Mass Torts and Due Process

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Almost all courts and scholars disfavor the use of class actions in mass tort litigation, since class actions infringe on each plaintiff’s control, or autonomy, over the tort claim. The Supreme Court, in fact, has strongly suggested that protecting such litigant autonomy is a requirement of due process, and has done so in recent decisions concerning the class action, arbitration, preclusion law, and the Erie doctrine. In this article I argue that protecting litigant autonomy in the mass tort context is self-defeating, and, in the process, rethink basic tenets of procedural due process. Relying on recent property theory, I first show that protecting litigant autonomy in mass tort litigation causes collective action problems that undermine the deterrent effect of the litigation. Thus, protecting a plaintiff’s autonomy over the claim leads to the very mass torts the claim seeks to prevent and remedy. Counterintuitively, this tragedy can be avoided by taking away each plaintiff’s autonomy over the claim, such as through a mandatory class action. I then use the self-defeating nature of litigant autonomy in the mass tort context to reexamine the law of procedural due process. The result is a revision of what process is "due" that takes each plaintiff’s individual interest in deterrence into account and impartially balances competing interests. I conclude that the law of procedural due process should end its preoccupation with the claim, and, in particular, a plaintiff’s control over it. Instead, the law of procedural due process should take a context-dependent approach that takes into account the enforcement objectives of tort law and analogous liability rules.
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INTRODUCTION

A consensus has emerged that the law of civil procedure stops at the claim. A federal court has considerable discretion over the procedures that apply to the claim, but the claim itself is, for the most part, inviolable. In its recent decisions the Supreme Court has emphasized the importance of protecting the claim, and, in particular, a plaintiff's control, or autonomy, over it, invoking a "deep-rooted historic tradition that everyone should have his own day in court." To force "[un]willing" plaintiffs to give up control of their claims, such as through a mandatory class action with no right to opt out of the class, would "abridge" the plaintiffs' "substantive right[s]." The Court, in fact, has strongly suggested that protecting a plaintiff's autonomy over the claim is a requirement of the Due Process Clause. After all, the claim is a "property" interest that cannot be deprived without due process, and "the usual rule for sales of either personal or real property is that the power of sale resides with the property owner."

For example, this past term, in *Wal-Mart Stores, Inc. v. Dukes*, the Court vacated class certification of Title VII gender discrimination claims

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

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


5 Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 160-61 (2003) (noting that "[a]pplying the Due Process Clause to class actions, the Supreme Court has characterized the right to sue as a form of property").
which sought injunctive relief and individual monetary remedies. The plaintiffs sought to certify a class under Rule 23(b)(2), which permits a class action when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," but does not require notice or an opportunity to opt out for class members. In rejecting the class action, the Court expressed a concern that "depriving people of their right to sue in this manner" would not comply "with the Due Process Clause," at least with respect to the plaintiffs' claims for monetary remedies. The Court also questioned whether procedural due process permits a mandatory class action for claims seeking injunctive relief, noting as an aside that such class actions are permitted under Rule 23(b)(2), "rightly or wrongly." The Wal-Mart decision is not an isolated incident. The Court has expressed a due process concern with protecting a plaintiff's autonomy over the claim in recent decisions involving arbitration, preclusion law, and the Erie doctrine.

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6 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. --- (June 20, 2011).
7 See Fed. R. Civ. P. 23(b)(2); see also id. 23(c)(2)(A) (providing that for classes certified under 23(b)(2), the court may, but not must, "direct appropriate notice to the class," and further does not require providing class members an opportunity to opt out).
8 Wal-Mart, 564 U.S., slip op. at 23; cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1973) (interpreting Rule 23 as requiring individual notice for all class members, noting that the notice provisions are "designed to fulfill the requirements of due process").
9 Wal-Mart, 564 U.S., slip op. at 23; see also MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 169 (2009) ("If . . . the autonomy value lies at the normative core of procedural due process, obviously [an] opt-out procedure is constitutionally preferable to the mandatory procedure imposed by Rule 23(b)(1) and (2).")
10 AT&T Mobility LLC v. Concepción, 563 U.S. ---, slip op. at 15 (Apr. 27, 2011) (in affirming validity of class action waivers in arbitration contracts, noting that "[f]or a class-action money judgment to bind absentees in litigation . . . absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class" (citing Phillips Petroleum Co v. Shutts, 472 U.S. 797, 811-12 (1985))).
11 Taylor v. Sturgell, 553 U.S. 880, 892-93, 901 (2008) (rejecting the doctrine of "virtual representation," which permits a court to preclude a plaintiff's claim if the same claim was litigated in a different action, and the other plaintiff had an "identity of interests and some kind of relationship" with the plaintiff, since it would create a "de facto class action" shorn of procedural protections "grounded in due process"); see also Smith v. Bayer Corp., 564 U.S. ---, slip op. at 12-15 (June 16, 2011) (concluding that a federal court, in denying class certification, cannot enjoin another plaintiff from seeking to certify a class action in a different court, since, among other things, preclusion law would not permit the first suit from binding the second consistent with due process, citing Taylor v. Sturgell).
12 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443 (2010) (Scalia, J.) (upholding the use of Rule 23 class actions against Erie and Rules Enabling Act challenges so long as they involve "willing" plaintiffs); Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (noting that a mandatory class action involving a limited fund not only raises due process concerns, but that "[t]he Rules Enabling Act underscores the need for caution" given "the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims
As the old saying goes, hard cases make bad law, but they also reveal the limits of legal doctrine. In this article I turn to a class of hard cases—mass torts—to rethink the law of procedural due process under the Due Process Clause. Mass torts have long perplexed courts and scholars, with the Supreme Court even concluding that they "def[y] customary judicial administration and call[] for national legislation." Nevertheless, and consistent with the emerging consensus, almost all courts and scholars disfavor the use of class actions in mass tort litigation because they infringe upon each plaintiff's autonomy over the claim. But, as I argue below, protecting such autonomy in the mass tort context is self-defeating. Using recent property theory on the "tragedy of the commons," I argue that protecting a plaintiff's autonomy over the claim leads to more mass torts. In fact, this self-defeating result can be avoided by taking away each plaintiff's autonomy over the claim, such as through a mandatory class action.

More importantly, I argue that the self-defeating nature of litigant autonomy in the mass tort context requires us to rethink basic tenets of the law of procedural due process. The insistence on protecting litigant autonomy absolutely in the mass tort context misconceives the objectives of substantive tort law, and, in particular, the deterrence function of tort liability. Indeed, this deterrence function is a common feature of many substantive areas of law that utilize civil liability. Accordingly, and as I argue below, the law of procedural due process should include each plaintiff's individual interest in deterrence, or avoiding the tort altogether, among the relevant interests at stake in the due process calculus. I also argue for a more impartial assessment of the relevant interests at stake in comparing different procedures for any potential "depriv[ation]" of due process. I conclude that the mass tort context casts significant doubt on the notion that "the fundamental requisite of due process of law is the opportunity to be heard." 

Mass torts are a consequence of mass production. They include torts caused by asbestos and other toxic chemicals, pharmaceuticals, mass
produced products and services, and oil spills. The injuries suffered by the plaintiffs can be devastating. One can think of Clarence Borel, whose lawsuit caused an "avalanche" of asbestos claims, writing to the judge to delay trial because of painful cancer treatments to his mouth. One can also think of the eleven rig workers who were never found after the Deepwater Horizon rig explosion. Mass torts not only cause grave injuries, but produce a large number of victims, who all vary significantly as to the extent of their injuries, the timing of their injuries, and even the state laws that apply to their injuries.

Given the high value and the high variance of the numerous claims, courts and scholars have been wary of entrusting the plaintiffs' claims to others in a class action. The variance among the plaintiffs inevitably produces internal conflicts; one subclass, such as those "currently injured," may not adequately represent the interests of the others, such as "exposure only" plaintiffs who have not yet manifested injury. Moreover, the plaintiffs as a whole may have an external conflict with the class action attorneys, who may "sell out" the plaintiffs' claims in "sweetheart settlements" in exchange for enormous fees. Not surprisingly, and as noted by the recently adopted Principles of the Law of Aggregate Litigation, "the class action has fallen into disfavor as a means of resolving mass-tort claims." At the very least, courts and scholars have

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18 Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 609-10 (1997) (noting these differences among plaintiffs in asbestos litigation); see also NAGAREDA, supra note 12, at xv-xvi (defining mass torts as torts involving plaintiffs who are geographically and temporally dispersed).
19 AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. b (2010) [hereinafter PRINCIPLES] (noting that "personal injury" cases like mass torts tend to produce highly "variable" and highly "viable" claims).
20 See Amchem, 521 U.S. at 626 (rejecting certification of settlement class action in asbestos litigation due, in part, to conflict between "the currently injured, [whose] critical goal is generous immediate payments" and "exposure-only plaintiffs" who seek to "ensur[e] an ample, inflation-protected fund for the future"); John C. Coffee, Class Action Accountability: Reconciling Exit, Voice, and Loyalty In Representative Litigation, 100 COLUM. L. REV. 370, 386 (2000) ("Whenever the injuries suffered by class members are relatively heterogeneous, internal conflicts necessarily arise.").
22 PRINCIPLES, supra note 19, § 1.02 reporters' notes cmt. b(1)(B); see also MANUAL OF COMPLEX LITIGATION § 22.7 (4th ed. 2004) ("Federal courts have 'ordinarily' disfavored -- but not ruled out entirely -- using class actions in dispersed mass tort
insisted on a right to notice and an opportunity to opt out of any mass tort class action (or similar aggregate procedure) to protect each plaintiff’s autonomy over the claim.\(^\text{23}\)

However, and as I show in Part I, protecting litigant autonomy in the mass tort context is self-defeating. Courts and scholars have focused on the variance of the mass tort plaintiffs on many fact and legal issues to conclude that such individual issues "predominate" in the litigation.\(^\text{24}\) However, despite these differences, all mass torts are caused by a decision on precautionary measures that is common to the plaintiffs. Examples include whether to add a warning label to asbestos products,\(^\text{25}\) whether to add a warning to a prescription drug,\(^\text{26}\) or whether to add a latch to a tire.\(^\text{27}\) Although the ex post effect of that decision will vary among the plaintiffs,
the ex ante decision itself, and many fact and legal issues concerning it, are all common to the plaintiffs. More importantly, courts will need to determine these common issues in order to determine the defendant's liability. Thus, resolution of these common issues of liability "predominate" in mass tort litigation, insofar as resolving those issues would "materially advance the resolution" of the plaintiffs' claims.\footnote{PRINCIPLES, supra note 19, § 1.05 cmt. a (defining "predominance" as primarily whether resolution of common issues would "materially advance the resolution of the claims").}

As it turns out, the predominance of common issues of liability in mass tort litigation puts the plaintiffs at a disadvantage. Consider a simple example. Suppose that the plaintiffs could commission a study on a common liability issue that would guarantee victory but would cost $2M. Most plaintiffs would not commission the study, even those with high value claims (say, $1M). But the plaintiffs acting collectively would do so if their aggregate recovery would be substantial (say, $100M) and they shared the cost of the study. In theory, the plaintiffs could bargain to aggregate their recoveries to invest collectively,\footnote{Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1, 2-15 (1960).} but, as I discuss below, collective action problems prevent successful "informal aggregation."\footnote{See Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits, 50 DUKE L.J. 381, 386-401 (2000) (describing "informal aggregation" through joinder, contract, and informal coordination). I further discuss how other alternatives, such as nonmutual offensive issue preclusion, do not solve the problem of asymmetric stakes. See infra Section I.B.3.}

The defendant, in contrast, owns all of the liability associated with any common issue, and thus can exploit economies of scale to invest in those issues.

The problem of asymmetric stakes in mass tort litigation\footnote{David Rosenberg first recognized the problem of asymmetric stakes in mass tort litigation. See David Rosenberg, The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System, 97 HARV. L. REV. 849, 902-03 (1984) [hereinafter Rosenberg, Causal Connection]; see also supra Section I.B (discussing Rosenberg's work). Rosenberg has never examined the implications of the problem of asymmetric stakes on the law of procedural due process, and has expressed "qualms about the meaning of the often asserted, but never carefully defined, concept of 'fair process.'" See David Rosenberg, Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't, 37 HARV. J. LEGIS. 393, 395 (2000) [hereinafter Rosenberg, What Defendants Have]. In this article I do not reject the concept of "fair process," but seek to reconceive its meaning in light of the problem of asymmetric stakes. I also refine Rosenberg's insights on the problem of asymmetric stakes in some key respects, as I discuss in more detail below. See infra Sections I.B, I.C, & II.B.} is best understood as a "commons" problem caused by a mismatch between the scale of a resource unit and the scale at which the resource is most efficiently used.\footnote{Fennell, HANDBOOK, supra note 14, at 33 (defining core "tragedy of the commons" and "anticommons" problems as arising from "the incentive misalignments produced by differently scaled activities under different ownership regimes").} Here the resource unit is the claim, which is owned by
each plaintiff, while the resource is enforcement of the law. The problem of asymmetric stakes not only gives the defendant an advantage in the litigation, but dulls the defendant's incentives to avoid mass torts in the first place. In fact, and as I argue below, protecting any form of litigant autonomy, such as by providing each plaintiff a right to opt out, only perpetuates the problem of asymmetric stakes. Consequently, litigant autonomy is self-defeating because it causes more mass torts. A mandatory class action avoids this self-defeating result because it is, in effect, a "trust device" that assigns collective control over (and a percentage interest in) the claims to a third party, class counsel, for the benefit of the plaintiffs. In doing so, the class action equalizes the stakes by enabling class counsel to invest in common issues as if he had the entire amount at stake, just like the defendant.

In Part II I use the self-defeating nature of litigant autonomy in the mass tort context to rethink the law of procedural due process under the Due Process Clause. The Due Process Clause prohibits the "depriv[ation]" of "life, liberty, or property, without due process of law." While courts have focused on the claim as the relevant "life, liberty, or property" interest, they have ignored the deterrence provided by the claim. I argue below that an entitlement to deterrence, understood as a "liberty" interest "to be free from . . . unjustified intrusion of personal security," should be included in the due process analysis. In fact, I argue that a "liberty" interest in deterrence should have normative priority over the other interests associated with the claim, since a failure to prevent a mass tort can result in injuries, such a death or disability, which can never be compensated.

I also develop a balancing test to determine whether there is a "depriv[ation]" caused by the class action. Courts have recognized that mandatory class actions may deprive the interests of the plaintiffs, most notably each plaintiff's autonomy over the claim. But, as I argue below, mandatory class actions may also prevent the deprivation of important interests caused by separate actions, such as in limited fund situations, where separate actions lead to races to the courthouse. In comparing procedures, I argue that courts should focus on the interests of all of the affected parties before the tort occurs. This impartial perspective includes the effect of a procedure on the defendant's ex ante precautionary measures, which not only takes into account the deterrence provided by

33 See RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (defining a "trust" as "fiduciary relationship" which "subject[s] the person who holds title to the property to duties to deal with it for the benefit of . . . one or more persons, at least one of whom is not the sole trustee).
36 See infra Section II.B.1.
the litigation, but avoids privileging irrelevant considerations such as when the plaintiff happens to manifest injury. In fact, and as I argue below, there is significant Supreme Court precedent for taking such an impartial approach to comparing procedures to determine any due process deprivation.\footnote{See infra Section II.B.3 (discussing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950)).}

I conclude by showing that the inadequate representation that may arise from class action conflicts cannot be resolved by protecting each plaintiff's autonomy over the claim. Instead, any potential inadequate representation can be prevented by such mundane matters as the way class attorneys are compensated, how damages are distributed, and how class certification is determined. Thus, I conclude that the law of procedural due process should shift away from its preoccupation with the claim and analogous procedural rights such as litigant autonomy, a "day in court" and even an "opportunity to be heard." Instead, the law of procedural due process should take a context-dependent approach that takes into account to the enforcement objectives of tort law and analogous liability rules.

I. MASS TORTS

Federal courts disfavor class actions in mass torts litigation largely as a matter of rule interpretation. Class actions in federal courts are governed by Rule 23, which provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members."\footnote{Fed. R. Civ. P. 23.} Under Rule 23, "[a] class action may be maintained' if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)."\footnote{Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010).} The third category, Rule 23(b)(3),\footnote{I discuss the other categories below. See infra Section II.B.} permits a class action if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members" and "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."\footnote{Fed. R. Civ. P. 23(b)(3) (emphasis added).}

Despite its expansive language, courts have concluded that mass tort litigation fails to satisfy Rule 23(b)(3). First, given the variance of the plaintiffs on many issues of fact and law, courts have concluded that issues common to the class do not "predominate" in mass tort litigation.\footnote{See, e.g., Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 622-23 (1997).}
Second, courts have only considered the class action "superior" to separate actions in small claims litigation, where the damages are too small to provide an incentive to bring suit individually.\(^{43}\) By contrast, the claims in mass tort litigation tend to be "viable," and thus, unlike in small claims litigation, the plaintiffs can "obtain representation in the market for legal services in the absence of aggregate treatment."\(^{44}\)

In this Part I argue that the consensus that mass tort litigation does not satisfy the "predominance" and "superiority" requirements of Rule 23(b)(3) stems from conceptual confusion about mass torts and class actions. In Section A, I argue that courts have not found a "predominance" of common issues in mass tort litigation because they ignore the common cause of mass torts – the defendant's ex ante precautionary measures. Because the defendant's liability will turn on issues of fact and law concerning its precautionary measures, these common issues of liability "predominate" in mass tort litigation. In Section B, I argue that class actions have not been found "superior" in mass tort litigation out of confusion as to why the class action is superior in small claims litigation. As I argue below, small claims litigation and mass tort litigation both share a problem of asymmetric stakes. In both contexts the defendant has more at stake than any one plaintiff, and thus has greater incentive to invest in the litigation. More importantly, for both the "superiority" of the class action arises from its "trust" function. The class action equalizes the stakes by assigning collective ownership of the claims to a third party, class counsel, for the benefit of the plaintiffs.

But one consequence of clarifying the confusion surrounding Rule 23(b)(3) and mass tort litigation is the realization that protecting litigant autonomy in the mass tort context is self-defeating. As I discuss in Section C, protecting litigant autonomy in any form, such as through a right to opt-out of a class action, perpetuates the problem of asymmetric stakes. More importantly, protecting litigant autonomy not only gives the defendant an advantage in the litigation, but it dulls the defendant's incentives to take precautionary measures to prevent the mass tort from happening in the first place. Litigant autonomy therefore presents a commons problem. Individual control of the claims, like individual grazing of commonly owned land, leads to a self-defeating result – more mass torts. In fact, protecting litigant autonomy in the mass tort context is
not only misguided, but calls into question basic tenets of the law of procedural due process. I examine those implications in Part II.

A. The Predominance of Common Issues

1. The Predominance Requirement

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

At first glance, mass tort litigation does not satisfy the predominance requirement given the variance of the plaintiffs on many fact and legal issues. This is vividly shown in Amchem Products, Inc. v. Windsor, where the Court reviewed a class action that sought to provide a global settlement of all unfiled asbestos claims. The Court noted that:

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

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

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

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

2. The Commonality of Mass Tort Liability

But the generally accepted definition of the mass tort obscures the underlying cause of mass torts. A mass tort is caused by a decision by the defendant concerning its precautionary measures that affects a population that includes the plaintiffs. In other words, mass torts arise from a decision by the defendant before the mass tort occurs that is common to the class. Moreover, because fact and legal issues related to that common cause will determine the defendant’s liability, those common issues "predominate" the litigation insofar as resolution of those issues would "materially advance the resolution" of the claims. Indeed, the commonality of issues of liability equally exemplifies a mass tort, since it distinguishes mass torts from "automobile accident litigation and other ordinary, high-volume litigation."

Consider, for example, the parties in Amchem before the tort occurred. In making decisions concerning its asbestos-containing products, Amchem could not know who specifically would be injured by its conduct, or how they would be injured. Instead, Amchem could only infer its expected liability for the exposed population "as a whole." For example, suppose

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52 See, e.g., id. at xii-xiii; Geoffrey C. Hazard, Jr., The Futures Problem, 148 U. PA. L. REV. 1901, (2000) (distinguishing between similar single event torts such as airplane crashes and "toxic torts") see also MANUAL OF COMPLEX LITIGATION § 22.1 (4th ed. 2004) (distinguishing between "single incident" and "dispersed mass torts").

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

54 David Rosenberg, Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit, 2003 U. CHI. LEGAL F. 1, 53 & n.60 ("The prospective defendant cannot know or predict how and to what degree contemplated conduct will benefit or harm anyone in the potentially affected population").

55 David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice By Collective Means, 62 IND. L.J. 561, 588 (1987) ("[I]n mass accident situations, the firm's accident prevention measures are of necessity the product of a collective, undifferentiated assessment of the probable loss from its activities for the class of potential victims as a whole; and, correspondingly, care-taking usually cannot be adjusted on an individualized basis."); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW § 6.2.1, at 129 (1987) ("Expected losses are a probability-weighted aggregation of losses that can arise in many individually unlikely ways.").
that the cost of adding a warning about the dangers of asbestos inhalation is $10 per unit. Suppose further that Amchem’s expected liability with the warning is $15 per unit, but $30 per unit without the warning. Based on these estimates, Amchem will add the warning because the sum of the costs of the warning and the expected liability ($10+$15) is less than the sum of its costs without the warning ($30). Here the decision to add a warning is common to the class, even though the effects of that decision will vary among the class members.

In fact, every mass tort arises from a decision concerning precautionary measures that is common to a large, dispersed population. Amchem concerned a decision not to add a warning label to its asbestos-containing products, and such failure-to-warn claims pervade mass torts litigation. But the decision can involve other precautionary measures, such as the design of a mass produced tire, or, perhaps most infamously, the decision of where to place a gas tank on a Ford Pinto.

The decision can remain common even it involves conduct that is not uniform to the class. An extreme example can be found in Wal-Mart Stores, Inc. v. Dukes, where the plaintiffs alleged that Wal-Mart, in delegating its hiring and promotion decisions to individual store managers, introduced "excessive subjectivity" to those decisions. Combined with its uniform corporate culture and Wal-Mart's awareness of the effects of delegating such decisions, the plaintiffs argued that Wal-Mart's "refusal to cabin its managers' authority amounts to disparate treatment." The conduct at issue in Wal-Mart seems at first glance to be "sporadic acts of discrimination," since it involved "literally millions of employment decisions." But this ignores the ex ante decision by Wal-Mart to delegate its pay and promotion decisions in the first place, as opposed to

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

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

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


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

63 Wal-Mart, 564 U.S., slip op. at 12.
"cabin[ing]" those decisions with more objective criteria. The fact that Wal-Mart's decision to delegate was implemented through "literally millions of employment decisions" does not make the decision itself any less common to the plaintiffs.\textsuperscript{64}

More importantly, the defendant's liability will depend on the resolution of issues of law and fact related to that common decision. For example, under the failure to warn liability standards that apply in most states, a firm is liable if "the foreseeable risks of harm" of the product could have been avoided by "the provision of reasonable instructions or warnings."\textsuperscript{65} This "risk-utility test" is generally understood as "whether the aggregate costs of adding some safety feature proposed by the plaintiff is or is not outweighed by the aggregate benefit of preventing foreseeable accidents like that which injured the plaintiff."\textsuperscript{66} As it turns out, this is the same analysis that Amchem engaged in to determine whether to add a label in the first place, since it based its decision on the aggregate costs ($10/unit) as compared to the aggregate benefit in harm avoided ($15/unit).

But the commonality of mass tort liability holds true regardless of the liability standard. Whether the firm's ex ante precautionary measures conform to the consumer expectations test, to an industry custom, or to a safety regulation under negligence per se rules, will all be common to the class, because the ex ante decision itself is common to the class. The commonality of mass tort liability also holds true even if multiple state laws apply. Although the law may differ, the differing liability standards typically share an element. Moreover, the laws will invariably share an issue of fact concerning the defendant's common decision, such as the defendant's knowledge of the dangers of asbestos inhalation.\textsuperscript{67}

\section{3. Commonality and Manageability}

Many admit that liability issues are common to the plaintiffs in mass tort litigation, but nevertheless conclude that such issues do not

\textsuperscript{64} This point was well recognized by the en banc majority. See \textit{Dukes v. Wal-Mart Stores, Inc.}, 603 F.3d 571, 600-12 (9th Cir. 2010) (en banc) (concluding that "[p]laintiffs' factual evidence, expert opinions, statistical evidence, and anecdotal evidence provide sufficient support to raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII").

\textsuperscript{65} \textit{RESTATEMENT (THIRD) OF TORTS} § 2(c).

\textsuperscript{66} \textit{DAVID G. OWEN, PRODUCTS LIABILITY LAW} § 8.5, at 508 (2005) (discussing risk-utility standard in the context of design defects) (emphasis added).

\textsuperscript{67} \textit{See, e.g., Jenkins v. Raymark Indus., Inc.}, 782 F.2d 468, 472-73 (5th Cir. 1986) (affirming class certified in asbestos litigation as to common issues such as the "state-of-the-art" defense, noting that "[i]t is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases").
"predominate." First, they argue that, regardless of the commonality of "upstream" issues like liability, courts would still have to decide "downstream" issues relating to individual damages, rendering the class action unmanageable. By contrast, in litigation in the securities fraud or antitrust context, damages are typically calculated using mechanical formulas, and thus the litigation can be effectively resolved by determining common issues of liability.

I disagree that individual damages in mass tort litigation cannot be calculated mechanically. Nevertheless, the perceived unmanageability of the mass tort class action presumes that the entire action must be resolved all at once. However, Rule 23 permits the certification of common issues "when appropriate," and the Principles encourage such "common issue" class actions if they would "materially advance the resolution of the claims." In fact, the bifurcation of common issues decided collectively and individual issues decided through individual trials is a common practice in antitrust and fraud litigation. Even within a common issue class action, a court can accommodate a number of procedures, such as bellwether trials, to avoid the error risk of an all-or-nothing determination.

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68 Principles, supra note 19, § 2.02 cmt. a; Samuel Issacharoff, Class Action Conflicts, 30 U.C. DAVIS L. REV. 805, 831-32 (1997); Roger L. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. ILL. L. REV. 69, 79 ("Little or no time and expense will be saved in these individual trials by virtue of the preceding mass trial on general causation."); see also Fed. R. Civ. P. 23(b)(3)(D) (noting that "the likely difficulties in managing a class action" is a "matter[] pertinent to" a finding of "predominance").

69 Principles, supra note 19, § 2.02 cmt. a; see also Issacharoff, supra note 68, at 831-32 (1997).

70 See infra Section II.B (discussing the use of damage scheduling to determine individual damages).


72 Principles, supra note 19, § 2.01 cmt. c.

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

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

75 Principles, supra note 19, § 2.02 cmt. b (noting that a common issue class action "would avoid placing both claimants and respondents at the risk of an all-or-nothing determination of the common issue on the merits of the aggregate," whereas separate actions "might reflect more accurately the degree of uncertainty associated with a given common issue."); see also In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-1300 (7th Cir. 1995) (Posner, J.) (noting advantage of "a pooling of judgment, of many different tribunals" produced by separate actions).
Second, while issues of liability may be common to the class, some argue that they cannot be "carved at the joint" from individual issues.\footnote{PRINCIPLES, supra note 19, § 2.03 reporters' notes cmt. b (citing Rhoun-Poulenc, 51 F.3d at 1303 & Castano v. Am. Tobacco Co., 84 F.3d 84 F.3d 734, 751 (5th Cir. 1996)).} For example, a finding that the defendant acted negligently may be common to the class, but may have to be reexamined to determine each plaintiff's comparative negligence. This would not only undermine the commonality of liability issues but, if true, may violate the Reexamination Clause of the Seventh Amendment.\footnote{See Rhoun-Poulenc, 51 F.3d at 1303 (noting concern with reexamination in context of comparative negligence defenses); cf. Patrick Woolley, Mass Tort Litigation and the Seventh Amendment Reexamination Clause, 83 IOWA L. REV. 499, 502 (1998) (agreeing that mass tort litigation involves overlapping issues, but that reexamination of those issues would not violate the Reexamination Clause "if it would not lead to confusion and uncertainty").}

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

B. The Superiority of the Class Action

1. The Problem of Asymmetric Stakes

Rule 23(b)(3) requires, along with a finding of predominance, a finding "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."\footnote{Kaplan, supra note 43, at 497 (noting that Rule 23(b)(3) category was primarily drafted to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"); see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights," quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).} Courts and scholars have recognized the superiority of the class action only in the context of litigation involving small claims for damages.\footnote{Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.).} In small claims litigation, the expected recovery is too small to provide the plaintiff an incentive to bring suit, since "only a lunatic or a fanatic sues for $30."\footnote{Fed. R. Civ. P. 23(b)(3) (emphasis added).} By contrast,
the claims in mass tort litigation tend to be large, or "viable," and consequently the class action is not "superior" because "there are likely to be realistic procedural alternatives . . . for the resolution of the underlying claims."81

But the consensus that the class action is not "superior" in the mass tort context does not adequately distinguish mass tort litigation from small claims litigation. Most obviously, mass tort plaintiffs may not, in fact, have "viable" claims given the high costs of litigating the claim.82 But mass tort litigation as a whole does not materially differ from small claims litigation once the problem of small claims litigation is fully fleshed out. Small claims litigation is problematic not just because the plaintiffs lack an incentive to bring suit separately, but because the defendant can exploit these insufficient incentives to escape liability altogether. Rule 23(b)(3) was no doubt influenced by a 1941 law review article, The Contemporary Function of the Class Suit, which advocated the use of class actions for small claims since the lack of separate actions would "impair the deterrent effect of the sanctions that underlie much contemporary law."83 A number of scholars have emphasized this deterrence rationale to support small claims class actions.84

But the problem of the defendant using the deficient incentives of the plaintiffs to escape liability is equally present in the mass tort context. This becomes clear when one shifts focus from the plaintiffs' incentives to bring suit to their incentives to make other investments during the litigation. Consider a simple example.85

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81 PRINCIPLES, supra note 19, § 2.02 cmt. b.
82 Rosenberg, supra note 31, at 418 n.52 ("Many cases of severe injury or death—'high stake' in the Court's taxonomy—involve complex issues of science and public policy as well as fact and law that render them uneconomical as separate actions.").
83 Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684, 686 (1941); see also Kaplan, supra note 42 (discussing the article in discussing the 1966 Amendments to Rule 23).
85 In discussing the problem of asymmetric stakes I rely upon a model litigant behavior that assumes that the parties seek to minimize their costs based on three factors: (1) the damages recoverable (or the liability that may be imposed) \( \rho \); (2) the probability of \( \rho \) occurring (\( p \)); and (3) the costs of the litigation process itself (for example, \( c_p \) for plaintiffs and \( c_D \) for defendants). Plaintiffs seek to maximize their net expected recovery, or \( ph - c_p \), while defendants seek to minimize their total expected litigation costs, or \( ph - c_D \). See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 389-418 (2004). The model and its basic assumptions are generally accepted and have been used by other procedural scholars. E.g., ROBERT G. BONE, THE ECONOMICS OF CIVIL PROCEDURE 34 (2003); see also PRINCIPLES, supra note 19, § 1.04, reporters' notes & cmt. a (acknowledging that "litigants tend to pursue economic gains"). Here I do not address limitations on the rationality or financing options of the parties. Such limitations
plaintiff ingested a drug that caused an injury totaling $500K.\textsuperscript{86} Suppose the plaintiff has the option of spending $25K for an expert that would result in a 50% probability of recovery at trial, or spending $1M for another expert that would result in a 100% probability of recovery at trial. Suppose that the manufacturer of the drug expects others to file claims based upon the same issue of generic causation, and that the total liability associated with that issue is expected to be $100M.

Here the plaintiff will hire the $25K expert because the cost of the expert ($25K) is less than the expected benefit ($500K \times 50\%, or $250K). The same is not true for the $1M expert. Even though the probability of success is certain (100%), the cost ($1M) is greater than the expected benefit ($500K). Of course, a plaintiff is not entitled to the best evidence available. But consider the incentives of the defendant. Unlike the plaintiff, if the defendant could hire an expert for $1M that would reduce the probability of recovery for the plaintiffs to 0\%, then the defendant would make that investment given the liability at stake ($100M). In fact, the defendant would be willing to invest $2M, or $3M, or $10M in an expert or other evidence showing no generic causation.

This example shows that both small claims and mass tort litigation share a problem of asymmetric stakes.\textsuperscript{87} In both situations, a defendant owns all of the potential liability associated with any common issue, but each plaintiff only owns a portion of the recovery (the flipside of liability). In small claims litigation, the fractional share of the liability owned by the plaintiff is so small that it prevents all of them from suing. But even if some plaintiffs own a share in the liability sufficient to bring suit, they will still have less incentive to invest in the suit than the defendant. The defendant simply has more at stake. Thus, the defendant can exploit economies of scale in investing in common issues that the plaintiffs cannot. Indeed, the defendant can exploit economies of scale for a variety

\textsuperscript{86} The following example is borrowed, with some modifications, from Rosenberg, \textit{What Defendants Have}, supra note 31, at 399-400. The example is also not far-fetched. \textit{See} In re Neurontin Mktg., Sales Prac., & Prods. Liab., 612 F. Supp. 2d 116 (D. Mass. 2009) (denying \textit{Daubert} motion to exclude expert testimony concerning whether gabapentin generally causes an increased risk of suicidality).

of investments in common issues, such as legal research, discovery and factual investigation, and the hiring of expert witnesses and other consultants.

2. The Class Action Solution

Recognizing the problem of asymmetric stakes further clarifies how the class action solves the problem. Admittedly, other legal interventions may solve the problem of asymmetric stakes, but here I focus on how the class action solves the problem to clarify the function of the class action.88

In small claims litigation, a class action is considered superior because it "aggregat[es] the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."89 A small claims class action is worth an attorneys' "labor," in part, because of the potential fee, which is usually calculated as a percentage of the total recovery.90 Moreover, the "common-fund doctrine" permits class counsel to spread any costs among the plaintiffs.91 Consequently, class counsel is given a stake that is consistent with having an entire stake in the liability. If class counsel invests in the litigation to increase the net amount of the entire pie, her cut of that pie commensurably increases. Along with a stake in the litigation, class counsel also receives dispositive control over the claims, which includes the power to settle the claims on a classwide basis.92 Taken together, class counsel is assigned both (1) a "beneficial interest" in the plaintiffs' recovery and (2) dispositive control, or "legal title," of the

88 Examples of other interventions to resolve the problem of asymmetric stakes include the use of exemplary remedies like punitive or statutory damages, the availability of contracting and market pressure, and public enforcement. See SHAVELL, supra note 85, § 2.4, at 398 (noting that "if there is an inadequate level of suit, the state can subsidize or otherwise encourage suit"); A. Mitchell Polinsky & Steven Shavell, The Uneasy Case for Products Liability, 123 HArv. L. Rev. 1437 (2010) (noting that market pressure in products liability contexts may obviate the need for the use of tort liability); SHAVELL, supra note 55, § 12.1-12.5, at 277-86 (noting the advantages and disadvantages of ex ante regulatory approaches versus the use of ex post liability). I discuss each of these interventions in more detail below. See infra Section I.B.3 (discussing private contracting); Section II.B.2 (discussing exemplary remedies like punitive damages); & Section II.C.3 (discussing alternative enforcement procedures in the context of federalism and separation-of-powers concerns).
89 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)).
90 PRINCIPLES, supra note 19, § 3.13(a) cmt. b (noting that "most courts and commentators now believe that the percentage [of the fee] method is superior" to the "lodestar method").
91 Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (permitting a district court to apportion costs, including attorneys' fees, against the unclaimed portion of a class action judgment under the "common-fund doctrine").
92 Fed. R. Civ. P. 23(e) (providing for procedures concerning "settlement, voluntary dismissal, or compromise").
claims for the benefit of the plaintiffs. But in doing so, the class action solves the problem of asymmetric stakes by equalizing the stakes. Class counsel, like the defendant, will invest in the litigation as if she had the total amount of liability at stake.

Understood in this functional sense, a class action is neither a "joinder" nor a "representative device," but a "trust" device. It is not a joinder device that aggregates the plaintiffs as parties into one proceeding. Although formally true as a matter of preclusion doctrine, the class action does not depend on the plaintiffs acting as a collective. The class action is also not a representative device because it does not depend on any plaintiffs at all, not even the nominal class representative. Class counsel, rather than any one representative plaintiff, initiates and controls the litigation of the plaintiffs' claims. Instead, a class action is a "trust" device, with class counsel acting as trustee of the plaintiffs' claim for the benefit of the plaintiffs. In effect, the class action makes class counsel

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93 Sprint Comm'ns Co. v. APCC Servs., Inc., 128 S. Ct. 2531, 2537-38 (2008) (defining, and distinguishing, the "beneficial interest" in a claim from the "legal title" to the claim).
94 See Diane Wood Hutchinson, Class Actions: Joinder or Representative Device, 1983 SUP. CT. REV. 459 (discussing historical vacillation between viewing class actions as "joinder" and as "representational" devices).
95 See, e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443 (2010) (Scalia, J.) (describing Rule 23 as only "allowing multiple claims (and claims by or against multiple parties) to be litigated together").
96 Samuel Issacharoff, Governance and Legitimacy in the Law of Class Actions, 1999 SUP. CT. REV. 337, 341 (noting that "[c]lass actions almost invariably come into being though the actions of lawyers—in effect, it is the agents who create the principals").
97 See RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (defining a "trust" as "fiduciary relationship" which "subject[s] the person who holds title to the property to duties to deal with it for the benefit of . . . one or more persons, at least one of whom is not the sole trustee"); cf. Richard A. Epstein, Class Actions: Aggregation, Amplification, and Distortion, 2003 U. CHI. LEGAL F. 475, 482 (noting that class action is a "forced exchange" that gives the victim's claim to a third party).

One could also view the class action as an "entity" in which class counsel is the director or officer and the plaintiffs are the shareholders. David L. Shapiro, Class Actions: The Class as Party and Client, 73 NOTRE DAME L. REV. 913, 921 (1998) (arguing for an entity theory of the class analogous to "congregations, trade unions, joint stock companies, corporations"). But the "trust" view of the class action improves on the "entity" view in two ways. First, the "entity" view suggests that the cohesion of the class is relevant. See id. at 921-22 (1998) (noting the lack of voluntary aggregation of the class members and proposing procedures such as voting to reflect cohesion). However, the problem of asymmetric stakes arises and is resolved regardless of the extent of class cohesion. Second, the "trust" conception of the class action highlights the underlying cause of the problem of asymmetric stakes – the excessive fragmentation of property rights. See Lee Anne Fennell, Slices and Lumps 2-3 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106421 (discussing problems of fragmentation and aggregation of property rights).
the "real party in interest."\textsuperscript{98} Indeed, "a common structural feature of all aggregate proceedings [is] the loss of control of litigation by persons whose interests are at issue."\textsuperscript{99}

3. The Inferiority of Informal Aggregation

Although the problem of asymmetric stakes has been acknowledged,\textsuperscript{100} some still question whether a class action is superior to separate actions in mass tort litigation. For example, plaintiffs, through their attorneys, can build large inventories of claims, share information, and enter into various agreements, associations, or consortiums to coordinate their investments.\textsuperscript{101} Thus, "[p]roperly handled, non-class collective litigation not only is viable, but goes a long way toward leveling the field against resource-rich defendants."\textsuperscript{102} Indeed, "there is no obvious reason to prefer public ordering to private ordering."\textsuperscript{103}

Of course, under certain conditions, parties can use private ordering to reach the most efficient outcome.\textsuperscript{104} But informal aggregation cannot completely solve the problem of asymmetric stakes in mass tort litigation. First, under current tort law, the market for claims is restricted. Plaintiffs cannot assert risk-based claims,\textsuperscript{105} and prohibitions on champerty and maintenance limit the transfer or selling of claims to others.\textsuperscript{106} Second, informal aggregation entails transaction costs. "Client recruitment is not

\textsuperscript{98} See Fed. R. Civ. P. 17(a) (providing that "[a]n action must be prosecuted in the name of the real party in interest," which can include "the trustee of an express trust"); Cf. Sprint, 128 S. Ct. at 2537 (permitting assignee of legal title to a claim as "real party in interest" for purposes of Rule 17 even though assignee was to remit all recovery to the assigns minus a flat fee).
\textsuperscript{99} PRINCIPLES, supra note 19, § 1.05 cmt. a; see also id. § 1.02 reporters’ notes cmt. b(2) (noting that "[b]ecause common issues provide the basis for consolidation, a consolidated proceeding resembles a class action certified on the basis of predominating common questions"); Charles Silver & Geoffrey P. Miller, The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal, 63 VAND. L. REV. 107 (2010) (noting that multi-district litigation in which judges have unfettered discretion to appoint lead counsel are recognized as "quasi-class actions.").
\textsuperscript{100} See, e.g., PRINCIPLES, supra note 19, § 1.02 cmt. b(3) (noting that "[a] defendant facing a large number of related claims enjoys naturally occurring economies of scale in legal proceedings").
\textsuperscript{101} See Erichson, supra note 30, at 386-401 (describing such processes).
\textsuperscript{102} Erichson, supra note 23, at 550 n.117; see also NAGAREDA, supra note 12, at 117-18 (arguing that informal aggregation provides "sufficient incentives").
\textsuperscript{103} Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 SUP. CT. REV. 183, 212 (2008).
\textsuperscript{104} See Coase, supra note 29, at 2-15.
\textsuperscript{105} John C.P. Goldberg & Benjamin C. Zipursky, Unrealized Torts, 88 VA. L. REV. 1625, 1641-49 (2002) (discussing, and defending, the requirement for realized harm under current tort doctrine).
\textsuperscript{106} Anthony J. Sebok, The Inauthentic Claim, 64 VAND. L. REV. (forthcoming 2011) (discussing, and criticizing, the law of champerty and maintenance).
costless," and plaintiffs also incur costs in communicating with other attorneys and reproducing information. The defendant never incurs these costs because it already owns all of the liability at stake. Third, and most importantly, informal aggregation involves strategic behavior that frustrates aggregation. A plaintiff may defect from informal aggregation to recover more separately, to avoid mixing his claim with other dubious claims, or to avoid any other costs of aggregating. Most perniciously, a plaintiff may defect to free-rider on investments in common issues made by others, such as through nonmutual offensive issue preclusion or by relying on the precedent or findings established in other cases. Taken together, market restrictions, transaction costs, and strategic behavior create collective action problems that prevent complete aggregation.

Nevertheless, some argue that complete aggregation is not necessary. Since investing in common issues has diminishing returns, informal, incomplete aggregation is sufficient because "the matters most likely to break open a case" only require "some minimal level of investment . . . to bring them to light." Given the uncertainty inherent in any investment, one cannot say a priori what the relationship is between investments in common issues and the probability of recovery. But the existence of a

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107 NAGAREDA, supra note 12, at 16.
110 See James D. Cox et al., Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 COLUM. L. REV. 1587, 1604-05 (2006) (noting that, in securities fraud litigation, reluctance of "institutional investors with large potential claims" to serve as lead plaintiffs in class actions since "[i]nstitutional lead plaintiffs incur costs when monitoring the actions of lead counsel").
111 See Rosenberg, What Defendants Have, supra note 31, at 425 (noting that "voluntary joinder is beset by free-riding").
113 See NAGAREDA, supra note 12, at 118; see also Erichson, supra note 23, at 550 n.117 (arguing in favor of informal aggregation, noting that "[f]urther investment in litigation inevitably reaches a point of diminishing returns").
sufficient investment level is doubtful given the complexity of the issues in mass tort litigation. After all, "one can always search for more evidence of causation or more evidence of a cover-up."\textsuperscript{115} Moreover, although, ex post, a minimal investment sufficiently uncovered a smoking gun, ex ante, the parties do not know how much investment is needed to find that smoking gun, if one exists at all. In fact, many cases may go completely uninvestigated in the absence of complete aggregation. Finally, even if there is such a level of investment, informal aggregation will not likely reach it, since the plaintiffs most likely to defect are those with large claims.\textsuperscript{116}

C. The Tragedy of Autonomy

1. The Problem of Litigant Autonomy

One consequence of the problem of asymmetric stakes is that control over the claim is of little value. This is obvious in the small claims context, since "the interest" in litigant autonomy "may be no more than theoretic."\textsuperscript{117} But litigant autonomy is also of little value in mass tort litigation because it causes the collective action problems that perpetuate the problem of asymmetric stakes.

These collective action problems surface even when litigant autonomy is protected in a limited form, such as through a right to opt out of the class.\textsuperscript{118} Permitting such a non-mandatory class action may overcome the market restrictions and transactions costs that frustrate informal aggregation.\textsuperscript{119} However, they still allow for strategic behavior that unravels complete aggregation. Studies have shown that plaintiffs with large claims tend to opt out of class actions.\textsuperscript{120} Indeed, the unraveling of the recent phen-fen global settlement was caused by front-end and back-

\textsuperscript{115} NAGAREDA, supra note 12, at 118; cf. Rosenberg, What Defendants Have, supra note 31, at 422 (arguing that parties "in reality choose from among a virtually continuous range of options").

\textsuperscript{116} NAGAREDA, supra note 12, at 145 (noting that in class action settlements, "high-value claimants will tend to depart, leaving mid- to low-value claims in the class").

\textsuperscript{117} Kaplan, supra note 42, at 391.

\textsuperscript{118} Fed. R. Civ. P. 23(c)(2)(B)(v) (requiring a class action certified under Rule 23(b)(3) to provide notice that "that the court will exclude from the class any member who requests exclusion").

\textsuperscript{119} But see Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997) (acknowledging, but not deciding, issue of whether exposure-only claimants have standing to sue).

\textsuperscript{120} Theodore Eisenberg & Geoffrey Miller, The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues, 57 Vand. L. Rev. 1529, 1555 (2004) (noting that "[a]s that recovery increases, so does the opt-out rate," conjecturing that "it may be a function of the association of high per-class-member recoveries with opting out class members believing that they can do better on their own, or as part of a different class action law suit, than as members of the class from which they opt-out").
end opportunities to opt out of the settlement.\footnote{See \textit{NAGAREDA}, \textit{supra} note 12, at 146-47.} Even more perniciously, opt out rights allow plaintiffs to hold out for a greater share of recovery, in effect holding complete aggregation hostage for a pay-off.\footnote{Michael A. Perino, \textit{Class Action Chaos? A Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions}, 46 \textit{Emory L.J.} 85, 96 (1997) (noting that opt out rights allow plaintiffs with high value claims to hold out to extract payoffs); Edward Brunet, \textit{Class Action Objectors: Extortionist Free Riders or Fairness Guarantors}, 2003 \textit{U. Chi. Legal F.} 403 (discussing hold out problem, but ultimately endorsing objectors to monitor class counsel).}

2. \textit{Litigant Autonomy as Self-Defeating}

One difference between small claims litigation and mass tort litigation is that, in mass tort litigation, some plaintiffs are better off suing separately than through a class action. A plaintiff with a small claim has no incentive to bring suit, or, for that matter, to defect from a class action.\footnote{See \textit{supra} Section I.A.} Thus, in small claims litigation every plaintiff benefits from a class action as compared to filing a separate action. However, this is not necessarily true in mass tort litigation. Even if you compared a mandatory class action to separate actions, there may be plaintiffs who are better off suing separately than joining the collective. Although the collective would do better as a whole, it is unclear why these plaintiffs have to suffer to benefit the collective. Understood in this way, the problem of asymmetric stakes in mass tort litigation creates a conflict between the collective interests of the plaintiffs and their individual interests.\footnote{This may not be true in all contexts. See Polinsky & Shavell, \textit{supra} note 88, at 1491 (noting that, among other things, market pressure and contracting may make liability for product defects unnecessary).}

But the problem of asymmetric stakes in mass tort litigation can be understood as a problem for each individual plaintiff if its consequences are considered across time. As noted above, before the tort occurs, the defendant cannot know how its actions would affect specific members of the class.\footnote{See \textit{supra} Section I.A.} Likewise, before the tort occurs, a plaintiff cannot know how he or she will be injured by a tort, if at all. Ideally, the plaintiffs would negotiate with the defendant on what precautionary measures to take. But in most mass tort contexts, such as in the asbestos context, the ability to contract prior to the mass tort is difficult, if not impossible.\footnote{See \textit{supra} Section I.A.} Instead, and as I discussed earlier, the defendant will choose its precautionary measures based upon its expected liability and costs.\footnote{See \textit{supra} Section I.A.}
Before the tort occurs, each plaintiff would prefer to maximize the defendant’s expected aggregate liability to induce the defendant to take optimal safety precautions. Accordingly, every plaintiff would prefer litigating any tort through a mandatory class action. However, after the tort occurs, that preference may change. After the tort occurs, the plaintiffs learn their fates within the population. Moreover, deterring the defendant is pointless because the tort cannot be undone. Thus, after the tort occurs, each plaintiff only cares about recovering as much as possible, rather than maximizing total expected liability.

To use a simple example, suppose that the plaintiffs know that, prior to the tort, the affected population will suffer $100M in damages and will have a 75% chance of recovery if they litigate as a mandatory class action. However, they also know that at least 10 individuals in the population will suffer damages of $4M with a 100% probability of recovery, with the resulting members, if aggregated without these 10 individuals, suffering $60M but with a 50% recovery. Before the tort occurs, each plaintiff would prefer the mandatory class action because their expected liability ($100M * 75%, or $75M) is greater than partial aggregation and a 10 separate actions of $4M ($60M * 50% + $40M, or $70M). However, after the tort occurs, if a plaintiff knows she has a $4M guaranteed claim, she will strategically defect from aggregation.

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

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

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128 The example is stylized but, given the size of the claims in mass tort litigation and the propensity of plaintiffs with high claims to opt out, not far-fetched.

129 See supra Section I.A (discussing Amchem’s ex ante decisionmaking concerning a warning).


131 This is particularly true if a mandatory class action awards damages based on average awards, or damage scheduling. See infra Section II.B.2.
Most importantly, the marginal decrease in expected recovery leads to a marginal increase in the risk of injury. Most individuals are generally risk averse, as evidenced by insurance markets for life, disability, and health insurance, and thus would incur additional risk-bearing costs. But even if insurance is available, the increase in risk will likely cause losses that can never be compensated with damages, such as death, loss of loved ones, cancer, or physical disabilities. Such nonpecuniary losses, in fact, constitute well over half of the losses caused by torts. It is highly unlikely that a plaintiff would prefer to bear this additional risk and, by definition, incomplete compensation for any loss, to preserve the "collateral benefit" of control over any claim.

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

### 3. Law Enforcement as a Commons

But the problem of asymmetric stakes in mass tort litigation is better understood as a problem familiar to the law. In property law, a "tragedy of the commons" arises when individual use of a commonly-owned resource result in self-defeating behavior. Although seldom defined, the classic example is individual grazing of commonly-owned land, which

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133 See Scott Hershovitz, Harry Potter and the Trouble With Tort Theory, 63 STAN. L. REV. 67, 74 (2010) (arguing that economic analysis of tort law ignore "collateral benefits" of lawsuits, since "[l]itigants often have reasons to tell their stories in public[,] [p]laintiffs may find a chance to do so empowering or cathartic"). As I discuss below, a mandatory class action can actually accommodate a right of participation, as distinct from a right of control. See infra Section II.B.3.
134 See Rosenberg, Only Option, supra note 87, at 867 n.72 ("If individuals recognized this problem ex ante, they would insist on (and invest in) an ex post law enforcement mechanism that effectively ties everyone to the proverbial mast of required collective action." (citing JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMUTMENT, AND CONSTRAINTS (2000)); cf. PRINCIPLES, supra note 19, § 1.04 cmt. e (expressing "a policy commitment to mimic market arrangements in contexts in which markets are prone to fail").
135 Shi-Ling Hsu, What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem, 69 ALB. L. REV. 75, 77 (2006) (noting that "[r]emarkably, of the thousands of putative applications of the tragedy of the commons, not one has sought to formally define the term").
may lead to overgrazing. Similar tragedies can result from fishing in a common pool, oil exploration, or "sending spam through the internet." Such "commons" problems have been analyzed as arising either from overuse or underinvestment of the common resource. "Commons" problems are further distinguished from "anticommons" problems. Unlike "commons" problems, which typically result from open access resources with too few rights to exclude, "anticommons" problems typically arise from resources with too many rights to exclude.

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

Recent property theory reconceives "commons" and "anticommons" tragedies as problems of scale. They arise from a mismatch between the scale of the ownership unit of a resource and the scale at which the resource is best used. In some cases individual ownership units may lead to overuse (or underinvestment) of a resource that is best used collectively, as in "tragedy of the commons" situations. Individual ownership units may also lead to hold out problems that prevent the best, collective use of a resource, as in "anticommons" situations. Either way, the core problem these tragedies share is that the ownership units are not set at the right scale to use the resource most efficiently.

Understood in this way, the problem of asymmetric stakes in mass tort litigation is best understood as a "commons" problem. It improves upon

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136 Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968).
137 See, e.g., OSTROM, supra note 14, at 3.
139 Fennell, Tragedies, supra note 14, at 914.
140 See, e.g., Francesco Parisi et al., Duality in Property: Commons and Anticommons, 25 INT'L REV. L. & ECON. 578 (2005) (suggesting that "the problem of the commons is related to a negative externality of use rights").
143 Epstein, supra note 97, at 486-87 (noting analytic similarity of mass tort settings to "common pool asset" settings like oil and gas extraction).
144 Fennell, Tragedies, supra note 14, at 917 (noting that "[i]t is possible to cast a particular collective action problem as either a problem of underinvestment or a problem of overuse").
146 Fennell, HANDBOOK, supra note 14, at 33.
precommitment as a framing device because it focuses on the scale problem that causes each plaintiff's different preferences over time. The problem of asymmetric stakes is, in essence, a property problem, caused by the insufficient scale of ownership of the claims.

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

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

II. DUE PROCESS

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

In this Part I use the self-defeating nature of litigant autonomy in the mass tort context to rethink the law of procedural due process. Here I focus on class actions rather than functional analogues like multidistrict

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147 Rosenberg, Only Option, supra note 87, at 847 & n.35 (citing MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965)).
148 Fennell, HANDBOOK, supra note 14, at 3.
149 See PRINCIPLES, supra note 19, § 1.05 reporters' notes cmt. a (noting that "when ownership and control of assets are divided, managers predictably lack incentives to maximize asset values and may even gain by acting to owners' detriment," citing sources to literature in corporate context).
150 See Smith, supra note 14 (noting that multiple uses of a resource may have different optimal scales, such as grazing and farming of land).
litigation, because in the class action context almost all courts and scholars consider litigant autonomy a requirement of procedural due process rather than a problem. Although the insistence on protecting litigant autonomy in mass tort litigation is expressed in nonclass settings, it is most clearly expressed as a due process concern in the class action context. My goal is to use the discrepancy between this insistence and the self-defeating nature of litigant autonomy in the mass tort context to reexamine procedural due process law under the Due Process Clause.

By its terms, the Due Process Clause provides that no person "shall be deprived of life, liberty, or property, without due process of law." In the class action context, courts have focused on the claim for compensatory damages, the "chose in action," as the relevant "life, liberty, or property" interest. As to the potential "depriv[ation]," courts have focused on the preclusive effect of a class action judgment on the claims of nonparty class members, which "may extinguish the chose in action forever through res judicata." As to the "process" "due," courts have permitted class actions only if, at a minimum, the interests of all class members are adequately represented.

The source of the modern law of procedural due process in the class action context is *Hansberry v. Lee*, which arose from an eviction action against Carl Hansberry, an African-American who purchased a home with a racially restrictive covenant. Hansberry argued, as a defense, that the covenant was unenforceable because it failed to satisfy a condition that "owners of 95 per centum of the frontage" sign the covenant. The plaintiff landowners countered that the covenant was found to be enforceable in a prior class action, and Hansberry was bound by the prior

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

152 U.S. Const. amend. V; id. amend. XIX.

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

154 See Shutts, 472 U.S. at 807; PRINCIPLES, supra note 19, § 2.07 cmt. b ("Restrictions of constitutional due process comprise the most significant constraints on the preclusive effect of the aggregate proceeding").

155 Hansberry v. Lee, 311 U.S. 32, 42-43 (1940); Bone, supra note 1 (same).

156 Hansberry, 311 U.S. at 37-38.


158 Hansberry, 311 U.S. at 38.
judgment because he was a member of the class.\textsuperscript{159} Hansberry, who was not a party to the prior proceeding, argued that to bind him to the judgment would violate due process.\textsuperscript{160}

The Court agreed. It recognized that the class action was an exception to the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."\textsuperscript{161} But the Court noted that due process permits a class action judgment to bind nonparty class members if the procedures used "fairly insure the protection of the interests of absent parties," such as when the nonparty members "are in fact adequately represented by the parties who are present."\textsuperscript{162}

The Court concluded that Hansberry's interests were not adequately represented since the prior class action, which sought to enforce the covenant, conflicted with the interests of class members like Hansberry "whose substantial interest is in resisting performance."\textsuperscript{163} The Court also noted that "the only support of the judgment in the [prior proceeding] was a false and fraudulent stipulation of the parties that 95 per cent had signed."\textsuperscript{164} Although the Court did not discuss it further, the "fraudulent stipulation" strongly suggested that the prior class action was a collusive action brought to establish the enforceability of the covenant.\textsuperscript{165}

The two sources of inadequate representation present in Hansberry – (1) internal conflicts within the class and (2) an external conflict of interest between the class and the class representative – have preoccupied courts in reviewing class actions in mass tort litigation. The Supreme Court has only examined mass tort class actions in two decisions concerning comprehensive class action settlements in asbestos litigation. In the first case, Amchem Products, Inc. v. Windsor, the Court rejected a settlement-only class action which settled the claims of presently injured claimants who had not yet filed claims and "futures" or "exposure-only" claimants who had not yet manifested injury.\textsuperscript{166} The Court concluded, among other things, that the "adequacy of representation" requirement of Rule 23(a)(4) was not satisfied because the interests of the class members were not aligned. Specifically, those presently injured plaintiffs within the class preferred "generous immediate payments," while "exposure-only" plaintiffs preferred "an ample, inflation-protected fund for the future."\textsuperscript{167}

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\textsuperscript{159} Id. at 38.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 40-41 (citing Pennoyer v. Neff, 95 U.S. 714 (1877)).
\textsuperscript{162} Id. at 42-43.
\textsuperscript{163} Id. at 45-46.
\textsuperscript{164} Id. at 37.
\textsuperscript{165} See Jay Tidmarsh, Rethinking Adequacy of Representation, 87 TEX. L. REV. 1137, 1138 (2009) (arguing that this concern was central to the court's holding).
\textsuperscript{166} See Amchem Prods., Inc v Windsor, 521 U.S. 591 (1997).
\textsuperscript{167} See id. at 626.
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In the second case, *Ortiz v. Fibreboard*, the Court rejected a settlement-only class action certified under a "limited fund" rationale pursuant to Rule 23(b)(1)(B). The proposed "limited fund" in *Ortiz* resulted from a multiparty settlement in which the defendant and a third-party insurer agreed to establish a fund to settle all existing asbestos claims in exchange for settling separate litigation over the insurer's coverage of the claims. In holding that the proposed class action did not involve a sufficient "limited fund" to satisfy Rule 23(b)(1)(B), the Court noted that "Fibreboard was allowed to retain virtually all its entire net worth." The Court further suggested that the class could have received more in the settlement, noting in a footnote that "[i]n a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant."!

The meaning of the *Amchem* and *Ortiz* decisions as to adequacy of representation is unclear, since the cases were decided on Rule 23 grounds. Moreover, conflicts inherently arise in all class actions. Nevertheless, both decisions strongly suggest that due process requires some protection of litigant autonomy in the mass tort context. For example, in *Amchem* the Court noted that the drafters of Rule 23 disfavored class actions in mass tort litigation because, unlike litigation involving small claims, "[e]ach plaintiff . . . has a significant interest in individually controlling the prosecution of" his or her case." Moreover, in *Ortiz* the Court noted that certification of the class under Rule 23(b)(1)(B), which permits mandatory class actions, would raise serious due process concerns because "objectors to the collectivism of a mandatory (b)(1)(B) action have no inherent right to abstain." Thus, the *Ortiz* Court viewed litigant autonomy, such as through a right to opt out of

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169 Fed. R. Civ. P. 23(b)(1)(B) (permitting a mandatory class action if individual litigation would, "as a practical matter . . . be dispositive" of the claims or nonparties).
170 *Ortiz*, 527 U.S. at 859.
171 Id. at 852 n.30.
172 But see *Issacharoff*, supra note 96, at 352 ("The fundamental strength of *Amchem* and *Ortiz* inheres in the subtle revisitation of the law governing due process in the resolution of representative actions.").
173 See *Tidmarsh*, supra note 165, at 1158-67 (noting that Rule 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) class actions all involve internal and external conflicts); see also John Bronsteen & Owen M. Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1431 (2003) (noting that Rule 23(b)(1)(B) "identifies the class members' competing interests in the limited fund as a basis for bringing the lawsuit as a class action, when in fact that competition between class members gives the court a reason to deny class certification").
175 *Ortiz*, 527 U.S. at 847.
the class, as necessary to protect against the internal and external conflicts that pervade mass tort litigation.\textsuperscript{176}

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

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

Courts have recognized the claim for compensatory damages, the "chose in action," as a "property" interest protected by the Due Process Clause.\textsuperscript{177} However, as with any property interest, there are a number of entitlements "bundle[d]" with the claim that could be deprived without due process.\textsuperscript{178} Here I want to delineate three such entitlements.

The first is the amount of compensation to which each plaintiff is entitled. It can be understood as the "beneficial interest" associated with the claim, analogous to the dividend, cash flow, or income rights provided by assets like shares of stock, partnership interests, or funds held in trust.\textsuperscript{179}

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

The third is an entitlement to avoid tortious conduct altogether, which is implied by the deterrence function of the claim. In other words, a chose in action reflects a social choice to provide an entitlement to avoid tortious conduct by protecting it through a private right of action.\textsuperscript{180} This social

\textsuperscript{176} Others agree. \textit{See, e.g.}, \textsc{Principles, supra} note 19, § 2.07 (citing sources).


\textsuperscript{178} \textit{See} \textit{Edward L. Rubin, Due Process and the Administrative State}, 72 \textit{Cal. L. Rev.} 1044, 1086 (1984) (noting that "it is now commonplace to acknowledge that property is simply a label for whatever bundle of sticks the individual has been granted").

\textsuperscript{179} \textit{Sprint Comm'n's Co. v. APCC Servs., Inc.}, 128 S. Ct. 2531, 2538-39 (2008).

choice is analogous to the provision of private rights of action in the antitrust, securities, and civil RICO contexts, or the provision of implied rights of action to deter violations of constitutional rights.

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

1. Deterrence as an Individual Entitlement

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

(noting that "[t]he state not only has to decide whom to entitle, but it must also simultaneously make a series of equally difficult second order decisions. These decisions go to the manner in which entitlements are protected," such as through liability rules that provide a cause of action for the damages that result from the lost entitlement).

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


See ILYA SEGAL & MICHAEL WHINSTON, PROPERTY RIGHTS 2 (unpublished draft, March 23, 2010) ("The basic concept of a property right is relatively simple: A property right gives the owner of an asset the right to the use and benefits of the asset, and the right to exclude others from them," citing sources); see also WILLIAM BLACKSTONE, COMMENTARIES 138-39 (defining a property right as "free use, enjoyment, and disposal"). One missing entitlement is the right of "disposal," or the right to transfer the claim to others. As noted above, the law of champerty and maintenance limits the ability of plaintiffs to sell their claim outside the settlement context. See supra Section II.B.

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

See, e.g., Tidmarsh, supra note 165, at 1167.

See, e.g., Catherine Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347, 363 (2003) ("I take as a starting point the normative view that economic deterrence is one goal of punitive damages (and our tort law system), but not, as some
each individual plaintiff. But conceptualizing deterrence as a public interest distinct from the private interests of the parties is mistaken. We have a public interest in deterrence because each individual has a private entitlement to it.

One reason why deterrence is considered a "policy" rather than an entitlement may be caused by the term deterrence itself. Deterrence does not describe the entitlement but the mechanism by which the entitlement is protected. The entitlement itself is the avoidance of tortious conduct, which is provided by tort law itself. In other words, individuals are entitled to deterrence because the law prohibits the conduct the claim seeks to deter. As emphasized by civil recourse theorists, "part of what gives tort law value is that it is a system of rules contained in common law that articulates legally enforceable norms about how one is obligated to treat others. . . . We recognize that the point is obvious; the problem is that it is almost blindingly obvious."  

A further source of resistance may be the diffuse nature of deterrence. First, the conduct prohibited by tort law is not specified. For example, tort law imposes a duty to provide reasonable warnings, but it does not define what warnings are required in specific circumstances. But this lack of specificity is not fatal to conceptualizing deterrence as an entitlement. For example, one could consider the entitlement as an

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

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

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

190 In fact, the lack of specificity is a feature, not a bug. Tort law uses general standards combined with damage remedies to induce individuals to reveal information
entitlement to be free from exposure to unreasonable risks of harm, and risks are considered entitlements, as evidenced by both insurance markets and markets for safety features, such as safety options in cars. If one is uncomfortable with viewing tort law as concerning risks of injury, one could view the entitlement to be free from unspecified conduct as akin to contracts imposing mandatory, if unspecified, duties, such as warranties or contracts for security services.

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

Third, the deterrence entitlement is not tangible thing, while tort law focuses on externalities like risks of harm. Although this distinction may have functional relevance, it does not define what counts as an entitlement. In fact, "[a] harmful externality can often be described as the taking of thing; for example, a firm that pollutes someone's air can be said to have taken clean air or an easement from the victim."

CONCERNING THE RELEVANT CONDUCT AND THE PARTIES' RESPECTIVE VALUATIONS OF IT. See generally AYRES, supra note 184.

191 See Lee Anne Fennell, Unbundling Risk, 60 DUKE L.J. 1285 (2011) (describing risk markets).

192 See, e.g., Goldberg & Zipursky, supra note 105.

193 Cf. SHAVELL, supra note 55, § 3.2.10 at 61 (adjusting model to "allow firms to offer product warranties, which is to say, to choose their own liability rules"); see also Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) (Stevens, J., dissenting) (analogizing enforcement of temporary restraining orders with mandatory arrest provisions to "a contract with a private security firm, obligating the firm to provide protection to respondent's family").


195 See, e.g., Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (Harlan, J., concurring) (noting that "the interest which Bivens claims – to be free from official conduct in contravention of the Fourth Amendment – is a federally protected interest").

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

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


2. *Deterrence as a Liberty Interest*

One may agree that deterrence is as an individual entitlement, but may have some difficulty in conceptualizing it as a "life, liberty, or property" interest under existing law. Under current law, "life, liberty, or property" interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."\(^{200}\) All deterrence entitlements in the mass torts context have an independent tort law source.\(^{201}\) However, the Court has insisted that the Due Process Clause is not a "font of tort law," and has found that some entitlements otherwise protected by tort law are not "life, liberty, or property" interests, such as reputational interests,\(^{202}\) injury caused by the negligence of prison officials,\(^{203}\) unfair competition,\(^{204}\) and police protection.\(^{205}\)

As an initial matter, it does not matter whether deterrence alone would be a sufficient "life, liberty, or property" interest, since the claim is already recognized as a "property" interest. For example, in *Paul v. Davis* the Court rejected a claim that an interest in "stigma" alone, while protected by state defamation law, is a "liberty or property" interest under the Due Process Clause.\(^{206}\) In doing so, the Court distinguished other cases that considered "the 'stigma' which may result from defamation by the government" because in those cases, the interest in reputation was tied "to more tangible interests, such as employment."\(^{207}\) Thus, *Paul v. Davis* demonstrates that an individual's interest in deterrence can enter the due process analysis, albeit through the Trojan Horse of the claim.

\(^{200}\) Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

\(^{201}\) Thus, I am not arguing for a right to tort law itself as a matter of due process, although I am sympathetic to the argument. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (arguing for a right to tort law itself as a matter of "structural due process").

\(^{202}\) Paul v. Davis, 424 U.S. 693, 717 (1976). The Court alluded to the possibility of a defamation action under state tort law, but did not resolve whether such a cause of action was available to the plaintiff. *Id.*

\(^{203}\) Daniels v. Williams, 474 U.S. 327, 328 (1986) ("[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.").

\(^{204}\) College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expenses Bd., 527 U.S. 666, 674 (1999) (concluding that "[t]o sweep within the Fourteenth Amendment the elusive property interests that are 'by definition' protected by unfair-competition law would violate our frequent admonition that the Due Process Clause is not merely a 'font of tort law'").

\(^{205}\) Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005); see also DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 n.2 (1989) (questioning, without deciding, whether "an entitlement to protective services" is a "property" interest under the Due Process Clause).


\(^{207}\) *Id.* at 701.
But the law of procedural due process has the resources to consider deterrence an interest independent of the claim. This is suggested by the Court's overemphasis on the "property" term of the "life, liberty, or property" interest. The more salient term in the mass tort context may be "liberty," since the Court has recognized as a "liberty" interest "the right to be free from, and to obtain judicial relief for, unjustified intrusion of personal security." In *Ingraham v. Wright*, for example, the Court recognized a "liberty" interest in being free from corporeal punishment at school, but held that existing state tort law procedures "are fully adequate to afford due process." Moreover, prior to the rejection of "stigma" as a sufficient "liberty or property" interest in *Paul v. Davis*, the Court identified reputation as a relevant "liberty" interest and then examined the sufficiency of the procedures in place to protect it. A similar approach was previously taken for negligent injuries caused by prison officials, and is suggested in the Court's recent assumption that informational privacy interests are a protected interest.

The approach taken in these cases suggests shifting the relevant "life, liberty, or property" interest from the claim to deterrence itself, which would accurately reflect the priority individuals place on deterrence over the other entitlements that comprise the tort claim. Indeed, conceiving of deterrence as a "liberty" interest strongly suggests that the claim, far from being a "property" interest, is part of the procedure that is subject to the law of procedural due process. Moreover, it would permit courts to distinguish "liberty" interests like tort interests from "property" interests

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

209 430 U.S. at 672. Although *Ingraham* involved government officials, the Due Process Clause applies equally to the actions of private parties. See Section II.B.2.

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

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

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

213 See supra Section I.C.

214 See *Ingraham v. Wright*, 430 U.S. 651, 678-80 (1977); *Parratt*, 451 U.S. at 543-44.
on other, more functional grounds, rather than follow the current ad hoc approach which permits entitlements in some things but not others.\textsuperscript{215}

3. \textit{Due Process as a Font of Tort Law?}

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

More importantly, what underlies the concern with the Due Process Clause serving as a "font" of tort law is the fear that greater due process scrutiny would result in a "wholesale federalization of tort claims against state and local government officials," with a "corresponding prospect of massive damages liability" for potential due process violations.\textsuperscript{216} But recognizing deterrence as a "liberty" interest does not entail such a result. Any concern with the "wholesale federalization" of state tort law can be addressed through the use of rebuttable presumptions to establish the sufficiency of existing tort law, which the Court has implicitly used in the past.\textsuperscript{217} Moreover, establishing a rebuttable presumption could exclude traditional, nonproblematic areas of tort law while allowing the parties to challenge the sufficiency of existing procedures in the mass tort and similar contexts, thus "leaving the due process right intact" for these settings.\textsuperscript{218}

B. The "Depriv[ation]"

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


\textsuperscript{217} See Parratt v. Taylor, 451 U.S. 521 (1981) (concluding that state tort law was sufficient for due process purposes, even though they did not provide the defendant with a right to sue individual officers or punitive damages).

\textsuperscript{218} \textit{Cf.} Levinson, \textit{supra} note 216, at 893 (citing sources that suggest "interpreting section 1983 to exclude some categories of constitutional violations, thus leaving the due process right intact in other remedial settings").
1. Preclusion and Other "Depriv[ations]"

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

The Court rejected the analogy. The Court noted that nonparty out-of-state plaintiffs are "not haled anywhere to defend themselves upon pain of a default judgment," and are further protected by the procedures surrounding class certification. Thus, "[u]nlike a defendant in a normal civil suit," the absent out-of-state plaintiff "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." Accordingly, the Court did not require absent, out-of-state class members to "opt in" to a class action in order for a state court to establish personal jurisdiction. It did hold, however, that the out-of-state class members were entitled to notice and a right to opt out, at least in class actions "concerning claims wholly or predominately for money judgments."

Although Shutts only addressed what procedures were necessary to establish personal jurisdiction over the out-of-state absent class members, Shutts suggests that preclusion itself may not be necessary to

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220 Id. at 807.
221 Id. at 809.
222 Id. at 807-10.
223 Id. at 810.
224 Id. at 812-13 & n.13.
225 Id. at 812-13. It should be noted that whether a state court proceeding could preclude the claims of out-of-state nonparties is the same issue the Court addressed in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), which I discuss below. See infra Section II.B.3. In Mullane the Court avoided cognizing the issue as one of personal jurisdiction and instead analyzed the issue as one of procedural due process. See Tobias Barrington Wolff, Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action, 156 U. PA. L. REV. 2035 (2008) (noting the analytic similarity between Shutts and Mullane). Moreover, the Court has recently suggested that Shutts extends beyond personal jurisdiction. See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ---, slip op. at 23 (June 20, 2011) (citing Shutts for the proposition that "[i]n the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process"); AT&T Mobility LLC v. Concepción, No. 09-893, 2011 WL 1561956, at *11 (S. Ct. Apr. 27, 2011) (citing Shutts for the proposition that "[f]or a class-action money judgment to bind absentees in litigation . . . absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class").
establish a deprivation. This is shown by the Court's highlighting of the more mundane burdens that may be imposed on a nonparty by litigation, separate and apart from the preclusive effect of the judgment. For example, the Court discussed such "burdens" as having to travel a great distance, hiring an attorney to defend yourself, or having to conduct discovery.\footnote{226} The Court concluded that, on balance, the lesser burdens of the class action for the out-of-state absent plaintiffs, combined with its benefits, permitted courts to establish jurisdiction with less than "opt in" consent.

The practical impact of actions on nonparties has also been recognized in other contexts. One example can be found in the interpleader context, which permits an entitlement holder, usually a nonparty, to bring suit to establish jurisdiction over all claimants to the entitlement.\footnote{227} Interpleader applies in situations where the entitlement cannot satisfy all claims, such that any action by one claimant would prejudice either the entitlement holder or other claimants. For example, in \textit{State Farm Fire & Casualty Co. v. Tashire}, a bus collision caused significant injury to thirty-eight persons, but the bus was only covered by a $20,000 insurance policy that could not satisfy all claims.\footnote{228} There, the Court permitted the insurer to interplead the victims not because of the preclusive effects of any separate action on any nonparty, since any one action would not formally preclude the claims of the other affected claimants. Instead, the Court was concerned with a "race to judgment," since "the first claimant to obtain such a judgment or to negotiate a settlement might appropriate all or a disproportionate slice of the fund before his fellow claimants were able to establish their claims."\footnote{229}

\textit{Shutts} also demonstrates that the class action may not be the problem. The Court noted that, given that the litigation involved small claims, "most of the plaintiffs would have no realistic day in court if a class action were not available."\footnote{230} Thus, in the context of small claims, a class action may be needed to prevent a deprivation caused by separate actions. I have already discussed the "superiority" of the class action for small claims.\footnote{231} Here I want to focus on two categories of cases in which mandatory class actions are permitted, presumably because of the potential deprivation caused by separate actions.\footnote{232}

\footnote{226} \textit{Shutts}, 472 U.S. at 808-09.  
\footnote{227} Fed. R. Civ. P. 22 (providing for interpleader); \textit{see also} 28 U.S.C. §§ 1335, 1397, & 2361 (providing for expanded interpleader in certain circumstances).  
\footnote{228} 386 U.S. 523, 525-26 (1967).  
\footnote{229} \textit{Id.} at 533.  
\footnote{230} \textit{Shutts}, 472 U.S. at 809.  
\footnote{231} \textit{See infra} Section I.B.  
\footnote{232} I say "presumably" because the Court has not directly addressed whether the categories satisfy procedural due process. \textit{See} Wal-Mart Stores, Inc. v. Dukes, 564 U.S. --, slip op. at 23 (June 20, 2011) (noting that "[Rule 23](b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or
The first category, as provided by Rule 23(b)(1)(A), are situations in which separate actions "would create a risk of . . . incompatible standards of conduct for the party opposing the class." 233 Class actions are rarely certified under Rule 23(b)(1)(A) because it significantly overlaps with Rule 23(b)(2), which permits the use of mandatory class actions in actions where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." 234 This is because the source of any risk of "incompatible standard[] of conduct" for the defendant would most likely arise from separate actions seeking "injunctive relief" generally applicable to the class as a whole. 235 Accordingly, I will treat the existing case law on Rule 23(b)(1)(A) and Rule 23(b)(2) interchangeably.

The second category, as provided by Rule 23(b)(1)(B), are situations in which separate actions "as a practical matter, . . . would substantially impair or impede [the nonparties'] ability to protect their interests." 236 As discussed in Ortiz, Rule 23(b)(1)(B) applies in situations in which "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members." 237 Despite its expansive terms, Rule 23(b)(1)(B) has predominantly been used in litigation involving limited funds, 238 "in effect the plaintiffs' version of interpleader." 239

Mandatory class actions are permitted in these two categories because both involve "indivisible remedies," since "the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants." 240 Accordingly, mandatory class actions are permitted because they "simply recognize[] the preexisting interdependence of the[] claims." 241 By contrast, almost all courts and scholars distinguish mass tort litigation from actions involving "indivisible

wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause") (emphasis added).

234 Id. 23(b)(2).
235 See PRINCIPLES, supra note 19, § 2.04 & cmt. a ("Courts . . . have not succeeded in giving any distinct meaning to Rule 23(b)(1)(A) by comparison to Rule 23(b)(2)").
238 Id. at 834.
239 See Issacharoff, supra note 103, at 187 n.10.
240 PRINCIPLES, supra note 19, § 2.04(b).
241 Id. § 2.04, cmt. a (2010); see also Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ---, slip op. at 22-23 (June 20, 2011) ("When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether the class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident.").
remedies" because the mass tort litigation is thought to involve "divisible remedies," or remedies "that entail the distribution of relief to one or more claimants individually, without determining in practical effect the application or availability of the same remedy to any other claimant."

But mass tort litigation cannot be meaningfully distinguished from actions involving indivisible remedies, particularly when one focuses on the "practical effect" of separate actions. Consider, for example, the distinction between injunctive relief and the compensatory damages. Injunctions are often considered "group" relief, while the compensatory damage remedy "depends more on the varying circumstances and merits of each potential class member's case." But this distinction is based on an apples-to-oranges comparison. Although the injunction is indivisible insofar as it applies equally to the class, the analogue in the mass tort context is not the damage remedy but the liability rule. Both provide a prospective rule that applies to the defendant's behavior. The only difference is that the injunction applies to a specific party or parties, while the liability rule applies generally. The correct analogue to the damage remedy, then, is not the injunction but the contempt action, which, like compensatory damages, also seeks to enforce a rule and may provide compensation.

Nevertheless, even if one were to compare the injunction to the compensatory damage remedy, there are aspects of mass tort litigation that are equally indivisible. Since any damage award would be premised on a finding of liability, or any common issue related to liability, it would require, in effect, a declaratory judgment as to those issues. Such a declaratory judgment as to liability (or an issue related to it) would apply indivisibly to the class. The Principles, in fact, implicitly recognize the declaratory judgment function of a resolution of a common issue,

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242 See PRINCIPLES, supra note 19, § 2.04(a).
243 See, e.g., Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (holding that Rule 23(b)(2) does not apply when "the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each potential class member's case.") (emphasis added).
244 See OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 9 (1978) (nothing that "[t]he issuance phase of the injunctive process . . . should be compared to the promulgation of a rule of liability" since "the concern of each is to establish standards of future conduct")
245 See id. at 12; Gary T. Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 TEX. L. REV. 1801, 1832 n.212 (1997) ("Admittedly, an injunction differs from general deterrence insofar as it focuses on a particular defendant deemed likely to behave improperly.").
246 See Fed. R. Civ. P. 23(b)(2), Advisory Committee Notes to 1966 Amendments of Rule 23, 39 F.R.D. 69, 102 (1966) (noting that declaratory relief "sett[les] the legality of the [defendant's] behavior with respect to the class as a whole"); PRINCIPLES, supra note 19, § 2.04, illus. 1 ("Aggregate treatment of the claim for a declaratory judgment would be permissible, for the remedy sought is indivisible.").
providing for the availability of class actions for common issues, but only if any findings can be appealed.\footnote{PRINCIPLES, supra note 19, § 2.03 cmt. b ("In authorizing aggregate treatment, the court also must authorize interlocutory appeal of any determination of the common issue on the merits.").}

Mass tort litigation also cannot be meaningfully distinguished from litigation involving a limited fund. Most obviously, mass tort litigation may involve a de facto limited fund insofar as the defendants' assets cannot satisfy all claims.\footnote{See, e.g., Mark J. Roe, Corporate Strategic Reaction to Mass Tort, 72 VA. L. REV. 1 (1986) (noting prevalence of bankruptcies in mass tort litigation); cf. Ortiz v. Fibreboard Corp., 527 U.S. 815, 851 (1999) (rejecting certification of a mass tort class action under Rule 23(b)(1)(B) in part because "there was no adequate finding of fact to support" the existence of a limited fund).
} In addition, and as I argued above, a separate action would "as a practical matter" impair the other class members, not because it would potentially deplete the fund, but because it would destroy the economies of scale necessary to put the class on equal footing with the defendant.\footnote{See supra Section I.B.} But other features of mass tort litigation mirror the concern with separate actions impairing other class members. For example, given the predominance of common fact and legal issues, the resolution of any such issue may, as a practical matter, impair the claims of the other plaintiffs. Moreover, scholars have frequently pointed out that mass tort claims are "interdependent" insofar as prior damage awards are used to establish damage amounts in subsequent suits.\footnote{See, e.g., Hensler & Peterson, supra note 53, at 967 (noting that "[i]n mass litigation, the likely amount that one plaintiff will receive for a claim depends upon the values of other claims").}

2. The Impartiality of the Comparison

To determine any deprivation, it has to be as compared to something else. Thus, courts generally take a comparative approach in assessing the potential deprivation caused by any procedure. The clearest statement of this comparative approach can be found in 

\textit{Mathews v. Eldridge}, where the Court addressed whether Social Security beneficiaries were entitled to a hearing prior to termination of their benefits.\footnote{Mathews v. Eldridge, 424 U.S. 319 (1976); see also Goldberg v. Kelly, 397 U.S. 254 (1970) (requiring a pretermination hearing for welfare benefits).} In determining that a "post-termination" hearing was sufficient to satisfy procedural due process, the Court examined the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function
involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\textsuperscript{252}

The \textit{Mathews} balancing test determines any deprivation based on a weighing of the costs and benefits of alternative procedures. The test has been extended to procedures involving solely private parties, with the "government's interest" substituted by the private defendant's interest.\textsuperscript{253} Courts have not applied the \textit{Mathews} balancing test to class actions, but the "superiority" requirement of Rule 23(b)(3) entails a similar comparative approach,\textsuperscript{254} and in class action decisions such as \textit{Hansberry} and \textit{Shotts} the Court engages in a similar balancing analysis.

One of the many shortcomings of the \textit{Mathews v. Eldridge} test is that it privileges "error[]" costs over other costs as the relevant deprivation.\textsuperscript{255} But as noted above, existing law includes other costs in comparing procedures. For example, in the limited fund context, mandatory class actions and pro rata distribution are permitted even though separate actions would more accurately determine the damages of any plaintiff. They are permitted to ensure the equitable treatment of the class members.

In fact, the emphasis on the equitable treatment of plaintiffs in the limited fund context reveals a flaw with the prevailing analysis of class

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\item Mathews, 424 U.S. at 335.
\item Connecticut v. Doerr, 501 U.S. 1, 11 (1991) (noting, however, that there should be "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections"). It should be noted that the Due Process Clause has been consistently applied to cases that lack a governmental actor as a party, presumably because the state, via the courts, oversees the availability of the class action device. Arguably, one could also see the private plaintiff, rather than the defendant, as standing in the shoes of the government, since the plaintiff can be understood as exercising a delegated power to enforce the law as a private attorney general. See William B. Rubenstein, \textit{On What a "Private Attorney General" Is – And Why It Matters}, 57 VAND. L. REV. 2129 (2004) (discussing the concept of a "private attorney general"). However, courts have consistently rejected such delegation arguments in the state action context. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-65 (1978) (finding no state action when statute which delegated to a private party the power to sell goods as a self-help remedy); Gillian E. Metzger, \textit{Privatization as Delegation}, 103 COLUM. L. REV. 1367 (2003) (criticizing failure of courts to find state action where state functions are delegated, or privatized, to other parties).
\item See Fed. R. Civ. P. 23(b)(3) (permitting class certification of an action involving damage remedies only if it is "superior to other available methods for fairly and efficiently adjudicating the controversy"); see also \textbf{PRINCIPLES, supra} note 19, § 2.02(a)(1) & cmt. b (in defining a "materially advance the resolution of the claims" standard for superiority, noting that "[t]he judicial inquiry . . . is inherently comparative").
\item Not everyone agrees. See Robert G. Bone, \textit{Securing the Normative Foundations of Litigation Reform}, 86 B.U. L. REV. 1155, 1161 (2006) (concluding that "[i]f the primary goal of adjudication is to produce outcomes that conform to the substantive law, it follows that accuracy must be the core metric for evaluating outcome quality"); Richard A. Posner, \textit{An Economic Approach to Legal Procedure and Judicial Administration}, 2 J. LEGAL STUD. 399, 441-42 (1973).
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actions in the mass tort context. One goal of interpleader is to avoid a "race to the judgment" in which the first to file may prejudice other later filers by depleting the fund.\textsuperscript{256} The Court expressed a similar concern in \textit{Amchem} over whether the proposed settlement privileged the "currently injured" over the "exposure-only" plaintiffs.\textsuperscript{257}

As courts and scholars have noted, the remedy in mass tort litigation, compensatory damages, is in practical operation a form of tort insurance, since, as seen most clearly in products liability contexts, "[i]n purchasing the product or service that resulted in exposure, every claimant – indeed, every exposed purchaser – bought from the firm what was in effect insurance against tortuous injury."\textsuperscript{258} Thus, one could use distributional procedures devised in insurance contexts to ensure that each individual plaintiff is treated equitably, such as damage scheduling, or the award of damages based on averages for certain injuries.\textsuperscript{259} In fact, damage scheduling is already implicitly used to determine damages,\textsuperscript{260} suggesting that courts and scholars should be open to using it. But many refuse to import the irrelevancy of the timing of the claim from the limited fund context to the mass tort context, concluding that procedures like damage scheduling "force[] the holders of high-value claims to subsidize the holders of low-value claims."\textsuperscript{261}

The concern with avoiding redistribution presents an additional flaw. For example, the availability of punitive damages is awarded primarily for deterrence purposes, but, if left uncoordinated among separate lawsuits, may result in overdeterrence.\textsuperscript{262} In fact, courts have expressed a concern

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\item\textsuperscript{256} State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533 (1967).
\item\textsuperscript{257} Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997).
\item\textsuperscript{258} Rosenberg, \textit{Causal Connection}, supra note 31, at 918; see also Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring) (justifying imposition of strict liability for manufacturing risks because "the risk of injury can be insured by the manufacturer and distributed among the public as the cost of doing business"). Indeed, the because of the availability of third party insurance and other substitutes for inducing reasonable precautionary measures, tort liability in the products liability context may not even be necessary. \textit{See} Polinsky & Shavell, supra note 88, at 1491 (noting this, and concluding that we should consider "curtailing such liability").
\item\textsuperscript{259} Rosenberg, \textit{End Games}, supra note 87, at 695-96 (praising damage scheduling used by then-special master Francis McGovern in asbestos and Dalkon Shield litigation).
\item\textsuperscript{260} See Alexandra Lahav, \textit{Rough Justice and the Problem of Value in Tort Law}, (unpublished manuscript 2010) (noting de facto "averaging" in separate actions).
\item\textsuperscript{261} John Coffee, \textit{Conflicts, Consent, and Allocation After Amchem Products -- Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money}, 84 VA. L. REV. 1541, 1550 (1998); see also Nagareda, supra note 5, at 201 (arguing that the plaintiffs have a "preexisting right to a nonaveraged recovery," regardless of whether it may unfairly favor some plaintiffs over others).
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that class actions may "blackmail" defendants into settling. But scholars have generally ignored the deterrence function of punitive damages, noting that "[f]or better or worse, the pursuit of punitive damage awards through uncoordinated individual lawsuits is part of the bundle of rights that existing law affords tort plaintiffs." In fact, scholars consciously ignore the effect of procedures on deterrence altogether.

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

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

263 See, e.g., In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-1299 (7th Cir. 1995) (Posner, J.) (noting potential for class actions to "blackmail" defendants into settling frivolous claims (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

264 See NAGAREDA, supra note 12, at 159.

265 Tidmarsh, supra note 165, at 1202-03 (admitting that his theory of adequacy of representation does not consider deterrence interests).

266 Rosenberg, supra note 54, at 25.

267 Id. at 25 & n.13 (citing John C. Harsanyi, Morality and the Theory of Rational Behavior, 44 SOC. RES. 623 (1977)); see also Harsanyi, supra, at 633 (noting that his proposed model "becomes a restatement of Adam Smith's theory of an impartially sympathetic observer" (citing ADAM SMITH, A THEORY OF MORAL SENTIMENTS (1759)).
Rawls to choose principles of justice, a device scholars have used to address the legitimacy of class action settlements.

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

The point of the impartial spectator device is not to justify the choice of any procedure based upon "hypothetical consent." Instead, the impartial spectator device is designed to force one to stand in the shoes of other parties by giving equal weight to each individual's circumstances. It appeals to a common sense notion of fairness, one that views the fairness of procedures in much the same way we consider the fairness of a pair of dice. In both cases we are comfortable with a range of outcomes, but would reject a structural bias in favor of any one outcome. Much as a

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268 See Rosenberg, Only Option, supra note 87, at 840 n.23 (2002) (noting similarity, citing JOHN RAWLS, A THEORY OF JUSTICE 136 (1971)).


270 This result is intuitive based upon the conclusions above. See supra Section I.C.

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

272 Bruce L. Hay, Procedural Justice – Ex Ante vs. Ex Post, 44 U.C.L.A. L. REV. 1803, 1844 (1997); see also Harsanyi, supra note 267, at 633-36 (arguing that the use of an impartial spectator device, which measures social policies based upon an equiprobability postulate, is designed to give each individual equal weight); Broome, supra note 271, at 99 (arguing that "fairness requires everyone to have an equal chance when their claims are exactly equal") (emphasis added).
die would not be fair if extra weight were added to one side, a procedure
would be similarly unfair if, as in the case of separate actions in the mass
tort context, the defendant has an inherent scale advantage in the litigation.

One may object to the impartial spectator device because it fails to
account for "soft values" like one's interest in dignity or autonomy, a
criticism often lodged against the Mathews balancing test.\textsuperscript{273} As an initial
matter, we already take soft values into account such as nonpecuniary
losses. It is unclear why it is permissible to determine the value of pain
and suffering in assessing damages but not litigant autonomy. But the
point of the impartial spectator device is to provide a basis for rationally
assessing tradeoffs. Protecting any soft value, including autonomy or
dignity, has costs, such as, in the mass tort context, more cancer or more
death. The impartial spectator device, and the comparative approach in
general, requires us to be more conscious about these trade-offs.

One may further object that focusing on the time before the tort occurs
is mistaken. For better or for worse, the court can only intervene after the
tort has occurred.\textsuperscript{274} But it is unclear why courts are required to ignore the
effect of procedures on deterrence, especially when issues of enforcement
are considered in the injunctive context. Moreover, considering the effects
of procedures on deterrence after the tort has occurred is not an anomaly
in the law. In the mass tort context there is considerable difficulty in
bringing the affected parties together before the tort occurs. Thus,
assessing how procedures would affect enforcement of the mass tort
liability rule after the tort occurred would be akin to the exception to the
mootness doctrine for those violations that are "capable of repetition, yet
evading review."\textsuperscript{275} In fact, the need to address the mooted issue of
enforcement is more compelling in the mass tort context given the
generality of the mass tort rule. Unlike in the injunctive context, any
decision adopted as to one mass tort will affect many, many others.\textsuperscript{276}

3. Litigant Autonomy as a Fundamental Liberty

But those who emphasize the importance of litigant autonomy have
seldom considered how it should be balanced against other important
interests. Instead, they have insisted that litigant autonomy is inviolable
no matter what. For example, the Supreme Court has emphasized our
"deep-rooted historic tradition that everyone should have his own day in
court," notably in contexts where the exercise of control by a party would

\textsuperscript{273} See Jerry L. Mashaw, Due Process in the Administrative State 158-253
(1985); see also Redish, supra note 9, at 142-44.
\textsuperscript{274} Redish, supra note 9, at 114.
\textsuperscript{275} See Roe v. Wade, 410 U.S. 113, 125 (1973) (citing cases).
\textsuperscript{276} Cf. Redish, supra note 9, at 198 (arguing for strict adverseness to satisfy the
"case or controversy" requirement of Article III primarily because of "the need for the
litigant in the initial suit to represent fully the position that similarly situated litigants
would take in subsequent suits").
preclude a nonparty from having that "day in court." Similarly, Henry Monaghan has argued that "[r]ecognition of a substantive due process right to opt out of at least some damage claims has considerable plausibility. It would limit the threat posed by modern aggregation practice to our long-standing tradition of individual litigation autonomy." 

It is unclear whether the invocation of "substantive due process" is simply rhetoric. One obstacle is that fundamental liberties typically must be "deeply rooted in this Nation's history and tradition," and proponents of a "long-standing tradition of individual claim autonomy" do not provide any historical support for it. In fact, many procedures, both antiquated and modern, do not respect a "day in court." Nevertheless, others have stressed the importance of litigant autonomy without any reference to a "long-standing tradition." For example, Martin Redish argues that "the due process version of litigant autonomy grows out of the same constitutional grounding as the First Amendment right of free expression," likening it to voting or other methods of political participation. Others have noted that litigant autonomy further respects the dignity of the individual plaintiffs by allowing them to participate in


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

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

282 See generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (discussing the historical use of representative litigation in England and the United States, noting "mandatory" nature of bill of peace in equity); see also Robert G. Bone, Making Effective Rules: The Need for Procedural Theory, 61 OKLA. L. REV. 319, 339-40 (2008) (noting that other forms of aggregation equally restrict litigant autonomy, but are otherwise permissible); Bone, supra note 1 (discussing the history of the doctrine of virtual representation, which permitted an action to preclude nonparties, as undermining any strong right to a "day in court").

283 REDISH, supra note 9, at 136-37; see also Frank I. Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights, 1973 DUKE L.J. 1153, 1175 (suggesting, but rejecting, that the right to participation is "derived from the First Amendment").
decisions that affect them.\textsuperscript{284} Thus, even if the right is not exercised, it is still the litigants' right, which should be respected absent compelling circumstances.\textsuperscript{285}

As an initial matter, it is important to distinguish between the right to control a claim and the right to participate in a proceeding.\textsuperscript{286} For example, a plaintiff may still have her "day in court" in the context of a bifurcated class action with a common issue proceeding and individual issue determinations.\textsuperscript{287} Even in a nonbifurcated class action, a plaintiff can otherwise appear to present her own legal arguments or evidence. Admittedly, preclusion doctrine can effectively destroy this participatory right, but participation can still be fairly well accommodated in most cases without giving plaintiffs control over their claims, and thus satisfy dignitary and legitimacy values.\textsuperscript{288}

Moreover, litigant autonomy, despite its resemblance to first amendment liberties, is nothing more than the control entitlement. The sublimation of the control entitlement is understandable, since such autonomy can be understood in a number of ways that implicate the Due Process Clause. It can, as suggested above, be understood as a fundamental liberty as a matter of substantive due process. It can also be understood as a "life, liberty, or property" interest in itself or a separate entitlement that prevents a deprivation without "due process."\textsuperscript{289}

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

One example of the confusing nature of the control entitlement and its possible incompatibility with other, higher order entitlements can be found

\textsuperscript{284} JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 158-253 (1985).
\textsuperscript{285} REDISH, supra note 9, at 137.
\textsuperscript{286} See PRINCIPLES, supra note 19, § 1.04, reporters' notes & cmt. a (distinguishing between a right of "voice" (that is, participation) and a right of "exit" (that is, control, or at least retaining control, over the claim)).
\textsuperscript{287} See supra Section I.A.
\textsuperscript{288} A mandatory class action can therefore accommodate participatory proceedings where the parties may have heterogeneous preferences as to the scope of relief, as in actions for structural injunctive relief. See Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976) (noting conflicts among plaintiffs, particularly black parents, over the appropriate injunctive relief in school desegregation cases).
\textsuperscript{289} George Rutherglen, Better Late Than Never: Notice and Opt-Out at the Settlement Stage of Class Actions, 71 N.Y.U. L. REV. 258, 286 (1996) ("The question of who controls the presentation of a claim in court is not much different from the question of who owns it.").
\textsuperscript{290} PRINCIPLES, supra note 19, § 2.07 cmt. e; see also id. § 1.05(c)(7) & cmt. j (providing that courts should permit opt outs to ensure adequacy of representation).
in *Mullane v. Central Hanover Bank & Trust Co.*, which concerned a New York state law that authorized "common trust funds" permitting small trusts to invest in one fund for common administration.\(^{291}\) At issue was a provision which allowed for periodic "accountings" held in New York Surrogate's Court that resulted in a "judicial settlement of the accounts . . . made binding and conclusive" as to "all questions respecting the management of the fund."\(^{292}\) Although the decrees would preclude any claim against the common trust fund administrator, the statute provided only for newspaper notice of the "accountings" to those with interests in the trust.\(^{293}\) Mullane, the court-appointed representative of beneficiaries of assets in the trust (none of whom showed up), challenged the notice provisions on due process grounds. The Court held that the notice provisions were generally deficient because it did not provide "notice reasonably calculated . . . to apprise interested parties" of the accountings.\(^{294}\)

As an initial matter, *Mullane* is generally cited for the proposition that "an opportunity to be heard" is a "fundamental requisite of due process," which entails notice "reasonably calculated . . . to apprise interested parties."\(^{295}\) *Mullane* is also generally cited for the proposition that the "chose in action" is a sufficient property interest for due process purposes.\(^{296}\) However, the "opportunity to be heard" and any control the beneficiaries had over their claims overlap significantly. What is the "opportunity to be heard" other than the "opportunity" to assert one's claim? Indeed, it is altogether unclear what the relevant "property" interest is in *Mullane*.\(^{297}\)

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

\(^{292}\) *Id.* at 309.
\(^{293}\) *See id.* at 313.
\(^{294}\) *Id.* at 314.
\(^{295}\) *Id.* (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
\(^{296}\) *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (noting that, in the context of a small claims class action, "a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs" (citing *Mullane*, 339 U.S. at 313)); *see also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 913 (2000) (noting that "the prominent due process precedent *Mullane v. Central Hanover Bank & Trust Co.* . . . arguably stand[s] for the proposition that an unadjudicated cause of action is property under the Due Process Clause").
\(^{297}\) *See* Merrill, *supra* note 296, at 913 n.110 (noting that "the cause of action in *Mullane* was designed to protect an existing property right – the beneficial interest in a trust fund – and it may be that the Court was relying on the underlying trust property to satisfy the property requirement").
The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remainderman, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages. In other words, the Court concluded that individual notice (and thus protection of litigant autonomy) was not required for hard-to-reach beneficiaries because the Court was sensitive to the other interests at stake. Specifically, protecting each beneficiaries control over their claim through such costly notice would destroy common fund trusts altogether. Thus, the Court had "no doubt that such impracticable and extended searches are not required in the name of due process." Unlike the hard-to-reach beneficiaries, the Court required mail notice for those beneficiaries that could easily be identified. Nevertheless, the Court did not require personal service of process since "[t]he individual interest does not stand alone but is identical with the class," and "any objection sustained would inure to the benefit of all." As with the unidentified beneficiaries, the Mullane Court effectively destroys the claim for those who do not receive mail notice, but again it does so sensitive to the other entitlements implicated by the claim. In particular, requiring personal service would not only "dissipate [the] advantages" of the common fund trust, but would be unnecessary given that the interests of those who failed to receive notice would be adequately protected by those who did. Thus, Mullane represents the flip side of Hansberry, by articulating a procedural scheme in which an action permissibly binds those absent because (1) to require more would be self-defeating and (2) the relevant entitlements are adequately protected.

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

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298 Mullane, 339 U.S. at 317-18 (emphasis added).
299 Id. at 317-18 (emphasis added).
300 Id. at 319.
301 In fact, the Mathews Court noted that its balancing test is based upon "our prior decisions," which would presumably include Mullane. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
litigant autonomy would destroy the very entitlements that make litigant autonomy worth having in the first place.

C. The "Process" "Due"

By its terms, the Due Process Clause permits deprivations of "life, liberty, and property," so long as they are deprived with "due process of law." In the class action context, the "process" "due" is understood as procedure that ensures the adequacy of representation of the interests of the class. As with the other terms of the Due Process Clause, in this section I want to reexamine the "process" "due" in the mass tort context. Here I want to return to the potential internal and external conflicts in mass tort class actions to show that protecting litigant autonomy is irrelevant, or worse, exacerbates the problems associated with these conflicts. Instead, other procedural innovations are necessary to achieve a "structural assurance of fair and adequate representation for the diverse groups and individuals affected."\(^{302}\)

1. Internal Conflicts

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

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

\(^{302}\) Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997).
2. **External Conflicts**

Some have argued in favor of increased opt-out rights for plaintiffs to serve as a market check on class action settlements, since the plaintiffs can exercise either their "voice" or "exit" rights to determine the adequacy of any settlement, and thus prevent class counsel from selling out the class.\(^\text{303}\)

But it is unclear what kind of "check" an opt-out signifies, since an individual plaintiff will only opt out if her own alternatives are better than the settlement. Accordingly, the individual decision to opt out says nothing about the overall fairness of the settlement, particularly with respect to other class members who may prefer the settlement because of litigation factors that may preclude their recovery.

More importantly, increasing autonomy as a "check" on class action settlements misstates the problem. The problem with sweetheart settlements is that class counsel may have an incentive to accept a settlement lower than the expected recovery of the class plaintiffs. But this problem arises not because of the lack of autonomy of the plaintiffs, but because of the lack of leverage for class counsel. To take a simple example, suppose that class counsel represents 1000 claimants in a proposed class action settlement, each suffering the same damages and each with the same initial probability of recovery. Suppose further that class counsel only represents 1 of these claimants in the absence of a class action. All else being equal, class counsel would be willing to settle for 1000 times less than the expected recovery for the class, since he only has 1/1000 of the share of the plaintiffs' claims without settling.\(^\text{304}\)

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

A related problem is the "reverse auction," where competing class attorneys try to certify class actions, with the defendant, in effect, settling with the lowest bidder.\(^\text{305}\) But the solution to the reverse auction is the same as the solution to sweetheart settlements. Rather than allow greater opt out rights, which may lead to competing class actions, courts instead

\(^{303}\) See, e.g., Coffee, supra note 20, at 419 (arguing for "enhancing the right to exit").


should have the power to enjoin other class actions from competing and driving the settlement value down.\textsuperscript{306}

The solutions to these problems, therefore, do not concern the plaintiffs' litigant autonomy but relate to aspects of class certification and attorney fee structure. Currently there is a trend to make class certification more difficult to obtain,\textsuperscript{307} but the arguments above suggest just the opposite. Apart from ensuring minimal requirements concerning competence and feasibility, it should be easier, not harder, to award class certification. Lessening the burden of certification would ensure that the plaintiff does not waste time acquiring control over the claims, and thus be further disadvantaged relative to the defendant.

3. \textit{Substance and Procedure}

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

But the resistance to the procedures necessary to insure the adequate representation of the plaintiffs arises not just out of respect for each plaintiff's autonomy. It also arises out of reluctance to consider the "whole structure" of procedure given the institutional limitations of courts.\textsuperscript{308} Accordingly, many courts and scholars define the boundary of procedure at the claim, setting aside matters related to how the claim impacts compliance with substantive liability standards as matters of social policy.

This concern with the institutional capacity of courts to consider the substantive impact of procedures finds its clearest expression in the Rules Enabling Act, which provides that the Rules "shall not abridge, enlarge or modify any substantive right."\textsuperscript{309} Setting aside its potential

\textsuperscript{306} See Wolff, \textit{supra} note 225, at 2093 (arguing in favor of greater use of antisuit injunctions to prevent reverse auctions).
\textsuperscript{307} See, e.g., In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006).
\textsuperscript{308} Lon L. Fuller, \textit{The Forms and Limits of Adjudication}, 92 Harv. L. Rev. 353, 371, 403 (1978).
unconstitutionality, courts have invoked the Act to cast significant doubt on procedures that should be used in mass tort and similar contexts.

In Ortiz, for example, the Court noted that "[t]he Rules Enabling Act underscores the need for caution" in using mandatory class actions in mass tort litigation under a limited fund rationale given "the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims in law." Likewise, in Shady Grove Orthopedic Associates., P.A. v. Allstate Insurance Co., the Court addressed whether a New York state law prohibiting class actions for claims seeking statutory damages prevented a federal court from certifying the same class under Rule 23. The Shady Grove Court concluded that Rule 23 could do so without violating the Rules Enabling Act, "at least insofar as [the Rule] allows willing plaintiffs to join their separate claims against the same defendants in a class action," suggesting that a mandatory class action with unwilling plaintiffs would violate the Act. Most recently, this past term, in Wal-Mart Stores, Inc. v. Dukes, the Court rejected the use of mandatory class actions under Rule 23(b)(2) for claims involving monetary remedies. In doing so, it rejected the use of random sampling of the plaintiffs' claims to determine aggregate damages. The Court considered such a "Trial By Formula" a possible violation of the Rules Enabling Act, particularly since it would infringe upon the defendant's right to assert statutory defenses. In fact, the Court has consistently rejected any procedure that would extinguish, reassign, or otherwise change the claim.

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310 See REDISH, supra note 9, at 62-85 (noting constitutional problems presented by the Rules Enabling Act and its delegation of rulemaking authority to the Supreme Court).
312 130 S. Ct. 1431 (2010).
313 Id. at 1443 (emphasis added).
314 564 U.S. ---, slip op. at 25 (June 20, 2011) (noting that allowing claims for monetary remedies under Rule 23(b)(2) would "do[] obvious violence to the Rule's structural features").
315 Id. at 27; see also Hilao v. Estate of Marcos, 103 F.3d 767, 782-87 (9th Cir. 1996) (permitting the use of random sampling of claims to determine aggregate damages in a class action involving human rights abuses).
316 Wal-Mart, 564 U.S., slip op. at 27.
One appeal of focusing on the claim as the relevant "substance" is that it provides a clear "substantive right" that demarcates the permissible bounds of court intervention under the Rules Enabling Act. Thus, it satisfies a concern shared by the Act and the *Erie* doctrine\(^\text{318}\) to prevent procedure from "substantially affect[ing] those primary decisions respecting human conduct which our constitutional system leaves to state regulation."\(^\text{319}\) It likewise satisfies a similar concern with ensuring that the Rules are not "an improper delegation of congressional legislative power."\(^\text{320}\) Defining the boundary line of procedure at the claim further prevents courts from addressing matters that are beyond their institutional competence. Indeed, in *Ortiz* the Court concluded that asbestos litigation "defies customary judicial administration and calls for national legislation."\(^\text{321}\)

The Rules Enabling Act and the related *Erie* and separation-of-powers doctrines are all notoriously difficult areas of the law, and my brief discussion here is not, nor could it be, exhaustive.\(^\text{322}\) But the institutional concerns that cause courts and scholars to interpret the Rules Enabling Act as prohibiting any change in the claim are seriously misguided. As an initial matter, it is unclear why the claim should be the dividing line between substance and procedure. The "substantive right" may include the procedures by which it is processed. Thus, it is unclear why Justice Scalia can confidently say in *Shady Grove* that the class action "really regulat[es] procedure" when, as both Justice Ginsburg and Justice Stevens point out, the right to seek statutory damages under New York state law is further defined by a prohibition on class actions.\(^\text{323}\) In fact, the claim is "rationally capable of classification as 'procedure'"\(^\text{324}\) since it can be understood as the procedure by which an entitlement to deterrence is provided.\(^\text{325}\)

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\(^{318}\) *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that state common law applies in diversity cases).


\(^{320}\) *R.EDISH*, *supra* note 9, at 69; *NAGAREDA*, *supra* note 12, at 84 (arguing against the use of mandatory class actions in mass tort litigation, since the "delegation made in the [Rules Enabling] Act must stop short of the legislative power that Congress might wield to alter preexisting rights"); see also *Stephen B. Burbank*, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1106-12 (1982) (arguing that the Rules Enabling Act's procedure/substance dichotomy was designed primarily to limit the lawmaking power the Act granted to the Supreme Court, thus satisfying separation-of-powers concerns).


\(^{322}\) I explore this issue in a future work. *See Sergio J. Campos, Erie as Enforcement Default Law* (on file with author).


\(^{324}\) *See id.* at 1442 (quoting *Hanna*, 380 U.S. at 472).

\(^{325}\) *See supra* Section II.A.
More importantly, focusing on the claim as the limit of procedure rests on too limited a view of the function of a court. Courts should not only be concerned with the limitations of its jurisdiction, but also its responsibility "to secure the just, speedy, and inexpensive determination of every action and proceeding." In fact, the history of the class action as an "invention of equity" reflects an attempt to use procedures to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." This may mean, as in litigation involving small claims, or litigation involving a limited fund, or litigation involving a mass tort, a modification of the claim so as not to "dissipate its advantages."

Of course, in trying to adjust procedure to make substance a practical reality, courts will inevitably make mistakes. But federal and state legislatures are not potted plants, and can easily express their disapproval. Moreover, a court can factor in its limitations by using other judicial doctrines, such as deference to other institutions, to cabin its inquiry. But what a court cannot do is abdicate its responsibility to calibrate procedure to the substantive interests at stake. The Due Process Clause requires no less, and the Rules Enabling Act only makes that obligation explicit.

328 Kaplan, supra note 43, at 497.
330 See Jennifer S. Hendricks, In Defense of the Substance-Procedure Dichotomy 42 (unpublished manuscript Feb. 17, 2011) (on file with author) (noting that "a uniformly applied set of Federal Rules would put state lawmakers on notice of the procedures to be used in diversity cases," thus "increasing democratic transparency in the states").

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

331 I suggest such deference by suggesting a rebuttable presumption that existing state tort law procedures satisfy procedural due process, which can be rebutted in the mass tort context. See supra Section II.A.1.
332 See Robert M. Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 YALE L.J. 718, 735 (1975) (arguing that the Rules Enabling Act only imposes a responsibility on courts "to justify the substantive impact in terms of the substantive values"); see also Stephen B. Burbank & Tobias Barrington Wolff,
CONCLUSION

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

*Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 21 (2010) (arguing that, in examining the validity of Rule 23 under the Rules Enabling Act, "courts must look to the substantive liability and regulatory regimes of state and federal law in determining whether aggregate relief is appropriate and consistent with the goals of the underlying law").