Saint Louis University Law Journal

Volume 56
Number 4 *Justice Systems Circa 2011: Public Courts, Military Commissions and Aggregate Processing (Summer 2012)*

Article 10

2012

From "Cases" to "Litigation" to "Contract": A Comment on Stability in Civil Procedure

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FROM "CASES" TO "LITIGATION" TO "CONTRACT": A COMMENT ON STABILITY IN CIVIL PROCEDURE

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INTRODUCTION

If American civil litigation is a drama, then for three decades Judith Resnik has played the *choragos*.[1] Her descriptions and deconstructions of civil procedure's evolutionary currents have no parallel. With article titles alone—*From "Cases" to "Litigation"*[2] is my favorite—Professor Resnik has set the terms of debate over civil procedure's present and future.[3] Her rich historical narratives bring to life epoch-making moments and epoch-making proceduralists far more vividly than deracinated procedural theory could. This attention to context and personality has enabled Professor Resnik to ask what procedure ought to accomplish in light of what it has done in the past, what it needs to do in light of emergent challenges, what values it has served, and what values it favors or jeopardizes as it evolves.

In one way or another, many of Professor Resnik's influential articles address procedural legitimacy, or the potential of civil processes to function fairly, accurately, efficiently, and appropriately in a democratic system of government.[4] A pattern emerges from articles like *From "Cases" to*

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1. The metaphor is not entirely apt. Whereas a *choragos*, as the leader of a chorus in a Greek drama, comments on the action but did not participate in it, Professor Resnik has been active for decades in both litigation and procedural reform efforts. *See* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 260 (4th ed. 2002).

2. Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5 (1991) [hereinafter Resnik, *From "Cases" to "Litigation"*].

3. *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378–79 (1982) [hereinafter Resnik, *Managerial Judges*] (discussing the "new oversight role" of judges and the reasons for the rise of the managerial judge); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 593–94 (2005) [hereinafter Resnik, *Procedure as Contract*] ("[D]ebate needs to center on what the law of 'Contract Procedure' should provide.").

4. *See, e.g.*, Resnik, *Procedure as Contract*, *supra* note 3, at 598.

"Litigation" and others in its vein.[5] Professor Resnik starts with a bygone era, during which a procedural model that served a set of values well thrived.[6] She describes how new processes emerge that deviate from this historical baseline in response to social, cultural, political, and legal change.[7] To the extent that values well-served by earlier processes suffer as procedure evolves, Professor Resnik asks whether the new forms and practices compensate for what is lost.[8] If not, the new processes risk a legitimacy deficit.

In my homage to this part of Professor Resnik's vast and influential *oeuvre*, I start with a premise based on this pattern: most members of the various communities that care about procedural legitimacy measure emergent procedures against an entrenched model that they vest with presumptive legitimacy. If correct, this premise permits a descriptive account, which I provide in Part I, that can help identify legitimate procedures and make sense of why they are legitimate. I argue that, in many instances, procedural legitimacy manifests itself as stability, an observable phenomenon. This stability depends significantly on social perceptions of procedural efficacy. During the present procedural era, observers of and participants in civil processes believe that procedures that govern the individual lawsuit—a remarkably stable procedural form—are effective, fair, and therefore legitimate per se. To use Professor Resnik's words, "the best efforts of the individual case system" provide many of us with a yardstick to evaluate legitimacy.[9] A deviation from this norm requires a justification responding to some nonprocedural policy demand, or what I call a "regulatory need," to enjoy legitimacy.

In Part II, I use another influential part of Professor Resnik's corpus as a springboard to discuss a particular deviation from the individual lawsuit baseline. In *Procedure as Contract* and repeatedly since then, she has expressed her unease with the phenomenon by which procedural regularity gives way to idiosyncrasy as parties "bargain for" particularized dispute

5. Other such articles include Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628 (2011) [hereinafter Resnik, *Compared to What?*] and Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) [hereinafter Resnik, *Failing Faith*].

6. *See, e.g.*, Resnik, *Compared to What?*, *supra* note 5, at 641 (beginning her examination of "legitimacy through publicity" and the importance of open court proceedings by looking at the 1792 Delaware Constitution and mid-nineteenth-century constitutions). I do not intend to suggest that Professor Resnik yearns for the past or treats it uncritically. *See* Resnik, *From "Cases" to "Litigation"*, *supra* note 2, at 68 (describing "dashed hopes about what individual, case-by-case adjudication can provide").

7. *See* Resnik, *Failing Faith*, *supra* note 5, at 540–45.

8. *See* Resnik, *From "Cases" to "Litigation"*, *supra* note 2, at 66–68.

9. *Id.* at 68.

resolution processes.[10] Professor Resnik has argued that contract's encroachment into the procedural realm tends to remove civil litigation from public view and thereby diminish procedure's potential to legitimate the exercise of power in a democracy.[11] Discussing a recent evolution in the law of aggregate litigation, I deploy my descriptive account of procedural legitimacy to explain why I concur with her concerns. If procedural legitimacy depends significantly on social perceptions, then the movement of civil processes into contractual shadows is troubling. This phenomenon interferes with reasoned and informed perceptions of procedural efficacy and makes possible the prospect that bad procedure will nonetheless stabilize.

I. PROCEDURAL STABILITY AND LEGITIMACY

Proceduralists are a funny lot. On one hand, many of them harbor conservative (with a little "c") tendencies. The disappearance of the civil trial has caused no end of heartburn, and yet the question "[w]hy does it matter?" remains open.[12] On the other hand, "[p]rocedures" have always had "great plasticity," to use Professor Resnik's words.[13] Constant reform is not only embraced but arguably built into the American procedural edifice.[14] A pragmatic philosophical bent bridges these competing impulses.[15] As one of pragmatism's variants treats them, traditional means of solving problems have presumptive legitimacy. They claim no abstract normative supremacy, but their wide and long-standing acceptance suggests that they work well. Wisdom may be inherited but it is not sacrosanct, so innovations are welcome.

10. Resnik, *Procedure as Contract*, *supra* note 3, at 595; *see also* 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, 132 (2011) [hereinafter Resnik, *Fairness in Numbers*]; Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 1, 46–47 (2011) [hereinafter Resnik, *Bring Back Bentham*]. I put "bargain for" in quotations because most of these contracts are adhesive. *See* Resnik, *Fairness in Numbers*, *supra*, at 128–29 (commenting on this phenomenon).

11. Resnik, *Bring Back Bentham*, *supra* note 10, at 52–53.

12. Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011).

13. Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 809 (2008).

14. *See* Thurman Arnold, *The Rôle of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 643 (1932) (describing lawyers' attitudes toward procedure and why they make constant reform possible).

15. On the pragmatic ethos of American civil procedure, see, for example, Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 212 (1992) [hereinafter Bone, *Rethinking*].

Yet changes require some justification, in terms of functional efficacy, for why the new means succeed better than the old.[16]

Most proceduralists are probably pragmatists—interested in and amenable to change, but mildly skeptical of it nonetheless. If this assessment is right, it motivates an account that can explain how to identify legitimate procedures and, at least partially, why they are legitimate. This account includes four claims:

(1) Procedural legitimacy may be difficult to establish as a matter of normative theory, but legitimate forms and processes are observable as social facts. Provided that it does not conflict with a society's fundamental political morality, a stable procedure is most likely legitimate for that society at a particular moment in time.

(2) Two determinants contribute to the stability, and thus overall legitimacy, of a procedure: formal legitimacy and social legitimacy. The former depends on whether some authoritative law permits the form or practice. The latter turns on whether members of the relevant communities perceive the procedure to be fair, accurate, efficient, and appropriate in their political system.

(3) At the present, a procedure enjoys a deep reservoir of social legitimacy if it resembles what happens in the ideal-type of the individual lawsuit. If the procedure deviates from this baseline, it will be unstable unless it effectively addresses some compelling regulatory need.

(4) Social legitimacy matters more than formal legitimacy to the stability and thus overall legitimacy of a procedure over time.

This account is pragmatic in two ways. First, it lashes procedural legitimacy to the mast of the individual lawsuit, a widely accepted and inherited adjudicatory form. Deviations from this baseline are also potentially legitimate but require a justification that makes sense as a functional matter. Second, formal rules matter less to legitimacy than perceptions of efficacy.

I use illustrations from class action history and commentary to elaborate on each claim. Before I do, two qualifications are in order. The first is obvious. Many of my claims need empirical support, and I therefore present them here as hypotheses. Second, my aim is modest. I hope to provide an instrument of sorts to use to tell which processes are legitimate for particular communities at particular moments in time. The stability of a particular procedure means nothing by itself to its normative desirability. The latter requires a theory about adjudication and the role it plays in a particular political order. For a similar reason, I acknowledge a limitation to my descriptive contribution. I do not explain why the individual lawsuit baseline is legitimate, something that

16. *See, e.g.*, Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1344–46 (1988).

would require an inquiry into adjudication's ends and the individual lawsuit's success as a means to them. Rather, I assert that a stable procedure is most likely legitimate, for whatever reason, and identify the determinants that make this so.

A. Observing Procedural Legitimacy

People have different expectations for how civil litigation should proceed, and thus they employ different metrics for judging procedural legitimacy. If a procedure enjoys wide and generally uncontroversial acceptance among members of the relevant communities, however, it likely measures up by many of these metrics. Its stability over time operates as an observable indicator that the procedure is legitimate for that particular society at that particular moment. Time matters for several reasons. Informed judgments about procedural efficacy can take a while to form, as lawyers, judges, and others observe the results of particular practices. Also, a feedback loop exists. As a new procedure gets established, it in turn influences expectations about how civil litigation should proceed.

Four determinants contribute to or detract from a procedure's stability. Two of them are components of its overall legitimacy. First, the procedure enjoys a strong endowment of "formal legitimacy" if some authoritative legal source unequivocally authorizes it. A federal court's exercise of jurisdiction over a dispute between citizens of different states with more than $75,000 in controversy is formally legitimate because the practice has an unassailable legal foundation.[17] When a court compels parties to submit to nonbinding mediation, and no statute or procedural rule expressly permits the court's order, the practice has a weaker claim to formal legitimacy.[18] An unlawful practice has no formal legitimacy. Rule 11 of the Federal Rules of Civil Procedure does not allow a court to grant a motion for sanctions if the nonmoving party has not had twenty-one days within which to withdraw the offensive paper.[19] A sanctions order issued before this safe harbor closes has no formal legitimacy.[20] Formal legitimacy has a straightforward relationship

17. The case undoubtedly satisfies the statutory requirements for diversity jurisdiction, and the statute is manifestly constitutional. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a) (2006).

18. *Compare In re* Atl. Pipe Corp., 304 F.3d 135, 142–45 (1st Cir. 2002) (refusing to find authorization for this sort of order in the nonspecific terms of Rule 16 of the Federal Rules of Civil Procedure, but finding authorization for it in the "inherent powers" of the court), *with* Strandell v. Jackson Cnty., 838 F.2d 884, 888 (7th Cir. 1987) (refusing to allow a district court to order the parties to submit to a summary jury trial in the absence of a statute or rule expressly giving the court the power to issue such a rule).

19. FED. R. CIV. P. 11(c)(2).

20. *See id.*; *see also* Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1327–29 (2d Cir. 1995) (finding a district court could not grant a motion for sanctions when the safe-harbor period had not yet run).

with overall legitimacy. An unlawful order will gain little traction as an acceptable practice and thus will enjoy no stability.

"Social legitimacy," stability's second determinant, refers to perceptions. A procedure enjoys a significant endowment of social legitimacy if most members of the relevant communities perceive it to be fair, accurate, efficient, and consistent with fundamental political and social commitments. I develop the idea of social legitimacy further in the next section.

No impermeable boundary separates formal from social legitimacy. A practice's formal legitimacy can strengthen social perceptions of legitimacy, as lawfulness strengthens arguments for the practice.[21] Likewise, a practice's social legitimacy can influence its formal legitimacy. Marginally lawful practices that address a widely recognized need can spur codifiers to act,[22] and robust social legitimacy can encourage continued use of a legally questionable practice.[23]

Exogenous shocks and political sclerosis, the third and fourth determinants, can affect a procedure's stability but not in ways that bear on its legitimacy. The former are changes in law or society that happen for reasons mostly unrelated to procedural efficacy, but that have a destabilizing effect for the procedure. The collapse in the number of antitrust class actions in the early 1980s, for example, had less to do with tepid enthusiasm for Rule 23 in this substantive area and more to do with the Reagan Administration's deregulatory agenda.[24] Also, a deeply problematic procedure can remain in place, not

21. *See, e.g.*, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 222–23 (William W. Dawson ed., 1938) (statement of Charles Clark) (invoking a Massachusetts decision on pleading to respond to critics of Rule 8).

22. Rule 23 was amended to permit appellate review of class certification decisions after lower federal courts began to engage in this sort of interlocutory review by way of mandamus. FED. R. CIV. P. 23(f) (amended 1998); Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 101, 102 (2001); *e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294 (7th Cir. 1995).

23. Summary judgment is a "pillar of our system," as one critic acknowledges, notwithstanding thoughtful objections to its lawfulness. John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 523 (2007); *see also* Suja A. Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA L. REV. 1667, 1669–72, 1678 (2008) (summarizing influential argument regarding unconstitutionality of summary judgment as well as attempts to rebut it). Courts have rejected out-of-hand challenges to summary judgment's constitutionality. *E.g.*, McDaniel v. Kindred Hosp., Inc., 311 F. App'x 758, 758 (6th Cir. 2009); Diekan v. Blackwelder, No. 10–ADMS–10039, 2011 WL 1167367, at *1 (Mass. Dist. Ct. Mar. 23, 2011).

24. Many antitrust class actions come on the heels of government action. Thus, when the Reagan Administration scaled back antitrust enforcement, fewer private antitrust class actions were filed. Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7; *see also* John E. McClatchey, *Introduction: Private Enforcement in the New Antitrust Era*, 58 ANTITRUST L.J. 271, 272–74 (1989). On the Reagan Administration's antitrust

because it is legitimate, but because of political sclerosis. Congress's repeated failures to replace tort with some administrative compensation scheme for asbestos litigation, for example, speak more to lobbying dynamics than to widespread satisfaction with traditional litigation.[25] These determinants are idiosyncratic, and for that reason I do not build them into my account of procedural legitimacy more generally.

B. Social Legitimacy and the Individual Lawsuit Baseline

Social legitimacy requires elaboration, especially since my definition—a procedure enjoys social legitimacy if members of the relevant communities believe in its efficacy—borders on the tautological. Proceduralists may use different sets of values to measure procedural legitimacy, which in turn depend on their political and social commitments. For the present procedural era, I hypothesize that these varied metrics, whatever they value and however they are deployed, produce roughly the same result. For decades, proceduralists have generally believed that a procedure modeled on what happens in the individual lawsuit, *conceived of as an ideal-type*, is legitimate.[26] The ideal-type of this lawsuit has familiar features:

- Parties of roughly equal strength with legal counsel initiate and defend the litigation;
- the case proceeds before a detached, neutral judge in a courtroom open to the public;
- attorneys solicit their clients' input for key litigation decisions;
- each party has meaningful notice of what happens in the case, a meaningful opportunity to gather evidence to support claims and defenses, and a meaningful opportunity to be heard; and

enforcement, see, for example, Robert Pitofsky, *Does Antitrust Have a Future?*, 76 GEO. L.J. 321, 321–24 (1987). On antitrust class actions' tendency to piggyback on government efforts, see John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 222 & n.16 (1983).

25. *See* Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 273–78 (2006).

26. *See* JOHN PATRICK DIGGINS, MAX WEBER: POLITICS AND THE SPIRIT OF TRAGEDY 120–23 (1996). Max Weber's concept of the ideal type is complicated, but an introductory definition suffices for this Comment. Ideal types are "heuristic categories that serve the purpose of posing questions and clarifying concepts. Ideal types are meant to be exaggerated simplifications of the complexity of historical data so that behavior may be analyzed in view of its approximations or deviations from the model or 'ideal,' that is, its complete attributes." *Id.* at 123.

- the impact of the lawsuit is constrained in time and scope, in that the primary purpose is remediation and dispute resolution, and that any wider impact is incidental.[27]

Practices consistent with this baseline are per se socially legitimate. If a practice differs from what happens in the individual lawsuit, it can still enjoy social legitimacy, but only if a compelling regulatory need justifies its deviation.[28]

Much contemporary civil litigation deviates from this stylized baseline;[29] the individual lawsuit may not have always been the Anglo-American norm;[30] other adjudicatory forms have enjoyed social legitimacy;[31] and the individual lawsuit form may deserve normative scrutiny. What functions as the procedural baseline, however, does not necessarily have to reflect the empirical average. As Professor Resnik has written, "the images that shape our thoughts are often not based upon statistical data . . . [but] 'vivid' information."[32] I acknowledge that my unproven hypothesis warrants skepticism, but I wager that the individual lawsuit form is probably more firmly entrenched today in perceptions about efficacious procedure than at any time in the past three decades.[33] For decades, commentators have juxtaposed the individual lawsuit

27. These are roughly the traits that Abram Chayes famously identified in the "traditional model" of litigation. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–83 (1976); *see also* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 17 (1979).

28. *Cf.* Daniel A. Farber, *Playing the Baseline: Civil Rights, Environmental Law, and Statutory Interpretation*, 91 COLUM. L. REV. 676, 678 n.12 (1991) (reviewing CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990)) ("A baseline . . . is a state of affairs that requires no justification, and that establishes a norm, so that any deviations from the baseline require special justification.").

29. For example, for the twelve-month period ending September 30, 2010, twenty-five percent of all civil actions in the federal courts included pro se litigants, a departure from the individual lawsuit ideal type in which the parties have representation. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 78 tbl. S-23 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf.

30. *See* Chayes, *supra* note 27, at 1283–84, 1283 n.11; *cf.* Bone, *Rethinking*, *supra* note 15, at 204 (challenging the "conventional understanding" that affording an individual his or her day-in-court has long been a sacrosanct requirement for a fair procedure).

31. *See* Resnik, *Fairness in Numbers*, *supra* note 10, at 135 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011)) (describing acceptance of class action as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only"). *See generally* Fiss, *supra* note 27 (defending structural-reform litigation).

32. Resnik, *Failing Faith*, *supra* note 5, at 511.

33. *Compare* Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004) (presenting a widely held view that structural injunction litigation has declined since the 1970s), *with* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 553–54, 568–69 (2006) (using data on prison reform injunctions to refute this "conventional wisdom").

with other "models" of adjudication.[34] Professor Resnik, for example, named an emergent procedural era in 1982 with her "managerial judging" model.[35] Each of these alternatives has weathered doctrinal or political challenges, sometimes couched in terms of how sharply they deviate from the individual lawsuit norm.[36] In contrast, the individual lawsuit continues to flourish, at times resisting replacement more muscularly than it has in previous decades.[37]

C. Regulatory Need and Social Legitimacy

Procedures that depart from the individual lawsuit baseline can enjoy widespread acceptance. But, whereas individual lawsuit processes are socially legitimate per se, these deviations stabilize only if they respond effectively to a regulatory need that requires them. Three class action examples illustrate this hypothesis.

1. Derivations and Regulatory Need: The Negative-Value Class Action

In July 1966, revisions to Rule 23 that generated modern class action practice went into effect.[38] The generic negative-value class action prosecuted under this revised rule deviates significantly from the individual lawsuit model.[39] Lawyers, not clients, initiate and control the litigation;[40] class members have either compromised or nonexistent rights to individual days-in-court;[41] the litigation has a widespread impact not incidentally but by design;[42] and so on. Serious doubts plagued the class action's formal legitimacy until

34. *See* Chris H. Miller, *The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation*, 72 ALB. L. REV. 117, 120–30 (2009) (cataloguing these proposed models).

35. *See* Resnik, *Managerial Judges*, *supra* note 3, at 380.

36. *See, e.g.*, Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 34 (2003).

37. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (beginning an opinion restricting a use of Rule 23 that had been permitted since the 1970s with an endorsement of the individual day-in-court ideal); Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (rejecting the notion of "virtual representation" that had been accepted by a number of circuits for years); Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (invoking the individual day-in-court ideal to contest mandatory class actions that had been experimented with since the early 1980s).

38. Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1031 (1966).

39. Negative-value class actions are ones where, absent joinder, the costs of litigating a claim would exceed its value.

40. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 309, 383 (1996); Bone, *Rethinking*, *supra* note 15, at 198.

41. Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 27–28 (2002).

42. Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 258 (2002).

recently.[43] But, by the late 1970s, threats to the stability of the negative-value class action largely disappeared,[44] and the adjudicatory form remained in a state of "dynamic . . . equilibrium" until 2011.[45]

Uncertain lawfulness notwithstanding, the negative-value class action stabilized in the 1970s because it served a regulatory need. The circumstances prevailing at its gestation explain why this novel adjudicatory form took root when it did. Efforts to create a procedural mechanism that could generate binding judgments without plaintiff consent, Rule 23's pioneering innovation, failed before the 1960s.[46] By the decade's end, however, the need for this mechanism grew acute. The negative-value class action responds to a failure in the market for rights vindication.[47] Suits for injuries with insufficient value

43. Immediately after its promulgation and for decades thereafter, critics attacked the new Rule 23 on grounds that it affected substantive rights in violation of the Rules Enabling Act ("REA"), 28 U.S.C. § 2072(b) (2006). *See, e.g.*, Edward J. Ross, *Rule 23(b) Class Actions—A Matter of "Practice and Procedure" or "Substantive Right"?*, 27 EMORY L.J. 247, 251 & n.15 (1978); William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 386 (1973); *see also* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 19 (2010) (alluding to such criticisms). The Supreme Court only addressed this issue in 2010. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443–44 (2010) (upholding Rule 23 under the REA).

44. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 668 (1979) (observing in 1979 that "class action practice under the existing rule appears to be stabilizing").

45. This description, from a prominent and thoughtful practitioner, is apt. Statement of Elizabeth Cabraser on Proposed Amendments to Fed. R. Civ. P. 23, *in* 4 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 600, 601 (1997).

46. In 1956, the U.S. Supreme Court rejected a proposed amendment that would have enabled Rule 23 to generate preclusive judgments. *See* Order Discharging the Advisory Committee, 352 U.S. 803 (1956); *see also* ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 26–27 (1955), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV10-1955.pdf (describing the proposed amendment that the Supreme Court rejected); Charles Clark, Reporter, Advisory Comm. on Fed. Rules of Civil Proc., Remarks at the Meeting of the Advisory Committee on Federal Rules of Civil Procedure 121 (May 18, 1953) (clarifying the intended preclusive effect of proposed amendment). Some commentators before 1966 advocated a class action rule that would generate preclusive judgments for some absent class members without their consent. *E.g.*, ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 282–83 (1950); Arthur John Keefe, Stanley M. Levy & Richard P. Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 342–43 (1948). When a Texas court treated a class action judgment in this manner, its decision attracted near-universal criticism. *See* Russell P. Duncan, Note, *Due Process Requirements of a State Class Action*, 55 YALE L.J. 831, 832 (1946) (discussing *Richardson v. Kelly*, 191 S.W.2d 857 (1945) to illustrate the "injustice [that] may result" from such an interpretation); Harold Hoffman, Comment, *Denial of Due Process Through Use of the Class Action*, 25 TEX. L. REV. 64, 64, 68 (1947).

47. *E.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)) ("The policy at the very core of the class

to attract fee-seeking plaintiffs' lawyers go unfiled. Government intervention, the standard response to a market failure, was an unattractive alternative by the late 1960s. The problems of agency ineptitude and capture, which Ralph Nader and others began to spotlight mid-decade, eroded confidence in bureaucratic efficacy.[48] Had agencies been inclined to regulate effectively, they often lacked the resources to do so.[49] Political polarization within Congress and between Congress and the President made bureaucratic improvement difficult.[50] The class action solved this problem,[51] one all the more pressing as the universe of substantive rights expanded in the 1960s and 1970s.[52] Rights vindication would depend on private initiative, not government action. Aggregation, which Rule 23 made easy by minimizing the transaction costs of joinder, provided the financial incentive. Lawyers could spread costs across a lot of claims and collect fees from all of them.

After some tumult in its first decade, the negative-value class action did not face opposition from lawyers, judges, or legislators that gained serious traction.[53] Two reasons explain this stability. First, there is no reason to think

action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

48. *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1061–62 (1997); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1296 (1986); Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 692–93 (2000).

49. *E.g.*, S. REP. NO. 91-1124, at 4 (1970) (discussing the incapacity of the Federal Trade Commission effectively to enforce consumer protection legislation); Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 920–23 (1978) (describing how the EEOC was overwhelmed by the number of complaints by 1971).

50. SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 4–5 (2010).

51. For a statement to this effect from the time, see, for example, Arthur H. Travers, Jr. & Jonathan M. Landers, *The Consumer Class Action*, 18 U. KAN. L. REV. 811, 812–14 (1970).

52. *E.g.*, FARHANG, *supra* note 50, at 66–67 (demonstrating the explosion in statutory entitlements starting in the mid-1960s); Robert L. Rabin, *The Monsanto Lectures: Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 9 (1988) (discussing the emergence of modern product liability litigation in the early 1960s).

53. The Class Action Fairness Act of 2005 was perhaps the most significant federal legislative effort to curb class litigation to pass since the revision of Rule 23 in 1966. The statute itself recognizes that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties." Class Action Fairness Act of 2005, Pub. L. No. 109-2, §2(a)(1), 119 Stat. 4, 4. In comparison, in the 1970s efforts to destroy class action practice entirely received serious consideration. *E.g.*, AM. COLL. OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 31–32 (1972) (recommending that class members have to opt in to class actions); ADVISORY COMM. ON CIVIL RULES, THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE

that the regulatory need the class action addressed in the late 1960s weakened. Second, social legitimacy is sticky. Once a procedure becomes entrenched, its normalcy influences expectations among members of relevant communities about how civil litigation should proceed.

2. Deviations and Regulatory Need: The Rise and Fall of the Mass Tort Class Action

The three periods in the history of the mass tort class action more fluidly illustrate how social legitimacy and regulatory need interact to influence a procedure's stability when it deviates from the individual lawsuit baseline. From the mid-1960s until the early 1980s, courts rarely certified proposed classes of personal injury claimants.[54] The market for individual legal representation never failed, so no policy justification existed forcibly to aggregate plaintiffs who could attract individual representation and litigate on their own.

Ironically, high claim value, the very reason for this market's adequacy, created a different regulatory need for aggregate processing by the mid-1980s. To put it crudely, plaintiffs filed too many individual actions, not too few. An "avalanche" of asbestos litigation,[55] seconded by huge quantities of DES, Dalkon Shield, breast implant, and other similar cases,[56] threatened to overwhelm federal dockets and deny individual plaintiffs actual access to courts.[57] With no good options,[58] some defendants, drowning under an

ADMINISTRATION OF JUSTICE 3 (1976), *microformed on* CI-6504-31 (proposing that the Advisory Committee seriously consider the ACTL's recommendations).

54. The first instance in which a district court certified a class in a mass tort case was *Payton v. Abbott Labs*, 83 F.R.D. 382, 385–87 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983). *See also In Camera*, 5 CLASS ACTION REP. 469, 469 (1978) (observing that this case represented the first instance of a certified mass tort class). The judge subsequently de-certified the class. Payton v. Abbott Labs, 100 F.R.D. 336, 340 (D. Mass. 1983). The first certified mass tort class to withstand subsequent review came in the *Agent Orange* litigation in 1983. *See In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 720 (E.D.N.Y. 1983), *mandamus denied*, *In re* Diamond Shamrock Chems. Co., 725 F.2d 858 (2d Cir. 1984). The original district judge indicated that he would certify an Agent Orange class in 1980, but he never entered a class certification order. *Id.* at 720. Some mass accident cases were certified before 1979. *See, e.g.*, Coburn v. 4-R Corp., 77 F.R.D. 43, 47 (E.D. Ky. 1977); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 560, 562 (S.D. Fla. 1973); *In re* Gabel, 350 F. Supp. 624, 630 (C.D. Cal. 1972); Am. Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155, 156 (N.D. Ill. 1969). *But see* Marchesi v. E. Airlines, Inc., 68 F.R.D. 500, 501 (E.D.N.Y. 1975) (describing the view that mass accident cases cannot be certified as "well settled").

55. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 470 (5th Cir. 1986).

56. *Cf.* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 945–47 (1995) (summarizing the emergence of the mass tort phenomenon post-1969).

57. Judge Walter Skinner stressed this point when he issued the first decision certifying a mass tort class in the federal system. *Payton*, 83 F.R.D. at 390 ("The courts are faced with the

unceasing torrent of individual actions, joined with plaintiffs to seek class certification and resolve all their liability at once.[59] Sensing an existential threat, federal appellate courts began to let class certification orders stand.[60] As they did, they invoked this regulatory need to explain why they now allowed deviations from the individual lawsuit baseline for tort claims.[61]

The pendulum began to swing back in the mid-1990s, and presently courts rarely deploy Rule 23 to manage mass torts.[62] The regulatory need has subsided. Asbestos filings have continued to mushroom,[63] but other mass torts that loomed on the horizon in the mid-1990s never really materialized.[64] Also, class certification did not prove to be the *sine qua non* for handling mass torts as it might have seemed in the desperate days of the 1980s. At present, lawyers and judges handle the mass torts that have developed in ways that do not deviate as far from the individual lawsuit baseline, at least formally, as the class action.[65]

choice of adapting traditional methods to the recurrent phenomenon of widespread drug litigation or leaving large numbers of people without a practical means of redress.").

58. The most-often proposed alternative, a legislatively created compensation scheme to replace the tort system, never materialized. *See* Richard Nagareda, *Public and Private Law Perspectives: Transcript of Professor Richard Nagareda*, 37 SW. U. L. REV. 659, 660 (2008).

59. Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1497–98 (2008).

60. *See In re* Cordis Corp. Pacemaker Prod. Liab. Litig., No. MDL 850, C-3-86-543, 1992 WL 754061, at *10 (S.D. Ohio Dec. 23, 1992) (citing Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196–97 (6th Cir. 1988)) ("[C]ourts no longer consider such [mass tort] cases to be *per se* unsuitable for certification.").

61. *E.g.*, *In re* A.H. Robins Co., Inc., 880 F.2d 709, 725 (4th Cir. 1989) (stressing the "recent . . . proliferation in the development and distribution of new products[,] . . . the complaints of injuries from the use of these products[,] . . . [and] an accelerating avalanche of mass products liability suits" as creating "probably the most important and difficult management problem facing the federal court system today" to justify class certification in a 1989 asbestos case); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (suggesting that "the current volume of litigation and more frequent mass disasters," as well as Congress's refusal to address, in particular, the asbestos litigation crisis, explained why class treatment of claims could justifiably deprive individuals of the "hearings and arguments for each . . . to the extent enjoyed . . . in the past").

62. *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 412 (2000) [hereinafter Erichson, *Informal Aggregation*] (noting that a "trend" in favor of class certification in mass torts cases "has been squelched").

63. *See* Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1899, 1906–08 (2002).

64. In 1995, Francis McGovern predicted that "[t]he future is in Albuterol, Norplant, RSI, tobacco, and Persian Gulf chemicals." Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022, 1026 (1995). None of these generated the sort of mass tort leviathan that asbestos or breast implants spawned.

65. *See infra* Part II.B.

3. Minimizing Deviations: Attorneys' Fees for Class Counsel

The contrast between the stability of the negative-value class action and the rise and fall of the mass tort class action suggests that a procedure can deviate from the individual lawsuit baseline only to the extent necessary to address a regulatory need. If a practice that more closely resembles what happens in the individual lawsuit can handle the same need, then the more extreme deviation risks a deficit of social legitimacy.

This to-the-extent-necessary limit on deviations explains why a striking proposal to increase fee awards in negative-value class actions[66] will probably gain little support. Presently, the bulk of a class action settlement, typically about seventy-five percent, goes to class members and not to class counsel as fees.[67] This pattern roughly reflects how plaintiffs' lawyers and their clients split the proceeds when an individual case settles.[68] As a number of commentators have argued, however, individual members of a small-stakes class have no real interest in any compensation.[69] If negative-value suits make sense as a policy matter, they do because they promise some measure of deterrence.[70] Settlement distributions thus blunt Rule 23's regulatory potential because class members with no more than a nominal interest in compensation get most of the settlement. If the money went to attorneys instead, their incentive to file class actions, and thus deter wrongdoing, would increase.[71] Hence the proposal: courts should award up to one hundred percent of a class settlement in a negative-value case to class counsel.[72]

Perhaps existing doctrine would permit these sorts of fees,[73] but they would deviate from the individual baseline in two ways. Fees of one hundred

66. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2069–71 (2010) [hereinafter Fitzpatrick, *Class Action Lawyers*].

67. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010) [hereinafter Fitzpatrick, *Empirical Study*].

68. *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 286 (1998).

69. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2018 (2007) [hereinafter Bone, *Who Decides?*] (observing that "compensation does very little justificatory work" for the small-stakes class action); Fitzpatrick, *Class Action Lawyers*, *supra* note 66, at 2067; Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104–05 (2006).

70. Fitzpatrick, *Class Action Lawyers*, *supra* note 66, at 2067; Gilles & Friedman, *supra* note 69, at 139.

71. *See* Fitzpatrick, *Class Action Lawyers*, *supra* note 66, at 2069–70.

72. *Id.* at 2069–70.

73. *Compare id.* at 2075–79 (defending the doctrinal plausibility of awarding 100% of the class settlement to class counsel), *with* David Marcus, *Attorneys' Fees and the Social Legitimacy of Class Actions*, 159 U. PA. L. REV. PENNUMBRA 157, 159–60 (2011) (challenging the doctrinal plausibility of this suggestion).

percent of the class settlement would sharply contrast with the norm of thirty-three percent in individual litigation. Also, the proposal flows from the denial that negative-value class actions have a compensatory function and thus juxtaposes it starkly with the individual lawsuit and its chief *raison-d'être*. The regulatory need is insufficient to push existing class action practice even further away from the baseline. Inadequate attorney incentives likely result in few worthwhile class actions that go unfiled.[74] Changed fee practices would only marginally amplify Rule 23's deterrence potential, while strengthening arguments against the form's legitimacy.[75]

D. The Priority of Social Legitimacy

As my final claim, I assert that the stability of a procedure, and thus the legitimacy this stability reflects, depend more on the social than the formal. A form or practice that enjoys a deep reservoir of social legitimacy but uncertain formal legitimacy will remain more stable over time than one with the opposite endowment. Indeed, a deep reservoir of social legitimacy can help a procedure remain stable in the face of exogenous shocks.[76]

This priority of social legitimacy results in significant part from the few formal restraints procedural doctrine imposes.[77] But even when the doctrine draws lines, a procedure with considerable social legitimacy can cross them. Two class action examples illustrate.

1. Class Certification of Back Pay Claims

An idiosyncratic application of Rule 23 to certify back pay claims in employment discrimination cases enjoyed decades of stability notwithstanding a weak doctrinal foundation. The practice began to lose favor in the 1990s, and in 2011 the Supreme Court ended it. Ebbs and flows of social legitimacy better account for this change than an explanation couched in terms of formal legitimacy.

74. Linda Sandstrom Simard, *Fees, Incentives, and Deterrence*, 160 U. PA. L. REV. PENNUMBRA 10, 14–17 (2011).

75. Prominent class action proponents have long taken pains to contest the claim that class actions provide no compensation to individual class members. *See, e.g.*, *In Camera*, 16 CLASS ACTION REP. 121, 253 (1993) (demonstrating how securities class actions offer much more compensation to individual class members than often suggested); Abraham L. Pomerantz, *Class Suits Defended: Actions Protect Stockholder and Small Consumer*, N.Y. TIMES, Apr. 25, 1971, at F22 (defending class actions by referring to a $132 million settlement that bestowed significant compensation on class members).

76. After a decade of attacks on the legitimacy of class actions starting in the mid-1990s, for example, federal class action practice remained robust. *Cf.* Fitzpatrick, *Empirical Study*, *supra* note 67, at 845 (reporting that federal district judges approved 688 class action settlements worth $33 billion in 2006 and 2007).

77. *See* Bone, *Who Decides?*, *supra* note 69, at 1962.

Class actions for money damages almost always proceed pursuant to Rule 23(b)(3),[78] which requires that issues common to the class predominate over individual ones, and that a class action is superior to individual actions.[79] Members of 23(b)(3) classes have a right to individual notice upon certification and an opportunity to opt out.[80] Rule 23(b)(2), which typically applies in cases for injunctive or declaratory relief, has no predominance or superiority requirements.[81] Also, members of a 23(b)(2) class have no notice or opt out rights.[82] This comparison has two relevant implications. Rule 23(b)(2) facilitates class actions, because it imposes a lesser hurdle to class certification than Rule 23(b)(3), and because it eschews costly procedural protections. Also, Rule 23(b)(2) class actions deviate even further from the individual lawsuit baseline than their Rule 23(b)(3) counterparts. Notice and opt out rights give 23(b)(3) class members modest control over their rights to sue, if not what individual plaintiffs enjoy.

Not long after Rule 23's recreation in 1966, federal courts began to use Rule 23(b)(2) to certify employment discrimination classes seeking back pay.[83] They treated this type of claim for monetary compensation more favorably than all others, and they pushed Title VII class actions further from the individual lawsuit baseline than others. The formal doctrinal justification for this practice did not fit the original expectations of Rule 23(b)(2)'s authors[84] and was "surprisingly weak."[85] Primarily, courts stressed that "the award of back pay" is "one element of the equitable remedy" contemplated by Rule 23(b)(2).[86] But Rule 23(b)(2) refers to injunctive or declaratory relief, not equitable relief. By drawing a wooden distinction between law and equity to bring back pay claims within Rule 23(b)(2)'s aegis, courts reverted to a sort of disfavored formalism in procedural analysis that the 1966 revision to Rule 23 had eradicated.[87]

78. *See* Holmes v. Cont'l Can Co., 706 F.2d 1144, 1156 (11th Cir. 1983) (explaining that Rule 23(b)(3) "covers" cases seeking monetary relief).

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

80. *Id.* 23(c)(2)(B).

81. *See id.* 23(b)(2).

82. *Id.* 23(c)(2)(A).

83. *E.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971).

84. Albert M. Sacks, Assoc. Reporter, Remarks at the Meeting of the Advisory Committee on Civil Rules 62 (Oct. 31–Nov. 2, 1963) (declaring that Rule 23(b)(2) "is not issued with any thought of . . . a judgment which in effect orders the payment of money").

85. George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 24 (1983).

86. *Robinson*, 444 F.2d at 802; *see also* Holmes v. Cont'l Can Co., 706 F.2d 1144, 1152 (11th Cir. 1983) (quoting Johnson v. Ga. Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969)).

87. *See* David Marcus, *Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 695 (2011) [hereinafter Marcus, *Flawed But Noble*] (describing revisions to Rule 23 in 1966).

This "more generous" treatment of Title VII class actions facilitated their prosecution and thereby addressed a regulatory need keenly felt in the 1970s.[88] The "first generation" of employment discrimination litigation targeted easily identifiable and systemic acts.[89] Courts treated the rights at stake as implicating "a policy that Congress considered of the highest priority" and insisted that their remediation warranted particular judicial energy and attention.[90] Government enforcement of antidiscrimination measures had proven largely ineffective by the early 1970s.[91] Given the ubiquity of discrimination as standard employment practice in parts of the country,[92] the costs of litigating enough individual cases to make a difference were prohibitive.[93] Several of the Fifth Circuit judges who wrote particularly influential Title VII opinions had previously recognized the class action's importance, given bureaucratic laxity, to the eradication of school desegregation.[94] They likely saw litigation history—a widespread problem of discrimination, an inadequate governmental response, and ineffective

88. *See* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 469 (9th Cir. 1973) ("While Rule 23 has no 'civil rights version', it is not surprising that its interpretation is more generous in [civil rights] case[s] than in others."); *see also Robinson*, 444 F.2d at 796–97, 802.

89. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–67 (2001).

90. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); *see also* Gay v. Waiters' and Dairy Lunchmen's Union, 549 F.2d 1330, 1331, 1334 (9th Cir. 1977), *amended by* 694 F.2d 531 (9th Cir. 1982) (in an opinion discussing the propriety of 23(b)(2) certification of back pay claims, opining that "in determining whether an action alleging discriminatory employment practices shall be allowed to proceed as a class action, a trial court must consider the broad remedial purposes of Title VII and must liberally interpret and apply Rule 23 so as not to undermine the purpose and effectiveness of Title VII in eradicating class-based discrimination"); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975) (arguing for class treatment of Title VII claims on grounds that they "have a broad public interest in that they seek to enforce fundamental constitutional principles"); Hackley v. Roudebush, 520 F.2d 108, 152 n.177 (D.C. Cir. 1975) ("The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest.").

91. Huff v. N. D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973) ("The federal courts have a particularly vital role in cases such as this. To them alone Congress has assigned the power to enforce compliance with the strictures against racial discrimination in employment."); ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 3 (1971).

92. *See generally* John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603 (1991) (providing various employment data showing discrimination in the economic and employment settings).

93. *Cf.* Belton, *supra* note 49, at 934 ("The development of the Title VII class action was critical in the private enforcement efforts.").

94. *Compare* Sagers v. Yellow Freight Sys., Inc., 529 F.2d 721, 724–25 (5th Cir. 1976) (Wisdom, J.), *and* Rodriguez v. E. Tex. Motor Freight, 505 F.2d 40, 45–46 (5th Cir. 1974) (Wisdom, J.), *and* Jenkins v. United Gas Corp., 400 F.2d 28, 29–30, 33–34 (5th Cir. 1968) (Brown, J.), *with* Marcus, *Flawed But Noble*, *supra* note 87, at 693–94.

individual litigation—repeat itself as civil rights advocates turned their attention to the workplace.[95] The regulatory need for class treatment required the particular deviation that Rule 23(b)(2) contemplates. Courts wanted to avoid the notice requirement that Rule 23(b)(3) triggers, for fear that "[t]he imposition of notice and the ensuing costs often discourage [Title VII] suits."[96]

In the 1990s, some courts expressed doubt about this practice.[97] In 2011, *Wal-Mart Stores, Inc. v. Dukes* ended it.[98] The formal basis for the Rule 23(b)(2) certification of back pay claims may have been questionable in the early 1970s, but by the time the Court took the issue each circuit had accepted it.[99] Its reservoir of social legitimacy, however, had dried up.[100] By 2011, the perceived need to favor Title VII claims above all others had receded. Employment discrimination litigation in the 1970s followed closely on the heels of the civil rights movement; not only has civil rights litigation moved from the center of American political culture, it has suffered recently from the perception of excess.[101] Litigation and other enforcement measures have

95. Belton, *supra* note 49, at 933 (noting connection in Fifth Circuit between school desegregation and employment discrimination litigation); *see also* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1427 (1998) ("Since the early 1970s, employment discrimination . . . has received more attention from courts and commentators than other areas of civil rights.").

96. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 254 (3d Cir. 1975) (additionally observing that "[c]lass actions . . . are powerful stimuli to enforce Title VII").

97. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 427 n.1 (5th Cir. 1998) (Dennis, J., dissenting) (commenting on the majority's strained effort to distinguish back pay claims from other claims for monetary relief that cannot be certified pursuant to Rule 23(b)(2)).

98. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2545–46 (2011).

99. Brief in Opposition of Respondents at 14–15, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277) (making this point and citing cases to show that "[a]ll circuits . . . agree that back pay may be sought under Rule 23(b)(2)").

100. I do not discuss case-specific reasons for the *Wal-Mart* decision and its timing, but the terrible atmospherics for the plaintiffs merit mention. The creators of the social science upon which the plaintiffs' expert based his opinion in favor of class certification disavowed the expert's analysis. John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks"*, 94 VA. L. REV. 1715, 1719 (2008); *see also Dukes*, 131 S. Ct. at 2553 n.8 (noting creators' disagreement with plaintiffs' expert's study). The type of antidiscrimination theory the plaintiffs alleged has been criticized by thoughtful commentators, otherwise sympathetic to the cause, as difficult to administer as a matter of finding violations and crafting remedies. *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 34–35 (2006) (criticizing second generation scholars' lack of substantive principles in analyzing workplace discrimination solutions on grounds that such an approach fails to provide "an operating theory of what is wrongful about discrimination"). Also, Wal-Mart's relevant employment data matched overall gender patterns for the economy at large. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 155–56 (2009).

101. *See* Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557 & n.8 (2001).

ended many of the most obvious discriminatory practices among employers.[102] Plenty of data suggest that employment discrimination remains rampant,[103] but instances are often less visible and often result from less explicit and sometimes subconscious biases.[104] Courts have proved "reluctant" to remediate this type of discrimination,[105] indicating either doubts to its possibility or skepticism about the efficacy of judicial remedy.

Moreover, the importance of Rule 23 to employment discrimination litigation has waned, and with it the need to deviate further from the individual lawsuit baseline for Title VII claims than for others. Class actions have been marginal to overall Title VII enforcement since the 1980s.[106] Bringing the procedural treatment of back pay claims in line with others for monetary compensation likely will have little impact on the overall effectiveness of antidiscrimination laws. Finally, the Supreme Court could be forgiven for wondering what, if any, benefits Rule 23(b)(2) treatment afforded Title VII claims. The Ninth Circuit's en banc opinion crafted a test for Rule 23(b)(2) certification that replicated Rule 23(b)(3)'s predominance and superiority requirements in function if not form,[107] and, as advocates have conceded, an individual notice requirement in Title VII cases probably would not hurt much.[108]

102. *See* PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 83–84, 94 (2008) (describing the salutary impact of 1970s Title VII litigation, particularly class actions, on discrimination in organized labor).

103. *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 118 n.45 (2009).

104. Sturm, *supra* note 89, at 460.

105. Bagenstos, *supra* note 100, at 23.

106. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1019 (1991) (observing that employment discrimination class actions have "virtually vanished from the scene"); *1991 Federal Court Class Action Statistics*, 14 CLASS ACTION REP. 284, 285 (1991) (charting the decline in civil rights class actions).

107. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 617 (9th Cir. 2010), *rev'd*, 131 S. Ct. 795 (2010) (listing four factors for courts to consider when deciding whether monetary relief "predominates" over injunctive or declaratory relief: "whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns").

108. *See, e.g.*, Letter from Theodore M. Shaw, Assoc. Dir.-Counsel, NAACP Legal Def. & Educ. Fund, Inc., to J. Alicemarie H. Stotler, Chair, Standing Comm. on Rules of Practice and Procedure (June 11, 1996), *in* 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 94, 96 (1997) (opposing an amendment to Rule 23(c)(e), which would require notice in all Rule 23(b)(2) class actions, but acknowledging that notice would be feasible in employment discrimination class actions).

2. Class Certification of Truth in Lending Act Claims

An episode in the history of Truth in Lending Act[109] ("TILA") litigation also illustrates the priority of social legitimacy over formal legitimacy to the overall stability of a procedure. As enacted in 1968, TILA enabled plaintiffs to recover a penalty of up to $1,000 with no showing of actual damages if the lender did not make certain required disclosures.[110] The statute fit Rule 23(b)(3) like a glove, as a TILA case for the statutory penalty presented no individual issues and thus satisfied Rule 23(b)(3).[111] But to many judges, certified TILA classes had troubling implications. A picayune violation of the statute by a large lender could generate tens of thousands of $1,000 claims. Aggregated into one case, these claims could inflict in one blow "a horrendous, possibly annihilating punishment, unrelated to any damage."[112] For most courts, distaste for this seemingly distorted consequence, not the "technical application of Rule 23," as one judge candidly admitted, required a denial of class certification.[113] Congress ratified this judicial mutiny in 1973 by placing an upward limit on a lender's total class action liability when plaintiffs had no actual damages.[114]

Since TILA and Rule 23 fit well together as a doctrinal matter, concerns of social legitimacy better explain the instability of early 1970s TILA class action practice. Cases for statutory penalties deviated significantly from the individual lawsuit ideal-type. By design, TILA plaintiffs were vehicles for creditor regulation and did not pursue some kind of individualized

109. Truth in Lending Act, Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968).

110. 15 U.S.C. § 1640(a)(1)–(2)(A) (2006); *see also* Wilcox v. Commerce Bank, 474 F.2d 336, 339 n.3 (10th Cir. 1973) (reprinting relevant part of TILA as enacted in 1968).

111. *Wilcox*, 474 F.2d at 343 ("[W]e agree that there is nothing in the Act itself, the Rule, or the notes of the Advisory Committee on Rules of Civil Procedure with respect to it which expressly or impliedly precludes class actions in this type of case."). *But see* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1081–85, 1082 n.64 (2011) (defending refusal to certify TILA claims as a sensible application of Rule 23(b)(3)'s superiority requirement).

112. Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972); *see also* Mathews v. Book-of-the-Month Club, Inc., 62 F.R.D. 479, 479–80 (N.D. Cal. 1974); Linn v. Target Stores, Inc., 61 F.R.D. 469, 472, 475 (D. Minn. 1973) (denying class certification motion and referring to the "potentially devastating effect on defendants"); Garza v. Chi. Health Clubs, Inc., 56 F.R.D. 548, 549 (N.D. Ill. 1972) (denying class certification on grounds that "the minimum recovery would be devastating for a small company").

113. *Linn*, 61 F.R.D. at 473, 475; *see also* Katz v. Carte Blanche Corp., 496 F.2d 747, 763 n.9 (3d Cir. 1974) (citing cases in which forty of fifty-one district courts that denied motions for class actions under TILA); CONG. RESEARCH SERV., CLASS ACTIONS BROUGHT IN FEDERAL COURTS UNDER SECTION 130 OF THE TRUTH IN LENDING ACT (1976) (compiling a list of cases). *But see* Beard v. King Appliance Co., 61 F.R.D. 434, 440 (E.D. Va. 1973) (refusing to deny class certification based on a concern about "the harsh result predicted by defendants," reasoning that such an argument is "a legislative or political, and not a judicial, determination").

114. Pub. L. No. 93-495, Title IV, § 408(a)(2)(B), 88 Stat. 1500, 1518 (1974).

compensation.[115] A regulatory need might have motivated private TILA enforcement, but the disquieting prospect that a defendant could have to surrender tens of millions of dollars without any demonstration of actual injury weakened the case for it. Even TILA's congressional defenders accepted that TILA class litigation was imbalanced and needed re-setting.[116]

* * *

To offer an abbreviated summary of my argument thus far: the stability of a procedure is often observable evidence that it is legitimate because it can indicate that the procedure measures up by many of the metrics people use to evaluate legitimacy. This stability results more from perceptions of efficacy and less from formal doctrine. Stability on its own does not suggest anything normatively meaningful about legitimacy, but it indicates what social consensus deems legitimate and can thereby point toward explanations about what matters to perceptions of efficacy. The stable individual lawsuit baseline, for example, helps isolate the sorts of regulatory needs that enabled deviations like certain class action procedures to stabilize.

A final thought is in order before moving on. A procedure's observable stability serves as a trustworthy outward manifestation of legitimacy only if perceptions are informed and reasoned. If dysfunctions interfere with social perceptions, a procedure's persistence could indicate nothing more than confusion. Occluded perceptions, in other words, could enable a bad procedure nonetheless to persist. Recent trends in the law of aggregate litigation raise just this possibility—that practices can become entrenched not because they are seen as legitimate, but because they are not seen at all. Professor Resnik has written eloquently about these sorts of developments for years. In the next Part, I join her chorus.

II. PROCEDURAL STABILITY IN CONTRACT'S WAKE

I find support for my account of procedural legitimacy, with its emphasis on social perceptions, in the notion of "publicity" that Professor Resnik takes

115. *See* COMM. ON BANKING, HOUS. & URBAN AFFAIRS, TRUTH IN LENDING ACT AMENDMENTS, S. REP. NO. 93-278, at 14 (1973) ("The purpose of the civil penalties section under Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy."); *see also Inaccurate and Unfair Billing Practices: Hearings on S. 1630 and S. 914 Before the Subcomm. on Consumer Credit of the Comm. on Banking, Hous. & Urban Affairs*, 93d Cong. 166 (1973) (statement of Mark Silbergeld, Attorney, Consumer Union, Washington Office) (agreeing that the purpose of TILA class actions is not to "reward or enrich the consumers" but to "provide a meaningful, effective penalty so that you can get compliance").

116. S. REP. NO. 93-278, at 35 (1973) (statement of Sen. William Proxmire and Sen. William D. Hathaway) (supporting a proposal to put an upward limit on a creditor's class action liability, but complaining that the upward limit in the proposed legislation was too low).

from Jeremy Bentham.[117] She has explained how the public's gaze is central to assessments of procedural legitimacy:

> Fairness requires . . . participation from those outside a litigation triangle, invited to partake in interactive exchanges that produce, confirm, or reject legal rules. That publicity enables assessments of whether procedures and decisionmakers are fair and permits an understanding of the impact of resources . . . of the treatment of similarly situated litigants, and of why one would want to get into (or avoid) court. The presence of the public divests both the government and private litigants of control over the meanings of the claims made and the judgments rendered and enables popular debate about and means to seek revision of law's content and application.
>
> . . . Without authorization for an audience to have a discrete and protected place . . . one has no way to assess the practices or understand how nuanced law application can be. Indeed, it is the performance of fairness before the public that legitimates adjudication.[118]

Professor Resnik fears that publicity, with its legitimizing potential, may prove a victim to a recent trend in civil litigation.[119] She rightly observes that "procedure is being swallowed up by contract."[120] Bargains for particularized processes that deviate from the procedural norm tend to block the public's view into dispute resolution. Professor Resnik particularly worries that the loss of publicity that contracted-for procedure entails erodes the capacity of civil processes to "offer[] to democratic governance . . . occasions to observe the exercise of state authority and to participate . . . in norm generation."[121]

I find "contract procedure" disquieting for a similar reason.[122] The replacement of court-centered processes and the publicity they enable with contractual idiosyncrasy degrades the quality of social perceptions of legitimacy. The stability of a particular procedure cannot reflect its legitimacy if it does not result from informed assessments of its efficacy. This problem occurs when parties by contract opt out of courts entirely and into privatized mechanisms for dispute resolution.[123] But even when the parties' bargained-

117. *E.g.*, Resnik, *Bring Back Bentham*, *supra* note 10, at 4–5; *see also id.* at 15–44.

118. Resnik, *Fairness in Numbers*, *supra* note 10, at 87.

119. *E.g.*, Resnik, *Bring Back Bentham*, *supra* note 10, at 52–53; Resnik, *Compared to What?*, *supra* note 5, at 694–98; Resnik, *Fairness in Numbers*, *supra* note 10, at 132.

120. Resnik, *Fairness in Numbers*, *supra* note 10, at 93.

121. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1102 (2006); *see also* Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and Death of Adjudication*, 58 U. MIAMI L. REV. 173, 191 (2003); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 526–37 (2006).

122. For this term, see Resnik, *Procedure as Contract*, *supra* note 3, at 594.

123. I refer here to arbitration. *Cf.* Resnik, *Fairness in Numbers*, *supra* note 10, at 124 (describing difficulty getting accurate data on what happens in arbitrations and observing that "a full account of process and outcomes for class arbitrations remains elusive").

for processes leave disputes in court, contract tends to disrupt the public's gaze by reducing the number of participants who can comment on a procedure's acceptability and opportunities to contest legitimacy.

I use a development in the law of aggregate litigation to defend this claim. For years, the class action has served as the chief alternative adjudicatory form to the individual lawsuit.[124] Proceduralists could readily assess its legitimacy, because the rigorous and detailed procedural rules that regulated class actions fostered significant scrutiny. At present, what I call the "informal aggregation model" is poised to replace the class action as this alternative. An example, as I discuss below, is the litigation involving first responders allegedly injured by the inhalation of toxic dust at Ground Zero. Contract regulates this model, and it does so in a manner that diminishes opportunities for a wide range of potentially interested parties to challenge the model's efficacy. The model deviates from the individual lawsuit baseline, but indicators as to whether it does so legitimately are lacking.

A. Judging Legitimacy: The Class Action

Lawyers have long utilized procedures other than the class action as alternatives to the individual lawsuit.[125] But none other flourished in so many substantive fields or maintained the same hold on the legal imagination.[126] The class action departs starkly from the baseline, most importantly because lawyers acquire power over and can settle plaintiffs' claims without their consent. To compensate for this loss of control, a detailed set of procedural requirements regulates the class action.[127] These rules ensure that adequate interest representation, which legitimates nonconsensual claim joinder, exists.[128] These procedures have a positive externality. By opening up and

124. *Id.* at 135.

125. *See, e.g.*, Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 121–28 (1968) (discussing creation of the MER/29 Group, a group of plaintiffs' attorneys pursuing prescription drug mass tort litigation as a group to, among other things, share information and defray costs). The multi-district litigation system has existed since 1968 and has been used with ever-increasing frequency since then. Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 896 (2001); *see also* Thomas E. Willging & Emery G. Lee, III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 793–94 (2010).

126. *See, e.g.*, Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 519 (2003) [hereinafter Erichson, *Beyond the Class Action*] ("Class actions get all the attention.").

127. *See generally* FED. R. CIV. P. 23(e) (providing the procedural rules for the settlement, voluntary dismissal, or compromise of class actions).

128. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 958–59 (1998).

regularizing class action litigation in at least four ways, they facilitate informed judgments about its legitimacy.

First, a single rule governs class action practice, meaning that cases deviate from the baseline in consistent ways. Rule 23 regulates a judge's supervisory role, for example, as well as class members' procedural rights. These important determinants of class action efficacy therefore remain the same from case to case. The class action routine under Rule 23 helps create a stable and rich substrate for assessments of legitimacy.

The regularity of class action practice also results from a second feature. Rule 23 vests judges with considerable power to manage class actions, but also an obligation to explain their decisions. Judges—not the parties—appoint counsel;[129] they determine whether to permit claim joinder; they approve notice plans;[130] they sign off on settlements;[131] and they set attorneys' fees.[132] As they make these decisions, judges should and typically do provide reasons.[133] An extensive body of caselaw on how and why class action practice deviates from the individual lawsuit baseline has accordingly emerged.

Third, Rule 23 requires multiple decision points, at which a uniquely broad array of constituencies with conflicting preferences have opportunities to debate the process. These multiple ports of entry, open to multiple participants, maximize the range of claims about class action legitimacy. When the court appoints class counsel, not only defendants but competing plaintiffs' firms have an opportunity to criticize each other's practices.[134] A defendant that contests class certification has an incentive not only to criticize the class action's effects on corporate and other typical targets, but also to identify harms to absent class members that the device can cause.[135] The rule provides particularly generous opportunities for an extensive set of

129. FED. R. CIV. P. 23(g)(1).

130. FED. R. CIV. P. 23(c).

131. FED. R. CIV. P. 23(e).

132. FED. R. CIV. P. 23(h).

133. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 794 (3d Cir. 1995) ("There is no explicit requirement in Rule 23 that the district judge make a formal finding that the requisites of the rule have been met in order to certify a class. However, most district judges have routinely done so, assuming that it was required, and in published opinions, a number of courts have endorsed or at least acknowledged the compelling policy reasons for doing so."); Besinga v. United States, 923 F.2d 133, 135 (9th Cir. 1991) (arguing for "a bright line rule requiring trial courts to certify a class in a written order which clearly sets out the class's compliance with Rule 23").

134. *See* FED. R. CIV. P. 23(g)(1)–(2) (setting forth the factors the court must consider in appointing class counsel and specifying that, where more than one adequate class counsel seeks appointment, the court must choose the applicant best able to represent the class).

135. *E.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805–06 (1985) (explaining why defendants have an interest in advocating for the due process rights of absent class members).

constituencies to weigh in at settlement. The district court has a heightened obligation to scrutinize the proposed terms carefully,[136] going well beyond its obligation to evaluate the settlement of individual actions.[137] Objectors with separate counsel can participate.[138] Finally, litigants have unusually easy access to an appellate court,[139] whose lack of docket-clearing incentive enables a disinterested review. This appellate review can extend to settlements, which in individual lawsuits ascend the judicial ladder only in unusual circumstances.

Fourth, the class action's doctrinal routinization has enabled the emergence of organized and sophisticated groups with predictable and conflicting preferences. The redundancy of controversial issues in class action litigation has justified the investment by corporate and consumer advocates to invest in research and lobbying. A robust public discourse on class actions has persisted for decades.

B. Judging Legitimacy in the Twilight of the Class Action

Most aspects of class action practice remained stable from the late 1970s to 2011. The richly informed and thoroughly ventilated arguments that the class action architecture facilitated made this stability a trustworthy indicator that the adjudicatory form proved satisfactory by diverse metrics of legitimacy. But this stability has disappeared, as the class action has suffered a mortal wound. In *AT&T Mobility LLC v. Concepcion*, the Supreme Court ruled, in effect, that prospective defendants can immunize themselves from class action litigation by coupling a class action waiver with an arbitration clause in an adhesive contract.[140] The decision will not affect a few areas of class action practice, but, without a congressional response, the decision may well derail much of it.[141]

Concepcion opens the door to an informal mechanism of claim aggregation to take on the class action's role as the chief alternative to the individual lawsuit. The foundation for this informal aggregation model includes several

136. *E.g.*, Ehrheart v. Verizon Wireless, 609 F.3d 590, 593 (3d Cir. 2010) (describing the district court's obligation to act as fiduciary at settlement).

137. Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1189 (8th Cir. 1984) ("In ordinary litigation, . . . courts recognize that settlement of the dispute is solely in the hands of the parties.").

138. *See* FED. R. CIV. P. 23(e)(5) (allowing any class member to object to the proposed settlement).

139. *See* Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (allowing "nonnamed" objectors to a settlement to appeal without first intervening); *see also* FED. R. CIV. P. 23(f).

140. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744, 1746, 1753 (2011).

141. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 639–40 (2012) (describing *Concepcion*'s likely reach).

contractual planks. Unlike class actions, this architecture frustrates, rather than facilitates, social perceptions of efficacy.

1. Informal Aggregation

For decades, primarily in mass tort cases, lawyers and courts have grouped large numbers of claims together without recourse to Rule 23.[142] Two traits characterize this informal model of aggregation. The first has to do with the mechanics of claim initiation and the binding reach of the judgment. In class actions, people become plaintiffs by operation of law, i.e., the class certification decision. Also, judicial approval yields a settlement that binds all class members who have not opted out. In the informal aggregation model, contract, not judicial fiat regulated by procedural rule, predominates. The plaintiffs' lawyer represents tens, hundreds, or even thousands of plaintiffs in one litigation, but he acquires power over their claims by entering into representation agreements with each.[143] Likewise, each plaintiff must consent to—that is, opt into—any settlement that the plaintiffs' lawyer negotiates.[144] Formally, the informal aggregation model deviates less from the individual lawsuit baseline than the class action.

The second trait has to do with the actual prosecution of the litigation. The attorney-client relationship exists on paper in the informal aggregation model, but otherwise the actual connection between lawyer and plaintiff is marginal. Although the plaintiffs' lawyer files separate lawsuits for each plaintiff, he has no intention of litigating them independently. Rather, discovery proceeds in a consolidated fashion, and the plaintiffs' lawyer hopes for a single aggregate settlement for the entire inventory of cases at once.[145] Functionally, the informal aggregation model better resembles the class action than the individual lawsuit baseline.

Until recently, the centrality of contract to the informal aggregation model disadvantaged it vis-à-vis the class action. A defendant facing thousands of claims will want a settlement that resolves most or all of its outstanding liability.[146] Rule 23 maps an easily traveled path to this sort of global peace. The stroke of a judge's pen joins claims together, pronounces a class-wide settlement final, and thus is all it takes to resolve the defendant's liability. Informally aggregated litigation amounts to a bundle of individual cases. In order for a single settlement to bind all the plaintiffs, the lawyers must

142. *See generally* Erichson, *Informal Aggregation*, *supra* note 62, at 386–400 (documenting "the rise of informal aggregation," predominantly in mass torts cases).

143. *See, e.g.*, Erichson, *Beyond the Class Action*, *supra* note 126, at 532 (noting that each plaintiff signs an individual retainer agreement).

144. *Id.* at 533.

145. *Id.*

146. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 271 (2011).

convince each one to consent to it. The default position is reversed; informally aggregated plaintiffs must opt in while class members opt out. Also, the transaction costs of getting global peace are much higher.

Starting in the late 1990s,[147] a mechanism deployed in informally aggregated litigation, the so-called "all-or-nothing" settlement, has closed this global peace gap.[148] Defendants propose an aggregate settlement, but require that a supermajority of plaintiffs, typically around ninety percent,[149] agree to the deal's terms before any money changes hands. Because attorneys' fees do not vest until this threshold of consent is reached, a plaintiffs' lawyer with a large inventory has an incentive to market the settlement aggressively to all of her clients.[150] A client could resist her attorney's entreaties that she settle, but she would have nowhere to go if she wanted to pursue her litigation. Any plaintiffs' lawyer competent to go toe-to-toe with the well-funded defendant would have an inventory of his own and thus would be similarly incentivized to exert pressure.[151] Global peace still requires consent from large numbers of plaintiffs, but the all-or-nothing mechanism leverages the only source of advice these plaintiffs have—their lawyers—to get this comprehensive buy-in.

As the sun sets on the class action, the informal aggregation model with the "all-or-nothing" settlement mechanism might become the chief alternative to the individual lawsuit.[152] In 2009, the American Law Institute blessed this sort of informal aggregation in its *Principles of the Law of Aggregate Litigation* by providing rules for its governance.[153] For the Reporter, the project's "single greatest contribution" is its aggregate settlement principle, which is designed to create paths to global peace without Rule 23.[154]

147. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1155 (2010) [hereinafter Nagareda, *Embedded Aggregation*] (observing that the first effort at an all-or-nothing settlement came in 1990s asbestos litigation).

148. *See generally* Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010) [hereinafter Erichson, *Trouble*] (defining "all-or-nothing" settlements).

149. Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 403 (2008).

150. *See* Nagareda, *Embedded Aggregation*, *supra* note 147, at 1156 (discussing this incentive in the context of the Vioxx aggregate settlement).

151. *See* Erichson & Zipursky, *supra* note 146, at 280 (discussing this phenomenon as it played out in the Vioxx aggregate settlement); Nagareda, *Embedded Aggregation*, *supra* note 147, at 1156 (discussing the same phenomenon).

152. *See* Johnson v. Nextel Commc'ns, Inc., 660 F.3d 131, 134–35 (2d Cir. 2011) (describing a variant of an all-or-nothing arrangement in an employment discrimination case); *see also* Erichson, *Trouble*, *supra* note 148, at 995 ("Not all troublesome aggregate settlements involve product liability or mass torts.").

153. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 3.16–3.17 (2010) [hereinafter ALI, PRINCIPLES].

154. Erichson & Zipursky, *supra* note 146, at 292–93 (quoting Professor Samuel Issacharoff).

2. An Example: The World Trade Center Disaster Site Litigation

The World Trade Center ("WTC") Disaster Site Litigation illustrates how the informal aggregation model, dominated by contract, works.[155] In 2003, a personal injury lawyer named David Worby filed a suit against New York City on behalf of a police officer, who happened to coach his son's hockey team.[156] This first plaintiff had worked at Ground Zero right after 9/11.[157] He alleged he developed leukemia because the city did not adequately protect him from exposure to toxic dust.[158] Word spread among the tightly knit community of New York City first responders, and soon Worby had more requests for representation than he could handle.[159] He turned to Paul Napoli, an experienced mass torts lawyer, for help.[160] At a press conference on September 13, 2004, Worby and Napoli announced they had filed more than 800 cases and would pursue a class action.[161] The case had no chance of getting certified. Indeed, the court denied class certification at a status conference without as much as a written order.[162] But the announcement, along with the toll-free number Worby and Napoli established (1-877-WTC-HERO),[163] steered more than 9,000 individual clients their way.[164] Other lawyers signed up hundreds more.[165]

Ten thousand individual cases made their way to Alvin Hellerstein of the Southern District of New York.[166] He consolidated them for pre-trial case management and agreed that Worby and Napoli would serve as lead plaintiff's

155. For a partial summary of this litigation, see generally Robin J. Effron, *Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199, 203–20 (2008) (describing the litigation as well as its doctrinal and pragmatic problems). For a journalistic account, see generally ANTHONY DEPALMA, CITY OF DUST: ILLNESS, ARROGANCE, AND 9/11 (2011) [hereinafter DEPALMA, CITY OF DUST].

156. Anthony DePalma, *9/11 Lawyer Made Name in Lawsuit on Diet Pills*, N.Y. TIMES, Mar. 30, 2008, at 23 [hereinafter DePalma, *9/11 Lawyer*].

157. *Id.*

158. *Id.*

159. DEPALMA, CITY OF DUST, *supra* note 155, at 247.

160. DePalma, *9/11 Lawyer*, *supra* note 156.

161. *First Major Class Action Lawsuit Filed for Ground Zero Cleanup Workers Afflicted with "WTC Toxic Diseases"*, PR NEWSWIRE, Sept. 13, 2004.

162. *See In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 499 (S.D.N.Y. 2009) (citing to the transcript of the status conference on October 28, 2004).

163. DEPALMA, CITY OF DUST, *supra* note 155, at 255.

164. Mark Hamblett, *Hellerstein Praises 'Very Good' WTC Deal*, N.Y. L.J., June 11, 2010, at 1.

165. Worby and Napoli represented more than 9,000 plaintiffs. *Id.* Another firm represented close to 700, and various firms represented about 300. Mark Hamblett, *Parties Campaign Aggressively for Participation in 9/11 Pact*, N.Y. L.J., Nov. 8, 2010, at 1 [hereinafter Hamblett, *Parties Campaign Aggressively*].

166. Hamblett, *Parties Campaign Aggressively*, *supra* note 165.

counsel.[167] In the midst of extensive skirmishing over jurisdiction and various immunities,[168] Judge Hellerstein appointed special masters to organize the cases, involving more than 350 different medical conditions allegedly caused by WTC dust.[169] The special masters gathered extensive medical and other information from all the plaintiffs, and then identified 200 of those most seriously injured.[170] From these cases, the parties and Judge Hellerstein selected thirty to proceed through full-blown discovery and trial.[171] By generating information about the value of particular types of claims, these bellwether cases would provide "[a] basis for settlement" for all 10,000.[172]

In March 2010, two months before the first trial dates, Napoli and Worby announced that they and the city had reached a deal to settle all the cases.[173] The city would pay as much as $657 million, with a grid accounting for the seriousness of the injury and the claim's strength to generate each plaintiff's share.[174] Crucially, the agreement would go into effect only if ninety-five percent of plaintiffs opted into it.[175] Judge Hellerstein was unenthused. He complained that the grid's complexities "would make a Talmudic scholar's head spin," denounced the short deadline of ninety days within which plaintiffs had to decide what do,[176] and lamented the agreement's proposal to set fees at thirty-three percent of each plaintiff's compensation.[177] In a dramatic courtroom scene, Judge Hellerstein stood to address the plaintiffs and vowed to do what he could to scuttle the deal.[178]

167. *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 7, 2005) (Case Mgmt. Order No. 2).

168. *E.g.*, *In re* World Trade Ctr. Disaster Site Litig., 521 F.3d 169, 173–77 (2d Cir. 2008) (describing procedural history of the case and considering various state and federal immunity defenses).

169. *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH), 2006 WL 3627760, at *1 (S.D.N.Y. Dec. 12, 2006) (order appointing special masters); DEPALMA, CITY OF DUST, *supra* note 155, at 276.

170. *In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 504 (S.D.N.Y. 2009).

171. *Id.* (describing the case management plan).

172. *Id.* at 505; *see also* Mark Hamblett, *Plan is Implemented to Resolve Complex Suits in WTC Cleanup*, N.Y. L.J., Feb. 25, 2009, at 1 (describing the plan).

173. Mark Hamblett, *Settlement Reached in 9/11 Respiratory Cases*, N.Y. L.J., Mar. 12, 2010, at 1.

174. *Id.*

175. Mireya Navarro, *Empathetic Judge in 9/11 Suits Seen by Some as Interfering*, N.Y. TIMES, May 3, 2010, at A17.

176. Noeleen G. Walder, *More Work is Needed to Reach a Fair 9/11 Settlement, Judge Says*, N.Y. L.J., Mar. 22, 2010, at 1.

177. *Id.*

178. DEPALMA, CITY OF DUST, *supra* note 155, at 320–21.

The parties bristled at Judge Hellerstein's meddling, and Napoli asked the Second Circuit to order him to stay out.[179] But the parties soon returned with a revised deal.[180] The June 2010 settlement capped the city's liability at $712.5 million.[181] Twenty-five percent of each plaintiff's recovery would go to his or her lawyer.[182] As before, money would only change hands once ninety-five percent of all 10,000 claimants signed on.[183] To get their compensation, settling plaintiffs would submit claims to a medical panel and a claims administrator, with a right to appeal the initial decision to mass torts guru Kenneth Feinberg.[184] Judge Hellerstein reacted more favorably. "It's not perfect, but it's very, very good," he said,[185] and he gave the proposed settlement his blessing.[186] Judge Hellerstein, Feinberg, and the plaintiffs' lawyers set about selling the settlement to the 10,000 individual plaintiffs.[187] By 9/11's tenth anniversary, ninety-nine percent had agreed to settle their cases pursuant to the aggregate deal's terms,[188] leaving only seventy-eight cases remaining for further litigation.[189] The plaintiffs' lawyers received close to $200 million in fees, with Napoli and Worby taking the lion's share.[190]

Contract regulated the WTC litigation in the two respects typical of the informal aggregation model. First, Napoli and Worby used individual client consent, not a judicial decree, to acquire control over and join together an inventory of claims. Second, the settlement took effect not because Judge Hellerstein said so, but because individual clients agreed to its terms. Otherwise, the WTC litigation resembled a class action. All of the city's potential liability was organized into one litigation unit for pre-trial case

179. *E.g.*, Mark Hamblett, *City Asks Circuit to Override Judge's Rejection of 9/11 Pact*, N.Y. L.J., Apr. 15, 2010, at 1; Navarro, *supra* note 175.

180. A. G. Sulzberger & Mireya Navarro, *Accord on Bigger Settlement for Ill 9/11 Workers*, N.Y. TIMES, June 11, 2010, at A1.

181. *See id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Sulzberger & Navarro, *supra* note 180.

186. *Id.*; *see also* Mark Hamblett, *Hellerstein Approves Respiratory Illness Settlement for 9/11 Workers*, N.Y. L.J., June 24, 2010, at 1.

187. *See, e.g.*, David B. Caruso, *Choice for 9/11 Rescue Workers is to Accept $713 Million Deal or Hope for Passage of Federal Compensation Bill*, N.Y. L.J., June 14, 2010, at 2 (documenting Feinberg's efforts); Mireya Navarro, *With 9/11 Settlement Letters, Tough Decisions*, N.Y. TIMES, Aug. 10, 2010, at A16 [hereinafter Navarro, *Tough Decisions*] (documenting Hellerstein's and Napoli's efforts); Hamblett, *Parties Campaign Aggressively*, *supra* note 165.

188. Mireya Navarro, *Terms Met, Payout Rises for Workers at 9/11 Site*, N.Y. TIMES, Sept. 13, 2011, at A28 [hereinafter Navarro, *Terms Met*].

189. Mark Hamblett, *Judge Sets Timetable to Handle Remaining 9/11-Related Claims*, N.Y. L.J., Apr. 20, 2011, at 1.

190. *See* Navarro, *Terms Met*, *supra* note 188.

management,[191] enabling Napoli and Worby to spread the considerable litigation costs across thousands of individual claims. The parties' endgame was a single settlement deal that would render global peace.

3. The Problem of Judging Legitimacy

The informal aggregation model's resemblance to the class action means that it deviates from the individual lawsuit baseline. But whereas a class action's procedural rigor facilitates social perceptions and thus judgments of legitimacy, the informal model's architecture occludes them.

First, no specialized procedural rules regulate informally aggregated cases, which, after all, are just individually filed lawsuits. Their litigation deviates from the individual lawsuit baseline in a more muddled and haphazard way than the class action, frustrating determinations of whether regulatory need justifies departures. Nothing determines, for example, the procedural protections individual plaintiffs have or what happens when the lawyers agree to settle.

Judge Hellerstein's attempt to block the first proposed settlement highlights the paucity of procedural regulation at a crucial moment for any aggregate litigation. Unlike the power Rule 23 gives them, judges supervising informally aggregated cases have no more formal say over settlement decisions than they have over any privately negotiated contract.[192] Judge Hellerstein acted like a class action judge, but his authority to do so was questionable at best.[193] His own explanation for why he could block the settlement effort showed the emperor without formal legal clothes: "This is 9/11. This is a case that has dominated my docket, and because of that, I have the power of review."[194]

Likewise, Rule 23 permits a judge to appoint separate counsel when conflicts arise among class members or between class counsel and some class members.[195] The judge has no more formal authority to do the same in informally aggregated cases than he or she does in individual actions. In that context courts reluctantly exercise this power.[196] While marketing the second

191. *Cf.* Nagareda, *Embedded Aggregation*, *supra* note 147, at 1154–55 (describing this phenomenon in the Vioxx litigation).

192. *See* Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 350–52 (2011).

193. *See* Mark Hamblett, *Judge's Rejection of 9/11 Settlement Raises Questions About His Asserted 'Power of Review'*, N.Y. L.J., Mar. 23, 2010, at 1 (quoting Howard Erichson and Geoffrey Miller expressing doubt that Judge Hellerstein had power to reject the first proposed settlement).

194. *Id.* (quoting Judge Hellerstein).

195. *See* FED. R. CIV. P. 23(g).

196. *E.g.*, Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979).

settlement agreement to his clients, Napoli asked Judge Hellerstein to dismiss some of their cases.[197] If granted, the total number of claims would have decreased, putting the 95% threshold closer in reach and with it hundreds of millions in attorneys' fees.[198] Noting the obvious conflict of interest, Judge Hellerstein appointed separate counsel for those disfavored clients.[199] But Napoli refused to cooperate, protesting that Judge Hellerstein purported to meddle with the attorney-client relationship.[200] When he ordered Napoli to cooperate, Judge Hellerstein again stressed that "[t]his is a unique litigation" to justify his decision.[201]

Without regulation by rule, informally aggregated litigation resists routinization. A second point of contrast with class actions exacerbates this hurdle for the evaluation of procedural legitimacy. A judge supervising informally aggregated cases has less power at crucial moments and correspondingly has a lesser obligation to issue reasoned decisions. Nothing like the class certification decision exists for the informal aggregation model.[202] To a significant extent, the plaintiffs' lawyers present the judge with a *fait accompli*, having compiled inventories of cases before the judge can weigh in on their joinder.[203] As noted, judicial power at settlement is questionable, so a reasoned opinion on a settlement's fairness would be largely advisory. The judge's power over pre-trial proceedings remains nearly total, as Judge Hellerstein's creative approach to case management suggests. But judges typically memorialize these sorts of decisions, if at all, in case management orders, not published opinions.[204] Judge Hellerstein's order for special masters and bellwether trials is an exception;[205] otherwise an interested person can get a sense of how the litigation proceeded only with a PACER password and the patience to sift through an epic and disorganized docket sheet.

197. *See In re* World Trade Ctr. Disaster Site Litig., 769 F. Supp. 2d 650, 653–54 (S.D.N.Y. 2011).

198. *See supra* notes 183–90 and accompanying text.

199. *In re World Trade Ctr. Disaster Site Litig.*, 769 F. Supp. 2d at 656–57.

200. *See id.* at 657.

201. *Id.*

202. The Judicial Panel on Multidistrict Litigation ("JPML") decides when cases can be aggregated through the multidistrict litigation system, 28 U.S.C. § 1407(a) (2006), but its short orders provide no illumination. *See, e.g.*, *In re* Ins. Brokerage Antitrust Litig., 360 F. Supp. 2d 1371 (J.P.M.L. 2005) (providing an illustrative example of the terse orders the JPML issues).

203. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358–59, 1364–65 (1995).

204. Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1292 (2010).

205. *See In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 501–05 (S.D.N.Y. 2009) (providing a case management plan in a published decision).

A third feature worsens the problem. Whereas a class action's multiple decision points give shifting alignments of parties with conflicting incentives opportunities to argue about procedural legitimacy, the informal aggregation model's architecture includes fewer such doors. In some instances, the court has less power to appoint the lead plaintiffs' attorney, so competing candidates have a less formal opportunity to critique each other.[206] Allegations of misconduct stemming from an earlier mass tort have dogged Napoli for years.[207] When Napoli appeared on behalf of over ninety percent of the plaintiffs,[208] however, Judge Hellerstein had little choice but to "designate" him as co-liaison counsel.[209] The defendant in a class action has a significant incentive to contest class certification, because an order certifying a class turns a case for a single claim into one for hundreds, thousands, or millions. Informal aggregation does not multiply the defendant's liability, since it only occurs after plaintiffs file numerous individual actions. If anything, aggregation serves the defendant's interests, as it lessens litigation costs while leaving the total number of claims unchanged. After the parties agree to settle and all incentives align, there are no formal avenues for soliciting the opinions of objectors, and no obvious paths anyone can follow to a disinterested appellate court.

4. Consent as an Inadequate Substitute for Procedural Legitimacy

Contract has the effect of pushing litigation out of sight because, at least in theory, it removes the justification for public examination of civil processes. It creates an avenue for consent and thus individual control over procedure. If plaintiffs can actually agree to join their claims together, then the need for procedural regulation of the decision to aggregate, and the scrutiny it engenders, diminish. Likewise, if plaintiffs affirmatively want to settle their

206. *See, e.g.*, *infra* notes 207–09 and accompanying text. This is not so for cases aggregated pursuant to the multi-district litigation system provided for in 28 U.S.C. § 1407. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 118–19 (2010) (discussing judicial power to appoint counsel in MDLs). The WTC Disaster Litigation was not aggregated pursuant to section 1407. *See* Rothman, *supra* note 192, at 321.

207. *In re* Diet Drugs Prods. Liab. Litig., 236 F. Supp. 2d 445, 459–60 (E.D. Pa. 2002) (finding the medical findings submitted by Napoli unreasonable); Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1259–61 (2008) (discussing Napoli's role in submitting unreasonable medical findings in *In re Diet Drugs Products Liability Litigation*); Anthony Lin, *Law Firm Can Sue on Behalf of Clients It Referred in Global Fen-Phen Litigation*, N.Y. L.J., Dec. 9, 2004, at 1 (discussing a New York judge's decision to permit a referring firm to sue Napoli's firm for breach of contract, fraud, breach of fiduciary duty, misappropriation, and unjust enrichment).

208. Hamblett, *Parties Campaign Aggressively*, *supra* note 165.

209. *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 7, 2005) (Case Mgmt. Order No. 2) (approving Napoli as Co-Liaison counsel).

claims, then a procedure that solicits and defers to the opinions of judges and outsiders is paternalistic. In short, if contract procedure frustrates social perceptions, a defender might respond, so what? Parties contract to deviate from the individual lawsuit baseline all the time,[210] and when they do, the quality of consent is the relevant concern. Contractual, not procedural, legitimacy determines whether any particular deviation should rightly flourish.[211]

At least for the informal aggregation model, however, I doubt that informed and freely given consent is ever possible. Without the class-wide preclusion that Rule 23 promises, defendants obtain global peace or its approximate from an aggregate settlement offer only if the supermajority of plaintiffs consent to it. Leveraging plaintiffs' lawyers' incentives makes this supermajority of consent plausible. If the defendant requires ninety percent of plaintiffs to buy-in before funding the settlement, plaintiffs' attorneys will do everything they can to convince all of their clients to agree to its terms. The plaintiffs in the WTC litigation felt just this pressure.[212] The conflict of interest between the lawyer and the client she advises, and thus reason to question the quality of client consent, is obvious.[213]

The ALI's *Principles* include a proposal designed to enable global peace without the coercion that all-or-nothing settlements, as presently devised, create.[214] Before receiving a settlement offer, plaintiffs can agree that, once the deal is on the table, they will be bound by a "substantial-majority vote" of all plaintiffs.[215] A deal that wins this vote binds all who sign up for this process.[216] In other words, a plaintiff who has agreed to the voting mechanism might otherwise hold out once the lawyers announce the deal's terms, but she is obliged to settle her claim. Defending a version of this proposal, Richard Nagareda maintained that the real problem with the typical all-or-nothing settlement is its timing.[217] Lawyers have to advise their clients under the shadow of potentially huge fees that will be paid only if close to all plaintiffs

210. *See* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 769 (1997) (discussing how parties may waive a number of procedural protections, such as the right to notice, hearings, or trial).

211. For an argument somewhat akin to this summary, see Nagareda, *Embedded Aggregation*, *supra* note 147, at 1160–64.

212. Hamblett, *Parties Campaign Aggressively*, *supra* note 165 (discussing the "unprecedented effort" by plaintiffs' attorneys to persuade their clients to accept the settlement offer).

213. Erichson, *Trouble*, *supra* note 148, at 1008–09, 1018.

214. ALI, PRINCIPLES, *supra* note 153, § 3.17(b).

215. *Id.*

216. *Id.*

217. Nagareda, *Embedded Aggregation*, *supra* note 147, at 1161–62.

consent.[218] By decoupling the moment when plaintiffs agree to tie their fates together from the moment when fees might or might not be paid, presumably the temptation to pressure clients diminishes.

To my mind, a change to the timing does little to reduce the coercive potential for either of the decisions plaintiffs have to make.[219] The first comes before the proposed settlement, when the plaintiffs' lawyer asks her clients to consent to the voting mechanism. The lawyer has a strong incentive to pressure all of her clients to say yes, even without money on the table. If the lawyer succeeds, she can offer a defendant a straightforward path to global peace and thereby make settlement more attractive. The probability of large fees from an aggregate deal goes up as the number of clients agreeing to abide by a substantial majority vote increases.

The second moment comes at the time plaintiffs must vote, when the settlement and attorneys' fees hang in the balance. The lawyers will pressure all of their clients to vote for the deal, to ensure that a small minority does not derail it. The moment has particularly extreme coercive potential, because pressure comes not just from the lawyer but from other plaintiffs as well. A wavering plaintiff might not like the proposed deal but agonize over the thought that her vote against it means that no one will be paid. As one WTC plaintiff remarked when deciding whether to agree to the second settlement proposal, "[i]t weighs heavy on one's mind that your decision would impact the compensation of those who are sick . . . because if you don't get 95 percent you're not going to settle."[220] A mechanism that explicitly lashes the fates of all together might engender group solidarity and other communitarian goods to flourish,[221] but the mechanism also contains within it troubling potential for unacceptable peer pressure.

The ALI's proposal may improve upon the current, inherently coercive structure of all-or-nothing deals, although I doubt that the change in timing is all that ameliorative. But if it is, the tradeoff is that clients must make uninformed decisions to abide by the vote of the substantial majority. Presumably a plaintiff would want some rough estimate of her claim's strength, particularly compared to her peers', before agreeing to abide by the substantial majority's will. An unusually strong claim might make a plaintiff reluctant to surrender the final say over her right to sue to a larger group of

218. *Id.* at 1161 ("Properly understood, the real point of hesitation about the Vioxx deal lies not in its reliance upon client consent but in the timing for such consent—when billions of dollars were on table for both lawyers and clients—so as to accentuate both lawyer temptation and client concern about regret if the client were to decline the deal.").

219. I here elaborate on what Howard Erichson and Benjamin Zipursky have previously argued. Erichson & Zipursky, *supra* note 146, at 301–03.

220. Navarro, *Tough Decisions*, *supra* note 187 (quoting plaintiff Lisa McDonald).

221. *See* Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 530–31 (2011).

weaker claimants. If asked to consent to the voting mechanism any period of time substantially before settlement, however, the plaintiff cannot receive an informed estimate about claim strength. According to the doctrinaire account of mass tort litigation, settlements become likely once plaintiffs establish credible threats that they can win at trial.[222] This credible threat requires that certain contested legal and factual issues get resolved so that parties can make rigorous assessments of expected liability.[223] Logically, then, clients who have to consent to the voting mechanism well in advance of settlement do so when these contested issues remain highly uncertain. For two years, for example, the city pursued a dizzying array of immunity defenses that, if they prevailed, would have knocked out all of its WTC liability.[224] A guess as to claim value during this time would necessarily need to factor in immunities, but no one—not even Judge Hellerstein—could say with any certainty how these defenses might play out.[225]

* * *

I realize that the informal aggregation model does not represent contract procedure more generally, and so the dysfunctions that make informed, freely given consent implausible for aggregated plaintiffs may not exist everywhere. Other contexts, however, exacerbate the legitimacy problem. Important to daily life are forms of contract procedure that surface most regularly in consumer transactions, like arbitration agreements and forum selection clauses.[226] For them, consent is most often "fictive" at best,[227] so contractual

222. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 14–15 (2007).

223. *Cf. id.* at 14 ("The immature stage marks the period for exploration of the legal and factual questions surrounding the merits of the litigation.").

224. *See In re* World Trade Ctr. Disaster Site Litig., 521 F.3d 169, 175–76 (2d Cir. 2008) (discussing each of the state and federal immunity defenses asserted by the defendants). The city filed its motion for judgment on the pleadings in February 2006, and the Court of Appeals for the Second Circuit issued its opinion on the defenses in March 2008. *See id.* at 170; *In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 569 (S.D.N.Y. 2006).

225. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 575 (concluding that information to determine whether certain immunity defenses applied was lacking without "much, much more" discovery).

226. *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 886 (2008) (documenting how frequently arbitration agreements appear in consumer contracts as compared to non-consumer contracts); Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 361, 361 (1993) ("Forum selection clauses are increasingly common in interstate commercial and consumer contracts."); *see also* ZACHARY GIMA, TAYLOR LINCOLN & DAVID ARKUSH, PUBLIC CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 1 (2009), *available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf (documenting the ubiquity of arbitration clauses in consumer form contracts).

legitimacy, or at least a type that requires litigants to agree to process, is unavailable. The informal aggregation model falls on the relatively transparent end of the contract procedure spectrum, since litigation at least remains in courts. Arbitration agreements lie on the opaque end. Social perceptions of procedural efficacy are not merely occluded but blocked entirely, increasing the likelihood that unfair, inaccurate, inefficient, and democratically inappropriate processes can stabilize.

CONCLUSION

One of Professor Resnik's great talents is to see connections among events and developments that elude the rest of us. The title of the part of the Childress Lecture Panel for which I wrote this Comment—"*Wal-Mart*, *A.T.&T.*, Aggregate Settlements, and the 2009 ALI Principles"—reflects her challenge to proceduralists, that we all appreciate the important links among the many parts of the American procedural system. It is important to do so at this particular moment, as procedure's movement into contractual shadows on a number of different fronts begs fundamental questions about civil processes and the roles they do and should play in a democratic society. This Comment is a tentative stab at putting some of the pieces of the puzzle together, but is really just an attempt to follow Professor Resnik's lead.

227. Resnik, *Fairness in Numbers*, *supra* note 10, at 129–30; *cf.* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991) (acknowledging that expecting actual consent to a forum selection clause in a consumer form contract "would be entirely unreasonable").