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Two Models of the Civil Litigant

David Marcus

TWO MODELS OF THE CIVIL LITIGANT

*David Marcus**

INTRODUCTION

Assume a children's rights organization brings a class action on behalf of all children in a state's foster care system. The organization seeks a structural injunction to remedy widespread deficiencies in the system's administration. The complaint tells a sickening story of rampant sexual and physical abuse, overextended and indifferent caseworkers, and children routinely bounced from one home to another. Although some of these injuries could support individual claims for money damages,[1] the organization decides not to pursue this sort of relief. It rightly determines that its chances for class certification, and ultimately its chances to obtain the system-wide injunction, increase if it eschews claims for money damages and the individualized issues they raise.

This choice might create a problem. Judgments in class actions generate preclusive effects, according to the same general principles that govern individual judgments.[2] A chance exists that, should the foster care class action proceed to final judgment, res judicata might bar all class members from seeking money damages for injuries that arise out of the same events the organization targets with its suit for injunctive relief.[3] A question thus arises: does the organization adequately re-

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1. *E.g.*, Henry A. v. Willden, 678 F.3d 991, 998–1001 (9th Cir. 2012).

2. 5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 16:14 (4th ed. 2002).

3. The majority view among the lower federal courts is that a judgment obtained in a class action brought solely for injunctive relief does not preclude individual class members from pursuing damages claims on their own in subsequent lawsuits. *E.g.*, Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996); Thorpe v. District of Columbia, No. 10-2250 (ESH), 2014 WL 1273134, at *26 (D.D.C. Mar. 29, 2014); Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 991 (D. Ariz. 2011). In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), however, the United States Supreme Court suggested that, if a plaintiff class elects to forego damages claims arising from the same events that generate claims for equitable relief, the decision might preclude the litigation of the damages claims going forward, *id.* at 2559. *Wal-Mart* may prompt reexamination of

present the interests of the foster children in the class action if it passes on potentially valuable claims for money damages to facilitate class certification and ultimately the pursuit of the structural injunction?

The right answer to this unsettled question might depend on how best to conceive of the civil litigant. If each litigant is a discrete individual, vested with a right to seek a remedy tailored to her particular circumstances, then the sacrifice of individual damages to further the interests of the group may be wrong. If, however, litigants are better thought of as members of communities, with their rights and obligations determined by group ties, then perhaps the organization may more properly pursue collective redress at the expense of individual compensation.

Answers to many such procedural problems depend on how the relationships among people impacted by events that generate litigation are understood to affect their identities as civil litigants. To provide a theoretical framework for thinking about the connection between procedural doctrine and group ties, I develop two conceptions, or models, of the civil litigant. I draw inspiration for the first model from the remarkable procedural jurisprudence of Judge Jack Weinstein, rightly celebrated in the festschrift to which this Article is a contribution. Judge Weinstein has shaped procedural doctrine in ways that sacrifice individual litigant control to serve communal ends. Also, he believes that the substantive makeup of litigants' claims, defenses, and remedies—what I refer to here as a litigant's "legal identity"—can depend on communal ties among litigants. To Judge Weinstein, litigants are not isolated individuals, but members of a community that defines them, and to which they owe obligations. His conception is the "community member" model (CM model) of the civil litigant.

The fast-growing corpus of procedural decisions issued by the Roberts Court inspires a competing model of the civil litigant. The Court has strengthened the control that individual litigants exercise over their participation in litigation. Also, it has refused to allow the interests of larger populations or the regulatory imperatives of the substantive law to affect the makeup of litigants' legal identities. These preferences are those of a decision maker who treats litigants as "au-

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the majority view. *E.g.*, Richardson v. L'Oreal USA, Inc., 991 F. Supp. 2d 181, 198–200 (D.D.C. 2013). In one unpublished order issued in a foster care reform class action, a district judge concluded that the prospect of preclusion of money damages claims weighed against a finding of adequate representation when the class representative sought only injunctive relief. Clark Cnty. Defendants' Proposed Order Denying Plaintiffs' Renewed Motion for Class Certification at 7–8, Clark K. v. Willden, 616 F. Supp. 2d 1038 (D. Nev. 2008) (No. 2:06-cv-01068-RCJ-RJJ).

tonomous individuals"; I therefore call the Court's conception the "autonomous individual" model (AI model).

The AI and CM models offer useful ways to organize and understand themes in procedural decisions that impact litigant freedom and distinctiveness. I define the two models in Part II, then show how commitments to their core tenets have led the Court and Judge Weinstein to treat individual litigants differently in each's procedural jurisprudence. In Part III, I question whether the Court's AI model has sufficient historical, doctrinal, or normative support to justify its capture of the Justices' procedural imaginations. Several decades ago, the federal judiciary tolerated doctrinal experiments in civil procedure that tried to strike a balance between individual litigant autonomy and distinctiveness, on one hand, and communal or regulatory ends, on the other.[4] During these years of exuberant creativity, no judge influenced the development of American procedural doctrine more than Judge Weinstein. If prevailing attitudes about procedural design are any indicator, this era has lapsed. Its end may herald a dramatic decrease in the capacity of American civil litigation to deliver broad, evenly distributed rights vindication—a goal Judge Weinstein has pursued relentlessly for fifty years.

The choice between the AI and CM models has high stakes. Take the foster care case as an example. Advocates have successfully obtained systemic relief in class actions brought against child welfare agencies in more than thirty states.[5] If procedural doctrine requires attention to the individual circumstances and needs of each child, plaintiffs will have much greater difficulty aggregating claims, seriously impairing the capacity of the judiciary to generate structural reform. The unalloyed individualism in the Roberts Court's procedural jurisprudence threatens this and many other types of aggregate litigation.[6] But if I am right that the AI model rests on an incomplete foun-

4. *See generally* David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 626–43 (2013) (describing attempts by federal courts in the 1970s to strike this balance in class action doctrine).

5. *E.g.*, CHILD WELFARE LEAGUE OF AM., CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005, at 2 (2005), *available at* http://thehill.com/sites/default/files/consentdecrees_0.pdf.

6. The Court's 2011 decision in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, discussed *infra* Part II.B.2, portends a significant alteration in class certification doctrine for structural reform litigation. For *Wal-Mart*'s influence on foster care reform litigation, see M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 839–41 (5th Cir. 2012). *See also Thorpe*, 2014 WL 1273134, at *2 (discussing *Wal-Mart*'s significance for class certification in a disabilities rights case); Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec., No. 07 Civ. 8224(KBF), 2012 WL 1344417, at *3–4 (S.D.N.Y. Apr. 16, 2012) (describing *Wal-Mart*'s influence in a case challenging enforcement practices by immigration officials).

dation, no good reason exists to explain why Judge Weinstein's procedural vision should not continue to steer the development of American civil procedure for another five decades.

II. The Supreme Court, Judge Weinstein, and Their Models of the Civil Litigant

One could scarcely imagine a sharper contrast between the prevailing ideologies of the Roberts Court, on one hand, and Judge Weinstein's judicial orientation, on the other. This juxtaposition is obvious when one examines contrasting themes in their procedural decisions—themes that bear the hallmarks of each model of the civil litigant. I begin this Part with a definition of each model. I then argue that a decision maker committed to the AI model would resolve procedural problems implicating litigant identity and autonomy as the Roberts Court has in recent years, while Judge Weinstein's procedural jurisprudence exemplifies the CM model's normative commitments.

A. The Two Models

The best way to define the AI and CM models is by contrasting each of their three core tenets. The first involves a litigant's *legal identity*. An "autonomous individual" asserts an interest, such as a claim or defense, with a substantive makeup that does not vary depending on the size or composition of the population affected by the events that generate litigation. To quote an advocate for individualism in procedural design, a claim or defense exists in an "abstract, pristine" form, determined without reference to any community.[7] A securities fraud plaintiff conceived of as an autonomous individual, for example, adduces the same evidence to establish reliance whether she sues individually or as part of a class. In contrast, communal context can determine the legal identity of a "community member." To use the same example, the CM model accepts that the composition of the reliance element might change depending upon whether the securities fraud plaintiff proceeds alone or joined in a class action.

The second primary difference between the two models involves *litigant autonomy*. As its name implies, the AI model takes a libertarian approach to litigant decision making. The choices of others affected by the events generating litigation cannot constrain how an autonomous individual participates in litigation. A decision maker committed to the AI model would treat the class action device with

7. Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Calif. L. Rev. 1573, 1592 (2007).

skepticism. The CM model privileges community needs and permits restrictions on a litigant's individual freedom in the service of those needs. A judge who views civil litigants as "community members" grants class certification more readily.

Remedial emphases provide the third primary difference. The AI model treats litigation as a discrete episode that commences when a particular individual files suit. It ends when a decision maker adjudicates the entitlements of individual participants to remedies tailored to their particular injuries or needs, or when the individual participants settle on terms that satisfy their private interests. Litigation succeeds when one individual receives a reasonable approximation of whatever the substantive law offers her. The CM model, in contrast, prioritizes individual redress less and communal objectives more. Litigation produces good results when it generates remedies that address the range of community concerns implicated by the events that led to the lawsuit. An individual litigant acts not only on her own behalf, but also on behalf of a community of people with something at stake.

The support I offer in Part III for the CM model (and, by extension, for Judge Weinstein's procedural jurisprudence) includes the argument that, as a general matter, decision makers are not compelled by law to accept one model or the other. Governing law makes the choice in specific instances. An employment discrimination plaintiff in some circuits, for example, cannot bring a pattern-or-practice claim unless she does so as a member of a class.[8] A pattern-or-practice plaintiff cannot be an "autonomous individual" in these circuits, as her claim's existence depends on her communal ties. When, however, authoritative doctrine does not require a decision maker to treat litigants as either autonomous individuals or community members, the decision maker's normative preferences for procedural design will lead her to favor one model or the other. I illustrate how preferences influence design with the contrasting procedural paths that Judge Weinstein and the Roberts Court have followed.

B. The AI Model in the United States Supreme Court

The Roberts Court has paid unprecedented attention to problems of civil procedure,[9] assembling a portfolio of procedural work that has

8. *E.g.*, Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 967–69 (11th Cir. 2008); Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355–56 (5th Cir. 2001).

9. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1603–06 (2014) (documenting the "spike" in Supreme Court opinions on the Federal Rules of Civil Procedure over the past decade); *see also* Howard M. Wasserman, *The*

begun to exhibit distinct trends.[10] Several themes in its decisions suggest that a majority of Justices conceive of litigants as autonomous individuals. Consistent with the AI model's core tenets, the Court has favored individual control over days-in-court, it has refused to allow case size to affect the substantive law's makeup, and it treats individual remedies as civil litigation's primary objective.

1. Days-in-Court and Individual Autonomy

The Court treats an individual's power to control her own day-in-court as an intrinsic value that procedural doctrine should honor.[11] *Taylor v. Sturgell*[12] offers a straightforward message about this value's importance. The decision, issued in 2008, strictly limits those instances when the actions of other parties can strip a litigant of control over the terms under which a court can adjudicate her interests.[13] Before the Court acted, some circuits had embraced a flexible standard for res judicata that, under certain circumstances, empowered a judgment to bind nonparties, provided that a party had represented the nonparties' interests adequately.[14] The lower courts in *Taylor* had relied on this doctrine of "virtual representation."[15] An antique aircraft enthusiast seeking technical specifications for a 1930s-era airplane brought and lost a Freedom of Information Act (FOIA) claim against the Federal Aviation Administration.[16] The enthusiast's friend, represented by the enthusiast's lawyer, then filed an identical FOIA lawsuit, seeking the same technical specifications.[17] The lower courts dismissed the friend's claim as precluded by the judgment in the enthusiast's case, concluding that the enthusiast had adequately represented his friend's interests.[18]

Roberts Court and the Civil Procedure Revival, 31 REV. LITIG. 313, 314–15 (2012) (describing "[t]he Court's re-engagement with civil procedure" under Chief Justice Roberts).

10. *E.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 366–67 (2013) (commenting on claims that the Roberts Court's procedural decisions manifest a pro-business tilt); Wasserman, *supra* note 9, at 328.

11. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311–12 (2013); *see also* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (plurality opinion); Taylor v. Sturgell, 553 U.S. 880, 892–93, 898 (2008).

12. 553 U.S. 880.

13. *Id.* at 900.

14. *E.g.*, Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 760–62 (1st Cir. 1994).

15. *Taylor*, 553 U.S. at 884.

16. *Id.* at 885–86.

17. *Id.* at 887–89.

18. *Id.* at 888–91. The lower courts required more than just a showing of adequate representation to find nonparty preclusion, but adequacy was an essential finding. *Id.* at 890.

The Supreme Court reversed, and in so doing, largely eliminated virtual representation doctrine.[19] The sort of nonparty preclusion the doctrine had permitted, the Court held, conflicted with the "deep-rooted historic tradition that everyone should have his own day in court."[20] The Court used more than tradition to support this holding, identifying a couple of pragmatic objections to virtual representation.[21] But the primary reason it gave for the doctrine's demise treats individual control over litigation decisions as something of a *grundnorm*.[22]

The FOIA claims in the two suits did not vary in the slightest, so *Taylor* offers a particularly strong endorsement for individual control over days-in-court.[23] As such, the decision is the sort that a procedural designer who finds intrinsic value in litigant autonomy—that is, value unrelated to outcome quality—would prefer.[24] *Taylor* also expresses an atomistic understanding of legal identity.[25] The virtual representation doctrine, which had flourished in some circuits before the decision, hinged the makeup of litigants' claims in part on whether others with similar interests had already sought to vindicate them.[26] By repudiating the doctrine, *Taylor* ensured that nothing the enthusiast did with his claim would affect the contours of the friend's claim.[27]

A less obvious but related message about the intrinsic value of litigant autonomy lurks in *American Express Co. v. Italian Colors Restaurant*,[28] decided in June 2013. A restaurant had done business with a credit card company pursuant to a form contract that included an

19. *Id.* at 893–95, 904, 907 (describing six categories of permissible nonparty preclusion).

20. *Id.* at 892–93 (quoting Richards v. Jefferson Cnty., Ala., 517 U.S. 793, 798 (1996)).

21. *Taylor*, 553 U.S. at 900–01.

22. As the Court reasoned, "[O]ur decisions emphasize the *fundamental nature* of the general rule that a litigant is not bound by a judgment to which she was not a party." *Id.* at 898 (emphasis added).

23. *Id.* at 885–88.

24. Professor Martin Redish, the most accomplished and sophisticated advocate of individualism in civil procedure, has celebrated *Taylor v. Sturgell* as consistent with a "process-based theory" of due process that "values participation either for its legitimizing effect in the eyes of the litigants or its facilitation of the citizen's role in democratic governance, whether or not decision making accuracy is improved as a result." Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1889–90 (2009). He continues: "[T]here may be a value in permitting each litigant to personally participate—have her day in court—that is entirely distinct from the value in securing an accurate outcome." *Id.* at 1890. Professor Redish faults the Court for not asserting this theory explicitly but otherwise praises the decision. *Id.* at 1887.

25. *Taylor*, 553 U.S. at 904.

26. *Id.* at 895, 901.

27. *Id.* at 885.

28. 133 S. Ct. 2304 (2013).

arbitration clause and a class action waiver.[29] Notwithstanding these provisions, the restaurant brought a class action in federal court against the company, alleging antitrust violations.[30] The class action waiver should not be enforced, the restaurant argued, because the cost of litigating its claims individually in arbitration would exceed the value of the claims themselves.[31] Simple economics would thereby ensure that the restaurant would eschew the vindication of its rights altogether and leave the substantive law unenforced unless it could spread litigation costs across a class of similar claims.[32] But the Court's majority was unmoved.[33] Federal Arbitration Act (FAA) doctrine arguably recognizes a defense to enforcement when enforcement would prevent the "effective vindication of a federal statutory right."[34] But the exception did not apply. The Court reasoned that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy,"[35] even if only an irrational person would lose money to engage in this pursuit.

Amex has little appeal if the success of a procedural doctrine that regulates access to adjudication depends on its capacity to generate substantive law enforcement. Someone committed to the CM model would fault *Amex* for this reason, because substantive law enforcement serves the interests of a community of regulatory beneficiaries. If, however, the metric for success asks whether the decision leaves an individual litigant free to choose to participate when she wants—the intrinsic value heralded in *Taylor*,[36] and one of the AI model's core tenets—then *Amex* fares better.

J. McIntyre Machinery, Ltd. v. Nicastro,[37] a personal jurisdiction case decided in 2011, is yet another recent decision that privileges individual control over the terms of participation in litigation.[38] The defendant, a British heavy equipment manufacturer, sold a machine for use in scrap metal recycling to its American distributor.[39] The distributor then resold the machine to a New Jersey factory, where the ma-

29. *Id.* at 2308.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 2310.
34. *Amex*, 133 S. Ct. at 2310 (internal quotation marks omitted).
35. *Id.* at 2311.
36. Taylor v. Sturgell, 553 U.S. 880, 892–93, 904 (2008).
37. 131 S. Ct. 2780 (2011) (plurality opinion).
38. *Id*. at 2791.
39. *Id.* at 2786.

chine injured a metalworker.[40] He sued the British manufacturer in New Jersey state court.[41]

The manufacturer had targeted the entire United States as an undifferentiated market for its products, and it did nothing to keep its machines out of New Jersey, the state with more scrap metal recycling than any other.[42] Nonetheless, the plurality agreed that the manufacturer had not purposefully availed itself of the state, and thus that the New Jersey court lacked personal jurisdiction.[43] The size of New Jersey's scrap metal recycling industry arguably gave the state a significant interest in the regulation of industry participants through civil litigation in its courts.[44] But the legitimate reach of New Jersey's regulatory authority played no role in the plurality's jurisdictional calculus.[45] Rather, taking a libertarian turn,[46] the plurality hinged the court's jurisdiction on the choices the defendant had made as it structured its business to interact with sovereigns of its choosing.[47] Because the manufacturer had not itself specifically targeted New Jersey for sales, a New Jersey court lacked jurisdiction.[48] As Justice Ginsburg noted in her dissent,[49] the plurality opinion effectively makes the willingness of a litigant to submit to a particular sovereign's authority the linchpin for jurisdictional analysis.[50]

2. The Irrelevance of Community Impact to Legal Identity

The AI model denies that a litigant's legal identity can change depending on the size and composition of the population affected by the litigation-generating event. A link obviously connects the event to the procedures litigants invoke. A rise in the number of affected individuals may trigger various joinder devices, such as the class action rule.[51] But this link does not extend beyond procedure; the extent of an event's communal impact does not influence the makeup of litigants'

40. *Id.*
41. *Id.*
42. *Id.* at 2795–96 (Ginsburg, J., dissenting).
43. *McIntyre*, 131 S. Ct. at 2790–91 (plurality opinion).
44. *Id.* at 2795 (Ginsburg, J., dissenting).
45. *Id.* at 2790 (plurality opinion) ("A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts.").
46. *See* Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U. CHI. LEGAL F. 1, 1–2.
47. *McIntyre*, 131 S. Ct. at 2789–90.
48. *Id.* at 2790–91.
49. *Id.* at 2795 (Ginsburg, J., dissenting) (framing and critiquing the plurality's argument).
50. *See id.* at 2787–88 (plurality opinion).
51. FED. R. CIV. P. 23.

claims and defenses. Two of the Court's recent decisions indicate agreement with this core tenet.[52]

Justice Scalia's opinion in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[53] decided in 2010, conceives of the substantive law as cordoned off from the influence of aggregate procedure. The plaintiffs sued Allstate Insurance Company under a New York law that imposed penalties on insurers for tardy reimbursements.[54] The law also prohibited the aggregation of these penalty claims in class actions.[55] The plaintiffs thus filed a class action in federal court and argued that Rule 23[56] preempted the New York joinder restriction.[57] Allstate invoked the Rules Enabling Act (Enabling Act) in response.[58] If New York law applied and class certification were denied, Allstate faced a potential liability of $500 under the applicable substantive law, or the value of the individual named plaintiff's claim.[59] No other victim would sue, deterred by the imbalance between litigation costs and the modesty of the statutory penalty.[60] Class certification under Rule 23 would transform this potential liability into $5 million, or the aggregate value of 1,000 identical claims no longer left fallow.[61] The application of Rule 23 alone would dramatically alter the substantive law's effective meaning for Allstate, in violation of the Enabling Act's requirement that rules of procedure not "abridge, enlarge or modify any substantive right."[62]

The Court disagreed with Allstate, holding that Rule 23 preempts the New York law.[63] Allstate's "aggregate liability," Justice Scalia reasoned for a plurality of Justices, "does not depend on whether the suit proceeds as a class action."[64] Rather,

> [e]ach of the 1,000-plus members of the putative class could . . . bring a freestanding suit asserting his individual claim. It is undoubtedly true that some plaintiffs would not bring individual suits for the relatively small sums involved will choose to join a class ac-

52. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408–09 (2010) (plurality opinion).

53. 559 U.S. 393.

54. *Id.* at 397.

55. *Id.* at 396–97.

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

57. *Shady Grove*, 559 U.S. at 397.

58. *Id.* at 408–09.

59. *Id.* at 408.

60. *Id.* at 408.

61. *Id.*

62. 28 U.S.C. § 2072(b) (2012); *Shady Grove*, 559 U.S. at 408–09.

63. *Shady Grove*, 559 U.S. at 398–99.

64. *Id.* at 408.

> tion. *That has no bearing, however, on Allstate's or the plaintiffs' legal rights*.[65]

Rule 23, just "a species" of "traditional joinder," "merely enables a federal court to adjudicate claims of multiple parties at once."[66] It "leaves the parties' legal rights and duties intact and the rules of decision unchanged."[67]

Justice Scalia's insistence that the aggregation of claimants does not alter Allstate's actual substantive liability smacks of formalism.[68] But *Shady Grove* implies that form, not felt experience, matters to a proper understanding of the relationship between Allstate's legal identity and the community of insureds impacted by its belated reimbursement practices.[69] Rule 23 simply adds together independent, fully formed claims that preexist in some "abstract, pristine" form before aggregation.[70] Their joinder does not somehow transform the substance of Allstate's legal identity in terms of the exposure it faced under the New York insurance law.[71]

Like *Shady Grove*, *Wal-Mart Stores, Inc. v. Dukes*,[72] decided in 2011, rejects a connection between the size of the community involved in the litigation and the makeup of any particular individual's claim or defense.[73] The plaintiffs sued Wal-Mart for gender discrimination on behalf of a class of 1.5 million current and former female employees, seeking back pay and other remedies.[74] Under Title VII of the 1964 Civil Rights Act, an employer can defend against a particular employee's claim for back pay if "such individual" suffered an adverse employment action "for any reason other than discrimination."[75] Wal-Mart argued that this statutory language entitled it to contest each employee's claim for back pay, rendering the litigation incapable of classwide resolution and the case therefore uncertifiable as a class action.[76] In response, the Ninth Circuit proposed that the parties select a statistically significant number of employees, litigate their back

65. *Id.* (emphasis added).

66. *Id.*

67. *Id.*

68. Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 64–66 (2010).

69. *See Shady Grove*, 559 U.S. at 408–09.

70. *See* Redish & Larsen, *supra* note 7, at 1592.

71. For more discussion of this theme, see Richard A. Nagareda, *The Litigation–Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1085–87 (2011).

72. 131 S. Ct. 2541 (2011).

73. *Id.* at 2561.

74. *Id.* at 2547.

75. 42 U.S.C. § 2000e-5(g)(2)(A) (2012).

76. *Wal-Mart*, 131 S. Ct. at 2549.

pay claims individually, and then extrapolate the results for the class as a whole.[77] This trial plan would have made most back pay claims resolvable in the aggregate and thus facilitate class certification. Had the Court agreed and upheld class certification, the size of the population of plaintiffs Wal-Mart faced would have had determinative influence for the substantive makeup of its defense. The right to defend against each employee's claim for back pay would have yielded to a right to defend against a selected sample of employee claims, and then to contest the extrapolated significance of this sample for the class as a whole.

The Court rejected this "Trial by Formula," as Justice Scalia derisively labeled it, because the plaintiffs devised it to facilitate class certification under Rule 23.[78] If class certification changed the parties' evidentiary burdens and opportunities to litigate, then the application of Rule 23 altered substantive rights in violation of the Enabling Act.[79] To put the thrust of this holding in AI model terms, the Court refused to allow the makeup of Wal-Mart's substantive legal identity, defined by the defenses it could assert, to change simply to account for the size of the community of alleged victims.

3. Individualistic Remedial Emphasis

AT&T Mobility, Inc. v. Concepcion,[80] decided in 2011, stands for the idea that individual redress is civil litigation's primary remedial goal, and that any broader regulatory effect that private litigation might have is merely incidental.[81] Like *Amex*, *Concepcion* involved a challenge to the enforcement of a class action waiver coupled with an arbitration clause included in a consumer form contract.[82] The *Concepcion* contract differed from the *Amex* one, however, because the former included certain "sweeteners," such as attorneys' fees provisions and damages enhancements, ostensibly designed to incentivize customers with only modest injuries to file claims.[83] The lower courts invalidated the clause/waiver combination as unlawfully exculpatory

77. *Id.* at 2561.

78. *Id.*

79. *Id.*

80. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

81. *Id.* at 1753. On this theme in general, see generally George Rutherglen, Wal-Mart*,* AT&T Mobility*, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24 (2012), *available at* http://www.virginialawreview.org/sites/virginialawreview.org/files/Rutherglen.pdf.

82. *Concepcion*, 131 S. Ct. at 1744.

83. *Id.*; *see also* Nagareda, *supra* note 71, at 1118–19.

and therefore unconscionable.[84] The sweeteners might ensure that arbitration expenses would not dissuade a customer aware of her injury and motivated to do something about it from pursuing a claim and obtaining compensation.[85] But few customers would recognize or care about their injuries.[86] Even if the sweeteners guaranteed compensation to any individual determined enough to file a claim, the district court observed, they could not generate enough filings successfully to address an "overarching policy concern of deterring corporate wrongdoing."[87] The district court therefore voided the clause as exculpatory, not because it denied compensation to motivated individual claimants, but because it enabled the defendant to dodge the regulatory force of the substantive law.[88]

The Supreme Court reversed, holding that any exculpation-based defense that the FAA recognizes misfired in this instance.[89] The sweeteners enabled the "individual prosecution of meritorious claims" for those who chose to avail themselves of arbitration.[90] Concerns about the many claims that would go unfiled, and by implication the deterrence lost, were "unrelated" to the FAA's exceptions and policies.[91] To the Court, exculpation meant a disruption to individuals' abilities to press their claims, not foregone law enforcement for a community of regulatory beneficiaries.[92] This understanding fits the AI model perfectly. Autonomous individuals are not undifferentiated vehicles for law enforcement, but distinct persons free to seek or abandon a remedy tailored for them.[93] If a doctrine allows them this choice, it cannot be exculpatory.

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84. Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *8 (S.D. Cal. Aug. 11, 2008).

85. Nagareda, *supra* note 71, at 1119.

86. *Laster*, 2008 WL 5216255, at *8; *see also* Nagareda, *supra* note 71, at 1119.

87. *Laster*, 2008 WL 5216255, at *14.

88. *Id.* at *14 ("Faithful adherence to California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct in cases involving large numbers of consumers with small amounts of damages, compels the Court to invalidate ATTM's class waiver provision."). The district court followed the California Supreme Court, which had previously held thusly. Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

89. *Concepcion*, 131 S. Ct. at 1746–48, 1753. Justice Thomas argued that no such defense exists. *Id.* at 1755 (Thomas, J., concurring).

90. *Id.* at 1753 (majority opinion).

91. *Id.*

92. *Id.* at 1746–48.

93. *Cf.* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 645 n.144 [hereinafter Redish et al., *Cy Pres Relief*] ("[W]hatever impact federal adjudication may have on the public interest must come as an incident to the assertion and adjudication of narrower, personal interests." (quoting Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 86)).

C. The "Community Member" Model in Judge Weinstein's Procedural Jurisprudence

The Court's recent decisions stress individual autonomy and distinctiveness. Judge Weinstein's procedural jurisprudence contrasts sharply. He has warned against an "individualism run riot" in the procedural regulation of civil litigation.[94] "[D]ignity [may be] enhanced by individual control of litigation for each person's own benefit,"[95] Judge Weinstein acknowledges, but civil litigation must also respond to the concerns of communities impacted by litigation-generating events.[96] When Judge Weinstein has addressed procedural problems involving the scope of litigant autonomy, the substantive makeup of litigant identity, or civil litigation's remedial emphasis, his communitarian-inflected responses are those a decision maker committed to the CM model would adopt.[97]

1. Pragmatic Benefits of Broad Participation

Judge Weinstein has expressed little patience for the sort of individual day-in-court fundamentalism championed by the *Taylor* court.[98] The "traditional assumption that each individual plaintiff is entitled to control his own case," he believes, "had more force in the era of the horse and buggy."[99] It is not that Judge Weinstein does little to enable individuals ensnared in litigation-generating events to appear in court. Indeed, he has argued, the voice that adjudication gives to individuals distinguishes the process from more depersonalized, bureaucratic ones in American government.[100] But individual litigant participation lacks intrinsic value as an end unto itself. Rather, Judge Weinstein aims for the involvement of a broad array of people in litigation, be-

94. JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 47 (1995).

95. *Id.* at 46.

96. *See, e.g.*, *id.* at 47 ("Compensation to the individual is not the end-all of modern mass tort law; the effects of remedies on the community cannot be ignored."); Helen E. Freedman & Kenneth R. Feinberg, *Managing Mass Torts*, 80 JUDICATURE 44, 44 (1996) (reviewing WEINSTEIN, *supra* note 94); Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 Nw. U. L. REV. 579, 583 (1994).

97. *See* WEINSTEIN, *supra* note 94, at 48 (identifying as a communitarian).

98. Taylor v. Sturgell, 553 U.S. 880, 892–93, 898 (2008).

99. Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO 1, 14, http://www.cardozolawreview.com/Joomla1.5/content/denovo/WEINSTEIN_2009_1.pdf; *see also* Jack B. Weinstein, *Adjudicative Justice in a Diverse Mass Society*, 8 J.L. & POL'Y 385, 403 (2000).

100. Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 975–76.

yond the parties named in the suit,[101] because of the good results this participation produces. For one thing, broad participation produces good substantive outcomes. The "right to be heard before [a person's] fate is sealed. . . . is vital to the effective functioning of the court," because "it minimizes the chance of error due to the lack either of knowledge or appreciation of the variety of interests that may be affected."[102]

For another, participation produces a public dialogue among those affected by the litigation-generating event that can strengthen adjudication's legitimacy. This dialogue "increases the sense of dignity of the participating person as an important entity, one who counts and will be heard."[103] Solicitude for individuals' perspectives is not just a palliative for victims but important for "[p]ublic confidence in our system of justice."[104]

This pragmatism steers Judge Weinstein away from the protection of individual control over days-in-court as fundamentally important and toward at least four approaches to procedural design consistent with the core tenets of the CM model. First, these public benefits of better law enforcement and strengthened legitimacy give courts a reason to do more than simply ensure that parties are not formally barred from asserting their own interests. To increase participation, courts should take affirmative steps to overcome a person's inertia, disinterest, disincentive, intimidation, or disability.[105] To this end, Judge Weinstein has solicited input on key litigation decisions from absent class members through surveys,[106] and he has immersed himself in the experiences of people impacted by litigation by visiting them in their communities.[107] He has even drafted community members to help with decision making, to ensure that "the values and standards of the community" inform a decision "of large moment" for its residents.[108]

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101. Jack B. Weinstein, *Litigation Seeking Changes in Public Behavior and Institutions—Some Views on Participation*, 13 U.C. DAVIS L. REV. 231, 236–37 (1980).

102. *Id.* at 232.

103. WEINSTEIN, *supra* note 94, at 47.

104. Bilello v. Abbott Labs., 825 F. Supp. 475, 480 (E.D.N.Y. 1993); *see also* David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2075 (1997).

105. *E.g.*, WEINSTEIN, *supra* note 94, at 2–3 (describing ways in which Judge Weinstein has strived to "provide individual justice . . . in a mass context").

106. D.S. *ex rel.* S.S. v. N.Y.C. Dep't of Educ., 255 F.R.D. 59, 67 (E.D.N.Y. 2008); *see also* Knight v. Bd. of Educ., 48 F.R.D. 108, 113 (E.D.N.Y. 1969).

107. *E.g.*, PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 173–78 (1986); WEINSTEIN, *supra* note 94, at 94–95; Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2012–15 (1997).

108. NAACP v. Acusport Corp., 226 F. Supp. 2d 391, 400 (E.D.N.Y. 2002) (holding that the court could empanel an advisory jury to help with decision making in a case for injunctive relief).

Second, a court does not need to defer to the choices of formally autonomous litigants for certain litigation decisions. The *Zyprexa* mass tort litigation involved the joinder of thousands of individual cases, each one filed by a plaintiff who had entered into a retainer agreement with an attorney.[109] These contracts included fee provisions.[110] Each individual plaintiff therefore consented to the surrender of a portion of her recovery to her lawyer.[111] Judge Weinstein nonetheless insisted that he could order a different fee for the plaintiffs' lawyers than what the total of these individual contracts would have generated.[112] Labeling the litigation a "quasi-class action," Judge Weinstein invoked a legitimacy concern—"public perceptions of the fairness of the judicial process in handling mass torts"—to trump individual plaintiffs' formal consent to a different fee arrangement.[113]

Third, because individual participation has utilitarian, not deontological, value, a presumption that everyone should control his or her own day in court should yield when it does little good.[114] In other words, participation's consequentialist value is consistent with procedures that de-emphasize the ability of individuals to control the conditions of their involvement in litigation, when such control would thwart extra-individual objectives.

An example comes from *In re DES Cases*,[115] a decision on personal jurisdiction wholly inconsistent with *McIntyre* and its emphasis on litigant autonomy.[116] The plaintiffs alleged injuries linked to a drug once thought to reduce complications during pregnancy.[117] A California manufacturer had contributed to a national marketplace for the drug but had not targeted New York specifically for any of its sales.[118] Sued in Judge Weinstein's court, the manufacturer moved to dismiss on grounds that it lacked the requisite ties to create personal jurisdic-

109. *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 494 (E.D.N.Y. 2006).
110. *Id.* at 493.
111. *Id.*
112. *In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122, 122–23 (E.D.N.Y. 2006).
113. *Id.*
114. Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 434 (1960) (insisting that "necessity makes due process" in an article calling for an expanded preclusive effect of class action judgments). Judge Weinstein's lack of concern for days-in-court as important in and of themselves is evident in his willingness to affirm a "nail-and-mail" service of process procedure that all but ensured that absentee landlords would not receive notice of allegations against them. Sterling v. Envtl. Control Bd., 793 F.2d 52, 53–54 (2d Cir. 1986) (reversing Judge Weinstein's decision).
115. Ashley v. Abbott Labs. (*In re* DES Cases), 789 F. Supp. 552 (E.D.N.Y. 1992).
116. *Id.* at 558.
117. *Id.* at 558–59.
118. *Id.* at 559, 592.

tion in New York.[119] Judge Weinstein denied the motion.[120] He observed that the New York Court of Appeals had adopted market share liability, a substantive innovation designed to allocate responsibility for a mass harm according to tortfeasors' extent of market participation, and to impose several, not joint and several, liability on these tortfeasors.[121] A dismissal of one of these tortfeasors on personal jurisdiction grounds would undermine this turn in the substantive law, by frustrating the ability of plaintiffs to recover in a manner consistent with the policies behind market share liability.[122] The manufacturer had benefited from "the laws of every state," including New York, "by participating in the national market for a generic good."[123] Therefore, consistent with the policies behind market share liability, New York courts could exercise jurisdiction over it.[124] To Judge Weinstein, the regulatory objectives of the applicable substantive law served as a primary jurisdictional consideration.[125] The manufacturer could not decide for itself where it would prefer to be sued by structuring its business in a particular way.[126]

Fourth, different types of participation, beyond that produced by individual control over days-in-court, can improve outcome quality and the legitimacy of adjudication. In the *Agent Orange* litigation, Judge Weinstein held hearings around the country to solicit input from as many veterans as possible on a proposed settlement.[127] At the same time, he all but guaranteed that he would dismiss at summary judgment the claim of any veteran who opted out of the class and proceeded individually.[128] Judge Weinstein valued veterans' voices, just not as individual plaintiffs in the formal setting of individual litigation.

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119. *Id.* at 559.

120. *Id.* at 594.

121. *In re DES Cases*, 789 F. Supp. at 572.

122. *Id.*

123. *Id.* at 576.

124. *Id.* at 592–93, 594.

125. *Id.* at 576 ("In this instance, . . . where substantive law has undergone significant development to accommodate socioeconomic change, it is necessary to interpret jurisdictional law so that it meets the demands of the subject matter of the litigation.").

126. *Id.* at 572.

127. SCHUCK, *supra* note 107, at 173–78.

128. Richard A. Nagareda, *Closure in Damage Class Settlements:* The Godfather *Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141, 156.

2. Substantive Law and the Determinative Significance of Communal Impact

In his 1973 remarks on the then-novel class action, Judge Weinstein insisted that "it is . . . quite unwise to slip into important changes[ ] in substantive law on the happenstance that a suit is brought by a class rather than by an individual claimant."[129] His thinking seems to have evolved. The Court in *Shady Grove* and *Wal-Mart* denied that the size and composition of the population affected by the litigation-generating event could have determinative influence on the substantive makeup of a litigant's claims or defenses.[130] Several of Judge Weinstein's opinions suggest otherwise, consistent with a link the CM model acknowledges between population size and litigant identity.

Population size has particularly influenced Judge Weinstein's choice of law decisions. He famously identified a single "national substantive rule" to govern the product liability claims brought by thousands of veterans hailing from dozens of jurisdictions in the *Agent Orange* litigation.[131] A decision maker confronted with a large number of alleged victims, Judge Weinstein reasoned, "might well recognize the unfairness in treating differently legally identical claims involving servicemen who fought a difficult foreign war shoulder-to-shoulder."[132] The same choice of law result "would not follow when individual, rather than class action, suits are tried," and therefore the makeup of claims prosecuted by individual veterans on their own differed.[133] Judge Weinstein took a similar tack when he invoked "American fraud theory" in a multistate class action brought against tobacco companies, to de-emphasize differences among the particular state laws that would have applied had class members brought their claims individually.[134]

The extent of an event's impact on a community has also determined litigants' evidentiary obligations in Judge Weinstein's court.[135] The light cigarette litigation involved claims that tobacco companies

129. Jack B. Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 301–02 (1973).

130. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408–09 (2010) (plurality opinion); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).

131. *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 724 (E.D.N.Y. 1983); *see also In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 692 (E.D.N.Y. 1984) (describing the composition of the class); *id.* at 711–13 (describing the "national consensus" law).

132. *In re Agent Orange*, 580 F. Supp. at 703.

133. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1261 (E.D.N.Y. 1985).

134. *In re* Simon II Litig., 211 F.R.D. 86, 139 (E.D.N.Y. 2002), *vacated*, 407 F.3d 125 (2d Cir. 2005).

135. Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1021–22 (E.D.N.Y. 2006), *rev'd sub nom.* McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008).

defrauded customers by misleadingly advertising light cigarettes as relatively safe for smokers.[136] The defendants argued that their right to litigate each individual class member's reliance on misrepresentations of cigarette safety precluded any aggregate processing of claims and thus class certification.[137] Judge Weinstein disagreed, determining that the plaintiffs could use "[g]eneralized proof," including "surveys, expert evidence on marketplace principles, and extrapolated and statistic analysis of individuals and groups in the class," to prove reliance for all class members.[138] Thus, while a smoker proceeding alone would presumably prove reliance with individualized evidence, the smoker as a class member could avail herself of different generalized evidence to establish this element of her claim.[139]

3. Remedial Emphasis

Judge Weinstein has repeatedly emphasized the close relationship between civil litigation and public administration, often presenting them as substitute strategies for the implementation of public policy.[140] Consistent with this understanding, he stresses regulatory goals as at least as important to civil litigation as individual remediation.[141] Litigants before Judge Weinstein appear not only as individuals seeking particularized relief, but as stand-ins for others from the same community of beneficiaries served by the applicable substantive law.[142]

This remedial emphasis guided Judge Weinstein's response to another problem with class certification that arose in the light cigarette litigation.[143] The tobacco companies insisted that class member damages could not be calculated or distributed through any aggregate process.[144] Each individual plaintiff had to establish her entitlement to damages separately, a situation that precluded class certification.[145]

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136. *Id.* at 1018.

137. *Id.* at 1046.

138. *Id.* at 1117.

139. *Id.* at 1022.

140. *See generally* Ramirez v. Dollar Phone Corp., No. 09-CV-2290 (JBW) (MDG), 2009 WL 3171738, at *16–18 (E.D.N.Y. Oct. 1, 2009); Weinstein, *supra* note 100, at 975–76.

141. *E.g.*, D.S. *ex rel.* S.S. v. N.Y.C. Dep't of Educ., 255 F.R.D. 59, 70 (E.D.N.Y. 2008) (praising a settlement in a class action because it will "help[ ] promote voluntary institutional change" and "inevitably affect parties other than those individuals who are expected to benefit directly").

142. Haynes v. Planet Automall, Inc., 276 F.R.D. 65, 70 (E.D.N.Y. 2011) (describing the class action not primarily as a device used to obtain compensation for specific individuals, but as a "mechanism . . . premised on a public policy favoring the protection of *the kind of consumers* found in the proposed class" (emphasis added)).

143. *Schwab*, 449 F. Supp. 2d at 1239–40.

144. *Id.* at 1239.

145. *Id.*

Judge Weinstein recognized that few individuals would pursue their claims absent the class action.[146] "The consequence of requiring individual proof from each smoker," he observed, "would be to allow a defendant which has injured millions of people and caused billions of dollars in damages to escape almost all liability."[147] Judge Weinstein proposed a "fluid recovery" plan as an alternative to the class action-thwarting insistence on particularized evidence.[148] Damages would be calculated in the aggregate, then distributed pro rata to each class member regardless of whom the tobacco companies had actually defrauded.[149] Judge Weinstein acknowledged that this plan would "run the risk of overcompensating some and undercompensating other members of the class,"[150] a separation of litigant from remedy at odds with core tenets of the AI model. But he justified this innovation, at least in part, because it would help obtain regulatory benefits.[151] "Fluid recovery," Judge Weinstein wrote, offered "a means of fulfilling the promise of class actions as a consumer protection device."[152]

* * *

I have presented the AI and CM models as alternative conceptions of the civil litigant thus far. But they are not equally plausible alternatives, at least insofar as they purport to describe prevailing approaches to procedural design. While academia remains chock full of Judge Weinstein's admirers,[153] the Supreme Court, following the lead of

146. *Id.* at 1240.

147. *Id.*

148. Schwab v. Philip Morris USA, Inc., No. CV 04-1945(JBW), 2005 WL 3032556, at *1 (E.D.N.Y. Nov. 14, 2005).

149. *Id.*

150. *Id.* at *18.

151. *Id.* at *8.

152. *Id.*

153. In her contribution to this festschrift, Linda Mullenix elegantly surveys decades of academic debate on autonomy versus aggregation in procedural scholarship and indicates that, among scholars, an emphasis on litigant autonomy remains a minority view. Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601, 621–27 (summarizing contemporary academic debates). She also quite rightly notes that, as judicial resistance to class action procedure has grown, aggregate litigation has taken on different forms, and that claim aggregation remains vibrant. *Id.* at 623. To my mind, however, the shift to nonclass mechanisms for aggregation is telling. These mechanisms primarily involve the joinder of individually filed actions, and nonclass aggregate settlements require individual plaintiffs affirmatively to opt in. These settlements derive their legitimacy from individual litigant consent—in other words, an autonomous choice to be bound. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 269 (2011). While this consent may be inauthentic, *id.* at 301, it nonetheless represents a significant and revealing departure from the sort of legitimizing mechanisms that support class action judgments.

lower courts,[154] has steered American civil procedure in a decidedly individualistic direction over the last couple of decades.[155] As Judge Weinstein has observed,

> The courts, including some of the best judges on the intermediate appellate and Supreme Court, have been strongly influenced by what is our traditional assumption: that each individual plaintiff is entitled to control his own case and that each defendant is entitled to defend against individual plaintiffs. . . . [That rationale] is not convincing today, where decisions affecting the lives of millions or billions of people are made by faceless corporations and others in this and other countries. An individual one-to-one responsibility is impossible to ascertain and compensate for.[156]

As *Wal-Mart*, *Amex*, and *Concepcion* suggest, this individualism has helped to limit certain procedural mechanisms, such as the class action, that otherwise particularly promise wide and equitable protection against mass harms.[157] Increasingly, Judge Weinstein, an iconoclastic, "1960s-style activist judge,"[158] wanders alone in a procedural wilderness.

III. The Questionable Case for the Autonomous Individual Model

The AI model may count among its adherents a majority of Justices on the Supreme Court, and it is consistent with a recent surge of individualism in procedural design. But this ascendancy rests on an unfinished foundation. What follows is hardly a complete argument for the CM model and its communitarian ramifications for procedural doctrine. I recognize that the CM model comes with a price, and any complete defense must grapple with its limitations. My ambition in this Part is modest. Enthusiasts for individualism and critics of Judge Weinstein's procedural outlook have advanced a number of doctrinal and theoretical arguments that are the sort an advocate for the AI model might offer. In this Part, I challenge these arguments, grounded in history, doctrine, and normative theory, as insufficient to

154. *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 745–822 (2013) (describing many ways by which the federal courts have restricted the use of the class action device over the past decade or so, with most changes spearheaded by lower courts).

155. Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 Loy. U. Chi. L.J. 545, 559 (2012) (commenting on the "individualistic focus" in "recent Supreme Court jurisprudence").

156. Weinstein, *supra* note 99, at 14.

157. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311–12 (2013); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746–48, 1753 (2011).

158. Mullenix, *supra* note 96, at 580; *see also* Minow, *supra* note 107, at 2032 (describing Judge Weinstein as "iconoclastic").

justify a rejection of the communitarian approach to civil procedure that the CM model takes.

A. The AI Model and the History of Procedure's Present

The AI model conveys a libertarian preference for doctrinal design. Procedural rules should ensure that individual litigants control their own days-in-court, and that civil litigation produces uniquely tailored remedies for them. Procedural doctrine should remain agnostic to whether individuals actually pursue their claims or obtain remedies, so long as formal legal barriers do not block individuals who want to do so. Because public policy is mostly indifferent to whether an individual decides to litigate or not, the state has little business crafting subsidies, such as the class action device,[159] to trump individual initiative and prompt litigation.

The normative primacy of individual litigant choice fits what Abram Chayes famously described as "our received tradition" in civil litigation.[160] A lawsuit, traditionally understood, is "a contest between two individuals or at least two unitary interests."[161] It is "party-initiated and party-controlled," and the judge is a "neutral arbiter of [the parties'] interactions."[162] Several of the Court's opinions discussed in Part II invoke this tradition as support for individualism in procedural design.[163] If this "received tradition" describes present-day civil litigation, the AI model would make sense as the most historically appropriate description of the civil litigant.

But the American system of civil justice left our "received tradition" behind long ago, at least since the 1960s. A libertarian approach to civil procedure that values litigant autonomy above all does not fit the regulatory role lawmakers have assigned civil litigation since this time. The last fifty years, an era that Judge Weinstein's judicial career spans, have witnessed the dramatic proliferation of litigation-enhancing devices in legislation and positively enacted procedural rules. Some of these devices have worked by deemphasizing individual litigant autonomy, in a manner inconsistent with a model that treats individual control as a *grundnorm*. The revised version of Rule 23,

159. Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2145 (2000) (discussing the class action device as a subsidy to facilitate litigation).

160. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

161. *Id.* at 1232.

162. *Id.* at 1283.

163. *E.g.*, Taylor v. Sturgell, 553 U.S. 880, 893 (2008); Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999).

finalized in 1966, draws its power from the joinder of class members to litigation without their affirmative consent.[164] The multidistrict litigation statute, enacted in 1968, usurps individual litigant control in favor of collective processing.[165] Other devices work by treating litigants not as idiosyncratic individuals seeking particularized remedies, but as undifferentiated vessels for law enforcement. Legislated damages enhancements spiked starting in the late 1960s,[166] and legislatures often included statutory damages provisions along with new substantive standards of conduct.[167] These innovations focused lawsuits less on individual compensation and instead emphasized the substantive law's regulatory force as a primary concern.

Other developments during this period likewise pushed the evolutionary trajectory of civil litigation away from the "received tradition." These include the entrenchment and spread of impact litigation,[168] and the emergence of coordinated claim handling among plaintiffs' lawyers for mass torts.[169] Legislation and rule making merit particular emphasis, however, because through them, lawmakers have expressly pursued a plan for the reconfiguration of American civil justice. Statutory penalties, damages enhancements, and aggregation mechanisms demonstrate a legislative preference in favor of—not neutrality toward—rights vindication.[170] The proliferation of these devices coincided with an uptick in the legislation of private rights to sue,[171] as lawmakers sought to mobilize private litigants to enforce

164. On the early history of the modern Rule 23, see generally Marcus, *supra* note 4.

165. 28 U.S.C. § 1407(a) (2012). On the early history of multidistrict litigation, see Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 928–30 (1995).

166. SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 66 (2010); *see also* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 644 (2013).

167. Burbank et al., *supra* note 166, at app. 719–22; *see also* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 169–72 (2011).

168. Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law,"* 2005 WIS. L. REV. 455, 458 & n.21; *see also* Karen O'Connor & Lee Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 HARV. J.L. & PUB. POL'Y 483, 484–93 (1984) (describing the emergence of public interest law and litigation starting in the 1960s).

169. Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 122–30 (1968); *see also* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 978 (1993) (describing the MER/29 litigation as the first mass tort litigation that involved significant coordination among plaintiffs' lawyers).

170. Margaret H. Lemos, *Special Incentives To Sue*, 95 MINN. L. REV. 782, 785–95 (2011).

171. Burbank et al., *supra* note 166, at 647.

new regulatory regimes.[172] Civil litigation was explicitly recast and relied on as a substitute for public administration,[173] a phenomenon Judge Weinstein understands well.[174] The Reagan Administration tried to scale back this "litigation state," but it largely failed.[175]

When private litigation functions as an alternative to public administration, it has as its purpose more than just the remediation of individual, discrete breaches of the social peace. By design, this litigation shoulders responsibility for the broad implementation of positively enacted social and economic programs, just as agency action often does.[176] Title VII as initially applied, for example, bothered less with individual compensation and instead sought social transformation through the recreation of the American workplace.[177] In this system of civil justice, individual plaintiffs serve as representatives of a community of regulatory beneficiaries, even as they act on their own behalf.

The AI model's libertarian insistence on litigant autonomy makes it poorly suited for an era, now fifty years old, in which the civil justice system serves as a process explicitly designed for regulatory, extra-individual ends. The civil litigant qua atomistic individual is not a continuation of our recent procedural past, but a break with the history of our procedural present. It is no accident that the AI model disfavors procedural mechanisms, such as the class action, that have contributed powerfully to litigation's regulatory objectives. In other contexts, sev-

172. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1547–48 (2014). For an example from the employment context, see James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1571 n.33 (1996).

173. FARHANG, *supra* note 166, at 216–17.

174. *E.g.*, Ramirez v. Dollar Phone Corp., No. 09-CV-2290 (JBW)(MDG), 2009 WL 3171738, at *18 (E.D.N.Y. Oct. 1, 2009).

175. Burbank & Farhang, *supra* note 172, at 1545, 1551–55.

176. Burbank & Wolff, *supra* note 68, at 33 ("The 1960s and 1970s brought broad recognition of the inability of traditional two-party litigation . . . to provide adequate enforcement of statutes designed to cure the imperfections of the common law, provide equal economic opportunity, or otherwise implement important social norms. Inclined to rely on litigation in place of, or in addition to, centralized administrative enforcement, lawmakers employed a variety of techniques [of the sort discussed in this Part]."); *see also* Chayes, *supra* note 160, at 1288 (implying that public law litigation involves "legislation designed explicitly to modify and regulate basic social and economic arrangements"). On agency adjudication and positive program implementation, see JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 35 (1983).

177. *E.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71 (1977) (describing Title VII's emphasis as on "eliminating discrimination in employment"); H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2401; Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 892–93.

eral Justices have demonstrated a striking willingness to question well-entrenched pillars buttressing parts of the American regulatory state.[178] Their embrace of the AI model should be understood in these terms, not as part of an unbroken tradition, but as a rupture pursued for deregulatory ends.

B. Doctrinal Determinants of Litigant Models

The doctrinal case for the AI model is no more self-evident than the historical one. Proponents of individualism in procedural design invoke the Due Process Clause and the Rules Enabling Act as laws requiring the protection of individual litigant autonomy and individual distinctiveness from community imperatives. As presently developed, however, neither law precludes a communitarian-inflected model of the civil litigant.

1. Due Process

Each of the CM model's core tenets raises due process concerns. The status of a right to sue as constitutionally protected property triggers two such problems.[179] Is this right unlawfully compromised if a judge invokes community concerns to abridge an individual's control over her participation in litigation? *Taylor v. Sturgell* begs something like this question. Can a remedy prioritize communal ends over the individual redress that the right might otherwise afford? Scholars advocating individualism in civil procedure have suggested that a due process problem results if courts design remedies in this manner.[180]

These questions have no ready answer in due process doctrine relevant to individual control over litigation and remedy. Professor Alexandra Lahav has identified several strains of due process in the Court's procedural jurisprudence, including "traditional due process" and "cost–benefit due process."[181] The first strain, exemplified by *Taylor v. Sturgell*, requires procedural doctrine to respect individual

178. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (commenting on "the danger posed by the growing power of the administrative state"); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156 (2010) (Roberts, C.J.) ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (questioning "whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers" and suggesting a willingness to revisit the nondelegation doctrine).

179. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (describing a "chose in action" as a "constitutionally recognized property interest").

180. Redish et al., *Cy Pres Relief*, *supra* note 93, at 650–51.

181. Lahav, *supra* note 155, at 546.

litigant autonomy and finds this obligation in a long tradition, albeit one more imagined than real.[182] The Court often invokes this tradition in discussions that place limits on aggregate procedure.[183] In contrast, the cost–benefit strain, famously developed in *Mathews v. Eldridge*,[184] balances the individual litigant's interests against extra-individual ones to determine whether a particular procedure is constitutionally acceptable.[185] By this calculus, the successful administration of the substantive law and similar extra-individual goods can justify processes that infringe on the autonomy of individual litigants.[186] To date, the Court has not done the sort of basic constitutional lawmaking necessary to explain when one strain of due process trumps the other, thereby requiring one model of the civil litigant over its competitor.

The third core tenet of the CM model, the idea that population size and composition can impact a litigant's substantive legal identity, raises a somewhat more complicated due process question. The problem is best framed as involving an ostensible "right to defend." As the argument goes, the substantive law affords a defendant a right to defend against an individual plaintiff's claim, defined as including particular elements and imposing a particular evidentiary burden. If the defendant cannot avail itself of precisely the same arguments or evidence when it litigates against plaintiffs en masse, does the alteration infringe on the defendant's due process rights?[187]

The Second Circuit answered a version of this question in the affirmative when it scuttled the fluid recovery plan Judge Weinstein proposed for the light cigarette litigation.[188] When plaintiffs can use aggregate methods to establish damages, the court held, "the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation."[189] Measured against either of Professor Lahav's due process strains, however, this holding leaves

182. *Id.* at 548–49.

183. *See supra* note 11 and accompanying text.

184. 424 U.S. 319, 347 (1976).

185. Lahav, *supra* note 155, at 550.

186. *See generally* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317–18 (1950) (balancing the rights of people with an interest at stake in the litigation against the need of the litigation to proceed and achieve socially valuable outcomes); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 975–77 (1993) (commenting on *Mullane*'s meaning).

187. Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319, 320 [hereinafter Moller, *New Lochnerism*]; *see also* Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 857 (2005).

188. McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 232–33 (2d Cir. 2008), *rev'g* Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006).

189. *Id.* at 232.

something to be desired. In his rigorous study of the "right to defend," Professor Mark Moller concludes that neither traditional nor cost–benefit due process places this ostensible right on constitutional footing.[190] Utilitarian and traditional approaches to due process, he concludes, "converge on essentials . . . . Then and now, due process leaves a great deal of room for courts to regulate parties' opportunities to present relevant evidence in civil proceedings in the service of equity and convenience."[191]

Judge Weinstein undertook the cost–benefit calculation when he certified a "limited fund" punitive damages class in an episode of tobacco litigation, finding the balance of interests to favor the modification of defenses available to the tobacco companies.[192] The Ninth Circuit did the same when it approved the "trial by formula" that the plaintiffs proposed in *Wal-Mart*.[193] Perhaps the judges applied cost–benefit due process doctrine incorrectly in these specific instances. But my concern is whether alterations to legal identities that the CM model tolerates *necessarily* trigger a due process violation. Neither the Second Circuit, reversing Judge Weinstein,[194] nor the Supreme Court, reversing the Ninth Circuit,[195] explained why a cost–benefit approach to due process cannot apply in this circumstance, or why its balance of interests necessarily excludes the sorts of innovations Judge Weinstein and the Ninth Circuit fashioned.[196]

2. The Rules Enabling Act

At first blush, the Enabling Act's "substantive rights" limitation[197] offers better ammunition against the idea that a litigant's legal identity can change as the affected community increases in size. In *Wal-Mart*, for instance, the plaintiffs proposed their "trial by formula" to facili-

190. Moller, *New Lochnerism*, *supra* note 187, at 321–23; *see also id.* at 324 n.30 (acknowledging that earlier arguments for a right to defend in a previous article are "without merit").

191. *Id.* at 324.

192. *In re* Simon II Litig., 211 F.R.D. 86, 153–54 (E.D.N.Y. 2002), *vacated*, 407 F.3d 125 (2d Cir. 2005).

193. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 627–28 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).

194. *In re Simon II*, 407 F.3d 125.

195. *Wal-Mart*, 131 S. Ct. 2541.

196. Professor Martin Redish, who has done more to develop the theoretical support for something like an autonomous individual model of a claimant than anyone else, concedes that existing doctrine under *Mathews* does not preclude these sorts of procedural innovations. MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 144–45 (2009); *see also* Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 566 (2013).

197. 28 U.S.C. § 2072(b) (2012).

tate class certification.[198] The Court disallowed this alteration to what the defendant would have otherwise faced in individual actions "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'"[199] As the majority opinion reasoned, "[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[200]

The Court's terse treatment of the Enabling Act in *Wal-Mart* betrays the statute's complexity,[201] and in particular, it ignores an important observation that Professor Tobias Barrington Wolff has best articulated: the substantive law itself may provide for an alteration in the rights, duties, and defenses at issue in an aggregate proceeding.[202] When Judge Weinstein permits the use of aggregate proof in a class action, or denies the defendants an opportunity to mount individualized defenses to particular class members' claims, the trial plan does not violate the Enabling Act if a plausible interpretation of the underlying substantive law authorizes the adjustment.

An Enabling Act violation does not necessarily follow even if a judge cannot find authorization for the alteration in the substantive law using accepted methods of statutory interpretation. The judge may have sufficient federal common lawmaking power to take interstitial steps to adjust a liability standard or evidentiary requirement in a manner that renders it more suitable for aggregate processing.[203] Judge Weinstein did not tap Rule 23 as the font for his determination that the plaintiffs could use aggregate evidence to establish reliance in

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

199. *Id.* (quoting 28 U.S.C. § 2072(b) (2008)).

200. *Id.*

201. On the complexity of the Enabling Act, see, for example, Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1041 (2011). Part of the difficulty stems from the Court's recent treatments of the Enabling Act. In *Shady Grove*, a plurality of Justices opined that a rule's validity under the "substantive rights" limitation should be tested by reference to the words of the rule alone and not its application in discrete instances. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010) (plurality opinion). The *Wal-Mart* dicta suggest that an otherwise-valid rule can be applied in violation of Enabling Act strictures. *Wal-Mart*, 131 S. Ct. at 2561. On facial and as applied challenges and the Enabling Act, see Thomas D. Rowe, Jr., *Sonia, What's a Nice Person Like You Doing in Company Like That?*, 44 CREIGHTON L. REV. 107, 109 (2010).

202. Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1041 (2013); *see also* United States v. City of New York, 276 F.R.D. 22, 44 n.11 (E.D.N.Y. 2011); George Rutherglen, *The Way Forward After* Wal-Mart, 88 NOTRE DAME L. REV. 871, 897 (2012).

203. For an example of the exercise of this power, see *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M 07-1827 SI, 2012 WL 555090, at *3–4 (N.D. Cal. Feb. 21, 2012); *see also* Blackie v. Barrack, 524 F.2d 891, 908 (9th Cir. 1975). *See generally* Burbank & Wolff, *supra* note 68, at 67.

the light cigarette litigation.[204] Rather, he made this evidentiary determination in a prior opinion—one having nothing explicitly to do with class certification—in which he denied the defendants' motion to dismiss on the merits.[205] Surely, the fact that the case proceeded as a class action "catalyzed" the substantive innovation, for Judge Weinstein would have had no reason to consider aggregate proof in an individual lawsuit.[206] But the catalyst for an innovation and the law that ultimately authorizes it can differ.

The evolution of the fraud-on-the-market doctrine (FOTM), which advocates have challenged on Enabling Act grounds in the Court,[207] demonstrates this distinction. The doctrine provides for a presumption of reliance on misstatements when markets for securities are efficient, on grounds that the share price, which investors rely on when they make purchases, internalizes all information. Securities fraud plaintiffs would face great difficulty getting a class certified without the doctrine, because individual issues would predominate over common ones if each class member had to make a personal showing of reliance.

But Rule 23 is not the legal source for FOTM. An exercise in federal common lawmaking may have initially produced FOTM,[208] but today a judge can legitimately find authority for it by interpreting the statutory regime for securities governance. The doctrine's origins date most importantly to a 1975 decision from the Ninth Circuit.[209] When the defendants in the case challenged the adoption of FOTM on Enabling Act grounds, the Ninth Circuit insisted that it found authority to craft the presumption in its substantive lawmaking powers, not in Rule 23.[210] The Supreme Court then blessed FOTM in 1988, invoking "considerations of fairness, public policy, and probability, as well as

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204. Schwab v. Philip Morris USA, Inc., 448 F. Supp. 2d 992, 1239 (E.D.N.Y. 2006), *rev'd sub nom.* McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008).

205. Falise v. Am. Tobacco Co., 94 F. Supp. 2d 316, 335 (E.D.N.Y. 2000).

206. Wolff, *supra* note 202, at 1047.

207. For an argument that the FOTM presumption violates the Rules Enabling Act, see Brief for Vivendi S.A. as *Amicus Curiae* in Support of Petitioners at 18, Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) (No. 13-317).

208. For the suggestion that FOTM doctrine originated in federal common law, see Edward A. Fallone, *Section 10(b) and the Vagaries of Federal Common Law: The Merits of Codifying the Private Cause of Action Under a Structuralist Approach*, 1997 U. ILL. L. REV. 71, 95 (arguing that "the content of the private cause of action for securities fraud is largely the product of 'federal common law'"); *see also id.* at 104–05 (discussing FOTM within the context of this discussion).

209. *E.g.*, Marcus, *supra* note 4, at 632–33 (discussing Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975)).

210. *Blackie*, 524 F.2d at 908; *see also* Tucker v. Arthur Andersen & Co., 67 F.R.D. 468, 480 (S.D.N.Y. 1975) (defending the presumption similarly).

judicial economy" as support—again, not Rule 23.[211] When Congress examined securities fraud class actions in the early 1990s, it rejected proposed legislation that would have ended the presumption.[212] In a recent decision involving FOTM, the Court recited this legislative history and clarified that FOTM now has roots in the statutory regime.[213]

In any particular instance, a substantive transformation consistent with procedural needs might indeed violate the Enabling Act, if the judge cannot use her own lawmaking powers to craft the alteration, or if the best interpretation of the statutory regime does not permit it.[214] In other situations, the substantive law might not only allow but also counsel for these alterations.[215] When the substantive law does so, as courts in public law litigation routinely (if implicitly) determine,[216] the transformation is not an "alchemy-like" violation of the Enabling Act,[217] but a straightforward implementation of lawmaker will. My point is simply that, as a general matter, the Enabling Act does not necessarily preclude the sorts of alterations that the CM model contemplates.

C. The Uncertain Normative Case for the AI Model

As with my historical and doctrinal arguments, I offer my theoretical challenge to the AI model simply to dispute that it is self-evidently better than the CM model as a conception of the civil litigant. A complete normative defense of the CM model would require much more than I provide here. Professor Martin Redish has crafted a richly theorized, sophisticated case for individualism in procedural design.[218] I borrow from and tweak his claims to identify the sort of arguments

211. Basic Inc. v. Levinson, 485 U.S. 224, 245 (1988).

212. Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 153 n.8.

213. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1200–01 (2013).

214. Wolff, *supra* note 202, at 1028–29.

215. *E.g.*, Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1117 (E.D.N.Y. 2006) ("The law is willing to adjust the standard of proof . . . using notions of common sense and fairness to effectuate the overall purpose of the statutory scheme."), *rev'd sub nom.* McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008).

216. *E.g.*, M.D. v. Perry, 294 F.R.D. 7, 31–33 (S.D. Tex. 2013) (discussing substantive due process doctrine and determining that it vests children in foster care with an undifferentiated claim for a risk of harm); Californians for Disability Rights, Inc. v. Cal. Dep't of Transp., 249 F.R.D. 334, 345 (N.D. Cal. 2008) (making a similar finding); Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth., 239 F.R.D. 9, 26 (D.D.C. 2006) (interpreting the Americans with Disabilities Act to vest the plaintiffs with a "universal claim" that does not require any individual plaintiff to demonstrate individualized harm).

217. Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 797 (2007).

218. *See generally* REDISH, *supra* note 196; Redish & Katt, *supra* note 24, at 1888–94.

than an advocate for the AI model might make. To my mind, they fall short of what is necessary to relegate Judge Weinstein's approach to the dustbin of procedural jurisprudence.

Professor Redish makes two claims about the practice of legitimate government in a democracy to support his preference for individualism in procedural design. First, at the "micro level," "the individual must be able to decide how he will seek to influence the governing process for the purpose of either protecting or fostering his own personal interests or advancing ideological goals he deems important."[219] If litigation as a governing process is to proceed legitimately, then "individuals must be able to make autonomous choices about how best to pursue their own interests in court."[220] The CM model subjects the freedom of an individual to control her participation in litigation to the imperatives of communal concerns. By Professor Redish's metric of democratic theory, this conception compares poorly to the AI model, which insists that individual litigants enjoy maximum autonomy, unfettered by group needs.

This argument smacks into an uncontroversial pragmatic reality. In many well-accepted ways, procedural doctrine significantly constrains litigant autonomy in the service of extra-individual ends, such as efficiency and judicial legitimacy.[221] One constraint is as basic as it gets. A defendant will have little luck getting a case against her dismissed simply because the plaintiff made choices as to the time and place of litigation. At some level, utilitarian considerations always trump libertarian values, a priority that manifests itself in ways that no procedural theorist of whom I am aware has challenged. The compulsory counterclaim rule, for instance, causes no consternation, even though it forces a defendant, sued against its will, to allege all claims that arise out of the same transaction or occurrence as the plaintiff's claim.[222] An argument from democratic theory that stresses individual control as the determinant of legitimacy must explain why such anodyne constraints on individual autonomy are acceptable, while others consistent with the CM model are not.

Institutional constraints on judicial power in a democracy inspire a second, "macro level" argument for individualism as a fundamental principle of procedural design. The substantive law, usually crafted by

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219. REDISH, *supra* note 196, at 4.

220. Redish & Berlow, *supra* note 217, at 768.

221. *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 619–22 (2011); *see also* Tidmarsh, *supra* note 196, at 576–77.

222. Tidmarsh, *supra* note 196, at 577 n.61.

an institution with electoral accountability, fixes individuals' legal identities in advance of litigation.[223] The CM model allows a judge to define a litigant's rights or defenses differently as the size of the affected population changes. Such judicial alterations amount to usurpations inconsistent with democratic theory. This lawmaking happens "not . . . through the use of the democratic process of legislative amendment, where the electorate may measure its chosen representatives by how they voted on the proposed revisions of existing law," but through procedural machinations of democratically unaccountable judges.[224] The AI model better respects the judiciary's proper institutional role within a democratic government by protecting litigant identity as provided for in the substantive law from judicial tampering.

I questioned a version of this argument in my discussion of the Enabling Act in Part III.B.2. The substantive law may itself vest litigants with different legal identities depending on their relationships with each other.[225] If legislatures authorize alterations to liability regimes for aggregate proceedings, or if the Constitution gives judges enough lawmaking latitude to make these alterations themselves, then the CM model authorizes nothing inconsistent with our democratic order.

Moreover, Professor Redish's "macro level" claim about democratic theory, if right, calls into question far more than just the sort of communitarian tendencies Judge Weinstein has demonstrated in aggregate litigation. In a "democratic society," Professor Redish insists, "[t]hose who make basic normative choices of social and moral policy . . . must at some level be representative of and accountable to those whom they govern."[226] This claim may be so, but it says little about how much policy an unelected official can legitimately make within broad constraints set by an institution accountable to an electorate. The nondelegation doctrine requires Congress to subject an agency's policymaking prerogative to only the most expansive of limits.[227] Within these delegated policymaking spaces, agencies make an enormous amount of economic and social policy, certainly more than what judges like Judge Weinstein have forged with their tweaks to the sub-

223. REDISH, *supra* note 196, at 5.

224. *Id.* at 21–22.

225. Professor Redish claims that most of the substantive law enforced through class actions vests claims exclusively in individuals. REDISH, *supra* note 196, at 36. This assertion bears some empirical scrutiny. For instance, a lot of public law class actions involve claims vested in groups, not individuals. *See supra* notes 176 and 177 and accompanying text. For a discussion of this issue, see Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 616–30 (2012).

226. REDISH, *supra* note 196, at 13.

227. *E.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1240–41 (1994).

stantive law. A federal judge who tinkers with an element of a claim or the evidence required to establish it to vindicate the policy of the substantive law must pose less of a threat to democratic government than, say, an independent agency with fulsome rulemaking power. Professor Redish unsurprisingly dislikes the nondelegation doctrine in its present guise,[228] but it and the message it expresses about lawmaking outside legislatures are nonetheless well entrenched.

A final critique of arguments for the sort of individualism that undergirds the AI model questions whether Professor Redish's approach to democratic theory provides the only acceptable metric to evaluate the legitimacy of American legal processes. Judge Weinstein's emphasis on civic engagement, informed deliberation, and functional efficacy tap into civic republicanism, another richly theorized theory of governmental legitimacy. To put it crudely, a civic republican emphasizes equal, inclusive, and broad participation by an engaged population, deliberating toward a common goal, as a source of legitimacy for the exercise of power.[229] The goal is government action aimed at the common good, not action to serve individuals' particular interests.[230] The CM model fits a civic republican mold, because it pegs rights and duties not to individual entitlements but to litigants' communal connections, and because it contemplates a sacrifice of litigant autonomy in favor of the common good. Professor Redish has challenged the normative appeal of civic republicanism as a theory suitable for civil litigation.[231] But his view is not the consensus among scholars of civil procedure.[232]

IV. CONCLUSION

To my mind, the autonomous individual model of the civil litigant is not self-evidently superior to the community member model. Likewise, the unrestrained, aggressive individualism that the Roberts Court has embraced is not obviously better for procedural design than Judge Weinstein's communitarianism. I nonetheless recognize that I have not made the case for the CM model, a task that must remain for

228. MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 135–61 (1995).

229. *E.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541–42 (1988).

230. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1531 (1992).

231. Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953–1971*, 51 DEPAUL L. REV. 359, 364–68 (2001).

232. *Cf.* Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1028 (2010) (challenging more generally individual participation as necessarily central to adjudicative legitimacy).

another venture. I wonder, though, if the fact of this festschrift alone says something about the appeal of Judge Weinstein's procedural vision. He is worthy of celebration not only because of his great intellectual firepower. Judge Weinstein is also uncommonly humane, a trait that has manifestly motivated his ceaseless efforts to use procedure to achieve wide and equal justice. Does the Court's arid individualism have the same capacity for empathetic justice? I doubt that it does.