THE ADAPTIVE AMERICAN JUDICIARY: FROM CLASSICAL ADJUDICATION TO CLASS ACTION LITIGATION

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ABSTRACT

Beginning primarily in the late-twentieth century, the American legal system underwent several rather dramatic changes in procedure and practice. In particular, class action litigation has become one of the distinguishing features of our legal system and it remains one of the most politically controversial areas of law. This article outlines recent fundamental changes in the American legal system by examining several prominent legal models suggested by scholars. It also specifically evaluates the class action device by theoretically analyzing several widely expressed concerns. Although these concerns are sensible, the history of the American legal system has demonstrated its remarkable adaptability and a careful analysis of specific concerns suggests some promising solutions, several of which have already resulted in considerable improvements.

INTRODUCTION

The American judiciary, particularly during the past several decades, has critically impacted our sociopolitical landscape. Federal courts have profoundly influenced nearly every major policy issue, including civil rights, women's issues, criminal punishment, health care, education, environmental regulation, corporate conduct, and consumer protection. Although a great deal of public discourse focuses on the policy issues themselves, legal scholars have identified fundamental changes in the formal *structure* and *procedures* of the courts as an underlying impetus of legal and

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political developments.

The purpose of this article is to provide a historical framework for evaluating developments in the American legal system and to demonstrate its remarkable versatility in resolving persisting institutional and procedural issues. In particular, this paper synthesizes existing scholarly literature on legal models and the major developments of the American legal system and evaluates claims regarding a relatively recent development—class action litigation. Part I presents the concept of a legal model and comments on its purposes and inherent limitations. Part II discusses the six most prominent legal models, in roughly chronological order, and then briefly identifies other trends and variations in the American legal system. Part III redirects the discussion to class action litigation and offers a brief history of the class action device. Part IV analyzes some of the most important concerns expressed by scholars regarding the potential consequences of class action litigation. Part V concludes the article by advocating a cautious but nevertheless optimistic reception of appropriate forms of class actions.

I. THE CONCEPT OF LEGAL MODELS

In the social sciences, a *model* is a simplified, often graphical, representation of the essential process of a particular variable or institution at a single point in time.[1] Legal scholars frequently use models to describe the functions and processes of the legal system. In this scenario, a legal model deliberately captures the most essential components of the legal system in an attempt to account for the majority of outcomes. Most research that deals with legal models, however, fails to explicitly recognize their purposes and inherent limitations. Understanding the following basic qualities of legal models is critical to interpreting and applying them correctly.

First, a legal model is a *simplified* description of the legal system.[2] It deliberately attempts to capture the essential features[3] of a system while excluding its insignificant features, thereby helping scholars to understand the most important system

[1] 10 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 378–79 (David L. Sills ed., 1968).

[2] *See* David E. Van Zandt, *Introduction: The Relevance of Social Theory to Legal Theory*, 83 NW. U. L. REV. 10, 26 (1989).

[3] *Id.*

outcomes. Second, a legal model *generalizes* the fundamental components of the legal system.[4] In other words, legal models do not attempt to precisely describe the underlying process of every case in the system; rather, they explain how the system generally works, in most cases. Again, its fundamental purpose is *parsimony*—or the ability to describe a phenomenon economically.[5]

Third, legal models are generally quite *stable*. Their qualities of simplification and generalization beg the question of when a traditional model[6] insufficiently describes the essence of the legal system and merits the construction of a new model. Although identifying and reconstructing models is largely a subjective process, legal scholars generally favor longevity until a model clearly fails to account for important qualities and outcomes.[7] This requires scholars to carefully determine when the legal system has breached a recognizable threshold of change and avoid revolutionizing every minor or isolated system change.

Fourth, legal models typically employ stepwise[8] models to describe processes. This feature is frequently misleading, as it suggests that wholesale changes neatly unfold in lockstep fashion. In actuality, however, emerging systems typically unfold rather gradually as they coexist and dynamically interact with pre-existing features. More sophisticated models reflect these considerations and frequently include features such as multivariate causation,[9] variable interaction,[10] and bidirectional influences.

Fifth, legal models can be either *descriptive* or *prescriptive*. Most of the models discussed in this paper are descriptive in nature, or attempt to objectively describe the most essential features of the legal system, regardless of whether the author views them positively or negatively. Prescriptive models, on the other hand,

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[4] *See id.* at 26–27.

[5] "[P]arsimony" is defined as "the scientific principle that things are usually connected or behave in the simplest or most economical way[s] . . . ." THE NEW OXFORD AMERICAN DICTIONARY 1245 (Elizabeth J. Jewell & Frank Abate eds., 2001).

[6] *See generally* Van Zandt, *supra* note 2, at 24–25 (describing traditional legal theory).

[7] *See generally* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255–64 (1997) (analyzing various legal models and challenges to them).

[8] "[S]tepwise" is defined as "in a series of distinct stages; not continuously . . . ." THE NEW OXFORD AMERICAN DICTIONARY, *supra* note 4, at 1670.

[9] *See* Seymour Martin Lipset, *The Expansion of Democracy*, 60 TEMP. L.Q. 985, 990 (1987).

[10] *See generally* James Lindgren, *Saks and Vidmar: A Litigation Approach to Social Science*, 17 J.L. & POL. 255, 267–70 (2001) (discussing the complexities of variable interaction).

represent what a particular author believes the legal system *should* look like, in order to maximize benefits and minimize costs.[11] Even descriptive models, however, are only useful to the extent they allow us to more fully understand the advantages and disadvantages of a particular manner of legal procedures and suggest mechanisms for improvement. Indeed, nearly all legal models have normative underpinnings and their authors frequently articulate normative reactions and prescriptive suggestions to those models.[12]

In summary, a successful legal model illuminates the most essential features of the legal system and enables researchers to identify its strengths and weaknesses and suggest reforms to improve its quality. Scholars should, however, maintain awareness that the inherent properties of legal models prevent them from describing every feature and case of the system and should proceed with an adequate degree of attentiveness to particular nuances and exceptional features. As Professor Rubenstein notes,

> [A legal model] is no doubt both underdrawn and overdrawn. It is underdrawn because it is just a sketch that needs further elucidation, application, and refinement. It is overdrawn because it is meant to be a model—crass, reductive, simplistic—but nonetheless recognizable. Surely all litigation has aspects of adjudication, management, and dealmaking. None of these models is clean, nor ever entirely explanatory or perfectly predictive of judicial behavior. Yet, each model focuses our thinking and re-orients our imagination. All models are, "'of course, human creations,' and thus, are not meant perfectly to reflect the real world, but rather to 'invite conversation and to appeal to the reader in a search for understanding.'"[13]

II. PROMINENT LEGAL MODELS

Beginning with Lon Fuller and Abram Chayes, legal scholars frequently described the American legal system according to several prominent models. They also accounted for important changes by

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[11] *E.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1471, 1522 (1998).

[12] *See, e.g.*, Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 894 (2008).

[13] William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 437 (2001) (quoting Andrew K. McThenia and Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1663 (1985)) (footnote omitted).

revising inherited models to more accurately reflect contemporary features of the legal system and provide an adequate framework for understanding and describing legal issues and processes. The history and development of the American legal system can be constructively described in terms of six prominent models: (1) Fuller's traditional model, (2) Chayes' public law model, (3) Resnik and Horowitz's managerial model, (4) Eisenberg's consultative process model, (5) Rubenstein and Mullenix's transactional model, and (6) Sabel and Simon's experimental model. The following subsections examine each of these models in roughly chronological order.

A. The Traditional Model

In 1978, Harvard Law Review posthumously published Lon Fuller's seminal article entitled *The Forms and Limits of Adjudication*,[14] which is the standard text used by legal professionals to describe the traditional model of the American legal system. Fuller defines the traditional legal process as "a process of decision that grants to the affected party a form of participation that consists [of] the opportunity to present proofs and reasoned arguments."[15] His conception of traditional adjudication explicitly includes five essential elements: (1) an accuser, (2) an accused, (3) an adjudicator, (4) a legal charge, and (5) a principle condemning the alleged crime.[16] According to this model, legal parties have clearly defined roles and participate in a dispute over a well-defined private issue.[17]

Subsequently, several prominent scholars have commented and expanded on Fuller's conception and have contributed to our understanding of the traditional legal model. For example, Chayes describes the traditional model as follows: "In our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights."[18] He also offers five essential elements: (1) bipolarity, (2) retrospective litigation, (3) right-based remedy, (4) self-contained impact, and (5) party-initiation and party-control.[19]

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[14] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

[15] *Id.* at 369.

[16] *Id.* at 365–66.

[17] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288 (1976).

[18] *Id.* at 1282.

[19] *Id.* at 1282–83.

According to this description, the American legal system attempts to resolve a dispute between two private parties regarding a previously committed violation of a right. Additionally, Rubenstein describes the traditional legal model, stating that "[t]he traditional premise of American civil adjudication is that ours is an adversary system: Litigation is a process by which an impartial arbiter resolves a dispute between private parties following an adversarial demonstration of privately developed facts and zealously presented legal arguments."[20] Alternatively, Eisenberg, a student and colleague of Fuller, describes three essential norms of traditional adjudication: (1) adjudicative *attention* to the parties, (2) adjudicative *explanation* of the ruling, and (3) strong *responsiveness* to the parties' proofs and arguments.[21]

In summary, each of these descriptions of the traditional legal model share common features. They essentially describe a party-driven adjudicative process characterized by reasoned argumentation and reliance on common law precedence. As we shall see, however, this model eventually became obsolete following its inability to satisfactorily respond to new challenges and issues.[22]

B. The Public Law Model

In 1976, Abram Chayes published *The Role of the Judge in Public Law Litigation*,[23] which has rapidly become one of the most influential law review articles ever written. In his seminal article, Chayes argues that

> [w]e are witnessing the emergence of a new model of civil litigation and, I believe, our traditional conception of adjudication and the assumptions upon which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of judge and court within this model.[24]

As previously noted, Chayes describes the antiquated traditional

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[20] Rubenstein, *supra* note 13, at 371.

[21] Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 411–12 (1978).

[22] *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3, 9, 13–15 (2001) (supplying an interesting alternative account of the American legal system, arguing, very similarly to Fuller, that "adversarial legalism," or lawyer-dominated legal contestation between two opposing parties, is the hallmark feature of American litigation).

[23] Chayes, *supra* note 17, at 1281.

[24] *Id.* at 1282.

model as a system of settling well-defined legal disputes between two private parties.[25] In contradistinction, the emerging public law model features a judge-dominated system of negotiation with a "sprawling and amorphous"[26] party structure, a "wide range of outsiders," and frequent attempts to administer ongoing collective relief.[27]

Regarding the historical underpinnings of this dramatic legal shift, Chayes argues that "[s]ometime after 1875, the private law theory of civil adjudication became increasingly precarious in the face of a growing body of legislation designed explicitly to modify and regulate basic social and economic arrangements."[28] Political trends embodied in prominent reforms such as FDR's New Deal and Truman's Great Society precipitated a proliferation of regulatory legislation that extensively influenced both public and private lives.[29] In response, American citizens increasingly relied on the independent judiciary to seek injunctive relief against new government institutions that, in one way or another, failed to administer equitable entitlements, which Congress typically framed as a fundamental legal or Constitutional right.[30]

Although Chayes mentioned several points of concern, he generally supported public law litigation and believed it performed

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[25] *See id.* at 1282–84.

[26] *Id.* at 1284.

[27] *Id.*

[28] *Id.* at 1288.

[29] Henry G. Manne, The Judiciary and Free Markets, 21 HARV. J.L. & PUB. POL'Y 11, 23 (1997); *see* Robert J. Pushaw, *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 578–79 (2008); *see also* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 12 (1985) (noting the "striking" growth of administrative rules since the 1930s). Lawrence Friedman discusses a fundamental transition in legal and social culture that has dramatically impacted our society. *See id.* at 42. He argues that around the dawn of the twentieth century, the west subscribed to the pursuit of an ideal he calls "total justice"—or the expectation that justice should and can exist everywhere ("general expectation of justice") and that persons should be compensated in instances of injustice ("general expectation of recompense"). *Id.* at 5, 42–43. Dramatic advances in technology convinced people that science is capable of preventing, managing, or even controlling uncertainty and disaster. *Id.* at 42. According to Friedman, this fundamental transition in attitude precipitated a spike in societal demands for justice and compensation. *Id.* at 42–43. In other words, technological and social change stimulated legal change. *Id.*

Additionally, Robert Kagan interestingly notes a potential cause of the perpetuation of adversarial legalism—legal academia and culture. *See* KAGAN, *supra* note 22, at 55–56. He argues that law schools offer students courses in legal ethics that "exalt[] adversarial legalism" and articulate a code of ethics that "endorse[s] zealous advocacy of clients' causes . . . without regard to the interests of justice in the particular case or broader societal concerns." *Id.* at 55.

[30] *See* FRIEDMAN, *supra* note 29, at 80–81.

a valuable role in our political society: "I am inclined . . . to urge a hospitable reception for the developments I have described . . . . After all, the growth of judicial power has been, in large part, a function of the failure of other agencies to respond to groups that have been able to mobilize considerable political resources and energy."[31] He then summarized, with remarkable prescience, the future direction of legal reform: "In the circumstances, I would concentrate not on turning the clock back (or off), but on improving the performance of public law litigation, both by practical attention to the difficulties noted in this [a]rticle and by a more systematic professional understanding of what is being done."[32]

C. The Managerial Model

Shortly after Chayes' revolutionary article, Judith Resnik (1982)[33] and Donald Horowitz (1983)[34] independently proposed the managerial model, suggesting yet another set of fundamental legal system revisions. Horowitz noted five primary features of the court's new managerial role: (1) extensive and affirmative rulings, (2) administrative oversight, (3) policy directives that required financial commitments, (4) continuing involvement, and (5) resilience to appeal.[35] Elements of managerial adjudication are unmistakably similar to those of Chayes.[36] Indeed, the managerial model may be viewed as a replacement, supplement, or extension of Chayes' public law model.

In particular, Horowitz and Chayes' legal analyses are remarkably similar, although their focal points are slightly different. Whereas Chayes deals generally with any form of litigation designed to correct public policy,[37] Horowitz more specifically focuses on what he calls "structural injunctions" or "institutional reform decrees," or court orders specifically requiring the reorganization of governmental bodies to satisfy judicial

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[31] Chayes, *supra* note 17, at 1313.

[32] *Id.*

[33] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 378 (1982) (coining the "managerial" description of judges).

[34] Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265.

[35] *Id.* at 1267–69.

[36] *See supra* text accompanying note 19.

[37] *See* Chayes, *supra* note 17, at 1284.

standards.[38] Also, although Chayes briefly gestures at "outsiders" as a common feature of public law litigation,[39] for Horowitz, Federal Rule 53's provision of a special master is "the most significant procedural device"[40] recently applied by the courts. Thus, Horowitz's model commits much more attention to the procedural changes of the courts, in addition to substantive tendencies, particularly the courts' "'inherent power to provide themselves with appropriate instruments required for the performance of their [managerial] duties.'"[41]

More clearly, according to Resnik, the difference between managerial and public law adjudication lies in the pre-trial activities of judges: "[T]he role of judges before adjudication is undergoing a change as substantial as has been recognized in the [post-trial] phase of public law cases. Today, federal district judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion."[42] In other words, according to Resnik's model, judicial activism has expanded into the pre-trial phase of litigation and represents a rather fundamental shift in judicial policymaking and the American legal system.[43] A later commentator nicely categorizes the role of the judge in each model—whereas Chayes' model describes a "judge . . . acting as legislator," the managerial model represents a "judge . . . acting primarily as an executive official 'managing' cases."[44]

At any rate, the underlying similar, and at times identical, features of the two models describe essentially the same transitional phenomenon—the judicial movement from adjudication of private disputes to ongoing and widespread relief of government entitlement failures. In this respect, legal scholars have probably overstated the degree of difference present in the transition from Chayes' public law litigation to Horowitz and Resnik's managerial litigation.

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[38] Horowitz, *supra* note 34, at 1266–69.
[39] Chayes, *supra* note 17, at 1284.
[40] Horowitz, *supra* note 34, at 1272.
[41] *Id.* (quoting *Ex parte* Peterson, 253 U.S. 300, 312 (1920)).
[42] Resnik, *supra* note 33, at 378 (footnote omitted).
[43] *See id.* at 377–80.
[44] Rubenstein, *supra* note 13, at 371–72.

D. The Consultative Process Model

In 1978, Melvin Eisenberg wrote a law review article entitled *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, in tribute to Fuller's pioneering work.[45] Although Eisenberg actually wrote the article before Horowitz's managerial model, he is positioned after Horowitz because his model more clearly departs from Chayes' public law model.

Although his legal analysis also closely relates to Chayes' public law litigation, Eisenberg illuminates an issue that Chayes unsatisfactorily articulated, or even ignored. Eisenberg constructs a rather direct transitional link between Fuller's traditional model of adjudication and his own consultative process model, arguably glossing over Chayes altogether.[46] He argues that traditional adjudication was extremely insufficient in one major respect—it failed to control for issues inadequately addressed by the plaintiff or defendant. He describes this deficiency as follows:

> There is, however, a serious potential conflict between strong responsiveness and the rulemaking function. The rules that an adjudicator lays down must anticipate applications to persons far removed from the current disputants, and must be responsive to those other persons' needs as well. Insofar as the issues framed by the parties do not adequately address those long term needs, the norm of strong responsiveness may conflict with the adjudicator's rulemaking function . . . . The force of this norm may therefore vary according to the nature of the inquiry and the quality of the parties' participation.[47]

The judiciary responded to this deficiency, either deliberately or unwittingly, by reforming its procedures to grant the judge significant discretion in considering facts and issues outside of the parties' reasoned argumentation.[48] In this important way, the American legal system moved away from traditional adjudication and its inherent deficiency and resolved the *attentiveness dilemma* by expanding the fact-finding and decision-making discretion of the

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[45] Eisenberg, *supra* note 21, at 410.

[46] *See id.* at 412–15.

[47] *Id.* at 413.

[48] *See e.g.*, Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996) (stating that an "[a]nalysis under Rule 12(b)(3) . . . permits the district court to consider facts outside of the pleadings").

courts.

E. The Transactional Model

Following the decade of proliferation of legal models and adjustments, William Rubenstein (2001)[49] and Linda Mullenix (1999)[50] proposed similar conceptions of the American legal system, respectively referred to as the transactional model and the mass tort model. These relatively remarkable conceptions of adjudication differ substantially from Chayes' public law litigation, but their significance has not yet achieved widespread recognition or impact. Rubenstein describes the explanatory power of the transactional model in the following terms:

> My premise in this [a]rticle is that just as the adversarial model failed to account for what courts were doing in fact, so too do these newer conceptions fail to explain much of what is now happening in complex private litigation. A new model of civil litigation has emerged: a "transactional" model. The large, sprawling class action lawsuits that occupy the current procedural domain have more in common with business deals than they do with traditional adversarial litigation, legislative activity, or executive management. . . .
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> . . . .
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> Twenty-five years ago, Professor Chayes stated that if a public law case is "recognizable as a lawsuit [it is] only because it takes place in a courtroom before an official called a judge." Transacted cases barely even share those attributes, however, as what happens in the courtroom before an official called a judge plays such a relatively minor part in the enormous transactional framework.[51]

More specifically, he identifies five essential elements of the new transactional style of litigation: (1) large financial transactions, (2) business-oriented attorney activities, (3) minor importance of familiar forms of adjudication (e.g., pleading, discovery, and trial), (4) judicial self-interested deal-brokering, and (5) national coordination of similar cases.[52] This new description of the

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[49] Rubenstein, *supra* note 13, at 371.

[50] Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999).

[51] Rubenstein, *supra* note 13, at 372–73 (quoting Chayes, *supra* note 17, at 1302).

[52] *See id.* at 372–73.

American legal system is revolutionary today just as Chayes' model was twenty-five years ago. In contradistinction to other post-Chayesian models, Rubenstein's transactional model fundamentally transforms our understanding of the legal system—judges have largely subordinated themselves to a relatively minor role in the adjudicative process and court decisions have become superficial imprimaturs of privately negotiated business deals.[53]

Similarly, Mullenix proposes her mass tort model as a descriptive conception of the American legal system, in which she labels the late twentieth century the "era of aggregate private dispute resolution" and argues that large aggregate damage claims have become so widespread that they constitute one of the dominant features of American law.[54] Again, according to her model, judges have resigned themselves to positions of minor importance and have exacerbated the problems of claims-aggregation by adding official approval of privately determined settlements.[55] Her model clearly contains strong normative elements, which are evident in her critical analysis of the elements of mass tort litigation.

Together, these two conceptions outline the transition from judicial policymaking and case-management to an era of pervasive mass tort claims, which are typically privately settled in circumstances that more closely resemble business negotiations than familiar legal disputes. Additionally, these models sketch a notable reversal of the tendency toward increasing judicial involvement and illustrate a system in which judges have peculiarly and willingly resigned themselves to a relatively detached and minor role in contemporary adjudication.

F. The Experimental Model

In 2004, Charles Sabel and William Simon published an alternative framework, situated in the Chayesian dialogue, for understanding the development and changes of the American legal system.[56] More precisely, they identify two distinct types of public law litigation—(1) command-and-control and (2) experimentalism—and discuss the transformation from the former to the latter type.[57]

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[53] *See id.* at 371.

[54] Mullenix, *supra* note 50, at 415.

[55] *See id.* at 430–31.

[56] Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

[57] *See id.* at 1016, 1019–20.

They suggest that rather than shifting away from public law litigation, the legal system continued to engage public policy issues; however, instead of relying on ongoing monitors to ensure adherence to specific directives, the courts increasingly demonstrated a willingness to experiment with innovative solutions and change gears when original directives failed to work properly.[58] Nonetheless, according to Sabel and Simon, the contemporary American legal system retained essential features of public law litigation and constitutes a movement within, rather than away from, the traditional Chayesian conception.[59] This rather prominent conception offers a defensible alternative or supplement to the more widely recognized legal movement away from public law litigation to other forms of adjudication previously discussed.

G. Summary of Trends

Several modes of analysis are available to analyze trends in the development of the American legal system. For instance, on the public-private nexus, the courts have traditionally dealt with private disputes between two parties,[60] then moved to large public-type disputes,[61] and currently involve themselves in a great deal of aggregated private disputes.[62] On the judicial empowerment axis, the courts have generally assumed increasingly significant roles, although the specific role of judicial intervention has recently diminished as judges rely on private settlement to resolve disputes.[63] Similarly, the dominant focal points of litigation have steadily shifted outside of the traditional court setting to private arenas and conference rooms.[64] In other words, while the impact of judicial decisions and litigation has steadily increased in scope and significance, the actual depth of court involvement has retreated, in many cases, to a rather superficial process of rubber-stamping imprimaturs.[65]

In terms of comparative assessment, Rubenstein's[66] and

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[58] *See id.* at 1018–20.
[59] *See id.* at 1018–21.
[60] *See supra* Part II.A.
[61] *See supra* Part II.B. (examining Abram Chayes' public law model).
[62] *See supra* Part II.E.
[63] *See supra* notes 53–55 and accompanying text.
[64] *See id.*
[65] *See id.*
[66] Rubenstein, *supra* note 13, at 371.

Mullenix's[67] transactional and mass tort models of the legal system arguably best exemplify the most prominent and interesting features of the current mode of American legal mediation. Previous and alternative conceptions of the legal system, however, clearly elucidate other characteristics of the legal system for which Rubenstein's and Mullenix's models fail to adequately account.[68] In any case, post-traditional legal systems resolve several disadvantages associated with Fuller's traditional adjudication but yield a number of additional problems.[69] The following sections specifically discuss perhaps the most prominent feature of the modern legal system—class action litigation.

III. A HISTORY OF THE CLASS ACTION DEVICE

Although modest in its origins, the class action device, in many ways, has become the hallmark feature of the American legal system. Indeed, the foregoing models illuminate the importance of class action litigation, in various forms and settings, by either explicitly or implicitly noting one common feature—adjudication of complex aggregated disputes. Before proceeding with a brief history of the class action device, a conceptual definition is in order. American Jurisprudence supplies an authoritative definition of class actions:

> [A] nontraditional litigation procedure permitting a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class of similarly situated persons when a question is one of common or general interest to persons so numerous as to make it impracticable to bring them all before court.[70]

In their chapter entitled *A Matter of Some Interest*, Deborah Hensler et al.[71] provide an illuminating overview of the history of the class action device.[72] They begin by noting the importance of

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[67] Mullenix, *supra* note 50, at 413.

[68] *See generally supra* Part II.A–D (discussing the Traditional, Public Law, Managerial, and Consultative Process models).

[69] *See generally infra* Part IV (discussing the problems of the institutional incompetence, judicial illegitimacy, and formal unconstitutionality).

[70] 59 AM. JUR. 2D *Class Actions or Suits* § 53 (2002).

[71] DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 9 (2000).

[72] *Id.* at 9–48. For a more analytical and thorough discussion of class action litigation, see Stephen C. Yeazell's pioneering work entitled *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977). For a more recent analysis, see H.

understanding the fundamental procedural history of class actions:

> [P]rocedural rules have important effects on litigation outcomes. Nowhere in the law is this truth more evident than in the battle over the class action rule, which empowers plaintiffs to bring cases that otherwise either would not be possible or would only be possible in a very different form. . . .
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> To understand the current controversy over class actions, and the important public policy issues that it implicates, it is useful to step back and consider the evolution of the class action procedure in the United States. The story of that evolution involves powerful committees charged with drafting procedural rules; the U.S. Supreme Court and other federal and state courts that have shaped class action practice through their rulings; Congress, which has enacted some statutes that facilitate class actions and others that restrict them; and lawyers, as practitioners and scholars, who have influenced all of the preceding through their writings and oral testimony. The record of controversy and change in the class action rule and its implementation signals the complex dilemmas posed by class actions and the powerful political forces at play whenever reform is in the air.[73]

The majority of legal historians trace the origin of the class action device to the so-called Bill of Peace in seventeenth-century England, which "enabled multiple plaintiffs or defendants to resolve common questions in a single legal action brought in the Courts of Chancery."[74] Additionally, this bill originally required legal joinder as well as physical presence of all participating plaintiffs, although the presence requirement was later relaxed as the size of group litigation expanded.[75] Additionally, the Bill of Peace required the representative plaintiffs "to show that they adequately reflected the interests of the entire group because the judgment would be binding on *all* plaintiffs . . . ."[76]

In 1833, American courts adopted Equity Rule 48, which "allowed for a representative suit when the parties on either side were too

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Patrick Glenn, *The Dilemma of Class Action Reform*, 6 OXFORD J. LEGAL STUD. 262 (1986).

[73] HENSLER ET AL., *supra* note 71, at 9–10.

[74] *Id.* at 10.

[75] *Id.*

[76] *Id.*

numerous for convenient administration of the suit."[77] Additionally, the United States Supreme Court later ruled in *Smith v. Swormstedt* (1853)[78] that the courts could issue binding rulings on absent party members.[79] Along with various state rules, Equity Rule 38 provided a straightforward framework for group litigation for over a century.[80]

In 1938, at the behest of Chief Justice Charles Hughes, a Supreme Court advisory committee drafted a set of procedural rules based on authority granted to the courts in the Rules Enabling Act (1934).[81] Rule 23 of the Federal Rules of Civil Procedure (1938) specifically dealt with the requirements and conduct of class action litigation.[82] In addition to rules of discovery, which required exchange of evidence prior to formal trial, Rule 23 categorized class action litigation into three types—"true," "spurious," and "hybrid."[83] This classification was critically important in legal practice, since only "true" class actions were legally binding on absent parties.[84]

In 1966, the Advisory Committee on Civil Rules re-evaluated Rule 23 and initiated reform that resulted in a number of rather significant changes,[85] including the following requirements: a large number of parties (the "numerosity" requirement) sharing fundamental issues of law (the "commonality" requirement) who are sufficiently represented by shared claims and defenses (the "typicality" requirement) as well as by representatives designated to protect the interests of the class (the "representative[]" requirement).[86] Additionally, Rule 23(b) (1966) re-categorized class actions as follows:

> (1)(a) when requiring claims to proceed individually would yield outcomes that might impose inconsistent obligations or standards of conduct on defendants;
>
> (1)(b) when requiring claims to proceed individually would allow plaintiffs who get to court first to take all the funds

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[77] *Id.* at 10–11.

[78] Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853).

[79] *Id.* at 303; HENSLER ET AL., *supra* note 71, at 11 & n.6.

[80] HENSLER ET AL., *supra* note 71, at 11.

[81] *Id.* at 11 & n.9.

[82] *Id.* at 11.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 12. For an informative analysis of some specific Advisory Committee proposed reforms to Rule 23, see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

[86] HENSLER ET AL., *supra* note 71, at 13.

> available for compensating losses, leaving nothing for other meritorious plaintiffs who might appear subsequently (often called a "limited fund" class action);
>
> (2) when the defendant has behaved in a manner that affects an entire group (by commission or omission), and the plaintiffs seek an order to prevent such behavior or to require the defendant to act in a particular matter (often called an "injunctive class action"); or,
>
> (3) when, as a practical matter, it would be more efficient for litigants with similar interests (usually in securing money damages) to proceed collectively, led by representative parties [("monetary damages class action")].[87]

Since Advisory Committee deliberations were closed to the public at the time of the 1966 Rule 23 revisions,[88] controversy over procedural changes exploded after their implementation. Most commonly, critiques of the new revisions centered on the *opt-out* procedure, which allowed the courts to automatically include unwitting class members who did not formally remove themselves from litigation, and the economic costs imposed on private businesses and the courts as a result of excessive litigation.[89] In response to the courts' rather loose application of class action requirements, the Supreme Court, in *Eisen v. Carlisle & Jacquelin*,[90] required plaintiff attorneys to notify prospective class members of impending litigation.[91]

Following the initial controversy regarding class action litigation, the public and professional attorneys thereafter remained relatively tranquil for some time.[92] *In re "Agent Orange" Product Liability Litigation*,[93] however, initiated the emergence of another type of civil proceeding known as "mass tort litigation," which seeks monetary relief for personal damages against a particular manufacturer or industry.[94] This new form of litigation precipitated the emergence of massive consumer and medical tort lawsuits and generated another round of controversy regarding the class action

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87 *Id.*
88 *Id.* at 15.
89 *See id.* at 15–16.
90 417 U.S. 156 (1974).
91 *Id.* at 176.
92 HENSLER ET AL., *supra* note 71, at 22.
93 100 F.R.D. 718 (E.D.N.Y. 1983).
94 *Id.* at 720.

matter.[95] In 1990, Chief Justice William Rehnquist commissioned a judicial committee, which based its deliberations on a 1986 report published by the American Bar Association, to investigate strategies for managing recent asbestos litigation.[96] Following several years of open discussion and public conferences, the Advisory Committee recommended seven modest revisions,[97] only one of which—a provision for interlocutory appeal of class certification—survived the implementation process.

In summary, the formal rules and provisions of class action litigation still closely resemble early British and American standards for group litigation. The history of Rule 23 procedural requirements, however, nicely frames the ongoing debate about class action litigation.

IV. ANALYSIS OF LEGAL CONCERNS

Fundamental changes in the American legal system always involve a certain degree of trade-offs, which many popular political commentators refuse to openly acknowledge. Although this article attempts to advance a particular theoretical viewpoint—justified by careful observation and analysis—it concedes that several problems still exist and that new challenges emerge with each successive development. As Farber acknowledges,

> [I]nstitutional factors . . . along with other checks on the judiciary, do make any fear of large-scale "judicial tyranny" unrealistic. The same institutional factors may even insure that in the long run the results of the process are usually acceptable to society at large. Still, misguided judicial interventions retain the capacity to do significant harm before they are curbed. . . . Perhaps it is best for judges to have an occasional nagging feeling that policymaking is a slightly risque activity in a democracy (so long as the nagging feeling does not translate into compulsive handwashing and other neurotic obsessions with judicial restraint). Judicial policymaking can be invaluable, but it is also possible to have too much of a good thing.[98]

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[95] *See, e.g.*, Report of the Judicial Conf. Ad Hoc Comm. On Asbestos Litigation Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. On the Judiciary, 102nd Cong. 383–85 (1991).

[96] *See id.* at 383–421.

[97] *Id.* at 409–21.

[98] Daniel A. Farber, *Stretching the Adjudicative Paradigm: Another Look at Judicial Policy*

Although an in-depth analysis of every identifiable problem is beyond the scope of this paper, a brief overview of the most prominent problems, along with proposed reforms, is certainly in order and illuminates the direction of the current legal system. The customary framework for analyzing class action litigation includes three categories of closely related vices: (1) institutional incompetence, (2) judicial illegitimacy, and (3) formal unconstitutionality. In order to encourage a more analytical discussion of class action litigation, this paper presents a slightly different enumeration of five specific issues and features.

A. The Problem of Legitimacy: Popular and Constitutional

First, Henry Hart and Albert Sacks discuss the problem of legitimacy.[99] As used in this context, legitimacy can refer to either constitutional fidelity or popular support, or both. Based on a misunderstanding of Fuller's analysis of parasitic legitimacy, Hart and Sacks argue that the judiciary's transformation away from traditional forms of adjudication results in a deterioration of public support of the institution, which diminishes its capacity to effectively accomplish its institutional purposes.[100] As Fuller explicitly notes, however, parasitic forms of legitimacy are not necessarily deteriorating; rather, they extract support from another organism:

> When I speak of a form of order as being parasitic, I mean merely that, although it seems to possess an original strength of its own, it in fact draws its moral sustenance from another form of order. In labeling it "parasitic," I intend no more condemnation than when a botanist calls a certain fungus "parasitic." Just as, from the standpoint of human interest, there are good and bad fungi, so parasitic forms of order may be good or bad.[101]

Additionally, as Chayes argues,

> [T]he ability of a judicial pronouncement to sustain itself in the dialogue and the power of judicial action to generate assent over the long haul [are] the ultimate touchstones of

Making and the Modern State, 24 LAW & SOC. INQUIRY 751, 767–68 (1999).

[99] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 642–46 (William N. Eskridge & Philip P. Frickey, eds. 1994).

[100] *See id.*

[101] Fuller, *supra* note 14, at 406.

legitimacy.

> In my view, judicial action only achieves such legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society.[102]

In other words, public legitimacy is not necessarily a matter of adherence to traditional norms or institutional roles; rather, the quality of decision-making and responsiveness to moral imperatives can foster public support for unconventional modes of policymaking.

Other critics challenge alternative forms of adjudication on grounds that they violate the constitutional separation-of-powers doctrine and argue that judicial policymaking encroaches on the policymaking responsibilities of the legislature. As Jeb Barnes argues, however:

> Under this system of checks and balances, no single branch should be seen as the principal policymaker, because a hallmark of American government is the dispersal of power among *overlapping* and *diversely representative* political forums. . . .
>
> . . . The implicit goal was to create dynamic tension among redundant branches facing countervailing political pressures and not an orderly division of labor between elected principals and appointed agents. Accordingly, the normative argument that Congress enjoys a privileged position in American policymaking may overstate the role of majority rule and elections in the Framers' design.[103]

Following Chayes' footsteps, a number of legal scholars, beginning with Owen Fiss, have reconceived the judiciary. According to Farber and Fiss' analysis, "the basic error made by Fuller . . . was to view mere dispute resolution as the central task of adjudication. . . . [*T*]*he role of the judge is to articulate social values and give them concrete form.*"[104] Although this statement is clearly overdrawn, given the legislature's responsibility to inject public values into governmental activity and the judiciary's political independence, it does make a valid point. Gerald Rosenberg nicely

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[102] Chayes, *supra* note 17, at 1316 (footnote omitted).

[103] Jeb Barnes, *Adversarial Legalism, the Rise of Judicial Policymaking, and the Separation-of-Powers Doctrine*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 35, 47 (Mark C. Miller & Jeb Barnes eds., 2004). For an opposing viewpoint, see John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833 (1991).

[104] Farber, *supra* note 98, at 757–58 (emphasis added).

reformulates this point:

> [I]n some cases, [the courts] can be more effective than other governmental institutions in producing significant social reform. As Aryeh Neier puts it, "[s]ince the early 1950s, the courts have been the most accessible and, often, the most effective instrument of government for bringing about the changes in public policy sought by social protest movements." . . .
>
> . . . Unlike legislatures or executives, courts do not act out of calculations of partisan preference. This means . . . that courts can point the way to doing what is "right." They can remind Americans of our highest aspirations and chide us for our failings. . . .
>
> . . . Where the public is ignorant of certain conditions, and political elites do not want to deal with them, court decisions can "politicize issues that otherwise might have remained unattended." . . . By bringing conditions to light, and showing how far from constitutional or statutory aspirations practice has fallen, court cases can provide a "cheap method of pricking powerful consciences." Thus, litigation "serves as a catalyst, not a usurper, of the legislative process."[105]

Enjoining the courts to formulate policy in certain matters, however, does not necessarily correlate with a desire for courts to intervene in matters of minor or even moderate importance. Indeed, as Feeley and Rubin argue,

> [j]udges prefer to rely on legal texts; they will generally abandon those texts, and make decisions designed to achieve beneficial results, *only when they have some assurance that the beliefs that motivate them are strongly felt and widely held, that is, that these beliefs are truly elements of social morality.*[106]

This observation forms an intuitively sensible explanation, at least in part, of why courts sometimes choose to involve themselves in pressing matters but at other times decline to intervene on the principle of judicial restraint. Eric Schulzke describes a phenomenon he calls "the urgency of . . . ugly imperatives,"[107] or a

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[105] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 22, 25 (Benjamin I. Page ed., 1991) (alteration in original) (citations omitted).

[106] MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 219 (1998) (emphasis added).

[107] Eric Schulzke, Attacking the Ugly Imperative: Judicial Capacity in Interventions Thick

situation of such gross abuse or neglect that it badly violates the public conscience and demands judicial intervention. Farber similarly explains the impetus behind prison reform litigation:

> The answer, I think, is that having found a constitutionally intolerable situation, the federal courts had very little choice. . . .
>
> . . . They could not simply content themselves with announcing that a massive violation of human rights was taking place, hoping that someone else might conceivably step in to remedy the situation. . . . Their only option was to try, as best as possible, to remedy the situation, using whatever means of action and whatever standards came to hand. This inevitably involved them in an unaccustomed role, one that raised serious doubts about both their ability and authority. But what else could they do?[108]

Beyond sympathizing, Owen Fiss even applauds the judicial policymaking of the civil rights era:

> It was not reasonable to expect the judges to be heroes, but the truth of the matter is that many lived up to these unreasonable expectations—they fought the popular pressures at great personal sacrifice and discomfort. The average judge turned out to be more heroic than the average legislator . . . .[109]

B. The Problem of Polycentricity

Second, Fuller notes the problem of "polycentric[ity],"[110] or the inability of courts to effectively manage cases that involve a number of different policy arenas and considerations.[111] This phenomenon is closely related to the problem of second-order effects, or the negative impact of unintended and unanticipated consequences of court decisions.[112] Fuller uses the metaphor of a spider web to illustrate these properties—just as pulling on a complex and intricate network of threads alters the shape of the object in a

and Thin 6 (Sept. 1, 2005) (unpublished manuscript, on file with American Political Science Association).

[108] Farber, *supra* note 98, at 764–65.

[109] OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 90 (1978).

[110] Fuller, *supra* note 14, at 394 (citing MICHAEL POLANYI, THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS 171 (reprint 1980) (1951)).

[111] *Id.* at 395–96.

[112] *Id.* at 394–95.

complicated and unexpected way, some types of social problems are connected with numerous other issues and problems and attempting to solve the problem with a simple "pull [of] one strand [of the web]" generates unexpected and often detrimental repercussions to other important areas of society.[113]

However, most critics fail to mention that Fuller himself mentions two mechanisms for rectification. According to Fuller, considerations of polycentric issues and second-order effects might be built into a judiciary by injecting a third type of rational discourse—logical deduction, or "the area where men seek to trace out and articulate the implications of shared purposes."[114] Interestingly, Eisenberg's consultative process model integrates what Fuller calls logical deduction by relying on a team of experts to advise the court on otherwise unforeseeable ramifications of potential rulings.[115] As a result, courts are able to address a variety of problem types by engaging experts in the decision-making process. He also notes that "an optimum solution can normally be arrived at only by vesting a single decisionmaker with . . . authority . . . not only to apply relevant criteria, but to determine how much weight each criterion is to receive and to change those weights as new objectives and criteria may require."[116] In other words, according to Eisenberg, managerial judges are in an ideal position to carefully consider polycentric problems and construct solutions that judiciously achieve optimal trade-offs.[117]

Fuller also suggests that the judiciary is capable of overseeing ongoing issues particularly well by improving legal rules and principles through adjustment over time.[118] Sabel and Simon note this property in their experimental model and introduce the notion of "positive polycentricity," or the "[w]eb [e]ffect," which illustrates "that under favorable conditions the partial interventions that limited information does allow can be informative enough to allow subsequent corrective measures, giving rise to new rounds of interventions and corrections."[119] In short, the problem of polycentricity can be resolved, at least to a considerable extent, by relying on third-party consultants and experimental forms of

[113] *Id.* at 395.
[114] *Id.* at 381.
[115] *See* Eisenberg, *supra* note 21, at 414.
[116] *Id.* at 425.
[117] *See id.* at 427–28.
[118] Fuller, *supra* note 14, at 398.
[119] Sabel & Simon, *supra* note 56, at 1080.

adjudication, both of which can be found in Fuller's own analysis.

C. The Problem of Individual Justice

Third, Martin Redish identifies the problem of individual justice.[120] Since class action litigation is typically initiated by private attorneys seeking personal economic gain, perverse incentives to settle often emerge, usually at the expense of class members.[121] The contingent fee structure of class action adjudication provides attorneys with a particular percentage of the award, regardless of the amount of effort spent on the case.[122] Consequently, attorneys often elect to settle for less than they could probably acquire in court, in order to avoid the costs of taking a particular case to trial, which results in huge payouts for attorneys in return for small investments of time and substantially smaller rewards for actual litigants.[123]

Additionally, Redish argues that an enormous number of class action lawsuits result in coupon settlements, or awards given in discounts for services and merchandise.[124] Coupons resulting from these settlements, however, are frequently unhelpful to individual litigants and cost the defendant virtually nothing, since they can simply offer their goods and services at the discounted production price.[125] Additionally, the completion of complex forms is often required to qualify for the settled coupons, which constructs yet another barrier to relief for litigants.[126] As a result, class action settlements often fail to satisfactorily achieve the primary goals of victim compensation and corporate deterrence.[127]

However, David Rosenberg's persuasive rejoinder defends class

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[120] *See generally* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (identifying the injustice faced by individual plaintiffs in modern class action lawsuits).

[121] *Id.* at 77–79.

[122] *See id.*

[123] *See id.* at 79, 104–05.

[124] *Id.* at 103–04.

[125] *Id.*

[126] *Id.*

[127] For further analysis of the perverse incentives and potential attorney abuses of class action litigation see generally William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997). *See also* Natalie C. Scott, *Don't Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 573–83 (2002); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 924, 929, 939–40 (1998).

action litigation within the individual justice tradition.[128] Perhaps the most common logical error critics commit is evaluating the effectiveness of class action litigation in isolation without comparing it against reasonable alternatives.[129] As Rosenberg notes, "the extent to which the interests of individual victims are sacrificed [should be] measured against the baseline of how their claims would fare in separate actions."[130] In most instances, individual victims achieve better results by aggregating their claims rather than pursuing separate trials.[131] Class actions create a legal economy of scale, which levels the playing field between individual litigants and wealthy corporate defendants and encourages legitimate litigation that is otherwise practically impossible.[132] Rosenberg nicely summarizes the advantages available to litigants through the class action device:

> The costs of traditional disaggregative, private law processes exclude many claims from the system. The cost barriers are compounded by other prevalent conditions, such as the low income status of a significant number of the victims, and the relatively low probability of success at trial that characterizes these legally and factually complex cases. In addition, to the extent that courts begin to use proportional liability to resolve the causation issues that routinely arise in toxic tort cases, the costs of disaggregative process are magnified in the evaluation of these claims by plaintiff attorneys. Many of these claims are rendered unmarketable to competent plaintiff attorneys because the returns on their contingent fee investment . . . are discounted in proportion to the probability of causation in each case. . . .
>
> . . . While it prevents victims from deriving the benefits of concerted action, the traditional process has no similar effect on the capacity of defendant firms to spread litigation costs and prepare the common questions efficiently on a once-and-for-all basis. . . . Because of their cost-spreading advantages, a defendant firm typically can afford not only to invest more in developing the merits of the claim than the opposing

[128] *See generally* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987) (offering a counterargument to the legal scholarship that criticizes the class action system's treatment of individual justice).

[129] *See id.* at 567.

[130] *Id.* at 566.

[131] *Id.* at 570–73.

[132] *Id.*

> plaintiff attorney, but also to finance a "war of attrition" through costly discovery and motion practice that depletes the adversary's litigation resources. The consequences of redundantly litigating common questions thus skews the presentation of the merits, promotes abusive strategic use of procedure, needlessly consumes public resources, and ultimately drains away a large amount of the funds available to redress, by judgment or settlement, victim losses.[133]

Rosenberg also mentions several procedural mechanisms that hedge against attorney collusion and unfair settlement awards.[134] For example, Federal Rule of Civil Procedure 23(e) requires judicial review and approval of class action settlements in order to protect the collective interests of class members and ensure distributional fairness.[135] Additionally, the notification requirement and the opt-out mechanism[136] preserve the rights of individual litigants to remove themselves from an undesirable settlement and seek relief on their own terms in their own individualized trial.[137] The bifurcation of liability and damage elements similarly allows litigants to collectively try facts of liability but seek damages separately.[138] Also, the contingent fee structure of class action litigation may actually encourage attorney loyalty and optimal outcomes:

> Because the attorney's stake in a class action is many times greater than it is in a separate action, the attorney's investment will also be far greater in the class than in a separate action. Despite having only a fractional interest, the class attorney will have sufficient incentives to invest at the level which closely approximates if it does not equal the investment level claimants able to finance their own litigation would regard as optimal. While the interests of lawyer and claimants in class actions are asymmetric . . . this differential is irrelevant as long as the lawyer's interest is sufficiently great to warrant an investment at the claimant's optimal level.[139]

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133 *Id.* at 570–71 (footnotes omitted).
134 *Id.* at 594.
135 FED. R. CIV. P. 23(e).
136 FED. R. CIV. P. 23(c)(2).
137 Rosenberg, *supra* note 128, at 569.
138 *Id.*
139 *Id.* at 583–84.

D. The Problem of Economic Productivity

Finally, a number of critics identify the problem of economic productivity as a prominent drawback of class action litigation. According to this group of scholars, frivolous litigation punishes large corporations and suffocates the productivity of the economy generally.[140] Rosenberg, however, responds as follows:

> The displacement argument predicts that by aggregating relatively low value mass tort claims in a class action, tort system resources will be monopolized by an endless and costly stream of individual damage trials that will undermine the system's functional productivity by excluding relatively higher value sporadic claims. There is, however, little substance to this position. . . . [A]ssuming that claims which are cost-effective for plaintiff attorneys to prosecute are cost-effective for the system to process, then displacement is unlikely to occur at all. Unless the expected return from the classed mass tort claims, net of the costs of litigating . . . exceeds the return expected from competing sporadic claims, plaintiff attorneys would admit the sporadic and exclude the mass tort claims from the system. Functioning as gatekeepers, plaintiff attorneys are thus likely to select among competing claims, sporadic or mass tort, those which are the most administratively efficient for the system to process. . . .
>
> . . .
>
> The overdeterrence argument is premised on the assumption that despite its risks, the net benefits of new technology . . . exceed those of the old technology . . . it replaces. According to this argument, the tort system—even in its inefficient private law mode, but certainly when its potency is enhanced by public law processes—overdeters firms that produce such new technology . . . .
>
> . . . [It] fail[s], [however], to recognize that while firms may not fully capture the social benefits of new technology . . . tort liability for the social costs can be absorbed into the product or service price without undermining efficient consumption. To the extent that

[140] For an analysis of mass tort problems and reforms, see generally John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344–55 (1995).

> demand decreases, it will reflect the choice of consumers at the cost-benefit margin.[141]

Additionally, a number of scholars and lawmakers have advocated adding a cost-benefit test to the adjudication of class actions.[142] In fact, the Civil Rules Advisory Committee of the early 1990's probably spent more time considering the addition of a cost-benefit test than any other proposed amendment.[143] Alternatively called "Factor (F)" or the "just ain't worth it" rule, this proposal advises judges to deny certification when the foreseeable costs exceed the possible benefits of class action litigation.[144] Although this device is certainly vulnerable to subjective and inconsistent applications, properly refining its criteria could result in more salutary adjudication of economically efficient and socially productive litigation.

E. Summary of Problems

Although scholarly expression of legal concerns is perfectly justifiable and even essential for improvement, each of the foregoing groups of concerns is generally either overstated or ignores real possibilities to contain harmful effects. The history of the American legal system has demonstrated its remarkable ability to transform to deal with emerging problems. For example, the judiciary responded to the sprawling new administrative and regulatory government by moving beyond traditional private adjudication and engaging, more or less effectively, important issues of public policy.[145] Since then, it has adapted to challenges of group litigation, technical fact-finding, and private settlement through fundamental changes in judicial procedures and norms, such as group certification standards, third-party consultation, equitability standards, and settlement certification. Additionally, legal experts have recently suggested a variety of procedural reforms, including cost-benefit testing, opt-in requirements, award caps, and attorney fee limitations, which are designed to resolve remaining problems but have not yet been implemented.[146]

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[141] Rosenberg, *supra* note 128, at 574–76.

[142] *See, e.g.*, HENSLER ET AL., *supra* note 71, at 473–76

[143] *Id.* at 473.

[144] *Id.*

[145] *See supra* Part III.B.

[146] A number of scholars have proposed various approaches to class-action reform. For example, Jonathan Molot argues that reform should move toward a more traditional role for

V. CONCLUSION

Perhaps the most peculiar feature of the class action dialogue is that even scholars who fundamentally disagree achieve a consensus on one rather startling point—class action litigation has become a semi-permanent feature of the American legal system. Nevertheless, some popular critics continue to advocate the total denouement of the class action device. Deborah Hensler et al. observe the following:

> At the heart of the long controversy over damage class actions is this dilemma: The litigation derives its capacity to do good from the same feature that yields its capacity to do mischief. . . .
>
> . . .
>
> . . . [W]e need to invest more of the legal system's energy and resources in regulating damage class action practices, seeking to improve the balance between public good and private gain whenever their use is sanctioned. . . .
>
> . . .
>
> Notwithstanding the difficulties, we think much can be gained by seeking a consensus on improving class action practices, even while the larger political debate continues.[147]

Although the goal of future research is to better understand class action litigation and develop procedures that can harness its legal virtues and contain its vices, clearly, as Professor Schulzke concludes, "The point is not to draw rigid lines that are . . . not sustainable."[148] Effectively addressing the problems of class action litigation, as well as many other prominent legal issues, requires

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the judge while continuing to hear policy-type issues. *See* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 30–32 (2003). H. Patrick Glenn argues that class action litigation has reached its limits and that subsequent reform will fail to accomplish anything significant. *See* Glenn, *supra* note 72, at 262. On the other hand, David Rudovsky argues that recent reforms that restrict available remedies encourages sub-constitutional behavior. *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1200–01 (2005). Two additional approaches, concerned with the *rate* of reform, have been suggested: (1) Stephen Berry supports an immediate overhaul of the class action device (*see* Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 322–23 (1980)), while (2) Philip Shuchman advocates a more incremental method of reform (*see* Philip Shuchman, *It Isn't that the Tort Lawyers Are So Right, It's Just that the Tort Reformers Are So Wrong.,* 49 RUTGERS L. REV. 485, 491–93 (1997)).

147 HENSLER ET AL., *supra* note 71, at 471–72.

148 Schulzke, *supra* note 107, at 25.

sensitizing ourselves to both its virtues and vices and formulating reasonable solutions and alternatives.[149] Developing an optimal class action device certainly does not involve rejecting or embracing it entirely, nor does it necessarily involve systematically balancing its general costs and benefits. In fact, class actions perhaps succeed marvelously in certain arenas such as civil rights, fail miserably in other areas such as environmental regulation, and marginally succeed or fail in other areas such as prison and mental hospital reform. To complicate the matter, class actions seem to succeed or fail to different degrees within each policy area and certain fascinating features cut in opposite directions and reverse themselves under various conditions. In short, class action litigation *itself* has become a polycentric legal issue that requires careful examination and thoughtful legal responses.

[149] Some critics have explicitly rejected any proposed attempt to weigh relative advantages and disadvantages of certain features of the American legal system or to produce any sort of overarching net judgments or systematic policy analysis. In his analysis of adversarial legalism, for example, Robert Kagan states,

> Do the negative aspects of American adversarial legalism "outweigh" its positive features? To pose the question in such global terms is not very useful. There is no way to count up and compare all the social costs and social benefits that a gigantic, multifaceted legal system send rippling through economic, political, and communal life. . . . [It] defies any easy answer, at least at that sweeping, system-wide level of analysis.

KAGAN, *supra* note 22, at 4. Although Kagan is certainly correct that answering these sorts of questions is not "easy," it is nevertheless potentially useful and perhaps possible. Statistical techniques and innovative methods present bright researchers with the necessary tools to properly pose and adequately answer these questions. *See, e.g.*, THOMAS E. WILLGING, LAURAL L. HOOPER, & ROBERT J. NIEMIC, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 3–4 (1996). If, in fact, as Kagan supposes, these questions cannot be answered on a "sweeping, system-wide level of analysis," certainly there may be a very useful mode of analysis that allows one to at least speak in terms of specific categories or situations. KAGAN, *supra* note 22, at 4.