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## The Class Action As Political Theory

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# THE CLASS ACTION AS POLITICAL THEORY<sup>†</sup>

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## INTRODUCTION

Since the advent of the modern class action, academics and jurists have struggled to articulate the precise scope of and rationale for this peculiar mode of litigation. In a certain sense, class actions give rise to an anomalous situation in the American tradition of civil adjudication by allowing one person to litigate the individual claims of an entire group of people in a single proceeding without their explicit endorsement of or participation in the litigation.<sup>1</sup> Paradoxically, the absent class members are simultaneously full participants and total non-participants in the litigation. The academic literature examining this form of litigation has portrayed the class action at times as a savior, bringing about justice in an otherwise flawed system of individual adjudication,<sup>2</sup> and other times as a villain, serving to artificially expand defendant liability and create a specialty practice for entrepreneurial plaintiffs' lawyers.<sup>3</sup> At the heart of these tensions lies an awkward mechanism for collective adjudication of passively enforced individual claims within a civil justice system largely designed for the purpose of vindicating actively pursued, individually held claims.

Although there is little consensus in class action scholarship as to why this island of collectivism exists in a sea of individualized dispute resolution,<sup>4</sup> there is near universal agreement that modern society necessitates the existence of some tool for the bringing of mass collective suits. Few doubt that "some litigious situations affecting numerous persons 'naturally' or 'necessarily' call[] for unitary adjudication."<sup>5</sup> The major issues in the class action debate center on how courts determine

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1. Although the idea of some form of group litigation goes back to medieval England, that form of litigation was in fundamental ways distinct from the modern class action. See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 4-7 (Yale Univ. Press 1987).

2. E.g., OWEN FISS, *The Political Theory of the Class Action*, in *THE LAW AS IT COULD BE* 122, 122 (2003); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

3. See, e.g., 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, 12-61 (1991); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 82-84; see also Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of Courts*, 54 LAW & CONTEMP. PROBS. 227 (1991) (arguing that aggregative litigation necessarily compromises the ideals of justice).

4. The class action differs from other multi-party joinder devices listed in the Federal Rules of Civil Procedure because it allows for a lack of participation by affected litigants. Other devices, such as compulsory or permissive joinder of parties, joinder of claims, impleader, or intervention allow all parties whose interests are the subject of the litigation to participate in the adjudication.

5. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386 (1967).

precisely when those situations arise and what control the class members retain over the adjudication of their individual claims.

Rule 23 of the Federal Rules of Civil Procedure attempts to provide at least some guidance in this regard. Rule 23(a) lists four requirements that a court must deem satisfied before certifying a class.<sup>6</sup> The rule then specifies that if a case meets all four of these requirements, it must still fall within one of the three categories of class actions described in Rule 23(b).<sup>7</sup> Only after satisfying this bifurcated examination can a case be certified as appropriate for class treatment. If a class is certified, depending on which of the Rule 23(b) categories the case falls within, the rule provides class members with the opportunity to leave the class and go it alone, or withholds that opportunity from absent class members.<sup>8</sup>

Because it is merely a rule of procedure, not surprisingly Rule 23 fails to provide a comprehensive theory of the class action's role and function. In light of the significant practical consequences that flow from class certification for potential litigants, however, scholars have sought to provide guidance on this issue, proposing a range of normative models of the class action aimed at promoting the procedure as a means for attaining broader legal or social ends.

The scholarly debate over these proposed class action models has focused primarily on the comparative social and economic costs and benefits associated with the various possible roles for Rule 23.<sup>9</sup> This sort of analysis has perpetuated the view of the class action, implicitly embraced by many scholars, as a legal device that is appropriately subjected, all but exclusively, to legal analysis.<sup>10</sup> Nothing, however, could be further from the truth.

On one level, of course, Rule 23 is nothing more than an elaborate joinder device that facilitates the application of legislatively enacted or common law created substantive causes of action within a broader system of civil dispute resolution. Viewed in this light, the class action is in reality far *less* than what scholars have perceived it to be: a device to simultaneously achieve social justice, redistribute wealth, and transform

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6. See FED. R. CIV. P. 23(a); see also discussion *infra* Part I.

7. See FED. R. CIV. P. 23(b); see also discussion *infra* Part I.

8. In some circumstances, depending on which of the Rule 23(b) categories the case falls within, Rule 23 either provides the judge with discretion to direct some degree of notice to absent class members, or requires the judge order notice. See FED. R. CIV. P. 23(c)(2)(A), 23(c)(2)(B).

9. E.g., Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993); Macey & Miller, *supra* note 3, at 105–16.

10. See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 126–27.

the nature of the entire adjudicatory process.<sup>11</sup> They have viewed the class action in this manner, despite the fact that, under the express terms of the Rules Enabling Act, a Federal Rule of Civil Procedure may not alter or modify underlying substantive rights.<sup>12</sup> On another level, however, the class action is considerably *more* than what legal scholars have generally conceived it to be. Because the class action imposes collectivist treatment—often coercively—on the adjudicatory process by which individually held rights are vindicated or protected, it inescapably implicates some of the most important debates of modern political theory. Yet only rarely have legal scholars even acknowledged the implications of the modern class action for the foundational issues of normative political theory.<sup>13</sup>

Just as the Truth in Lending Act requires creditors to disclose the terms and costs of a loan to potential borrowers,<sup>14</sup> this Article seeks to identify the framework of political theory underlying each doctrinal or conceptual model of the modern class action. We do so in order to enable potential adherents of each approach to fully recognize and understand the political consequences that inexorably flow from acceptance of one or the other of the proposed legal models. Acceptance of any legal model of the class action requires acceptance of the underlying normative political judgments that inspire its creation. The choice of a legal model of the class action represents, at least implicitly, judgments on important normative controversies of political theory, carrying profound consequences beyond those appearing explicitly within the four corners of the class action rule.

In this Article, we examine structural legal models of the class action proposed by leading legal scholars, from two distinct perspectives. The first perspective can be characterized as analytical and taxonomical. It seeks to categorize each of these proposed models in terms of normative political theories that, we assert, are necessarily implicated by the various models. The second perspective can best be described as normatively critical. On the level of political theory, we reject all of the existing scholarly models because all of them ignore or reject core notions of liberal individualism which, we believe, underlie American liberal democracy in general and the adversary system of litigation in particular.

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11. See, e.g., FISS, *supra* note 2; Rosenberg, *supra* note 2; David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998); discussion *infra* Part III.

12. See Rules Enabling Act, 28 U.S.C. § 2072 (2000).

13. The two arguable exceptions are FISS, *supra* note 2, and Rosenberg, *supra* note 2. Neither article, however, recognizes or deals with the foundational competing political theories potentially triggered by use of the modern class action. See discussion *infra* Parts III.A, III.C.

14. 15 U.S.C. § 1601(a) (2000).

We then fashion our own proposed model of the class action, which we call the “individualist” model, that seeks to fashion a legal framework of the class action that fosters the values inherent in a commitment to liberal individualism. Because one must understand the consequences associated with a political theory in order to appreciate its impact, we initially describe the various political theories implicated by the modern class action debate. We take as a baseline a traditional liberal political theory, grounded in a basic commitment to a belief in the worth and integrity of the individual as a core participant in a democratic society. We then compare liberalism with the political theories implicated by the existing scholarly models of the class action.

Of particular significance in the class action debate is the emphasis that liberalism places on an individual’s right to personal autonomy.<sup>15</sup> The concept of “personal autonomy,” however, is ambiguous. In its most extreme manifestation, the concept embodies traditional libertarian precepts of wide-ranging individual choice, free from control or direction by the state. In shaping our liberal individualist model of the class action, however, we need not commit ourselves on foundational issues of substantive libertarianism. Because the class action is an adjudicatory device, the only area of individual choice necessarily implicated by our theoretical model is a type of *meta*-decision making that focuses on what we call “*process-based autonomy*.” This concept refers to the category of decisions individuals are able to make concerning the nature of their participation in the democratic process or their efforts to influence the decisions made by democratic institutions. This form of autonomy is to be distinguished from *substantive* autonomy, which concerns individuals’ freedom to make decisions concerning the conduct of their day-to-day existence. Pursuant to the concept of process-based autonomy, individuals are deemed to possess autonomy over decisions about how to participate in the process of collective decision making concerning such substantive decisions. Thus, individuals have autonomy to determine what they will say in an effort to influence the political process or the manner in which they will attempt to petition the government for redress of grievances. Liberal democratic theory—as well as American constitutional law—for the most part insulates these decisions from external control. Individuals who resort to the adjudicatory process in order to vindicate or protect their substantive legal rights are appropriately viewed as simply additional manifestations of the political meta-autonomy that forms a central element

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15. See discussion *infra* Part II.A.

of liberal democratic theory. A class action rule that disregards these protective participatory rights dangerously undermines the proper role of autonomous individuals within a liberal democratic civil justice system. After elaborating upon liberal theory, we then contrast the emphasis on individual political autonomy in this political theory with the alternative approaches to political theory that are implicated in the class action debate: utilitarianism,<sup>16</sup> communitarianism,<sup>17</sup> and civic republicanism.<sup>18</sup> In each case, the subordination of the individual to external considerations conflicts with the normative importance placed on process-based individual autonomy by liberal theory.

We then consider the implications for political theory of the class action models proposed by leading legal scholars. We reject all of these models for their failure to recognize the central role of the individual in the political and judicial processes. A class action model premised upon liberal theory will permit abandonment of process-based individualism when, and only when, to employ collective treatment would—paradoxically—further precepts of individual choice. Certainly individuals may always voluntarily elect to act collectively, and in some cases the prohibitive cost of bringing an individual claim would, as a practical matter, preclude individuals from pursuing their claims without pooling their resources as part of a class. While those claims are still retained by the individual class members, it is generally understood that when a small injury is inflicted upon a large number of people, resort to the class action may be the only way for the individual class members to recover for their injuries.<sup>19</sup> The liberal model of the class action that we propose suggests the need for a sliding scale measure by which to determine the validity of class action treatment. This scale is tied to considerations related to the size of the individual claims at stake and a rough prediction about the corresponding ability of individuals to vindicate their private rights by individual pursuit of their claims.

We have two goals in this Article. Initially, we seek to alter the nature of the class action debate, by expressly inserting the perspective of political theory. Recognizing how the modern class action is structured may have significant consequences for the foundations of normative political theory, we hope to remove the theoretical superficiality that has

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16. See discussion *infra* Part II.B.1.

17. See discussion *infra* Part II.C.

18. See discussion *infra* Part II.D.

19. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 905 (1987).

characterized much of the modern scholarly debate concerning class actions. While on occasion that debate has touched on questions of political theory, those references are generally superficial or misguided. At the very least, then, we hope to establish that acceptance of one or the other of the scholarly models of the class action necessarily brings with it significant political baggage. Second, we hope to convince the reader that, when viewed from this perspective, all class action models that have been proposed to this point should be rejected because they ignore, undermine, or dilute fundamental notions of process-based individual autonomy.

### I. CLASS ACTIONS UNDER RULE 23

#### A. *Class Certification and the Right to Opt Out*

We begin with a brief overview of the basic features of the class action as set out in Rule 23 of the Federal Rules of Civil Procedure. Though certain aspects of the rule have been altered over the years, in terms of basic framework Rule 23 is largely unchanged from the major overhaul it underwent as part of the 1966 civil rules amendments.<sup>20</sup> A class action requires a would-be representative plaintiff to make a successful motion for class certification.<sup>21</sup> If the class is certified, the class representative acts on behalf of the entire class, functioning in a fiduciary capacity. The outcome of the litigation will legally bind not only the class representative, but every member of the class. In the motion for class certification, the plaintiff is not expected to establish the merits of the lawsuit, but rather only that his “allegations, if assumed to be true and to state a valid cause of action, are suitable for class treatment and resolution.”<sup>22</sup>

Rule 23 requires that the proposed class satisfy a list of requirements. This involves a two-step inquiry. Initially, potential class representatives must demonstrate that they meet each of the four 23(a) prerequisites: (1)

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20. See generally Kaplan, *supra* note 5, at 375–400 (describing the 1966 Federal Rules Amendments impacting class actions).

21. See FED. R. CIV. P. 23(c)(1)(A). A recognized subset of class actions has served as a source of significant controversy in recent years for their focus of class certification as an end in and of itself rather than the initial step in the process of class litigation. These so-called “Settlement Class Actions” occur when the would-be class representatives and the parties opposing the class collaboratively seek certification of a class on the condition that the district court approves a predetermined settlement arrangement. See generally Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006) (arguing that settlement class actions violate Article III’s case or controversy requirement).

22. STUART T. ROSSMAN & DANIEL A. EDELMAN, NATIONAL CONSUMER LAW CENTER, CONSUMER CLASS ACTIONS § 9.1.3.1, at 104 (5th ed. 2002).



the number of potential class members must be so large that the use of permissive joinder is impractical (“numerosity”); (2) the class must share common questions of law or fact (“commonality”); (3) the claims of the class representative must be typical of the entire class (“typicality”); (4) the class representative must be capable of adequately representing the interests of the entire class (“adequacy”).<sup>23</sup> Upon establishing these four conditions, the litigant moving for class certification must show that the suit falls within at least one of the three categories of class actions described in Rule 23(b).<sup>24</sup> The differences among these categories may have great practical significance because the categories afford different levels of protection for and impose different restrictions on absent class members. One category of class actions, those brought pursuant to Rule 23(b)(3), allows absent class members to “opt out” of the litigation. For classes in which absent class members possess the right to opt out, class representatives are burdened with the obligation to provide notice to as many absent class members as is practicable.<sup>25</sup> Other categories, however, do not automatically require class representatives to shoulder this burden, because class members are not permitted to withdraw from the class. These classes are described as “mandatory.”<sup>26</sup>

The first of these different categories is the 23(b)(1) class, which is subdivided into two sub categories: the (b)(1)(A) class and the (b)(1)(B) class. The (b)(1)(A) class includes those instances in which the defendant could potentially face inconsistent obligations if individual claims were to be litigated separately.<sup>27</sup> The (b)(1)(B) class, on the other hand, applies when the interests of the individual claimants could be undermined by separate adjudications.<sup>28</sup> The classic example of this appears when a defendant has a limited fund from which to pay damages, and the total of the individual claims is likely to exceed the fund.<sup>29</sup> For both (b)(1)(A) and (b)(1)(B) classes, membership in the class is mandatory, with no requirement of notice.<sup>30</sup>

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23. FED R. CIV. P. 23(a).

24. FED R. CIV. P. 23(b).

25. FED R. CIV. P. 23(c)(2).

26. A district court has discretion to require notice even in the cases of mandatory classes. FED. R. CIV. P. 23(d)(2).

27. FED. R. CIV. P. 23(b)(1)(A). For a discussion of how the (b)(1)(A) class functions in practice, see *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989).

28. FED. R. CIV. P. 23(b)(1)(B).

29. These are informally known as “limited pie” situations. *E.g.*, *Baker v. Wash. Mut. Fin. Group, LLC*, 193 Fed. Appx. 294 (5th Cir. 2006).

30. See FED. R. CIV. P. 23(c)(2)(A).

The second category of class action is provided for in Rule 23(b)(2), which applies to instances in which the relief sought is primarily or exclusively injunctive or declaratory relief applicable to the class as a whole.<sup>31</sup> The paradigmatic example of a (b)(2) class is a civil rights litigation where a defendant has acted in a way generally applicable to the class as a whole.<sup>32</sup> As in the case of (b)(1) classes, (b)(2) classes are mandatory with no notice required.<sup>33</sup>

The final category of class suit is the Rule 23(b)(3) class. For these cases, class certification does not follow directly from the interwoven nature of the interests at stake in the litigation, but would “achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”<sup>34</sup> Plaintiffs seeking class certification as a (b)(3) class must demonstrate that questions of law and fact “predominate” over the individual issues in the litigation.<sup>35</sup> They must also show that litigation as a class is “superior” to other forms of adjudication.<sup>36</sup> Rule 23 provides judges determining predominance and superiority with a list of four factors to consider in making their evaluation: (1) the interest of absent class members in directing the litigation of their claims in separate actions; (2) the existence of ongoing litigation concerning the class; (3) the desirability of having all litigation adjudicated in one forum; (4) the potential difficulties in managing the class.<sup>37</sup> For class actions falling within Rule 23(b)(3), plaintiffs must provide notice to absent class members and absent class members must have the opportunity to opt out of the litigation.<sup>38</sup>

The companion to the notice requirement in (b)(3) classes is the class members’ right to opt out of a class action, an option unavailable in all other categories of class actions. An opt-out system differs from an opt-in system in its treatment of absent class members’ inertia. Under an opt-out system, absent class members are presumed to be part of the class, while under an opt-in system, they are presumed to have elected not to participate in the class litigation absent their affirmative act to include themselves. The practical difference is that under an opt-in system passive

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31. FED. R. CIV. P. 23(b)(2).

32. *E.g.*, *Holland v. Steele*, 92 F.R.D. 58 (N.D. Ga. 1981).

33. *See* FED. R. CIV. P. 23(c)(2)(A).

34. FED. R. CIV. P. 23(b)(3) advisory committee’s note (1966).

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

36. *Id.*

37. *Id.*

38. FED. R. CIV. P. 23(c)(2)(B).

class members retain their individually granted rights to sue, but under an opt-out system defendants are typically subjected to greater damage awards due to the larger class size.<sup>39</sup> No category of class action under the current federal rule provides for an opt-in procedure. Classes are either mandatory or, under (b)(3), opt-out in structure.

### *B. Positive and Negative Value Class Actions*

An additional subject discussed in the class action literature concerns the size of the individual claims at stake in the class litigation. Scholars have noted a significant distinction between two types of class actions based on the size of individual class members' claims.<sup>40</sup> Type-A class actions, or "Positive Value" class actions, include those class actions where individual claims are sufficiently large so that "each claim would be independently marketable even in the absence of the class action device."<sup>41</sup> Type-B class actions, or "Negative Value" class actions, on the other hand, refer to those class actions where the costs in establishing and collecting the individual claims are greater than the potential recovery.<sup>42</sup>

The importance of this distinction lies in the alternative rationales typically offered to justify inclusion of the claims in a class proceeding. The standard argument in favor of negative value class actions is that absent the class proceeding, these claims would never be brought because it would be economically inefficient to do so on an individual basis.<sup>43</sup> By authorizing class treatment of negative value claims, a class action rule is thought to achieve distinct goals. First, it enables individual claimants to obtain compensation when such relief would have been otherwise infeasible. Second—and, to many commentators, far more important<sup>44</sup>—allowing litigation collectivization in these situations effectively enforces existing substantive legal restrictions on private or governmental

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39. The significance is not merely theoretical. Few potential class members ever opt out of a class action. See THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 10 (1996) ("Across all four districts, the median percentage of members who opted out of a settlement was either 0.1% or 0.2% of the total membership of the class. . . .").

40. Coffee, *supra* note 19, at 904–06.

41. *Id.* at 904.

42. *Id.* at 905. Professor Coffee also describes a third category of class actions, the Type-C class action, which occurs when the class includes absent class members with both Type-A and Type-B claims. *Id.* at 905–06. Specific consideration of this type of class action is unnecessary for the analysis presented in this Article. We propose an alternative version of "Type-C" class action. See discussion *infra* Part IV.B.2.

43. See, e.g., Coffee, *supra* note 19, at 904–06.

44. See discussion *infra* Part III.A.

offenders. In the case of positive value class actions, however, the rationale typically offered is that they minimize the expenditure of resources by consolidating all claims into a single proceeding and avoiding duplicative litigation.<sup>45</sup>

## II. POLITICAL THEORIES RELEVANT TO THE CLASS ACTION DEBATE

While Rule 23 sets out the existing legal framework of the modern class action, surely its contours do not exhaust the scope of potential normative debate over the scope and structure of the class action. There are many ways the class action device may be structured, and Rule 23's dramatic revision in 1966 underscores the fact that the provision is always subject to normatively based reconsideration and modification. The tension among competing normative judgments about the costs and benefits of the class action become clear only through an intensive examination of the underlying political theories implicated by the various proposed normative models of the device. Most class action scholars have ignored the political theory implications of the class action models they advocate. Yet the political theory implicit in the various proposed structures can speak volumes about their merits.<sup>46</sup>

In order to make the consequences of these theoretical ties explicit, it is first necessary to provide a brief description of the various political theories implicated by the class action debate. What becomes immediately obvious is that only liberal theory emphasizes the role of the individual in controlling the legal pursuit and protection of his individual interests. The other major political theories implicated by modern class action scholarship view individualism either as an irrelevancy, a consideration unworthy of significant emphasis, or even as a morally deleterious consideration. An exhaustive study of the nuances suggested by these political theories is beyond the scope of this Article. Yet by examining how the basics of each political theory respond to fundamental questions about the state, government, politics, and justice, we are in a better position to understand how each of these political philosophies has dealt with what should be seen as the central issues of the modern class action debate. In this section, we explore the basic elements of the four political theories implicated in the legal scholarship of class action commentators:

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45. E.g., Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 819 (2006).

46. See discussion *infra* Part III.

liberalism, utilitarianism, democratic communitarianism, and civic republicanism.

### A. *Liberalism*

Although there are many often conflicting variations, liberal political theory generally emphasizes the centrality of the individual's personal growth, integrity, liberty, or all three. The worth of the individual is central to Kantian moral philosophy,<sup>47</sup> and is assumed to be fundamental in John Stuart Mill's more instrumental justification of liberalism.<sup>48</sup> Under these versions of liberal philosophy, the primacy placed on the worth of the individual dictates recognition of the individual's role in the functioning of the democratic state.<sup>49</sup>

#### 1. *Autonomy, Liberal Theory, and the Democratic State*

While the various subcategories of liberal theory differ in a number of ways, at some level most recognize the centrality of some form of individual autonomy. John Rawls provides a useful definition of autonomy by asserting that people are autonomous when they "act[] from principles that they would acknowledge under conditions that best express their nature as free and equal rational beings."<sup>50</sup> Although this view of autonomy has not been universally accepted,<sup>51</sup> the subtle distinctions in the outer reaches of autonomy are beyond the scope of this Article.<sup>52</sup> At its foundation, autonomy dictates a significant level of free choice for the individual on issues of some consequence to him, unfettered by coercive external forces, either governmental or private. Of special concern to us, however, is the fundamental dichotomy between alternative visions of

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47. See IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF ETHICS* 62 (Thomas Kingsmill Abbott trans., Longmans, Green & Co. 5th ed. 1916) (1873) ("A rational being must always regard himself as giving laws either as member or as sovereign in a kingdom of ends which is rendered possible by the freedom of will.")

48. JOHN STUART MILL, *ON LIBERTY* 63 (Elizabeth Rapaport ed., 1978) (1859).

49. See JOHN RAWLS, *A THEORY OF JUSTICE* 250 (1971).

50. RAWLS, *supra* note 49, at 515; see also IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 51–52 (Lewis White Beck trans., Bobbs-Merrill 1959) (1785).

51. Gerald Dworkin, for example, has also focused on the conditions surrounding the exercise of decision making in defining autonomy by claiming, "[a] person is autonomous if he identifies with his desires, goals, and values, and such identification is not itself influenced in ways which make the process of identification alien to the individual." Gerald Dworkin, *The Concept of Autonomy*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 61 (1989).

52. See also discussion *infra* Part IV.B. Whether these distinctions would impact how a model of the class action derived from liberal theory would be constructed is a subject best left for another day.

individual autonomy, rather than its generic application. Democratic theory, we believe, recognizes a foundational distinction between *process-based* autonomy and *substantive* autonomy.

Process-based autonomy refers to the ability of individuals to control the nature of their participation in the processes of collective democratic government.<sup>53</sup> The concept, in other words, refers to the individual's ability to make decisions about her efforts to influence the collective decision-making process—or “meta-decisions.” Examples of these meta-decisions include whether, when, and how to speak publicly on a political issue, petition the government for a redress of a grievance, participate in a political campaign, or vote. The extent of one's process-based autonomy determines how much control an individual has over decisions impacting both how one participates in the democratic process and the ways in which one attempts to influence the decisions made by democratic institutions. By way of contrast, substantive autonomy refers to the more general power of individuals to make decisions directing the course of their lives. This broader category of decision making includes choices that individuals make as part of their private lives, unconnected to direct participation in the democratic process. Examples include whom to marry, where to work, whether to have an abortion, or whether to use narcotics. Depending upon how broadly one chooses to define the concept of substantive liberty, the concept may extend beyond such relatively intimate, personal choices to also include individual decisions that simultaneously impact the interests of other members of society, such as whether to sell automatic weapons, pay workers a living wage, or test a new medication before placing it on the market.

Recognizing and understanding the dichotomy between process-based and substantive autonomy is central to a full understanding of liberal theory. Liberal theory, in the narrow form we employ, is by no means necessarily synonymous with libertarianism. Instead, on most issues of substantive autonomy, liberal theory—again, in the narrow incarnation that we advocate—is wholly agnostic. What liberal theory is not agnostic about is the need for commitment to core notions of individual autonomy in deciding how to participate in the processes of democracy.<sup>54</sup> In contrast,

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53. Nearly all democratic theorists recognize the indispensable role of individual participation in political institutions in a legitimate democratic state. *E.g.*, ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE* 9 (1960).

54. *Cf.* JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 285 (1942) (noting that in a democracy “the people have the opportunity of accepting or refusing the men who are to rule them”).

the libertarian branch of liberal theory, associated primarily with the scholarship of Robert Nozick, calls for nearly limitless protection of substantive individual autonomy. Nozick proposed that the state may only restrain autonomy for the “protection against force, theft, fraud, enforcement of contracts, and so on . . . .”<sup>55</sup> Anything beyond those restrictions violates the core right of the individual because individuals properly enjoy virtually total autonomy over their actions.<sup>56</sup> This approach erects individual autonomy as a nearly impenetrable barrier against state intrusion and has been relied upon to support the legalization of all narcotics and prostitution, as well as the abolition of taxation.<sup>57</sup>

Rawls takes a more expansive view of the appropriate role of the state in restricting autonomy, determined by means of a thought experiment he calls the “veil of ignorance.”<sup>58</sup> This model assumes that in a state of nature called the “original position” and behind a “veil of ignorance,” where an individual is presumed to be unaware of his social status in future society, the individual would choose a rule limiting individual autonomy; then the state may legitimately restrain that exercise of autonomy.<sup>59</sup> Rawls believed that this inquiry leads to his so-called First Principle, which requires that individuals be given as much liberty as possible so long as each member of society enjoys the same degree of liberty.<sup>60</sup> The legitimacy of inequalities in liberty among individuals resulting from state intervention is determined on the basis of their conformity to Rawls’s Second Principle, which posits that these inequalities must satisfy two conditions: (a) they are to be to the greatest benefit of the least advantaged members of society; and (b) they are to be attached to positions and offices open to all, under conditions of equality of opportunity.<sup>61</sup> He calls this “the

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55. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* ix (1974).

56. Nozick’s libertarian philosophy is closely tied to John Stuart Mill’s earlier idea of the “Harm Principle,” which claims the state may only coerce the will of its citizens to the extent necessary to prevent harm to others. MILL, *supra* note 48, at 91. Mill claimed that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.” *Id.*

57. It is worth noting, however, that Nozick later described some of his views as “seriously inadequate” and appeared to recant aspects of his extreme form of libertarianism. ROBERT NOZICK, *THE EXAMINED LIFE* 286–96 (1989); *but see An Interview with Robert Nozick*, *The Robert Nozick Pages* (Jul. 26, 2001), <http://www.juliansanchez.com/nozick/jsinterview.html> (“[W]hat I was really saying in *The Examined Life* was that I was no longer as *hardcore* a libertarian as I had been before. But the rumors of my deviation (or apostasy!) from libertarianism were much exaggerated.”).

58. RAWLS, *supra* note 49, at 136–42.

59. Rawls argues that the basis for any such restriction “can be defended only if it is necessary to raise the level of civilization so that in due course these freedoms can be enjoyed.” *Id.* at 152.

60. *Id.* at 250.

61. *Id.* at 83.

difference principle,” which serves to allow a limited amount of state interference in individual autonomy where doing so serves the interests of justice.<sup>62</sup>

It is true that Nozick and Rawls failed explicitly to recognize the process-based/substantive dichotomy when crafting their theories. However, both theories are at least consistent with, even if not expressly confined to, a commitment to process-based autonomy. The minimalist state advocated by Nozick, for example, would find little reason for restricting the ability of individuals to control their meta-decision making.

Arguably more complex in this regard would be Rawls’s use of the veil of ignorance construct. It is perhaps conceivable that some restriction on process-based autonomy could be imposed if it would be legitimately selected by those in the original position. But Rawls’s First Principle would seem to preclude the possibility of imposing such a restriction from behind the veil, because it suggests that people would select a procedure that takes away their ability to direct the course of their personal interactions with the institutions of democracy. Rawls proceeds on the assumption that individuals behind the veil would be risk-averse about threats to their liberty, preferring procedures that maximize individual autonomy over the sort of authoritarian procedures that allow process-based autonomy to be exercised by someone other than the individual. Thus, the notion that any branch of liberal theory would allow for a legitimate subjugation of an individual’s process-based autonomy is highly dubious.<sup>63</sup> A legitimate liberal-democratic government requires that individuals be autonomous when participating in governmental processes and seeking to influence the decisions of democratic institutions.

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62. *Id.* at 75–78.

63. Even in the “New Liberalism” of L.T. Hobhouse, which has been described as “communitarian liberalism,” such a restriction would not appear to be justifiable. See Alan Ryan, *The Liberal Community*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV* 91, 95 (John W. Chapman & Ian Shapiro eds., 1993). Under this form of liberal theory, which arguably justifies a more extensive role for the state in regulating individual autonomy, the state may limit the decision making power of an individual any time where doing so would prevent an individual from exerting coercion over other members of the community. L.T. HOBHOUSE, *LIBERALISM* 63 (Batoche Books 1999) (1911). Yet any argument that would use Hobhouse’s liberal theory to justify the restriction of an individual’s procedure-based choices in the civil justice system would have to show that those decisions have the effect of constraining another person’s ability to make similar decisions. Such an argument seems tenuous, at best.



## 2. *Process-Based Autonomy, Adjudication, and the Adversary System*

To this point, we have established that liberal theory places great value on an individual's autonomy over meta-decisions—that is, decisions about the nature, scope, and extent of the individual's participation in the processes of collective decision making that characterizes liberal democracy. The most obvious forms of collective decision making affected by process-based autonomy are political in nature: attempts to persuade or influence other private individuals or governmental officials, participation in political campaigns, or voting. It is our position, however, that individuals' attempts to protect their legal rights and interests by resort to the judicial process are also appropriately characterized as an exercise of process-based autonomy. The adversary system of adjudication is another governmental process that vests meta-decision making authority in individuals who seek to influence a governmental institution's ultimate decisions that will impact their lives. Just as democratic theory necessitates the existence of process-based autonomy because it ties the legitimacy of governmental decision making to recognition of individual autonomy of participation, so, too, does the legitimacy of the adversary system rely on a judgment that individuals must be able to make autonomous choices about how best to pursue their own interests in court.

Fundamental to the adversary system is a party's ability to control fact development and the presentation of legal arguments.<sup>64</sup> In the words of Lon Fuller, this “distinguishing characteristic” of the adversary system “confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”<sup>65</sup> The legitimacy of the outcomes produced by the adversary system rests on the notion that litigants will present their case to the court in the way they see fit. The selection of the adversary mode of dispute resolution confirms and fosters the American commitment to liberal theory.<sup>66</sup> It recognizes the inevitability of differences of opinion in a pluralistic society on issues “involving both societal and individual needs, interests, and values.”<sup>67</sup> As such, it embraces the notion of conflict and its orderly resolution, and legitimizes the outcome of this resolution process by providing litigants with control over the legal pursuit and protection of

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64. Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 650 (1983).

65. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

66. Redish & Kastanek, *supra* note 21, at 576.

67. Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953–1971*, 51 DEPAUL L. REV. 359, 366 (2001).

their interests.<sup>68</sup> The liberal character of American civil adjudication stems from the presumption that in exercising this control, litigants are, in Rawls's words, "acting from principles that they would acknowledge under conditions that best express their nature as free and equal rational beings."<sup>69</sup> The adversary system harnesses the ability of litigants to make autonomous decisions in legitimizing the outcomes it produces. Individuals are presumed to have no legitimate complaint if they were allowed to present their case in the way they chose to present it—or, to put it another way, had "their day in court."

Beyond a few rare, statutorily created exceptions,<sup>70</sup> our adjudicatory system is largely predicated upon the idea of individualized adjudication for the purpose of vindicating or protecting the individual's legally protected rights and interests. Indeed, Article III's injury-in-fact requirement arguably reflects a belief that litigants should use private adjudication *only* to vindicate harms done directly to them.<sup>71</sup> A litigant's decision to pursue his private right to sue may operate in a way that benefits another party, but doing so must be incidental to the vindication of his own rights. The adversary system recognizes that although many people may share a common interest and wish to advance that interest, they may disagree about how best to advance it. They are therefore granted the authority, on an individual basis, to pursue those interests in the way that they see fit. Perhaps of greatest consequence, individuals are—within broad parameters—assigned the responsibility for the choices they make in how they pursue their claims. Litigants are burdened with the bars of collateral estoppel and *res judicata* for the outcome of the cases they litigate. Justifying the potentially harsh consequences of these bars reflects a presumption that litigants will have had the opportunity to present their case in the way they deem most effective.

It is true, of course, that the discretion to mount one's own case in the manner one sees fit is not absolute. Rules of ethics, laws of evidentiary admissibility, and the potentially competing interests of other potential litigants, among other restrictions, naturally constrain the scope of individual discretion in certain instances. But the same is true of even the

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68. *Id.*

69. RAWLS, *supra* note 49, at 515. Gerald Dworkin has also focused on the conditions surrounding the exercise of decision making in defining autonomy by claiming "[a] person is autonomous if he identifies with his desires, goals, and values, and such identification is not influenced in ways which make the process of identification in some way alien to the individual." Dworkin, *supra* note 51, at 54, 61.

70. *See, e.g.*, 28 U.S.C. § 1335 (2000) (statutory interpleader).

71. Redish & Kastanek, *supra* note 21, at 563–66.

most highly prized forms of process-based autonomy. Felons and those under the age of eighteen are generally denied the right to vote, and few consider the right of even politically focused expression to be absolute. But it does not follow that individual choice in such matters is of less than compelling significance. In the case of adjudication brought to vindicate private rights, a system that bound one litigant by the decision in a case over which another person had total control would run counter to the value placed on process-based autonomy. At a minimum, it would represent a highly paternalistic system, derived from an underlying assumption that someone else knows better how to vindicate individuals' rights than the individuals themselves, even when those individuals would have affirmatively chosen to actively protect their own rights. It would surely be difficult to reconcile such presumptions with the dictates of process-based autonomy inherent in liberal democratic theory.

### *B. Utilitarianism*

The basic position of utilitarian philosophy is that the state has a duty to make decisions that will maximize happiness—"the greatest possible surplus of pleasure over pain"<sup>72</sup>—aggregated over all members of society. Utilitarian theory views the state's primary function to be the promotion of the broadest possible "utility." In the language of its recognized innovator, Jeremy Bentham:

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question . . . . [I]f that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual. . . . The interest of the community then is, what?—the sum of the interests of the several members who compose it.<sup>73</sup>

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72. HENRY SIDGWICK, *THE METHODS OF ETHICS* 413 (MacMillan 1907) (1874).

73. JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 2–3 (1988) (footnote omitted). Modern utilitarians appear to be in disagreement as to whether measuring the "total utility" created by an action means increasing the average utility of all the members of society or the sum of all utility amongst societal members. J.J.C. SMART, *An Outline of a System of Utilitarian Ethics*, in *UTILITARIANISM: FOR AND AGAINST* 1, 27–28 (J.J.C. Smart & Bernard Williams eds., 1973). As this ambiguity does not impact the analysis of utilitarianism from a liberal individualist perspective, we skip over this problem, noting only that accepting the Utilitarian Model of the class action likely requires an answer to this question.

Since Bentham's era, the vast literature dissecting utilitarianism has given rise to a seemingly limitless variety of nuanced approaches to the theory. Scholarship examining Bentham's writing has described him as everything from a totalitarian to an individualist.<sup>74</sup>

Bentham recognized that the interests of individuals would be both selfish and varied. As one scholar noted, Bentham "offered no hope that a man will act other than in pursuit of his own interests, and little hope that these interests will naturally be associated with the interests of others."<sup>75</sup> In order to counterbalance the inherent selfishness of man, he proposed that legislators attempt to craft laws that would influence the behavior of the public to act in the general interest.<sup>76</sup> But Bentham also stated that:

The Legislator is not the master of the dispositions of the human heart: he is only their interpreter and their servant. The goodness of his laws depends upon their conformity to the general *expectation*. It is highly necessary, therefore, for him rightly to understand the direction of this expectation, for the purpose of acting in concert with it.<sup>77</sup>

An effective lawmaker, then, must attempt both to project the desires of the individual members of society and enact laws reflecting those passions, while also crafting laws that would subordinate these hedonistic desires. This "individualist" aspect of utilitarianism focuses on the preferences of the individual members of society and recognizes that those preferences may differ. Yet it has been simultaneously recognized that utilitarianism also includes an authoritarian streak,<sup>78</sup> since it allows justice

74. James E. Crimmins, *Contending Interpretations of Bentham's Utilitarianism*, 29 CAN. J. POL. SCI. 751, 751 (1996). Bentham has been quoted as saying that:

Liberty . . . not being more fit than other words in some of the instances in which it has been used, and not so fit in others, the less the use that is made of it the better. I would no more use the word liberty in my conversation when I could get another that would answer the purpose, than I would brandy in my diet, if my physician did not order me: both cloud the understanding and inflame the passions.

*Id.* at 752 (citing DOUGLAS G. LONG, BENTHAM ON LIBERTY: JEREMY BENTHAM'S IDEA OF LIBERTY IN RELATION TO HIS UTILITARIANISM 173 (1977)).

75. R. Cranford Pratt, *The Benthamite Theory of Democracy*, 21 CAN. J. ECON. & POL. SCI. 20, 20 (1955).

76. *Id.*

77. Jeremy Bentham, *Principles of the Civil Code*, in 1 THE WORKS OF JEREMY BENTHAM 297, 322 (Russell & Russell 1962) (1830).

78. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 112 (1979) ("This formulation does not exclude the possibility that A may know B's true preferences better than B does—the possibility, that is, of paternalism.").

to be deeply paternalistic by requiring a lawmaker to determine what will make an individual happy.

Individual autonomy is of no special importance in utilitarian philosophy. Even under a form of “individualist utilitarianism,” which does provide greater weight to the preservation of individual autonomy,<sup>79</sup> the value placed on self-determination reflects a judgment about the amount of utility derived from liberty, rather than recognition of any inherent value in individual choice and integrity. “The utilitarian legislator is said to value liberty *because* it is essential to each person’s happiness, and thus productive of the greatest happiness, and devises laws accordingly.”<sup>80</sup> Again, the sole concern of the utilitarian is whether a policy will maximize the overall happiness present in society.<sup>81</sup> Thus, to a utilitarian the protection or promotion of autonomy “is in itself of no special moral interest. Since as a rule people capable of autonomy want opportunities to live autonomously and find satisfaction in living autonomously, there is on utilitarian grounds abundant reason for increasing people’s opportunity to live in that way.”<sup>82</sup> John Stuart Mill is perhaps the most well recognized “individual autonomy utilitarian,” in the way he justifies the preservation of individual autonomy on pragmatic, self-developmental grounds.<sup>83</sup> Unlike the Kantian approach, which views individual autonomy as a first principle absolutely and unquestioningly shielded from government intrusion, Mill justifies the central role of individual choice solely on the basis of the value it serves in enhancing the happiness of the individual. Whatever one thinks of the Millian defense of autonomy, however, there can be little doubt that the bulk of utilitarian thought focuses not at all on the values of individual choice.

More fundamentally, the fact that utilitarian theory regards individual autonomy as simply another factor among many illuminates the broader problem with utilitarianism in a political system premised on the existence of rights. In the words of Judge Posner:

Rights in a utilitarian system are strictly instrumental goods. The only final good is the happiness of the group as a whole. If it is

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79. E.g., Fred Rosen, *The Origin of Liberal Utilitarianism: Jeremy Bentham and Liberty*, in VICTORIAN LIBERALISM: NINETEENTH-CENTURY POLITICAL THOUGHT AND PRACTICE (Richard Bellamy ed., 1990).

80. Crimmins, *supra* note 74, at 755.

81. A source of disagreement among utilitarian theorists lies with whether happiness is measured in terms of an aggregate of individual happiness or the general happiness of the entire society. See Posner, *supra* note 78, at 113.

82. Lawrence Haworth, *Autonomy and Utility*, 95 ETHICS 5, 5 (1984).

83. See MILL, *supra* note 48.

maximized by allowing people to own property and marry as they choose and change jobs and so on, then rights to these things will be given to them, but if happiness could be increased by treating people more like sheep, then rights are out the window.<sup>84</sup>

While this perception may be easily overstated,<sup>85</sup> it is beyond dispute that utilitarianism is a philosophy “which judge[s] actions neither by their motives nor their intrinsic qualities, but by their consequences.”<sup>86</sup> The broader point is that “[u]tilitarianism in itself does not make any class of actions categorically wrong; everything depends upon one’s guess about the effects of a policy upon the psychic state of millions of individuals.”<sup>87</sup> It is this communal aspect of utilitarianism that Rawls criticized in crafting his theory of justice.<sup>88</sup> To utilitarians, the concept of the individual matters only insofar as individuals are deemed units for deriving measurements of utility.<sup>89</sup> Utilitarian theory acknowledges the individual’s ability to choose what makes him happy and what does not, and will generally leave those preferences undisturbed. Yet if abridging the happiness of an individual will create greater happiness for others, then the individual’s will must give way to the interests of the majority.

### C. Communitarianism

The modern strains of communitarian political theory function primarily as a response to Rawlsian liberalism, rather than as a single unified political philosophy.<sup>90</sup> Perhaps reflecting this responsive character, the common characteristic of modern communitarian theorists is disdain

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84. Posner, *supra* note 78, at 116.

85. A common method of criticizing utilitarianism is to point to the “parade of horrors” that may emerge from the utilitarian state. The father of utilitarianism, Jeremy Bentham, did little to help his disciples in this regard as he once proposed eliminating begging by enslaving beggars. *Id.* Yet, in this regard, utilitarians frequently point out that, practically speaking, these sorts of horrible consequences are unlikely to ever occur as people typically do not derive sufficient pleasure from the suffering of others to allow such extreme results. See SMART, *supra* note 73, at 70–71.

86. Samuel Brittan, *Two Cheers for Utilitarianism*, 35 OXFORD ECON. PAPERS 331, 334 (1983).

87. Christopher T. Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 MICH. L. REV. 123, 141 (1987).

88. RAWLS, *supra* note 49, at 26.

89. See David A. J. Richards, *Rights and Autonomy*, 92 ETHICS 3, 5 (1981) (“Utilitarianism . . . fails to treat persons as equals in that it literally dissolves moral personality into utilitarian aggregates.”).

90. That is not to suggest, however, that many of the core concepts of communitarian theory only emerged after Rawls. Aspects of communitarian theory date back as far as ancient Athens, and can be seen as a recurring theme in political theory. For the purposes of this Article, however, the focus is solely on the communitarian political philosophers who have offered distinct approaches over the last twenty years.

for liberalism's overemphasis on individualism. This shared objection manifests itself in two largely distinct political philosophies with different approaches to the way communal will can constrain the autonomous decision making of the individual. We label the first of these approaches "democratic communitarianism," a theory that vests the power of self-determination in the community as a whole, rather than the individual, based on its belief in the primacy of social tradition and context in determining the identity and views of an individual. This approach does not predetermine what the substantive normative decisions made by and for the community should be, but instead posits that as a general matter, any attempt to define justice in a way that disregards broader communal interests, whatever those interests may be, is incoherent. The second of these approaches, which we call "objective truth communitarianism," posits that there are objectively good and bad policy decisions and that the government has a responsibility to enact policies that promote the "good life" for all of society. This approach contends that government should not be neutral towards the views and actions of the public, but rather should steer society towards a predetermined ideal society, even if that requires the constraint of individual preferences.

Each version shares a related disagreement with the normative conclusions associated with liberal theory. Yet their differing approaches to the means of incorporating the communal interests at stake raise distinct concerns. The democratic communitarians effectively subordinate the value of individual autonomy to the social institutions that shape the community as a whole. The objective truth communitarians, in contrast, allow justice to be defined by the purely political preferences of those who, for whatever reason, have been vested with the *a priori* power to define justice. Because modern class action theory appears to reflect only issues of process-based communitarianism, our theoretical inquiry here is confined to that aspect of communitarian theory.

Democratic communitarianism, much like liberal theory, places value on a commitment to a foundational premise of societal self-determination. The theory rejects the notion that values exist beyond those determined by the society of self-governing citizens. In this important sense, the theory rejects any form of totalitarianism or authoritarianism. Thus, communitarians believe that society is best served by political decisions that reflect the preferences of the entire community.<sup>91</sup>

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91. It is this aspect of democratic communitarianism that has led some commentators to label it as simply a new approach to "majoritarianism." MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* x (1998).

In contrast to liberalism, however, democratic communitarianism views the community, rather than the individual, as the foundational democratic unit. The individual is seen only as a part of broader social institutions to which he is inescapably and organically connected. Democratic communitarians believe that the interests of society are best served by a state that adopts policies designed to promote the communal entities that shape an individual's identity. Individual autonomy is to be protected only to the extent that doing so does not undermine these different communal attachments that play such an important role in shaping the life choices made by individuals.

Democratic communitarianism rejects the importance that liberalism places on atomistic individual autonomy. Where liberals like Kant and Rawls argue that individuals have a supreme interest in selecting and pursuing the aims they deem important, democratic communitarians argue that individuals are defined largely by their various communal attachments. The ultimate result of this insight is that the policies selected by the state should not emphasize the protection of an individual's ability to make autonomous choices, but should instead initially seek to sustain and promote the communal attachments that allow for the very sense of well-being and self-respect that lies at the heart of the justification for liberal individualism. Communitarian theory is grounded in the belief that individual autonomy divorced from the communal ties that shape that autonomy is incoherent. The reasons for the actions one selects are derived from the experiences shaped by communal groups that are often involuntarily or passively selected, such as racial, gender, or religious affiliations.<sup>92</sup> They contend that government policies best further the interests of society by seeking to promote the interrelationship of individuals with society as a whole.

At the heart of the communitarian argument lies a metaphysical view of an individual's identity as bound up with each person's various communal attachments. Charles Taylor has perhaps most clearly articulated this view of identity and why it requires a reconceptualization of the liberal view of justice.<sup>93</sup> Professor Taylor advocates an Aristotelian

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92. See CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1991); see also Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 685 (1990).

93. CHARLES TAYLOR, *Atomism*, in 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 187 (1985). It should be noted that "Atomism" is primarily a response to rights-based libertarian theorists in the Nozickian tradition, rather than a critique directly aimed at the sort of liberal individualism of Rawls. Rawls in fact does address the role of social organizations in shaping social identity in *A Theory of Justice*. See RAWLS, *supra* note 49, at Part III. This does not render Taylor's



view of the individual as “a social animal, . . . because he is not self-sufficient alone, and in an important sense is not self-sufficient outside a polis. . . . [Individualism] affirms the self-sufficiency of man alone . . . .”<sup>94</sup> Taylor considers liberal individualism flawed because it ignores the fact that “living in society is a necessary condition of the development of rationality . . . or of becoming a fully responsible, autonomous being.”<sup>95</sup> The autonomy contemplated by liberal theory “is a freedom by which men are capable of conceiving alternatives and arriving at a definition of what they really want, as well as discerning what commands their adherence or their allegiance.”<sup>96</sup> He contends that this sort of autonomy can only be developed by the norms imposed by society as a whole. Further, the very desire to possess this sort of autonomy derives from “the developments of art, philosophy, theology, science, [and] the evolving practices of politics and social organization . . . .”<sup>97</sup> He reasons that these institutions, which shape and provide meaning to the individual, “require stability and continuity and frequently also support from society as a whole—almost always the moral support of being commonly recognized as important, but frequently also considerable material support.”<sup>98</sup> As a consequence,

the free individual of the West is only what he is by virtue of the whole society and civilization which brought him to be and which nourishes him. . . . [A]ll this creates a significant obligation to belong for whoever would affirm the value of this freedom; this includes all those who want to assert rights either to this freedom or for its sake.<sup>99</sup>

The consequence of this communitarian view of the self from a political theory perspective is that it elevates the importance of community to a level far higher than that of the individual alone. In the words of Professor Taylor:

The crucial point here is this: since the free individual can only maintain his identity within a society/culture of a certain kind, he has to be concerned about the shape of this society/culture as a

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criticism of liberalism irrelevant, as subsequent communitarians have explained, because the extent to which Rawls incorporates the role of community in shaping identity is relatively minor.

94. TAYLOR, *supra* note 93, at 189.

95. *Id.* at 191.

96. *Id.* at 204.

97. *Id.*

98. *Id.* at 205.

99. *Id.* at 206.

whole. He cannot . . . be concerned purely with his individual choices and the associations formed from such choices to the neglect of the matrix in which such choices can be open or closed, rich or meagre. It is important to him that certain activities and institutions flourish in society. It is even of importance to him what the moral tone of the whole society is—shocking as it may be to libertarians to raise this issue—because freedom and individual diversity can only flourish in a society where there is a general recognition of their worth.<sup>100</sup>

The failure that democratic communitarians like Taylor identify in liberalism lies with its promotion of an atomistic notion of the self that they believe to be metaphysically incoherent and to inspire hedonistic behavior.

There are many flaws in the reasoning underlying democratic communitarianism. Initially, communitarians fallaciously treat the normative and the descriptive perspectives as interchangeable. As purely an empirical matter, it is of course true that individuals rarely, if ever, exist in atomistic isolation. None of us, after all, is Robinson Crusoe—and even he needed his companion, Friday. We all live within a broader society which, to a certain extent, shapes and frames us. It does not follow, however, that society should not be structured by an abstract normative commitment to recognition of the individual as an integral unit, worthy of respect apart from his communitarian associations. Indeed, it is for the very reason that the individual may so easily be overwhelmed by the society as a whole that the need to emphasize the importance of the individual's growth and development is so compelling. A democratic society could not function effectively otherwise. Even modern civic republicans, who generally deplore the selfishness of the individual and instead value communal pursuit of the public interest, acknowledge that absent the opportunity for personal and intellectual growth the individual will be unable to function as an active participant in the governing process.<sup>101</sup> The simple fact is that a community, ultimately, is composed of individual citizens. If society places no value on their worth or growth, we will be left with a community of automatons—hardly the basis of a democratic society, and hardly the appropriate building block for active, flourishing communal institutions.

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100. *Id.* at 207.

101. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989).

It is quite conceivable that one could choose to prefer at least a diluted form of communitarianism over the extreme substantive libertarianism of Nozick. That is an issue that is beyond the scope of our inquiry. It is quite another thing, however, to choose communitarianism at the expense of the process-based autonomy that, we believe, lies at the heart of liberal theory. Absent a commitment to the individual citizen's ability to make choices about the nature of his participation in the governing process or to protect his own rights and interests within that process legally unfettered by external communal forces, the concept of a viable democracy is rendered incoherent, because the concept of an active, thoughtful citizen will have become incoherent. It would therefore be nonsensical to commit to democracy as one's chosen form of government without accepting the value of individual self-determination.<sup>102</sup> A community is composed of individuals, and it is the free will of those individuals, acting individually or in association with others, that is exercised when policy choices are made. Without some foundational respect for the moral and intellectual integrity of the individual, any notion of democracy is ultimately rendered incoherent.

#### *D. Civic Republicanism*

Related to, but in an important sense distinct from, communitarianism is the revised theory of civic republicanism that surfaced late in the twentieth century. Although civic republicanism was originally tied to such morally distasteful precepts as racism, jingoism, and sexism,<sup>103</sup> in its modern and streamlined form the theory has shifted dramatically to the political left. As revived by such leading legal scholars as Cass Sunstein and Frank Michelman,<sup>104</sup> civic republicanism is characterized by its commitment to the deliberative pursuit of the public interest and disdain for the selfish, pluralistic pursuit of narrow personal interests.<sup>105</sup> Individualism, not surprisingly, is for the most part a political casualty of this focus. Because one of us has previously coauthored an extensive scholarly critique on the modern version of civic republicanism,<sup>106</sup> we decline to mount such an attack here. Our present focus, rather, is on a

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102. See discussion *supra* Part II.A.1.

103. Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1665 (1988).

104. See generally Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

105. See *supra* notes 99–100.

106. Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

comparison of civic republicanism to the various forms of communitarianism.

In their disdain for the value of individualism and their focus on some sense of community, the two theories are clearly linked. However, communitarian theory does not appear to be as narrowly tied to pursuit of some political form of the public interest. Presumably, communitarian theory could find value even in more narrowly defined communities—even those grounded in notions of self-interest, as long as the “self” in question is defined on a community basis. For example, the National Association of Manufacturers or the National Chamber of Commerce could presumably qualify for protection under at least some forms of communitarian theory, broadly defined. The same is definitely untrue of modern civic republican theory. Civic republicanism finds selfish pursuit of private profit-making interests to be harmful, rather than beneficial, whether the pursuit is individually or group based.

### III. LEGAL MODELS OF THE CLASS ACTION

To this point, we have described four normative models of political theory: liberalism, utilitarianism, democratic communitarianism, and civic republicanism. While we have made no express mention of the implications of these theories for the nature or scope of the modern class action, our thesis is that: (1) the various normative approaches towards the class action that have been advocated by prominent legal scholars are best understood largely as manifestations of one or another of these broader political theories; and (2) when viewed from this theoretical perspective, each should be found wanting because of its improper departure from the fundamental norms of liberal theory, which value the process-based autonomy of the individual. Before one can recognize and comprehend these legal-political intersections, however, it is first necessary to understand the structures of the various legal models of the class action. It is therefore to that exploration that we now turn.

We identify three class action models that illustrate the breadth and depth of legal scholarship on the normative rationale and proposed structure of the modern class action. We call the first of these models the “utilitarian justice” model, which is principally linked to the writings of Professor David Rosenberg. It relies on the belief that the common good is best served by a class action device that provides optimal deterrence in mass tort cases. Such deterrence can be achieved, Rosenberg argues, only by means of all-inclusive, mandatory classes. The second approach emerges from the writings of David Shapiro and Samuel Issacharoff,

which we label the “communitarian process” model. This approach seeks to view the class action largely as the adjudication of claims held by community-like entities, rather than as the aggregation of separately held individual claims. The final model, which we associate with Owen Fiss, is labeled the “public action” model. This approach views the class action exclusively as a device to vindicate the public interest by enforcing public rights against governmental or private offenders. From the perspective of the public action model, individual claimants are nothing more than the instrumental vehicle by which the public interest is legally vindicated.

#### *A. The Utilitarian Justice Model*

The “utilitarian justice” model of the class action seeks to utilize the class action as a mechanism for overcoming what are perceived to be the inefficiencies in the adversary system’s treatment of mass exposure tort claims by adjudicating all such claims that are individually held in the form of mandatory class actions. By requiring the aggregation of the individually held claims in mass torts, this model envisions a class action rule that facilitates the use of substantive tort law as an instrument for ensuring an optimal level of deterrence. Following in a long tradition of utilitarianism,<sup>107</sup> the utilitarian justice model determines the appropriateness of the invocation of the class action procedure on the basis of an estimate of the overall societal utility to be achieved as a result.

This approach was first described by David Rosenberg and it is in his scholarship that this model has been most clearly detailed and refined.<sup>108</sup> Rosenberg’s initial treatment of the class action came in an article in which he advocated a reconceptualization of tort law in mass exposure cases.<sup>109</sup> Deeming the class action to be the “keystone” of a reformulated mass exposure tort system,<sup>110</sup> Rosenberg focused his early work on its facilitative value in creating a tort system he believed would “enhance the system’s functional productivity considerably.”<sup>111</sup> Rosenberg’s approach to the class action sought to deal with the problem that individual plaintiffs

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107. David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 831 n.1 (2002) (claiming that his theory of the class action draws on “theories of deterrence, insurance, law enforcement, rational choice analysis, and welfare economics”).

108. *E.g.*, Rosenberg, *supra* note 2; *see also* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 23 (1987).

109. *See* Rosenberg, *supra* note 2, at 905–08.

110. *Id.* at 907.

111. *Id.* at 908. Professor Rosenberg also discussed the importance of restructuring the nature of remedies as an important element of the “public law” system of tort liability in mass exposure cases. *Id.* at 916–24.

face in mass exposure cases in proving causation by a preponderance of the evidence. They are frequently unable to do this for two reasons. First, there exists a “problem of determining the origin of the victim’s disease.”<sup>112</sup> When the injury in a mass exposure case involves illness, there are typically multiple possible causes of the disease. It is often true that collectively only a certain percentage of a particular class of injury or harm is caused by exposure to a defendant’s product, effectively rendering impossible determination of causation in the individual case. Usually, the most an individual plaintiff bearing the burden of proof is able to establish is a statistically higher rate of disease among those who have come into contact with the defendant’s product, and it is at best unclear how successful such a trial strategy would be. The second obstacle possibly facing mass exposure plaintiffs occurs because “it is often unclear which one of several manufacturers of a given toxic agent produced the particular unit of the substance that harmed the plaintiff.”<sup>113</sup> Mass exposure cases often involve several manufacturers who make effectively identical products and potential plaintiffs will come into contact with products produced by more than one of these manufacturers. This makes it nearly impossible for individual plaintiffs to establish, by a preponderance of evidence, which factor actually caused his injury.

The paradigmatic example of these problems of proof occurred in the Agent Orange litigation of the 1980s. In the years following the Vietnam veterans’ return, a number of them “died prematurely or reported debilitating illnesses or claimed that their children were born with serious congenital birth defects.”<sup>114</sup> When the veterans linked their conditions to their exposure to the chemical agent known as Agent Orange, which had been employed as a defoliant during the war to clear parts of the Vietnam jungle, they faced both of the evidentiary problems Rosenberg identified. It was, as a practical matter, all but impossible for an individual plaintiff to prove that his particular illness had been caused by exposure to Agent Orange.<sup>115</sup> Science was unable to definitively tie the various illnesses to a singular cause. Additionally, Agent Orange had been manufactured by a number of different chemical companies. It would be impossible to keep track of which chemical company’s “Agent Orange” had been used in

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112. *Id.* at 855–56. Professor Rosenberg also noted that the problem is compounded by the prohibition of statistical correlation evidence as the sole basis for liability under the traditional tort system. *Id.* at 857 & nn.37–38.

113. *Id.* at 855–56.

114. SCHUCK, *supra* note 108, at 23.

115. *Id.* at 29.

which parts of Vietnam in order to establish individual causation by a preponderance.<sup>116</sup> Yet despite these evidentiary barriers, it was at least conceivable that Agent Orange had, in fact, caused some of the illnesses suffered by the Vietnam veterans and their families. Judge Jack Weinstein of the United States District Court for the Eastern District of New York addressed this problem by effectively implementing Rosenberg's model through the process of inducing settlement.<sup>117</sup> He cited Rosenberg's 1984 article and chose to certify the class, allowed statistical evidence to be introduced, and imposed damage scheduling once the litigation reached a settlement.<sup>118</sup>

The Agent Orange litigation provides real-world support for Rosenberg's key observation that in the mass tort context, the impact of the causation problem can cause potentially significant problems for individual plaintiffs. Yet under the restrictions of an individualized adjudicatory system, where the assessment of damages is preceded by the all-or-nothing assessment of liability on an individualized basis, the total damages assessed against that defendant are likely to be significantly lower than had the adjudication been classwide in effect.

Rosenberg's attempt to remedy this danger inspired his proposed "public law" reformulation of the tort system in mass exposure cases.<sup>119</sup> A key element of this public law model was the use of the class action as a tool to achieve the broad objective of the tort system of deterring future tortious conduct.<sup>120</sup> Rosenberg proposed a collectively based "proportionality rule" to replace the individualized case-by-case preponderance rule in mass tort cases. He argued that both compensatory and deterrence objectives would be better served by "impos[ing] liability and distribut[ing] compensation in proportion to the probability of causation . . . regardless [of] whether that probability fell above or below the fifty-percent threshold and despite the absence of individualized proof of the causal connection."<sup>121</sup> In practice, this would mean the use of statistical averaging and damage scheduling that would allow a class to recover a statistically determined amount if its members could establish an overall statistical probability that their illnesses were caused by exposure to a product, even if that probability would likely amount to less than a

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116. *Id.*

117. *Id.* at 143–67.

118. *Id.* at 270.

119. Rosenberg, *supra* note 2, at 859–60.

120. *Id.*

121. *Id.* at 859.

preponderance in an individualized adjudication. Thus, even if certain especially resourceful plaintiffs or plaintiffs with unique circumstances would have been able to take advantage of an individualized system of adjudication, as a collective matter the class of plaintiffs as a group would benefit substantially from a unified form of adjudication.

Rosenberg further noted that the causal connection problem is exacerbated by the institutional advantages defendants enjoy in a one-on-one litigation system that allows them to litigate what is effectively the same case over and over again, while each plaintiff is forced to start from scratch.<sup>122</sup> He argued that a system composed exclusively of individual adjudications allows “[t]he defendant firm, but not the plaintiffs, [to] take advantage of economies of scale in case preparation, enabling it to invest far more cost-effectively in the litigation.”<sup>123</sup> He believed that this institutional advantage leads to lower recovery for plaintiffs precisely because there are a large number of them.<sup>124</sup> He suggests that as an alternative, the class action “prevents the defendant from using the plaintiffs’ numerosity against them”<sup>125</sup> by providing plaintiffs with a similar scale economy that defendants enjoy.

Under this utilitarian justice model, then, the class action is made to function as a mechanism for requiring potential individual claimants to act collectively in pooling their resources and subordinating their desire to maximize their personal interests in order to ensure the optimal outcome for the group.<sup>126</sup> According to Rosenberg, this model of the class action has three basic elements:

First, to exploit litigation scale economies fully, courts should automatically and immediately aggregate all potential and actual claims arising from mass tort events into a single mandatory-litigation class action, allowing no class member to exit. Second, to achieve optimal deterrence efficiently, courts should statistically estimate total aggregate liability and assess the appropriate level of damages (normally, and for present purposes, assumed to equal total

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122. See generally David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000) (discussing the impact of the relative economies of scale between plaintiffs and defendants).

123. Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1379 (2000). In making this argument, Professor Rosenberg departs from his traditional focus on mass exposure cases alone and speaks more generally about class actions across areas of substantive law.

124. *Id.* at 1379–80.

125. *Id.* at 1380.

126. Rosenberg, *supra* note 107, at 832.



aggregate tortious harm). Third, to advance the goal of optimal insurance, courts should distribute damages to class members according to the relative severity of their injury rather than the relative strength of their legal claim.<sup>127</sup>

In support of this model, Rosenberg focused on how the underlying philosophy of his class action rule would function in practice under a reformulated tort system. He summarized his foundational theory by noting:

[T]he law should seek to minimize the sum of accident costs—specifically, the total costs of precautions against accident, unavoidable harm, risk-bearing, and administration of the legal system. . . . I posit systemic failure of administrative regulation to control risk appropriately and of government and commercial first-party insurance to cover loss adequately. Therefore, the need exists for “optimal tort deterrence” to prevent unreasonable risk of accident and for “optimal tort insurance” to cover residual reasonable risk.<sup>128</sup>

He argued that the class action fulfills this need. He thus concluded that his model’s effectiveness requires that all class actions in mass tort suits be mandatory.<sup>129</sup>

At the heart of this proposal is Rosenberg’s view that the debate over class actions is incorrectly focused on procedure, rather than on its substantive tort law dimension.<sup>130</sup> Process-oriented analysis, Rosenberg believes, distracts from the potential utilitarian virtues of the class action procedure in facilitating tort law’s goal of deterring unjustifiably harmful behavior.<sup>131</sup> He charged the “myopic proceduralist” with placing too much stock in the virtues of individualism and procedural formalism, while ignoring the functional benefits of what we call his utilitarian justice

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127. *Id.* at 834.

128. *Id.* at 831–32.

129. *Id.* at 831. Professor Rosenberg does qualify this proposal by suggesting that this only applies to the adjudication of mass tort cases. *See id.* (“My prior writings develop the argument for adjudicating *mass tort cases* collectively by mandatory-litigation . . . .”) (emphasis added). This limitation, however, neither alters our analysis nor does it remain consistent with the content-neutral role of procedure envisioned by the Rules Enabling Act.

130. Rosenberg, *supra* note 103, at 838.

131. *See* David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass Exposure Cases*, 71 N.Y.U. L. REV. 210, 214 (1996) (claiming that his “perspective focuses analysis of civil procedure for tort cases on the discrete functions of tort liability in minimizing the costs of accident, most importantly by achieving appropriate levels of deterrence and compensation consistent with the efficient administration of justice”).

model.<sup>132</sup> He noted that “proceduralists” compound their analytical shortcomings with “shoddy cost-benefit analysis, general disregard of pre-suit, *ex ante* conditions, and resort to deontological and even ontological claims, usually asserted in the form of vacuous and question-begging moralisms, hackneyed slogans, pseudo-traditions, and other conceptual shell games like ‘plaintiff autonomy,’ ‘day in court,’ and ‘process values.’”<sup>133</sup> He further argued that a formalistic approach to individual justice causes a net loss to individual plaintiffs and ignores the *ex ante* preferences they would have from behind a Rawlsian veil of ignorance.<sup>134</sup>

In contrast to the majority of class action scholars, Rosenberg actually does make an effort to ground his class action model in broader precepts of political theory. However, he inaccurately portrays his approach as effectively all things to all people, satisfying the dictates of virtually every normative model of political theory. In reality, Rosenberg’s class action approach, when viewed through the lens of political theory, amounts to a form of stark, Benthamite utilitarianism, with all of that theory’s disdain for the values of individualism contemplated by liberal theory. Rosenberg’s tort law view of the class action relies on the basic utilitarian principle that the social utility of law is to be determined by reference to the extent that it fosters the greatest good to the greatest number. As is true of all such utilitarian approaches, this model values individualism only up to the point that it is necessary to maximize overall utility.<sup>135</sup> Indeed, in shaping the utilitarian justice model Rosenberg considers arguments focused on individual autonomy to be disingenuous, to the extent they rely on “self-validating assertions that individual participation ‘increases self-respect.’”<sup>136</sup> While he does purport to rationalize his model by reference to liberal theoretical perspectives as well, such references are wholly

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132. “‘Proceduralist’ refers to the approach that ignores deterrence and compensation objectives and related individual welfare effects of the substantive law in evaluating the operation and potential redesign of the civil liability system.” David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 19 n.2.

133. *Id.* Professor Rosenberg has also been highly critical of the 1966 amendments to Rule 23 claiming that they are “basically flawed,” *id.* at 20, and that they reflect an “inexplicable proceduralist disregard of the deterrence and insurance functions of civil liability and general neglect of the relative effects of rule choices on individual welfare.” *Id.* at 20 n.4. Further, “the 1966 revisions also displayed neophytic understanding of substantive law governing mass production risks, operational dynamics of procedure, and economies of practice.” *Id.*

134. *Id.* at 25 n.13; *Cf.* RAWLS, *supra* note 49, at 136–42.

135. As with utilitarians that attempt to quantify the value of individual integrity, Rosenberg claims that his model provides for “appropriate regard for individual rights,” rather than any sort of absolute protection in the Kantian tradition. *See* Rosenberg, *supra* note 2, at 860.

136. Rosenberg, *supra* note 107, at 211 n.3.

specious. For good or ill, his close and dominating tie to utilitarianism is clear.<sup>137</sup>

The rationale Rosenberg provides for his system makes clear that his sole aim in developing the utilitarian justice model is to provide the greatest good to society as a whole, regardless of its impact on the individual plaintiff's ability to control the protection of his individually held legal rights. His argument in support of this model is divided into two parts: a "utilitarian appraisal" and a "rights-based appraisal."<sup>138</sup> Yet both are, ultimately, forms of utilitarian analysis, with the "rights-based appraisal" simply an extension of his "utilitarian appraisal," which overtly focuses exclusively on considerations of economic efficiency.<sup>139</sup> In later writing, Rosenberg declared that his model "relies on the normative premise that the law should promote individuals' well being, that is, their welfare or utility."<sup>140</sup> While he does use the word "individuals," that hardly qualifies his theory as an example of liberal individualism. In fact, but for the largely cosmetic use of the word "individuals," Rosenberg's approach roughly parallels Bentham's approach, premised on the postulate that "[g]eneral utility ought to be the foundation of [a legislator's] reasonings. To know the true good of the community is what constitutes the science of legislation; the art consists in finding the means to realize that good."<sup>141</sup> Both Rosenberg and Bentham appear to believe that "society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it."<sup>142</sup> Rosenberg makes this

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137. Rosenberg maintains that from a political theory perspective, his model is consistent with a wide range of philosophies, relying on utilitarian theorists, as well as liberals like Rawls and libertarians like Nozick. See Rosenberg, *supra* note 2, at 859–60; Rosenberg, *supra* note 103, at 840 & n.23. Yet in presenting his argument that liberal theory supports his model, Rosenberg still notes that his model is "intuitively more compatible with utilitarian premises than with notions of individual rights." Rosenberg, *supra* note 2, at 860.

138. Rosenberg, *supra* note 107, at 860.

139. *Id.* In this way, he appears to conflate utilitarianism with law and economics, an approach of debatable merit. See Posner, *supra* note 78 (distinguishing economic analysis of the law from Benthamite utilitarianism).

140. Rosenberg, *supra* note 107, at 831.

141. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 1 (Uendra Baxi ed., 1975); see also GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 681 (3d ed. 1961) ("[Under Bentham's conception of the law] legislation is to be measured in terms of its effectiveness, the costliness of its enforcement, and in general by its consequences in producing a system of exchanges which on the whole is advantageous to most members of the community. Utility is the only reasonable ground for making action obligatory.").

142. RAWLS, *supra* note 49, at 22 (citing HENRY SIDGWICK, *THE METHODS OF ETHICS* (7th ed. 1907)). It should also be noted, given the link between the model proposed by Professor Rosenberg and other law and economics scholars, see *supra* note 107, that Jeremy Bentham is recognized in some

collectivist premise the principal justification for his model.<sup>143</sup> He effectively adopts a “utility as deterrence” rationale, which sees the greatest utility generated by the greatest deterrence. The effect of this benefit can only be maximized by use of a mandatory system of class actions, where there is no possibility of opting out and plaintiffs do not have to assume the cost of notice to absent class members.<sup>144</sup>

Rosenberg incorrectly believes that his class action model also grows out of a “rights-based appraisal” on the basis of wholly unsupported assumptions about the desires and interests of potential plaintiffs. Because the claims adjudicated in a class action are, in their pristine substantive form, individually held rights on the part of claimants, each of those claims individually carries at least the potential for an award of the maximum damages allowed by the substantive law. Any model of the class action truly grounded in individualism would allow individual claimants to choose to take their chances in individual suits to seek those maximum damages.

Rosenberg nevertheless argues that his model goes beyond utilitarianism, satisfying elements of both the libertarian analysis of Nozick and the liberal theory of Rawls. Yet any claim that his model can be reconciled with liberal theory should be met with a high degree of skepticism. Rosenberg’s claim that his model is consistent with Nozick’s brand of libertarianism fails to adequately account for the total and unbending role of individual autonomy laid out by Nozick.<sup>145</sup> Rosenberg asserts that rights-based theories “are premised on the concept of individual entitlements to personal security and autonomy—entitlements that may not usually be overridden or compromised for the good of society.”<sup>146</sup> He then claims that “[t]ortious conduct, whether defined by moral, political, or economic criteria, constitutes a wrongful infringement of those entitlements.”<sup>147</sup> He concludes by arguing that “[f]rom a rights-oriented standpoint, then, the role of the tort system is to perform ‘corrective justice’ in order to preserve entitlements against wrongful

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circles as “the parent of economic analysis of law.” Posting of Cass R. Sunstein, Animal Welfare and Economic Analysis, to The Faculty Blog, [http://uchicagolaw.typepad.com/faculty/animal\\_welfare/index.html](http://uchicagolaw.typepad.com/faculty/animal_welfare/index.html) (Apr. 18, 2006, 09:27 CST).

143. *See generally* Rosenberg, *supra* note 2.

144. *Id.*

145. *See* Rosenberg, *supra* note 2, at 877–87.

146. *Id.* at 877 (citing CHARLES FRIED, RIGHT AND WRONG 81–82 (1978); NOZICK, *supra* note 55, at 57).

147. *Id.*

infringement.”<sup>148</sup> In making this case Rosenberg has two aims. The first is to justify his emphasis on deterrence as the primary goal of his class action model above compensation. He argues that because there can never be total compensation for the invasion of a right,<sup>149</sup> achieving optimal deterrence is a more important goal of the tort system in achieving the aim of “preserv[ing] the value of entitlements.”<sup>150</sup> His second aim is to justify any perceptible invasion on rights of individuals stemming from the use of the class action.

Despite this explanation, Rosenberg fails to satisfy the concerns of libertarian theory. Nozick did suggest that the state was justified in providing “protection against force, theft, fraud, enforcement of contracts, and so on.”<sup>151</sup> Certainly protection from and compensation for the negligent acts of others falls within that framework. But Nozick also noted that “the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their *own* good or protection.”<sup>152</sup> Rosenberg ascribes to Nozick a balancing approach to individual rights—namely that the law should provide the greatest degree of autonomy and personal security to as large a segment of society as reasonably possible. But there is little to suggest Nozick would endorse such an approach to individually held rights. In their pristine form, both common law and statutory tort rights are individually possessed. Even accepting Rosenberg’s functional evaluation that one’s rights would be best served by group treatment under a class action, he still fails to account for the individual’s autonomy interest in determining how to enforce rights that are individually possessed. Thus, while Nozick would presumably allow the state to create a system of redress for personal wrongs, the suggestion that he would concur in anything approaching Rosenberg’s collectivist utilitarian approach to the adjudication and enforcement of those rights is questionable.

More recently, Rosenberg sought to invoke the veil of ignorance thought experiment propounded by Rawls, in an effort to rationalize his approach as a form of liberal theory.<sup>153</sup> Rosenberg argued that an *ex ante* approach to rulemaking demonstrates that his approach to the class action is the most just because any individual unaware of the society-to-come

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148. *Id.*

149. *Id.* at 878–79.

150. *Id.* at 879.

151. NOZICK, *supra* note 55, at ix.

152. *Id.*

153. See Rosenberg, *supra* note 107, at 840–43; discussion *supra* note 129 and accompanying text.

would prefer his mandatory approach in light of its optimal deterrence effect.<sup>154</sup> From this point of view he might claim that he actually does respect the role of the individual by valuing individuals up to the point that an unbiased individual would do so, phrasing the individual's choice from behind the veil of ignorance as one between reduced compensation and no compensation. Based on the risk-averseness Rawls associates with decisions made from behind the veil of ignorance, Rosenberg argues that "any rational individual would choose a legal system that minimizes the sum of accident costs and uses mass tort liability to do so."<sup>155</sup> Once again, Rosenberg fails in his effort to be all things to all political theorists.

Rawls described his theory as "an alternative to utilitarian thought generally," finding utilitarianism deficient for reasons that apply equally to Rosenberg's class action model.<sup>156</sup> Utilitarians allow individual interests to be overcome if such action corresponds to a sufficient increase in the happiness of other societal members. Rawls notes this by saying "[t]he striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfactions is distributed among individuals."<sup>157</sup> As a result of this analysis, Rawls ultimately concluded that "[u]tilitarianism does not take seriously the distinction between persons."<sup>158</sup> But clearly, Rosenberg's approach suffers from the identical shortcoming. Rawls might well have objected to the loss of individual choice that necessarily comes with Rosenberg's collectivist approach.<sup>159</sup> Rawls's First Principle derived from the veil of ignorance thought experiment seeks to maximize individual autonomy to the greatest extent possible. Rosenberg, in contrast, uses the thought experiment to maximize the restriction of individual autonomy based on the broader interest of society.

Rosenberg substantially misuses the Rawlsian veil of ignorance construct, primarily because he invokes it at the wrong point in the process. When individual class members make the strategic decision whether to opt out of a class proceeding (the point at which he employs the construct), they are *not* behind a veil of ignorance, at least in the sense

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154. Rosenberg, *supra* note 107, at 840. It should be noted that under Rule 23 as it exists currently, the large majority of mass tort class actions will fall into the (b)(3) category, where both notice and an opt-out option are required. *Ortiz v. Febreboard Corp.*, 527 U.S. 815 (1999). This is quite different from Rosenberg's approach.

155. Rosenberg, *supra* note 107, at 840.

156. RAWLS, *supra* note 49, at 22.

157. *Id.* at 26.

158. *Id.* at 27.

159. *See id.* at 61–63.

Rosenberg suggests. Of course, individual plaintiffs do not know with certainty what the outcome of their individual suits will be. But they do know what resources and evidence they will be able to bring to an individual suit. Under any system that values process-based individual autonomy, the choice whether to sue individually or as part of a collective effort is best left to the individual herself. Any externally imposed assessment amounts to a form of paternalism that is anathema to core notions of liberal individualism. Liberal theory would therefore necessarily reject Rosenberg's model because of its reliance on the utilitarian tradition of justifying a heavy sacrifice of individual autonomy—in this case, purely process-based autonomy—when the societal good is sufficiently powerful.<sup>160</sup>

Rosenberg's contravention of the precepts of liberal theory goes much farther than his undermining of process-based individual autonomy. By employing what is openly and unambiguously designed to be purely a rule of *procedure* (the class action rule) as a means of surreptitiously altering the DNA of preexisting substantive tort law, Rosenberg's model blatantly subverts the foundations of representative democracy on a "macro" level. While substantive libertarianism would probably oppose direct modification of substantive law in order to collectivize previously individually held rights,<sup>161</sup> the process-based branch of individual autonomy would likely be agnostic on the issue.<sup>162</sup> But the fact remains that current substantive mass tort law, whether in the form of legislation or common law, mostly vests the substantive claim in the victim in an individual capacity. If the liberal presumptions about individually held rights were, in fact, to be transformed due to compelling and overwhelming counterutilitarian interests, such a transformation should be achieved by means of an open and transparent exercise of the democratic process, rather than furtively under the guise of a rule of procedure.<sup>163</sup>

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160. Cf. RAWLS, *supra* note 49, at 30–31. Rawls notes that in utilitarian theory, if men take a certain pleasure in discriminating against one another, in subjecting others to a lesser liberty as a means of enhancing their self-respect, then the satisfaction of these desires must be weighed in our deliberations according to their intensity, or whatever, along with other desires. If society decides to deny them fulfillment, or to suppress them, it is because they tend to be socially destructive and a greater welfare can be achieved in other ways.

*Id.*

161. See discussion *supra* text accompanying notes 55–57. It should be noted that constitutional and normative barriers to such a transformation would be far greater were it to be imposed retroactively, as well as prospectively.

162. See discussion *supra* text preceding note 54.

163. See generally Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States*

### B. *The Communitarian Process Model*

An alternative to the utilitarian justice model is what we label the “communitarian process” model of the class action, which, in most cases, views a class as a stand alone “entity,” rather than an aggregation of separate individual claims. This model, associated principally with the scholarship of David Shapiro and Samuel Issacharoff,<sup>164</sup> deems the class in most cases to be an organic entity, in which each individual class member is conceptualized as little more than an inherent element of that entity. The individual class members retain little, if any, control over their individual claims as the claim itself becomes the property of the class-entity, which is empowered to make decisions about how to act in the best interests of the group as a whole. Though its legal advocates for the most part do not frame the model in terms of abstract political theory, to a large extent it reflects the normative precepts of democratic communitarianism.<sup>165</sup>

Perhaps the chief scholarly advocate of an “entity” approach to the class action is Shapiro.<sup>166</sup> He characterizes the “principal focus” in the debate over the correct perspective of the class action as whether a class “should be viewed as not involving the claimants as a number of individuals . . . but rather as an entity in itself.”<sup>167</sup> In determining that “the ‘class as entity’ forces should ultimately carry the day,”<sup>168</sup> he argues that the consequence of such an interpretation is that “the individual who is a member of the class, for whatever purpose, is and must remain a member of that class, and as a result must tie his fortunes to those of the group with respect to the litigation, its progress, and its outcome.”<sup>169</sup> Shapiro

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v. Klein, 100 NW. U. L. REV. 437 (2006).

164. See Shapiro, *supra* note 11; Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1060 (2002).

165. See discussion *supra* Part II.C.

166. Shapiro attributes the notion of a class as an entity to a number of other scholars, and the specific “entity” terminology to Professor Edward H. Cooper. See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 26–32 (1996). While the language of a class as an entity and many of the ideas associated with that theory do emerge from Professor Cooper’s 1996 article, Professor Shapiro’s work has helped to provide a more complete portrait of the impact of an entity approach to a class.

167. Shapiro, *supra* note 11, at 917.

168. *Id.*

169. *Id.* at 919. It is notable that Shapiro is careful to point out that the entity theory does not eliminate every element of individualism from a class member. *Id.* (“[E]ven this entity model does not deny the class member the opportunity to seek private advice, or to contribute in some way to the progress of the litigation . . .”). Yet he correctly notes that this nominal retention of individual autonomy still “severely limits such aspects of individual autonomy as the range of choice to move in or out of the class or to be represented before the court by counsel entirely of one’s own selection.” *Id.*



conceptualizes the distinction between an “entity” approach and an aggregation-of-individuals approach as one between “advocates of individual autonomy in litigation and the proponents of what has been praised as ‘collective’ justice.”<sup>170</sup> By contrasting his “entity” model with one favoring individual autonomy, he acknowledges the subordination of individuality inherent in his model. He states that “[t]he conclusion that the entity model is preferable is not an easy one for a person like me, who believes in the virtues of autonomy and individual choice.”<sup>171</sup> While acknowledging the tension this creates with individual notions of autonomy, particularly if individual choice involves the right to have “a personal ‘day in court’—of the ability to participate in the fullest sense in the adjudication of a claim of right,” he argues that this virtue is

far from self-evident: if such participation is not cost-effective, and would be seen by the vast majority of those similarly affected (as well as by their adversary) to run counter to their own objective of a fair and effective outcome, then the argument proceeding from the value of autonomy may be flawed.<sup>172</sup>

Without squarely arguing that there is a right to a personal day in court, Shapiro does seem to suggest that even if that right does exist, other factors can override its importance.

The rationale Shapiro offers for recognizing the inseparable intertwining of class members into a coherent, organic unit varies based on the nature of the class action. He identifies three general types of class actions and proposes differing rationales for an entity approach to each type. He claims that the strongest case for entity treatment applies to (b)(1) and (b)(2) classes because “the class must in essence stand or fall as a unit because of the truly indivisible interests of the class members.”<sup>173</sup> He therefore argues that they “afford[] less basis for concern about issues of individual autonomy and control.”<sup>174</sup> This assumption of class

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170. *Id.* at 916.

171. *Id.* at 923.

172. *Id.*

173. *Id.* at 925.

174. *Id.* at 926 n.32 (citing Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 234–87 (1990)). This is a view he attributes to Professor Robert Bone. Bone, *supra*, at 234. Such a view of the (b)(2) and (b)(1) classes, it should be noted, is conceptual nonsense. Both (b)(1) and (b)(2) claims, are, in their pristine substantive form, individually held, as proven by the fact that, in the abstract, each could be legally pursued to fruition on an individual basis. They are transformed into class form solely because of procedural considerations of fairness or efficiency. For a more detailed explication of this point, see Martin H. Redish & Nathan D. Larson, *Class Actions, Litigant Autonomy, and the Foundations of*

indivisibility, however, in most cases has no basis in reality. In (b)(1)(A) class actions, for example, the only “indivisible” aspect is the behavior of *the party opposing the class*. In no substantive sense are the *rights of the class members* necessarily indivisible in any sense. Purely as a theoretical matter, each could be pursued in its own proceeding, because each is held by the litigant in his individual capacity.

Indivisibility of class member rights is even less evident in (b)(1)(B) classes. For example, where individually held tort claims are aggregated because of the availability of only a limited insurance fund to pay damages, the plaintiff class members’ claims are legally intertwined in no substantive sense. To the contrary, in the presence of only a limited fund for damages, the strategic antagonism among plaintiff class members is even greater than in (b)(3) classes, where the defendant’s resources are assumed to be large enough to cover all damages. Finally, in (b)(2) classes, where injunctive relief is necessarily the predominant remedy, there is not even a requirement that the *defendant’s* behavior towards class members be indivisible, much less that the claims of plaintiff class members be indivisible. All that is required is that the party opposing the class have acted in a manner generally applicable to the class. It is certainly conceivable that such class-wide behavior could be easily divisible. For example, an employer could conceivably discriminate racially against some employees without doing so to others. Hence individualized injunctive relief against the party opposing the class could easily be confined only to specified employees. Shapiro’s description is accurate, then, only in the circular sense that Rule 23 renders it so.

The second type of entity-based class Shapiro calls the “small value” claim or, in the language used earlier,<sup>175</sup> the “Negative Value” class action. He argues that the purpose of a small claim or negative value class action is not

compensating those harmed in any significant sense, or of providing them a sense of personal vindication, but rather, and perhaps entirely, the purpose of allowing a private attorney general to contribute to social welfare by bringing an action whose effect is to internalize to the wrongdoer the cost of the wrong.<sup>176</sup>

The context of the small value class action, Shapiro reasons, makes whatever private rights may be sacrificed to the entity a secondary

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*Procedural Due Process*, 95 CAL. L. REV. 1573 (2007).

175. See discussion *supra* Part I.B.

176. Shapiro, *supra* note 11, at 924.

consideration. From this observation, he argues that “notions of individual choice, autonomy, and participation—and their resonance in the constitutional guarantee of due process—are not so rigid that they cannot yield to practical arguments about the nature of the case, the character of the wrong complained of, and the individual interests at stake.”<sup>177</sup>

The final category of class actions identified by Shapiro concerns positive value class actions under Rule 23(b)(3). He describes these classes as “the hardest to bring within” an entity model precisely because “the rulemakers in 1966 expressed doubt that such cases were appropriate for class treatment at all.”<sup>178</sup> He nevertheless finds persuasive support for the view “that a mass tort is, and should be treated as, substantively different from a one-on-one tort.”<sup>179</sup>

Shapiro’s conceptualization of the class as an entity has a number of important procedural implications for the operation of the class proceeding. For example, he believes acceptance of the entity approach leads logically to significant restrictions on the availability of both notice and opt-out, even in (b)(3) classes.<sup>180</sup> He unquestioningly accepts the absence of both in the other categories.

Shapiro’s description of the entity theory allows for two possible ways to conceptualize the entity itself. The first is as an entity that is conceptually distinguishable from the aggregation of distinct, individualized claims held by each member of the class. Under this theory, the aggregation of rights in a class action is metaphysically transformed into something distinct from the sum of its parts. The other interpretation of the entity is one that conceptualizes the class as a form of aggregation of individual claims, but in which the interests of the individual class members are pragmatically overwhelmed by the needs of the class as a whole. If viewed as the latter, the theory is reminiscent of a form of Benthamite utilitarianism.<sup>181</sup> If viewed as the former, the entity model is more appropriately seen as a type of democratic communitarianism: the substantive rights being enforced are determined by democratic processes, but once created they are deemed to be held in a communitarian form,

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177. *Id.* at 925.

178. *Id.* at 926. As Shapiro notes, the Advisory Committee Note to the 1966 amendments to Rule 23 specifically said that class actions would not be appropriate in mass tort cases because they typically would involve different questions of damages, liability, and defenses for each individual member. PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 39 F.R.D. 73, 103 (1966) (advisory committee’s notes on proposed Rule 23).

179. Shapiro, *supra* note 11, at 932.

180. *Id.* at 938.

181. See discussion *supra* Part II.B.

where each individual's right is defined by and inseparable from the whole.

The very use of the word "entity" to describe the model would seem to imply more of a communitarian rationale. However, Shapiro appears to employ both theories at various points in his analysis, primarily taking an "entity-as-distinct-organism" approach when discussing the so-called impersonal (b)(1) and (b)(2) class actions, where he contends the right is effectively a group right because of the nature of the interests being litigated.<sup>182</sup> In the case of (b)(3) classes, however, Shapiro seems to advocate a more starkly pragmatic form of utilitarianism.

Though he appears to care little about litigant autonomy, Shapiro does acknowledge that the most important concern in class litigation is that the absent class members are adequately protected by the class representative. The fiduciary roles of the class representative and class counsel become particularly significant under a model that views the group as an entity that subsumes its individual members.<sup>183</sup> At some level, at least, Shapiro's class action approach bears similarity to democratic communitarianism and its disregard for liberal norms. Whether because of a process of rights reconceptualization or a categorical concession of the superiority of group needs in class action contexts, Shapiro's entity model readily transforms individually held claims into a communitarian framework. As in classic communitarianism, rights of the individual are viewed as inseparable from the needs and interests of the community as a whole. In this sense, the entity model is reminiscent of Charles Taylor's critique of classical liberalism in justifying a definition of individual rights based on group needs.<sup>184</sup> The individual class member exists only as a member of the larger entity that constitutes the class. By conceptualizing the individual class members largely, if not exclusively, as members of a group, the communitarian process model's approach to the individual is the antithesis of the liberal "atomism" attacked by Taylor. The rationale that Shapiro supplies for this approach focuses primarily on the deterrence objectives of class actions.<sup>185</sup>

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182. Given Shapiro's relatively scant analysis of (b)(1) and (b)(2) classes, however, it is difficult to determine which of these two approaches he takes in these contexts. Indeed, he may find the distinction irrelevant in (b)(1) and (b)(2) classes, as, practically speaking, "the class must in essence stand or fall as a unit because of the truly indivisible interests of the class members . . . or because the granting of equitable relief . . . is bound to affect the group as a whole." Shapiro, *supra* note 11, at 925.

183. See also Issacharoff, *supra* note 164, at 1060; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 357.

184. See *supra* notes 92–93.

185. Shapiro, *supra* note 11, at 923–24.

The value neutrality of democratic communitarianism distinguishes it from a device designed from the outset solely to generate predetermined policy outcomes.<sup>186</sup> In this sense, the approach is distinguishable from the “objective truth” version of the theory, which defines the community in terms of its commitment to some moral “truth” higher than the normative choices reached by democratic processes.<sup>187</sup> Thus, Shapiro’s class action model involves no commitment to a particular set of predetermined substantive value choices. Nevertheless, as a matter of the liberal democratic process his model expresses little concern for the autonomy of the individual in determining how he will employ the legal system as a means of protecting his individually held substantive rights. Instead, Shapiro’s concern for the individual is focused for the most part on the paternalistic concern that individual plaintiffs will be fairly and adequately represented.<sup>188</sup> While such a concern is no doubt a legitimate one in those situations in which individuals are, for legal or practical reasons, unable to make such choices for themselves,<sup>189</sup> to deem satisfaction of these paternalistic requirements as *sufficient*, rather than merely necessary, is to ignore the foundations of liberal process-based autonomy that are so central to the normative structure of liberal democracy.

Shapiro’s class action model achieves its goal by transforming what in every class action category is nothing more than an aggregation of the claims of individual plaintiffs possessing individually granted rights into a new legal animal—an “entity,” in which an individual’s claim is seen essentially as an element within a broader communitarian whole. This fact can be proven by answering a very simple hypothetical question: under governing substantive law, could *each* of the plaintiffs who are made members of a class bring a legally valid claim individually against the defendant, had the class proceeding never been instituted? The answer in every situation, of course, must be yes. Rule 23, in *all* of its categories (with the exceptions of Rules 23.1 and 23.2, both of which concern suits by substantively established legal entities),<sup>190</sup> does nothing more than aggregate preexisting individual claims. This distinguishes claims of class members from claims brought by true entities, such as partnerships or trade unions.

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186. See discussion *infra* Part III.C.

187. See discussion *supra* text accompanying notes 90–91.

188. See Shapiro, *supra* note 11, at 958–60.

189. Indeed, where appropriate such paternalistic concerns are dictated by due process. See *Hansberry v. Lee*, 310 U.S. 32 (1940); Redish & Larson, *supra* note 174.

190. See discussion *supra* Part I.

To be sure, unless one is a rigid Kantian, or Nozickian libertarian, it is conceivable that, in the presence of compelling circumstances, an individual's ability to control adjudication of his claim may be restricted in the interests of a more broadly defined group of claimants. But there are two fatal flaws in Shapiro's articulation of such a model. First, he is far too willing to sacrifice the individual to broader communitarian interests, never demanding anything approaching a showing of a compelling interest for the subjugation of an individual's process-based autonomy in the litigation context. After all, why should one be required to justify restriction of individual autonomy, when all that is involved in the first place is an entity, where any claim of the individual is fully shared with others? Second, he seems quite content to allow this alchemy-like transformation of individual right to entity-held right through reliance on a procedural rule that, by statutory origin, is not permitted to modify or abridge substantive rights. If individually held substantive claims are either to be transformed into entity claims, or sacrificed to broader communitarian interests, surely it is only by transparent resort to the representative and accountable branches of government that such results are appropriately achievable. Through reliance on the smokescreen of procedural joinder and fictionalized entities, however, Shapiro is somehow able to avoid both an analysis of the need for the compelling interest standard and the need for acquiring support in the democratic process.

### C. *The Public Action Model*

The "public action" model of the class action views the private class action exclusively as an instrument to enforce public goals and values, as embodied in governing law. In this sense, the model differs fundamentally from both the liberal and communitarian models.<sup>191</sup> The public action model evaluates the proper role of the class action on the basis of a normative judgment of what is "good" for society in two ways. Public action model adherents claim that while individual litigant participation in a lawsuit is important in certain types of litigation, the class action is justified solely because it aids in the enforcement of laws that implement broader public purposes.<sup>192</sup> The public action model sees the class action

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191. See discussion *supra* Part III.B; discussion *infra* Part IV.

192. OWEN FISS, *The Allure of Individualism*, in *THE LAW AS IT COULD BE*, *supra* note 2, at 118; see also *id.* at 122 ("It is not surprising, therefore, that the class action gained great currency during the civil rights era, when private attorneys generally received their greatest endorsement through the actions of groups such as the NAACP Legal Defense Fund.").

as a means of protecting the public interest, rather than vindicating aggregated private interests.<sup>193</sup>

The public action model's strongest advocate is Owen Fiss. Fiss asserts that the class action device exists because certain laws are aimed at protecting the public, and private suits brought to enforce those laws will have the beneficial effect of vindicating the public interest.<sup>194</sup> He reasons that class certification increases the value of claims that, standing alone, would have been economically inefficient to pursue, even though socially significant. The goal, then, is to make them viable causes of action that provide sufficient economic incentive for attorneys to pursue them.<sup>195</sup> The public's interest in seeing these cases litigated justifies any restriction that class action procedure may impose on an individual's process-based autonomy. Fiss advocates a limitation on the use of the class action on the basis of this underlying philosophy, arguing that "[a] court should not permit a plaintiff to bring suit on behalf of unnamed class members unless the class lawsuit is necessary to vindicate important public rights and the named plaintiff satisfies the court that he will adequately represent the interests of the other class members."<sup>196</sup> Fiss never states precisely what makes the subject of a class action "an important public right," limiting his description to those statutes "aimed at protecting the public."<sup>197</sup> He does suggest, however, that some normative judgment about the "importance" of a suit should color the drafting, and possibly the application, of the class action rule.<sup>198</sup>

Fiss makes clear that the class action supersedes an individual's interest in having his own day in court because the device is designed to advance the public good.<sup>199</sup> He distinguishes the types of litigation in which the

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193. John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1419, 1423 (2003).

194. *Id.*

195. FISS, *supra* note 2, at 125 ("[T]he level of compensation must be high enough to make it worthwhile for the best and brightest to undertake such ventures.").

196. Bronsteen & Fiss, *supra* note 193, at 1423.

197. *Id.* at 1419.

198. *Id.* Fiss also fails to make clear whether a private lawsuit that provided no public benefit or operated against the public interest could be legitimately certified as a class if it still met the formal Rule 23 requirements, although he does seem to suggest that the Rule 23(b)(3) "superiority" factor could be used to preclude class actions where no public goals were achieved through a specific class action. *See id.* at 1424 (discussing the use of "superiority" as a means of limiting the instances where classes are certified).

199. As a general matter, Fiss believes the job of courts is "not to maximize the ends of private parties nor simply to secure the peace but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: Their job is to interpret those values and bring reality into accord with them." OWEN FISS, *Against Settlement*, in *THE LAW AS IT COULD BE*, *supra* note 2, at 101.

individual's right to participate is to be respected by claiming that "the fairness of procedures turns, in part, on the social ends they serve."<sup>200</sup> The distinction rests on the difference between what Fiss calls "interest representation," which he associates with class actions, and representation that he describes as "consistent with individualistic values."<sup>201</sup> Interest representation occurs where an "individual [is] bound by the action of someone purporting to be his or her representative even though that individual had no say whatsoever over the selection of that representative, indeed, might not have even known of the appointment or that he or she was being represented."<sup>202</sup> He believes that while "the value of individual participation has an important role to play in the legal process . . . we must also recognize that we accord that value different weight in different contexts."<sup>203</sup> Fiss concedes that a system in which "[t]he named plaintiff is not the agent of the other class members" is "inherently suspect and grate[s] against even a minimum regard for allowing individuals to be in charge of their own destiny."<sup>204</sup> Yet he justifies the "interest representation" for class actions solely because such proceedings, under the circumstances in which he envisions their use, "enhance private enforcement of public laws."<sup>205</sup>

Fiss determines under what circumstances the value of individual participation is to be deemed sufficiently strong to preclude interest representation based on a normative determination of whether society is best served by abridging an individual's process-based autonomy. He uses the examples of criminal cases and adjudicatory administrative proceedings as instances in which individualized participation "is a value in its own right," because "particular individuals have been singled out."<sup>206</sup> In these instances, he finds that individual participation "manifests a public commitment to the dignity and worth of the individual, [and] serv[es] a more instrumental end by ensuring that the facts and issues are presented to the court in the sharpest possible terms."<sup>207</sup> Fiss argues that class actions do justify restriction of an individual's right to participate in litigation, however, "for the private enforcement of laws that are aimed at

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200. See FISS, *supra* note 192, at 121.

201. *Id.* at 116.

202. *Id.*

203. *Id.* at 119–120.

204. Bronsteen & Fiss, *supra* note 193, at 1421.

205. FISS, *supra* note 192, at 118.

206. *Id.* at 120. In drawing this distinction, Fiss is differentiating these types of litigation from structural injunctions that appear in civil rights litigation.

207. *Id.*



protecting the public.”<sup>208</sup> This suggests that the public purposes he attributes to these laws do not single out individuals in a manner that signifies a public commitment to their dignity and worth. He criticizes the sort of individualism that is “Kantian in nature and gives each individual total control over his or her rights.”<sup>209</sup> His contextual view of rights, based on his own assessment of societal consequences, allows him to draw a line between litigation in which process-based autonomy should be protected and litigation in which it should not, based on his assessment of the suit’s social importance.<sup>210</sup>

From the perspective of liberal individualism, Fiss manages to combine the worst of both worlds. In cases deemed to have been brought in furtherance of the public interest, the individual’s autonomy interest in control over his claim means precious little. The autonomy interest is to be summarily sacrificed to the needs of a broader collectivist process.<sup>211</sup> This is so, even though the triggers for the lawsuits—the vehicle by which the public interest is to be legally enforced—are legal claims vested by lawgiving authority solely in the individual claimants themselves. Their pursuit may well advance the public interest, but that does not alter the fact that two legal rights being enforced are privately held. However, when the claims being enforced are deemed to have been brought predominantly in furtherance of *private* interests, the strategic and efficiency benefits of class treatment are apparently to be largely denied to them, even in cases in which the interests of individual claimants could possibly be furthered by use of class action treatment.

Though Fiss does not expressly employ the characterization and the fit is by no means perfect, we believe that the public action model is strongly reminiscent of a form of modern civic republicanism. That political theory, it should be recalled, focuses on pursuit of some vague notion of the public interest that differs qualitatively from the aggregation of individual interests.<sup>212</sup> The theory expresses disdain for individualism, in most contexts, as the morally unacceptable pursuit of selfish personal interests at the expense of the public at large.<sup>213</sup> If one sees the individualism central to liberal theory as necessary for the flourishing of

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208. Bronsteen & Fiss, *supra* note 193, at 1419.

209. FISS, *supra* note 192, at 120; *see also* Judith Resnick, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 52 (1991) (“The primacy of the individual in relation to her or his own case has declined.”).

210. *See* FISS, *supra* note 192, at 120.

211. *See* Bronsteen & Fiss, *supra* note 193, at 1419, 1424.

212. *See* Redish & Lippman, *supra* note 106; discussion *supra* Part II.C.

213. *See* discussion *supra* Part II.C.

the citizenry and the ultimate success of democracy, as we do,<sup>214</sup> then modern civic republicanism must be deemed a serious threat to the moral and personal pluralism so vital to an active and ever developing democracy. To the extent the public action model of the class action reflects a normative commitment to some notion of the public interest divorced from and in lieu of the vindication of individual rights—which it appears to do—then, like civic republican political theory, it must be rejected.

It surely does not follow, we should emphasize, that the class action is to play no role in facilitating enforcement of public-regarding law. As Fiss correctly notes, the class action has often been rationalized as a form of “private attorney general.” The earliest explanation of the private attorney general rationale for the class action dates back to the seminal article by Professors Harry Kalven and Maurice Rosenfield. Kalven and Rosenfield envisioned the class action as a device for filling gaps in the enforcement of statutes. They argued that the need to effectuate the “deterrent effect of the sanctions which underlie much contemporary law” had been largely addressed by “the contemporary development of administrative law,” but that this method of enforcement had alone proven insufficient.<sup>215</sup> Further, they argued that use of traditional joinder devices fails to provide an adequate group remedy because “it presupposes the prospective plaintiffs’ advancing en masse on the courts.”<sup>216</sup> Only class actions, a system in which courts “ignore the various claimants until a decree has been obtained,”<sup>217</sup> would serve as the needed “vehicle for paying lawyers handsomely to be champions of semi-public rights.”<sup>218</sup>

The reporter for the rules advisory committee that promulgated the pivotal 1966 amendments to Rule 23 also considered the class action to be consistent with the private attorney general concept. Professor Benjamin Kaplan, while not expressly using the term “private attorney general,” clearly recognized the use of class suits as a means of advancing the public interest.<sup>219</sup> But there was certainly nothing in the revised rule that *confined* the benefits of the class action to such “public interest” situations. The

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214. See discussion *supra* Part II.A.

215. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686–87 (1941) (“[Administrative law] is a method of preventing injuries by the injunction, the stop order and the cease and desist order . . . [A]n administrative body does not normally act to remedy wrongs which have occurred.”).

216. *Id.* at 687.

217. *Id.* at 688.

218. *Id.* at 717.

219. See Kaplan, *supra* note 5, at 394.

1966 amendments to Rule 23 sought to create a standard that would “sort out the factual situations or patterns that had recurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*.”<sup>220</sup> The focus of these amendments was on the legal and factual situation at hand, not exclusively on the pursuit of a broader societal interest.

The variation on the private attorney general approach that Fiss employs to rationalize the class action led him to suggest a series of changes to Rule 23, designed to better reflect what he believed to be the procedural device’s philosophical foundation. He argued that class actions are justified only where they serve to provide for private enforcement of “public laws,” and that the current incarnation of Rule 23 should be “revise[d] . . . to make certain that it is used only in those situations where that social purpose is served.”<sup>221</sup> The key alteration he proposed would be elimination of the class action categories set out in Rule 23(b), making every class action subject to an analysis using both the current 23(a) factors and the two factors listed in 23(b)(3).<sup>222</sup> Fiss also proposed reinterpretation of some of the factors he would preserve from Rule 23(a) and 23(b)(3). In addition to his suggested approach to the (b)(3) requirement of superiority,<sup>223</sup> he argued that the “numerosity” requirement of Rule 23(a) should be read to make sure that class actions are only allowed where “there are many small individual claims” that in the aggregate “constitute a [sufficient] social harm,” seemingly implying that the class action should be confined solely to negative value claims.<sup>224</sup> Fiss claims that the considerations that go into creating separate types of class actions under 23(b) “do not serve the purpose of directing a court to scrutinize either the adequacy of interest representation or the social value and practical necessity of bringing a lawsuit as a class action.”<sup>225</sup> He then

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220. *Id.* at 386. *See also* Snyder v. Harris, 394 U.S. 332, 342 (1969) (Fortas, J., dissenting).

221. Bronsteen & Fiss, *supra* note 193, at 1422. Interestingly, Professors Fiss and Bronsteen appear to propose changes to the rule in the same breath that they question the obligations of courts to observe the niceties of any procedural rule. *Compare id.* at 1423–50, *with id.* at 1451 (“Rule 23 lacks the force of law as that term is ordinarily understood. The rule is but a guideline or rule of thumb whose force derives only from consistent practice and the wisdom that the rule embodies.”).

222. Notably, Kalven and Rosenfield made a similar argument with respect to the elimination of the older distinctions between “true,” “hybrid,” and “spurious” class actions. *See* Kalven & Rosenfield, *supra* note 215, at 703.

223. *See supra* Part II.C.

224. Bronsteen & Fiss, *supra* note 193, at 1419, 1423. They go on to claim that the numerosity requirement should be used to help “limit class actions to circumstances in which they are necessary to uphold a value that is important enough to absent class members inherent in any class action.” *Id.* at 1423.

225. *Id.* at 1427.

called for a uniform standard for individualized notice, with an eye toward minimizing costs to the plaintiffs.<sup>226</sup>

Because Fiss's model, much like the theory of civic republicanism, focuses exclusively on protection of the public interest, rather than on the need to vindicate individuals' private interests, he seems to dismiss the possibility that, under certain circumstances, use of the class action device could effectively facilitate the vindication of private rights. We see no reason, however, why the public and private uses of the class action need be considered mutually exclusive. Contrary to Fiss's suggestion, the class action may produce strategic benefit even to positive value claim holders, whatever its impact on enforcement of public-regarding laws.

Where Fiss's model runs into potential difficulty, above and beyond its unnecessary truncation of public law enforcement, is its conceivable use to rationalize "faux" class actions. These are suits that purport to be negative value class suits, but in which the individual claims are so small that no reasonable class member could be expected to expend the time and effort to claim his minimal portion of the ultimate award. Presumably Fiss would have no problem with such a use of the class action, since it is designed solely to further the public interest by enforcing public values and policing governmental and corporate misbehavior. This analysis, however, dangerously ignores significant alteration of the remedial portion of the underlying substantive law. That law has vested a *compensatory remedy* in the *individual claimant*, not in bounty hunter private plaintiffs' attorneys—the only individuals who benefit directly from a faux class action. Such a fundamental transformation in underlying law requires transparent modification through democratic processes.<sup>227</sup>

#### IV. FASHIONING AN "INDIVIDUALIST" MODEL OF THE CLASS ACTION

Thus far, we have established that existing scholarly models of the class action emanate—at least implicitly—from traditions of political theory that either minimize or disregard the significance of process-based individual autonomy. Indeed, one might be tempted to assume that, because of its essentially collectivist nature, the class action is inherently inconsistent with foundational notions of liberal individualism, and that to accept the procedure is necessarily to undermine or limit individualism. There are, to be sure, potential tensions between the class action procedure and the political theory of process-based individualism. In situations

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226. See *id.* at 1434–39.

227. See generally Redish, *supra* note 10.

where this tension is inescapable, we believe that the normative force of process-based individualism requires that the class action procedure be supported by a showing of a truly compelling justification. It is important to understand, however, that the two should not always be seen to be in conflict. To the contrary, numerous instances will arise where authorizing a class action will actually serve as a catalyst to the attainment of individualist goals and the furtherance of individualist values. In this section, we seek to fashion a normative model of the class action that achieves these salutary ends.<sup>228</sup> In so doing we seek to overcome the shortcomings of the three existing models we previously identified by better reflecting the liberal individualist norms that, we believe, inhere in our civil justice system and its foundational commitment to the adversary process.<sup>229</sup>

#### *A. The “Individualist Difference” Principle*

The initial problem in designing a class action framework consistent with liberal theory is the prima facie individualist-collectivist tension that exists between an individual’s interest in process-based autonomy (dictating unfettered individual discretion in controlling litigation) on the one hand and the scope of authority vested in class representatives in a class action that effectively supersedes the individual class members’ ability to control adjudication of their own claims on the other. The class action limits an individual’s ability to direct the course of his interaction with the judicial process because class representatives effectively make all the decisions about how the individually possessed claims will be pursued. In mandatory classes, the infringement on an individual’s process-based autonomy interest is even greater because the individual lacks even the basic choice whether to participate in the collective and passive litigation of his rights.

In crafting a model of the class action that focuses on the fundamental importance of an individual’s process-based autonomy, we draw a loose methodological analogy to the two principles of justice identified by John Rawls in his *A Theory of Justice*. Rawls’s “First Principle,” it should be recalled, requires that all people enjoy the greatest degree of liberty

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228. This does not, we should note, represent a legal construction of the specific provisions of the current Rule 23. Rather, it is a normative approach to how the class action should be utilized, grounded in ideas drawn from political theory.

229. See discussion *supra* Part II.A.

compatible with like liberty for all.<sup>230</sup> In a parallel manner, our class action model begins with the premise that, at least as a *prima facie* matter, all individuals are entitled to full control over the process-based choices made while pursuing their individual claims,<sup>231</sup> and that—again, at least as a *prima facie* matter—control of those choices may not be taken away without the individual’s unambiguous expression of consent. Rawls’s “Second Principle,” which he labels “the Difference Principle,” requires that social and economic inequalities be attached to positions open to all under fair equality of opportunity, and that these inequalities be arranged to the greatest benefit to the least well off members of society.<sup>232</sup> The foundation for this perspective is Rawls’s belief that it would be unjust to have “inequalities that are not to the benefit of all.”<sup>233</sup> The Difference Principle, therefore, asserts that the unequal distribution of social and economic power is justified if, and only if, that inequality acts to benefit society’s least well off.

The justification for our Individualist Model of the class action relies on a loose analogy to Rawls’s Difference Principle. We therefore label it an “Individualist Difference Principle.” Just as Rawls’s Difference Principle justifies inequality based on the paradoxical potential for those inequalities to benefit the least well off members of society, the Individualist Difference Principle justifies the limitations that class certification places on an individual’s process-based autonomy rights if, and only if, treating him as part of a collective litigating unit would ultimately advance his individual interests in a manner he is incapable of achieving as an individual litigant. While our First Principle posits that individuals be able to protect their legally recognized interests independently by resort to the litigation system, the Individualist Difference Principle recognizes the occasional value of collectivism in promoting the exercise of an individual’s litigating autonomy. The use of the collectivist class action procedural device is thus justified in those instances where, absent such a process, the individual claimants will be effectively unable to vindicate their individual claims if they are required to pursue them on their own.<sup>234</sup> The Individualist Model conceptualizes

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230. RAWLS, *supra* note 49, at 60–61.

231. See discussion *supra* Part II.A.2.

232. RAWLS, *supra* note 49, at 62.

233. *Id.*

234. We recognize, of course, that our analogy to Rawls breaks down when viewed on a purely normative level. While we establish our two principles on the basis of an unwavering normative commitment to the value of process-based individualism, Rawls’s Second Principle quite clearly contemplates a significant modification of the seemingly unbending commitment to individual liberty

the class action as a tool for aiding the individual's pursuit of his own interests and as a means of furthering process-based autonomy by providing individuals with the option of an alternative collectivist strategy for maximizing their claims through a process of voluntary collectivism.

While our class action model selectively authorizes procedural collectivization, it is designed to remain consistent with core values of process-based autonomy. Even when it authorizes collectivization, it views litigants as autonomous beings brought together as an aggregate of individuals, rather than as a stand alone entity. In this sense, the substantive rights sought to be vindicated remain individually held and are simply brought in one proceeding, with the nuances between individual claims recognized through the use of subclasses and separate damage hearings, where necessary. In so doing, the model is careful not to transform the underlying substantive law being enforced in the class proceeding.

### *B. The Mechanics of the Individualist Class Action*

Crafting a model of the class action that flows from the normative value that liberal theory places on individualism requires that any rule providing for the creation of class actions have as its primary focus the preservation and facilitation of process-based individual autonomy. In this sense, the class action is appropriately seen as a procedural analogy to the substantive freedom of association that has been recognized under the First Amendment right of free expression.<sup>235</sup> In both contexts, individuals may choose to collectivize in order to more effectively exercise their process-based autonomy. Such a view of the class action is fully consistent with the dictates of the substance-procedure dichotomy embodied in the Rules Enabling Act, pursuant to which the class action rule is promulgated,<sup>236</sup> because it recognizes that the applicable substantive law has, in most cases, created exclusively individually held, rather than group held, claims. In shaping our model, we seek to demonstrate that a class action rule derived from liberal theory provides a powerful alternative to

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embodied in his First Principle. Still, we do not consider our model to be diametrically and inherently opposed to Rawls's second principle, because our focus is exclusively on the value of *process-based* autonomy, while Rawls's modification exclusively concerns the *substantive* version—an issue on which we are agnostic. More importantly, our analogy is purely a structural one. Like Rawls, we develop two principles, the second of which restricts the first when to do so would paradoxically further the liberty of all individual claimants.

235. See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963).

236. 28 U.S.C. § 2072 (2000).

existing class action models premised upon utilitarian, communitarian, or civic republican theory. The primacy afforded the role of individuals and the exercise of their process-based autonomy under liberal theory would appropriately establish a class action rule that maintains the American adversary tradition in which, in most cases, litigants are allowed to voluntarily choose to make use of the judicial process in order to protect or vindicate their individually held rights.

### *1. Mandatory Classes*

Perhaps the easiest conclusion for one committed to liberal individualism is that mandatory class actions will almost always be deemed invalid because of their negative impact on process-based autonomy. The notion that a class representative could require another individual to resort to the judicial process for redress of a wrong inflicted against the two of them, and limit or remove that individual's ability to control the litigation, serves as an egregious example of an unwarranted restriction of process-based autonomy. Liberal theory contemplates that individuals will possess the opportunity to exercise their autonomy in choosing either to exercise or refuse to exercise the right to initiate litigation, and to control it once instituted.<sup>237</sup>

That is not to say, however, that all mandatory classes are necessarily unjustifiable under most forms of liberal theory. Where the rigid protection of individual autonomy is simply not feasible or would lead to absurd results, any form of liberal theory other than, presumably, a pure Kantian version would recognize the need for individualist values to give way. Such circumstances would amount to the showing of a truly compelling justification for abandonment of liberal individualism. This appears to be so in the case of the Rule 23(b)(1)(A) class, where individual suits could give rise to conflicting obligations for a litigant opposing the class. But while Professor Shapiro justifies the mandatory nature of these classes on the basis of the interrelationship of the interests of the

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237. We should emphasize that to say that an individual has the right to refuse to initiate litigation does not necessarily mean that the individual will always possess unfettered autonomy in choosing *the timing of suit*. Thus, we see no problems with compulsory counterclaims, *see* FED. R. CIV. P. 131(a), or declaratory judgment proceedings, in which a potential defendant can effectively require a potential plaintiff to litigate his claim. The key difference is that in both of these contexts, the potential plaintiff always has the option of having *res judicata* imposed against him due to his refusal to pursue his claim. In contrast, a member of a mandatory class has no option to withdraw pursuit of his claim under any circumstances.



litigants,<sup>238</sup> such a view—for reasons already explained—is clearly incorrect.<sup>239</sup> The point, rather, is the compelling need to avoid anomalous results that would flow from permitting separate actions. The coercive power of the State cannot justly be used to force a party into a no-win situation. Imposing anomalous obligations on individual defendants forces them to exercise their autonomy so that they must ignore one of the obligations placed upon them. The severe restriction on the defendant's autonomy would seem to justify restriction of the autonomy of the various potential plaintiffs in this context.

Currently, Rule 23 also makes the so-called “limited fund” classes under Rule 23(b)(1)(B) mandatory. When considered from the vantage point of liberal theory, this conclusion is difficult to justify. In the case of limited fund class actions, the rationale for treating them as mandatory classes is that doing so provides for a more egalitarian distribution of compensation in cases where it would be impossible for every member of the class to collect their complete damages if every suit were brought as an individual action.<sup>240</sup> While this is a plausible argument, it does not go so far as to eliminate an individual's interest in process-based autonomy. The decision to opt in or opt out of a class represents an individual's decision as to how he can best advance his interests. If a litigant concludes that his interests would be better advanced by not participating in the class and either proceeding on his own with the representation of his choosing or not proceeding at all—perhaps for ideological reasons—there is no reason to prevent them from exercising that choice. Unlike in a (b)(1)(A) class, the act of opting out of a (b)(1)(B) class would not create a scenario where the protection of process-based autonomy would give rise to anomalous or logically untenable results. Rather, it would merely reflect the high value placed on process-based autonomy by the adversary system and the liberal theory of which it is an outgrowth.

Currently, Rule 23 also makes classes primarily seeking injunctive or declaratory relief under Rule 23(b)(2) mandatory.<sup>241</sup> The argument for treating them as mandatory classes is that the relief will benefit the entire class as a whole, making the act of opting out largely meaningless. Further, should individuals choose not to participate in a class action, the

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238. See Shapiro, *supra* note 11, at 925–26.

239. See discussion *supra* Part III.B.

240. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 228–31 (2003).

241. A litigant may seek damages in addition to an injunction or declaratory judgment, but that relief must be the secondary form of relief being sought. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1775, at 463–70 (2d ed. 1986).

fear is that they could subject a defendant to the cost of litigating the same suit for injunctive or declaratory relief over and over again.

Yet in the special case of the (b)(2) class, recall that the plaintiffs are often civil rights plaintiffs seeking what has been described as “idealistic” ends.<sup>242</sup> It is certainly conceivable that some individuals may not agree with the idealistic ends being sought and it would be improper to presume their assent to that end. From the perspective of liberal theory, then, individuals should be able to register their dissent from the ideological ends being pursued. Thus, an individual should be able to register that dissent through self-removal from the class. While it is reasonable to operate from a presumption that the individual interests of the class members will be consistent with one another, this alone does not justify the mandatory nature of the (b)(2) class. Class members in a (b)(2) class may disagree with the entire notion of the suit or conclude that their interests are better served by exiting the class. Under liberal theory, they retain this option. These considerations lead to the conclusion that (b)(2) classes should allow for self-exclusion from the class.

It should be recalled that Professor Rosenberg’s class action model would dictate the use of mandatory class proceedings in mass tort exposure cases.<sup>243</sup> While Rosenberg provides interesting and thoughtful rationales for such mandatory treatment, we cannot deem his justifications to be sufficiently compelling to validate abandonment of a litigant’s right to pursue his claim individually. In such cases the individual stakes are likely to be quite high. At the very least, if such a drastic modification of our adjudicatory system is to be implemented, it must be through resort to the governing processes by which the substantive rights are created in the first place. If the authoritative organs of government—whether legislative or judicial—wish to transform the DNA of the substantive rights involved by reconceptualizing them substantively as group held rights, the political process may police such choices. To continue to conceptualize the substantive rights as individually held while simultaneously transforming them under the guise of procedural modification is to divert—and probably pervert—the democratic process. In this sense, the “micro” version of liberal democratic theory, focused on preservation of the right of the individual litigant to enforce his substantive rights, serves also to

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242. See Redish, *supra* note 10, at 93–94.

243. See discussion *supra* Part III.A. Note that this is generally not current practice under Rule 23, since most mass exposure cases are likely to fall within the (b)(3) category, where the opt-out right is guaranteed.

protect the “macro” version of the theory by preserving basic notions of transparency and accountability.

## 2. *Class Actions, Opt-Out, and the Sliding Scale*

As we have shown, liberal theory authorizes mandatory class actions only in the rarest and most compelling of circumstances. To the extent class participation is purely voluntary, however, one might reason that no tension exists between the collectivist class action proceeding and individualism: individuals may choose to associate with others in pursuing enforcement of their rights. Viewed in this manner, the class proceeding might be seen as simply another voluntary joinder device, or an analogy to the First Amendment freedom of association. But while such reasoning is correct purely as a matter of theoretical abstraction, the issue tends to become more complicated when placed in the context of litigation reality. There are two conceivable means by which a litigant may exercise her choice not to participate in a class action: (1) failing to include herself in the class (opt-in) or (2) failing to remove herself from the class (opt-out). Because the inertia is so very different in the two situations, the practical and theoretical consequences may differ dramatically, depending on which method is chosen. Many who fail to remove themselves from the class may well do so either because of misunderstanding, confusion, or simple forgetfulness. Thus, a failure to opt out may not always reflect a class member’s considered decision to pursue his claims through the class proceeding.

In shaping our individualist model, we seek to establish a sliding scale for determining when, if ever, the more passive opt-out procedure, rather than an affirmative opt-in procedure, should be permitted. As the size of the individual claim increases, the likelihood that an individual will consent to the surrender of his process-based autonomy rights probably decreases. As such, the individualist model of the class action ties the decision between an opt-in or an opt-out system based on the value of the individually possessed claims. It requires class members to opt in where the class action involves a positive value claim and permits use of an opt-out procedure in cases involving negative value claims, under certain circumstances. This reflects the reasonable *ex ante* presumption that individuals are more likely to choose to participate in the class when their claims are so small that individual suit would not be viable. But because under an opt-out system this presumption is rebuttable, our approach preserves the ability of every individual to make the decision to choose not

to participate in the judicial process or take his chances by leaving the group and going it alone.

In drawing this distinction, we draw upon Professor Coffee's labels to distinguish positive value claims from negative value claims.<sup>244</sup> Yet while we accept Coffee's distinction between positive value "Type-A" class actions and negative value "Type-B" class actions, we replace Coffee's "Type-C" category (a mixture of "Type-A" and "Type-B" claims) with our own version of the "Type-C" class action. There are, we believe, two distinct types of negative value claims. On the one hand, some negative value claims are of sufficient size that a rational person would want to go to the trouble of taking affirmative steps to redeem a favorable award, even though individualized pursuit of the claim by resort to the litigation process would presumably not be viable. The appropriate rationale for use of an opt-out procedure, as currently employed in (b)(3) class actions, is the presumption that an absent class member would generally have no reason not to participate in the class proceeding. In those particular situations in which the individual class member does wish to do so, affirmative action on his part should be required to reverse that presumption.

On the other hand, some negative value claims are so low that a rational person would be unlikely even to go to the trouble to put in for the claim once a class-based award has been made or settlement reached, much less pursue individualized litigation. As previously noted, this sort of class action is appropriately described as the "faux class action,"<sup>245</sup> because absent class members are litigants in name only. Type-C classes should never be authorized, because they do not represent a true aggregation of individual claims required and assumed by Rule 23 and the underlying substantive law. Instead, they are effectively nothing more than "bounty hunter" suits, in which the plaintiffs' attorneys, rather than the class members, are the real parties in interest. These suits are illegitimate, not because they are inherently immoral, but because they are unauthorized by the substantive law being enforced in the class proceeding. As nothing more than a procedural rule, Rule 23 may not transform the underlying substantive law that provides the basis for the suit in the first place.<sup>246</sup> The prohibition on Type-C classes under an opt-in rule does not follow as a result of normative liberal theory's concern for individualism, but from the procedural concerns of macro democratic

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244. See Coffee, *supra* note 19, at 904–06.

245. See Redish, *supra* note 10, at 77.

246. See Redish, *supra* note 10, at 77.

theory.<sup>247</sup> The substantive statutes that provide private damage remedies typically provide remedies vested in the individual as victim. A class action is, in every legal sense, merely the aggregation of those individual claims. When claims are so miniscule that individuals are unlikely to take the effort to recover their awarded claims, then the lawsuit effectively becomes a *qui tam* action—inducing the plaintiffs’ attorneys to act as private enforcers of legal restraints—that is not created by the substantive law itself.<sup>248</sup> This allows a rule of procedure to amend the statutes enacted by the legislative process, running counter to the most foundational principles of democratic government.

As this trichotomy of plaintiffs’ claims underscores, however, predictions about plaintiffs’ strategic choices are not always as easy to make as this reasoning suggests. Plaintiffs with Type-A claims are, it would seem, just as likely to choose to pursue their claims on their own as to effectively forfeit all control to class representatives. The entire basis for the reasonable presumption of inclusion, then, breaks down in Type-A classes. What remains in its wake is liberal theory’s presumption of an individual’s process-based autonomy. Thus, for Type-A claims, where the economic stakes to the individual plaintiff are substantial, an opt-in procedure should be required. There is nothing to prevent an individual litigant from agreeing to become a member of the class based on his assessment that his interests would be best advanced by collective litigation. But the opt-out presumption does not reflect the value placed on individual autonomy in liberal theory and creates a higher burden for those who wish not to sue than on those who want to sue. In short, opting out has the effect of putting words into a litigant’s mouth—a practice that contradicts fundamental precepts of liberal theory, absent some strong *ex ante* basis to assume the contrary.

The presumption that individuals wish to retain their process-based autonomy is far less persuasive in the context of the Type-B class. For negative value claims, the ability of a litigant to control his claim is largely illusory, because by hypothesis his claim is not practically sustainable as a separate, individual suit, even though the formal possibility of pursuing the claim through individualized resort to the litigation process remains. The presumption in favor of consent to sue in this context leads logically to authorization of an opt-out system. Here, for an individual to vindicate his claim, he has few, if any, options beyond consenting to be a part of a

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247. This is an argument more completely examined in Redish, *supra* note 10.

248. *Id.* at 81–82.

class. Should individuals in this position wish to take their chances and attempt to seek a better means of protecting their own interests, then they retain the autonomous decision making power to do so. This conclusion follows directly from our Individualist Difference Principle: opt-out and opt-in are varied, based on which of the two procedures is more likely to further the individual claimant's interests in vindicating his rights.

#### CONCLUSION

This Article has sought to make explicit what to date has been largely implicit: the ramifications for political theory of existing class action models. Further, it has offered a class action model rooted in the individualist concerns that lie at the heart of liberal theory. Once this theoretical centrality is accepted, the class action models of leading legal scholars are revealed for what they basically are: rejections of liberal process-based individualism.

The class action model advocated in this Article attempts to reconcile the role of process-based autonomy with the inherent collectivism of the class action device. Our system's traditional commitment to process-based individual autonomy presents inescapable problems and questions for any system of class adjudication. Yet the focus of the class action literature has largely ignored the theoretical "elephant in the room" and as a result has failed to recognize the tension between a collectivist procedural device and an adversarial system premised on notions of process-based individual autonomy. All of this leads to focus on and acceptance of our alternative model of the class action, which seeks to minimize encroachment upon process-based autonomy inherent in existing models while simultaneously protecting the integrity of the democratic process. Only by keeping these twin objectives in mind can we be reasonably certain that the class action will operate to further, rather than retard, the values of individualism that lie at the heart of our civil justice system.