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Mass Torts and Due Process

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INTRODUCTION

A consensus is emerging that the law of civil procedure stops at the claim. A federal court has considerable discretion over the procedures that apply to the claim, but the claim itself is, for the most part, inviolable. In its recent decisions, the Supreme Court has emphasized the importance of protecting the claim and, in particular, a plaintiff's control, or autonomy, over it. In doing so, the Court has invoked a “deep-rooted historic tradition that everyone should have his own day in court.”¹ To force “[un]willing” plaintiffs to give up control of their claims, such as through a mandatory class action, which provides no right to opt out of the class, would “abridge” each

1. Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)). The Court has stressed the importance of a “day in court” in a variety of contexts. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (in the context of a mandatory asbestos class action settlement under Federal Rule of Civil Procedure 23(b)(1)(B)); Martin v. Wilks, 490 U.S. 755, 762 (1989) (in the context of intervention under Rule 24). But see Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 195–96 (1992) (criticizing the notion that the Supreme Court has consistently protected a “day in court” in the nonparty preclusion context).

plaintiff's "substantive right."² The Court, in fact, has strongly suggested that protecting a plaintiff's autonomy over the claim is a requirement of the Due Process Clause.³ After all, the claim is a "property" interest that cannot be deprived without due process,⁴ and "the usual rule for sales of either personal or real property is that the power of sale resides with the property owner."⁵

For example, in *Wal-Mart Stores, Inc. v. Dukes* the Supreme Court vacated the class certification of Title VII gender discrimination claims that sought injunctive relief and monetary remedies.⁶ The plaintiffs sought to certify a class under Federal Rule of Civil Procedure 23(b)(2), which permits a class action where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," but does not require notice or an opportunity to opt out for class members.⁷ In rejecting the class action, the Court expressed a concern that "depriving people of their right to sue" without notice or opt out rights would fail to comply with the Due Process Clause, at least with respect to each plaintiff's claim for monetary remedies.⁸ The Court also questioned whether procedural due process permits a mandatory class action for claims seeking

2. 28 U.S.C. § 2072(b) (2006) (prohibiting a rule that would "abridge, enlarge or modify any substantive right"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (Scalia, J.) (concluding that a Rule 23 class action of state law claims that could not be brought as a class action in state court would not violate the Rules Enabling Act, but only "insofar as it allows willing plaintiffs to join their separate claims against the same defendants").

3. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); *id.* amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). This Article refers to both Due Process Clauses collectively as the "Due Process Clause," although they do not overlap entirely. See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 414–15 (2010) (discussing the difference between the two clauses with respect to the law of substantive due process).

4. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) (referring to a claim as a "chase in action" and noting that it "is a constitutionally recognized property interest possessed by each of the plaintiffs").

5. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 160–61 (2003) ("Applying the Due Process Clause to class actions, the Supreme Court has characterized the right to sue as a form of property.").

6. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560–61 (2011).

7. See FED. R. CIV. P. 23(b)(2); see also *id.* 23(c)(2)(A) (providing that for classes certified under 23(b)(2) the court "may," but not must, "direct appropriate notice to the class" and further is not required to provide class members an opportunity to opt out).

8. *Wal-Mart*, 131 S. Ct. at 2559; cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (interpreting Rule 23(b)(3), which typically governs class actions for monetary remedies, as requiring individual notice for all class members, noting that the notice provisions are "designed to fulfill requirements of due process"). I discuss in more detail below the different categories of class actions, including class actions under Rule 23(b)(2) and 23(b)(3). See *infra* Parts I.A & II.B.

injunctive relief, noting as an aside that such class actions are permitted under Rule 23(b)(2), “rightly or wrongly.”⁹ The *Wal-Mart* decision is not an isolated incident. The Court has expressed a due process concern with protecting a plaintiff’s autonomy over the claim in recent decisions involving arbitration,¹⁰ preclusion law,¹¹ and the *Erie* doctrine.¹²

As the old saying goes, hard cases make bad law. But hard cases also reveal the limits of legal doctrine. In this Article, I turn to a class of hard cases—mass torts—to rethink the law of procedural due process under the Due Process Clause. Mass torts have long perplexed courts and scholars. They include torts caused by asbestos and other toxic chemicals, pharmaceuticals, oil spills, and other mass-produced products and services. The plaintiffs not only suffer significant injuries, but the sheer number of plaintiffs, each with claims that raise unique fact and legal issues, stretch judicial resources to the limit. Not surprisingly, the Supreme Court has concluded that mass torts “def[y] customary judicial administration and call[] for national legislation.”¹³

9. *Wal-Mart*, 131 S. Ct. at 2559; see also MARTIN H. REDISH, WHOLESALÉ JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 169 (2009) (“If . . . the autonomy value lies at the normative core of procedural due process, obviously [an] opt-out procedure is constitutionally preferable to the mandatory procedure imposed by Rule 23(b)(1) and (2).”).

10. *AT&T Mobility LLC v. Concepción*, 131 S. Ct. 1740, 1751 (2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985)) (in affirming validity of class action waivers in arbitration agreements, noting that “[f]or a class-action money judgment to bind absentees in litigation . . . absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class”).

11. *Taylor v. Sturgell*, 553 U.S. 880, 892–93, 901 (2008) (rejecting the doctrine of “virtual representation,” which permits a court to preclude a plaintiff’s claim if the same claim was litigated in a different action, and the previous plaintiff had an “identity of interests and some kind of relationship” with the current plaintiff, because it would create a “de facto class action” shorn of procedural protections “grounded in due process”); see also *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380–82 (2011) (citing *Sturgell*, 553 U.S. at 901) (concluding that a federal court, in denying class certification, cannot enjoin another plaintiff from seeking to certify a class action in a different court, because, among other things, preclusion law would not permit the first suit to bind the second consistent with due process).

12. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (Scalia, J.) (upholding the use of Rule 23 class actions against *Erie* and Rules Enabling Act challenges so long as the class actions involve “willing” plaintiffs); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (noting that a mandatory class action involving a limited fund not only raises due process concerns, but that “[t]he Rules Enabling Act underscores the need for caution” given “the tension between the limited fund class action’s pro rata distribution in equity and the rights of individual tort victims at law”); see also RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 84 (2007) (arguing against the use of mandatory class actions in mass tort litigation since “the delegation made in the [Rules Enabling] Act must stop short of the legislative power that Congress might wield to alter preexisting rights”).

13. *Ortiz*, 527 U.S. at 821 (discussing asbestos litigation).

Nevertheless, and consistent with the emerging consensus, almost all courts and scholars disfavor the use of class actions in mass tort litigation because the class action device infringes upon each plaintiff's autonomy over the tort claim. The variance among the plaintiffs inevitably produces internal conflicts; one subclass, such as those "currently injured," may not adequately represent the interests of the others, such as "exposure only" plaintiffs who have not yet manifested injury.¹⁴ Moreover, the plaintiffs as a whole may have an external conflict with the class action attorney, who may "sell out" the plaintiffs' claims in "sweetheart settlements" in exchange for enormous fees.¹⁵ Not surprisingly, and as noted by the recently adopted *Principles of the Law of Aggregate Litigation*, "the class action has fallen into disfavor as a means of resolving mass-tort claims."¹⁶ At the very least, courts and scholars have insisted on a right to notice and an opportunity to opt out of any mass tort class action (or similar aggregate procedure) to protect each plaintiff's autonomy over the claim.¹⁷

14. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (rejecting certification of a settlement class action in asbestos litigation due, in part, to a conflict between "the currently injured, [whose] critical goal is generous immediate payments," and "exposure-only plaintiffs," who seek to "ensur[e] an ample, inflation-protected fund for the future"); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 386 (2000) ("Whenever the injuries suffered by class members are relatively heterogeneous [sic], internal conflicts necessarily arise.").

15. See *Ortiz*, 527 U.S. at 852–53 & n.30 (1999) (noting that in the class action context, "with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant"); Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377–78 & nn.1–2 (2000) (discussing, and criticizing, scholarly literature on sweetheart settlements).

16. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 reporters' notes cmt. b(1)(B) (2010) [hereinafter ALI, PRINCIPLES]; see also MANUAL OF COMPLEX LITIGATION § 22.7, at 413 (4th ed. 2004) [hereinafter MANUAL] ("Federal courts have 'ordinarily' disfavored—but not ruled out entirely—using class actions in dispersed mass tort cases."); 5 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 17.2, at 300 (4th ed. 2002) ("Certification of a plaintiff class in mass tort cases has been difficult to attain since Rule 23 was amended in 1966," detailing reasons); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1783 (3d ed. 1998) (noting that "several federal courts have refused to certify mass-accident cases under Rule 23(b)(3)," citing cases). In fact, class actions for "mass accident" cases have been disfavored from the beginning, as reflected in the 1966 Amendments to the Federal Rules of Civil Procedure, which permitted for the first time class certification of claims involving damage remedies. Advisory Committee Notes to 1966 Amendments of Rule 23, 39 F.R.D. 69, 103 (1966).

17. See *Ortiz*, 527 U.S. at 847 (rejecting mandatory settlement class action in asbestos litigation in part because "objectors to the collectivism . . . have no inherent right to abstain"); see also ALI, PRINCIPLES, *supra* note 16, § 2.07 (arguing in favor of "opt outs" to protect the interests of the plaintiffs, citing cases); Coffee, *supra* note 14, at 380 (arguing for opt out rights because the role of the attorney in mass tort litigation is "to facilitate client autonomy"); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective*

But, as I argue in Part I below, protecting litigant autonomy in the mass tort context is self-defeating. Using recent property theory on the “tragedy of the commons,”¹⁸ I argue that protecting a plaintiff’s autonomy over the claim leads to more mass torts. Specifically, protecting litigant autonomy in the mass tort context creates collective action problems among the plaintiffs that impair the deterrent effect of mass tort litigation. In fact, this self-defeating result can be avoided by taking away each plaintiff’s autonomy over the claim, such as through a mandatory class action.¹⁹

More importantly, and as I argue in Part II, the self-defeating nature of litigant autonomy in the mass tort context requires us to rethink basic tenets of the law of procedural due process. The insistence on protecting litigant autonomy in the mass tort context neglects the deterrence function of tort liability. Indeed, this deterrence function is a common feature of many substantive areas of law that utilize civil liability. Accordingly, the law of procedural due process should include among the relevant interests at stake each plaintiff’s individual interest in deterrence, understood as a “liberty”

Representation, 2003 U. CHI. LEGAL F. 519, 530 (discussing a number of modifications to nonclass aggregation of mass tort and similar litigation to ensure that “client autonomy is adequately protected”); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1065 (2002) (arguing for opt-out rights in mass tort litigation because “[i]t would limit the threat posed by modern aggregation practice to our long-standing tradition of individual litigation autonomy,” quoting Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1174 (1998)).

18. See Lee Anne Fennell, *Commons, Anticommons, Semicommons*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35 (Kenneth Ayotte & Henry E. Smith eds., 2010) [hereinafter Fennell, *Commons*] (discussing commons, anticommons, and semicommons); see also ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 7 (1990) (discussing three models, including the “tragedy of the commons,” and noting that they all “are diverse representations of a broader and still-evolving theory of collective action” involving “common resources”); Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 913–25 (2004) [hereinafter Fennell, *Tragedies*]; Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131, 135–44 (2000).

19. Here I rely primarily, although not exclusively, upon David Rosenberg’s work on the need for mandatory collective procedures in mass tort litigation. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System*, 97 HARV. L. REV. 849, 902–03 (1984) [hereinafter Rosenberg, *Causal Connection*]; see also *infra* Part I.B (discussing Rosenberg’s work). Rosenberg, however, has never examined the implications of his work on mass tort litigation on the law of procedural due process and has expressed “qualms about the meaning of the often asserted, but never carefully defined, concept of ‘fair process.’” See David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. ON LEGIS. 393, 395 (2000) [hereinafter Rosenberg, *What Defendants Have*]. In this Article, I do not reject the concept of “fair process,” but seek to reconceive its meaning in light of the collective action problems endemic to mass tort litigation. I also refine Rosenberg’s insights in some key respects, as I discuss in more detail below. See *infra* Parts I.B, I.C, & II.B.

interest “to be free from . . . unjustified intrusions of personal security.”²⁰ I also argue for a more impartial assessment of the relevant interests at stake in comparing different procedures for any potential “depriv[ation]” of due process.²¹ In particular, I argue that the law of procedural due process should look at the impact of any procedure on the ex ante incentives of all the relevant parties, including the defendant. I conclude that the mass tort context casts significant doubt on the notion that “the fundamental requisite of due process of law is the opportunity to be heard.”²² Instead, the law of procedural due process should take a context-dependent approach that takes into account the enforcement objectives of tort law and analogous liability rules.

I. MASS TORTS

Federal courts disfavor class actions in mass tort litigation largely as a matter of rule interpretation. Class actions in federal courts are governed by Rule 23, which provides that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members.”²³ Under Rule 23, “[a] class action may be maintained’ if two conditions are met: [t]he suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b).”²⁴ The third category, Rule 23(b)(3),²⁵ permits a class action if “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.”²⁶

Despite Rule 23(b)(3)’s expansive language, courts consistently have concluded that mass tort litigation fails to satisfy Rule 23(b)(3). First, given the variance of the plaintiffs on many issues of fact and law, courts have concluded that issues common to the class do not

20. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

21. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *see also* *Connecticut v. Doehr*, 501 U.S. 1, 10–18 (1991) (applying the *Mathews* balancing test to litigation involving solely private parties).

22. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

23. FED. R. CIV. P. 23.

24. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010).

25. I discuss the other categories below. *See infra* Part II.B.1.

26. FED. R. CIV. P. 23(b)(3).

“predominate” in mass tort litigation.²⁷ Second, courts have only considered the class action “superior” to separate actions in small claims litigation, where the damages are too small to provide an incentive to bring suit individually.²⁸ By contrast, the claims in mass tort litigation tend to be “viable,” and thus, unlike in small claims litigation, the plaintiffs can “obtain representation in the market for legal services in the absence of aggregate treatment.”²⁹

In this Part, I argue that this consensus stems from conceptual confusion about mass torts and class actions. In Section A, I argue that courts have not found a predominance of common issues in mass tort litigation because they ignore the common cause of mass torts—the defendant’s ex ante precautionary measures. Because the defendant’s liability will turn on issues of fact and law concerning its precautionary measures, these common issues of liability “predominate” in mass tort litigation.

In Section B, I argue that class actions have not been found superior in mass tort litigation out of confusion as to why the class action is superior in small claims litigation. As I argue below, small claims litigation and mass tort litigation both share a problem of asymmetric stakes. In both contexts the defendant has more at stake than any one plaintiff and thus has greater incentive to invest in issues common to the parties. More importantly, for both, the superiority of the class action arises from the de facto trust function of the class action. In both contexts, the class action, in effect, assigns and entrusts the plaintiffs’ claims to the class attorney for the benefit of the class. By assigning collective ownership of the claims to class counsel, the class action equalizes the stakes, thereby giving the class (through the class attorney) the same incentives to invest in common issues as the defendant.

One by-product of clarifying the confusion surrounding Rule 23(b)(3) and mass tort litigation is the realization that protecting litigant autonomy in the mass tort context is self-defeating. As I

27. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–24 (1997). In fact, the drafters of the 1966 amendments that resulted in Rule 23(b)(3) concluded that a class action is “ordinarily not appropriate” in a “mass accident” case where there would be “significant questions . . . affecting the individuals in different ways.” See Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966) (Advisory Committee’s note); see also Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 (1967) (noting that “litigation arising from ‘mass accidents’ . . . would ordinarily not be appropriate for class handling” because “individual questions of liability and defense will overwhelm the common questions”). Benjamin Kaplan was the reporter for the 1966 amendments.

28. See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

29. ALLI, PRINCIPLES, *supra* note 16, § 2.02 cmt. b.

discuss in Section C, protecting litigant autonomy in any form, such as through a right to opt out of a class action, perpetuates the problem of asymmetric stakes. More importantly, protecting litigant autonomy not only gives the defendant an advantage in the litigation, but it diminishes the defendant's incentives to take precautionary measures to prevent the mass tort from occurring in the first place. Litigant autonomy therefore causes a tragedy of the commons. Like individual overgrazing of commonly owned land, individual control of the claims leads to a self-defeating result for all of the plaintiffs—more mass torts. In fact, protecting litigant autonomy in the mass tort context not only is misguided, but it also calls into question basic tenets of the law of procedural due process. I examine those implications in Part II.

A. *The Predominance of Common Issues*

1. The Predominance Requirement

Although Rule 23(b)(3) requires a finding that common issues “predominate” over individual ones,³⁰ the meaning of “predominate” is unclear. Consequently, and as noted by the *Principles of the Law of Aggregate Litigation*, the predominance requirement as applied has involved a number of “multifaceted inquiries.”³¹ But the *Principles* further notes that, on the whole, the “predominance” requirement has been interpreted to require the existence of common issues that, if resolved, would “materially advance the resolution” of the claims.³²

At first glance, mass tort litigation cannot possibly satisfy the predominance requirement given the variance of the plaintiffs on many fact and legal issues. This is vividly shown in *Amchem Products, Inc. v. Windsor*, where the Court reviewed a class action that sought to

30. FED. R. CIV. P. 23(b)(3).

31. ALI, PRINCIPLES, *supra* note 16, § 2.02(a)(1) cmt. a.

32. *Id.* § 2.02(a)(1) cmt. a; *see also* Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1080 (2005) (arguing that the predominance requirement should be interpreted as requiring that common issues exist such that the claims can be effectively resolved in a class action); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831–32 (1997); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (“What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but, rather, the capacity of a class-wide 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.”) (emphasis added). I discuss in more detail the predominance requirement and the insistence on “common answers” in a separate article. *See* Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT’L L. (forthcoming 2012), available at <http://ssrn.com/abstract=1999691>.

provide a global settlement of all unfiled asbestos claims.³³ The Court noted the following:

Class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases. [Moreover,] [s]tate law governed and varied widely on such critical issues as “viability of [exposure-only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury.”³⁴

Accordingly, the Court concluded that common issues did not predominate.³⁵

The litany of individual issues in mass tort litigation has come to define mass torts. Mass torts, such as the injuries caused by asbestos in *Amchem*, are generally defined as torts in which the plaintiffs are not only numerous, but also geographically and temporally dispersed.³⁶ Mass torts are distinguished from “mass accidents,” which are torts that injure a geographically dispersed class but are caused by a single event in time, such as a hotel fire.³⁷ Mass torts are also distinguished from “toxic torts,” which are torts that are temporally dispersed but geographically confined, such as the spill of a toxic substance with a long latency period.³⁸

2. The Commonality of Mass Tort Liability

The generally accepted definition of a mass tort, like the conclusion that individual issues predominate in mass tort litigation, focuses on the plaintiffs after the mass tort has occurred. After the mass tort has occurred, the plaintiffs may be located in different locations, may manifest different diseases at different times, and may differ as to other fact and legal issues.

But the generally accepted definition of the mass tort obscures the underlying cause of mass torts. A mass tort is caused by a single decision about precautionary measures, made by the defendant, which affects a population that includes the plaintiffs. In other words, mass

33. 521 U.S. 591, 609–10 (1997).

34. *Id.* (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626–28 (3d Cir. 1996)) (citations omitted).

35. *Id.* at 622.

36. See, e.g., NAGAREDA, *supra* note 12, at xv–xvi.

37. See *id.* at xii–xiii; Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1901–02 (2000) (distinguishing between mass torts and single event torts such as airplane crashes); see also MANUAL, *supra* note 16, § 22.1 (distinguishing between “single incident” and “dispersed mass torts”).

38. See NAGAREDA, *supra* note 12, at xii–xiii; Hazard, *supra* note 37, at 1901–02 (distinguishing between mass torts and “toxic torts”).

torts are caused by a decision made by the defendant before the mass tort occurs that is common to the class. Because fact and legal issues related to that common cause will determine the defendant's liability, those common issues "predominate" the litigation, insofar as resolution of those issues would "materially advance the resolution" of the claims. Indeed, the commonality of issues of liability equally exemplifies a mass tort, since it distinguishes mass torts from "automobile accident litigation and other ordinary, high-volume litigation."³⁹

Consider, for example, the parties in *Amchem* before the tort occurred. In making decisions concerning its asbestos-containing products, Amchem could not know which consumers would be injured by its conduct or how those consumers would be injured.⁴⁰ Instead, Amchem could only estimate its expected liability for the exposed population "as a whole."⁴¹ For example, suppose that the cost of adding a warning about the dangers of asbestos inhalation is ten dollars per unit. Suppose further that Amchem's expected liability with the warning is fifteen dollars per unit, but it is thirty dollars per unit without the warning. Based on these estimates, Amchem will add the warning because the sum of the costs of the warning and the expected liability (ten dollars + fifteen dollars) is less than the sum of its costs without the warning (thirty dollars). Here the decision to add or not add a warning is common to the class, even though the effects of that decision will vary among the class members.

In fact, every mass tort arises from a decision concerning precautionary measures that is common to a large, dispersed population. *Amchem* concerned a decision not to add a warning label

39. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 966 (1993) (noting that "the commonality of issues and actors among individual mass tort claims" distinguishes mass torts from "automobile accident" and other "high volume" litigation).

40. David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 53 & n.60 ("The prospective defendant cannot know or predict how and to what degree contemplated conduct will benefit or harm anyone in the potentially affected population.").

41. STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 129 (1987) ("Expected losses are a probability-weighted *aggregation* of losses that can arise in many individually unlikely ways."); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice By Collective Means*, 62 IND. L.J. 561, 588 (1987) ("[I]n mass accident situations, the firm's accident prevention measures are of necessity the product of a collective, undifferentiated assessment of the probable loss from its activities for the class of potential victims as a whole; and, correspondingly, care-taking usually cannot be adjusted on an individualized basis.").

to its asbestos-containing products,⁴² and such failure-to-warn claims pervade mass tort litigation.⁴³ But the decision can involve other precautionary measures, such as the design of a mass-produced tire,⁴⁴ or, perhaps most infamously, the decision of where to place a gas tank in a Ford Pinto.⁴⁵

As in the asbestos example above, the decision can remain common even if it involves conduct that is not uniform to the class. An extreme example somewhat outside the mass tort context⁴⁶ can be found in *Wal-Mart Stores, Inc. v. Dukes*, where the plaintiffs alleged that Wal-Mart, in delegating its hiring and promotion decisions to individual store managers, introduced “excessive subjectivity” to those decisions.⁴⁷ Because of Wal-Mart’s uniform corporate culture and its awareness of the effects of delegating such decisions, the plaintiffs alleged that Wal-Mart’s “refusal to cabin its managers’ authority amounts to disparate treatment.”⁴⁸ The conduct at issue in *Wal-Mart* seems at first glance to be “sporadic acts of discrimination,”⁴⁹ since it involved “literally millions of employment decisions.”⁵⁰ But this ignores the ex ante decision by Wal-Mart to delegate its pay and promotion decisions in the first place, as opposed to cabining those decisions with more objective criteria. The fact that Wal-Mart’s decision to delegate was implemented through “literally millions of

42. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973) (“Here, the plaintiff alleged that the defendants’ product was unreasonably dangerous because of the failure to give adequate warnings of the known or knowable dangers involved.”).

43. See NAGAREDA, *supra* note 12, at 5 (noting that in mass torts arising from products liability claims, “the crux of [the plaintiffs’] allegations is that the manufacturer failed to provide adequate warnings concerning some risk associated with the product”).

44. See *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 503, 520–21 (S.D. Ind. 2001) (finding that common issues as to whether a tire design was defective supported finding that common issues predominated), *rev’d* 288 F.3d 1012 (7th Cir. 2002) (concluding that common issues did not predominate because multiple state laws applied).

45. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 358–62 (Ct. App. 1981) (discussing the problems with the Ford Pinto).

46. I say “somewhat” because the claims in *Wal-Mart* are based on Title VII, a statutory source of liability. However, the relevant provisions are modeled on tort law. See Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 519 (2002) (noting that “the courts have frequently looked to common-law tort doctrines to create the common law of Title VII”).

47. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 149 (N.D. Cal. 2004).

48. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547–48 (2011) (citing 42 U.S.C. § 2000e-2(a)).

49. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (defining disparate treatment pattern-or-practice claims as claims which concern conduct that “is repeated, routine, or of a generalized nature,” where plaintiffs must prove “more than sporadic acts of discrimination”).

50. *Wal-Mart*, 131 S. Ct. 2541, 2552.

employment decisions” does not make the decision itself any less common to the plaintiffs.⁵¹

More importantly, the defendant’s liability will depend on the resolution of issues of law and fact related to that common decision. For example, under the failure-to-warn liability standards that apply in many states, a firm is liable if “the foreseeable risks of harm” of the product could have been avoided by “the provision of reasonable instructions or warnings.”⁵² This “risk-utility test” is generally understood as “whether the aggregate costs of adding some safety feature proposed by the plaintiff is or is not outweighed by the aggregate benefit of preventing foreseeable accidents like that which injured the plaintiff.”⁵³ As it turns out, this mirrors the analysis Amchem would engage in to determine whether to add a label in the first place, since it would base its decision on the aggregate costs (e.g., ten dollars/unit) as compared to the aggregate benefit in harm avoided (e.g., fifteen dollars/unit).

The commonality of mass tort liability holds true regardless of the liability standard. The firm’s ex ante decision concerning its precautionary measures could be subject to the consumer expectations test, to an industry custom, or to a safety regulation under negligence per se rules. Regardless of which standard applies, the issue of whether the firm satisfies any of these standards will be common to the class because the ex ante decision itself is common to the class. The commonality of mass tort liability also holds true even if multiple state laws apply. Although the law may differ, the different liability standards typically share an element.⁵⁴ Moreover, the laws will invariably share an issue of fact concerning the defendant’s common decision, such as the defendant’s knowledge of the dangers of asbestos inhalation.⁵⁵

51. This point was well-recognized by the en banc majority. See *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 600–12 (9th Cir. 2010) (en banc) (concluding that “[p]laintiffs’ factual evidence, expert opinions, statistical evidence, and anecdotal evidence provide sufficient support to raise the common question whether Wal-Mart’s female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII”). I discuss this aspect of *Wal-Mart* in more detail in Campos, *supra* note 32.

52. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(c) (1998).

53. See DAVID G. OWEN, PRODUCTS LIABILITY LAW § 8.5 (2005) (discussing the analogous risk-utility standard in the context of design defects).

54. See, e.g., *In re Sch. Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992) (certifying class given common legal elements of different claims); *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83 (D. Mass. 2008) (same).

55. See, e.g., *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472–73 (5th Cir. 1986) (affirming class certified in asbestos litigation as to common issues such as the “state-of-the-art”

3. Commonality and Manageability

Many admit that liability issues are common to the plaintiffs in mass tort litigation but nevertheless conclude that these common issues do not predominate. First, they argue that, regardless of the commonality of “upstream” issues like liability, courts would still have to decide “downstream” issues relating to individual damages, rendering the class action unmanageable.⁵⁶ By contrast, in securities fraud or antitrust litigation, damages are typically calculated using mechanical formulas, and thus the litigation can be effectively resolved by determining common issues of liability.⁵⁷

I disagree that individual damages in mass tort litigation cannot be calculated mechanically.⁵⁸ Nevertheless, the perceived unmanageability of the mass tort class action incorrectly presumes that the entire action must be resolved all at once.⁵⁹ However, Rule 23 permits the certification of common issues “when appropriate,”⁶⁰ and the *Principles* encourages “common issue” class actions when they would “materially advance the resolution of the claims.”⁶¹ In fact, the bifurcation of common issues decided collectively and individual issues decided through individual trials is a common practice in antitrust and fraud litigation.⁶² Even within a common issue class action, a court can accommodate a number of procedures, such as bellwether

defense, noting that “[i]t is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases”).

56. ALI, PRINCIPLES, *supra* note 16, § 2.02 cmt. a; Issacharoff, *supra* note 32, at 831–32; Roger L. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 79 (“Little or no time and expense will be saved in these individual trials by virtue of the preceding mass trial on general causation.”); *see also* FED. R. CIV. P. 23(b)(3)(D) (noting that “the likely difficulties in managing a class action” is a “matter[] pertinent to” a finding of “predominance”).

57. ALI, PRINCIPLES, *supra* note 16, § 2.02 cmt. a; Issacharoff, *supra* note 32, at 831–32.

58. Specifically, and as I discuss below, a court can use damage schedules, which define categories of injuries and assign average awards to those categories, to distribute damages among the class. *See infra* Part II.B.2 (discussing the use of damage scheduling to determine individual damages).

59. For a more detailed discussion of this “all-at-once” fallacy, see Campos, *supra* note 32.

60. FED. R. CIV. P. 23(c)(4).

61. ALI, PRINCIPLES, *supra* note 16, § 2.01 cmt. c.

62. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001), *overruled on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) (“In the event that the district court does find conflicts [as to damage calculation] . . . there are a variety of devices available to resolve the problem [including] the possibilities of bifurcating liability and damage trials.”); *see Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (affirming RICO class certification and suggesting procedural mechanisms available at a later stage for individual issues such as damages (citing *Visa Check*, 280 F.3d. at 145)).

trials,⁶³ to avoid the possible error risk of an all-or-nothing determination of liability.⁶⁴ Indeed, a class action can utilize multiple trials to allow common issues of liability to “mature” over time.⁶⁵

Second, while issues of liability may be common to the class, some argue that they cannot be “carved at the joint” from individual issues.⁶⁶ For example, a finding that the defendant acted negligently may be common to the class, but it may have to be reexamined to determine each plaintiff’s comparative negligence. This not only would undermine the commonality of liability issues but also, if true, may violate the Reexamination Clause of the Seventh Amendment, which provides that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”⁶⁷

However, it is possible to carve liability issues and individual issues at the joint. Again, when a defendant makes a decision that may subject it to liability, it does so prior to any injury to, let alone any possible comparative negligence by, the potential plaintiffs. Accordingly, the defendant’s liability and the plaintiffs’ comparative liability cannot overlap because they concern two events at different points in space and time. Indeed, a jury determining an issue of comparative negligence can rely upon an earlier finding of the defendant’s negligence and simply determine the proportion of a specific plaintiff’s fault. Given this lack of overlap, a court can safely bifurcate common issues from individual ones in mass tort litigation.

63. See Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 634–37 (2008) (discussing and recommending the use of bellwether trials in class actions and other aggregate litigation).

64. ALI, PRINCIPLES, *supra* note 16, § 2.02 cmt. b (noting that a common issue class action “plac[es] both claimants and respondents at the risk of an all-or-nothing determination of the common issue on the merits of the aggregate,” whereas separate actions “might reflect more accurately the degree of uncertainty associated with a given common issue”); see also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–1300 (7th Cir. 1995) (Posner, J.) (noting advantage of “a pooling of judgment, of many different tribunals” produced by separate actions).

65. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748–49 (5th Cir. 1996) (discussing benefit of separate actions in allowing legal issues in mass tort litigation to “mature”); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688–89 (1989) (discussing “mature” mass torts where the basic issues of liability have been developed through individual litigation).

66. ALI, PRINCIPLES, *supra* note 16, § 2.03 reporters’ notes cmt. b (citing *Castano*, 84 F.3d at 751; *Rhone-Poulenc*, 51 F.3d at 1303).

67. U.S. CONST. amend. VII; *Rhone-Poulenc*, 51 F.3d at 1303 (noting concern with reexamination in context of comparative negligence defenses); cf. Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 502 (1998) (agreeing that mass tort litigation involves overlapping issues, but that reexamination of those issues would not violate the Reexamination Clause “if it would not lead to confusion and uncertainty”).

B. The Superiority of the Class Action

1. The Problem of Asymmetric Stakes

Rule 23(b)(3) requires, along with a finding of predominance, a finding “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”⁶⁸ Courts and scholars have recognized the superiority of the class action only in the context of litigation involving small claims for damages.⁶⁹ In small claims litigation, the expected recovery is too small to provide the plaintiff an incentive to bring suit since “only a lunatic or a fanatic sues for \$30.”⁷⁰ By contrast, the claims in mass tort litigation tend to be large, or “viable,” and consequently the class action is not “superior” because “there are likely to be realistic procedural alternatives . . . for the resolution of the underlying claims.”⁷¹

However, the consensus that the class action is not “superior” in the mass tort context does not adequately distinguish mass tort litigation from small claims litigation. Most obviously, mass tort plaintiffs may not, in fact, have viable claims given the high costs of litigating the claim.⁷² But mass tort litigation as a whole does not materially differ from small claims litigation once the problem of small claims litigation is fully fleshed out. Small claims litigation is problematic not only because the plaintiffs lack an incentive to bring suit separately, but because the defendant can exploit these insufficient incentives to escape liability altogether. Rule 23(b)(3) was no doubt influenced by a 1941 law review article, *The Contemporary Function of the Class Suit*, which advocated the use of class actions for small claims litigation since the lack of separate actions would “impair the deterrent effect of the sanctions that underlie much contemporary

68. FED. R. CIV. P. 23(b)(3).

69. Kaplan, *supra* note 28, at 497 (noting that the Rule 23(b)(3) category was primarily drafted to vindicate “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all”); *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.”).

70. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

71. ALL PRINCIPLES, *supra* note 17, § 2.02 cmt. b.

72. Rosenberg, *What Defendants Have*, *supra* note 19, at 418 n.52 (“Many cases of severe injury or death—‘high stake’ in the Court’s taxonomy—involve complex issues of science and public policy as well as fact and law that render them uneconomical as separate actions.”).

law.”⁷³ A number of scholars have emphasized this deterrence rationale to support small claims class actions.⁷⁴

The problem of the defendant using the deficient incentives of the plaintiffs to escape liability is equally present in the mass tort context. This becomes clear when one shifts focus from the plaintiffs’ incentives to bring suit to their incentives to make other investments during the litigation. Consider a simple example.⁷⁵ Suppose that an individual plaintiff ingested a drug that caused \$500,000 in damages.⁷⁶ Suppose the plaintiff has the option of (1) spending \$25,000 for an expert on generic causation that would result in a 50% probability of recovery at trial or (2) spending \$1,000,000 for a different expert on generic causation that would result in a 100% probability of recovery at trial. Suppose that the manufacturer of the drug expects others to file claims based upon the same issue of generic causation and that the total liability associated with that issue is expected to be \$100,000,000.

The plaintiff will hire the \$25,000 expert because the cost of the expert is less than the expected benefit ($\$500,000 \times 50\%$, or \$250,000). The same is not true for the \$1,000,000 expert. Even though the probability of success is certain (100%), the cost is greater

73. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941); see also Kaplan, *supra* note 28 (discussing the Kalven and Rosenfield article in the context of discussing the 1966 Amendments to Rule 23).

74. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2057–63 (2010); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 103–08 (2006); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 715–20 (2006).

75. Here and throughout the Article, I rely upon a model of litigant behavior that assumes that the parties seek to minimize their costs based on three factors: (1) the damages recoverable (or the liability that may be imposed) (h); (2) the probability of h occurring (p); and (3) the costs of the litigation process itself (for example, c_P for plaintiffs and c_D for defendants). Plaintiffs seek to maximize their net expected recovery, or $ph - c_P$, while defendants seek to minimize their total expected litigation costs, or $ph + c_D$. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 389–418 (2004) (examining the basic theory of litigation). The model and its basic assumptions are generally accepted and have been used by other procedural scholars. See, e.g., ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 34 (2003) (modeling litigant behavior in decisions to file suit using the same factors); see also ALLI, *PRINCIPLES*, *supra* note 16, § 1.04, reporters’ notes & cmt. a (acknowledging that “litigants tend to pursue economic gains”). Here I do not address limitations on the rationality or financing options of the parties. Such limitations are independent of the problem of asymmetric stakes and, in any event, tend to be biased in favor of the defendant.

76. The following example is borrowed, with some modifications, from Rosenberg, *What Defendants Have*, *supra* note 19, at 399–400 (using an example to illustrate that a variety of factors do not generate optimal incentives to maximize the aggregate value of classable claims). The example is also not far-fetched. See *In re Neurontin Mktg., Sales Practices, & Prods. Liab. Litig.*, 612 F. Supp. 2d 116, 122 (D. Mass. 2009) (denying *Daubert* motion to exclude expert testimony concerning whether gabapentin generally causes an increased risk of suicidality).

than the expected benefit (\$500,000). Of course, a plaintiff is not entitled to the best evidence available. But consider the incentives of the defendant. Unlike the plaintiff, if the defendant could hire an expert for \$1,000,000 that would reduce the probability of recovery for the plaintiffs to 0%, then the defendant would make that investment given the liability at stake (\$100,000,000). In fact, the defendant would be willing to invest \$2,000,000, or \$3,000,000, or \$10,000,000 on an expert or other evidence showing no generic causation.

This example shows that both small claims and mass tort litigation share a problem of asymmetric stakes.⁷⁷ In both situations, a defendant owns all of the potential liability associated with any common issue, but each plaintiff only owns a portion of the recovery (the flipside of liability). In small claims litigation, the fractional share of the liability owned by the plaintiff is so small that it prevents all plaintiffs from suing. But even if some plaintiffs own a share in the liability sufficient to bring suit, they will still have less incentive to invest in the suit than the defendant. The defendant simply has more at stake. Thus, the defendant can exploit economies of scale in investing in common issues that the plaintiffs cannot. Indeed, the defendant can exploit economies of scale for a variety of investments in common issues, such as legal research, discovery and other factual investigation, and the hiring of expert witnesses and other consultants.

2. The Class Action Solution

Recognizing the problem of asymmetric stakes further clarifies how the class action solves the problem. Admittedly, other legal

77. The problem of asymmetric stakes was first identified by David Rosenberg in his work on mass tort litigation. See Rosenberg, *Causal Connection*, *supra* note 19, at 902–03 (describing how case-by-case resolution of mass exposure claims affects plaintiffs and defendants differently). Recent works by Rosenberg clarifying the problem include Rosenberg, *supra* note 41, at 567 (examining the asserted conflict between the ideal of individual justice and the collective processes of class actions); Rosenberg, *supra* note 40, at 23 (arguing that the opt-out right provided in Rule 23(b)(3) class actions is unnecessarily destructive of individual welfare); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 832 (2002) [hereinafter Rosenberg, *Only Option*] (arguing that mandatory class actions are necessary “for ‘optimal tort deterrence’ to prevent unreasonable risk of accident and for ‘optimal tort insurance’ to cover residual reasonable risk”); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 695–96 (1989) [hereinafter Rosenberg, *End Games*] (commenting on Professor Francis McGovern’s collective process innovations for class action of asbestos claims); Rosenberg, *What Defendants Have*, *supra* note 19, at 393 (explaining the advantages of scale economies in mass tort claims and discussing the social costs of the systematic bias favoring defendants over plaintiffs). Rosenberg, however, does not use the term “asymmetric stakes,” which I borrow from Robert Bone in his discussion of nonparty preclusion. See Bone, *supra* note 1, at 246–47, 255.

interventions may solve the problem of asymmetric stakes.⁷⁸ However, I focus on how the class action solves the problem to clarify the function of the class action.

In small claims litigation, a class action is considered superior because it “aggregat[es] the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”⁷⁹ A small claims class action is worth an attorney’s “labor,” in part, because of the potential fee, which is usually calculated as a percentage of the total recovery.⁸⁰ Moreover, the “common-fund doctrine” permits class counsel to spread any costs among the plaintiffs.⁸¹ Consequently, class counsel is given a stake that is consistent with having an entire stake in the liability. If class counsel invests in the litigation to increase the net amount of the entire pie, her cut of that pie commensurably increases. Along with a stake in the litigation, class counsel also receives dispositive control over the claims, which includes the power to settle the claims on a class-wide basis.⁸²

Taken together, the class action assigns to the class attorney both (1) a “beneficial interest” in the plaintiffs’ recovery and (2) dispositive control, or “legal title,” of the claims for the benefit of the

78. Examples of other interventions to resolve the problem of asymmetric stakes include ex ante regulation, the use of exemplary remedies like punitive or statutory damages, the availability of contracting and market pressure, and nonclass aggregation procedures. *See, e.g.*, SHAVELL, *supra* note 41, at 277–86 (discussing the advantages and disadvantages of ex ante regulatory approaches versus the use of ex post liability); SHAVELL, *supra* note 75, at 398 (noting that “if there is an inadequate level of suit, the state can subsidize or otherwise encourage suit”); A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1442 (2010) (noting that market pressure in products liability contexts may obviate the need for the use of tort liability); Campos, *supra* note 32 (discussing functional equivalence of class action to multidistrict litigation). I discuss each of these alternative interventions in more detail below. *See infra* Part I.B.3 (discussing private contracting); Part II.B.2 (discussing exemplary remedies like punitive damages); Part II.C.3 (discussing alternative enforcement procedures in the context of federalism and separation-of-powers concerns); text accompanying notes 87–89 (discussing nonclass aggregation procedures). I want to stress, however, that these interventions are generally less optimal than the class action because they either (1) mimic the class action (as with nonclass aggregation); (2) require the use of a class action to prevent adverse consequences such as underdeterrence or overdeterrence (as with imperfect ex ante regulation or punitive damages); or (3) call into question whether civil liability should be used at all (as with market pressure, contracting, and ex ante regulation).

79. *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)).

80. *See* ALI, PRINCIPLES, *supra* note 16, § 3.13(a) cmt. b (noting that “most courts and commentators now believe that the percentage [of the fee] method is superior” to other methods of attorney compensation).

81. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (permitting a district court to apportion costs, including attorneys’ fees, against the unclaimed portion of a class action judgment under the “common-fund doctrine”).

82. *See* FED. R. CIV. P. 23(e) (providing procedures for attorneys concerning “settlement, voluntary dismissal, or compromise” of a class action).

plaintiffs.⁸³ In doing so, the class action solves the problem of asymmetric stakes by equalizing the stakes. Due to these entitlements, the class attorney, like the defendant, will invest in the litigation *as if* she had the total amount of liability at stake.

Understood in this functional sense, a class action is neither a “joinder” nor a “representative device,”⁸⁴ but a trust device. The class action is not a joinder device that aggregates the plaintiffs as parties into one proceeding.⁸⁵ Although formally true as a matter of preclusion doctrine, the class action does not depend on the plaintiffs acting as a collective. The class action is also not a representative device because it does not depend on any plaintiffs at all, not even the nominal class representative. The class attorney, rather than the representative plaintiff, initiates and controls the litigation of the plaintiffs’ claims.⁸⁶ Instead, a class action is a *de facto* trust device, with the class attorney acting as trustee of the plaintiffs’ claims for the benefit of the plaintiffs.⁸⁷ In effect, the class action makes class counsel the “real

83. See *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2536–38 (2008) (defining and distinguishing the “beneficial interest” in a claim from the “legal title” to the claim).

84. See Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 459 (discussing historical vacillation between viewing class actions as “joinder” and as “representational” devices).

85. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (Scalia, J.) (describing Rule 23 as only “allowing multiple claims (and claims by or against multiple parties) to be litigated together”).

86. See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341 (“Class actions almost invariably come into being through the actions of lawyers—in effect, it is the agents who create the principals.”).

87. See RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (defining a “trust” as a “fiduciary relationship” which “subject[s] the person who holds title to the property to duties to deal with it for the benefit of . . . one or more persons,” at least one of whom is not the sole trustee); cf. Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 488 (noting that a class action is a “forced exchange” that gives the victim’s claim to a third party).

One could also view the class action as an “entity” in which class counsel is the director or officer, the claims are the corporate asset, and the plaintiffs are the shareholders. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 921 (1998) (arguing for an entity theory of the class analogous to “congregations, trade unions, joint stock companies, [and] corporations”). But the trust view of the class action improves on the entity view in two ways. First, the entity view suggests that the cohesion of the class is relevant. See *id.* at 921–22 (noting the lack of voluntary aggregation of the class members and proposing procedures such as voting to reflect cohesion). However, the problem of asymmetric stakes arises and is resolved regardless of the extent of class cohesion. Second, the trust conception of the class action highlights the underlying cause of the problem of asymmetric stakes—the excessive fragmentation of property rights. See Lee Anne Fennell, *Slices and Lumps* 2–3 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Series, No. 211, 2008), available at <http://ssrn.com/abstract=1106421> (discussing problems of fragmentation and aggregation of property rights).

party in interest.”⁸⁸ Indeed, “a common structural feature of all aggregate proceedings [is] the loss of control of litigation by persons whose interests are at issue.”⁸⁹

3. The Inferiority of Informal Aggregation

Although the problem of asymmetric stakes has been acknowledged,⁹⁰ some scholars still question whether a class action is superior to separate actions in mass tort litigation. For example, scholars point out that plaintiffs, through their attorneys, can build large inventories of claims; share information; and enter into various agreements, associations, or consortiums to coordinate their investments.⁹¹ According to these scholars, “[p]roperly handled, non-class collective litigation not only is viable, but goes a long way toward leveling the field against resource-rich defendants.”⁹² Indeed, “there is no obvious reason to prefer public ordering to private ordering.”⁹³

Of course, under certain conditions, parties can use private ordering to reach the most efficient allocation of legal entitlements.⁹⁴ But informal aggregation cannot completely solve the problem of asymmetric stakes in mass tort litigation. First, current tort law restricts the market for claims. Plaintiffs cannot assert risk-based claims,⁹⁵ and prohibitions on champerty and maintenance limit the

88. See FED. R. CIV. P. 17(a) (providing that “[a]n action must be prosecuted in the name of the real party in interest,” which may include “the trustee of an express trust”); cf. *Sprint*, 128 S. Ct. at 2541–42 (permitting assignee of legal title to a claim as “real party in interest” for purposes of Rule 17 even though assignee was to remit all recovery to the assignors minus a flat fee).

89. ALI, PRINCIPLES, *supra* note 16, § 1.05 cmt. a; see also *id.* § 1.02 reporters’ notes cmt. b(2) (noting that “[b]ecause common issues provide the basis for consolidation, a consolidated proceeding resembles a class action certified on the basis of predominating common questions”); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105, 109 (2010) (observing that multi-district litigation in which judges have unfettered discretion to appoint lead counsel have been recognized as “quasi-class actions”).

90. See, e.g., ALI, PRINCIPLES, *supra* note 16, § 1.02 cmt. b(3) (“A defendant facing a large number of related claims enjoys naturally occurring economies of scale in legal proceedings.”).

91. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–401 (2000) (describing such processes).

92. Erichson, *supra* note 17, at 550 n.117; see also NAGAREDA, *supra* note 12, at 117–18 (arguing that informal aggregation provides “sufficient incentives”).

93. Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 212.

94. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–15 (1960) (discussing what would become the Coase theorem).

95. See John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1641–49 (2002) (discussing and defending the requirement for realized harm under current tort doctrine).

transfer or selling of claims to others.⁹⁶ Second, informal aggregation entails transaction costs. Recruiting clients entails significant costs,⁹⁷ and plaintiffs also incur costs in communicating with other attorneys and reproducing information. The defendant never incurs these costs because it already owns all of the liability at stake. Third, and most importantly, informal aggregation involves strategic behavior that frustrates aggregation. A plaintiff may defect from informal aggregation to recover more separately,⁹⁸ to avoid mixing her claim with other dubious claims,⁹⁹ or to avoid any other costs of aggregating.¹⁰⁰ A plaintiff may also defect to free ride on investments in common issues made by others,¹⁰¹ such as through nonmutual offensive issue preclusion¹⁰² or through reliance on the precedent or findings established in other cases. Taken together, market restrictions, transaction costs, and strategic behavior cause collective action problems that prevent complete aggregation.

Nevertheless, some scholars contend that complete aggregation is not necessary. Since investing in common issues presumably has diminishing returns, informal, incomplete aggregation is sufficient because “the matters most likely to break open a case” only require “some minimal level of investment . . . to bring them to light.”¹⁰³ Given

96. See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 61 (2011) (discussing, and criticizing, the law of champerty and maintenance).

97. See NAGAREDA, *supra* note 12, at 16 (acknowledging that “[c]lient recruitment is not costless”).

98. See McGovern, *supra* note 65, at 667 (noting that in the *Jenkins v. Raymark* litigation, fifty-two plaintiffs opted out in part because they were “afraid that any lump-sum resolution would short change” them).

99. See Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209, 226 (1988) (noting that aggregation can lead to an increased likelihood of the class’s recovery, but awards to plaintiffs with strong cases might decrease).

100. See James D. Cox et al., *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1604–05 (2006) (noting that in securities fraud litigation, “institutional investors with large potential claims” are reluctant to serve as lead plaintiffs in class actions because “[i]nstitutional lead plaintiffs incur costs when monitoring the actions of lead counsel”).

101. See Rosenberg, *What Defendants Have*, *supra* note 19, at 425 (noting that “voluntary joinder is beset by free-riding”).

102. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–32 (1979) (permitting nonmutual offensive collateral estoppel for common issues under certain conditions); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 956–57 n.42 (1998) (discussing the free-rider problem caused by nonmutual issue preclusion); *cf.* *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982) (rejecting preclusion of common issues in asbestos litigation due to ambiguity in jury verdicts).

103. See NAGAREDA, *supra* note 12, at 118; *see also* Erichson, *supra* note 17, at 550 n.117 (arguing in favor of informal aggregation, noting that “[f]urther investment in litigation inevitably reaches a point of diminishing returns”).

the uncertainty inherent in any investment, one cannot say a priori what the relationship is between investments in common issues and the probability of recovery.¹⁰⁴ But the existence of a sufficient investment level is doubtful given the complexity of the issues in mass tort litigation. After all, “one can always search for more evidence of causation or more evidence of a cover-up.”¹⁰⁵ Moreover, ex post, a minimal investment may uncover a smoking gun. However, ex ante, the parties do not know how much investment would be needed to find that smoking gun, if one exists at all. In fact, a case may go completely uninvestigated in the absence of complete aggregation.¹⁰⁶ Finally, even if there exists such a level of investment, informal aggregation probably will not reach it because the plaintiffs most likely to defect are those with large claims.¹⁰⁷

C. *The Tragedy of Autonomy*

1. The Problem of Litigant Autonomy

One consequence of the problem of asymmetric stakes is that control over the claim is of little value. This is obvious in the small claims context, since “the interest” in litigant autonomy is “no more than theoretic.”¹⁰⁸ But litigant autonomy is also of little value in mass tort litigation because it causes the collective action problems that perpetuate the asymmetric stakes between the defendant and each individual plaintiff.

These collective action problems surface even when litigant autonomy is protected in a limited form, such as through a right to opt out of the class.¹⁰⁹ Permitting such a nonmandatory class action may

104. See Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1269 (2006) (analogizing lawsuits to “research and development projects,” noting that they share an endemic, irreducible uncertainty as to the relationship between investments and payoffs).

105. NAGAREDA, *supra* note 12, at 118; cf. Rosenberg, *What Defendants Have*, *supra* note 19, at 422 (arguing that parties “in reality choose from among a virtually continuous range of options”).

106. Cf. S. Todd Brown, *Specious Claims and Global Settlement*, 42 U. MEM. L. REV. (forthcoming 2012) (noting that scrutiny of screening methods to identify individual victims in mass tort litigation involving silica resulted in fewer claims, less investment, and an end to the litigation).

107. NAGAREDA, *supra* note 12, at 145 (noting that in class action settlements, “high-value claimants will tend to depart, leaving mid- to low-value claims in the class”); see also Brown, *supra* note 106 (same).

108. Kaplan, *supra* note 28, at 391.

109. See FED. R. CIV. P. 23(c)(2)(B)(v) (requiring a class action certified under Rule 23(b)(3) to provide notice that “that the court will exclude from the class any member who requests exclusion”).

overcome the market restrictions and transaction costs that frustrate informal aggregation.¹¹⁰ However, it still allows for strategic behavior that would unravel complete aggregation. Studies have shown that plaintiffs with large claims tend to opt out of class actions.¹¹¹ Indeed, the unraveling of the recent fen-phen global settlement was caused by multiple opportunities to opt out of the settlement.¹¹² Even more perniciously, opt-out rights allow plaintiffs to hold out for a greater share of recovery, in effect holding complete aggregation hostage for a payoff.¹¹³

2. Litigant Autonomy as Self-Defeating

One difference between small claims litigation and mass tort litigation is that, in mass tort litigation, some plaintiffs are better off suing separately than through a class action. A plaintiff with a small claim has no incentive to bring suit or, for that matter, to defect from a class action.¹¹⁴ Thus, in small claims litigation every plaintiff benefits from a class action as compared to filing a separate action. This is not necessarily true of mass tort litigation. Even if one compared a mandatory class action to separate actions, there may be plaintiffs who are better off suing separately than joining the collective. Although the collective would do better as a whole, it is unclear why some plaintiffs would have to suffer to benefit the collective. Understood in this way, the problem of asymmetric stakes

110. *But see* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (acknowledging, but not deciding, the issue of whether exposure-only claimants have standing to sue).

111. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1555 (2004) (noting that “[a]s th[e] recovery increases, so does the opt-out rate,” conjecturing that “it may be a function of the association of high per-class-member recoveries with opting out class members believing that they can do better on their own, or as part of a different class action law suit, than as members of the class from which they opt-out”).

112. *See* NAGAREDA, *supra* note 12, at 146–47 (discussing the fen-phen global settlement, and noting that plaintiffs utilized multiple opt-outs to destroy the settlement).

113. *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, 96 (1997) (noting that opt-out rights allow plaintiffs with high value claims to hold out to extract payoffs). *But see* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 403 (discussing the hold-out problem, but ultimately endorsing objectors to monitor class counsel).

114. *See* David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible Remedies,”* 79 GEO. WASH. L. REV. 542, 548 (2011) (noting that in small claims class actions no plaintiff has an incentive to either aggregate or defect).

in mass tort litigation creates a conflict between the collective interests of the plaintiffs and their individual interests.¹¹⁵

But the problem of asymmetric stakes in mass tort litigation can be understood as a problem for each individual plaintiff if its consequences are considered over time. As noted above, before the tort occurs, the defendant cannot know how its actions would affect specific members of the class.¹¹⁶ Likewise, before the tort occurs, a plaintiff cannot know how she will be injured by a tort, if at all. Ideally, the plaintiffs would negotiate with the defendant on what precautionary measures to take. But in most mass tort contexts, such as in the asbestos context, the ability to contract prior to the mass tort is difficult, if not impossible.¹¹⁷ Instead, the defendant will choose its precautionary measures based upon its expected liability and costs.¹¹⁸

Before the tort occurs, each plaintiff would prefer to maximize the defendant's expected aggregate liability to induce the defendant to take optimal safety precautions to prevent mass torts. Accordingly, every plaintiff would prefer litigating any mass tort through a mandatory class action. However, after the tort occurs, that preference may change. At that point in time, the plaintiffs learn whether the defendant's conduct injures them or not. Moreover, deterring the defendant from committing the mass tort is pointless because the tort has already happened. Thus, after the tort occurs, each plaintiff only cares about recovering as much as possible, rather than maximizing the defendant's expected aggregate liability.

To use a simple example,¹¹⁹ suppose that the plaintiffs know that, prior to the tort, the affected population will suffer \$100,000,000 in damages and will have a 75% chance of recovery if they litigate as a mandatory class action. However, they also know that at least 10 individuals in the population will suffer damages of \$4,000,000 with a 100% probability of recovery, with the remaining members, if

115. See Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 11–24 (2009) (distinguishing between “group-oriented individuals” and “individuals-within-the-collective” and noting the tension between the two).

116. See *supra* Part I.A.

117. This may not be true in all contexts. See Polinsky & Shavell, *supra* note 78, at 1491 (noting that, among other things, market pressure and contracting may make liability for product defects unnecessary).

118. See *supra* Part I.A.

119. The example is stylized but realistic given the size of the claims in mass tort litigation, the variance of high and low value claims among the plaintiffs, and the propensity of plaintiffs with high claims to opt out. See NAGAREDA, *supra* note 12, at 146–47 (discussing litigation concerning the diet drug fen-phen). In fact, the inability to sufficiently aggregate could effectively end the litigation. See Brown, *supra* note 106 (noting that the failure to sufficiently aggregate in silica litigation led to the end of the litigation).

aggregated without these 10 individuals, suffering \$60,000,000 but with a 50% chance of recovery. Before the tort occurs, each plaintiff would prefer the mandatory class action because the expected aggregate liability ($\$100,000,000 \times 75\%$, or $\$75,000,000$) would be greater than partial aggregation and 10 separate actions for $\$4,000,000$ ($\$60,000,000 \times 50\% + \$40,000,000$, or $\$70,000,000$). However, after the tort occurs, if a plaintiff knows she has a $\$4,000,000$ guaranteed claim, she will strategically defect from aggregation.

Any preference for a separate action after the tort occurs, although rational at the time, is ultimately self-defeating. In the above example, the difference between the mandatory class action and informal aggregation is roughly $\$5,000,000$ in expected liability, which may be the difference between the defendant adding or not adding a warning label,¹²⁰ or putting the gas tank on the side rather than the rear.¹²¹ Thus, protecting the plaintiff's right to bring a separate action not only leads to the defendant avoiding its full liability—it causes the very mass torts each plaintiff wanted to avoid in the first place.

Arguably, before the tort occurs, an individual plaintiff may prefer less than complete aggregation to preserve control over her claim. But it is unlikely. A plaintiff may recover more in the absence of a mandatory class action, but it is more likely that the plaintiff will recover less, particularly if the plaintiff winds up with a weaker claim. Even if the plaintiff would recover more separately, she would likely have higher costs litigating a claim separately than in a group, leading to more incomplete compensation.¹²²

Most importantly, and as noted above, the protection of each plaintiff's autonomy over the claim would cause a marginal decrease in the plaintiffs' expected aggregate recovery. This decrease, in turn, would cause a marginal increase in the risk of injury for every plaintiff. This is because the decrease would reduce the incentives the defendant has to take ex ante precautionary measures.¹²³ Most

120. See *supra* Part I.A (discussing Amchem's ex ante decisionmaking concerning adding a warning label).

121. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 360–61 (Ct. App. 1981) (discussing Ford's cost-benefit analysis in placing gas tanks in the Ford Pinto).

122. This is particularly true if a mandatory class action awards damages based on damage scheduling. See Part II.B.2 (discussing damage scheduling).

123. There may be a concern with mass torts that are difficult to forecast due to uncertainty, which may prevent a defendant from determining the risk of their occurrence and thus prevent a defendant from taking appropriate ex ante precautionary measures. However, even when such uncertainty obtains, liability may still optimally deter defendants by inducing the defendants to produce information as to the riskiness of the mass tort as well as to the appropriate precautionary measures. See SHAVELL, *supra* note 41, at 56–57 (noting that, under strict

individuals are generally risk averse, as evidenced by insurance markets for life, disability, and health insurance, and thus would incur additional risk-bearing costs from incomplete aggregation.

But even if insurance is readily available, the increase in risk will likely cause losses that can never be compensated with damages, such as death, loss of loved ones, cancer, or physical disabilities. Such nonpecuniary losses, in fact, constitute well over half of the losses caused by torts.¹²⁴ It is highly unlikely that a plaintiff would prefer to bear this additional risk of injury, along with incomplete compensation for any actual injury, to preserve the “collateral benefit” of control over any claim.¹²⁵

Thus, the problem of asymmetric stakes can be understood as a problem of individual precommitment. It allows a defendant to exploit each plaintiff's post-tort preference to recover as much as possible to frustrate each plaintiff's pre-tort preference to avoid the tort altogether. This is analogous to the commitment problems that arise when, for example, a dieter's short-term preference for high-calorie food frustrates a long-term preference for losing weight. As noted by David Rosenberg, the mandatory class action can be seen as a “mast-tying” device that prevents the plaintiffs from destroying the collective procedure they each would have agreed to before the tort.¹²⁶

3. Law Enforcement as a Commons

But the problem of asymmetric stakes in mass tort litigation is better understood as a problem familiar to the law. In property law, a “tragedy of the commons” arises when individual use of a common resource results in self-defeating behavior. The classic example is individually owned cattle grazing on commonly owned land, which

liability, a firm will have an incentive to engage in appropriate research and development into precautionary measures); *id.* at 129 (noting that if defendants are not liable for unusual harms, then “their incentives to exercise caution will be inadequate”).

124. See TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2002 UPDATE 17 fig. (2002).

125. See Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 74 (2010) (arguing that economic analysis of tort law ignores “collateral benefits,” noting “[l]itigants often have reasons to tell their stories in public [and] [p]laintiffs may find a chance to do so empowering or cathartic”). As I discuss below, a mandatory class action can accommodate a right of participation, as distinct from a right of control. See *infra* Part II.B.3.

126. See Rosenberg, *Only Option*, *supra* note 77, at 833 n.72 (“If individuals recognized this problem *ex ante*, they would insist on (and invest in) an *ex post* law enforcement mechanism that effectively ties everyone to the proverbial mast of required collective action.” (citing JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000)); *cf.* ALI, PRINCIPLES, *supra* note 16, § 1.04 cmt. e (expressing “a policy commitment to mimic market arrangements in contexts in which markets are prone to fail”).

may lead to overgrazing.¹²⁷ Similar tragedies can result from fishing in a common pool,¹²⁸ extracting oil,¹²⁹ or sending Internet spam.¹³⁰ Such commons problems have been analyzed as arising from either overuse¹³¹ or underinvestment¹³² of the common resource. Commons problems are further distinguished from anticommons problems. Unlike commons problems, which typically result from open-access resources with too few rights to exclude, anticommons problems typically arise from resources with too many rights to exclude.¹³³

All of these commons and anticommons tendencies are present in mass tort litigation.¹³⁴ Plaintiffs overuse their claim by suing separately, causing underinvestment in common issues.¹³⁵ Moreover, like an anticommons, mass tort litigation generally involves too many rights to exclude, as each plaintiff has the power to “veto” complete aggregation.¹³⁶ In fact, the holdout problems that exemplify anticommons situations can be found in class actions with opt-out rights.

Recent property theory reconceives commons and anticommons tragedies as problems of scale. They arise from a mismatch between the scale of the ownership unit of a right to a certain use of a resource and the scale at which the exercise of those rights is optimal.¹³⁷ In “tragedy of the commons” situations, individual ownership of a right to use, such as an individual right to graze one’s cattle, may lead to overuse (or underinvestment) of a resource such as land. Individual ownership of a right to use may also lead to hold-out problems that

127. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1244–45 (1968).

128. See, e.g., OSTROM, *supra* note 18, at 3.

129. See, e.g., Gary D. Libecap & James L. Smith, *The Economic Evolution of Petroleum Property Rights in the United States*, 31 J. LEGAL STUD. S589, S590 (2002) (analyzing the evolution of property rights and regulatory arrangements in the extraction of oil from common pools in the United States).

130. Fennell, *Tragedies*, *supra* note 18, at 914.

131. See, e.g., Francesco Parisi et al., *Duality in Property: Commons and Anticommons*, 25 INT’L REV. L. & ECON. 578, 583 (2005) (suggesting that “the problem of the commons is based on a negative externality [of use rights]”).

132. See, e.g., ELINOR OSTROM ET AL., RULES, GAMES, AND COMMON-POOL RESOURCES 14–15 (1994).

133. See Frank I. Michelman, *Ethics, Economics and the Law of Property*, 24 NOMOS 3, 9 (1982).

134. Epstein, *supra* note 87, at 486–87 (noting analytic similarity of mass tort settings to “common pool asset” settings like oil and gas extraction).

135. Fennell, *Tragedies*, *supra* note 18, at 917 (“It is often possible to cast a particular collective action problem as either a problem of underinvestment or a problem of overuse.”).

136. Michael Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621, 666 (1998) (noting that in anticommons contexts, “multiple owners of rights of exclusion in an object each have a veto on others’ use”).

137. Fennell, *Commons*, *supra* note 18, at 33.

prevent the best use of a resource, as in anticommons situations. Either way, the core problem these tragedies share is that the ownership units of the right to use a resource are not set at the right scale.

Understood in this way, the problem of asymmetric stakes in mass tort litigation can be seen as a tragedy of the commons. Recasting the problem of asymmetric stakes as a commons problem improves upon precommitment as a framing device because it focuses on the scale problem that causes each plaintiff's different preferences over time. The problem of asymmetric stakes is, in essence, a property problem, caused by the insufficient scale of the ownership unit of the right to control the claims.

While the ownership unit is the right to use the claim, the resource appears to be investment in common issues, which are, in a sense, commonly owned by the plaintiffs. But the development of common issues is subsidiary to the objectives of mass tort litigation. It determines not only the amount recovered, but also whether the defendant will comply with the law in the first place. Thus, the resource in mass tort litigation is not just the common issues, but the enforcement of the law itself. In essence, law enforcement in mass tort litigation is a "public good" that can only be provided collectively and, more importantly, can be squandered individually.¹³⁸ Here individual control of the claim results in the class "shooting itself in the collective foot" by causing more mass torts.¹³⁹

In concluding that litigant autonomy is self-defeating in the mass tort context, I have assumed that class counsel would adequately represent the interests of the class. This assumption is unrealistic because agency problems frequently occur in both the class action and other organizational contexts.¹⁴⁰ It may turn out that litigant autonomy prevents class counsel from selling out the plaintiffs. Thus, such monitoring may be another "use" of the resource that is best assigned individually, even though common issues are best developed collectively.¹⁴¹ But whether this is the case strikes at the very core of the law of procedural due process, which I discuss in the next Part.

138. Rosenberg, *Only Option*, *supra* note 77, at 847 & n.35 (citing MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965)).

139. Fennell, *Commons*, *supra* note 18, at 3.

140. See ALI, *PRINCIPLES*, *supra* note 16, § 1.05 reporters' notes cmt. a (noting that "when ownership and control of assets are divided, managers predictably lack incentives to maximize asset values and may even gain by acting to owners' detriment," citing sources to literature in the corporate context).

141. See Smith, *supra* note 18, at 32 (noting that multiple uses of a resource may have different optimal scales, such as grazing and farming of land).

II. DUE PROCESS

In the previous Part, I argued that the problem of asymmetric stakes in mass tort litigation causes a plaintiff's control over the claim to be self-defeating. Litigant autonomy in the mass tort context leads to more mass torts. Counterintuitively, each plaintiff is better off if litigant autonomy is taken away, such as through a mandatory class action.

In this Part, I use the self-defeating nature of litigant autonomy in the mass tort context to rethink the law of procedural due process. Here I focus on class actions rather than functional analogues like multidistrict litigation. This is because in the class action context almost all courts and scholars consider litigant autonomy a requirement of procedural due process rather than a problem. Although the insistence on protecting litigant autonomy in mass tort litigation is expressed in nonclass settings,¹⁴² it is most clearly expressed as a due process concern in the class action context. My goal is to use the discrepancy between the requirement of litigant autonomy under the law of procedural due process and the self-defeating nature of litigant autonomy in the mass tort context to reexamine procedural due process law under the Due Process Clause.

By its terms, the Due Process Clause provides that no person "shall be deprived of life, liberty, or property, without due process of law."¹⁴³ In the class action context, courts have focused on the claim for compensatory damages, the "chose in action," as the relevant "life, liberty, or property" interest.¹⁴⁴ As to the potential deprivation, courts have focused on the preclusive effect of a class action judgment on the claims of absent class members, which "may extinguish the chose in action forever through *res judicata*."¹⁴⁵ As to the "process" "due,"

142. See, e.g., Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 313 (2011) (arguing against advance consent to settle a claim in aggregate settlements, since "[w]hether to develop or use that claim at all is, of course, the individual's choice").

143. U.S. CONST. amend. V, XIV.

144. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (noting that, in the context of a small claims class action, "a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs" (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950))).

145. *Id.* at 807; ALI, PRINCIPLES, *supra* note 16, § 2.07 cmt. b ("Strictures of constitutional due process comprise the most significant constraints on the preclusive effect of the aggregate proceeding.").

courts have permitted class actions only if, at a minimum, the interests of all class members are adequately represented.¹⁴⁶

The source of the modern law of procedural due process in the class action context is *Hansberry v. Lee*, which arose from an eviction action against Carl Hansberry, an African American who purchased a home with a racially restrictive covenant.¹⁴⁷ Hansberry argued, as a defense,¹⁴⁸ that the covenant was unenforceable because it failed to satisfy a condition that “owners of 95 per centum of the frontage” sign the covenant.¹⁴⁹ The plaintiff landowners countered that the covenant was found to be enforceable in a prior class action, and Hansberry was bound by the prior judgment because he was a member of the class.¹⁵⁰ Hansberry, who was not present in the prior proceeding, argued that to bind him to the judgment would violate due process.¹⁵¹

The Court agreed. It recognized that the class action was an exception to the “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”¹⁵² But the Court noted that due process permits a class action judgment to bind absent class members if the procedures used “fairly insure the protection of the interests of absent parties,” such as when the absent members “are in fact adequately represented by the parties who are present.”¹⁵³

The Court concluded that Hansberry’s interests were not adequately represented because the prior class action, which sought to enforce the covenant, conflicted with the interests of class members like Hansberry “whose substantial interest is in resisting performance.”¹⁵⁴ The Court also noted that “the only support of the judgment in the [prior proceeding] was a false and fraudulent

146. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940); Bone, *supra* note 1, at 214–18 (analyzing *Hansberry* and its progeny).

147. *Hansberry*, 311 U.S. at 37–38.

148. Due process protection extends to defenses as well as claims. *See, e.g.*, *Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 3–4 (2010) (Scalia, Circuit Justice) (citing *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). *But see* Mark Moller, *Class Action Defendants’ New Lochnerism*, UTAH L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1792526> (arguing that, under an originalist interpretation of the Due Process Clause, the Clause does not recognize an individualized defense as a protectable interest).

149. *Hansberry*, 311 U.S. at 38.

150. *Id.*

151. *Id.*

152. *Id.* at 40–41 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

153. *Id.* at 42–43.

154. *Id.* at 45–46.

stipulation of the parties that 95 per cent had signed.”¹⁵⁵ Although the Court did not discuss it further, the “fraudulent stipulation” strongly suggested that the prior class action was a collusive action brought to establish the enforceability of the covenant.¹⁵⁶ This collusion strongly suggests that the class attorney could never have been an adequate representative of Hansberry’s interests.

The two sources of inadequate representation present in *Hansberry*—(1) internal conflicts of interest within the class and (2) an external conflict of interest between the class and the class attorney—have preoccupied courts in reviewing class actions in mass tort litigation. The Supreme Court has only examined mass tort class actions in two decisions concerning comprehensive class action settlements in asbestos litigation. In the first decision, *Amchem Products, Inc. v. Windsor*, the Court rejected a settlement-only class action which settled the claims of presently injured claimants who had not yet filed claims and “futures” or “exposure-only” claimants who had not yet manifested injury.¹⁵⁷ The Court concluded, among other things, that the “adequacy of representation” requirement of Rule 23(a)(4) was not satisfied because the interests of the class members were not aligned. Specifically, those presently injured plaintiffs within the class preferred “generous immediate payments,” while “exposure-only” plaintiffs preferred “an ample, inflation-protected fund for the future.”¹⁵⁸

In the second case, *Ortiz v. Fibreboard Corp.*,¹⁵⁹ the Court rejected a settlement-only class action certified under a “limited fund” rationale pursuant to Rule 23(b)(1)(B).¹⁶⁰ The proposed “limited fund” in *Ortiz* resulted from a multiparty settlement in which the defendant and a third-party insurer agreed to establish a fund to settle all existing asbestos claims in exchange for settling a separate litigation over the insurer’s coverage of the claims. In holding that the proposed class action did not involve a sufficient limited fund to satisfy Rule 23(b)(1)(B), the Court noted that “Fibreboard was allowed to retain virtually all its entire net worth.”¹⁶¹ The Court further suggested that the class could have received more in the settlement, noting in a

155. *Id.* at 38.

156. See Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1153 n.76 (2009) (arguing that this concern was central to the court’s holding).

157. 521 U.S. 591, 604 (1997).

158. *Id.* at 626.

159. 527 U.S. 815, 815 (1999).

160. FED. R. CIV. P. 23(b)(1)(B) (permitting a mandatory class action if individual litigation would “as a practical matter . . . be dispositive” of the claims or nonparties).

161. *Ortiz*, 527 U.S. at 859.

footnote that “[i]n a strictly rational world, plaintiffs’ counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel’s grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.”¹⁶²

Since both *Anchem* and *Ortiz* were decided on Rule 23 grounds, their implications for the law of procedural due process are unclear.¹⁶³ Moreover, conflicts inherently arise in all class actions.¹⁶⁴ Nevertheless, both decisions strongly suggest that due process requires some protection of litigant autonomy in mass tort litigation. For example, in *Amchem*, the Court noted that the drafters of Rule 23 disfavored class actions in mass tort litigation because, unlike litigation involving small claims, “[e]ach plaintiff . . . has a significant interest in individually controlling the prosecution of” her case.¹⁶⁵ Moreover, in *Ortiz* the Court noted that certification of the class under Rule 23(b)(1)(B), which permits mandatory class actions, would raise serious due process concerns because “objectors to the collectivism of a mandatory (b)(1)(B) action have no inherent right to abstain.”¹⁶⁶ Thus, the *Ortiz* Court viewed litigant autonomy, which is promoted through procedures like a right to opt out of the class, as necessary to protect against the internal and external conflicts that pervade mass tort litigation.¹⁶⁷

The view that due process requires protection of litigant autonomy in the mass tort context, despite its self-defeating nature, provides an opportunity to rethink each element of the law of procedural due process—the “life, liberty, and property” interest, the “depriv[ation],” and the “process” “due.” I discuss each in turn.

162. *Id.* at 852 n.30.

163. *But see* Issacharoff, *supra* note 86, at 352 (“The fundamental strength of *Amchem* and *Ortiz* inheres in the subtle revisitation of the law governing due process in the resolution of representative actions.”).

164. *See* Tidmarsh, *supra* note 156, at 1158–67 (noting that Rule 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2) class actions all involve internal and external conflicts); *see also* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1431 (2003) (noting that Rule 23(b)(1)(B) “identifies the class members’ competing interests in the limited fund as a basis for bringing the lawsuit as a class action, when in fact that competition between class members gives the court a reason to deny class certification”).

165. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997) (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (1996)).

166. *Ortiz*, 527 U.S. at 846–47.

167. Others agree. *See, e.g.*, ALI, PRINCIPLES, *supra* note 16, § 2.07 (citing sources).

A. The "Life, Liberty, or Property" Interest

Courts have recognized the claim for compensatory damages, the "chase in action," as a "property" interest protected by the Due Process Clause.¹⁶⁸ However, as with any property interest, there are a number of entitlements "bundle[d]" with the claim that could be deprived without due process.¹⁶⁹ Here I want to delineate three such entitlements.

The first entitlement is the amount of compensation to which each plaintiff is entitled. It can be understood as the "beneficial interest" associated with the claim, analogous to the dividend, cash flow, or income rights provided by assets like shares of stock, partnership interests, or funds held in trust.¹⁷⁰

The second entitlement is the right to control the action, which I have referred to as litigant autonomy. This entitlement corresponds to the legal title of the claim and encompasses a number of decision rights concerning the use of the claim, such as when to file a complaint, what relief to request, and whether to settle.

The third entitlement is the right to avoid tortious conduct altogether, which is implied by the deterrence function of the claim. In other words, a claim for damages reflects a social choice to provide an entitlement to avoid tortious conduct by protecting it through a private right of action.¹⁷¹ This social choice is analogous to the provision of private rights of action in the antitrust, securities, and

168. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs." (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); see also *Logan v. Zimmerman*, 455 U.S. 422, 428 (1982) (holding that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause" (citing *Mullane*, 339 U.S. at 313)). The Court has not always been consistent in recognizing a claim as a form of property. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expenses Bd.*, 527 U.S. 666, 673-75 (1999) (holding that while the Lanham Act "may well contain provisions that protect constitutionally cognizable property interests," the causes of action defined by the Act were not property interests for Due Process Clause purposes).

169. See Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1086 (1984) (noting that "it is now commonplace to acknowledge that property is simply a label for whatever 'bundle of sticks' the individual has been granted").

170. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 280 (2008).

171. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090-92 (1972) (noting that "[t]he state not only has to decide whom to entitle, but it must also simultaneously make a series of equally difficult second order decisions. These decisions go to the manner in which entitlements are protected," such as through liability rules that provide a cause of action for the damages that result from the lost entitlement).

civil RICO contexts¹⁷² as well as the provision of implied rights of action to deter violations of constitutional rights.¹⁷³

The first two entitlements are common entitlements bundled with any property interest,¹⁷⁴ and these two entitlements have been the focus of courts and scholars in discussing the due process implications of the class action. The third has received little sustained attention, so it is worth discussing it in more detail.

1. Deterrence as an Individual Entitlement

Although many acknowledge that a tort claim deters, few consider deterrence an individual entitlement.¹⁷⁵ Instead, many conceptualize deterrence as a “diffuse” good provided “to society as a whole” distinct from the private interests of the parties.¹⁷⁶ Deterrence is variously referred to as a “goal,” “objective[],” or “policy,”¹⁷⁷ but not

172. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130–31 (1969) (“[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.”); *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (“Congress’ aim in enacting the 1934 [Securities and Exchange] Act was not confined solely to compensating defrauded investors. Congress intended to deter fraud and manipulative practices in the securities markets”); *Rotella v. Wood*, 528 U.S. 549, 557 (2000) (“The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, ‘private attorneys general,’ dedicated to eliminating racketeering activity.”).

173. E.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 388 (1971).

174. See Michael Whinston & Ilya Segal, Property Rights 2 (Mar. 23, 2010) (unpublished draft), available at <http://ssrn.com/abstract=1577382> (“The basic concept of a property right is relatively simple: A property right gives the owner of an asset the right to the use and benefits of the asset, and the right to exclude others from them,” citing sources); see also 1 WILLIAM BLACKSTONE, COMMENTARIES 138–39 (1769) (defining a property right as a right to “free use, enjoyment, and disposal”). One missing entitlement is the right of “disposal,” or the right to transfer the claim to others. As noted above, the law of champerty and maintenance limits the ability of plaintiffs to sell their claim outside the settlement context. See *supra* Part II.B.2.

175. Notable exceptions are law and economic scholars. See, e.g., IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 4–5 (2005) (noting that “[t]he notion of a ‘legal entitlement’ is an expansive one,” which includes “the right to bodily security”); see also Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 369–70 (2001) (noting, and criticizing, the tendency of law and economics to collapse property law and tort law as law concerning legal entitlements).

176. See, e.g., Tidmarsh, *supra* note 156, at 1167 (describing “inadequate deterrence” as a “more diffuse harm to society as a whole”).

177. See, e.g., Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 331–32 (2008) (arguing that procedure should pay “attention to the substantive policies underlying legal rights,” including “deterrence”); Issacharoff, *supra* note 17, at 1076 (noting that, in comparing risk-based and harm-based claims, “[s]o long as the probabilistic assessments are accurate, the deterrence objectives of the tort system are met in either case, as are the compensatory claims of the affected group as a whole.”); Catherine Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 363 (2003) (“I take as a

as a private entitlement for each individual plaintiff. But it is a mistake to conceptualize deterrence as a public interest distinct from the private interests of the parties. We have a public interest in deterrence because each individual has a private entitlement to it.

One reason why deterrence is considered a policy rather than an entitlement may be due to the term deterrence itself. Deterrence does not describe the entitlement but the mechanism that protects the entitlement. The entitlement itself is the avoidance of tortious conduct, which is provided by tort law. In other words, individuals are entitled to deterrence because the law prohibits the conduct that the claim seeks to deter. As emphasized by civil recourse theorists,

[P]art of what gives tort law value is that it is a system of rules contained in common law that articulates legally enforceable norms about *how one is obligated to treat others*. . . . We recognize that the point is obvious; the problem is that it is almost blindingly obvious.¹⁷⁸

A further source of resistance may be the diffuse nature of deterrence. First, tort law does not specify the conduct that it prohibits.¹⁷⁹ For example, tort law imposes a duty to provide reasonable warnings, but it does not define what warnings are required in specific circumstances.¹⁸⁰ But this lack of specificity is not fatal to conceptualizing deterrence as an entitlement.¹⁸¹ One could consider the entitlement, for instance, as an entitlement to be free from exposure to unreasonable risks of harm, and risks are considered

starting point the normative view that economic deterrence is *one* goal of punitive damages (and our tort law system), but not, as some law-and-economics scholars would have it, the exclusive goal.”)

178. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 976–77 (2010) (emphasis added). Indeed, a recognition of deterrence as an individual entitlement is also compatible with corrective justice theory. After all, tort law is a law of duties, and “[d]uty, in turn, is essentially about *the existence of obligation in tort*—about whether the relationship of the parties is governed by the law of torts, by some other branch of law (for example, by contract or property), or by no law at all.” Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131, 1134 (2009) (arguing that the tort of negligent infliction of emotional distress arises from an obligation by the tortfeasor to not “assault the autonomy” of the victim). Accordingly, in the mass tort context, the defendant has a duty under tort law not to commit the mass tort, which confers on each potential victim an individual right to avoid the mass tort. I thank Greg Keating for clarifying my thoughts on this issue.

179. See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (rejecting enforcement of a temporary restraining order as a “property” interest for due process purposes because the order did “not specify the precise means of enforcement”).

180. See, e.g., RESTATEMENT (3D) OF TORTS: PROD. LIAB. § 2(c) (1998) (defining a product as defective if “foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings”).

181. In fact, the lack of specificity is a feature, not a bug. Tort law uses general standards combined with damage remedies to *induce* individuals to reveal information concerning their conduct and their respective valuations of it. See generally AYRES, *supra* note 175.

entitlements, as both insurance markets¹⁸² and markets for safety features demonstrate. If one is uncomfortable with viewing tort law as prohibiting risks of injury,¹⁸³ one could view the entitlement to be free from unspecified conduct as akin to contracts imposing mandatory, if unspecified, duties, such as contracts for security services or product warranties.¹⁸⁴

Second, the deterrence entitlement is not specified as to the individual, since tort liability operates through general deterrence.¹⁸⁵ But this is also not fatal. For example, the Bill of Rights applies generally but is viewed as protecting individual rights,¹⁸⁶ and likewise, statutory entitlements typically are based upon generally applicable laws.¹⁸⁷

Third, the deterrence entitlement (or, more precisely, the safety it provides) is not considered a tangible thing, but a reduction of a harmful externality.¹⁸⁸ Although this distinction may have functional relevance,¹⁸⁹ it does not define what counts as an entitlement. In fact, “[a] harmful externality can often be described as the taking of a thing; for example, a firm that pollutes someone’s air can be said to have taken clean air or an easement from the victim.”¹⁹⁰

182. See Lee Anne Fennell, *Unbundling Risk*, 60 DUKE L.J. 1285, 1293–1308 (2011) (describing risk markets).

183. See, e.g., Goldberg & Zipursky, *supra* note 95.

184. *Town of Castle Rock*, 545 U.S. at 756 (Stevens, J., dissenting) (analogizing enforcement of temporary restraining orders with mandatory arrest provisions to “a contract with a private security firm, obligating the firm to provide protection to respondent’s family”); cf. SHAVELL, *supra* note 41, at 61 (adjusting model to “allow firms to offer product warranties, which is to say, to choose their own liability rules”).

185. GUIDO CALABRESI, *THE COST OF ACCIDENTS* 69 (1970).

186. See, e.g., *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring) (“[T]he interest which Bivens claims—to be free from official conduct in contravention of the Fourth Amendment—is a federally protected interest.”).

187. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 (1969) (holding that welfare benefits provided by state and federal law “are a matter of statutory entitlement for persons qualified to receive them”).

188. Cf. *E. Enters. v. Apfel*, 524 U.S. 498, 554 (1998) (Breyer, J., dissenting) (stating that “property” for Takings Clause purposes should be limited to “a specific interest in physical or intellectual property,” such as “physical property” or an “identifiable fund of money”); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting “stigma” as a property interest for due process purposes, distinguishing it from “tangible interests such as employment”).

189. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 40–42 (2000) (arguing that the “numerus clausus” supports a theory of property rights as providing modular entitlements that reduce information costs).

190. See Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 715, 771–72 (1996) (accepting the distinction between the “taking of things” and “externalities” on functional grounds, but considering both “property rights”).

2. Deterrence as a Liberty Interest

One may agree that deterrence is an individual entitlement, but may have some difficulty in conceptualizing it as a “life, liberty, or property” interest under the Due Process Clause. Under current law, “life, liberty, or property” interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”¹⁹¹ All deterrence entitlements in the mass torts context have an independent tort law source.¹⁹² However, the Supreme Court has insisted that the Due Process Clause is not a “font of tort law” and has found that some entitlements otherwise protected by tort law are not “life, liberty, or property” interests, such as reputation,¹⁹³ avoidance of prison officials’ negligence,¹⁹⁴ fair competition,¹⁹⁵ and police protection.¹⁹⁶

As an initial matter, it does not matter whether deterrence alone would be a sufficient “life, liberty, or property” interest, since the claim is already recognized as a “property” interest. For example, in *Paul v. Davis*, the Court rejected a claim that an interest in “stigma” alone is a “liberty or property” interest under the Due Process Clause.¹⁹⁷ In doing so, the Court distinguished other cases that considered “the ‘stigma’ which may result from defamation by the government” because, in those cases, the interest in reputation was tied “to more tangible interests, such as employment.”¹⁹⁸ Thus, *Paul v. Davis* demonstrates that an individual’s interest in deterrence can

191. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

192. Accordingly, I am not arguing for a right to tort law itself as a matter of due process, although I am sympathetic to the argument. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 590–96 (2005) (arguing for a right to tort law itself as a matter of “structural due process”).

193. *Paul v. Davis*, 424 U.S. 693, 717 (1976). The Court alluded to the possibility of a defamation action under state tort law, which could obviate the need for a claim under the Due Process Clause, but it did not resolve whether such a cause of action was available to the plaintiff. *Id.*

194. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (“[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.”).

195. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expenses Bd.*, 527 U.S. 666, 674 (1999) (“To sweep within the Fourteenth Amendment the elusive property interests that are ‘by definition’ protected by unfair-competition law would violate our frequent admonition that the Due Process Clause is not merely a ‘font of tort law.’”).

196. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); see also *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 n.2 (1989) (questioning, without deciding, whether “an entitlement to protective services” is a “property” interest under the Due Process Clause).

197. *Paul*, 424 U.S. at 717.

198. *Id.* at 701.

enter the due process analysis, albeit through the Trojan horse of the claim.

But the law of procedural due process has the resources to consider deterrence an interest independent of the claim. In the above cases, the Court focused on the “property” term of the “life, liberty, or property” interest. The more salient term in the mass tort context may be “liberty,” since the Court has recognized as a “liberty” interest “the right to be free from, and to obtain judicial relief for, unjustified intrusion of personal security.”¹⁹⁹ In *Ingraham v. Wright*, for example, the Court recognized a “liberty” interest in being free from corporeal punishment at school but held that existing state tort law procedures “are fully adequate to afford due process.”²⁰⁰ Moreover, prior to the rejection of stigma as a sufficient “liberty or property” interest in *Paul v. Davis*, the Court identified reputation as a relevant “liberty” interest and then examined the sufficiency of the procedures in place to protect it.²⁰¹ Courts have used a similar approach for negligent injuries caused by prison officials.²⁰² Furthermore, the Court’s recent assumption that an informational privacy interest is an interest protected by the Due Process Clause suggests this liberty approach.²⁰³

The approach taken in these cases suggests shifting the relevant “life, liberty, or property” interest from the claim to deterrence itself, which would accurately reflect the priority individuals place on deterrence over the other entitlements that comprise the tort claim.²⁰⁴ Indeed, conceiving of deterrence as a

199. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Here I do not conceive of this liberty interest as a “fundamental liberty” protected by the law of substantive due process. I discuss such an approach below. See *infra* Part II.B.3. I would further note that, historically, the interests protected by the Due Process Clause were not circumscribed, but included “a rational continuum which, broadly speaking, includes a freedom from substantially arbitrary impositions and purposeless restraints.” *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citing cases).

200. 430 U.S. at 672. Although *Ingraham* involved government officials, the Due Process Clause applies equally to the actions of private parties. See Part II.B.2.

201. See *Paul*, 424 U.S. at 722–35 (Brennan, J., dissenting) (discussing the prior case law).

202. *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981), *overruled by Daniels v. Williams*, 474 U.S. 327 (1986) (finding no due process violation for negligent loss of property given that “[t]he State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State”).

203. See *Nat’l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 756–57 (2011) (assuming, without deciding, that the Constitution protects a right to informational privacy in addressing the adequacy of procedures to protect employee information during a background check). *But see id.* at 765 (Scalia, J., dissenting) (citing *Paul v. Davis*, and noting that “[i]f outright defamation does not qualify, it is unimaginable that the mere disclosure of private information does”).

204. See *supra* Part I.C.2 (discussing why plaintiffs would prefer maximizing expected aggregate liability ex ante to prevent mass torts from occurring in the first place).

“liberty” interest strongly suggests that the claim, far from being a “property” interest, is part of the procedure that is subject to the law of procedural due process.²⁰⁵ Moreover, it would permit courts to distinguish liberty interests like tort interests from property interests on functional grounds, rather than follow the current ad hoc approach that permits entitlements in some things but not others.²⁰⁶

3. Due Process as a Font of Tort Law?

Finally, conceiving of deterrence as a “liberty” interest would not convert the law of procedural due process into a “generalized font” of tort law.²⁰⁷ As an initial matter, the Due Process Clause applies to all substantive areas of the law, so it is unclear why the Due Process Clause could not equally be a “font” of administrative law or criminal law.

More importantly, underlying the concern with the Due Process Clause serving as a “font” of tort law is the fear that greater due process scrutiny would result in a “wholesale federalization of tort claims against state and local government officials,” with a “corresponding prospect of massive damages liability” for potential due process violations.²⁰⁸ But recognizing deterrence as a “liberty” interest does not entail such a result. Any concern with the “wholesale federalization” of state tort law can be addressed through the use of rebuttable presumptions to establish the sufficiency of existing tort law, which the Court has implicitly used in the past.²⁰⁹ Moreover, establishing a rebuttable presumption could shield traditional, nonproblematic areas of tort law from scrutiny, thus “leaving the due process right intact” for these settings, while allowing the parties to

205. See *Parratt*, 451 U.S. at 543–44 (holding that there was no due process violation because “[t]he State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State”); *Ingraham*, 430 U.S. at 678–80 (holding that existing state tort law procedures “are fully adequate to afford due process”).

206. Cf. *Nat’l Educ. Ass’n-R.I. ex. rel. Scigulinsky v. Ret. Bd. of R.I. Emps.’ Ret. Sys.*, 172 F.3d 22, 29 (1st Cir. 1999) (Boudin, J.) (listing various entitlements protected and not protected under the Takings Clause).

207. *Paul v. Davis*, 424 U.S. 693, 717 (1976).

208. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 893 (1999) (noting that *Paul v. Davis* most likely arose out of a fear of “the wholesale federalization of tort claims,” citing sources).

209. See *Parratt v. Taylor*, 451 U.S. 521, 543–44 (1981) (concluding that state tort law was sufficient to protect an interest in avoiding negligence for due process purposes, even though state tort law did not provide the defendant with a right to sue individual officers for punitive damages).

challenge the sufficiency of existing procedures in the mass tort and similar contexts.²¹⁰

B. The “Depriv[ation]”

The Due Process Clause prohibits any “depriv[ation]” of a “life, liberty, or property” interest without “due process of law.” As evidenced by *Hansberry*, current law recognizes the potential deprivation caused by the class action as the preclusive effect of any judgment on the claims of the absent class members, particularly the effect of preclusion on the autonomy the absent plaintiffs can exercise over their claim. In this Section, I reexamine the potential “deprivation” caused by the use of class actions in mass tort litigation.

1. Preclusion and Other “Depriv[at]ions”

As an initial matter, the focus on the preclusion of a absent plaintiff’s claim caused by the class action takes too narrow a view of the potential deprivation. In *Phillips Petroleum v. Shutts*, for example, the Court reviewed a class action certified under Kansas state law that included in-state and out-of-state class members.²¹¹ The plaintiffs sought recovery for the interest earned on allegedly late royalty payments by Phillips, each claim “averaging about \$100 per plaintiff.”²¹² Phillips contended that the Kansas state court lacked personal jurisdiction over the absent class members who lived out of state, citing case law concerning a court’s personal jurisdiction over an out-of-state defendant.²¹³

The Court rejected the analogy, noting that absent out-of-state plaintiffs are “not haled anywhere to defend themselves upon pain of a default judgment” and are further protected by the procedures surrounding class certification.²¹⁴ Thus, “[u]nlike a defendant in a normal civil suit,” the absent out-of-state plaintiff “may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”²¹⁵ Accordingly, the Court did not require absent, out-of-state class members to opt in to a class

210. *Cf.* Levinson, *supra* note 208, at 893 (citing sources that suggest “interpreting section 1983 to exclude some categories of constitutional violations, thus leaving the due process right intact in other remedial settings”).

211. 472 U.S. 797, 797 (1985).

212. *Id.* at 807.

213. *Id.* at 809.

214. *Id.* at 807–10.

215. *Id.* at 810.

action in order for a state court to establish personal jurisdiction. The Court did hold, however, that the out-of-state class members were entitled to notice and a right to opt out, at least in class actions “concerning claims wholly or predominately for money judgments.”²¹⁶

Although *Shutts* only addressed what procedures were necessary to establish personal jurisdiction over the out-of-state absent class members,²¹⁷ *Shutts* suggests that preclusion itself may not be necessary to establish a deprivation. This is shown by the Court’s highlighting of the more mundane burdens that litigation may impose on a nonparty, separate and apart from the preclusive effect of the judgment. For example, the Court discussed such “burdens” as having to travel a great distance, hire an attorney to defend yourself, and conduct discovery.²¹⁸ The Court concluded that, on balance, the lesser burdens of the class action for the out-of-state absent plaintiffs, combined with the benefits of the class action device, permitted courts to establish jurisdiction with less than opt-in consent.

The practical impact of actions on nonparties has also been recognized in other contexts. One example can be found in the interpleader context, which permits an entitlement holder to bring suit to establish jurisdiction over all claimants to the entitlement.²¹⁹ Interpleader applies in situations where the entitlement cannot satisfy all claims, such that any action by one claimant would prejudice either the entitlement holder or other claimants. For example, in *State Farm Fire & Casualty Co. v. Tashire*, a bus collision caused significant injury to thirty-eight persons, but the bus was only covered by a \$20,000 insurance policy that could not satisfy all claims.²²⁰ There, the Court permitted the insurer to interplead the

216. *Id.* at 812–13 & n.13.

217. *Id.* at 812–13. It should be noted, however, that whether a state court proceeding could preclude the claims of out-of-state nonparties is the same issue the Court addressed in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which I discuss below. See *infra* Part II.B.3. In *Mullane*, the Court avoided cognizing the issue as one of personal jurisdiction and instead analyzed the issue as one of procedural due process. See Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2095–96 (2008) (noting the analytic similarity between *Shutts* and *Mullane*). Moreover, the Court has recently suggested that *Shutts* extends beyond personal jurisdiction. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (citing *Shutts* for the proposition that “[i]n the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process”); *AT&T Mobility LLC v. Concepción*, 131 S. Ct. 1740, 1751 (2011) (citing *Shutts* for the proposition that “[f]or a class-action money judgment to bind absentees in litigation . . . absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class”).

218. *Shutts*, 472 U.S. at 808–09.

219. FED. R. CIV. P. 22 (providing for interpleader); see also 28 U.S.C. §§ 1335, 1397, & 2361 (providing for expanded interpleader in certain circumstances).

220. 386 U.S. 523, 525–26 (1967).

victims, but not because of the preclusive effects of any separate action on any nonparty, since any one action would not formally preclude the claims of the other affected claimants. Rather, the Court was concerned with a “race to judgment” since “the first claimant to obtain such a judgment or to negotiate a settlement might appropriate all or a disproportionate slice of the fund before his fellow claimants were able to establish their claims.”²²¹

Shutts also demonstrates that the class action may not be the problem. The Court noted that, given that the litigation involved small claims, “most of the plaintiffs would have no realistic day in court if a class action were not available.”²²² Thus, in the context of small claims, a class action may be necessary to prevent a deprivation caused by separate actions. I have already discussed the “superiority” of the class action for small claims litigation.²²³ Here I want to focus on two categories of cases in which mandatory class actions are permitted, presumably because of the potential deprivation caused by separate actions.²²⁴

The first category, as provided by Rule 23(b)(1)(A), includes situations in which separate actions “would create a risk of . . . incompatible standards of conduct for the party opposing the class.”²²⁵ Class actions are rarely certified under Rule 23(b)(1)(A) because it significantly overlaps with Rule 23(b)(2), which permits the use of mandatory class actions in actions where “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”²²⁶ This is because the source of any risk of an “incompatible standard[] of conduct” for the defendant would most likely arise from separate actions seeking “injunctive relief” generally applicable to the class as a whole.²²⁷ Accordingly, I will treat the existing case law on Rule 23(b)(1)(A) and Rule 23(b)(2) interchangeably.

221. *Id.* at 533.

222. *Shutts*, 472 U.S. at 809.

223. *See supra* Part I.B.

224. I say “presumably” because the Court has not directly addressed whether the categories satisfy procedural due process. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (“[Rule 23](b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (*rightly or wrongly*) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause.”) (emphasis added).

225. FED. R. CIV. P. 23(b)(1)(B).

226. *Id.* at 23(b)(2).

227. *See* ALI, PRINCIPLES, *supra* note 16, § 2.04 & Reporters’ Notes cmt. a (“Courts . . . have not succeeded in giving any distinct meaning to Rule 23(b)(1)(A) by comparison to Rule 23(b)(2).”).

The second category, as provided by Rule 23(b)(1)(B), is comprised of situations in which separate actions, “as a practical matter, . . . would substantially impair or impede [the nonparties’] ability to protect their interests.”²²⁸ As discussed in *Ortiz*, Rule 23(b)(1)(B) applies where “the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.”²²⁹ Despite its expansive terms, Rule 23(b)(1)(B) has predominantly been used in litigation involving limited funds,²³⁰ “in effect the plaintiffs’ version of interpleader.”²³¹

Mandatory class actions are permitted in these two categories because both involve “indivisible remedies,” or remedies where “the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.”²³² Accordingly, mandatory class actions are permitted because they “simply recognize[] the preexisting interdependence of the[] claims.”²³³ By contrast, almost all courts and scholars distinguish mass tort litigation from actions involving “indivisible remedies” because the mass tort litigation is thought to involve “divisible remedies,” or remedies “that entail the distribution of relief to one or more claimants individually, without determining in practical effect the application or availability of the same remedy to any other claimant.”²³⁴

But mass tort litigation cannot be meaningfully distinguished from actions involving indivisible remedies, particularly when one focuses on the “practical effect” of separate actions. Consider, for example, the distinction between injunctive relief and compensatory damages. Injunctions are often considered “group” relief, while the compensatory damage remedy “depends more on the varying circumstances and merits of each potential class member’s case.”²³⁵

228. FED. R. CIV. P. 23(b)(1)(B).

229. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833–34 (1999) (citations and quotations omitted).

230. *Id.* at 834.

231. Issacharoff, *supra* note 86, at 187 n.10.

232. ALI, PRINCIPLES, *supra* note 16, § 2.04(b).

233. *Id.* at § 2.04, cmt. a (2010); *see also* *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (“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.”).

234. ALI, PRINCIPLES, *supra* note 16, § 2.04(a).

235. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (holding that Rule 23(b)(2) does not apply when “the monetary relief being sought is less of a *group*

But this distinction is based on an apples-to-oranges comparison. Although the injunction is indivisible insofar as it applies equally to the class, the analogue in the mass tort context is not the damage remedy but the liability rule. Both provide a prospective rule that applies to the defendant's behavior.²³⁶ The only difference is that the injunction applies to a specific party or parties, while the liability rule applies generally.²³⁷ The correct analogue to the damage remedy, then, is not the injunction but the contempt action, which, like compensatory damages, also seeks to enforce a rule and may provide compensation.

Nevertheless, even if one were to compare the injunction to the compensatory damage remedy, there are aspects of mass tort litigation that are equally indivisible. Since any damage award would be premised on a finding of liability, or any common issue related to liability, it would require, in effect, a declaratory judgment as to those issues. Such a declaratory judgment as to liability (or an issue related to it) would apply indivisibly to the class.²³⁸ The *Principles*, in fact, implicitly recognizes the declaratory judgment function of a resolution of a common issue, providing for the availability of class actions for common issues, but only if the court's resolution of those issues can be appealed.²³⁹

Mass tort litigation also cannot be meaningfully distinguished from litigation involving a limited fund. Most obviously, mass tort litigation may involve a de facto limited fund insofar as the defendant's assets cannot satisfy all claims.²⁴⁰ In addition, and as I

remedy and instead depends more on the varying circumstances and merits of each potential class member's case") (emphasis added).

236. See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 9 (1978) ("The issuance phase of the injunctive process . . . should be compared with the promulgation of a rule of liability" since "the concern of each is to establish standards of future conduct.").

237. *Id.* at 12; see Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1832 n.212 (1997) ("Admittedly, an injunction differs from general deterrence insofar as it focuses on a particular defendant deemed likely to behave improperly.").

238. See FED. R. CIV. P. 23(b)(2), Advisory Committee Notes to 1966 Amendments of Rule 23, 39 F.R.D. 69, 102 (1966) (noting that declaratory relief "sett[les] the legality of the [defendant's] behavior with respect to the class as a whole"); ALI, *PRINCIPLES*, *supra* note 16, § 2.04, illus. 1 ("Aggregate treatment of the claim for a declaratory judgment would be permissible, because the remedy sought is indivisible.").

239. ALI, *PRINCIPLES*, *supra* note 16, § 2.03 cmt. b ("In authorizing aggregate treatment, the court also must authorize interlocutory appeal of any determination of the common issue on the merits.").

240. See, e.g., Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1 (1986) (noting the prevalence of bankruptcies in mass tort litigation); cf. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 851 (1999) (rejecting certification of a mass tort class action under Rule 23(b)(1)(B) in part because "there was no adequate finding of fact to support" the existence of a limited fund).

argued above, a separate action would “as a practical matter” impair the other class members, not because it would potentially deplete the fund, but because it would destroy the economies of scale necessary to put the class on equal footing with the defendant.²⁴¹

Other features of mass tort litigation also raise a concern that separate actions will impair nonparties. For example, given the predominance of common fact and legal issues, the resolution of any such issue may, as a practical matter, impair the claims of the other plaintiffs. Moreover, scholars have frequently pointed out that mass tort claims are “interdependent” insofar as prior damage awards are used to establish damage amounts in subsequent suits.²⁴²

2. The Impartiality of the Comparison

To determine any deprivation, it has to be compared to something else. Thus, courts generally take a comparative approach in assessing the potential deprivation caused by any challenged civil procedure. The clearest statement of this comparative approach can be found in *Mathews v. Eldridge*, where the Court addressed whether Social Security beneficiaries were entitled to a hearing prior to termination of their benefits.²⁴³ In determining that a “post-termination” hearing was sufficient to satisfy procedural due process, the Court examined the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁴⁴

The *Mathews* balancing test determines any deprivation based on a weighing of the costs and benefits of alternative procedures. The test has been extended to procedures involving solely private parties, with the “government’s interest” substituted by the private defendant’s interest.²⁴⁵ Courts have not applied the *Mathews*

241. See generally *supra* Part I.B.

242. See, e.g., Hensler & Peterson, *supra* note 39, at 967 (“In mass litigation, the likely amount that one plaintiff will receive for a claim depends upon the values of other claims.”).

243. *Mathews v. Eldridge*, 424 U.S. 319 (1976); see also *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (requiring a pretermination hearing for welfare benefits).

244. *Mathews*, 424 U.S. at 335.

245. *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (noting, however, that there should be “due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections”). It should be noted that the Due Process Clause has been consistently applied to cases that lack a governmental actor as a party, presumably because the government, via the courts, oversees the availability of the class action device. Arguably, one could also see the private plaintiff, rather than the defendant, as standing

balancing test to class actions, but the “superiority” requirement of Rule 23(b)(3) entails a similar comparative approach,²⁴⁶ and in class action decisions such as *Hansberry* and *Shutts*, the Court engaged in a similar comparative analysis.

One of the many shortcomings of the *Mathews* balancing test is that it privileges error costs over other costs as the relevant deprivation.²⁴⁷ But, as noted above, existing law includes other costs in comparing procedures. In the limited fund context, for example, mandatory class actions and pro rata distribution are permitted even though separate actions would more accurately determine the damages of any plaintiff. They are permitted to ensure the equitable treatment of the class members.

In fact, the emphasis on the equitable treatment of plaintiffs in the limited fund context reveals one flaw with the prevailing analysis of class actions in the mass tort context. One goal of interpleader is to avoid a “race to the judgment” in which the first to file may prejudice other later filers by depleting the fund.²⁴⁸ The Court expressed a similar concern in *Amchem* over whether the proposed settlement privileged the “currently injured” over the “exposure-only” plaintiffs.²⁴⁹

As courts and scholars have noted, the remedy in mass tort litigation, compensatory damages, is in practical operation a form of tort insurance because, as seen most clearly in products liability contexts, “[i]n purchasing the product or service that resulted in exposure, every claimant—indeed, every exposed purchaser—bought

in the shoes of the government, since the plaintiff can be understood as exercising a delegated power to enforce the law as a private attorney general. See William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2142–59 (2004). However, courts have consistently rejected such delegation arguments in the state action context. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164–65 (1978) (finding no state action when statute delegated to a private party the power to sell goods as a self-help remedy); see also Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1457–61 (2003) (arguing for expanding the finding of state action to include state functions that are delegated, or privatized, to other parties).

246. See FED. R. CIV. P. 23(b)(3) (permitting class certification of an action involving damage remedies only if it is “superior to other available methods for fairly and efficiently adjudicating the controversy”); see also ALI, PRINCIPLES, *supra* note 16, § 2.02(a)(1) & cmt. b (in defining a “materially advance the resolution of [the] claims” standard for superiority, noting that “[t]he judicial inquiry . . . is inherently comparative”).

247. Not everyone agrees. See Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1161 (2006) (concluding that “[i]f the primary goal of adjudication is to produce outcomes that conform to the substantive law, it follows that accuracy must be the core metric for evaluating outcome quality”); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 441–42 (1973) (focusing on error costs, costs of cases litigated, and costs of cases settled to determine efficiency of procedures).

248. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 533 (1967).

249. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

from the firm what was in effect insurance against tortious injury.”²⁵⁰ Thus, one could use distributional procedures devised in insurance contexts to ensure that each individual plaintiff is treated equitably. One such procedure used in insurance contexts is damage scheduling, which involves the award of damages based on averages for certain injuries.²⁵¹ In fact, damage scheduling is already implicitly used to determine damages,²⁵² suggesting that courts and scholars should be open to using it. But many refuse to import the irrelevancy of the timing of the claim from the limited fund context to the mass tort context, concluding that procedures like damage scheduling “force[] the holders of high-value claims to subsidize the holders of low-value claims.”²⁵³

The concern with avoiding redistribution presents an additional flaw. For example, punitive damages are awarded primarily for deterrence purposes, but, if left uncoordinated among separate lawsuits, punitive damages may result in overdeterrence.²⁵⁴

250. Rosenberg, *Causal Connection*, *supra* note 19, at 918; *see also* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring) (justifying the imposition of strict liability for manufacturing risks because “the risk of injury can be insured by the manufacturer and distributed among the public as the cost of doing business”). Indeed, because of the availability of third party insurance and other substitutes for inducing reasonable precautionary measures, tort liability in the products liability context may not even be necessary. *See* Polinsky & Shavell, *supra* note 78, at 1491 (noting this, and concluding that we should consider “curtailing such liability”).

251. Damage scheduling involves the defining of categories of injuries and setting the amount of damages for each category, which is usually based on an average of the awards provided for that category. *See, e.g.*, Kenneth S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 188 (1992) (describing damage schedules for pain and suffering, where the schedule “would categorize typical injuries according to severity, and would prescribe the range of awardable pain and suffering damages for each category”); Rosenberg, *End Games*, *supra* note 77, at 695–96 (praising damage scheduling used by then-special master Francis McGovern in asbestos and Dalkon Shield litigations). The use of scheduling is common in insurance contexts, such as Medicare, or workers’ compensation schemes, which, in effect, provide insurance for workplace accidents. *See, e.g.*, Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1585 (2004) (noting the prevalence of scheduling to pay for workplace injuries, which dates as far back as the 1880s); *Overview*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <https://www.cms.gov/FeeScheduleGenInfo/> (Feb. 22, 2012) (discussing fee schedules for reimbursements under Medicare).

252. *See* Alexandra Lahav, *The Case for “Trial by Formula,”* 90 TEX. L. REV. 571 (2012).

253. John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent to Give Away Their Clients’ Money*, 84 VA. L. REV. 1541, 1550 (1998); *see also* Nagareda, *supra* note 5, at 201 (arguing that the plaintiffs have a “preexisting right to a nonaveraged recovery,” regardless of whether it may unfairly favor some plaintiffs over others).

254. *Cf. In re Simon II Litig.*, 211 F.R.D. 86, 163–64, 194 (E.D.N.Y. 2002) (certifying a punitive damage class action under Rule 23(b)(1)(2) to avoid imposition of excessive punitive damages in violation of the Due Process Clause). *See generally* A. Mitchell Polinsky & Steven

In fact, courts have expressed a similar concern that class actions may “blackmail” defendants into settling.²⁵⁵ But scholars have generally ignored the possible overdeterrence caused by punitive damages, noting that “[f]or better or worse, the pursuit of punitive damage awards through uncoordinated individual lawsuits is part of the bundle of rights that existing law affords tort plaintiffs.”²⁵⁶ In fact, scholars consciously ignore the effect of procedures on deterrence altogether.²⁵⁷

These two flaws arise from a failure to take an impartial perspective in comparing the class action to separate actions. The first flaw results from a failure to take an impersonal perspective. Current law privileges some parties (presently injured) over others (futures) even though courts explicitly criticize such inequitable treatment. The second flaw results from a failure to take a temporally impartial perspective. Scholars privilege the point in time after the tort has occurred to compare the impact of different procedures. A better perspective would be to assess the impact of procedures before the tort occurs, thereby including the effects of those procedures on avoidance of the tort itself.

One method of maintaining an impersonal and temporally impartial perspective is to use imaginative devices to avoid biasing any affected person or point in time. David Rosenberg, for example, has argued that procedures should be assessed from the perspective of “a single individual who has the opportunity to choose the legal system for managing accident risk before knowing his or her own prospects in that world regarding incidence of accidents, access to resources, and advantage in the chosen legal system.”²⁵⁸ Here, Rosenberg posits an individual who has to make a rational choice between different legal regimes without knowing his or her identity and before knowing the potential outcomes. Rosenberg relies upon a utilitarian framework proposed by John Harsanyi, who similarly utilized a single “impartial spectator” by which to assess social policies.²⁵⁹ It is also analytically similar to the “veil of ignorance”

Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (discussing the deterrence function of punitive damages).

255. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (noting potential for class actions to “blackmail” defendants into settling frivolous claims (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973))).

256. See NAGAREDA, *supra* note 12, at 159.

257. Tidmarsh, *supra* note 156, at 1202–03 (admitting that his theory of adequacy of representation does not consider deterrence interests).

258. Rosenberg, *supra* note 40, at 25.

259. *Id.* at 25 & n.13 (citing John C. Harsanyi, *Morality and the Theory of Rational Behavior*, 44 SOC. RES. 623 (1977)); see also Harsanyi, *supra*, at 633 (noting that his proposed model

device used by Rawls to choose principles of justice,²⁶⁰ a device scholars have used to address the legitimacy of class action settlements.²⁶¹

Using such an impartial spectator device, a mandatory class action would be preferable in the mass tort context to alternatives that protect some form of litigant autonomy. The mandatory class action is preferable for plaintiffs because it provides optimal deterrence and, in almost all cases, compensation that would offset any gain from exercising litigant autonomy and bringing a suit separately. Moreover, a mandatory class action would impose optimal liability on the defendant, thus avoiding any concern with overdeterrence. This result is obtained by comparing what the average utility would be with a mandatory class action as compared to nonmandatory class action settings, assuming that the impartial spectator has an equal probability of being any person, whether plaintiff or defendant, and assuming that one has to choose before the tort occurs.²⁶²

The point of the impartial spectator device is not to justify the choice of any procedure based upon “hypothetical consent.”²⁶³ Instead, the impartial spectator device is designed to force one to stand in the shoes of other parties by giving equal weight to each individual’s

“becomes a restatement of Adam Smith’s theory of an impartially sympathetic observer” (citing ADAM SMITH, A THEORY OF MORAL SENTIMENTS (1759)).

260. See Rosenberg, *Only Option*, *supra* note 77, at 840 & n.23 (2002) (noting similarity, citing JOHN RAWLS, A THEORY OF JUSTICE 136 (1971)).

261. 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, 282–83 (2006) (claiming, normatively, that “a rule allowing subsequent challenges to class action settlements is compelled by our basic intuitions of fairness and justice” and builds upon a “Rawlsian construct of fairness”).

262. This result is intuitive based upon the conclusions above. See *generally supra* Part I.C.2.

263. See Robert G. Bone, *Agreeing to Fair Process: The Problem With Contrarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 518–42 (2003) (distinguishing between two forms of the “hypothetical consent” argument—egoistic contractarianism and ideal contractarianism—and arguing that ideal contractarianism is really a heuristic rather than an attempt to recreate an actual agreement). I provide such an “egoistic contractarianism” argument above. See *generally supra* Part I.C.2. It should be noted that Rosenberg fails to distinguish between the ex ante preferences of mass tort plaintiffs, which would be the basis of a “hypothetical agreement,” and the impartiality device used to weigh competing interests. See Rosenberg, *Only Option*, *supra* note 77, at 840 (2002) (conflating “ex ante” preferences of plaintiffs with “veil of ignorance”); see also Bone, *supra*, at 536 & n.145 (noting this discrepancy). Here I am explicit about the device I use, again not to invoke “hypothetical consent,” but to *fairly* balance competing interests by according them their proper weight devoid of irrelevant considerations. See John Broome, *Fairness*, 91 PROCS. OF THE ARISTOTELIAN SOC’Y 87, 94 (1990) (arguing that “the particular business of fairness is to mediate between the conflicting claims of different people”).

circumstances.²⁶⁴ It appeals to a common sense notion of fairness, one that views the fairness of procedures in much the same way we consider the fairness of a pair of dice. In both cases we are comfortable with a range of outcomes but would reject a structural bias in favor of any one outcome. Much as a die would not be fair if extra weight were added to one side, a procedure would be similarly unfair if, as in the case of separate actions in the mass tort context, the defendant has an inherent scale advantage in the litigation.

Some scholars may object to the impartial spectator device because it does not properly account for “soft values” like one’s interest in dignity or autonomy, a criticism often lodged against the *Mathews* balancing test.²⁶⁵ As an initial matter, we already take soft values, such as nonpecuniary losses, into account. It is unclear why it is permissible to determine the value of pain and suffering in assessing damages but not litigant autonomy. But the point of the impartial spectator device is to provide a basis for rationally assessing tradeoffs. Protecting any soft value, including autonomy or dignity, has costs. In the mass tort context, these costs include an increased risk of cancer or death. The impartial spectator device, and the comparative approach in general, requires us to be more conscious about these tradeoffs.

Some scholars further object that focusing on the time before the tort occurs is mistaken. For better or for worse, the court can only intervene after the tort has occurred.²⁶⁶ But it is unclear why courts are required to ignore the effect of procedures on deterrence, especially when issues of enforcement are considered in the injunctive context. Moreover, considering the effects of procedures on deterrence after the tort has occurred is not an anomaly in the law. In the mass tort context there is considerable difficulty in bringing the affected parties together before the tort occurs. Thus, assessing how procedures would affect enforcement of the mass tort liability rule after the tort occurred would be akin to the exception to the mootness doctrine for those violations that are “capable of repetition, yet evading review.”²⁶⁷ In fact, the need to address the mooted issue of enforcement is more

264. Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1844 (1997); see also Broome, *supra* note 263, at 99 (arguing that “fairness requires everyone to have an equal *chance* when their claims are exactly equal”) (emphasis added); Harsanyi, *supra* note 259, at 633–36 (arguing that the use of an impartial spectator device, which measures social policies based upon an equiprobability postulate, is designed to give each individual equal weight).

265. See JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 158–253 (1985); see also REDISH, *supra* note 9, at 142–44.

266. REDISH, *supra* note 9, at 114.

267. See *Roe v. Wade*, 410 U.S. 113, 125 (1973) (citing cases).

compelling in the mass tort context given the generality of the mass tort rule. Unlike in the injunctive context, any decision adopted as to one mass tort will affect many, many others.²⁶⁸

3. Litigant Autonomy as a Fundamental Liberty

Those who emphasize the importance of litigant autonomy have seldom considered how it should be balanced against other important interests. Instead, they have insisted that litigant autonomy is inviolable no matter what. For example, the Supreme Court has emphasized our “deep-rooted historic tradition that everyone should have his own day in court,” notably in contexts where the exercise of control by a party would preclude a nonparty from having that “day in court.”²⁶⁹ Similarly, Henry Monaghan has argued that “[r]ecognition of a substantive due process right to opt out of at least some damage claims has considerable plausibility. It would limit the threat posed by modern aggregation practice to our long-standing tradition of individual litigation autonomy.”²⁷⁰

It is unclear whether the invocation of “substantive due process” is simply rhetoric. One obstacle is that fundamental liberties typically must be “deeply rooted in this Nation’s history and tradition,”²⁷¹ and proponents of a “long-standing tradition of individual claim autonomy” do not provide any historical support for

268. *Cf.* REDISH, *supra* note 9, at 198 (arguing for strict adverseness to satisfy the “case or controversy” requirement of Article III primarily because of “the need for the litigant in the initial suit to represent fully the position that similarly situated litigants would take in subsequent suits”).

269. *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (“[A]pplication of claim and issue preclusion to nonparties runs up against the ‘deep-rooted historic tradition that everyone should have his own day in court.’” (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999)).

270. Monaghan, *supra* note 17, at 1174 (1998).

271. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). *But see* *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (noting that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry” (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

it.²⁷² In fact, many procedures, both antiquated and modern, do not respect a “day in court.”²⁷³

Nevertheless, others have stressed the importance of litigant autonomy without any reference to a long-standing tradition. For example, Martin Redish has argued that “the due process version of litigant autonomy grows out of the same constitutional grounding as the First Amendment right of free expression,” analogizing litigant autonomy to voting or other methods of political participation.²⁷⁴ Others have noted that litigant autonomy further respects the dignity of the individual plaintiffs by allowing them to participate in decisions that affect them.²⁷⁵ Thus, even if the right is not exercised, it is still the litigants’ right, which should be respected absent compelling circumstances.²⁷⁶

As an initial matter, it is important to distinguish between the right to control a claim and the right to participate in a proceeding.²⁷⁷ For example, a plaintiff may still have her “day in court” in the context of a bifurcated class action with a common-issue proceeding and individual-issue determinations.²⁷⁸ Even in a nonbifurcated class action, a plaintiff can otherwise appear to present her own legal arguments or evidence. Admittedly, preclusion doctrine can effectively destroy this participatory right, but participation can still be fairly

272. See CHARLES FRIED & DAVID ROSENBERG, MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT 27 (2003) (“Those who invoke that tradition merely assert its existence, even in the face of a large amount of evidence to the contrary.”); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 967 (1993) (“I am not sure there is any such tradition.”).

Justice Rehnquist’s majority opinion in *Martin v. Wilks* is the first explicit recognition of such a tradition, but only cites a reference to *Wright and Miller* that provides no other historical references. See *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (citing 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 449, at 417 (2d ed. 1981)).

273. See generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (discussing the historical use of representative litigation in England and the United States, noting mandatory nature of bill of peace in equity). See also Bone, *supra* note 177, at 339–40 (noting that other forms of aggregation equally restrict litigant autonomy, but are otherwise permissible); Bone, *supra* note 1, at 231–32 (discussing the history of the doctrine of virtual representation, which permitted an action to preclude nonparties, as undermining any strong right to a “day in court”).

274. REDISH, *supra* note 9, at 136–37. But see Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights*, 1973 DUKE L.J. 1153, 1175 (suggesting, but rejecting, that the right to participation is “derived from the First Amendment”).

275. See MASHAW, *supra* note 265, at 158–253 (1985).

276. REDISH, *supra* note 9, at 137.

277. See ALI, PRINCIPLES, *supra* note 16, § 1.04, reporters’ notes & cmt. a (distinguishing between a right of “voice” (that is, participation) and a right of “exit” (that is, control, or at least retaining control, over the claim)).

278. See *supra* Part I.A.

well accommodated in most cases, and thus satisfy dignitary and legitimacy values, without giving plaintiffs control over their claims.²⁷⁹

Moreover, litigant autonomy, despite its resemblance to First Amendment liberties, is nothing more than the control entitlement. The sublimation of the control entitlement is understandable since such autonomy can be understood in a number of ways that implicate the Due Process Clause. It can, as suggested above, be understood as a fundamental liberty protected by the law of substantive due process. It can also be understood as a “life, liberty, or property” interest in itself²⁸⁰ or a separate entitlement that prevents a deprivation without due process.²⁸¹

But regardless of how one conceptualizes the control entitlement, certain ways of protecting it may be incompatible with other important interests. In fact, casting the control entitlement as an interest so important that it can only be infringed by a “compelling interest” concedes that the control entitlement can be infringed if it would have a negative impact on other important legally protected interests.

One example of the confusing nature of the control entitlement and its possible incompatibility with other higher-order entitlements can be found in *Mullane v. Central Hanover Bank & Trust Co.*, which concerned a New York state law that authorized “common trust funds” permitting small trusts to invest in one fund for common administration.²⁸² At issue was a provision which allowed for periodic “accountings,” held in New York Surrogate’s Court, that resulted in a “judicial settlement of the accounts . . . made binding and conclusive” as to “‘all questions respecting the management of the fund.’”²⁸³ Although the decrees would preclude any claim against the common trust-fund administrator, the statute provided only for newspaper notice of the “accountings” to those with interests in the trust.²⁸⁴

279. A mandatory class action can therefore accommodate participatory proceedings where the parties may have heterogeneous preferences as to the scope of relief, as in actions for structural injunctive relief. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (noting conflicts among plaintiffs, particularly black parents, over the appropriate injunctive relief in school desegregation cases).

280. George Rutherglen, *Better Late Than Never: Notice and Opt-Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 286 (1996) (“The question of who controls the presentation of a claim in court is not much different from the question of who owns it.”).

281. ALL, PRINCIPLES, *supra* note 16, § 2.07 cmt. e; see also *id.* § 1.05(c)(7) & cmt. j (providing that courts should permit opt outs to ensure adequacy of representation).

282. 339 U.S. 306, 307–09 (1950).

283. *Id.* at 309.

284. See *id.* at 309–10 (explaining the notice requirements under the statute).

Mullane, the court-appointed representative of beneficiaries of assets in the trust (none of whom appeared), challenged the notice provisions on due process grounds. The Court held that the notice provisions were generally deficient because they did not provide sufficient notice of the accountings.²⁸⁵

Mullane is generally cited for the proposition that “an opportunity to be heard” is a “fundamental requisite of due process,” which entails notice “reasonably calculated . . . to apprise interested parties.”²⁸⁶ *Mullane* is also generally cited for the proposition that the “chose in action” is a sufficient property interest for due process purposes.²⁸⁷ However, the “opportunity to be heard” and any control the beneficiaries had over their claims overlap significantly. What is the “opportunity to be heard” other than the opportunity to assert one’s claim? Indeed, it is altogether unclear what the relevant property interest is in *Mullane*.²⁸⁸

But, despite the above language, the Court in *Mullane* effectively destroys the control entitlement for some of the beneficiaries, because to protect it would be self-defeating. The Court concluded that the publication notice was in fact permissible for those individuals who could not be located or, in the case of those individuals whose interests were “conjectural or future,” could not be identified. The Court stated:

The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remainderman, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages.²⁸⁹

In other words, the Court concluded that individual notice (and thus protection of litigant autonomy) was not required for hard-to-reach beneficiaries because the Court was sensitive to the other interests at stake. Specifically, protecting each beneficiary’s control over her claim

285. *Id.* at 311, 318.

286. *Id.* at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

287. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (noting that, in the context of a small claims class action, “a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs” (citing *Mullane*, 339 U.S. at 313)); see also Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 913 (2000) (“[T]he prominent due process precedent *Mullane v. Central Hanover Bank & Trust Co.* . . . arguably stand[s] for the proposition that an adjudicated cause of action is property under the Due Process Clause.”).

288. See Merrill, *supra* note 287, at 913 n.110 (“[T]he cause of action in *Mullane* was designed to protect an existing property right—the beneficial interest in a trust fund—and it may be that the Court was relying on the underlying trust property to satisfy the property requirement.”).

289. *Mullane*, 339 U.S. at 317–18 (emphasis added).

through such costly notice would destroy common fund trusts altogether. Thus, the Court had “no doubt that such impracticable and extended searches are not required in the name of due process.”²⁹⁰

Unlike the hard-to-reach beneficiaries, the Court required mail notice for those beneficiaries that could easily be identified. Nevertheless, the Court did not require personal service of process since “[t]he individual interest does not stand alone but is identical with the class” and “any objection sustained would inure to the benefit of all.”²⁹¹ As with the unidentified beneficiaries, the *Mullane* Court effectively destroys the claim for those who do not receive mail notice, but again it does so in a manner sensitive to the other entitlements implicated by the claim. In particular, requiring personal service not only would dissipate the advantages of the common fund trust but would be unnecessary because that the interests of those who failed to receive notice would be adequately represented by those who did. Thus, *Mullane* represents the flip side of *Hansberry*, by articulating a procedural scheme in which an action permissibly binds those absent because (1) it would be self-defeating to require more and (2) the relevant entitlements are adequately protected.

Although *Mullane* did not engage in the balancing test outlined in *Mathews v. Eldridge*, the decision is consistent with an approach that takes all of the relevant interests at stake into account to compare different procedures.²⁹² Moreover, the *Mullane* Court considered not only the effect of notice on the litigation of the fiduciary duty claims, but also its impact on the ex ante incentives of the defendant. The *Mullane* Court recognized that putting too onerous an obligation of notice for common fund trusts may dissipate the advantages of such trusts for banks like the defendant, effectively abolishing them. But the most important aspect of *Mullane* is a willingness to *not* protect litigant autonomy absolutely. The *Mullane* Court recognized that in the common fund trust context, as in the mass tort context, protecting litigant autonomy would be self-defeating. Protecting litigant autonomy would destroy the very entitlements that make litigant autonomy worth having in the first place.

290. *Id.* at 317–18.

291. *Id.* at 319.

292. In fact, the *Mathews* Court noted that its balancing test is based upon “our prior decisions,” which would presumably include *Mullane*. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

C. The “Process” “Due”

By its terms, the Due Process Clause permits deprivations of “life, liberty, and property,” so long as they are deprived with “due process of law.” In the class action context, the “process” “due” is understood as the procedures that are necessary to ensure the adequate representation of the interests of the class. As with the other terms of the Due Process Clause, in this Section, I want to reexamine the “process” “due” in the mass tort context. Here, I want to return to the potential internal and external conflicts in mass tort class actions to show that protecting litigant autonomy is irrelevant or, worse, exacerbates the problems associated with these conflicts. Instead, other procedural innovations are necessary to achieve a “structural assurance of fair and adequate representation for the diverse groups and individuals affected.”²⁹³

1. Internal Conflicts

One significant concern with mass tort class actions is that internal conflicts may lead to an inequitable distribution of damages, particularly with respect to exposure-only plaintiffs. But protecting autonomy both misstates the problem and exacerbates it. The problem is that a procedure for distribution of the recovery may be imposed on the class that biases the presently injured over those not yet injured. A solution to that problem would be the use of (1) an insurance fund, to reduce the risk that future claimants will not recover because of bankruptcy or limits on successor liability, and (2) damage scheduling, to reduce the risk that present claimants rig the rules to recover on a preferred basis. Neither of these solutions depends on the availability of a plaintiff to opt out of the class or otherwise exercise autonomy over the claim.

In fact, protecting litigant autonomy, such as through the availability of a right to opt out, eliminates any chance for a court to impose an equitable procedure for distributing the recovery. Instead, the opt-out right (1) allows the presently injured to recover fully to the detriment of future-only claimants, (2) allows the presently injured to bias any settlement in their favor with the threat of a holdout, and, most importantly, (3) undermines the scale economies necessary to maximize the recovery of *all* class members, thus optimizing deterrence.

293. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997).

2. External Conflicts

Some scholars have argued in favor of increased opt-out rights for plaintiffs to serve as a market check on class action settlements, since the plaintiffs can exercise their “exit” rights to signal when the class attorney is selling out the class.²⁹⁴ But it is unclear what kind of check an opt-out signifies because a plaintiff will only opt out if her own alternatives are better than the settlement. Accordingly, the individual decision to opt out says nothing about the overall fairness of the settlement, particularly with respect to other class members who may prefer the settlement because other factors, such as difficulties in proving specific causation, may preclude their recovery.

More importantly, increasing autonomy as a check on class action settlements misstates the problem. The problem with sweetheart settlements is that the class attorney may have an incentive to accept a settlement lower than the expected recovery of the plaintiffs. But this problem arises not because of the lack of autonomy of the plaintiffs, but because of the lack of leverage for the class attorney. To take a simple example, suppose that the class attorney represents 1,000 claimants in a proposed class action settlement, each suffering the same damages and each with the same initial probability of recovery. Suppose further that the class attorney only represents one of these claimants in the absence of a class action. All else being equal, class counsel would be willing to settle for roughly 1,000 times less than the expected recovery for the class since she only has 1/1,000 of the share of the plaintiffs’ claims without settling.²⁹⁵

In fact, protecting litigant autonomy facilitates sweetheart settlements. As an initial matter, protecting autonomy by permitting opt outs will reduce the economies of scale the class attorney can use to invest in common issues, reducing the probability of success on the merits and, accordingly, reducing the plaintiffs’ expected recovery. More importantly, permitting opt outs will reduce the share of the plaintiffs’ expected recovery that the class attorney would otherwise have and thus, all else being equal, will give class counsel an incentive to settle too cheaply.

A related problem is the “reverse auction,” in which competing class attorneys try to certify class actions, and the defendant, in effect,

294. See, e.g., Coffee, *supra* note 14, at 419 (arguing for “enhancing the right to exit” for these reasons).

295. See Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 481 (1997) (discussing this problem of inadequate leverage).

settles with the lowest bidder.²⁹⁶ But the solution to the reverse auction is the same as the solution to sweetheart settlements. Rather than allow greater opt-out rights, which may lead to competing class actions, courts instead should have the power to enjoin other class actions from competing and driving the settlement value down.²⁹⁷

The solutions to these problems, therefore, do not concern the plaintiffs' litigant autonomy but relate to aspects of class certification and the attorney fee structure. Currently there is a trend to make class certification more difficult to obtain,²⁹⁸ but the arguments above suggest just the opposite. Apart from ensuring minimal requirements concerning the competence of the class attorney, it should be easier, not harder, to obtain class certification. Lessening the burden of certification would ensure that the class attorney does not waste time acquiring control over the claims, which would further disadvantage the plaintiffs relative to the defendant.

3. Substance and Procedure

The theory of procedural due process presented here is relatively simple. It only requires an identification of the relevant interests implicated by the litigation and then an impartial comparison of the impact of different procedures on those interests. One obvious consequence of this context-dependent view of procedural due process is to permit the use of mandatory class actions in mass tort litigation, which would require only a more expansive interpretation of Rule 23(b)(1)(B) or an amendment to Rule 23(b)(3) to remove the insistence on individual notice and opt-out rights. Moreover, although I argue for a context-dependent approach to the law of procedural due process, the argument presented here maps neatly onto litigation in other substantive areas of the law—antitrust, securities and consumer fraud, employment discrimination, and civil rights litigation—in which the same problem of asymmetric stakes arises.

But the resistance to the procedures that are necessary to insure the adequate representation of the plaintiffs arises not just out of respect for each plaintiff's autonomy. It also arises out of reluctance

296. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354–55 (1995) (discussing the problem of the reverse auction).

297. See Wolff, *supra* note 217, at 2046–47 (arguing in favor of greater use of antisuit injunctions to prevent reverse auctions).

298. See, e.g., *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (requiring a heightened standard for class certification); see also Campos, *supra* note 32 (discussing this trend).

to consider the “whole structure” of procedure given the institutional limitations of courts.²⁹⁹ Accordingly, many courts and scholars define the boundary of procedure at the claim, setting aside matters related to how the claim impacts compliance with substantive liability standards as matters of social policy.

This concern with the institutional capacity of courts to consider the substantive impact of procedures finds its clearest expression in the Rules Enabling Act, which provides that the Federal Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right.”³⁰⁰ Setting aside its potential unconstitutionality,³⁰¹ courts have invoked the Act to cast significant doubt on procedures like the mandatory class action because they infringe upon the claim.

In *Ortiz*, for example, the Supreme Court noted that “[t]he Rules Enabling Act underscores the need for caution” in using mandatory class actions in mass tort litigation under a limited fund rationale given “the tension between the limited fund class action’s pro rata distribution in equity and the rights of individual tort victims in law.”³⁰² Likewise, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Court addressed whether a New York state law prohibiting class actions for claims seeking statutory damages prevented a federal court from certifying the same class under Rule 23.³⁰³ The *Shady Grove* Court concluded that Rule 23 could do so without violating the Rules Enabling Act “at least insofar as [the Rule] allows *willing* plaintiffs to join their separate claims against the same defendants in a class action,” suggesting that a mandatory class action with unwilling plaintiffs would violate the Act.³⁰⁴ Most recently, this past term, in *Wal-Mart Stores, Inc. v. Dukes*, the Court rejected the use of mandatory class actions under Rule 23(b)(2) for claims involving monetary remedies.³⁰⁵ In doing so, it rejected the use of random sampling of the plaintiffs’ claims to determine aggregate

299. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 371, 403 (1978) (discussing the general reluctance of courts to engage in extended forms of relief).

300. 28 U.S.C. § 2072(b) (2010).

301. See REDISH, *supra* note 9, at 62–85 (noting constitutional problems presented by the Rules Enabling Act and its delegation of rulemaking authority to the Supreme Court).

302. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

303. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1432 (2010).

304. *Id.* at 1443 (emphasis added).

305. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (noting that allowing claims for monetary remedies under Rule 23(b)(2) would “do[] obvious violence to the Rule’s structural features”).

damages.³⁰⁶ The Court considered such a “Trial By Formula” a possible violation of the Rules Enabling Act, particularly since it would infringe upon the defendant’s right to assert statutory defenses designed to limit the claim.³⁰⁷ In fact, the Court has consistently rejected any procedure that would extinguish, reassign, or otherwise change the claim.³⁰⁸

One appeal of focusing on the claim as the relevant “substance” is that it provides a clear “substantive right” that demarcates the permissible bounds of court intervention under the Rules Enabling Act. Thus, it satisfies a concern shared by the Act and the *Erie* doctrine³⁰⁹ to prevent procedure from “substantially affect[ing] those primary decisions respecting human conduct which our constitutional system leaves to state regulation.”³¹⁰ It likewise satisfies a similar concern with ensuring that the Rules are not “an improper delegation of congressional legislative power.”³¹¹ Defining the boundary line of procedure at the claim further prevents courts from addressing matters that are beyond their institutional competence. Indeed, in *Ortiz*, the Court concluded that asbestos litigation “defies customary judicial administration and calls for national legislation.”³¹²

The Rules Enabling Act and the related *Erie* and separation-of-powers doctrines are all notoriously difficult areas of the law, and my

306. *Id.* at 2561. *But see* Hilao v. Estate of Marcos, 103 F.3d 767, 782–87 (9th Cir. 1996) (permitting the use of random sampling of claims to determine aggregate damages in a class action involving human rights abuses).

307. *Wal-Mart*, 131 S. Ct. at 2561.

308. *See* Semtek Int’l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001) (interpreting Rule 41(b), which covers voluntary dismissal of actions, to not preclude another action in state court because such an interpretation “would arguably violate the jurisdictional limitation of the Rules Enabling Act,” citing *Ortiz*); *see also* Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1157–61 (2011) (noting Supreme Court precedent concluding that preclusion and statute-of-limitation periods would violate the Rules Enabling Act); *cf.* 6A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1545 (4th ed. 2010) (concluding that substantive law relating to the assignment of claims is the basis for the real-party-in-interest rule).

309. *Erie R.R. v. Tompkins*, 304 U.S. 64, 79–80 (1938) (holding that state common law applies in diversity cases).

310. *Hanna v. Plumer*, 380 U.S. 460, 474–78 (1965) (Harlan, J., concurring).

311. REDISH, *supra* note 9, at 69; *see* NAGAREDA, *supra* note 12, at 84 (arguing against the use of mandatory class actions in mass tort litigation, since the “the delegation made in the [Rules Enabling] Act must stop short of the legislative power that Congress might wield to alter preexisting rights”); *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106–12 (1982) (arguing that the Rules Enabling Act’s procedure/substance dichotomy was designed primarily to limit the lawmaking power the Act granted to the Supreme Court, thus satisfying separation-of-powers concerns).

312. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

brief discussion here is not, nor could it be, exhaustive.³¹³ But the institutional concerns that cause courts and scholars to interpret the Rules Enabling Act as prohibiting any change in the claim are misguided. As an initial matter, it is unclear why the claim should be the dividing line between substance and procedure. The substantive right may include the procedures by which it is processed. Thus, it is unclear why Justice Scalia can confidently say in *Shady Grove* that the class action “really regulat[es] procedure” when, as both Justice Ginsburg and Justice Stevens point out, the right to seek statutory damages under New York state law is further defined by a prohibition on class actions.³¹⁴ In fact, the claim is “rationally capable of classification as ‘procedure’ ”³¹⁵ since it can be understood as the procedure by which an entitlement to deterrence is provided.³¹⁶

More importantly, focusing on the claim as the limit of procedure rests on a limited view of the function of a court. A court should be concerned with not only the limitations of its jurisdiction but also its responsibility “to secure the just, speedy, and inexpensive determination of every action and proceeding.”³¹⁷ In fact, the history of the class action as an “invention of equity”³¹⁸ reflects an attempt to use procedures to vindicate “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”³¹⁹ This may mean a modification of the plaintiff’s right to use the claim so as not to “dissipate its advantages.”³²⁰

Of course, in trying to adjust procedure to make substance a practical reality, courts will inevitably make mistakes. But federal and state legislatures are not potted plants and can easily express their disapproval.³²¹ Moreover, a court can factor in its limitations by

313. I explore these areas in more detail in a separate article. See Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. (forthcoming 2012) (on file with author).

314. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting) (“New York’s decision instead to block class-action proceedings for statutory damages . . . makes scant sense, except as a means to a manifestly substantive end.”); see also *id.* at 1450 (2010) (Stevens, J., concurring) (noting that states traditionally refine substantive law through the use of procedure).

315. See *id.* at 1442 (quoting *Hanna*, 380 U.S. at 472).

316. See *supra* Part II.A.

317. FED. R. CIV. P. 1.

318. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).

319. Kaplan, *supra* note 28, at 497.

320. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950).

321. See Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 136 (2011) (noting that “a uniformly applied set of Federal Rules would put state lawmakers on notice of the procedures to be used in diversity cases,” thus “increasing democratic transparency in the states”).

using other judicial doctrines, such as deference to other institutions, to cabin its inquiry.³²² But what a court cannot do is abdicate its responsibility to calibrate procedure to protect the substantive interests at stake. The Due Process Clause requires no less, and the Rules Enabling Act only makes that obligation explicit.³²³

CONCLUSION

In this Article, I used the mass tort context to rethink the law of procedural due process. The Article can be understood as a work of translation insofar as it translates insights from rational choice and economic theory to test the concepts that underlie due process analysis. But the Article is also a work of excavation. The problem of asymmetric stakes that plagues mass tort litigation has a family resemblance to problems, most notably the tragedy of the commons, as old as the law itself. More importantly, and as I argued above, the law has the resources to deal with it. Thus, what I propose is not new or extraordinary³²⁴ but should give courts confidence that mass torts are not intractable. New guises may reveal old dilemmas.

Indeed, legislatures have consistently expressed their views as to the availability of the class action, most notably in the securities context. *See, e.g.*, Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); *see also* Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (expanding diversity jurisdiction and imposing limitations on class action settlements to prevent class attorneys from selling out the class). In fact, Congress can avoid courts altogether and set up administrative procedures to deal with certain substantive areas of the law. For example, the Bankruptcy Code can be seen, in effect, as a statutory scheme to create mandatory class actions when a limited fund is caused by an inability for the debtor to proceed as a going concern. I explore such abrogation of existing procedures in more detail in a future work. *See* Campos, *supra* note 313.

322. For example, I propose a rebuttable presumption that existing state tort law procedures satisfy procedural due process, which can be rebutted in the mass tort context. *See supra* Part II.A.3.

323. *See* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 735 (1975) (arguing that the Rules Enabling Act only imposes a responsibility on courts “to justify the substantive impact in terms of the substantive values”); *see also* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 21 (2010) (arguing that, in examining the validity of Rule 23 under the Rules Enabling Act, “courts must look to the substantive liability and regulatory regimes of state and federal law in determining whether aggregate relief is appropriate and consistent with the goals of the underlying law”).

324. Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).