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CALIBRATING PARTICIPATION: REFLECTIONS ON PROCEDURE VERSUS PROCEDURAL JUSTICE

*Elizabeth Chamblee Burch**

INTRODUCTION

Procedure plays a pivotal role in our justice system—it impacts how and whether substantive rights are enforced and whether citizens view courts as legitimate institutions. Unfair procedures have been labeled “the single most important source of popular dissatisfaction with the American legal system.”¹ And empirical studies demonstrate that whether people are satisfied with the process and perceive it as being procedurally fair significantly impacts their opinions of whether courts are legitimate sources of power and authority, often even more so than whether they win or lose.² Nevertheless, whether it’s because of these qualities or in spite of them, procedure is a prime target for strategic gamesmanship.

In most government branches, corporations easily have the upper hand. The average American cannot demand an audience with the President or lobby Congress with any real hope. But she can sue in hopes of bringing corporate wrongdoing to justice³—or so goes the

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1. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC’Y REV.* 513, 517 (2003) (quoting Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 *LAW & SOC’Y REV.* 427, 434 (1977)).

2. See, e.g., E. ALLAN LIND ET AL., INST. FOR CIVIL JUSTICE, R-3708-ICJ, *THE PERCEPTION OF JUSTICE: TORT LITIGANTS’ VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION AND JUDICIAL SETTLEMENT CONFERENCES*, v, 50–53, 51 tbl.4.1 (1989). (“Although winners were more satisfied with their experiences than losers, the litigants’ satisfaction with their experiences had less to do with actual case outcomes, costs, and delay than with how the litigants’ experiences with the system compared with their expectations.”); Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience*, 18 *LAW & SOC’Y REV.* 51, 69–70 (1984); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 65, 68 (Joseph Sanders & V. Lee Hamilton eds., 2001) (“While lawyers and judges often think that people’s reactions to their experiences are driven by whether or not they ‘win’ their case, that position is not supported by empirical research on disputing.”).

3. As Arthur Miller writes:

traditional telling of the litigation story.⁴ Painting the plaintiff as the prima donna, she gets to decide who to sue, what claims to bring, and where to file suit. The defendant, by contrast, is stuck with a few reactive tools: counterclaims, impleader, removal, and transfer. That is, unless the plaintiff signed a contract with an arbitration or forum selection clause, or the defendant is not subject to personal jurisdiction in her state, or the only way to gain the information necessary to plausibly plead her claim is through discovery, or her case is transferred or swept up in multidistrict litigation. Slowly, her litigation control and participation opportunities begin to wane in the only governmental branch available to her.

So begins the alternative version of the litigation story. Like the wolf's retelling of the *Three Little Pigs* in which "[t]he real story is about a sneeze and a cup of sugar[.]"⁵ the corporate account depicts plaintiffs running amok with frivolous claims. Nationwide corporations faced a slew of injustices: worthless lawsuits, liability rules that leaned too heavily in plaintiffs' favor, biased local juries, runaway juries awarding jackpot-level punitive damages, drive-through class certification in state courts, and class actions that blackmailed corporations into settling.⁶ Innovation and creativity suffered, market

The efforts of public interest attorneys go well beyond the classic civil rights and legislative reapportionment battles. Asbestos is held in check by the private bar. Tobacco is cabined by the private bar. Defective pharmaceuticals such as diet drugs, Vioxx, and other products are removed from our midst. Illicit financial and market practices of companies such as Enron are halted by the private bar. . . . Fewer Americans die or become incapacitated by defective products or toxic substances, and important social and economic policies are enforced because of the work of these lawyers.

Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 299–300 (2013) (footnotes omitted).

4. As Tom Tyler has explained: "[T]he judiciary fares reasonably well in contrast to the other branches of government [in terms of trust]. The proportion of Americans expressing a similar level of trust in the judiciary was 75% in 2003. However, even the courts have lost legitimacy in recent years." Tom R. Tyler, *The Psychology of Aggregation: Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711, 721 (2015).

5. JON SCIESZKA, *THE TRUE STORY OF THE 3 LITTLE PIGS* 4 (1989).

6. Marc Galanter might label this the "jaundiced view." Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717–21 (1998) ("The legal system can be restored to sanity only by 'reform.' The needed reforms, it turns out, make it more difficult for individual claimants to use the system to challenge corporate entities, reduce levels of accountability, place ceilings on remedy, and in some cases move organizational disputes with workers, customers, and patients from public forums into 'alternative' forums sponsored by the corporation itself."); see also Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1090 (2012) (dubbing this part of the "cost-and-delay narrative").

forces were hamstrung,⁷ and something had to be done. Civil justice or “tort reform” followed apace and the rhetoric began.⁸ When reform faltered substantively at the federal level, it trickled into the states’ laws and manifested in federal civil procedure despite, as Marc Galanter put it, “a now-formidable mass of empirical data that shows that so many of its key assertions are at best exaggerated and in many cases entirely mistaken[.]”⁹

This tug-of-war is important to contextualize a seemingly narrow procedural point about plaintiffs’ ability to meaningfully participate in litigating their rights, particularly when the same defendant harms many people in similar ways. Now it is the rare plaintiff who sues a nationwide (or worldwide) corporation in her home jurisdiction and can litigate and resolve her claims there. Although several factors play a role in this phenomenon (including tort reform efforts like the Class Action Fairness Act¹⁰), one of the most significant factors is Supreme Court jurisprudence over the last ten years in the areas of arbitration,¹¹ personal jurisdiction,¹² pleading,¹³ and class actions.¹⁴ Of course, recent cases aren’t the first evidence of a shift away from procedural justice norms. Commentators have long lamented the “vanishing trial” and the rise of summary judgment,¹⁵ often citing those

7. *E.g.*, VICE PRESIDENT OF THE UNITED STATES, PRESIDENT’S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 6 (1991); Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness’s Agenda for Legal Reform*, 75 JUDICATURE 244, 245–48 (1992).

8. *See, e.g.*, Galanter, *supra* note 6, at 734–37 (debunking the pervasive myth that America has 70% of the world’s lawyers); Miller, *supra* note 3, at 332 (“Politicians and special interests, sometimes aided, perhaps ‘innocently,’ by the media, vilify the plaintiffs’ bar as fee-hawking ambulance chasers. Americans have been defamed as fortune hunters trying to win the litigation lottery. Bogus caseload statics are propagated, while empirical data is ignored” (footnote omitted)); AM. TORT REFORM FOUND., <http://www.judicialhellholes.org> (last visited Oct. 5, 2015) (publishing annual reports of abuses in the judicial system and “focusing primarily on jurisdictions where courts have been radically out of balance”).

9. Galanter, *supra* note 6, at 722. *See generally* Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 7 DENV. U. L. REV. 77, 77–91 (1993) (exposing the inaccurate statistics used to portray this view).

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

11. *E.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

12. *E.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

13. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

14. *E.g.*, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

15. *See, e.g.*, Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge’s Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 101 (2010); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL & LEGAL STUD. 459, 459 (2004); Patricia Lee Refo, *The Vanishing Trial*,

trends as evidence of “[m]erit-phobia,” “death by a thousand procedural cuts,” and a general demolition of both democratic tradition and the civil justice system’s credibility.¹⁶

At the heart of these concerns lies a persistent theme: the need for citizen access to, and participation in, convenient dispute resolution. Other scholars writing about arbitration,¹⁷ closing the courthouse doors,¹⁸ and the democratizing function of trials¹⁹ have already tackled many facets of this theme. Accordingly, this Article hones in on a slightly different aspect: securing and curtailing participation rights through both aggregating and pleading. What participation rights the Supreme Court secures by protecting individuals’ rights against virtual representation and preclusion, it takes away by imposing heightened pleading standards. Pleading is participating; it’s the crucial first step. Closing the courthouse doors when defendants hold the information plaintiffs need to plausibly plead their claims forecloses all manner of justice—not just procedural justice.

Part II begins by explaining why voice matters and how, after many commentators interpreted *Mathews v. Eldridge*²⁰ as adopting a purely instrumental view of participation, the Court’s more recent decisions in *Taylor v. Sturgell*²¹ and *Smith v. Bayer Corp.*²² regard participation and its corresponding “day-in-court” ideal as doing more than just ensuring accurate outcomes.²³ Those opinions take significant measures to protect nonparties’ participation rights against the gradual creep of both preclusion doctrines and aggregate litigation. By striking down efforts to extinguish nonparties’ day in court through virtual representation and proposed but never certified class actions, the Court has shifted toward the dignitary view of participation: allowing some subsequent cases to proceed improves the outcome’s accuracy no more than any “do-over” would. Viewed solely in that light, the rationale is

LITIGATION, Winter 2004, at 1, 4; William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73 (2006).

16. See, e.g., Miller, *supra* note 3, at 307–09.

17. See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012).

18. See, e.g., Judith Resnik & Dennis Curtis, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011); see also Erwin Chemerinsky, *Closing the Courthouse Doors: October Term 2010*, 14 GREEN BAG 2d 375 (2011), http://www.greenbag.org/v14n4/v14n4_articles_chemerinsky.pdf; Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

19. See *supra* note 15 (citing sources discussing vanishing trials).

20. 96 S. Ct. 893 (1976).

21. 553 U.S. 880 (2008).

22. 131 S. Ct. 2368 (2011).

23. See *infra* notes 32–68 and accompanying text.

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nonsensical because it undercuts the entire premise behind preclusion doctrines. Rather, the Court recognized that participation does more than simply increase accuracy—it promotes litigants’ dignitary interests and ensures the outcome’s legitimacy.²⁴

Still, protecting nonparties’ right to participate provides lower courts with no guidance on how litigants might exercise that right within aggregate litigation. In aggregate litigation, a claimant is one of many (or an absent class member), attorney-client relationships are attenuated at best, inclusion within the group may be mandatory, and claimants may not even know about the action until a settlement has been proposed. Intuitively, the context must matter: when claims are personal to the holder, like personal injury claims, disputants are more likely to feel slighted by inadequate participation than they are in small-claims class actions over a few dollars. But a claim’s personal nature fails to explain the lack of participation in some mandatory class actions. For example, absent class members in school desegregation litigation held strong and conflicting views about bussing their children to poor but integrated schools.²⁵ Nevertheless, as a Rule 23(b)(2) class, the parties did not have to notify affected parents until after they proposed a settlement. And had the case been fully litigated, not settled, no notice whatsoever would have been required.

Accordingly, Part III.A builds a framework for considering participation rights in aggregate litigation based on underlying substantive rights, group dynamics, and empirical studies on procedural justice. Classifying the underlying substantive rights at stake along a spectrum that ranges from individually held rights with divisible remedies to group rights requiring indivisible remedies may help predict participation expectations as well as explain the pragmatic results. For instance, individuals litigating their own personal injury claims are likely to have strong day-in-court expectations (i.e., they will be able to present the specific facts of their case to the judge without others interfering). At the other end of the spectrum, for example, when a state sues another state to secure water rights for its citizens, citizens might voice

24. In this sense, the Court extended its core rationale in *Martin v. Wilks* that “one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” See 490 U.S. at 761 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

25. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 471 (1976); Leo Crowley, Note, *Due Process Rights of Absentees in Title VII Class Actions—The Myth of Homogeneity of Interest*, 59 *B.U. L. REV.* 661, 666–80 (1979) (arguing that the divergent interests in Title VII cases cause inadequate representation).

their concerns in town hall meetings, but it's unlikely that they'd expect the court to entertain their grievances directly.

Moving away from those two poles toward the middle of the spectrum, when a group is highly cohesive, as it might be when aggregate rights are concerned, members may feel comfortable participating through a representative. In organized groups such as unions, opportunities to participate and dissent within group governance might satisfy members' participation needs such that they can speak with one voice in court. The practical can align with the personal: group rights require a group remedy that inures to all or to none equally. Thinking of voice in this way reflects procedure's fundamentally interpersonal nature in governing and mediating citizens' interactions with one another and the courts, but it also aligns with research on group engagement. Put simply, group identity can play a primary role in shaping members' participation expectations.

As the school desegregation cases illustrate, there are some stumbling blocks to ensuring adequate participation in any kind of mandatory class action or involuntary joinder. Substantive rights and day-in-court expectations do not always neatly divide into aggregate or individual rights or all-or-nothing participation, as a spectrum suggests. The middle of the spectrum often proves the most challenging. Group members may be only loosely affiliated even when litigating aggregate rights that demand a single remedy. Thus, they may have vastly conflicting opinions about legal theories, presenting evidence, and shaping the aggregate remedial relief, yet receive no notice until parties propose a settlement.²⁶ Accordingly, Part III.B suggests means for improving voice in mandatory actions by notifying members upon certification, not just settlement.

Finally, Part IV returns to recent Supreme Court cases to expose a fundamental inconsistency in the Court's day-in-court jurisprudence. Although Part II describes the Court as taking exemplary measures to shield individuals' participation rights from the steady drum beat of efficiency—protecting them against the swell of virtual representation and uncertified classes—the Court then faltered in deciding pleading cases. The majority in *Bell Atlantic Corp. v. Twombly*²⁷ and *Ashcroft v. Iqbal*²⁸ failed to connect pleading with participating. The complaint is a plaintiff's first opportunity to voice her concerns to the court, to

26. Rule 23(c)(2) allows, but does not require, notice in mandatory actions, although the "court must direct notice in a reasonable manner to all class members who would be bound" by a proposed settlement under Rule 23(e)(1). FED. R. CIV. P. 23.

27. 556 U.S. 662 (2009).

28. 550 U.S. 544 (2007).

state a claim that entitles her to relief, and to open the courthouse doors. Curtailing that chance by requiring plaintiffs to state facts, the most plausible interpretation of which entitles them to relief, forecloses further participation opportunities when the defendant possesses that information. Consequently, Part IV investigates the cost-and-delay myth that corporations and the Court cite to justify plausibility pleading in *Twombly* and *Iqbal*. After determining that those concerns lack empirical support and that the Court undermined democratic rulemaking procedures by instituting heightened pleading standards, one is left to wonder whether the last branch of government truly remains open to the public. After all, guaranteeing an individual's right to her day in court is a right often devoid of meaning if it applies only to plaintiffs who already possess the necessary facts.

Of course, state courts are still open. One possible fallout is that plaintiffs who can avoid federal jurisdiction will seek respite in those state courts that have not inhibited participation via pleading.²⁹ And most litigation takes place in state court anyway. So, whether we should be concerned about recent Supreme Court decisions plays into the longstanding debate over whether parity exists between federal and state courts.³⁰ As the recent clash over gay marriage rights in Alabama illustrates, the parity debate rages on with important substantive rights hanging in the balance.³¹ Nevertheless, this Article neither attempts to resolve that debate nor claims that procedural justice is the only thing disputants care about. Instead, it links participation to courts' legitimacy, provides a framework to help judges

29. A 2010 report noted that twenty-four states adopted tighter pleading standards with twenty-seven maintaining traditional notice pleading. A. Benjamin Spencer, *Pleading in State Courts After Twombly and Iqbal*, in POUND CIVIL JUSTICE INST., 2010 BACK TO THE FUTURE: PLEADING AGAIN IN THE AGE OF DICKENS? 2 (2010), http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2038349_code392707.pdf?abstractid=2038349&mirid=1.

30. *E.g.*, Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that parity is a myth and that constitutional litigators prefer federal courts); Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988).

31. A federal judge legalized same-sex marriage, but Roy Moore, the Alabama Supreme Court Chief Justice, ordered judges not to issue marriage licenses to same-sex couples. Alan Blinder & Richard Pérez-Peña, *Gay Marriage in Alabama Begins, But Only in Parts*, N.Y. TIMES, Feb. 10, 2015, at A1. As Burt Neuborne recognized, procedural parity is an important factor. He defined this term as:

[T]he better forum as the one more likely to assign a very high value to the protection of the individual, even the unreasonable or dangerous individual, against the collective, so that the definition of the individual right in question will receive its most expansive reading and its most energetic enforcement.

Neuborne, *supra* note 30, at 727.

understand litigants' varying voice expectations in aggregate litigation, and registers alarm over limiting court access through plausibility pleading.

II. PROTECTING NONPARTIES' PARTICIPATION IDEALS

It may seem odd, but people are often more concerned with just procedures than fair outcomes.³² To be sure, outcomes matter, but fair treatment by the decision maker matters, too. Because democratic systems like ours take citizen preferences into account when designing process, procedure impacts the judiciary's institutional legitimacy.³³ Institutional legitimacy is critical for obvious reasons: not everyone can have everything they want, so society must be willing to accept judicial decisions, win or lose.³⁴ And study after study shows that disputants are more willing to accept and voluntarily comply with decisions that are reached fairly.³⁵

Over the years, scholars have described procedural justice components in various ways.³⁶ Tom Tyler, one of the most influential scholars in this field, has identified four "primary factors" that contribute to procedural fairness, including "opportunities for participation (voice), the neutrality of the forum, the trustworthiness of the authorities, and the degree to which people receive treatment with dignity and respect."³⁷ Even though our system is designed with these principles in mind,³⁸ procedures can drift away from their procedural justice moorings.

Take forum shopping, for example. When people litigate against those outside their social group—say individuals versus large corporations—they are particularly concerned with gaining an upper hand via

32. Tyler & Lind, *supra* note 2, at 71; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do with It?*, 79 WASH. U. L.Q. 787, 818, 818 n.150 (2001) (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 66–70, 205 (1988)).

33. LIND & TYLER *supra* note 32, at 63–64.

34. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 118 (2000). "The willingness to defer to social rules flows from judgments that authorities are legitimate and ought to be obeyed." *Id.* at 120.

35. *Id.* at 119 (citing numerous studies).

36. For instance, in 1980, Gerald Leventhal proposed that people use six criteria when evaluating procedural fairness: (1) whether all interested parties' views were represented; (2) the decision maker's consistency in applying substantive laws and legal rules; (3) the use of nonbiased decision makers; (4) whether the decision was based on accurate information; (5) whether there were error correction mechanisms; and (6) whether those involved in decision making acted ethically. LIND & TYLER, *supra* note 32, at 107.

37. Tyler, *supra* note 34, at 121.

38. Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 149 (2011).

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process and forum selection.³⁹ And social-identity theorists have empirically shown that people respond more positively to authority figures when they believe that those figures share common moral values.⁴⁰ But arbitration and multidistrict litigation alter forum selection in ways that may move plaintiffs away from their preferred geographic location (making participation difficult) and change the decision maker to someone who may not share the plaintiff's values, experience, or community norms.⁴¹ So, while public support for courts hinges on the notion that authorities share common moral values with the communities they serve,⁴² transfer and arbitration can undermine that support, particularly if claimants perceive the new authority as biased.⁴³

In some respects then, procedural justice can lead to a zero-sum analysis: increasing control and participation for plaintiffs by allowing them to remain in their chosen fora might decrease defendants' justice perceptions. Yet, this need not always be the case. Even forum selection is filled with compromises: plaintiffs choose state court, a defendant removes to federal court, but that court is often not located so far away that plaintiffs can't participate or that the judge becomes atypical. Likewise, providing plaintiffs with increased participation rights need not detract from defendants' voice opportunities.⁴⁴ But aggregating plaintiffs can impact their voice, too. And allowing thousands of individuals to control their own cases would undermine the very purpose of joinder—to increase efficiency and consistency.

Before tackling the aggregation-versus-voice conundrum, it is helpful to understand what procedural justice theorists mean by participa-

39. Tyler, *supra* note 34, at 123.

40. "When people think that group authorities represent their values, they identify and cooperate with them." Jason Sunshine & Tom Tyler, *Moral Solidarity, Identification with the Community and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group's Moral Values*, 66 SOC. PSYCHOL. Q. (SPECIAL ISSUE) 153, 162 (2003).

41. Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 686 (2013).

42. Sunshine & Tyler, *supra* note 40, at 154.

43. See LIND ET AL., *supra* note 2, at 65–66; TOM R. TYLER, WHY PEOPLE OBEY THE LAW 117 (1990) (citing Robert Folger, *A Referent Cognitions Theory of Relative Deprivation*, in 4 RELATIVE DEPRIVATION AND SOCIAL COMPARISON 33 (James M. Olson et al. eds., 1986) and Robert Folger, *Rethinking Equity Theory: A Referent Cognitions Model*, in JUSTICE IN SOCIAL RELATIONS 145 (Hans Werner Bierhoff et al. eds., 1986)); E. Allan Lind & Robin I. Lissak, *Apparent Impropriety and Procedural Fairness Judgments*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 19, 26–27 (1985); R.A. Macdonald, *A Theory of Procedural Fairness*, 1 WINDSOR Y.B. ACCESS JUST. 3, 19 (1981); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Value of Procedural Due Process*, 95 YALE L.J. 455, 482–91 (1986).

44. Nevertheless, there is evidence supporting the notion that defendants are winning the procedure battle. And because procedure is often comparative, when people judge their circumstances vis-à-vis others, the relative deprivation theory suggests that recalibration may be in order. Hollander-Blumoff, *supra* note 38, at 150 n.125.

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tion. Participating allows litigants to feel some control over their cases by presenting evidence and stating their case.⁴⁵ This includes basic due process rights like ensuring that those who are bound by a decision have the opportunity to take part (and be heard) in adjudication, but it also includes observing the proceedings, cross-examining witnesses, and hearing the judge's decision.⁴⁶ Nevertheless, social psychologists, philosophers, and even legal scholars have set forth at least two theories as to why participation matters.⁴⁷

First, the instrumental view posits that participation is valuable because voice influences the case's outcome (decisional control or outcome control).⁴⁸ By this thinking, participation is necessary to produce substantively accurate outcomes and diminish error.⁴⁹ Participation might thus be curtailed when it fails to enhance accuracy, as it might in some class actions. If the class representative is truly adequate and typical, adding more voices may not enhance the outcome, so voice could be marginalized. Conversely, participation could im-

45. LIND ET AL., *supra* note 2, at 61; TYLER, *supra* note 43, at 116 (citing Tom Tyler, et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72 (1985)); see John Thibault & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 546–47, 558 (1978).

46. MICHAEL D. BAYLES, PROCEDURAL JUSTICE: ALLOCATING TO INDIVIDUALS 40 (1990) (“The common-law principle of an opportunity to be heard has typically been taken to include rights (1) to adequate notice, (2) to pre-hearing discovery, (3) to an adjournment, (4) to present evidence, (5) to rebut evidence and often to cross-examine adverse witnesses, (6) to a copy of the transcript, and (8) [sic] to reasons for a decision.” (citing GEOFFREY A. FLICK, NATURAL JUSTICE: PRINCIPLES AND PRACTICAL APPLICATION 69 (1984) and Roderick A. Macdonald, *Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice*, 39 FLA. L. REV. 217, 237 n.36 (1987))); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 280 (2004); see *Martin v. Wilks*, 490 U.S. 755, 759–62 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 251 (1994); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (contending that “the promotion of participation and dialogue by affected individuals in the decisionmaking process” is a central feature of the Due Process Clause). See generally Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 269 (1992) (arguing that the extent of a nonparty's right to relitigate claims or issues should vary with the type of case).

47. Procedural due process scholarship divides along similar lines. Martin H. Redish & William J. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1889 (2009) (discussing the two camps).

48. TYLER, *supra* note 43, at 116; E. Allen Lind et al., *Voice, Control & Procedural Justice*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990).

49. Robert Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1015–16 (2010); see *Mathews v. Eldridge*, 424 U.S. 319 (1976) (providing a balancing test that has typically been used to protect systemic accuracy, not noninstrumental values). *But see* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976) (criticizing *Mathews* as too narrow).

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prove accuracy in settlement class actions. In settlement classes, the power balance tips in defendants' favor by allowing them to "[seek] closure on the cheap by taking advantage of the absence of class members and the weak bargaining position of would-be class counsel."⁵⁰ Consequently, allowing class members to intervene routinely to protect their rights might improve the outcome's accuracy when the adversarial process breaks down.⁵¹

Second, the noninstrumental perspective suggests that participation is important for reasons beyond buttressing accuracy; process control is independently valuable because people appreciate being able to state their position to a decision maker.⁵² In this sense, participating enhances dignity and legitimacy regardless of whether it improves the outcome's accuracy.⁵³ Recent studies have embraced this view and posited that people value the chance to explain their side regardless of whether their story ultimately influences the third party's decision.⁵⁴ Although these two different views are not mutually exclusive, they do have important implications for large-scale litigation when participation opportunities are slim.

After the Supreme Court decided *Mathews v. Eldridge* in 1976, many commentators read the Court's multi-factor balancing test as protecting only systemic accuracy—the instrumental view.⁵⁵ The test itself seemingly accommodates both instrumental and noninstrumental concerns: it benignly asks courts to balance private interests and the risk that those interests will be erroneously deprived against the public or governmental interest.⁵⁶ Nevertheless, many commenta-

50. Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 953 (2014).

51. "Affording class members such a right of intervention will not render class litigation unmanageable, but rather has the potential to significantly improve the quality of representation afforded even to absent class members." Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 573 (1997).

52. TYLER, *supra* note 43, at 116; Lind et al., *supra* note 48, at 952.

53. See Redish & Katt, *supra* note 47, at 1890.

54. See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 162 (1985) (discussing the findings of Thibaut and Walker in their study of whether "adversarial" or "inquisitorial" trial procedure better serves the purposes of justice); TYLER, *supra* note 43, at 133; see also LIND & TYLER, *supra* note 32, at 96–97.

55. See, e.g., Mashaw, *supra* note 49, at 48 ("The [*Mathews*] Court conceives of the values of procedure too narrowly: it views the sole purpose of procedural protections as enhancing accuracy, and thus limits its calculus to the benefits or costs that flow from correct or incorrect decisions. No attention is paid to 'process values' that might inhere in oral proceedings or to the demoralization costs that may result from the grant-withdrawal-grant-withdrawal sequence to which claimants like *Eldridge* are subjected.").

56. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

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tors subsequently interpreted this test as aiming to improve accuracy and minimize error, not to heed litigants' dignitary concerns.⁵⁷

More recent opinions, however, cater to noninstrumental concerns by permitting repetitious litigation that arguably does little to improve accuracy—at least not beyond the gains that anyone might expect from a second chance. In both *Taylor v. Sturgell* and *Smith v. Bayer*, the Court might have reasoned that allowing a second plaintiff to relitigate the same Freedom of Information Act (FOIA) request or certify a similar class action after other courts had previously denied both would do little to correct error or improve the outcome. And relitigating those requests would do nothing to further efficiency or consistency. But the Court permitted subsequent litigation to proceed in both cases.

In *Taylor*, the Court gutted the virtual representation doctrine. Virtual representation precluded individuals from relitigating based on a watered down version of adequate representation shorn of its class-certification protections.⁵⁸ The case involved two friends, both vintage aircraft enthusiasts, who separately filed FOIA requests for old F-45 airplane records. Although the plaintiffs lacked any legal relationship, the appellate court held that Greg Herrick's earlier suit precluded Brent Taylor's later request for the same information because Herrick was Taylor's "virtual representative" and the two used the same lawyer.⁵⁹ When Taylor brought his case, he sought to litigate two issues that Herrick failed to raise relating to the recapture of protected trade secret status.⁶⁰ Thus, one might contend that instrumental concerns dictated the Court's decision—allowing the second suit would lead to a more accurate outcome. But that rationale alone would erode preclusion doctrines entirely; many losing litigants would learn from their mistakes and could improve their outcome with a "do-over."⁶¹ The result makes more sense from a noninstrumental perspective: Taylor did not have a "full and fair opportunity to litigate[.]" and precluding him based on virtual representation would un-

57. See, e.g., Mashaw, *supra* note 49, at 48 ("[A]s the Court seeks to make sense of a calculus in which accuracy is the sole goal of procedure, it tends erroneously to characterize disability hearings as concerned almost exclusively with medical impairment and thus concludes that such hearings involve only medical evidence, whose reliability would be little enhanced by oral procedure."); Woolley, *supra* note 51, at 590–91 ("[The *Mathews* test] has usually been viewed solely as a means to ensure procedures whose accuracy is commensurate with the interests at stake.").

58. *Taylor v. Sturgell*, 553 U.S. 880, 885 (2008).

59. *Id.*

60. *Id.* at 887–88.

61. A plaintiff might, for example, seek to relitigate the same issues a second time by switching adversaries, a proposition that nonmutual, defensive issue preclusion prevents. See *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328 (1971) (discussing issue preclusion).

dermine the “deep-rooted historic tradition that everyone should have [his or her] own day in court.”⁶²

Similar concerns dictated the outcome in *Bayer*.⁶³ In multidistrict proceedings consolidated in Minnesota, Bayer successfully defeated a motion to certify a class of West Virginia residents who purchased Baycol. When a West Virginia state court subsequently considered whether to certify a similar class of West Virginia purchasers, Bayer persuaded the Minnesota federal court to enjoin the state court from hearing the motion.⁶⁴ The company argued that the second proposed class could not proceed because “an unnamed member of a proposed but uncertified class” had already represented the second proposed class.⁶⁵ Citing the instrumental concern that there was no need to relitigate whether to certify “the same class” alleging “the same legal theories,” the Eighth Circuit agreed.⁶⁶ But this was paradoxical: Bayer wanted to bind the second proposed class representative to a class that never existed. As the Supreme Court made clear in reversing the Eighth Circuit: “Neither a proposed class action nor a rejected class action may bind nonparties.”⁶⁷ Here again, one could cite instrumental concerns—West Virginia disavowed federal Rule 23’s predominance analysis and could thus decide to certify a class when the federal court did not. But the Court did not stop there. It extended *Taylor*’s core day-in-court rationale: “To allow [the first suit] to bind nonparties would be to adopt the very theory *Taylor* rejected.”⁶⁸

III. PARTICIPATING IN AGGREGATE LITIGATION

In many respects, the Supreme Court has done an admirable job of shielding litigants’ participation rights from involuntary collectivization that lacks appropriate safeguards. But participation—much less control—is cursory, at best, in large-scale litigation. Aggregate litigation, from class actions to mass joinder through multidistrict litigation, trades participation and control for efficiency and consistency. It also adds new depth to a wrinkle that is inherent in many procedural justice studies: most studies are performed on parties, not their lawyers. But lawyers’ own impressions can influence their clients’ perceptions, and the way an attorney treats her clients—by spending time commu-

62. *Taylor*, 553 U.S. at 892–93 (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996)).

63. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2378 (2011).

64. *Id.* at 2374.

65. *Id.* at 2379.

66. *Id.* at 2374 (quoting *In re Baycol Prods. Lit.*, 593 F.3d 716, 724 (8th Cir. 2010), *vacated*, No 09–1069, 2011 WL 11747958 (8th Cir. Aug. 4, 2011)).

67. *Id.* at 2380.

68. *Id.* at 2381.

nicating with them and explaining the process, for example—can also affect clients' experiences with the justice system.⁶⁹

Attorneys' time, however, is scarce in aggregate litigation, which is often a numbers game. In class actions, class members are, by definition, absent, and the only communication that most receive comes when the judge decides to certify the class or, more likely, the lawyers have proposed a class settlement. Rules 23(b)(1) and (b)(2) do not require parties to notify class members at all until they reach a settlement even though class membership is mandatory.⁷⁰ Thus, due process and, to some extent, procedural justice seem to hinge on whether the attorney and class representative adequately represented absent members.

The attorney-client relationship is attenuated in multidistrict litigation too; plaintiffs retain their own attorney, but attorneys often represent hundreds of plaintiffs with nominally related claims. Meaningfully communicating and fully informing each client becomes more difficult pragmatically and logistically.⁷¹ Moreover, transferee judges add a layer of bureaucracy by appointing steering committees. Without a seat at this decision-making table, individual attorneys may be unable to effectively voice their clients' concerns, much less control the litigation.⁷² Plus, because most cases settle while in multidistrict litigation, plaintiffs have little to no opportunity for presenting indi-

69. See Hollander-Blumoff, *supra* note 38, at 147 (“Although there are not yet clear data demonstrating the effects of procedural justice assessments by lawyers on clients or of the relationship between specific lawyer behavior and client perceptions, a discussion of procedural justice in litigation would be incomplete without an acknowledgement that both of these perceptions may be important, may differ from one another, and may also be dynamically inter-related.”); Jonathan Casper et al., *Procedural Justice in Felony Cases*, 22 *LAW & SOC'Y REV.* 483, 485 (1988) (suggesting that clients felt the process was, procedurally, more just based on the amount of time they spent communicating with their attorney); William L.F. Felstiner & Ben Pettit, *Paternalism, Power, and Respect in Lawyer-Client Relations*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW*, *supra* note 2, at 39 (suggesting the importance of lawyer-client experiences to clients' procedural justice perceptions); Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 *FORDHAM URBAN L.J.* 473, 495 (2010) (noting that pro se litigants “felt they had a greater opportunity to speak” but those with lawyers felt more in control).

70. FED. R. CIV. P. 23(C)(2), (E).

71. Some attorneys have eased this problem by embracing technology to widely disseminate information. See Robert Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 *U. PITT. L. REV.* 727 (2008); Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 *COLUM. J. L. & SOC. PROBS.* 451 (2012). This is not to say that attorneys representing many clients in the same litigation do not comply with Model Rule of Professional Conduct 1.4, but that the character of the relationship itself changes from a one-on-one relationship to a less personal group setting.

72. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 *N.Y.U. L. REV.* 71, 73–75 (2015).

vidual evidence or taking part in hearings.⁷³ Plaintiffs can, however, decide whether to settle. Yet, some settlements include coercive terms, such as those requiring participating attorneys to recommend the deal to all of their clients and withdraw from representing clients who refuse, that can negate genuine consent and control.⁷⁴

A. *Adjusting Voice To Reflect Underlying Rights
and Group Dynamics*

As this thumbnail sketch of aggregate litigation illustrates, participation differs from bipolar litigation in many respects, even beyond attenuated lawyer-client relationships. Aggregate litigation can impact absent class members, affect groups as a whole, and have quasi-public components. Accordingly, understanding participation requires considering these unique circumstances alongside traditional instrumental concerns about improving accuracy as well as noninstrumental concerns that participation enhances perceived fairness apart from outcomes.

Intuitively, disputants are less likely to feel slighted by inadequate voice opportunities in small claims litigation, such as being overcharged by a dollar or two for an e-book,⁷⁵ than in claims that are personal to the holder, such as having to surgically replace a defective hip implant.⁷⁶ In this sense, procedural justice is context dependent; it

73. This is troubling; hearings are a crucial means to “provide injured parties with an opportunity to express their feelings, state their arguments, present their evidence, describe their losses, and talk about their grievances.” Tyler, *supra* note 4, at 729. See Alexandra D. Lahav, *Participation and Procedure*, 64 DEPAUL L. REV. 513, 524-27 (2015) for the rationales in favor of increased dialogue in this context to facilitate participation.

74. *E.g.*, Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto at 5-6, *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. Nov. 9, 2007) (No. 1657), <http://www.officialvioxsettlemnt.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf>. See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 279-92 (2011), for the many ways in which this agreement arguably ran afoul of the *Model Rules of Professional Conduct*.

75. For example, Apple was sued for price fixing its electronic books. Bob Van Voris, *Apple E-Books Litigation Is Set To Get Resolved for \$450 Million*, CLASS ACTION LITIG. REP. (BNA) (Nov. 21, 2014), http://news.bna.com/clsn/CLSNWB/split_display.adp?fedfid=59380512&vname=clasnotallissues&wsn=504174000&searchid=26105957&doctypeid=1&type=date&mode=doc&split=0&scm=CLSNWB&pg=0.

76. In 2010, Johnson & Johnson and DePuy recalled 93,000 hip implants, leading to lawsuits claiming that the recalled devices were defective and caused metal poisoning in patients. Jef Feeley, *J&J To Pay as Much as \$420 Million More To Resolve Additional ASR Hip Implant Suits*, CLASS ACTION LITIG. REP. (BNA) (Feb. 23, 2015), http://news.bna.com/clsn/CLSNWB/split_display.adp?fedfid=63780035&vname=clasnotallissues&wsn=503096000&searchid=26105962&doctypeid=1&type=date&mode=doc&split=0&scm=CLSNWB&pg=0.

varies based on litigants' claims and expectations.⁷⁷ But this notion that participation rights should fluctuate depending on whether a lawsuit is personal to the holder fails to fully explain the lack of voice opportunities in multidistrict litigation and mandatory classes. For instance, courts often certified school desegregation and bussing cases as mandatory 23(b)(2) classes that required no notice until settlement despite clear evidence of strongly held and conflicting opinions as to the remedy: some class members preferred to improve local African-American schools instead of integrating, while others wanted to avoid bussing their children to integrated but violent schools.⁷⁸ So, while the claim's personal nature surely matters, it is difficult to understand the lack of voice opportunities using that metric alone.⁷⁹ Something more must be afoot.

Analyzing the underlying right at stake and categorizing it along a spectrum that ranges from individually held rights to group rights can help to both explain and organize corresponding participation expectations in aggregate litigation. When plaintiffs suffer individual injuries at the same defendant's hands and unite their claims for economic or efficiency reasons, joinder itself neither converts their injuries into an aggregate harm nor automatically diminishes their initial day-in-court expectations.⁸⁰ Consequently, plaintiffs with hip injuries are likely to feel frustrated by inadequate participation opportunities in multidistrict litigation. Conversely, when the underlying right arises from an aggregate harm that affects a group equally and collectively and demands an indivisible remedy, such as declaratory or injunctive relief, litigants might tolerate less participation if they closely identify with the group's representatives or participate in decision making at the organizational level.⁸¹

77. TYLER, *supra* note 43, at 143; Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 11 (2009); Bruce Dyer, *Determining the Content of Procedural Fairness*, 19 MONASH U. L. REV. 165, 170 (1993); Macdonald, *supra* note 43, at 33 (“[P]rocedural fairness requires more than positivistic adherence to a finite set of pre-existing rules . . .”).

78. See generally Crowley, *supra* note 25, at 666–74 (arguing that the divergent interests in Title VII cases cause inadequate representation).

79. See Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 234–35 (1992) (“The impact of preclusion on public respect for the judiciary should depend on the type of case in which the doctrine is invoked, the way the doctrine operates (whether it precludes single issues or entire claims), and the reasons given for preclusion. After all, individuals are precluded today without participating, and have been in the past, even as to matters about which they care deeply.”).

80. See generally Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 519–25 (2011) (discussing the associative obligations of solidarity or loyalty among plaintiffs who alleged that the defendant caused them similar harm).

81. This divide aligns with psychological distinctions. As Tom Tyler writes:

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TABLE 1: A RIGHTS-BASED SPECTRUM⁸²

| | Individual Rights | | | | Aggregate Rights | | |
|-----------------------------------|-----------------------------|--------------------------------------|------------|--------------------------|---|-----------------------------|--|
| Remedy | Divisible remedy | | | | Indivisible remedy | | |
| Voluntariness and autonomy | Voluntary individual action | | | | Involuntary joinder or representative litigation | | |
| Participation expectation | High day-in-court ideals | | Varies | | Varies based on group dynamics | | Low day-in-court ideals |
| Joinder device | None | Rules 20, 42 | MDL §1407 | Rule 23(b)(3) | Rules 23(b)(1), 23(b)(2) | <i>Parens patriae</i> | Entity itself litigates |
| Examples | Personal injury claim | Bus accident involving twenty people | Mass Torts | Securities class actions | Desegregation, Title VII employment discrimination, or civil rights class actions | Public transit system fares | State versus State, Corporations ⁸³ |

As one might guess, however, allocating participation opportunities based on sorting rights into two black-or-white, individual-versus-aggregate categories is artificial at best. Categories can bleed together. Thus, identifying the underlying right at stake is but a starting point. One must then consider other factors, such as group cohesion and organization. Although litigants’ substantive rights—individual or aggregate—are fixed, their expectations may vary.

For example, tight-knit groups that predate lawsuits over individual rights may affect participation needs and even allocation decisions.

A central distinction made in the social psychological literature is between deprivations that people understand to have occurred at the individual level (e.g., “I get less than I should”) and the group level (e.g., “my group gets less than it should”). This framing issue is important because it shapes whether people respond to an injustice as individuals or as a group. In particular, the group-level framing of injustice may lead to people taking group-based or collective action, which has been defined as acts in which people serve as representatives of a group to which they belong when the action is directed at improving the conditions of the group as a whole.

Tyler, *supra* note 4, at 732 (footnotes omitted).

82. An earlier version of this table appeared in Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 *FORDHAM L. REV.* 3043, 3053 tbl.1 (2013).

83. A corporation is treated as a legal entity distinct from its individual members. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 59 (AM. LAW INST. 1982) (“Except as stated in this Section, a judgment in an action to which a corporation is a party has no preclusive effects on a person who is an officer, director, stockholder, or member of a non-stock corporation . . .”).

As I have explored in-depth elsewhere,⁸⁴ group governance might provide individuals with voice opportunities outside of the court such that the group can speak collectively in the litigation context. For instance, in the Stringfellow Acid Pits toxic-tort litigation, a single group—the Concerned Neighbors in Action—formed out of other community organizations and created a charter that governed members’ litigation and settlement activities.⁸⁵ Other examples of groups involved in litigating individual harms abound: labor unions in the asbestos litigation, support groups in the tainted blood products⁸⁶ and breast implant cases, veterans’ groups in the Agent Orange litigation, and citizens’ committees in the Buffalo Creek.⁸⁷

When individual rights are at stake and the system procedurally aggregates those claims, groups might also form after the decision to sue.⁸⁸ Both Vioxx and breast implant plaintiffs created support networks that facilitated information sharing and networking.⁸⁹ So, if the system and the lawyers encouraged litigants to communicate with one another, they might ultimately decide to collaborate and speak with one voice on key issues, like settlement. Collaboration might lead to plaintiff delegates who, alongside attorneys on a plaintiffs’ steering committee, present stakeholders’ interests during plaintiffs’ consortium meetings and ensure that the attorneys periodically update the group on significant developments.⁹⁰ Those extra judicial voice opportunities could restore some measure of participation and control to plaintiffs swept up in multidistrict litigation.⁹¹

84. Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 147–49 (2011).

85. Jack Hitt, *Toxic Dreams: A California Town Finds Meaning in an Acid Pit*, HARPER’S MAG., July 1995, at 57–58, 62. The plaintiffs even developed constitutional procedures for approving a settlement offer, which included using a separate judge to decide whether the offer was fair. *Id.*

86. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 298 (2000) (describing the hemophiliac community’s HIV litigation).

87. See generally Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 21–23 (2009) (“[D]istinguishing how class litigation fits into the bigger picture.”).

88. I’ve written about this possibility in-depth elsewhere. See Burch, *supra* note 77, at 12; See Burch, *supra* note 84, at 132–34; Burch, *supra* note 87, at 21–22.

89. Burch, *supra* note 87, at 22–23; HENSLER, *supra* note 86, at 1626 n.210; Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 919–21.

90. Burch, *supra* note 84, at 132–34.

91. *Id.*; Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL., PUB. POL’Y & L. 211, 243 (2004) (noting that litigants prefer either well-established court rules or *ex ante* agreed on procedures); see also Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1221–25 (1982) (discussing the judicial strategies employed to alleviate conflicts arising in class member representation).

While underlying substantive rights remain static, cohesion among litigants does not; group unity is flexible. Although group cohesion can vary, definitions tend to center around commitment, consensus, attraction among group members, connectedness, working toward a common goal, unity of purpose, and placing significance in common norms.⁹² Highly cohesive groups are likely to have: (1) members who share physical and social immediacy; (2) homogeneity through shared experiences, organizations, or historic events; and (3) overlap in goals, values, and intentions.⁹³ Procedural justice studies have increasingly demonstrated noninstrumental effects (concerns that go beyond self-interest in influencing an outcome) based on group identification, even when the common circumstance was minimal.⁹⁴

This means that when the substantive right arises from an aggregate harm—a harm that affects a group of people equally and collectively—and demands an indivisible remedy such as declaratory or injunctive relief, litigants might tolerate less participation if they closely identify with the represented group.⁹⁵ Aggregate harms affect a group qua group; think of housing and school desegregation cases, or Title VII employment discrimination class actions seeking to enjoin discriminatory behavior, for example. Suits like these seek indivisible remedies—such as integration or the cessation of discriminatory practices—relief that yields a uniform result regardless of whether a single individual or an entire group sues.⁹⁶ Moreover, proving liability requires the judge to examine how the employer, housing authority, or school system treated a group of people in comparison to others outside the group. In that sense, the litigation operates to group members' benefit or detriment equally. So, if group members identify with those litigating on their behalf, they may feel more comfortable with diminished individual participation.⁹⁷

92. See generally Albert A. Cota et al., *The Structure of Group Cohesion*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 572, 574–77 (1995) (discussing and studying group cohesion).

93. R. Scott Tindale et al., *Shared Cognition in Small Groups*, in BLACKWELL HANDBOOK ON SOCIAL PSYCHOLOGY: GROUP PROCESSES 1, 5 (Michael A. Hoagg & R. Scott Tindale eds., 2001).

94. LIND & TYLER, *supra* note 32, at 230–31.

95. Professor Patrick Woolley has argued, in contrast, that structural reform suits are individual rights because they are often premised on the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which guarantee rights to individuals. Woolley, *supra* note 51, at 587–89.

96. John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1433 (2003). See generally PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 2.04(b) (AM. LAW INST. 2010) (“Indivisible remedies are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.”).

97. See *infra* Part III.B (proposing readjustments based on group dynamics in mandatory and issue classes).

In short, groups can alter litigants' day-in-court expectations, particularly when they are cohesive and well organized. When members are united in their shared litigation plans and objectives, their representative's voice may be all that's needed.⁹⁸ Likewise, if the group is highly organized such that it maintains its own governance structure (e.g., unions), the extra-judicial participation may substitute for court-based participation. Even though these variables can affect participation expectations in predicable ways, they are neither transparent nor predictable to judges because judges cannot always identify which groups are united and which are divided.

Accordingly, collateral attacks based on inadequate representation may act as a mild failsafe for instrumental and dignitary participation concerns.⁹⁹ When a class action purports to extinguish individual rights, courts should allow plaintiffs to relitigate their claims if the first court failed to identify and correct "structural conflicts" between the claimants themselves or between the representatives and the claimants.¹⁰⁰ Individual harms do not morph into aggregate harms simply because courts treat them collectively through multidistrict litigation or even Rule 23(b)(3) class actions. And though participation expectations may fluctuate if litigants identify with and consent to group governance, one's right to conflict-free representation does not succumb to group will.

Conversely, if the class action purports to terminate aggregate rights that demand a single, indivisible remedy, courts should tolerate greater conflicts and permit collateral attack only when the representatives acted contrary to the group's best interests or tried to represent an overinclusive group in which some members would require a remedy that the representative had no selfish reason to pursue.¹⁰¹ When the underlying right is inherently aggregate, like litigation setting pub-

98. See generally Burch, *supra* note 87, at 22–31 (discussing the moral and political psychology as well as social psychology in analyzing group dynamics within nonclass aggregation).

99. See *infra* Part III.B.2 (suggesting that providing routine notice to litigants involved in mandatory class actions, would enable those who are dissatisfied with the group process to intervene under Rule 24 or object to the settlement under Rule 23(e)).

100. See generally PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 2.07(a) (listing the rules on individual rights in aggregate claims). That is, a conflict of interest either between the claimants and the lawyers who would represent claimants on an aggregate basis, . . . or . . . among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves.

Id.

101. *Id.* at 3061.

lic-transit fares¹⁰² or implementing a federal wildlife-management statute,¹⁰³ citizens are bound by the result not because they had adequate participation opportunities or even perfectly aligned interests, but because remedying an aggregate right demands an aggregate remedy.¹⁰⁴ Because every member receives the same indivisible remedy, if one member is inadequately represented then they all are. But, if the group representative tried to shoehorn individual, divisible relief into a mandatory class, for example, then the previous suit should not bind the class member.¹⁰⁵ Allowing a member to resurrect her substantive and participation rights under those circumstances would alleviate dignitary concerns and may well improve the outcome's accuracy because her eligibility to relief, particularly divisible relief, may depend on information that only she possesses.

In sum, considering substantive rights alongside malleable group dynamics is a useful heuristic for thinking through a smattering of relationships between participation, adequate representation, and joinder. This Section's framework linked participation rights to fixed substantive rights but layered in flexible expectations based on group cohesion and organization. As such, it reflected procedure's fundamental interpersonal character as governing social interaction between citizens and the courts¹⁰⁶ and incorporated recent research on the group engagement model when group identity played a primary role in assessing procedural justice.¹⁰⁷

B. Examining and Recalibrating Participation

Linking critical procedural rights like adequate representation and the right to participate in the proceedings to the underlying substan-

102. See, e.g., *Berman v. Denver Tramway Corp.*, 197 F.2d 946 (10th Cir. 1952).

103. *Alaska Legis. Council v. Babbitt*, 15 F. Supp. 2d 19 (D.D.C. 1998), *aff'd*, 181 F.3d 1333 (D.C. Cir. 1999).

104. Burch, *supra* note 82, at 3052.

105. *Id.* at 3058–61; see, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (noting that class representatives might have perverse incentives to risk potentially valid claims for divisible relief if they were permitted to drop those claims in hopes of certifying a Rule 23(b)(2) class); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (allowing a party to collaterally attack a previous, mandatory class action that extinguished his right to pursue divisible remedies).

106. See generally Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCHOL. REV. 349, 350 (2003) (redefining procedural justice).

107. See generally *id.* at 352 (describing the group engagement model). “[W]ithin the study of procedural justice, research has shifted from exclusively defining procedural fairness by the quality of decision-making procedures to broader definitions of procedural fairness that also consider the quality of people’s interpersonal treatment when they are interacting with others.” *Id.* at 357.

tive right at stake has important implications for how courts should treat individuals in issue-class actions and mandatory classes.¹⁰⁸ These areas expose opportunities, nuances, and the need for certain changes to support oscillating participation levels based on group dynamics.

1. *Tailoring Participation in Issue Classes*

To illustrate, let's consider a straightforward example such that we can then build in layers of complexity to demonstrate how the system might tailor participation opportunities to coincide with remedial relief and policy goals. Imagine that Defendant owns a factory and plaintiffs allege that Defendant's storage tank leaked the chemical Trichloroethylene (TCE) into the soil and groundwater around their homes. The leak affects approximately 1,000 would-be class members who live within a mile or two of the factory. Plaintiffs sue on several theories, including: the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA);¹⁰⁹ the Resource Conservation and Recovery Act of 1976 (RCRA);¹¹⁰ and nuisance. Additionally plaintiffs request indivisible injunctive relief requiring Defendant to remediate the contaminated area.¹¹¹

If each plaintiff sued individually, in theory, each would have her day in court, but courts would hear repetitive evidence about Defendant's conduct and could reach inconsistent verdicts as to Defendant's cleanup responsibilities. Neither dignitary nor instrumental procedural justice concerns dictate that individual participation is necessary; representative litigation under Rule 23(b)(2) should suffice. When plaintiffs request only declaratory or injunctive relief relating to De-

108. This discussion has some bearing on *parens patriae* suits that litigate quasi-sovereign interests. Although the state's interest must be distinct from individual citizens' interests, the Supreme Court has been enigmatic in defining the parameters of "quasi-sovereign" interests, leaving creative attorneys general to depart from well-traveled paths like environmental and antitrust issues. See generally Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982) (defining *parens patriae*). As one commentator observed: "'Quasi-sovereign' is one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their moorings and drift off into the ether. It is a meaningless term absolutely bereft of utility." Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1851 (2000).

109. 42 U.S.C. §§ 9601–75 (2012).

110. *Id.* §§ 6901–92 (2012).

111. These basic facts are taken from *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910 (7th Cir. 2003). Nevertheless, I have manipulated them to make certain points about indivisible and divisible relief that do not always mesh with environmental laws. For example, private parties must exhaust administrative remedies before bringing toxic-tort claims in court: before suing under CERCLA, private parties must provide notice to the Environmental Protection Agency administrator, the state, and the defendant sixty days before suing. Plaintiffs may file suit only if the government decides not to sue. 42 U.S.C. §§ 9659(a), (d)–(e). The same is true for claims under the RCRA. *Id.* at §§ 6972(b)(2)(A)–(B).

defendant's conduct, all plaintiffs are united in their shared goal to establish Defendant's remediation obligations.¹¹² They can, in other words, speak with one voice on that issue. Plus, cleaning up the spill on a property-by-property basis wouldn't do much good; contaminated areas would continue to leach into the soil and repollute remediated land.¹¹³ As to instrumental accuracy concerns, if individuals possessed unique information pertaining to Defendant's conduct, class-wide discovery would mine that knowledge, prevent information asymmetries among plaintiffs, and allow each plaintiff to benefit from those details equally.

This reasoning extends one step further to certifying issue classes that pertain to Defendant's conduct elements. As I have elaborated elsewhere,¹¹⁴ "conduct components" concern a defendant's behavior: whether Defendant released TCE into the ground, when Defendant knew contaminants were being released, and whether Defendant fully defined the contamination's extent or impact under state remediation programs.¹¹⁵ When a defendant's actions are uniform and nonindividualized,¹¹⁶ conduct components are common to all people affected by those actions and are, thus, theoretically ripe for aggregate treatment and diminished participation.¹¹⁷ From an instrumental perspective,

112. See Burch, *supra* note 87, at 26–27 (suggesting that people within groups may use reasoning and bargaining to pressure one another to agree about how to accomplish their shared end).

113. The public nuisance doctrine reflects this practicality. It suggests that public officials or class representatives are the only ones who have standing to enjoin a public nuisance unless the private party has suffered a different kind of harm than other members of the public. 4 RESTATEMENT (SECOND) OF TORTS § 821C (AM. LAW INST. 1979).

114. Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1875–76 (2015).

115. See, e.g., Amended Class Action Complaint for Injunctive, Declaratory & Other Relief at 2–3, *Mejdrech v. Lockformer Co.*, No. 01 C 6107, 2003 WL 22078392 (N.D. Sept. 5, 2003), 2001 WL 34554328.

116. Contrast, for example, the *Rustein* and *Avis* cases. See *infra* notes 124–27.

117. See, e.g., *In re Deepwater Horizon*, 739 F.3d 790, 804, 815–16 (5th Cir. 2014) (“[T]he district court set forth a considerable list of issues that were common to all the class members’ claims. Nearly all of these issues related to either the complicated factual questions surrounding BP’s involvement in the well design, explosion, discharge of oil, and cleanup efforts” and that those issues were certifiable “despite the particular need in such cases for individualized damages calculations.”); *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014) (noting that liability issues related to defendant’s conduct were “suited to class-wide resolution”); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987) (upholding certification based on defendant’s military-contractor defense); *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269, 279–80 (E.D. Tex. 1985) (certifying a class action based on defendant’s state-of-the-art defense). *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, No. 8:10ML2151JVS (FMOx), 2012 WL 7802852, at *2 (C.D. Cal. Dec. 28, 2012) (“The class members’ claims all arise from allegations regarding a common defect. Moreover, the class members’ claims derive from similar or identical warranties and are based on common advertisements and representations regarding their vehicles.”); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C. 2002) (“[A]s to the vitamin product class, plaintiffs have

adding or subtracting a particular plaintiff when adjudicating a defendant's behavior should have no effect on accuracy because conduct elements are distinct from plaintiffs' eligibility for relief.¹¹⁸ Likewise, from a dignitary perspective, as long as the evidence of a defendant's conduct isn't unduly constrained by presenting it separately from evidence that concerns a specific plaintiff's eligibility for relief,¹¹⁹ speaking with one voice on conduct issues increases the likelihood that plaintiffs will be fully heard: issue classes level resource and informational asymmetries that typically favor defendants.¹²⁰ And, after uniform adjudication on conduct issues, plaintiffs would then have the burden of proving—and the opportunity to participate in—their individual entitlement to relief.

So, returning to the toxic tort example, if the plaintiffs requested not just indivisible relief as to Defendant's cleanup obligations, but also compensatory damages for their diminished property value, layering divisible relief atop indivisible relief need not change participation constructs as to the indivisible relief. Plaintiffs are still united in their commitment to establish Defendant's uniform conduct. But they might splinter over what weight or significance to afford to subsequent questions of entitlement or allocation. Those concerns translate into collective, issue-class procedures: as the Seventh Circuit recognized in *Mejdrech v. Met-Coil Systems Corp.*,¹²¹ it makes sense to litigate “the core questions, i.e., whether or not and to what extent [Met-Coil] caused contamination of the area in question” “in one fell swoop while leaving the remaining, claimant-specific issues to individ-

alleged that defendants have participated in a unitary overarching conspiracy which encompassed a number of identified vitamins.”)

118. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) (“[I]f common issues truly predominate over individualized issues in a lawsuit, then ‘the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered.’” (second alteration in original) (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 322 (5th Cir. 1978), *abrogated by* *Bridge v. PHX Bond & Indem. Co.*, 553 U.S. 639 (2008)); *see* *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (“If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issue in one fell swoop while leaving the remaining, claimant-specific issue to individual follow-on proceedings.”).

119. For example, in an issue-class trial on whether a defendant defectively designed a product, exemplar plaintiffs might need to testify as to the product's risks and benefits. Eligibility elements in the toxic tort example provided in text *supra* would include specific causation, such as evidence that Defendant's contamination leaked onto a particular plaintiff's property and caused harm there (such as decreased property value or personal injuries). *See* Burch, *supra* note 114, at 1874–81, for more on eligibility versus conduct elements.

120. *Id.* at 52.

121. 319 F.3d 910 (7th Cir. 2003).

ual follow-on proceedings.”¹²² In these later proceedings, individuals could participate in and present unique evidence demonstrating the fact and extent of their individual injuries, such as a home within the affected area and any evidence of particular personal harm they suffered.

These circumstances must, however, be carefully distinguished from those in which the full scope of a defendant’s conduct comes into focus only by taking a bird’s eye view of multiple plaintiffs’ claims. In that case, proof is not aggregate proof that applies to each plaintiff’s claim equally as in the toxic tort example but, rather, evidence built from a series of individual circumstances. Procedurally, these types of cases tend not to proceed as Rule 23(b)(2) class actions, but through joining individual plaintiffs under Rule 20.¹²³

When liability necessitates proving an array of individual incidents, such as some pattern-or-practice type cases, then voice, participation, and the ability to present individual evidence are each critical to producing accurate outcomes and honoring plaintiffs’ dignitary interests. Put differently, forcing would-be plaintiffs into mandatory joinder through a (b)(2) class (in which they are often not notified about the suit until settlement) would affect the quality and nature of the evidence as well as the legitimacy of the outcome. Accordingly, courts have justifiably denied class treatment in cases like *Rutstein v. Avis Rent-A-Car Systems, Inc.*,¹²⁴ in which plaintiffs would have to demonstrate the individualized circumstances of why they were each denied car rentals to show religious animus on Avis’s part,¹²⁵ and *Jackson v. Motel 6 Multipurpose, Inc.*,¹²⁶ in which each plaintiff would have to prove why they were denied accommodations or given dirty hotel rooms to show racial discrimination.¹²⁷

Putting those circumstances aside, when courts can isolate a defendant’s uniform conduct for issue-class treatment, it may make sense to certify those proceedings as a mandatory issue class. Returning to the toxic tort example, either Defendant contaminated the area or it

122. *Id.* at 911 (alteration in original).

123. They might likewise fit within Rule 23(b)(3) if they meet Rule 23(a)’s commonality requirement and common questions predominate over individual ones.

124. 211 F.3d 1228 (11th Cir. 2000).

125. *Id.* at 1235 (denying class certification because “[e]ach plaintiff [would] have to bring forth evidence demonstrating that the defendant had an intent to treat him or her less favorably because of the plaintiff’s Jewish ethnicity”).

126. 130 F.3d 999 (11th Cir. 1997).

127. *Id.* at 1006 (denying class certification because plaintiffs’ proof would have “require[d] distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination”).

didn't. And while one jury or judge might reach the wrong outcome on that question, providing an interlocutory appeal on the merits serves other procedural justice goals, like correcting error and alleviating any undue settlement pressure.¹²⁸

2. *Improving Participation in Mandatory Classes*

As Part III.A illustrated, ensuring adequate participation in mandatory class actions can prove challenging for several reasons: (1) Rule 23(b)(2) requires no notice until parties propose a settlement and none at all if the class is fully litigated; (2) ameliorating harm demands an indivisible remedy that applies to the whole group; and (3) the underlying substantive rights are not always purely aggregate.¹²⁹ For instance, some have argued that structural reform suits, which invariably demand indivisible remedies, rest on rights that the Fourteenth Amendment's Equal Protection and Due Process Clauses guarantee to individuals, not groups.¹³⁰ And even when a right plainly belongs to a group, group members may be only loosely affiliated. They may thus have vastly conflicting opinions about legal theories, presenting evidence, and shaping the aggregate remedial relief yet receive no notice.¹³¹ That result is troubling from both the instrumental and noninstrumental perspective.¹³²

To illustrate these concerns, consider an example. In *Waters v. Barry*,¹³³ the American Civil Liberties Union (ACLU) challenged an 11:00 PM curfew that ordered all minors in the District of Columbia to be inside after that time; yet, many of the class members and their parents preferred to trade their First Amendment rights for public safety.¹³⁴ Those conflicting interests, however, did not prevent the court from certifying a Rule 23(b)(2) non-opt-out class. While one

128. See generally PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 2.09 cmt. b. (AM. LAW INST. 2010) (discussing the availability of an interlocutory appeal as a means to determine a common issue on the merits). See Burch, *supra* note 114, for a more in-depth discussion of these issues. This mandatory issue-class approach likewise complies with the recent Supreme Court requirements in *Dukes* that "a classwide proceeding generate common answers apt to drive the resolution of the litigation" and that courts should not include individualized relief within a mandatory class. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

129. See *supra* Burch, *supra* note 82, at 3053 tbl.1.

130. See, e.g., Woolley, *supra* note 51, at 586–89.

131. Rule 23(c)(2) allows, but does not require, notice in mandatory actions, although the "court must direct notice in a reasonable manner to all class members who would be bound" by a proposed settlement under Rule 23(e)(1).

132. It is likewise troubling from a due process perspective. See Burch, *supra* note 82, at 3048. 133. 711 F. Supp. 1125 (D.D.C. 1989).

134. *Id.* at 1131–32.

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might rationalize that having adequate and typical representatives would be all that the instrumental view requires, input from group members might affect which theories of liability to pursue or which evidence to emphasize, both of which could affect the outcome. And in *Waters*, members' involvement could have shaped remedial relief in a way that addressed both public safety concerns and First Amendment rights. Because class members were not ACLU members, allowing them to participate in the proceedings or in open meetings could satisfy their dignitary needs.¹³⁵

When loose-knit groups face litigation that entails only one uniform remedy that affects members equally, one possible fix is to encourage judges to notify class members when they certify a (b)(2) class as they do in (b)(3) classes.¹³⁶ Notifying members before settlement could provide interested members with an informal group-based forum for participating by weighing in on key litigation decisions and remedial relief.¹³⁷ Group-centered participation opportunities can supplement scant court-based participation, add dignitary value, and enhance the outcome's legitimacy even if the controlling representatives do not ultimately incorporate members' divergent views.¹³⁸

From an instrumental perspective, encouraging notice and group-based participation when aggregate rights are at stake may improve accuracy. Groups of cognitively diverse people can make more accurate predictions, solve problems, improve performance, and aggregate information.¹³⁹ Even though litigants with less group solidarity are

135. See Tyler & Blader, *supra* note 106, at 350–54.

136. Rule 23(c)(2)(A) already permits this solution without requiring a rule change. Additionally, the subcommittee for Rule 23 recently raised the question of requiring notice in mandatory actions given the low cost and widespread availability of electronic means. ADVISORY COMMITTEE ON CIVIL RULES 285–86 (Apr. 9–10, 2015), <http://www.uscourts.gov/file/17943/download>. Using electronic means to communicate with class members in mandatory classes could facilitate participation without proving cost-prohibitive for public interest groups that often initiate these cases.

137. See, e.g., *Williams v. Lane*, 96 F.R.D. 383, 386 (N.D. Ill. 1982) (“More important, this Court can afford class members the opportunity to comment on the issue of relief if their views on this subject are truly discordant.”).

138. LIND & TYLER, *supra* note 32, 102–03; E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 956–58 (1990) (discussing the results of a study examining the correlation between voice and perceived control); Linda Musante et al., *The Effects of Control on Perceived Fairness of Procedures and Outcomes*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 223, 237–38 (1983).

139. SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 137–44 (2007); see also HOWARD RHEINGOLD, *SMART MOBS: THE NEXT SOCIAL REVOLUTION*, at xviii, 164, 182 (2002) (discussing how technological advances allow people to work together for the better in some situations); JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 29–31 (2004).

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likely to disagree more, conflict and dissonance are actually beneficial; they encourage novel solutions, diverse ideas, and creative problem solving.¹⁴⁰ Forcing representatives to first defend their position within the group context can foster persuasive advocacy and well-developed arguments in addition to increasing the likelihood that dissenters will be more willing to accept the court's ultimate decision.¹⁴¹ Although dissenters would still be bound by the litigation's outcome because the remedy must inure to all or to none, if their position does not gain traction within the group setting, they might object under Rule 23(e)(5) or intervene under Rule 24 and state their position to the judge.¹⁴²

IV. CURTAILING PARTICIPATION THROUGH PLAUSIBILITY PLEADING

Reflecting on recent Supreme Court jurisprudence thus far suggests that the Court has taken measures to protect an individual's right to her day in court against encroachment by external parties who seek to extinguish those participation opportunities without sufficient safeguards. *Taylor* and *Bayer* each support this notion.¹⁴³ What the Court seems to have missed, however, is that pleading is participating. The complaint is a plaintiff's first opportunity to voice her concerns to the court and state a claim that entitles her to relief. Curtailing that right closes the courthouse door and forecloses further participation opportunities.

There is thus a glaring disconnect in the Supreme Court's decisions. In 2008, a unanimous Court decided *Taylor*, and, in 2011, a nearly unanimous Court decided *Bayer*.¹⁴⁴ But shortly before *Taylor*, in 2007, the Court instituted plausibility pleading in *Bell Atlantic Corp. v. Twombly*.¹⁴⁵ And right after *Taylor*, in 2009, the Court ensured that lower courts applied its new heightened standard universally with its

140. Lisa Troyer & Reef Youngreen, *Conflict and Creativity in Groups*, 65 J. SOC. ISSUES 409, 413 (2009).

141. See W. RUSSELL NEUMAN, *THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN THE AMERICAN ELECTORATE* 126–27 (1986) (discussing the three effects of group participation in politics); Rhode, *supra* note 91, at 1223–24.

142. Intervention would need to be timely. See Woolley, *supra* note 51, at 590–93, for a full discussion of this intervention proposal.

143. See *supra* notes 58–68 and accompanying text. One might even read *Wal-Mart*, along the same lines. There, the Court required sufficient commonality to glue the class together and refused to allow backpay (a divisible remedy) to be included within a mandatory class, which protects absent class members' individual rights to divisible relief from terminating without the chance to opt out. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2001).

144. Justice Thomas joined in only part of the majority's opinion.

145. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

opinion in *Ashcroft v. Iqbal*.¹⁴⁶ Although both *Twombly* and *Iqbal* incited dissent,¹⁴⁷ the Court's majority overlooked the obvious tension: guaranteeing a universal right to one's day in court is a thin right indeed if it applies only to those who already have all of the information they need. Pleading unlocks discovery, and the purpose of discovery is to facilitate the exchange of information, especially information known to only one party.

So, the universal right to one's day in court, to participate in one's lawsuit, is not so universal after all. What could possibly explain this change? The *Twombly* majority cited concern over cost and delay.¹⁴⁸

For decades, however, procedural justice studies have suggested that cost and delay do not play a significant role in litigants' opinions of procedural fairness.¹⁴⁹ Granted, most studies are conducted on individuals, not corporations,¹⁵⁰ but individual litigants' perception of cost was unrelated to judgments of fairness or system satisfaction.¹⁵¹ When researchers tested the effects of defendants paying their own costs versus defendants with fees paid by insurance companies, they still found no relationship between procedural fairness judgments and cost discrepancies.¹⁵² In short, within the realm of traditional tort litigation, cost and delay did not greatly impact litigants' procedural justice evaluations.¹⁵³ These generalized findings suggest that efforts to reduce cost and delay should not be shouldered at the expense of voice, dignity, and impartiality in decision making.¹⁵⁴

146. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942–43 (2008).

147. *Twombly* prompted dissent from Justices Stevens and Ginsburg, and the dissenters in *Iqbal* swelled to include Justices Souter (who authored the *Twombly* opinion) and Breyer.

148. *Twombly*, 550 U.S. at 558–59.

149. See, e.g., LIND ET AL., *supra* note 2, at 55–56 (“The absence of any correlation at all between delay and satisfaction or perceived fairness is especially striking in light of the frequent assertion that litigants are dissatisfied with the civil justice system because of the delays they encounter. Delay appears not to play a substantial role in determining whether tort procedures are seen as fair and whether the litigant leaves the court satisfied. . . . As was the case with the results of the analyses of case delay, the absence of any real relationship between litigation cost and perceived fairness or satisfaction is an unexpected and especially noteworthy finding.”)

150. Hollander-Blumoff, *supra* note 38, at 149 (suggesting that “procedural justice effects are likely to be more profound” for individuals and “may be particularly critical in counteracting negative impressions of resource-based rather than merit-based decisions and of bias toward corporate parties”).

151. See, e.g., LIND ET AL., *supra* note 2, at 56.

152. *Id.* at 57. But see E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 984 (1990) (suggesting that there is a relationship between perceived fairness and whether the cost was more or less than expected).

153. LIND ET AL., *supra* note 2, at 77; Lind et al., *supra* note 152, at 984 (noting that subjective measures of outcome and cost were based on whether a litigant had modest expectations and understood the economic realities of litigation).

154. LIND ET AL., *supra* note 2, at 78.

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Nevertheless, for as long as procedural justice research has suggested that cost and delay are not significant factors for litigants, those factors have served as stalking horses for various interests and reforms on both sides of the aisle.¹⁵⁵ Despite empirical evidence suggesting that these factors are neither integral to public perceptions of procedural justice nor actually problematic,¹⁵⁶ defendants' recent complaints about meritless claims and burgeoning discovery costs did not fall on deaf ears.¹⁵⁷ Quite the contrary: *Twombly*¹⁵⁸ and *Iqbal*¹⁵⁹ reinterpreted Rule 8(a)(2)'s "short and plain statement of the claim showing that the pleader is entitled to relief"¹⁶⁰ as requiring claimants to establish their complaint's plausibility as to liability on the merits without using conclusory legal allegations. This change threatens procedural justice tenets in at least three ways.

First, the reinterpretation itself—accomplished by judicial fiat rather than the transparent, democratic rulemaking process—strained the legitimacy of the new gloss on Rule 8.¹⁶¹ Unlike Supreme Court opinions, the seven-step rulemaking process includes multiple layers that insulate and legitimize it, including a public notice-and-comment period, Supreme Court approval, and congressional review.¹⁶² To be

155. See, e.g., AM. COLL. OF TRIAL LAWYERS ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 2 (2009), <http://www.uscourts.gov/file/document/final-report-actl-iaals-joint-project> (claiming that the justice system "is in serious need of repair" because it "takes too long and costs too much" and that the rise of "alternative dispute resolution emphasizes [those] point[s]"); John S. Palmore, *The Urgency of Economic Litigation*, 67 A.B.A. J. 814 (1981) (suggesting that reducing litigation costs can fix problems with access to legal services and curb the trend toward alternative dispute resolution).

156. JAMES S. KAKALIK ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA xxvii (1998) (e-book), http://www.rand.org/pubs/monograph_reports/2009/MR941.pdf; Reda, *supra* note 6, at 1115–16.

157. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (noting concerns over groundless claims and discovery costs); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007).

158. *Twombly*, 550 U.S. at 570.

159. *Iqbal*, 556 U.S. at 667–68.

160. FED. R. CIV. P. 8(a)(2).

161. E.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 850 (2010) ("[B]efore discarding the pleading system that has been in place for many years, we ought to discuss its virtues and failures soberly and with the relevant information before us. The rulemaking bodies should have hosted that discussion. *Twombly* and *Iqbal* short-circuited any such discussion."); Miller, *supra* note 3, at 333–34 (2013); Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L. REV. 571, 575 (2012); *Hearing on Whether the Supreme Court Has Limited Americans' Access to Court Before the S. Comm. on the Judiciary*, 111th Cong. 2 (Dec. 2, 2009) (statement of Professor Stephen B. Burbank), <http://www.judiciary.senate.gov/imo/media/doc/12-02-09%20Burbank%20Testimony.pdf>.

162. 28 U.S.C. §§ 2071, 2073, 2077 (2012). Granted, some have criticized the rulemaking process as losing credibility too. E.g., Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 798–99 (1991).

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sure, the Supreme Court itself enjoys a great deal of legitimacy,¹⁶³ but that support rests on the principle of neutrality.¹⁶⁴ As the Court has noted in previous controversial decisions, firmly adhering to precedent suggests that decision making and discretion is neither arbitrary nor subjective.¹⁶⁵ More to the point, procedural justice research ties neutrality to judgments based on solid information (as opposed to personal opinions).¹⁶⁶ But, in *Twombly* and *Iqbal*, the Court disregarded both precedent and available empirical data on discovery costs.

Before the Court invented plausibility pleading, plaintiffs had to give defendants “fair notice of the grounds for entitlement to relief” and, for fifty years, “the accepted rule” under *Conley v. Gibson*¹⁶⁷ was that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹⁶⁸ Several times thereafter, the Court overturned and chastised lower courts for deviating from *Conley* and imposing heightened pleading standards.¹⁶⁹ More stringent pleading standards, the Supreme Court explained, “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”¹⁷⁰ Yet, *Twombly* did just that. It dubbed *Conley*’s language as “best forgotten as an incom-

163. *E.g.*, THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 138–41 (1989) (citing polls indicating greater support for courts than the executive or legislative branches); James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC’Y REV. 469, 470 (1989).

164. *See, e.g.*, Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 713 (1994) (“The data analyzed support the argument made by the Justices in [*Planned Parenthood v. Casey*] (as well as by legal scholars such as Fiss) that perceptions of political neutrality bear an important relationship to Court legitimacy.”)

165. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”); Tyler & Mitchell, *supra* note 164, at 709 (“Adherence to precedent provides one method for appearing principled and thus for maintaining legitimacy and obedience.”). R

166. Tyler & Mitchell, *supra* note 164, at 776 (“[N]eutralty effects are primarily related to judgments about honesty and about whether information (not personal opinion) is used to make decisions.”). R

167. 355 U.S. 41 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

168. *Id.* at 45–46. *But see Twombly*, 550 U.S. at 561 (recognizing *Conley* as the accepted rule but calling for a less literal reading).

169. *See, e.g.*, *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (2002) (citing *Leatherman* favorably to undercut heightened pleading standards in the employment discrimination context).

170. *Leatherman*, 507 U.S. at 168.

plete, negative gloss on an accepted pleading standard.”¹⁷¹ Ignoring standard rules practice and contrary precedent when combined with the slipperiness of *Twombly*’s new standard leads to a multiplicative concern: as Professor Arthur Miller expressed, “the motion to dismiss may well morph into a trial-type inquiry with the capability of terminating a case at its outset based on little more than judicial intuition and a personal sense of what in the complaint seems convincing and what does not.”¹⁷²

In deciding *Twombly* and *Iqbal*, the Court not only rebuffed precedent,¹⁷³ it also announced a new standard without considering information on the true costs of discovery. Had the change worked through normal rulemaking channels, the Supreme Court could have considered empirical data on discovery costs. As the Federal Judicial Center revealed in its 2009 study, the median cost to defendants of both discovery and attorneys’ fees was only \$20,000 per case, and those expenses cost plaintiffs \$15,000.¹⁷⁴ To put these numbers in perspective, they constitute 3.3% of the reported stakes for defendants and 1.6% for plaintiffs, numbers that are not disproportionate or worrisome.¹⁷⁵ Moreover, the study is not an anomaly; contrary to persistent anecdotes, these numbers are in line with decades of empirical work that reached similar conclusions.¹⁷⁶

Second, there is a lingering question as to what *Twombly* and *Iqbal* actually accomplished. Plaintiffs are now twice as likely to face 12(b)(6) motions to dismiss, and courts are more likely to grant those motions.¹⁷⁷ But those dismissals do not reach the level of statistical significance.¹⁷⁸ By this view, plausibility pleading appears to have accomplished little beyond adding cost and delay to civil litigation, lining lawyers’ pockets through additional billable hours, and taxing the al-

171. *Twombly*, 550 U.S. at 546; accord *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009) (“*Twombly* retired the *Conley* no-set-of-facts test . . .”).

172. Miller, *supra* note 3, at 338.

173. Clermont & Yeazell, *supra* note 161, at 832 (“The two cases profoundly changed the law of pleading by adopting a procedural mechanism without precedent in the law.”).

174. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR. NAT’L, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

175. *Id.*

176. Reda, *supra* note 6, at 1103–16 (citing numerous studies).

177. Lonny Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 7 (2012).

178. JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, at vii, 21 (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf).

ready overburdened judiciary. And, while cost and delay do not typically affect litigants' procedural fairness opinions, they become significant when the delay is unreasonable.¹⁷⁹ As one nonpartisan study concluded, "[i]f more rapid or less expensive procedures accomplish cost and time savings at the expense of apparent dignity, carefulness, or lack of bias, they may constitute a poor bargain in the eyes of litigants."¹⁸⁰

Third, plausibility pleading may raise entry barriers that, at least for some, may be insurmountable. Carefully reading the Federal Judicial Center's empirical study on dismissals after *Iqbal*, one scholar has argued that highlighting only statistically significant results without explaining what that terminology means can paint an incomplete picture of pretrial litigation today.¹⁸¹ For example, even though 12(b)(6) dismissals in the post-*Iqbal* period were not statistically significant, "plaintiffs were twice as likely to face a dismissal motion," and "a defendant's chances of winning dismissal after *Iqbal* were better both overall and in every case category examined."¹⁸² Moreover, examining court dockets tells us little about whether the plausibility standard deters citizens from filing claims or how many plaintiffs with meritorious claims have been filtered out of the system.¹⁸³

If litigants are deterred from bringing meritorious cases, then there is more to worry about than added cost and delay; the decisions threaten the fundamental fabric of Americans' day-in-court ideal.¹⁸⁴ Plaintiffs face inherent information asymmetries in certain types of cases like products liability and employment discrimination that make gathering the necessary information to meet *Twombly*'s plausibility standard nearly impossible.¹⁸⁵ And though procedural justice tenets dictate that process should allocate the risk of error and the cost of access as evenly as possible among the parties,¹⁸⁶ these pleading deci-

179. LIND ET AL., *supra* note 2, at 77; Lind et al., *supra* note 152, at 983–84.

180. LIND ET AL., *supra* note 2, at 78.

181. Hoffman, *supra* note 177, at 6–7.

182. *Id.* at 40.

183. *Id.* at 32.

184. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) ("[It is] our 'deep-rooted historic tradition that everyone should have his own day in court. . . .'" (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1982))); Chemerinsky, *supra* note 18, at 390 ("No principle is more basic to our constitutional system than that a person who has been hurt deserves his or her day in court.").

185. Miller, *supra* note 3, at 341–46 (providing but one example of a slip-and-fall case alleging serious injuries in which the court dismissed the case because the plaintiff failed to allege "what the substance on the floor was, how it got there, how long it had been there, and whether anyone else had slipped and fallen").

186. See, e.g., BAYLES, *supra* note 46, at 117–20; Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 514 (2003) ("In addition to considering the risk of error, a theory of procedural fairness must take

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sions fall disproportionately on plaintiffs.¹⁸⁷ That, in turn, undermines a basic principle on which nearly everyone agrees—that participation and voice are critical to fair process and voice begins with pleading.¹⁸⁸

V. CONCLUSION

In sum, after protecting one's right to her day in court from the ever-expanding notions of aggregate litigation, the Supreme Court then stymies plaintiffs from exercising that right in a broad array of cases in which information lies beyond their grasp. As of the last count, over one-half of the states embraced some version of plausibility pleading as well.¹⁸⁹ Combining this with trends toward arbitration and away from trials leaves one wondering what role remains for the third branch.

In what seems to be a war on litigation, the Court's cases defending the right to have one's day in court against virtual representation and proposed but never certified classes provide one small ray of hope. Preventing defendants from extinguishing plaintiffs' rights to sue without procedural safeguards, adequate representation, or notice at least permits plaintiffs' lawyers and public interest groups to continue the fight.

Two other points of light bear mention. First, despite tightening class certification standards, courts are embracing greater use of issue classes, which can target defendants' conduct and—heaven forbid—adjudicate it on the merits. But this means that courts need to think carefully about how to frame those issues and ensure appropriate participation opportunities for involved plaintiffs.¹⁹⁰ Second, the Subcommittee on Rule 23 appears poised to require early notice to those with rights affected by mandatory classes. In its April 2015 report to the Advisory Committee on Civil Rules, the Subcommittee indicated a willingness to engage the issue given the low cost and ease of electronic communication.¹⁹¹ Nevertheless, the overall outlook remains grim. Courts' legitimacy hangs in the balance; recalibration cannot come soon enough.

account of process costs, including social costs of additional procedure to reduce error, and it must do so within the framework of the fairness theory itself.”).

187. Solum, *supra* note 46, at 257–58.

188. Hollander-Blumoff, *supra* note 38, at 135–36. “Although requiring plaintiffs to say more about . . . facts may look, at first blush, like an opportunity to increase participation, in fact this requirement dampens participation because it raises the bar to have one's case heard before the court at all.” *Id.* at 153.

189. See Spencer, *supra* note 29, at 2, 14–16.

190. See Burch, *supra* note 114, for more information on how courts might handle issue classes.

191. ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 136, at 285–86.

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