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## Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation

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**Cross-Border Collective Redress in the European Union:  
Constitutional Rights in the Face of the Brussels I Regulation**

**S.I. Strong**

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Cross-Border Collective Redress in the European Union:  
Constitutional Rights in the Face of the Brussels I Regulation

S.I. Strong\*

ABSTRACT

In February 2012, the European Parliament broke new legal ground when it adopted a revolutionary new resolution aimed at establishing a coherent European approach to cross-border collective redress. After years spent resisting any sort of mechanism that resembled U.S.-style class actions, the E.U. is now set to develop a unique form of regional collective relief that will offer European plaintiffs a range of previously unexplored legal opportunities. However, this new procedure will also give rise to a variety of entirely unprecedented challenges.

This Article considers the various issues associated with the creation of a system of collective relief in a region that has traditionally been hostile to the provision of large-scale private litigation. In so doing, the discussion focuses on the clash between certain constitutional rights relating to the ability of the plaintiff to choose the time, place and manner of bringing suit and the European Union's primary form of legislation concerning cross-border procedure, Council Regulation 44/2001 on jurisdiction and on recognition and enforcement of civil and commercial judgments, commonly known as the Brussels I Regulation.

Although this analysis is set within the confines of European Union law, it sheds new light on the U.S. class action debate by unbundling certain procedural rights held by the parties. Furthermore, many of the issues discussed in the Article may soon be directly relevant to U.S. parties if a number of proposed revisions to the Brussels I Regulation are enacted as expected.

Interest in international class and collective relief has never been higher among corporate, commercial, consumer and antitrust lawyers. This Article provides important insights into key European issues that give rise to significant ramifications for U.S. interests.

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## I. Introduction

At one point, the United States was the only jurisdiction in the world to offer private relief for large-scale legal injuries, primarily, though not exclusively, in the form of the class action.<sup>1</sup>

Although class actions have been severely criticized in the United States and elsewhere for much of their nearly fifty-year lifespan, the concept of collective redress has spread beyond U.S. borders and is now a fixture in numerous countries, including those in both the common and civil law traditions.<sup>2</sup>

Nowhere has this shift to private relief been more remarkable than in the European Union, where the comprehensive nature of the European regulatory regime once made private forms of collective relief appear both unnecessary and unlikely.<sup>3</sup> However, sixteen of the

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<sup>1</sup> See 28 U.S.C. §1407 (2012); FED. R. CIV. P. 23; Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, in 622 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 7, 8 (Deborah Hensler et al. eds, 2009) [hereinafter *The Annals*].

<sup>2</sup> See *The Annals*, *supra* note 1; see also Global Class Actions Exchange, available at <http://globalclassactions.stanford.edu/>. Individual procedures can vary radically. In addition to U.S.-style representative relief, which is marked by its use of a trans-substantive, opt-out mechanism that can be triggered by a single individual acting as a lead plaintiff, nations have adopted forms of collective relief that include other types of representative relief (including relief that 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), aggregate relief and settlement-only relief. See Hensler, *supra* note 1, at 13-17.

<sup>3</sup> The development of private forms of collective relief in Europe has been much commented-upon. See John C.L. Dixon, *The Res Judicata Effect in England of a US Class Action Settlement*, 46 INT'L & COMP. L.Q. 134 (1997); 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 CIVIL JUST. Q. 370, 370 (2010); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?* 52 VAND. L. REV. 179, 181 (2009); Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 44-45 (2011); 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) [hereinafter *Mulheron, Opt-Out*]; Rachael

twenty-seven European Member States currently offer some form of large-scale private relief at the national level,<sup>4</sup> while European law offers collective redress to residents of all Member States in a select number of subject matter areas, including consumer, competition, intellectual property and environmental law as well as in cases involving injunctive relief.<sup>5</sup>

Therefore, collective redress can now be considered a reality within the European Union.<sup>6</sup> However, the patchwork nature of regional legislation and the inconsistent availability and nature of national forms of collective relief have raised questions as to whether the current state

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Mulheron, *Recent Milestones in Class Action Reform in England: A Critique and A Proposal*, 127 L.Q. REV. 288, 289 (2011); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 21-25 (2009); 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 COMP. LIT. 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); S.I. Strong, *Regulatory Litigation in the European Union: Fact or Fantasy?* (forthcoming 2013); Gerhard Wagner, *Collective Redress – Categories of Loss and Legislative Options*, 127 L.Q. REV. 55, 55 (2011).

<sup>4</sup> See Directorate General for Internal Policies, Overview of Existing Collective Redress Schemes in EU Member States, IP/A/IMCO/NT/2011-16, 5 (July 2011), available at <http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf>; see also European Commission, 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), COM(2010) 748 Final, 2010/0383 (COD), Dec. 14, 2010, ¶3.1.1 [hereinafter Brussels I Recast]; The Annals, *supra* note 1; Jeremy Fleming, *Joining Forces Across Europe*, 87 EUR. LAW. 45, 45 (2009) (citing thirteen nations in 2009).

<sup>5</sup> See European Parliament and Council Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] O.J. L143/56; European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer practices [2005] O.J. L149/22 (Unfair Commercial Practices Directive); European Parliament and Council Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights [2004] O.J. L195/16; European Parliament and Council Directive 2000/35/EC of 29 June 2000 on combating late payments in commercial transactions [2005] O.J. L200/35; European Parliament and Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests [1998] O.J. L16/51; Council Directive 93/13/EEC of 5 Apr 1993 on unfair terms in consumer contracts [1993] O.J. L95/29; see also White Paper, *Damages Actions for Breach of the EC Antitrust Rules*, COM(2008)165 (2 April 2008); Green Paper, *Consumer Collective Redress*, COM(2008)794 (27 November 2008); European Parliament, Resolution of 2 February 2012 on "Towards a Coherent European Approach to Collective Redress," P7\_TA(2012)0021, ¶¶10-14 [hereinafter Resolution]; Christopher Hodges, *European Union Legislation*, in The Annals, *supra* note 1, at 78, 78-85.

<sup>6</sup> See Hodges, *supra* note 5, at 78-85.

of affairs is hindering the proper operation of the internal market.<sup>7</sup> These concerns led the European Commission to initiate a public consultation in February 2011 to help determine whether it was necessary, desirable and legally possible to create a coherent European approach to collective redress.<sup>8</sup>

As a result of the consultation process, which generated over 19,000 submissions,<sup>9</sup> and an own-initiative report,<sup>10</sup> the European Parliament adopted a resolution (Resolution) on February 2, 2012, calling on the European Council, the European Commission and the various Member States to work together towards creating a coherent European approach to cross-border collective redress.<sup>11</sup> By limiting its efforts to cross-border collective actions, the European Parliament was able to focus on the European Union's core concerns and legal competencies vis-à-vis the proper

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<sup>7</sup> See Resolution, *supra* note 5, ¶¶E-H, 6, 15.

<sup>8</sup> See European Commission (EC), Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011) 173, Feb. 4, 2011 [hereinafter Public Consultation]. In that document, the European Commission defined collective redress as:

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: 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.

*Id.* ¶7; see also Brussels I Recast, *supra* note 4, art. 37(3) (as amended) (including a somewhat different definition).

<sup>9</sup> The number of submissions was high, but not unprecedented. The submissions are available for public viewing. See European Commission, Directorate-General Justice, Public Consultation: Towards a Coherent European Approach to Collective Redress, [http://ec.europa.eu/justice/news/consulting\\_public/news\\_consulting\\_0054\\_en.htm](http://ec.europa.eu/justice/news/consulting_public/news_consulting_0054_en.htm) (last visited April 3, 2012).

<sup>10</sup> See Committee on Legal Affairs Report, 12 January 2012, "Towards a Coherent European Approach to Collective Redress," 2011/2089(INI).

<sup>11</sup> See Resolution, *supra* note 5, ¶30. The European Commission is scheduled to address these issues in late 2012. See European Commission, Commission Actions Expected to be Adopted 31/05/2012-31/12/2012, at 5, available at [http://ec.europa.eu/atwork/programmes/docs/forward\\_programming\\_2012.pdf](http://ec.europa.eu/atwork/programmes/docs/forward_programming_2012.pdf) (indicating the European Commission intends to produce a communication on general principles of the EU framework for collective redress by the fourth quarter of 2012).

workings of the internal market, thus respecting the principles of subsidiarity and proportionality reflected in the Treaty on the Functioning of the European Union (TFEU).<sup>12</sup>

In adopting the Resolution, the European Parliament is addressing a very real issue with significant financial and social ramifications.<sup>13</sup> Not only are collective legal injuries of increasing importance in the region, but a rising number of collective actions within the European Union include a cross-border element.<sup>14</sup> However, creating a coherent European-wide means of addressing these claims will not be easy, either in legal or political terms.<sup>15</sup> One of the most difficult tasks will be to find a means of resolving certain inherent tensions between fundamental or constitutional principles of justice on the one hand and the European Union's primary form of legislation concerning cross-border procedure, Council Regulation 44/2001 on jurisdiction and on recognition and enforcement of civil and commercial judgments, commonly known as the Brussels I Regulation, on the other.<sup>16</sup> However, "the application of the Brussels I

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<sup>12</sup> See Resolution, *supra* note 5, ¶¶M, 4, 6; Public Consultation, *supra* note 8, ¶14; see also Consolidated Version of the Treaty on European Union [2010] O.J. C83/01, art. 5 [hereinafter TFEU]. The TFEU amended and replaced the Treaty Establishing the European Community, one of the founding documents of the European Union. See *id.*; see also Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] O.J. C306/01, art. 1, Dec. 17, 2007.

<sup>13</sup> Unrecompensed collective injuries are valued at 0.4% of the European Union's annual gross domestic product (GDP). Furthermore, one in five European citizens will experience some sort of collective legal injury each year. Seventy-nine percent of consumers in the European Union want some form of collective redress. See Resolution, *supra* note 5, ¶D.

<sup>14</sup> In 2008, nearly ten percent of all collective redress claims in Europe included some sort of cross-border element. See Green Paper, *Consumer Collective Redress*, COM(2008)794 ¶15 (27 November 2008). However, that percentage might be as high as forty percent according to a problem study report. See Directorate General for Internal Policies, *supra* note 4, at 43.

<sup>15</sup> See Gail Orton, *When Lobbying DG COMP Makes Sense; European Competition Officials are Policy-Makers as Well as Regulators*, 7 COMP. L. INT'L 50, 52 (2011).

<sup>16</sup> See Council Regulation (EC) No. 44/2001 of 22 December 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]. Sometimes the provision is known as the "Brussels Regulation" or "Brussels Regulation I."

Regulation with regard to collective redress proceedings has so far been largely overlooked by the policymakers and English legal literature.”<sup>17</sup>

The interplay between constitutional or fundamental rights and the Brussels I Regulation gives rise to a number of potential problems, many of them quite complicated.<sup>18</sup> Although these concerns may appear to be relevant only to European parties, certain proposed revisions to the Brussels I Regulation would make much of this analysis equally applicable to parties involved in internationally oriented class actions based in the United States.<sup>19</sup> Furthermore, the type of deconstructionist constitutional analysis conducted herein may be applicable by analogy to some of the class-action debates currently underway in the United States.<sup>20</sup>

Given the complexity of this area of law, it is impossible to consider all the various issues simultaneously. Therefore, this Article will consider the matter from only one perspective, that

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<sup>17</sup> Mihail Danov, *The Brussels I Regulation: Cross-Border Collective Redress Proceedings and Judgments*, 5 J. PRIVATE INT’L L. 359, 360 (2010) [hereinafter Danov, Brussels I] (citations omitted). *But see* Burkhard Hess, *Cross-border Collective Litigation and the Regulation Brussels I*, 2 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX) 54 (2010); Horatia Muir Watt, *Brussels I and Aggregate Litigation*, 2 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX) 111 (2010).

<sup>18</sup> *See* Peter Barnett, *The Prevention of Abusive Cross-Border Re-Litigation*, 51 INT’L & COMP. L.Q. 943, 957 (2002); Fairgrieve & Howells, *supra* note 3, at 380; Christopher Hodges, *Collective Redress in Europe: The New Model*, 29 CIVIL JUST. Q. 370, 370 (2010); Mulheron, *Opt-Out*, *supra* note 3, at 426-27; Monestier, *supra* note 3, at 44-45; Rizzuto, *supra* note 3, at 29-30; S.I. Strong, *Cross-Border Collective Redress and Individual Participatory Rights: Quo Vadis?* under consideration by AM. J. COMP. L. (forthcoming 2013) [hereinafter Strong, Quo Vadis]; Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 332-69 (2011).

<sup>19</sup> *See infra* notes 89-91 and accompanying text. These particular revisions are likely to be adopted, unlike certain other proposals which are much more controversial. *See infra* notes 84 and accompanying text.

<sup>20</sup> *See infra* notes 44-47 and accompanying text. For example, one of the major issues currently under discussion in the United States involves the ability of a party to waive the right to proceed as a class. *See* AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011). This issue turns largely on the nature of the right to proceed as a class. *See* S.I. Strong, *Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT’L L. & COMM. REG. 921 (2012) [hereinafter Strong, Canada]. The current discussion could add much to that debate, since the analysis contained herein unbundles some of the procedural rights associated with collective relief in an entirely novel manner. *See also* Strong, Quo Vadis, *supra* note 18.



of individual plaintiffs who wish to proceed with their claims outside the collective context.<sup>21</sup> In so doing, the discussion not only identifies problems facing litigants under existing laws, it also considers various means of improving the current regime as well a number of proposed changes to the Brussels I framework that could affect cross-border collective relief both inside and outside the European Union.<sup>22</sup> The emphasis of the analysis is not only critically important given the European Parliament’s express pronouncements about the deference to be given to the plaintiff’s right to individual relief,<sup>23</sup> it addresses certain issues that are often overlooked in both the United States and Europe.<sup>24</sup>

The structure of the Article is as follows. First, Section II outlines the legal framework for the individual rights in question, based on various constitutional and fundamental principles of law. Next, Section III introduces the Brussels I Regulation and describes the ways in which the Regulation conflicts with the constitutional and fundamental rights of individual plaintiffs.<sup>25</sup> Finally, Section IV discusses the impact of the proposed changes to the Brussels I Regulation and provides various additional proposals for improving the provision of cross-border collective redress in Europe.<sup>26</sup>

## II. Plaintiffs’ Individual Constitutional and Fundamental Rights Relating to Collective Redress

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<sup>21</sup> Empirical studies have not calculated how often plaintiffs opt out of U.S. class actions and to what effect, although researchers have indicated it would be “interesting” to study that issue. *See* THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 79 (1996).

<sup>22</sup> *See* Brussels I Regulation, *supra* note 16; Brussels I Recast, *supra* note 4.

<sup>23</sup> *See* Resolution, *supra* note 5, ¶27.

<sup>24</sup> Although the concept of individual participatory rights in U.S. class actions has not been widely explored, given the longstanding belief that class counsel effectively controls the shape of the proceedings, an analytical shift seems to be taking place. *See infra* notes 97, 148 and accompanying text.

<sup>25</sup> *See* Brussels I Regulation, *supra* note 16.

<sup>26</sup> *See id.*

Traditionally, European procedural law has been considered “sub-constitutional,” in sharp contrast to the approach adopted in the United States.<sup>27</sup> However, there appears to be a trend among some European courts and commentators to begin viewing certain procedural issues from a constitutional or fundamental human rights perspective.<sup>28</sup>

Procedural rights exist at both the European and Member State level.<sup>29</sup> Thus, for example, article 47 of the Charter of Fundamental Rights of the European Union (Charter)<sup>30</sup> states in relevant part 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. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.<sup>31</sup>

This provision is obviously important to parties involved in large-scale legal actions, although the procedures used to provide an “effective remedy” may not be the same in a

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<sup>27</sup> See Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1009 (2006).

<sup>28</sup> 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 eds., 2012); see also Mauro Cappelletti, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International and Social Trends*, 25 STAN. L. REV. 651 (1973). But see J.J. Fawcett, *The Impact of Article 6(1) of the ECHR on Private International Law*, 56 INT’L & COMP. L.Q. 1, 33 (2007) (suggesting courts have tended to downplay the interplay between constitutional or other fundamental rights and the Brussels I Regulation). An interesting analysis involves the interplay between general principles of adjudicative fairness and enumerated procedural rights. See David M. Siegel, *Canadian Fundamental Justice and U.S. Due Process: Two Models for a Guarantee of Basic Adjudicative Fairness*, 37 GEO. WASH. INT’L L. REV. 1, 5-11 (2005).

<sup>29</sup> See Andrew Le Sueur, *Access to Justice Rights in the United Kingdom*, 5 EUR. H.R. L. REV. 457, 458 (2000).

<sup>30</sup> See Charter of Fundamental Rights of the European Union, 2000/C 364/1, Dec. 18, 2000 [hereinafter Charter]; Pieter Van Cleynenbreugel, *Judge-Made Standards of National Procedure in the Post-Lisbon Constitutional Framework*, 37 EUR. L. REV. 90, 94-95 (2012).

<sup>31</sup> Charter, *supra* note 30, art. 47.

collective dispute as in a bilateral one.<sup>32</sup> Indeed, in some cases, a collective redress mechanism may be the only means by which an effective remedy can be provided.<sup>33</sup>

At this point, it is impossible to say precisely what is meant by the Charter in this particular context, since there is no case law construing the term “an effective remedy” in the context of a collective suit.<sup>34</sup> Indeed, there are not many judicial decisions considering any aspect of the Charter at either the European or national levels, since the Charter existed in a sort of legal limbo from 2000, its initial adoption date, until 2007, when the Lisbon Treaty gave the Charter legal force and brought it into the European constitutional framework.<sup>35</sup> However, it is likely that procedural rights guaranteed under the Charter will become increasingly relevant to the development of law in this field, given that national provisions of law are subject to European scrutiny pursuant to article 19(1) of the Treaty on the Functioning of the European Union (TFEU).<sup>36</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> See Resolution, *supra* note 5, ¶F; *Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980) (“The 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.”); *Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated August 4, 2011, ¶545, available at <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf>.

<sup>34</sup> Charter, *supra* note 30, art. 47.

<sup>35</sup> See David Anderson & Cian C. Murphy, *The Charter of Fundamental Rights, in E.U. LAW AFTER LISBON* \*1 (Andrea Biondi et al., eds., 2012); see also *id.* at \*7 (discussing fundamental nature of Charter rights).

<sup>36</sup> See TFEU, *supra* note 12, art. 19(1); Cleynebreugel, *supra* note 30, at 95; see also Anderson & Murphy, *supra* note 35, at 8-20 (discussing the extent to which the Charter and European Convention on Human Rights can be relied upon in individual litigation). However, this view is not universally held, with some courts suggesting a limited role for the Charter in the protection of individual rights. See *ZZ v. Secretary of State for the Home Department*, [2011] EWCA Civ. 440 ¶16.

Of course, the rights guaranteed under the Charter are not absolute.<sup>37</sup> Instead, most – including the procedural rights subsumed within article 47 – are subject to the balancing test outlined in article 52(1), which states that:

[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.<sup>38</sup>

Again, this test has seldom been judicially discussed due to the unique procedural posture of the Charter.<sup>39</sup> Nevertheless, article 52(1) usefully identifies the various factors that are relevant to a balancing analysis under European law, even though the Charter does not make any suggestion as to the relative weight of the individual criteria.<sup>40</sup>

Balancing tests are always difficult to implement, particularly when both individual and public interests are at stake. Indeed, a number of commentators have taken the view that it is impossible to balance individual rights against the interests of the state,<sup>41</sup> typically because the elements on either side of the equation are said to be inherently incommensurable.<sup>42</sup> However,

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<sup>37</sup> See Charter, *supra* note 30.

<sup>38</sup> *Id.* art. 52(1).

<sup>39</sup> See *id.*; see also *supra* note 35 and accompanying text. However, it appears that in order to rely on the balancing test under article 52(1), there first must be a relevant right existing at national law. See *McB v. E*, Case C-400/10PPU, [2011] Fam. 364, ¶52 (ECJ, Oct. 5, 2010); see also *ZZ v. Secretary of State for the Home Department*, [2011] EWCA Civ. 440 ¶16 (noting that the Charter may not create any new substantive rights). That right would exist in the case of individual participatory rights. See *infra* note 64 and accompanying text.

<sup>40</sup> See Charter, *supra* note 30, art. 52(1).

<sup>41</sup> This claim is made in various areas of constitutional law. See J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 331 (1969); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 G.W. L. REV. 685, 736 (1992); Roscoe Pound (1943), *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 697 (1990).

<sup>42</sup> See Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 46, 51 (1989); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1748 (1995).

this is not to say that a balancing analysis cannot take place; indeed, it often must, as a practical matter.<sup>43</sup>

Cass Sunstein's approach to incommensurability and valuation in law may be useful here, since he recognizes the problems associated with weighing very different goods or interests.<sup>44</sup> Despite these differences, Sunstein believes that "choices can be made among incommensurable goods, and that such choices are subject to reasoned evaluation."<sup>45</sup> In making such choices, he suggests that "it is desirable to have a highly disaggregated picture of the consequences of legal rules, a picture that enables the judge to see the various goods at stake."<sup>46</sup> He would then place each situation into context, since he believes that decisions concerning incommensurable goods cannot be made in the abstract.<sup>47</sup>

The concept of deconstructing the various rights at issue is particularly useful in the realm of collective claims, since it helps identify whether the real issue is an item of fundamental or constitutional importance or whether it is merely an interest or policy.<sup>48</sup> Therefore, the analytical approach adopted this Article involves breaking apart the constituent elements of any particular rights claim so as to understand and subsequently weigh what is truly involved.<sup>49</sup> This analysis occurs in the context of a real-world discussion replicating the way that the rights analysis will play out in practice.<sup>50</sup> Furthermore, this Article takes the view that the best way to

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<sup>43</sup> See Le Sueur, *supra* note 29, at 473; Sunstein, *supra* note 42, at 1735-36; see also *infra* note 145 and accompanying text.

<sup>44</sup> See CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 81 (1997).

<sup>45</sup> *Id.*; see also Virgílio Afonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 OXFORD J. LEG. STUD. 273, 301 (2011).

<sup>46</sup> SUNSTEIN, *supra* note 44, at 99.

<sup>47</sup> See *id.* at 101. This approach is consistent with analysts who propose using scenarios to guide the development of international legal theory and practice. See William J. Aceves, *Predicting Chaos? Using Scenarios to Inform Theory and Guide Practice*, 45 VA. J. INT'L L. 585, 607-09 (2005).

<sup>48</sup> See Charter, *supra* note 30, art. 52(1).

<sup>49</sup> See *infra* notes 139-50 and accompanying text.

<sup>50</sup> See *infra* notes 113-17 and accompanying text.

balance the rights and interests at stake in any conflict is to compare similarly weighted factors – i.e., rights to rights – whenever possible, and to compare dissimilarly weighted factors – i.e., rights to “objectives of general interest” – only as a second-best technique.<sup>51</sup>

Although the Charter is an important source of fundamental rights under European law, there are other authorities available. One well-known and frequently used authority is the European Convention on Human Rights (ECHR).<sup>52</sup> Here, the relevant provisions are found in article 6(1), which reads, in part, that “[i]n the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”<sup>53</sup> Article 13 contains a related right, stating 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.”<sup>54</sup>

Article 6(1) has generated an extremely large amount of case law<sup>55</sup> due, in part, to the fact that the provision’s relatively general language encompasses a wide range of subsidiary protections, including access to justice, the right to a fair hearing and a number of other litigation-oriented rights.<sup>56</sup> While the various judicial decisions are useful in suggesting the type of elements that make up the right to a fair trial, the relatively novel nature of cross-border

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<sup>51</sup> See Charter, *supra* note 30, art. 52(1).

<sup>52</sup> European Convention on Human Rights, as amended by protocols nos. 11 and 14, effective 1 June 2010 [hereinafter ECHR], available at [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION\\_ENG\\_WEB.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf); Cleynenbreugel, *supra* note 30, at 95-96.

<sup>53</sup> ECHR, *supra* note 52, art. 6(1). For an analysis of article 6(1) in the context of opt-out collective actions, see Danov, Brussels I, *supra* note 17, at 378-80.

<sup>54</sup> *Id.* art. 13.

<sup>55</sup> Article 6(1) is cited in 7139 cases heard by the European Court of Human Rights. See ECHR, *supra* note 52, art. 6(1); European Court of Human Rights, Case Law Database [hereinafter ECHR Database], available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (searching under article “6-1”) (site last visited March 30, 2012).

<sup>56</sup> See ECHR Database, *supra* note 55 (expanding the keyword search under article 6). The claim of access to justice and the right of a fair trial both have several constituent elements. See Le Sueur, *supra* note 29, at 459-62.

collective relief in Europe means that none of these decisions have yet considered an article 6 challenge in the context of collective redress.<sup>57</sup> Nevertheless, certain principles apply by analogy and may be relied upon in domestic courts pursuant to article 19(1) of the TEFU and various provisions of national law.<sup>58</sup>

The standards identified by the Charter and the ECHR are very important to the inquiry being carried out in this Article, since much of the analysis revolves around the proper interpretation and application of a key piece of European legislation, namely the Brussels I Regulation.<sup>59</sup> However, European law is not the only source of legal rights available to parties residing in the European Union.<sup>60</sup> Indeed, most plaintiffs interested in protecting their procedural rights in cases involving cross-border collective relief are more likely to rely on constitutional provisions that exist as a matter of national law.<sup>61</sup> The most relevant principles for

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<sup>57</sup> Notably, any case law arising under the ECHR should apply to the Charter in roughly equal measure, since significant efforts were made to ensure that the Charter is interpreted in a manner consistent with the ECHR. *See* Anderson & Murphy, *supra* note 35, at 7 (noting also that Charter rights may in some cases be more extensive than those under the ECHR). One court that has recently addressed collective redress in the pan-European context is the Amsterdam Court of Appeal, which is enabled to rule on certain collective settlements pursuant to the Dutch Act on Collective Settlements of 2005 (WCAM). *See* Act on Collective Settlements 2005; Scor Holding (Switzerland) AG v. Liechtensteinische Landesbank AG, Amsterdam Court of Appeal, 17 Jan 2012 (often referring to the settlement itself as SCOR Holding (Switzerland) AG/Zurich Fin. Serv. Ltd. Stichting Converium Sec. Compensation Found./Vereniging VEBNVCVB)), informal English version available at <http://www.converiumsettlement.com/images/stories/documents/Decision%2017%20January%202012.pdf>; Ianika Tzankova & Daan Lunsigh Scheurleer, *The Netherlands, in The Annals*, *supra* note 1, at 149, 153-55.

<sup>58</sup> *See* TFEU, *supra* note 12, art. 19(1); Human Rights Act 1998 (Eng.), arts. 1, 4, *available at* <http://www.legislation.gov.uk/ukpga/1998/42/contents>; Cleynebreugel, *supra* note 30, at 95; *see also* Anderson & Murphy, *supra* note 35, at 8-20 (discussing the extent to which the Charter and ECHR can be relied upon in individual litigation).

<sup>59</sup> *See* Charter, *supra* note 30, art. 47 (referring to an effective remedy for violation of rights and freedoms guaranteed under E.U. law); ECHR, *supra* note 52, art. 6(1); Brussels I Regulation, *supra* note 16.

<sup>60</sup> *See* TFEU, *supra* note 12, art. 5.

<sup>61</sup> National law – including constitutional law – remains of vital importance within the European Union, pursuant to the principle of subsidiarity. *See id.*

the purposes of this Article involve what may be called “individual participatory rights,” which are best illustrated by certain debates relating to the opt-out representative actions.<sup>62</sup>

The essence of the plaintiff’s individual participatory right in the context of a collective dispute involves the ability to choose whether, when and where to bring a legal claim,<sup>63</sup> which in some European Member States rises to the level of a fundamental constitutional concern.<sup>64</sup> In these jurisdictions, opt-out approaches to collective redress are constitutionally suspect because they allow binding adjudication of individual rights without sufficient evidence of individual

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<sup>62</sup> Individual participatory rights can arise in the context of representative, aggregative and settlement-only relief, albeit in slightly different manners. See *Ashmore v. British Coal Corp.*, [1990] 2 Q.B. 338, 348-49 (C.A.) (Eng.) (involving individual participatory rights in the context of a test case); Strong, *Quo Vadis*, *supra* note 18 (discussing defendants’ and plaintiffs’ individual participatory rights); Wasserman, *supra* note 18, at 340-41; see *infra* note 134. Furthermore, individual participatory rights can be put into issue in settlement-only forms of collective relief, particularly those in the Netherlands, which has created an innovative form of large-scale opt-out relief as a result of the Collective Settlements Act 2005. See Tzankova & Scheurleer, *supra* note 57, at 149. (Notably, the Netherlands is currently considering certain proposals to expand its collective redress scheme beyond settlements only.) However, to the extent that issues involving individual participatory rights arise in the context of aggregative and settlement-only relief, the issues are essentially the same as in representative actions. Therefore, this Article will focus only on the latter for ease of discussion, except where noted.

<sup>63</sup> There may be a fourth element, the right to choose the means of litigating one’s rights. See Strong, *Quo Vadis*, *supra* note 18; see also *infra* notes 147-50 and accompanying text. Furthermore, each of these constituent elements may not be given equal weight. See *infra* notes 134-41 and accompanying text.

<sup>64</sup> See *In re Vivendi Universal*, No. 02 Civ. 5571, 2009 WL 855799, at \*3 (S.D.N.Y. Mar. 31, 2009) (noting the defendant argued that the U.S. court could not assume jurisdiction over French class members because a French court would hold class actions to be unconstitutional); Monestier, *supra* note 3, at 38-39 (discussing French, German and Swedish law); see also *infra* notes 147-50 and accompanying text (suggesting a fourth possible element relating to the manner of suit). In some states, this right is framed as a matter of public policy rather than as a constitutional issue. However, even that lower level of protection is still problematic, since Member States are allowed to refuse to recognize or enforce a judgment from another Member State on the basis of public policy. See Brussels I Regulation, *supra* note 16, 34(1); see also *infra* notes 172-84 and accompanying text. However, discussions about public policy give rise to questions about whether there is – or should be – a distinction between transnational (also known as international) public policy and domestic public policy in matters of international enforcement. See Adeline Chong, *Transnational Public Policy in Civil and Commercial Matters*, 128 L.Q. REV. 88, 90 (2012); Danov, Brussels I, *supra* note 17, at 390; Jerca Kramberger Škeri, *European Public Policy (With an Emphasis on Exequatur Proceedings)*, 7 J. PRIVATE INT’L L. 461 (2011). It is beyond the scope of this Article to consider the different ways that international and domestic public policy affect enforcement issues involving judicial forms of collective redress, although the author has considered that issue in the context of international class arbitration. See S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT’L L. 1, 67-73 (2008).



decisions to litigate.<sup>65</sup> The concern is that while the failure to opt out of the action may reflect a conscious decision on the part of the plaintiff to join the group action, it is also possible for certain people to become part of the class or collective unknowingly (because they did not receive adequate notice of the proceeding) or unwillingly (because they did not properly understand the opt-out process).<sup>66</sup>

Although opt-out procedures are associated most closely with U.S. class actions,<sup>67</sup> four European Member States (Denmark, Norway, Portugal and The Netherlands) have adopted domestic forms of collective redress that also provide some form of opt-out relief.<sup>68</sup> While there is no doubt that these four countries are perfectly entitled to adopt opt-out provisions as a matter of national law, significant difficulties can arise when such mechanisms are introduced into the cross-border context.<sup>69</sup>

Although new twists could arise in the context of the proposed coherent European approach,<sup>70</sup> the biggest problem has traditionally involved plaintiffs who did not opt out of the first action but who subsequently might wish to bring their own action in a second forum.<sup>71</sup> If the court in the second state believes that the constitutional rights of the complaining parties have not been respected in the first proceeding because opt-out mechanisms do not provide plaintiffs with a suitable means of exercising their individual participatory rights, then the court will not

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<sup>65</sup> Opt-out procedures of course purport to adjudicate the claims of certain represented persons unless those individuals affirmatively indicate that they do not want to be part of the plaintiff group. See Rachael Mulheron, *The Recognition, and Res Judicata Effect, of a United States Class Actions Judgment in England: A Rebuttal of Vivendi*, 75 MODERN L. REV. 180, 181-82.

<sup>66</sup> See Resolution, *supra* note 5, ¶20.

<sup>67</sup> See FED. R. CIV. P. 23; Hensler, *supra* note 1, at 16.

<sup>68</sup> See Directorate General for Internal Policies, *supra* note 4, at 38; Henrique Sousa Antunes, *Portugal*, in *The Annals*, *supra* note 1, at 161, 165; Camilla Bernt, *Norway*, in *The Annals*, *supra* note 1, at 220, 226; Tzankova & Scheurleer, *supra* note 57, at 154; Eric Werlauff, *Class Actions in Denmark*, in *The Annals*, *supra* note 1, at 202, 204.

<sup>69</sup> Provision of collective relief falls within the competence of the individual Member States. See Resolution, *supra* note 5, ¶¶M, 3, 7.

<sup>70</sup> See *infra* notes 80-215 and accompanying text.

<sup>71</sup> See Monestier, *supra* note 3, at 7; Wasserman, *supra* note 18, at 379-80.

give the first judgment *res judicata* effect and will allow the second suit to be brought.<sup>72</sup> This of course is highly problematic, since defendants value collective proceedings only to the extent that such actions can provide a judgment that has a preclusive effect against everyone who was part of the named collective.<sup>73</sup>

Defendants in U.S. courts have relied on the fundamental unfairness associated with allowing foreign plaintiffs to use an adverse decision against the defendant without permitting the defendant to reap the rewards of a successful defense as a means of blocking the creation of international class actions.<sup>74</sup> While defendants frame the issue as a defense right, the issue actually turns on the plaintiffs' individual participatory rights to an equal (or perhaps greater) extent.<sup>75</sup>

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<sup>72</sup> See Monestier, *supra* note 3, at 10-13, 31; Wasserman, *supra* note 18, at 380. Although the issue would appear to arise at the enforcement stage, some courts in the North America consider these matters anticipatorily, when the decision is being made whether to allow the claim to progress on a group basis. This technique causes significant problems. See Monestier, *supra* note 3, at 7; Strong, Canada, *supra* note 20; Wasserman, *supra* note 18, at 379-80. In the United States and Canada, the determination would be made at the class certification stage, although the procedure will be different under the laws of the various European Member States, since collective redress in Europe does not resemble the U.S. class action. See Monestier, *supra* note 3, at 7, 10-13, 31; Strong, Canada, *supra* note 20; Wasserman, *supra* note 18, at 379-80.

<sup>73</sup> See Nagareda, *supra* note 3, at 13. Notably, the Brussels I Regulation and European jurisprudence do not speak of a judgment having *res judicata* value, but instead focus on concepts of recognition and enforceability. See Mihail Danov, *EU Competition Law Enforcement: Is Brussels I Suited to Dealing With All the Challenges?* 61 INT'L & COMP. L.Q. 27, 46 (2012) [hereinafter Danov, Competition Law]; Wasserman, *supra* note 18, at 332-69; see *infra* notes 75 and accompanying text. However, parties seeking to establish the *res judicata* effect of a judgment from another Member State may be able to rely on principles of national law. See Barnett, *supra* note 18, at 957.

<sup>74</sup> See Monestier, *supra* note 3, at 31 (discussing lack of mutuality); see also George A. Bermann, *U.S. Class Actions and the "Global" Class*, 19 KAN. J. L & PUB. POL'Y 91, 98 (2009) (describing the "mirror image" criterion).

<sup>75</sup> The essence of these defense rights include the right to rely on a previously and properly adjudicated judgment, i.e., the right to establish claim or issue preclusion. See Barnett, *supra* note 18, at 944; see also Strong, Quo Vadis, *supra* note 18. This idea is subsumed within the notion of *res judicata*, which:

encapsulates a principle inherent in all judicial systems, namely that an earlier adjudication is conclusive in a second suit involving the same subject-matter and same legal bases. As such, the doctrine reflects two fundamental maxims of justice: that no person should be proceeded against twice in respect of the same subject-matter, and that it is in the interest of the state that repetitious and wasteful re-litigation be avoided.

The potential issues relating to the protection of individual participatory rights led the European Parliament to state in its February 2012 Resolution that any European-wide system of collective redress “must be founded on the opt-in principle.”<sup>76</sup> While the European Parliament’s decision may have been based on politics and policy as much as a concern about individual participatory rights,<sup>77</sup> the result is that any European system of cross-border collective redress will not include an opt-out element, consistent with the European intent not to adopt “a US-style class action system or any system which does not respect European legal traditions.”<sup>78</sup> However, in removing the possibility of a European-wide opt-out action, the European Parliament did not eliminate all problems associated with individual participatory rights, as discussed in the next section.<sup>79</sup>

### III. Rights Versus Regulations – The Role of the Brussels I Regulation in Cross-Border Collective Redress

One of the issues currently being considered in North American legal circles is whether the right to proceed as a class is substantive or procedural in nature.<sup>80</sup> The European Parliament comes down clearly on the procedural side of the debate, stating that “access to justice by means of collective redress comes within the sphere of procedural law.”<sup>81</sup> Thus, the Brussels I Regulation

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Barnett, *supra* note 18, at 944 (citations omitted).

<sup>76</sup> Resolution, *supra* note 5, ¶20.

<sup>77</sup> Some commentators have claimed that European authorities, including the European Court of Justice, are more concerned about upholding the Brussels I regime than about protecting human rights, including procedural rights of a constitutional and fundamental nature. See Fawcett, *supra* note 28, at 16, 27 (citing Maronier v. Larmer, [2002] EWCA Civ. 774, [2003] Q.B. 620).

<sup>78</sup> Resolution, *supra* note 5, ¶2.

<sup>79</sup> See Danov, Brussels I, *supra* note 17, at 392.

<sup>80</sup> The issue typically arises in the context of the discussion about waivers of class relief. See Strong, Canada, *supra* note 20.

<sup>81</sup> *Id.* ¶15. However, the distinction between procedure and substance is not always clear in other areas of European law, suggesting that this issue will likely be debated in the future. See Le Sueur, *supra* note 29, at 463-66.

“should be taken as a starting point for determining” issues relating to jurisdiction and enforcement of cross-border collective disputes.<sup>82</sup>

In some ways, the European Parliament’s pronouncements make further analysis easy, since they indicate that all forms of inter-European collective redress must be evaluated in light of the Brussels I Regulation.<sup>83</sup> However, as shall be seen, merely limiting the sources of relevant legal authority does not necessarily limit the nature or scope of issues to consider or the problems that can arise.

As a preliminary matter, it is important to consider whether it is worthwhile to focus on the current text of the Brussels I Regulation, given that the European Commission is in the process of revising that instrument.<sup>84</sup> Indeed, collective redress is one of the issues specifically mentioned as being of concern in the revision process.<sup>85</sup>

As it turns out, most of the amendments under discussion at the time of writing do not affect the analysis contained herein, not only because most of the proposals do not touch on those aspects of the Brussels I Regulation that are most problematic from the viewpoint of plaintiffs in collective disputes,<sup>86</sup> but also because the European Commission is taking a very cautious approach towards collective disputes and is explicitly retaining certain key aspects of

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<sup>82</sup> Resolution, *supra* note 5, ¶26; *see also* Brussels I Regulation, *supra* note 16.

<sup>83</sup> *See* Brussels I Regulation, *supra* note 16.

<sup>84</sup> *See* Brussels I Recast, *supra* note 4. The status of the revision process may be tracked at the Legislative Observatory, European Parliament, *available at* [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2010/0383\(COD\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2010/0383(COD)). The process thus far has been highly contentious as a result of certain provisions regarding the interaction between the Brussels I Regulation and arbitration. *See* Luca G. Radicati di Brozolo, *Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?* 7 J. PRIVATE INT’L L. 423 (2011).

<sup>85</sup> *See* Brussels I Recast, *supra* note 4, ¶2.

<sup>86</sup> *See infra* notes 255-56 and accompanying text.

the Brussels I Regulation in cases involving collective redress.<sup>87</sup> Therefore, this Article will focus on the Brussels I Regulation as currently enacted, although some consideration will be given to the proposed revisions in section IV, which discusses a more rights-oriented approach to cross-border collective redress in Europe.<sup>88</sup>

Notably, there is one aspect of the proposed revisions that bears immediate mention, since it is highly relevant to parties from the United States. According to the European Commission, one of the aims of the new instrument is the “[e]xtension of the jurisdiction rules of the Regulation to disputes involving third country defendants, including regulating the situations where the same issue is pending before a court inside and outside the EU.”<sup>89</sup> This is a significant development, since the Brussels I Regulation currently only applies when the defendant (or one of multiple necessary defendants) is domiciled in a European Member State.<sup>90</sup> If this new approach is adopted (and there is no reason to believe it will not), it could result in many of the issues raised in this Article applying to class actions that are based in the United States but that involve European parties.<sup>91</sup>

Having dispensed with the preliminaries, it is time now to turn to a substantive analysis of the Brussels I Regulation.<sup>92</sup> The purpose of the Regulation is to facilitate inter-European litigation in two different ways: first, by providing clear and predictable rules concerning which

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<sup>87</sup> See *id.* ¶3.1.1 (noting requirements relating to *exequatur* of collective disputes will not be subject to revision); see also Škeri, *supra* note 64 (discussing importance of *exequatur* proceedings and effect of proposed revisions).

<sup>88</sup> See Brussels I Regulation, *supra* note 16; Brussels I Recast, *supra* note 4, ¶23 (as amended).

<sup>89</sup> Brussels I Recast, *supra* note 4, ¶3.1; see also *id.* ¶¶1.2, 17 (as amended), art. 34 (as amended).

<sup>90</sup> See Brussels I Regulation, *supra* note 16, ¶8, art. 6(1); *Owusu v. Jackson*, Case C-281/02, [2005] Eur. Ct. Rep. I-1381 (ECJ), [2005] Q.B. 801 (Eng.).

<sup>91</sup> See Brussels I Recast, *supra* note 4, art. 34 (as amended).

<sup>92</sup> A detailed discussion of the general aspects of the Brussels I Regulation is beyond the scope of this Article, although additional reading is available. See Brussels I Regulation, *supra* note 16; ADRIAN BRIGGS & PETER REES, CIVIL JURISDICTION AND JUDGMENTS (2009); Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623, 659-64 (2012); Michaels, *supra* note 27, at 1038-52.

national court has jurisdiction over any particular matter, thereby reducing parallel proceedings and increasing legal certainty, and second, by providing an easy and predictable means of recognizing and enforcing judgments from other Member States.<sup>93</sup>

Although the Brussels I Regulation contemplates the possibility of some types of multiparty suits, the drafters did not design the instrument with large-scale collective actions in mind.<sup>94</sup> As such, parties can experience substantial difficulties when attempting to apply the Brussels I Regulation to an inter-European collective action.<sup>95</sup> Indeed, some plaintiffs could find their individual participatory rights effectively eviscerated.<sup>96</sup> Not only is this a significant problem, it appears to have been largely unanticipated by European legal authorities and commentators.<sup>97</sup>

The following discussion mirrors the structure of the Brussels I Regulation by first considering issues relating to jurisdiction before moving on to concerns regarding enforcement.<sup>98</sup>

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<sup>93</sup> See Brussels I Regulation, *supra* note 16, ¶¶11, 17. Further reading on the proposed provisions is available. See Richard Fentiman, *Brussels I and Third States: Future Imperfect?* 13 CAMBRIDGE Y.B. EUR. LEGAL STUD. 65 (2010-11).

<sup>94</sup> See *id.*; Danov, Brussels I, *supra* note 17, at 364; Zheng Sophia Tang, *Multiple Defendants in the European Jurisdiction Regulation*, 34 EUR. L. REV. 80, 82-83 (2009).

<sup>95</sup> See Brussels I Regulation, *supra* note 16; Danov, Brussels I, *supra* note 17, at 364.

<sup>96</sup> See *infra* notes 198-210 and accompanying text.

<sup>97</sup> Most analyses regarding the development of a European form of collective redress appear to have focused on ways of avoiding the problems inherent in U.S.-style class actions and therefore have focused on issues commonly discussed in U.S. commentary. See Resolution, *supra* note 5, ¶¶2, 16, 20. While protection of individual participatory rights has not traditionally been an issue that arises in the context of U.S.-style class actions, given the presumed constitutional propriety of opt-out actions, U.S. analysts suggest a change may be underway to take individual interests and preferences into account. See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009) (arguing that class actions are unconstitutional due to the way in which they encroach on liberal democratic autonomy values); John C. Massaro, *The Emerging Federal Class Action Brand*, 59 CLEV. ST. L. REV. 645, 667 (2011) (claiming the United States is “headed for a uniform federally-driven brand of class actions, and the expressly-stated purpose of this change is heightened protection of individual participatory rights”); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Walmart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 150-51 (2011); see also *infra* note 148.

<sup>98</sup> See Brussels I Regulation, *supra* note 16.

Although each item is addressed separately, there are areas of unavoidable overlap, since jurisdiction and enforcement are related concepts.

A. Jurisdictional concerns relating to cross-border collective redress

The European view of jurisdiction, as reflected in the Brussels I Regulation, is very different from that of the United States.<sup>99</sup> Thus, for example:

American law relies on broad standards of “fairness” and “reasonableness” that are applied in each individual case. This enables the judge to focus on achieving justice in individual cases even if it hampers predictability for the parties. European law, by contrast, uses hard and fast rules that are easier to apply and therefore more predictable. . . . In addition, U.S. law provides specific doctrines, such as forum non conveniens and antisuit injunctions, that give judges discretion to fine-tune and equilibrate jurisdiction in individual cases. European law is strongly opposed to both doctrines, as the European Court of Justice (ECJ) has recently made clear. Instead, Europeans consider jurisdictional bases non-discretionary, resolving the problem of parallel proceedings through a *lis alibi pendens* rule that uses a strict formal criterion of which court was seized of the matter first.<sup>100</sup>

Given this basic backdrop, it is unsurprising that the essential premise of the Brussels I Regulation is that jurisdiction is always proper in the defendant’s domicile.<sup>101</sup> However, there are times when the Brussels I Regulation authorizes jurisdiction elsewhere, but only so long as there is a “close link between the court and the action or in order to facilitate the sound administration of justice.”<sup>102</sup> Unlike the United States – which relies on the somewhat nebulous “minimum contacts” test of *International Shoe* and its progeny as a means of determining whether a particular court has personal jurisdiction – the Brussels I Regulation spells out each of the various heads of jurisdiction, which can range from special jurisdiction based on the type of

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<sup>99</sup> See Michaels, *supra* note 27, at 1007, 1039-52.

<sup>100</sup> *Id.* at 1008.

<sup>101</sup> See Brussels I Regulation, *supra* note 16, art. 2.

<sup>102</sup> See Brussels I Regulation, *supra* note 16, ¶12. For an analysis of the difficulties associated with jurisdiction in collective cases under various articles of the Brussels I Regulation, see Danov, Brussels I, *supra* note 17, at 365-78.

claim at issue<sup>103</sup> or jurisdiction based on the domicile of a co-defendant in any action involving several necessary co-defendants.<sup>104</sup> The Brussels I regime also makes special provision for jurisdiction in cases involving certain vulnerable parties, such as consumers, employees or insureds, allowing suit to be brought in a number of other places, including the domicile or habitual place of employment of the plaintiff.<sup>105</sup> Defendants may also consent to the jurisdiction of a particular court.<sup>106</sup>

Therefore, although the Brussels I Regulation was meant to simplify questions of jurisdiction, it is clear that several courts may simultaneously have jurisdiction over any particular matter.<sup>107</sup> Plaintiff are typically free to choose where they want to file suit, so long as the court has proper jurisdiction under the Regulation.<sup>108</sup> While defendants cannot object to the

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<sup>103</sup> For example, tort claims are amenable to suit where the harmful event occurred, while contract disputes may be brought in the place of performance. *See* Brussels I Regulation, *supra* note 16, art. 5.

<sup>104</sup> *See id.* art. 6(1); *see also* *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (plurality opinion) (agreeing that the two-part test in *International Shoe* should be applied but failing to provide a clear description of whether minimum contacts requires the defendant to “purposefully direct” its conduct toward the forum); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (requiring exercise of jurisdiction to be reasonable); *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408, 414-15 (1984) (distinguishing between specific and general jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (noting that “‘foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause;” instead, courts must find “purposeful contacts” and the “reasonable” exercise of jurisdiction); *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (noting that “due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it ‘such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice”’)” (citations omitted); *id.* at 319 (noting “the criteria” for adjudicating personal jurisdiction “cannot be simply mechanical or quantitative”). Article 6(1) has been a cause for concern for non-Europeans, since it has been used to assert jurisdiction over defendants from outside the European Union even in cases where the dispute would more logically be heard elsewhere. *See* Brussels I Regulation, *supra* note 16, art. 6(1); *Owusu v. Jackson*, Case C-281/02, [2005] Eur. Ct. Rep. I-1381 (ECJ), [2005] Q.B. 801 (Eng.); 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). Notably, jurisdiction over non-domiciliaries is set to expand under the proposed revisions to the Brussels I Regulation. *See* Brussels I Recast, *supra* note 4, ¶¶1.2, 3.1, 17 (as amended), art. 34 (as amended).

<sup>105</sup> *See* Brussels I Regulation, *supra* note 16, arts. 9(1), 16(1), 19(2); *see also id.* ¶13.

<sup>106</sup> *See id.* art. 24.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.* *But see id.* art. 22 (indicating some instances where certain courts have exclusive jurisdiction).



place where suit is brought other than on the basis of lack of jurisdiction,<sup>109</sup> the Brussels I Regulation includes a number of mechanisms intended to protect defendants from procedural improprieties, most notably the possibility of parallel suits.<sup>110</sup> The most useful provision in this regard is article 27, which prohibits the bringing of “the same cause of action . . . between the same parties” in the courts of a second Member State.<sup>111</sup>

Although the jurisdictional principles contained in the Brussels I Regulation appear relatively clear on their face, problems can arise in the collective context when one or more parties attempt to exercise their individual participatory rights to file an action separately from the collective proceeding.<sup>112</sup> These issues can best be described through use of a hypothetical.

Assume a collective dispute is filed in the court of Member State A, a court with jurisdiction over the matter. The action is the first to be filed with respect to the collective

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<sup>109</sup> The common law principle of *forum non conveniens* does not apply within the European Union. See *Owusu v. Jackson*, [2005] Eur. Ct. Rep. I-1381, ¶46. However, courts with “exclusive jurisdiction” over an action will be given priority in certain limited circumstances. See Brussels I Regulation, *supra* note 16, arts. 22, 25, 29. Otherwise, the court first seised of a matter will have priority to hear a matter, so long as jurisdiction is proper. See *id.* art. 30. Some commentators writing in the context of competition law have suggested that the first-seised rule could result in problems if the first court is somehow less than competent to handle these sorts of complex claims. See *Danov*, Brussels I, *supra* note 17, at 383-84; *Danov*, Competition Law, *supra* note 73, at 52-53. This issue could also arise in the context of collective suits, in that a small regional court may not be equipped to hear a complex inter-European collective claim. However, at this point defendants faced with this prospect have no recourse under European law.

<sup>110</sup> See Brussels I Regulation, *supra* note 16, ¶15. However, some commentators take the view that the Brussels I Regulation provides insufficient protection against vexatious, duplicative litigation. See *Barnett*, *supra* note 18, at 954-57.

<sup>111</sup> See Brussels I Regulation, *supra* note 16, art. 27. Under article 27(1), the second suit will be stayed until jurisdiction is properly established in the court first seised of the matter. See *id.* If and when jurisdiction is determined to be proper in the court first seised of the matter, the second court must decline jurisdiction under article 27(2). See *id.* While it is beyond the scope of this Article to consider issues relating to parallel proceedings in a European Member State and a third country, the proposed revisions to the Brussels I Regulation address this issue, which could be relevant in cases involving a U.S. class action and an inter-European collective dispute. See Brussels I Recast, *supra* note 4, ¶3.1.2; see also *Fentiman*, *supra* note 93, at 65.

<sup>112</sup> See Brussels I Regulation, *supra* note 16.

injury, resulting in the court in Member State A being the first seised of the matter.<sup>113</sup>

Furthermore, the domestic law of Member State A allows for cross-border collectives to be formed on an opt-in basis, consistent with the principles espoused by the European Parliament in the Resolution.<sup>114</sup> For the sake of argument, imagine that Member State A also allows national collective actions to be formed on an opt-out basis, consistent with the principle of subsidiarity.<sup>115</sup> Now assume that at least one person – Person A – domiciled in Member State A has properly opted out of the group action<sup>116</sup> and at least one person – Person B – domiciled in Member State B has declined to opt into the group action. Can Person A and/or Person B (i.e., the non-participating parties) bring suit in another court in the European Union that has jurisdiction over the matter under the Brussels I Regulation?<sup>117</sup> What factors should guide that decision and what constitutional concerns might arise as a result of this procedural choice?

First, it would not appear as if the second suit is barred under article 27 of the Brussels I Regulation, since Persons A and B are not parties to the collective proceeding in Member State A.<sup>118</sup> However, the question of whether non-participants to a collective action can or should be

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<sup>113</sup> See *id.* art. 30. Slightly different problems could arise if an individual action is filed before the collective suit, although those issues can be considered within the framework of the current analysis. See *infra* note 263 and accompanying text.

<sup>114</sup> See Resolution, *supra* note 5, ¶20.

<sup>115</sup> See *id.* ¶M, 4, 20.

<sup>116</sup> The same type of concern would arise if Member State A used an opt-in mechanism for domestic parties as well as foreign parties, and the person in Member State A chose not to opt into the collective proceeding.

<sup>117</sup> This Article sets aside the issue of whether Person A or B could subsequently assert an individual or collective claim outside the European Union against the same defendant as in the suit filed in Member State A or against another defendant, such as a corporate parent. However, given the attractive nature of the U.S. punitive damages scheme, this situation is likely to arise with some frequency.

<sup>118</sup> See Brussels I Regulation, *supra* note 16, art. 27; see also Danov, Brussels I, *supra* note 17, at 381; Danov, Competition Law, *supra* note 73, at 39 (discussing standard for article 27 under *Gubisch Maschinen-fabrik v Palumbo*, Case 144/86 [1987] ECR 4861, ¶14). Although at least one court has appeared to disregard the precise language of article 27 in the context of test cases, that seems a poor result, given the patent applicability of article 28. See Brussels I Regulation, *supra* note 16, arts. 27-28; see also *Ashmore v. British Coal Corp.*, [1990] 2 Q.B. 338, 348-49 (C.A.) (Eng.); Wasserman, *supra* note 18, at 340-41; see also *supra* note 134.

considered the same as parties to the collective suit is highly contentious and not yet thoroughly analyzed in Europe or elsewhere.<sup>119</sup> However, one commentator writing in the context of disputes seated in the United States and involving plaintiffs from outside the United States has noted that:

[a]lthough foreign laws authorizing group litigation are in an enormous state of flux right now, the current differences among group litigation vehicles suggest that foreign courts may hesitate before concluding that a class action and a follow-up action by an individual absent class member against the same defendant involve the “same parties” for purposes of claim preclusion.<sup>120</sup>

As difficult as this question may be in some jurisdictions, the European analysis may be simplified as a result of the European Parliament’s recent remark that “individual victims should remain free not to pursue the opt-in collective action but instead to seek redress individually.”<sup>121</sup>

Furthermore, reference to the full text of the governing document<sup>122</sup> – the Brussels I Regulation – strongly suggests that article 27 should be set aside in favor of article 28, which refers to situations “[w]here related actions are pending in the courts of different Member States.”<sup>123</sup> Two actions are considered to be “related” in cases “where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of

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<sup>119</sup> See Wasserman, *supra* note 18, at 345-46.

<sup>120</sup> *Id.* at 380.

<sup>121</sup> See Resolution, *supra* note 5, ¶27.

<sup>122</sup> U.S.-trained lawyers should take some care when anticipating how European legislation is or should be interpreted, since different countries apply different techniques to statutory interpretation. See Nathalie Hofmann, *Interpretation Rules and Good Faith as Obstacles to the UK’s Ratification of the CISG and to the Harmonization of Contract Law In Europe*, 22 PACE INT’L L. REV. 145, 154 (2010); Giulio Itzcovich, *The Interpretation of Community Law by the European Court of Justice*, 10 GERMAN L.J. 537, 549-57 (2009) (noting different means of interpreting European Union legislation).

<sup>123</sup> See Brussels I Regulation, *supra* note 16, art. 28(1). However, even if the litigants are considered “the same parties” such that article 27 applies, the analysis is largely the same as that conducted herein under article 28, since the two solutions under article 27 – stay or dismissal – are also contemplated under article 28. See *id.* arts. 27-28.

irreconcilable judgments resulting from separate proceedings.”<sup>124</sup> Because there is no requirement under article 28 that the parties in question be the same, this seems to be the provision that should apply to disputes involving plaintiffs such as Person A and Person B.<sup>125</sup>

Article 28 gives a court faced with a related action several procedural options.<sup>126</sup> First, under article 28(1), the second court may “stay its proceedings,” presumably pending the outcome of the first action.<sup>127</sup> Second, under article 28(2), the second court may decline jurisdiction “if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.”<sup>128</sup> Notably, the second court cannot technically order consolidation of the first and second action in the court of Member State A, since the second court has no power over judicial proceedings in another sovereign state.<sup>129</sup> However, an order of dismissal directed at the parties can be quite persuasive, since it effectively strips non-participating parties of an alternate forum in which the dispute can be heard and forces them to join the first suit if they wish to have their rights adjudicated.<sup>130</sup> Third, the second court could

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<sup>124</sup> *Id.* art. 28(3); *see also* Danov, Brussels I, *supra* note 17, at 382-83 (discussing irreconcilability in collective context); Tang, *supra* note 94, at 90-92 (discussing two strands of thought regarding irreconcilability).

<sup>125</sup> *See* Brussels I Regulation, *supra* note 16, art. 28(3); Danov, Competition Law, *supra* note 73, at 41.

<sup>126</sup> *See* Brussels I Regulation, *supra* note 16, art. 28.

<sup>127</sup> *Id.* art. 28(1).

<sup>128</sup> *Id.* art. 28(2). Consolidation in Member State A would in most cases appear permissible, since the very nature of the collective proceedings contemplates multiple parties.

<sup>129</sup> This principle is illustrated in jurisprudence concerning anti-suit injunctions, where courts in one state only have power over the parties, not over the foreign court. *See* Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 78 (3d Cir. 1994) (vacating an injunction because it “purport[ed] to place the court in the position of supervising the law enforcement activities of a foreign sovereign nation against its own citizens on its own soil”); Younis Bros. & Co. v. CIGNA Worldwide Ins. Co., 167 F. Supp. 2d 743, 745 (E.D. Pa. 2001) (noting that “numerous courts have recognized a district court’s power to issue an anti-suit injunction that enjoins litigants over which it has in personam jurisdiction from pursuing duplicative litigation in a foreign forum”); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 81-82 (2009).

<sup>130</sup> *See* Brussels I Regulation, *supra* note 16, art. 28(2).

allow the related action to proceed in parallel with the collective action in Member State A, although this alternative may be somewhat disfavored.<sup>131</sup>

As a policy matter, dismissal under article 28(2) seems the better course of action, since that approach preserves judicial resources and promotes consistency in judgments, something that is critically important in cross-border collective disputes.<sup>132</sup> However, by denying parties of their preferred forum, article 28(2) appears to violate the non-participating parties' fundamental and constitutional right to choose the time and place that they assert their legal claims.<sup>133</sup>

This is, of course, only a problem to the extent that individual participatory rights are defined as being absolute or very nearly so.<sup>134</sup> Initially, dismissal raises significant concerns, given statements from the European Parliament that “individual victims should remain free not

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<sup>131</sup> This third option is recognized only implicitly in language indicating that the second court's powers to stay or dismiss the second action are only discretionary. *See id.* art. 28. In many ways, it appears as if the drafters of the Brussels I Regulation did not contemplate this alternative being used much, if at all, based on the purpose and intent of the Brussels I Regulation to diminish the incidence of concurrent proceedings and the grammatical construction of article 28 itself. *See id.* ¶15, art. 28. For example, not only does article 28 fail to mention the possibility of parallel proceedings, it also implicitly suggests the existence of only two procedural alternatives by indicating that the second court “may stay” its proceedings and “may also . . . decline jurisdiction.” *Id.* art. 28. Commentators also suggest that proceedings are not to run in parallel, although certain unusual circumstances could create exceptions to the general rule. *See C.J.S. Knight, Complicating Simplicity: The “Court First Seised” and “Related Actions” in Article 28, 27 CIVIL JUST. Q. 454, 459-60 (2008).*

<sup>132</sup> *See* Brussels I Regulation, *supra* note 16, art. 28(2); *see also* Resolution, *supra* note 5, ¶5; Strong, *Quo Vadis*, *supra* note 18.

<sup>133</sup> *See* Brussels I Regulation, *supra* note 16 art. 28(2).

<sup>134</sup> *See* Le Sueur, *supra* note 29, at 469-74 (discussing extent to which certain rights have override powers or are subject to a margin of appreciation). Absolute or heightened protection of the individual right to sue might make more sense if individuals were, in fact, commonly exercising their abilities to do so. However, this is typically not the case in situations where collective redress would be appropriate. Furthermore, European jurisprudence has been able to recognize various “fake” conflicts regarding important procedural rights and to undertake any necessary balancing analyses. *See* Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 26 AM. U. INT'L L. REV. 183, 188-89 (2010). Interestingly, the English Court of Appeal denied the claim that individual participatory rights are absolute in a large-scale proceeding involving test cases. *See* *Ashmore v. British Coal Corp.*, [1990] 2 Q.B. 338, 348-49 (C.A.) (Eng.); Wasserman, *supra* note 18, at 340-41 (discussing claimant's view that she had an “absolute right” to sue in the absence of claim or issue preclusion or an agreement to be bound by the test cases). However, aggregative litigation schemes that rely on test cases are uniquely situated, in that the explicit intent is that the test cases should act as a precedent for later disputes. Therefore, *Ashmore* may not be relevant in all contexts. *See* *Ashmore*, [1990] 2 Q.B. at 348-49.

to pursue the opt-in collective action but instead to seek redress individually.”<sup>135</sup> While these rights were explicitly made subject to “the general rules of private international law laid down in the Brussels I, Rome I and Rome II regulations,” it would be very strange to recognize a right only to allow its immediate curtailment.<sup>136</sup>

The analysis is further complicated by the fact that article 28(2) of the Brussels I Regulation specifically allows courts to deny plaintiffs in bilateral disputes the right to choose the place where their claims will be heard by allowing courts to “decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.”<sup>137</sup> If the European Parliament’s remark about individual participatory rights is taken at face value, it might lead to parties to collective disputes being treated more deferentially under the Brussels I Regulation than parties to bilateral disputes.<sup>138</sup>

The answer to this dilemma may lie in the fact that article 28(2) does not affect the plaintiff’s decision as to whether and when to assert a claim.<sup>139</sup> Instead, it only affects the place where the claim may be brought. This suggests that it may be possible or indeed desirable to separate out the different elements of the individual participatory right in collective disputes, distinguishing in this instance between the right to decide whether and when to assert a claim on the one hand and the right to decide where to assert a claim on the other.<sup>140</sup> In so doing, it may be possible to determine whether one of these constituent rights is more important than the others

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<sup>135</sup> Resolution, *supra* note 5, ¶27.

<sup>136</sup> *Id.*

<sup>137</sup> See Brussels I Regulation, *supra* note 16, art. 28(2).

<sup>138</sup> See *id.*; Resolution, *supra* note 5, ¶27. This does not seem to be the European Parliament’s intent, given statements indicating that collective claimants are not to be given a preferential position in other regards, such as access to evidence. See *id.* ¶20.

<sup>139</sup> See Brussels I Regulation, *supra* note 16, art. 28(2).

<sup>140</sup> This type of unbundling approach reflects the analytical method suggested by Cass Sunstein. See SUNSTEIN, *supra* note 44, at 99.

and whether one of these sub-elements actually forms the indivisible core of what has heretofore been considered a single, unitary right.<sup>141</sup>

Given the language of article 28(2), it would appear that the right to decide where a claim may be brought can be made subject to a balancing analysis that takes into account a number of different factors.<sup>142</sup> Some of these elements are policy-based (for example, efficiency and the preservation of judicial resources) while others are more rights-based (for example, the right to avoid irreconcilable judgments, which would be a right accruing to the defendant as the common party in this situation).<sup>143</sup>

This type of deconstructionist analysis, which has not been considered before in the context of collective redress, is highly intriguing, since it makes the various factors to be considered more transparent.<sup>144</sup> Furthermore, it is consistent with the idea that:

[t]hough the rhetoric of “fundamental rights” is used to describe rights relating to access to justice, in practice the courts . . . have recognised that the rights are limited by utilitarian factors. Unlike many other fundamental rights (think of freedom of expression), rights about access to justice require public expenditure: they assume a functioning legal system with courts and (to an extent) provision of public funds to assist people finance [sic] litigation. In the light of this stark fact, no one can think of access to justice rights as absolute.<sup>145</sup>

Although declining jurisdiction under article 28(2) may make sense legally, it could cause problems politically, since it makes the suit in Member State A look very much like a mandatory collective action, something that is suspect as a matter of European policy.<sup>146</sup> This is intriguing, since individual plaintiffs are being told in both a mandatory collective action and an

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<sup>141</sup> *See id.*

<sup>142</sup> *See* Brussels I Regulation, *supra* note 16, art. 28(2).

<sup>143</sup> *See* Barnett, *supra* note 18, at 944; Strong, Quo Vadis, *supra* note 18.

<sup>144</sup> *See* SUNSTEIN, *supra* note 44, at 99.

<sup>145</sup> *Le Sueur*, *supra* note 29, at 473. The question, of course, is whether this sort of balancing analysis complies with the requirements of the Charter. *See* Charter, *supra* note 30, art. 52(1).

<sup>146</sup> *See* Brussels I Regulation, *supra* note 16, art. 28(2). While it is possible that the non-participating parties could find a third Member State with jurisdiction over their claims, there is no guarantee that this third court would not decline jurisdiction as well.

article 28(2) dismissal that they cannot pursue their claims in the place and manner of their choosing, based on concerns relating to expediency and the risk of irreconcilable judgments.<sup>147</sup> However, this additional element – “the manner of their choosing” – could be significant in this analysis and could distinguish dismissal of a bilateral suit under article 28(2) from dismissal of a suit related to a collective action, since some people may see something inherently different between proceeding as a member of a collective and proceeding as an individual.<sup>148</sup> As such, this new element could constitute sufficient means to defeat dismissal of a related action under article 28(2) of the Brussels I Regulation.<sup>149</sup> If so, then this additional factor – namely, the means by which a claim is asserted – could be considered to be as much of a fundamental constitutional right as the ability to choose whether and when to assert a claim, and thus perhaps should be added to the trio of existing elements that are normally viewed as making up the individual participatory right.<sup>150</sup>

At this point, it is unclear from the text of the Resolution whether the European Parliament wishes to protect only the right to proceed individually or whether the aim is simply to protect the right to proceed separately from the collective, which would include the right to bring a second collective action as well as an individual action.<sup>151</sup> While the answer to this

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<sup>147</sup> See *id.* art. 28(3).

<sup>148</sup> To some extent, issues regarding plaintiffs’ right to choose the manner of proceeding have been obscured in the legal literature due to the overarching perception, at least in the United States and Canada, that it is counsel that drives decisions about litigation tactics. See Jasminka Kalajdzic, *Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and the Class Action Praxis*, 49 OSGOODE HALL L.J. 1, 8, 10, 15-19 (2011); Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1948 (2011). However, the focus of this analysis may be changing. See *supra* note 97.

<sup>149</sup> See Brussels I Regulation, *supra* note 16, art. 28(2).

<sup>150</sup> See *supra* note 63 and accompanying text.

<sup>151</sup> For example, the Resolution notes that “individual victims should remain free not to pursue the opt-in collective action,” which suggests the right at issue involves the ability to proceed individually, but also notes the need to avoid “subsequent unnecessary individual or collective actions concerning the same infringement,” which suggests that subsequent collective actions – if necessary – would be permitted. Resolution, *supra* note 5, ¶¶20, 27. The propriety of a second collective action could depend on whether



question could be determinative of a number of issues, it is possible, even in the absence of an answer to this question, to consider the kinds of factors a court can or should take into account when deciding whether to dismiss an action under article 28(2) of the Brussels I Regulation in favor of a collective proceeding in another Member State.<sup>152</sup>

One important issue involves the matter of whether the second suit is individual or collective in nature. An individual suit would likely be considered more deferentially than a second collective suit, since the plaintiff asserting an individual claim would appear to be truly interested in asserting his or her individual participatory rights, however those rights are defined.<sup>153</sup> Furthermore, a second collective suit would likely be tainted by the perception that the plaintiffs were engaging in forum shopping or were bringing the case for strike suit purposes.<sup>154</sup> Neither of these tactics are welcome in a framework that attempts to “avoid[] excessive litigation and subsequent unnecessary individual or collective actions concerning the same infringement.”<sup>155</sup>

Nevertheless, there might be some circumstances where it would be appropriate to bring a second collective suit. For example, such an action might be justified if there are significant differences in the substantive or procedural law applicable to the two proceedings, since it might seem inequitable to force a party who has explicitly chosen not to opt into one lawsuit to become involved that proceeding even though it does not offer the same rights or remedies that are available in the plaintiff’s chosen forum.<sup>156</sup> Thus far, much of the focus has been on potential

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it is brought simultaneously with the first or subsequently. See Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 464-65 (2000).

<sup>152</sup> See Brussels I Regulation, *supra* note 16, art. 28(2).

<sup>153</sup> See Resolution, *supra* note 5, ¶26; see also Wasserman, *supra* note 18, at 380.

<sup>154</sup> See Resolution, *supra* note 5, ¶¶2, 26.

<sup>155</sup> *Id.* ¶20.

<sup>156</sup> For example, a court might find it relevant if Member State A only offered injunctive relief while Member State B offered compensatory relief. With sixteen different national systems of collective

differences in substantive law, with the Resolution recognizing the need to examine existing conflict-of-law rules to avoid problems associated with cross-border litigation.<sup>157</sup> However, no mention is made about conflict-of-laws issues relating to variations in procedural law,<sup>158</sup> even though procedural matters can have as much of an impact on the assertion of collective claims as substantive matters and the European Charter emphasizes the importance of an “effective remedy” at law.<sup>159</sup>

Another factor that may be relevant to the dismissal analysis under article 28(2) of the Brussels I Regulation involves the nationalities of the parties bringing the second suit.<sup>160</sup> Some courts may take the view that certain vulnerable parties (namely consumers, employees and insureds) have the right to pursue their claims in their domicile, regardless of whether a collective claim is pending in another Member State.<sup>161</sup> However, courts considering the strength of this argument will need to take into account the way in which a collective suit equalizes the power imbalance between plaintiffs and defendants, transforming parties that may

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redress currently established within the European Union, there is scope for significant variation in procedures. See Directorate General for Internal Policies, *supra* note 4, at 5; see also *id.* at 38 (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”).

<sup>157</sup> See Resolution, *supra* note 5, ¶27. Notably, some Member States take the view that a coherent European scheme of cross-border collective redress is only appropriate in cases where European law is already harmonized, since the conflict of laws issues would otherwise become too difficult to implement. See UK Response to EU Consultation on Collective Redress, ¶7, available at [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/uk\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/uk_en.pdf).

<sup>158</sup> The Resolution implicitly recognizes the problems associated with variations in national procedure. See *id.* ¶¶H, 4. Of course, the idea that a conflict-of-laws analysis may be necessary vis-à-vis cross-border collective procedures is relatively new. See S.I. Strong, *Mass Torts and Arbitration: Lessons From Abaclar v. Argentine Republic*, in UNCERTAINTY AND MASS TORT: CAUSATION AND PROOF \_\_\_ (forthcoming 2012) [hereinafter Strong, Mass Torts]; Strong, Canada, *supra* note 20.

<sup>159</sup> Charter, *supra* note 30, art. 47; see also Strong, Mass Torts, *supra* note 158; Strong, Canada, *supra* note 20.

<sup>160</sup> See Brussels I Regulation, *supra* note 16, art. 28(2).

<sup>161</sup> See *id.* arts. 9(1), 16(1), 19(2); see also *id.* ¶13.

have been considered individually vulnerable into a powerful collective entity.<sup>162</sup> It might also be relevant for courts to consider the extent to which arguments based on nationality give rise to concerns about non-discrimination and equal access to justice.<sup>163</sup>

Finally, some courts may find it relevant to consider whether relief as to one plaintiff provides relief as to all.<sup>164</sup> Certainly those issues have been considered sufficient to justify creation of a mandatory collective in other jurisdictions and might support dismissal of an action under article 28(2) of the Brussels I Regulation.<sup>165</sup>

As this discussion suggests, dismissal of an action under article 28(2) is problematic as a matter of constitutional and European law.<sup>166</sup> However, courts faced with an action that is related to an ongoing collective suit do not have to dismiss the second action under article 28 of the Brussels I Regulation.<sup>167</sup> Instead, they may decide to stay the second action pending the outcome of the first suit or possibly decide to proceed with the second suit in parallel to the first.<sup>168</sup> However, both of these options raise significant problems as a matter of constitutional and fundamental human rights law. These issues are considered in the following subsection in the context of enforcement.

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<sup>162</sup> See Strong, Canada, *supra* note 20; 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. \_\_\_ (forthcoming 2012).

<sup>163</sup> For example, a claim based on nationality might allow Person B, who was not domiciled in the place where the first collective action was brought, to bring an individual claim while Person A could not.

<sup>164</sup> This type of situation arises most frequently in cases involving injunctions. See FED. R. CIV. P. 23(b)(1); *see also id.* 23(b)(2).

<sup>165</sup> See Brussels I Regulation, *supra* note 16, art. 28(2); Le Sueur, *supra* note 29, at 469 (noting need for non-discrimination in national courts). Interestingly, some U.S. commentators hold that mandatory classes, including those created for injunctive relief, are unconstitutional. See REDISH, *supra* note 97; Alexandra D. Lahav, *Are Class Actions Unconstitutional?* 109 MICH. L. REV. 993, 998 (2011) (book review).

<sup>166</sup> See Brussels I Regulation, *supra* note 16, art. 28(2).

<sup>167</sup> See *id.*

<sup>168</sup> See *id.* art. 28; *see also supra* notes 126-31 and accompanying text.

B. Enforcement concerns relating to cross-border collective redress

Cross-border collective redress creates more than just jurisdictional concerns. Enforcement is also potentially problematic, even though the Brussels I Regulation is explicitly intended to create an easy and predictable means of recognizing and enforcing judgments rendered by courts in another Member State.<sup>169</sup> Although commentators from the United States often analogize the Brussels I Regulation to the Full Faith and Credit Clause of the U.S. Constitution, European experts see the procedures in a slightly different light.<sup>170</sup>

According to the Brussels I Regulation, judgments from one Member State may only be denied recognition or enforcement<sup>171</sup> in another Member State in one of a very few circumstances described in articles 34 or 35.<sup>172</sup> The best-known basis for non-recognition or enforcement involves judgments whose recognition would be “manifestly contrary to public policy in the Member State in which recognition is sought.”<sup>173</sup> This provision has been used to oppose the adoption of opt-out procedures in any European-wide system of collective redress,

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<sup>169</sup> See Brussels I Regulation, *supra* note 16, ¶17, arts. 33, 38, 53. In the absence of an international agreement such as the Brussels I Regulation, parties seeking recognition and enforcement of a foreign judgment have to rely on international comity, which is notoriously unpredictable. See *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895); GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 1009-18 (2007).

<sup>170</sup> See U.S. CONST., art. IV, §1; Brussels I Regulation, *supra* note 16; Barnett, *supra* note 18, at 956; Andrea M. Corcoran & Terry L. Hart, *The Regulation of Cross-Border Financial Services in the EU Internal Market*, 8 COLUM. J. EUR. L. 221, 257 n.130 (2002); Grossi, *supra* note 92, at 648 n.103.

<sup>171</sup> The distinction between “recognition” and “enforcement” of a judgment can occasionally cause confusion. “Recognition” of a foreign judgment gives the judgment the status of a national court judgment in that state. See Barnett, *supra* note 18, at 954. However, most parties want more than just recognition of a judgment; they want the court to use its coercive power to give effect to the terms of the judgment. In those cases, parties seek to have the judgment “enforced.” In some jurisdictions, it is necessary to complete the procedures necessary for recognition (*exequatur*) before proceeding to enforcement. See *id.* at 944-45. In other jurisdictions, it is possible to combine the two procedures. The proposed revisions to the Brussels I Regulation would do away with *exequatur* proceedings in cases other than collective proceedings. See Brussels I Recast, *supra* note 4, ¶3.1.1.

<sup>172</sup> See Brussels I Regulation, *supra* note 16, arts. 34-35.

<sup>173</sup> *Id.* art. 34(1); see also Danov, *Competition Law*, *supra* note 73, at 48-49 (discussing litigation rights in competition context and interplay with public policy exception under Brussels I Regulation).

based on the argument that some Member States view collectives based on opt-out jurisdiction as contrary to fundamental principles of constitutional law and hence to public policy.<sup>174</sup>

Interestingly, arguments stemming from the public policy exception seems to be based largely, if not exclusively, on practical concerns about whether parties who fail to opt out of a collective action have done so as a matter of conscious choice or as a result of errors in the notification process.<sup>175</sup> If that is indeed the true nature of the objection, then this type of public policy concern would appear to be entirely subsumed by article 34(2) of the Brussels I Regulation, which allows non-recognition in cases involving insufficient notice.<sup>176</sup> Since issues arising under article 34(2) can be resolved through adequate notice provisions, it would appear that many, if not all, constitutional and public policy objections to opt-out relief could also be met through processes ensuring proper notice.<sup>177</sup>

While this argument makes sense as a matter of logic, political opposition to opt-out relief is such that the European Parliament's decision to allow only opt-in actions in cross-border matters is unlikely to change.<sup>178</sup> However, the analysis does suggest that there are no blanket objections that can be made to opt-in actions under article 34(1) and (2), since the affirmative behavior required under opt-in procedures addresses both the constitutional concerns about individual participatory rights as well as public policy concerns about notice.<sup>179</sup>

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<sup>174</sup> See Monestier, *supra* note 3, at 38-39.

<sup>175</sup> See *supra* note 66 and accompanying text.

<sup>176</sup> See Brussels I Regulation, *supra* note 16, art. 34.

<sup>177</sup> See Jocelyn G. Delatre, *Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation*, 8 COMP. L. REV. 29, 52 (2011); see also *Tavoulaareas v. Tsavlis* (The Atlas Pride) [2006] EWHC 414, ¶39 (Comm.) (Eng.).

<sup>178</sup> See Resolution, *supra* note 5, ¶20.

<sup>179</sup> See Brussels I Regulation, *supra* note 16, art. 34.

Article 34 describes two other ways in which a collective judgment can fail to obtain recognition.<sup>180</sup> Both of these involve the possibility that the judgment whose recognition or enforcement is being sought is “irreconcilable” with a judgment of the enforcing court or the court of another Member State.<sup>181</sup> However, these two provisions explicitly state that the two judgments in question must be between “the same parties,” therefore running into the same problem that arose with respect to article 27, namely whether non-participants to a collective suit in one Member State who want to assert their rights separately (i.e., people like Person A and Person B) can be considered “the same parties” as parties to the collective proceeding.<sup>182</sup>

The analysis here is the same as it was previously, with the European Parliament’s statement in the Resolution concerning the protection of individual participatory rights suggesting that courts will be unable to conclude that the parties are the same, at least when the second suit involves an individual claim.<sup>183</sup> However, this leads to an interesting dilemma. If the non-participating parties are not identical with those in the collective suit, then neither article 34(3) nor article 34(4) can apply, thus requiring recognition and enforcement of the collective judgment even if it is inconsistent or even irreconcilable with a judgment in the second suit.<sup>184</sup>

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<sup>180</sup> *See id.* Grounds for non-recognition under article 35 are not relevant to this discussion. *See id.* art. 35.

<sup>181</sup> This includes irreconcilability with a judgment of the Member State where recognition and enforcement are currently being sought as well as a third Member State. *See id.* arts. 34(3), 34(4).

<sup>182</sup> *See id.* art. 34; *see also supra* notes 119-20 and accompanying text. This aspect of article 34 does not seem to be well-discussed judicially, with only a passing reference in the English case law. *See Tavoulareas v. Tsavlis (The Atlas Pride)* [2006] EWHC 414, ¶48 (Comm.) (Eng.); *see also Hess, supra* note 17, at 116 (noting this question is open).

<sup>183</sup> *See* Resolution, *supra* note 5, ¶27.

<sup>184</sup> *See* Brussels I Regulation, *supra* note 16, art. 34; Danov, Brussels I, *supra* note 17, at 393. One possible way to avoid this outcome would be to claim that irreconcilable judgments are contrary to public policy, even if they are not between the same parties, thus bringing the judgment under article 34(1). *See* Brussels I Regulation, *supra* note 16, art. 34(1). However, that approach seems somewhat disingenuous, given that the concept of individual participatory rights would appear to contemplate the possibility of inconsistent judgments but to set those concerns aside in order to prioritize the ability of an individual plaintiff to sue at the time, place and possibly manner of his or her choosing. Furthermore, the public policy exception is said to be used only in exceptional circumstances. *See* Danov, Brussels I, *supra* note 17, at 390.

This conclusion obviously has potentially significant repercussions for the defendant, since the lack of any grounds upon which to base an action for non-recognition means that most, if not all, collective suits will be enforced in other Member States.<sup>185</sup> Furthermore, this conclusion also has ramifications regarding the decision whether to stay a second action under article 28 of the Brussels I Regulation.<sup>186</sup>

The motivating factor underlying an article 28 stay appears to be legal consistency, in that staying the second suit pending the outcome of the first suit will allow the second suit to be decided in accordance with the principles outlined in the first suit.<sup>187</sup> This purpose is reflected in language permitting the court to consider a stay only in circumstances where there is a “risk of irreconcilable judgments resulting from separate proceedings.”<sup>188</sup> However, for that rationale to carry weight, there would need to be some sort of preclusive value attached to the first judgment,<sup>189</sup> even though there was no precise identity of parties.<sup>190</sup>

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<sup>185</sup> Of course, there could be individual grounds for non-recognition under article 34 (for example, lack of proper notice in that particular case), but there are no blanket objections that would apply. *See* Brussels I Regulation, *supra* note 16, art. 34.

<sup>186</sup> *See* Brussels I Regulation, *supra* note 16, art. 28; *see also supra* note 166-68. Although such issues are beyond the scope of this Article, questions arise as to the impact of article 34(4) on individual participatory rights of parties who have chosen not to proceed in the foreign collective action. *See* Brussels I Regulation, *supra* note 16, art. 34(4); *see also* Brussels I Recast, *supra* note 4, art. 34 (as amended). This could involve issues relating to a parallel class action seated in the United States.

<sup>187</sup> *See* Brussels I Regulation, *supra* note 16, art. 28.

<sup>188</sup> *Id.* art. 28(3).

<sup>189</sup> There are three basic types of preclusion. *See* Barnett, *supra* note 18, at 944. Any one of these three could be at issue in a case involving collective suits and individual participatory rights. However, the most likely type of preclusion that would be sought in a case involving a non-participating party would be issue preclusion. *See id.* at 949-51.

<sup>190</sup> *See* Brussels I Regulation, *supra* note 16, art. 28 (noting the actions are only “related”); *see also* Briggs & Rees, *supra* note 92, ¶726 (citing C-351/96 *Drourut Assurances SA v. CMI* [1998] ECR I-3075); Barnett, *supra* note 18, at 944 (noting the need for “the same parties (or their privies)”); K.R. Handley, *Res Judicata in the European Court*, L. Q. REV. 191 (2000). Enforcement of the first judgment, in whole or in part, would appear to be proper under article 48. *See id.* art. 48. However, this provision has not been discussed by the European Court of Justice, with only one case appearing to cite the provision’s statutory predecessor. *See* Van den Boogaard v. Laumen, Case C-220/95, ECR 1997 Page I-01147 (discussing article 42 in the Brussels Convention).

While that line of analysis makes sense as a matter of logic, it is problematic as a matter of law because the concept of preclusion is not addressed in the Brussels I Regulation.<sup>191</sup>

Instead, the document speaks only of recognition and enforcement, raising significant questions as to what effect a collective judgment that is recognized in another Member State would have on a subsequent related litigation.<sup>192</sup>

Given the Brussels I Regulation's silence on this matter, commentators have advised courts to turn to domestic law for guidance.<sup>193</sup> However, problems again arise, in this case due to the significant amount of national variation with respect to the concept of preclusion.<sup>194</sup> For example:

[i]n . . . England and Wales, the Netherlands, Spain, and the United States . . . judgments have issue preclusive effect. In . . . other countries, however – Germany, France, Romania, Sweden, and Switzerland – judgments have no issue preclusive effect. When coupled with the narrow definition of the claim for purposes of claim preclusion employed in these countries and the failure to accord settlements claim preclusive effect, this lack of issue preclusive effect may leave parties with a fair bit of room to relitigate matters already adjudicated by changing the theory upon which they sue or by seeking different relief.<sup>195</sup>

Although the analysis is highly unpredictable,<sup>196</sup> the outcome will nevertheless ultimately depend on:

the willingness (or not) of . . . European countries to bind persons who were not formally named as parties to the prior litigation. . . . European countries uniformly limit the claim preclusive effect of a judgment to the parties to the proceedings, but not all of them define the “parties to the proceedings” identically. All of the participating European countries [in a study conducted by the British Institute of

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<sup>191</sup> See Brussels I Regulation, *supra* note 16; see Strong, *Quo Vadis*, *supra* note 18 (discussing a number of problems relating to preclusion).

<sup>192</sup> See Barnett, *supra* note 18, at 945. The European understanding of the preclusive effects of a judgment is not the same as it is in the United States. See Wasserman, *supra* note 18, at 335-39.

<sup>193</sup> See Barnett, *supra* note 18, at 956.

<sup>194</sup> See *id.* at 953-57; Wasserman, *supra* note 18, at 344-45.

<sup>195</sup> Wasserman, *supra* note 18, at 344-45 (citations omitted) (considering a study conducted by the British Institute for International and Comparative Law (BIICL)); see also Barnett, *supra* note 18, at 953-57.

<sup>196</sup> Commentators agree that problems regarding preclusion will only increase in the future. See Barnett, *supra* note 18, at 945, 957; Wasserman, *supra* note 18, at 379.



International and Comparative Law, or BIICL] bind persons named as parties to the first action and their legal successors. Some countries also bind absentees if their interests were represented in the action. The BIICL Report notes that “[t]his may occur in the context of group and representative actions.”<sup>197</sup>

Courts considering these issues must conduct a rights analysis, weighing the pros and cons of each of the various possible outcomes.<sup>198</sup> For example, if a stay is imposed under article 28, but the collective judgment is given no preclusive value, then the parties to the second suit have only suffered a delay.<sup>199</sup> While too long a wait could give rise to constitutional concerns, this is perhaps the best option from an individual plaintiff’s perspective, since it allows the plaintiff to choose the time (albeit somewhat delayed), place and manner of making a claim.<sup>200</sup> However, courts must also take into account the defendant’s constitutional or fundamental rights regarding the absence of any preclusive value being attached to the earlier judgment as well as public policies regarding efficiency and preservation of judicial resources.<sup>201</sup> A number of additional factors would likely be relevant to this analysis, including (1) the implications associated with potentially inconsistent or irreconcilable judgments (i.e., would the judgments be truly irreconcilable, as in the case of competing judgments, or would the inconsistency relate to an issue of less significance, constitutionally speaking),<sup>202</sup> (2) the extent to which the plaintiffs in

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<sup>197</sup> Wasserman, *supra* note 18, at 345 (citations omitted) (writing in the context of cross-border class actions involving U.S. class actions); *see also id.* at 379.

<sup>198</sup> *See* SUNSTEIN, *supra* note 44, at 99, 101. For an analysis involving the defendant’s individual participatory rights, see Strong, *Quo Vadis*, *supra* note 18.

<sup>199</sup> *See* Brussels I Regulation, *supra* note 16, art. 28.

<sup>200</sup> In some cases, a delay of trial could be so long as to constitute a breach of the right of access to justice. *See* Fawcett, *supra* note 28, at 9; Le Sueur, *supra* note 29, at 466-67. However, concerns about delay may be assuaged to the extent that the non-participant whose proceeding has been delayed could join the collective suit in the other jurisdiction.

<sup>201</sup> *See supra* note 145 and accompanying text. For a discussion of defense rights in collective litigation, see Strong, *Quo Vadis*, *supra* note 18.

<sup>202</sup> *See* Barnett, *supra* note 18, at 946 (discussing situations involving “abusive re-litigation in which *contradiction* of the earlier foreign judgment is what describes the claimant’s cross-border action”); Strong, *Quo Vadis*, *supra* note 18.

the second suit intend to raise entirely new arguments<sup>203</sup> and (3) the status of the second suit as individual or collective in nature.<sup>204</sup>

Alternatively, the court could decide to stay the second suit and give the first judgment some preclusive value concerning issues and/or claims to be raised in the second suit.<sup>205</sup>

Notably, this approach is highly problematic for the plaintiff in the second suit, since he or she could find certain claims limited or eliminated entirely by virtue of the judgment in the first action. If this is the likely outcome, then many parties would be better served by opting into the collective action, since they would then have some chance of influencing that action's litigation strategy and perhaps improving their chances of recovery.<sup>206</sup> Notably, if a plaintiff declines the opportunity to join the collective and instead pursues a separate action, then that party's individual participatory rights are formally respected, but with a possible diminution in their effective value. However, that might be considered a suitable response in light of the other rights and interests at stake.<sup>207</sup>

Notably, the precise effect on the plaintiff's individual participatory rights will not be known until after the first suit is concluded. Although individual plaintiffs could suffer the effective loss of their claims if the defendant wins the first suit and the judgment is given preclusive value, those same plaintiffs will not suffer any injury to their claims if the plaintiffs in

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<sup>203</sup> See Wasserman, *supra* note 18, at 344-45 (suggesting parties may be better able to avoid the preclusive effect of earlier judgments to the extent a subsequent action advances new theories); Strong, Quo Vadis, *supra* note 18.

<sup>204</sup> The nationalities of the parties and the differences between the procedural or substantive law to be used in the first and second proceeding might also have some bearing on the court's analysis, although these issues seem less persuasive in the context of a preclusion analysis than in a jurisdictional analysis. See *supra* notes 154-63 and accompanying text.

<sup>205</sup> See Brussels I Regulation, *supra* note 16, art. 28; see Strong, Quo Vadis, *supra* note 18.

<sup>206</sup> Empirical evidence from the United States indicates that individual plaintiffs seldom wish to become individually involved in the conduct of a class action, suggesting that plaintiffs in pan-European collective suits might be similarly disinclined to participate actively in a large-scale legal action. See WILLGING ET AL., *supra* note 21, at 55-59.

<sup>207</sup> See *supra* notes 145, 201 and accompanying text; see also Strong, Quo Vadis, *supra* note 18 (undertaking a detailed balancing analysis).

the collective action win, since the earlier judgment will have no negative impact on an individual plaintiff's case.<sup>208</sup>

However, questions arise as to whether it is fair to the defendant to allow a potentially large group of plaintiffs to take this kind of wait-and-see attitude, since one of the major aims of collective redress is to provide parties with a single and final determination regarding the collective injury.<sup>209</sup> Plaintiffs in the first action might also object to subsequent individual plaintiffs acting as “free riders” off of the first action, since later plaintiffs can use the first case as a type of roadmap to a winning argument, even if the first judgment is not given preclusive value in another Member State. The free rider problem might be particularly acute given the widespread use in Europe of loser-pays rules<sup>210</sup> and the European Parliament's disinclination to change these rules in cases involving collective redress.<sup>211</sup> Indeed, many courts might find it inequitable to allow individual plaintiffs to opt out of the first action because of a concern about costs, only to reap the benefit later of a nearly sure judgment (or settlement) in their favor.

As the preceding suggests, utilizing a stay under article 28(1) of the Brussels I Regulation is not a panacea to the difficulties associated with individual participatory rights.<sup>212</sup> Some courts, recognizing the potentially fatal effects of a negative judgment arising out of a collective suit in another Member State on an individual plaintiff's case as well as the inequities associated with allowing an individual plaintiff to act as a free rider on an earlier collective suit that is successful, could decide to neither stay nor dismiss the second action under article 28, but instead allow the

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<sup>208</sup> It is assumed here that a defendant who lost the collective suit would be able to block later plaintiffs from using that judgment to their benefit, but there are a number of permutations to consider. *See infra* notes 235-52 and accompanying text; *see also* Strong, *Quo Vadis*, *supra* note 18.

<sup>209</sup> *See* Hensler, *supra* note 1, at 20-21.

<sup>210</sup> *See id.* at 22; Strong, *Quo Vadis*, *supra* note 18.

<sup>211</sup> *See* Resolution, *supra* note 5, ¶20 (noting “there can be no action without financial risk” and leaving issues relating to allocation of costs to individual Member States).

<sup>212</sup> *See* Brussels I Regulation, *supra* note 16, art. 28(1).

second action to go forward, effectively allowing a race to judgment.<sup>213</sup> Since bilateral actions typically take less time than multilateral actions, this approach might have the effect of reversing the preclusion analysis, with the second-filed action being the first to have judgment entered.<sup>214</sup> Although this approach might seem to protect individual participatory rights, it appears to be entirely at odds with the purposes and principles of the Brussels I Regulation and is therefore not recommended.<sup>215</sup>

#### IV. Proposals and Conclusions

As the preceding section shows, simply providing plaintiffs with the right to refuse to opt into a collective lawsuit does not mean that they will be able to enjoy their individual participatory rights in any realistic manner. While the numerous difficulties identified in this Article could be used to justify the conclusion that any kind of cross-border collective relief is impossible within the European Union's legal framework, there are a number of ways to make a cross-border collective rights regime workable. These suggestions fall into three separate categories: concerns regarding jurisdiction, concerns regarding enforcement and concerns regarding parallel proceedings. Each is discussed below in turn.

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<sup>213</sup> The power to stay or dismiss an action under article 28 is discretionary, although the better reading of the provision appears to suggest that one or the other should be chosen. *See id.* art. 28; Strong, Quo Vadis, *supra* note 18; *see also supra* note 131 and accompanying text.

<sup>214</sup> There is no apparent cause for objection under the Brussels I Regulation merely because a second suit, filed in a court with proper jurisdiction and not involving the same parties and the same cause of action under article 27, has won a race to judgment. *See* Brussels I Regulation, *supra* note 16, arts. 27-30, 34-35.

<sup>215</sup> *See id.* art. 15. However, allowing individual suits to go forward before the collective suit would solve a number of problems (such as the diminution of the value of the plaintiff's claim or the free rider issue), particularly if the judgment in any individual suits were not given preclusive value in the collective suit. *See* Strong, Quo Vadis, *supra* note 18.

#### A. Issues regarding jurisdiction

The first issue to be addressed involves jurisdictional concerns. Many of the problems associated with cross-border collective redress under the Brussels I Regulation relate to the fact that collective suits can currently be brought in number of jurisdictions.<sup>216</sup> This issue could easily be addressed by interpreting or amending the Brussels I Regulation to limit the number of places where a collective suit can be brought.

For example, one solution might be to allow collective relief to be sought only in the Member State where a majority of the members of the collective are domiciled, rather than in any court where jurisdiction is proper under the Brussels I Regulation.<sup>217</sup> This kind of balancing analysis would appear to be proper under the various human rights instruments governing access to justice, since the right to a fair trial does not guarantee parties the right to be heard in any particular venue.<sup>218</sup> Furthermore, plaintiffs have long been required to initiate actions in courts other than their own under the Brussels I Regulation.<sup>219</sup>

Of course, this assumes that jurisdiction would be proper under the Brussels I Regulation in the place where the majority is domiciled.<sup>220</sup> Although that would appear likely, given that

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<sup>216</sup> See Brussels I Regulation, *supra* note 16, arts. 2-24.

<sup>217</sup> See *id.*

<sup>218</sup> See Fawcett, *supra* note 28, at 9 (“What Article 6 [of the ECHR] requires is that there is a trial somewhere and that this is before a tribunal in accordance with the requirements of Article 6. It does not matter that this trial is abroad.”).

<sup>219</sup> See Brussels I Regulation, *supra* note 16, arts. 2-6. Although plaintiffs are given the right to sue in their own home courts in certain limited circumstances relating to consumer, insurance and employment disputes, those provisions tend to focus on the vulnerability of the plaintiffs and the likelihood that the claims in question may be relatively small. See *id.* arts. 9(1), 16(1), 19(2); see also *id.* ¶13. However, these concerns are largely based on an access to justice rationale, in that parties are unlikely to assert a claim in a foreign court in situations where they are particularly vulnerable or where the transaction costs of proceeding in a distant location outweigh the amount in contention. However, neither of these concerns exist in a collective suit, thereby eliminating the need to provide plaintiffs in these kinds of claims with (literally) a home court advantage.

<sup>220</sup> See *id.*

most collective suits would be expected to fall under articles 9, 16 or 19 of the Brussels I Regulation, which provide for jurisdiction in the place where the plaintiff resides or is employed in disputes involving consumer, insurance and employment matters,<sup>221</sup> some provision would need to be made to address cases where jurisdiction was not proper in the place where the majority was domiciled.

One solution might be that jurisdiction in those cases might be had in the defendant's domicile.<sup>222</sup> Although contingency jurisdiction based on the defendant's domicile would be perfectly appropriate, there is always the possibility that the place where jurisdiction over a collective suit is proper does not offer collective relief.<sup>223</sup> Interestingly, the proposed revisions to the Brussels I Regulation provide for another sort of contingency jurisdiction that might be useful in this regard.<sup>224</sup> This provision, which appears as proposed article 26, states that:

[w]here no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:

- (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or
- (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied;

and the dispute has a sufficient connection with the Member State of the court seised.<sup>225</sup>

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<sup>221</sup> *See id.* arts. 2, 5-6.

<sup>222</sup> Jurisdiction under the Brussels I Regulation is always proper in the place where the defendant is domiciled. *See id.* art. 2.

<sup>223</sup> Only sixteen Member States currently offer a form of collective relief. *See* Directorate General for Internal Policies, *supra* note 4, at 5.

<sup>224</sup> *See* Brussels I Recast, *supra* note 4, art. 26 (as amended).

<sup>225</sup> *Id.* art. 26 (as amended).

This proposed provision (termed “*forum necessitatis*”) would be very useful to plaintiffs seeking a place to bring a collective claim.<sup>226</sup> Not only does the text identify one of the principles on which collective redress is based (access to justice),<sup>227</sup> it also contemplates the impossibility (or impracticability) of suit in certain Member States, a situation that could arise in cases involving collective redress.<sup>228</sup> This solution also complies with the requirements of article 47 of the Charter, since individual relief may not constitute an “effective remedy” in cases involving collective injury.<sup>229</sup>

Another form of contingency jurisdiction that is identified under the proposed revisions to the Brussels I Regulation allows for jurisdiction based on the existence of property within the Member State, so long as the value of the claim is “not disproportionate” to the value of the property and the dispute has a “sufficient connection” to the Member State in question.<sup>230</sup> While this provision does not track the needs of collective plaintiffs quite as closely as the first proposal, it nevertheless provides a potentially useful alternative.<sup>231</sup>

A jurisdictional approach that is based primarily or exclusively on the place where a majority of the plaintiffs are domiciled is useful in a number of ways, not the least of which is the elimination of forum shopping and parallel litigation, at least with respect to collective suits, since there is only one location where a majority of the possible plaintiffs can reside. To some extent, caution needs to be taken that any proposals meant to facilitate collective claims do not create problems by expanding the number of courts that could exercise jurisdiction over these types of claims. However, the proposed *forum necessitatis* would not create problems in this

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<sup>226</sup> *See id.*

<sup>227</sup> *See* Resolution, *supra* note 5, ¶E.

<sup>228</sup> *See* Directorate General for Internal Policies, *supra* note 4, at 5 (noting only sixteen Member States currently offer collective relief).

<sup>229</sup> *See* Charter, *supra* note 30, art. 47.

<sup>230</sup> Brussels I Recast, *supra* note 4, art. 25 (as amended).

<sup>231</sup> *See id.* arts. 25-26 (as amended).

regard, since such a forum only arises in the absence of another suitable location.<sup>232</sup>

Nevertheless, the better approach would be to amend the Brussels I Regulation so that only one collective suit may be brought with regard to a particular legal injury.

While useful, these suggestions only address problems associated with multiple collective suits and do not address issues relating to the simultaneous assertion of individual claims. Under the Brussels I regime, courts faced with a single non-participant must consider whether the individual suit should be stayed, turned away, or allowed to proceed in parallel with the collective suit.<sup>233</sup> These issues are considered below in section C.<sup>234</sup>

#### B. Issues regarding enforcement

Concerns about the recognition and enforcement of collective judgments exist at number of levels. Notably, these issues do not relate to the ability of the collective judgment to be recognized and enforced under the Brussels I Regulation.<sup>235</sup> Indeed, the opt-in system contemplated by the Resolution is specifically designed so as to avoid problems with recognition and enforcement under article 34 of the Regulation.<sup>236</sup> Instead, difficulties arise because there appear to be no standard grounds for refusing enforcement of a collective judgment, not even in cases where a non-participant in the first suit has brought a second, related action in another Member State, thus raising the possibility of legally irreconcilable judgments.<sup>237</sup>

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<sup>232</sup> See *id.* art. 26 (as amended).

<sup>233</sup> Although this analysis has focused on individual claims brought in a place other than the location where the collective suit was proceeding, it is theoretically possible for an individual action to be brought in the place where the collective suit is pending, unless national law permits for mandatory classes similar to that contemplated under Rule 23(b)(1) and (b)(2) of the U.S. Federal Rules of Civil Procedure. See FED. R. CIV. P. 23(b).

<sup>234</sup> See *infra* notes 253-27 and accompanying text.

<sup>235</sup> See Brussels I Regulation, *supra* note 16, arts. 33-35.

<sup>236</sup> See *id.* art. 34(1).

<sup>237</sup> See *id.* art. 34; see also Strong, *Quo Vadis*, *supra* note 18.



This, of course, could be highly problematic, although the extent of the dilemma is unclear, given that the failure of the Brussels I Regulation to address matters concerning preclusion, combined with the significant degree of national variation concerning claim and issue preclusion, means that there is currently no way to predict what preclusive value a judgment arising out of a collective suit can or should have in a subsequent individual dispute.<sup>238</sup> However, the fact that the Brussels I Regulation contemplates the possibility of irreconcilable judgments in several different contexts suggests that a judgment that has been recognized will have some preclusive value.<sup>239</sup>

Some commentators may see this as something of a moot point, at least as a practical matter, given the belief that very few plaintiffs will bring an individual action in cases where collective redress is available.<sup>240</sup> However, there is no way to know what will happen in the future, since the loser-pays principle may create an incentive for individual plaintiffs to wait until a positive judgment has been obtained in one jurisdiction so that they can assert their claims in a relatively risk-free environment.<sup>241</sup>

Going forward, there are a number of steps that need to be taken to resolve problems relating to the recognition and enforcement of judgments arising out of collective actions. First and foremost, some effort should be made to revise the Brussels I Regulation so as to take issues of preclusion into account, at least in the context of collective redress.<sup>242</sup> While this would require a significant rethinking of the instrument, given that it currently focuses only on issues of recognition and enforcement, providing some form of guidance to parties would significantly

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<sup>238</sup> *See id.*

<sup>239</sup> *See id.* arts. 28, 34.

<sup>240</sup> Commentators in the United States have remarked on the absence of any empirical data on this point. *See WILLGING ET AL.*, *supra* note 21, at 79.

<sup>241</sup> *See Strong, Quo Vadis*, *supra* note 18; *see also supra* notes 210-11 and accompanying text.

<sup>242</sup> *See Brussels I Regulation*, *supra* note 16.

improve collective litigation within the European Union and hence the operation of the single market.<sup>243</sup> Principled and well-considered analysis is particularly important given that this is an issue of constitutional importance.<sup>244</sup>

At this point, no suggestions in this regard have been made in the proposed revisions to the Brussels I Regulation.<sup>245</sup> Instead, the European Commission has explicitly decided not to change the procedures currently used for recognition and enforcement of disputes under the Brussels I Regulation in cases involving collective redress.<sup>246</sup> This is in many ways unfortunate, since the new provisions on enforcement include a new article, proposed article 46, that could have been very useful in cases involving individual participatory rights, since it allows parties to resist recognition and enforcement of judgments based on a violation of “the fundamental principles underlying the right to a fair trial.”<sup>247</sup>

Problems relating to recognition and enforcement procedures are not limited to preclusion issues.<sup>248</sup> Questions also arise with respect to who is entitled to receive notice of a proceeding to recognize or enforce a collective judgment. Under the Brussels I Regulation, an “interested party” can may raise the issue of recognition in an ongoing dispute, apparently as either a defensive or offensive tactical maneuver.<sup>249</sup> An “interested party” can also make an

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<sup>243</sup> See Resolution, *supra* note 5, ¶4.

<sup>244</sup> See Barnett, *supra* note 18, at 945, 957; Wasserman, *supra* note 18, at 345, 379.

<sup>245</sup> See Brussels I Recast, *supra* note 4.

<sup>246</sup> The kinds of collective cases at issue under the proposed revisions involve “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 “a group of more than fifteen claimants.” Brussels I Recast, *supra* note 4, art. 37(3) (as amended). In some Member States, collective redress may only be sought by an official organization. See Hensler, *supra* note 1, at 14.

<sup>247</sup> Brussels I Recast, *supra* note 4, art. 46 (as amended). The mechanism for recognizing and enforcing judgments arising out of collective suits will be revisited three years after the entry into force of the revised regulation to see whether it is appropriate to have collective judgments decided under the new streamlined procedures. See *id.* art. 37(4) (as amended).

<sup>248</sup> See *supra* notes 73-75 and accompanying text.

<sup>249</sup> See Brussels I Regulation, *supra* note 16, art. 33.

application for enforcement, although the only person to receive notice of that application is “[t]he party against whom enforcement is sought,” and then only after the proceedings have concluded.<sup>250</sup>

While the issue of recognition and enforcement will presumably be brought to the attention of people like Person A and Person B, who have filed suit prior to the conclusion of the collective action and will presumably reinstate those proceedings after the conclusion of the collective suit, the question becomes whether Person C – someone who has not yet filed a claim but who did not opt into the collective suit – is entitled to any sort of notice regarding recognition or enforcement proceedings. Obviously Person C will want to know, prior to filing, if there is a judgment that may be adverse to his or her interests, particularly if that judgment has any preclusive value and there is a fee-shifting regime in place, since Person C may otherwise be exposed to unnecessary litigation costs.<sup>251</sup> Furthermore, Person C may want to participate in any proceedings to recognize or enforce the collective judgment, particularly if that judgment is to have any preclusive effect as to Person C’s claims. However, there currently appears to be no mechanism by which Person C will be notified of recognition or enforcement proceedings, nor does Person C have standing to participate in such proceedings under the Brussels I Regulation, although there could be some remedy as a matter of national law.<sup>252</sup> Again, these somewhat thorny problems arise because the procedures outlined in the Brussels I Regulation currently contemplate a two-party relationship rather than a multiparty one.

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<sup>250</sup> *See id.* art. 38. The person against whom enforcement is sought may appeal the decision, but may not make any submissions regarding the application prior to the initial decision. *See id.* arts. 41, 43.

<sup>251</sup> This sort of situation would be addressed in England through pre-filing protocols requiring a letter before action, but it is not clear whether every jurisdiction has similar mechanisms in place. *See Civil Procedure Rules (Eng.), Practice Direction – Pre-Action Conduct*, ¶7.1, *available at* [http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd\\_pre-action\\_conduct#IDAVNA2](http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#IDAVNA2).

<sup>252</sup> *See* Brussels I Regulation, *supra* note 16.

### C. Issues regarding parallel proceedings

The final topic to consider involves concerns regarding parallel proceedings. This is one area of considerable overlap, since issues relating to preclusion arise in this context to almost the same extent that they do in enforcement proceedings.

One of the key goals of the Brussels I Regulation is the reduction or elimination of parallel proceedings.<sup>253</sup> However, the two primary means by which this goal is accomplished in bilateral disputes – staying the second action or dismissing it in favor of an earlier action – are highly problematic in the context of collective suits due to the enunciated desire to respect the individual participatory rights of parties who have chosen not to proceed in the collective suit.<sup>254</sup>

Notably, the revisions to the Brussels I Regulation provide no new proposals in how to address this issue.<sup>255</sup> Instead, courts are left with the same options as currently exist under the Brussels I Regulation, namely staying a suit or dismissing it in favor of jurisdiction elsewhere.<sup>256</sup>

The difficulties associated with protecting individual participatory rights in their entirety means that a balancing analysis is necessary.<sup>257</sup> Such an analysis should be guided by article 52(1) of the Charter, which indicates that any limitation on a fundamental right must “respect the essence” of the right in question and that “limitations may be made only if they are necessary

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<sup>253</sup> See *id.* ¶15; see also Brussels I Recast, *supra* note 4, arts. 29-34 (as amended).

<sup>254</sup> See Brussels I Regulation, *supra* note 16, art. 28; Danov, Brussels I, *supra* note 17, at 380..

<sup>255</sup> See Brussels I Regulation, *supra* note 16, art. 28; Brussels I Recast, *supra* note 4, art. 30 (as amended).

<sup>256</sup> See Brussels I Regulation, *supra* note 16, art. 28; Brussels I Recast, *supra* note 4, art. 30 (as amended). This confusing state of affairs appears poised to be extended to cases proceeding outside the European Union. See Brussels I Recast, *supra* note 4, art. 34 (as amended). Notably, there is already a great deal of commentary concerning the extent to which a judgment arising out of a U.S. class judgment may be recognized and enforced in European Member States. See Dixon, *supra* note 3, at 134; Monestier, *supra* note 3, at 44-45; Mulheron, Opt-Out, *supra* note 3, at 426-27; Russell, *supra* note 3, at 164-79; Wasserman, *supra* note 18, at 379-80.

<sup>257</sup> See Strong, Quo Vadis, *supra* note 18; see also *supra* notes 37, 134 and accompanying text.

and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”<sup>258</sup>

Under this approach, a limitation on individual participatory rights under either of the alternatives currently offered under the Brussels I Regulation would seem most appropriate in cases where the second action involved claims or defenses that were essentially identical with those involved in the collective claim.<sup>259</sup> In these cases, questions of judicial efficiency and, more importantly, respect for the defendant’s rights would appear to allow a minor infringement on the plaintiff’s individual participatory rights.<sup>260</sup> Indeed, in cases involving dismissal in favor of consolidation with a parallel proceeding,<sup>261</sup> the only real issue is the place where the plaintiff is asserting the claim, since the timing has been decided.<sup>262</sup> Since existing principles of European law suggest that a plaintiff’s choice of venue can be overturned in some circumstances, denying plaintiffs of their choice of venue in some types of disputes related to collective cases does not seem entirely inappropriate.<sup>263</sup>

However, the analysis changes if the individual suit is in some way different from the collective claim. This scenario could arise in cases where a plaintiff seeks individualized

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<sup>258</sup> Charter, *supra* note 30, art. 52(1).

<sup>259</sup> See Brussels I Regulation, *supra* note 16, art. 28; see Strong, Quo Vadis, *supra* note 18.

<sup>260</sup> As indicated previously, the better analysis involves a rights-to-rights balancing mechanism rather than a rights-to-interests one. See *supra* notes 44-47 and accompanying text.

<sup>261</sup> The situation is perhaps different when the individual claim is brought after the conclusion of the collective suit. However, that issue is considered above as a matter of enforcement, not a matter of parallel proceedings.

<sup>262</sup> Some issues could arise pursuant to the notion that the plaintiff has the right also to determine the manner of suit (i.e., individual versus collective), but where the claims and legal theories are the same in both suits, the right to proceed individually does not seem that weighty. Indeed, in these cases it would seem very unlikely that an individual would even want to bring a separate claim unless it was for some sort of harassment or strike suit purposes.

<sup>263</sup> See Fawcett, *supra* note 28, at 9. A more difficult question is what result must obtain if the collective suit is brought after the individual claim, since the Brussels I Regulation gives preference to courts that are first seised of an action. See Brussels I Regulation, *supra* note 16, arts. 27-30. However, that issue is beyond the scope of this Article.

damages<sup>264</sup> or wishes to pursue different legal theories than those asserted in the collective suit.<sup>265</sup> Alternatively, it could be the defendant who introduces disparate legal or factual issues through the assertion of individualized defenses,<sup>266</sup> although it may be difficult for a plaintiff to anticipate in advance whether a particular defense will be raised.<sup>267</sup>

Courts and commentators considering cross-border collective suits outside the context of the Brussels I Regulation have taken the view that the more distinct the facts or legal issues, the less likely and less appropriate it is to give any kind of preclusive value to the first suit.<sup>268</sup> While more consideration of this issue is necessary from a rights perspective, it could be that a similar approach is appropriate under the Brussels I Regulation, at least if one considers individual participatory rights to include the right to have a judge hear the plaintiff's facts and legal theories on an individualized basis.<sup>269</sup>

This is not to say that concerns about individualized damages or defenses cannot be addressed in a collective suit as a pragmatic matter, since the use of subclasses or bifurcation of issues can certainly alleviate many of plaintiffs' and defendants' concerns about proceeding collectively in the face of certain distinguishing factors.<sup>270</sup> However, certain plaintiffs may decide that they do not want to pursue that sort of generalized relief but instead to proceed

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<sup>264</sup> The issue of individualized damages is often seen in product liability and other cases involving personal injury.

<sup>265</sup> See Strong, *Quo Vadis*, *supra* note 18; Wasserman, *supra* note 18, at 379-80.

<sup>266</sup> For example, one defense that could require the use of different plaintiff groups involves the question of whether an alleged injury relating to anticompetitive behavior has been passed on to consumers. See Strong, *Quo Vadis*, *supra* note 18. If such behavior has occurred, there is no cognizable injury on behalf of the business asserting a claim against the defendant.

<sup>267</sup> One question that has not been discussed in this Article or in the existing legal literature is whether a plaintiff – having initially opted into a proceeding – can subsequently choose to leave the collective without prejudice to his or her ability to bring an individual claim later. This question would likely be decided as a matter of national law, in at least the first instance, although the cross-border element, including various conflict of laws concerns, could complicate matters. As interesting as this issue is, it is beyond the scope of this Article.

<sup>268</sup> See *supra* notes 195-97 and accompanying text.

<sup>269</sup> See Brussels I Regulation, *supra* note 16; Strong, *Quo Vadis*, *supra* note 18.

<sup>270</sup> See FED. R. CIV. P. 23(c)(4)-(5); Strong, *Quo Vadis*, *supra* note 18.

individually.<sup>271</sup> The choice therefore becomes whether to (1) stay the action, based on fairness concerns relating to the burden of forcing the defendant to proceed in two (or more) courts at once, subject to the proviso that the first judgment will have no preclusive value if the suits are sufficiently dissimilar, or (2) allow the second proceeding to go forward, based on concerns about the unfairness of a delay to the individual plaintiff, thus forcing the defendant to defend itself on multiple fronts simultaneously.<sup>272</sup>

As with most issues in this area of law, the outcome may depend on the precise facts at issue. Thus, for example, courts might be influenced by the size of the defendant and the nature of the second claim. A large corporate defendant that is used to facing a multitude of small suits might be better equipped to handle one more small individual matter than a small to medium sized enterprise (SME) that is expending all its energy on the collective suit.

These are just some of the issues and concerns that arise in the context of the current proposal to create a coherent European approach to cross-border collective redress.<sup>273</sup> Obviously, there is a great deal more that can and should be said on this subject, particularly with respect to the nature of the various rights at stake and the way in which they are weighed against each other.<sup>274</sup> Although this Article has concentrated on plaintiffs' individual participatory rights, defendants also have significant rights that arise as a matter of national and European law.

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<sup>271</sup> Evidence suggests that this may be a good tactical move for plaintiffs in cases involving individual damages, since plaintiffs who proceed individually may receive higher damages awards than plaintiffs who proceed collectively. *See* Petition for a Writ of Certiorari, *AT&T Mobility LLC v. Concepcion*, 130 S.Ct. 3322 (2010) (No. 09-893), at 12.

<sup>272</sup> *See* Strong, *Quo Vadis*, *supra* note 18. Concerns about delay appear of increasing concern under the revisions to the Brussels I Regulation, with a number of provisions including specific time limits. *See* Brussels I Recast, *supra* note 4, arts. 29(2), 45(4), 46(5), 56(5), 58(2) (as amended).

<sup>273</sup> *See* Resolution, *supra* note 5.

<sup>274</sup> *See* Strong, *Quo Vadis*, *supra* note 18.

These competing rights and interests must be balanced in a principled and predictable way, pursuant to the governing legal standards.<sup>275</sup>

As difficult as this analysis has been, it is hoped that this discussion will help inspire a more robust debate about the fundamental and constitutional nature of various procedural rights associated with collective redress in both Europe and the United States. Cross-border collective relief is an issue of increasing importance around the world, and it is incumbent on legislators, judges and lawyers to find principled and practical solutions to the challenges ahead.<sup>276</sup>

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<sup>275</sup> See Charter, *supra* note 30, art. 52(1); SUNSTEIN, *supra* note 44, at 99; Strong, Quo Vadis, *supra* note 18.

<sup>276</sup> See S.I. Strong, *Collective Redress in the Cross-Border Context: Litigation, Arbitration, Settlement and Beyond*, in THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW \_\_ (forthcoming 2012).