the research they spawned led to an emerging field of study of the design of novel dispute resolution systems to help courts and organization alike cope with disputes for which they were not equipped. The research coming out of these experiences provides a framework

185. *See, e.g.*, Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2004).

186. *See, e.g.*, Cathy A. Costantino, *Managing Facilitation and Consensus-Building Processes: Forget the Discipline and Break the Rules*, 23 NEGOT. J. 193 (2007); Jacqueline Nolan-Haley et al., *Panel Discussion: Problem-Solving Mechanisms to Achieve Consensus: How Do We Ensure Successful Resolution?*, 35 FORDHAM URB. L.J. 205 (2008); Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002).

187. *See, e.g.*, Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, 12 UCLA J.L. & TECH. 1 (2008).

188. *See, e.g.*, Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999); Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121 (2002); Kenneth R. Feinberg, *Response to Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1647 (1995); Deborah R. Hensler, *Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995); Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Relfections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513 (1997); *see also* CPR INSTITUTE, MASS CLAIMS RESOLUTION FACILITIES (2012).

189. *See, e.g.*, Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1366–67 (2005) (discussing the different types and characteristics of claims facilities in mass tort cases, and the various authorities and contexts that create them).

190. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

for diagnosing problems with the structure of aggregate dispute resolution processes and offers some lessons drawn from experience implementing such structures. The types of problems that dispute systems have addressed bear similarities to the types of Internet-based disputes discussed in the preceding Part, in the sense that they have frequently involved large numbers of people with diverse sets of interests seeking to address a common dispute. In doing so, DSD processes have treated large groups of disputants in more nuanced ways than the class action's historical entity model. Thus DSD provides a number of ways to think about democratizing mass disputes and improving the structure of class actions with respect to a number of issues.

1. *Identifying and Certifying Classes*

The first issue to consider is when class treatment is appropriate, or, more generally, when court involvement is required for collectivization of claims in mass disputes. Relatedly, identifying the contours and membership of the class becomes more complex the more individuals become involved. The existing standard for deciding when class treatment is appropriate is descriptive, based largely on the characteristics of the group and the effects an adjudication would have on them. The criteria for certification seek to determine whether plaintiffs and the legal issues giving rise to their claims are similar enough to warrant adjudication in one proceeding. Providing for more plaintiff autonomy would effectively add an intent-based standard to the certification calculus.

Prior to a judicial decision to aggregate, giving voice to stakeholders might involve allowing for more stakeholder input to help determine the contours of the class. It would also involve taking into account the independent actions of groups to bring resolution to a dispute. This means that if an action is brought and class treatment is requested, a court would need to consider whether or not groups have already formed and begun action with respect to the underlying dispute, as well as whether the dispute could be effectively resolved without court involvement.

Putative class members could be canvassed, surveyed, or "crowdsourced" for information that could be useful to a court in determining class cohesiveness. An example of where such an approach could be useful can be found in the Supreme Court's *Dukes* decision, where it mentions in *dicta* that anecdotal evidence in sufficient quantities

could have aided in the determination commonality. A similar process could be used to refine classes into subclasses sharing more common issues. Solicitations for plaintiff support could include methods for comments and requests for certain types of redress; they could also allow better sorting into classes that actually share common complaints.

Recognizing individuality also would involve allowing earlier and more frequent opportunities to decide whether or not to be included in the class. Although existing procedure contains opt-out rights, the ability to exercise those rights often come once the decision on certification is made. As discussed further below, the certification decision creates a significant shift in the power dynamic of the action, and individuals may want to weigh in earlier.

A court weighing certification would also need to consider how technology changes the bargaining dynamics between parties in the dispute. One effect of Rule 23's claim aggregation mechanism is to correct a power imbalance caused by resource disparities between defendants who are often large, wealthy, and well organized, and plaintiffs who are traditionally diffuse, and whose claims are too small to incentivize individual legal action. Resource disparities inevitably influence outcomes in the civil adjudication system, by both limiting entry into the system and determining success once there.[191] Aggregation helps to neutralize resource and thus bargaining power disparities by leveraging economies of scale and providing lawyers with appropriate incentives for adjudication of the legal rights of the class to be conducted.

However, if putative class members plaintiffs collectivize and leverage power on their own (for example, by threatening the reputation of the company, attracting regulatory attention, or influencing stock price), then allowing aggregation in a litigation process would confer a double subsidy, shifting bargaining power potentially too far

191. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); *see also* Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 LAW & SOC. INQUIRY 497 (1996); Paul Brace & Melinda Gann Hall, *"Haves" Versus "Have Nots" in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases*, 35 LAW & SOC'Y REV. 393 (2001); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000) (describing the advantage corporate plaintiffs attain through the ability to hire better quality legal services). *But see* Donald Songer, Ashlyn Kuersten & Erin Kaheny, *Why the "Haves" Don't Always Come Out Ahead: Repeat Players Meet Amici Curiae for the Disadvantaged*, 53 POL. RES. Q. 537 (2000) (discussing situations in which the traditional power dynamic is not necessarily outcome determinative, due to intervention by external parties).

in their favor. In that event, the judge would need to consider whether he or she could help to broker a resolution without needing to certify a class.

Shifting power dynamics between putative plaintiffs and defendants might also mean a different analysis of the superiority requirement for certification under Rule 23(b)(3) actions where monetary damages are sought.[192] The superiority analysis requires that proceeding as a class be superior to other available methods of dispute resolution. The purpose of the requirement is to protect autonomy and due process by ensuring that aggregation is truly the fairest and most efficient way necessary to the disposition of the legal claims at stake, lest due process be violated.[193] It could be argued that collective action via the Internet is a superior process to court-based aggregation, in that is faster, more efficient, and potentially lead to better outcomes. A superiority inquiry, as it currently exists, could be aided by input from potential class members about their interests in an individualized versus aggregate proceeding. Moreover, if class actions are changed to provide for greater autonomy and better serve due process, the calculation of what sorts of processes are actually "superior" may need to change, at least to the extent that due process and autonomy are weighed. Ad hoc collective actions may be effective, but they also have the potential to drown out minority voices and provide little protection for the rights of would-be defendants. Those concerns would need to be accounted for in the certification decision.

One risk of a more democratized approach to certification is its potential to limit the use of class actions even further than they have been by recent legal developments, because it would make certification more difficult or the actions themselves overly cumbersome to administer. Such a curtailment would be a poor result because, for many types of widespread harms, lawyer involvement is necessary to identify the wrong, develop evidence, and put plaintiffs on notice.

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192. The factors to be considered when deciding on superiority include
(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action. FED. R. CIV. P. 23(b)(3). *See also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615–16 (1997).

193. *See* Voigt, *supra* note 127, at 626–36. (arguing that "superiority" should be weighed against any existing process, not only judicial ones, as the requirement was meant to ensure fairness and efficiency); *accord* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1779 (3d ed. 2005).

However, in an age in which complainants can bring what are essentially "negative value" disputes without court assistance, it is reasonable to require that class lawsuits have at least some support from members of the class. This is not to propose an all "opt-in" mechanism for class actions.[194] A system could incorporate a threshold level of involvement, or simply canvas a sample of the putative class to understand their preferences on aggregation.[195]

2. *Means of Engaging Different Types of Groups — A Public Dispute Model*

Whether or not an action is granted certification as a formal class action, a set of procedures would need to be developed to engage stakeholders in large-scale litigation. The groundwork for a possible system is already in place, as evinced by how disputants are using new media technology. What began spontaneously on the Internet can be channeled using processes developed in systems for voting, deliberative democracy, management of public disputes, and efforts to use Internet technology to engage the public in regulatory decisions.

Instead of prescribing one process for every interaction with plaintiffs, a range of processes would exist to capture different sizes of class, different subgroups, and different levels of class member engagement. Such systems would also make thoughtful attempts to engage and educate those who would otherwise not know or care about the process. The basic contours of how these processes might work are described below.

a. *Dialogic processes and hearings*

On one end of the participatory spectrum, deliberative forums, hearings and town-hall type meetings could be available online for claimants who have particularly strong desires to participate. Processes used in regulatory negotiations, particularly the emerging system, dubbed "Regulation 2.0," are instructive starting points for developing new processes for allowing more participation and autonomy in mass litigation.[196] Regulation 2.0 attempts to harness social

194. However, an opt-in system has been proposed in some countries. Italy, for example, has adopted such a system. *See* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 202 (2009).

195. For example, a threshold could be determined using statistical methods, such as those that have been advocated (and used) in addressing issues of damages. Once a particular threshold is reached, an opt-out regime could again prevail.

196. *See generally* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382,

media for eliciting the interests of stakeholders in administrative rulemaking proceedings from a wider audience than typically gets involved.[197] Such endeavors provide particularly apt comparisons for the class action context because of some of the shared characteristics of the regulatory process and class litigation — in particular, each involves problems that affect a large number of stakeholders and have a large number of stakeholder interests that should ideally be accommodated in the resolution process.[198] Experiments engaging online groups in rulemaking have admittedly met with mixed results.[199] Some of the problems faced have included lack of participation,[200] lack of informed decision-making, and poor quality of

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382–83 (2011) [hereinafter *Rulemaking in 140 Characters or Less*] ("Web 2.0 technologies and methods seem well suited to overcoming one of the principal barriers to broader, better public participation in rulemaking: unawareness that a rulemaking of interest is going on."); *see also* Cynthia R. Farina, *Achieving the Potential: The Future of Federal E-Rulemaking (2009)*, 62 ADM. LAW REV. 279 (2010).

197. *See generally* Farina et al., *Rulemaking in 140 Characters or Less, supra* note 196; Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 1001 (2010). For a general discussion of the history of online rulemaking efforts, see Beth Simone Noveck, *The Future of Citizen Participation in the Electronic State*, 1 J.L. & POL'Y FOR INFO. SOC'Y 1 (2005); CARY COGLIANESE, E-RULEMAKING: INFORMATION TECHNOLOGY AND REGULATORY POLICY: NEW DIRECTIONS IN DIGITAL GOVERNMENT RESEARCH 15–18, 51–58 (REGULATORY POLICY PROGRAM, REPORT NO. RPP-05, 2004), http://www.hks.harvard.edu/m-rcbg/rpp/erulemaking/papers_reports/E_Rulemaking_Report2004.pdf; COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 21–22 (2008), https://public.resource.org/change.gov/ceri-report-web-version.fixed.pdf. *See also* E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended in scattered sections of 5, 10, 13, 31, 40, 44 U.S.C.). The Act required agencies to accept comments by electronic means and to make available online public submissions and other materials. *Id.*

198. *Cf.* Nagareda, *supra* note 67 (comparing class actions to a form of administrative process).

199. *See* Farina et al., *Rulemaking in 140 Characters or Less, supra* note 196, at 382–90.

200. *See id.* at 382–90. For a general discussion of the problems with Internet-based attempts to enhance participation in the rulemaking context, see Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J., 893, 924–25 (2006) ("[Increased public] participation may correlate to political mobilization, so an agency might bend to the participants' wishes even if it did not believe that they represented the median American"); Bill Funk, *The Public Needs a Voice in Policy. But Is Involving the Public in Rulemaking a Workable Idea?*, CPRBLOG (Apr. 13, 2010), http://www.progressivereform.org/CPRBlog.cfm?idBlog=F74D5F86-B44E-2CBB-ED150 7624B63809E ("The notice-and-comment procedure of rulemaking isn't supposed to be a political exercise."); Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV'T 41, 43–46 (2006) (arguing that "e-mail and cyberspace" do not necessarily foster "widespread, technologically-driven transformation of passive citizens into thoughtful, deliberative, and engaged actors" and describing the "brain-numbing quantity of duplicative e-mails.").

comments.[201] However, those experiments have also yielded successes, as well as valuable lessons for making systems of social network participation more effective.

Experiments in the regulatory space, as well as work done on deliberative democracy, consensus building, and resolving public disputes through inclusive multilateral dialogue, are instructive here.[202] These models are useful as the extent that they employ processes designed to build consensus as well as effect bargains.[203] The model could take a number of different forms depending on the size of the groups involved and the scope of the questions. More structured, formal online discussions could be set up for larger more diffuse groups. Less formal discussions could be arranged for smaller classes, or smaller subgroups within a class. Smaller groups could follow pre-set rules or come up with rules of their own for how to proceed and report. In either case, claimants might have a number of avenues for providing comment, ranging from real time chat to tweeting or leaving posts on blog sites. This can be done relatively easily on a computer, on a smartphone, or via text message. Features allowing participants to approve or disapprove of comments left by others would allow more passive and efficient participation by others who do not wish to leave messages of their own. Such mechanisms can be similar to "liking," re-tweeting, or sharing the comment on a Facebook page In addition to providing an easy means for participants to express opinions, approval and disapproval mechanisms help to manage information volume by aggregating people with similar sentiments, and the possibility of being approved provides incentives for individuals inclined to post comments to continue engaging.[204]

Mechanisms for online discussion, commentary, and information dissemination hold potential, but can also present many problems, as anyone who has participated in an online discussion has observed. First, the norms of discussion that would be appropriate in the litigation context differ significantly from the free form, unstructured nature of most online discussion that most participants of a system

201. *See e.g.*, Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 196, at 382–90.

202. *See* Menkel-Meadow, *supra* note 185, at 360–66.

203. *See Id.* at 360; *see also* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999).

204. *Cf.* Farina et al., *Rulemaking in 140 Characters or Less*, supra note 196, at 443–45 (discussing the benefits and drawbacks of approval and rating mechanisms for rulemaking commentary).

would be accustomed to. Online discussions rarely maintain any particular standard of civility, and it is not uncommon to see inflammatory or abusive statements.[205] Such abusive statements can easily beget more abusive statements, causing discussion to spiral out of control. Second, even absent such statements, it is likely that many comments would simply be uninformed. Complex litigation is not an area that people are likely to understand readily, and it would be very easy for comments to follow a race to the bottom resulting in simple bashing of the defendants, the lawyers, or both. Third, approval and disapproval mechanisms could enhance tendencies to simplify comments or post caustic or comments that contain little useful content, but attract praise from others nonetheless. Moreover, mechanisms simplifying participation run the risk of oversimplifying complex and important issues, perhaps even giving participants a false overconfidence in their understanding of them.

Similar problems have been encountered in the rulemaking context, and the lessons that have emerged are highly consistent with practices used in DSD efforts like consensus building and deliberative democracy. One lesson from regulatory experiments is the critical importance of well-trained facilitators to encourage discussion, and assist in the productive discussion.[206] Facilitators can influence the level of discussion enormously in a number of ways. First, they can set explicit norms and ground rules for discussion. It is easy to underestimate the importance of this step, and it is easy to imagine that users of online systems, un-used to such strictures, would find ground rules easy to ignore. However, ground rules play a significant role in creating norms of interaction, even in the Web 2.0 space. They can be recalled and referred to as a standard of behavior when comments become overly agitated, unproductive, or veer off into personal attacks. Second, skilled facilitators can help elevate the level of discussion by asking follow up questions that probe users to think more deeply about their statements, as well as by paraphrasing and reframing less productive comments. This would accomplish several things. Rephrasing, adjusted for the text-based nature of the Web 2.0 space, would help to satisfy participants' basic interest in being heard, which is often an underlying motivation for excessively angry commentary. Paraphrasing and asking follow up questions would

205. *See, e.g., id.* at 446.

206. *See id.* at 438; *see also* Menkel-Meadow, *supra* note 185, at 362 ("The key to such processes is that they are professionally developed and managed to evolve from the needs of the particular parties engaged and so are flexible. Also, once elaborated, these events provide clear rules of process, as well as decision.").

also allow the facilitator to steer the tone and content of the discussion. In regulatory comment rooms for example, participants were found to respond favorably to facilitators' requests to improve their comments, and methods to tame individuals with overly agitated comments usually proved successful.[207]

Facilitators could also share information and correct misunderstandings, perhaps pointing users to documents, tutorials, or online videos when it is clear that comments reflect a poor understanding of substantive issues. They could also provide users with a better understanding the legal background of a case, helping to provide the "shadow of the law" important for users to understand their alternatives.[208] In this way, the facilitator can serve an educative as well as norming function in the discussion. Where approval and disapproval mechanisms are employed, the facilitator can use this information to detect the kinds of comments that resonate with most participants, and analyze where an intervention might be needed to get a discussion back on track. One technique proposed in the regulatory context is to allow facilitators to nudge participants towards better commentary by starring or otherwise publicly approving comments that conform to discussion norms.

While facilitation can be effective at mitigating some of the inherent problems of social networking participation, facilitator effectiveness depends on the person's skill and the appearance of neutrality. These require training, not to mention additional personnel, increasing the amount of resources required to manage mass litigation. Prototype artificial intelligence systems have met with success in preliminary studies using them as facilitators in mediation.[209] Such systems would have the advantage of reducing the resources required to engage classes of plaintiffs, while also potentially appearing more neutral and objective than a human facilitator. However, such systems are unlikely to be in widespread use in the near future. Instead, as further discussed below, the roles of class counsel or the class representative might be reconfigured to take on some or all of this responsibility.

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207. *See, e.g.*, Farina et al., *Rulemaking in 140 Characters or Less*, *supra* note 196, at 446.

208. Mnookin & Kornhauser, *supra* note 190.

209. *See e.g.*, David Allen Larson, *Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator*, 25 OHIO STATE J. DISPUTE RESOLUT. 105 (2010); *see also* Arno R. Lodder & John Zeleznikow, *Artificial Intelligence and Online Dispute Resolution, in* ONLINE DISPUTE RESOLUTION THEORY AND PRACTICE 73 (Mohamed Wahab, et al., eds. 2012), *available at* http://www.mediate.com/pdf/lodder_zeleznikow.pdf.

Regardless of the identity of the facilitator, the desired endpoint of discussions would need to be determined, and the scope of participants' decision making power and input would have to be made clear to them to avoid setting undue expectations. The endpoint could be consensus (whether defined as unanimity, majority or supermajority), but that would not be necessary, and would likely be difficult in many cases. Nonetheless, dialogic processes could yield proposals, recommendations, or suggestions to be voted on, or they could simply be accumulation of information about interests or other characteristics of the class members that would be relevant to the legal claims. In addition, they would allow claimants to express their views, learn about the action, and connect with others. They would also provide courts and counsel with better information about the underlying dispute and class members concerns. Even large and free-ranging discussions with many different tweets, posts, and other indicia of sentiment could be mined for trends and patterns using existing technology. This would result in "crowdsourcing" ideas to assist lawyers and judges in crafting negotiation strategies and proposals. Indeed, technology exists to tap into the sentiment of crowds even outside of the context of an organized forum. This would also provide information about large groups of outliers, indicating the appropriateness of a different subclass or group altogether.

Although deliberative decision-making and consensus building processes have limitations, they have worked outside of litigation and outside of the online world in numerous contexts involving large-scale disputes. For example, such processes have worked to varying degrees for environmental issues, land use problems, strategic planning for government entities, taxation, regulations, inter-group and intra group disputes, and political and religious reconciliations.[210] Well-constructed processes could be beneficial to class litigants as well, by helping them to learn more about the process, giving them spaces to air their grief and frustrations, interact with one another, share stories, sympathize, and feel a greater sense of catharsis.[211]

In addition, such techniques could also be helpful in formulating what types of default choices to offer class members. Inevitably, many members of a class would not engage in meaningful participation. Moreover, there may still be instances where it is important for class counsel and the courts to safeguard class members from eagerly making choices that are objectively bad. Ordinarily, this would mean

210. *See* Menkel-Meadow, *supra* note 185, at 363 (collecting examples of outcomes from consensus-building processes).

211. *See id.*

that when they are presented with choices, pre-selected defaults would be enormously important, as they will tend to influence the choices individuals make.[212] In crafting such defaults, information about the perspective that class members have on the issues would help to craft decisions in appropriate ways.

In the context of such deliberative processes, questions would need to be resolved, the details of which are beyond the scope of this paper. For instance, what kind of decision rule (if any) would be used? Would majority rule suffice? Would it be fair in light of the possibly skewed nature of the participants? Would there be quorum requirements? How would participation be maintained over time? The answers to these questions might vary depending on the size of the class, and the decision to be taken. Some consensus-building processes leave the development of processes and decision rules to the participants themselves, reasoning that such approaches engender greater compliance and buy-in. In large diffuse classes, agreeing on decision rules would prove difficult, and baseline rules would need to be established.

b. *Voting systems and exit*

Because the goal of the system would be to keep the cost of using it low for claimants, simple voting mechanisms would be useful for divining the wishes and preferences of class members, and giving them a means for making decisions. Voting procedures would be particularly useful where classes are extremely large and diffuse, and where baseline engagement levels are low. A voting mechanism for discerning preferences among class members would employ ballots containing a number of different possibilities, regarding, for instance, a material decision such as whether or not to settle and what the settlement would entail. It could also consist of a set of possible needs, wants, desires, or opinions about an action to parse class member sentiment. The user would be asked to rank order his or her preferences or allocate points to indicate importance of various items. Such systems have been useful in encouraging individuals to truthfully reveal their preferences and allowing analysts to discern the strength of sentiment for various preferences.[213] Voting systems have

212. For a discussion of default rules, see Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002); Richard H. Thaler, Cass R. Sunstein & John P. Balz, *Choice Architecture* (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1583509.

213. *See, e.g*, Richard Zeckhauser, *Voting Systems, Honest Preferences and Pareto Optimality*, 67 THE AMERICAN POLITICAL SCIENCE REVIEW 934, 934–40 (1973). Voting

also been shown to increase likelihood of participation when done well, given their relatively low cost for participants.[214]

In addition, a new model of expression would situate exit as one of a number of actions class members could take to express dissatisfaction with a settlement, or any other action taken in the class action process. Class members could be informed of their rights to exit, express an opinion or desire with regard to the suit or settlement in a nuanced way that could be addressed directly rather than indirectly through complete rejection *in toto*, and, if exit indeed became the only option, there would be opportunities to inform other class members of defects and their opt out rights and possibly gather enough people to exit to make alternative litigation viable.

c. *Representatives and class counsel revisited*

Representatives would likely still be useful in such a process, especially where classes are large and interests fractured. But a broader view of the role and selection of those representatives would be possible. This could mean outright election of an individual (or individuals) by class members. It could also entail processes whereby the representative could connect with claimants to participate more effectively in negotiations with respect to the action. The class would thus act as a "free-form focus group." More input on how the representative should act and what views to express would be useful in helping to align the representative's interests more closely with those of class members. Moreover, representatives need not be limited to the plaintiffs' side. Defendant representative could also be used to engage stakeholders and allow them to express their interests. This expression would be valuable, not only allowing plaintiffs to influence the process but giving individuals a chance to tell their stories and be heard, an important component of a dispute system.[215]

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systems have also been the subject of criticism for producing inconsistent results depending on small variations in how questions are asked. A large literature exists about how to use such systems to produce accurate results. *See e.g.*, Hannu Nurmi, *Voting Paradoxes and Referenda*, 15 SOC. CHOICE WELFARE 333 (1998). The technical details of such systems are beyond the scope of this paper.

214. Farina et al., *Rulemaking in 140 Characters or Less, supra* note 196, at 443 ("We have, therefore, been very cautious about introducing any form of voting or ranking into Regulation Room design — even though information science research shows that these forms of user engagement help build online community and foster additional participation.").

215. *See* Menkel-Meadow, *supra* note 185, at 360–66 (discussing essential component of a consensus building process). The importance of the opportunity to be heard has also been noted in mass tort claims systems. *See, e.g.* KENNETH R. FEINBERG,

Class counsel would assume a different but equally important role in a more participatory system. Internet technology is already changing the way that lawyers and clients interact in the class action context. Lawyers can now use tools like blog postings and Twitter feeds to identify patterns of small, widespread harm (such as slower than advertised DSL speeds) that were previously imperceptible. Lawyers currently use the Internet, Facebook, and Twitter to find potential class members before an action is brought and to connect class members with settlement facilities once the action is concluded. Similarly, aggrieved individuals use blogs and consolidation websites to aggregate on their own, and, if they desire, find a lawyer to represent them.[216] These emerging trends demonstrate new ways to connect lawyers and clients, connect class members with each other, and, streamline the ways in which claimants can access settlements.

Such changes can be built upon to enhance the lawyers' role and lessen the inherent principal-agent tension[217] between class counsel and the class members that has been the subject of many reforms efforts.[218] This could occur in several ways. First, an important feature of Web 2.0 regulatory systems for engaging stakeholder is information architecture and the ability of the system to educate and explain issue. Lawyers well trained in client counseling would be particularly suited to helping develop this architecture. In addition, providing avenues for lawyers to connect with claimants would allow class counsel to fill an important but often missing advisory role for members of the class, explaining the law and the action to interested class members and helping them think about the pros and cons of any decisions they might be asked to make. It is easy to imagine how this could be done through a variety of interfaces, including videos, chat discussions, or virtual Q&A facilities. In addition, the greater level of interaction between lawyers and claimants has the potential to serve a monitoring function by increasing general awareness of what lawyers are doing, and providing an outlet for class members to discuss

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WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005); Burch, *supra* note 35, at 30.

216. For example, the Internet site TopClassActions.com connects potential plaintiffs looking to bring suit with lawyers, and lawyers who suspect there may be potential class harms, with plaintiffs.

217. *See* ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000).

218. *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1381 (2000).

the suit and the lawyers' actions.[219] Some information conveyed to class members would likely have to be censored beyond what would normally occur in a lawyer-client relationship, given that anything of a sensitive nature would be easily obtainable by the opposing attorneys or the public at large. While the limits of this would need to be considered more fully, conveying even basic information would be helpful for engaging class members and providing greater transparency in the process.

Second, because of lawyers' process expertise, they would assume additional importance in helping the court to devise the appropriate methods and levels of engagement for class members. They might also serve as particularly adept facilitators for any discussions or forums that take place.[220] Serving as neutral facilitator in an adversarial proceeding may run against the grain of what most class counsel do. However, lawyers are increasingly taking on facilitative roles, and doing so for the class would help class counsel to advocate on behalf of class members better. Moreover, even outside of a certified class action, lawyers could advise potential class claimants on ways to resolve their problems, through the use of Internet and social media to bring alleged malfeasors to the bargaining table.

3. *Monitors and Catalysts*

Internet-based processes raise another possibility for the resolution of large-scale disputes that depart more dramatically from traditional court-based processes. In this paradigm an ombuds-type entity could exist to monitor complaints, disputes and other types of online activity for patterns pointing to large-scale problems. This body could identify the problem to the alleged malfeasor and give them the option to correct it or alternatively seek to disseminate information about the pattern of harm to regulators and/or individuals who might be affected. If simple dissemination of information did not produce results, the body could seek to convene groups online to take action together to address the alleged wrong. If that proved ineffective, the entity could locate counsel to take the case through the formal litigation process. Such entities would provide monitoring services, helping

219. *Cf.* Burch, *supra* note 106, at 36 (discussing experiments with providing greater information to mass tort plaintiffs: "Such techniques provide plaintiffs with a limited degree of transparency that is not generally available in mass cases. They have the advantage of avoiding overreaching by some attorneys, as in the fen-phen case.").

220. *Cf.* Menkel-Meadow, *supra* note 185, at 364 (discussing a model of the lawyer as consensus builder in deliberative democratic systems).

to identify potential problems and catalysts for collective action, where it can be created without involvement of the courts.

A system of monitoring may at first seem far-fetched, but research is finding that social media is particularly suited to uncovering potentially large-scale problems before they spread. One interesting example of this is a study finding the Twitter is better at predicting outbreaks of cholera in the developing world than any other detection mechanism.[221] This is due to the fact that many individuals in developing countries have cell phones and will post tweets about isolated incidents that, when viewed in the aggregate, bring forward a pattern of outbreak than can provoke swift intervention. For a model of how the courts might be used to incent and manage such processes, it is instructive to look at the experience of Europe using laws that take the court-as-catalysts approach.[222] This approach connects with a body of theory that claims that the role of courts as norm elaborators and norm enforcers should be supplemented with an understanding that courts have an important role as catalysts for inquiry and remediation.[223] Environmental regulation is one area in which this approach has gained traction, where certain regulations call for the creation of rules or the resolution of certain disputes using processes designed to include the broadest possible range of stakeholders.[224] The central idea of the court-as catalysts approach is that the law mandates a convening process by which stakeholders must be invited to negotiate a regulatory proposal about which all have a material interest. The court does not prescribe a process or manage the discussion, but provides a backstop of remedies related to the process. For example, the resulting regulation or decision can only be challenged if an element of the process was missing — for instance a key stakeholder was not invited or some fraud or conflict of interest emerged to cause doubt that the result was consensus driven.[225] Thus, all parties have an incentive to include as many stakeholders as possible and design an inclusive system. Note that inclusion in this context does not mean that every important

221. *See* Rumi Chunara, Jason R. Andrews & John S. Brownstein, *Social and News Media Enable Estimation of Epidemiological Patterns Early in the 2010 Haitian Cholera Outbreak*, 86 AM. J. TROP. MED. HYG. 39 (2012); Connie St. Louis & Gozde Zorlu, *Can Twitter Predict Disease Outbreaks?*, 344 BRITISH MEDICAL JOURNAL (2012), http://mbds.promedmail.org/documents/BMJ_Twitter_May2012.pdf.

222. *See* Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 565–80 (2007).

223. *See id.*

224. *See id.*

225. *See id.*

stakeholder actually participated, but that each had the opportunity to do so. In the context of aggregate litigation a similar process could be used to encourage monitoring efforts for widespread harms, as well as to induce inclusive settlement negotiations if those harms are uncovered and determined to be actionable by the court.

A number of questions would have to be resolved about such a system before it could be workable, and addressing them is beyond the scope of this paper. For example, would this be too complicated and drag proceedings out too long? Experience with privately established claims commissions have not always found them faster than traditional processes. Involving stakeholders to such a large degree could become unwieldy, muddling grievances and limiting potential resolutions.

Assuming these questions could be addressed, court-catalyzed disputing processes could accommodate and account for parallel dispute resolution efforts that arise organically on the Internet, and they could provide for much faster resolution. Imagine, for example, a situation in which potential stakeholders are notified and convened, either in person or virtually. The putative defendant realizes the extent of dissatisfaction with its practices even absent any discussion of the legal merits. It could choose to establish its own procedures for correcting the action and compensating the attorneys and class members who had been aggrieved. Or, it could proceed to a litigation process to defend the action, but only after showing that alternative processes are not warranted.[226]

4. *Problems of Participation*

In any new system design, it is questionable that individuals would know about the dispute resolution process or care enough to

226. Collateral attack usually indicates a lack of buy-in from the attacking plaintiff. *See* Burch, *supra* note 35. For a description of the collateral attack problem generally, see William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 820–41 (2007). *See also* Bone, *Puzzling Idea*, *supra* note 75, at 625 ("The collateral attack problem is easy to state. In the typical situation, a class action settles and a discontented member of the class brings a separate suit seeking to litigate the same claim. The defendant in the second suit argues claim preclusion, but the plaintiff responds that she was not adequately represented in the class action and therefore cannot constitutionally be bound. The issue is whether the plaintiff should be allowed to litigate and avoid preclusion if he succeeds in convincing the second judge that representation was inadequate in the first suit, even if the first judge already determined it was adequate.").

participate. Even where costs are low, class actions may seem remote, esoteric, or irrelevant to many putative class members, especially where individual recoveries are small. Experiments with online notice and comment mechanisms for regulatory action, for instance, have so far met with mixed levels of interest.[227] Examples of online "protests" in some consumer contexts provide evidence that at least some groups of people feel strongly enough to participate in mass dispute resolution. However, even when people participate, a vast majority of group members tend to remain silent, potentially skewing the input in favor of the more vocal individuals.

Nonetheless, the opportunity to participate remains important to maintain the legitimacy of the system. Where participation lags, efforts aimed at improving it continue to be developed and meet with increasing success. In other public engagement contexts, such as public referenda and electoral participation, there is evidence that Internet-based engagement efforts significantly increase levels of voting and political organizing.[228] Web 2.0 technology provides promise in this respect, because it is easy to use. At an extreme, even data mining and other passive forms of gauging group sentiment could be employed to introduce class member concerns, if not their actual engagement. Of course, using the web to enhance participation assumes that individuals have access o it and know how to use it. While greater numbers of people are gaining Web 2.0 access and savvy, there would undoubtedly be many people left out of engagement efforts. However, there would still be far fewer people left out of a Web 2.0 process than there would under existing procedures. As effective approaches to engagement emerge and are refined, productive engagement could be significantly increased.

V. CONCLUSION

Aggregate dispute resolution, historically an odd fit in the civil justice system, has evolved to be very different from the traditional model of litigation. Throughout that evolution, the core assumptions

227. *See* Farina et al., *Rulemaking in 140 Characters or Less*, supra note 196, at 453.

228. *See* Filipe R. Campante, Ruben Durante & Francesco Sobbrio, *Politics 2.0: The Multifaceted Effect of Broadband Internet on Political Participation* (National Bureau of Economic Research, Working Paper No. 19029, 2013), *available at* http://www.nber.org/papers/w19029; *see also* Stephanie Young, *OIRA Chief Sunstein: We Can Humanize, Democratize Regulation*, HARV. L. REC., Mar. 12, 2010, http://hlrecord.org/?p=9714 (quoting Cass Sunstein, Adm'r, Office of Info. & Regulatory Affairs, Address at Harvard Law School: Humanizing Cost-Benefit Analysis (Mar. 1, 2010)).

about the proper place of the collective plaintiffs relative to the defendant, the lawyers, the judge, and the rest of society have become less connected with underlying reality.

It is beyond doubt that the relation of individuals to the court, the state, and to each other has changed in significant ways and in a very short time due to advances in social networking technology and changing practices of networking behavior. If an institutional process is to maintain its legitimacy, it must remain connected to the societal realities in which it exists. The class action is no different. To remain relevant, adaption to account for these technologies is essential.