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Samuel Issacharoff

New York University School of Law

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ASSEMBLING CLASS ACTIONS

SAMUEL ISSACHAROFF*

ABSTRACT

Five times in the past few years, the Supreme Court has engaged the propriety of class actions.¹ Taken together, these cases revisit certain core issues in class action law, all turning on the need and justification for grouping individuals as part of a collective entity for litigation purposes. When examined from the perspective of legal treatment of individuals as part of a collective—assembling the class action, in the terminology of the title—three distinct aspects of class organization stand out. First, the existence of a litigation entity requires that someone be in charge, and that in turn raises the problem of how to ensure the faithfulness of the appointed agent. Second, the decision to forge a litigation entity necessarily empowers one side of the dispute relative to the other side, and that requires some justification. And, finally, even when litigation entities exist, class action law must come to terms with the range of individual autonomy that should still be recognized, including the ability to contract out of collective representation.

As developed in the difficult recent class action cases, the questions of leadership, underwriting, and autonomy help define how modern class action practice endeavors to provide equality of treatment and predictability in the interaction between the individual insults of aggrieved citizens and the indiscriminating consequences of mass society.

I. INTRODUCTION

In his classic work, *The Common Law*,² Oliver Wendell Holmes set about to explain the newly emerging field of tort law. Although the principles of compensation for accidents were well-known at the common law for centuries, only in the 19th century did these principles become recognized as an autonomous and significant branch of legal inquiry. Holmes sought to define the world of reasonable care, duties, and

* Reiss Professor of Constitutional Law, New York University School of Law. This article was initially presented at the 18th Annual Symposium of the Institute for Law and Economic Policy. I am appreciative of the comments received there, particularly from Kenneth Feinberg, Robert Klonoff, Troy McKenzie, Arthur Miller, and Joseph Sellers. I am indebted as well to Nikolaus Williams for research assistance.

1. This Article does not take into account the further additions of the October 2012 Term.
2. OLIVER W. HOLMES, JR., *THE COMMON LAW* (1881).

compensation—what we now understand as the pillars of the tort law—by invoking *Brown v. Kendall*, a noteworthy case written by the highly regarded Judge Lemuel Shaw.³ *Brown v. Kendall* involved a classic once-occurring harm in which a man raising a stick to separate two fighting dogs accidentally struck and injured a bystander.⁴ For Holmes, the object of the law was to provide incentives toward reasonable care to avoid such haphazard events, and then to provide compensation for the harm suffered by the unfortunate victim.⁵

Even in its early exposition, however, tort law had to confront sources of harm well removed from the random events of life among strangers. For Holmes, this meant that almost as soon as he set out his basic principles, he had to anticipate that the events giving rise to claims under tort law might have a different origin. In the place of random events, Holmes conjectured that the legal treatment of duties and compensation might not emerge from such a particularized individual quality:

If . . . the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court. . . .

. . .

Facts do not often exactly repeat themselves in practice; but cases with comparatively small variations from each other do.⁶

Fewer than twenty years later in his *The Path of the Law* address of 1897,⁷ Holmes returned to explore the significance of mass repetitive injury to flesh out this early insight. In so doing, Holmes introduced a deeper account of the object of tort law. This time, his thinking about the objectives of the law had changed, and he abandoned his view that the organizing principle of the field should be chance interpersonal encounters.⁸ In its place, Holmes turned to the burgeoning problem of mass society and the apparently inevitable onslaught of injuries thrown off by the progress of industry.

3. 60 Mass. 292 (1850).

4. *Id.*

5. HOLMES, *supra* note 2.

6. *Id.* at 111, 124.

7. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

8. *Id.*

Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses.⁹

Now, all of a sudden, the injured party might still be unknown ahead of time, and might have personal or even idiosyncratic reactions to the particular injury. But the fact that there would be some individual in this circumstance was known ahead of time as a statistical certainty. The ensuing harm could no longer be seen as simply a random occurrence between the victim and the tortfeasor but was instead a matter of statistical probability. For Holmes, this meant that the tort law acquired the qualities of insurance and accountancy, fields that were learning to fix the cost of accidents within the product market.¹⁰ And, moving forward, as the statistical certainties of injuries in mass society would continue to grow, the individual component of any particular claim would be diminished, even if we would still want our legal systems to honor the individual victim.

More than a century later the law governing mass harms continues to be torn between the conflicting impulses in Holmes's early rendition of tort law. All Western legal systems take the individual to be the core of their rules, responsibilities, and rights. This individual focus, however, fits uncomfortably with the reality of mass society and poses fundamental challenges to these legal systems, which are designed to protect individual rights and incentivize the behavior of individuals. This is by no means unique to the law of torts or physical harms. Individual consumers, for example, have an inherent inability to protect themselves effectively from the improper or fraudulent conduct of a distant and usually more financially powerful seller.¹¹ Traditional contract notions premised on

9. *Id.* at 467.

10. *Id.*

11. See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, J. L. & ECON. 67 (1973).

negotiation, a bargained offer and acceptance, and a meeting of the minds poorly fit the mass production of goods and services in advanced economies. Such limitations have put pressure on legal systems to innovate in response to the changing needs of society and to expand the traditional, party-bound notion of litigation.

I will use the core tension in addressing individual rights within the aggregate as an organizing principle around which to discuss three areas of contemporary class action controversies. In a short period, the Supreme Court handed down five significant opinions on class actions¹² that together make the biggest impact on the field since the landmark cases of *Amchem Products, Inc. v. Windsor*¹³ and *Ortiz v. Fibreboard Corp.*¹⁴ Taken together, these cases revisit certain core issues in class action law, all turning on the need and justification for treating individuals as part of a collective entity for litigation purposes. When examined from the perspective of legal treatment of individuals as part of a collective— assembling the class action, in the terminology of the title—three distinct aspects of collective organization stand out, and will organize the discussion of the new class action jurisprudence. First, the existence of a litigation entity requires that someone be in charge, and that in turn raises the problem of how to ensure the faithfulness of the appointed agent. Second, the decision to forge a litigation entity necessarily empowers one side of the dispute relative to the other side, and that realignment of litigation prospects requires some justification. And, finally, even when litigation entities exist, class action law must still come to terms with the range of individual autonomy that should still be recognized, including the ability to contract out of collective representation.

II. REPRESENTATION AND THE PROBLEMS OF AGENCY

We can think of the modern era of class action law as taking up where Holmes' early insights left off. Beginning at least with *Supreme Tribe of Ben-Hur v. Cauble*,¹⁵ class actions not only performed the statistical blending function that Holmes anticipated, but assumed the ability to bind absent parties to the outcome of the litigation. This was a critical move, and one that the Court lost no time in acknowledging represented a

12. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

13. 521 U.S. 591 (1997).

14. 527 U.S. 815 (1999).

15. 255 U.S. 356 (1921).

departure from the presumption in Anglo-American law of the right of direct participation as a condition for preclusive enforcement of a judgment.¹⁶ As the Court noted once again in *Smith v. Bayer Corp.*, the first of its five recent cases on class action practice, “A court’s judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions.”¹⁷

Once the Court started down this path to binding absent parties, however, the critical question became the nature of the authority to resolve contested legal claims on behalf of others. The early representative action avoided this problem entirely by allowing parties to join into a collective judgment that was secured for them, but otherwise suffer no adverse consequences.¹⁸ For reasons that have been explored extensively in modern scholarship,¹⁹ that form of one-way intervention created immense strategic imbalances, offering defendants the prospect of conclusive losses but only the briefest of respite in victory. In turn, however, recognizing the force of collective resolution meant committing power to an agent to act as a controlling surrogate, including for adverse results.

There simply is no escaping the need for agency in collective actions. The American rules of civil procedure anticipate the use of the class action only when the action is not capable of being managed as an aggregation of individual claims.²⁰ The key to an important strain of recent class action cases turns on the problem of agency, or as it is sometimes known in our field as the “governance problem.”²¹ Increasingly the case law addressing the governmental structures of a class action—doctrinally presented through the Rule 23(a)(4) requirement of adequacy of representation—have come to serve as the touchstone defining whether representative litigation can satisfy the constitutional requirements of due process.²² As expressed by Professor Owen Fiss, the emerging constitutional standard guarantees “not a right of participation, but rather . . . a ‘right of

16. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

17. 131 S. Ct. 2368, 2379 (2011).

18. For a discussion of this, see generally Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923 (1998).

19. See, e.g., Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63 (1988).

20. See FED. R. CIV. P. 23.

21. I believe the term is taken from an article of mine. See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337.

22. FED. R. CIV. P. 23(a)(4) (“[T]he representative parties will fairly and adequately protect the interests of the class.”).

representation': not a day in court but the right to have one's interest adequately represented."²³

To bind individuals not joined in their individual capacity requires imparting some organic quality to the class action. It is of course the case that "[t]he law can regard *any* person either as a member of a group or as a legally distinct individual."²⁴ But the law of class actions appears to attempt to do both at once. Absent class plaintiffs are both members of a judicially-approved collective body and yet stand apart in terms of actual participation and control over the management of that collective body. It is for this reason that recent scholarship has begun to gnaw at the underdeveloped concept of representative actions and has instead begun to view the class action as an "entity" once it has been certified, to use Professor David Shapiro's term.²⁵

What then is the source of legitimacy for a class action to be deemed the proper mechanism to resolve the claims of absent class members? History proves to be an unsatisfactory guide for the modern 23(b)(3) class action.²⁶ The wellspring for modern class action practice, as ably chronicled by Professor Stephen Yeazell, reveals that some conception of an entity accompanied a significant body of early representative actions.²⁷ One finds early English cases in which the representative entity pre-existed the class action litigation, as with local governors bringing suit as the named representative for their citizenry, the parish being represented by the local priest, or a guild being represented by its formal leadership.²⁸ Thus, for example, in one famous case, the mayor of York assumed the role of representative agent on behalf of the residents of his city in a dispute with citizens of other towns concerning fishing rights in a local river.²⁹ I have previously written of these cases as constituting organic

23. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970-71 (1993).

24. Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1848, 1851 (1998).

25. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998).

26. A Rule 23(b)(3) class action requires that "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

27. STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 40 (1987).

28. *Id.* ("most medieval group litigation involved groups whose organization antedated the lawsuit itself . . . unlike some modern collective litigation, medieval group litigation did not overcome the difficulties of organizing a group for collective action. That task had already been done.").

29. *Mayor of York v. Pilkington*, (1737) 25 Eng. Rep. 946 (Ch.).

class actions “so as to highlight the fact that the organizational form of the legal action precedes the particular controversy.”³⁰ The critical distinction in these cases is that they do not put a court in the uncomfortable position of selecting an agent who is somehow “able enough” to speak on behalf of others and bind them to the effect of an adverse judgment. A court acknowledging that a mayor may speak for his municipality is doing nothing more than extending the application of the preexisting political power of the office to a corresponding representative claim.³¹

Searching for pre-existing organic leadership in the modern class action setting is likely to have little payoff. One can find isolated cases, such as *UAW v. Brock*,³² and read them for the proposition that authority established in the political realm on behalf of a dispersed class of interested parties should be translatable to the modern class structure.³³ Or, one could perhaps stretch the appointment of a lead plaintiff under the Private Securities Litigation Reform Act (“PSLRA”)³⁴ as trying to recreate in the realm of the market economy the same conception of pre-existing leadership selection. But even these are limited analogies, far removed from the comprehensive hierarchies of England of old, and certainly have no application in the typical consumer or small-value class action.

The doctrinal mechanism for avoiding the governance problem was to impart class litigation with the quality of a gift rather than an obligation. That was the effect of having no capacity to bind anyone other than the lead named plaintiff, as all other members of the representative action were not parties and could not be bound to the judgment. In the event of a plaintiff’s victory, the absent class members could, in effect, join into the lawsuit—what in modern parlance would be termed an “opt-in” class action—only after the fact and if the result was favorable.³⁵ While this procedure avoids binding absent class members to potentially adverse consequence, the reciprocal consequences for a defendant are severe. In

30. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 363–64.

31. The same principle applies to private associations, rather than public office-holdings, as with the ability of the head of a lodge association to represent the interests of the lodge in *Lloyd v. Loaring*, (1802) 31 Eng. Rep. 1302 (Ch.).

32. 477 U.S. 274 (1986).

33. In *UAW v. Brock* the Court allowed the UAW to serve as the class representative for all claimed beneficiaries of enhanced unemployment benefits for jobs lost as a result of foreign competition. *Id.* The Court reasoned that the central role of the UAW in agitating politically for the claimed benefits made it the presumptive best candidate for the stewardship of the class. *Id.* at 290.

34. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

35. See Cooper, *supra* note 18.

effect, in any such class litigation, the defendant is able to prevail only as to the named plaintiff, but can lose to the entire class.

Finding mechanisms that confer legitimacy is the challenge of the modern, sprawling class action. That legitimacy is challenged under two conditions that were relatively absent from historic class action practice: first, there is no pre-existing political or organizational vehicle that can claim an independent source of authority to speak for the collective; and, second, modern conceptions of fairness and finality require that the non-participating class members be bound to the outcome of the litigation as if they were parties. So until the modern class actions with these two features, there was no need to police independently the adequacy of representation. The basic rule that emerges most directly from the modern context is that adequate representation is a prerequisite for binding individuals to the outcome of a case, and that this in turn requires that the class representatives “fairly represent [the class members] with respect to the matters as to which the judgment is subsequently invoked.”³⁶ The key issue is the guarantee that the agent be the faithful guardian of the interests of the class. The two most important opinions of the U.S. Supreme Court of the past two decades concerning class actions both dealt with the problem of class action governance. In *Amchem Products, Inc. v. Windsor*,³⁷ and then subsequently in *Ortiz v. Fibreboard Corp.*,³⁸ the Supreme Court confronted efforts to resolve masses of asbestos personal injury cases on a class action basis, either using the mechanism of the opt-out requirements of the damages class action or the compulsory joinder of the limited fund class action. Each presented a complex multiparty agreement that bound not only the presently injured claimants, but all future claimants.³⁹ In effect, the two cases tested the ability of class actions to provide the type of global resolution of a mass harm that had evaded legislative or administrative action.

Each of the proposed asbestos class action settlements failed, and each failed because the required guarantees of faithful representation of the absent class members could not be satisfied.⁴⁰ Two facts decided each case, despite the formal differences in the types of class actions being pursued. First, each class consisted of inherently divided camps that sought different allocations of the limited amounts of recovery available to

36. RESTATEMENT (SECOND) OF JUDGMENTS § 42(1)(d) (1982).

37. 521 U.S. 591 (1997).

38. 527 U.S. 815 (1999).

39. See *Amchem*, 521 U.S. at 627; *Ortiz*, 527 U.S. at 815.

40. See *Amchem*, 521 U.S. at 626–28; *Ortiz*, 527 U.S. at 854–57.

distribute in the settlements. Second, in each case, a condition of settling with the present claimants was the ability to cabin and resolve future claims by those who did not know they were ill, or did not even know they were at risk for asbestos related disease—the problem of unknown future claimants being “rationally indifferent” to the terms of the proposed settlement, in John Coffee’s formulation.⁴¹ In *Ortiz*, this problem was compounded by the differential access to limited insurance coverage for some but not all of the claimants.⁴² That too created an internal conflict among class members once the proposed settlement blended the recoveries, in effect using one group’s privileged access to insurance claims to cross-subsidize the recoveries of other claimants. Second, the fact that the proposed class counsel had loyalties to the presently injured who were their clients further compromised the interests of the future claimants, as did the fact that individual cases of present claimants could be partially or entirely resolved outside the settlement structure only if the whole deal were approved.⁴³

Putting the two parts of the Court’s analysis together properly directs attention at the governance structure of the complex entities that have emerged in the modern class action. Most central are what Justice Ginsburg in *Amchem* termed the “structural assurance[s]” that provide clear guarantees of attorney fidelity to the class, even when allocation decisions must be made.⁴⁴ The key is that a supervising court must be assured at the threshold stage of the litigation that there are no structural allegiances of class counsel that would create incentives to favor one part of the class over another, or be biased against seeking the best possible return to a defined subset of claims.⁴⁵ Some allocation decisions are inescapable because there is an inevitable rough-hewn quality to the relief provided by class actions. This can take place overtly, as with the common decision to substitute imprecise damage estimates in cases where the administrative costs of fine-tuning individual recoveries would overwhelm the resources available to the class. But it can just as easily take place covertly when lawyers decide to forego some claims, such as those arguably barred by a statute of limitations, or decide not to prosecute

41. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 405 (2000).

42. *See Ortiz*, 527 U.S. at 828.

43. *Id.*

44. *Amchem*, 521 U.S. at 627.

45. *Id.*

individual-based damages that would place the class action beyond the managerial control of one court.

To tie the *Amchem/Ortiz* concern back to the Court's most recent cases, consider the agency implications of the unanimous ruling in *Smith v. Bayer Corp.*⁴⁶ At immediate issue in *Bayer* was the effect of the denial of class certification in a federal court case on a parallel state court case.⁴⁷ In rejecting Bayer's argument that issue preclusion should foreclose the prospect of a subsequent certification of an overlapping class under state law for a putative class headed by different class representatives, the Court wrote: "we know that [the prior federal case] was *not* a class action. Indeed, the very ruling that Bayer argues ought to be given preclusive effect is the District Court's decision that a class could not properly be certified."⁴⁸ The Court in *Bayer* held that no non-party to a litigation may be bound by the outcome of that litigation, reaffirming the paradoxical consequences of non-mutual issue preclusion.⁴⁹ For the Court, that principle dictated the conclusion that when a class was not certified, there was no agent authorized to bind the putative class members to any outcome, even as to the certification decision itself.⁵⁰ The failure to create the class as an entity meant simply that there was no appropriate agent authorized to speak on behalf of a non-party.

The flip-side of *Bayer*, as spelled out in Justice Ginsburg's extensive discussion of the principle of claim preclusion against non-parties in the earlier case of *Taylor v. Sturgell*,⁵¹ is that the decision to certify does empower the collective agent to bind the joined individuals. Where the interests of the agent may depart from that of the underlying principals, the claimed representation must fail. This core lesson of the authority of the agent, invoked to protect the absent class members in *Bayer*, resurfaced shortly afterwards as one of the bases for overturning the certification order in the much more high-profile *Wal-Mart* sex discrimination class:

[The certification of a mandatory, non-opt out class created] the possibility . . . that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power

46. 131 S. Ct. 2368 (2011).

47. *Id.*

48. *Id.* at 2380.

49. *Id.* at 2379–82.

50. *Id.*

51. 553 U.S. 880 (2008). For an earlier discussion of the limits of claim preclusion outside the formal requirements of Rule 23, see Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183.

to hold themselves apart from. . . . That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have.⁵²

III. TILTING THE PLAYING FIELD

Mass society changes the strategic interactions between parties to a legal dispute. Going back to the opening example of the random strike of a bystander by a man trying to separate fighting dogs, the case of *Brown v. Kendall*⁵³ reveals that it is not only the random quality of the event that distinguishes that classic tort case from the industrial accidents that would later preoccupy Justice Holmes. In any case involving two individuals, the law may safely presume not only the self-interestedness of the parties to the dispute, but rough parity in the stakes of the dispute.⁵⁴ It is of course true that one party may be wealthier than the other, or that one has access to better counsel or other resources that may tip the scales of the legal dispute. But the parties are equal in that the dispute is over their mutual obligation to each other, and nothing more. In the classic account of the defining features of a common law legal dispute, the case is party-centric and emerges from the autonomous conduct of the parties to the dispute. Most centrally, the decision to litigate or settle is party-initiated and party-controlled, and the boundaries of the dispute are self-contained. This last insight is critical because it confines the impact of any judgment to the parties themselves.

Once in the domain of mass interactions, however, the dynamics of litigation change. A seller of goods to a dispersed population, a provider of uniform services to a broad-ranging clientele, the manufacturer of a defective product, the purveyor of tainted pharmaceuticals or malfunctioning medical devices—all of these are outside the model of individual-to-individual interactions. For the potential defendant in these iterated exchanges, even the litigation decision in one case is not confined to the claim of the particular claimant. Rather, the disputes quickly become “polycentric,” in Lon Fuller’s terminology,⁵⁵ drawing in the

52. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011).

53. 60 Mass. 292 (1850).

54. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–92 (1976) (setting forth the party-centric assumptions of traditional common law adjudication).

55. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978).

impact of trial or settlement on other potential claimants, on potential joint tortfeasors, on insurers, on reputation effects, on standing in the capital markets, and a host of concerns unlikely to be present in the resolution of one-off accidents between citizens in a chance encounter. When the effect of the expanding law of preclusion is added in, the problem multiplies. Every individual case is potentially about the entire universe of affected claimants and business partners.

The resulting asymmetry in stakes between the single-shot plaintiff and the repeat-play defendant dooms the small player in litigation, already incapacitated by the frequent problem of the low stakes that any individual claimant may have serving to discourage suit. Hence the oft-repeated observation that in litigation the haves come out ahead.⁵⁶ Repeat play demands greater attention to litigation, justifies greater expenditures on the prosecution of claims or the preservation of defenses, and forces the institutional actor to view even a small lawsuit as a broad threat. Thus emerges the centrality of the class action in the limited stakes, negative value litigation context. The decision to aggregate creates symmetry in the litigation's stakes, and justifies the cost of prosecution at a level commensurate to that of the defence.

But the decision to expand the economic stakes on the plaintiffs' side of the equation could potentially produce its own distortions, as illustrated by Judge Richard Posner's concern that the excessive stakes in any particular class action might coerce settlement through a forced bet-the-ranch sweepstakes.⁵⁷ The prospects of litigation are not subject to linear precision *ex ante*. Rather predictions of outcomes in litigation necessarily move across a range of potential outcomes and the tails of a normal distribution in a case with some merit extend from zero recovery at one extreme to many multiples of probable liability at the other. A company facing that distribution may be risk averse, or simply unable to accept even a limited prospect of ruinous liability. As an empirical matter, such extraordinary losses are more likely to be realized in repeated single trials

56. Marc Galanter, *Why The "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

57. The extent of the extortion or blackmail effect is, not surprisingly, a subject of dispute. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995) ("[Faced with a class action, defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."); Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 *NOTRE DAME L. REV.* 1377 (2000); Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 *N.Y.U. L. REV.* 1357 (2003) (challenging whether in practice class actions actually have the claimed coercive power asserted by critics).

in the tort system—generally, in the mass personal injury context—in which decisions by isolated juries may have a compounding effect on liability, particularly if punitive damages are assessed.⁵⁸ Nonetheless, the same leverage gained on the plaintiffs’ side by the decision to aggregate necessarily raises the pressure and the stakes for the defendant. Furthermore, aggregation into a single proceeding also invites the caution of Judge Frank Easterbrook about the “central planner” mentality that would not allow claims to accrue and the courts to learn from the varied experience of multiple trials.⁵⁹

Viewed in this light, the decision whether or not to certify a class action is not simply a procedural device; it is likely to be “outcome affective” (to borrow Justice Ginsburg’s terminology),⁶⁰ if not directly outcome determinative. Courts have spoken of the decision not to certify a small value case as the “death knell” of the prospects for legal redress against an institutional actor,⁶¹ yet have also spoken of the extortionate power of the class action.⁶² If both are true, or partially true, or even perceived to be true, how are courts supposed to decide at the threshold procedural stage of class certification whether the resulting class is indispensable, coercive, just, proper, or any combination in between?

Some insight comes from two significant cases decided by the Supreme Court in 2011. In the first, *Wal-Mart Stores, Inc. v. Dukes*,⁶³ the Court confronted a request to certify a class of millions of women employees of the giant Wal-Mart chain on a claim that they were victims of a subjective standard of decision-making that resulted in rampant employment discrimination. Taken at face value, a class action would certainly have been an efficient way of organizing such litigation if indeed women collectively had been subject to persistent discriminatory practices. On this view, the question of certification transformed a complaint about the specific conduct that befell a particular woman, Betty Dukes, or any other individual female employee. Once organized around the systemic treatment of women at the giant Wal-Mart firm, the class action was clearly the superior mechanism to examine a set of institutional practices

58. The effects of potential repeat punitive damages awards are discussed in Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1934 (2002).

59. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

60. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996).

61. *See, e.g., Korn v. Franchard Corp.*, 443 F.2d 1301, 1304 (2d Cir. 1971).

62. *See supra* note 57.

63. 131 S. Ct. 2541 (2011).

that either promoted discrimination or allowed the prospect of discriminatory behavior to fester.

If indeed the challenge was to the systemic practices of Wal-Mart, the collective determination of such events was not only efficient, but seemed the only way to make that determination in a consistent and principled way. At the same time, the very condition complained of—the subjective decision-making—meant that the litigation could aggregate the claims only insofar as the focus of litigation was on scrutinizing the company-wide practices within which such decision-making might occur. The result of the litigation would necessarily tip the scales against Wal-Mart because a determination of company-wide misbehavior opened the doors to potential liability on a mass scale. Certification transformed the case from something that happened, at least allegedly, to some women into a broad-scale investigation of the company as a whole. The very scale of Wal-Mart's operations invited a broad inquiry, yet that logic would presumably lead every case against Wal-Mart to serve as a class action. At its extreme, a customer injured by tripping over an item left on the floor by another customer raises questions about the overall practices of inventory management across the massive enterprise.

Nothing in the procedural ruling on certification could provide a normative baseline for whether or not such broad aggregation was correct in any particular case. On the one hand, Wal-Mart could ill complain that its practices were subject to broad-scale challenge given the mass nature of the enterprise and the well-known firm penchant for centralizing all aspects of store management. At the same time, not every case could raise every global issue; sometimes, a slip and fall is really just a slip and fall. Some threshold inquiry had to distinguish the occasional from the persistent, and the routine from the particular. For the Supreme Court the critical lever proved to be the nature of the resolution that could be achieved through collective prosecution: could the proposed class litigation determine whether any particular woman had been subject to discrimination?⁶⁴ As framed by the American Law Institute (“ALI”), the question is whether aggregate treatment “materially advances the resolution of multiple civil actions by addressing the core of the dispute in a manner [likely] . . . to generate significant judicial efficiencies”⁶⁵

Altering the stakes of litigation can neither be the justification for consolidating masses of claims, nor for denying their consolidation.

64. *See infra* note 65.

65. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 (2010).

Rather, the justification must be whether or not the claims are significantly mirror images of each other, in effect the market replicas of each other. To the extent that the cases fit the model of “if as to one, then as to all,” class treatment is justified.⁶⁶ At bottom, the question is whether the conduct complained of was directed in an undifferentiated fashion to the normal workings of mass markets, or whether there was a retained level of individual idiosyncrasy about the subject of the litigation. In Holmes’s terms, the issue is whether we are still in the domain of *Brown v. Kendall* or whether we have passed into the world of statistical victimhood.⁶⁷

The Supreme Court in *Wal-Mart* turned to the work of my late dear collaborator, Richard Nagareda, to formalize the inquiry into the collective core of the dispute:

What matters to class certification . . . is not the raising of common “questions”—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.⁶⁸

In turn, the procedural considerations on class certification are driven by the same inquiry into whether the common elements of the class define the issues in dispute:

When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member’s individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class.⁶⁹

66. Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 671 (2011); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 185 (2009) (defining this formulation as the key to optimal class action practice).

67. See HOLMES, *supra* note 2.

68. *Wal-Mart*, 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)) (internal quotation marks omitted).

69. *Id.* at 2558–59.

There is a formal demarcation in *Wal-Mart* between the different aspects of Rule 23, covering the injunctive claims of (b)(2) and the damages focus of (b)(3)—in much the way there had been a decade earlier in the technical distinctions between (b)(1) and (b)(3) classes in *Amchem* and *Ortiz*.⁷⁰ But the real demarcation, to use the language of the ALI's *Principles of Aggregate Litigation*, is between claims that are essentially indivisible, as with the common claim for an injunction, and those that are fully divisible, as with demands for recompense for the individual manifestations of injury.⁷¹ Ultimately, the class in *Wal-Mart* could not harness a collective resolution of what happened to the various class members, nor could it create a unified framework for answering that question. The realignment of the balance of litigation incentives that almost invariably accompanies class certification could not be justified by the traditional indicia of common resolution of the class allegations. Put another way, while the modern class action does not have the organic feature of the village claims of medieval England, the decision to aggregate should reflect some unifying conduct in the defendant's engagement with the collective claimants.

What does the modern equivalent of the organic class action of old look like? An answer can be found in the Court's important opinion in favor of class certification in a second case from the same Term, *Erica P. John Fund, Inc. v. Halliburton Co.*⁷² By contrast to the subjective decisions at issue in *Wal-Mart*, *Halliburton* concerned the uniform effects of allegedly false disclosures on the market price of Halliburton stock.⁷³ This is the classic form of securities fraud litigation in the United States, but it has one critical problem. In order for any plaintiff to prevail in a fraud case, the alleged victim must show that she relied on the deception in making the financial decision that led to a loss.⁷⁴ Were each individual member of the class compelled to come forward to testify about whether or not she saw the representations in question and acted because of them, then the securities litigation would be as inconclusive as the claims of discrimination in *Wal-Mart*. At most, the class litigation could establish what Halliburton did, but could not assign liability as to any given

70. *See id.* at 2558.

71. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04 (2010).

72. 131 S. Ct. 2179 (2011).

73. *Id.* at 2187.

74. *Id.* at 2183.

plaintiff. To follow Professor Nagareda's formulation, there would be no common answers forthcoming.⁷⁵

This proved not to be a problem. It would be an extremely odd outcome to believe that masses of investors in the publicly-traded Halliburton stock were each reading the disclosures on their own, and each relying independently on the underlying information in making a decision. Contracts negotiated one-by-one may work that way, but not rapid-fire computer transactions on the New York Stock Exchange, especially in the era of automated transactions triggered by complicated price-based algorithms.⁷⁶ Rather, the NYSE is a thick and efficient market, one in which economic theory tells us that all relevant information is already priced into the stock transactions. The transactions at the margin reflect the optimism of buyers and the pessimism of sellers, all operating under the same presumed universe of access to all relevant market information. Under the efficient capital markets hypothesis, material and relevant information is integrated across the mass of transactions, and it is the market as a whole that relies on such representations, including when the underlying information proves to be the product of fraudulent deception.⁷⁷

In such thick markets, the image of the individual-to-individual bargain makes no sense; the contract world had moved well beyond its analogues to simple torts such as *Brown v. Kendall*.⁷⁸ Aggregation clearly altered the bargaining power of the parties, and did so to the detriment of the defendant Halliburton. But Halliburton had reaped the benefits of raising capital on an efficient mass scale and was now being challenged for its conduct in the litigation equivalent of an efficient market for functionally identical claims. The market treated all buyers and sellers as unified by the transactional environment, in ways analogous to the medieval burghers of York.

What then justifies the law presuming to alter the initial putative symmetry between the parties? No one can seriously doubt that class certification alters the playing field by raising the stakes of the litigation.

75. Cf. Nagareda, *supra* note 68.

76. See Karl Finders, *Evolution of Stock Market Technology*, COMPUTERWEEKLY.COM (Nov. 2, 2007), <http://www.computerweekly.com/Articles/2007/11/02/227883/the-evolution-of-stock-market-technology.htm> (defining algorithmic trading as systems that "buy shares automatically when predefined market conditions are met").

77. See Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 384 (1970) ("in an efficient market prices 'fully reflect' available information"); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 567 (1984) (surveying the literature on the efficient capital market hypothesis and identifying the mechanisms through which information may be incorporated into the market price).

78. 60 Mass. 292 (1850).

Ever since the expansion of issue preclusion in *Parklane Hosiery Co. v. Shore*,⁷⁹ there has been the risk that the defendant would always have more at stake than the plaintiff. Even if there were no formal issue preclusion, an adverse judgment invites more litigation against the losing defendant, and if issue preclusion attaches, then all the more so. Seemingly, this is a one-sided disadvantage for the losing defendant; a litigation version of the schoolyard piling-on. But oddly this creates a paradox. The defendant always has more at stake in any case, and therefore has an incentive to litigate beyond the rational spending of any particular plaintiff. This is what underlies the decades old observation of Professor Marc Galanter as to why the “haves” come out ahead in litigation—a simple story that those who have more at stake will spend more, and so long as there is a positive correlation between spending and results, the more incentivized party will draw upon greater resources and will in turn obtain better results.⁸⁰ This is so predictable that at some point rational plaintiffs would not enter into litigation with repeat-play defendants.

Precisely because it is so obviously true that better incentivized players will come out ahead, there must be an evolutionary response or the tort system would ultimately prove incapable of addressing the statistically certain harms that concerned Holmes. Part of the response is institutional with the emergence of repeat-play actors such as insurance companies and a specialized bar in small-value claims. The use of the tort law to organize claims with predictable characteristics emerged in the mill towns of New England, the early use of mass transit such as trolley cars, and other areas of statistically certain harms.⁸¹ Such routine processing has even allowed auto accident claims—seemingly the characteristic one-off event—to rationalize a claims system that rarely requires litigation.⁸² Another part of the evolution of mass claims comes with the growing sophistication and resources of the plaintiffs’ bar. While most tort plaintiffs will have only a single encounter with a compensable harm, this is not true of the lawyers who will handle their claims. The modern plaintiffs’ mass harm bar has evolved to counter the repeat-play advantage that institutional defendants

79. 439 U.S. 322 (1979).

80. Galanter, *supra* note 56, at 124–25.

81. The development of the tort law as an administrative form of handling mass harms is analyzed in Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregated Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004). The authors gratefully acknowledge that this paper was first presented to the ILEP conference in 2004.

82. *Id.* at 1603–18 (discussing the role of specialized accident lawyers and insurance companies to create a set of administrative grids for handling routine auto accident claims).

enjoy with regard to any individual claimant.⁸³ In response to the institutional incentive of defendants to invest beyond the value of any single claim, the plaintiffs use techniques ranging from the development of efficient referral markets to the creation of ad hoc firms to diversify risk and concentrate assets in common question litigation.⁸⁴

Private aggregation has its limits. The internet and other means of modern communication have driven down the costs of contacting potential clients and making viable smaller claims in coordinated fashion. But at some point, even the reduced transaction costs overwhelm the stakes in smaller claims. At that point, the collective gain of the joint endeavor cannot overcome the transactional requirement of one-by-one representation. And nowhere is this transactional barrier more likely to be reached than in the consumer setting in which some mass-produced good or service does not live up to its warranted claims.

It is precisely in cases where there is no independent market for effective risk pooling that courts, by virtue of the decision to certify a class, become the decisive arbiters of which claims will survive. In taking individually unviable claims and giving them collective life, courts are realigning the financial interests of the parties and giving positive expected value to claims that would otherwise be worthless. Viewed in this light, the certification of small-value claims is a state subsidy to collective prosecution, requiring only the costs of notice to bind absent parties to a joint undertaking.⁸⁵

Unfortunately, the act of giving value to otherwise valueless claims imposes some burden of justification and care. At an earlier time in class action law, courts indulged the presumption that the decision to certify a class could be handled independently of the merits of the dispute. Under *Eisen v. Carlisle & Jacquelin*,⁸⁶ formal class action law forbade any merits

83. I leave to the side the ability of internet communication to facilitate the creation of informal organizations among claimants themselves. See Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506 (2011); Robert H. Klonoff, Mark Herrmann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727 (2008).

84. Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1180–82 (2009).

85. Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2145–46 (2000) (“The class action rule . . . [gives lawyers] incentives to subsidize access to courts for small claimants.”); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 847–53 (2002) (pushing further to argue that since only aggregation can allow plaintiffs to invest in litigation on an equal basis with defendants, there must be compelled joinder of all similarly situated plaintiffs, with no opt-out rights).

86. 417 U.S. 156 (1974).

inquiry in determining whether to certify a class.⁸⁷ Rule 23 was a pleading rule and the transsubstantive nature of procedure treated the aggregation issue as independent of the evaluation of how likely the plaintiffs were to succeed on their claims.⁸⁸ Since the purpose of the class action was to provide for collective resolution of the common causes of action, there was a need for class actions to bind in defeat as well as in victory, a purpose that would be compromised if courts were drawn into assessing likely success on the merits as a precondition to certification.

The *Eisen* rule fared poorly in practice. The consequences of class certification required a judicial inquiry into the Rule 23 factors that drew the courts more deeply into the factual premises of the case.⁸⁹ Initially, the concern was with the propriety of absent plaintiffs being bound by the result of an adverse ruling, giving rise to the requirement that courts conduct a “rigorous” analysis at the class certification stage.⁹⁰ Over time, however, the argument about prejudice from improper class certification was assumed by the defendants. First, the availability of collateral challenge to class action settlement legitimately raised concerns about the finality of payments to absent class members should judgments or settlements be subsequently compromised.⁹¹ Second, and more significantly, defendants claimed that the alteration of stakes caused by class actions would compel the risk averse into unmerited settlements.⁹² Third, courts recognized the tax on judicial resources presented by large-scale litigation itself required some justification, especially if defects in the

87. *Id.* at 177.

88. *See id.* 177–78.

89. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. h (2010) (discussing certification being a matter of proof not pleading).

90. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). For purposes of protecting the absent class members, the Court directed the inquiry toward the determination, “whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Id.* at 157 n.13.

91. For an overview of the range of collateral challenges to class action settlements, see Samuel Issacharoff and Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649 (2008). To a large extent, the risk to a settling defendant is mitigated by the inclusion of a release as part of the settlement payment, as with a form acceptance on the back of the check above the signature line.

92. The Supreme Court implicitly rejected this line of argument in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010). Justice Scalia held that class certification only multiplied the number of claims, leaving each with the same expected value as if standing alone. *Id.* at 1443. If the expected value of a claim is seen not as a fixed number, but as a probably distribution of potential values, the effect of class certification is to magnify the consequences of suffering the misfortune of an award at one of the tails of the distribution.

class structure would preclude the ability to reach a dispositive resolution by trial or settlement.

Regardless of the source of the claimed prejudice, class action law has settled on a fairly robust merits inquiry as part of the class certification process. The *Eisen* approach was repeatedly rejected, and the final blows came in the two dominant areas of class action law, securities fraud and antitrust. The critical cases were the Second Circuit's securities decision in *In re Initial Public Offerings Securities Litigation*⁹³ and the Third Circuit's antitrust ruling in *In re Hydrogen Peroxide*.⁹⁴ The Supreme Court itself endorsed a more fulsome class certification inquiry in *Wal-Mart*, ruling that district courts are required to resolve any "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [those issues] *again* at trial in order to make out their case on the merits."⁹⁵ While the law remains unsettled in this area,⁹⁶ the impact of class certification on the dynamics of litigation is clearly emerging front and center in class action debates.

IV. CONTRACTING OUT OF THE COLLECTIVE

In some sense, the world of class action debates is cyclical.⁹⁷ The divide between the Supreme Court's upholding of an aggregate claim in *Halliburton* and the refusal to extend such treatment to the claim of sex discrimination in *Wal-Mart* returns us to our opening concern. American law, together with that of the great majority of legal systems, is organized around a premise of individual agency. Individual citizens are rights holders; they enter into contracts; they possess claims of bodily integrity; they rely on expectations of dominion over property. Aggregation of claims of legal rights necessarily deprives them of some of the autonomy,

93. 471 F.3d 24 (2d Cir. 2006).

94. 552 F.3d 305 (3d Cir. 2008).

95. *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011).

96. The Supreme Court has granted a writ of certiorari to review the apparent conflict between *Eisen* and *Wal-Mart* on the question of the degree to which merits based evidentiary questions need to be resolved at the class certification stage. See *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011) *cert. granted in part*, No. 11-864, 2012 WL 113090 (U.S. June 25, 2012). See also PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. h (2010) (discussing proof issues at class certification).

97. In a favorite episode of the television show *30 Rock*, Liz Lemon's loser boyfriend Dennis is trying to corner the market in New York for beepers in 2006. Business is predictably bad, but Dennis is optimistic. He explains to Liz, in a brilliant bit of absurdity, "technology is cyclical." Liz is distraught and proclaims that, no, technology is not cyclical. *30 Rock: Jack Meets Dennis* (NBC television broadcast Nov. 30, 2006). But Dennis is right in that some things never go away—though maybe not beepers. For an earlier New York-centric account of a similar insight, see YOGI BERRA, *THE YOGI BOOK* 45 (expounding on the phenomenon of "déjà vu all over again").

of the due regard for the Kantian integrity of their status as individuals. Mass society is a fact of life, and it is a system of organizing economic relations to the benefit of collective society. But it is not the premise of the legal system and much of the law of aggregate claims turns ultimately on the persuasiveness of the case that there is indeed a basis for the departure from individualized premises.

This then brings us to the third area of contemporary controversy, falling squarely in the tension between the individual and the collective. The issue arises from the increasing pattern of inserting mandatory arbitration clauses in consumer and employment contracts. At this point in the United States, most cell phone contracts, credit card agreements, banking contracts, and a host of other mass marketed goods and services require consumers to agree to arbitrate all claims that may arise from any allegations of improper charges, fraud, or deceptive practices. The same pattern is found in employment contracts regarding wage and hour claims, discrimination allegations, and other potential repeat offense allegations of improper behavior.

Such arbitration agreements create significant barriers to suit under the Supreme Court's interpretation of a 1925 statute, the Federal Arbitration Act ("FAA").⁹⁸ That statute was designed to compel federal courts to honor voluntary agreements to resolve disputes outside the court system, an important prohibition on the better resourced or more recalcitrant party to a business dispute seeking to re-litigate the entire dispute. Of late, mass producers of goods and services have inserted these clauses to compel individual consumers to seek redress for small value harms in arbitration rather than courts and—most centrally—to do so on a one-by-one basis. Almost invariably, the arbitration agreements come with a no-class-actions prohibition that, if enforced, serves for all intents and purposes as an ironclad barrier to privately organized collective challenge to perceived improper practices.

The mandatory arbitration provisions in ordinary consumer contracts places in stark relief the tension between the legal system's presumptive commitment to individual autonomy and the compromises inherent in mass society. At first glance, contractual exchanges should be given the widest berth in terms of respecting the integrity of individual decision-making. Just as consumers are entrusted to choose among competing cell phone offerings, including a bewildering array of payment plans, why should they not also be allowed to choose the form of dispute resolution

98. 9 U.S.C. §§ 1–16 (2006).

that is most attractive to them? The problem here is two-fold. First, as a practical matter, the compelled arbitration provisions are buried in mountains of instructional and disclosure forms of little concern to the typical consumer.⁹⁹ Most people in the market for a cell phone are seeking to acquire, surprisingly, a cell phone; most are not shopping for litigation alternatives. In economic terms, a mass market should clear to the efficient marginal price in terms of the important features of the relevant market. For cell phones, that is likely to be the style of the product, its various capabilities, and its price. Beyond that, terms buried in contractual boilerplate are unlikely to have any salience to the consumer,¹⁰⁰ or to be the source of an effective market-clearing signal. Second, to the extent that consumer protection turns on private enforcement, then the disabling of effective aggregate litigation has direct policy implications for the overall regulation of consumer affairs.¹⁰¹

In the leading recent case on the enforceability of mandatory arbitration, *AT&T Mobility LLC v. Concepcion*,¹⁰² the Supreme Court threw its weight behind the enforceability of such consumer arbitration agreements. For the Court, the overall policy preference for arbitration compelled the result and claims of disparity in bargaining power were simply too broad to overcome the contractual mandate.¹⁰³ Yet, the Court continued to vacillate in two ways. First, the decisive fifth vote of Justice Thomas turned on the particular contract to be enforced and the fact that a California court was refusing on policy grounds to give credit to a Delaware state arrangement, a decision with federalism implications.¹⁰⁴ Second, and more significantly, the Court continued its insistence that the arbitration procedure be meaningful, not impose costs on a claimant who

99. For example, the average credit card agreement is 5,000 words. Raj Date, *Know Before You Owe: Credit Cards*, CONSUMER FIN. PROT. BUREAU (Dec. 7, 2011), <http://www.consumerfinance.gov/speeches/know-before-you-owe-credit-cards/>. A typical credit card agreement from Bank of America is fourteen pages long. *Example of Credit Card Agreement for Bank of America Secured MasterCard and Visa Accounts*, CONSUMER FIN. PROT. BUREAU (Dec. 30, 2011), http://files.consumerfinance.gov/a/assets/credit-cardagreements/pdf/creditcardagreement_5795.pdf.

100. See OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 91–96 (2012) (identifying the effect of limited capacity to evaluate complicated information under the rubric of the salience heuristic in decision-making).

101. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005). For a more formal account, see Yeon-Koo Che & Kathryn E. Spier, *Exploiting Plaintiffs Through Settlement: Divide and Conquer*, 164 J. INSTITUTIONAL & THEORETICAL ECON. 4 (2008).

102. 131 S. Ct. 1740 (2011).

103. *Id.* at 1749–53.

104. *Id.* at 1753–56 (Thomas, J., concurring).

could otherwise avail herself of the court system, and provide the realistic capacity for an individual remedy.¹⁰⁵

The tension between individual autonomy and meaningful legal accountability is highlighted in the unfortunate case of *CompuCredit Corp. v. Greenwood*.¹⁰⁶ At issue was a commercial operation that targeted the most misbegotten of consumers with an offer that only the desperate would seek.¹⁰⁷ CompuCredit offered cards to individuals “with weak credit ratings.”¹⁰⁸ In the contemporary economic environment, that would include those who had suffered home foreclosures or other setbacks that made them unable to secure ordinary consumer credit. CompuCredit would deliver the opportunity to “rebuild” one’s credit rating by providing a credit card with a \$300 line of credit, and the claimed opportunity to restore creditworthiness through the regular use of the card and timely payment of bills.¹⁰⁹ In exchange for this opportunity, CompuCredit charged fees of \$257 against the line of credit, benefiting the consumers with \$43 to “repair” their credit history, and another \$257 of debt.¹¹⁰

Leaving to the side the predatory quality of this exchange, the vulnerability of this class of consumers led Congress to pass the Credit Repair Organizations Act (“CROA”)¹¹¹ which offered certain legal protections, at least in principle. Foremost among these statutory protections was the requirement of prominent disclosure by outfits such as CompuCredit that all consumers have a right to sue the company for malfeasance.¹¹² CompuCredit dutifully carried this disclosure, then coupled it with a mandatory arbitration waiver that rendered the statutory disclosure meaningless. While individuals had the statutory right to be aware of the right to sue, the terms of the credit card agreement included a waiver of those same statutory rights, which in turn was disclosed without any prominence. The Supreme Court upheld the compelled waiver on the ground that the resulting disclosure “may be imprecise, but it is not misleading—and certainly not so misleading as to demand, in order to avoid that result, reading the statute to contain a guaranteed right it does not in fact contain.”¹¹³ The result left the most desperate of consumers,

105. *Id.* at 1751–53.

106. 132 S. Ct. 665 (2012).

107. *See id.* at 668.

108. *See id.* at 676.

109. *See id.*

110. *See id.*

111. Pub. L. No. 104-208, 110 Stat. 3009-455 (1996) (codified at 15 U.S.C. § 1679 (2006)).

112. 15 U.S.C. § 1679(f), (g) (2006).

113. *CompuCredit*, 132 S. Ct. at 672.

those already in dire straits financially, with the prospect of fending for themselves individually when the hoped for credit turnaround became yet another source of unsustainable debt.¹¹⁴

The question that the Court declined to entertain in *CompuCredit* is that of defining the point at which apparently individual choice ceases to be meaningful. At some point, the fact of entering into a credit card contract with a latent condition, such as the loading up of further consumer debt, becomes the modern consumer version of Justice Holmes's insight of statistically certain yet individually contingent harms.¹¹⁵ If the claimed harm is part of an undifferentiated market that operates to select its participants along clear criteria, and if the cause of action follows directly from the customary operation of that market, then it is hard to justify treating the resulting legal claims as isolated individual episodes. The insight into the way that markets work in *Halliburton* may compel similar aggregate treatment, even where the markets are not as perfectly impersonal and efficient as stock transactions on the New York Stock Exchange.

Recent appellate opinions show the unresolved tensions in current doctrine. In one case, *Kilgore v. Keybank, National Association*,¹¹⁶ the Ninth Circuit Court of Appeals found that an arbitration agreement in student loan contracts was enforceable and precluded filing suit in court.¹¹⁷ On similar underlying facts, the Second Circuit Court of Appeals in *In re American Express Merchants' Litigation*¹¹⁸ refused to order arbitration of claims of merchants arguing that the terms of use of American Express cards constituted an illegal tying arrangement under the federal antitrust laws.¹¹⁹ What divided the two courts remains the unresolved issue at the heart of class action practice. The Ninth Circuit saw the contractual bargain to waive arbitration as fundamentally a matter of individual choice, and accordingly found that the terms of that contract did not rise to the level of "unconscionability" necessary to void the contractual obligation.¹²⁰ By contrast, the Second Circuit focused on the effect of individual arbitration requirements in terms of the impact of such lone

114. The consumer case is one area in which I share the pessimistic account of Dean Klonoff. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

115. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

116. 673 F.3d 947 (9th Cir. 2012).

117. *Id.* at 964.

118. 667 F.3d 204 (2d Cir. 2012), cert granted sub nom *American Express Co v. Italian Colors Restaurant*, No. 12-133.

119. *Id.* at 219.

120. *Kilgore*, 673 F.3d at 964.

enforcement obligations on the prospect of vindicating the statutory rights underlying the antitrust laws.¹²¹ Viewed from the vantage point of the individual transactor, the Ninth Circuit saw the exchange as well within the potential realm of informed individual decision-making. Viewed from the competing perspective of the societal interest in ensuring legal enforcement in mass markets, the Second Circuit came to the opposite conclusion.

At stake in the arbitration cases is not so much the preemptive force of a 1925 statute passed long before consumer markets had the standardized form they do today. Rather, the issue is the uncertain relation between the individualist premise of contract law and the modern world of mass enterprise. The latest installment in this area of law came in the Supreme Court's reversal of *In re American Express* as this Article heads to press. In *American Express Co. v. Italian Colors Restaurant*, the Court rejected the "effective vindication" argument categorically: "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."¹²² Indeed, the Court saw *Concepcion* as compelling the acceptance that the American legal system is not charged with providing a meaningful remedy for all claimed breaches of a substantive right, even those recognized at law.¹²³ This prompted a blistering dissent by Justice Kagan, charging that "to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled . . .," with the result being that instead of a cost savings device, "arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."¹²⁴

V. CONCLUSION

Mass society needs mechanisms of mass dispute resolution. It is hardly surprising in this day and age that the largest environmental disaster in the

121. *American Exp.*, 667 F.3d at 219. Professor McKenzie argues that one of the advantages bankruptcy offers in resolving mass claims is that it starts from the premise of a shared interest among all creditors, and does not indulge the individualistic assumptions of the common law. Troy A. McKenzie, *Toward a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012).

122. *Am. Express Co. v. Italian Colors Rest.*, No. 12-133, 2013 WL 3064410 at *4 (June 20, 2013).

123. *Id.* at * 6.

124. *Id.* at * 15.

United States,¹²⁵ the Deepwater Horizon catastrophe in the Gulf of Mexico, yields the largest proposed class action settlement in American history.¹²⁶ While there are innumerable issues regarding the contributing causes of the ill-fated British Petroleum drilling venture, and many corresponding issues of the extent of the harms caused by the released oil, there can be no denying that the core event was a single occurrence crying out for collective resolution.¹²⁷ The use of the class action vehicle to settle the bulk of private party claims in the BP litigation confirms once again the continued centrality of class actions in the mass resolution of collective harms.

At the heart of the many controversies surrounding class action litigation in the U.S. is the still unresolved tension between what legal claims belong in the category of the individual and what claims belong to a world of market relations that has long since transcended even the individual victims. As the sweep of industry and commerce expands worldwide, these controversies will not abate any time soon. But it is also worth remembering that these concerns are not before us for the first time. In concluding his discussion of the emergence of tort law in the modern era, Oliver Wendell Holmes noted more than a century ago that,

It might be said that in such cases the chance of a jury finding for the defendant is merely a chance, once in a while rather arbitrarily interrupting the regular course of recovery, most likely in the case

125. Barack Obama, *Remarks by the President to the Nation on the BP Oil Spill* (June 15, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill> (calling the spill the “worst environmental disaster”).

126. The proposed settlement is split in two: one settlement for economic and property loss, and another for medical loss. The settlements received preliminary approval from the Eastern District of Louisiana on May 2, 2012. Preliminary Approval Order As to the Proposed Economic and Property Damages Class Action Settlement, *In Re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 [hereinafter *Economic Settlement*], available at [http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order\(EconomicSettlement\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order(EconomicSettlement).pdf); Preliminary Approval Order As to the Proposed Medical Benefits Class Action Settlement, *In Re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179 [hereinafter *Medical Settlement*], available at [http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order\(MedicalSettlement\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders/05022012Order(MedicalSettlement).pdf). The structure of the settlements is complex. The proposed medical settlement would cover certain workers and certain residents of surrounding Gulf areas. *Medical Settlement* at 5. The proposed economic settlement would establish claim categories by geographic location and the nature of the loss or damage, including damage to, real estate, vessels, and seafood as well as economic loss. *Economic Settlement* at 5. BP has estimated that claims stemming from the settlements will cost \$7.8 billion. John Schwartz, *Accord Reached Settling Lawsuit Over BP Spill*, N.Y. TIMES (Mar. 3, 2012), <http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html>. The author serves as counsel to the Plaintiffs’ Steering Committee that negotiated the proposed settlements.

127. *Economic Settlement* at 2.

of an unusually conscientious plaintiff, and therefore better done away with. On the other hand, the economic value even of a life to the community can be estimated, and no recovery, it may be said, ought to go beyond that amount. It is conceivable that some day in certain cases we may find ourselves imitating, on a higher plane, the tariff for life and limb which we see in the *Leges Barbarorum*.¹²⁸

Holmes, with characteristic perspicacity, anticipates two critical developments in the law's treatment of mass enterprise activity, one on each side of the equation. The first is substantive and introduces the idea of enterprise-based strict liability rather than negligence as the touchstone for mass hazards. The second, directed to the plaintiffs in such cases, is to rationalize the compensation away from the unpredictability and cost of individual jury determinations. The reference to the *Leges Barbarorum*, the Germanic formalistic codification of Roman Law during the Middle Ages, is to the use of a schedule of damages as the basis for compensating the inevitable injuries attending to mass society.

Our inherited legal traditions seek to honor the individual as the heart of our system of duties and responsibilities. But by the time we get to something like the proposed BP class action settlement, we have moved far in the direction that Holmes anticipated more than a century ago. Under the Oil Pollution Act, the discharge of oil is statutorily entrusted to a strict liability regime,¹²⁹ and what the parties negotiated is an extraordinarily detailed compensatory code for economic and medical harms.¹³⁰ We no longer seek to write out a comprehensive formula of harms ahead of time, in the fashion of the medieval application of Roman law, but our class action practice endeavors to provide equality of treatment and predictability in the interaction between the individual insults of aggrieved citizens and the indiscriminating consequences of

128. Holmes, *supra* note 7, at 467.

129. Oil Pollution Act of 1990, P.L. 101-380.

130. See *Economic Settlement*, *supra* note 126, and *Medical Settlement*, *supra* note 126. Indeed, the class action remains the best mechanism for overseeing the equitable resolution of mass disputes. See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 143–51 (2007).

mass society.¹³¹ It is not an easy line to walk. But the tension is hardly novel.

131. As well captured by Judge Anthony Scirica of the Third Circuit:

The class action device and the concept of the private attorney general are powerful instruments of social and economic policy. Despite inherent tensions, they have proven efficacious in resolving mass claims when courts have insisted on structural, procedural, and substantive fairness. Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality.

Sullivan v. DB Invs., Inc., 667 F.3d 273, 340 (3d Cir. 2011) (Scirica, J., concurring).