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# COMPETING VALUES: PRESERVING LITIGANT AUTONOMY IN AN AGE OF COLLECTIVE REDRESS

*Linda S. Mullenix\**

## I. INTRODUCTION

There is little doubt concerning Judge Jack Weinstein's monumental impact on the law in the twentieth and twenty-first centuries. In a career spanning decades, Judge Weinstein has played a major activist role in shaping legal debates and jurisprudence concerning criminal law, evidence, civil procedure, the role of the judge, and more broadly, questions of access to justice.<sup>1</sup> Judge Weinstein's accomplishments are rightly honored by the academy and the legal profession, and his remarkable longevity has permitted other occasions to memorialize his enormous contributions to justice in America.<sup>2</sup>

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1. See generally JEFFREY B. MORRIS, *LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN* (2011).

2. See, e.g., Stephen Breyer, *Tribute to the Honorable Jack Weinstein*, 97 COLUM. L. REV. 1947 (1997); Symposium, *Judge Jack B. Weinstein, Tort Litigation, and the Public Good*, 12 J.L. & POL'Y 149 (2003) (a round table discussion honoring Judge Weinstein); Joan B. Wexler, *In Praise of Jack B. Weinstein*, 97 COLUM. L. REV. 1968 (1997).

The sheer scope of Judge Jack Weinstein's interests, expertise, and professional accomplishments—including thousands of judicial opinions often running into hundreds of pages—presents an unnerving task for anyone venturing an appreciation of Judge Weinstein's life's work. Surely this was a problem that Professor Jeffrey Morris grasped when he undertook the daunting task of writing his excellent judicial biography of Judge Weinstein.<sup>3</sup> That book, based on hundreds of hours of interviews and extensive research of Judge Weinstein's work product, provides an estimable examination of the reach of Judge Weinstein's influence on the law.

It is senseless to attempt to evaluate in which spheres of justice Judge Weinstein's life's work has had the greatest impact; surely each attempt to evaluate includes an individual assessment of Judge Weinstein's enduring influence on the law. This paper focuses on Judge Weinstein's significant contributions to the development and resolution of mass tort litigation—a legal arena in which he is so closely identified as to have earned the title of the King of Mass Torts.<sup>4</sup>

Without a doubt, Judge Weinstein emerged as an early and leading proponent of collective redress for claimants allegedly injured by mass tort harms. As will be discussed, Judge Weinstein's innovative approach to resolving mass tort cases was forged in the 1960s during the heyday of class action litigation, with the concomitant recognition of an emerging model of public law litigation. Firmly grounded in this ethos, Judge Weinstein quickly grasped the problem of mass tort litigation as a modern form of 1960s-style public law litigation. So construed, Judge Weinstein spent over four decades of his career creating novel procedures to accomplish collective redress for injured claimants.

Against this backdrop of Judge Weinstein's role as a significant expositor of mass tort litigation, this Article explores the debate between litigant autonomy and collective redress that undergirded the early days of mass tort litigation. As will be seen, this vital debate gradually receded as proponents of aggregate settlements—including Judge Weinstein—dominated the field. Clearly, collective redress advocates prevailed in this jurisprudential debate, supported in large measure (but not exclusively) by the influence of Judge Weinstein's jurisprudence. However, as innovative means for resolving mass torts and aggregate litigation emerged in the twenty-first century, including

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3. MORRIS, *supra* note 1.

4. Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 560 (2002).

various informal and nonclass aggregation techniques, a number of scholars have revitalized the debate centered on litigant autonomy.<sup>5</sup>

Thus, it is perhaps ironic that the federal judge so closely associated with the need for a compassionate interaction between the judicial officer and the individual brought before a court would choose, in civil litigation at least, the path of collective redress over litigant autonomy. Moreover, it is perhaps ironic that the judge so singularly sensitive to individual needs would embrace jurisprudence that effectively reduces individuals to faces in the crowd. Furthermore, it is perhaps confounding that the judge so alert to fundamental questions of justice and fairness would ultimately embrace the judicial rationale of efficiency above all else—a rationale now shared, surprisingly, with Judge Richard Posner.<sup>6</sup>

While recent debates over collective redress versus litigant autonomy have polarized along familiar lines,<sup>7</sup> others scholars have sought to find a middle ground for rethinking the problem of litigant autonomy in an age of aggregate settlements.<sup>8</sup> After reviewing these scholarly efforts, this article turns to a brief discussion of developments in the European Union (EU), where, after many years of resisting American-style class litigation, EU countries are now considering a recommendation from the European Commission (EC) to implement collective redress mechanisms.<sup>9</sup>

Prior to joining the movement for collective redress, the EU countries engaged in a heated debate concerning the civil law fundamental “adversary” principle, a concept that embraces the notion of litigant autonomy. Unlike the United States, the EU has resolved this debate by insisting that any collective redress mechanism must simultaneously provide for the preservation of litigant autonomy.

In conclusion, the EU debate and its ultimate resolution provide an interesting, provocative opportunity for revitalization of the litigant autonomy debate in the United States. In the United States, parties to massive disputes have radically transformed the ways in which aggregate claims are resolved, so that these claims no longer resemble

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5. See *infra* notes 132–162 and accompanying text.

6. See, e.g., *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (defending an earlier finding of an efficiency rationale in support of Rule 23(b)(3) damage class action certification); *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012) (holding that the Rule 23(b)(3) requirement for predominance of common questions “is a question of efficiency,” discussing the efficiency rationale undergirding Rule 23(b)(3) damage class actions, and upholding class certification in the moldy washing machine litigation).

7. See *infra* notes 132–156 and accompanying text.

8. See *infra* notes 157–162 and accompanying text.

9. Commission Recommendation 2013/396/EU, 2013 O.J. (L 201) 60.

class litigation of the late twentieth century. These new modalities for aggregate claim resolution should raise concerns about fundamental fairness and justice to individual claimants, because the mechanisms have significantly limited or eliminated opportunities for meaningful litigant involvement in the resolution of individual claims. Thinking about ways to permit aggregate claims resolution while preserving and enhancing litigant autonomy—which autonomy has been largely sacrificed as a consequence of the triumph of aggregate claims processing during the late twentieth century—is a worthy project.

## II. THE 1960S PARADIGM SHIFT TO PUBLIC LAW LITIGATION AND JUDGE WEINSTEIN'S EMBRACE OF COLLECTIVE DISPUTE RESOLUTION

### A. *The Shift from Traditional Bipolar Litigation to Public Law Litigation*

If biography is destiny, then there is much in Judge Weinstein's personal narrative to illuminate his judicial philosophy. Judge Weinstein comes by his passion for justice honestly, raised in the midst of the vibrant immigrant communities of New York City and as a child of the Great Depression.<sup>10</sup> His formative years were tempered by the dire economic circumstances of the 1930s and 1940s, as well as the experiences of World War II's Greatest Generation.<sup>11</sup> As a witness to this cauldron of human experience, Judge Weinstein developed an abiding compassion for the poor, illiterate, destitute, unfortunate, sick, and wounded: the least favored among us.<sup>12</sup>

Although Judge Weinstein's sympathies were nurtured throughout these formative years, he actually is a true child of the social and political ferment of the liberal 1960s. In the judicial arena, these heady days were characterized chiefly by the Warren Court's imprint, with its historical recognition and expansion of civil rights and liberties.<sup>13</sup> In the procedural arena, landmark advances in access to justice were accomplished through the enactment of President Lyndon Johnson's Great Society progressive legislative program,<sup>14</sup> coupled with histori-

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10. MORRIS, *supra* note 1, at 30–36.

11. *Id.* at 36–41.

12. *Id.* at 35 (“Weinstein has never lost his emotional connection to the working class community within which he grew up and those with whom he had worked in his high school and college years. He remembers that these were the people that really needed an advocate.”).

13. See generally MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* (Mark Tushnet ed., 1993).

14. See generally ROBERT DALLEK, *LYNDON B. JOHNSON: PORTRAIT OF A PRESIDENT 190–207* (2004).

cal rule revisions that enabled private enforcement of newly created rights. Thus, the decade from the early 1960s through the mid-1970s was characterized by an unusual convergence of comprehensive federal substantive legislation and significant federal procedural reforms. In this period, President Lyndon Johnson was able to effectively work with Congress to enact a sweeping domestic legislative agenda, including the Civil Rights Acts of 1964<sup>15</sup> and 1968,<sup>16</sup> the Voting Rights Acts of 1965<sup>17</sup> and 1970,<sup>18</sup> the Higher Education Act,<sup>19</sup> Medicare,<sup>20</sup> and other similar legislation.<sup>21</sup>

In tandem with these substantive legislative initiatives, Congress enacted a “rules package” (1966 Amendments) that substantially amended several procedural rules.<sup>22</sup> The procedural rules included, most notably, Rule 18,<sup>23</sup> dealing with joinder of claims and remedies; Rule 19,<sup>24</sup> dealing with necessary and indispensable parties and renamed “Joinder of Persons Needed for a Just Adjudication”; Rule 20,<sup>25</sup> dealing with permissive joinder of parties; Rule 23,<sup>26</sup> the class action rule; and Rule 24,<sup>27</sup> dealing with intervention.

An overarching philosophy united the historic 1966 Amendments. By the early 1960s, the Advisory Committee on Civil Rules concluded

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15. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). Titles I and VIII add voting rights provisions. Pub. L. No. 88-352, §§ 101, 801, 78 Stat. at 241–42, 266. Titles III and IV provide for school and public facility desegregation. § 301, § 401, 78 Stat. at 246–49. Title IX authorizes federal intervention in claims of denials of equal protection. § 901, 78 Stat. at 266–67.

16. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 42 U.S.C.). The 1968 Civil Rights Act includes provisions dealing with civil rights violence, such as civil disobedience and rioting. Pub. L. No. 90-284, 82 Stat. at 73–77. Title VIII provides for a comprehensive fair housing law. § 801, 82 Stat. at 81–89. Other provisions (Titles II-VII) are related to Native American rights. §§ 201-701, 82 Stat. at 77–81.

17. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

18. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified as amended in scattered sections of 52 U.S.C.).

19. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended in scattered sections of 42 U.S.C.) (providing for Medicare and Medicaid).

20. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 U.S.C.).

21. See, e.g., Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988).

22. See generally Sherman Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966) (commenting on the 1966 Amendments); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) (notes from the Advisory Committee Reporter on the 1966 Amendments).

23. FED. R. CIV. P. 18 (“Joinder of Claims”).

24. FED. R. CIV. P. 19 (“Required Joinder of Parties”).

25. FED. R. CIV. P. 20 (“Permissive Joinder of Parties”).

26. FED. R. CIV. P. 23 (“Class Actions”).

27. FED. R. CIV. P. 24 (“Intervention”).

that several federal rules, most notably the joinder rules, failed to effectuate the intentions of the 1938 drafters of the Rules of Civil Procedure.<sup>28</sup> Rather than facilitating the liberal joinder of parties and claims, the rules had instead calcified into a set of rigid, inflexible, and limiting principles that defeated the original rule makers' intentions. Hence, the 1966 Amendments were intended to rectify the inflexibility that had accreted to the joinder provisions. The Advisory Committee Notes described the problems with the original rules and indicated the intended liberal application for the amendments.<sup>29</sup> Significantly (and famously), the reform of Rule 23 was the centerpiece initiative of the 1966 Amendments.

Many commentators have noted the impact of the 1966 class action rule reform, explaining how that liberal rule revision empowered new classes of litigants, created a new plaintiffs' class action bar, and inspired an outpouring of class action litigation,<sup>30</sup> characterizing the decade following the 1966 amendment of Rule 23 as a Golden Age of class action litigation. In this ten-year span, plaintiffs' attorneys utilized the amended class action rule to accomplish various social justice initiatives aimed at reforming the practices of institutions resistant to change. Thus, the period between the mid-1960s and 1970s experienced significant class action litigation for injunctive and declaratory relief, pursued through the Rule 23(b)(2) class action. The paradigm litigation of this era, then, sought reform of prison systems, school integration, housing and accommodations, and relief from conditions of incarceration as well as mental health facilities.<sup>31</sup>

Surveying these vital new legal initiatives, Professor Abram Chayes of Harvard Law School famously detected a major paradigm shift in the legal landscape, which he described in his 1976 landmark article *The Role of the Judge in Public Law Litigation*.<sup>32</sup> The central thesis of Professor Chayes's article was to contrast the "traditional" civil lawsuit with the new litigation model that emerged mid-century in federal courts. Professor Chayes identified five salient characteristics of the

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28. See David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 600–01 (2013) (describing the failure of the original class action rule).

29. KAPLAN, *supra* note 22.

30. *Id.* at 609–11.

31. See, e.g., *Hart v. Cmty. School Bd. of Educ.*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) (ordering an integration plan for the Mark Twain middle school in Coney Island, Brooklyn); *Manicone v. Cleary*, No. 74 C 575 (E.D.N.Y. Dec. 12, 1977) (order granting a prisoner access to telephones) *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975) (holding that a prisoner had a right to receive meals meeting religious dietary requirements).

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

traditional civil case: (1) the lawsuit was bipolar; (2) the litigation was retrospective; (3) the right and the remedy were interdependent; (4) the lawsuit was a self-contained episode; and (5) the process was party-initiated and party-controlled.<sup>33</sup>

Professor Chayes described a new “public law” model of adjudication as “sprawling and amorphous,” “subject to change over the course of the litigation,” and “suffused and intermixed with negotiating and mediating processes at every point” with the judge as a dominant figure in organizing and guiding the case, as well as continuing involvement in administration and implementation of relief.<sup>34</sup> He then identified the types of litigation embraced by this new public law model:

School desegregation, employment discrimination, and prisoners’ or inmates’ rights cases come readily to mind as avatars of this new form of litigation. But it would be mistaken to suppose that it is confined to these areas. Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these fields display in varying degrees the features of public law litigation.<sup>35</sup>

As others have noted, Professor Chayes’s description was dated at the time he published his observations.<sup>36</sup> In 1976, Professor Chayes’s analysis reflected dramatic changes in the litigation landscape of the 1950s and 1960s: an era marked at the outset by the Supreme Court’s 1954 decision in *Brown v. Board of Education*.<sup>37</sup> Professor Chayes’s vision, then, was cabined by a backward-looking but nonetheless accurate reflection of events in the 1950s and 1960s.

Nonetheless, the wholesale revision of the joinder rules ushered in and encouraged a new age of complex litigation that essentially was nonexistent in federal practice prior to the 1966 Amendments; class actions were not a major portion of federal dockets and the original class action rule was difficult to construe and apply.<sup>38</sup> The flexibility and liberal ethos of the 1966 Amendments invited complexity, encour-

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33. *Id.* at 1282–83.

34. *Id.* at 1284.

35. *Id.*

36. See, e.g., Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 648 (1988) (“Perhaps more basically, Chayes’s focus on public law litigation seems ill-conceived because the incidence of the kind of lawsuits he had in mind—school desegregation and prison conditions cases—was waning even as he wrote.”).

37. 347 U.S. 483 (1954).

38. See Marcus, *supra* note 28, at 600–01 (discussing the difficulties with applying the original class action rule).



aging the expansion of civil litigation. Indeed, the amended intervention rule invited persons outside the litigation to join. In short, the 1966 Amendments made possible modern federal complex litigation as we know it.

In the same spirit that inspired the 1966 Amendments, Congress in 1968 enacted the federal multidistrict litigation (MDL) statute,<sup>39</sup> which liberally provided for the transfer of cases within the federal system to one venue for coordinated pretrial proceedings.<sup>40</sup> The MDL statute, then, also made possible modern federal complex litigation. In this same period, the federal courts expanded standing doctrines to liberally permit access to the federal courts—yet another factor that contributed to the burgeoning complex litigation in the 1960s and 1970s.<sup>41</sup>

It is no surprise, then, that the mid-1960s ushered in a decade of bustling class action and other complex litigation activity. This decade—on which Professor Chayes reflected—was chiefly the decade of the great Rule 23(b)(2) injunctive class action. Attorneys quickly learned to harness the Rule 23(b)(2) class action to seek remediation under the civil rights laws and related legislation. Hence, the publication of Professor Chayes's classic article in 1976—exactly one decade after the 1966 Amendments—aptly captured the synergistic interaction of the new federal substantive law and the liberalized federal procedure. As Professor Chayes observed, this combination of events resulted in a paradigm shift to a new type of litigation—his public law model.

*B. Judge Weinstein's Transformative Role as Judicial Advocate for the Public Law Litigation Model*

Professor Chayes's description of the public law model was insightful, capturing the essence of the paradigm shift in litigation that had occurred in the prior decade. In hindsight, however, Professor Chayes's model captured a brief historical moment; he did not anticipate modern dispersed mass tort litigation or foresee the other types of complex litigation that have emerged in federal forums in the twenty-first century.

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39. Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (2012)).

40. *See id.*

41. *See, e.g.,* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (according liberal standing to sue to environmental protection nonprofit groups).

Nonetheless, other actors in the complex litigation arena seized upon Professor Chayes's insights about the public law model as a useful analogy to advocate on behalf of the efficacy of various new complex litigation techniques. Thus, Professor David Rosenberg of Harvard Law School<sup>42</sup> and Judge Jack Weinstein of the Eastern District of New York became leading proponents of this view.<sup>43</sup>

It is not surprising that Professor Chayes's insights concerning the public law paradigm resonated so strongly with Judge Weinstein. Early in his judicial career, Judge Weinstein became a devotee of the class action as a means to resolve group claims, albeit in conventional 1960s-style class litigation.<sup>44</sup> But Judge Weinstein's appreciation for the class action rule was significantly amplified during his management of the *Agent Orange* litigation,<sup>45</sup> which was Judge Weinstein's gateway to the mass tort universe and his domination of the field. In the context of his developing expertise with mass tort cases, Judge Weinstein readily embraced the analogy to public law litigation, drawing the comparison to the 1960s institutional reform litigation with which he was very familiar. Judge Weinstein explained:

Mass tort cases are akin to public litigations involving court-ordered restructuring of institutions to protect constitutional rights. In dealing with such mass tort cases as Agent Orange, asbestos, and

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42. See David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); see also David Rosenberg, *The Casual Connection in Mass Tort Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); David Rosenberg, *Toxic Tort Litigation: Crisis or Chrysalis? A Comment on Feinberg's Conceptual Problems and Proposed Solutions*, 24 Hous. L. REV. 183 (1987).

43. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995); see also PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 268–76 (1986) (describing the public law tort approach endorsed by Professor Rosenberg and Judge Weinstein); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 472–74 (1994).

44. See, e.g., *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 572 F. Supp. 1300 (E.D.N.Y. 1983) (holding that the state institution violated mentally handicapped children's constitutional rights, and ordering corrective measures), *vacated*, 737 F.2d 1239 (2d Cir. 1984); *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975) (holding that a prisoner had a right to receive meals meeting religious dietary requirements); *Hart v. Cmty. Sch. Bd. of Educ.*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) (ordering an integration plan for the Mark Twain middle school in Brooklyn, New York); *Wilson v. Beame*, 380 F. Supp. 1232 (E.D.N.Y. 1974) (granting a preliminary injunction that permitted segregated Muslim pretrial detainees to participate in religious activities with general inmate population); *Manicone v. Cleary*, No. 74 C 575 (E.D.N.Y. Dec. 12, 1977) (order granting a prisoner access to telephones). After thirty-four years, Judge Weinstein's school desegregation order in *Hart* was finally lifted after a judicial finding that the school had achieved racial diversity and was receiving high scores on state examinations. *Hart v. Cmty. Sch. Bd.*, 536 F. Supp. 2d 274, 284 (E.D.N.Y. 2008).

45. See generally SCHUCK, *supra* note 43 (describing at length Judge Weinstein's management and supervision of the *Agent Orange* litigation and class action settlement).

DES, I have sensed an atmosphere similar to that of public interest cases I have supervised, such as the Mark Twain school desegregation case, the reform of the Suffolk County Developmentally Disabled Center, and jail and prison reform litigation.<sup>46</sup>

Thus, for Judge Weinstein, both mass tort and public law litigations implicated serious political and sociological issues. Both were constrained by economic imperatives. Both had strong psychological underpinnings. And both affected larger communities than those encompassed by the litigants before the court. Applying the public law model to the mass tort context, Judge Weinstein concluded:

Mass tort cases unfortunately do not involve the application of legislative schemes representing careful analysis of the policy problems presented. By their very nature, these cases involve unanticipated problems with wide-ranging social and political ramifications. A judge does not “legislate from the bench” simply because he or she considers the broadest implications of his or her decisions in such a case. Judges not only may take such a view; they must.<sup>47</sup>

Thus, Judge Weinstein easily extrapolated from his 1960s experience of institutional reform litigation<sup>48</sup> to the 1970s and 1980s phenomenon of mass tort litigation. Not only did he view these cases as analogous to the sprawling, amorphous public law cases of the 1960s, but the public law model also supplied Judge Weinstein with the rationale and justification for the managerial judging he endorses:

[J]udges, particularly in mass tort cases, cannot and should not remain neutral and passive in the face of problems implicating the public interest. In mass tort cases, the judge often cannot rely on the litigants to frame the issues appropriately. The judge cannot focus narrowly on the facts before the court, declining to take into account the relationship of those facts to the social realities beyond the courthouse door. The judge cannot depend upon the slow creep of case-by-case adjudication to yield just results and just rules of law.

In this respect the problem is analogous to that of institutional reform litigation.<sup>49</sup>

It is perhaps worth noting that nearly forty years later, neither Professor Chayes's nor Judge Weinstein's public law paradigms accurately capture the current terrain of complex aggregate claim resolution.<sup>50</sup> In the twenty-first century, aggregate dispute settlements have

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46. Weinstein, *supra* note 43, at 472–74 (footnotes omitted).

47. Weinstein, *supra* note 43, at 541 (footnotes omitted).

48. See MORRIS, *supra* note 1, at 168–74.

49. Weinstein, *supra* note 43, at 540.

50. See Linda S. Mullenix, *Mass Tort Litigation as Public Law Litigation: Paradigm Misplaced*, 88 Nw. U. L. REV. 579 (1994) (rejecting the analogy to 1960s public law litigation as misplaced); see also Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Dispute*

stretched the boundaries of the judicial function, arrogating to private parties as well as an array of judicial surrogates vast powers for resolving aggregate claims. This aggregative private dispute resolution paradigm resembles nothing so much as private legislation with wide-reaching effects, carrying the pseudo-imprimatur of judicial oversight and approval, but frequently accompanied by troubling questions about fairness, adequate representation, and the merger of legislative, administrative, and judicial functions.

### III. ORIGINS OF THE JURISPRUDENTIAL DEBATE OF THE 1980s–1990s: THE TRIUMPH OF COLLECTIVE REDRESS MECHANISMS

#### A. *The Debate Between Litigant Autonomy and Aggregate Claim Resolution*

The jurisprudential debate between litigant autonomy and aggregate claim resolution developed somewhat slowly after, and as a consequence of, the advent of the seminal mass tort cases on federal dockets. The beginnings of the era of mass tort litigation can be traced to the late 1970s, when courts first experienced an influx of significant numbers of individual tort claims based on exposure to toxic substances (asbestos), injuries from defective medical devices (the Dalkon Shield), or harms caused by pharmaceuticals (Bendectin and diethylstilbestrol (DES)).<sup>51</sup> Perhaps the most emblematic, seminal mass tort litigation of that era was *Agent Orange*, which eventually came under Judge Weinstein's judicial management.<sup>52</sup> As Professor Peter Schuck aptly noted in his 1986 book, the *Agent Orange* litigation represented "a new kind of case."<sup>53</sup> In the *Agent Orange* litigation, Schuck recognized that the courts were confronted "with an unprecedented challenge to our legal system," of which the legal system had not yet grasped.<sup>54</sup>

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*Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999) (discussing changes in the litigation landscape from the 1960s class action paradigm).

51. See LINDA S. MULLENIX, *MASS TORT LITIGATION: CASES AND MATERIALS* 4–20 (2d ed. 2008) (describing seminal mass torts in asbestos, Dalkon Shield, and Agent Orange litigation); see also Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 70–74 (noting that mass trials of personal injury claims were largely unknown before the 1970s, and tracing modern group litigation in the United States to the early 1970s).

52. Judge George C. Pratt originally was assigned the *Agent Orange* litigation and issued numerous orders prior to Judge Weinstein's assuming authority over the litigation. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 737 (E.D.N.Y. 1979) (order denying motion to dismiss for lack of subject matter jurisdiction).

53. SCHUCK, *supra* note 43, at 3.

54. *Id.* at 6.

Significantly, the fact that Professor Schuck did not venture these opinions until 1986 highlights the point that courts, scholars, and practitioners were relatively slow to grasp the significance of the new mass tort cases emerging on state and federal dockets. The best evidence of the profession's gradual awakening to the new, challenging litigation was the creation by institutional organizations, in the mid-1980s, of numerous task forces and research efforts to "study" the problem of mass tort litigation and provide recommendations for handling these new complex cases.<sup>55</sup>

### 1. *Litigant Autonomy: The Scholarly Debate in the 1980s*

While institutional law reform organizations began undertaking various projects to study mass tort litigation, federal judges grappled with judicial case management and the problem of whether mass torts could be certified under the class action rule.<sup>56</sup> When some courts

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55. There was a flurry of such efforts from the mid-1980s through the early 1990s. *See, e.g.*, A.L.I., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994) (studying mass tort phenomenon and recommending changes to the MDL statute and a federalized choice-of-law regime); 2 A.L.I., *REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY* 389-91 (1991) (defining the problem of mass tort litigation); FED. COURTS STUDY COMM., *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* (1990) (part of the 1988 Judicial Improvements Act; containing three recommendations relating to complex litigation); MARK A. PETERSON & MOLLY SELVIN, RAND INST. FOR CIVIL JUSTICE, *RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES* at vii, 31-37 (1988); Ad Hoc Comm. on Asbestos Litigation, *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* (Mar. 1991) (recommending that Congress consider a national legislative scheme for resolution of asbestos personal injury claims or new statutory authority for consolidation and collective trials of asbestos cases; also recommending that Advisory Committee on Civil Rules study amendments to Rule 23 to accommodate requirements of mass tort cases); Comm'n on Mass Torts, A.B.A., *Report Number 126 to the A.B.A. House of Delegates* (Aug. 1989) (studying mass tort litigation and making recommendations concerning handling of litigation arising out of single event disasters or negligent product design).

In addition to these institutional studies, other legislative bodies were actively involved in proposing legislation to address the emerging problems relating to mass tort litigation. *See, e.g.*, Multiparty, Multiforum Jurisdiction Act of 1993, H.R. 1100, 103d Cong. (1st Sess. 1993) (1993 version of a succession of acts to deal with mass tort cases, intended to amend Title 28 to add a new section on multiparty, multiforum jurisdiction and to amend 28 U.S.C. § 1407 to permit trial of transferred actions). A watered down version of this legislation, conferring diversity jurisdiction over civil actions arising from single accidents, was subsequently enacted in 2002. Multiparty, Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369 (2012). *Compare id.* with UNIFORM TRANSFER OF LITIGATION ACT (1991) (establishing a model code for transferring and consolidating cases in state courts). *See generally* Deborah H. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 89-90 (noting the burgeoning interest in mass tort litigation and institutional law reform efforts underway in the mid-1980s).

56. *See, e.g.*, *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) (reversing class certification), *cert. denied sub nom.* A. H. Robins Co. v. Abed, 459 U.S. 1171 (1983); *In re "Bendectin" Prods. Liab. Litig.*, 102 F.R.D. 239 (S.D. Ohio), *appeal dismissed sub nom.* Schreir v. Merrell Dow Pharmaceutical, Inc., 745 F.2d 58 (6th Cir.), *mandamus granted*, 749 F.2d 300 (6th Cir. 1984) (vacating trial court's Bendectin class certification);

forged ahead with certification of mass tort or settlement classes (with mixed success),<sup>57</sup> commentators began questioning whether the efficiency rationales supporting class certification subverted fundamental rights to litigant autonomy. Thus, by the mid-1980s, the actions of various judges in turning to Rule 23 as the superior means for resolving mass tort litigation inspired the first round of the litigant autonomy debate.

As this nascent debate developed, there was no clear or authoritative articulation of the concept of litigant autonomy.<sup>58</sup> Instead, proponents defaulted to formulaic rhetoric which generally embraced a litigant's right to have her "day in court."<sup>59</sup> As will be seen, the concept of litigant autonomy has been explained variously to include process rights to supervise or manage one's own litigation;<sup>60</sup> to engage in a meaningful relationship with an attorney of the litigant's choosing;<sup>61</sup>

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MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* 211–21 (1996) (noting that the mandatory certification of class action settlement of Bendectin claims was overturned on appeal to Sixth Circuit); MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* 240–45 (1985) (describing A.H. Robins' attempts to certify a punitive damage class of Dalkon Shield claimants, which was defeated in the Ninth Circuit in 1982 and denied by Judge Robert Mehrige in the Eastern District of Virginia in 1985).

57. See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986) (upholding class certification of school districts seeking compensation for costs of asbestos remediation); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986) (upholding class certification of asbestos claimants); *In re Fed. Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (vacating class certification of victims of the Hyatt Regency Hotel skywalk collapse under the Anti-Injunction Act); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980) (granting class certification in the *Agent Orange* litigation); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983) (vacating class certification of DES claimants); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (denying class certification to the proposed asbestos litigation class).

58. See Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573 (2007) (noting the surprising lack of attention to the collectivist–individual tension that adheres in the class action framework).

59. See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1060 (2012) (noting the Supreme Court's invocation of the "deep-rooted historic tradition that everyone should have his own day in court"); Redish & Larsen, *supra* note 58, at 1573 (anchoring the Court's litigant autonomy understanding to a due process view preserving an individual's right to have their day in court).

60. See Redish & Larsen, *supra* note 58, at 1579 ("'Autonomy,' in contrast, refers to the individual's interest in having the power to make choices about the protection of her own legally authorized or protected rights through resort to the litigation process.").

61. SCHUCK, *supra* note 45, at 263–64 (noting that a primary attribute of the traditional non-aggregative approach to litigation involved "the sanctity and indissolubility of the conventional attorney–client relationship"); see also Hensler, *supra* note 55, at 91 (noting that a primary attribute of the traditional nonaggregative approach to litigation involved "the sanctity and indissolubility of the conventional attorney–client relationship").

to have an opportunity to develop the litigation and evidence related to the litigation;<sup>62</sup> and to appear and give testimony before a jury.<sup>63</sup> Expressions of litigant autonomy also encompassed personal dignity principles, including the psychological or cathartic values entailed in exercising individual autonomy.<sup>64</sup> In addition, the concept of litigant autonomy often has been defined in opposition to its alternative of collective dispute resolution, aggregative nature of which undermines or eliminates essential attributes of litigant autonomy.<sup>65</sup>

The nascent jurisprudential debate that pitted the relative merits of aggregate litigation against litigant autonomy was advanced chiefly in the scholarly arena, but also found expression in judicial opinions. In this period, Professor Roger Trangsrud offered perhaps the most cogent articulation of the importance of litigant autonomy in the emerging age of aggregate litigation.<sup>66</sup> He argued that the traditional justifications for individual claim autonomy remained important in mass tort cases, and he anchored this claim in due process rights. Central to his argument was the notion that tort claims in particular, because of the personal nature of bodily injury, typically involved incidents of tremendous importance to the individual plaintiff or the plaintiff's family.<sup>67</sup> He suggested that until recently, the American legal system had treated such claims "with uncompromised due process."<sup>68</sup>

Professor Trangsrud also discussed the various process values important to the concept of litigant autonomy, particularly in personal injury tort cases. Among these were the ability to procure an attorney of one's own choosing, to develop a relationship with that attorney, to assist in case development,<sup>69</sup> and perhaps most importantly, to appear

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62. SCHUCK, *supra* note 45, at 263.

But the traditional view is also deeply embedded in American legal traditions and individualistic liberal values that sanctify certain doctrines and institutions—the fault standard, private control of litigation, trial by jury, the dominance of “reasonableness” criteria, the preponderance-of-the-evidence rule for proof of causation, and a relatively passive judicial role in tort cases.

*Id.*

63. SCHUCK, *supra* note 45, at 263–64.

64. *Id.* at 263 (noting the dignitary interests involved in personal injury torts).

65. *Id.* at 262–63; *see also* Hensler, *supra* note 55, at 90.

66. Trangsrud, *supra* note 51, at 74–76.

67. *Id.* at 74; *see also* SCHUCK, *supra* note 45, at 263 (noting that tort claims involve an “invasion of dignitary and other subjective interests, particularly pain and suffering”).

68. Trangsrud, *supra* note 51, at 74.

69. *Id.* at 74–76; *see also* SCHUCK, *supra* note 45, at 263.

A class action corrodes the individual attorney–client relationship. The intimate contact and consultation that force lawyers to educate their clients, respond to their wishes, and litigate faithfully and vigorously are supplanted by a condition of amorphous anonym-

in court to give testimon—to tell one’s story to a jury of peers.<sup>70</sup> In this regard, Professor Transgrud was mindful of sociological studies supporting the cathartic effects of witness testimony. Moreover, limiting the ownership and control over the prosecution of a tort claim to the injured party was essential to avoid the possible risk of overreaching, deception, and misconduct by others seeking to bring the tort claim on another’s behalf.<sup>71</sup>

Furthermore, Professor Transgrud recognized that while courts had expanded their scope to provide remedial social justice through the class action vehicle (noting the public law litigation of the 1960s), he urged that these examples should not be used to obscure “the original and first purpose of our civil courts—to adjudicate justly disputes between individuals.”<sup>72</sup> In support of the judicial system’s “jealous protection” of an individual’s absolute right to control his or her own tort claim, Professor Transgrud noted that English and American courts had long held that personal injury claims were not assignable to others.<sup>73</sup> Additionally, the American legal system had traditionally operated from the assumption that economic decisions are best made by the true property owner (or in this case, the tort claimant), rather than by another person.<sup>74</sup> Thus, control and disposition of a claim ought to rest with the claimant (the injured party or his family), and

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ity. Meaningful communication, trust, and accountability become impossible. In effect, individual litigants lose their personal attorneys. They must settle instead for representation by court-designated lead counsel, whose loyalties are diffuse and whose incentives may be different.

SCHUCK, *supra* note 45, at 263.

70. *Id.* at 263–64.

71. Transgrud, *supra* note 51, at 75. Professor Transgrud argued:

Unless control of such tort claims was left to the injured party, a “litigious person could harass and annoy others if allowed to purchase claims for pain and suffering and pursue the claims in court as assignees.” There was also the risk of overreaching, deception, and other misconduct by the party seeking to acquire the right to bring a tort claim on another’s behalf. These remain major concerns today, as evidenced by the methods used by attorneys to solicit clients in mass tort cases and to obtain control over the cases of nonclients by bringing class actions or becoming lead counsel in huge consolidated tort cases. The attorney’s fees at stake in mass tort cases are so high as to strain the norms that ought to govern professional conduct.

*Id.* (footnotes omitted); *see also* SCHUCK, *supra* note 45, at 264 (noting the potential for compromise of the attorneys’ autonomy and duties of loyalty in class action negotiations and settlements).

72. Transgrud, *supra* note 51, at 74.

73. *Id.* at 75.

74. *Id.*; *see also* SCHUCK, *supra* note 45, at 264 (noting that the position of tort claimants may differ significantly with regard to the value of their individual claims, and therefore the inequities of subjecting individuals to uniform class treatment was correspondingly increased).



not with some stranger such as a class representative or the lead counsel in a class action case consolidated in some venue.<sup>75</sup>

While suggesting that the concept of litigant autonomy was grounded in American due process principles, Professor Trangsrud ultimately based the litigant autonomy principle on more profound natural law sources:

Underlying our tradition of individual claim autonomy in substantial tort cases is the natural law notion that this is an important personal right of the individual. While much less celebrated than other natural rights, such as the right to practice one's own religion or to think and speak freely, the right to control personally the suit whereby a badly injured person seeks redress from the alleged tortfeasor has long been valued both here and in England. The responsibility for asserting such a claim rested with the injured individual and his family, and the exercise of this right was protected. It was not the duty of the government or some third party to initiate such suit, nor could the government or some third party interfere with in the prosecution of the action.<sup>76</sup>

Two observations are in order. First, Professor Trangsrud's anchoring the litigant autonomy principle in natural law theory was somewhat surprising in the age of positive law, because natural law theory finds scant expression in our constituent documents or legislation, especially as it relates to tort claims. Nonetheless, Professor Martin Redish has recently revitalized the concept of litigant autonomy as a measure of both due process and freedom of expression,<sup>77</sup> a contention that resonates in Professor Trangsrud's original natural law argument. Second, as we shall see, the European insistence on litigant autonomy—their deeply held adversary principle—derives from natural law theory.

In this same period, advocates for the growing consensus in support of aggregate claim resolution responded to Professor Trangsrud's dissent from mass tort litigation trials. These advocates challenged Professor Trangsrud's argument on its own grounds: namely, that his

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75. Trangsrud, *supra* note 51, at 75. Professor Trangsrud also noted that individual claimants often wish to litigate or settle based on an array of economic considerations, intangible personal beliefs, or concerns which are unique to them, individually. If claimants enjoy autonomy over their claims, then they can obtain an outcome best suited to their personal views. In contrast, [i]f others assume control over their claim, then this is less likely to happen because these strangers will often not be aware of the special circumstances attending this claim or will have a divided loyalty because the stranger will often be responsible for many other substantial tort claims as well.

*Id.* at 75–76; see also SCHUCK, *supra* note 45, at 263–64 (discussing the distorted role of counsel in class litigation).

76. Trangsrud, *supra* note 51, at 74–75.

77. Redish & Larsen, *supra* note 58, at 1575.

depiction of the virtues of individual claim prosecution—his vision of litigant autonomy—were highly idealized, unrealistic, and not supported by the ways in which traditional tort litigation was accomplished in the real world.<sup>78</sup>

In debunking Professor Trangsrud's vision of the sanctity of litigant claim autonomy, Professor Deborah Hensler used empirical research findings on ordinary tort litigation from Rand Corporation to conclude that, in practice, such litigation diverged substantially from Professor Trangsrud's vision. Thus, the version of legal reality drawn from empirical research suggested instead a litigation process in which

(1) lawyer–client relations are more often perfunctory and superficial than intimate; (2) the locus of control is shifted toward lawyers rather than clients; (3) lawyers educate their clients to a view of the legal process that serves the lawyer's interests as much, if not more than clients' interests; (4) litigants are frequently only names to both lawyers and court personnel; and (5) trial is rarely desired, except perhaps by litigants, or delivered.<sup>79</sup>

With the chief arguments in support of the litigant autonomy principle thus deflated, Professor Hensler used the Rand Corporation's findings to articulate what would become several core tenets of the aggregationist position: (1) a crisis mentality generated by the sheer numbers of tort cases filed on court dockets; (2) the futility of attempting to resolve these cases on an individualized basis; and (3) the lack of enthusiasm by lawyers and judges for adjudicating these cases on an individualized basis.<sup>80</sup> She concluded: "In mass tort cases, the sheer volume of litigation exacerbates the tensions between the system's goals and the actors' financial and other incentives that are present even in routine cases. Personalized case-by-case processing is not possible and not desired by many lawyers and judges."<sup>81</sup>

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78. Hensler, *supra* note 55, at 91–97.

79. *Id.* at 92.

80. *Id.* at 96–98.

81. *Id.* at 104. Ironically, Professor Hensler suggested (one may only venture hopefully) that mass aggregate litigation might be configured to address both the demands of judicial efficiency as well as litigant autonomy:

Faced with the realities of current mass tort litigation, courts—and legal scholars—should be open to the possibility that expanding the use of formal aggregative procedures may provide more litigant control over the litigation process, more opportunity for litigant participation in the process, and a better match between victims' losses and compensation for these losses.

*Id.* In this suggestion, Professor Hensler anticipated the conclusion and recommendations of the EU countries by several decades. For a discussion of the *EU Recommendation on Collective Redress Mechanisms*, see *infra* notes 175–178 and accompanying text.

## 2. *Litigant Autonomy: The Courts Weigh In*

The scholarly debate over litigant autonomy versus aggregate litigation that emerged in the mid-1980s was engendered by the academic community's reaction to experiments by activist judges in shaping new and often innovative techniques for resolving mass torts.<sup>82</sup> By the mid-1980s, several judges with significant mass tort dockets forged ahead with using the class action to attempt to resolve these cases.<sup>83</sup> Although most of the judicial opinions evaluating the merits of class certification hewed closely to the Rule 23 requirements,<sup>84</sup> any number of the new mass tort judges infused their decisions with dicta explaining various policy rationales for the approval of class resolution of mass torts. Thus, the arguments in favor of aggregation found a voice in judicial opinions of this era.<sup>85</sup>

By the mid-1980s, the theory and policy rationales supporting class action resolution of mass tort cases were grounded largely in efficiency and pragmatism. In opinions certifying mass tort classes, the judges sounded several common themes about adjudicating these new mega-cases. Often, judges invoked a crisis mentality generated by the sheer number of cases on their dockets.<sup>86</sup> In addition, judges noted the similarity and repetitive nature of the claims, concluding that repeated individualized trial of duplicative cases was wasteful, costly,

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82. See, e.g., Hensler, *supra* note 55, at 90.

83. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987) (upholding Judge Weinstein's class certification and approval of the *Agent Orange* class action settlement); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986) (upholding class certification of an asbestos litigation class); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986) (upholding class certification of a nationwide class of school districts seeking compensation for the remediation of asbestos hazards in school buildings).

84. See, e.g., cases cited *supra* note 83.

85. See *Jenkins*, 782 F.2d at 470–71. Perhaps the most famous expression of the judiciary's embrace of mass tort class litigation was the Fifth Circuit's pronouncement in *Jenkins*: "Necessity moves us to change and invent." *Id.* at 473.

86. See, e.g., *id.* at 470, 473 (noting that 21 million American workers were potentially exposed to significant amounts of asbestos, translating into thousands of law suits, and that courts were "ill-equipped" to handle this "avalanche of litigation") ("The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters."); *School Asbestos Litig.*, 789 F.2d at 1000 (characterizing the asbestos litigation scene as an "unparalleled situation in American tort law"); *Payton v. Abbott Labs*, 83 F.R.D. 382, 390 (D. Mass. 1979), *vacated* 100 F.R.D. 336 (D. Mass. 1983) (certifying a class of DES claimants) ("Mass marketing of potent drugs is a modern phenomenon. Traditional models of litigation, pitting one plaintiff against one defendant, were not designed to, and cannot, deal with the potential injury to numerous and geographically dispersed persons that mass marketing presents.").

and inefficient.<sup>87</sup> This efficiency rationale, in turn, supported the quest for a more effective means of resolving mass claims on an aggregate basis.<sup>88</sup> Addressing fairness concerns, judges turned the autonomy principle on its head, urging that the sheer volume of cases would deny individual litigants their day in court—that justice delayed was justice denied.<sup>89</sup>

Other courts rationalized experiments with novel class action techniques by reference to the judicial management tool of conditional certification.<sup>90</sup> Hence, even those judges skeptical of aggregate techniques for resolving mass torts permitted leeway to such experimentation, reasoning that if the litigation subsequently proved unmanageable, the court could always decertify the class.<sup>91</sup> Finally, some mass tort judges noted (some in exasperation, apparently) that the courts needed to act to resolve mass tort litigation in an aggregative fashion because Congress declined to legislate solutions to these burgeoning mass tort problems.<sup>92</sup> Judicial activism to address mass tort litigation, then, in the face of the failure of legislative action, was

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87. See, e.g., MULLENIX, *supra* note 51, at 40 (reprinting a December 29, 1989 order from *Cimino v. Raymark Industries, Inc.* noting that the court did not have the resources to try 3,031 asbestos minitrials, coupled with the astronomical costs of trying those cases).

88. See, e.g., *Jenkins*, 782 F.2d at 472 (stating that the purpose of class actions was to conserve resources of parties and courts by permitting claims to be litigated in an economical fashion); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 784–86 (E.D.N.Y. 1980) (approving class certification of *Agent Orange* claimants after considering other procedural alternatives); *Payton*, 83 F.R.D. at 390 (“[C]ourts are faced with the choice of adapting traditional methods to the recurrent phenomenon of widespread drug litigation or leaving large numbers of people without a practical means of redress. It has been the tradition of the common law to adapt.”).

89. See, e.g., MULLENIX, *supra* note 51, at 40 (reprinting a December 29, 1989 order from *Cimino v. Raymark Industries, Inc.*, noting that individual asbestos cases had been pending for over three years, and concluding that “[t]his Court can see no justice in denying the Plaintiffs their day in court in the interest of providing the Defendants with a procedure for the repetitive assertion of their defenses”).

90. See, e.g., *School Asbestos Litig.*, 789 F.2d at 1011; *Agent Orange*, 506 F. Supp. at 790 (indicating that the court could subsequently decertify the *Agent Orange* class if individualized issues of causation or damages became problematic). The 2003 amendments to Rule 23 eliminated the provision in Rule 23(c) permitting conditional class certification, which often was relied upon by mass tort judges in certifying these class actions.

91. See, e.g., *School Asbestos Litig.*, 789 F.2d at 1011; *Agent Orange*, 506 F. Supp. at 790.

92. See, e.g., *Falise v. Am. Tobacco Co.*, 241 B.R. 48, 60 (E.D.N.Y. 1999) (commenting on the failure of Congress to enact comprehensive national mass tort legislation); *In re Joint E. and S. Dist. Asbestos Litig.*, 129 B.R. 710, 878, 906 (E.D.N.Y. & S.D.N.Y. 1991) (noting Congress’s repeated failure to enact national tort legislation even if restricted only to mass torts); *In re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colo.* on Nov. 15, 1987, 720 F. Supp. 1445, 1454 (D. Colo. 1988), *rev’d on other grounds sub nom. Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992) (urging Congress to enact uniform tort law to apply in mass tort cases).

viewed as a principle of necessity to achieve justice for injured claimants.<sup>93</sup>

While some judges forged ahead with various class action experiments, other courts instead resisted the nascent aggregationist movement, at least through the mid-1980s. These courts declined to endorse arguments based on pragmatic efficiency rationales, but rather hewed closely to Rule 23 requirements which mass tort cases typically failed to satisfy.<sup>94</sup> Other courts, focused on problems of applicable law, viewed attempts to certify nationwide mass tort cases as violative of *Erie* principles.<sup>95</sup> As a practical matter, some judges, when confronted with novel class certification motions or proposed trial plans suggested that they could perceive no benefits to be gained from class certification.<sup>96</sup> Furthermore, when confronted with novel, multiphase trial plans for adjudicating the rights of mass tort claimants, some courts rejected these proposals, concluding that the innovative plans did not resemble trials as contemplated by the Seventh Amendment or the tradition of jury trials in the United States.<sup>97</sup> And, responding to justifications based on legislative inaction, other courts predictably responded that such judicial activism exceeded the judiciary's authority by engaging in a de facto legislative function.<sup>98</sup> Perhaps most interesting, however, is that very few of the courts

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93. Kenneth R. Feinberg, *Do Mass Torts Belong in the Courtroom?*, 74 JUDICATURE 237 (1991) (stating that in the absence of Congressional action, courts must grapple with problems raised by mass torts).

94. See, e.g., *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (vacating class certification because of the misapplication of Rule 23(b) class categories); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 850-51 (9th Cir. 1982) (denying class certification for failure of the proponents to satisfy Rule 23(a) requirements); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 570-71 (E.D. Tex. 1974) (denying class certification for failure of the proposed class action to satisfy predominance and superiority requirements).

95. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (decertifying a nationwide class of hemophiliacs without proper regard to *Erie* doctrine on applicable law in federal diversity cases); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740-44 (5th Cir. 1986) (decertifying the class when the trial court failed to take into account varying applicable state law).

96. See, e.g., *Mertens v. Abbott Labs.*, 99 F.R.D. 38, 42 (D.N.H. 1983) (declining to certify a class of DES claimants, concluding that "[t]he advantage of certifying a class in this action is at best obscure, and the gain difficult to perceive").

97. See, e.g., *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (disapproving a three-phase trial plan of asbestos claimants) ("We are persuaded on reflection that the procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not.").

98. *Id.* ("It is sufficient now to conclude that Phase II [of the trial plan] cannot go forward without changing Texas law and usurping legislative prerogatives, a step federal courts lack the authority to take.").

eschewing mass tort class litigation referenced the litigant autonomy principle in their opinions.<sup>99</sup>

For nearly a decade spanning the mid-1970s through the mid-1980s, the tension between collective redress mechanisms and litigant autonomy percolated throughout the mass tort litigation landscape. However, in a series of landmark 1986 appellate decisions, the aggregationists effectively prevailed in the jurisprudential debate. In that year, the Fifth Circuit upheld the first asbestos class action,<sup>100</sup> the Third Circuit endorsed a nationwide class of school districts seeking compensation for asbestos abatement,<sup>101</sup> and the Second Circuit upheld class certification of the *Agent Orange* settlement.<sup>102</sup> Collectively, these three appellate decisions embraced the litany of rationales for expanded application of Rule 23 to mass tort litigation and ushered in a decade of further experimentation with novel aggregation techniques.<sup>103</sup> The proponents on behalf of the litigant autonomy principle had lost the day, and the litigant autonomy argument receded from the public debate over mass tort and class action litigation.

*B. Judge Weinstein's Conflicted Views on Litigant Autonomy and Collective Redress*

It would do a grave injustice to Judge Weinstein to suggest that he is not interested in individual justice; his entire career and judicial philosophy stands as a rebuke to such a suggestion. Judge Weinstein is rightly known and honored precisely for his concerns over ensuring individual dignity to each person appearing before a court, especially but not exclusively in the criminal context.<sup>104</sup> Judge Weinstein has correctly apprehended the intimidating, coercive nature of judicial proceedings and documented his efforts to provide assistance, succor,

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99. See Redish & Larsen, *supra* note 58, at 1573 (“Surprisingly little of this wealth of discussion, however, has concerned the collectivist–individual tension that inheres in much of the class action framework.”); see also *id.* at 1584–85 (“It is both puzzling and distressing, then, that nothing in the Court’s controlling due process jurisprudence even touches on, much less values, the interest in litigant autonomy.”). It is difficult to find any judicial opinions referencing litigant autonomy, other than passing references to a tradition of honoring a litigant’s right to his day in court. Certainly, courts eschewing class certification of mass tort cases did not rest their decisions on litigant autonomy grounds.

100. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986).

101. *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986).

102. *In re “Agent Orange” Prods. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987).

103. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (upholding class certification of victims of Marcos regime, and settling damage claims by a statistical extrapolation methodology); *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992) (approving statistical modeling for class-wide damages).

104. MORRIS, *supra* note 1, at 97, 101, 137–41, 182–84, 209–12, 251–63.

and reassurance to the less fortunate caught up in the legal system.<sup>105</sup> He famously has been a crusader for reform of the harsh mandates of the sentencing guidelines, precisely because those guidelines provide judges with scant leeway to modify criminal sentences to take into account highly individualized circumstances.<sup>106</sup> Indeed, even in the mass tort arena, he titled his seminal and influential work *Individual Justice in Mass Tort Litigation*.<sup>107</sup>

And yet one cannot doubt that in the class action and mass tort arena, Judge Weinstein has been the foremost aggregationist of the twentieth and twenty-first centuries. No other judge has had a greater impact than Judge Weinstein, who throughout his career has been the primary judicial innovator to endorse experimental aggregate litigation techniques. Beginning in the late 1970s with his initial forays into civil rights and public law class litigation,<sup>108</sup> Judge Weinstein readily approved of the class action rule as a means to achieve social justice.<sup>109</sup> And when handed the *Agent Orange* litigation in the early 1980s, Judge Weinstein engrafted his knowledge of the public law model onto resolving the *Agent Orange* cases. He never looked back. Furthermore, when the federal courts in the mid-to-late 1990s began to repudiate novel class experiments, Judge Weinstein pivoted to embrace nonclass action settlement techniques to resolve aggregate litigation, single-handedly inventing the quasi-class action.<sup>110</sup>

Judge Weinstein's opinions in mass tort and class action decisions—entailing lengthy factual and procedural exposition—invariably default to the various rationales developed by aggregationist courts and

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105. *Id.* at 61–64, 239–41.

106. *Id.* at 63–64, 101, 140–41, 279.

107. WEINSTEIN, *supra* note 43.

108. *See supra* notes 44–49.

109. *See supra* notes 44–49.

110. *See* *McMillan v. City of New York*, 2008 WL 4287573, at \*5 (E.D.N.Y. Sept. 19, 2010) (stating, in an attorney fee dispute, that “in a sense this was a quasi[-]aggregate or quasi[-]class action with increased power to control fees”); *see also* *McMillan v. City of New York*, 2010 WL 1487738, at \*1 (E.D.N.Y. April 13, 2010) (noting in an attorney fee dispute from the Staten Island Ferry crash litigation that “[t]he benefits of that aspect of this quasi-class action litigation allegedly accrued to hundreds of injured claimants, including the client[s]”); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006); *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162, 178 (E.D.N.Y. 2001) (third-party payor litigation against tobacco company defendant) (“Defendants have not raised the point that, in a sense the class action or quasi-class action such as the present one, where many claims are aggregated, takes care of the problem of social payment for the full cost of damages a defendant caused.”); *United States v. Cheung*, 952 F. Supp. 148, 148–49 (E.D.N.Y. 1997) (federal restitution action for criminal actions) (“What was in effect a civil quasi-class action is coordinated with a criminal proceeding to assure maximum recovery by the victims with minimum transactional costs.”); *cf.* Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CINN. L. REV. 389 (2011).

scholars.<sup>111</sup> Thus, Judge Weinstein squarely aligned with the scholars and jurists who concluded that in the mass tort arena, the sheer volume of cases ensured that justice delayed meant justice denied.

#### IV. REVIVING THE LITIGANT AUTONOMY DEBATE IN THE TWENTY-FIRST CENTURY

##### A. *The Search for a Middle Path: Reconciling Aggregate Claim Resolution with Litigant Autonomy*

While this Article contends that by the mid-1990s the aggregationists had won the field in favor of collective redress mechanisms, others may rightly point to the eventual federal judicial backlash against innovative use of Rule 23 to refute this assertion. Thus, Judge Posner's famous repudiation of nationwide class certification of the tainted blood cases in 1995,<sup>112</sup> followed quickly by the Fifth Circuit's reversal of the nationwide certification of a class of persons addicted to nicotine products,<sup>113</sup> signaled a rethinking of the suitability of the class action rule to resolve mass tort cases.<sup>114</sup> Moreover, the Supreme Court finally entered the mass tort arena in the late 1990s, driving significant nails into the aggregationist position by repudiating two nationwide class action settlements of asbestos claims.<sup>115</sup>

In its *Amchem* and *Ortiz* decisions especially, the Court (in extensive dicta) telegraphed its distaste for the innovative experiments federal judges had been using to resolve mass tort cases through the class action rule.<sup>116</sup> Focusing on the dictates of the Rules Enabling Act,<sup>117</sup> the Court indicated that the actions of federal judges in certifying mass tort litigation and settlement classes most likely had transcended judicial authority under the Rules Enabling Act.<sup>118</sup> Concurring Jus-

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111. See generally MORRIS, *supra* note 1, at 315–68 (analyzing Judge Weinstein's path-breaking judicial activism and innovation in mass tort litigation spanning four decades).

112. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

113. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

114. See *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (decertifying a class of penile implant claimants).

115. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

116. *Ortiz*, 527 U.S. at 845 (“Finally, if we needed further counsel against adventurous application of Rule 23(b)(1)(B), the Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale.”); see also *Amchem*, 521 U.S. at 628–29.

117. 28 U.S.C. §§ 2071–2072 (2012).

118. *Ortiz*, 527 U.S. at 864 (“The Advisory Committee did not envision mandatory class actions in cases like this one, and both the Rules Enabling Act and the policy of avoiding serious constitutional issues counsel against leniency in recognizing mandatory limited fund actions in



tices noted that the courts were not free “to devise an ideal system for adjudicating” mass tort claims, and that unless and until the Advisory Committee on Civil Rules revised the class action rule, the appropriate resolution of mass tort cases “cries out for legislative solution.”<sup>119</sup>

Most notably, perhaps, the Court’s 1999 opinion in *Ortiz*—repudiating a mandatory limited fund class settlement of nationwide asbestos claims—revitalized the litigant autonomy debate that had receded during the heyday of the aggregationist movement. The Court noted that “[t]he inherent tension between representative suits and the day-in-court ideal [was] only magnified” if individual claims were aggregated into a mandatory settlement class.<sup>120</sup> The Court suggested that serious due process concerns were raised when claimants might be unidentifiable, or when claims were resolved without regard to consent or, in some instances, contrary to the objections of dissenters.<sup>121</sup> Invoking the litigant autonomy principle, the Court concluded:

[N]o less important, mandatory class actions aggregating damage claims implicate the due process “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made party by service of process” it being “our ‘deep-rooted historic tradition that everyone should have his own day in court.’”<sup>122</sup>

While it might seem that, at the close of the twentieth century, the Supreme Court’s endorsement of the litigant autonomy principle effectively ended grand experiments with collective redress mechanisms, nothing could be further from reality. The federal judicial decisions limiting application of the class action rule did not kill off class litigation; rather, these decisions famously channeled class litigation into state court forums,<sup>123</sup> eventually precipitating enactment of

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circumstances markedly different from the traditional paradigm.”); *see also Amchem*, 521 U.S. at 629.

119. *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring) (noting the “elephantine mass of asbestos cases”).

120. *Id.* at 846 (majority opinion).

121. *Id.* at 846–47.

122. *Id.* at 846 (citations omitted) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), and *Martin v. Wilks*, 490 U.S. 755, 762 (1989)).

123. *See generally* The Class Action Fairness Act of 2005, S. REP. NO. 109-14 (2005), reprinted in 2005 U.S.C.C.A.N. 3; The Class Action Fairness Act of 2003, S. REP. NO. 108-123 (2003) (detailing the channeling of class litigation into state courts in the wake of federal resistance to certifying litigation and settlement classes in the late 1990s); 151 CONG. REC. H727-29 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

the Class Action Fairness Act (CAFA) of 2005<sup>124</sup> to address alleged abusive state court class action practices.<sup>125</sup>

Moreover, by the dawn of the twenty-first century, federal judicial restraint in application of the class action rule induced the plaintiff and defense bars to seek and fashion new aggregate litigation mechanisms to resolve collective claims apart from the constraints of the class action rule. Thus, the litigation landscape changed radically, with a focus on utilizing the MDL statute and MDL forums as a means for resolving massive litigation through nonclass aggregate settlements.<sup>126</sup> The most prominent exemplars of this trend were the pharmaceutical *Vioxx* settlement,<sup>127</sup> followed by Judge Weinstein's similar oversight of the *Zyprexa* settlement.<sup>128</sup>

In addition, the very language of complex dispute resolution shifted from exclusive discussion of class actions and instead focused on the more amorphous concept of "aggregate litigation,"<sup>129</sup> a label that embraced an array of nonclass collective redress mechanisms. This shift

124. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

125. See, e.g., *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 952 (9th Cir. 2009).

Congress enacted CAFA in 2005 to "assure fair and prompt recoveries for class members with legitimate claims; [to] restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and [to] benefit society by encouraging innovation and lowering consumer prices." As this description makes clear, CAFA was designed primarily to curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts.

*Id.* (alterations in original) (citations omitted) (quoting Pub. L. No. 109-2, 119 Stat. at 5); see also *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1197-98 (11th Cir. 2007) (concluding that CAFA expanded federal diversity subject matter jurisdiction to combat perceived abuses in class litigation and abusive practices by the plaintiffs' class counsel); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404 (6th Cir. 2007) (same); *Mississippi ex rel. Hood v. Entergy Miss., Inc.*, 2012 WL 3704935, at \*4 (S.D. Miss. Aug. 25, 2012) (same); *Proffitt v. Abbott Labs.*, 2008 WL 4401367, at \*1 (E.D. Tenn. Sept. 23, 2008) (same).

126. Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine To Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 64, 71, 85, 87-95 (2013) (describing the changed litigation landscape from class actions to MDL auspices, with reference to attorney fee awards). Professor Ratner asks:

How do we account for both the similarities and the differences between class actions and MDLs, in terms of the degree of litigant autonomy and involvement? For example, trial courts do not typically pass judgment on the fairness or adequacy of non-class aggregate settlements; but given the extraordinary degree of disenfranchisement of individual plaintiffs within the aggregate of an MDL, should they?

*Id.* at 85.

127. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640 (E.D. La. 2010) (describing *Vioxx* nonclass litigation and settlement in an opinion relating to fee awards); see also *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549 (E.D. La. 2009) (same).

128. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006) (describing *Zyprexa* litigation and settlement in nonclass context in an opinion relating to fee awards).

129. See, e.g., A.L.I., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* (2010).

in terminology was purposeful; it permitted advocates frustrated by judicial constraints in the class action arena to embrace more expansive collective redress mechanisms that effectively circumvented the class action rule. In keeping with the changing litigation landscape, Judge Weinstein readily embraced these new aggregative techniques, agreeing that the federal decisions limiting the use of the class action rule required resort to new innovative techniques for resolving mass claims.<sup>130</sup>

Although it may seem that the litigant autonomy debate receded from jurisprudential attention in the wake of the Court's decision in *Ortiz*,<sup>131</sup> in the last decade, several scholars have revitalized this debate, often (but not exclusively) in the shadow of nonclass collective redress mechanisms.<sup>132</sup> Perhaps the most prominent proponent of the litigant autonomy principle is Professor Martin Redish, whose arguments favoring litigant autonomy are based on his belief of the antidemocratic nature of class action litigation.<sup>133</sup>

The recent resuscitation of the litigant autonomy debate is significant for three reasons. First, scholars have attempted to offer more conceptually comprehensive definitions of the litigant autonomy principle than had been ventured in earlier conversations.<sup>134</sup> Second, scholars have aligned along a more nuanced spectrum of views regard-

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130. *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 269 (E.D.N.Y. 2006) (citing Preliminary Draft No. 4 of *Principles of the Law of Aggregate Litigation*); see also Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 Nw. U. L. REV. 511, 547–49 (2013) (discussing Judge Weinstein's endorsement of nonclass aggregate settlement techniques in light of the difficulty of obtaining and prosecuting class litigation).

131. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); see also Redish & Larsen, *supra* note 58, at 1584–85 (“Surprisingly little of this wealth of discussion, however, has concerned the collectivist–individual tension that inheres in much of the class action framework.”).

132. See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, U. CHI. LEGAL F. 519, 525–26 (2003). Professor Erichson contends, correctly, that the arguments favoring class action litigation as a mechanism for protecting individual rights now inaccurately reflects the reality of how aggregative cases are decided outside the class action rule. *Id.* at 524 (“To the extent it purports to draw a neat line between class and non-class litigation, however, the traditional understanding misses important aspects of what happens in modern, large-scale, non-class litigation. The reality of class and non-class litigation is messier by the theoretical distinction between them.”); see also William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 432–37 (2001) (discussing the autonomy debate as embedded in the transactional model of class action settlements).

133. See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009); see also 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 (2009); Redish & Larsen, *supra* note 58, at 1573–74, 1584–85.

134. See, e.g., Rubenstein, *supra* note 132, at 432–37 (stating that transaction adjudication deepens injury to individual autonomy, violates participation rights, affronts individual dignity, and offends the day-in-court ideal).

ing litigant autonomy. As discussed above, the litigant autonomy debate of the 1970s and 1980s polarized along two axes: those advocating for aggregative claims resolution through application of the class action rule, versus traditional day-in-court proponents.<sup>135</sup> While some scholars recently have staked out positions at similar extremes, others have sought to locate a middle ground that satisfies the requirements of both collective redress and litigant autonomy.<sup>136</sup> Third, many scholars engaged in this new round of debate are mindful of the changed litigation landscape that has inspired renewed interest in the problem of litigant autonomy in a world of aggregate settlements.<sup>137</sup>

Contemporary scholars grappling with the litigant autonomy principle have variously attempted to offer more sophisticated and jurisprudentially grounded understandings of this concept. Many scholars recognize the individual autonomy principle as a function of due process, an approach that is not new.<sup>138</sup> Thus, Professor Redish has argued that the litigant autonomy principle is a logical outgrowth of the country's commitment to process-based liberal democratic thought, "and therefore a foundational element of procedural due process analysis."<sup>139</sup>

But beyond grounding litigant autonomy in due process concerns, Professor Redish expanded the concept to embrace a fundamental right to participate in and resort to the processes of democratic government, what he calls "meta-autonomy."<sup>140</sup> Thus, "[a]t its definitional core, democratic theory is grounded in a societal commitment to the notions of self-determination."<sup>141</sup> Furthermore, the American

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135. See discussion *supra* notes 66–99.

136. Although Professors Redish and Larsen stake out a position strongly arguing in favor of litigant autonomy, they nonetheless recognize that even robust claims for litigant autonomy have limits. Hence, they note, "This does not mean that litigant autonomy necessarily should be deemed an absolute. It has long been understood that the procedural due process inquiry triggers some form of weighing process that takes into account competing interests and values." Redish & Larsen, *supra* note 58, at 1574. See also Rubenstein, *supra* note 132, at 432–37 (seeking to define countervailing values in favor of a transactional model of aggregate claim settlements that concededly sacrifice values inherent in litigant autonomy).

137. See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011) (critically examining the *Vioxx* nonclass settlement); see also Erichson, *supra* note 132; Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000); Ratner, *supra* note 126; Rubenstein, *supra* note 132 (describing the changed nature of class litigation and settlement practices at the beginning of the twenty-first century).

138. See discussion *supra* note 68; see also, e.g., Campos, *supra* note 59, at 1060 (acknowledging Supreme Court decisions anchoring litigant autonomy principle in due process).

139. Redish & Larsen, *supra* note 58, at 1574.

140. *Id.* at 1575.

141. *Id.* at 1581.

legal system's commitment to the adversary system is further recognition of a litigant's autonomy in protecting or pursuing his or her rights in the legal process.<sup>142</sup>

Moreover, Professor Redish contends that the due process version of litigant autonomy grows out of the same constitutional grounding as the First Amendment right of free expression,<sup>143</sup> which itself is a manifestation of seventeenth-century natural law theory. Thus, by analogizing litigant autonomy to First Amendment rights, Professor Redish conceptualizes the principle in a manner that resonates in Professor Trangsrud's earlier arguments advocating the litigant autonomy position.<sup>144</sup>

In addition to the value of democratic participation, Professor Redish enumerates other essential values entailed in litigant autonomy. These include an individual's interest in having the power to make choices about the protection of legally authorized or protected rights through resort to the litigation process,<sup>145</sup> political pluralism, self-determination, and individual integrity.<sup>146</sup> Correlatively, an individual should not have to trust in or defer to the competence, resources, or enthusiasm of others to protect or advance her individual interests.<sup>147</sup> Other scholars have proposed even more opaque, detailed conceptualizations of the litigant autonomy principle as a function of process-oriented (intrinsic) or outcome-oriented (instrumental) theories of participation.<sup>148</sup>

In the context of these efforts to formulate more sophisticated, theoretical definitions of litigant autonomy, scholars nonetheless have aligned in predictable, polarized camps in the current collectivist-individual autonomy debate.<sup>149</sup> Thus, Professor Redish—although conceding that litigant autonomy is not an absolute value<sup>150</sup>—is squarely entrenched as the most prominent advocate for the litigant autonomy position. Moreover, other scholars have suggested that an array of federal legislation since the mid-1990s, as well

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142. *Id.* at 1583. Professors Redish and Larsen's conceptualization of litigant autonomy, tied to the adversary system, resonates in the European "adversary principle," which rigorously protects litigant autonomy, even in collective redress regimes. *See* discussion *infra* notes 166–170.

143. Redish & Larsen, *supra* note 58, at 1575.

144. *See supra* notes 66–76 and accompanying text.

145. Redish & Larsen, *supra* note 58, at 1579.

146. *Id.* at 1584.

147. *Id.* at 1583.

148. *See, e.g.,* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 196, 201–06 (1992).

149. *See* Ratner, *supra* note 126, at 87–92 (canvassing the current debate between those favoring autonomy versus proponents of aggregation).

150. Redish & Larsen, *supra* note 58, at 1574.

as a series of Supreme Court decisions, has demonstrated that the Court “has consistently been more interested in marking the boundaries of aggregation, or preserving the ideals of litigant autonomy, than in enabling or facilitating aggregation.”<sup>151</sup>

In contrast, some contemporary aggregationists—taking a page from the debates of the 1980s—have advanced robust defenses of class and nonclass collective redress mechanisms, even at the expense of the litigant autonomy principle.<sup>152</sup> In arguing in support of the contemporary aggregationist position, these scholars once again debunk the litigant autonomy ideal, rely on traditional efficiency rationales, and contend that litigant autonomy undermines outcome fairness.<sup>153</sup> Moreover, Professor Michael Perino has applied game theory to argue that individual autonomy may be fundamentally incompatible with obtaining global resolution in mass torts and other kinds of class actions, noting that strong claims for individual autonomy can destroy class resolution of aggregate claims, while weak claims for autonomy negate the necessity for opt-out rights.<sup>154</sup>

As a practical matter, one commentator has noted that the Judicial Panel on Multidistrict Litigation is also seen as favoring aggregation.<sup>155</sup> This panel often selects pro-aggregation judges (including Judges Weinstein and Fallon), who have demonstrated an interest in facilitating and managing resolution of these cases.<sup>156</sup> Thus, notwithstanding a litany of legislation and seemingly anti-aggregative decisions emanating from the Supreme Court, in the real world of complex litigation, efforts at collective redress (particularly under MDL auspices) continue apace.

While the debate over aggregative litigation remains as polarized as it was in the 1980s and 1990s, other scholars who have surveyed the shift towards nonclass aggregate dispute resolution have endeavored

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151. Ratner, *supra* note 126, at 88–89 (“[T]hese decisions, taken as a whole, represent a sustained effort to cabin the systemic urge to aggregate.”).

152. See, e.g., Bone, *supra* note 148; Campos, *supra* note 59 (arguing that protecting litigant autonomy in mass tort context is self-defeating, causes collective action problems, and undermines the deterrent effect of litigation); Sergio J. Campos, *The Future of Mass Torts . . . and How To Stop It*, 159 U. PA. L. REV. PENNUMBRA 231 (2011) (arguing that the individual day-in-court model undermines the plaintiffs’ interest by dividing potential recovery, and favoring compelled mandatory class actions even though this may infringe on litigant autonomy); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1106 (2010) (seeking to break down the neat division between the perceived need for legal regulation of class actions and “the supposedly benighted world of autonomous individual lawsuits”).

153. See articles cited *supra* note 152.

154. See Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85 (1997).

155. Ratner, *supra* note 126, at 90–91.

156. *Id.*

to locate an intermediate approach to reconciling the competing values of collective redress versus individual autonomy.<sup>157</sup> Thus, Professor Erichson, contemplating the problems inherent in nonclass aggregate litigation, has proposed that the class litigation experience is useful in thinking about how to resolve the inherent tension between competing collectivist and individual values.<sup>158</sup> The class action experience, he argues, emphasizes the importance of recognizing the relinquishment of autonomy in the conduct of litigation and settlement negotiations.<sup>159</sup> Consequently, actors in the aggregate litigation arena ought to substitute opportunities for autonomous decision making at the two most critical moments in litigation: at the outset of collective representation, and during the acceptance or rejection of a settlement.<sup>160</sup>

Similarly, Professor Jay Tidmarsh has attempted to find a middle ground convergence of autonomy with utility principles through the application of a set of presumptions that courts should apply in assessing the superiority test for class certification.<sup>161</sup> Proceeding from the premise that class actions should be grounded in social utility rather than the competing value of individual litigant autonomy, Tidmarsh nonetheless argues that a properly applied superiority analysis should assist in supporting individual autonomy claims in appropriate cases.<sup>162</sup>

*B. The Ascendancy of Litigant Autonomy in a Collective Redress Regime: The Example of the European Union*

In the United States, the renaissance of the litigant autonomy debate in the twenty-first century has taken on some urgency in the context of the burgeoning recourse to nonclass, aggregate dispute resolution techniques. In this view, if the class actions of the mid-

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157. See Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 105 (1994) (discussing then-pending proposed amendments to Rule 23 and suggesting that the Advisory Committee on Civil Rules should spell out principles that help clarify how much weight litigant autonomy should receive in the class action setting) (“[L]itigant autonomy is a potentially significant obstacle to mass-tort class actions . . .”). Professor Rubenstein has attempted to justify the transactional model of modern aggregate claim resolution, particularly in the class action context, by asserting that certain off-setting principles such as equality and efficiency justify the sacrifice of individual autonomy claims. Rubenstein, *supra* note 132, at 432–37. The efficiency rationale historically is the oldest justification undergirding aggregate settlements; Rubenstein simply applies this and similar rationales to contemporary settlement classes.

158. Erichson, *supra* note 132, at 529.

159. *Id.*

160. *Id.*

161. See Jay Tidmarsh, *Superiority as Unity*, 107 Nw. U. L. REV. 565 (2013).

162. *Id.*

1980s and 1990s willingly sacrificed litigant autonomy on the altar of utilitarian efficiency, then nonclass aggregate settlements of the twenty-first century are even more problematic in ignoring or overriding litigant autonomy claims. Thus, collective redress mechanisms that are largely untethered from the judicial oversight provided by the class action rule present an even ruder affront to the litigant autonomy principle.<sup>163</sup>

Surveying the changed litigation landscape with its shift towards nonclass aggregate settlements, some academic commentators (as noted above) have sought to explore solutions that address the inherent paradox that the individual autonomy principle often undermines or defeats collective redress. However admirable these attempts to find a middle ground, as a practical matter, these proposals seem tepid or impractical surrogates for the protection of robust litigant autonomy.

Hence, the suggestion that courts pay special attention to ensuring litigant participation at the outset of litigation as well as during settlement negotiations—in absence the of concrete suggestions concerning how to accomplish these goals—remains laudatory and idealistic rhetoric unlikely to be implemented. Moreover, the suggestion that courts adopt an enhanced superiority analysis to protect litigant autonomy in compelling cases, while interesting, is unlikely to affect current class action jurisprudence or a judge's cursory application of the superiority requirement or gain traction in the real world. Also, this proposal has no application apart from the class action context and therefore is not especially helpful in addressing the litigant autonomy issue in nonclass aggregative settings.

In the context of this American academic debate over what is to be done, the EU countries have developed an interesting approach to resolving the problem presented by the competing values inherent in collective redress regimes pitted against the litigant autonomy principle. As is perhaps now well-known, the EU countries throughout the twentieth century steadfastly resisted enactment of any American-style class action litigation mechanisms.<sup>164</sup> The well-documented European resistance to class action litigation was based on a variety of jurisprudential, historical, and sociological factors.<sup>165</sup> Moreover, the

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163. See Mullenix, *supra* note 130.

164. See Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217 (1992) (discussing the European resistance to American class action litigation and reasons for the unlikely prospects for enacting class action regimes in European countries).

165. *Id.* There are numerous reasons why it may be difficult to transplant American-style class action litigation onto European continental legal systems, including but not limited to (1) a lack



civil law countries' emphatic adherence to a central "adversary" principle of justice impeded efforts towards enactment of collective redress regimes.<sup>166</sup> In essence, the European adversary principle, derived from natural law, expresses a fundamental day-in-court right that is conceived of as intrinsic to human nature and an individual's very personhood.

In the twenty-first century, however, the traditional European resistance to class litigation has significantly changed, with almost all EU countries now embracing some form of collective redress mechanisms.<sup>167</sup> While it is beyond the scope of this Article to discuss the array of aggregative approaches EU countries have adopted, it is significant to note that all—with three exceptions<sup>168</sup>—have sought to preserve the adversary principle within collective redress rules.<sup>169</sup> The EU countries, then, have maintained the autonomy principle by conditioning collective redress on the opt-in principle: that is, persons must individually affirm and consent to joining any collective action.<sup>170</sup>

This is in stark contrast to the American approach to class litigation, which affords no right of consent to participate in mandatory class

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of entrepreneurial lawyering; (2) different attorney fee regimes; (3) a lack of contingency fees; (4) a lack of punitive damages; (5) strong regulatory oversight; (6) strong social and medical support systems; (7) different judicial roles; (8) a lack of jury trials; and (9) different legal and social cultures eschewing litigation and blame. See Linda S. Mullenix, *American Exceptionalism and Convergence Theory: Are We There Yet?* in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 41 (Janet Walker & Oscar Chase eds., 2010) (Proceedings of the International Association of Procedural Law, Toronto Conference on "The Future of Categories"), reprinted at 49 SUPREME CT. L. REV. 2D 41 (2010); see also Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 4–12 (2001).

166. See, e.g., Alessandro Barzagli, *Recognition and Enforcement of United States Judgments in Italy*, 18 N.Y. INT'L L. REV. 61, 79, 81 (2005) (discussing the Italian adversary principle).

167. See, e.g., Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2009, at 7 (discussing European, common law, and other civil law countries that have adopted a class action or aggregate dispute resolution mechanism); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1 (2009) (discussing the same); Janet Walker, *Who's Afraid of U.S.-Style Class Actions?*, 18 SW. J. INT'L L. 509 (2012) (discussing the same).

168. See Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409, 415–27 (2009). The three countries adopting opt-out regimes are Denmark, the Netherlands, and Portugal. *Id.* at 415. All other European countries that have adopted some form of collective redress mechanism have done so on an opt-in basis. *Id.* at 415–20.

169. *Id.* (providing a detailed discussion of EU countries' collective redress mechanisms, and describing a preference for the opt-in principle in most of these law reforms).

170. *Id.*; see also Andrea Conzatti, *The Recognition of U.S. "Opt-Out" Class Actions in China*, 44 GEO. J. INT'L L. 641 (2013) (suggesting that China most likely would not recognize American opt-out class action judgments because of its adherence to the civil law adversary principle).

action litigation,<sup>171</sup> and no opportunity to opt-out. Thus, class members in mandatory class actions can neither expressly nor impliedly consent to the adjudication of their rights. The American class action rule provides an opt-out right only to claimants involved in a Rule 23(b)(3) damage class action.<sup>172</sup> Furthermore, the American opt-out right is available only at the back-end of class action proceedings, after a court has certified a litigation class or provisionally approved a negotiated settlement. In other words, the American opt-out principle affords scant opportunities for meaningful individual participation in aggregate litigation. Moreover, unlike the EU countries, the United States has steadfastly repudiated all efforts to introduce an opt-in principle to its class action rule<sup>173</sup> or embrace the opt-in class in its jurisprudence.<sup>174</sup>

While individual EU countries have forged ahead with enacting an array of different aggregate dispute resolution mechanisms to apply domestically, the supervening EU legislative body—the EU Commission—finally propounded an EU Commission Recommendation on collective redress for all EU member states in August 2013.<sup>175</sup> After several years of exhaustive study and debate, the EU Recommendation sets forth principles for a collective redress mechanism.<sup>176</sup> Significantly for the debate over litigant autonomy, the EU Recommendation authorizes creation of a collective redress mechanism conditioned on an opt-in right.<sup>177</sup> In mandating this opt-in requirement, the EU Parliament eschewed the alternative opt-out mechanism that undergirds the American class action rule, as well as the opt-out principle incorporated by three member states in their individual collective redress legislation.<sup>178</sup> In this fashion, the EU rec-

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171. See FED. R. CIV. P. 23(b)(1)(A), (b)(1)(B), (b)(2). These are the so-called mandatory classes. Claimants who are part of these classes have no right to opt-out of the class, and under American class action jurisprudence, there is no mechanism for opting into the class.

172. FED. R. CIV. P. 23(b)(3) (class action for damages; class claimants must receive notice of the action and the right to opt-out of the class).

173. See Bone, *supra* note 157, at 84–85 (commenting on a pending proposal to amend Rule 23(c) to authorize an opt-in class, to be used only rarely); see also FED. R. CIV. P. 23(c)(4) (Proposed Rule 1993), FED. R. CIV. P. 23(c)(4) advisory committee note (Proposed Draft 1993); Christopher J. Roche, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 VA. L. REV. 1463, 1472–75 (2005) (describing the attempted 1991 reform to Rule 23, which included an opt-in provision to replace the opt-out provisions, but was withdrawn and not submitted to the Advisory Committee).

174. See *Kern v. Siemens Corp.*, 393 F.3d 120 (2d Cir. 2004).

175. Commission Recommendation 2013/396/EU, 2013 O.J. (L 201) 60.

176. *Id.*; see also Resolution on Towards a Coherent European Approach to Collective Redress, EUR. PARL. DOC. P7\_TA(2012)0021 (2012).

177. Commission Recommendation 2013/396/EU, 2013 O.J. (L 201) 60.

178. *Id.*

ognized the fundamental European adherence to the adversary principle, which the EU Commission was unwilling to sacrifice in the interests of achieving collective redress.

*C. Reflections on the Comparative U.S. Preference for an Opt-Out Procedure*

The American preference for an opt-out class procedure, limited to Rule 23(b)(3) damage class actions, is a longstanding bedrock principle of our class action practice.<sup>179</sup> In successive decades, proponents of the opt-out procedure have successfully defeated attempts to amend Rule 23 to require an opt-in rather than an opt-out principle.<sup>180</sup> Nonetheless, this steadfast adherence to the opt-out principle has been justified more by a peculiar American-style pragmatism than by any well-reasoned jurisprudence.<sup>181</sup>

Thus, the arguments marshalled in favor of the opt-out principle tend to run to practical considerations rather than any overarching, philosophical theories of justice—although the practical arguments ultimately are impressed into the service of this loftier arc. Supporters of the opt-out principle generally contend that people are busy, inattentive, lacking in sophistication, or at worst, lazy. In this narrative, only the most energized and attentive claimants will make an effort to join litigation. Hence, any procedure that requires a person to take affirmative steps to join litigation is bound to fail, thereby denying people the right to remediation through their sheer personal inertia. Proponents of the opt-out principle contend that this argument has even greater force in small-claims class litigation, where people have even less incentive to take affirmative steps to join class litigation concerning trivial claims that they may not even care about.

Supporters of the opt-out principle point to studies showing the low rates of opt-out claims in Rule 23(b)(3) actions as proof that people are disinclined to make an affirmative effort to execute steps in their own interests.<sup>182</sup> In this view, then, the opt-out principle accomplishes

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179. The opt-out procedure has been part of Rule 23 since the 1966 Amendments introduced the (b)(3) damage class action category into the revised rule. *See* Mulheron, *supra* note 168, at 427–53 (discussing arguments for and against opt-in and opt-out classes, based on the British experience with the opt-in procedure; arguing in favor of EU countries adopting an opt-out rule instead).

180. *See supra* note 173 (discussing attempts at inducing the Advisory Committee on Civil Rules to amend Rule 23 to adopt an opt-in regime rather than the current opt-out regime).

181. *See, e.g.*, *Kern v. Siemens Corp.*, 393 F.3d 120 (2d Cir. 2004).

182. *See* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims To Preserve the Integrity of Federal Group Wage Actions*, 58 AM. U. L. REV. 515, 544–45 (2009) (noting low participation rates in both opt-in and opt-out actions); *see also* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settle-*

justice by embracing (and binding) the broadest class of claimants who need to do nothing to receive remediation for a violation of rights or other injury. On the contrary, the opt-in principle undermines justice and fairness goals by requiring a person to take affirmative steps to engage in the litigation process, which few will actually exercise.

Moreover, both the plaintiff and defense bars continue to support the American opt-out regime for entirely rational, self-interested reasons, although both sides of the docket are perfectly capable of bending self-serving arguments into more principled rhetoric sounding in fairness themes. On the plaintiffs' side of the docket, class attorneys seek to maximize the size of any class because of the negotiating leverage conferred by the threat of a large class of claimants. Perhaps even more important, the maintenance of a sizeable class of claimants will redound to larger counsel fees accruing through class-wide settlement. To the extent that a front-end opt-in principle might diminish class participation, jeopardize threshold class certification because of a lack of numerosity, undermine negotiation strategy, and imperil large fees, plaintiffs' class action attorneys have little incentive to endorse an opt-in rule.

On the defense side of the class action docket, corporate defendants also support the opt-out principle for entirely different reasons. The opt-out principle assists defendants in securing global peace of all claims, and in this regard, class action defendants actually benefit from the "lazy claimant" stereotype. Precisely because studies demonstrate that few claimants opt-out after receiving notice, defendants are able to bind to a judgment a maximum universe of potential plaintiffs who might otherwise pursue individual claims. This goal of binding the greatest number of class members is the reason why corporate defendants typically insist on so-called "exploding provisions" in class action settlements: that is, that a settlement will explode or be rescinded if the number of opt-out claimants exceeds a certain percentage of the class size.<sup>183</sup>

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ments, 59 FLA. L. REV. 71, 121 (2007) (discussing low opt-out rates); Francis E. McGovern, *Second-Generation Dispute System Design Issues in Managing Settlements*, 24 OHIO ST. J. ON DISP. RESOL. 53, 54 (2008) (noting the extremely low participation rate in claims-made class action settlement); THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 10* (1996) (finding the median opt-out rate in four case studies to be "either 0.1% or 0.2%").

183. See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 925 (1987) (noting that a large number of opt-outs might induce defendants to withdraw from settlements); see also Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV.

Theoretically, it might seem that defendants ought to endorse an opt-in principle if it is true that few will make that effort, thereby undermining the potential for class certification, enhancing defendants' bargaining position, and reducing exposure to class-wide damages and attorney fees. However, this is a counterintuitive conclusion because corporate defendants in complex mass actions generally prefer to negotiate sweeping aggregate settlements that bind all potential claimants (whether lazy or not), on terms of the defendants' own devising, to the alternative of death by a thousand cuts.

The opt-out preference in American class litigation, then, has become firmly entrenched through nearly fifty years of experience that has educated the practicing bar to the strategic and pragmatic advantages of this regime. The attorneys who work these cases have little incentive to reform a system based on a principled litigant autonomy argument. In this, attorneys are supported by a judiciary that reflexively rejects and dismisses the opt-in option as un-American and not supported by any authority.

Thus, the Second Circuit swiftly and curtly repudiated the single experimental attempt to apply an opt-in procedure in an American class action.<sup>184</sup> In presiding over the Austrian ski fire class litigation, which claimed the lives of 155 victims, including eight Americans, Judge Shira Scheindlin conditionally certified a liability-only class predicated on the requirement that foreign claimants affirmatively opt-in to the class.<sup>185</sup> She justified her order of an opt-in class based on her equity powers as a judge;<sup>186</sup> she most likely was concerned that any American class judgment would not be recognized or accorded res judicata effects in the foreign claimants' home countries unless the foreign claimants were afforded an opt-in right.<sup>187</sup> In response, the Second Circuit indicated that equity did not provide a basis for a judge order-

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149, 173 (2003) (commenting that en masse opt-out of high value claims may scuttle opt-out class settlement).

184. *Kern*, 393 F.3d at 124.

185. *In re Ski Train Fire in Kaprun, Austria* on Nov. 11, 2000, 220 F.R.D. 195 (S.D.N.Y. 2004), *rev'd sub nom. Kern*, 393 F.3d 120.

186. *Id.* at 210 (noting that the class action rule itself had equity origins). Judge Scheindlin also based her authority to order an opt-in class on an analogous opt-in procedure under FSLA actions, and citation to two cases suggesting this was permissible. *See id.* at 209–11.

187. *Id.* at 209 (discussing the problem of binding foreign claimants to an American class action judgment in an opt-out class action, and problem of possible lack of preclusion by foreign courts); *see also* Antonio Gidi, *The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America*, 37 *BROOK. J. INT'L L.* 893 (2012) (discussing the problem of res judicata effects of American class action judgments by foreign nation states); Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 *TUL. L. REV.* 1 (2011) (discussing the same); Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 *CORNELL L. REV.* 87 (2011) (discussing the same); Rhonda Wasserman, *Transna-*

ing an opt-in class, noting that there was absolutely no authority in Rule 23 or American class action jurisprudence to support certification of an opt-in class.<sup>188</sup>

The debate surrounding the American opt-out preference is advanced solely with reference to class action litigation, but has little valence for nonclass litigation that is not subject to the class action rule. Even if the Advisory Committee on Civil Rules were somehow persuaded to endorse an opt-in procedure for Rule 23, this would have no authoritative impact—other than as a persuasive model—on nonclass aggregative techniques currently deployed to resolve mass disputes. In this regard, the *Principles of the Law of Aggregate Litigation*,<sup>189</sup> setting forth broad principles to govern disputes not subject to the class action rule, endorsed an opt-in principle for such litigation. In so doing, they cited and relied on Judge Scheindlin's decision in the Austrian ski fire litigation.<sup>190</sup>

## V. CONCLUSION

As indicated above, the debate over litigant autonomy versus collective redress has taken on a new life in the twenty-first century, particularly as the litigation landscape has been transformed by the emergence of large-scale nonclass aggregative disputes. Generally, advocates on both sides of the debate fail to acknowledge—let alone give credence to—the legitimate competing values on either side, but instead have retreated into well-worn, polarized camps that largely resonate in the same debate that played out in the 1980s and 1990s. What has changed, however, is the enhanced sophistication of the academic theories brought to bear in the debate.

Nonetheless, scholars, jurists, and practicing lawyers have generally dug in on one side or the other, and rigidly maintain that justice and fairness is achievable only through their particular vision of either individual or aggregate dispute resolution. Meanwhile, the commentators who have attempted to find some middle path that acknowledges and accounts for the competing values of litigant autonomy and collective redress have only been able to offer somewhat unrealistic, idealistic proposals that are unlikely to gain traction in the real world.

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*tional Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313 (2011) (discussing the same).

188. *Kern*, 393 F.3d at 128. The Court rejected all three bases upon which Judge Scheindlin issued her order. *Id.* at 125–29.

189. A.L.I., *supra* note 129, § 2.10, at 176–77 (“Aggregation by Consent”) (rejecting the Second Circuit’s holding in *Kern* prohibiting an opt-in class as incorrect).

190. *Id.* at 177 cmt. a.

The current challenge, then, is to rethink the problem of how to preserve litigant autonomy in the age of collective redress. It seems clear that the solution will not be found in the Advisory Committee's tinkering at the edges of the existing class action rule, or by urging judges to do something different or better in their oversight of either class or nonclass litigation. Moreover, half-baked efforts at providing litigants with some enhanced opportunities for participation may run the risk of devolving into little more than forms of autonomy window-dressing, without meaningfully addressing the fundamental human dignity and participation concerns that underlie the autonomy principle.

The EU *Principles for Collective Redress*,<sup>191</sup> mandating an individual's opt-in election as a condition for participation in an aggregate resolution of mass claims, supplies fertile ground for reconsidering the American resistance to the opt-in alternative. The opt-in principle, long advocated by Professor Redish as the basic construct underlying democratic participation in class litigation, merits more thoughtful consideration than the cursory dismissal typically accorded in American deliberations.<sup>192</sup> Moreover, the EU countries have agreed upon the necessity for the opt-in principle as it applies to collective redress mechanisms—entirely apart from the American class action context. In an interesting example of procedural convergence, perhaps reflecting on the EU's preference for opt-in regimes, the *Principles of the Law of Aggregate Litigation* also similarly has endorsed the opt-in principle.<sup>193</sup>

It should be noted that the requirement of an opt-in regime is only a first step towards accomplishing a measure of litigant autonomy within collective redress settings. But requiring individuals to opt-in is an important threshold recognition that affirmative consent is a more robust expression of litigant autonomy than its alternative of implied consent through failure to opt-out. American jurisprudence, then, has it backwards: in the class action arena, only after significant litigation events have occurred, up to and including class certification and settlement negotiations, are individual litigants afforded a right to exit the class. In the absence of electing this option, class action jurisprudence

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191. Commission Recommendation 2013/396/EU, 2013 O.J. (L 201) 60.

192. See John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 911 & n.54 (citing authority); see also John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1446–47 (2003) (arguing for class settlements to bind only those claimants who opt in).

193. A.L.I., *supra* note 129, § 2.10, at 176–77 (discussing the possibility of aggregation by actual consent of claimants in exceptional situations).

determines that individuals have impliedly consented to an aggregate resolution of individual claims.<sup>194</sup>

Additionally, there is simply no right of consent in mandatory class actions, based on the theoretical notion of class cohesion and homogeneity. And, as twenty-first century complex litigation has demonstrated, the questions of express or implied consent to aggregate resolution of individual claims is even further exacerbated in the non-class context. In the absence of a Rule 23 amendment to include a litigant opt-in requirement—which is highly unlikely, given the results of historical attempts—there are few other institutional or procedural mechanisms to accomplish even this limited form of litigant autonomy.

In reconceptualizing the problem of litigant autonomy in the age of collective redress, it is important to begin from a position that recognizes this is not a zero-sum problem: that according individual autonomy does not necessarily defeat aggregative dispute resolution techniques. Much of the debate, spanning decades, has posited that the principle of litigant autonomy is in intractable and unresolvable tension with aggregative settlement, and one must give way for the other. However, providing meaningful measures of litigant autonomy need not be the enemy of efficient and fair resolution of mass claims.

The opt-in principle is a useful starting point to secure a degree of litigant autonomy, but even this must be accomplished with knowing, informed, and intelligent decision making.<sup>195</sup> The opt-in principle ought to be mandated at the very outset of proposed aggregate litigation and not deferred until some later time when individual participation opportunities have been significantly diminished or eliminated. Moreover, preserving litigant autonomy under collective redress regimes should not end with an opt-in right, but should incorporate practical and meaningful opportunities for litigant participation through collective proceedings.

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194. See Leslie, *supra* note 182, at 120–23 (stating that courts approving settlements misinterpret failure to opt-out as approval of settlement terms).

195. See generally Linda S. Mullenix, *Mass Tort Funds and the Election of Remedies: The Need for Informed Consent*, 31 REV. LITIG. 833 (2012) (discussing the need for informed consent mechanisms to protect the rights of prospective litigants forced to elect between individual litigation or a relief fund award forfeiting a litigation right).



