A Regulatory Theory of Legal Claims

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Procedural law in the United States seeks to achieve three interrelated goals in our system of litigation: efficient processes that achieve "substantive justice" and deter wrongdoing, accurate outcomes, and meaningful access to the courts. For years, however, procedural debate, particularly in the context of due process rights in class actions, has been redirected toward more conceptual questions about the nature of legal claims—are they more appropriately conceptualized as individual property or as collective goods? At stake is the extent to which relevant procedures will protect the right of individual claimants to exercise control over their claims. Those with individualistic conceptions of legal claims tend to object to procedures that operate at the expense of claimant autonomy. Conversely, those who endorse collectivist views tend to downplay claimant autonomy. In the class action context, the debate between individualistic and collectivist views of legal claims has been waged as a proxy war between more fulsome and more limited availability of class procedures—a debate that has been rightly described as "intractable."

This Article does not seek to resolve that debate, but to broaden it. The individualistic versus collectivist debate about legal claims arises not just in the class action context but in other contexts as well—a point long overlooked in legal scholarship.

Taking this broader view yields significant insights. It turns out that this conceptual debate has different implications for key normative questions in our litigation system and procedural law. For example, in the class action context, the individual-autonomy conception of legal claims is used as an argument for procedures that often frustrate access to justice. In litigation finance, individual-autonomy conceptions are critical to access. The debate between individualistic and collectivist conceptions of legal claims thus does

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not point consistently to any set of normative goals, but instead it cuts in precisely opposite directions.

Two central insights emerge from this stalemate. First, formalist theories of legal claims provide a poor baseline for determining the scope of litigant autonomy and for guiding procedural law. Second, they should be replaced by a theory for legal claims that not only accounts for, but also better aligns with, foundational normative goals of our litigation system.

This Article therefore proposes a regulatory theory of legal claims, which has three fundamental components. First, and drawing upon intellectual foundations of property, economic, and litigation theory literature, this Article posits that litigant autonomy over legal claims—though a strong norm—can be regulated in appropriate instances. Second, it provides a theoretical basis for the notion that the judiciary may appropriately regulate litigant autonomy over claims, including through procedural mechanisms. Third, it sets forth a key component of an overall theory of procedure itself—specifically, as appropriately directed toward regulating litigant autonomy to reduce transaction cost barriers to claiming. By then operationalizing this theory within various litigation contexts, this Article demonstrates in concrete ways how its regulatory theory of legal claims points a way forward on the resolution of numerous difficult questions in today's litigation landscape.

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INTRODUCTION

Procedural law in the United States has long sought to achieve three related, and often overlapping goals: (1) efficient processes and institutions that achieve "substantive justice" and deter violations of law,[1] (2) consistent and accurate outcomes based on the merits of parties' claims,[2] and (3) meaningful legal access for those who have

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1. *See* Elihu Root, *The Layman's Criticism of the Lawyer*, 26 GREEN BAG 471, 479 (1914) (describing the procedural issues resulting from the growth of new provisions in the New York Code); *see also* Roscoe Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163, 167–68 (1915) (comparing the size and scope of Field's Code of Civil Procedure in the United States with the English Judicature Act); Adolph J. Rodenbeck, *The New Practice in New York*, 1 CORNELL L.Q. 63, 66 (1916) (describing the excessive level of procedure in the court system and the need for reform in the interest of not only the "bench and bar, but in the interest of those who have the occasion to resort to the courts for the enforcement of their substantive rights"); John H. Wigmore, *The Qualities of Current Judicial Decisions*, 9 ILL. L. REV. 529, 538 (1915) (criticizing evidence statutes as "rigid steel-work" that are "never allowed to bend").

2. *See, e.g.*, CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1182 (3d ed. 2004) (stating that a basic philosophy of the Federal Rules is to facilitate a "determination of litigation on the merits"); J. Maria Glover, *The Federal Rules of*

claims[3] for relief. These goals underlie the Federal Rules of Civil Procedure themselves. Prior to the adoption of the Federal Rules of Civil Procedure, for example, reformers like Roscoe Pound[4] and Charles Clark[5] railed against stifling procedural codes that "together with the sporting attitude toward litigation, frustrated the ability of courts to adjudicate disputes on their merits" and deliver substantive justice.[6] Procedure was supposed to be the "handmaid" of justice—yet all too often, formalist "nitpicking" over essentialist questions about procedure became an end in itself.[7]

Underscoring the progressive procedural reform movement that gave rise to the modern Federal Rules of Civil Procedure is the very first of those rules, and it commands that disputes involving legal claims be "determin[ed]" in a "just, speedy, and inexpensive" manner.[8] To the extent those claims are deemed meritorious through unbiased adjudication, or meritorious enough to move forward in the process toward trial or, more likely, settlement——compensation, some

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Civil Settlement, 87 N.Y.U. L. REV. 1713, 1715 (2012); Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule* Twombly *and* Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141, 148 (2009), https://www.pennlawreview.com/online/158-U-Pa-L-Rev-PENNumbra-141.pdf [http://perma.cc/4ML2-TYLM] ("The drafters of the Federal Rules objected to fact pleading because it . . . too often cut[ ] off adjudication on the merits."); Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 527 (2006) (stating that one goal of the new procedural rules in 1938 was "the resolution of cases on their substantive merits").

3. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 10.4 (AM. LAW INST. 2010) (describing the central "object of aggregate proceedings" as "enabling claimants to voice their concerns and facilitating the rendition of further relief that protects the rights of affected persons").

4. Pound described the prevailing mentality as follows: "The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly?" Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 406 (1906) [hereinafter Pound, *Causes of Popular Dissatisfaction*]; *see also* Roscoe Pound, *Appendix E. Principles of Practice Reform*, 33 ANN. REP. A.B.A. 611, 635 (1910) (referring to the "archaic formalism" of procedure).

5. Charles E. Clark, *Procedural Fundamentals*, 1 CONN. B.J. 67, 73 (1927); Charles E. Clark, Comment, *Pleading Negligence*, 32 YALE L.J. 483, 490 (1923).

6. Hiro Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1969 (2014).

7. *Id.*; *see, e.g.*, Elihu Root, *Reform of Procedure*, *in* PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING OF THE N.Y. STATE BAR ASS'N 87, 89 (1911) ("Rules and formulas originally designed as convenient aids to the attainment of ultimate ends become traditions and dogmas."); Thomas W. Shelton, *Greater Efficacy of the Trial of Civil Cases*, 33 COM. L. LEAGUE J. 661 (1928). For example, Pound and Shelton often lamented how the pages of the appellate reporters were saturated with cases that turned solely on points of procedure rather than substantive law. *See, e.g.*, *Simplification of Judicial Procedure: Hearings Before the Subcomm. of the S. Comm. on the Judiciary*, 64th Cong. 5, 9 (1916) (statement of Thomas W. Shelton); Roscoe Pound, *The Place of Procedure in Modern Law*, 1 SW. L. REV. 59, 76–77 (1917).

8. FED. R. CIV. P. 1.

modicum of access to justice, and, to the extent a defendant changes its wrongful behavior, deterrence of wrongdoing can be achieved. As the "handmaid" of legal claims, the reformers envisioned that procedural rules would assist the effectuation of those claims in a way that took into account these broader normative goals.

Since that time, scholars and courts have long grappled with a related, and hotly debated, question of whether and to what extent individuals may exercise autonomy over their legal claims.[9] Though not always expressed in these precise terms, this debate is concerned fundamentally with whether legal claims are properly conceptualized primarily as individualistic, over which claimants exercise fulsome individual autonomy,[10] or primarily as collectivist, over which litigant autonomy is appropriately sacrificed in favor of, say, overall compensatory interests of a group of claimholders or public interests, like deterring wrongdoing and filling regulatory gaps in the enforcement of substantive directives.[11] In this debate, conception has

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9. *See, e.g.*, Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1066 (2012) (arguing that protecting litigant autonomy values in mass tort context is self-defeating); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000) (relying upon individual autonomy values to prevent principal agent problems); Mark Moller, *Separation of Powers and the Class Action*, NEB. L. REV. (forthcoming), http://ssrn.com/abstract=2478953 [https://perma.cc/2ZRC-28GF]; Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601 (2015); Martin Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573 (2007) (defending values of litigant autonomy); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109 (2015) (cautioning against a collective view of class claims); David Rosenberg, Response, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002) (arguing for a collective conception of class claims).

10. *See, e.g.*, Coffee, *supra* note 9; Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1065–66 (2002) (challenging the extent to which we afford fulsome protection for litigant autonomy); Redish & Larsen, *supra* note 9, at 1616–18 (insisting that litigant autonomy is the cornerstone of due process); Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599 (2015).

11. *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 661–66 (2013) (noting that at least in certain contexts, legal claims serve a public function that must be accounted for in determining how to apply procedural rules, though not arguing for a purely public conception of legal claims); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) [hereinafter Fiss, *Against Settlement*] (arguing for a public conception of legal claims); Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273 (2009) [hereinafter Fiss, *The History of an Idea*] (reiterating his 1984 argument for a public conception of legal claims); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1141–42 (2012) (making arguments similar to those espoused in *Private Enforcement*); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987) (arguing for a collective view of class claims); Rosenberg, *supra* note 9 (arguing that opt-out rights should not be permitted in mass tort cases); David L. Shapiro, *Class Actions: The Class as*

consequences: the "appropriate" conception of legal claims dictates the appropriate content, contours, and application of procedural rules and doctrine.

This fundamental debate is most developed, feverish, and long-standing in the class action context. In that corner of the procedural landscape, the Court's recent jurisprudence has come down firmly on the side of litigant autonomy over legal claims, with distinct consequences for procedural law.[12] For example, in *Amchem Products, Inc. v. Windsor*, the Supreme Court rejected arguably the most promising means for resolving thousands of asbestos cases by way of a global settlement.[13] It did so in large part because the settlement purported to resolve the claims of those who had not yet manifested injury, and the Court did not believe opt-out rights under Federal Rule of Civil Procedure 23(b)(3) sufficiently protected litigants' due process right to pursue one's individual day in court for these claims.[14] The Court's invocation of an individual day-in-court conception of due process vis-à-vis legal claims necessarily rejected more collective conceptions of the class claims—perhaps as inextricably interrelated as a matter of any claimant obtaining compensation, or as a matter of achieving otherwise elusive resolution to a massive public-health disaster.[15]

The Court reaffirmed its commitment to litigant autonomy over class claims most recently in *Wal-Mart Stores, Inc. v. Dukes*.[16] Plaintiffs, female employees of Wal-Mart, brought Title VII discrimination claims and sought both injunctive and monetary relief under the mandatory class provision of Rule 23(b)(2).[17] A unanimous

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Party and Client, 73 NOTRE DAME L. REV. 913, 917 (1998) (arguing that the class functions as a collective entity, not a collection of individuals, though not going so far as to demand mandatory treatment of all class actions).

12. The Supreme Court has come down firmly on the side of treating legal claims as property rights over which litigants should have unfettered autonomy in class action decisions, *see, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348–50 (2011); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623–25 (1997); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 807–08 (1985); in arbitration decisions, *see, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–10 (2013); in preclusion decisions and preclusion law, *see, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008); and in the *Erie* doctrine, *see, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407–09 (2010).

13. 521 U.S. at 628–29.

14. *Id.* at 628; *see also* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 77–78 (noting that the Court in *Amchem* viewed the deal as an impermissible delegation of power to class counsel to sell plaintiffs' claims).

15. *See* NAGAREDA, *supra* note 14, at 79–80 (describing the *Amchem* deal as a "rival[ ] to the legislative process").

16. 564 U.S. at 366–67.

17. *Id.* at 363.

Court rejected this attempt to combine monetary damages in the form of back pay with injunctive relief under Rule 23(b)(2), noting that removing opt-out rights would "depriv[e] people of their right to sue" in violation of the Due Process Clause, at least vis-à-vis monetary damages—though the Court expressed skepticism about the mandatory nature of the class action for claims involving injunctive relief as well.[18] The Court's emphasis on litigant autonomy extends beyond the class action context; indeed, it underlies a broad swath of the Court's procedural jurisprudence.[19]

Class action scholars continue to debate whether class claims are appropriately conceptualized as individualistic or collectivist, and those on either side of the conceptual divide seem no closer to agreement.[20] This debate, however, has largely ignored the other areas of litigation in which this same question about the proper conception of legal claims arises. Indeed, virtually no scholarly attention has been given to the ways in which that debate pervades our civil justice system throughout numerous procedural issues across the litigation landscape.

This Article is the first to take a broader view, by looking at the ways in which the debate between a litigant autonomy and a collective view of legal claims plays out *across* current and seemingly unrelated issues in modern litigation. This broader frame yields significant insights. The debate over the proper formalist conception of legal claims is largely orthogonal to the key normative values in our litigation system like access to justice, compensation, and deterrence. Take access to justice as an example. An individualistic conception of legal claims tends to constrain the use of the class action procedure and impedes the claim-facilitative function that it can serve; in other procedural contexts, like alternative litigation finance, an individualistic conception of claim ownership is central to the claim-facilitative effects of funding. Across procedural contexts, the individualistic conception cuts *exactly the opposite way*. The same is true of the collectivist conception. Rather than providing formalism's oft-promised clarity of answers,[21] these formalistic conceptions yield completely conflicting results.

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18. *Id.* (noting that injunctive mandatory classes are permitted under Rule 23(b)(2) "rightly or wrongly").

19. *See* Campos, *supra* note 9, at 1060 n.1 (listing a variety of cases where the Supreme Court has focused on individual litigant autonomy).

20. *See* Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939 (2011) (setting out the collective versus individual property views of class actions).

21. *See, e.g.*, Burnham v. Superior Court of Cal., 495 U.S. 604, 625–26 (1990) (extolling the virtues of formalism—chief among them, clarity—in an opinion by Justice Scalia).

Therefore, rather than looking to formalist conceptual frameworks to dictate the scope of litigant autonomy, this Article provides a new way. Building on insights from property, economic, and litigation dynamics literature, this Article develops a theory for regulating individual litigant autonomy in ways that align with foundational goals of our litigation system. To be clear, regulation of litigant autonomy justified under this Article's theory need not be embodied in the procedural design, interpretation, and doctrine of the judiciary; for instance, Congress could regulate litigant autonomy through legislation. However, if this Article's regulatory theory of legal claims is to provide an alternative to formalist theories of legal claims used within the judicial system, it *must* provide a theoretical basis for that sort of regulation. Accordingly, this Article also provides a theory both of the judicial role and of procedure as legitimate sources of regulation for legal claims; it also sets forth a theory of procedure as appropriately directed at regulating litigant autonomy in order to reduce or prevent the generation of substantial transaction cost barriers to claiming.

Part I of this Article briefly sets forth the long-standing conceptual debate about the nature of class members and class actions, situating that debate as one fundamentally about the appropriate conception of legal claims. Part II broadens the frame. By exploring the implications of these dichotomous conceptual views of claims within three current, and seemingly unrelated, areas of the litigation landscape, the following insight emerges: the conceptual theories of legal claims generate precisely opposite results vis-à-vis fundamental normative goals of our litigation system, depending on context. Unsurprisingly, this incentivizes and generates strategic gamesmanship by advocates who switch from one conception to another when it serves their overall procedural aim.

Part III offers a new theory—namely, a regulatory theory of legal claims. Under this theory, individual autonomy over claims can be regulated in limited circumstances, and the judiciary is an appropriate body (among others) for regulating litigant autonomy. Part III also posits that procedure is one appropriate mechanism for regulating litigant autonomy, and it provides a theory of procedure's role as properly encompassing the reduction of transaction cost barriers to claiming as part of its regulatory role,. Part III concludes by operationalizing this regulatory function for procedure within the various litigation contexts discussed in Part II and to the class certification debates set forth in Part I. In so doing, it demonstrates the ways in which this Article's regulatory theory of legal claims, and the prescriptive framework it will (continue to) generate, provides a

better way forward on the achievement of key aims of our litigation system.

I. THE LONG-STANDING CLASS ACTION DEBATE ABOUT THE APPROPRIATE CONCEPTION OF LEGAL CLAIMS

The procedural reform movement that culminated in 1938 with the Federal Rules of Civil Procedure stemmed in large part from the notion that procedural law at the time was divorced from notions of fairness and led to the appearance of injustice.[22] Substantive rights were often subsumed by the formalities of procedure, frustrating both the effectuation and merit-based determination of recognized legal claims.[23] In response, reformers greatly simplified procedure to conform more closely to the expectations of "farmers and business men and workmen," in the hopes that simplification would help procedure, as the handmaid of legal claims, achieve substantive justice[24] through the efficient resolution of claims on their merits so that (when warranted) substantive law could achieve its aims of compensation, deterrence, and the like.[25]

In debates about procedural design, interpretation, and scope, scholars and courts have for decades focused on a related, but quite different, question for guidance: whether and to what extent claimants can exercise control over their legal claims.[26] Fundamentally, this is a question about the proper conception of legal claims as either

22. Aragaki, *supra* note 6, at 1970.

23. *See* Charles E. Clark, *Methods of Legal Reform*, 36 W. VA. L.Q. 106, 111 (1929) (advocating for procedure as a means to an end rather than an end itself, which is a major defect of common law); *see also* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 962 (1987) (noting that the problem of "procedural technicality stand[ing] in the way of reaching the merits" as a key point of Clark's work).

24. Root, *supra* note 1, at 478.

25. *See* FED. R. CIV. P. 1 ("[The Federal Rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."); *see also* Pound, *supra* note 4, at 404–06 (arguing that procedure should enable courts to administer justice according to the law).

26. *See, e.g.*, NAGAREDA, *supra* note 14, at 114–34 (evaluating the merits of a mandatory class action regime); Campos, *supra* note 9, at 1081–87 (discussing the problems of litigant autonomy); Moller, *supra* note 9 (manuscript at 6–24) (same). To some degree, the adoption of the Federal Rules of Civil Procedure aided in this transition. Under the Field Code rules of pleading, cases would frequently go stagnant for many years, leaving claimants with no ability to do anything with their claims, one way or another. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986) (noting that "[t]he high hopes for the Field Code were not realized" because the reformulation of pleading rules caused difficulties "for even the most common claim" and "led to stagnation that interfered with resolution of disputes on their merits").

individualistic[27] or collectivist in nature.[28] At stake for procedure is whether and to what extent its rules and doctrines may interfere (or not) with litigant autonomy. This fundamental debate has occurred, to some degree, throughout the procedural landscape,[29] but it has long been at the center of the scholarly and judicial debate over claims in a certified class action.[30]

Class action scholars have taken different positions, with some arguing for a conception of claims over which litigants should be given full, or nearly full, autonomy.[31] Moving away from this position are scholars who describe the class and all its claims as an entity—whose collective goals must be placed ahead of the autonomous incentives and desires of an individual litigant in most instances.[32] On the opposite end of the spectrum are scholars who argue that the collective needs of the class action require any and all class actions to be mandatory; no one may exercise autonomy over her claim individually.[33]

Underlying these approaches to class claims—particularly those at either end of the conceptual spectrum—is a rather stark, binary view of litigant autonomy. Under a view that places a premium

27. *See* sources cited *supra* note 2.

28. *See* sources cited *supra* note 10.

29. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–41 (1985) (finding that the nature of procedural due process turned heavily on the corresponding characterization or conception of the property right of a legal claim); *see also* Campos, *supra* note 9, at 1081–85 (mentioning other contexts in which the individualistic versus collectivist views of claimants come up in the litigation landscape).

30. Some recent work has also debated whether the class action is best viewed from a communitarian or a civil republican perspective. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE x-xi (2d ed. 1998) (discussing the communitarian conception of goods); Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 2–8 (2009) (discussing the ramifications of viewing group litigants as members of a community from which certain obligations flow); *see also* Burch, *supra*, at 4 ("Alasdair MacIntyre emphasized human association as a source of self-identity and the building of society." (citing ADRIAN LITTLE, THE POLITICS OF COMMUNITY 19 (2002))).

31. *See, e.g.*, Redish & Larsen, *supra* note 9, at 1574–75 (arguing that litigant autonomy is a foundational element of procedural due process analysis); *see also* NAGAREDA, *supra* note 14, at 84 (arguing against the use of mandatory class actions in mass tort litigation on the grounds that "the delegation made in the [Rules Enabling] Act must stop short of the legislative power that Congress might wield to alter preexisting rights"); Moller, *supra* note 9 (manuscript at 3–5) (arguing that due process concerns for property rights do not alone justify litigant autonomy, but that separation of powers concerns provide the rest of the justification).

32. *See* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 26–32 (1996) (explaining the benefits to the overall group of treating a class like an entity); Shapiro, *supra* note 11, at 917–18 ("[T]he notion of the class as entity should prevail over more individually oriented notions of aggregate litigation.").

33. *See* Campos, *supra* note 9, at 1064 (arguing that protecting litigant autonomy in the mass tort context is self-defeating); Rosenberg, *supra* note 9, at 831–34 (arguing that opt-out rights should not be permitted in mass tort cases).

on party control, an individual has almost complete dominion over her claim, almost as a natural right. At the other end of the spectrum is the view that the party's control over her claim is at the grace of someone else—a judge, a class attorney, or a rulemaker.

Part A provides a brief overview of individual-autonomy-focused views of the class action. Part B then sketches more collective, or representational views of the class action. Part C then situates these two ends of the class action debate within a framework of analysis about the conception of legal claims more generally, setting the stage for Part II's exploration of these dichotomous conceptions across the procedural landscape.

A. Individual Autonomy Views of the Class Action

Countless scholars have explored the interaction between individual autonomy and due process rights in the class action context.[34] Without recounting the vast literature here, perhaps the strongest position in favor of individual autonomy for class members comes from the work of Martin Redish. Redish has argued that litigant autonomy should be protected to the greatest extent possible by the Due Process Clause, not simply because it is a compelling interest that frequently, if not almost always, outweighs other procedural values,[35] but primarily because liberal democratic thought demands a belief in the "centrality of individual autonomy" when a person seeks to advance or protect her interests—one might even say property—through governmental processes.[36]

Values of litigant autonomy—the individual right to control one's legal claim[37] in litigation, the right, if one wants, to a "day in

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34. *See, e.g.*, Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651 (2014); Issacharoff, *supra* note 10; Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71; Redish & Larsen, *supra* note 9.

35. *See* Redish & Larsen, *supra* note 9, at 1577–78 (rejecting as misguided the balancing test in *Mathews v. Eldridge* and in *Connecticut v. Doehr* as ignoring due process's "moorings in the values of liberal political theory" which would protect a "foundational belief in the value of allowing individuals to make fundamental choices about the judicial protection of their own legally authorized rights").

36. *Id.* at 1575.

37. As Mark Moller has explained, the concept of a "claim" could have various constituent parts: (1) what he terms the "primary right," which is the protected interest that the right to relief protects; (2) what he terms the "remedial right," which is the right to a remedy for the infringement of the primary right; and (3) the "right of action" or the "claim," which is the right to sue. Moller, *supra* note 9 (manuscript at 6). Often the three travel together (though they do not necessarily have to). *See* Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1117 (2010) ("[C]ivil law need not necessarily define the scope of the right

court"—provide the foundation for the Supreme Court's class action jurisprudence in recent decades. Specifically, it has skewed largely against certification in favor of preserving individual control of one's claim,[38] no matter how unrealistic that an individual could pursue her claim alone.[39] In fact, the Court has described notions of litigant autonomy vis-à-vis one's claim—her "day in court"—as the "usual rule" from which Rule 23 only narrowly departs.[40] The notion here is that a procedural rule—Rule 23—should not be interpreted to interfere with individual autonomy. The source of protection invoked for these individual autonomy values is due process.[41]

The contours of Rule 23 in Supreme Court class action jurisprudence flow not only from a strong individual autonomy conception of due process; they also stem from a particular view of Rule 23 as a "mere joinder" device. As recently as 2010, the Supreme Court compared the class action device under Rule 23 to other rules governing simple joinder—therefore, the class action device is *merely* a joinder device, *merely* a mechanism for collecting individual claims for more efficient adjudication.[42] For purposes of engaging in procedural decisionmaking and interpretation, then, the joinder conception of the

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of action in a manner that synchronizes with either the wrong or the remedy."). For purposes of this Article, I treat the term "claim" as generally encompassing all three, unless otherwise stated.

38. The emphasis on a litigant's control over his own claim is a feature of the federal system itself. *See, e.g.*, Lincoln Prop. Co. v. Roche, 546 U.S. 81, 91 (2005) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties." (alteration in original) (quoting 16 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14[2][c] (3d ed. 2005))); Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 12 (2003) ("The [well-pleaded complaint] rule makes the plaintiff the master of the claim." (alteration in original) (quoting Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987))).

39. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (antitrust class action); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (antitrust class action); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (Title VII class action alleging sex discrimination); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (asbestos litigation).

40. *See, e.g.*, *Dukes*, 564 U.S. at 363 (noting that due process likely requires notice and opt out in (b)(2) actions that involve claims for monetary relief); Ortiz v. Fibreboard Corp., 527 U.S. 815, 839–41 (1999) (discussing the history of the principle in favor of treating claim owners equally); Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979) ("[T]he Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.").

41. Moller, *supra* note 9 (manuscript at 9) (noting that individual control over one's claim derives from conceptions of property in the nineteenth century, which "viewed the right to exclusive use as the core feature of property").

42. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407–08, 450 (2010) (stressing that the class action is like joinder and does not change anything about the parties' rights or duties, nor does it bear on the functioning of substantive remedial schemes despite, as the dissent pointed out, the New York Legislature's arguably clear view to the contrary).

class action forecloses as inappropriate consideration of collective values potentially served by Rule 23, such as the ways in which it makes small-value claims marketable and provides the class as a collective with greater leverage against defendants, among others.[43]

The implications of a joinder view of the class action—at least taken to its literal extreme—would of course be absurdly rigid and impractical.[44] As Judge Diane Wood of the Seventh Circuit Court of Appeals famously traced, a joinder conception of the class action would call for according precisely the same due process to absent class members as if they had been joined under Rule 20.[45] According to Judge Wood, at least, such a requirement would destroy the class action device merely through the expense of serving each and every class member with process.[46]

While necessarily short of demanding the extreme set of affairs identified by Judge Wood,[47] the Court has invoked litigant autonomy associated with a joinder view of the class action in its application of various Rule 23 certification requirements as well as its application of the *Erie* doctrine to the class action device.[48] Extrapolating from the Court's jurisprudence, a particular view of procedure emerges—one that ought to preserve, or at least not interfere with, the individual character of claims and the ability of individual claimants to exercise control over those claims.

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43. The Court did note, in separate cases, that the ability of the class action to impose settlement pressure on defendants was a negative feature of the device. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 664–65 (2010) (discussing the "basic precept that arbitration 'is a matter of consent, not coercion,' " and the potential pitfalls of class action arbitration).

44. Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 491 (describing both potential models of the class action).

45. *Id.*

46. The joinder model "imposes the same procedural requirements on every class member, whether representative or absent." *Id.* at 478. Thus, every member of the class would have to be served with process because each "must independently satisfy all procedural requirements for appearing before the court in question." *Id.* at 459 (contrasting this aspect of the joinder model with the representational model's emphasis placed upon the named class representative—allowing the individual to act as the legal representative once her right to come before the court was established).

47. One could point to the collective action provision under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b) (2012), or under the Magnuson Moss Act, 15 U.S.C. § 2310(e) (2012), which affirmatively requires members of the collective action to opt in, as comprising even more extreme positions on the litigant autonomy spectrum. However, since those provisions do not come under the purview of Rule 23, or typically get discussed in the individualistic versus collectivist conceptual debates about the class action, it is sufficient for this article simply to mention them here.

48. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010).

B. Representational, or Collective, Views of the Class Action

Under representational or collective views of the class action, the basic notion is that a representative party litigates alone, but on behalf of absent class members until liability is established.[49] Once that has occurred, the judgment is held open so that absent class members can come and establish their rights to share in the recovery.[50] This view departs from notions of preserving as much as possible the individual character and participation rights of individual class members and their claims. Instead, collectivist conceptions are grounded in other normative concerns: efficiency and economy of litigation for litigants and the role of the class action as a mechanism for enforcing legislative prerogatives and supplementing public law enforcement efforts.[51] Indeed, even before Rule 23 took its modern form in 1966, scholars identified the class action as a vehicle to "explore the possibilities of revitalizing private litigation to fashion an effective means of group redress."[52] This view was reinforced in the 1966 amendments to Rule 23.[53]

This fundamental tension between the value of individual autonomy, which is protected and emphasized by the joinder model on the one hand, and values like collective justice, which are promoted on the other, continues to be debated in some form or another today.[54]

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49. Hutchinson, *supra* note 44, at 471.

50. *Id.*

51. *Id.* at 480; *see also* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 691–95 (1941).

52. *See* Kalven & Rosenfield, *supra* note 51, at 687.

53. *See* Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. INDUS. & COM. L. REV. 501, 504–05 (1969); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397–98 (1967); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("A class action solves this [disproportionate expense and claim value] problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (citation omitted)).

54. For examples of scholars who took stances in favor of placing a premium on values of individual autonomy, see Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 5–14 (1990); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 69–76. Others advocated in favor of a more "collective" approach to class actions. *See, e.g.*, JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 1–2 (1995); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992); Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479 (1997); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 4–6 (1991); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 695–98 (1989). For a sample of recent views on this debate, see Elizabeth J. Cabraser, *The Rational Class: Richard Posner and Efficiency as Due Process*, 82 GEO. WASH. L.

Scholars espousing representational theories of the class action fall on somewhat of a spectrum. One of the most famous proponents of a representational view of the class action is David Shapiro, who set forth an "entity" model of the class action.[55] This (somewhat moderate) "entity" model[56] holds that the class action should not be viewed fundamentally as involving the claims of a number of individuals or even an aggregation thereof, but rather as "an entity in itself for . . . determining the nature of the lawsuit, the role of the lawyer and the judge, and the significance of the disposition."[57] Under this model, the entity, not various individuals, is the litigant—and by extension, one could say, the master of the claims.

Under Shapiro's entity model, individual class members are still permitted to seek private counsel, to participate in some way in the litigation if desired, or even to opt out (though only under certain, somewhat narrow, conditions[58]) in the case of a 23(b)(3) class action. Overall, however, the entity model calls for sublimation of individual autonomy values in favor of collective ones. A number of consequences follow from this conception, including an increased need under Rule 23 for cost-benefit weighing vis-à-vis notice to class members, particularly those with low-value claims, and a need to limit the opt-out right in Rule 23(b)(3) so as not to interfere with the collective functioning of the class device and the compensatory interests of the collective, among others.[59]

Further along the spectrum of collectivist class action conception is David Rosenberg's view that all class actions must be mandatory.[60] This view is grounded in the normative premise that the law should achieve the public, social objective of promoting individual welfare, which Rosenberg argues is best achieved by bringing about

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REV. ARGUENDO 85 (2014); Campos, *supra* note 9, at 1081–85; and Moller, *supra* note 9 (manuscript at 17–28).

55. Shapiro, *supra* note 11, at 917–18.

56. The term "entity" model of the class action was coined by Edward Cooper. *See* Cooper, *supra* note 32, at 26.

57. Shapiro, *supra* note 11, at 917; *see also* Cooper, *supra* note 32, at 26.

58. In support of the entity model of class action, Shapiro argued that unconditional opt-out rights of members would undermine the substantive interests of the class as a whole. *See* Shapiro, *supra* note 11, at 938 ("If there is a clear need for an unconditional right to opt out, one wonders about the soundness of the underlying decision to allow class treatment."). However, Shapiro noted that "a conditional or limited ability to opt out as part of a litigated or negotiated outcome may be consistent with class treatment of a claim," listing conditions such as the specified limits on attorney fees paid to those who opt out, a requirement that an individual contribute to the common costs incurred by the class, a cap on recovery, and some limits on punitive damage awards. *Id.* at 957–58, 958 n.128.

59. *Id.* at 935–38.

60. Rosenberg, *supra* note 9, at 831.

optimal deterrence.[61] Along those lines, Rosenberg has argued that the deterrent purpose of the class action is predominately public, and that too great a focus on compensation can actually frustrate that purpose.[62] This view, even though ultimately aimed in part at promoting *individual* welfare, requires complete sublimation of individual autonomy so that individuals can collectively pool their litigation resources in order to maximize wealth.[63] Absent organized collective action by a plaintiff class—and the associated economies of scale—defendants can wield the distinct litigation advantages that derive from aggregate stakes, thereby reducing optimal deterrence and the related compensation.

The collective views of the class action all differ somewhat in their precise conceptual contours. Fundamentally, though, whether presented as a representative model, an entity model, or a social goods model, the driving notion is that a legal claim does not belong, exclusively or primarily, to an individual claimholder.

C. Conceptual Debates About the Nature of Class Actions as Debates About the Nature of Legal Claims Themselves

Underlying these dualities in the class action context are not just competing views of the class action device specifically, but a tension between the appropriate conceptions of legal claims themselves. For instance, individualistic, joinder-type views of the class action give precedence to the individual's ownership and control of legal claims.[64] Implicit in that view is the notion that a legal claim is personal property over which a claimholder exercises significant control—control that can only be taken away rarely, if ever.

Relatedly, (often implicitly) underlying individualistic conceptions of the class action are strong notions of claim ownership and property rights, like alienation and exclusion. Mark Moller has made this underpinning explicit, arguing that litigant autonomy arguments are rooted in very specific nineteenth-century property views of legal claims as conferring upon claimholders strong rights of

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61. *Id.* at 831–32.

62. *See id.* at 846–47; *see also* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2046–47 (2010) (arguing that at least for small-value claims class actions, the purpose of the class is to achieve deterrence, not compensation).

63. David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 427–28 (2000).

64. *See, e.g.*, Shapiro, *supra* note 11, at 918 (noting that a joinder, or aggregation model, of the class action entails the sacrifice of as little individual autonomy as possible).

exclusive use.[65] An individualistic conception of the class action, with its implicit directive to preserve as much of an individual's control over her claim (particularly over alienation), departs little from this particular eighteenth- and nineteenth-century conception of property.[66]

Underlying representational or collectivist views of the class action (again, usually implicitly) is a conception of claims more as parts of an overall "entity" or "collective." It is to this collective that all members' fortunes are joined and to whose collective purposes rights of individual autonomy must submit.[67] Viewing class claims this way—as mechanisms for achieving deterrence, for effectuating legislative prerogatives, and/or, in the presence of other similar claims, for achieving an overall better compensatory result for the collective and the individuals within it[68]—requires a much weaker conception of individual ownership of legal claims.

Procedural law does not explicitly resolve doctrinal issues with reference to this underlying debate over the nature of legal claims. However, Supreme Court class action jurisprudence in the past two decades has implicitly embraced strong individual autonomy approaches to the legal claims of absent class members. Perhaps the most prominent example of this trend is the Court's decision in *Amchem Products, Inc. v. Windsor*, in which the Court reviewed a class action and accompanying settlement that sought to resolve all unfiled asbestos claims.[69] The Court concluded that common issues did not predominate over individual ones, and thus the proposed class and class settlement ran afoul of Federal Rule of Civil Procedure 23(b)(3).[70] In doing so, the Court noted that individual issues define mass torts—suggesting that certification of *any* class in a mass tort case would run afoul of the strictures of Rule 23,[71] and, as a matter of litigant

65. Moller, *supra* note 9 (manuscript at 9).

66. *See* Wynehamer v. People, 13 N.Y. 378, 433 (N.Y. 1856) ("Property is the right of any person to possess, use, enjoy and dispose of a thing."); Jones v. Van Zandt, 13 F. Cas. 1054, 1055 (C.C.D. Ohio 1849) ("Property is the exclusive right of possessing, enjoying and disposing of a thing which is in itself valuable.").

67. Some argue that conceptualizing legal claims as individual property for which property holders can obtain value in the form of compensation relegates the public deterrent goals of our system of litigation to (at best) second-place status, as (at best) incidentally achieved through compensation of a sufficient number of plaintiffs. *See, e.g.*, Campos, *supra* note 9, at 1081–83; David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 900 (1984) (arguing that a private law view of mass tort claims "squander[s] the system's resources" and "deprives the system of their deterrence value").

68. *See* Issacharoff, *supra* note 10, at 1060; Shapiro, *supra* note 11, at 924–25.

69. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997).

70. *Id.* at 622.

71. *Id.* at 624–25; *see also* NAGAREDA, *supra* note 14, at xv–xvi.

autonomy, with claimholders' due process rights to have their day in court on these individual issues.

As Justice Breyer noted in his dissent, the majority ignored the collective view—and by extension, the collective values—of class claims, which would counsel in favor of upholding the settlement. He argued that the majority placed too great a focus on individual day-in-court ideals—ideals that meant, as a practical matter, no one in this class would ever receive compensation for their injuries.[72] At least in *Amchem*, the litigant autonomy the Court fought so fiercely to protect was worth precisely zero to these claimants in the way of actual compensation.[73]

The strong individual autonomy conception of claims in *Amchem* is now well established in case law.[74] It is the dominant conception of legal claims in much of the Court's recent procedural jurisprudence,[75] and it is a cornerstone of its class action jurisprudence.[76] Nonetheless, and particularly given that most

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72. *Amchem*, 521 U.S. at 629–41 (Breyer, J., dissenting).

73. In the end, the plaintiffs to the *Amchem* deal received no compensation through adjudicative processes, and the various asbestos companies entered into bankruptcy, leaving issues of compensation to be dealt with even today. RICHARD A. NAGAREDA ET AL., THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 135 (2d ed. 2013); *see also, e.g.*, Campos, *supra* note 9, at 1082–84 (arguing that litigant autonomy is self-defeating in the context of mass tort class actions).

74. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 424 (1982) (deciding whether a state's termination of an individual's cause of action violates due process); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 307 (1950) (discussing the violation of individual control over claims via an inadequate notice campaign to class members); Timothy P. Terrell, *Causes of Action as Property:* Logan v. Zimmerman Brush Co. *and the "Government–as–Monopolist" Theory of the Due Process Clause*, 31 EMORY L.J. 491 (1982) (critiquing the Supreme Court's treatment of causes of action as property).

75. *See, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (rejecting the notion of injury absent some harm to pre-existing "property"); Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 670, 672 (2016) (holding that an unaccepted settlement offer does not moot the named plaintiff's claim in a class action, but leaving open the questions of whether an accepted offer would moot that claim and whether the claim of a named plaintiff in a class action has any collective component in addition to the individual property component of that claim); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (making clear that potential legal claims are tradable via contract for goods and services); *Amchem*, 521 U.S. at 620–22 (emphasizing the individual due process protections for absent class members' claims that are paramount at the certification stage).

76. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); *Concepcion*, 563 U.S. 333; Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); *Amchem*, 521 U.S. 591. These litigant autonomy ideals arguably trace back to *Hansberry v. Lee*, 311 U.S. 32, 38 (1940), and extend through the Supreme Court's jurisprudence all the way to today. *See* Bone, *supra* note 54, at 214–18 (tracing *Hansberry* and its progeny and criticizing the Court for consistently insisting on a "day-in-court" ideal).

everything in life is "only for now,"[77] the conceptual debate continues.[78]

The class action, however, does not exist in a vacuum. Missing from the debate over the conceptual nature of class claims is a cross-cutting analysis of the implications of this debate across various procedural contexts. The next Part undertakes that analysis by situating the fundamental tension regarding the proper conception of legal claims underlying the class action debate within various, largely unrelated, contexts across the broader procedural landscape. This analysis produces a somewhat unexpected insight: as a matter of foundational goals of our litigation system,[79] adopting a single conception of legal claims generates *precisely opposite results*.

II. SITUATING THE FORMALIST DEBATE ABOUT THE PROPER CONCEPTION OF LEGAL CLAIMS WITHIN THE BROADER PROCEDURAL LANDSCAPE

For class actions, proponents of collectivist theories may be right that an individualistic conception of claims frustrates goals like compensation, deterrence, and access to justice.[80] This argument is arguably most compelling when class claims are small value, though few collectivists offer that as a reason for conceptual distinction.[81] In any event, at least in the *post*-certification class action context, an individualistic conception of legal claims may often prove claim *disabling*.[82]

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77. ROBERT LOPEZ & JEFF MARX, *For Now*, *on* AVENUE Q (RCA Victor 2003).

78. *See infra* Part II.

79. *See, e.g.*, FED. R. CIV. P. 1 (stating the disputes must be *resolved* in a "just, speedy, and inexpensive" manner).

80. Campos, *supra* note 9, at 1092; Rosenberg, *supra* note 9, at 833–34; Shapiro, *supra* note 11, at 916, 931.

81. *See, e.g.*, Campos, *supra* note 9, at 1074–79 (explaining that class actions in small claims litigation may solve problems with asymmetric stakes between plaintiffs and defendants); Rosenberg, *supra* note 63, at 415–17 (arguing that even with marketable claims, an individual mass tort plaintiff lacks aggregate stakes and the corresponding bargaining leverage for settlement); *see also* Fitzpatrick, *supra* note 62, at 2067–74 (arguing that the purpose of many class actions, certainly those involving small-value claims, is deterrence, not compensation).

82. *See, e.g.*, Cabraser, *supra* note 54, at 104 (arguing that individual property conceptions of due process in certain class action contexts are essentially smokescreens for preventing certification, and thus, any compensation, deterrence, or access to justice for claimants); Campos, *supra* note 9, at 1081–85 (arguing that individual rights to opt out interfere with the functioning of the mass tort class action, and offering a paternalistic approach to those rights—that they should be limited to achieve compensation and deterrence for the individual, and overall, the group); Rosenberg, *supra* note 9, at 831–34 (making similar arguments to Campos); Shapiro, *supra* note 11, at 935–37 (noting that, at least in small-value claims class actions, the economies

Across the procedural landscape, however, whether an individualistic conception of legal claims disables claiming is far from clear. Indeed, an individualistic view of legal claims that would support fuller commoditization of claims may well *facilitate* claiming. The converse is also true. The same is true with regard to other normative metrics. As seen in the class action context, an individual-autonomy view of claims may well *frustrate* access to justice, deterrence, and compensation—as Justice Breyer lamented in *Amchem*. Yet precisely the opposite is true in the context of litigation financing: absent a robust individual-autonomy view of claims, alienation of claims to a funder becomes difficult.

These binary conceptual dichotomies obscure and confound various normative goals of our legal system in any number of procedural contexts. They include, but are not limited to, attorneys' fiduciary duties to claimants that limit informal claim settlement;[83] judicial review of consent decrees brokered with public actors to promote "fairness, reasonableness, and adequacy";[84] various procedural rules governing settlement set-offs among jointly liable defendants with the same plaintiff;[85] and rules governing contingency arrangements between lawyers and clients, just to name a few. Over-constrained by one formalist conception of legal claims or another, all of these doctrines struggle to identify the appropriate balance between the near-absolute form of litigant autonomy required by individualistic conceptions and the near-absolute permission to interfere with that autonomy permitted by collectivist conceptions.

The conceptual debates tend to occur within the confines of procedural silos. This Part takes a broader view. It focuses for the first time on three seemingly unrelated and important controversies in modern litigation: offers to settle with named plaintiffs *pre-certification* of a class under Rule 68, alternative litigation financing,

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of scale achieved through the certification of a class outweigh the individual benefits of autonomous actions such as opting out).

83. *See* Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 134–35 (2d Cir. 2015) (recognizing attorneys' fiduciary duty to their clients when negotiating settlements).

84. "When reviewing a proposed consent decree, the trial court is to review the settlement for fairness, reasonableness, and adequacy." EEOC v. Prod. Fabricators, Inc., 666 F.3d 1170, 1172 (8th Cir. 2012) (reviewing lower court's rejection of motion for approval of consent decree).

85. For instance, the Uniform Apportionment of Tort Responsibility Act provides that if a plaintiff settles with Defendant *A* and proceeds against Defendant *B*, the second recovery is offset by the percentage that Defendant *A* was found liable for, even if that would have been more than what the plaintiff actually recovered. In contrast, for instance, the New York rule provides that the second settlement or verdict will be offset by only the absolute amount Defendant *A* settled for. N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 2007). The California rule provides that the second settlement will be offset by whichever of the former two is the smallest amount. CAL. CIV. PROC. CODE § 877 (West 2012).

and mandatory arbitration agreements in individual consumer and employment contracts. What this broader analysis reveals is this: at a systemic level, debating between binary conceptions of legal claims fails to point a coherent way forward for procedure to achieve any number of fundamental goals of our litigation system.

A. Rule 68 Offers to Settle with the Named Class Plaintiff Pre-certification

Moving just beyond the world of certified class actions lies a problem at the intersection of not-yet certified class actions and Rule 68 offers to settle. In *Campbell-Ewald Co. v. Gomez*, decided this term, the Supreme Court grappled with the question of whether a defendant's unaccepted Federal Rule of Civil Procedure 68 offer of settlement to the named plaintiff in a putative class—a class yet to be certified—moots both the named plaintiff's claim and the claims of the class members as well.[86] By way of background: When a class complaint is filed, the complaint must identify one or more named plaintiffs. A class action may not proceed *without* a named plaintiff.[87] Federal Rule of Civil Procedure 23 then requires the court to analyze, for purposes of certification, whether that named plaintiff is an adequate representative of the class and whether that plaintiff's claims are typical of those of the absent class members.

Since the advent of Rule 23 in 1966, defense counsel have employed any number of strategies to defeat class certification. Most of those strategies involve arguments, grounded in individualistic conceptions of claims, that the requirements of Rule 23 are not satisfied. More recently, defendants have turned to Rule 68, which permits defendants to make settlement offers to plaintiffs. The strategic gambit is this: in the context of putative class actions, defendants attempt to entice the *named* plaintiff to settle under Rule 68, with the hopes that (1) the settlement (or even offer of settlement) will render the claims of remaining class members moot, and (2) that remaining class members will be unable to continue their suit

86. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 669–70 (2016).

87. Continuation of a class action without a representative would "jettison the last vestiges of the case-or-controversy requirement . . . ." Holmes v. Fisher, 854 F.2d 229, 233 (7th Cir. 1988). "Article III of the U.S. Constitution requires that a plaintiff with a personal stake in the dispute be present at all times in the litigation." David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 798–99 (2003) (noting a logical solution to a named plaintiff being picked off is to find a substitute); *see also* Howe v. Varity Corp., 896 F.2d 1107, 1111 (8th Cir. 1990) ("Class representatives must have a personal stake in the outcome of the case at the time the district court rules on class certification in order to prevent mootness of the action.").

elsewhere—given that it can be time-consuming and expensive to replace the initial named plaintiff in a class action.[88] Defendants' gambit is potentially attractive for the named plaintiff: with the leverage of the class behind him, the named plaintiff may well be able to capitalize on defendants' broader strategic aims in the form of a settlement premium on his own claim.

The particular instantiation of this problem involved in *Campbell-Ewald* arose after the named plaintiff received an unsolicited text message and filed a class claim against Campbell-Ewald Company alleging violations of the Telephone Consumer Protection Act of 1991.[89] Pursuant to Rule 68, the defendant offered the plaintiff $1,503 for "each unsolicited text message," costs, and a stipulation to an injunction.[90] This settlement offer exceeded, by three dollars, the statutory maximum awardable for unsolicited text messages[91]—arguably not much of a premium as a matter of the underlying substantive law (and perhaps a poor strategic move by the defendant, in the end). However, even though the named plaintiff had not yet accepted the settlement offer, the defendant rightly noted that the offered amount constituted "complete relief" for the named plaintiff under the statute. Therefore, the defendant argued, the offer of "complete relief" made the case moot and deprived the lower court of jurisdiction over the entire case.[92]

The defendant's two principal arguments were driven by an individualistic view of claims. First, the defendant argued that the named plaintiff should not be prevented from exchanging his claim for compensation simply because he is part of a putative class. Second, the defendant argued that when a named plaintiff is offered full compensation for his claim, there is no property left to exchange, and thus, no remaining interest in the lawsuit.[93] Driving that second argument is the individualistic conception claims that the defendant proffered: the named plaintiff's only interest in his claim is individual compensation, and that interest was extinguished once the defendant made an offer of complete relief.

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88. Koysza, *supra* note 87, at 798–99.

89. Brief for Petitioner at 2, *Campbell-Ewald*, 136 S. Ct. 663 (No. 14-857), 2015 WL 4397132, at *2; Brief for the Respondent at 7, *Campbell-Ewald*, 136 S. Ct. 663 (No. 14-857), 2015 WL 5064005, at *7.

90. Brief for Petitioner, *supra* note 89, at 6–7; Brief for the Respondent, *supra* note 89, at 9.

91. The statute provides five hundred dollars for each violation and the possibility of treble damages if there is a knowing and willful violation. Brief for Petitioner, *supra* note 89, at 3, 7.

92. *Id.* at 10–11.

93. *Campbell-Ewald*, 136 S. Ct. 663; Brief for Petitioner, *supra* note 89, at 26–35.

The defendant also explicitly urged the Court to reject collectivist views of legal claims. First, the defendant asserted that the named plaintiff "lack[ed] any personal interest in representing others in this action"[94] and thus there was no "'real need' for the court to exercise its judicial power."[95] Second, the defendant characterized the named plaintiff's possible collective interests either in helping the class vindicate claims or in achieving deterrence as unrelated to the nature of claims; instead, those interests were mere "ancillary procedural right[s]" that were "extinguished" when the defendant made an offer of complete relief.[96] Third, as an alternative argument, the defendant urged the Court to keep any collective conceptions of claims firmly within the boundaries of the class action universe, arguing that any such interests vis-à-vis putative class members were inconsequential to the mootness analysis because class certification had not yet occurred.[97]

Plaintiffs' counsel and the Solicitor General, unsurprisingly, adopted a more collective view of the named plaintiff's claim; both also vigorously contested the individual-autonomy framing of the claim by the defendant. First, Gomez argued that part of the interest for a named plaintiff in his putative class claim is a collective one—of recovery for the class, even at the expense of immediate relief to himself.[98] The government similarly linked the named plaintiff's interest in his claim with those of the class—namely those involving the economies of scale achieved for the group via the class device.[99] Second, Gomez argued that an individualistic conception of claims would allow defendants to "pick off" class representatives,[100] thereby forcing remaining claimants to go it alone, often an uneconomical choice given the high costs of litigation.[101]

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94. Brief for Petitioner, *supra* note 89, at 28 (quoting Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013)).

95. *Id.* at 16 (quoting Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009)).

96. *Id.* at 27.

97. *Id.* at 28 ("Thus, when Plaintiff's individual claim became moot, the absent class members were not parties to the lawsuit and had no legal status.").

98. Brief for the Respondent, *supra* note 89, at 34 ("But it is the very nature of *representative* litigation for the lead plaintiff to pursue recovery *for the class*—even if that comes at some cost or delay to his personal recovery.").

99. Brief for the United States as Amicus Curiae Supporting Respondent at 20, Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016) (No. 14-857), 2015 WL 5138588, at *20.

100. Brief for the Respondent, *supra* note 89, at 38; *see also* Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 99, at 19 ("[R]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by . . . defendant[ ] . . . would frustrate the objectives of class actions . . . .").

101. Brief for the Respondent, *supra* note 89, at 41.

The Court rejected the defendant's mootness argument, but not necessarily its conception of legal claims—it left that question unanswered. Instead, the Court based its holding on the fact that the named plaintiff had not yet accepted the defendant's settlement offer. Because the settlement offer was just that and no more—an unaccepted offer, unsupported by any binding judgment or even a guarantee that the offer would not be rescinded by the defendant at any moment—it did not moot claims.

Because the Court declined to address the more difficult questions raised by the parties' diametrically opposite conceptions of legal claims, the state of the law on the pick-off settlement issue remains largely uncertain. Indeed, would the mootness analysis change if the defendant actually deposited the funds with the Court, thus avoiding the possibility that the offer could be withdrawn? Alternatively, do the named plaintiff's collective interests in representing a class affect the conception of his claim such that mootness is avoided even if the named plaintiff receives full compensatory relief?

The theoretical questions about the nature of named plaintiffs' claims and the relationship between the named plaintiff and the absent class members pre-certification do not only go unanswered in *Campbell-Ewald*.[102] Although the literature is robust regarding the relationship between the named plaintiffs' claims and the claims of class members *post*-certification and, relatedly, with regard to the individual or collective nature of a class plaintiff's claim,[103] whether a named plaintiff's claims or the plaintiff himself bears some relationship to the rest of the class claims or class plaintiffs *pre*-certification has not been explored.

Here, it is difficult to achieve coherence between the "appropriate" conception of legal claims and the normative purposes of our litigation system. An individualistic view of claims enables the named plaintiff to alienate his claim and obtain compensation, perhaps more compensation than he could obtain individually, given his ability to leverage the class for his own gain. For remaining class members, however, a view of claims that affords the named plaintiff full autonomy over his own claim may well impede the effectuation of their claims, thereby frustrating goals of access to justice and

102. *See* Petition for a Writ of Certiorari at i, *Campbell-Ewald*, 136 S. Ct. 663 (No. 14-857), 2015 WL 241891, at *i (presenting the question, which was left unanswered by the Court, if the fact that a plaintiff has asserted a class claim has an effect on if that plaintiff's case becomes moot when plaintiff receives an offer of complete relief on his claim).

103. *See supra* Part I.

compensation for those plaintiffs and frustrating goals of deterrence achievable through group litigation.

A collective view of legal claims also presents difficulties. At first blush, viewing a legal claim as a mechanism for achieving collective goals may seem conceptually justified here, as has been argued in the post-certification context,[104] and perhaps normatively justified as well. However appropriate (or not) that collective conception is in the post-certification context, it is problematic in the *pre*-certification context. For one, though the named plaintiff is listed on a class complaint, until the class is certified, his claim is still untethered to any other claim; if there is an "entity,"[105] it does not yet exist—a conceptual point the *Campbell-Ewald* defendant made in its brief. Largely missing from the defendant's brief—which primarily offered its own formalist account of claims as justification for a mootness holding—are arguments about the undesirable normative consequences that a strong collectivist view of pre-certification class claims would generate. And untethered from a formal entity, that claim conception—and its implications for claims involving mass harm—has no principled limit; any claims stemming from related conduct by a common defendant could now impose collectivist duties and responsibilities on claimholders vis-à-vis control over their claims.

Now, whether to adopt an individualistic or collectivist view of legal claims cuts in opposite directions *within* this same procedural context: Access to justice for whom? Compensation for whom? Claiming for whom?

Moreover, even if the Court declared, based upon the particular considerations at work in the Rule 68 pick-off context, that the collectivist view is the theoretically appropriate conception of legal claims, that decision would send shock waves through the system. As the next Section discusses, the individual autonomy conception of claims has a wholly different normative valence in the context of alternative litigation finance. In that context, the road to greater access to justice, compensation, and deterrence (at least if one accepts the argument that deterrence flows from compensation) is paved with money to fund one's suit. The ability to obtain third-party funding for litigation, however, largely demands a view of legal claims as individual pieces of property—commodities even—over which claimants exercise a great deal of control.

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104. *See supra* Part I.

105. *See* Shapiro, *supra* note 11, at 917 (stating a class action should be viewed as an "entity" and not as an " 'aggregation' of individuals").

B. Limitations on Alternative Litigation Financing Arrangements

Alternative litigation finance, also referred to as third-party litigation funding, is "a group of funding methods that rely on funds from insurance markets or capital markets instead of, or in addition to, a litigant's own funds."[106] Undergirding the connection between legal claims and litigation funding is a conception of legal claims as fully alienable pieces of individual property—property that can be sold, in full or in part, to a non-party funder who assists the claimant financially in pursuing her claim.

The emergence of alternative litigation finance is a fairly recent phenomenon in the United States.[107] In its modern form, third-party litigation funding enables a party with no relationship to a given lawsuit to pay upfront costs facing a litigant (usually a plaintiff or a class plaintiff).[108] These non-party funders are typically specialist funding companies or hedge funds whose business model is to finance

106. Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011) (quoting *Demand for Third Party Litigation Funding Rises as Supply Becomes Volatile,* BAKER & MCKENZIE, LLP (2008) (link no longer operative)); *see also* John P. Rafferty, *You Have to Spend Money to Make Money: The Rise of Third-Party Litigation Finance in International Litigation*, PENN ST. J.L. & INT'L AFF. BLOG (Mar. 3 2016), http://sites.psu.edu/jlia/you-have-to-spend-money-to-make-money-the-rise-of-third-party-litigation-finance-in-international-litigation/#_edn1 [https://perma.cc/YLB2-SP8J] (quoting same).

107. The practice of litigation funding is more developed in Australia and the United Kingdom, where third-party funders have been investing in lawsuits for many years. In Australia,

> the litigation funding industry has since 1995 enjoyed a statutory exception to the earlier common law prohibition against maintenance and champerty, in order to assisted [sic] company administrators and liquidators to pursue debts on behalf of creditors of a company. The industry subsequently expanded in Australia to fund class actions and large single plaintiff actions as successive superior court judgments overturned common law principles against "maintenance" and "champerty", imported from the British common law. In 2006, the High Court of Australia confirmed the legitimacy of third parties funding litigation, or agreeing to indemnify litigants for costs, in exchange for a percentage of any recovery.

Regulation of Third Party Litigation Funding in Australia, LAW COUNCIL OF AUSTL. 4 (2011), https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/RegulationofthirdpartylitigationfundinginAustralia.pdf [https://perma.cc/7WQ2-9XLE]; *see also* Steinitz, *supra* note 106, at 1279–80 (discussing litigation funding in Australia). The United Kingdom has also permitted litigation funding for a number of years. The United Kingdom abolished both tort and criminal liability for maintenance and champerty in 1967. Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453, 453 n.3 (2011) (citing Rachael Mulheron & Peter Cashman, *Third-Party Funding of Litigation: A Changing Landscape*, 27 CIV. JUST. Q. 312, 318 (2008)). In 2007, the Civil Justice Council, a court advisory body, recommended against new regulations of the litigation financing industry out of concern that such regulations would hinder access to the legal system. Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 VILL. L. REV. 83, 112–13 (2008).

108. Steinitz, *supra* note 106, at 1275–77.

litigation costs in exchange for a portion of any eventual award or settlement.[109]

However, these modern practices have been compared to historical practices of purchasing claims or paying the costs of another's suit—practices that date back at least to feudal England,[110] and practices that, for most of that history, have been prohibited under common-law doctrines of champerty and maintenance. In the United States, champerty is generally defined as a claim sale between a plaintiff or a defendant and a third party for a portion of the proceeds of the suit; maintenance is the financing of a suit by the third party.[111] The person or entity that purchases the interest in the suit is known as the champertor and, by definition, has no other interest in the suit besides a financial one.[112] The purposes behind laws prohibiting champerty and maintenance are to prevent "multitudinous and useless lawsuits" and to prevent "speculation in lawsuits."[113]

Under English common law, claims and rights could not be assigned, and suits not brought in one's own name were forbidden.[114] As a workaround to the prohibition on assignment of legal claims, wealthy people agreed to pay a litigant's expenses on a legal claim—frequently one involving title to land—through which the funder could potentially become a joint owner of a landed estate.[115] Unsurprisingly, these claimholders were often poor; further, their opponents were frequently enemies of the financer. Through these suits, third parties not only sought to gain riches, but also sought to inflict financial or political injury upon the enemy defendants.[116] The suits were proxy battles for separate, feudal wars.[117]

Agreements to fund lawsuits were rampant in feudal England; neither clerical nor secular courts were able to police them. The King's ministers, the landed gentry, sheriffs, and even judicial officials themselves colluded to obtain money through agreements to finance

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109. *Id.* at 1276.

110. *See* Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 64 (1935) ("The movement against maintenance . . . began as early as the growth of the power of the Crown.").

111. State v. Chitty, 17 S.C.L. (1 Bail.) 379, 400 (1830); 14 C.J.S. *Champerty & Maintenance* § 2 (2016); 14 AM. JUR. 2D *Champerty and Maintenance* § 3 (2016).

112. 14 C.J.S. *Champerty and Maintenance* § 17.

113. *Id.* § 2.

114. Noland v. Law, 170 S.C. 345, 353 (1933); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *135 (stating that champerty is "abhorred" by English law).

115. Radin, *supra* note 110, at 58–64.

116. *Id.*

117. *Id.*

strangers' lawsuits.[118] The King's attempts to eliminate these agreements were thwarted by his own law enforcement officials—often the worst offenders in the collusive agreements to gain wealth through champerty and maintenance.[119]

Nonetheless, the abhorrence of the practice by the King and his courts traveled across the pond. The Supreme Court of South Carolina described the practice of champerty thusly in 1830:

> [Champerty is a practice by which] one lend[s] money to promote and stir up suits . . . [he is the] busy-body, the deceiver, the vile knave, or unthrift[; he] excites others to litigation, with an intention to vex, and oppress, and by this means extort money, [he] is . . . an offender against public justice.[120]

Implicit in this view of the champertor was a clear belief that full individual autonomy over claims was inconsistent with a strong public policy against the vexatious stirring up of litigation by speculators and other miscreants.

At the time of their founding, around half of the states, either through common law or by statute, prohibited claimholders from selling an interest in their claims in order to effectuate them. Other states, even at the time of their founding, recognized that these doctrines were outdated and never incorporated them into their common law.[121] Currently, most states—though not all[122]—have softened their views on doctrines of champerty and maintenance, either by abolishing them altogether[123] or by limiting the application of these restrictions to the scenarios in which financial assistance was not solicited by the plaintiff.[124]

This doctrinal turnaround, and the rise in alternative litigation financing that accompanied it, is predicated on at least two interrelated views of legal claims: one conceptual, one normative. The first is that legal claims are appropriately conceptualized as commodities that can be exchanged, sold, and otherwise alienated by

118. Percy H. Winfield, *The History of Maintenance and Champerty*, 35 L.Q. REV. 50, 57–68 (1919).

119. *Id.*

120. State v. Chitty, 17 S.C.L. (1 Bail.) 379, 399–401 (1830).

121. Radin, *supra* note 110, at 67–68.

122. *See* MISS. CODE ANN. § 97-9-11 (West 2016) (prohibiting maintenance and champerty in all situations except contingent fee arrangements); Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., 2014 Del. Super. LEXIS 103, at *11 (Del. Super. Ct., Feb. 27, 2014) (recognizing champerty and maintenance in Delaware); Frank v. TeWinkle, 45 A.3d 434, 438 (Pa. Super. Ct. 2012) (noting that in Pennsylvania, maintenance and champerty doctrines are alive and well).

123. Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277–78 (2000).

124. Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 725 (N.D. Ill. 2014) (emphasizing that Illinois only prohibits "officious intermeddling" with another's suit).

the claimholder—indeed, according to some scholars, that property is an asset that carries risk and therefore can and should be able to be transferred either through insurance or litigation funding.[125] The second view is, as a normative matter, that the effectuation of claims is impeded by the high costs of litigation in the United States—costs that may be defrayed by litigation funding.[126] Litigation funding also increases plaintiffs' bargaining power,[127] thereby reducing the costs generated by our expansive system of procedure.[128]

Opposition falls into two basic camps: those who believe that alternative litigation funding harms plaintiffs and those who believe it harms defendants. The former believe that, as in feudal England, litigation funders take advantage of plaintiffs for their own personal gain, leaving plaintiffs with little compensation.[129] Moreover, those needing litigation funding are "vulnerable" to unfavorable funding terms with "sky-high" interest rates,[130] terms that should at least be made transparent.[131]

The U.S. Chamber of Commerce currently leads the charge against alternative litigation finance as harmful to defendants. It has argued that litigation funding creates a "secret" operation against defendants who are not "aware that a funder is involved in litigation against them."[132] The Chamber and others have also argued that

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125. Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833, 848 (2015); Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617, 618 (2014).

126. *See* J. Maria Glover, *Alternative Litigation Financing and the Limits of the Work Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911 (2016) (analyzing recent discovery cases involving alternative litigation financing and concluding that implicit in the various holdings is a belief that litigation funding enables otherwise impecunious plaintiffs to pursue their rights).

127. Steinitz, *supra* note 106, at 1305–06.

128. *See, e.g.*, Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 103 (2010) (arguing that litigation finance arrangements could provide compensation for those who cannot otherwise access the expensive litigation system); *see also* Sebok, *supra* note 125, at 894 (raising similar arguments); Silver, *supra* note 125, at 618–23 (arguing that litigation funding is similar to liability insurance and thus permissible and desirable in our litigation system).

129. *See, e.g.*, Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, 23 WIDENER L.J. 229, 231–32 (2013) (noting that lawsuit lenders charge rates so high that consumers recover "little or no money" after settling the case); Martin Merzer, *Cash-Now Promise of Lawsuit Loans Under Fire*, FOX BUS. (Apr. 19, 2013), http://www.foxbusiness.com/personal-finance/2013/03/29/cash-now-promise-lawsuit-loans-under-fire/ [https://perma.cc/ZP8T-SKBW] ("[L]itigation funding is intended for the desperate . . . .").

130. Baker, *supra* note 129, at 232.

131. Bert I. Huang, *Litigation Finance: What Do Judges Need to Know?*, 45 COLUM. J.L. & SOC. PROBS., 525, 527 (2012).

132. *Third Party Litigation Funding*, U.S. CHAMBER INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/issues/third-party-litigation-funding (last visited Sept. 23, 2016)

litigation funding will plague defendants with longer lawsuits—as plaintiffs reject "reasonable" settlements and hold out for larger payouts at the behest of funders—and with nuisance lawsuits—as litigation funders bring into court otherwise meritless lawsuits to extract settlements.[133] Still others criticize litigation funding as enabling third parties to fund litigation in order to harm defendants for the funder's own gain—say, to settle old scores.[134]

Opponents of litigation funding ground many of their arguments in a collectivist conception of legal claims and present that view as intertwined with interests of the litigation system as a whole. In the context of litigation funding, that conception is internally coherent enough. But that position is *directly* at odds with the individualistic conception of claims urged by the Chamber and others in the class action context[135] and in the context of arbitration agreements, discussed below.[136]

Putting aside the strategic maneuvering behind this cross-context incoherence, the important conceptual takeaway is this: in the context of alternative litigation finance, the normative implications of an individualistic conception of legal claims are inconsistent with,

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[https://perma.cc/7SUX-WHXZ] (explaining that third-party litigation funding prolongs litigation which hurts defendants who are "forced to divert additional time and money from productive activity.").

133. *Id.*; *see also* Steinitz, *supra* note 106, at 1324 (expressing concern that litigation funders will influence the decision of whether and when to settle).

134. A recent example of this possible problem involved Peter Thiel, cofounder of PayPal and initial investor of Facebook, who provided approximately ten million dollars to help Hulk Hogan (Terry Bollea) sue Gawker Media. *See* Ryan Mac & Matt Drange, *This Silicon Valley Billionaire Has Been Secretly Funding Hulk Hogan's Lawsuits Against Gawker*, FORBES (May 24, 2016, 7:29 PM), http://www.forbes.com/sites/ryanmac/2016/05/24/this-silicon-valley-billionaire-has-been-secretly-funding-hulk-hogans-lawsuits-against-gawker/#3d3785eb7805 [https://perma.cc/P6BN-GZ2P]. The $140 million awarded to Hogan drew attention to the suit as well as to third-party litigation funding. Thiel had "hired a legal team several years ago to look for cases" for him to support financially. *See* Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War With Gawker*, N.Y. TIMES (May 25, 2016), http://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html?_r=0 [https://perma.cc/CV98-9J78]. While Thiel views his litigation funding as "one of [the] greater philanthropic things" he has done, others see his funding as a revenge against Gawker for outing Thiel as homosexual. *Id.* Thiel viewed Gawker as a pioneer of a "damaging way of getting attention by bullying people" and funded Hogan's suit for "specific deterrence" of Gawker. *Id.*

135. *See, e.g.*, Brief of the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner at 17, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 3167313 (stating that most arbitral consumer claims would not survive the "close look" of a trial court).

136. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/B5L9-T4L2] [hereinafter CFPB 2015 ARBITRATION STUDY] (finding that arbitration contracts disfavor claimholders, often to a large degree).

even *diametrically opposite* to, the implications of an individualistic conception of legal claims in the class action context and the Rule 68 offers of settlement context. In the class action and Rule 68 pick-off settlement contexts, an individualistic view may impede claiming; in the context of litigation funding, it *effectuates* claiming.[137] The next Section explores this conceptual dissonance in one final illustrative context: mandatory arbitration agreements in consumer, employment, and finance contracts.

C. Mandatory Arbitration Agreements

The Supreme Court's jurisprudence regarding contractual agreements to arbitrate reinforces its largely individualistic conception of legal claims. Indeed, it advances an exclusive view of legal claims as such.[138] This individualistic view of legal claims in the Court's arbitration jurisprudence is explicitly indifferent to whether that conception impedes claiming, access to justice, compensation, and deterrence.

The Court's strong individualistic view in this space evolved over time. Very briefly, the Supreme Court in the 1980s interpreted the Federal Arbitration Act ("FAA") as evidencing a "liberal federal policy favoring arbitration agreements."[139] Armed with this language, the Supreme Court took a new and relatively aggressive stance vis-à-vis the conception of legal claims—even those arising under federal statutes—as property to be exchanged between private parties, subject to private contracts, in private proceedings, with private adjudicators. In doing so, the Court simultaneously rejected collective values, such as airing of grievances in public courts, providing information about wrongdoing through public proceedings, and generating legal

137. To be clear, a collectivist view of claims does not absolutely foreclose the ability to alienate claims, at least in part. One modern debate about litigation financing is whether customary forms of funding through debt—for instance, borrowing for the lawyer working on a contingent arrangement or by the client—may be substituted with *equity* financing, which creates, in effect, a limited purpose partnership or corporation. These latter arrangements have a historical precedent in state charters, which are set up to further a private aim with a public purpose (for instance, disputes over the Harvard and Dartmouth charters). *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819) (upholding Dartmouth College's original private charter, which predated the formation of the state of New Hampshire, against the New Hampshire legislature's attempt to make Dartmouth a public institution whose trustees would be appointed by the Governor). Whatever this debate's resolution, though, an individualistic view of claims no doubt provides the strongest case for alienation and litigation funding.

138. *See, e.g.*, J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) (detailing Supreme Court jurisprudence's shift towards dispute resolution in arbitration).

139. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

precedent. Nonetheless, the Court for decades indicated that its willingness to promote values of individual autonomy rested upon a critical premise: those values were consistent with, and indeed helped achieve, the efficient, cost-effective resolution of claims.

However, faced with contractual provisions designed by defendants to make arbitration *more* onerous for claiming, the Court ultimately resolved what had become, at the Court's behest, a tension between individual-autonomy conceptions of claims and the notion that arbitration existed to resolve claims firmly in favor of individual autonomy.[140] The coup de grâce was its 2013 decision in *American Express Co. v. Italian Colors Restaurant*,[141] wherein the Court held that plaintiffs' waiver of class procedures in an arbitration contract was enforceable under the FAA even though—as defendants stipulated—those claims could not be brought individually.[142] In one fell swoop, the Court jettisoned the notion, expressed in prior opinions,[143] that it "would have little hesitation" to strike down arbitration contracts if they impaired parties' ability to bring federal statutory claims.[144]

After *Italian Colors*, consumers, employees, and others are free to exchange any and all potential legal claims for, say, something as simple (but usually necessary) as a credit card. Or a cell phone. Or a job.[145] Given now-permissible terms in arbitration contracts that frustrate claiming, however, those legal claims are almost never effectuated,[146] much less exchanged for compensation.[147]

140. *See* Glover, *supra* note 138, at 3058–74 (discussing Supreme Court weighing of freedom of contract with enforcement of substantive rights).

141. 133 S. Ct. 2304 (2013).

142. *Id.* at 2310–12.

143. *See* Glover, *supra* note 138, at 3068 n.67 (tracing multiple cases).

144. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

145. Maureen Sherry, Opinion, *A Colleague Drank My Breast Milk and Other Wall Street Tales*, N.Y. TIMES (Jan. 23, 2016), http://www.nytimes.com/2016/01/24/opinion/a-colleague-drank-my-breast-milk-and-other-wall-street-tales.html [https://perma.cc/67UZ-RUP2] (detailing various incidents of discrimination she and others faced while working as brokers; neither she nor her colleagues could bring claims under Title VII because they had signed binding arbitration agreements requiring dispute resolution by entities tied to the financial industry).

146. This was the case in *Italian Colors*. Even though the individual claims were of relatively high value, the cost of an antitrust expert far exceeded the value of any individual's claim, rendering it a negative-value claim and thus non-pursuable. 133 S. Ct. at 2308.

147. Of the 244 cases in which companies made counterclaims against plaintiffs in arbitration, the Consumer Financial Protection Bureau found, in its Final Report on Arbitration, that those companies obtained relief in ninety-three percent of the cases; of "341 cases filed in 2010 and 2011 that were resolved by an arbitrator," consumers obtained relief in nine percent of disputes. *See* CFPB 2015 ARBITRATION STUDY, *supra* note 136, § 1, at 12. Even when claims are brought in arbitration, the deck is stacked against them. *See, e.g.*, *Arbitration: Is It Fair When*

Here, an individualistic conception of unfettered rights of claim ownership—unmoored from any other purpose or limitation—disables claiming, frustrates access to justice, compensation, and, potentially, deterrence.[148] The Court's arbitration jurisprudence—which enables defendants to use any number of procedural provisions to frustrate claiming—stems in part from the efforts of proponents who advocated for an individualistic conception of claims[149] and touted its virtues,[150] at least in this context.[151] Compensation for claims need not be in the

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Forced?: Hearing Before the S. Comm. on the Judiciary, 112th Cong. (2011) [hereinafter *Forced Arbitration Hearing*] (discussing the Minnesota Attorney General's shutdown of the National Arbitration Forum for being biased against consumers and for having taken money from financial institutions). Corporations fare far better in arbitration than individuals do, with individuals prevailing in about nine percent of cases and corporations, on counterclaims, in about ninety-three percent. CFPB 2015 ARBITRATION STUDY, *supra* note 136, § 1, at 12. Further, compared to class litigation, individuals fared far worse in arbitration vis-à-vis compensation and entry of judgments. *Id.* at § 6.

148. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 378 (2005) (arguing that the threat of class action liability plays a vital role in deterring corporate wrongdoing); Glover, *supra* note 138, at 3075–83 (arguing that the Supreme Court's jurisprudence effectuates a functional removal of substantive law from the books without legislative approval); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 807 (2009) (arguing that the privatization of "the enforcement of statutory rights erodes those rights"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1634 (2005) ("[T]he use of mandatory arbitration is curtailing the use of jury trials and class actions . . . and is limiting public access to our justice system."); J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1746 (2006) (noting that many courts have emphasized that class actions provide access to justice for claims that would otherwise be economically impossible).

149. *See* Opening Brief of AT&T Mobility LLC at 36–43, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 08-56394), 2009 WL 2494186, at *36–43 (arguing that the fact that a class action may be barred is of no consequence because litigant still had a right to their individual claim).

150. *See, e.g.*, *Forced Arbitration Hearing*, *supra* note 147, at 14–16, 151–63 (statements of Christopher R. Drahozal, John M. Rounds Professor of Law and Associate Dean for Research and Faculty Development, University of Kansas School of Law, and Victor E. Schwartz, U.S. Chamber Institute for Legal Reform and U.S. Chamber of Commerce) (focusing on freedom of contract values and benefits of arbitration to consumers in the form of bringing claims and exchanging litigation for cost savings); *The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 7–8 (2007) (statement of Peter B. Rutledge, then Associate Professor, Columbus School of Law, Catholic University of America) (arguing that "eliminating predispute arbitration agreements would not make individuals as a whole better off"); Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 270 (2008) (arguing that individuals should have control over their claims and that arbitration benefits consumers); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90–93 (raising similar arguments).

151. The individualistic conception of claims was not the ultimate gambit; it was the contractual provisions it enabled. *See, e.g.*, *File a Complaint*, AT&T.COM, https://www.att.com/esupport/article.html#!/wireless/KM1041856 (last visited Sept. 23, 2016) [https://perma.cc/LKG3-

form of remediation for wrongdoing; instead, proponents argued, it could be exchanged ex ante in a contractual trade that benefited consumers.[152] Indeed, proponents posited that this individualistic approach to claims enabled potential claimholders to obtain, say, a cell phone, at a lower price.[153] There is no empirical support for this cost-savings claim.[154]

* * *

This conceptual incoherence across the litigation landscape has real consequences. Consider the following not-unexpected combination of all the foregoing examples. It illustrates the inability of formalist conceptions of legal claims to achieve either conceptual or normative coherence across the procedural landscape.

Say that a group of female employees are allegedly discriminated against at a Wall Street firm. They wish to bring a Title VII class action against the firm, but they cannot afford to pay the litigation costs, including hefty expert fees, to prove their claims. Therefore, their attorney seeks out a third-party funder, who agrees to finance the suit in exchange for a portion of any eventual award. The employer immediately files a Motion to Compel Arbitration, noting that all employees signed a binding arbitration agreement with a class action prohibition as a part of their employment contracts. Under a strong individualistic view of legal claims, as has been adopted by the

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MP6J] (containing a blow-up provision that requires a court to strike the entire agreement if it strikes the class action prohibition clause).

152. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2315 (2013) (discussing limitations that are in place to ensure arbitration's benefits); *Concepcion*, 563 U.S. at 348 (arguing that "the principal advantage of arbitration" is its informality, which creates a faster, more efficient, and less costly process).

153. Such cost savings were said to result from the reduced litigation burden on the contract drafter. *See, e.g.*, Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537, 541 (2002) (arguing that consumers will benefit from arbitration in the form of cost savings); Ware, *supra* note 150, at 90–93 (arguing that mandatory arbitration lowers consumer prices because litigation cost savings are passed on from corporations to consumers). *But see* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 771 (acknowledging that there may not be cost savings for consumers because of mandatory arbitration); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75, 93–98 (2004) (arguing that Ware's arguments about cost savings for consumers are based upon oversimplified economic assumptions). To date, no definitive empirical evidence has demonstrated this to be the case. CFPB 2015 ARBITRATION STUDY, *supra* note 136.

154. When the CFPB conducted an empirical investigation of the claim that mandatory arbitration agreements result in lower prices for consumers in the form of passed cost savings, it found that there was no support at all for the alleged phenomenon. CFPB 2015 ARBITRATION STUDY, *supra* note 136, § 10.3, at 15–17.

Supreme Court in its arbitration jurisprudence, these agreements are enforceable, and the suit is over.

Imagine, however, that the opposite conception of legal claims is taken—that they are intertwined with other class members' claims, that they are also mechanisms of deterrence—and thus they cannot so freely be traded away like chits of property in a form contract. The court thus denies the Motion to Compel Arbitration, and the case proceeds—financed by the litigation funder. The defendant employer moves to compel the discovery of various funding documents, arguing in part that litigation-funding arrangements are illegal under doctrines of maintenance and champerty. Now it is the defendant arguing that claims cannot be freely alienated. Plaintiffs' counsel argues that such alienation is permissible, and, as such, the requested documents are irrelevant and/or protected by the work product doctrine. Assume the court agrees, and in its opinion notes that impecunious parties should be free to alienate their claims in whole or in part in order to pursue those claims. Very early in the suit, the court has already taken two separate conceptual views of legal claims—a collective one to deny the Motion to Compel Arbitration, and a strong individualistic view to obtain the funding.

Assume now that the defendant makes the named plaintiff a settlement offer under Rule 68 for nearly twice the expected value of her individual claim. The defendant knows that being a named plaintiff in this sort of lawsuit brings all manner of unwanted attention, and it suspects that few others, if any, would be willing to serve in that capacity. Additionally, of those who might be suitable to assume the lead plaintiff role, few have as compelling a claim as this named plaintiff. A strong individualistic view of claims enables the named plaintiff to profit handsomely from her claim sale; the opposite, collectivist view broadens access to justice and compensation overall but diminishes it for one.

In this scenario, at every turn, the named plaintiff, the court, and the defendant are at a conceptual crossroad. Individual property views of claims lead in opposite directions all throughout the suit. The opposite is also true. Perhaps most importantly, in this example, following *one* conceptual road—a strong individualistic conception of legal claims—ends the suit at the arbitration stage. Following the collectivist conception ends the suit when the class attempts to gain financing. In *both cases*, neither suit even gets off the ground.

Stepping back, what the foregoing analysis reveals is this: the cross-cutting view provided here offers a new perspective—not one that *resolves* the debate, but one that reveals the possible futility in doing so. Indeed, the foregoing examples in this Part illustrate a

broader problem for procedure: debates within particular procedural arenas about the proper conception of legal claims—whether as individual or as more collective in nature—do not point the way forward on key objectives in our litigation system.

III. A REGULATORY THEORY OF LEGAL CLAIMS

Resolving the "intractable" debate between individualistic and collectivist conceptions of claims would lead our litigation system in normatively and conceptually incoherent directions. However, if resolving that debate could not yield a sound approach to questions of litigant autonomy, *what can*?

This Article provides a new theory of legal claims—one that can more coherently address the foundational normative goals of our litigation system by permitting a less rigid approach to litigant autonomy—which this Article refers to as a "regulatory theory of legal claims." Drawing upon insights from property theory, economic theory, and litigation theory, Section A develops the theory that the individual property rights associated with legal claims may be subject to regulation in appropriate circumstances. It then offers a theory of the judicial role, within the confines of its lawmaking power vis-à-vis procedural law,[155] as appropriately including regulation of litigant autonomy. Finally, it provides a specific theory of procedure's role as appropriately directed toward, among other things, reducing substantial transaction cost barriers to claiming. That theory of procedure's role simultaneously provides the crucial first, functional building block of an overall regulatory framework for operationalizing this Article's regulatory theory of legal claims.

Section B then applies this theory to the procedural issues discussed in Part II and to the class-certification disputes addressed by the conceptual debates in Part I. This analysis provides new

155. *See generally* 28 U.S.C. § 2072 (2012) (referred to as "The Rules Enabling Act"); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (tracing the history and meaning of the Rules Enabling Act); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 U. WASH. L. REV. 1027 (2013) (discussing interstitial substantive lawmaking by the judiciary in "procedural" decisions). The precise scope of the Court's procedural lawmaking power under the Rules Enabling Act, particularly in federal question cases, has not been fully explored or theorized by scholars or by the Court. I begin to develop a theoretical basis for the scope of the Court's procedural lawmaking power in federal question cases in forthcoming work. *See* J. Maria Glover, *The Supreme Court's "Non-Trans-Substantive" Class Action*, 165 U. PA. L. REV. (forthcoming 2017) (setting forth the theoretical principle of procedural symmetry as one principle for operationalizing the Enabling Act limitations on the Court's procedural lawmaking power).

insights into those procedural problems, and it reveals a number of benefits to the theory—including increased transparency in procedural decisionmaking and reduction of strategic gamesmanship of the sort highlighted in Part II. It also generates, for further consideration, a number of new potential changes to procedural doctrine.

A. A Regulatory Theory of Legal Claims

Viewed across the broader litigation landscape, formalist conceptions of legal claims generate both negative *and* positive repercussions for important normative goals like access to justice, compensation, and deterrence. Thus, these conceptual dichotomies are unappealing on their own formalist terms in their inability to produce a clear and coherent path to resolving difficult questions in our litigation system. Instead, they produce directly conflicting answers.

The regulatory insight from that stalemate is this: the way forward is to break free from absolutist views and to develop a theory for regulating individual autonomy over legal claims. This Section develops such a theory and proceeds in three Parts. Part 1 provides theoretical bases for departing from formalistic conceptual frameworks for legal claims and litigant autonomy and for adopting an alternative approach—a new regulatory theory of legal claims. Drawing insights from property theory, economic theory, and litigation theory, this Part posits that litigant autonomy over legal claims *can* be regulated in certain appropriate circumstances—here, at the very least, to correct transaction cost-based failures within the market for legal claims. Part 2 then builds on this regulatory theory of legal claims by addressing institutional expertise and power for regulating litigant autonomy over those claims. In particular, while it seems relatively uncontroversial that Congress and state legislatures could (and do) regulate litigant autonomy in both substantive and procedural laws, the litigation focus of this Article requires, and Part 2 provides, a theoretical account of the judicial role and judicial lawmaking power as legitimately including the regulation of legal claims and litigant autonomy, including through procedural mechanisms. Part 3 begins a larger project of defining the nature and scope of procedure's role in regulating legal claims and litigant autonomy. It does so by providing a theoretical account of procedure as appropriately directed toward addressing the particular market failure highlighted in Part 1—transaction cost barriers to the effectuation of recognized substantive rights.

1. Regulatory Theory of Legal Claims: From Conceptual Absolutism to Regulating the Market for Legal Claims

Moving from conceptual theories of legal claims to a regulatory theory of legal claims is perhaps a bold step. It cuts against decades of individual property conceptions of legal claims embedded in various procedural rules and doctrines; it also challenges some of the foundational assumptions underlying formalist approaches to legal claims and litigant autonomy. Nonetheless, this Article's regulatory theory of legal claims is not a radical proposal. For one, it does not require departure from existing judicial and scholarly approaches to legal claims as forms of property; indeed, if anything, many theoretical underpinnings and principles of property theory commend this Article's approach.[156] For two, this Article's regulatory theory of legal claims has additional intellectual foundations in positive (and relatedly, transactional) economic theory, as well as litigation theory.

Thus, the development of this Article's regulatory theory of legal claims can begin, somewhat uncontroversially, with the Supreme Court's long-accepted notion that legal claims are forms of property.[157]

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156. To be clear, though, this Article's theory does not necessarily require a foundation in property-based conceptions of legal claims to arrive at a conclusion that litigant autonomy can be restricted, at the very least, in order to effectuate foundational normative goals of the litigation system. That regulatory insight could potentially stem, say, from an institutional account of legal claims. *See, e.g.*, Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011 (2010) (drawing upon Dworkin's work to argue that litigant autonomy and day-in-court ideals are embedded in the institution of civil adjudication and therefore subject, in scope and content, to factors that lead the institution to serve its functions and normative purposes). Further, one might potentially ground in institutionally based theories the notion that, to the extent alienation and exclusion of legal claims are central procedural rights attendant litigant autonomy, those procedural rights can be restricted to take account of social costs. *See, e.g.*, RONALD DWORKIN, *Principle, Policy, and Procedure*, *in* A MATTER OF PRINCIPLE 72, 86 (1985) (acknowledging the social-cost limits to the imposition of an outcome-based theory of procedural rights). Of course, an institutional approach to procedural rights vis-à-vis legal claims might well justify greater regulation of litigant autonomy in certain circumstances than would a property-based approach; further, depending on one's particular views regarding the values, purposes, and normative underpinnings of the institution of civil adjudication, an institutional baseline for regulating litigant autonomy might lead to different regulatory prescriptions than one grounded in property theory, economic theory, and litigation theory. This Article does not take on these or related questions here. Because this Article's regulatory theory is designed in significant part to respond directly to the pathologies of our existing litigation system, it does not depart here from the property-based foundations of legal claims embedded in long-standing Constitutional doctrine and the longer span of historical approach to and understanding of legal claims. *See, e.g.*, *supra* Part II (discussing the long history of doctrines of maintenance and champerty, themselves premised on a property-based conception of legal claims).

157. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) (explaining that "[t]he hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law"); *see also* Ileto v. Glock, Inc., 565 F.3d 1126, 1148 (9th Cir. 2009) (citing *Logan* for the proposition that a pending cause of action, "even before it is reduced to a final dollar amount, it

Two principal rights attendant ownership of property are the rights of alienation—the right to sell or transfer in whole or in part—and of exclusion—the right to keep non-owners from entering or using the property.[158] Simple enough.

It is at this preliminary stage that both rigid individualistic and collectivist conceptions of legal claims arguably go astray, not just as a matter of the normative underpinnings of our system of litigation,[159] but as a matter of the very principles of property theory undergirding those formalistic conceptions. Some of the confusion assuredly lies here: informing the litigant autonomy debate are unresolved and underexplored notions of property, property rights, and the contours of property ownership,[160] where questions regarding whether and to what extent alienation rights attach are both central

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is a 'species of property' "); N.Y. State Nat'l Org. for Women v. Pataki, 261 F.3d 156, 163 (2d Cir. 2001) ("There is no dispute that a legal cause of action constitutes a 'species of property protected by the Fourteenth Amendment's Due Process Clause.'" (citation omitted)).

158. Many scholars have written about the concept of property as a "bundle of rights"; a crucial part of that bundle is alienation. *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 319 (1997) ("No expression better captures the modern legal understanding of ownership than the metaphor of property as a 'bundle of rights.' "); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712 (1996) ("The currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a 'bundle of rights.' "). It is worth noting that similar rights of alienation and exclusion would not necessarily be precluded by a theory of legal claims grounded largely in the institutional commitments of courts rather than the property-like nature of claims. *See generally* Bone, *supra* note 156 (suggesting that the nature of and limitations on procedural rights derive from the institution—civil adjudication—in which they are embedded).

159. *See supra* Part II and Part III.A.

160. Among property scholars and policymakers, there is continued conceptual disagreement about the nature of property and property rights. *See, e.g*, PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY 2 (setting out a social-morality-based theory of the nature of property ownership and property law as aimed at fostering and governing community relationships related to property); Richard A. Epstein, *Property Rights, State of Nature Theory, and Environmental Protection*, 4 N.Y.U. J.L. & LIBERTY 1, 2 (2009) ("Questions about property rights, their origin, and their measure have been at the forefront of serious political discourse since ancient times."). This Article does not seek to resolve that underlying confusion, which may inform the confusion underlying conceptual debates about legal claims. Further resolving this underlying confusion is *not* necessary for this Article's central proposal of a regulatory theory for legal claims, even as a matter of property theory. Once property comes into existence, it moves around—through contract, through inheritance and intestate succession, through gifts, through taxation, and in other ways, including alienation. Alienation typically involves substituting one form of property for another, so the fact that claims are not *original* forms of property in, say, the Lockean sense is not problematic. Claims are things people receive as substitutes for their property, either involuntarily (through tort, for instance) or more-or-less voluntarily (through contract, for example). Claims are a poor substitute for money (perhaps the ideal substitute for property), but they are a form of compensation for property. *See also, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918) (holding that INS had violated Associated Press's property right in news stories—which had no copyright protection—by rewriting them and publishing them in INS's own paper).

and difficult.[161] Perhaps because of that confusion, or perhaps in spite of it, formalist conceptual dichotomies implicitly adopt equally formalist and extreme conceptions of property and property rights, conceptions that have led procedural doctrine to diverge not only from normative goals of our litigation system, but also in important ways from principles of property theory and the manner in which property law often functions.

To illustrate, take the collective notions of property often underlying equally collectivist conceptions of legal claims. These include views of property as having a decidedly public character[162] and views of property as having a collective character to maximizing group *and* individual welfare.[163] The prescriptions for litigant autonomy,

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161. This debate is particularly pronounced in the world of intellectual property. *Compare* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004) (noting the "propertization" trend in intellectual property law and discussing limits in property law that should apply to intellectual property law), Stephen L. Carter, *Does it Matter Whether Intellectual Property is Property?*, 68 CHI.-KENT L. REV. 715 (1993) (discussing benefits associated with treating trademarks like property), Gregory Dolin & Irina D. Manta, *Taking Patents*, 73 WASH. & LEE L. REV. 719 (2016) (drawing parallels between the AIA's alteration of the scope of vested patent rights and regulatory takings of property), Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 118 (1990) ("[E]xcept in the rarest case, we should treat intellectual property and physical property identically in the law."), Irina D. Manta & Robert E. Wagner, *Intellectual Property Infringement as Vandalism*, 18 STAN. TECH. L. REV. 331 (2015) (discussing the relationship between property law and intellectual property law), *and* Adam Mossoff, *Patents as Constitutional Private Property*: *The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 690 (2007) (discussing the historical application of the Takings Clause to patents), *with* Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After* College Savings v. Florida Prepaid, 37 SAN DIEGO L. REV. 637, 667 (2000) (arguing that private property's application to intellectual property could only occur through analogy), *and* Davida H. Isaacs, *Not All Property is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They Are Right to Do So*, 15 GEO. MASON L. REV. 1, 2–3 (2007) ("[P]atentholders are not entitled to assert takings claims.").

162. *See, e.g.*, RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS 143–299 (1996) (describing the features of a public good). Instead, some collectivists' conceptions seem informed by a means-based conception of property.

163. *See, e.g.*, Campos, *supra* note 9, at 1074–79 (viewing claims as most efficiently able to generate deterrence and individual compensation through collective proceedings); Rosenberg, *supra* note 9, at 844; *see also* C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986) (noting that property law promotes "cooperative and productive activity" where individual welfare depends on "effective uses of resources" and the collective welfare depends on allocation of goods to the highest value user); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (explaining the concept of tragedy of the commons and societal benefits from limitations placed on growing population). An example of such a collective notion of property is in the use of zoning ordinances. *See generally* Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (upholding constitutionality of zoning ordinance "asserted for the public welfare"). For examples of zoning ordinances, see, for example, S. F., Cal., Ordinance 22-15 (Feb. 3, 2015) (planning ordinance art. 2.5 § 253 governing height of proposed buildings and structures); City of Ladue, Mo., Ordinance 1175 (Apr. 28, 2016) (providing restrictions for fences (sec. IV C)). And at least with regard to litigant autonomy, these

though, are roughly the same. Heavy-handed restrictions, if not outright bans, on individual autonomy are permitted and perhaps required.

However, it is a long-standing tenet of property theory that restraints (particularly private restraints) on alienation and exclusion are generally disfavored.[164] This is not to say that regulations of property rights are never imposed on collectivist grounds. Indeed, courts often ground restrictions of property rights in collectivist notions. For instance, with zoning laws, the theory behind interference with property rights is that all individuals' property values will increase if no individuals are allowed to, say, construct a monstrosity.[165] Moreover, much of the Supreme Court's takings jurisprudence finds that collectivist, welfare maximization concerns can override absolute rights to control over one's property (with compensation).[166]

Nonetheless, such regulations are exceptional. Just as individual ownership is not absolute, it is not absolutely subject to regulation, either. Quite the contrary. Property law proceeds from what one might call a "default" position that property rights ought not be infringed absent compelling reason. So too should any property-grounded theory of legal claims.

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views share similarities with collective views of the institution of civil adjudication itself as being public in nature, thus imbuing legal claims with a similarly public character. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Unmoored from the limitations of property theory and doctrine, though, collective, and quite broadly public, views of civil adjudication might well generate different, and more expansive, regulatory prescriptions vis-à-vis litigation autonomy—a question and its implications this Article defers to future work.

164. For instance, assume a developer wishes to erect a brand-new city-center complex. If one hundred homeowners live in the desired area, but only ninety-nine agree to sell, the developer *cannot* force the holdout to do so. The developer could, however, take his concerns to city hall and convince them that the development would serve any number of city-specific interests. The city could then condemn the property for "public use," and so long as reasonable value is provided to the holdout, the right of exclusion would likely not, under long-standing Supreme Court jurisprudence, trump the justifications for regulating that right. *See infra* notes 173–175 and accompanying text.

165. *See* William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105 (2006) (discussing how land-use regulations increase property value partly due to "scarcity effects," in which an increase of scarcity of land-use for a particular purpose drives up surrounding property prices); *see also* Elizabeth Rhodes, *UW study: Rules Add $200,000 to Seattle House Price*, SEATTLE TIMES (Feb. 14, 2008), http://old.seattletimes.com/html/businesstechnology/2004181704_eicher14.html [https://perma.cc/XWR5-GQQZ] (attributing price increase to land-use regulations due to their limitation on supply of land for construction). This theory dovetails somewhat with David Rosenberg's theory of class actions: the most efficient use of property—here, legal claims—is secured not through the facilitation of maximum individual control over the claim, but through collectivist-driven restrictions on alienation. Rosenberg, *supra* note 9.

166. *See infra* notes 173–175 and accompanying text.

This is especially true given that collectivist justifications for overriding litigant autonomy will often arise on a case-by-case, or context-by-context, basis. This is perhaps unsurprising, given a similar tendency in the property law context. Indeed, collectivist concerns regarding litigant autonomy will not arise consistently as a matter of degree or kind across the wide swath of the litigation landscape[167] or even within the *same* procedural context.[168]

On the other hand, the near-absolute conception of rights of alienation and exclusion underlying individualistic conceptions of legal claims conflicts with the fact that, as a matter of property law and theory, such near-absolute rights do not flow inexorably from the existence of property ownership.[169] Yet little is provided in the way of theoretical justification by the Court or in the scholarship for why legal claims should be treated so differently from other forms of property.

Property rights like alienation and exclusion are not unfettered. Fundamentally, the law of property will enforce as property "only those interests that conform to a limited number of standard forms."[170] The principle that property forms are fixed—referred to as *numerus clausus*—is a universal feature of the property landscape and stands as a significant limitation not only on freedom of contract, but also on individual choice vis-à-vis property.[171] The principle of *numerus clausus* is commended by its purpose of preventing the generation of high transaction costs by idiosyncratic property (and alienation by its initial holder)—costs that would almost inevitably be imposed upon third parties.[172]

Further, the Supreme Court has, in any number of cases, regulated property rights like alienation for reasons relating to the

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167. *See supra* Part II.

168. *See infra* Part III.B (pointing out how collectivist views of legal claims sometimes advance normative goals, including efficiency—and the associated compensation for individuals—in class actions, but sometimes do not).

169. Pure litigant autonomy views of legal claims are not particularly consistent with how property rights are treated as a general matter, except perhaps in a very Lochnerian sense. *See* Lochner v. New York, 198 U.S. 45 (1905) (setting forth a largely unbridled view of property and contract rights that ushered in the "Lochner" era of the same).

170. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 3 (2000).

171. *See id.* at 3–4. Though frequently criticized, Merrill and Smith defend *numerus clausus* on the ground that, when new property rights are created, third parties must spend considerable time and resources to figure out the contours of those rights, how to avoid violating them, and how to acquire them; in short, idiosyncratic rights generate costs, costs that will likely not be internalized by those seeking to create them—in other words, these new rights become a "true externality." *Id.* at 8.

172. *Id.*

public interest, for the benefit of the courts, and to further other governmental interests, just to name a few.[173] Courts have also restricted property owners' ability to convert property in certain situations where doing so would harm third parties or their property interests.[174] Finally, although the Supreme Court has held that the government may not completely destroy the value of one's property without compensation, a property owner cannot demand that his property retain its same form, condition, or character.[175]

The regulatory insight is this: While property law certainly disfavors restraints on alienation and exclusion, those rights are not accurately described as absolute. So too with legal claims. The next question, of course, is this: What are the "appropriate circumstances" for regulation of legal claims?

It is at this point that insights from property theory converge with insights from litigation theory and positive economic theory. Litigation theory helps situate the property and its attendant rights and uses in context. Specifically, and with some admitted differences (discussed below), much of the functioning and character of our litigation system resembles that of a commodities market.[176] Most legal claims are exchanged for some form of compensation.[177] This

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173. The Court has taken a rather loose approach to what constitutes "public use" or "public interest" for purposes of whether the government can interfere with someone's property rights. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005) (holding that the City of New London could exercise eminent domain in furtherance of their economic development plan, which met the "public use" requirement of the Fifth Amendment); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (making clear that property rights are qualified and that the Hawaii Land Reform Act of 1967, which transferred title in real property from lessors to lessees in order to reduce the concentration of land ownership, constituted "public use" for purposes of the Fifth Amendment); Berman v. Parker, 348 U.S. 26 (1954) (holding that it was in the power of Congress to take into account, in enacting redevelopment legislation that called for the condemnation of petitioner's property, aesthetic and health considerations).

174. *See, e.g.*, Licari v. Blackwelder, 539 A.2d 609 (Conn. App. Ct. 1988).

175. *See, e.g.*, Brown v. Legal Found., 538 U.S. 216 (2003) (holding that the state's use of interest from "interest on lawyers' trust accounts" did not constitute a regulatory taking because clients suffered no net loss and finding that the state was authorized to use the interest from the accounts to pay for legal services for the poor, as it qualified as "public use"); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding that the New York City Landmarks Preservation Commission's approval of a fifty-story office building on top of Grand Central Terminal did not constitute a taking).

176. *See, e.g.*, Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005) (describing the litigation system as a market for legal claims); Molot, *supra* note 128 (discussing skewed settlements as a market failure and providing a market-based solution); Jack L. Millman, Note, *Structuring a Legal Claims Market to Optimize Deterrence*, 91 N.Y.U. L. REV. 496 (2016) (proposing methods for optimizing the market for claims within the context of third-party litigation funding).

177. *See, e.g.*, Abramowicz, *supra* note 176, at 709 (describing the typical legal claim as involving an exchange for compensation).

exchange exists against a backdrop of a public system and public rules.[178] Nonetheless, that public apparatus explicitly encourages private enforcement of regulatory directives[179] through a private contract in the form of settlement.[180] In short, legal claims exist within a system that looks much like a market—a market for claims.

To be clear, this market for legal claims is necessarily limited to economic claims exchanged (or sought to be exchanged) for compensation (whether through settlement or some form and degree of adjudication). This market would therefore generally not include claims for indivisible noneconomic relief.[181] Nor would it include claims involving subject matter not typically believed appropriate for alienation either as a matter of property or procedural law.[182]

The existence of a market for legal claims—now clarified—yields an additional regulatory insight: among other things, regulation of legal claims might be warranted to correct market failures. This regulatory insight, however, requires qualification. Economic theorists have identified a number of conditions that constitute market failure in standard markets, such as negative externalities, transaction costs, information asymmetries, and agency problems.[183] The market for legal claims, however, is not a typical market, in a number of respects.

For one, the market for legal claims lacks the many buyers and sellers that tend to produce efficient market outcomes: claims can currently be "sold" only to a limited number of "buyers" (defendants) by a limited number of "sellers" (plaintiffs). To be sure, market

178. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS §§ 19, 21 (AM. LAW INST. 2016) (stating that res judicata applies to private settlement agreements).

179. *See* FED. R. CIV. P. 16 advisory committee's note to 2003 amendment.

180. *See, e.g.*, Glover, *supra* note 2 (tracing the history of the rise of settlement and arguing that the Federal Rules of Civil Procedure ought to better align with that litigation endpoint); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996) (explaining why, in our system, it is usually better to settle); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991) (explaining why most cases settle).

181. For instance, claims for purely injunctive relief under Rule 23(b)(2) are currently not within the scope of this Article. However, claimants often seek some modicum of monetary relief under Rule 23(b)(2). *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 366–67 (2011) (rejecting plaintiffs' attempt to join claims for back pay with claims for injunctive relief under Title VII). Given the uncertainty of the law, this Article leaves specific consideration of these hybrid claims for another time.

182. *See generally* Abramowicz, *supra* note 176, at 722–26 (discussing "procedural justice" and alienability); David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 727–28 (2012) (citing examples of inalienable property).

183. *See, e.g.*, RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS (2d ed. 2012); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004).

conditions of bilateral monopoly (or, where there are multiple plaintiffs, potentially conditions of oligopsony monopoly) are not unique to litigation—they exist in other areas, including property and contract—and those conditions do not stand as a barrier to regulation in those contexts in certain defined situations.[184] Nonetheless, as a general matter, what constitutes a market failure in a market operating under such a constraint is frequently unclear—particularly given that the bilateral monopoly itself can generate its own unique market dysfunctions.[185] Moreover, this peculiarity of the market for legal claims, among others (such as the pronounced role and strategic incentives of counsel in market transactions), makes the process of identifying and defining market failures difficult. Accordingly, direct wholesale importation of market-failure definitions from capital market and positive economic literature to a regulatory theory for legal claims would be inappropriate.

Therefore, as a starting point for designing a regulatory framework that flows from the theoretical notions set forth thus far, this Article focuses initially on one well-defined and persistent market failure in litigation: transaction cost barriers to the effectuation and exchange of recognized legal claims.[186] What constitutes "appropriate circumstances" for the regulation of claims, then, at least includes the need to correct this fundamental market failure.

* * *

So far, this Article has offered normative and theoretical justifications for eschewing formalist conceptions of legal claims. It has then offered a theoretical justification for regulating, in appropriate circumstances, litigant autonomy over legal claims. It has done so, moreover, without requiring radical departure from the Supreme Court's long-standing property-based conception of legal claims. It has additionally offered grounding—both as a matter of property theory and transactional economic theory—for the notion

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184. For example, after a buyer contracts to purchase a home, but before closing, the condition of that market is one of bilateral monopoly. As a consequence, there are restrictions on what buyers and sellers may do during that period: a buyer typically cannot do something that would significantly damage his credit; a seller cannot tear down the garage. In the world of contracts, one often finds requirements contracts, exclusive supplier contracts, and requirements contracts with exclusive supplier provisions—all situations characterized by bilateral monopoly, all situations subject to regulations in contract law.

185. *See supra* note 184.

186. *See, e.g.*, Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000) (advocating for subsidized transaction costs for low-value claimants).

that legal claims can be regulated to reduce or prevent transaction cost barriers to effectuating substantive legal rights.

It is uncontroversial that such regulation of individual autonomy could be embodied in the substantive law. (Indeed, many regulations of real property are embodied in substantive law). Congress or state legislatures could of course regulate litigant autonomy vis-à-vis particular substantive claims within statutory remedial schemes. The basic regulatory theory of legal claims, set forth above, is consistent with such regulation.

This Article's regulatory theory of legal claims, however, was offered in large part as a response to the inability of formalist theories of legal claims to guide *procedural* law in normatively coherent ways. Indeed, proponents of those formalist theories have largely sought to dictate the contours of procedural law, not the content of laws governing primary conduct. Thus, the following Parts develop two additional components to this Article's regulatory theory of legal claims. One, a theoretical account of whether and to what extent it is appropriately within the scope of the judicial role and courts' lawmaking powers to regulate litigant autonomy, including through procedural law and decisionmaking. Second, a theoretical account of the role of procedure as appropriately harnessed in that regulatory capacity, and more specifically here, as directed toward the reduction of transaction cost barriers to the effectuation of recognized substantive rights.

2. A Regulatory Theory of Legal Claims: The Judicial Role and Lawmaking Power in Regulating Litigant Autonomy

Operating on the premise that claimants are often appropriately characterized as property holders with certain rights vis-à-vis their claims,[187] one preliminary question is whether it is properly within the role of the judiciary to regulate those property interests. One traditional justification for government regulation of property rights is that the ownership of property is inextricably bound up with numerous public institutions and processes of the government. With real property, of course, the *source* of regulation is often legislatively enacted statutes or edicts issued by a democratically elected body (like a city council)—the democratically elected bodies with which the

187. Again, at least as a theoretical matter, one could also operate on the premise that these rights are "procedural rights," unmoored from property conceptions, rights that derive from the institutional exigencies of civil adjudication, and thus subject to some level of regulation by the judiciary. *See supra* note 163.

ownership of property is often inextricably bound. And to be sure, it would be entirely appropriate for Congress or a relevant state legislature to regulate litigant autonomy, say, by omitting a private right of action for enforcing a particular substantive remedial scheme itself[188] or in a stand-alone "procedural" legislative enactment.[189]

The justification for property-rights regulation by a government institution with which those rights are inextricably bound, however, has significant purchase vis-à-vis the judiciary as well. This is obviously true with regard to the substantive common law of property and judicial involvement in proceedings like the attachment of real property. It is likewise true with regard to legal claims more generally. Indeed, the fact that regulation of legal claims could—and in some instances, should—emerge from a democratically elected government body, does not diminish the justifications for judicial regulation of legal claims. Indeed, the judiciary is the government body most inextricably bound up with the ownership of legal claims.

Indeed, at least once a private right of action has been created, the judiciary is the government institution with which ownership of legal claims (even those ultimately sent to arbitration under the FAA[190]) is arguably *most* inextricably bound. At a basic level, the public provides the subsidy for the use of courts and thus for the bringing and pursuing of claims. State and federal procedural rules—promulgated, at least in the federal system, by the Supreme Court pursuant to congressionally delegated authority—provide the pathway for the effectuation of claims. Courts provide the means for enforcement of judgments, even those reached through private contract. Courts enter into judgment—and thus insinuate their continued supervision and management of—settlements between parties.

Further, courts have long had the authority to engage in regulation on behalf of the public interest, partly on the theory that the government provides the courts. For example, the "public interest" is one of the criteria for issuing an injunction—a criterion one might say permits regulation on behalf of the public. Of course, not every

188. *See, e.g.*, *In re* Intelligroup Sec. Litig., 468 F. Supp. 2d 679, 707 (D.N.J. 2006) (finding no private right of action under the Sarbanes-Oxley certification provisions based on Congress's explicit use of rights-creating language in 15 U.S.C. § 7244).

189. *See, e.g.*, N.Y. C.P.L.R. § 901(b) (Consol. 2016) (prohibiting plaintiffs whose claims arise under statutes providing for penalties or minimum damages awards from bringing those claims as part of a class action).

190. Federal Arbitration Act of 1925, 9 U.S.C. § 10 (providing for judicial review of arbitral awards).

injunction actually serves the public interest, and not every public interest justifies regulation. Along those lines, defining the scope of judicial authority to regulate in the "public interest" cannot reasonably be done only by reference to the fact that the public provides the courts.

It would instead seem appropriate for the interconnectedness between the publicly funded judiciary and the ownership of legal claims to provide both partial justification for and *boundaries of* the judicial role in regulating legal claims. Thus, whether regulating ownership of legal claims or other forms of property, the definition of what constitutes the "public interest" ought to derive from—and not extend beyond—the functions, institutional concerns, and normative commitments of the judiciary and the exigencies of civil adjudication.[191] Thus, identification of a public interest related, say, to the operation or character of the courts is appropriately the basis for judicial regulation;[192] invocation of unrelated public interests might well constitute an inappropriate judicial exercise of regulatory power.[193]

That said, many of the relevant "public interests" associated with judicial regulation of litigant autonomy—and, more particularly, regulation of that autonomy to address litigation market failures like transaction cost barriers to claiming—are intertwined with the functioning of courts and the normative values underlying, say, the Federal Rules of Civil Procedure.[194] For instance, judges have an interest in and a normative commitment to managing their own dockets; they also have institutional normative commitments to

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191. In *Shelley v. Kraemer*, the Supreme Court engaged in regulation of property subject to racially restrictive covenants purely for the public interest—for purely social policy and social justice reasons. 334 U.S. 1 (1948). Good as those reasons may be *as a social policy matter*, the implications for judicial authority to regulate property rights might be described as intolerable in breadth—with no limiting principle, what was to stop any court, anywhere, from restricting property rights for any reason it liked? Untethered from any constraint on "public interest" for purposes of the scope of judicial regulatory authority, *Shelley* arguably represented an inappropriate exercise of judicial authority more appropriately undertaken by democratically accountable legislatures and regulatory agencies.

192. One can already find examples of procedural regulation appropriately described as being more for the benefit of the courts and the public than litigants. *See, e.g.*, FED. R. CIV. P. 16 (governing settlement conferences); FED. R. CIV. P. 23(a)–(b) (setting forth the requirements for class certification).

193. *See supra* note 191 (discussing *Shelley v. Kraemer*).

194. *See* FED. R. CIV. P. 1 ("[The Federal Rules of Civil Procedure] should be construed, administered, and employed by the court . . . to secure the just, speedy, and inexpensive determination of every action and proceeding."); *infra* Part III.A.3 (discussing the normative purposes discussed by the Rules' drafters, including resolving claims on their merits).

resolving legal claims efficiently and on their merits.[195] At times, judges even have fiduciary or quasi-fiduciary duties to litigants and their claims, usually when those litigants' claims are being pursued on a representative basis.[196]

Moreover, courts have unique and particularized expertise in the dynamics of claiming, the litigation process, and claim resolution. And the value of this expertise is not diminished simply because, under this Article's regulatory theory of legal claims, judges would be called to engage in "regulatory"-type analysis when making decisions regarding litigant autonomy over claims. Indeed, courts already perform this sort of analysis in various areas of the litigation landscape. As just one example, courts engage in regulatory-like balancing of normative trade-offs in procedural interpretation and innovation vis-à-vis individual autonomy over legal claims in the class certification and settlement process. As Richard Nagareda has traced in the context of mass torts, for instance, the process of resolving legal claims resembles regulatory administration.[197] Any number of conceptual and normative considerations—individual autonomy, access to justice, compensation, deterrence, collectivist values like increasing settlement leverage for the class—are at play and in tension within this procedural arena. Nagareda has argued, therefore, that judicial review of mass settlements under Federal Rule of Civil Procedure 23(e) ought to resemble the "hard look" doctrine in administrative law,[198] which requires administrative agencies to provide reasoned explanations for their choices and to explicitly

195. *See* FED. R. CIV. P. 1; Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (interpreting FED. R. CIV. P. 8 as requiring plaintiffs to set forth "plausible" claims for relief, thereby injecting increased merits-based consideration earlier in litigation partially on the grounds that meritless claims impose undue settlement pressure on defendants and clog the courts' dockets); CHIEF JUSTICE JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/2U8D-SAHR] (emphasizing that the 2015 Amendments to the Federal Rules of Civil Procedure reflect the need for judges to run cases efficiently and to manage dockets).

196. *See, e.g.*, *In re* Prudential Sec. Inc. Ltd. P'ships Litig., 985 F. Supp. 410, 414 (S.D.N.Y. 1997) ("In considering the fairness of fees the courts serve as fiduciaries, guarding the rights of absent class members."); *see also* Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975) ("Under Rule 23(e), the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members."); Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833 (2011) (discussing the judge's role as a fiduciary in class action and quasi-class-action fee review).

197. *See, e.g.*, NAGAREDA, *supra* note 14, at 5.

198. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 56–57 (1983) (utilizing the hard look doctrine to find agency acted arbitrarily and capriciously when it failed to provide adequate basis and explanation for its action).

balance competing normative considerations.[199] Nagareda's prescription (and, in some cases, description[200]) rests upon notions that the judiciary has both the authority and the expertise to engage in a cost-benefit analysis to regulate individual autonomy over class claims.

Of course, for Nagareda, the demand for a "hard look" analysis derives in large part from the administrative-like nature of a mass-tort proceedings generally.[201] Perhaps, then, judicial expertise vis-à-vis legal claims, litigant autonomy, and litigation dynamics would not, for Nagareda, justify the "regulatory"-type decisionmaking urged by this Article.[202] But perhaps his view would not be so limited.

Even at the time Nagareda urged a "hard look" analysis in the context of mass torts, the Court had already engaged in a regulatory-type balancing analysis outside of the mass-tort context.[203] More fundamentally, however, the appropriateness of judicial regulation of legal claims has support in procedural history and theory itself—particularly the history and structure of the Federal Rules of Civil Procedure. Historically, the motivations for and the creation of the modern administrative state and the Federal Rules of Civil Procedure developed largely in parallel. As Hiro Aragaki has explored, many of the same concerns that animated administrative regulatory reform in the 1920s and 1930s animated the work of the procedural reformers operating at the same time.[204] Indeed, Pound, Clark, and other procedural reformers were working within a larger progressive context that sought, through various forms of regulation, to achieve both

199. Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 903 (1996).

200. *See, e.g.*, *id.* at 917–19 (describing an administrative-like approach to settlement approval and design by Judge Robert M. Parker); *see also* Martha Minow, *Judge for the Situation: Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2021 (1997) (describing the various administrative-agency-like tasks Judge Weinstein assumed in his development, supervision, and management of the Agent Orange class settlement).

201. *See* Nagareda, *supra* note 199, at 948–52.

202. This is, of course, a tragically unanswerable question. *See, e.g.*, J. Maria Glover, John C.P. Goldberg, Samuel Issacharoff, Suzanna Sherry, *Tributes to Richard Nagareda*, 64 VAND. L. REV. 1401 (2010) (four separate tributes).

203. *See, e.g.*, Matthews v. Eldridge, 424 U.S. 319 (1976) (finding that individuals have a statutorily granted property right to Social Security benefits which can only be terminated without sufficient due process protections, and determining the extent of those due process protections by devising an administrative-like balancing test of private and public interests).

204. Aragaki, *supra* note 6, at 1975–77 (focusing primarily on the enactment of the Federal Arbitration Act as being of a piece with Pound's and Clark's procedural reforms, particularly vis-à-vis the achievement of access to justice).

substantive and procedural goals, like better access to justice and efficient and fair resolution of disputes.[205]

Thus, it seems entirely within the scope of the judicial role—both as a matter of the institutional relationship with and expertise regarding legal claims—to regulate litigant autonomy. A second question is whether and to what extent such regulation falls within the scope of the courts' substantive and procedural lawmaking powers (and particularly, the more limited powers of the federal courts[206]). As for substantive lawmaking powers, federal courts are rather constrained, as they generally lack the power to make common law.[207] However, federal courts do have interstitial lawmaking power in relation to federal statutes.[208] Unless Congress has provided to the contrary, courts have some leeway to interpret and give meaning to relevant statutes,[209] to apply statutory dictates to case-specific facts, and to fill in statutory gaps—all of which may bear on litigant autonomy over claims.[210] Thus, exercise of this power in ways that determine or impact litigant autonomy is, at least as a theoretical matter, appropriate vis-à-vis the balance of power between Congress and the judiciary.[211]

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205. *Id.* at 1969–71.

206. Of course, state courts have broad powers to develop common law that may well define, expand, or restrict litigant autonomy over claims. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

207. *See id.*

208. *See, e.g.*, Wolff, *supra* note 155, at 1044.

209. This Article does not address long-standing debates regarding the precise scope and proper methods of federal courts' power in matters of statutory interpretation. For views on this debate see, for example, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) (setting forth the various mechanisms of textual analysis of statutory and constitutional provisions); J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009) (rejecting the notion that all text—particularly as it ages—can be given reliable meaning by judges, and therefore counseling in favor of judicial restraint in matters now best left to the democratically accountable branches of government); Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism [https://perma.cc/EJ2Y-LDXU].

210. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (interpreting FED. R. CIV. P. 23 in light of what Congress said in the Rules Enabling Act); Wolff, *supra* note 155, at 1044 (discussing the federal courts' interstitial lawmaking power vis-à-vis substantive statutes); *see also* Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 725–26 (N.D. Ill. 2014) (concluding that plaintiffs' funding arrangement did not constitute "officious" intermeddling under Illinois laws prohibiting maintenance and champerty).

211. *See* Glover, *supra* note 155 (setting forth a theory of "procedural symmetry," whereby federal courts have power to interpret federal statutes in ways that affect the operation of procedural rules as a matter of separation of powers and the Rules Enabling Act, but arguing that the Court's current practice of making these substantive judgments implicit or obscure contravenes the judicial responsibility to provide particularized analysis and reasons for substantive decisions in its opinions).

Indeed, federal courts have long exercised this interstitial lawmaking power to determine whether federal statutes do or do not provide a private right of action in the face of statutory silence—an exercise of power that goes to the very existence of legal claims and any accompanying litigant autonomy. Further, the Supreme Court has recently interpreted a number of substantive federal statutes in ways that bear directly on litigant autonomy over legal claims as a matter of *substantive* law—for instance, by either facilitating or impeding the class action device.[212]

The scope of federal courts' *procedural* lawmaking powers is also circumscribed, but likely still broad enough to include room for some regulation of legal claims and litigant autonomy. In the federal system, it is the Supreme Court's task, subject to congressional approval, to promulgate procedural rules,[213] so long as those rules do not have the effect of "abridg[ing], enlarg[ing], or modify[ing]" substantive rights.[214] Federal courts then have room, within the (somewhat disputed[215]) confines of the Rules Enabling Act, to interpret and apply those procedural rules, even in ways that would affect litigant autonomy over claims, so long as any procedural decision does not conflict with the explicit dictates of the relevant substantive right. To synthesize, and as I have explored in other work, the federal courts' exercise of procedural lawmaking power must not (1) contravene any explicit statement to the contrary by Congress or relevant state legislature in the substantive right or remedial scheme

212. *See, e.g.*, Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1191 (2013) (interpreting Rule 10b–5 of the Securities and Exchange Act of 1934 as *not* requiring proof of materiality at the certification stage, thereby reducing transaction costs to the effectuation of securities fraud claims, now more easily certifiable as a class action *as a matter of substantive law*); *Dukes*, 564 U.S. at 367 (rejecting the Ninth Circuit's "Trial by Formula" as it would infringe upon defendants' right, under Title VII, to raise defenses in individual proceedings against plaintiffs' claims of discrimination, thus imposing limitations on plaintiffs' ability to aggregate claims).

213. Rules Enabling Act, 28 U.S.C. § 2072 (2012).

214. *Id.*

215. *Compare* Gasperini v. Ctr. for Humanities, 518 U.S. 415, 462–65 (1996) (Scalia, J., dissenting) (positing that a Federal Rule of Civil Procedure is either valid under the Enabling Act or not), *and* Shady Grove Orthopedic Assocs,, P.A. v. Allstate Ins. Co., 559 U.S. 393, 409–10 (2010) (Scalia, J.) (plurality opinion) (making the same basic point about the validity of Federal Rules), *with Shady Grove*, 599 U.S. at 416–19 (Stevens, J., concurring) (positing that the second portion of the Enabling Act should be analyzed in a specific comparison of the relationship between the relevant Federal Rule and the relevant state policy), *and* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 722–25 (1974) (criticizing the Supreme Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965), for ignoring the second provision of the Rules Enabling Act).

itself[216] or (2) contravene a binding judicial interpretation of *substantive* law, at least without explicit change, clarification, or reversal of that prior substantive proclamation.

For example, a federal court could not, say, interpret a federal statute that explicitly provided for a private right of action as not containing one. Similarly, it could not allow plaintiffs to satisfy the strictures of Federal Rule of Civil Procedure 23 by using a statistical sampling of trials if the language of the relevant federal statute under which plaintiffs brought claims explicitly stated, or was interpreted by the Supreme Court to mean, that defendants have a right to rebut any plaintiff's claims through individualized proof.[217] In both situations, the federal court would have tread upon the separation of powers concerns underlying the Rules Enabling Act by using procedural decisionmaking to "abridge, modify, or enlarge" congressionally enacted pronouncements, whether those contained explicitly in the statutory text or in the Court's interpretations of that text.[218]

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216. *Shady Grove*, 599 U.S. at 404, 410 (Scalia, J.) (plurality opinion) (describing FED. R. CIV. P. 23 as a rule that "really regulates procedure," and thus is valid under the Enabling Act and also ignoring as irrelevant legislative history about the New York state legislature's purpose in enacting a statute that prohibited the use of class actions to vindicate claims involving statutory penalties or statutory damages); *id.* at 418–20, 436 (Stevens, J., concurring) (urging a more robust analysis under the Enabling Act that would take into account substantive state prerogatives but concluding that because the New York legislature's class action prohibition for claims giving rise to statutory penalties was not embodied in any particular substantive statute that provided for said penalties, applying FED. R. CIV. P. 23 in federal court did not "abridge, modify, or enlarge" a substantive right under the Enabling Act). The dissenting Justices in *Shady Grove*, not to mention scores of procedural theorists, may not draw the line between substance and procedure as Justice Stevens did in *Shady Grove*, between specific substantive statutes and stand-alone statutes that apply broadly to those substantive statutes. *Id.* at 443–45 (Ginsburg, J., dissenting) (focusing on the substantive policies behind N.Y. C.P.L.R. § 901(b), though not within the Enabling Act rubric of *Hanna*). I do not resolve that debate here. For the time being, this Article clarifies the scope of the judiciary's procedural lawmaking power to regulate legal claims by reference to the existing boundaries of that power embodied in current Supreme Court doctrine.

217. *Dukes*, 564 U.S. at 367 (holding that plaintiffs' proposed "Trial by Formula" to overcome Rule 23 certification hurdles was prohibited by the Enabling Act, as it would ride roughshod over defendants' right to rebut plaintiffs' claims of discrimination through individualized proceedings); Wolff, *supra* note 155, at 1034–37 (noting that the relevant portion of Title VII regarding the right individualized defenses was not explicit about whether that right required individualized proceedings and concluding that the Court engaged in interstitial (but implicit) substantive lawmaking on that score).

218. The scope of federal courts' procedural lawmaking power under the Enabling Act is less clear in diversity cases, in a number of respects. One continuing question is what constitutes "judge-made" law versus a Federal Rule of Civil Procedure under the *Erie* doctrine. *See, e.g.*, *Gasperini*, 518 U.S. at 458 (Scalia, J., dissenting) (criticizing the majority opinion for not finding that certain Seventh Amendment interests were bound up with Federal Rule of Civil Procedure 59). Another is whether and to what extent the validity of federal procedural rules under the Enabling Act calls for analysis of state substantive policies in particular cases. *See, e.g.*, *Shady Grove*, 559 U.S. at 425 (Stevens, J., concurring) (arguing that the Enabling Act analysis should

Congress has not explicitly deemed legal claims arising under federal statutes generally, or certain legal claims in particular, as forms of property, individual or otherwise.[219] Unless Congress (or a state legislature, when relevant) states otherwise, then, courts are not bound to formalistic conceptions of legal claims when engaging in procedural decisionmaking, at least not as a matter of separation of powers. As discussed above, though, the Supreme Court *has* explicitly held that legal claims are forms of property, and it has exhibited a trend toward individualistic conceptions of legal claims in certain areas of its jurisprudence.[220] Nonetheless, it would be inaccurate to assert that the Court had adopted one or the other formalistic conceptions of legal claims.[221] The scope of judicial procedural lawmaking power, even the more limited version for federal courts, thus appropriately includes room for regulation of litigant autonomy over legal claims through procedure.

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The foregoing provided an account of the appropriateness of the judicial role in regulating litigant autonomy over claims, as well as the general scope of the judiciary's substantive and procedural

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not simply ask whether a Federal Rule "really regulates procedure," but should consider whether that rule "abridges, modifies, or enlarges" a *state* substantive right); *Gasperini*, 518 U.S. at 462–65 (Scalia, J., dissenting) (suggesting that Federal Rules of Civil Procedure are either valid or not). Finally, there is continuing debate regarding whether Federal Rules of Civil Procedure should be interpreted narrowly to avoid conflict with important state policies. *Shady Grove*, 559 U.S. at 457–59 (Ginsburg, J., dissenting) (arguing that all efforts should be made to accommodate state interests in the analysis of whether a Federal Rule of Civil Procedure actually conflicts with the state law). For a fuller discussion of the Court's continued struggle for coherence and theoretical soundness in its *Erie* jurisprudence, see, for example, Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17 (2010).

219. Perhaps the closest Congress has come to doing so was including a "collective action" provision in the Fair Labor Standards Act, but in the FLSA, Congress made no explicit mention of a conception of legal claims, and it would be inappropriate to read the statute as doing so. For one, the history of the FLSA itself, as well as the "collective action" provision, suggests that it was intended to apply to low-wage, unorganized (non-union) workers. *See* FRANCES PERKINS, THE ROOSEVELT I KNEW 247–59 (1946). Moreover, the "collective action" provision in the FLSA is not mandatory; indeed, it requires an affirmative choice by any would-be litigant to opt-in to the action. 29 U.S.C. § 216(b) (2012).

220. *See supra* Part I.

221. Indeed, just last term, the Supreme Court invoked language sounding in collective conceptions of legal claims in issuing a holding that, to the extent statistical evidence was permissible in an individual case, it must also be available in a class case. *See* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1046 (2016) (recognizing the inherently collective nature of certain types of injury and stating that "[i]n many cases, a representative sample is 'the only practicable means to collect and present relevant data' establishing a defendant's liability' ").

lawmaking powers in doing so. However, an important, related question remains: Is there an account of procedure *itself* (somewhat broadly defined[222]) that would support and then operationalize that judicial power?

Answering that question comprehensively would of course require an equally comprehensive theoretical account of procedural rights and the related roles of procedure in our litigation system. Such a task is well beyond the scope of a single article. However, the next Part begins that larger project by offering a theory of procedure as appropriately directed toward reducing transaction cost barriers to claiming.

3. A Theory of Procedure in Reducing Transaction Cost Barriers to the Effectuation of Substantive Rights

This Article's regulatory theory of legal claims calls for the regulation of litigant autonomy to address market failures—and in particular, here, transaction cost barriers to the effectuation of recognized legal claims. Building upon the foregoing, then, this final Part provides an account of the role of procedure as properly directed toward regulating litigant autonomy *for that purpose.* Before proceeding, a few preliminary points are in order. To begin, this account of procedure's role in reducing transaction cost barriers to effectuating recognized rights should not be understood as prescribing the *only* role for procedure, either in our litigation system generally or within this Article's regulatory theory of legal claims in particular. Nor is it intended to suggest that this procedural role is *absolute,* in the sense that it would necessarily have to be balanced with, and at times against, other procedural roles when relevant and appropriate. Instead, the following account of procedure's role in reducing transaction cost barriers to the effectuation of substantive rights is offered here as (1) a building block toward a larger theoretical account of procedure and procedural rights and (2) a foundational component of an ultimate overall regulatory framework for operationalizing this Article's regulatory theory of legal claims.

An account of procedure as appropriately directed toward reducing transaction cost barriers to the effectuation of recognized legal claims perhaps logically begins with, and is certainly grounded in, the history of the Federal Rules of Civil Procedure themselves. The

222. *See supra* Part II.B (discussing substantive doctrines like maintenance and champerty that are nonetheless "procedural" in nature, given that they do not govern primary human behavior or conduct).

dominant conception of procedure and of the Federal Rules, oft repeated over the decades in judicial opinions, casebooks, and scholarly works, is that procedure is the "handmaid" of substance. That conception of procedure drove the work of the Rules' drafters, particularly Pound, who viewed procedure's relationship with substance as one of aiding—not just getting out of the way of—resolution of substantive claims on the merits.[223]

For procedure to serve as the "handmaid" of substance, Pound emphasized the need for judicial (as opposed to party[224]) discretion over procedure, and that

> [e]xcept as they exist for the saving of public time and maintenance of the dignity of the tribunals, . . . rules of procedure should exist only to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case; and nothing should depend on or be obtainable through them except the securing of such opportunity.[225]

For Pound, procedure's role in providing a "full" and "fair" "opportunity" to litigants to present or defend their cases was integral to procedure's role in aiding the resolution of cases on the merits. These interconnected purposes are reflected in Pound's specific suggestions regarding the content of procedural rules—for instance, those regarding rules of pleading, joinder, and trials, among others—suggestions that ultimately found expression in the Federal Rules themselves.[226]

Pound's view regarding the roles of procedure—and particularly the role of "secur[ing] to all parties . . . a fair opportunity to present their case"—are consistent with the role for procedure prescribed by this Article. For starters, to the extent transaction cost barriers to the effectuation of recognized substantive rights are present—whether as a general matter, as a product of procedural law, or as the result of party engineering of the procedural landscape to generate those costs—procedure's prescribed role in securing an opportunity for litigants to present their cases would seem to involve

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223. *See* WRIGHT & MILLER, *supra* note 2, § 1182 (stating that a basic philosophy of the Federal Rules is to facilitate a "determination of litigation on the merits"); Tidmarsh, *supra* note 2, at 527 (noting that one key goal of the new procedural rules was "the resolution of cases on their substantive merits," and did not intend for procedure to be subjugated to substance, but rather to be integrated with it).

224. While Pound leveled any number of criticisms of the adversarial system, he accepted its assured survival, as the "yoke of commercialism" had long since perverted "the relation of attorney and client" to one of "employer and employee." Pound, *supra* note 4, at 415, 417.

225. Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 402 (1910).

226. *See* Tidmarsh, *supra* note 2, at 527–28.

the reduction of those costs in appropriate circumstances.[227] To put the point perhaps as Pound might, procedure should ensure that cases are resolved on the merits, not the transaction costs.

Moreover, the law and economics insights from which this procedural role derived[228] resonate with Pound's theories of procedure. In particular, the notion that procedure should reduce transaction costs and error costs[229] aligns with Pound's views that procedure should both secure for litigants an opportunity to present their cases and facilitate the resolution of cases on the merits. Moreover, whether expressed in economic terms (as transaction and error costs) or in procedural terms (as opportunity for claiming and merits-based resolution of claims), the two roles for procedure are complementary, even if at times in tension. Indeed, procedure's role in reducing error costs[230]—acknowledged as a necessary role even by those espousing outcome-based theories of procedure—helps blunt potential normative arguments that allowing procedure to reduce transaction cost barriers to the effectuation of claims will gin up litigation and bring claims of dubious merit into the system.

Along those lines, and as with any procedural role, the role in reducing transaction cost barriers to the effectuation of recognized

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227. As this Article has acknowledged, various strains of procedural theory have long recognized that any procedural role, however dominant a given theory argues it should be, must be balanced against competing interests. *See, e.g.*, *supra* note 156. That said, it is not the task of this Article to set forth to resolve long-standing debates regarding the theoretical or normative value and/or scope of the day-in-court ideal by settling questions of which procedural interests—beyond the ones articulated here—matter and by how much. For particular views on these debates, see, for example, Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1880 (2009) (providing a theoretical grounding for the day-in-court ideal, from which the authors argue the Court should almost never depart); Lawrence Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004) (arguing that participation rights are the touchstone of procedural rights). *See generally* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (discussing the notion of a full and fair opportunity to litigate an issue for purposes of offensive non-mutual collateral estoppel).

228. *See supra* Part III.A.

229. *See, e.g.*, POSNER, *supra* note 183, at 773–76 (describing the role of procedure as one of reducing transaction costs and error costs); Kuo-Chang Huang, *Does Discovery Promote Settlement? An Empirical Answer*, 6 J. EMPIRICAL LEGAL STUD. 241 (2009).

230. *See* POSNER, *supra* note 183. Procedure's role in reducing error costs is acknowledged by theorists outside the law and economics realm as well. *See, e.g.*, Bone, *supra* note 156, at 1018–25 (discussing Dworkin's outcome-based theory of procedural rights and moral harm, which nonetheless takes into account error costs). Moreover, at least inasmuch as Pound believed that the primary purpose of adjudication was to produce outcomes that enforced the substantive law, he would likely consider it part of procedure's role to reduce error costs. Like outcome-based and social justice theorists who would emerge later, Pound's view that the ultimate goal for procedure was to bring about merits-based resolution would seemingly be offended by, say, the extraction of verdict, settlement, or other resolution based on nonmeritorious claims. *See, e.g.*, Glover, *supra* note 2, at Parts I and III.

rights is necessarily constrained by the relevant substantive rights themselves. As a historical matter, procedure was inherently constrained by the subservient role vis-à-vis substantive rights that Pound ascribed to it; more formally, it is constrained by the substantive law because of the Rules Enabling Act, the *Erie* doctrine, preemption doctrines, and the like. This constraint, however, is also question-begging vis-à-vis the appropriateness of directing procedure toward the reduction of transaction cost barriers to the effectuation of claims: Specifically, and in the absence of any explicit regulation of litigant autonomy within a particular substantive law, is there anything about substantive rights qua substantive rights that limits, or even precludes, this theory of the role of procedure?

At a broad level, this question highlights the substantive law flipside of Pound's procedural coin. For Pound, procedure was meant to *integrate* with substantive law,[231] and the ultimate social justice goals Pound associated with the outcomes of adjudication were inextricably linked with the procedures for administering substantive rights.[232] Yet, as commentators have noted, Pound's theories of social justice were decidedly thin,[233]and thus his prescriptions run the risk that procedure would facilitate the enforcement of normatively *undesirable* legal rules and therefore facilitate social *in*justice.

Since Pound's time, far more robust accounts of social justice, the nature of law and moral harm, and substance-divorced roles of procedure have emerged.[234] And in no way do I diminish their importance or relevance to any ultimate theory of procedure and procedural justice. It is important to note, though, that many of these concerns relate more directly to the ex post effects of any adjudicative judgment upon primary human behavior—ex post effects that, to be

231. *See* Tidmarsh, *supra* note 2, at 523 n.37 (citing various of Pound's works, including Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905) (using the history of law and equity to argue against legal formalism vis-à-vis substance and procedure)).

232. Pound, *Causes of Popular Dissatisfaction*, *supra* note 4, at 406 (criticizing the formalist procedural and litigation system, the "sporting theory of justice," of the early 1900s as follows: "The inquiry [in the cases] is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly?").

233. *See* Tidmarsh, *supra* note 2, at 530.

234. Since Pound's time, theories for justifying law—such as natural law, legal positivism, and morality theories—have been developed and enriched. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (law and morality); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) (natural law); H. L. A. HART, THE CONCEPT OF LAW (1961) (legal positivism); JOHN RAWLS, A THEORY OF JUSTICE (1971) (theory of justice in a pluralistic society). For discussion of some of procedure's additional, substance-divorced functions, see, for example, John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657 (1994); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999).

sure, constituted one of Pound's key, but under-theorized, goals for trans-substantive procedure. An account of procedure as properly directed toward the reduction of transaction costs to the effectuation of recognized rights, however, involves an interaction between substance and procedure that is more bound up with ex ante opportunities—opportunities for participation in a lawsuit, and opportunities for presenting one's claims to a court in the first place.

Though obviously related to any ultimate effects of adjudication, the interconnectedness between the "handmaid" role of procedure ex ante and substantive law therefore relates less directly to outcome-based metrics of social justice and more directly to the *functional* nature of substantive rights. Private rights of action—whatever their ultimate normative valence—are neither self-starting nor self-executing. And courts (as well as other forms of dispute resolution, for that matter) are accessible only through assertion, through procedural means, of a right to remedy under substantive law. If cases should be resolved on their merits (or at least not on their transaction costs), reduction of the financial impediments of court access or lawsuit maintenance seems foundational to procedure's "handmaid" role ex ante.[235]

Indeed, the ex post goals reflected in the text of the Federal Rules themselves—again, whatever their normative valence—are derivative of and dependent upon this related, but conceptually distinct, ex ante role for procedure in reducing transaction cost barriers to the effectuation of substantive rights. For instance, Federal Rule of Civil Procedure 1 states that procedure should facilitate the "determin[ation]" of claims; achievement of that goal would necessarily require procedural mechanisms for the *bringing* of claims—and indeed, such mechanisms can be found in the Federal Rules.[236] More importantly, in creating these mechanisms—

235. To be sure, Congress can address transaction costs in its statutory remedial schemes, for instance by including statutory or treble damages provisions to ease the costs of claiming. This sort of substantive lawmaking is of course consistent with regulating legal claims and litigant autonomy set forth in this Article. Nonetheless, transaction cost barriers to claiming have persisted even in the face of such statutory provisions. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (involving nonmarketable claims arising under the Sherman Antitrust Act, which provides for treble damages); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001) (construing narrowly the terms "prevailing party," contained in numerous federal statutes providing fee awards to "prevailing part[ies]," as not applicable unless the legal relationship between the parties had been altered by final judgment or, say, a consent decree).

236. FED. R. CIV. P. 1; *see, e.g.*, FED. R. CIV. P. 7 (defining pleadings); FED. R. CIV. P. 8 (governing the sufficiency of pleadings); FED. R. CIV. P. 12 (providing various opportunities for a party to defend against claims brought against her).

particularly those related to pleading—Pound and the reformers were guided by a view that procedural technicalities should not erect barriers to claiming: procedure should not discourage ordinary people from *bringing* claims to court;[237] rather procedure should *secure* litigants the opportunity to present their cases. Indeed, if procedure has no role in securing some modicum of opportunity for litigants (and perhaps "ordinary" litigants in particular) to present their cases, procedure's interrelationship with substantive law ex ante does not amount to all that much; its interrelationship ex post amounts to even less.

As it turns out, though, these assertions about the weakness of the relationship between procedure and substance, whether ex ante or ex post, are less predictive than they are descriptive. Commentators have noted that, over the years, procedure has been reduced to somewhat of a second-class status; rather than being interrelated with substance, procedure has been shunted to the side.[238] Indeed, an anemic or formally nonexistent interrelationship between substance and procedure is precisely the sort of relationship the Supreme Court has described in recent cases. A prominent example comes from the majority opinion in *American Express Co. v. Italian Colors Restaurant*, authored by the late Justice Scalia. There, the Supreme Court described substantive rights as "merely formal,"[239] thereby accepting the descriptive reality that substantive rights are not self-executing as normatively tolerable or even desirable.[240] The Court's description of substantive rights as "merely formal," though perhaps the most blatant in language, is nonetheless an unsurprising outgrowth of the Court's rigidly formalistic (and arguably theoretically unsound[241])

237. *See* Tidmarsh, *supra* note 2, at 522–25.

238. *Id.* at 516.

239. *See Italian Colors*, 133 S. Ct. at 2310; *see also* Glover, *supra* note 138, at 3073 ("In abandoning the idea that arbitration agreements cannot impair parties' practical ability to bring federal statutory claims, the Court effectively reduced federal substantive causes of action to mere formalities."). Even in *Italian Colors*, the Supreme Court acknowledged, begrudgingly, that notions of effective vindication of statutory rights *might* cover filing and administrative fees in arbitration—transaction costs—that would make access to the forum impracticable. *Italian Colors*, 133 S. Ct. at 2310–11. This equivocation on the point seemed to reflect, at best, a grudging acceptance of its prior dictum to that effect in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000), but possibly a willingness to retreat from that dictum in the future. Glover, *supra* note 138, at 3073.

240. *Italian Colors*, 133 S. Ct. at 2310 (stating that the existence of a substantive right does not carry with it a procedural path to vindication).

241. *See* Burbank & Wolff, *supra* note 218 (arguing that formalism is unsound policy); Glover, *supra* note 155.

views of "procedure" and "substance" that have long existed in its *Erie* and *Hanna* jurisprudence.[242]

Under a "merely formal" conception of substantive rights, it would not necessarily be impermissible for procedural law to reduce transaction costs to claiming.[243] However, neither the Court's decisions in *Shady Grove* and *Italian Colors* nor the formalism undergirding those opinions would consider it either the appropriate role of procedure or the dictate of substantive rights to reduce those costs. Indeed, the Court in *Italian Colors* makes clear that private parties may engineer the procedural landscape in ways that *increase* those costs, at least in arbitration. Pound, I daresay, would shudder at these thoughts.[244]

The Court's "merely formal" conception of substantive rights, however, is not just problematic for Pound. Without an opportunity for vindication, substantive rights amount to little or nothing as a matter of property theory (worth nothing) and as a matter of certain long-standing strains of rights theory (actually nothing).[245] And this notion that one role for procedure is to secure an "opportunity" for the vindication of these substantive rights, lest they amount to nothing, also undergirds the Rules Enabling Act itself, which calls for consideration of the interaction between substantive rights and relevant procedures.[246]

The Court's "merely formal" conception of substantive rights is also in tension with Congress's long-standing, frequent reliance upon private litigation to achieve regulatory directives.[247] Congress and

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242. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 414–15 (2010) (advocating for the *Sibbach* method, which produces "a single hard question of whether a Federal Rule regulates substance or procedure"); Sibbach v. Wilson & Co., 312 U.S. 1, 13–14 (1941) ("The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."); *see also* Burbank & Wolff, *supra* note 218, at 25–26 (describing the Court's *Erie* jurisprudence as "wooden").

243. Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) (explicitly invoking such considerations in Judge Posner's certification and issue classing decisions).

244. Tidmarsh, *supra* note 2, at 515, 520 (noting that Pound believed that judges, not parties, should exercise control over procedure; noting also that Pound spoke out vigorously against legal formalism).

245. This notion derives in part from John Locke's insight that "*ubi jus ibi remedium*" (rights without remedies) are empty rights. *See* JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 20, at 12 (J.W. Gough ed., Basil Blackwell 1946) (1690).

246. *See* Burbank & Wolff, *supra* note 218, at 27–31 (arguing that the Rules Enabling Act, among other things, calls for consideration of the interaction between the substantive right at issue and the relevant procedure).

247. *Cf.* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES 19 (2010) (explaining how "Congress's difficulty in controlling

legislatures know well that substantive rights are not self-executing: when they wish to calibrate (or recalibrate) the reach of rules governing primary conduct, they frequently adjust the *procedures* that enable, or disable, the effectuation of those rights. Other times, but operating under a similarly less formalistic conception of substantive rights, legislatures recalibrate the contours of the substantive right in ways that either facilitate or frustrate the ability of claimants to access transaction cost reducing procedures.[248]

Finally, the "merely formal" descriptor that the Court assigns to substantive rights misrepresents the actual contours of the very jurisprudence that generated it. Further, that descriptor obscures the very real ways in which some of the holdings in the Supreme Court's facially formalistic, *procedural* jurisprudence are driven in large part by *substantive* judgments—and more to the point, judgments about the interaction between the underlying substantive law and relevant procedural mechanisms.[249] In fact, many of the Court's recent class action "procedural" holdings have been driven in large part by the extent to which the Court is comfortable (or not) with that interaction of procedure and substance as a matter of facilitating or frustrating claiming.[250] In short, the Court's conceptual formalism is somewhat fictive.[251] Behind the formalist veil, even the current Court recognizes and accounts for a close interrelationship between procedure and the effectuation of substantive rights. Whatever the view of particular justices regarding the proper contours of that interrelationship, it seems that it cannot credibly be a view that substantive rights are "merely formal."

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The notion that procedure may appropriately be directed toward the reduction of transaction cost barriers to the effectuation (or

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the administrative state can cause . . . reliance upon private lawsuits, which provide a mechanism for Congress to bypass unwilling agencies and opposing presidents").

248. *See, e.g.*, Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (2012) (codified as amended in scattered sections of 15 U.S.C.) (requiring heightened pleading for securities fraud in order to make claiming harder, but accepting the use of the fraud-on-the-market theory for securities fraud claims, which makes claiming as a class action easier); N.Y. C.P.L.R. § 901(b) (Consol. 2016) (prohibiting the use of class actions for claims for statutory penalties).

249. Glover, *supra* note 155.

250. *Id.*

251. *Id.* Ironically, the facially, but somewhat fictively, formalist analysis potentially exacerbates the transaction costs and error costs generated by uncertainty in the substantive law. *See* POSNER, *supra* note 183.

opportunity to effectuate) of substantive rights is not merely a theoretical one. That notion also provides a means for operationalizing this Article's overall regulatory theory of legal claims, which I undertake in the following Section. By doing so, the next Section demonstrates ways in which this Article's regulatory theory of legal claims generates new and more coherent procedural paths for our litigation system—paths the formalist conceptual views struggle to identify.

B. The Regulatory Theory of Legal Claims Applied

Moving from formalistic conceptual theories to a regulatory theory of legal claims must not only be justified as a theoretical matter; it must be justified as a functional matter. This Section therefore revisits the difficult litigation problems presented in Part II, as well as the conceptual debate regarding class claims from Part I, through the lens of this Article's regulatory theory of legal claims. This analysis generates new insights on these problems, as well as different, and more normatively coherent, potential regulatory prescriptions regarding litigant autonomy than those generated by dichotomous conceptual theories. Those insights, and the potential procedural prescriptions they generate, commend the theoretical shift urged by this Article.

1. Applying the Regulatory Theory of Legal Claims to Rule 68 Offers of Settlement to Named Plaintiffs

Recall from Part II the basic problem at the intersection of Rule 68 offers of settlement and class actions. Before a class is certified, the defendant offers to settle with the named plaintiff. On the one hand, exchange of the named plaintiff's claim with the defendant *pre-certification* appears a straightforward example of smooth functioning in the market for legal claims. On the other hand, the gambit by the defendant, presumably, is to eliminate or devalue all the absent class members' claims by leaving them without a named plaintiff.

If the defendant succeeds, assuming the Rule 68 settlement offer is not of sufficient value to cause the defendant to change or internalize the costs of its behavior, the "smooth" exchange between the named plaintiff and defendant would not just frustrate deterrence. It would destroy the value of the remaining class members' claims, and in a particular way: absent the class mechanism, many (or perhaps all) remaining plaintiffs would now face the significant

increase in transaction costs associated with pursuing claims individually. These transaction costs—generated by the named plaintiff's exchange of her claim—represent the particular form of litigation market failure that may be addressed under this Article's theory.

Here, there is additional justification for potential regulation. Although the class is not yet certified, the named plaintiff is in an advantageous position vis-à-vis settlement negotiations *because of* her relationship to and membership in the class. Specifically, given the defendant's strategic gambit, the plaintiff is likely able to leverage the power of the class to obtain a more favorable settlement than she otherwise could on her own.[252] She extracts *more* value for her property than she could otherwise by exploiting the value of absent class members' property[253]—the defendant's willingness to settle with the named plaintiff presumably stems in significant part from its hope that settlement with the named plaintiff will functionally resolve the entire class action—a hope worth considerable value if realized. Thus, the named plaintiff receives a windfall by leveraging the considerable value to the defendant of the transaction-cost market failure generated by the alienation of her claim.

Those espousing a collectivist view of legal claims might well point to this particular normatively undesirable state of affairs both as evidence of its theoretical soundness and as support for maintaining the formalist status quo. Indeed, this scenario reinforces the notion, embedded in many collectivist views, that claims of related conduct against the same defendants are inextricably intertwined, their fortunes tied, and, therefore, their property interests collective as opposed to individual. Those notions, in turn, would guide procedural law toward a remedy whereby named plaintiffs' rights to alienate claims are restricted or deemed nonexistent. Either way, the collectivist view remedies the market failure; there is no need for a different approach to legal claims. There are a number of difficulties with this.

It is unclear whether the formalist collectivist theory of class claims has much, if anything, to say about the functional relationship between the named plaintiff's claim value and the claim value of other putative class members. Formal collectivist conceptions lose their functional force when no class has been certified, and thus no entity

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252. *See, e.g.*, *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (discussing the power of aggregate stakes at the bargaining table); Rosenberg, *supra* note 63, at 427 (same).

253. *See supra* Part III.A (property law disfavors third-party exploitation of others' property interests for their own benefit).

has emerged. In order to dictate remedies in this scenario, then, collectivist theories of legal claims would have to recognize the existence of informal entities or collective units—joined, perhaps, by collective welfare,[254] public purpose,[255] or shared interest that might be frustrated or destroyed by collective action problems and the like,[256] just to name a few. As a matter of theory, the collectivist view would likely support this recognition, if it does not already. Then the real problems emerge.

Consider the world that a formalist collective view of legal claims, untethered to formalist notions of litigation entities, would create. Begin with the pre-certification Rule 68 settlement offer scenario presented here. Many groups with similar injuries caused by the same defendants do not become part of a certified class, for any number of reasons.[257] Moreover, settlements often inform other settlements of similar claims.[258] Thus, would an individual in such a group who, say, needed compensation quickly be prohibited from settling if it could be argued that her settlement would establish a low ceiling for future settlements involving similar injuries by the same defendant? Could any member of a group who suffered similar injuries, even by different defendants, be similarly restricted, either on the grounds that the group's claims are inextricably intertwined or, more broadly, that the public interest in punishing and preventing wrongdoing requires such a prohibition? If grounded in the stringent dictates of formalist conceptions of legal claims, justification for interference with litigant autonomy is potentially without limit. Further, and at least to the extent such interference is grounded in a "public interest" unrelated to the integrity or functioning of the courts, it arguably constitutes an illegitimate exercise of judicial power.

This Article's regulatory theory of legal claims would suggest different and, in the main, more constrained prescriptive responses. For one, instead of an outright ban on the named plaintiff's right to alienate her claim under a Rule 68 settlement, regulation could be directed toward the party most directly responsible for imposing—

254. *See* Rosenberg, *supra* note 9 (arguing for a collective conception of class claims).

255. *See generally* CORNES & SANDLER, *supra* note 162 (describing the features of a public good).

256. *See id.* at 324–26 (describing the concept of collective action and the concept's associated issues).

257. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 802 F. Supp 2d 740 (E.D. La. 2011); *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., 2016 U.S. Dist. LEXIS 47253 (J.P.M.L. Apr. 7, 2016).

258. *See* Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 975 (2010) ("[P]rior settlements are a benchmark or reference point from which to consider the merits of future, similar cases.").

indeed the party whose explicit aim it is to impose—the problematic transaction costs on remaining plaintiffs. Under that approach, embodied perhaps in an amendment to Rule 68 or Rule 23, the defendant would be required, after making a settlement offer to the named plaintiff, to find a suitable substitute named plaintiff, and, if none can be found, to retract the offer. This change would likely reduce the number of Rule 68 settlement offers made to named plaintiffs—a good result vis-à-vis the market failure of transaction cost barriers to the effectuation of absent class members' substantive rights. Moreover, this change does little, at least formally, to interfere with the named plaintiff's right of alienation; it still permits the named plaintiff to settle, just likely not at the supra-compensatory rate available prior to rule change. This latter result is not troubling; indeed it is desirable: the supra-competitive settlement amount available to the named plaintiff only exists because the current regulatory structure permits that plaintiff to exploit the transaction costs against absent class members' claims to her own advantage. The regulatory notion is to remove incentives for either defendants or named plaintiffs to impose these costs, all the while preserving the named plaintiff's freedom to exchange her claim.

However, this particular regulatory prescription is ultimately suboptimal under this Article's regulatory theory. Fundamentally, defendants are not loyal to the class; they are certainly not fiduciaries of the class.[259] Indeed, defendants would likely be incentivized to select affirmatively suboptimal named plaintiffs, thus potentially leaving in place transaction cost barriers to effective realization of class claims.[260]

Named plaintiffs, however, could be described as having some modicum of fiduciary or quasi-fiduciary relationship with, and duties to, the pre-certified class.[261] As such, the autonomy of the named plaintiff to alienate her claim is arguably appropriately subject to regulation, at least when exercising that right would (or very likely would) generate transaction costs to the plaintiff class's effectuation of their legal claims. Another potential, and narrowly tailored, form of procedural regulation, therefore, would be a requirement that the

259. Even the class attorney may not be sufficiently loyal to the class pre-certification. FED. R. CIV. P. 23 advisory committee notes to 2003 amendment (suggesting the need for interim counsel with fiduciary duties to the class pre-certification).

260. Such barriers could take the form of additional litigation expenditures needed to obtain compensation for the plaintiff class that would roughly equal what could have been obtained with the original, more suitable, named plaintiff with fewer expenditures.

261. *See* FED. R. CIV. P. 23; *see also supra* Part III.A (discussing the quasi-fiduciary duties of third parties in certain relationships with property owners).

named plaintiff, as a precondition to accepting a Rule 68 offer, remain in the class until class counsel, exercising good faith efforts, identifies a suitable replacement. This regulatory response—which could be embodied in an amendment to either Rule 68 or Rule 23, or even as an interpretation of a named plaintiff's duties as set forth by the Advisory Committee Notes to Rule 23—would likely work well in the sorts of class actions typified by a relatively deep bench of suitable and willing named plaintiffs, as both the transaction costs for replacement would be low, and the interference on the named plaintiff's right of alienation, in terms of time, would also likely be minimal.

However, this response may be insufficient to address the transaction cost market failure in some instances: First, in cases where it is apparent that there is no plentiful supply of suitable replacement named plaintiffs. Or, second, even in cases like the ones described above, but wherein the transaction costs associated with identifying a new named plaintiff (and, if defendants continue the pick-off gambit, another named plaintiff, and so on down the line) mount in ways that significantly impede the ability of classes to proceed with their claims. In such instances, prohibiting settlements *with the named plaintiff* may be warranted. A narrowly tailored approach would counsel in favor of a case-by-case restriction of the named plaintiff's right to alienate her claim—though any debate by the Rules Advisory Committee would need to question whether the transaction costs associated with a case-by-case approach (as the issue would likely require briefing) would dwarf the transaction costs it would reduce, therefore suggesting the possible need for a straightforward ban.

This last regulatory proposal—a ban on named plaintiff settlements—sounds much like the one required by the collective approach to legal claims. While it is not the endeavor of this Article to settle upon any particular regulatory prescription, if application of the regulatory theory of legal claims leads to a conclusion that named plaintiffs cannot accept Rule 68 offers of settlement, is the theory really any different, much less *better*, than the formalist collectivist conceptual view?

I believe the answer is yes. First of all, the regulatory theory of legal claims imposes upon any procedural regulation a number of limiting principles, which are largely absent in the prescriptive dictates of formalist conceptual views. Indeed, even though one of the prescriptions set forth here is the same as that generated by a collectivist view of claims, its theoretical underpinnings—and therefore its ultimate reach—are completely different. Specifically, because any restriction upon the right to alienate one's legal claims is

grounded in a theory of procedure as reducing transaction-cost market failures (generated here by the pick-off settlement), that restriction necessarily will not be justified across the litigation landscape simply because various parties' claims are "inter-connected" or "bound up with the public interest." In contrast, both the justification for regulation of litigant autonomy and the particular design of any regulatory mechanism *in a particular context* would stem from the foundations—and limitations—of this Article's theory.

For example, this Article's theory explicitly calls for consideration of the specifics of the relevant procedural context—here, Rule 68 pick-off settlements—to determine whether and to what extent regulation is justified. And in *the Rule 68 pick-off context*, justification for some level of restriction of a party's right to alienate a claim is rather strong, at least as a matter of sensitivity to transaction cost barriers to claiming. Drawing specifically from the property theory foundations of this Article's theory, justification for regulation in this context is bolstered by the fact that the named plaintiff is in somewhat of a functional fiduciary or quasi-fiduciary relationship with other class members and their property interests.[262]

Justification for regulation under this Article's theory, however, does not come without limitation. Generally speaking, then, the foundations of this Article's theory would tend to steer such regulation toward mechanisms that interfere as little as possible with the right of alienation. To operationalize these broader principles, consider as an example the following possible regulatory mechanism. Instead of simply prohibiting named plaintiffs from accepting Rule 68 settlement offers (the prescription that flows necessarily from the collectivist view of legal claims), the designation of named plaintiff status could be conditioned upon the refusal of any such settlement offer as part of a named plaintiff's duties to the class pre-certification. This regulatory mechanism certainly (though justifiably) interferes with the named plaintiff's right to alienate her claim, but it does so more narrowly, and perhaps more tolerably as a matter of property law and theory, through a form of consent.

2. Applying the Regulatory Theory of Legal Claims to Alternative Litigation Finance

By its own terms, alternative litigation funding facilitates the effectuation of substantive claims by reducing transaction costs associated with litigation. Prohibitions on the alienation of legal

262. *See supra* Part III.A.

claims, currently in the form of maintenance and champerty laws, but potentially in the form of any number of proposed regulations on litigation finance,[263] prevent the use of funding arrangements to reduce those costs. To the extent the effect of litigation funding on reducing transaction costs to claiming is descriptively accurate,[264] prohibitions on those subsidies of litigation are inconsistent with this Article's theory of legal claims and the role of procedure to reduce the transaction costs of claiming.

Here, those committed to a strong individual autonomy view of legal claims would offer *their* conceptual view as a remedy: maintenance and champerty laws are inconsistent with individualistic, absolutist views of property rights, and thus should be jettisoned. Perhaps (though not certainly) because of the dominance of this individualistic conception of legal claims in the procedural jurisprudence of the Supreme Court, this prescription is already becoming reality.[265] However, the individualistic conceptual approach has difficulties. First, it is limited in its ability to provide guidance for procedural decisionmaking vis-à-vis litigation finance beyond the point of sale of claims (champerty) or the point of obtaining funding for pursuing claims (maintenance). Second, even as to the elements of alternative litigation finance for which it can provide prescriptive guidance, it paints with too broad a brush.

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263. *See, e.g.*, Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388 (2016) (proposing modifications to the Federal Rules of Civil Procedure to regulate potential conflicts of interest in litigation financing); Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155 (2015) (suggesting a paradigm shift in viewing and regulating litigation funding from a "legal ethics paradigm" to an "incorporation paradigm"); Martin J. Estevao, Note, *The Litigation Financing Industry: Regulation to Protect Consumers*, 84 U. COLO. L. REV. 467 (2013) (discussing measures to "prevent predatory behavior and ensure reasonable profits for [litigation financing companies]"); *Litigation Funding: The Basics and Beyond*, CENTER ON CIVIL JUSTICE AT N.Y.U. SCHOOL OF LAW (Nov. 20, 2015), http://www.law.nyu.edu/centers/civiljustice/2015-fall-conference [https://perma.cc/7XV8-PG2A] (Panels Two (Professors Geoffrey Miller, Maya Steinitz, Bradley Wendel, Michael G. Faure, and Jef De Mot; Joshua Schwadron and Travis Lenkner) and Four (Professors Arthur Miller, Elizabeth Chamblee Burch, J. Maria Glover, Victoria Shannon Sahani, and Stephen Gillers; Michael Fishbein), discussing possible regulations of litigation finance).

264. Some have expressed concern that the funding terms leave plaintiff with little compensation. *See, e.g.*, Steinitz, *supra* note 106, at 1277, 1322. To the extent litigation funding effectuated claiming but did not confer compensatory benefit to the plaintiff, this Article's conception of procedure's role vis-à-vis transaction costs would perhaps not be offended in the abstract. That conception, however, is tied to fundamental precepts of property, which would frown upon the funders' complete devaluation of plaintiffs' claim; it is also tied to a market of claims that are pursued for compensation. *See supra* Part III.A.

265. *See, e.g.*, Del Webb Cmtys., Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011) ("The consistent trend across the country is toward limiting, not expanding, champerty's reach.").

As to the first difficulty, the individualistic conception of legal claims, grounded as it is in near-absolutist views of property rights, would likely prescribe the elimination of maintenance and champerty laws or any other such prohibitions. That is likely the end of its regulatory journey. However, those laws prohibiting litigation finance are only the beginning of the overall regulatory road. The aim of maintenance and champerty laws is to restrict *directly* the ability of third-party litigation funding to reduce transaction cost barriers to effectuation of substantive claims. Other existing procedural rules and doctrines, however, make no mention of financing at all. Yet, they are being used *indirectly* to impose additional transaction costs on subsidized plaintiffs.

For instance, defendants frequently seek discovery of communications involved in obtaining litigation financing—the deal documents themselves—and communications with the funder that occurred after that deal was signed.[266] Apart from the relatively rare situation in which the defendant has a legitimate defense under state law champerty or maintenance doctrines,[267] the only relevance of these documents is that they reflect either the litigation funder's or the party's assessment of the strengths and weaknesses of the claims and the damages estimate.[268] This satisfies relevance in a technical sense, but it is not the sort of information that should be used at trial.[269] At bottom, these are less discovery requests than they are mechanisms to impose significant transaction costs upon plaintiffs who need litigation funding—perhaps significant enough to impede efforts by plaintiffs to use litigation funding at all.

The few courts that have addressed these issues have by and large extended work product protection to such communications.[270] However, the requirements in the discovery rules for claiming privilege[271]—which require plaintiffs to create a privilege log—enable

266. *See* Glover, *supra* note 126 (citing all cases with published opinions on the issue).

267. *See Del Webb Cmtys.*, 652 F.3d at 1156 ("The consistent trend across the country is toward limiting, not expanding, champerty's reach.").

268. Glover, *supra* note 126.

269. For instance, a funder's assessment of the plaintiff's likely recovery should not be used to influence the fact finder's resolution of the claim's merits, any more than an adversary should be able to call its adversary's attorneys to testify about the legal weakness of their client's case. *See, e.g.*, Mister v. Ne. Ill. Commuter R.R. Corp., 571 F.3d 696 (7th Cir. 2009) (holding that party admission can be excluded under Federal Rule of Evidence 403); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 734 (N.D. Ill. 2014) (stating the trier of fact should not be invited to treat candid internal assessments of the strength of the party's legal position as evidence of guilt).

270. Glover, *supra* note 126.

271. FED. R. CIV. P. 26(b)(5)(B).

the requests alone to impose transaction costs upon a funded plaintiff. Indeed, these costs are *unique* to funded plaintiffs and additional to those associated with discovery into the merits. The creation of a privilege log is well known to be a burdensome task, and in the context of litigation finance, perhaps particularly so. All told, obtaining, setting up, and using litigation funding can generate hundreds, if not thousands, of email communications and documents.[272] If one role of procedure is to reduce transaction cost barriers to claiming, these discovery requests achieve the opposite: they impose a penalty.

The individualistic conceptual view of legal claims has little, if anything, to say about discovery requests, privilege logs, and work product privilege. Theoretically, perhaps, an individualistic conception of legal claims might demand reform to the extent these practices actually eliminated litigation-funding outfits or stopped those outfits from financing any claims under a certain value, thereby indirectly restraining alienation. However, even that theoretical possibility is speculative. These claims would likely be lumped together conceptually with all the other unmarketable claims, like those in the Court's individualistic arbitration jurisprudence. That is to say, wholly disregarded.

This Article's regulatory theory, however, *would* address these and other indirect restrictions on alienation for purposes of litigation funding. This regulatory theory may call for amendment to or particularized interpretation of procedural law to prevent the imposition of additional, funded-litigation-specific transaction costs. For instance, Federal Rule of Civil Procedure 26(a) could be amended to declare communications with litigation financing entities per se irrelevant—though this is likely overbroad.[273] Alternatively, Rule 26 could be amended to provide near-categorical protection under the work product doctrine to litigation-funding documents. It could read: "This Rule does not contemplate that a party claiming communications with a litigation financing entity has to describe the nature of the documents or materials withheld pursuant to the work product privilege."

This Article's regulatory theory would also, of course, provide guidance regarding direct prohibitions on litigation finance—guidance that would differ in important respects from that provided by the

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272. Glover, *supra* note 126; *supra* Part III.

273. Imagine a plaintiff, funded by a third-party financer, wished to sue that financer for breach of contract. Those documents would be directly relevant, as Rule 26(a) currently prescribes, to a party's claims or defenses. FED. R. CIV. P. 26(a).

individualistic conception of claims. Both the individualistic conception of legal claims and this Article's theory of legal claims would call for the elimination of champerty laws, which prohibit the selling of one's claim to another. However, there are real concerns about litigation funding's normative valence vis-à-vis the integrity and functioning of litigation and the judicial system in the context of maintenance—in particular, concerns that funders will support litigation not to reduce an impecunious party's transaction costs, but to coax a would-be plaintiff to bring suit so that the funder may achieve its own goals and to settle its own scores.[274] In addition to ginning up (arguably) wasteful litigation, such practices obscure the "real party in interest" from the court.

The near-absolute conception of property rights undergirding the individualistic view of legal claims would likely not impose restrictions on a funder's ability to coax a claimholder to litigation in this way. And to be sure, this Article's regulatory theory of legal claims, limited as it currently and necessarily is to guiding procedure toward the reduction of transaction costs to claiming, does not speak directly to this normative concern. In contrast with the individualistic conceptual theory of legal claims, however, the regulatory theory leaves room for exploring (1) whether procedure may appropriately regulate litigant autonomy when it interferes with systemic interests of the courts, the judicial system, and the judicial function,[275] and (2) if so, whether the benefits and potential effectiveness of such regulation, motive-based as it may be in the situation of a litigation funder with ulterior motives,[276] outweigh its downsides either to litigant autonomy or to other interests to which procedural regulation may appropriately be directed. Again, it is not (and cannot be) the aim of this Article to provide an answer for all possible questions—including this last one regarding maintenance. What the foregoing analysis demonstrates,

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274. *See supra* Part II.B (discussing the history of maintenance and champerty laws, as well as the controversial funding, by Peter Thiel, of Hulk Hogan's lawsuit against Gawker).

275. *See, e.g.*, *supra* Part III.A (discussing the limitations of courts to issue injunctions restricting property use grounded in the "public interest," but noting that interests directly bearing upon the judicial function and integrity of the courts might appropriately constitute a "public interest" for which the judiciary can regulate). Further, any such procedural regulation would have intellectual foundations in the already existing Federal Rule of Civil Procedure 11, which gives judges the authority to sanction parties who bring litigation for improper purposes. FED. R. CIV. P. 11.

276. Motive-based regulations are those aimed at people's motives—here, the motives of the funder and the claimant. They are difficult to enforce, given their focus on subjective intent, and they create perverse incentives for individuals to cover their tracks. They are also somewhat inconsistent with the objective character of property regulations that restrict "improper use," which are agnostic to say, the motive of neighbor *A* in filling his lawn with prohibited ornaments and statutes; whether he likes that décor or just wants to annoy his neighbor is irrelevant.

however, is that this Article's theory can provide guidance on difficult litigation issues in a way that is more normatively coherent and transparent than existing formalist theories and frameworks.

3. A Regulatory Approach to Legal Claims in the Context of Mandatory Arbitration Agreements

Recall that mandatory arbitration agreements, particularly (though not necessarily) those with class action waivers, have been shown to reduce, if not eliminate, the ability for plaintiffs to vindicate their claims in any forum.[277] The Supreme Court's procedural arbitration jurisprudence enables and even incentivizes[278] these sorts of contracts. This is perhaps unsurprising, given that, among other things, the Supreme Court's procedural jurisprudence is strongly undergirded by an individualistic conception of legal claims.

Individualistic views of claims, at their core, call for largely unfettered rights of claim exchange. In property, such free exchange is commended by the notion that it tends to promote efficient exchange and thus property is directed toward its highest-value use. In the context of mandatory arbitration agreements, however, it is far from clear that claims are being exchanged toward their highest-value use; indeed, most would-be plaintiffs do not even realize that they are making the exchange in the first place. Consumers and employees suffer a distinct informational disadvantage relative to the drafting corporations with regard to both the meaning of key legal terms in the agreement[279] and with regard to the nature of the exchange of their legal claims. Regarding the latter, even if consumers are aware that by accepting a job or obtaining a cell phone they are exchanging their legal claims ex ante for arbitration, they are not aware that they are likely exchanging them ex post for *no dispute resolution* at all, given the surrender of procedural mechanisms, like the class action, that would defray the often high transaction costs of bringing their claims.[280] Thus, those future legal claims are exchanged for perhaps

277. *See* CFPB 2015 ARBITRATION STUDY, *supra* note 136, § 1, at 9, 11 (finding that of the tens of millions of consumers who use consumer financial products or services that are subject to arbitration clauses, only 1,847 individual disputes were filed with the AAA).

278. *See* Glover, *supra* note 138, at 3076, 3092 (noting that it would be unwise for corporate counsel not to include arbitration clauses and class action prohibitions in contracts with employees, consumers, and the like).

279. *See* Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 WAYNE L. REV. 1903, 1915–16 (2000).

280. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (finding that without the cost-sharing enabled by class procedures, no single merchant could afford the

nothing at all: despite claims by corporations that mandatory arbitration agreements confer value to consumers because the cost savings associated with arbitration (or, more likely, no arbitration) are passed on to consumers in the form of lower-cost goods,[281] empirical research does not support this claim.[282]

Taking the strongest collectivist view of legal claims—that they are not purely individual property—and the collectivist view of claimants—that they are not purely individual property holders—would suggest the need for restrictions upon the rights of consumers and employees to alienate their claims through these contracts, on the theory that their future claims are intertwined with those of others and with public interests.[283] Fundamentally, this is of course a non-starter: at the very least, it is wholly impractical to ban consumers from purchasing goods or employees from accepting jobs, particularly when—at least in the consumer context—all sellers of a particular good use the same basic contract, and it is nonnegotiable. Moreover, it would be equally impractical to regulate an exchange individuals have little to no idea they are making [284]

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transaction costs of an antitrust expert—estimated to be around a million dollars—required to prove their claims).

281. Empirical research does show that arbitration generates cost savings in comparison to litigation, but those costs tend to be internalized by the contract drafters. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 336–39 (2007) (discussing the reasons why arbitration arguably is less costly than litigation); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008) (presenting evidence that companies include arbitration clauses in consumer contracts not because it is less costly but because it precludes aggregate consumer actions).

282. *See* CFPB 2015 ARBITRATION STUDY, *supra* note 136, § 10, at 5 (finding that despite the large amount collected, no empirical evidence supported the claim that mandatory arbitration contracts produced cost savings for consumers).

283. One of the relevant public interests is that of public precedent and judicial opinions. *See, e.g.,* Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 774, 799–800 (2008) (providing cell phone contract to illustrate that much of what is traditionally public becomes private in private dispute settlements); Sabbeth & Vladeck, *supra* note 148, at 809, 838 (arguing that the open nature of judicial proceedings themselves is a public value lost in the wave of arbitration). *See generally* Fiss, *Against Settlement*, *supra* note 11, at 1085–87 (discussing the public value of written opinions). Another is the loss of public proceedings, whether or not the cases actually go to trial. Another is the public's interest in deterring corporations from wrongdoing—at least to the extent mandatory arbitration agreements with class action waivers amount to exculpatory clauses for defendants. *See, e.g.*, Gilles, *supra* note 148, at 378, 430 (arguing that corporate wrongdoing is deterred by class action liability).

284. *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety, in* ECONOMIC ANALYSIS OF THE LAW: SELECTED READINGS 59, 61 (Donald A. Wittman ed., 2002) (arguing that public regulation is better when information related to wrongdoing is "difficult to communicate to private parties because of its technical nature"); *see also* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*,

Assume, however, that the collectivist view did not require such an extreme response. Presume instead that the collectivist view of legal claims called for restrictions upon the terms of the contracts themselves—perhaps on the theory that, given the uniformity of the contracts and the transactions, the public interests at stake, and the collective action problems to claiming in these contexts, the future claims are properly considered as part of a collective. On that theory, those claims should not be disentangled ex ante. However, as with all applications of the conceptual approaches to legal claims, even when selectively deployed, there are difficulties.

Once more, the collective prescription goes too far. As a preliminary matter, it is difficult to conceptualize future interests as either primarily individual or primarily collective in this context. Even if the drafters' strategic gambit suggests the potential for collective claims, one might accuse the conceptual framework of jumping the gun. Be that as it may, public values such as judicial precedent, public proceedings, and even deterrence are no doubt important—perhaps so much so in any particular case as to justify regulation of property rights or freedom of contract—but those values are present in nearly all cases.[285] Absent any other restriction on the dictates of this conception of legal claims, the formalist collectivist conception—though still perhaps appealing in the clarity of its content and prescriptive consequences—is also still troubling in its tendency not to impose limiting principles.

Nonetheless, perhaps this flaw of formalism would be tolerable if the negative transaction cost consequences for legal claims in the context of mandatory arbitration agreements flowed exclusively, or even primarily, from improper conception of claims. Moreover, an individualistic conception of claims undoubtedly undergirds the Court's adoption of near-absolute principles of freedom-of-contract conceptions in these cases—principles that in turn justify these exchanges. That said, the provisions in these contracts that have generated the most concern among scholars, Congress, courts, regulatory agencies, and litigants were crafted with near-explicit recognition of the collective character of a great number of future

91 VA. L. REV. 93, 97 (2005) (arguing that Congress should delegate the responsibility to create private rights of action to agencies charged with administering the relevant statute because the agency has superior information about the effects of private suits on overall enforcement strategy).

285. For instance, Owen Fiss's view regarding the value of the creation of judicial precedent and the scourge of settlement would call for no settlement. Fiss, *Against Settlement*, *supra* note 11; Fiss, *The History of an Idea*, *supra* note 11 (defending his views from *Against Settlement*).

claims.[286] To some degree, then, that collective conception was the genesis of some of the problematic provisions. Drafters of these agreements, therefore, relied on two *completely opposite* conceptions of legal claims in formulating, providing, and compelling the enforcement of contractual provisions that impose transaction cost barriers to the effectuation of substantive claims. Those transaction costs, therefore, do not flow exclusively from one conception or the other; the transaction costs, not the conceptual theory, are the gambit.

Indeed, what unifies the problematic contractual provisions in arbitration agreements is that they impose transaction cost barriers to claiming. Some provisions eliminate collective procedures. Some include forum selection clauses requiring travel to far-flung fora or include fee-shifting provisions that require claimants to incur heavy expenses just to bring their claim—both stymied to greater and lesser degrees under unconscionability doctrine.[287] Others prohibit individuals from sharing expert evidence with others similarly situated in order to reduce the often exorbitant transaction costs associated with developing an expert report.[288]

Moreover, contractual provisions aimed at reducing these transaction costs have proved ineffective—a wholly unsurprising fact given the overall strategic goals of those drafting the contracts. For instance, the arbitration clause at issue in *AT&T Mobility, LLC v. Concepcion*[289] purported to correct the failure by providing that it would pay any claimant's arbitration fees, and, among other things, that it would provide a bonus payment of five thousand dollars to any claimant whose ultimate arbitral award exceeded any of AT&T's prior settlement offers to that claimant.[290] As a matter of offsetting transaction costs, this contractual response by AT&T seemed sound enough. As a practical matter, it was wholly ineffective: even after the revision of its arbitration clause, very few claimants brought their claims in arbitration versus AT&T; even fewer obtained

286. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); David Korn & David Rosenberg, Concepcion*'s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 MICH. J.L. REFORM 1151 (2013) (suggesting that a court certify a class of plaintiffs subject to mandatory arbitration agreement with class prohibitions before sending them to arbitration; once in arbitration, the plaintiffs arbitrate individually, but proceed from a collective posture vis-à-vis pre-trial discovery cost sharing and the like); Nagareda, *supra* note 37, at 1115.

287. *See, e.g.*, Glover, *supra* note 148, at 1745–46 (discussing first-generation arbitration clauses, which contained particularly draconian provisions).

288. *See, e.g.*, Transcript of Oral Argument at 4, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133), 2013 WL 705521, at *4 (discussing whether confidentiality clauses vis-à-vis evidence sharing in arbitration contracts would be enforceable).

289. 563 U.S. 333 (2011).

290. *Id.* at 351–52.

compensation.[291] This is unsurprising for a host of reasons, one of which AT&T was no doubt well aware: consumers by and large tend not to read their contracts[292] nor do they understand key contractual terms, even potentially favorable ones.[293]

To reduce transaction costs to effective vindication of claims in the context of mandatory arbitration agreements, any regulatory response must account for the transactional context in which the claims operate. The most prominent regulatory response in existence is the rule recently promulgated by the Consumer Financial Protection Bureau ("CFPB") prohibiting the use of mandatory arbitration agreements in certain financial products in the financial industry.[294] The CFPB rule's broad prohibitions on freedom of contract are grounded in a number of concerns that reach far beyond those associated with transaction cost barriers to claiming. These concerns are beyond the scope of this Article's regulatory framework; some are likely beyond the scope of this Article's entire regulatory theory of legal claims.

Whatever the normative valence of the CFPB rule, it would have limited reach, if it issues.[295] The CFPB has limited jurisdiction, and the rule would almost assuredly not reach any number of industries or entities that use mandatory arbitration agreements. Moreover, the future of the CFPB itself is currently a bit uncertain, both as a matter of whether it will be allowed to maintain its current independence from the executive,[296] and as a matter of whether

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291. *See* CFPB 2015 ARBITRATION STUDY, *supra* note 136, § 3, at 51.

292. *See, e.g.*, *id.* § 3, at 28–29 (noting that very few consumers read arbitration contracts, and even those who do generally do not understand what arbitration is).

293. *See id.* § 3, at 23 (finding that seventy-five percent of people do not know what arbitration is).

294. On May 6, 2016, and pursuant to § 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203), the Bureau of Consumer Financial Protection (Bureau) proposed to establish 12 CFR part 1040, which would (1) prohibit covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action with respect to the covered consumer financial product or service; and (2) require a covered provider that is involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to the Bureau; and (3) apply to certain consumer financial products and services. Bureau of Consumer Financial Protection, Notice of Proposed Rulemaking to Establish 12 CFR Part 1040 (May 6, 2016), http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf [https://perma.cc/T7YE-PLKN].

295. The comment period for this proposed rule closed on August 22, 2016; no rule has issued as of January 1, 2017.

296. On October 11, 2016, the United States Court of Appeals for the District of Columbia struck down the structure of the CFPB as violating Article II of the Constitution. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 4–6 (D.C. Cir. 2016). As an independent agency

Congress makes various changes to the source the CPFB's creation and authority, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act—which is one of the many targets of the new administration.[297]

The procedural provisions in mandatory arbitration agreements engineer the litigation landscape in a very particular way—namely, so as to *generate* transaction costs to the effectuation of substantive rights. Of late, the Supreme Court has not interpreted the FAA—a procedural law, in the non-Rules Enabling Act sense[298]—as appropriately directed toward reducing (or at least not intentionally generating) transaction costs to the effectuation of substantive rights. A heavily individualistic conception of litigant autonomy undergirds and enables the Supreme Court's jurisprudence permitting—perhaps even endorsing—that engineering of the litigation landscape.[299] According to this Article's regulatory theory of legal claims, however, situations in which contractual provisions engineer the litigation landscape in such a way are precisely those for which judicial regulation of litigant autonomy is warranted.

The most direct regulatory response that flows from this Article's regulatory theory—and one that happens to be more consistent with both the text of the FAA and the view of procedure that originally animated the FAA[300] rather than current Supreme Court FAA jurisprudence—would be a judicial one. A broad response, grounded in the notion that procedure is appropriately directed toward reducing transaction costs to the effectuation of recognized rights, would involve a reinterpretation of the FAA as not permitting the inclusion of contractual procedural provisions that are designed to generate such costs. A narrower response—one that might better

headed by a single Director, removable only for cause, CFPB's structural departure from historical practice "ma[de] a significant difference for the individual liberty protected by the Constitution's separation of powers" because the single director possesses more unilateral authority than the multi-member commission. *Id.* at 36. The court remedied this violation by striking down the for-cause removal provision of the Dodd-Frank Act. *See id.* at 38–39. On November 18, 2016, CFPB petitioned for a rehearing en banc. *See* Respondent Consumer Financial Protection Bureau's Petition for Rehearing En Banc, PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1 (2016) (No. 15-01177).

297. *See, e.g.*, Ryan Tracy, *Donald Trump's Transition Team: We Will "Dismantle" Dodd-Frank*, WALL ST. J. (Nov. 10, 2016), http://www.wsj.com/articles/donald-trumps-transition-team-we-will-dismantle-dodd-frank-1478800611 [https://perma.cc/W9JZ-TP3W].

298. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2315–20 (2013) (Kagan, J., dissenting) (noting that the FAA governs procedure, and therefore should yield in the presence of federal statutes governing substantive legal rights).

299. *See* Glover, *supra* note 155 (arguing that underlying the Court's recent arbitration decisions was a substantive judgment about the normative value of low-value class action suits).

300. *See* Glover, *supra* note 138, at 3059–64.

balance litigant autonomy and freedom-of-contract principles and transaction cost barriers to the effectuation of substantive rights—might involve a more as-applied approach, whereby contracts containing procedural provisions designed to generate transaction costs would be struck down if and when they prevent or severely impede the effectuation of recognized substantive rights. Under that narrower approach, contractual provisions might be allowed on a case-by-case basis (for instance, if they do not actually generate significant transaction costs to claiming) or for other compelling reasons largely beyond the scope of this Article's current framework.[301]

Either regulatory suggestion, of course, requires a change in the Court's current interpretation of the FAA. These approaches also call for the Court to move away from the formal individualistic views of litigant autonomy and legal claims that undergird its FAA jurisprudence. Nonetheless, these judicial regulatory solutions are perhaps the cleanest of all: from procedural doctrine the problem came; from procedural doctrine the problem should depart. Order could be restored to the galaxy.

4. Coming Full Circle: A Regulatory Approach to Legal Claims in the Contexts of Class Action Opt-Outs and Class Unity

This Article began by tracing the contours of a long-standing conceptual debate in the class action context about whether the class device is best viewed as a collection of individuals, who should retain

301. For instance, one way in which an arbitration agreement might seek to prevent claimants from effectuating substantive claims is to prohibit *any* cost-sharing procedures. *Italian Colors*, 133 S. Ct. at 2314 (Kagan, J., dissenting) (pointing out that the arbitration agreement in *Italian Colors* prohibited class actions as well as any form of cost-sharing among individuals in arbitration). Whether it is appropriate to strike down such prohibitions on the grounds that procedure's role is to reduce (or at least not generate) transaction costs to claiming would depend upon the precise cost-sharing mechanism being banned. For instance, both established contract principles and litigation practice allow for the confidential exchange of evidence in a lawsuit and for the confidentiality of settlement. These practices, though not without their critics, are believed, among other things, to protect sensitive information, increase accuracy, promote settlement, and perhaps most relevant for this Article, reduce transaction costs to settlement. *See* Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1480–82 (2006) (disallowing secret settlements increases health and other hazards to the public because parties will opt to leave the system of litigation altogether, removing the claims from the public eye); Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers As Lawmakers*, 46 ARIZ. L. REV. 733 (2004) (noting confidentiality practices "promote settlement of the current case, increase the accuracy of the litigation process, and reduce legal error"); Alison Lothes, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 438–40 (2005) (discussing pro-confidentiality scholars' emphasis on cost saving and litigants' rights to privacy and autonomy). This Article leaves such granular regulatory questions to later work.

near-full autonomy over their claims, or as an entity, wherein individuals tie their fortunes to one another, perhaps even so much as to prevent them from opting out of the class. Recall that the Court has moved in a decidedly individualistic conceptual direction in its class action jurisprudence, and particularly in its interpretation of class certification requirements. That individualistic view calls for class members to retain a great deal of autonomy over claims, and thus leads courts to scrutinize proposed classes under Rule 23 for near-total similarity among claimants at the certification stage[302] and to approach with great skepticism any class that does not provide for opt-outs.[303]

To be sure, many of the opinions rooted in notions of individual autonomy of legal claims provide important protections for class members.[304] At the same time, jurisprudence rooted in individual autonomy has eliminated settlement deals and left plaintiffs without compensation;[305] it has also provided defendants with a great deal of ammunition for preventing the certification of classes—and thereby preventing the economies of scale for claiming achievable under the

302. For an argument that this requirement misses the mark, see Bone, *supra* note 34, at 651 ("[A] cohesiveness requirement . . . sends courts on a hopeless, misguided search for class unity.").

303. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363, 366 (2011) (denying 12(b)(2) mandatory class claims for back pay, despite incidentally flowing from Title VII claims for injunctive relief, while noting that mandatory classes, "*rightly or wrongly*," still exist (emphasis added)).

304. Indeed, collectivist views of class members' legal claims—views that often lead to a demand that Rule 23 disallow any opt-outs—are particularly concerning. Moreover, one can identify the problems of these views in Rule 23(b)(2) class actions that also include claims for monetary relief. *See, e.g.*, *id.* at 359 (unanimously rejecting plaintiffs' attempt to certify claims for backpay under Rule 23(b)(2)). In order to obtain (b)(2) certification, plaintiffs are incentivized to downplay the compensatory elements of class members' claims; for instance, in *Dukes*, the compensatory element was limited to backpay. *Id.* at 345. The problem, however, stems from the preclusive effects that would attach to any future class members' claims for *other forms* of compensatory relief to which she may have been legally entitled, but which were not brought in the original class action. *Id.* at 364. Intra-class conflicts can also arise when the class for (monetarily valuable) injunctive and monetary is comprised of members competing for a limited pool of resources. *See In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 236 (2d Cir. 2016) (rejecting seven billion dollar settlement proposal for a class of merchants certified under both 23(b)(2) and (b)(3) on the grounds that class counsel could not represent both classes, who were competing for a limited pool of relief from defendants).

305. *See, e.g.*, Elizabeth J. Cabraser, *Recent Developments in Nationwide Products Liability Litigation: The Phenomenon of Non-Injury Products Cases, the Impact of* Amchem *and the Trend Toward State Court Adjudication, and the Continued Viability of Carefully Constructed Nationwide Classes in the Federal Courts*, SC33 ALI-ABA COURSE OF STUDY MATERIALS 1, 23 (1998).

class mechanism—under the auspices of "protecting" the various class members' autonomy.[306]

As with the procedural scenarios discussed above, the problem is not so much that either conceptual view is unable to achieve a "good" result at any given time. It is that procedural regulation, tied to formalist conception, tends to generate normatively and theoretically inconsistent results.[307] Again, though, if the regulatory theory of legal claims suggested by this Article is to have persuasive force, it must generate different and better answers for procedural law and for the regulation of litigant autonomy. This Article therefore concludes by examining the operation of the regulatory theory of legal claims within the context of the hotbed of conceptual debate—class action certification.

Of course, there is far more involved in debates about certification requirements and opt-outs than could be covered, much less given justice, here. Therefore, I limit the analysis here to one particularly thorny issue regarding litigant autonomy in the class-certification universe—the problem of negative-value class claims at the certification stage.

Under the regulatory theory of legal claims set forth in this Article, there is arguably little justification for limiting litigant autonomy in situations where, in the main, class members' claims are individually marketable, unless perhaps there is some anomalous condition vis-à-vis the resources of the relevant group of plaintiffs.[308] In class actions made up of individually marketable claims, vindication of substantive rights is not particularly dependent upon the transaction-cost-lowering effects of class procedure. Indeed, the resulting exchange of those claims—via settlement—may well be worse for claimholders as a matter of compensation and access to justice through the class proceeding than had they struck out on their

306. *See, e.g.*, *Dukes*, 564 U.S. at 362–63 (noting that there needs to be a case specific inquiry into whether class issues predominate with respect to each member's individual claims, whereas there are fewer protections when in a 23(b)(2) class because the relief is collective in nature); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Phillips Petrol. Co. v. Shutts, 472 U.S. 797 (1985); Campos, *supra* note 9, at 1066.

307. *See supra* Part I.B and Part II.

308. For instance, if the group of plaintiffs is a sophisticated group of wealthy investors claiming securities fraud, the combination of their resources and high-value claims may well counsel in favor of a thumb on the scale for litigant autonomy. Alternatively, if the group of plaintiffs is a group of industrial workers who have inhaled asbestos, their claims might be of high value, but their resources virtually nonexistent. There, the value of claims cannot be the only touchstone for determining the public nature of the claims. *See, e.g.*, *Amchem*, 521 U.S. at 625–26.

own.[309] Of course, this is not to say that there aren't any number of systemic reasons—efficiency, as well as access to justice for claimants unrelated to the class in the judicial queue—that justify the joinder of multifarious similar claims (though such interests may not justify restricting litigant autonomy).

In this relative absence of transaction costs to claiming, the appropriate regulatory response is likely none at all—to preserve existing judicial doctrine vis-à-vis Rule 23's certification requirements and opt-out provisions. This is by no means an endorsement of the individualistic conception of claims that underlies the doctrine to be preserved. In this particular context, Rule 23 doctrine *happens* to align well with the notion that procedure should reduce transaction costs to effective vindication of recognized rights. The problem, then, is the basis for this happenstantially appropriate doctrine. Because it rests on a *conceptual* theory, it risks functioning a bit like a broken clock—right twice a day (and for the wrong reason).

When scrutinizing a class at the certification stage, courts are in part worried that class members' claims will be undersold either because of a lack of unity among the class (unity defined, perhaps ironically, as identity of individual interests)[310] or because of the

309. Perhaps the most egregious illustration of this possibility comes from nonpecuniary class action coupon settlements, which constitute inefficient outcomes and provide inadequate compensation for individual plaintiffs. *See, e.g.*, DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS 27, 83, 488–89 (2000) (noting coupon settlements are "inadequate compensation for the alleged wrongdoing of defendants" and, because they "impose no real cost on the defendant," do not achieve deterrence); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 994–95 (2002) (noting coupon settlements are structured to "maximize the gains for the corporate defendant while minimizing any compensation to the class," and that class counsel often "sell out the interests of the class in exchange for relatively generous attorneys' fees"); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & CONTEMP. PROBS. 97, 110 (1997) (recognizing nonpecuniary settlements create inefficiency, difficulty in valuation of damages, and opportunity for attorney manipulation where "counsel . . . accept[s] settlement less favorable to class than what counsel might obtain by further prosecution"). The Court has expressed similar concerns in its due process analysis regarding monetary claims embedded in mandatory classes for non-monetary relief. *See Dukes*, 564 U.S. at 362–63 ("While we have never held [an absence of the right to opt-out violated due process] where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here"; noting also that the allowance of non-predominant monetary damages in a mandatory class did not stem from Rule 23); *Ortiz*, 527 U.S. at 846–47 ("[M]andatory class actions aggregating damages claims implicate the due process principle" where "damages claims [are] gathered in a mandatory class" and "objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain.").

310. *See, e.g.*, Bone, *supra* note 34 at 654–55 (discussing the Court's focus on similarity and unity among class members).

mandatory nature of the proposed class, if relevant.[311] The economic transaction—the settlement—whereby claims are traded for a fair value for some, may well impose a negative externality upon both the remaining class members, who are undersold, and upon the public, which does not receive the value of deterrence tied to the scope of the wrongdoing.[312] However, whether the first concern (and relatedly the second) actually manifests depends in large part on the value of any individual's claim in the first place and the resources available, generally speaking, to the plaintiffs involved. In other words, whether there is a negative effect upon various absent class members' effectuation of substantive claims depends upon whether they could pursue their claims individually in the first place; if they could not do so, the negative effect of a settlement upon their ability to claim, their access to justice, or their ability to obtain compensation is somewhat fictive. Accordingly, stringent certification requirements driven by individualistic conceptions of legal claims seem out of place, as Justice Breyer suggested in *Amchem*.[313]

More than that, stringent certification requirements that demand high levels of "class unity"[314] may well frustrate the ability to

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311. *See, e.g.*, *Dukes*, 564 U.S. at 364 (noting protections of 23(b)(3) class counters the incentive to risk a class's "potentially valid claims for monetary relief"); *see also Ortiz*, 527 U.S. at 849 (noting the certification of mandatory 23(b)(2) class actions effectively concludes all proceedings, save the final fairness hearing, ending the claims of all absent persons the rule is designed to protect); *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 226 (2d Cir. 2016) (finding that (b)(2) certification was inappropriate because, among other things, it risked underselling plaintiffs' monetary claims).

312. *See* Glover, *supra* note 2, at 1185 (discussing the need for connection between scope of the wrong and scope of the compensation as it relates to deterrence).

313. *Amchem*, 521 U.S. at 629–30 (Breyer, J., dissenting in part).

314. In class action jurisprudence, class unity is not defined, as one might think, by the presence of interdependence among claimants vis-à-vis normative goals, but rather—perhaps ironically—by identity of claims and claimant characteristics among individuals. *See, e.g.*, Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982). The question animating the doctrinal search for class unity, therefore, is an individualistic one: are the individual claims and claimants sufficiently similar that, in one individual's self-interested pursuit of her litigation interests, she will necessarily advance the litigation interests of the other class members? Underlying the concept of litigation interests, in turn, is necessarily an individualistic conception of that term: for a plaintiff with an individually unmarketable claim, the named plaintiff's pursuit of her claim—even if it differs somewhat from the unmarketable claim—arguably advances the litigation interests in compensation and access to justice of that first claimant. This is true even if the two claimants' litigation strategies and outcomes might differ, *because of the difference in claims*, in (totally hypothetical) individual proceedings. The Court's jurisprudence on class unity is not attentive to the former conception of litigation interests—a conception that takes into account the litigation interests *in the aggregate proceeding* and the relationship between the aggregate proceeding, and the absent plaintiffs' ability to obtain compensation and access to justice. Instead, the definition of litigation interests is predicated on the individualistic, "day-in-court" notion of litigation, a notion of how claims might be treated in individualized proceedings (however unlikely such proceedings might be).

vindicate claims in precisely the way this Article's view of procedure counsels against: when the claims of class members are unmarketable individually[315] and/or when the group of plaintiffs is characteristically under-resourced, the absence of the class mechanism functionally means the presence of insurmountable transaction costs to claiming. Under this Article's framework, then, one might offer the following corrective to the collectivist conception of legal claims that would have (over)remedied this problem: class claims (and their claimants) constitute an entity *if*, as in the context of unmarketable claims and/or characteristically under-resourced plaintiffs, each individual claim is intertwined with the claims of others in the most fundamental sense. There is no claim and there is no plaintiff without the unit; the aggregate unit *is* the plaintiff.[316]

Freed from formalistic constraints but guided (and likewise constrained) by the principles set forth in this Article, the certification analysis would now explicitly take into account the value of the majority of the claims in class, as well as the resources typical of the parties. Further, such analysis might involve a comparison of the relative alienability of claims on an individual basis versus a collective basis.[317] Neither prescription likely requires a change to Rule 23.[318] If the claims are low-value, and are not meaningfully alienable on an individual basis, strict imposition of Rule 23 requirements directed at preserving a fictive notion of strong individual ownership and use of claims seem inappropriate at best. Here, inquiries regarding

315. *See* Cabraser, *supra* note 54 (tracing Judge Posner's class action jurisprudence, which determines the level of due process attendant a particular class claim based on considerations like claim value).

316. In some respects, this is the notion David Shapiro was driving at in *The Class as Party and Client*. Shapiro, *supra* note 11, at 938–39. Unlike Shapiro's more formalistic conception of the class as an entity, however, this Article takes the position that there are certain circumstances in which the normative goals of our litigation system are served by encouraging aggregate units; the fact that legal claims within that unit are interdependent on one another is a feature of any given individual's ownership of that claim, but it is not an absolute, or even near-absolute, conception of either the class or the underlying class claims.

317. Such an analysis is not unheard of. The class of merchants in *American Express Co. v. Italian Colors Restaurant* presented a similar analysis. 133 S. Ct. 2304, 2316 (2013) (explaining no individual plaintiff's claim was worth enough to justify the expense of the antitrust expert). Whether factors like expert fees ought to be considered in the certification analysis, or are more appropriately addressed (if at all) by, say, legislatures in crafting the contours of substantive law, is a question beyond the scope of this Article. For a brief discussion of the ways in which state legislatures have amended substantive laws to help plaintiffs avoid class certification hurdles, see Glover, *supra* note 155.

318. Indeed, there is arguably a textual hook for this interpretive change in Rule 23. Rule 23 calls for courts to ask whether the class action is a *superior* vehicle for the resolution of claims—an inquiry that already asks courts to compare class resolution versus individual resolution of claims. FED. R. CIV. P. 23(b)(3).

commonality, typicality, and "unity"—as embodied in adequacy of representation requirements[319]—are better redirected toward alignment with procedure's role in reducing transaction costs to effectuating substantive rights.

Assume, however, that the specific regulatory prescriptions above are not adopted. Indeed, assume further that its normative underpinnings are rejected in favor of other concerns. Even then, the potentially significant payoffs that the regulatory theory of legal claims could generate for the class-certification debate in particular and procedural theory more generally are not destroyed. Particularly in light of the normative incoherence that results from formalist conceptual frameworks illustrated in Part II, analysis of the class-certification problem under these new conditions perhaps more clearly reveals the benefits of this Article's theory for procedural decisionmaking and design.

Along these lines, assume that the Court's adoption of an individualistic approach toward certification requirements is driven, at least in part, by implicit concerns about the *in terrorem* effect of class certification on *defendants*.[320] When these *in terrorem* effects actually occur—in other words, when dubious claims nonetheless yield relatively high settlements from defendants—this result is no less troubling for procedure's role in effectuating claims than when claiming is disabled. At the very least, such settlements constitute error costs; they also represent a failure of procedure to "resolve claims on the merits."[321] Approaching class certification analysis using this Article's regulatory theory of legal claims would first lift the veil on this normative trade-off by eliminating the formalist conceptual language about plaintiffs' individual autonomy.[322]

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319. *See, e.g.*, Bone, *supra* note 34, at 657 (arguing that the typicality and commonality requirements collapse into the adequacy of representation requirement).

320. See *Stolt-Nielsen S.A. v. AnimalFeeds International* for one of the few cases in which the Court explicitly sets forth reasons for disallowing class actions—namely, the *in terrorem* effect on defendants. 559 U.S. 662, 663–65 (2010).

321. Glover, *supra* note 2, at Part II.

322. Indeed, to the extent the possibility of an *in terrorem* effect on defendants exists in any given case, it would fit within this Article's regulatory framework: the extraction of a nuisance settlement (or worse) from a defendant has a negative effect on deterrence. Such a determination, however, would necessarily have to rest on some measure of an evaluation of the viability of plaintiffs' legal theories, and their likelihood of success on those theories. The former is an appropriate consideration at the time of certification; the latter is almost assuredly not. *See, e.g.*, Glover, *supra* note 155 (arguing that some of the Supreme Court's recent class certification decisions were driven by largely unspoken determinations about the viability of plaintiffs' legal theories; that these determinations are appropriate under Rule 23, Supreme Court precedent, and the Rules Enabling Act; and that the Court has a duty to make these determinations explicit); Richard A. Nagareda, *Common Answers for Class Certification*, 63

Further, these transparency gains would have real consequences. By requiring courts to make explicit the normative and theoretical underpinnings of its approach to class certification, the regulatory theory could in turn reveal either the need for other, different, and possibly unseen regulatory steps. To the extent the Court believes that class certification (and, perhaps, certification of class actions involving low-value claims in particular[323]) imposes *in terrorem* effects on defendants, the explicit expression of that concern would draw attention to the need for regulations that address *directly* the problem of nuisance settlements.[324] For instance, although current Supreme Court jurisprudence requires courts to engage in merits-based inquiries when those inquiries overlap with certification requirements,[325] that has *not* led courts, including the Supreme Court, to *expressly* evaluate whether plaintiffs' underlying substantive theories are legally cognizable.[326] To illustrate, the Title VII class claims in *Dukes*, *as presented by the class*, likely satisfy Rule 23 certification requirements (even as ratcheted up by the Court in that same case). Under plaintiffs' "conduit" theory of discrimination under Title VII, there was a common question as to whether Wal-Mart's corporate culture, effectuated through discretion-based decisionmaking, resulted in discrimination against women. For the Court, there was an unstated preliminary question—whether Title VII permitted proof of discrimination through a conduit theory. The Court implicitly answered this preliminary question in the negative, expressing its holding largely in procedural language under Rule 23(a). Had it been explicit about its Title VII conclusion, however, the procedural consequences under Rule 23(a) would have followed

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VAND. L. REV. EN BANC 149 (2010) (counseling judges against conflating certification standards with standards for summary judgment).

323. *See* Glover, *supra* note 155 (arguing that the Court's class action arbitration jurisprudence reflects a substantive judgment that certain types of class actions—like low-value consumer class actions—are not worth facilitating because, among other reasons, they generate *in terrorem* effects for defendants).

324. This call for the Court to regulate normative problems caused by, or intertwined with particular procedures is not completely new. As Richard Nagareda has explained, the Court's decision in *Bell Atlantic Corp. v. Twombly* constituted an attempt to regulate, through pleading rules, normatively undesirable practices in the discovery process, a move he referred to as "regulatory indirection." Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 674 (2011).

325. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 n.6 (2011) (clarifying Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974)).

326. Such evaluation occurred, but was not made explicit, about plaintiffs' theory of Title VII in *Dukes*, 564 U.S. at 360. *See also* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1028 (2013) (arguing that the Court's decision in *Dukes* involved numerous Title VII policy judgments).

naturally and without much need for comment. The more direct route—whereby the Court would have explained why, as a matter of Title VII law, plaintiffs' "common question" was not legally cognizable—would have generated needed clarification in the substantive law. It also would have provided a guide for lower courts to likewise weed out legally impossible, and therefore unmeritorious, suits at the certification stage—thereby reducing the number of suits that may generate problematic *in terrorem* effects.

Alternatively, or in addition, the Rules Advisory Committee, or more informally, the authors of the Manual for Complex Litigation, could create a preliminary (and perhaps nonbinding) summary-judgment-type procedure for issuing a merits-based opinion that would follow quickly on the heels of class certification.[327] This could reduce a class's leverage at the settlement table where claims are of dubious merit, both by reducing factual information asymmetries between the parties about claim value, and by reducing the level of variance facing defendants in their settlement calculus.[328]

In the end, then, the regulatory theory of legal claims reveals regulatory pathways for *harmonizing* the often competing normative considerations at work. Freed from formalist constraints regarding the conception of claims, assume first that the Court's normative concerns about *in terrorem* effects remain in place, and assume further that mitigation of such effects is a theoretically valid procedural purpose.[329] However, assume also that the Court accepts as descriptively accurate the existence of normatively undesirable transaction-cost market failure generated by stringent certification requirements in low-value class actions. Explicit expression of the way in which normative concerns about *in terrorem* effects actually dictate procedural doctrine in turn highlights the need for direct regulation of those *in terrorem* effects. Such direct regulation thereby potentially makes room for the

327. *See, e.g.*, Glover, *supra* note 2, at 1730 (making a similar suggestion, though introducing the possibility of financial penalties (*e.g.*, the other party's costs) for parties who proceed with litigation after the issuance of an unfavorable preliminary judgment who then lose in a binding judgment); Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 203 (suggesting the introduction of nonbinding evaluations of the merits of a case earlier in the litigation process).

328. *See, e.g.*, Glover, *supra* note 2, at 1732–34 (discussing how information asymmetries and variance distort settlement values).

329. This Article does not address whether the generation of *in terrorem* effects for defendants constitutes a market failure in the litigation system, nor whether it should be the purpose of procedure to mitigate those effects. In prior work, however, I have argued that procedure should seek to produce more accurate settlement values, in part by providing merits-based assessments earlier in the litigation process, and particularly in class litigation involving high levels of variance. Glover, *supra* note 2, at 1764–68.

regulation of other important interests. Indeed, this approach opens up a potential regulatory pathway for procedure to reduce transaction cost barriers to claiming in the subset of class actions involving low-value claims. Along these lines, the specific regulatory prescriptions set forth in this Section are of course not the only ones we could adopt. Instead, as here, they illustrate the ways in which the regulatory theory in this Article points in new and different directions for the achievement of key normative goals of our litigation system.

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Of course, there are possible alternatives to the problem of transaction cost barriers to the effectuation of substantive rights—alternatives that likewise do not require reversion to formalist conceptual frameworks. For instance, one could design a less expensive system of dispute resolution and procedure where, ideally, supplemental financing is unnecessary and unmarketable claims are fewer, perhaps along the lines of the fast-track for claims in the United Kingdom. Such ideas are the subject of future work and are beyond the scope of this Article. As necessary as such reforms may be, they are not likely to supplant our current system. Accordingly, they would not replace, wholesale, this Article's regulatory theory for claims.

CONCLUSION

This Article has focused on the ways in which long-standing conceptual debates about legal claims and litigant autonomy that occur within specific procedural contexts play out across the broad swath of the litigation landscape. This cross-cutting analysis reveals that formalist conceptions of legal claims as either individualistic or collectivist cannot provide a coherent path toward resolving many of the most difficult questions facing procedural decisionmaking in particular and our litigation system in general.

Our approach to litigant autonomy therefore should not and cannot derive from absolutist views. Instead, this Article offers a theory for *regulating* individual autonomy over legal claims. Grounded in principles of economic theory and litigation theory—as well as the intellectual foundations of property underlying modern conceptions of legal claims—this theory posits that litigant autonomy can be regulated in appropriate circumstances, such as to reduce transaction-cost market failures that impede the effectuation of substantive rights. More than that, it is properly within the role and lawmaking

power of the judiciary to engage in such regulation, including through the use of procedural mechanisms. Operationalizing this Article's theory within the very procedural contexts that formalist conceptions struggled to address, this Article's theory points a way forward for navigating the interrelationship of procedure, substantive rights, and the ownership of claims in an increasingly complex litigation landscape.