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The Political Justification for Group Litigation

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INTRODUCTION

What is the relationship between the democratic political order in the United States and class action or other group litigation?[1] This Essay examines two aspects of that relationship. First, it considers group litigation through the lens of the relationship between the individual and the state and argues that litigation can promote desirable ends such as citizen empowerment and deliberation.[2] Second, it evaluates the structural implications of group litigation for the judicial branch and argues that group litigation can provide a safety valve for the executive and the legislature. These are significant justifications for enabling it.

The debate over the legitimacy of the American class action has often been framed in terms of its internal structure and the protections it provides for absent class members. This Essay argues that what legitimates the class action best is the role it plays in the larger polity rather than the internal protections it offers participants. Concerns about autonomy of class

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1. I focus on the American class action and mass tort litigation models and on their legitimacy within the American political system. The legitimacy of international class actions heard in the United States, as illustrated by the Holocaust litigation case study, is an important issue not addressed here. The reader should note that there has been a lot of comparative work on class actions. *See, e.g.*, Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7 (2009); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179 (2009); Ángel R. Oquendo, *Upping the Ante: Collective Litigation in Latin America*, 47 COLUM. J. TRANSNAT'L L. 248 (2009).

2. *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004) (presenting arguments in favor of deliberative democracy). There is significant debate over what kind of democracy we have in the United States and what we ought to have. For a description and brief evaluation of models of democracy, see Amy Gutmann, *Democracy*, *in* 2 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 521 (Robert E. Goodin et al. eds., 2007) (describing different theories of democracy). For some economic defenses of class action litigation, see 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 (1991); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709 (2006).

members or agency costs remain important.[3] But even if policy makers found the silver bullet for regulating them, this would not legitimate class actions or other group litigation. Solutions to the *legitimacy* problem of class actions, to the extent that problem exists, cannot be found in the rules that govern class member participation, lawyer compensation, or judicial oversight. Legitimacy depends on the role of the class action in the larger political order. Accordingly, this Essay addresses the possibilities and limitations of class actions in the American political system.

The role of group litigation in American representative democracy can be seen from two perspectives: individual and structural. The first perspective considers the extent to which litigation promotes good citizenship—in the sense of encouraging political participation, permitting the vindication of rights, clarifying legal rules and standards, and providing a forum for articulation and debate of fundamental principles and values.

A second perspective sees the implications of group litigation for the structural role of courts in the constitutional order. Perhaps more than other suits, group litigation puts pressure on the role of the judge. Judges adopt an active role in group litigation, shaping disputes and sometimes attempting to resolve them even when the law provides an inadequate remedy.[4] Group litigation also puts pressure on the executive and legislative branches. Plaintiffs can use group litigation as a political tool to affect the relationship between different branches of government. At the same time, the executive and legislative branches may pressure the judiciary to resolve complex disputes in order to relieve the other branches of government of their responsibility. In short, group litigation is best understood as an element of government in the modern American state.

I. DEFINING LEGITIMACY

To show that the key to the legitimacy of the class action is not its internal structure but its role in the political order requires a definition of legitimacy. Only then can we consider what legitimates the class action device and whether the near exclusive focus of procedural scholarship on the class action's internal structure ought to be reconsidered.

In a useful article focusing on legitimacy in constitutional law, Richard Fallon identified three definitions of the term: (1) legal legitimacy, (2) moral legitimacy, and (3) sociological legitimacy.[5] Fallon correctly

3. For an essay on the internal governance of the class action weaving together strands from agency theory, political theory, and public choice theory, see Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013).

4. *Compare* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (lauding the active role of judges in shaping disputes), *with* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (pointing out the negative consequences of this new managerial role).

5. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792–93 (2005).

points out that these three types of legitimacy are interrelated and not always distinguishable from one another. Nevertheless, they provide valuable ways of thinking about this contested term.

Legal legitimacy is measured by compliance with legal norms.[6] Under this definition, a class action that comports with due process and Federal Rule of Civil Procedure 23 can "legitimately" bind class members because it has complied with all the legal requirements for class treatment. But is it fair to bind absent class members if these requirements have been met? This question invokes the idea of moral legitimacy.

Moral legitimacy, sometimes referred to as political legitimacy, is concerned with whether a particular form of government is justified on the basis of moral principles.[7] There are a number of theories of moral legitimacy. For example, John Rawls proposed that a government is morally legitimate if citizens who do not know the particulars of their own situation would endorse it after fair deliberation.[8] Some have argued that imagining a similar process among class members would legitimate the class action.[9]

Frank Michelman offers another take on the question of moral legitimacy. Michelman writes that a government is morally legitimate when it is "respect-worthy," that is, all things considered, it is worth preserving even when it produces specific laws that are unjust.[10] An inquiry into moral legitimacy urges us to ask whether, considering its role in extant political structure as a whole, the class action is legitimate. This Essay adopts a version of Michelman's approach.

Sociological legitimacy measures the extent to which members of the relevant political community regard a law as justified.[11] The study of the social psychology of procedural justice is largely based on this conception of legitimacy.[12] One difficulty with sociological legitimacy is that just

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6. *See id*. at 1794–95.

7. *See id*. at 1796–97.

8. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999). For a cogent description, see Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 315–16 (2004).

9. *See* David A. Dana, *Adequacy of Representation After* Stephenson*: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279 (2006).

10. Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345, 358 (2003) ("The core of a 'legitimacy' plea thus consists of two propositions: first, that our country's total, extant system of government by law is morally worth preserving (and here we would always implicitly be adding, considering the realistically available alternatives); and, second . . . that preserving it requires recognition all-round that the state is, so to speak, within its rights enforcing every law that issues from the system, including even some very bad and immoral ones.").

11. Fallon, *supra* note 5, at 1795–96.

12. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 26 (1990) (defining legitimacy by reference to "a conception of obligation to obey any commands an authority issues so long as that authority is acting within appropriate limits"); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 115,

because people obey a law does not mean that they think the law is legitimate.[13] If, for example, all class members do not opt out of a settlement, and by virtue of their inaction are deemed to accept it, is this a sufficient condition for the court to say that the class action procedure was legitimate or that the outcome was just?[14]

Another fundamental question for sociological legitimacy is whether the fact that people think a procedure is fair or an outcome just is a sufficient condition for legitimacy of that procedure or law when others think it unjust or unfair. Let us imagine that a reliable poll determined that most people think class actions are a good procedure, is that sufficient to make class actions legitimate? What if most people believed that the doctrine of virtual representation, rejected by the Supreme Court in a recent decision because it violated the individual's right to his day in court, was a good idea and should be recognized?[15]

Psychological studies can help illuminate attitudes toward a particular procedure. For example, some studies suggest that people prefer adversarial proceedings to inquisitorial ones.[16] Yet the class action fairness hearing lacks a true adversarial proceeding. Because these studies were not conducted in the context of the class action, it is hard to know the extent of this procedural device's sociological legitimacy. Some scholars have claimed that the class action is widely perceived to be illegitimate, or would be if people knew more about it, but these assertions lack evidentiary support.[17]

133–40 (1992) (describing findings that perceived fairness of process is critical to the perception of legitimacy of outcomes).

13. Fallon, *supra* note 5, at 1795–96; *see also* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 407–18 (critiquing the concept of sociological legitimacy and arguing that legitimacy is an inaccurate description of why people obey the law).

14. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1560 (2004) (documenting low opt-out rates and questioning the meaningfulness and efficacy of this procedural device).

15. *See* Taylor v. Sturgell, 553 U.S. 880 (2008). In *Taylor*, an individual filed a Freedom of Information Act suit and lost. *Id.* at 885. Another individual, who looked legally identical to the first, filed essentially the same suit. *Id.* The issue presented was whether the first suit could bind the participant in the second, virtually identical suit, and the Court held that it could not because every person is entitled to his day in court. *Id.* at 904.

16. JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 119–22 (1975); *see also* ALLAN E. LIND AND TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

17. *See* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 52 (2009) (stating that there would be "widespread public outrage" if the general public knew of the effect of the class action procedure on substantive law). A recent DRI study found that 65 percent of those surveyed thought the class action "makes corporations more responsible" and about the same proportion believe that it unfairly enriches plaintiffs' attorneys. *See Annual DRI National Poll on the Civil Judicial System*, DRI, http://dri.org/news/PollHighlights (last visited Apr. 19, 2013). That poll was conducted by an institution with a vested interest in the answer, the

This Essay does not ask whether widespread support for a procedure such as the class action is necessary or sufficient for its acceptance as legitimate. Nor does it consider the legal legitimacy of class actions, which I take to mean the extent they comply with constitutional due process requirements.[18] Instead, this Essay evaluates whether the class action is consistent with a conception of moral legitimacy, recognizing that the question is intertwined with questions of legal and sociological legitimacy. My thesis is that the class action's moral legitimacy depends on the role that the class action plays in the larger political structure. If the reader is convinced that the class action is legitimate in that sense, the next question is what internal structural changes need to be made to improve the function the class action serves in the political sphere.

II. CLASS ACTIONS, INDIVIDUALS, AND THE STATE

Litigation is a part of how U.S. citizens understand their relationship with the state and their place in the polity. Traditionally litigation was a way for individual citizens to challenge the powerful state apparatus.[19] In addition to providing a forum for individuals to assert their rights against the state, litigation is a mechanism for realizing of other aspects of the rule of law: transparency, accountability, and equality before the law. Courts can also provide a forum for debate about significant political issues, and lawsuits may be a catalyst for this debate.

A. Transparency

One way that litigation promotes transparency is by revealing information that is otherwise hidden or unavailable.[20] Information is critical to good citizenship, for without it citizens cannot responsibly

Defense Research Institute (DRI), which describes itself as the "Voice of the Defense Bar." *See* DRI, http://www.dri.org/ (last visited Apr. 19, 2013).

18. I address the intersection between the Due Process Clauses and class actions elsewhere. Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545 (2012).

19. The courts were (and are) the only governmental institution outside party control, but their relationship with the other branches of government is complex. *See* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 22–26 (1982). Skowronek describes the nineteenth century interaction between the branches as follows: "Judicial activism was a natural complement to an electoral-representative system that had a natural impulse to distribute benefits widely through logrolling politics (like the politics of granting special corporate charters) and to avoid, so far as possible, bold declarations of winners and losers in legislation." *Id*. at 29; *see also* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010) (describing the Congressional enactment of statutes providing for private enforcement mechanisms in order to entrench and decentralize regulation).

20. Transparency can have uses beyond information forcing, including framing narratives of motives, methods of understanding our world, and respect for others through communication and consultation. We make meaning through litigation not only by asking the court to create narratives for us, but by the process of contesting those narratives.

deliberate on important issues, vote for representatives, or hold governments and other institutions (both public and private) accountable for their actions. Producing information entails costs. Information production is expensive and the release of information can be embarrassing, creating reputational costs. These are some of the reasons for the ongoing battles over the scope of discovery.

Consider the decision of participants to enroll in the 9/11 Victim Compensation Fund (VCF).[21] Enrollment in the VCF required victims and their families to forego their right to sue.[22] Many expressed regret at joining the VCF not necessarily because they thought they would get more money from a trial, but because they missed the opportunity to use the trial process to obtain information about government responsibility for the attacks.[23] Despite the work of the 9/11 Commission, which investigated the tragedy, these potential litigants felt that there was more information to be discovered and, perhaps, other narratives to be told about the attacks which could only be done in the courtroom.

Information forcing was also part of the calculus in the class action litigation against Swiss banks for retaining funds of Holocaust victims.[24] The lawyers prosecuting the lawsuits against the banks sought bank records that would reveal the names of Jewish account holders immediately preceding and during the Second World War.[25] Without these records, there was no way of proving their claims, as the members of the class possessed no evidence of the deposit of the funds.[26] The Swiss banks' business has been based in large part on a promise of secrecy. Opening their books could put their success at risk.

It appears from later events that at one point the banks possessed records of the Jewish accounts but destroyed them. Some speculative reasons for the destruction of documents include a desire to keep the funds, fear that they would be caught in a lie (having denied access to account holders and their heirs), and the reputational damage of having withheld these funds from Holocaust victims.

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21. *See* Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645 (2008).

22. *Id.* at 650.

23. *Id.* at 663.

24. *See In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 167 (E.D.N.Y. 2000) (approving settlement in class action against Swiss banks concerning bank accounts belonging to Holocaust victims). *See generally* MICHAEL R. MARRUS, SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S (2009) (providing a historical description and evaluation of the litigation). For a brief discussion in a larger meditation on vengeance and forgiveness and the role of memory, see MARTHA L. MINOW, BETWEEN VENGEANCE AND FORGIVENESS 111–12 (1998).

25. *See generally* Michael J. Bazyler, *www.swissbankclaims.com: The Legacy and Morality of the Holocaust-Era Settlement with the Swiss Banks*, 25 FORDHAM INT'L L.J. 64 (2001) (summarizing the obstacles faced by lawyers and class members in the Holocaust Victim Assets Litigation).

26. *Id.* at 75–76 n.28.

While the case was in its initial stages, Jewish leaders struck a deal with the Swiss banks to open their accounts to a select group headed by Paul Volcker, formally called the "Independent Committee of Eminent Persons" and more popularly known as the "Volcker Committee."[27] That group began reviewing the bank records and may have influenced the judge in the Swiss banks litigation to deny discovery requests during the initial stages of the litigation.[28] Had the Swiss banks not allowed the Volcker Committee access, they may have faced the much harsher and more significant effects of discovery. This is because evidence came to light during the course of the litigation that the banks had intentionally and systematically destroyed records.[29] Spoliation of evidence of this kind can give rise to substantial monetary sanctions and adverse jury instructions at trial.

What lessons can we learn from these examples? Justice is impossible to achieve without access to information because there can be no real discussion of the underlying wrongs. That discussion is necessary if there is to be a narrative of motives and ultimately a resolution. There are numerous ways to access information. In the Swiss banks litigation, an out of court compromise on the part of the defendant resulted in the release of some of the information needed for plaintiffs to understand what happened and to resolve the lawsuits. Information may be released through nonadjudicatory bodies such as truth and reconciliation commissions. Or information may come out in Congressional hearings, as it did in the aftermath of 9/11. In other cases, litigation forces information into the public eye. Litigation is a particularly powerful means of information forcing, and even the threat of civil discovery can result in disclosure. By enabling litigation that cannot be brought individually, group litigation serves a critical role in a society that depends on litigation to unearth information.

Any litigation can reveal information; it need not be an aggregated proceeding. But aggregate litigation empowers plaintiffs who otherwise would not be able to bring suit individually. Furthermore, the high profile nature of some class actions and other aggregate litigation also means that the information is publicized more readily than in individual litigation, which might receive less attention.

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27. *See Chronology:* In re Holocaust Victim Assets Litigation, SWISSBANKCLAIMS, http://www.swissbankclaims.com/Chronology.aspx (last visited Apr. 19, 2013) (agreement entered on May 2, 1996).

28. Burt Neuborne, Transnational Holocaust Related Litigation in United States Courts: The Swiss Bank and German Slave Labor Cases 39 (June 22, 2012) (unpublished manuscript) (on file with author). Secrecy imposed by Swiss law likely had a role as well.

29. *See* Bazyler, *supra* note 25, at 75–76 n.28.

B. Accountability

A second function of group litigation is to provide a means to hold individuals, organizations, and governments accountable for wrongdoing.[30] Group litigation especially enhances the ability of legal institutions to compensate individuals, vindicate individual rights, order prospective relief, and deter future misconduct. Compensation, vindication, and deterrence make it possible to hold institutions and individuals accountable for their actions.

Collective suits enable litigation. Group litigation allows individuals who have been wronged to solve collective action problems that make it difficult to sue individually.[31] Individuals are unlikely to have the wherewithal or resources to mount a lawsuit against powerful companies such as the Swiss banks, and they lack the capacity to band together and share knowledge and resources absent some aggregation procedure such as the class action. Well-capitalized law firms, by contrast, have both the expertise and the resources to pursue extended and costly lawsuits on behalf of groups of plaintiffs, particularly when the result of the litigation will be a substantial common fund from which the lawyers can be paid a percentage fee.

Imagine a lone Holocaust survivor trying to mount a lawsuit against the Swiss banks—where would she find a lawyer willing to represent her? Where would she find the money to pay the attorney's fee? How would she develop the kind of sophisticated theory of liability that the lawyers for the plaintiffs in the Holocaust litigation were able to develop? It would be difficult indeed for any individual or inexperienced lawyer to navigate the legal thickets of jurisdiction, discovery, and motion practice in such complex litigation. The same is true for domestic litigation, such as copyright suits against large internet companies[32] or class actions sounding in equal protection law against the U.S. government.[33]

C. Equality

A third requirement for democratic government is equality before the law. This ideal is sometimes difficult to reconcile with the reality that individuals in the United States are not equal in resources, limiting their ability to access the court system and the procedures it provides for

30. Accountability can mean a number of things: requiring defendants to pay for their wrongful conduct (retroactive accountability); preventing defendants from continuing with wrongful conduct (prospective accountability); and creating incentives for defendants to alter the structure of their institutions to prevent wrongful conduct.

31. *See, e.g.*, Macey & Miller, *supra* note 2, at 9.

32. *See, e.g.*, Authors Guild v. Google, Inc., 282 F.R.D. 384 (S.D.N.Y 2012) (lawsuit alleging copyright infringement in Google Books project); *see also* James Grimmelmann, *The Elephantine Google Books Settlement*, 58 J. COPYRIGHT SOC'Y U.S.A. 497 (2011).

33. Ashcroft v. Iqbal, 556 U.S. 662 (2009) (dismissing a class action lawsuit against the Attorney General and FBI Director alleging conspiracy to discriminate on the basis of national origin and religion in the aftermath of 9/11).

vindicating rights. The role of group litigation in promoting equality can be seen as two separate functions: access to the law declaration (vindication) and distributive justice (remedies).

First, consider the law declaration function of the courts. Litigants who do not have the wherewithal to file a lawsuit or pursue it adequately are limited in their ability to participate in the judicial process. As a result, they cannot effect changes in the law through judicial interpretation or obtain affirmations of their legal rights in the face of recalcitrant opponents. Over time, this lack of access to the law declaration function of the courts can alter the law in favor of one group over others and can result in systematic exclusion.[34] Enabling individuals to sue collectively can solve this problem by providing mechanisms to finance litigation and incentivizing lawyers to pursue lawsuits.

Significant drawbacks to the way group litigation is pursued in the United States stand in the way of achieving the goal of access to the law declaration function of the courts. The American court system has always struggled with the question of how to balance the law declaration function with the dispute resolution function. In group litigation, the emphasis has leaned heavily toward resolving disputes, sometimes at the expense of law declaration.[35] Some have indicated that this is what happened in the Swiss banks litigation as there were no rulings on substantive legal issues.[36] Instead, the case was settled (for a significant sum) before the liability of the Swiss banks was determined.[37] This is exactly the point of settlement: to achieve closure before the merits are determined and the uncertainty that makes settlement attractive to both parties evaporates. The size of the settlement amount also speaks to the culpability of the defendant and the wrongfulness of their actions, even if they deny liability in the settlement documents. Nevertheless, the narrative of culpability that emerges in a settlement is different than one that would emerge through a trial process.

The tension between law declaration and settlement can play out in a number of ways. Perhaps a legal ruling is put off to spur settlement, or perhaps settlement is a judge's way of avoiding a legal ruling he would prefer to leave unwritten for equity's sake. This tension raises deep jurisprudential questions about the role of the judge: What ought to be his

34. The most influential discussion of this phenomenon remains Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

35. *Compare* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (criticizing settlements for preventing courts from fulfilling their law declaration function), *with* Samuel Isaacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009) (noting the benefits of settlements in dispute resolutions); *see also* Judith Resnik, *Courts: In and out of Sight, Site and Cite*, 53 VILL. L. REV. 771 (2008) (underscoring the importance of transparency in the court system and highlighting concerns about secret settlements).

36. Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 806–07 (2002).

37. *See id.* at 808–12.

fidelity to the formal law in the face of injustice? How robust is the relative autonomy of law? What is the role of the judge in an adversarial system and may he ever promote settlement? To this last question, the American system has given an emphatic "Yes!" and has gone quite far in encouraging judges to manage their cases to promote settlement.[38]

In light of these questions, consider the following evaluation of the Swiss banks litigation: "Given many weaknesses in their cases, the enormous settlement Holocaust victims secured from Swiss banks might also illustrate how a district judge, bent on vindicating claims no matter how legally implausible, forces through some class action settlement."[39] This evaluation is perhaps what led some European critics to label American litigation as political in the sense that the judge places his policy preference for a particular outcome above the formal demands of the law.[40] On the one hand, judicial decisions viewed as divorced from substantive legal requirements endanger the relative autonomy of law from the more rough and tumble world of politics and may ultimately delegitimize the courts. On the other hand, a judge's failure to promote the just outcome where dictates of the formal law are at least unclear also delegitimizes the courts.

A second equality promoting function of the courts is to effectuate distributive justice. Group litigation is no exception to the generally understood phenomenon that most cases settle.[41] The problem of distributive justice is of particular concern where allocation of the proceeds of the lawsuit must be made among class members who may be quite different from each other.

In the Swiss banks litigation, for example, many individuals had no method of proving that they were the owners or heirs of the accounts in question because much of the documentation was destroyed.[42] Other account owners were no longer living and no heirs could be found. This left a significant amount to be distributed in a manner that was not purely

38. This emphasis on settlement is not all encompassing. Many lawsuits with class allegations do not settle and many cases are decided by motion rather than by settlement. Most lawsuits filed as class actions never obtain class action status. The best currently available data indicates that only 30 percent of cases filed with class allegations ultimately seek class certification. *See* EMERY G. LEE III & THOMAS E. WILLGING., FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 11 (2008), *available at* https://bulk.resource.org/courts.gov/fjc/cafa1108.pdf ("In the 231 sampled class actions, 70 motions to certify a class were identified."). About 10 percent of class actions settle, *see id.* at 16, while 3 percent ultimately are certified for litigation (although many of these settle as well). *See id.* at 11 tbl.9 (observing that 6 of 231 sampled class actions, or 2.6 percent, were certified without restriction).

39. David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1985 n.121 (2008).

40. MARRUS, *supra* note 24, at 32–33.

41. *See* LEE & WILLGING, *supra* note 38, at 2 (observing that of the cases sampled, "all class actions in which a class was certified, whether for litigation or settlement purposes, ended with class settlements").

42. *See* Bazyler, *supra* note 25, at 75–76 n.28.

compensatory. The initial decision was made to prioritize compensation over need, so that individuals who could prove that they owned an account would be compensated for the losses they sustained. This too is a difficult decision from a broad distributive justice perspective, as many Holocaust survivors were needier than those entitled to the funds. The decision reflected the underlying legal principle that the money belonged to those who had deposited the funds.

One of the five classes in the Swiss Banks litigation—the looted assets class—proved to be impossible to administer because no records existed. Ultimately, that portion of the settlement was distributed to the poorest survivors. The doctrine of *cy pres*, which in the class action context allows funds to be distributed to their next best use when they cannot be given directly to injured class members, made this possible.[43] Often *cy pres* distributions are awarded to charities related to the underlying subject matter of the suit. *Cy pres* awards have been controversial because they are somewhat distanced from the compensation imperative of the law.[44] In the Swiss banks litigation, the court and the claims administrator determined what would be the best allocation among living Holocaust survivors, with input from various stakeholders.[45] There was significant disagreement and ultimately the process of determining allocation of these funds was moral and political rather than legal, as only the loosest legal principles governed the distribution of funds post settlement.[46]

Because the settlement and its distribution were court sanctioned, it was important that the distribution be just in the eyes of the class members, the litigants, and the public at large. To reach a compromise that appeared just to all interested parties, the court not only conducted a fairness hearing but the magistrate overseeing the distribution scheme did a considerable amount of work communicating with the relevant groups. The distribution itself was a result of a dialogue among parties who had difficulty reaching agreement and demonstrates the importance of deliberation to attaining results that respect human autonomy and broader commitments to justice. Litigation provided the forum for this deliberation, first in the form of more stylized legal arguments before the court, later through settlement negotiations, and ultimately settlement administration.

D. Deliberation

Courts provide a forum for reasoned deliberation. Participation in reasoned deliberation is one way to give effect to dignity and autonomy

43. BLACK'S LAW DICTIONARY 444 (9th ed. 2009).

44. *See* Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1957–58 (2011) (discussing *cy pres* awards).

45. *See* Neuborne, *supra* note 36, at 808–13.

46. *See id.*

values.[47] In the traditional binary lawsuit, litigants may participate by consulting with their lawyer about the course of the litigation, perhaps being subject to a deposition or medical evaluation, appearing as a witness at trial, or participating in settlement negotiations. In class actions, such direct participation in the course of the litigation is not possible, if only because many absent class members do not even know they are a part of the litigation until settlement. Instead, class actions offer an opportunity to participate directly by speaking out in a fairness hearing.[48]

Not every class action is likely to produce a robust hearing. For example, consumer class actions—where what is at stake is a statutory penalty or the refunding of a banking fee—may be treated differently than a case such as the Swiss banks litigation.[49] This is because of the symbolism of what is at stake. In a small-claims consumer class action, the nature of the violation is impersonal and lacks a political charge. The primary purpose of consumer class actions is deterrence, because the compensation for individuals is so small. By contrast, in the Swiss banks litigation, although the suit sounded in contract, it evoked a narrative of the attempt to silence and erase the existence of the victims of the Holocaust. This undercurrent added political significance to the litigation. As a result, the opportunity to participate by writing to the judge or speaking at the fairness hearing was a critical component of a fair process. The opportunity to speak and to be heard in an official setting is probably the closest a court proceeding can come to promoting individual dignity.

In the larger historical picture, the fairness hearing in the Swiss banks litigation gave the victims an opportunity to tell their story in a formal proceeding and a public space,[50] and thereby contribute to the historical record.[51] But the desire to produce a narrative testimony before the court is not limited to such extreme circumstances. Permission to tell the court one's story is for some the irreducible minimum of just procedure, even if the telling does not directly result in a legal ruling. Judge Alvin Hellerstein, who oversaw all the litigation related to the tragedy of 9/11, told me a story

47. *See generally* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS: NOMOS XVIII 126, 127–28 (J. Roland Pennock & John W. Chapman eds., 1977); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–304 (2004).

48. *See* FED. R. CIV. P. 23(e) (requiring judicial approval of settlements in class actions).

49. For a contrasting example, the Google Books settlement spurred a fairness hearing with testimony from individual authors, groups of authors, and even foreign governments. *See* James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. REV. 387 (2013) (describing and criticizing the Google Books settlement); *cf.* Pamela Samuelson, *The Google Books Settlement As Copyright Reform*, 2011 WIS. L. REV. 479 (considering the benefits of the Google Books settlement).

50. *See* PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 148–62 (1997) (describing the role of Eichmann trial in giving a public opportunity for victims to tell their story and its tension with the judicial role).

51. *See* Leora Bilsky, *The Judge and the Historian: Transnational Holocaust Litigation As the New Model*, 24 HIST. & MEMORY 117, 129–30 (2012).

of the firefighters who were denied relief in their lawsuit against New York City. Although they lost their case on a dispositive motion, meaning there was no trial, they nevertheless asked the court for the opportunity to tell their stories. The judge listened. Similarly, in the related litigation concerning illnesses suffered by first responders, Judge Hellerstein held a fairness hearing, although no rule of procedure requires one when a case that is not a class action is settled.[52]

Speaking at a fairness hearing is not a sufficient condition for making the outcome of the litigation substantively just from the litigant's point of view.[53] In our adversarial system, we rely on participants in the judicial system to present arguments to the court and on the court to weigh those arguments neutrally. Accordingly, the fairness hearing can be an opportunity to educate the judge, especially when objectors at the fairness hearing are sincere and represented by rigorous and capable counsel. But providing the judge with information is not the only purpose of the fairness hearing.

The ongoing fights between different factions in any litigation where a great deal is at stake, as in the Swiss banks litigation, demonstrate that people both want the opportunity to be heard and to be obeyed. The right to speak on its own does not guarantee that the outcome will be just. A hearing should not be understood as a replacement for substantive justice, but it is nevertheless a separate piece of the puzzle which recognizes that the dignity of the individuals is an important part of court proceedings. Permitting the individual to voice his or her disagreement, even if it ultimately leads nowhere, is a special function of the courts in a democratic society. This is one way that the judiciary differs from the legislative and executive branches.[54]

III. CLASS ACTIONS AND INTERBRANCH RELATIONS

So far this Essay has focused on the individual, and discussed the ways in which group litigation can promote citizenship and deliberation in American democracy. I now turn to the implications of group litigation for the structure of government, in particular the relationship between the

52. *See generally* Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127 (2012).

53. Nevertheless, it is widely believed that procedural justice is an important component of why people obey the law. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (presenting social-psychological studies which demonstrate that procedural justice is important for individuals who have not prevailed in accepting losses in adjudicative settings).

54. This is one reason why the newly adopted pleadings regime raises concerns—can the plausibility pleadings test allow for individuals to have their day in court, especially when bringing claims where the evidence is of a defendants' state of mind or is information only available to the defendant? *See generally* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010) (discussing the uses and potential abuses of screening mechanisms for complaints).

courts and other governmental branches. The structural implications of group litigation are threefold. First, the courts' role in group litigation may raise concerns about the improper expansion of judicial power when courts facilitate settlements rather than ruling on the legal questions at issue.[55] Second, participants may use the litigation process in order to gain the attention of the other branches of government or the public as part of a broader publicity strategy. In such cases the court's resolution of the controversy is secondary to the articulation or broadcast of the controversy. The litigation becomes part of a broader democratic dialogue. Third, the legislative or executive branches may prefer to allow the courts to resolve pressing social or political problems because they are unable to do so themselves. Should this be an option?

A. The Proper Role of Courts

The court's role in facilitating a settlement class may look like an overreach of judicial power, although whether it is categorized as such depends on one's view of what courts do in the ordinary case and what their relationship is with the other branches of government.[56] The traditional views of what courts do split into a dispute resolution function and a law declaration function, sometimes also loosely overlapping with the public/private distinction. Law declaration is often assumed to be more important for the public regarding function of law, especially for civil rights cases or suits against the government, whereas dispute resolution is understood as a more private function. As ideal types, these descriptions are useful but they do not reflect reality. The court's role is both to resolve the dispute and declare the law.[57] Where there is a trial, these two functions overlap almost completely. Where there is a private settlement, they diverge.

In the group litigation context, where a settlement must be approved by the court and is accompanied by public fairness hearings, the two functions intersect in ways that are not always satisfying for those seeking categorical answers to the law declaration/dispute resolution divide. For example, in the Swiss banks litigation, plaintiffs brought claims for money damages on behalf of Holocaust survivors and their heirs. The ability of the court to resolve this dispute through a settlement was dissatisfying for those who wanted not only compensation but vindication through a judicial declaration

55. Settlement practices are more concerning when there is legal authority weighing against one of the parties than when the outcome is uncertain.

56. There is voluminous literature on the judges' role. *Compare, e.g.*, Chayes, *supra* note 4 (arguing in favor of judicial involvement in dispute framing and resolution), *with* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003) (defending the traditional, more neutral judicial role). One of the best articles on this topic remains Judith Resnik, *Managerial Judges*, *supra* note 4, at 374 (critiquing the modern judicial propensity to manage and shape litigation and influence its results).

57. Additionally, resolving a dispute not only has private effects for the parties, but also larger public effects such as deterrence.

that the Swiss banks behaved wrongfully. When the parties settled the Swiss banks litigation for a great deal of money and the court adjudicated the fairness of the settlement, did this in fact signal something that came close to law declaration?[58] Compare the resolution of the Swiss banks cases with asbestos litigation. There the Supreme Court rejected a massive settlement that purported to solve a longstanding problem facing both the courts and the legislative branches. Although the Court regretted that no legislative resolution was forthcoming, it ultimately found that the cases could not be settled as a class action for fairness reasons.[59] This left the disputes unresolved and the liability uncertain.

In the context of mass tort settlements, Martha Minow observes: "A judge who engages in the process of creating administrative responses to social problems is also inevitably immersed in political views, but lacks the tethering or camouflage of the traditional adjudicatory procedure."[60] This tethering is important in part because it preserves the sociological legitimacy of the court against accusations of overreaching. Maintaining the relative autonomy of law is also necessary for moral legitimacy. In the context of court responses to atrocity, including the Swiss banks litigation described earlier, Minow writes that "making law dependent on the vagaries of politics, risks jeopardizing the very aspiration of law to be impartial, fair, and steady, and thereby distinct from strategic power and individual personalities."[61] As noted earlier, courts have significant discretion in determining whether a settlement is fair, and there is no requirement that the court provide a final declaration of the underlying law when a case is settled.[62] As a result, one might ask whether the tether to traditional adjudicatory procedure is sufficient to lend moral legitimacy to the class action settlement process, especially where there have been no dispositive motions.

Perhaps the answer ultimately rests on a convergence of sociological and moral legitimacy based on a shared sense of satisfaction with the outcome among class members and the general public. If the outcome is broadly understood as fair, if the distribution of proceeds from the settlement seems just, if the amount of settlement seems a sufficient signal of contrition, then perhaps this is enough—even without a legal ruling or apology. Perhaps substantive justice can overcome a process that does not reflect the ideal of

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58. *See supra* notes 36–37 and accompanying text.

59. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627–29 (1997). For a critique of the *Amchem* settlement, see generally Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995). For a discussion of bankruptcy as a solution to the problem posed by asbestos litigation, see Troy A. McKenzie, *Toward a Bankruptcy Model for Non-class Aggregate Litigation*, 87 NYU L. REV. 960, 969 (2012).

60. Martha Minow, *Judge for the Situation: Judge Weinstein and the Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2022 (1997).

61. MINOW, *supra* note 24, at 40.

62. *See supra* Part I.C–D.

adjudication and thereby make the entire political system more worthy of respect. But where there is disagreement among the beneficiary class members, or where the public perception is that the settlement is insufficient relative to the allegations or unjust in its allocation, the chain tethering adjudicatory process to the settlement may not be able to bear the weight of disappointment.

B. Political Struggle in the Courts

Concerns about class treatment and particularly class action settlements have often been viewed through the lens of concern over court overreaching in relation to the political branches. But filing and prosecuting a lawsuit also provides a forum for litigants to project their voices into the political debate and a means to communicate through the suit outside the formal constraints of the law. For example, complaints in controversial cases often contain a preamble paragraph, not necessary to meet any procedural requirements but useful as a publicity tool.[63] The Swiss banks litigation complaints contained such a paragraph as well as a narrative of the victims' stories.[64]

Group litigation, by virtue of the size of the plaintiff class and often the size of the damages requested, may increase the volume of plaintiffs' protests even further. One imagines that many discrimination suits were filed against Wal-Mart before *Dukes v. Wal-Mart*[65] made national headlines, first as a class action in district court and ultimately at the Supreme Court level.[66] Similarly, a class composed of Holocaust survivors commands greater interest than an individual suit and thereby focuses attention to the injustice of the Swiss banks' behavior.

There are other means of communication on the public stage. Filing a lawsuit may not be the first public relations strategy that comes to mind. Nevertheless, large-scale lawsuits, be they class actions or aggregations, must be recognized as one method that Americans use for political communication as well as dispute resolution. As Jules Lobel has explained, "courts not only function as adjudicators of private disputes, or institutions that implement social reforms, but as arenas where political and social movements agitate for, and communicate, their legal and political agenda."[67] Under this model of the courts, the outcome of the lawsuit plays a diminished role, and perhaps the judge does as well. In addition to a favorable ruling, "[t]he litigation can serve a variety of roles: to articulate a

63. *See, e.g.*, Samuel J. Terilli et al., *Lowering the Bar: Privileged Court Filings As Substitutes for Press Releases in the Court of Public Opinion*, 12 COMM. L. & POL'Y 143 (2007) (arguing in favor of using filings as press releases).

64. *See, e.g.*, Amended Complaint, Weisshaus v. Union Bank of Switz., No. 96-5161 (E.D.N.Y. July 30, 1997), *available at* http://www.swissbankclaims.com/Documents/weisshaus%20amended.pdf.

65. 222 F.R.D. 137 (N.D. Cal. 2004).

66. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

67. Jules Lobel, *Courts As Forums for Protest*, 52 UCLA L. REV. 477, 479 (2004).

constitutional theory supporting the aspirations of the political movement, to expose the conflict between the aspirations of law and its grim reality, to draw public attention to the issue and mobilize an oppressed community, or to put public pressure on a recalcitrant government or private institution to take a popular movement's grievances seriously."[68] Stuart Eizenstat, the Clinton Administration official who was most involved with the Holocaust litigation, said that the suits were "simply a vehicle for a titanic political struggle, which was messy, sometimes unseemly, and constantly frustrating."[69] Groups or perhaps whole social movements can use the courts as a way to amplify or illustrate their message and to communicate with other branches of government. Enabling this communication supports the ideal of a deliberative democracy that respects the rights and claims of all persons equally.

C. A Legislative Back-up Plan

The third way that the relationship between the political branches can play out in group litigation is when the executive or legislative branch specifically seeks court resolution to avoid the political costs that might arise from their actions. While this is not common, it is a recurring phenomenon. In the Swiss banks litigation, Eizenstat received significant praise for the key public role he played in helping the parties reach a resolution.[70] Speaking of the adjudication, Eizenstat explained that "external pressures and intervention of the U.S. government compensated for the serious flaws in the legal cases."[71]

In other parts of the Holocaust litigation, the relationship between litigation and executive action was more direct. The Clinton Administration and the German Chancellor ultimately settled the piece of the Holocaust litigation concerning the use of slave labor by corporations.[72] That agreement did not emanate from a court. Instead, it was an executive agreement on the part of the German government to fund reparations in exchange for (among other things) a promise from the U.S. government that it would prevent further lawsuits.[73] The lawsuits were the catalyst and the backdrop for this governmental action, but the relief ultimately came from a political compromise rather than a judicially sanctioned one.

Anthony Sebok critiques the resolution of the German slave labor cases:

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68. *Id*. at 480.
69. *See* MARRUS, *supra* note 24, at 28 (quoting Stuart Eizenstat).
70. *Id*. at 16.
71. *Id*. at 18.
72. *Id*. at 21.
73. There is a dispute over whether the promise of protection from lawsuits had any value given the treaties and underlying law. Anthony J. Sebok, *Un-settling the Holocaust Litigation (Part II)*, FINDLAW (Aug. 29, 2000), http://writ.news.findlaw.com/sebok/20000829.html.

> Although it is supposed to illustrate the power of the individual suing in private law against private corporations, in reality it reaffirms the primacy of the state. The agreement occurred because the German government offered the money and the American government offered the protection. On their own, without the help of the two governments, the forced labor plaintiffs almost surely would have lost, for their claims had been legally extinguished long before the agreement was made.[74]

I am not sure the lawsuits were meant to epitomize the individual against the state—the private against the public. These lawsuits were brought on behalf of groups who had agitated and protested the failure of governments to compensate them for their suffering and restore their property. In this sense, the lawsuits were associational rather than individual. Although the allegations in these lawsuits sounded in the private law of torts, restitution, and unjust enrichment, they were also using the medium of these doctrines to assault the political compromises reached in the wake of the Second World War. These lawsuits combined both private values (compensation) and public values (deterrence and vindication) far more than an ordinary tort suit might.

The asbestos litigation that culminated in *Amchem Products, Inc. v. Windsor*[75] is an example of the courts refusing to solve a broad social problem. The widespread use of asbestos in the United States caused hundreds of thousands of injuries and lawsuits. Ultimately, after congressional attempts to solve the problem by legislation failed, lawyers negotiated a massive settlement. The Supreme Court rejected the settlement as unfair to claimants, particularly future claimants.[76] The opinion began with a lament. It described a U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation Report that had recommended a legislative solution to the massive influx of asbestos cases across the country. Justice Ginsburg wrote: "Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. To this date, no congressional response has emerged."[77] Congress, one can deduce, would have liked a court-created solution to this problem. The Court, rigorously applying the requirements of Rule 23, declined to assist.[78]

All of this raises the question of the appropriate structure of government. The traditional view of separation of powers is based on the idea that the judicial branch's independence requires separation of the judicial from the

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74. *Id.*

75. 521 U.S. 591 (1997).

76. *See id.* at 626–28. For an argument that the settlement was unfair, see generally Koniak, *supra* note 59.

77. *Windsor*, 521 U.S. at 598 (citations omitted).

78. For a brief overview of the controversy, see Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255 (2006).

executive and legislative. But there are a number of ways in which the federal courts' formal independence from the other branches of government is not the whole story. For example, judges depend on the legislative branch to pay their salaries and the costs of running the court system;[79] they depend on the executive to enforce their rulings; and, many believe, they depend on the people to sustain their legitimacy.[80] In other words, the branches of government are intertwined and interdependent while simultaneously autonomous and separate.[81] Some separation must be maintained in order for the courts to review governmental action independently and to defend unpopular or minority rights in the face of powerful majority interests. At the same time, some cooperation is necessary to resolve the complex cases that arise in the wake of mass harms and to make the compromises necessary for resolving those cases.

The difficulty lies in drawing the line between autonomy and cooperation in a way that does not rip the tether to adjudicative procedure, even if it does stretch it a bit uncomfortably. That difficulty cannot be resolved here except to note that in the cases that raise significant complex issues involving injury to large numbers of people, an exception to the norms of binary adjudication is appropriate in order to have government both worthy of respect and one that accords respect to its citizens.

CONCLUSION

This Essay has argued that the legitimacy of the class action device ought to rest on the role it plays in the larger political structure. This thesis can be contrasted with those who argue that the legitimacy of the class action device is derived from its internal structure and the protections it provides individual class members. The political role of the class action has implications for individual citizens and the structure of government. On the individual level, collective litigation helps achieve some of the key values of a desirable democratic society—values associated with the rule of law: transparency, accountability, equality, and deliberation. To the extent the class action performs these functions (and is reformed to perform them better) it is morally legitimate.

On the broader social level, collective litigation may be more troubling as it appears to upset the traditional role of the courts as separate and

79. The Constitution provides that judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. Nevertheless, the legislature writes the check, determines the amount, and decides on raises for the judiciary.

80. "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction." Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) (explaining the courts' power as largely one of public trust).

81. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stating that the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity").

independent from the other branches of government and, in the process, perhaps endangers the relative autonomy of law. Because collective litigation, however imperfect, enables group protest and inspires solutions to major social problems, it provides an important element in the larger political structure. Ultimately, the moral legitimacy of the class action on the societal level depends on the extent to which the results of the litigation fit the substantive law and the ideal of justice.[82] The difficulty for judges has been opining on this very question, especially in the settlement context. Instead of determining whether a settlement is substantively fair, judges have focused on a set of procedural factors that serve as indicia of fairness, such as the reaction of the class to the settlement, in terms of the number of opt outs and objectors, or how vigorously the lawyers litigated.[83] The courts' difficulty in approving the substantive outcomes of class litigation remains a significant challenge for the moral legitimacy of the class action device.

The next step, therefore, is to consider what internal structural changes need to be made to improve the function the class action serves in the political sphere. I have pointed to settlement approval as one area for improvement. There are others. As changes to Rule 23 are considered, they should be evaluated in terms of the larger political role the class action plays. In other words, changes to the class action procedure should be adopted when they improve the role the class action can play in political order outside the litigation.

82. In this sense, sociological legitimacy feeds political legitimacy.

83. For example, courts sometimes look at the "*Grinnell* factors" to judge fairness of a settlement. The *Grinnell* factors are (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). In an earlier article, I suggested that these nine factors were "substantive." Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 138 n.341 (2003). Upon reflection, this is incorrect. Factors (1), (2), and (3) are really procedural considerations. The remaining factors all boil down to one question: How does this settlement compare to what plaintiffs could get at trial, discounted for risk of loss?