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REGULATORY LITIGATION IN THE EUROPEAN
UNION: DOES THE U.S. CLASS ACTION
HAVE A NEW ANALOGUE?

*S.I. Strong**

The United States has long embraced the concept of regulatory litigation, whereby individual litigants, often termed “private attorneys general,” are allowed to enforce certain public laws as a matter of institutional design. Although several types of regulatory litigation exist, the U.S. class action is often considered the paradigmatic model for this type of private regulation.

For years, the United States appeared to be the sole proponent of both regulatory litigation and large-scale litigation. However, in February 2012, the European Union dramatically reversed its existing policies toward mass claims resolution when the European Parliament adopted a resolution proposing to create a coherent European approach to cross-border collective redress. Given certain conceptual similarities between cross-border collective redress and global class actions, the question logically arises as to whether the European Union is in the process of embracing a form of regulatory litigation.

This issue is of great importance not only to European audiences who may have to recalibrate their thinking about what constitutes “regulation” within the European sphere, but also to American audiences who will have to consider how the new European procedures affect the ability of U.S. courts to

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bring European parties into global class actions. Although many of the issues may appear to be procedural in nature, the more interesting—and challenging—analyses arise as a matter of regulatory law.

This Article is the first to consider the European resolution from a regulatory perspective, using a combination of new governance theory and equivalence functionalism to determine whether the European Union has adopted or is in the process of adopting a form of regulatory litigation. In so doing, the Article considers a number of issues, including the basic definition of regulatory litigation, how class and collective relief can act as a regulatory mechanism, and the special problems that arise when regulatory litigation is used in the transnational context. The Article also includes a normative element, providing a number of suggestions on how European authorities—who are still in the early stages of drafting the relevant procedures—can better achieve the regulatory and other objectives set forth in the resolution. Through these means, the Article makes a significant contribution not only to the domestic understanding of regulatory law, but also to the increasingly important field of transnational regulation. Audiences in both the United States and the European Union, as well as readers from other countries, can benefit greatly from this analysis.

I. INTRODUCTION

For decades, Europe and the United States have been characterized as representing opposite ends of the spectrum with regard to their approach to regulation.¹ The United States has traditionally been seen as embracing a mixed model of shared public-private authority, with individual litigants being permitted, if not encouraged, to act as “private attorneys general” and enforce various public laws in an otherwise highly deregulated market environment.² European nations, on the other hand, have been painted as preferring a more formal regulatory model that includes a large number of legislative and administrative enactments that deny both the need and opportunity for any sort of “private” regulation through litigation.³

1 “There is no consensus in policy or academic circles as to what exactly is connoted by the term regulation.” Colin Scott, *Privatization and Regulatory Regimes*, in *Oxford Handbook of Public Policy* 651, 653 (Michael Moran et al. eds., 2006). One classic definition states that regulation involves “sustained and focused control exercised by a public agency over activities that are socially valued,” although modern critics have expanded the scope of application to include regulatory activity undertaken by private actors and other decentralized entities. See *id.* (citing Phillip Selznick, *Focusing Organizational Research on Regulation*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 363, 363 (Roger G. Noll ed., 1985)).

2 See John S. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 *COLUM. L. REV.* 288, 344 (2010); see also J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 *WM. & MARY L. REV.* 1137, 1140 (2012).

3 See Coffee, *supra* note 2, at 345.

While these stereotypes may still exist in the popular mindset, “[c]omparative studies of developments in regulatory law and policy in Western states over the past three decades have shown a widespread movement away from a top-down approach in public governance to an increasingly hybrid interaction of public and private actors.”⁴ This is intriguing, not just from an academic perspective, but also as a practical matter, since it suggests that European nations may be adopting what could be seen as a more Americanized model of regulation.⁵ However, it is dangerous to read these developments too robustly, since the mere fact that other nations are increasing the role of private actors in their regulatory schemes does not necessarily mean that those jurisdictions are adopting U.S. regulatory methods and mechanisms per se.⁶

One area of particular interest involves the use of large-scale litigation to achieve certain regulatory ends. This technique, often referred to as “regulatory litigation,” arises when a “diffuse set of regulators,” including “private citizens, public regulatory bodies, nongovernmental organizations, and private market agents[,] . . . regulate social harm”⁷ by “us[ing] litigation and the courts to achieve and apply regulatory outcomes to entire industries.”⁸

One of the best known forms of regulatory litigation is the U.S. class action.⁹ While the regulatory elements of class action litigation

4 Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*, 15 EUR. J. INT'L L. 197, 201 (2004) (reviewing A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY* (2003)); see also Scott, *supra* note 1, at 652 (recognizing that “regulation occurs within ‘regimes’ characterized by diffuse populations and of actors and considerable diversity in the norms and mechanisms of control”).

5 See Francesca Bignami, *Cooperative Legalism and the Non-Americanization of European Regulatory Styles: The Case of Data Privacy*, 59 AM. J. COMP. L. 411, 412, 414–15 (2011); R. Daniel Kelemen, *Suing for Europe: Adversarial Legalism and European Governance*, 39 COMP. POL. STUD. 101, 102 (2006).

6 See Bignami, *supra* note 5, at 412, 414–15 (referring to the European model as “cooperative legalism”).

7 Glover, *supra* note 2, at 1146.

8 Patrick Luff, *Risk Regulation and Regulatory Litigation*, 64 RUTGERS L. REV. 73, 96 (2011) (quoting ANDREW P. MORISS ET AL., *REGULATION BY LITIGATION* 1 (2009)).

9 However, not all class actions operate in a regulatory manner. See RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS* 63, 63–66 (2004); see also *infra* Part III.B.I. Class actions are not the only type of regulatory litigation. See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 612–25 (2012) (discussing the role of the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), and state attorneys general as well as shareholder litigation, which is considered the weakest and “most controversial” of the various forms of regulatory litigation); Glover, *supra* note 2, at 1190–91 (discussing enforcement mechanisms in

give rise to few issues in domestic disputes, the device's regulatory potential has caused a number of difficulties in cases involving multinational classes.¹⁰ For example, U.S. judges not only have to consider how regulatory efforts initiated by private actors in U.S. courts should or will be considered in countries that only allow traditional forms of regulation,¹¹ judges also have to take into account what the legal, political, and economic ramifications of these so-called "regulatory mismatches" will be at both the national and international levels.¹²

These tasks obviously go far beyond what trial judges are usually expected to do.¹³ Nevertheless, U.S. courts are being asked to address these sorts of issues with increasing frequency, since the forces of globalization are not only driving up the number and diversity of mass multinational injuries but also the number of ways in which those injuries can be said to affect U.S. parties and U.S. interests (and hence attract the jurisdiction of U.S. courts).¹⁴

the Racketeer Influenced and Corporate Organizations (RICO) Act); Luff, *supra* note 8, at 113 (discussing both "top-down" and "bottom-up" regulatory legislation); Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CAL. L. REV. 885, 886 (2007) (discussing state attorneys general).

10 See Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 67 (2007) [hereinafter Buxbaum, Securities]; Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 309–17 (2006) [hereinafter Buxbaum, Transnational]; Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 41–52 (2009).

11 These issues affect questions regarding international enforceability of a class action judgment as well as the initial certification of the class. See Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 78–79 (2011); Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 313–16 (2011).

12 See Nagareda, *supra* note 10, at 13; see also *infra* Part II.

13 See Monestier, *supra* note 11, at 79 ("The complexity of foreign law on the recognition and enforcement of foreign judgments generally, as well as the lack of comparable class procedures elsewhere, greatly limits the ability of a U.S. court to ascertain whether or not a U.S. class judgment would be enforceable in a given foreign court."); Wasserman, *supra* note 11, at 313 ("As global markets have expanded and transborder disputes have multiplied, American courts have been pressed to certify transnational class actions. . . .").

14 These issues have led to a flood of commentary. See Deborah Hensler, *How Economic Globalisation is Helping to Construct a Private Transnational Legal Order*, in THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW 249, 250–59 (Sam Muller et al. eds., 2011) [hereinafter Hensler, Future]; George A. Bermann, *U.S. Class Actions and the "Global Class,"* 19 KAN. J.L. & PUB. POL'Y 91, 94 (2009) (discussing the potential for "inter-jurisdictional conflict" and the worry about whether U.S. class action judgments

The situation has become even more complicated in recent years because the United States is no longer the only country in the world to provide for large-scale litigation in its domestic courts.¹⁵ Over the last ten years, numerous countries in both the common law and civil law traditions have adopted various forms of class and collective redress as a matter of national law.¹⁶ While some of these procedures provide for opt-out representative relief in a manner similar to that reflected in U.S. class actions, other devices differ significantly as a matter of both form and function.¹⁷

Given Europe's traditional antipathy toward both regulatory litigation and U.S. class actions, it might seem as if Europe would be the last region in the world to embrace any type of collective relief.¹⁸ As it turns out, sixteen of the twenty-seven European Member States now provide for some form of large-scale litigation as a matter of national law,¹⁹ with collective relief also being made available in a number of

will be recognized and enforced abroad); Buxbaum, *Securities*, *supra* note 10, at 35 (discussing *forum non conveniens*); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class Actions*, 2009 WIS. L. REV. 465 (2009); John C.L. Dixon, *The Res Judicata Effect in England of a US Class Action Settlement*, 46 INT'L & COMP. L.Q. 134 (1997); Rachael Mulheron, *The Recognition, and Res Judicata Effect, of a United States Class Actions Judgment in England: A Rebuttal of Vivendi*, 75 MOD. L. REV. 180, 181–82 (2012) [hereinafter Mulheron, *Vivendi*]; Nagareda, *supra* note 10, at 11–12; Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV. 87, 89 n.70 (2011) (discussing economic issues relating to global class actions); Mark Stiggelbout, *The Recognition in England and Wales of United States Judgments in Class Actions*, 52 HARV. INT'L L.J. 433 (2011).

15 See 622 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE (Deborah Hensler et al. eds., 2009) [hereinafter THE ANNALS] (discussing thirty different jurisdictions); see also Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, in THE ANNALS, *supra*, at 7, 15–17.

16 See Hensler, *supra* note 15, at 7; see also THE ANNALS, *supra* note 15.

17 Procedures range from other types of representative relief (such as that which is available only on an opt-in basis, only with respect to certain substantive areas of law, only with respect to injunctive relief, and/or only at the instigation of an approved intermediary entity such as a government association or non-government organization) to aggregate and settlement only relief. See Hensler, *supra* note 15, at 8, 13–17.

18 See Coffee, *supra* note 2, at 345.

19 See DIRECTORATE GENERAL FOR INTERNAL POLICIES, OVERVIEW OF EXISTING COLLECTIVE REDRESS SCHEMES IN EU MEMBER STATES 38 (2011) [hereinafter Directorate General], available at <http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf> (noting European Member States have adopted four general types of collective redress: “group and representative actions, test case procedures and procedures for skimming off profits”); see also Filippo Valguarnera, *Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action*, 10 GLOBAL JURIST 1, 8–19 (2010).

specific subject matter areas as a matter of European law.²⁰ However, the most significant development in this field comes as a result of a resolution adopted by the European Parliament in February 2012 (Resolution) calling for the creation of a coherent European approach to collective redress in cross-border disputes.²¹

Because European legislation only applies to European actors, the Resolution might initially appear to be of limited applicability outside the European Union.²² However, U.S. parties and U.S. courts need to be aware of these developments for several reasons. First, the European Union's primary form of legislation concerning cross-border

20 See Directive 2004/35, of the European Parliament and the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, 2004 O.J. (L 143) (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:143:0056:0075:en:PDF>; Directive 2005/29, of the European Parliament and the Council of 11 May 2005 Unfair Commercial Practices Directive, 2005 O.J. (L 149) (EC), *available at* http://www.esma.europa.eu/system/files/2005_29_EC.pdf; Directive 2004/48, of the European Parliament and the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 195) (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:157:0045:0086:en:PDF>; Directive 2000/35, of the European Parliament and the Council of 29 June 2000 on Combating Late Payment in Commercial Transactions, 2000 O.J. (L 200) (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:200:0035:0038:en:PDF>; Directive 98/27, of the European Parliament and the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, 1998 O.J. (L 166) (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:166:0051:0055:EN:PDF>; Directive 93/13, of the European Parliament and the Council of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) (ECC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML>; see also *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (Apr. 2, 2008); *Green Paper on Consumer Collective Redress*, COM (2008) 794 final (Nov. 27, 2008) [hereinafter *Green Paper on Consumer Collective Redress*]; European Parliament, Resolution of 2 February 2012 on "Towards a Coherent European Approach to Collective Redress," P7_TA-PROV (2012) 0021, ¶¶ 10–14 [hereinafter *Resolution*], *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0_DOC+XML+V0//EN; Christopher Hodges, *European Union Legislation*, in *THE ANNALS*, *supra* note 15, at 78–85 [hereinafter *Hodges, ANNALS*].

21 See Resolution, *supra* note 20. The Resolution was adopted following a public consultation from the European Commission and an own initiative report from the European Parliament. See *Public Consultation: Towards a Coherent European Approach to Collective Redress*, SEC (2011) 173 final (Feb. 4, 2011) (EC) [hereinafter *Public Consultation*], *available at* http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf; Committee on Legal Affairs Report, 12 January 2012, "Towards a Coherent European Approach to Collective Redress," 2011/2089 (INI) [hereinafter *Lehne Report*], *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0012+0+DOC+PDF+V0//EN>.

22 See Resolution, *supra* note 20.

der procedure, Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of civil and commercial judgments (the Brussels I Regulation)²³ is applicable to cases involving cross-border collective redress pursuant to the explicit terms of the Resolution.²⁴ Although the Brussels I Regulation normally only applies when the defendant is domiciled in a European Member State²⁵, there are times when a defendant domiciled outside the European Union will be made subject to these provisions.²⁶

Second, the Resolution suggests an imminent need for change in the type of analysis that U.S. courts undertake in global class actions

23 See Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 5(3), 2001 O.J. (L 12) 1 (EC) [hereinafter Brussels I Regulation].

24 See Resolution, *supra* note 20, ¶¶ 26–27.

25 See Brussels I Regulation, *supra* note 23, ¶ 8, art. 6(1). Long-anticipated revisions to the Brussels I Regulation were formally approved by the Council of the European Union just as this Article was going to press and will go into effect on January 10, 2015. See Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351) 1 [hereinafter Brussels I Recast]. However, none of the revisions affect the current analysis.

26 See Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1386, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49758&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2389349>; S.I. Strong, *Backyard Advantage: New Rules Mean That U.S. Companies May Be Forced to Litigate Across the Pond*, 28 LEGAL TIMES 43 (May 23, 2005) (noting a foreign defendant may be subject to the Brussels I Regulation if that party is one of several necessary defendants, where one of those defendants is domiciled in a European Member State). Notably, the revised version of the Brussels I Regulation contemplates other instances in which the Regulation can affect persons domiciled outside the European Union. See Brussels I Recast, *supra* note 25. For example:

The recast regulation will provide that no national rules of jurisdiction may be applied any longer by member states in relation to consumers and employees domiciled outside the EU. Such uniform rules of jurisdiction will also apply in relation to parties domiciled outside the EU in situations where the courts of a member state have exclusive jurisdiction under the recast regulation or where such courts have had jurisdiction conferred on them by an agreement between the parties.

Another important change will be a rule on international *lis pendens* which will allow the courts of a member state, on a discretionary basis, to stay the proceedings and eventually dismiss the proceedings in situations where a court of a third state has already been seized either of proceedings between the same parties or of a related action at the time the EU court is seized.

Press Release, The Council of the European Union, Recast of the Brussels I regulation: towards easier and faster circulation of judgments in civil and commercial matters within the EU (6 Dec. 2012), 16599/12, PRESSE 483. This new *lis pendens* rule could be particularly important in cases involving U.S. global class actions.

involving European parties. At this point, most courts and commentators have focused on the problems that arise when U.S.-style regulatory litigation clashes with regulatory regimes that do not use litigation as a regulatory device.²⁷ However, the Resolution could be construed as reflecting an intent by the European Union to adopt its own form of regulatory litigation.²⁸ If this is indeed the case, then U.S. courts will have to undertake a new type of analysis that considers not only whether and to what extent European forms of collective relief (which will likely include significant procedural differences from U.S. class actions) include a regulatory element, but how such mechanisms measure up to U.S. forms of regulatory litigation.²⁹

This will be a daunting task, particularly given that no analyses have yet been conducted concerning the Resolution's regulatory potential.³⁰ This suggests a significant need for a critical evaluation of whether and to what extent the procedures proposed by the Resolution constitute a form of regulatory litigation.³¹

This Article intends to fill that critical gap and, in so doing, achieve two basic objectives. First, this discussion aims to provide U.S. courts with a better understanding of the ways in which various forms of large-scale litigation operate as a regulatory mechanism in both the United States and the European Union so as to help judges understand the issues at stake in global class actions. This analysis is valuable as a matter of both domestic and comparative law, since it will help U.S. courts determine whether and to what extent they should allow foreign parties to participate in a U.S. global class action.³²

27 See Bermann, *supra* note 14, at 94; Buxbaum, Securities, *supra* note 10, at 35; Choi & Silberman, *supra* note 14, at 465; Dixon, *supra* note 14, at 134; Monestier, *supra* note 11, at 44–45; Mulheron, Vivendi, *supra* note 14, at 181–82; Rachael Mulheron, *The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409, 426–27 (2009); Nagareda, *supra* note 10, at 11–12; Simard & Tidmarsh, *supra* note 14, at 89; Wasserman, *supra* note 11, at 335–69 (offering an overview of “salient differences” between the preclusion doctrines in Europe and the United States).

28 See Resolution, *supra* note 20; see also *infra* Part IV.A.

29 See *supra* note 17.

30 See Resolution, *supra* note 20. Some analyses of procedural issues are available. See S.I. Strong, *Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation*, 44 ARIZ. ST. L.J. (forthcoming 2013) [hereinafter Strong, Brussels I].

31 See Resolution, *supra* note 20.

32 Although concerns regarding the international enforceability of a class award may seem to relate only to the tail end of a dispute, the issue actually arises very early on since many U.S. judges take future enforceability into account during certification proceedings and will not allow an international class to go forward if the defendant

Second, the Article aims to help European authorities consider whether and to what extent the procedural mechanisms outlined in the Resolution constitute a form of regulatory litigation.³³ This is particularly important given the relative scarcity of discussion regarding the regulatory impact of collective redress measures already adopted by the various European Member States.³⁴ In some ways, this phenomenon can be explained by the fact that European states tend to justify large-scale litigation on efficiency and compensatory grounds rather than regulatory rationales, possibly as a result of the traditional European vision of regulation as arising solely as a result of legislative or administrative action.³⁵ However, the lack of emphasis on the regulatory nature of collective redress in European jurisprudence may also be the result of a political desire to distance European forms of

cannot be assured that any resulting judgment will be given preclusive effect in other jurisdictions. See Monestier, *supra* note 11, at 10–13.

33 See Resolution, *supra* note 20.

34 Virtually all existing commentary on the use of collective redress in Europe focuses on procedural issues rather than regulatory concerns. See generally EXTRATERRITORIALITY AND COLLECTIVE REDRESS (Duncan Fairgrieve & Eva Lein eds., 2012); see also Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures—European Debates*, 58 INT'L & COMP. L.Q. 379, 380 (2009); Christopher Hodges, *Collective Redress in Europe: The New Model*, 29 CIV. JUST. Q. 370, 370 (2010) [hereinafter Hodges, *Collective*]; Christopher Hodges, *What Are People Trying to Do in Resolving Mass Issues, How Is It Going, and Where Are We Headed?*, in THE ANNALS, *supra* note 15, at 330, 338 [hereinafter Hodges, *Resolving*]; Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 177, 181 (2009); Rachael Mulheron, *Recent Milestones in Class Action Reform in England: A Critique and a Proposal*, 127 L.Q. REV. 288, 289 (2011); Mulheron, *Opt-Out*, *supra* note 27, at 426–27; Laura Carballo Piñeiro, *Collective Redress in the Proposal for a Brussels I bis Regulation: A Coherent Approach?*, 2 ZEITSCHRIFT FÜR EUROPÄISCHES UNTERNEHMENS- UND VERBRAUCHERRECHT – J. EUR. CONSUMER & MARKET L. 81 (2012); Francesco Rizzuto, *Does the European Community Have Legal Competence to Harmonise National Procedural Rules Governing Private Actions for Damages From Infringements of European Community Antitrust Rules?*, 2 GLOBAL COMPETITION LITIG. REV. 29, 29–30 (2009); Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 141, 164–79 (2010); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401 (2002); Strong, *Brussels I*, *supra* note 30; S.I. Strong, *Cross-Border Collective Redress and Individual Participatory Rights: Quo Vadis?* 32 CIV. JUST. Q. — (forthcoming 2013) [hereinafter Strong, *Quo Vadis*]; Gerhard Wagner, *Collective Redress—Categories of Loss and Legislative Options*, 127 L.Q. REV. 55, 55 (2011).

35 See Coffee, *supra* note 2, at 345. However, this does not necessarily mean that the procedures do not also include regulatory elements. See Directorate General, *supra* note 19, at 38; MULHERON, *supra* note 9, at 63, 66; Bignami, *supra* note 5, at 441–59 (discussing regulatory styles of France, Germany, Britain, and Italy); Hodges, *Resolving*, *supra* note 34, at 336–38; Christopher Hodges, *Europeanization of Civil Justice: Trends and Issues*, 26 CIV. JUST. Q. 96, 117–18, 121 (2007) [hereinafter Hodges, *Europeanization*].

collective redress from U.S. class actions, which are seen as contributing significantly to an abusive litigation culture.³⁶

Although it may not be politically expedient within Europe to discuss the regulatory effect of collective redress, European authorities nevertheless need to be aware of the impact such procedures may have on national and regional regulatory regimes so that the procedures that are ultimately adopted achieve their desired objectives and avoid upsetting the existing regulatory equilibrium.³⁷ Since the European Commission and other European bodies have only just begun the process of developing the procedures in question, recommendations on the current proposals are both timely and appropriate, since there is still time for lawmakers to take the various suggestions into account.³⁸

The Article proceeds as follows. First, Part II puts the discussion into context by considering the problems associated with transnational regulatory litigation as a matter of both procedural and regulatory law. Although this Part forms the foundation for later analysis, the points made here are important in their own regard, since this discussion demonstrates how global class actions interact with foreign regulatory regimes and identifies various issues that U.S. courts must take into account when deciding whether to allow a global class action to proceed. This Part is also helpful to those looking at the matter from the European perspective, since it demonstrates the role that regulatory litigation plays in a world where “no formal political state

36 See Resolution, *supra* note 20, ¶ 2; see also Bignami, *supra* note 5, at 460; Hodges, Europeanization, *supra* note 35, at 115; Valguarnera, *supra* note 19, at 3, 19–21.

37 Failure to recognize the regulatory effect of a particular procedure can lead to unintended overdeterrence. See Giuseppe Dari-Mattiacci & Gerrit De Geest, *Carrots, Sticks, and the Multiplication Effect*, 26 J.L. ECON. & ORG. 365, 377 (2010); Russell, *supra* note 34, at 151 n.47.

38 Creation of the new mechanism for cross-border collective redress will follow the ordinary legislative procedure. See Resolution, *supra* note 20, ¶ 29; see also Consolidated Version of the Treaty on the Functioning of the European Union art. 294, Mar. 30, 2010, 2010 O.J. (C 83) 173 [hereinafter TFEU] (outlining the ordinary legislative procedure, also known as the co-decision procedure). The European Commission is scheduled to disclose its first proposed initiative in the fourth quarter of 2012. See *Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 20, Item 110, COM (2011) 777 final (Nov. 15, 2011), available at http://ec.europa.eu/atwork/pdf/cwp2012_annex_en.pdf; Commission Actions to be Adopted, 30/03/2012–31/12/2012, Legislative Proposals, available at http://ec.europa.eu/atwork/programmes/docs/forward_programming_2012.pdf.

has authority of a scope commensurate with modern global business.”³⁹

Next, Part III introduces the concept of regulatory litigation *per se*. This discussion identifies the role that the mechanism plays in the United States and the European Union as a matter of institutional design and describes those areas where regulatory litigation may be most necessary. This Part adopts a functional analysis⁴⁰ to help overcome various problems associated with comparing procedures on a transatlantic basis and applies new governance theory⁴¹ as a means of addressing certain differences of opinion regarding what regulation is or should be.⁴²

Part IV turns the focus to Europe and uses the information generated in Part III to evaluate whether and to what extent the Resolution constitutes a form of regulatory litigation.⁴³ This analysis focuses both on the enunciated purposes of the Resolution as well as the preliminary procedures that have been proposed by the European Parlia-

39 Nagareda, *supra* note 10, at 13; *see also* Resolution, *supra* note 20, ¶¶ H, 19 (emphasizing the cross-border nature of the Resolution).

40 *See* Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339, 357 (Mathias Reiman & Reinhard Zimmerman eds., 2006).

41 New governance theory attempts to identify new regulatory mechanisms that fall between traditional command and control models of regulation and deregulated markets. *See* On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 *COLUM. L. REV.* 2098, 2100 (2008) (reviewing RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008) and DAN ARIELY, *PREDICTABLY IRRATIONAL* (2008)); *see also* R. DANIEL KELEMEN, *EUROLEGALISM* (2011); DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS* (1998); Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *VAND. J. TRANSNAT'L L.* 501 (2009); Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 *AM. J. COMP. L.* 859, 872–73 (2011); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267 (1998); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 *GEO. L.J.* 53, 54 (2011); Scott, *supra* note 1, at 652.

42 New governance theory supplies a new critical perspective on questions of institutional design. *See* IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 3 (1992) (“Good policy analysis is not about choosing between the free market and government regulation. . . . [S]ound policy analysis is about understanding private regulation . . . and how it is interdependent with state regulation”); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 *N.Y.U. L. REV.* 875, 882 (2003) (suggesting “the way past the current impasse is to return to [a] commitment to a legal decisionmaking process that is deeply informed about the institutions with which legal actors interact”).

43 *See* Resolution, *supra* note 20.

ment.⁴⁴ This Part also takes the discussion in a more normative direction by applying dispute system design theory to consider which procedures would be best suited to achieve the regulatory and other aims outlined in the Resolution.⁴⁵ Finally, Part V pulls the various strands of analysis together and provides some concluding observations for both U.S. and European audiences.

Before beginning, it is helpful to make several preliminary points. First, this Article does not attempt to determine whether regulatory litigation is objectively “better” than traditional forms of regulation. While such analyses are useful, there is extensive literature on this matter already.⁴⁶

Second, this Article focuses only on certain European-level measures—that is, the Resolution—and not on procedures that exist at the individual Member State level.⁴⁷ Although it would be interesting to consider the extent to which different Members States’ laws on collective redress reflect a regulatory purpose, as a practical matter, U.S. courts will be more concerned with the Resolution and subsequent European legislation, since those are the measures that will be most relevant to cross-border disputes involving U.S. parties.⁴⁸

Third, it is helpful to introduce what is meant by “collective redress” in the European context. The term is often used as a means of distinguishing certain forms of large-scale relief from “class actions,” which is the phrase used to refer to procedural mechanisms that incorporate most, if not all, of the traits of the U.S. class action.⁴⁹

44 See *id.*

45 See Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 177–78 (2007) (noting dispute systems design “is not a dispute resolution methodology itself” but instead reflects “the intentional and systematic creation of an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system”).

46 See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 9 (2001); KELEMEN, *supra* note 41; ANDREW P. MORRIS ET AL., *REGULATION BY LITIGATION* 171 (2009) (concluding that “regulation by litigation is [not] appropriate”); *REGULATION THROUGH LITIGATION* (W. Kip Viscusi ed.) (2002); Gillian K. Hadfield, *Don’t Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 56 DEPAUL L. REV. 401, 401, 405 (2007); Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007); Andrew P. Morriss et al., *Regulation by Litigation*, 9 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 109 (2008); William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 710 (2006).

47 See Resolution, *supra* note 20.

48 See *id.*; *supra* notes 23–26 and accompanying text.

49 See Hensler, *supra* note 15, at 13; Hodges, *Resolving*, *supra* note 34, at 338; see also *supra* note 17. Interestingly, U.S. courts have begun to identify differences between class and collective procedures. See *Velez v. Perrin Holder & Davenport Cap-*

Several different definitions of collective redress currently exist within the European Union. For example, in a public consultation undertaken in 2011 regarding the possibility of a European approach to cross-border collective redress, the European Commission defined the term as reflecting:

a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices. There are two main forms of collective redress [in the European Union]: by way of *injunctive relief*, claimants seek to stop the continuation of illegal behaviour; by way of *compensatory relief*, they seek damages for the harm caused.⁵⁰

A more detailed definition was used by the European Commission in a draft revision to the Brussels I Regulation, although that language was ultimately not adopted.⁵¹ This provision defined collective redress as involving:

proceedings which concern the compensation of harm caused by unlawful business practices to a multitude of injured persons and which are brought by

- i. a state body
- ii. a non-profit making organisation whose main purpose and activity is to represent and defend the interests of groups of natural or legal persons, other than by, on a commercial basis, providing them with legal advice or representing them in court, or
- iii. a group of more than twelve claimants.⁵²

Individual Member States may also define the term as a matter of national law.⁵³ However, there is no need to identify one particular definition as superior to the others, at least for purposes of this Article. Instead, it is sufficient to recognize that procedures relating to collective redress under European and individual Member State law are significantly different from procedures used in U.S. class actions.⁵⁴

ital Corp., 769 F. Supp. 2d 445, 446–47 (S.D.N.Y. 2011); *JetBlue Airways Corp. v. Stephenson*, 931 N.Y.S.2d 284, 288–89 (N.Y. App. Div. 2011).

50 Public Consultation, *supra* note 21, ¶ 7.

51 See Brussels I Regulation, *supra* note 23; see also *supra* note 25.

52 *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, art. 37(3)(b) (as amended) COM (2010) 748 final (Dec. 14, 2010). The Council of the European Union approved the final revisions to the Brussels I Regulation just as this Article was going to press, and this definition was not included in the final approved draft. See Brussels I Recast, *supra* note 25.

53 See Directorate General, *supra* note 19, at 38.

54 See FED. R. CIV. P. 23.

However, it is important to understand the extent of those differences at least as a general concern, since they can contribute to the procedural and “regulatory mismatches” that arise in cases involving transnational regulatory litigation, a subject that is taken up in the next Part.⁵⁵

II. ISSUES RELATING TO TRANSNATIONAL REGULATORY LITIGATION

Globalization has led to an ever-increasing number of large-scale legal injuries that include a cross-border element.⁵⁶ Given the amount of trade that occurs between the United States and the European Union, controversies involving U.S. and European parties may be among the most frequent to arise.⁵⁷ However, mass disputes are also becoming increasingly common at an intra-European level, with a 2008 study estimating that ten percent of the collective redress cases involving the then-thirteen Member States with collective redress mechanisms were cross-border in nature.⁵⁸ That number was estimated to be as high as forty percent if the calculation included collective injuries in Member States without domestic forms of collective redress.⁵⁹

The increasing volume of cross-border collective injuries was one reason behind the European Parliament’s decision to adopt the Resolution.⁶⁰ However, European authorities were also concerned about the effectiveness of existing procedures providing for collective redress, particularly in cases involving intra-European disputes.⁶¹

55 See Nagareda, *supra* note 10, at 13.

56 See Hensler, *Future*, *supra* note 14, at 250–55.

57 The economic relationship between the European Union and the United States is the largest in the world, with trade flows of approximately \$3.6 billion a day. See *European Union*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/europe-middle-east/europe/european-union> (last visited Sept. 19, 2012) (citing figures from 2010).

58 See Directorate General, *supra* note 19, at 43.

59 See *id.*

60 See Resolution, *supra* note 20, ¶ H.

61 *Id.* ¶ G (noting “in some Member States the overall performance of the existing consumer redress and enforcement tools designed at EU level is not deemed satisfactory, or such mechanisms are not sufficiently well known, which results in their limited use”). Commentators have also found large scale litigation to be problematic on an intra-European basis. See Peter Barnett, *The Prevention of Abusive Cross-Border Re-Litigation*, 51 INT’L & COMP. L.Q. 943, 957 (2002); Fairgrieve & Howells, *supra* note 34, at 380; Hodges, *Collective*, *supra* note 34, at 370; Mulheron, *Opt-Out*, *supra* note 27, at 426–27; Rizzuto, *supra* note 34, at 29–30; Strong, *Brussels I*, *supra* note 30; Strong, *Quo Vadis*, *supra* note 34.

Europeans are not the only ones to notice the difficulties associated with resolving international large-scale disputes. A number of North American and international organizations have also been working on these issues, primarily through the promulgation of non-binding procedural protocols meant to assist courts with the coordination of parallel actions.⁶² Numerous commentators have also considered these issues.⁶³

Although existing analyses and protocols are helpful in their own way, they are at best a partial answer to the problem, since they focus almost entirely on procedural concerns.⁶⁴ The real challenge—both practically and jurisprudentially—arises as a matter of regulatory law.⁶⁵

The difficulty here is that while traditional means of regulation do exist in the international realm, such efforts are often incomplete or ineffective, due to the absence of a single political entity with comprehensive authority over the wrongful behavior and associated legal injuries.⁶⁶ International regulatory agencies, to the extent they exist,⁶⁷ typically operate only on a sectoral basis and do not (or can-

62 See AMERICAN BAR ASSOCIATION, ABA PROTOCOL ON COURT-TO-COURT COMMUNICATIONS IN CANADA-U.S. CROSS-BORDER CLASS ACTIONS & ABA NOTICE PROTOCOL: COORDINATING NOTICE(S) TO THE CLASS(ES) IN MULTIJURISDICTIONAL CLASS PROCEEDINGS (2011), available at <http://www.cba.org/cba/resolutions/pdf/11-03-A-bckd.pdf>; AMERICAN LAW INSTITUTE & INTERNATIONAL INSOLVENCY INSTITUTE, GUIDELINES APPLICABLE TO COURT-TO-COURT COMMUNICATIONS IN CROSS-BORDER CASES (2003), available at http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf; AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010); CANADIAN BAR ASSOCIATION, CONSULTATION PAPER: CANADIAN JUDICIAL PROTOCOL FOR THE MANAGEMENT OF MULTIJURISDICTIONAL CLASS ACTIONS (2011); INTERNATIONAL BAR ASSOCIATION, GUIDELINES FOR RECOGNISING AND ENFORCING FOREIGN JUDGMENTS FOR COLLECTIVE REDRESS (2008), available at <http://www.ibanet.org/Search/Default.aspx?q=guidelines%20for%20Recognising%20and%20enforcing>; see also Betsy M. Adeboyejo, *Protocols for Cross-Border Cases . . . Will They Work?*, ABA Now (Aug. 6, 2011), <http://www.abanow.org/2011/08/protocols-for-cross-border-cases-%E2%80%A6-will-they-work/>.

63 See Bermann, *supra* note 14, at 94; Buxbaum, *Securities*, *supra* note 10, at 35; Choi & Silberman, *supra* note 14, at 465; Dixon, *supra* note 14, at 134; Mulheron, Vivendi, *supra* note 14, at 181–82; Mulheron, *Opt-Out*, *supra* note 27, at 426–27; Nagareda, *supra* note 10, at 11–12; Stiggelbout, *supra* note 14, at 433.

64 See *supra* notes 62–63 and accompanying text.

65 See Buxbaum, *Securities*, *supra* note 10, at 52–56; Buxbaum, *Transnational*, *supra* note 10, at 257–72; Nagareda, *supra* note 10, at 14–41.

66 See Nagareda, *supra* note 10, at 13; Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 699–703 (2005).

67 These regulatory bodies typically must be set up by international agreement, since no state has worldwide authority over regulatory concerns. See Nagareda, *supra*

not) always provide an efficient, predictable, and legally enforceable means of regulating the relevant behavior.⁶⁸ Formal regulatory bodies also find it difficult to respond rapidly to threats of international legal harm, even though the pace and integrated nature of modern globalized society means that developments in one jurisdiction can have a nearly instantaneous effect elsewhere in the world.⁶⁹

The absence of formal means of regulation has led to the development, in some cases, of transnational regulatory litigation, which results when various public and private actors “regulate social harm”⁷⁰ on an international basis by “us[ing] litigation and the courts to achieve and apply regulatory outcomes to entire industries.”⁷¹ For years, the United States has been seen as the leader in transnational regulatory litigation due to its willingness and ability to allow global class actions.⁷² However, as the U.S. experience shows, using litigation as a transnational regulatory mechanism can be highly problematic.⁷³

For example, some of the institutional design concerns that are often raised regarding regulatory litigation in the national sphere can be used to oppose transnational regulatory litigation as well.⁷⁴ These issues would involve questions relating to whether private litigation

note 10, at 13; *see also* Statute of the International Atomic Energy Agency, 8 U.S.T. 1093, 276 U.N.T.S. 3 (1956), *available at* <http://www.iaea.org/About/statute.html#A1.1> (acting as worldwide regulator of matters relating to nuclear energy).

68 *See* Stewart, *supra* note 66, at 703 (describing international regulation as involving “a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes and actors, resembling nothing so much as a Jackson Pollock painting”); *see also* Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in 50 YEARS OF THE NEW YORK CONVENTION, 14 ICCA CONG. SER. 10–11 (Albert Jan van den Berg ed., 2008).

69 *See* Sungjoon Cho & Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 CHI. J. INT’L L. 491, 494 (2012) (noting “international regulations, if any, may not come as quickly as the urgency of the problems would demand”); Richard N. Gardner, *The Bretton Woods-GATT System After Sixty-Five Years: A Balance Sheet of Success and Failure*, 47 COLUM. J. TRANSNAT’L L. 31, 43 (2008).

70 Glover, *supra* note 2, at 1146.

71 Luff, *supra* note 8, at 96 (quoting ANDREW P. MORISS ET AL., REGULATION BY LITIGATION 1 (2009)); *see also* Buxbaum, Transnational, *supra* note 10, at 252–53.

72 *See* Jodie A. Kirschner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritorialism, Sovereignty, and the Alien Tort Statute*, 29 BERKELEY J. INT’L L. (forthcoming 2012); Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court’s “Transactional Test,”* 52 VA. J. INT’L L. 405, 405 (2012).

73 *See* Buxbaum, Securities, *supra* note 10, at 52–56; Buxbaum, Transnational, *supra* note 10, at 252–53, 257–72; Nagareda, *supra* note 10, at 14–41.

74 *See* Coffee, *supra* note 2, at 345.

constitutes an appropriate means of enforcing public laws and whether regulatory silence should be construed as an unintended gap or a conscious policy decision on the part of the relevant political actors.⁷⁵ These issues are not discussed in detail in this Article, since they are adequately addressed in the literature concerning regulatory litigation in the domestic realm.⁷⁶

Other problems arise as a matter of civil procedure.⁷⁷ For example, it can be hard to identify a court with jurisdiction over all interested persons, obtain extraterritorial application of domestic laws, and/or achieve international enforcement of judgments.⁷⁸ Cases involving class or collective relief often experience additional difficulties, since the forum state's approach to large-scale litigation may not be the same as that taken in other relevant jurisdictions, thus creating a procedural mismatch.⁷⁹ Parties seeking to assert multinational class actions in the United States have experienced significant problems as a result of U.S. courts' standard use of opt-out mechanisms, since some countries view opt-out procedures as constitutionally suspect and will not enforce a judgment if a plaintiff did not affirmatively opt into the lawsuit.⁸⁰

While many of these procedural issues exist in any type of international litigation, they are exacerbated in regulatory litigation, since different states often have different views about the propriety of using litigation as a means of regulation.⁸¹ Courts have traditionally tried to avoid difficulties in this regard by "consider[ing] markets separately, and view[ing] their role as protecting conditions only within" their

75 *See id.*

76 *See supra* note 46 and accompanying text.

77 Interestingly, this appears to be the most common analytical paradigm for issues relating to transnational regulatory litigation. *See supra* note 14 and accompanying text.

78 *See* Buxbaum, Securities, *supra* note 10, at 18–67; Buxbaum, Transnational, *supra* note 10, at 272–93; Kirschner, *supra* note 72; Nagareda, *supra* note 10, at 19–41; S.I. Strong, *Mass Torts and Arbitration: Lessons From Abaclat v. Argentine Republic*, in *UNCERTAINTY AND MASS TORT: CAUSATION AND PROOF* (José Ferrer Beltrán et al. eds.) (forthcoming 2013) [hereinafter Strong, Mass Torts]; Ventoruzzo, *supra* note 72, at 443.

79 *See supra* note 14. However, difficulties can arise even when procedures in the two countries are similar. *See* S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 N.C.J. INT'L L. & COM. REG. 921, 926–27 (2012) [hereinafter Strong, Canada].

80 *See In re Vivendi Universal*, No. 02 Civ. 5571, 2009 WL 855799, at *3 (S.D.N.Y. Mar. 31, 2009); Monestier, *supra* note 11, at 44–45; Mulheron, Opt-Out, *supra* note 27, at 426–27.

81 *See* Buxbaum, Transnational, *supra* note 10, at 297–305.

own jurisdiction,⁸² consistent with longstanding jurisprudential principles about the power of the territorial state.⁸³ However, a highly balkanized approach can be troublesome in a contemporary legal environment that includes highly integrated global markets and internationally fluid societies.⁸⁴ Therefore, it has been suggested that “where the economic markets for particular products are not separable along geographic lines, regulatory efforts too must be directed at a more broadly defined market.”⁸⁵

Use of a highly territorial approach to regulation in cases of global injuries can affect both individuals and society as a whole.⁸⁶ For example, the failure to coordinate regulation across national boundaries in cases of multinational harm can lead to regulatory gaps (which leads to under-deterrence of the harmful behavior),⁸⁷ regulatory duplication (which leads to over-deterrence of what could include socially beneficial behavior)⁸⁸ and regulatory inconsistency

82 *Id.* at 282; *see also* Nagareda, *supra* note 10, at 37; Stewart, *supra* note 66, at 697. As the Second Circuit stated recently:

[F]oreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors—and paying taxes. . . . American courts and lawyers [do not] have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them—and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees.

Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268, 270 (2d Cir. 2011) (discussing claims under the Alien Tort Claims Act).

83 *See* Anne Orford, *Jurisdiction Without Territory: From Holy Roman Empire to the Responsibility to Protect*, 30 MICH. J. INT’L L. 981, 981–82, 1013 (2009) (noting that these views arose in the sixteenth and seventeenth centuries).

84 *See* Nagareda, *supra* note 10, at 37; *see also* Hensler, *Future*, *supra* note 14, at 250–55.

85 Buxbaum, *Transnational*, *supra* note 10, at 260; *see also id.* at 297–305; Nagareda, *supra* note 10, at 13.

86 *See* Alberto Cassone & Giovanni B. Ramello, *The Simple Economics of Class Action: Private Provision of Club and Public Goods*, 32 EUR. J. L. & ECON. 205, 209–12, 222–23 (2011); Giovanni B. Ramello, *Aggregate Litigation and Regulatory Innovation: Another View of Judicial Efficiency*, 32 INT’L REV. L. & ECON. 63, 64 (2012).

87 This scenario may be most readily seen in the context of antitrust or competition law, in that developing countries without robust antitrust or competition law regimes “may leave anti-competitive conduct entirely unregulated,” thus requiring other countries to step in so as to “ensure better regulation of markets everywhere.” Buxbaum, *Transnational*, *supra* note 10, at 261. However, problems with comparative under-regulation can also arise in other fields, such as those involving securities, pharmaceuticals, or the environment. *See id.*

88 *See* Russell, *supra* note 34, at 151 n.47.

(which leads to parties being made subject to different obligations under multiple applicable standards).⁸⁹

However, deciding to engage in regulatory litigation on a transnational basis gives rise to its own set of difficulties. For example, courts attempting to address a global regulatory injury can experience problems with respect to the substantive law used to resolve the dispute.⁹⁰ In contrast to “[t]ransnational public law litigation,” which “takes place in the domestic courts of a particular country” and applies “international law norms,”⁹¹ transnational regulatory litigation typically involves domestic courts applying domestic regulatory law “for the benefit of the international community.”⁹² This can create considerable tension on the foreign relations front,⁹³ since the laws in question often involve politically sensitive issues such as those relating to economic policy.⁹⁴

Other problems arise because some state courts are loathe to relinquish jurisdiction over their own citizens in cases where “the mandatory and regulatory nature” of certain laws give rise to a “particularly strong” national interest in enforcing those laws domestically.⁹⁵ Not only can these concerns lead some courts to refuse to relinquish

89 See Buxbaum, *Transnational*, *supra* note 10, at 261; Alan Devlin & Michael Jacobs, *Antitrust Divergence and the Limits of Economics*, 104 *Nw. U. L. Rev.* 253, 267–68 (2010) (discussing inconsistent actions taken by the U.S. Department of Justice and the European Commission with respect to Microsoft, as well as the proposed merger between Honeywell and General Electric); see also William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 *MICH. L. REV.* 1019, 1036 n.67 (2012) (discussing three transatlantic scrapes between the U.S. Department of Justice and European entities.); Stewart, *supra* note 66, at 695 (“[T]he past twenty-five years have witnessed a dramatic shift of regulatory authority from the nation state to a dizzying variety of global regulatory regimes, including international organizations, transnational networks of national regulatory officials, and private or hybrid private-public regulatory bodies.”).

90 See Buxbaum, *Transnational*, *supra* note 10, at 254–57.

91 *Id.* at 257; see also *id.* at 254–55.

92 *Id.* at 254.

93 See Buxbaum, *Securities*, *supra* note 10, at 63–64 (noting “concerns that an expansive assertion of jurisdiction by [one nation’s] courts plays in other countries as an instrument of regulatory hegemony”); see also Buxbaum, *Transnational*, *supra* note 10, at 270.

94 See Buxbaum, *Transnational*, *supra* note 10, at 255 (citing examples under U.S. antitrust law, securities law, and the Racketeering Influenced and Corrupt Organizations Act (RICO)). This is assuming that the forum state can find a means of applying national law extraterritorially. National legislatures typically do not intend their laws to have extraterritorial effect, particularly in the politically sensitive realm of regulatory law. See *id.* at 268; see also Ventoruzzo, *supra* note 72, at 436.

95 See Buxbaum, *Securities*, *supra* note 10, at 37; see also Kirschner, *supra* note 72. For example, U.S. courts may be disinclined to decline jurisdiction on grounds of

jurisdiction over their own nationals, but some judges may decline jurisdiction over foreign nationals as an exercise of comity.⁹⁶ Although it is technically possible for courts to address substantive issues by applying different national laws to different subgroups of parties, that process can become so complicated as to destroy the superiority of the class mechanism over other means of resolving the dispute.⁹⁷

Up until this point, most of the practical and academic debate regarding transnational regulatory litigation has focused on problems associated with global class actions filed in U.S. courts.⁹⁸ However, the expansion and diversification of large-scale litigation around the world⁹⁹ means that an ever-increasing number of jurisdictions are now amenable to taking on the challenges associated with transnational regulatory litigation.¹⁰⁰ Thus, for example, the Canadian case of *Silver v. Imax Corp.*¹⁰¹ was heralded as making “Ontario a new haven for secondary market class actions”¹⁰² after the U.S. Supreme Court curtailed plaintiffs’ ability to bring “foreign-cubed” securities actions in the United States in *Morrison v. National Australia Bank Ltd.*¹⁰³ The Netherlands has also been touted as being capable of addressing “foreign-cubed” securities actions as well as other global regulatory concerns as a result of the Dutch Act on Collective Settlements of 2005,

forum non conveniens in cases where “the claims of U.S. nationals . . . strongly implicate local regulatory interests.” Buxbaum, Securities, *supra* note 10, at 38.

96 See Bermann, *supra* note 14, at 94; Monestier, *supra* note 11, at 71.

97 See FED. R. CIV. P. 23(b)(3); Buxbaum, Securities, *supra* note 10, at 66–67.

98 See Bermann, *supra* note 14, at 93; Buxbaum, Securities, *supra* note 10, at 35; Choi & Silberman, *supra* note 14, at 465; Dixon, *supra* note 14, at 134; Monestier, *supra* note 11, at 44–45; Mulheron, Vivendi, *supra* note 14, at 181–82; Nagareda, *supra* note 10, at 11–12; Wasserman, *supra* note 11, at 331–69.

99 See The ANNALS, *supra* note 15 (discussing thirty different national regimes).

100 Some commentators have suggested that the European Union and its individual Member States may be replacing the United States as the leading jurisdiction to police the wrongdoing of multinational actors. See Kirschner, *supra* note 72.

101 *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (Can. Ont. Sup. Ct. J.); *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Can. Ont. Sup. Ct. J.).

102 Mark Gelowitz, *Court Certifies Class Action Against Imax: Liability May be Coming Soon to a Theatre Near You*, LAW. WKLY., Feb. 19, 2010, <http://www.lawyersweekly.ca/index.php?section=article&articleid=1103> (last visited Sept. 29, 2012); see also *Silver*, [2009] O.J. No. 5573; *Silver*, [2009] O.J. No. 5585; Monestier, *supra* note 11, at 75 n.260; Strong, Canada, *supra* note 79, at 927.

103 See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2894 n.11 (2010) (Stevens, J. concurring) (defining “foreign-cubed” actions).

which allows the creation of world-wide classes on an opt-out basis, albeit for settlement purposes only.¹⁰⁴

As the first public entity to address the numerous challenges associated with cross-border collective redress, the European Union has taken on a daunting task, even if the focus is only on procedural matters.¹⁰⁵ However, the Resolution and attendant future legislation may also provide solutions and insights into certain issues relating to transnational regulatory litigation within the European Union¹⁰⁶ and with other countries, including the United States.¹⁰⁷ Further details regarding the Resolution are discussed below.¹⁰⁸ First, however, it is necessary to analyze the concept of regulatory litigation more thoroughly. This subject is addressed in the next Part.¹⁰⁹

III. REGULATION, LITIGATION, AND REGULATORY LITIGATION

A. Methodological Issues

Because regulatory litigation defines itself primarily on an operational level, it is impossible to identify the form, effect, or purpose of the device simply by consulting a particular statute or procedural

104 See Arjan de Boode & Allard Huizing, *The Netherlands as an Alternative Forum for Cross Border Class Settlements and the Potential Consequences for Claims by "Foreign Cubed" Plaintiffs under U.S. Securities Laws*, GREENBURG TRAURIG ALERT (Jan. 2010), <http://www.gtlaw.com/News-Events/Publications/Alerts/132898/The-Netherlands-as-an-Alternative-Forum-for-Cross-Border-Class-Settlements-and-the-Potential-Consequences-for-Claims-by-Foreign-Cubed-Plaintiffs-under-US-Securities-Laws> (last visited Sept. 28, 2012); Ianika Tzankova & Daan Lunsigh Scheurleer, *The Netherlands*, in *The ANNALS*, *supra* note 15, at 149, 153–55. The Amsterdam Court of Appeal has recently confirmed a settlement involving a pan-European class. See Hof's-Amsterdam 17 Januari 2012, (Scor Holding (Switz.) AG/Liechtensteinische Landesbank AG) (Neth.), English translation available at <http://www.converiumsettlement.com/images/stories/documents/Decision%2017%20January%202012.pdf>. (often referring to the settlement itself as SCOR Holding (Switzerland) AG/Zurich Fin. Serv. Ltd. Stichting Converium Sec. Compensation Found./Vereniging (VEBNCVB)).

105 See Resolution, *supra* note 20. Some private organizations have attempted to address this issue. See *supra* note 62 and accompanying text.

106 See Resolution, *supra* note 20; see also *infra* notes 323–80 and accompanying text. Because the European Union has the political power to regulate certain matters within the European Union, the Resolution may be unique in the world of transnational regulatory litigation. See TFEU, *supra* note 38, arts. 3, 5 (noting one area of European competence involves the operation of the internal market); Resolution, *supra* note 20, ¶¶ M, 4, 6, 8.

107 See *supra* notes 23–26 and accompanying text.

108 See Resolution, *supra* note 20; see also *infra* notes 323–80 and accompanying text.

109 See *infra* Part III.

rule.¹¹⁰ Instead, regulatory litigation invokes complex questions of institutional design, not only between different public institutions but also between public and private actors.¹¹¹ This can make analysis difficult, both within and between the United States and the European Union, since the two legal systems have traditionally perceived regulation as being carried out through very different institutional means.¹¹² The situation is further complicated by the fact that class actions—which constitute the paradigmatic form of regulatory litigation—do not act exclusively as regulatory devices, but instead fulfill various other functions, including those relating to compensation and efficiency, in varying degrees and possibly even to the exclusion of any regulatory purpose.¹¹³

Commentators exploring the possible “Americanization” of European law have noted the importance of “gather[ing] data on how the law is being used on the ground” before coming to any conclusions about the convergence of any particular regulatory mechanisms.¹¹⁴ This focus on the law “on the ground” suggests the propriety of a functional methodology that recognizes not only that “similar institutions can fulfil different functions in different societies or at different times,” but also that “similar functional needs can be fulfilled by different institutions.”¹¹⁵ Since regulatory litigation challenges a number of formalist assumptions, such as those regarding “regulation” as an exclusively legislative or “public” activity, functionalism appears to be a particularly appropriate research methodology for this Article.¹¹⁶

110 However, regulatory litigation is reflected in a number of statutes and rules, as well as various common law principles. See Buxbaum, *Transnational*, *supra* note 10, at 256.

111 See Coffee, *supra* note 2, at 350; Dorf, *supra* note 42, at 879–80; Glover, *supra* note 2, at 1146.

112 See Coffee, *supra* note 2, at 344–45.

113 See Michael M. Karayanni, *A Model Typology for Class Actions: Lessons From Israel, in Cross Border Class Actions*, Brussels, Belgium, 27 April 2012; see also DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS* 121–22 (2000); MULHERON, *supra* note 9, at 63, 66 (explaining the different objectives of different nations’ class action regimes); Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 *GA. L. REV.* 63, 74–76 (2008) (arguing that private enforcement is a cost-effective way to protect public rights).

114 Bignami, *supra* note 5, at 460 (“This empirical work is equally or more likely to find institutional resistance to change as it is to find Americanization.”).

115 Michaels, *supra* note 40, at 357 (discussing equivalence functionalism); see also Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 *CORNELL L. REV.* 61, 74–76 (2009); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1228–29 (1999).

116 See *supra* notes 41–42 and accompanying text.

Functionalism also “overcomes the epistemic/doctrinal difference between civil and common law by declaring it functionally irrelevant”¹¹⁷ and considers how different legal systems solve the same functional concerns. Given that the current study requires analysis across the common law-civil law divide, functionalism appears to constitute a highly suitable methodological approach. A functionalist methodology includes three distinct attributes:¹¹⁸

First, functionalist comparative law is factual, it focuses not on rules but on their effects, not on doctrinal structures and argument, but on events. As a consequence . . . legal systems are compared by considering their various judicial [and legislative] responses to similar situations. Second, functionalist comparative law combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society. . . . Consequently, and third, function itself serves as *tertium comparationis*. Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems.¹¹⁹

Consistent with the preceding, the current inquiry will adopt a needs-based analysis to identify what a legal system needs to operate effectively and efficiently within its own regulatory sphere.¹²⁰ This approach will be used not only as a means of considering whether the European Union has developed a form of regulatory litigation that is comparable to that used in the United States but also as a means of defining what regulatory litigation is.

B. *Regulatory Litigation as a Function of Need*

1. Litigation as a Necessary Form of Regulation

a. Litigation as a form of regulation

“In order to understand what regulatory litigation is, it is necessary first to understand how it functions—as a stopgap that acts to protect individual citizens from risk.”¹²¹ If risk reflects the functional touchstone for regulation, then “courts become regulatory instruments” to the extent “that they are essential to the operation of . . . risk regulation.”¹²²

117 Michaels, *supra* note 40, at 357; *see also id.* at 342.

118 *See id.* at 342.

119 *Id.*

120 It may be that regulatory litigation is particularly appropriate in cases involving cross-border legal injuries. *See supra* notes 56–73 and accompanying text.

121 Luff, *supra* note 8, at 114.

122 *Id.* at 113.

The concept of courts acting in a regulatory fashion may seem unobjectionable to many U.S. trained lawyers, since the notion of litigation as regulation is so deeply embedded in the American legal psyche.¹²³ However, framing litigation as a risk regulator flies in the face of the “received tradition,” common in many European jurisdictions, that “the lawsuit is a vehicle for settling disputes between private parties about private rights.”¹²⁴ Under this more formalist command and control model, regulation is a function of public law and can therefore only be generated by democratically accountable branches of government.¹²⁵

The “Continental tendency to sharply divide public and private law” can be explained as “the result of the hierarchical organization of power” common in many European jurisdictions.¹²⁶ In these legal systems, “each section of bureaucracy tends to specialize in a certain field and jealously defend its prerogatives.”¹²⁷ Conflicts can appear not only at the inter-agency level but also at the institutional level, leading the various branches of government to defend their spheres of influence from incursions brought by other institutional actors.¹²⁸

The situation is very different in the United States. Because the U.S. system reflects a horizontal rather than hierarchical power structure,¹²⁹ American courts and commentators do not distinguish between public and private law in quite the same way that European authorities do.¹³⁰ Instead, regulatory responsibility is often shared between different institutional actors.¹³¹ Thus, in the United States:

123 See *id.* at 80; see also MORRIS ET AL., *supra* note 46, *passim*; viscusi, *supra* note 46, *passim*.

124 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976); see also Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 576–77 (1997) (explaining the regulatory role of the courts); Luff, *supra* note 8, at 101 (analyzing theories of regulatory litigation).

125 This view is not limited to Europe. See Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POL'Y 331, 368 (2011).

126 Valguarnera, *supra* note 19, at 19 (discussing MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986)).

127 Valguarnera, *supra* note 19, at 19.

128 See *id.*

129 See *id.* at 3; see also Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 886 (2012) (“Federal agencies routinely contract with each other to exchange money, regulatory power, and governmental services.”).

130 See Ronald A. Brand, *Private Law and Public Regulation in U.S. Courts*, in 2 CENTER FOR INTERNATIONAL LEGAL EDUCATION (CILE) STUDIES 115, 115 (2005).

131 See *id.*

The label of “regulation” can be applied to a wide spectrum of governmental and private activity. Definitions of regulation in the wider field of regulatory theory have spanned the gamut from state-sponsored efforts to command and control individual behavior through the use of targeted rules to any form of social control, regardless of the actors involved. . . . [Hence,] “it has become widely accepted that regulation can be carried out by numerous mechanisms other than those commonly typified as ‘command and control.’”¹³²

While this regulatory approach has traditionally been associated with the United States, other jurisdictions are now beginning to consider the potential merits of the kind of shared public-private model of regulation that is advocated by new governance theorists.¹³³ Indeed, command and control models of regulation are becoming increasingly disfavored, not only in the United States, but in Europe as well.¹³⁴ Thus, while “some commentators are uncomfortable with the idea of ‘selfish’ individual interests being used as an instrument for promoting collective welfare,” some European analysts are beginning to recognize that class and collective relief “has the potential to recreate, in the judicial domain, the same effects that individual interests and motivations, governed by the perfect competition paradigm, bring to the market.”¹³⁵ Of course, it remains to be seen whether the Resolution brings this new theoretical approach into practice.¹³⁶

b. Bottom-up and Top-down Regulatory Litigation

Once regulatory litigation has been framed as a means of addressing risk, it is possible to distinguish between various types of risk.¹³⁷

132 Luff, *supra* note 8, at 89–90 (citations omitted).

133 For example:

When faced with gaps and ambiguities in the law, judges need not simply choose between the Scylla of deference and the Charybdis of usurpation. Trial courts can address some broad social problems without directly taking over responsibility for running institutions like prisons, schools, and police forces, while appellate courts need not themselves fill the gaps in constitutional and other open-ended legal norms; they can instead (or at least additionally) instigate reform by other actors.

Dorf, *supra* note 42, at 882–83; *see also supra* notes 41–42 and accompanying text.

134 *See* Bignami, *supra* note 5, at 418; Hodges, *ANNALS*, *supra* note 20, at 336–38; Sabel & Simon, *supra* note 41, at 54.

135 Cassone & Ramello, *supra* note 86, at 223.

136 *See infra* notes 347–80 and accompanying text.

137 *See* Luff, *supra* note 8, at 113–14. Regulatory litigation can also be seen as a means of addressing other types of market distortions, although those issues are beyond the scope of this Article. *See* Hodges, *ANNALS*, *supra* note 20, at 337.

For example, some types of risks can be anticipated in advance while others cannot. One type of regulatory litigation—that which operates “top down”—focuses on “risks that have already come to pass. In such instances, the law fills the regulatory gaps by providing individuals the means to achieve compensation for their injuries. . . . [T]he legislature can do so either through the establishment of administrative agencies or through the use of substantive law.”¹³⁸

In these sorts of cases, “courts become regulatory instruments”¹³⁹ to the extent that they enforce various statutes and administrative pronouncements. This sort of regulatory litigation is quite common, and “[i]t is for this reason that some authors have suggested that all litigation is regulatory and, in this sense, they are correct.”¹⁴⁰

One example of top-down regulatory litigation involves the European regulation¹⁴¹ on passenger rights, which gives airline passengers the right to private compensation arising from delayed or cancelled flights.¹⁴² The risk of cancelled or delayed flights is already known and can easily be anticipated to arise again in the future. Providing passengers with a right to individual compensation serves as a means of regulating the future behavior of industry actors, with the “penalty” of a right to individual compensation acting as the catalyst for airlines to take all reasonable steps to avoid or insure against cancelling or

138 Luff, *supra* note 8, at 113 (citations omitted).

139 *Id.*

140 *Id.*; see also Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1155 (2003) (reviewing W. KIP VISCUSI, *SMOKE-FILLED ROOMS* (2002)) (arguing that it is not new to have regulation by litigation); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT’L L. 159, 174 (2011) (“Both regulation and litigation ultimately have a regulatory effect.”).

141 European regulations are immediately enforceable in the European Union and do not need to be given domestic effect through the enactment of any enabling legislation by the individual Member States. See European Commission, *What are EU Regulations?*, http://ec.europa.eu/eu_law/introduction/what_regulation_en.htm (last visited Sept. 28, 2012). As such, regulations exist in the same form in all Member States. See *id.* European directives, on the other hand, must be implemented by national legislatures before taking effect. See *id.* As a result, the principles embodied in a European directive will be available in slightly different form in individual Member States, although the directive should theoretically have the same effect throughout the European Union. See *id.*

142 See Regulation 261/2004 of the European Parliament and of the Council of 11 February 2004 Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) 295/91, 2004 O.J. (L 46) (EC) [hereinafter Regulation on Passengers’ Rights]; see also KELEMEN, *supra* note 41, at 1–5 (considering European Union’s passenger rights regulation)

delaying flights in the future.¹⁴³ Although the regulation does not currently include the right to pursue claims collectively, that could change as a result of procedures contemplated by the Resolution.¹⁴⁴

While injuries arising from delayed or cancelled flights are easily foreseeable, not all risks can be identified in advance.¹⁴⁵ This has led to a second and more controversial type of regulatory litigation, namely the “bottom-up . . . use of law by judges and litigants.”¹⁴⁶ It is this type of regulatory litigation that is primarily at issue in this Article.

Bottom-up regulatory litigation shares certain functional attributes with top-down regulatory litigation, in that bottom-up regulatory litigation, “[l]ike legislative efforts to regulate, . . . aims to address risk.”¹⁴⁷ However, it does so in “a different way,” using “the legal remedy or the settlement equivalent in order to influence future, risk-producing behaviors. In cases properly described as regulatory, the remedy is structured either by a party or by the judge with the intent of altering future behavior.”¹⁴⁸ Although there is some difference of opinion about certain aspects of bottom-up regulatory litigation, the three critical elements are: (1) intent, meaning “not only the desire to influence behavior as the conscious object of the one who would regulate, but also the desire to prevent some future, risk-producing behavior,” (2) a pre-existing substantive norm which is to be enforced by “the litigant, the judge, or the two acting in concert,” who “intend to

143 See KELEMEN, *supra* note 41, at 1–5. The regulation primarily operates as an administrative mechanism, in that it sets the rate of compensation, but specifically states that it does not limit the right to judicial relief. Regulation on Passenger’s Rights, *supra* note 142, ¶ 22, arts. 7–8, 12–13.

144 See Regulation on Passengers’ Rights, *supra* note 142; Resolution, *supra* note 20.

145 The problems of unanticipated regulatory issues are readily apparent in the context of the recent financial crisis. For example, as one commentator noted:

Identifying unanticipated risk is hard and there is no reason to think that the same busy federal officials, who apparently overlooked these risks in 2006 and 2007, will become more prescient simply because they serve together on an elite Council. The presence of the one independent expert is helpful, but there was no lack of experts in the late 2000s who warned of an impending financial collapse. There were also some savvy investors and economists who anticipated the collapse, but the financial regulators and the US intelligence community apparently took no notice of that.

Steve Charnovitz, *Addressing Government Failure Through International Financial Law*, 13 J. INT’L ECON. L. 743, 748 (2010) (citation omitted).

146 Luff, *supra* note 8, at 113; see also Robertson, *supra* note 140, at 175.

147 Luff, *supra* note 8, at 113.

148 *Id.*; see also Dorf, *supra* note 42, at 935–54 (discussing “experimentalist” judging undertaken by “problem-solving” courts that act similarly to “problem-solving” agencies).

produce some action on the part of the target of regulation because of the risk (and the litigant's or judge's apprehension of the risk) that the target actor's future behavior will fall short of the relevant norm," and (3) a rule, typically in the form of a remedy, "that expresses the norm to the world and attempts to limit the threats (risk) to that norm."¹⁴⁹

This definition of bottom-up regulatory litigation is quite useful.¹⁵⁰ Not only does it identify a functional objective that cannot be readily addressed by legislative or administrative bodies (i.e., unanticipated risk), it also provides a principled, predictable basis on which such actions may be based (i.e., a pre-existing substantive norm working in conjunction with a pre-existing rule or remedy).¹⁵¹ However, application of this standard in cases involving class and collective relief can be somewhat problematic because the definition of remedies has traditionally been considered to refer only to damages, injunctions, and declaratory judgments, not the ability to proceed as a group.¹⁵²

Some people may see this issue as something of a moot point, given the number of courts and commentators that have suggested that the capacity to proceed as a class or collective is a type of remedy.¹⁵³ However, there are other authorities that frame the ability to

149 Luff, *supra* note 8, at 113–14. One potential area of disagreement relates to whether a conscious intent to regulate is really necessary or whether a regulatory effect is sufficient. Other differences of opinion arise over the necessary extent of the regulatory effect, with some commentators suggesting that the effect must be felt by an entire industry while others believe that only the individual defendant needs to be affected. See *id.* at 96; Strong, Canada, *supra* note 79, at 967–70; see also MULHERON, *supra* note 9, at 64 (discussing what constitutes regulatory effect).

150 For example, this definition can be used to consider whether certain types of mass, class, or collective arbitration constitute a form of "regulatory arbitration." See S.I. Strong, *Mass Procedures as a Form of "Regulatory Arbitration"*—Abaclat v. Argentine Republic and the International Investment Regime, 38 J. CORP. L. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2146626 [hereinafter Strong, Regulatory Arbitration].

151 See Luff, *supra* note 8, at 75, 113.

152 See 1 DAN B. DOBBS, LAW OF REMEDIES §1.1, at 1–11 (2d ed. 1993); see also Lorian Hardcastle, *Government Tort Liability for Negligence in the Health Sector: A Critique of the Canadian Jurisprudence*, 37 QUEEN'S L.J. 525, 541 (2012) (contrasting judicial remedies, including damages, injunctions, and declaratory relief, with remedies available to other regulators, including "ombudsmen, commissioners and auditors" whose powers are typically limited to "publicity and persuasion").

153 See *Parham v. J.R.*, 442 U.S. 584, 616 (1979) (referring to "class-action remed[y]"); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 127 (2d Cir. 2011) (referencing "class remedies"), *cert. denied*, 132 S. Ct. 1742 (2012); *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1139 (11th Cir. 2010) (referring to "class action remedy"); *Canfield v. United States*, 14 Ct. Cl. 687, 689 (1988) (distinguishing the class remedy

proceed collectively as a species of right.¹⁵⁴ This is cause for some concern, for although the elevation of a particular concept to the status of a “right” allows that principle to trump or override certain other laws or practices, a sharp distinction is often made between rights and remedies.¹⁵⁵

The debate between rights and remedies will be taken up more fully later in this Article.¹⁵⁶ However, at this point it is sufficient to note that concerns about whether and to what extent class or collective relief constitutes a remedy need not bar class or collective actions from being defined as a form of bottom-up regulatory litigation, since traditional types of remedies—injunctions, damages, or declaratory judgments—can be combined with class and collective relief in such a way that a number of class actions fall within the definition of bottom-up regulatory litigation.¹⁵⁷ Not only is this useful for purposes of this Article, in that it allows both U.S. and possibly European forms of class and collective relief to constitute a form of regulatory litigation, but it is consistent with conclusions reached by commentators under other sorts of analyses indicating that some, but not all, class actions contain a regulatory element.¹⁵⁸

A few examples based on Rule 23 of the Federal Rules of Civil Procedure will serve to illustrate this point.¹⁵⁹ To begin with, injunctions clearly constitute the kind of forward-looking remedy contemplated by the definition of bottom-up regulatory litigation used in this

under the Fair Labor Standards Act and the Federal Rules of Civil Procedure); CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 72, at 740 (4th ed. 1983) (describing class actions as “one of the most socially useful remedies in history”) (citation omitted); Antonio Gidi, *Issue Preclusion Effect of Class Certification Orders*, 63 *HASTINGS L.J.* 1023, 1063 & n.185 (2012) [hereinafter Gidi, *Issue Preclusion*] (citing *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 2.04, at 118–29 (2010)).

154 See *infra* notes 224–32 and accompanying text.

155 See Andrew Le Sueur, *Access to Justice Rights in the United Kingdom*, 5 *EUR. H.R. L. REV.* 457, 469–74 (2000); J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 *CAL. L. REV.* 277, 287–89 (2010); see also *infra* notes 224–31.

156 See *infra* notes 223–37 and accompanying text.

157 See Luff, *supra* note 8, at 113.

158 See MULHERON, *supra* note 9, at 63–66; see *infra* notes 314–30 and accompanying text.

159 See *FED. R. CIV. P.* 23. Not all class actions are the same, even within the United States. For example, courts have recognized that class relief under the Fair Labor Standards Act is different than that which is available under the Federal Rules of Civil Procedure. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, §16, 52 Stat. 1060, 1069 (codified at 29 U.S.C. § 216 (2006)); *FED. R. CIV. P.* 23; *Raniere v. Citigroup, Inc.*, 827 F. Supp. 2d 294, 310 (S.D.N.Y. 2011).

discussion.¹⁶⁰ Therefore, actions proceeding under Rule 23(b)(2) of the Federal Rules would qualify as bottom-up litigation, since that rule provides for injunctive relief on a classwide basis.¹⁶¹

Next, class requests for money damages are often said to constitute a form of regulatory litigation,¹⁶² based on empirical research showing that:

Despite their distaste for class litigation and their dismay about rising numbers of lawsuits, many corporate representatives . . . said that . . . class litigation had caused them to review financial and employment practices. Likewise, some manufacturers noted that heightened concerns about potential class action suits sometimes have a positive influence on product design decisions.¹⁶³

However, it is important to identify precisely how this regulatory effect comes about.¹⁶⁴ For example, it is possible to argue that the high level of compensatory damages associated with a large class constitutes a sufficient disincentive to those who would otherwise be inclined to act in an unlawful manner, particularly in situations where it is unlikely that individual compensatory suits would be brought in the absence of class or collective relief.¹⁶⁵ However, experience shows that there are times when large-scale compensatory relief will not be sufficient to regulate wrongful behavior because the cost associated with providing compensation is less than the cost of avoiding harm.¹⁶⁶ In those cases, compensatory damages are an insufficient deterrent to illegal behavior.¹⁶⁷

160 See Luff, *supra* note 8, at 113; see also *supra* note 148 and accompanying text (defining bottom-up litigation).

161 See FED. R. CIV. P. 23(b)(2). Bilateral injunctions could also constitute a form of regulatory litigation, if the regulatory effect only needs to be felt by the target and not by the industry as a whole. See Luff, *supra* note 8, at 113–14; see also *supra* note 148.

162 See FED. R. CIV. P. 23(b)(1), (b)(3); HENSLER ET AL., *supra* note 113, at 68, 71–72.

163 HENSLER ET AL., *supra* note 113, at 119; see also Russell, *supra* note 34, at 145–48 (analyzing the deterrence value of class actions).

164 See HENSLER ET AL., *supra* note 113, at 68, 71–72.

165 *Id.* at 68; see also Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 754 (2008) (considering how compensatory relief serves regulatory ends).

166 See Russell, *supra* note 34, at 145–48. The most well-known example of this kind of seemingly callous cost-benefit analysis involves Ford Motor Company’s approach to design defects in the Pinto automobile. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1020 (1991).

167 See W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 569 (2000).

The second and more likely alternative is that the regulatory effect in cases involving money damages arises by combining the class-expanding aspects of Rule 23 with various statutory or common law means of imposing treble or punitive damages.¹⁶⁸ Various background principles of law, such as the easy availability of contingency fees and the broad scope of pre-trial discovery, also contribute to the deterrent effect, since such measures not only allow class lawsuits to be brought in the first instance but also increase opportunities for expanding the size of the class, exposing other causes of action and/or providing the means of prevailing on the merits.¹⁶⁹ Therefore, it is the combination of these various factors—a broad class-expanding mechanism, a substantive law that provides for damages multipliers and a variety of pro-plaintiff principles of basic civil procedure—that provide not only the incentive to bring damages class actions but also provide much of the regulatory effect.¹⁷⁰ Given that one of these necessary elements—money damages—clearly constitutes a type of remedy, this species of class action falls squarely within the definition of bottom-up regulatory litigation.¹⁷¹

Although these two types of class actions appear to act in a regulatory manner, the same cannot necessarily be said of all forms of large-scale legal relief used in the United States. For example, Rule 23(b)(1) of the Federal Rules of Civil Procedure allows parties to bring class actions so as to avoid potentially inconsistent judgments or the diminution of other parties' rights.¹⁷² Although these disputes include some of the same elements seen in Rule 23(b)(3) cases—i.e., the class-expanding mechanism and various litigation incentives as a matter of basic procedural law—it is not clear whether damages multi-

168 See FED. R. CIV. P. 23(b)(3). Sometimes treble damages are available as a matter of statutory law. See Insider Trading Sanctions Act of 1984 § 2, 15 U.S.C. § 78u-1(a) (2006); Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. 1964(c) (2006); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987) (“Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney’s fees.”); Glover, *supra* note 2, at 1151. Other times, multipliers are imposed as a matter of common law. See Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 531 (2011).

169 See Nagareda, *supra* note 10, at 2; Strong, *Mass Torts*, *supra* note 78.

170 See HENSLER ET AL., *supra* note 113, at 71–72; Hensler, *supra* note 15, at 25–26; Hodges, *Resolving*, *supra* note 34, at 336.

171 See Hodges, *Resolving*, *supra* note 34, at 336; see also Luff, *supra* note 8, at 113; *supra* note 148 and accompanying text.

172 The paradigmatic example here involves disputes involving a limited fund. See FED. R. CIV. P. 23(b)(1); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

pliers would always be available in these types of disputes.¹⁷³ While plaintiffs could attempt to certify an individual damages dispute under Rule 23(b)(1) or Rule 23(b)(2) simply as a means of avoiding the more onerous notice provisions under Rule 23(b)(3), such efforts are less likely to succeed given the U.S. Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*.¹⁷⁴ Therefore, cases arising under Rule 23(b)(1) appear to focus more on concerns about fairness and efficiency than on regulation, although a full functional or empirical analysis could prove otherwise.¹⁷⁵

Class actions are not the only type of large-scale litigation available in the United States. Federal multi-district litigation (MDL)¹⁷⁶ has been receiving an increased amount of attention over the last few years¹⁷⁷ as a result of several recent decisions from the U.S. Supreme Court that appear to curtail parties' ability to seek large-scale representative relief.¹⁷⁸ Although "MDL aggregation is not *exactly* an alter-

173 See FED. R. CIV. P. 23(b)(1). For example, while the substantive law in question could provide for punitive or treble damages, there may not be sufficient commonality among the plaintiff group to allow the effective imposition of such damages. Compare *Ortiz*, 527 U.S. at 864 (suggesting that "it would be essential that the fund be shown to be limited independently of the agreement" and "that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses"), with FED. R. CIV. P. 23(b)(1) (not requiring commonality of facts or law). Furthermore, parties to a Rule 23(b)(1) case may sometimes agree to limit the availability of any punitive damages claims. See *id.* 23(b)(1); *Ortiz*, 527 U.S. at 827.

174 131 S. Ct. 2541, 2558 (2011) (reasoning that individual monetary claims belong in Rule 23(b)(3) and are not to be combined with classwide relief in a Rule 23(b)(2) class); see also FED. R. CIV. P. 23(b) (explaining ways a class action may be maintained).

175 See *Wal-Mart Stores*, 131 S. Ct. at 2558 ("Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class." (citation omitted)). A full functional or empirical analysis of Rule 23(b)(1) cases is beyond the scope of this Article. See FED. R. CIV. P. 23(b)(1).

176 See 28 U.S.C. §1407 (2006); Hensler, *supra* note 15, at 16–17; HENSLER ET AL., *supra* note 113, at 99; Glover, *supra* note 2, at 1213–14.

177 Some U.S. commentators believe that use of aggregative techniques such as MDL is likely to rise because of the difficulties associated with certification of classes in mass torts cases. See *Ortiz*, 527 U.S. at 815; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 776–77, 806 (2010).

178 See *Wal-Mart Stores*, 131 S. Ct. at 2541; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). Not all commentators read these decisions as being entirely negative. See Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion*,

native to class action” litigation,¹⁷⁹ MDL nevertheless provides a solution to the problem of mass legal injuries by combining various individual claims “involving one or more common questions of fact” on an aggregative, rather than representative basis.¹⁸⁰ This means that claims are combined only for “coordinated or consolidated pre-trial proceedings”¹⁸¹ and are subsequently disaggregated to address individual issues and provide final disposition of the claims.¹⁸²

In some ways, it might seem as if MDL cannot provide any regulatory effect, since the judge hearing the consolidated matter is not providing the ultimate remedy (i.e., injunctive, monetary, or declarative relief) that would drive the defendant or other industry actors to alter their future behavior.¹⁸³ However, bottom-up regulation can be based not only on a rule or remedy, but also on “the settlement equivalent” thereof.¹⁸⁴ Since aggregation under the MDL framework can drive settlement in the same way that class certification decisions do, MDL may be capable of acting as a regulatory device.¹⁸⁵ Although this is an interesting proposition, more work, particularly of a functional and

Wal-Mart v. Dukes, and Turner v. Rogers, 125 HARV. L. REV. 78 (2011); S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration?* Stolt-Nielsen, AT&T and a Return to First Principles, 17 HARV. NEGOT. L. REV. 201 (2012) [hereinafter Strong, First Principles].

179 Willging & Lee, *supra* note 177, at 794.

180 28 U.S.C. § 1407.

181 *Id.* (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred. . . .”); see also Hensler, *supra* note 15, at 16–17 (noting that once the pretrial process is finished, mass claims are “disaggregated and dispersed to the courts where they were initially filed for final disposition”).

182 See Hensler, *supra* note 15, at 16–17.

183 See 28 U.S.C. §1407; Luff, *supra* note 8, at 113. See generally DOBBS, *supra* note 152 (discussing availability of remedies and their effect on future conduct).

184 Luff, *supra* note 8, at 113. This focus on “the settlement equivalent” raises the question of whether actions under Rule 23(b)(1) can also be considered regulatory. See FED. R. CIV. P. 23(b)(1); see also *supra* notes 172–175 and accompanying text (discussing Rule 23 of the Federal Rules of Civil Procedure). While a regulatory effect is theoretically possible, empirical work would be helpful to determine whether such effect exists as a functional matter.

185 See Hensler, *supra* note 15, at 16–17 (noting most aggregated claims settle); see also Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123 (2012) (“Settlement is the ‘endgame’ of mass tort litigation. And with the general demise of class actions in this field, mass tort litigation is increasingly resolved through non-class aggregate settlements.”); *id.* at 139–53 (discussing the evolution of non-class aggregate settlements); HENSLER ET AL., *supra* note 113, at 108–09.

empirical nature, needs to be done before any conclusions can be made about how MDL operates in the U.S. regulatory regime.¹⁸⁶

As the preceding suggests, U.S. class actions can be considered regulatory even if the ability to proceed as a class is not considered a remedy of itself. This discussion has also shown that it is impossible to conclude that class or aggregative procedures fulfill a regulatory function simply by virtue of the number of participants, since some other factors must be present to create the necessary regulatory effect.¹⁸⁷ This conclusion is important, since it suggests that the procedures contemplated by the Resolution cannot provide a regulatory effect simply by virtue of their collective nature.¹⁸⁸

c. Substantive and Procedural Risk

The next question to consider is whether and to what extent a legal system can or should allow unanticipated risk to be resolved through bottom-up regulatory litigation and whether all sorts of unanticipated risk should be considered in the same light.¹⁸⁹ This analysis is important because what looks like an unanticipated risk in some legal systems may be framed in other jurisdictions as a conscious choice to leave those risks unregulated. In the latter situation, bottom-up regulatory litigation would be jurisprudentially illegitimate, even if it constituted an effective means of addressing such risks, because such mechanisms would be contrary to that legal system's institutional design.¹⁹⁰

Traditionally, European jurisdictions have resisted bottom-up regulatory litigation on the grounds that "decisions on the appropriate scope of regulatory protection" should "be left to . . . politically

186 See Glover, *supra* note 2, at 1213–14 (suggesting MDL procedures can operate in a regulatory manner). Thus far, much of the scholarly focus on MDL has been on procedural issues rather than regulatory or policy concerns regarding matters of institutional design. See Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

187 See *supra* notes 158–71 and accompanying text.

188 See Resolution, *supra* note 20; see also *infra* Part IV (explaining regulatory litigation in Europe).

189 See Luff, *supra* note 8, at 75, 113–14.

190 Commentators have, of course, questioned whether regulatory litigation actually fulfills its regulatory objectives effectively and without any undue ancillary effects and market distortions, but that is a different question than the one posed here. See Hodges, *ANNALS*, *supra* note 20, at 336.

accountable actors.”¹⁹¹ Under this view, regulatory litigation constitutes an illegitimate usurpation of legislative or administrative authority because such measures allow judges and litigants to operate in “the presence of regulatory gaps” that are considered conscious “policy decisions on the part of agencies and the legislature.”¹⁹²

While that analysis may make sense in cases where the type of risk at issue has been identified in advance (since the failure to regulate in those situations obviously reflects a conscious policy decision on the part of the democratically elected branches of government), arguments about the judiciary improperly infringing on the legislative prerogative carry less weight in situations where the risk is unanticipated.¹⁹³ Indeed, it is difficult to say that courts and private actors are acting in contravention to policy decisions made by the legislature if the legislature never considered the matter in question.¹⁹⁴

When viewed in this light, bottom-up regulatory litigation appears as less of “an ad hoc supplement to public law”¹⁹⁵ and more of an essential element of a comprehensive regulatory regime. As such, regulatory litigation can be viewed as consistent with, rather than in conflict with, public forms of regulation, “[e]ven when public enforcement is relatively robust,” since “private enforcement may

191 Luff, *supra* note 8, at 113. Of course, other commentators view the existence of regulatory gaps as reflecting a need for private action. See Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 654–659 (noting this need may arise particularly in cases where there has been “political failure” or where those with “no potential for [political] redress” have been affected).

192 Luff, *supra* note 8, at 113. Top-down regulatory litigation has not suffered from these same kinds of criticisms, since it grows out of “statutory designs that evince a conscious choice on the part of the legislators to vest regulatory enforcement authority in private parties.” *Id.* at 95. Indeed, the European Union already utilizes top-down regulatory litigation, as shown by the passengers’ rights example. See Regulation on Passengers’ Rights, *supra* note 142; see also *supra* notes 141–46 and accompanying text (analyzing top-down regulatory litigation involving the European regulation on passenger rights).

193 Some distinction could be made between risk that was unanticipated and risk that was unable to be anticipated, but that discussion will be left for another day. See *supra* note 145 (noting a risk that was anticipatable, but not anticipated by the relevant regulatory authorities).

194 See Luff, *supra* note 8, at 75.

195 Glover, *supra* note 2, at 1137. This consistency becomes more apparent when the various elements of regulatory litigation are identified. See *supra* note 149 and accompanying text. Notably, public means of enforcement do not need to fail completely before private remedies can be sought. Glover, *supra* note 2, at 1155. Furthermore, any system that allows both public and private forms of regulation must be careful to avoid duplication of efforts and over-deterrence. See *id.* at 1158–59.

serve a complementary regulatory role in the achievement of various substantive goals.”¹⁹⁶

While this analysis may overcome some of the criticism aimed at regulatory litigation, it may not be enough to overcome skepticism based on the view that the substance of public regulation must be determined by politically accountable actors.¹⁹⁷ However, those concerns can be met through further refinements to the concept of unanticipated risk.

One of the seminal cases on U.S. class actions, *Deposit Guaranty National Bank v. Roper*, holds that:

[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.¹⁹⁸

According to this decision, class relief developed as a functional response to certain “injuries unremedied by the regulatory action of government,” i.e., certain unanticipated risks.¹⁹⁹ However, the risks at issue cannot relate to the type of injury, since the three-prong test for regulatory litigation indicates that claims must be made under a pre-

196 Glover, *supra* note 2, at 1158; see also Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1, 4 (2012) (describing the interplay between public and private concerns in third-party verification).

197 See Nathan Howe, *The Political Question Doctrine’s Role in Climate Change Nuisance Litigation: Are Power Utilities the First of Many Casualties?*, 40 ENVTL. L. REP. NEWS & ANALYSIS 11229, 11238–40 (2010) (discussing courts’ views on the propriety of litigation prior to the enactment of legislation); Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 248 (2005). Some public bodies may consciously choose not to act in some cases, although “[o]ne of the most significant risks of executive-driven moratoria is their likelihood to invite legal battles.” Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883, 1927 (2012).

198 *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980). While this statement could be read as implicating certain concerns relating to compensation and efficiency, the reference to “injuries unremedied by the regulatory action of government” establishes a firm link to regulatory concerns. *Id.*

199 *Id.* Actually, this language could be read even more broadly to include risks that were anticipated but left unregulated for whatever reason. See *supra* note 197.

existing substantive norm.²⁰⁰ Instead, the unanticipated risk must be something other than substantive.²⁰¹

Closer contemplation of *Deposit Guaranty National Bank* suggests that the risk in question refers either to the scope of injury (such as an unanticipated volume of harm) or to the nature of the injury (such as an unexpectedly low value of each individual claims).²⁰² In other words, the legislature anticipated a particular type of substantive harm but did not anticipate the possibility that the standard method of addressing the harm (i.e., bilateral litigation) would be incapable of sufficiently deterring the behavior in question. Instead, certain unexpected aspects of the injury generated the need to use a particular procedural mechanism (i.e., class or collective techniques) to provide an adequate legal response.²⁰³ Because the unanticipated element here relates to certain procedural needs, bottom-up regulatory litigation can be said to provide a response to an unanticipated procedural risk.

While *Deposit Guaranty National Bank* suggests one type of unanticipated procedural risk,²⁰⁴ class and collective claims may generate other types of procedural risks. For example, it is possible to consider the likelihood of inconsistent judgments from the perspective of risk, even though most discussions relating to large-scale litigation appear to analyze inconsistent judgments under the rubric of procedural fairness.²⁰⁵ However, it can be said that inconsistent judgments arise when the state has contemplated a particular type of substantive harm but has not anticipated the magnitude of claims that would ensue and the possibility that some of those judgments might be inconsistent

200 See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (discussing that Rule 23 cannot “abridge, enlarge or modify” any substantive right (citation omitted)). A pre-existing substantive norm constitutes the second element of the three-prong test for bottom-up regulatory litigation. See *supra* note 149 and accompanying text.

201 See Luff, *supra* note 8, at 75, 113.

202 See *Deposit Guar. Nat'l Bank*, 445 U.S. at 339; see also *Abaclat* (formerly *Beccara*) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 483 (Aug. 4, 2011) [hereinafter *Abaclat Award*], available at <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf>; S.I Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 *ARB. INT'L* 493, 502 (2010) [hereinafter Strong, *De-Americanization*].

203 See *Deposit Guar. Nat'l Bank*, 445 U.S. at 339; see also *Abaclat Award*, *supra* note 202, ¶ 483; Strong, *De-Americanization*, *supra* note 202, at 502.

204 See *Deposit Guar. Nat'l Bank*, 445 U.S. at 339.

205 See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 n.14 (1979); *Ellis v. Ga.-Pac. Corp.*, 550 So. 2d 1310, 1318 (La. Ct. App. 1989).

with one another.²⁰⁶ As such, class and collective relief can be viewed as providing an adequate, albeit unanticipated, procedural response to a particular type of procedural risk.

Framing bottom-up regulatory litigation as a means of addressing unanticipated procedural risk could resolve the concerns of those who worry that regulatory litigation constitutes an impermissible infringement on the proper domain of politically accountable actors because procedural matters can be viewed as being more properly within the scope of judicial rather than legislative or administrative authority.²⁰⁷ Furthermore, even this limited judicial power remains subject to the oversight of democratically elected branches of government because legislatures are enabled to enact subsequent legislation or regulation that reverses the course of most types of any regulatory litigation, if the elected officials find those decisions problematic.²⁰⁸ Indeed, legislative overrides have often been used in the United States when the political branches believe the courts have overstepped their bounds with regard to class relief.²⁰⁹

206 See Strong, *Regulatory Arbitration*, *supra* note 150, at 73–74 (discussing how investment law failed to foresee problems of inconsistent results). The possibility of inconsistent judgments is considered relevant to the creation of some (but not all) types of class actions, although those suits are not necessarily regulatory in nature. See FED. R. CIV. P. 23(b)(1)(A); see also *supra* notes 172–175 and accompanying text (describing fairness and consistency of judgments).

207 This is particularly true given that there is some legislative oversight of judicial rule-making. See Rules Enabling Act, 28 U.S.C. §§ 2071–72, 2074 (2006) (requiring Congressional approval of rules of court, including the Federal Rules of Civil Procedure); see also *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010); Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1066–67 (2011) (discussing legislative limits on judicial rule-making).

208 The one exception would be in constitutional cases in legal systems where the courts have the final say on such matters. See Dimitrios Kyritsis, *Constitutional Review in Representative Democracy*, 32 OXFORD J. LEGAL STUD. 297, 320–24 (2012).

209 Many of these enactments have focused on the availability or scope of the class mechanism rather than the underlying substantive law, which not only suggests that the legislature is acting in a counter-regulatory manner but also supports the notion that regulatory litigation focuses on procedural, rather than substantive, risks. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4), (b), 119 Stat. 4, 4–5 (2005) (codified at 28 U.S.C. § 1711 (2006)); Omnibus Consolidated Receptions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321–53 (1996) (limiting availability of legal aid in class actions); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66 (1996) (codified at 18 U.S.C. § 3626, 28 U.S.C. §§ 1915, 1915(f), and 42 U.S.C. § 1997e (2006)); Glover, *supra* note 2, at 1165; Greenberg, *supra* note 124, at 579; Johnson, *supra* note 191, at 646–47; George Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 28 (2012), available at <http://www.virginialawreview.org/>

This dynamic interaction between the various branches of government suggests that bottom-up regulatory litigation does not constitute a private form of regulation, operating outside the scope of political debate and discourse. To the contrary, the process appears highly iterative, with the judicial, legislative, and executive branches working responsively rather than in isolation.

If this is true, then the real debate is not about whether and to what extent bottom-up regulation contravenes the will of politically elected officials.²¹⁰ Instead, the focus is more on default preferences²¹¹ and where the risk of action (or inaction) should lie as a matter of institutional design.²¹² While this issue is beyond the scope of this Article, it is well-covered by other commentators.²¹³

inbrief.php?s=inbrief&p=2012/04/14/post. Although most subsequent measures have focused on limiting judges' and litigants' ability to obtain class relief, legislators have also taken steps to correct situations where the courts have improperly restricted class relief, thus returning the scope or availability of the class device to its previously expansive state. See Greenberg, *supra* note 124, at 585–86 (discussing employment discrimination).

210 See *supra* notes 207–209 and accompanying text.

211 Although commentators have focused heavily on the analysis of default rules in the context of contract and corporate law, relatively little attention has been paid to default provisions in the realm of regulatory litigation and other questions of institutional design. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89 (1989) (noting lack of scholarship on default rules); see also Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881, 885 (2003) (supporting modern contract scholarship and results it provides in “clarifying . . . contract rules,” “illuminating . . . default rule[s],” and “underscoring . . . renegotiation”); Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1591 (1999) (discussing optimal default rules for contractual incompleteness through understanding underlying reasons for the incompleteness); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 729–30 (1992) (explaining gap-filling for incomplete contracts); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 615 (1990) (analyzing the economic impact of *Hadley v. Baxendale*); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 834, 839 (2003) (comparing how contract lawyers and economists construct default rules about contracts).

212 See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 840–70 (2004); Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1387 (2011).

213 See *supra* note 46 and accompanying text. Notably, however, many questions about whether regulatory litigation is inherently better than traditional forms of regulation typically cannot be answered empirically. Thus, for example, while it might be useful to ask which regulatory mechanism—regulatory litigation or traditional regulation—is capable of responding most speedily to changed or changing circumstances,

Framing bottom-up regulatory litigation as a means of addressing unanticipated procedural risks also provides the means of responding to other potential areas of concern. For example, some critics might claim that remedy-based regulation does not provide sufficient predictability to parties to allow them to alter their behavior to reduce the risk of liability or obtain the necessary insurance.²¹⁴

While predictability is of course important, that concern appears to be met to the extent that regulatory litigation is based on both a pre-existing substantive norm and a pre-existing rule or remedy.²¹⁵ Because potential defendants are on notice that they may be subject to a particular type of remedy if their action causes injury, they can take adequate precautions so as to avoid or limit legal liability,²¹⁶ even if the precise type of injury or scope (i.e., the unanticipated procedural risk) cannot be anticipated.²¹⁷ Notably, defendants are not responsible for all unanticipated risks, since bottom-up regulatory liti-

no definitive answer appears to exist. See Kerr, *supra* note , at 840–70 (considering whether courts are at a comparative disadvantage in regulating areas that are rapidly changing due to difficulties in revising judicial doctrines and precedent); Sant’Ambrogio, *supra* note 212, at 1387 (discussing problems associated with agency delays).

214 This problem is not limited to regulatory litigation, since traditional forms of regulation can often be equally difficult to interpret and predict. See McAllister, *supra* note 196, at 22.

215 See Luff, *supra* note 8, at 114; see also Dorf, *supra* note 42, at 876–77; *supra* notes 149, 152 and accompanying text (explaining bottom-up regulatory litigation).

216 The type of precautions to be taken depends on the nature of the substantive risk in question and not on the likelihood of bilateral versus multilateral litigation. For example, a pharmaceuticals manufacturer might undergo additional testing so as to avoid any potential claims that personal injuries that might arise from the use of a particular drug were negligently caused, while a national corporation might require extensive management training and voluntary internal audits of regional hiring or promotion practices so as to anticipate and avoid claims of employment discrimination. See Daphné Richemond-Barak, *Regulating War: A Taxonomy in Global Administrative Law*, 22 EUR. J. INT’L L. 1027, 1056–67 (2011). Although some critics see these sorts of “defensive” measures as unnecessarily costly and socially undesirable to the extent they delay certain products (such as pharmaceuticals) from reaching the market or increase the cost of those items, self-restraint (like self-regulation) may be preferable to mandatory forms of public regulation, which could be more onerous. See Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28, 29–30 (2011); see *infra* notes 257–270 and accompanying text.

217 However, the possibility of regulatory litigation may provide the incentive to undertake the precautionary measures in question, although the desire to avoid regulatory litigation does not depend on whether the suit involves class or collective relief. See Glover, *supra* note 2, at 1190–91 (suggesting that in some situations—such as large-scale RICO actions—aggregative or class-expanding mechanisms may not be necessary, since the treble damages provisions alone are sufficient to provide a regulatory effect).

gation does not impose a system of strict liability, unless such an approach is permitted under the applicable substantive law.²¹⁸ Instead, the defendant in a remedy-based form of regulatory litigation is only liable to the extent identified in the relevant substantive norm.²¹⁹

d. The Nature of the Ability to Proceed as a Class or Collective

This Article's concept of a regulatory remedy does not require class or collective mechanisms to be considered remedial in nature.²²⁰ Instead, the requirements for bottom-up regulatory litigation can be met in cases involving class and collective relief by combining traditional remedies with large-scale litigation techniques and various background principles of procedural law.²²¹ This approach is not only useful in discussions under U.S. law, it is also helpful in analyses involving European law, since the analytical framework does not reflect a bias towards U.S. forms of collective justice.²²²

Although it is not necessary to delve more deeply into the nature of class and collective procedures, it is worthwhile to do so briefly, since differences in the way the ability to proceed as a group is characterized may help explain why regulatory litigation is so difficult for some people to accept in both the United States and Europe.²²³ As it turns out, the key issues appear to arise as a result of two interrelated jurisprudential traditions, namely the longstanding elevation of (1) rights over remedies and (2) substantive over procedural law.²²⁴

218 See Luff, *supra* note 8, at 113; see also *supra* notes 149–152 and accompanying text (discussing the role substantive law plays in bottom-up regulatory litigation).

219 See *supra* note 149 and accompanying text.

220 See *supra* notes 172–87 and accompanying text.

221 See *supra* notes 148, 172–87 and accompanying text.

222 See Resolution, *supra* note 20; see also *infra* Part IV (analyzing regulatory litigation in Europe).

223 Some authorities frame the ability to proceed as class or collective as a remedy. See *Parham v. J.R.*, 442 U.S. 584, 616 (1979); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 127 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012); *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1139 (11th Cir. 2010); *Canfield v. United States*, 14 Cl. Ct. 687, 689 (1988); Gidi, Issue Preclusion, *supra* note 153, at 1065 & n. 185; WRIGHT, *supra* note 153, §72, at 740. Others suggest it may be some type of right. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); Gidi, Issue Preclusion, *supra* note 153, at 1065 & n.185.

224 Although detailed consideration of this issue is beyond the scope of this Article, it would be very useful to conduct a rights-balancing analysis concerning class and collective relief, on the one hand, and regulatory concerns on the other. Some general information on this topic is available. See Robert G. Bone, *Agreeing to Fair Process*:

First, some people appear to view bottom-up regulatory litigation as less valuable or less legitimate because it appears to involve a remedy rather than a right.²²⁵ As Owen Fiss has noted, there is a long and “complicated relationship between rights and remedies,” based largely on the common (mis)perception that:

Rights are “the true meaning of . . . constitutional values, such as equality, liberty, due process, or property. . . .” Remedies are designed to “actualize” the constitutional value and incorporate considerations that are not principled corollaries of the constitutional value but rather are “subsidiary,” “strategic,” and “instrumental.” Thus, remedies are “subordinate” to rights. They are not only subordinate, but also metaphysically segregated, for “rights operate in the world of abstraction, remedies in the world of practical reality.” . . . Although Fiss wants to keep judges in the business of remedies, he worries that judges will distort the true meaning of constitutional rights by tailoring them to fit what effective remedies are available. Fiss fears that the purity of rights will be corrupted by the practicalities of remedies.²²⁶

Second, even if the ability to proceed as a group is considered a right rather than a remedy, that right may be characterized as “merely” procedural rather than substantive.²²⁷ This can be problematic, for although a growing number of commentators recognize that procedure and substance are inextricably linked,²²⁸ there nevertheless

The Problem with Contractarian Theories of Procedural Fairness, 83 B.U. L. REV. 485, 535 (2003); Virgílio Afonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 OXFORD J. LEGAL STUD. 273, 284–299 (2011); Le Sueur, *supra* note 155, at 473.

225 See Luff, *supra* note 8, at 113. Interestingly, the two concepts do not have to be mutually exclusive. See Margaux J. Hall & David C. Weiss, *Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights*, 36 BROOK. J. INT’L L. 453, 501 (2011) (discussing how rights may incorporate a remedy); see also Strong, *Regulatory Arbitration*, *supra* note 150, at 64–81 (discussing how investment law may recognize a right to a remedy).

226 Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 870–71 (1999) (citations omitted) (discussing Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979)); see also *id.* at 857–58 (explaining difference between rights and remedies). The notion that remedies are in some way subordinate to rights may also be reflected in the laws of some European Member States. See Antony Lester, *The Human Rights Act 1998—Five Years On*, 2004 EUR. H.R. L. REV. 258, 260.

227 See *Anchem Prods.*, 521 U.S. at 613; see also *Shady Grove Orthopedic Assocs., v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010); *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 ¶¶ 15, 17 (Can.); Strong, *Canada*, *supra* note 79, at 965–75.

228 See Jamie Dodge, *The Limits of Private Procedural Ordering*, 97 VA. L. REV. 723, 733 (2011); see also *Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion 86 (Oct.

appears to be a lingering perception that matters of substance are more important than matters of procedure.²²⁹ This may be particularly true in the United States, where a number of recent decisions from the U.S. Supreme Court have reputedly signaled “[t]he conversion of procedural rules from publicly created, mandatory guarantors of procedural justice to default rules subject to market forces.”²³⁰ This is said to “alter[] the nature and function of civil procedure at a basic level” by challenging “the traditional conception of private enforcement as serving a dual public and private role.”²³¹

Although judicial discussions regarding the nature of the ability to proceed as a class or collective have thus far been somewhat unsatisfactory due to their highly formalistic nature, U.S. courts currently appear to view the right as procedural rather than substantive.²³² Commentators have taken a different view, suggesting that it may be appropriate to consider the right to proceed as a class as substantive in nature, at least in some circumstances.²³³ The European Union appears poised to adopt a proceduralist interpretation, based on language in the Resolution stating that “access to justice by means of collective redress comes within the sphere of procedural law.”²³⁴

Consideration of this issue is still in its early days. However, as the discussion goes forward, courts and commentators may wish to think

28, 2011), *available at* http://italaw.com/documents/Abacat_Dissenting_Opinion.pdf.

229 The elevation of substance over procedure may be more apparent in civil law than in criminal law. *See* Dodge, *supra* note 228, at 731–57. Indeed, some commentators have suggested that criminal law protects procedure more than substance. *See* Nancy Gertner, *On Competence, Legitimacy and Proportionality*, 160 U. PA. L. REV. 1585, 1595 n.57 (2012); Jessica Brooks, Note, *Two-Way Video Testimony and the Confrontation Clause: Protecting Vulnerable Victims After Crawford*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 183, 184 (2012).

230 Dodge, *supra* note 228, at 725.

231 *Id.* at 725–26.

232 For example, courts have been known to rely solely on the placement of the right in the relevant rules of civil procedure. *See Amchem Prods.*, 521 U.S. at 613 (discussing Federal Rules of Civil Procedure and noting that Rule 23 cannot “abridge, enlarge or modify” any substantive right and should, as such, be considered procedural in nature); *see also Shady Grove*, 130 S.Ct. at 1442 (describing what constitutes a procedural right); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980) (noting the right of a litigant to employ Rule 23 of the Federal Rules of Civil Procedure or the collective action procedures under the FLSA “is a procedural right only, ancillary to the litigation of substantive claims”); *Bisaillon*, 1 S.C.R. 666, ¶¶ 15, 17; *Strong, Canada*, *supra* note 79, at 965–75.

233 *See* Gidi, Issue Preclusion, *supra* note 153, at 1063 & n.185; Greenberg, *supra* note 124, at 577 (regarding injunctive relief); *Strong, Canada*, *supra* note 79, at 965–75.

234 Resolution, *supra* note 20, ¶ 15.

about whether rights really are distinct from remedies and whether it would be possible to construe particular substantive rights as including a right to a particular remedy.²³⁵ Alternatively, it might be possible to argue that certain procedural rights have been elevated to the status of a substantive right.²³⁶ While these propositions are by no means universally accepted,²³⁷ they do indicate areas for further discussion and debate.²³⁸

Although European authorities may be predisposed to characterize the right to collective relief as procedural in nature,²³⁹ that right may be given somewhat elevated status in practice, based on statements in the Resolution that “in the European area of justice, citizens and companies must not only enjoy rights but must also be able to enforce those rights effectively and efficiently”²⁴⁰ and an increasing inclination in the European Union to provide procedural rights with a high degree of protection and respect as a general concern.²⁴¹

This emphasis on procedural justice is reflected most clearly in the concept of an effective remedy, which is explicitly protected as a

235 See Hall & Weiss, *supra* note 225, at 501 (discussing how rights may incorporate a remedy); Wilkinson, *supra* note 155, at 288.

236 This may be the case in international investment law. See CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION § 3.01 (2007) (suggesting that “[t]he protection offered to investors by the dispute resolution provisions of treaties is sufficiently important to rise to the level of a substantive principle in its own right”). See generally Strong, Regulatory Arbitration, *supra* note 150, at 64–81 (discussing how investment law may recognize a right to a remedy).

237 See *Shady Grove*, 130 S. Ct. at 1444–46; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14 (1941) (noting the term “substantive right” did not include procedural rights, even if they were “important” or “substantial”); *Ides*, *supra* note 207, at 1054.

238 The U.S. Supreme Court recently addressed certain issues regarding potential overlaps between substantive and procedural rights in the context of federal diversity class actions, which may generate more detailed analysis by both courts and commentators. See *Shady Grove*, 130 S. Ct. at 1442–48. Justice Stevens’ concurrence, which controls the plurality opinion, is particularly interesting in this regard. See *id.* at 1448–50 (Stevens, J., concurring); see also Julia B. Strickland et al., *2010 Class Action Developments*, 1946 PLI/CORP. 537, 541–43 (Apr. 9–10, 2012) (explaining the *Shady Grove* decision).

239 See Resolution, *supra* note 20, ¶ 15.

240 *Id.* ¶ A; see also *id.* ¶¶ E, 17 (noting importance of procedural rights).

241 See Burkhard Hess, *Procedural Harmonisation in a European Context*, in CIVIL LITIGATION IN A GLOBALIZING WORLD 159, 169–72 (X.E. Kramer & C.H. van Rhee ed., 2012); Le Sueur, *supra* note 155, at 475; see also Mauro Cappelletti, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends*, 25 STAN. L. REV. 651, 652 (1973) (examining “the more significant aspects of procedural guarantees”). See generally Strong, *Quo Vadis*, *supra* note 34 (examining new European resolution creating an avenue for regional collective relief).

matter of national, international, and European law.²⁴² Thus, for example, Article 13 of the European Convention on Human Rights states that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”²⁴³ Article 47 of the Charter of Fundamental Rights of the European Union similarly states that “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”²⁴⁴ Although no court has yet interpreted the “effective remedy” language of these provisions in the context of collective redress, it appears likely that the term will be interpreted expansively, since such procedures are often considered to constitute a necessary procedural response to a particular type of injury.²⁴⁵

While it is important to determine whether the right to proceed as a class or collective is substantive or procedural in nature, an equally critical concern involves whether the right should be considered private, and thus held by an individual, or public, and thus held either by the group of persons asserting the claim or by society at large.²⁴⁶ The answer to this latter question can determine whether

242 See *Le Sueur*, *supra* note 155, at 458. See generally Strong, *Quo Vadis*, *supra* note 34 (discussing European adoption of cross-border collective redress claims). The notion of an effective remedy also underlies U.S. jurisprudence, though more implicitly. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

243 European Convention on Human Rights, art. 13, *effective* June 1, 2010 (as amended by Protocols Nos. 11 & 14), *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>; see also *Le Sueur*, *supra* note 155, at 457–58 (discussing the right to an effective remedy under the European Convention on Human Rights).

244 Charter of Fundamental Rights of the European Union, 2000/C 364/1, art. 47, 18 Dec. 2000; see also Pieter Van Cleynenbreugel, *Judge-Made Standards of National Procedure in the Post-Lisbon Constitutional Framework*, 37 EUR. L. REV. 90, 95–97 (2012) (discussing the “fundamental right to an effective ‘remedy’”); Hess, *supra* note 241, at § 8.4; Sionaidh Douglas-Scott, *The Charter of Fundamental Rights as a Constitutional Document*, 2004 EUR. H.R. L. REV. 37, 46 (explaining the current limited system of remedies for private parties).

245 See KELEMEN, *supra* note 41, at 14 (noting “the broad empowerment of private actors to assert their legal rights”); *Abaclat Award*, *supra* note 202, ¶ 483; Glover, *supra* note 2, at 1137; Strong, *De-Americanization*, *supra* note 202, at 502; see also *supra* notes 202–219 and accompanying text (analyzing procedural risks).

246 See Dodge, *supra* note 228, at 770–83 (explaining the public-private distinction). Western legal analysis tends to focus on individual rights and remedies rather than group rights. See Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 734 (1986). However, large-scale litigation includes a number of public benefits. See Patrick A. Luff, *Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions*, 41 U. MEM. L. REV. 65, 74 n.36 (2010) [hereinafter Luff,

certain “procedural contracts are able to sever the tie between compensation and deterrence interests, thus creating a choice for the individual between the public and private interest in litigation.”²⁴⁷ The most well-known and controversial of these efforts involves contractual waivers of class and collective relief.²⁴⁸

Waivers of class remedies are, of course, very much at the cutting edge of U.S. law right now as a result of the recent Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, which upheld a contractual waiver of class remedies that was placed in an arbitration agreement.²⁴⁹ However, that decision failed to address several important issues regarding the nature of the ability to proceed as a class.²⁵⁰

Although the highly individualistic economic analysis carried out by the majority suggests that several justices view the ability to proceed as a class as entirely private in nature, there is no discussion about the effect private waivers might have on larger regulatory concerns,²⁵¹ despite a significant amount of commentary cautioning against letting those with “superior economic power”²⁵² take “unilateral control over designing a dispute system for conflicts to which [they are] a party”²⁵³ and create a form of private dispute resolution that “disserve[s] fundamental social interests—while serving all too well the legal profession’s narrow self-interest.”²⁵⁴ However, some lower federal courts have stepped into the gap left by the Supreme Court, noting that the ability to proceed on a collective basis cannot be waived in certain circumstances, such as those involving the Fair Labor Standards Act

Memphis]; HENSLER ET AL., *supra* note 113, at 121–22; MULHERON, *supra* note 9, at 63, 66; Burch, *supra* note 113, at 74–76

247 Dodge, *supra* note 228, at 771–72.

248 See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); see also Strong, *First Principles*, *supra* note 178, at 227–29 (analyzing use of waivers in class arbitration context).

249 See *AT&T Mobility*, 131 S. Ct. at 1744, 1753.

250 See Dodge, *supra* note 228, at 772–83; Strong, Canada, *supra* note 79, at 965–71; Strong, *First Principles*, *supra* note 178, at 211–40 (analyzing whether class arbitration meets the standards necessary to properly be considered arbitration).

251 See *AT&T Mobility*, 131 S. Ct. at 1753; Strong, Canada, *supra* note 79, at 965–71; Strong, *First Principles*, *supra* note 178, at 240. The dissent took a more holistic view of the issues at stake. See *AT&T Mobility*, 131 S. Ct. at 1760–61 (Breyer, J., dissenting).

252 Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation in the Workplace*, 14 HARV. NEG. L. REV. 1, 17 (2009).

253 Bingham et al., *supra* note 252, at 5; see also Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 80 (2009).

254 Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 368 (1986).

(FLSA), since collective relief provisions “are integral to [that statute’s] function and structure.”²⁵⁵

When considering waivers of class and collective relief, it is useful to reflect on the possible ramifications of a decision to allow private re-ordering of regulatory procedures in jurisdictions that use bottom-up regulatory litigation as an integral part of their regulatory systems.²⁵⁶ Four basic outcomes appear possible.

First, the widespread limitation or elimination of the right to proceed as a class or collective could lead to public actors being required to increase public enforcement of various laws at a rate equal to the amount of private enforcement that has been lost through the use of waivers or similar devices.²⁵⁷ This alternative could have a potentially significant effect on the public purse, since public entities that engage in regulatory litigation will need more resources to produce higher levels of performance.²⁵⁸ If waivers occur infrequently or are analyzed on an individual, case-by-case basis, this additional burden on public agencies may seem negligible. If, however, the use of class waivers becomes routine or widespread, either generally or within a specific industry, then the cost of replacing private enforcement with public enforcement could be substantial.²⁵⁹ Furthermore, because public actors may not be as effective as private actors in regulating some

255 *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 310 (S.D.N.Y. 2011); see also Dodge, *supra* note 228, at 772–83; Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 796 nn.118–19 (2002) (citing cases regarding waivers). *But see* LaVoice v. UBS Fin. Serv., Inc., No. 11 Civ. 2308(BSJ) (JLC), 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (declining to follow *Raniere*).

256 The assumption is that the elimination of class or collective remedies will result in the abandonment of the claims by the private individuals. See Strong, *First Principles*, *supra* note 178, at 238 (noting non-certification of a class, mass, or collective often sounds the “death knell” to such proceedings).

257 See Dodge, *supra* note 228, at 782.

258 In the United States, these functions are often carried out by the Department of Justice and state attorneys general, although other enforcement agencies also exist. See Baer, *supra* note 9, at 612–25; Luff, *supra* note 8, at 113–14; Meyer, *supra* note 9, at 886.

259 See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); Dodge, *supra* note 228, at 782; Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 *J. EMPIRICAL LEGAL STUD.* 536, 544, 565 (2012) (noting class waivers are widespread in some types of consumer transactions but not in others); Glover, *supra* note 2, at 1165–67 (noting increasing use of waivers of class arbitration and litigation).

types of behavior, additional expenditures may be needed in order to bring public entities up to the necessary standard of competence.²⁶⁰

Second, curtailing the ability to proceed as a class or collective could lead to public actors being expected to fill the gap left by the departure of private regulators, even though no additional resources are provided to the relevant agencies. This scenario would likely lead to under-deterrence of wrongful behavior, since public bodies cannot be expected to achieve more results without a concomitant rise in the amount of resources available to them.²⁶¹ Although public agencies in both the United States²⁶² and Europe²⁶³ have often had to make do with very little in the way of resources, shortages in public funding may increase as the global economy works its way out of the recent financial crisis.

Third, limitations on the right to proceed as a class or collective could lead legislative or administrative bodies to increase regulation *ex ante* so as to eliminate the need for regulatory litigation *ex post*.²⁶⁴ While the regulations in question could simply reflect more or more detailed provisions of the same types that are now in place, the changes could also be different in kind.²⁶⁵ Thus, for example, private regulatory remedies relating to mass torts could be replaced by criminal liability for individual and corporate tortfeasors²⁶⁶ or by social

260 See Glover, *supra* note 2, at 1153–55; see also *infra* notes 276–281 and accompanying text (analyzing limitations on public bodies).

261 See Glover, *supra* note 2, at 1153; see also Dodge, *supra* note 228, at 782.

262 See Glover, *supra* note 2, at 1154 (noting scarce public resources have long been “the rule, not the exception” in the United States); see also Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCL A. L. REV. 1087, 1132–34 (2007) (predicting the aftermath of *Buckhannon* will reduce private enforcement efforts and acknowledging it is “unlikely that there will be an infusion of funds into state and federal enforcement to fill the breach”); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1415–16 (2011) (noting “more public enforcement is actually necessary to effectuate the goals of a statute,” as evidence suggests an overreliance on private action results in “under-enforcement of the law”); Heidi Mandanis Schooner, *Private Enforcement of Systemic Risk Regulation*, 43 CREIGHTON L. REV. 993, 1000–04 (2010) (acknowledging the limits of public enforcement).

263 See Bignami, *supra* note 5, at 412.

264 See Burch, *supra* note 113, at 70–77, 128; Luff, *supra* note 8, at 113–14; Robertson, *supra* note 140, at 162, 175.

265 See Burch, *supra* note 113, at 70–77, 128; Strong, Canada, *supra* note 79, at 980.

266 See Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1197–98 (1998); Byron G. Stier, *PIP Breast Implants and Mass Torts in Europe*, MASS TORT LITIGATION BLOG (Jan. 30, 2012), http://lawprofessors.typepad.com/mass_tort_litigation/2012/01/pip-breast-implants-and-mass-torts-in-europe.html [hereinafter *PIP Breast Implants*] (describing the traditional European

insurance programs that eliminate the need for wrongdoers to pay compensatory damages.²⁶⁷

Fourth, elimination of the right to proceed as a class or collective could inspire legislators to reinstate private forms of group relief at previously existing levels, effectively superseding any judicial decisions permitting private waiver of class or other types of regulatory remedies.²⁶⁸ Regulatory litigation often involves this kind of iterative process wherein the legislature and judiciary mutually monitor each other's actions, so it would not be surprising to see some form of legislative action in response to certain types of judicial decisions.²⁶⁹ Indeed, such efforts have already been seen in the wake of the U.S. Supreme Court decision in *AT&T Mobility*.²⁷⁰

Given these alternatives, some critics may find regulatory litigation less problematic than they originally believed.²⁷¹ Furthermore, these kinds of analyses demonstrate the importance of considering regulatory litigation holistically, as a matter of institutional design, rather than simply evaluating the device on an individualistic basis, devoid of context.²⁷²

2. Specific Needs Giving Rise to Regulatory Litigation

Given the benefits of a contextual analysis, it is perhaps unsurprising that the next step of this discussion puts bottom-up regulatory litigation into a practical, functional framework by identifying the types of situations where such litigation might be most necessary and appro-

approach as “more reliant on criminal law than tort for deterrence, compensatory damages are limited because of the comparatively extensive governmental social insurance, punitive damages are unavailable, and class actions are traditionally not embraced.”). See generally Frank J. Vandall, *The Criminalization of Products Liability: An Invitation to Political Abuse, Preemption, and Non-Enforcement*, 57 CATH. U. L. REV. 341 (2008) (arguing the criminalization of products liability is “neither necessary, nor desirable.”).

267 See Burch, *supra* note 113, at 70–77, 128; Jules L. Coleman, *Mistakes, Misunderstandings, and Misalignments*, 121 YALE L.J. ONLINE 541, 564–65 (2012), available at <http://yalelawjournal.org/the-yale-law-journal-pocket-part/tort-law/mistakes,-misunderstandings,-and-misalignments/>; Stier, *supra* note 266.

268 See Greenberg, *supra* note 124, at 585–86; Ventoruzzo, *supra* note 72, at 439.

269 *Id.*; see also *supra* notes 208–209 and accompanying text (describing the interaction of legislatures and courts with regards to regulatory litigation).

270 See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011).

271 See Burch, *supra* note 113, at 70–77, 128; Strong, Canada, *supra* note 79, at 980.

272 See Dodge, *supra* note 228, at 729 (noting dangers of uncontextualized procedural analysis); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 106–21 (2005).

priate. Previous analysis of this issue has been somewhat unsatisfactory, as demonstrated by suggestions that litigation might be considered “regulatory by virtue of the number of participants, [or] the size or nature of the remedy.”²⁷³ The problem with that approach is that it could be used to argue that all forms of large-scale litigation should be considered regulatory, thus reducing the analysis about the situations in which regulatory litigation is most appropriate to a simple inquiry as to the circumstances in which class or collective redress is permitted as a matter of national law. However, this methodology cannot be correct, since not every form of class or collective relief is regulatory in nature.²⁷⁴

Therefore, other factors must be considered. Since regulatory litigation arises as a “stopgap . . . to protect individual citizens from risk,”²⁷⁵ the most appropriate inquiry would be to identify how best to identify and address unanticipated risk from a functional perspective.²⁷⁶ As it turns out, there are three instances when regulatory litigation might be particularly appropriate as a matter of institutional design.

a. Limitations on Public Bodies

First, regulatory litigation may be necessary in cases where “limitations on public bodies . . . circumscribe their effectiveness in achieving regulatory goals.”²⁷⁷ Because public regulators are unable to achieve anticipated or optimal levels of enforcement on their own, class or collective relief can act as a supplement to public enforcement mechanisms.²⁷⁸

Public entities can experience various types of limitations, although the most obvious is underfunding.²⁷⁹ Scarce public resources have long been “the rule, not the exception,”²⁸⁰ in the United States, which may be one reason why class actions have become so prevalent in the U.S. However, European institutions also

273 Luff, *supra* note 8, at 88 (footnote omitted).

274 See MULHERON, *supra* note 9, at 63–66; see also *supra* notes 172–86 and accompanying text (discussing types of large-scale litigation available in the United States).

275 Luff, *supra* note 8, at 114; see also *id.* at 75.

276 See *supra* Part III.A.

277 Glover, *supra* note 2, at 1153.

278 See *id.* at 1140, 1145–46.

279 See *id.* at 1153 (discussing situations where “public governmental enforcement bodies have limited resources that are . . . insufficient to perform the functions with which they are tasked”).

280 *Id.* at 1154; see Albiston & Nielsen, *supra* note 262, at 1132–34; Pasachoff, *supra* note 262, at 1415–16; Schooner, *supra* note 262, at 1000–04.

appear to be increasingly “overtaxed and under-resourced,” suggesting that a need for regulatory litigation may be on the rise in the European Union.²⁸¹ This need for private means of enforcement in Europe may increase further as a result of the recent financial crisis. While it would be premature to suggest that there is a causal connection between the increase in collective redress in the European Union over the last ten years and the recent challenges in public funding, such a conclusion makes some intuitive sense.²⁸²

b. Informational Disadvantages

Second, regulatory litigation may be necessary in situations where public authorities suffer from “informational disadvantages” in comparison to private citizens.²⁸³ Informational asymmetries can arise in a variety of ways. For example, the tendency toward “public underinvestment in information” can result in agencies holding sub-optimal levels of information.²⁸⁴

As a result, “the best sources of information about private wrongs are often the parties themselves.”²⁸⁵ This may be particularly true in cases where regulatory bodies are geographically distant from the place of legal injury, since that “not only limits their ability to access or be accessed by those who suffered alleged harm but also reduces their ability to even know that such harm occurred in the first place.”²⁸⁶ Problems could also arise in situations where the regulatory body is particularly large or politically decentralized, as might occur in the multi-tiered structure found in the European Union.²⁸⁷ In such circumstances, private forms of regulation, including class or collective suits, might provide a better means of addressing the legal injury.²⁸⁸

Access to information may vary according to the type of injury at issue. Thus, for example, individual employees may be better placed than public regulators to identify violations of the Fair Labor Standards Act, since employees “will usually have the best information

281 Bignami, *supra* note 5, at 412 (claiming, however, that has not led to regulatory litigation but to “cooperative legalism”).

282 See Directorate General, *supra* note 19, at 38.

283 Glover, *supra* note 2, at 1154.

284 See Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1431 (2011).

285 Glover, *supra* note 2, at 1154.

286 *Id.* at 1154–55.

287 See Abigail C. Moncrieff, *Cost-Benefit Federalism: Reconciling Collective Action Federalism and Libertarian Federalism in the Obamacare Litigation and Beyond*, 38 AM. J. L. & MED. 288, 304–05 (2012) (noting size affects informational asymmetries).

288 See Glover, *supra* note 2, at 1155.

regarding underpayment of wages or nonpayment of overtime.”²⁸⁹ However, unlawful behavior in the realm of consumer finance may not be as obvious to individual users “who are looking at a single credit card statement” and therefore are less able to identify “practices like predatory lending or the charging of usurious interest rates.”²⁹⁰

Private individuals’ access to information may also depend on certain background principles of law that exist outside the regulatory scheme.²⁹¹ For example, litigants in U.S. courts can obtain a great deal of information from both parties and third parties through the discovery process.²⁹² Although judicial discovery was not created with regulatory litigation in mind, the device can be used to facilitate private enforcement of public laws in the United States.²⁹³

The situation is very different in the European Union. Not only is the scope of discovery in litigation much narrower (to the extent the concept of pre-trial production of documents and information even exists), but most litigants are required to have their evidence in hand prior to filing their lawsuits.²⁹⁴ Because private individuals based in the European Union have far less access to information as a result of the litigation process, they may be unable to utilize regulatory litigation as effectively as parties suing in U.S. courts.²⁹⁵ Notably, the Resolution has already recommended against the adoption of any

289 *Id.* at 1184; see Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, § 16, 52 Stat. 1060, 1069 (codified at 29 U.S.C. § 216 (2006)). This would support the decision not to allow parties to waive their rights to collective action in Fair Labor Standards Act (FLSA) suits. See *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011) (holding the right to proceed collectively under the FLSA cannot be waived).

290 Glover, *supra* note 2, at 1182.

291 See *supra* notes 169–170 and accompanying text.

292 See FED. R. CIV. P. 26; Stephenson, *supra* note 284, at 1428–29, 1447–53 (considering judicial informational disadvantages). Generous rules regarding notice pleading eliminate the need for plaintiffs to have evidence of their allegations at the time of filing, although recent Supreme Court decisions have tightened the pleading standard in the United States. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT’L & COMP. L. REV. 1, 3–8 (2011) (comparing pleading standards inside and outside the U.S.).

293 See Nagareda, *supra* note 10, at 13.

294 See Dodson & Klebba, *supra* note 292, at 7–8. Of all the European Member States, only England recognizes a right to discovery similar to that used in the U.S., although even then, the scope of disclosure is construed much more narrowly than in the United States. See S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 501–03, 522–23 (2010).

295 See Nagareda, *supra* note 10, at 2.

special measures that might increase access to evidence in cases involving cross-border collective redress, stating that:

[C]ollective claimants must not be in a better position than individual claimants with regard to access to evidence from the defendant, and each claimant must provide evidence for his claim; an obligation to disclose documents to the claimants (“discovery”) is mostly unknown in Europe and must not form part of the horizontal framework.²⁹⁶

c. Capture

Third, private forms of relief may be necessary in cases where “public regulatory bodies are potentially subject to capture by well-capitalized or politically influential interest groups.”²⁹⁷ While the compromises necessary in the political process suggest that no one interest group will ever entirely capture a particular agency, “the disproportionate influence of well-organized interest groups is disturbing” to a number of commentators in the field.²⁹⁸ Certainly industry groups were seen to have asserted a great deal of political pressure on the question of collective redress in Europe during the public consultation process undertaken by the European Commission prior to the adoption of the Resolution.²⁹⁹

Interestingly, some public choice theorists suggest that courts are now subject to the same concerns about “capture” of special interests as other public institutions.³⁰⁰ This phenomenon may perhaps be most apparent in cases heard in the U.S. Supreme Court, given that many of the same interest groups that are active in legislative lobbying

296 Resolution, *supra* note 20, ¶ 20.

297 Glover, *supra* note 2, at 1155.

298 Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 43 (1991); see Glover, *supra* note 2, at 1204.

299 See *Public Consultation: Towards a Coherent European Approach to Collective Redress*, EUROPEAN COMMISSION, DIRECTORATE-GENERAL JUSTICE, http://ec.europa.eu/justice/news/consulting_public/news_consulting_0054_en.htm (last visited Oct. 6, 2012) (containing approximately 19,000 submissions made as part of the European Commission’s public consultation on collective redress); Valguarnera, *supra* note 19, at 1–2.

300 See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1322–23 (1999); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1069 (1997). *But see* Andrew P. Morriss & Craig Allen Nard, *Institutional Choice & Interest Groups in the Development of American Patent Law*, 19 SUP. CT. ECON. REV. 143, 217–18 (2011) (arguing “courts and Congress each present interest groups with different costs and benefits,” and in certain conditions seeking a federal court opinion is “significantly less” costly than lobbying Congress for a statutory change).

now undertake judicial “lobbying” through use of the amicus process.³⁰¹

Nevertheless, many commentators take the view that regulatory litigation is preferred over more traditional means of regulation precisely because judges are not subject to capture.³⁰² Other observers go even further, suggesting that class and collective relief expands democratic opportunities because “class actions may increase the political expression of larger groups” that are disadvantaged during the traditional lobbying and legislative process.³⁰³ Other experts suggest that “the threat of private actions can increase the expected probability that a punishment will be imposed relative to a purely public regime.”³⁰⁴

Focusing the regulatory analysis on functionally based criteria such as the availability of resources, informational advantages, and the possibility of capture provides useful benefits to lawmakers in both the United States and Europe.³⁰⁵ Not only do these types of operational considerations provide useful information for states considering the role of bottom-up regulatory litigation in their own domestic systems, they constitute a neutral means of comparing the usefulness of regulatory litigation across jurisdictional lines.³⁰⁶ Therefore, as the European Union works to develop its coherent approach to cross-border collective redress, drafting authorities should be aware of the potentially heightened need for regulatory litigation in situations where state actors are either unwilling (because of capture) or unable (because of insufficient resources or informational disadvantages) to engage in public forms of regulatory litigation.³⁰⁷ However, it

301 See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490–91, 1505–07 (2008) (discussing the strategy and success rate of the U.S. Chamber of Commerce, a non-profit advocacy group formed by corporate interests to promote a pro-business agenda at the Supreme Court).

302 See Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1155–57 (2003); see also Cassone & Ramello, *supra* note 86, at 223 (suggesting that that “[c]lass action can thus re-establish the alignment between public and individual interests where there are no credible alternatives”).

303 Sophie Harnay & Alain Marciano, *Seeking Rents Through Class Actions and Legislative Lobbying: A Comparison*, 32 EUR. J.L. & ECON. 293, 303 (2011).

304 Reza Rajabiun, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States*, 8 J. COMP. L. & ECON. 187, 200 (2012).

305 See Michaels, *supra* note 40, at 342, 357.

306 See *id.*

307 When public bodies fail to provide a sufficient level of regulation through traditional or litigation-oriented means, the levels of legal injury will rise. If private forms of bilateral litigation are not enough to address the injuries in question

remains to be seen whether the procedures proposed in the Resolution are likely to result in some form of regulatory litigation.³⁰⁸ This issue is considered in the next Part.³⁰⁹

IV. REGULATORY LITIGATION IN EUROPE

A. *Current Forms of Regulatory Litigation*

Applying the analysis outlined in Part III to issues of European law, it appears likely that the European Union has already adopted a top-down form of regulatory litigation, which “allows the government to address risks that have already come to pass.”³¹⁰ Indeed, the European regulation on passengers’ rights seems to fall firmly within the definition of this type of procedure.³¹¹

The more difficult question is whether the European Union has adopted or is adopting a form of bottom-up regulatory litigation as a result of its coherent European plan for cross-border collective relief.³¹² This is an intriguing question, for although there is some evidence suggesting that European authorities consider some of the individual Member States’ existing collective redress schemes to be regulatory in nature,³¹³ there has been little public discussion thus far about whether and to what extent European authorities intend or expect the new inter-European form of collective redress to do the same.³¹⁴

(because of unanticipated procedural risks), then regulatory litigation may be appropriate. See *supra* notes 202–206 and accompanying text.

308 See Resolution, *supra* note 20. Although some commentators take the view that regulatory litigation requires intent on the part of the litigants or judge, it is also possible to achieve an unintended regulatory effect. See Dari-Mattiacci & De Geest, *supra* note 37, at 377; Luff, *supra* note 8, at 113; Russell, *supra* note 34, at 151 n.47.

309 See *infra* Part IV.

310 Luff, *supra* note 8, at 113.

311 See Regulation on Passengers’ Rights, *supra* note 142; see also *supra* notes 142–144 and accompanying text (exploring European regulation of passenger rights as an example of top-down regulatory litigation).

312 See Resolution, *supra* note 20; Luff, *supra* note 8, at 113.

313 See Directorate General, *supra* note 19, at 6 (stating that “[m]arket outcomes may be efficiently corrected by government or courts provided that access information and organisation are facilitated and kept at minimum cost to avoid creating externalities” (emphasis omitted)); see also *id.* at 7 (suggesting that “[a]nother response to market failure or government failure may be judicial intervention”).

314 For example, the European Parliament’s own-initiative report is somewhat ambiguous in this regard. See Lehne Report, *supra* note 21, ¶ 4 (“[A]ction is needed at EU level in order to improve the current EU regulatory framework so as to allow victims of infringements of EU law to be compensated for the damage they sustain and thus contribute to consumer confidence and smoother functioning of the inter-

While commentators have considered the issue, their opinions are somewhat inconsistent. For example, some observers believe:

that European regulatory styles are converging, but not on a system of adversarial legalism, as the Americanization literature suggests. Rather, European systems are converging on a regulatory process that combines tough, legalistic administrative enforcement of government rules, extensive public pressure on industry actors to self-regulate, and low levels of litigation³¹⁵

Other experts take the view that some European forms of collective redress “comprise[] claims that are essentially regulatory in character, enabling collective action to defend the collective rights of consumers in specified circumstances.”³¹⁶

One reason for these differing perspectives may relate to the fact that the law on the books does not necessarily reflect the law in practice.³¹⁷ Although there are numerous pieces of European legislation providing for collective redress,³¹⁸ those devices are neither well known nor well used.³¹⁹ Therefore, a formalist analysis might suggest one level of support for bottom-up regulatory litigation while a functional analysis showed another.³²⁰

While it would be possible to conduct a retrospective review of the various types of collective redress that are currently available under European law to determine whether any of those devices constitute bottom-up regulatory litigation, that exercise seems somewhat futile in light of the scale of reform proposed by the Resolution.³²¹ Therefore, the following analysis focuses on whether and to what extent the Resolution contemplates the creation of a bottom-up form

nal market.”); *see also id.* ¶ 9 (noting “that there are gaps in the existing regulatory framework” and stressing “the added value of a coherent EU action for the establishment of a common framework in the field of collective redress to address the shortcomings and lack of effectiveness of the existing EU legal instruments, the diversity of situations at national level, the potential evolution and reforms of existing national collective redress systems or the introduction of collective redress systems in Member States where such instruments do not yet exist”). However, it may be that the European Commission will undertake a full regulatory analysis in its forthcoming impact report. *See* Resolution, *supra* note 20, ¶ 4.

315 Bignami, *supra* note 5, at 412 (referring to the new European style as “cooperative legalism”).

316 Hodges, *Europeanization*, *supra* note 35, at 115.

317 *See* Michaels, *supra* note 40, at 342 (discussing methodology of functionalism).

318 *See supra* note 20.

319 *See* Resolution, *supra* note 20, ¶ G.

320 *See* Michaels, *supra* note 40, at 342.

321 *See* Resolution, *supra* note 20; *see also supra* note 17 (listing forms of collective redress).

of regulatory litigation, based on two separate factors: the enunciated purposes of the Resolution and the proposed procedures.³²² The first of these elements will identify any regulatory effects that are intended by the European Parliament while the second will pinpoint any unintended regulatory effects as well as the extent to which the proposed procedures are likely to fulfill the European Parliament's stated objectives.³²³

B. *The Resolution—Enunciated Purposes*

1. Compensatory and Efficiency-Related Rationales

On first glance, the Resolution might appear to be more concerned with compensation and efficiency than with regulation, based on statements indicating that “victims of unlawful practices – citizens and companies alike – must be able to claim compensation for their individual loss or damage suffered, in particular in the case of scattered and dispersed damages, where the cost risk might not be proportionate to the damages suffered.”³²⁴ Other provisions state that “bundling claims in a single collective redress procedure, or allowing such a claim to be brought by a representative entity or body acting in the public interest, could simplify the process and reduce costs for the parties involved.”³²⁵ Similar language notes that while “public enforcement is essential to implement the provisions of the Treaties, . . . fully achieve the goals of the EU and . . . ensure the enforcement of EU competition law,”³²⁶ “public enforcement to stop infringements and impose fines does not of itself enable consumers to be compensated for damage suffered.”³²⁷

322 See Resolution, *supra* note 20.

323 Although the type of intent necessary for bottom-up regulatory litigation involves that of the judge or the litigants rather than that of the legislature or executive, it is nevertheless useful to consider whether and to what extent European authorities appear to be contemplating the use of regulatory litigation as a matter of institutional design. See Luff, *supra* note 8, at 113–14; see also Strong, Regulatory Arbitration, *supra* note 150 (discussing legislative intent in regulatory litigation and arbitration).

324 Resolution, *supra* note 20, ¶ 1; see also *id.* ¶ E (noting collective redress is appropriate because individual consumers “often face significant barriers in terms of accessibility, effectiveness and affordability owing to sometimes high litigation costs, potential psychological costs, complex and lengthy procedures, and lack of information on the available means of redress”).

325 *Id.* ¶ K; see also *id.* ¶¶ 20, 22 (regarding representative bodies).

326 *Id.* ¶ 6.

327 *Id.* ¶ J.

These statements clearly indicate that the European Parliament is promoting a form of cross-border collective redress because such measures constitute an effective means of addressing certain types of large-scale legal injuries.³²⁸ In so doing, the European Parliament upholds the principles enunciated in national, international, and European law requiring parties to have recourse to an effective remedy.³²⁹ However, the right to an effective remedy can be justified on both regulatory and non-regulatory grounds.³³⁰ Therefore, the mere adoption of collective procedures as a means of providing an effective remedy does not necessarily lead to the conclusion that the collective mechanisms proposed in the Resolution are meant to operate as a form of bottom-up regulation.³³¹ More must be shown before that conclusion can be reached.

2. Public Regulatory Rationales

A second set of statements found in the Resolution are regulatory in nature, but only to the extent that those provisions are meant to establish a legal or factual justification for European intervention (i.e., regulation) in the area of cross-border collective redress.³³² Rather than describing how collective redress might provide some type of regulatory effect, these statements discuss issues such as the principles of subsidiarity and proportionality (which identify the legal parameters within which European authorities must act),³³³ “the integration of European markets,”³³⁴ and the fragmented and incomplete nature of national and European legislation concerning collective redress.³³⁵

Because these references are meant only to demonstrate that European authorities are acting in a manner that is consistent with their powers under the relevant treaties, it is not surprising that these

328 See *id.* ¶¶ E, J–K, 1, 6, 20, 22.

329 See *supra* notes 242–45 and accompanying text.

330 See *supra* notes 242–245 and accompanying text. Furthermore, a particular mechanism can simultaneously fulfill compensatory and regulatory aims; there is no need for one function to exclude the other. See HENSLER ET AL., *supra* note 113, at 121–22; MULHERON, *supra* note 9, at 63, 66; Burch, *supra* note 113, at 74–76; Luff, Memphis, *supra* note 246, at 74.

331 See *supra* notes 187–88 and accompanying text.

332 See Resolution, *supra* note 20, ¶¶ H–J, 4, 6. The Resolution also notes that seventy-nine percent of European consumers support the adoption of a collective redress mechanism. See *id.* ¶ D.

333 *Id.* ¶¶ M, 4. European authorities are only authorized to act in certain areas as a matter of fundamental European law. One such area of competence involves the operation of the internal market. See TFEU, *supra* note 38, arts. 3, 5.

334 Resolution, *supra* note 20, ¶ H; see also *id.* ¶¶ I–J, 4, 6.

335 See *id.* ¶¶ H–I, L, 15.

provisions do not appear sufficient to suggest that the Resolution is introducing a form of bottom-up regulatory litigation into European law.³³⁶ Instead, the necessary language must be found elsewhere.

3. Private Regulatory Rationales

As it turns out, there is a third set of statements that appears to suggest that the European Union is intending to adopt a form of bottom-up regulatory litigation as a matter of institutional design. For example, at one point the Resolution indicates that “in some Member States the overall performance of the existing consumer redress and enforcement tools designed at EU level is not deemed satisfactory, or such mechanisms are not sufficiently well known, which results in their limited use.”³³⁷ This reference to “enforcement tools” appears to indicate that something more than mere compensation or efficiency is at work.³³⁸ Indeed, that statement seems to suggest that private litigation is being used to enforce public laws, either through statutory design (as in top-down regulatory litigation) or through the provision of remedies (as in bottom-up regulatory litigation).³³⁹

Additional evidence of regulatory intent is seen in statements that “when a group of citizens are victims of the same infringement, individual lawsuits may not constitute an effective means of stopping unlawful practices or obtaining compensation, in particular if the individual loss is small in comparison with the litigation costs.”³⁴⁰ While this language mentions compensatory and efficiency-oriented aims, the reference to “stopping unlawful practices” appears to suggest a desire to deter certain types of future behavior.³⁴¹ This suggests the intention to manage risk through litigation, a hallmark of regulatory litigation.³⁴²

Finally, and perhaps most conclusively, the Resolution indicates that “national and European authorities play a pivotal role in the enforcement of EU law, and private enforcement should only supplement, but not replace, public enforcement.”³⁴³ Additional language

336 See *id.* ¶¶ D, H–J, L, 4, 6, 15; Luff, *supra* note 8, at 75, 113–14.

337 Resolution, *supra* note 20, ¶ G; see also *id.* ¶ 3 (welcoming the “efforts of Member States to strengthen the rights of victims of unlawful behavior by introducing or planning to introduce legislation aimed at facilitating redress”).

338 *Id.* ¶ G.

339 See Luff, *supra* note 8, at 113–14.

340 Resolution, *supra* note 20, ¶ F.

341 *Id.*

342 Luff, *supra* note 8, at 113.

343 Resolution, *supra* note 20, ¶ I.

mentions the “need to improve injunctive relief remedies”³⁴⁴ so as to protect “both the individual interest and the public interest.”³⁴⁵ These references to the public interest and the role of private litigation as a supplement to public means of regulatory enforcement again suggest an intention to adopt regulatory litigation as a matter of institutional design, since those two elements are central to the common understanding of regulatory litigation.³⁴⁶ Therefore, the Resolution appears to reflect a clear and significant shift away from the traditional perception that European jurisdictions do not engage in regulatory litigation.³⁴⁷

C. *The Resolution—Proposed Procedures*

One of the aims of this Article is to determine whether and to what extent the procedures outlined in the Resolution will allow an effective form of regulatory litigation to develop in the European Union.³⁴⁸ Full analysis of this issue is impossible, since the Resolution does not describe the final procedures that will be used to create a coherent European approach to cross-border collective redress.³⁴⁹ However, the European Parliament has made a number of preliminary suggestions in this regard, and it is possible and indeed helpful to evaluate the efficacy of these initial proposals, since that will provide practical assistance to European authorities charged with creating a final set of procedures.³⁵⁰

Although the European Union, as a second-generation user of collective redress mechanisms, is perfectly placed to learn from the

344 *Id.* ¶ 12.

345 *Id.* ¶ 13; *see also id.* ¶ 23 (regarding injunctive relief).

346 *See Glover, supra* note 2, at 1140, 1145–46.

347 *See Resolution, supra* note 20; *see also supra* note 3 and accompanying text (noting the perception that European nations prefer formal to private regulation).

348 *See Resolution, supra* note 20; *see also supra* note 33 and accompanying text.

349 Instead, the European Parliament has asked the European Commission to conduct an impact assessment that demonstrates “action is needed at EU level in order to improve the current EU regulatory framework so as to allow victims of infringements of EU law to be compensated for the damage they sustain and thus contribute to consumer confidence and smoother functioning of the internal market.” *Resolution, supra* note 20, ¶ 4; *see also TFEU, supra* note 38, art. 294 (detailing the ordinary legislative procedure); *Resolution, supra* note 20, ¶ 29 (indicating “that the European Parliament must be involved . . . in any legislative initiative in the field of collective redress”).

350 The European legislative process is still in the very early stages of development, with a significant amount of opportunity for future development. *See Resolution, supra* note 20, ¶ 29; *see also TFEU, supra* note 38, art. 294 (outlining the ordinary legislative procedure).

mistakes from other legal systems, it is possible to overcompensate for the errors of others.³⁵¹ Indeed, this may be what is happening in the European Union, since it quickly becomes apparent that the Resolution's approach to cross-border collective redress is more reactive than proactive, with the clear intention being "that Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions."³⁵² Not only are many of the procedures framed in negative, rather than positive, terms, but the document focuses almost entirely on issues that are hotly debated in the United States rather than on developments that arise under the law of the European Union or the individual Member States.³⁵³

The Resolution's procedural proposals include several different elements.³⁵⁴ First and foremost, the European Parliament indicates that "the European approach to collective redress must be founded on the opt-in principle," a feature that clearly renounces U.S.-style opt-out class actions.³⁵⁵ Other facets of the Resolution also demonstrate a rejection of U.S. principles and the abusive litigation culture that is commonly associated with the U.S. approach to mass claims.³⁵⁶ Therefore, the Resolution requires members of the collective to be identified prior to the bringing of the claim, creates a procedure to allow a judge to conduct a preliminary analysis on admissibility, and allows for retention of the individual right to assert one's claim.³⁵⁷ Concerns about background principles of American law are also

351 See Francis E. McGovern, *Second-Generation Dispute System Design Issues in Managing Settlements*, 24 OHIO ST. J. ON DISP. RESOL. 53, 53 (2008) ("Second-generation learning can benefit as much from understanding why designs fail as it can from understanding why they succeed.").

352 Resolution, *supra* note 20, ¶ 2; see also *id.* ¶ 9 (citing evidence that "collective redress mechanisms available within the EU have not generated disproportionate economic consequences"); Directorate General, *supra* note 19, at 9 (concerning benchmarks regarding collective redress mechanisms).

353 See Resolution, *supra* note 20, ¶ 20; see *supra* notes 14, 34 and accompanying text.

354 See Resolution, *supra* note 20.

355 *Id.* ¶ 20.

356 See *id.* ¶ 2; see also Bignami, *supra* note 5, at 460 (noting European nations have resisted Americanization and tended towards a model of cooperative legalism); Hodges, *Europeanization*, *supra* note 35, at 115; Valguarnera, *supra* note 19, at 3, 19–21 (comparing the manner in which American and European market regulation impacts the legal system and propensity for litigation).

357 See Resolution, *supra* note 20, ¶ 20. The emphasis on the need to protect the individual right to assert one's claim is particularly interesting because of certain difficulties involving European rules of civil procedure. See Strong, *Brussels I*, *supra* note 30; Strong, *Quo Vadis*, *supra* note 34.

apparent in prohibitions on contingency fees, production of documents (discovery), and punitive damages.³⁵⁸ The Resolution also rejects the U.S. procedural approach to attorneys' fees by explicitly retaining the European-derived loser-pays principle.³⁵⁹

This is not to say that the Resolution does not include some elements that are reminiscent of U.S.-style class actions.³⁶⁰ For example, the Resolution recommends that any future form of cross-border collective redress operate on a horizontal, rather than sectoral (subject-specific), basis, as has been used by the European Union in the past.³⁶¹ While this move makes the proposed procedures more similar to the trans-substantive approach embodied in Rule 23 of the Federal Rules of Civil Procedure, the shift is considered appropriate because "collective redress mechanisms available within the EU have not generated disproportionate economic consequences."³⁶² This decision to adopt a horizontal approach is consistent with the example set by other legal systems that have expanded the availability of class or collective redress after an initially positive experience.³⁶³

European authorities are in a difficult position because "Europe seeks to strike a precarious balance—to facilitate the closure of related civil claims in the aggregate but, at the same time, not to 'enable' litigation."³⁶⁴ Numerous commentators have suggested that the European desire to avoid an abusive litigation culture could lead European authorities to design a system of collective redress that is so

358 See Resolution, *supra* note 20, ¶ 20. Many of the more abusive aspects of U.S. class actions do not arise as a result of the nature of class action procedures themselves but because of the interaction between those procedures and background principles of U.S. civil procedure. See Nagareda, *supra* note 10, at 2; Strong, *Mass Torts*, *supra* note 78.

359 See Resolution, *supra* note 20, ¶ 20 (stating "there can be no action without financial risk").

360 See *id.*

361 See *id.* ¶¶ 1, 15–24, 26; see also *supra* note 20.

362 Resolution, *supra* note 20, ¶ 9; see FED. R. CIV. P. 23. Some types of class or collective relief are available in the United States on a sectoral basis. See Fair Labor Standards Act of 1938, 29 U.S.C. §216 (2006).

363 See Hensler, *supra* note 15, at 15.

364 Nagareda, *supra* note 10, at 28; see also Hensler, *supra* note 15, at 22–25 (noting the need to balance incentives for group action against concerns about abusive litigation). However, "even the stated resistance to the 'litigation culture' of the United States on the part of European systems will not—indeed, cannot—immunize Europe from the kinds of structural dynamics exhibited by U.S.-style aggregate litigation." Nagareda, *supra* note 10, at 8. See also *infra* note 405 and accompanying text.

restrictive it curtails the effectiveness of large-scale litigation as a regulatory and compensatory device.³⁶⁵

Problems arise with respect to several of the proposed procedures, beginning with the recommendation that European authorities adopt an opt-in, rather than an opt-out, mechanism.³⁶⁶ This choice was driven by a number of factors, not the least of which was the fact that opt-out procedures are considered constitutionally suspect in several European Member States.³⁶⁷

While this decision is a perfectly legitimate exercise of public policy, the functional ramifications cannot be ignored. For example, opt-in procedures tend to result in smaller groups than opt-out procedures, thereby reducing the deterrent (i.e., regulatory) effect of the device in question.³⁶⁸ Although the number of plaintiffs is related to some extent to the preferred default principle (i.e., whether plaintiff inaction should work to increase or decrease class size), opt-in actions' smaller size is also the result of certain logistical difficulties associated with creating an opt-in class.³⁶⁹ European authorities developing the new cross-border collective redress mechanism need to be aware of these sorts of pragmatic concerns and, if necessary, address them so as ensure that any procedures that are adopted provide the desired regulatory effect free from any unintended distortions.³⁷⁰

365 See Hensler, *supra* note 15, at 22–23; Mulheron, Opt-Out, *supra* note 27, at 452–53; Sarah A. Westby, Note, *Associations to the Rescue: Reviving the Consumer Class Action in the United States and Italy*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 157, 195–96 (2011).

366 See Resolution, *supra* note 20, ¶ 20.

367 The problem is that opt-out procedures do not provide adequate assurance for some countries that all plaintiffs have consciously chosen to exercise their individual litigation rights in this way and at this time. See *In re Vivendi Universal*, No. 02 Civ. 5571 (RJH) (HBP), 2009 WL 855799, at *3 (S.D.N.Y. Mar. 31, 2009); Buxbaum, Securities, *supra* note 10, at 32–34; Monestier, *supra* note 11, at 38–39; Strong, *Quo Vadis*, *supra* note 34.

368 See Hensler, *supra* note 15, at 22–23; Mulheron, Opt-Out, *supra* note 27, at 452–53; Westby, *supra* note 365, at 195–96.

369 See Mulheron, Opt-Out, *supra* note 27, at 452–53. For example, “[o]pt-in systems could be burdensome and cost-intensive for consumer organisations which have to do preparatory work such as identifying consumers, establishing the facts of each case, as well as running the case and communicating with each plaintiff.” Green Paper on Consumer Collective Redress, *supra* note 20, ¶¶ 55–56; see also Mulheron, Opt-Out, *supra* note 27, at 451 (advocating for an opt-out alternative to effectuate collective redress within the European Member States).

370 See Mulheron, Opt-Out, *supra* note 27, at 452–53; see also *supra* notes 241–45 and accompanying text (discussing the procedural justice and efficacy of remedies in class claims).

A second potential problem involves the Resolution's prohibition on punitive and exemplary damages.³⁷¹ This provision is also based on constitutional concerns expressed by various Member States, in this case, regarding the way in which punitive damages blend private and public (i.e., criminal law) concerns.³⁷² Again, the decision to exclude punitive damages is entirely appropriate from a public policy perspective. However, numerous commentators have suggested that caps on damages in large-scale litigation reduce the regulatory value of class and collective actions, which suggests that European authorities should consider whether the coherent European approach to cross-border collective redress needs to adopt special mechanisms to counteract the reduction in regulatory effect caused by the limitation on damages.³⁷³

A third problem area involves funding mechanisms.³⁷⁴ Contingency fees are strongly disfavored in Europe, and although some Member States allow third party litigation funding to fill this particular gap, the availability of these alternative funding mechanisms varies from state to state.³⁷⁵ The Resolution takes no position on this issue, leaving the matter of funding to the individual Member States to decide.³⁷⁶ While European authorities and individual Member States are fully entitled to disallow third-party and contingency-fee funding as a matter of public policy, that decision must be made subject to the recognition that the absence of any special funding devices "poses huge challenges for the effective implementation of class actions" and other collective mechanisms.³⁷⁷ Indeed, some commentators have concluded that "partial compensation of victims and large profits for the class counsel, far from being a side-effect [of U.S. class litigation],

371 See Resolution, *supra* note 20, ¶ 20.

372 See Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301, 310–11 (2007); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 322, 324 n.22 (2003).

373 See Westby, *supra* note 365, at 195–96; see also Cassone & Ramello, *supra* note 86, at 222–23 (discussing the ramifications of class action remedies that only partially compensate victims); Hensler, *supra* note 15, at 22–25.

374 See Hensler, *supra* note 15, at 22–23; Hodges, ANNALS, *supra* note 20, at 343.

375 See Coffee, *supra* note 2, at 350–51; Hensler, *supra* note 15, at 22–23; Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 360–66 (2011); Robertson, *supra* note 140, at 161–62.

376 See Resolution, *supra* note 20, ¶ 20.

377 Hensler, *supra* note 15, at 23; see also Coffee, *supra* note 2, at 350–51 (suggesting third party litigation funding is not implausible and "its impact has already been felt").

are actually a necessary condition for reallocation of the costs and risks associated with the legal action.”³⁷⁸

The fourth and final issue involves fee-shifting provisions. Loser-pays rules can limit the ability of class and collective relief to act as a regulatory agent, since plaintiffs in a large-scale litigation often cannot afford to pay for respondents’ legal fees and costs and may therefore decide not to bring the case in the first place.³⁷⁹ As a result, some jurisdictions mitigate the harsh effect of the loser-pays principle in cases involving the public interest so as to avoid this chilling effect.³⁸⁰ The Resolution indicates that loser-pay rules should apply in cases involving cross-border collective redress, but does not discuss how those principles should be applied and whether any adjustments can or should be made to soften the effect of the loser-pays rule.³⁸¹ Again, this is an issue that European authorities should consider so as to make sure that the procedures they adopt have the desired regulatory effect.

D. Dispute Resolution Design Theory in the European Context

When considering how best to structure the European approach to cross-border collective redress, European authorities should take advantage of recent advances in dispute system design (DSD) theory so as to create “an effective, efficient, and fair dispute resolution process based upon the unique needs of a particular system.”³⁸² Although DSD originated in the field of alternative dispute resolution, DSD theory has subsequently been used in a wide variety of contexts, including international investment arbitration, international law, international mass claims processes, federalism, and the rule of law.³⁸³

378 Cassone & Ramello, *supra* note 86, at 222–23.

379 See Hensler, *supra* note 15, at 22–23; see also Strong, *Quo Vadis*, *supra* note 34.

380 See Hensler, *supra* note 15, at 22–23; Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT’L L. 125, 146–48 (2003); Strong, *De-Americanization*, *supra* note 202, at 517–22.

381 See Resolution, *supra* note 20, ¶ 20.

382 Franck, *supra* note 45, at 178.

383 See Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISP. RESOL. 67, 76–78 (2011); Cohen, *supra* note 253, at 54–60; Franck, *supra* note 45, at 177–78; Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171, 176 (2009) [hereinafter McGovern, DSD]; Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 23, 130 (2011); Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT’L L. 1, 46–47 (2010) (discussing areas where DSD has been used).

While a full DSD analysis is beyond the scope of this Article,³⁸⁴ the first step involves a functional analysis, which is consistent with the methodological approach that has been used herein.³⁸⁵

A DSD-oriented functional analysis yields “operational criteria” that can and should be considered in any effort to create or amend procedures associated with bottom-up regulatory litigation.³⁸⁶ These criteria “seek to better guide courts, legislatures, and administrative agencies in tailoring mechanisms of private enforcement to the particular exigencies of the regulatory scheme and the potential private-party regulator.”³⁸⁷ Therefore, when considering the proposals made in the Resolution and evaluating the confines of any future procedures regarding a coherent system of cross-border collective redress, European authorities should keep the following issues in mind.³⁸⁸

1. Allowing regulators with superior information to act first

First, “all things being equal, enforcement mechanisms should be entrusted to, and tailored to the needs of, the regulator with superior information relevant to potential wrongdoing.”³⁸⁹ The party chosen to act as regulator not only needs to have the best access to information, but also sufficient incentive to use that information in an appropriate manner.³⁹⁰

Public entities have an operational advantage, and thus should be the regulator of choice, in cases where the relevant information is particularly voluminous or complex or where a comparative analysis is

384 A full DSD analysis requires consideration of “at least eight initial variables,” including “function, metaphor, authority and funding, size and similarity, organization and implementation, eligibility criteria, damage methodology, and compensation.” McGovern, DSD, *supra* note 383, at 176.

385 See *supra* Part III.A.

386 Glover, *supra* note 2, at 1144; see also Luff, *supra* note 8, at 113–14 (describing how risk regulation through litigation effectively establishes a rule that “takes the form of the remedy that attempts to influence future behavior”); McGovern, DSD, *supra* note 383, 176 (describing how certain claims resolution processes can correct the “perceived slowness, expense, and detriment to individual claims” experienced in international arbitration); Spain, *supra* note 383, at 46–47 (“The use of DSD approaches has been considered in the context of resolving international investment disputes . . . and shows that they can increase effectiveness, efficiency, and legitimacy.”).

387 Glover, *supra* note 2, at 1144–45; see McGovern, DSD, *supra* note 383, 176; Spain, *supra* note 383, at 46–47.

388 See Resolution, *supra* note 20.

389 Glover, *supra* note 2, at 1144.

390 See *id.* at 1179–80.

necessary.³⁹¹ Conversely, private actors appear to be better regulators in situations where they are geographically proximate to the cause of the harm or where the wrongdoing is aimed toward private individuals or persons operating in a particular marketplace or similar type of closed environment.³⁹²

This analysis suggests that the horizontal approach advocated by the European Parliament may not be the best way to proceed, since it appears to contemplate the adoption of a single procedure applicable across multiple subject matter areas and therefore may not take into account differences relating to access to information.³⁹³ Indeed, this type of trans-substantive approach has caused some difficulties in the United States in the past.³⁹⁴ However, the Resolution suggests that some degree of procedural differentiation might be available in some cases, such as those involving follow-on actions in the competition law context.³⁹⁵ This appears to be a very good suggestion, given that follow-on actions equalize informational asymmetries by allowing private individuals to use information gleaned during a public enforcement process in an action for individual compensatory damages.³⁹⁶

This is not to say that European authorities should retain a sectoral approach, since the current system of subject matter-specific relief has already proven problematic.³⁹⁷ However, U.S. difficulties with a trans-substantive mechanism suggest that some sort of middle course should be charted.³⁹⁸

2. Avoiding over- and underdeterrence

Second, those who are involved in devising new forms of regulatory litigation need to ensure that they are creating the right regulatory balance. This could prove particularly difficult for European authorities charged with creating a coherent European approach to cross-border collective redress, given the various challenges associated

391 *See id.* at 1180.

392 *See id.* at 1191.

393 *See* Resolution, *supra* note 20, ¶ 20.

394 *See* Karayanni, *supra* note 113; Nagareda, *supra* note 10, at 7–9; Strong, *Mass Torts*, *supra* note 78 .

395 Resolution, *supra* note 20, ¶ 21.

396 *See* Russell, *supra* note 34, at 147, 174.

397 *See* Resolution, *supra* note 20, ¶ 15 (“[U]ncoordinated EU initiatives in the field of collective redress will result in a fragmentation of national procedural and damages laws, which will weaken and not strengthen access to justice within the EU”).

398 *See id.*

with transnational regulatory litigation.³⁹⁹ However, the task is facilitated somewhat by the fact that the European Union has the political authority to operate on a regional basis, at least in certain matters, and therefore is operating in a manner that is somewhat (though not completely) analogous to a national authority in a closed legal system.⁴⁰⁰

When considering the various procedures that could be used to establish a form of regulatory litigation, lawmakers must navigate between the Scylla and Charybdis of over- and underdeterrence. Overdeterrence can occur when the “mechanisms of private enforcement combine vis-à-vis the enforcement of a particular substantive law to create excessive or duplicative liability that is vastly disproportionate to the underlying harm.”⁴⁰¹ Numerous commentators have expressed concern about situations where “a particular mechanism of enforcement in a specific regulatory context too easily permits private parties to extra settlement values either for meritless claims or for conduct that the relevant legislature has not even deemed wrongful.”⁴⁰² Instead, “private enforcement mechanisms” need to “be integrated with other regulatory efforts” to provide “the complete range of remedies provided in a given scheme” while still being “tailored appropriately so as not to generate over-remediation.”⁴⁰³

Although opponents to regulatory litigation often focus on the issues associated with overregulation, underdeterrence can be as much of a problem as overdeterrence.⁴⁰⁴ Indeed, commentators have already expressed concern that the proposals outlined in the Resolu-

399 See *supra* Part II.

400 See Nagareda, *supra* note 10, at 13 (noting problems when “no formal political state has authority of a scope commensurate with modern global business”); see also *supra* note 333 and accompanying text (describing the legal parameters in which European authorities are authorized to act). Issues relating to the way in which the coherent European approach to cross-border collective redress will interact with the regulatory regimes of individual Member States are beyond the scope of this Article, although such concerns are important for the European authorities to consider.

401 Glover, *supra* note 2, at 1189.

402 *Id.*; see also Coffee, *supra* note 2, at 344 (acknowledging the difficulties associated with structuring adequate deterrence); Kovacic, *supra* note 89, at 1041 (noting the “U.S. style of private rights of action . . . pose[] serious risks of overdeterrence”); Luff, Memphis, *supra* note 246, at 81 (“Following administrative action with class actions, according to critics, yields only excessive penalties rather than increased deterrence.”).

403 Glover, *supra* note 2, at 1144.

404 See Buxbaum, Transnational, *supra* note 10, at 261.

tion are too severe and will lead to a collective redress mechanism that provides little, if any, regulatory value.⁴⁰⁵

When considering both over- and underdeterrence, it is important to do so from a functional perspective, since what may appear to be a useful mechanism on the books may not be used in practice with any frequency or efficiency.⁴⁰⁶ Indeed, this has been the problem with many of the collective redress mechanisms that are currently in place at the European and Member State level.⁴⁰⁷

3. Using private litigation to address harm not prevented through regulation

Finally, in some fields, “it is implausible to ask regulatory bodies to craft *ex ante* measures that anticipate all future harm or to close every potential compliance loophole, at least without drastically over-regulating on the front end so as to foreclose or discourage market entry in the first place.”⁴⁰⁸ Indeed, the need to address unanticipated risk is one of the primary reasons why bottom-up regulatory litigation developed in the first place.⁴⁰⁹ Several areas of particular operational concern have already been identified as likely candidates for regulatory litigation in the European Union.⁴¹⁰

It is often said that regulatory litigation is less appropriate in situations where legislative or administrative bodies have either refused to act or have provided for more traditional forms of regulation, since that demonstrates a desire to reserve those particular subject matter areas for public forms of regulation.⁴¹¹ However, some areas of regulatory activity “are characterized by historical levels of significant underenforcement, thus necessitating private enforcement mechanisms to achieve regulatory goals.”⁴¹² In those cases, private litigation

405 See Resolution, *supra* note 20, ¶ 20; see *supra* notes 364–73 and accompanying text.

406 See Michaels, *supra* note 40, at 342; see *supra* notes 317–19 and accompanying text.

407 See Resolution, *supra* note 20, ¶¶ G–H, 3; see *supra* notes 317–19 and accompanying text.

408 Glover, *supra* note 2, at 1202; see also *id.* at 1144 (suggesting that private enforcement mechanisms account for “*ex post* mechanisms to a regime’s comprehensive regulation of harm that is difficult to prevent *ex ante*”).

409 Luff, *supra* note 8, at 113; see *supra* notes 200–04 and accompanying text.

410 See *supra* Part III.B.2.

411 Luff, *supra* note 8, at 113.

412 Glover, *supra* note 2, at 1204; see also *id.* at 1144–45 (“[T]o the extent regulatory experience indicates a pattern of underenforcement by the public regulatory body, appropriate enforcement mechanisms should be allocated to private parties to ensure the proper achievement of regulatory goals.”).

may act as an appropriate supplement to public forms of regulation.⁴¹³

V. CONCLUSION

Regulatory litigation is an extremely controversial subject in both the United States and Europe.⁴¹⁴ While this Article has set aside the question of whether litigation constitutes the best means of regulating certain types of activity,⁴¹⁵ the discussion reflected herein demonstrates how difficult the concept of regulatory litigation is to define as a matter of both theory and practice.⁴¹⁶ Additional challenges arise in international and comparative contexts, since different countries not only adopt different views about the propriety of using litigation as a means of regulation, but also embrace different procedural means of effectuating those regulatory aims.⁴¹⁷

Although the term “regulatory litigation” encompasses a variety of different procedures, this Article has focused on those involving class and collective disputes.⁴¹⁸ While large-scale litigation techniques provide a useful response to many of the problems associated with mass legal injuries, such mechanisms can trigger both regulatory and procedural mismatches when used to address multinational harms.⁴¹⁹

Analysis of regulatory issues in the transnational context is becoming more and more challenging, given the wide and increasing diversity of large-scale litigation methods currently in use around the world.⁴²⁰ Longstanding antipathies towards U.S.-style class actions often create additional difficulties,⁴²¹ since the desire to distinguish new procedures from U.S. class actions can lead either to a failure to recognize the regulatory potential of a particular procedure (resulting in unintended distortions to the regulatory equilibrium) or to a con-

413 See *id.* at 1204.

414 See Bignami, *supra* note 5, at 413; Luff, *supra* note 8, at 113.

415 See *supra* note 46 and accompanying text.

416 See *supra* Part III.

417 See *supra* Part II.

418 See *supra* note 9 and accompanying text.

419 See *supra* Part II.

420 See THE ANNALS, *supra* note 15.

421 Sometimes the hostility toward U.S. class actions is based on faulty information. For example, many people oppose class actions because of concerns about punitive damages, contingency fees, and broad-ranging judicial discovery, even though those features are not actually part of the class or collective mechanism. See Baumgartner, *supra* note 372, at 310–11; Gidi, *supra* note 372, at 322, 324 n.22, 337. Similarly, class actions are commonly criticized as primarily involving frivolous claims, even though empirical evidence suggests that is not the case. See Burch, *supra* note 113, at 85; Russell, *supra* note 34, at 150–52.

scious effort to limit the availability of class or collective relief (resulting in a reduction in the regulatory value of the procedure, perhaps even to the vanishing point).⁴²²

Although a final conclusion cannot be reached until European authorities have determined the precise parameters of the proposed pan-European approach to cross-border collective redress, it appears highly likely that the procedures outlined in the Resolution will ultimately result in a new European form of bottom-up regulatory litigation.⁴²³ If this is indeed the case, then European authorities need to proceed carefully, since there are signs that several of the procedures that are currently being proposed may unintentionally diminish the regulatory effectiveness of the collective redress mechanisms that are to be adopted.⁴²⁴ Fortunately, there is still sufficient time to reverse any trend in that regard, since the drafting and consultation process has only just begun.⁴²⁵ While there are a number of ways of responding to the various concerns, this Article has provided several suggestions regarding the areas in which regulatory litigation might be most appropriate as a functional matter,⁴²⁶ as well as the ways in which the proposed procedures might be improved.⁴²⁷

Although this discussion has focused extensively on European developments, there is much that American audiences can gain from this analysis. For example, this Article provides U.S. courts with a better understanding of how the regulatory litigation process works in the United States and other countries, thus facilitating judicial analyses regarding domestic and global class actions. U.S. legislators also obtain a number of benefits, ranging from an alternative view on how group litigation might proceed in domestic cases (which might assist ongoing debates regarding class action reform in the United States) to additional insights into issues relating to transnational regulation (which might inspire increased attention to treaty negotiations in certain areas of law).

This Article also contains useful lessons for parties, courts, and lawmakers outside the United States and the European Union, since the analytical methods developed herein can be used in other jurisdictions to help improve the understanding of how regulatory litigation

422 See *supra* notes 36–38, 360–81, and accompanying text.

423 See Resolution, *supra* note 20; see also *supra* Part IV.

424 An ineffective mechanism would not only be harmful to the European Union's regulatory aims, it would also have an equally detrimental effect on any compensation that was to be provided under the scheme.

425 See *supra* note 38 and accompanying text.

426 See *supra* Part III.B.2.

427 See *supra* Part IV.D.

might operate at home and abroad. Even if some or even most states decide not to adopt regulatory litigation into its domestic legal system, it is useful to have an increased international appreciation for the possibilities and pitfalls of transnational regulatory litigation, since that might lead to international efforts to either increase the effectiveness of such lawsuits (which might occur through the adoption of formal or informal procedural protocols such as the ones currently being proposed by a number of North American and international organizations⁴²⁸) or decrease the need for such litigation (which might occur through increased use of formal transnational regulation).⁴²⁹ Either way, individuals, corporations, and states benefit through the reduction of various kinds of problems, including overdeterrence, underdeterrence, and regulatory inconsistencies, that can arise when courts and lawmakers do not fully understand how litigation can operate as an intended or unintended regulatory mechanism.⁴³⁰

Although the United States was once the only country in the world to allow large-scale litigation, as well as so-called “private” means of regulation, much has changed in recent years.⁴³¹ Numerous countries now allow for class or collective relief as a matter of national law, although it is unclear whether and to what extent those jurisdictions recognize the regulatory potential of the various mechanisms.⁴³² An equally large number of states have abandoned the traditional command and control model of regulation, at least in some regards, and are increasing the amount and types of private participation in regulatory endeavors.⁴³³ While the overlap between countries that have adopted class and collective redress and countries that have adopted a new governance approach to regulation may be only partial,⁴³⁴ the simultaneous appearance of these two phenomenon suggests a heightened if not urgent need for analysis of the ways in which various forms of class and collective relief constitute a form of regulatory litigation on both the domestic and international levels. Large-scale legal injuries are on the rise, within and between countries, and states must find

428 See *supra* note 62 and accompanying text.

429 See *supra* Part II.

430 See *supra* notes 36–38, 87–89, and accompanying text.

431 See *supra* notes 15–16 and accompanying text.

432 See MULHERON, *supra* note 9, at 63–66. This is not to say that every legal system should use class or collective relief as a regulatory mechanism, but countries should be aware of the regulatory potential of such devices so that any unintended regulatory effects do not arise to upset the regulatory equilibrium established by political actors.

433 See Zumbansen, *supra* note 4, at 201; see also Scott, *supra* note 1, at 651.

434 See *supra* notes 41–42 and accompanying text.

an effective and principled means of addressing those issues as a matter of both regulatory and procedural law.⁴³⁵ Hopefully, this Article provides a helpful first step in that regard.

435 *See supra* Part II.

