

THE CONSTITUTIONAL LIMITS OF JUDICIAL RULEMAKING: THE ILLEGITIMACY OF MASS- TORT SETTLEMENTS NEGOTIATED UNDER FEDERAL RULE 23

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It is time to recall that the judicial power of the United States has limits. The federal judiciary cannot by rule of court confer on itself the power to sanction settlements of mass tort claims not suited for a consolidated trial, however attractive to the judiciary such efficient dispositions may be.

THE RULES ENABLING ACT

The limit to the Court's authority to make rules of court is implicit in the Constitution and explicit in the provision of the Rules Enabling Act forbidding the Court to promulgate rules modifying or abridging substantive rights.¹ The Act authorizes the Court only to make rules "of practice and procedure" for lower federal courts.² The line between substance and procedure is notoriously shadowy;³ many legitimate rules of court have substantive consequences,⁴ just as much

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1. 28 U.S.C. § 2072(b) (1994).

2. *Id.* § 2072(a).

3. See Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333 (1933); Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281.

4. Examples of rules bearing on statutes of limitations are provided in Carrington, *supra* note 3, at 310-21.

substantive law has procedural implications.⁵ And of course there are legal nihilists who will deny that the line exists at all,⁶ so free are the Justices to declare their enactments to be mere procedure. Yet, there is a difference between substance and procedure that is easily discerned in many of its applications and that difference marks the limits of judicial rulemaking under the Constitution of the United States.

While there are no settled meanings of the terms "substance" and "procedure" as used in the Rules Enabling Act,⁷ the difference can be stated in the language of Article III: the lawful function of judge-made procedure rules is to facilitate the only lawful mission of federal courts—deciding cases or controversies.⁸ In the alternative, it might be said that valid rules of practice and procedure facilitate the enforcement of law by guiding courts in the application of legal texts to facts.⁹ Or, the difference can also be stated in the language of Rule 1 of the Federal Rules of Civil Procedure, i.e., "to secure the just, speedy, and inexpensive determination of every action."¹⁰ In this locution, justice is not broad social justice among classes, but is just recognition of the merits of individual claims and defenses. Procedure rules, in short, aim to cause dispositions on the merits, not to redefine those merits.

PROPOSED RULE 23(b)(4): PROCEDURE OR SUBSTANCE?

The Advisory Committee on Civil Rules is presently considering an addition of paragraph (b)(4)¹¹ to Rule 23 that would authorize the certification of class actions for the limited purpose of settlement; such certifications would be excused from the present requirements of paragraph (b)(3) that common questions predominate.¹² The proposal is intended to legitimate the practice of some federal courts in certifying as class actions matters that have already been or will be settled

5. See, e.g., Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992).

6. See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984). Compare Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219 (1989).

7. A thorough review of the few cases and the richer commentary addressing this distinction was attempted in Carrington, *supra* note 3, at 297–321.

8. U.S. CONST. art. III.

9. Cf. *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941).

10. FED. R. CIV. P. 1.

11.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

FED. R. CIV. P. 23(b)(4) (proposed addition to Rule 23).

12. FED. R. CIV. P. 23(b)(3) in pertinent part requires that "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

by contracts made between an alleged tortfeasor and counsel purporting to represent a class of alleged tort victims.¹³ Such matters cannot be tried as class actions because the rights of individual class members are too diverse to permit their resolution *en masse*.

By definition, therefore, the proposed rule applies only to matters that will never be the subject of litigation in a federal court. It has nothing to do with the Article III mission of deciding cases or controversies, but is instead a means of promoting and endorsing putative private dispositions by lending them the imprimatur of the court, thus garbing contracts in the dress of judgments. It is indeed questionable whether a settlement-only class action is a case or controversy at all; certainly some such settlements look very much like collusive suits traditionally condemned as frauds on the court¹⁴ that federal courts have been enjoined from entertaining.¹⁵

Nor does the proposed rule facilitate civil law enforcement. Indeed, the whole purpose of the settlement class action is to avoid the noisome burden of applying law to fact. Settlements achieved by the means proposed are not bargaining in the shadow of the law because, by definition, the law will never be applied by the court, nor will any disputed facts be determined. Stephen Burbank's question about the 1984 proposal to amend Rule 68 seems even more applicable to paragraph (b)(4): does it "really regulate[...]the judicial process for enforcing rights and duties" or "is it not, rather, designed precisely to abort that process?"¹⁶

The proposal can be said to facilitate speedy and inexpensive terminations, but only in the same way that the repeal of substantive rights and defenses can reduce cost and delay in litigation. The proposed rule does nothing to secure "just" determinations within the meaning of Rule 1, and is therefore not congruent with the aims expressed in that rule. It is thus barren of significance as a rule of "practice and procedure" as that distinction is employed in the Rules Enabling Act.

Moreover, the present practice of some lower federal courts in certifying mass tort claims for settlement under Rule 23 cannot be legitimated by a rule of court.¹⁷ Rule 23 does not authorize federal courts to place the seal of judgment on a settlement of a mass dispute not meeting its requirements for certification of a class action to be tried and decided on the merits.¹⁸ The 1966 Rules Committee appended

13. See MANUAL FOR COMPLEX LITIGATION § 30.45 (3d ed. 1995).

14. See, e.g., *French v. Jeffries*, 149 F.2d 555 (2d Cir. 1945).

15. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

16. Stephen Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425, 432 (1986).

17. See *infra* text accompanying notes 22-77. See also *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994) (approving \$4.255 billion settlement, paid out by defendants over a thirty-year period to a world-wide Rule 23(b)(3) opt-out class). This settlement subsequently fell apart as it greatly underestimated the number of claimants, and its principal defendant, Dow Corning, filed for bankruptcy. See Tamar Lewin, *Judge in Dow Implant Bankruptcy Ousts Lawyers on Panel*, N.Y. TIMES, Mar. 23, 1996, at 7.

18. See *infra* text accompanying notes 80-82.

to the present rule a Note explicitly disavowing its applicability to mass torts.¹⁹ The Supreme Court promulgated the rule with that understanding. Congress passively allowed it to become the national law with that same understanding. On the basis of that understanding, Rule 23 was regarded by its 1966 revisers as a valid exercise of the Court's rulemaking authority.

While lacking significance as a rule of practice and procedure, proposed paragraph (b)(4) is replete with substantive consequences. These consequences are not fully visible because it is the nature of settlement to sublimate questions of right and duty and to silence further consideration of the merits or the policies advanced by the agreed result. It is possible that the settlement-only class action has progressed as far as it has for this reason, that judges employing it do not see clearly the rights and duties affected when all they examine is a proposed settlement. It is what Judge Jack Weinstein has identified as a substantive law revision hiding behind "procedural camouflage."²⁰

The attainment of global peace in mass torts is a legislative purpose of formidable complexity. In advancing the present proposal, the Civil Rules Committee was aware of many of the difficulties, but addresses them only in the proposed Committee Notes. Many critics of the proposal have advanced ideas for its improvement,²¹ but these are so substantive in character that they call attention to the impropriety of asking the Supreme Court to enact them as a rule of court. We count at least ten substantive consequences confronted by the architects of global peace in mass torts.

1. There are the substantive rights of state governments to enact and enforce their own laws governing such matters as standards of care, measures of damages, statutes of limitations, and the law of judgments.²² There is no federal law measuring the standard of care in tort; with rare exception,²³ there is no applicable national statute of limitations;²⁴ there is no national law of judgments other than the full faith and credit clause;²⁵ and there is no federal law of damages by which diverse injuries can be measured. Unless the tort victims are all asserting rights governed by the laws of the same state, an omnibus settlement necessarily

19. For commentary on the import of the 1966 Rules Committee Note in connection with the intended scope of Rule 23, see 7B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE*, CIVIL § 1783, at 76 (2d ed. 1986).

20. Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 829 (1993).

21. Many are unpublished, but for one example, see Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366 (1996).

22. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) (en banc).

23. See Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829 (1983).

24. See Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532 (1996).

25. U. S. CONST. art. IV, § 1.

overrides differences in state law. A federal statutory scheme could be devised²⁶ by which appropriate deference to the sovereignties of the states can be accommodated, but it would surely require an exercise of the commerce power and entail a massive trespass on the *Erie* principle. Such a law authorizing the use of settlement-only classes in cases arising in interstate commerce would satisfy Article I of the Constitution, but might be denoted as a random preemption of state law vulnerable under the Due Process Clause of the Fifth Amendment.²⁷ The relationship of the federal government to the states is a matter of substance, not mere procedure to be controlled by rule of court. It is Congress, not the Court, that wields the Commerce Power.

2. The substantive impact of the proposed rule displaces not only the states' laws of torts, but also the states' laws of conflict of laws.²⁸ That corpus of law regulates relations between states, rather than between the states and federal law, but it is not less substantive on that account. As the Supreme Court affirmed in *Phillips Petroleum Co. v. Shutts*,²⁹ if the rights of class members are defined by the laws of different states, those differences may not be disregarded merely because of the existence of a class action, even one that is sustained by the predominance of common questions of fact.³⁰ An order approving a mass tort class action settlement disregards conflicts of law governing the substantive rights and duties being terminated. Indeed, one of the alleged advantages of the settlement-only class action is that it enables a court to dispose of thousands, even millions of potential cases without noticing the substantive differences amongst them.³¹

26. See, e.g., AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT, PROPOSED FINAL DRAFT (1993); Multiparty, Multiforum Jurisdiction Act, H.R. 1100, 103d Cong., 1st Sess. (1993).

27. Cf. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74–80 (1938). Justice Brandeis, for the Court, criticized the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842), which enabled non-citizens, armed with the power to choose state or federal common law in an action, to discriminate against citizens of a particular state, as “render[ing] impossible the equal protection of the law.” 304 U.S. at 75. To Justice Brandeis, this state of affairs represented “an unconstitutional assumption of power by the courts of the United States.” *Id.* at 79.

28. Cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (holding that Kansas law cannot be applied to determine the rights of royalty owners in Texas and Oklahoma minerals).

29. *Id.* See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1 (1986).

30. See *Shutts*, 472 U.S. at 821 (noting that a state may not use its assumption of jurisdiction in a class action “as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law”).

31. The Advisory Committee sets forth the settlement class action as a solution to choice of law problems in mass-tort litigation. Minutes, Civil Rules Advisory Committee, Apr. 18–19, 1996, in ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, VOLUME I (1997). For support of a federalized choice-of-law regime in mass tort litigation, see Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L.

To elaborate briefly, an individual class member asserting a substantial individual claim cannot intelligibly evaluate an offer to settle that claim without making some assumptions about the controlling law. When a judge undertakes to evaluate a settlement in the performance of the duty imposed by subdivision (e) of the rule,³² he or she necessarily makes similar assumptions, but in gross, rounding off the differences among the rights and duties of the parties. A statute creating a device to settle many claims at once would prescribe, or is authorizing the court to prescribe, answers to the following substantive questions, perhaps among others: what is the applicable standard of care? what harms are to be compensated? how is compensation to be measured? under what circumstances are punitive damages to be taken into account? who pays the costs of resolution on the merits of issues that must be tried? if there are multiple causes of the harms to be compensated, how is liability to be apportioned among multiple alleged tortfeasors? what effect would any apportionment have on the rights and duties of other alleged tortfeasors not joined in the action? are punitive damages appropriate, and, if so, how are they to be measured? Each of these questions raises a potential issue of choice of law. Yet all are given one Procrustean answer without regard for the differences in the states' laws governing individual members of the class.³³

3. A settlement-only class action necessarily requires establishment of a fictional contract of employment between members of the class and class counsel who will be paid from the proceeds of the settlement of members' claims. Judge Easterbrook was perhaps understating when he observed that "a settlement followed by a fairness hearing remains more like a contract than like litigation."³⁴ Perhaps such a contract is created through the notice and opt-out procedure, but this requires an extraordinary extension of the concept of mutual assent. Indeed, the usual class action notice is so uninformative to the average citizen receiving it as to make most other contracts of adhesion look like carefully negotiated bargains.³⁵ Contracts between attorneys and their clients are substantive legal

REV. 249 (1992). For a reconsideration of a federal common law approach to mass-tort litigation, see Barbara Atwood, *The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon, and Van Dusen*, 19 CONN. L. REV. 9 (1986); Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1631 (1992) (suggesting that the academy has given short shrift to this option). *But see* Larry Kramer, *Complex Litigation Choice of Law*, 71 N.Y.U. L. REV. 547, 574 (1996) (arguing that the substantive nature of choice-of-law rules makes the decision to apply them, like federal tort or contract law, a legislative one).

32. FED. R. CIV. P. 23(e).

33. All these questions were raised by the settlement in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), *cert. granted*, 117 S. Ct. 379 (1996). For a useful comparison, see *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996).

34. *Kamilewicz v. Bank of Boston Corp.*, 1996 WL 676729, at *5 (Easterbrook, J., dissenting from the denial of rehearing en banc).

35. The likelihood that a class member will actually receive and comprehend the notice of the action is in every case very small. Frequently, the cost of reading and understanding the notice exceeds the benefits, and not infrequently, the notice is impenetrable by the average citizen. See Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1474 (1989); Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 667-68

relationships and the validity of adhesion contracts with regard to such relations is a matter of utmost substantive-political sensitivity.³⁶

The problem of creating a fictional contract of fiduciary relations exists in some measure with respect to all class actions. It is, however, much less a problem if it is supposed that the class action is one in which common issues predominate so that there can be a trial of those issues, for the duties of trial counsel are well-formed, and there is far less risk of a conflict of interest between the class attorney and the members of the class fictionally designated to be his or her clients. It is therefore more reasonable to infer the clients' assent to the class representation. Indeed, when there is a trial, the fictional nature of the attorney-client contract is generally inconsequential. The conflict of interest problem is muted even in settlement if the requirements of (b)(1), (2), or (3) are met, but if the class is not identified by the predominance of common questions, as (b)(4) contemplates, the class lawyer is laden with conflicts of interest. It is not possible in the absence of predominating common questions for class counsel to negotiate a settlement equally faithful to all his or her fictional clients. It is therefore unrealistic to infer assent.

The difference between (b)(3) and (b)(4) in this respect is illuminated by comparison to *Phillips Petroleum Co. v. Shutts*.³⁷ The Court there noted that most of the members of the class had something to gain and very little to lose by being included in the class; it was therefore reasonable, in the Court's view, to suppose that nonresponding class members assented to the jurisdiction of the court in Kansas.³⁸ Also, because of the predominance of common questions, it was also reasonable to suppose that class members were willing to have the class attorneys represent them. No such supposition can be justified in the mass tort situation in which the claims are large and diverse.

Americans are now accustomed to contracts of adhesion. They are an acceptable, even a benign device, so long as their provisions are reasonable, i.e., consistent with the reasonable expectations of the party whose assent is fictionalized. But they are not enforceable when they go beyond those reasonable expectations.³⁹ The claimants in the *Shutts* class were royalty owners presumably possessed of some sophistication; they likely understood the notice they received, and it was plausible to believe that most would regard the suit as advantageous to themselves. The *Shutts* claimants are in contrast to the average personal injury victim, who is unlikely to comprehend a class action notice. It is beyond the experience or expectation of reasonable citizens that the failure to respond to what

(1986); THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 51 (1996). The latter authors observe that notice usually arrived cloaked in "legal jargon," incomprehensible to the "lay reader." *Id.*

36. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

37. 472 U.S. 797 (1985).

38. See *id.* at 810, 813.

39. See generally Todd D. Rakoff, *Contracts of Adhesion: An Essay of Reconstruction*, 96 HARV. L. REV. 1174 (1983).

looks like a slightly unusual piece of junk mail constitutes assent to the solicitation of employment by self-selected counsel desiring to represent the recipient in an action involving serious personal injury or death.⁴⁰ There is no reason to believe that a serious personal injury claimant desires to be represented by class counsel.⁴¹ This becomes especially obvious when we consider the nature of the representation that will be provided by this self-selected attorney and the conflicts of interest that inhere in that role.

4. The fictional contract created between class members and their lawyer also radically modifies the powers of the attorney as agent of class member clients. The attorney to whom the class member is said to be a client, is no ordinary attorney, because he or she lacks the normal duties of fidelity and obedience to the client. It is elementary agency law that a client as principal is not bound by the promises of an attorney as agent to settle except on authorized terms.⁴² It is also elementary agency law that a principal can revoke the authority of the agent, and that a client can therefore dismiss a lawyer whose representation the client no longer desires.⁴³ Thus, under conventional law, a litigant is entitled to reject a settlement negotiated without explicit advanced approval,⁴⁴ and can dismiss counsel at his or her pleasure.⁴⁵ Insofar as subdivision (e) of Rule 23 confers settlement authority on class counsel, it abrogates the customary substantive right of a client to reject settlement and dismiss the lawyer who recommended it. Moreover, an ordinary lawyer has a duty to reject a compromise providing generous fees but modest relief for the client.⁴⁶

In the (b)(3) situation, the predominance of common questions may possibly justify such an implication of authority to settle and to claim a fee from the proceeds of settlement where the settlement and fee are subject to the approval of the court. But in the absence of predominating common questions, no such implication is warranted for it is not a reasonable inference that a class member intends to confer such extraordinary authority on class counsel in the mass tort situation. The false inference effects a substantial change in the law of agency.

5. Such fiduciary duties as may be imposed on class counsel are enforced by another body of tort law; lawyers who betray their clients' interests expose themselves to liability.⁴⁷ The risk of betrayal is particularly marked in the proposed

40. WILLGING ET AL., *supra* note 35, at 45-52. See also Arthur R. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973).

41. Roger Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74-76.

42. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33(1) (1996).

43. See RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 118 (1957); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 44(1), (2).

44. See, e.g., *Fennell v. TLB Kent Co.*, 865 F.2d 498 (2d Cir. 1989).

45. However, the discharged lawyer retains the right to compensation already earned at the time of discharge. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 44, cmt. b.

46. *Id.* § 206, cmt. f.

47. *Id.* § 28 & cmt. b (noting "[a] lawyer is a fiduciary").

(b)(4) class because of the dissimilarity of the claims being settled.⁴⁸ It seems to be widely assumed, however, that court approval of a settlement under subdivision (e) insulates class counsel from collateral attack by “clients” aggrieved by an apparent sell-out of their claims by lawyers laden with conflicts of interest.⁴⁹ This assumption may not be correct if the usual principles of tort law apply.⁵⁰ If an analogy can be made to the law of provisional remedies, the action of the court granting an attachment or a temporary restraining order without proper notice and security against abuse of process does not insulate from liability the party and counsel who persuaded the court so to violate the law.⁵¹ Perhaps a mass tort victim-client aggrieved by a class settlement can likewise maintain a claim against the class lawyer notwithstanding court approval of the settlement.⁵² Indeed, the fact of judicial approval might be said to make the settlement “state action,” and hence actionable under federal civil rights laws.⁵³ In an appropriate case, it would seem that the tort law of many states would allow for the recovery of punitive damages against manifestly faithless class counsel. Whatever the answers to the questions thus posed, they are answers rooted in tort law. If the interface of subdivision (e) and paragraph (b)(4) is to have any effect on the tort claims of class members against class counsel, the rule is one of substance, not procedure.

6. Resolution of monetary claims entails the assignment of monetary values to the choses in action being compromised. Choses in action are, of course, intangible property rights.⁵⁴ Subdivision (e) as applied even in (b)(3) cases assumes that there is a fair value of a mass of claims that can be detected by the court and counsel. If, however, there is no standard by which fairness can be judged,⁵⁵ then the promised

48. For an overview of this problem, see Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 CORNELL L. REV. 811, 826–36 (1995).

49. See, e.g., *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992).

50. See Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1120–26 (1995).

51. Cf. *Wyatt v. Cole*, 504 U.S. 158 (1992) (holding that qualified immunity is not available to plaintiff and counsel for securing relief under Mississippi replevin statute later determined to be unconstitutional).

52. Compare *Kamilewicz v. Bank of Boston Corp.*, 1995 WL 758422 (N.D. Ill., Dec. 15, 1995), *aff’d*, 92 F.3d 506 (7th Cir.), *reh’g denied*, 1996 WL 676729. An action for breach of fiduciary duty by class counsel was dismissed for lack of subject matter jurisdiction because the settlement had been approved by an Alabama state court. 92 F.3d at 508. The court rejected the argument that the malpractice claim was independent of the class action, but it is not clear that this is correct or that a different result might not obtain on different facts. See 1995 WL 758422, at *5–6 (leaving open the possibility that an action could have been pursued if plaintiffs in the instant case were in the role of plaintiffs on the issues of attorney’s fees during the Alabama phase of litigation or if the plaintiffs had asserted an independent claim).

53. 42 U.S.C. § 1983 (1994). Cf. *Wyatt*, 504 U.S. at 163–69.

54. See RESTATEMENT (FIRST) OF THE LAW OF PROPERTY pt. III, introductory note (1944).

55. See William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 841–42 (1995). Judge Schwarzer contends that subdivision (e) is inadequate because “it leaves the parties operating in the dark and the

protection of subdivision (e) is a delusion. Despite this handicap, district courts reviewing mass tort settlements have found all but a few settlements "unambiguously fair."⁵⁶

Generally, counsel determining whether a settlement of a personal injury claim is fair analyzes its merits, i.e., the likelihood of its success and the damages likely to be assessed if the claim is tried. But even after making that calculation, experienced personal injury lawyers will differ in the value they assign to their cases, sometimes by a factor of several multiples.⁵⁷ There is no value of an individual personal injury claim that can be designated as its fair value in settlement. What is fair is what informed and uncoerced disputants will accept, and fairness has little meaning other than that.⁵⁸

In (b)(3) cases, because the common questions of law and fact predominate, it may be plausible that class counsel can prudently appraise the value of each of the claims being settled *en masse* and that most class members might willingly authorize acceptance of a payment so measured. When common questions do not predominate, as in mass tort proceedings under proposed paragraph (b)(4), there is no method by which an intelligent judgment can comprehend the settlement value of diverse claims, however "mature."⁵⁹ Not only class counsel, but the court acting under subdivision (e) can do little more than take a stab in the dark⁶⁰ unless it is to inform itself on the merits of each case, a process that would defeat the very purpose of the exercise.

Moreover, the prospect that claims will be valued with little or no regard for the expected outcome of trial disturbs the ability of individual claimants to settle their disputes with alleged tortfeasors because settlements are generally the result of predictability associated with the prospect of a trial on the merits. Difficult though it often is to foretell the likely results of a trial, it is always more difficult to foretell the outcome of an informal settlement negotiation conducted without the prospect that rights will be enforced if no settlement is reached.

court unable to define either the measure of its responsibility or the limit of its power." *Id.* at 842.

56. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 962 (1995).

57. GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983).

58. Coercion is, of course, the endemic hazard in institutionalized settlement efforts. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

59. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989).

60. A successful plaintiffs' attorney is likely to have a portfolio or "inventory" of diverse claims, and may take cases to amplify the portfolio that would not, if pursued singly, be worth the effort. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 704-06 (1986). The court approving settlement *en masse* cannot see the differences; they are in "a black box." Geoffrey Hazard, *The Black Box of Settlement*, Lecture Delivered at the Boston University Law School (Oct. 27, 1994), cited in Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1169 n.35 (1995).

In these respects, the guesswork associated with mass tort class action settlement effects a substantial modification of the property rights of class members. The modification of rights from those that can be enforced at trial to those that will be measured by weak conjecture effects a transfer of wealth from class members with clearly meritorious claims to those whose claims are more dubious. Intangible property rights are thus modified by any law conferring authority on a court to approve *en masse* a settlement of personal injury claims.

The wealth transfer is most apparent when the court-approved settlement treats diverse class members as if their claims were of equal worth. Thus, in one recent mass tort case,⁶¹ the parties agreed on a settlement awarding an equal sum to each person claiming to be infected by impure blood transfusions, without regard for differences in the quality of the evidence of harm or that the defendants could have detected the impurity at the time of transfusion.⁶² Plaintiffs with strong evidence of grave harm were made to pay for generous settlements to other plaintiffs who may not have been harmed at all.

The wealth transfer may take a different form when class counsel imposes "their notions of which claimants are more or less deserving," and excludes injuries or conditions which would constitute viable claims outside the settlement architecture.⁶³ Thus, in another recent case, the district court ruled that a settlement could award no compensation at all to class members having viable claims that class counsel deemed less worthy than others that were presumed to be more serious, and thus more worthy of satisfaction from the limited funds the defendant was willing to provide to secure global peace.⁶⁴

7. There is the closely related problem of dividing the proceeds of a global settlement among members of the class when class members' claims are not to be treated as equal. Typically, the defendant will have no desire to participate in that division, but is sometimes willing to contribute to a fund to be administered for the class members.

Such a fund must then be defended against false or excessive claims. The cost of that defense, normally borne by the defendant, then falls on the common fund, and thus indirectly on the class members. The value of their claims are thus further devalued by the imposition of a share of the defense cost. Not only are intangible property rights thus impaired, but the shifting of the defense costs also has social and political consequences by turning the claimants away from the alleged wrongdoer and against one another. Generally, the resolution of these conflicts is left to class counsel, who are thus burdened with conflicts of interest of epic

61. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 169 F.R.D. 632 (1996).

62. The settlement is awaiting approval. *Id.*

63. Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 456-57 (1996).

64. *See In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 WL 578353, at *8-9 (N.D. Ala. Sept. 1, 1994) (holding that dissatisfaction and objections of those with illnesses not compensated by the settlement does not constitute grounds for rejection of a settlement).

proportions.⁶⁵

8. The right to individual control and management of one's own personal injury claim is itself a substantive right, indeed perhaps a constitutional right.⁶⁶ As the Court not long ago said, there is a "deep-rooted historic tradition that everyone should have his own day in court."⁶⁷ In this respect, the substantive entitlement may be denoted jurisprudential. The civility of our law has long been thought to rest on its recognition of individual entitlements and responsibilities, and a central entitlement has been the right to assert one's own rights.⁶⁸ As Justice Harlan wrote in 1971:

American society...[bases] its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common law model.... [T]hose who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of our concept of due process.... [W]ithout due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.⁶⁹

A legal system that no longer has time for individuals has seriously modified the quality of justice.⁷⁰ As Frank Michelman puts it, we depend in some measure on "litigation values"⁷¹ as the distinctive mark of our citizenship. Perhaps we cannot afford the luxury of treating citizens as individuals in mass tort cases, but surely a law abrogating the right of individuals to be treated as individuals in regard to their distinctive personal injuries is a substantive enactment.

9. The ability of the defendant to pay is a significant factor in judging the fairness of the terms of many settlements, including many mass torts, asbestos

65. Wolfman & Morrison, *supra* note 63, at 472.

66. See John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 608-10 (1984); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970-71 (1993). The Ninth Circuit has affirmed the constitutional right to "opt out" of a (b)(3) class action. See also *Brown v. Tigor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992).

67. *Martin v. Wilkes*, 490 U.S. 755, 762 (1989) (citing 18 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, JURISDICTION AND RELATED MATTERS § 4449, at 417 (1981)). See *In re Asbestos Litig.*, 90 F.3d 963, 999 (5th Cir. 1996) (Smith, J., dissenting). Compare *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

68. Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172.

69. *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971).

70. Patrick Johnson, *Civil Justice Reform: Juggling Between Politics and Perfection*, 42 FORDHAM L. REV. 833, 881 (1994). See also Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisprudential Principles for Process Choice*, 1984 WIS. L. REV. 893, 908-21.

71. Michelman, *supra* note 68, at 1172-77. See also Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 20 (1974); Geoffrey C. Hazard, *The Effect of the Class Action Device upon the Substantive Law*, 58 F.R.D. 307, 308 (1973) (contending that the class action, by nature a "mass production remedy," affronts "the sense of individualization that is very important in the administration of justice").

being the obvious example.⁷² That ability to pay is connected to other substantive rights and duties of the debtor. A feature of many settlement-only class actions, whether intended or not, is the creation of a voluntary bankruptcy process for use by solvent debtors. Indeed, it may be that the primary aim of some mass tort defendants seeking settlements is to protect the security of corporate management from the hazards associated with seeking the protection of the bankruptcy court. And one bargaining chip employed by some mass tort defendants to induce class settlement may be the threat to seek the protection of a bankruptcy court.

Almost the whole range of issues and concerns arising in bankruptcy are therefore raised by the concept of the settlement-only class action when applied to a defendant of questionable solvency. Illustratively, the fairness of a settlement may depend upon the net worth of the defendant. A court approving such a settlement is obliged to consider the worth of competing claims on the available assets and whether those assets can be augmented by unwinding transactions that have diminished the defendant's ability to pay. The contract and property interests protected by bankruptcy law are not less exposed to modification and diminution when those protections are circumnavigated by a Rule 23 settlement. Proposed paragraph (b)(4) simply fails to address the vast number of substantive issues addressed by Congress in the Bankruptcy Act,⁷³ with which bankruptcy lawyers are conversant. Silence does not deprive such legislation of substantial impact on the rights and duties it fails to observe.

10. Finally, there is the problem of future plaintiffs, including those yet unborn.⁷⁴ The present proposal disowns that issue, leaving it to case law. But the case law to which the issue is left has been made to rest in large measure on Rule 23.⁷⁵ The Committee Note attached to the (b)(4) proposal expresses the purpose of facilitating the resolution of the issue regarding future claims.⁷⁶ Courts imposing

72. See, e.g., *In re Asbestos Litig.*, 90 F.3d 963, 983 (5th Cir. 1996) (noting Fibreboard's "possibility of unlimited liability"); *Georgine v. Amchem Prods., Inc.* 160 F.R.D. 478 (E.D. Pa. 1995).

73. See, e.g., 11 U.S.C. § 1125(a)(1) (1994) (providing for disclosure of adequate information); § 1126 (giving creditor the right to accept or reject a plan); § 1129(b) (proscribing inequitable discrimination among creditors). See also Richard L. Epling, *Are Rule 23 Class Actions a Viable Alternative to the Bankruptcy Code?*, 23 SETON HALL L. REV. 1555, 1568-69 (1993); John C. Coffee, Jr., *The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1386-88 (1995) (noting that, beginning in the early 1980s, many asbestos producers sought shelter in bankruptcy in order to get relief from ballooning claims and to preserve as much equity as possible for their shareholders).

74. For discussion, see Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 882-87 (1995).

75. See, e.g., *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994); *Ahearn v. Fibreboard*, 162 F.R.D. 505 (E.D. Tex. 1995). See also *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983). These cases "express a position that is hardly well-established." Koniak, *supra* note 50, at 1062.

76. Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, Advisory Committee Notes, Apr. 18-19, 1996, in ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23,

global peace on future plaintiffs would therefore be expected to rely on proposed paragraph (b)(4) and its Note referring to future claims with even greater ease and justification than have those who fashioned the settlement-only class action out of the present text of the rule. That the substantive consequences of the rule are acknowledged and specified only in the Committee Note does not change the substantive character of the law it would purport to create. To the contrary, the Notes in this instance serve to call attention to the nature of (b)(4) as a disguise.

Proposed paragraph (b)(4), and the lower court practice it would seek to legitimate, are not principles of practice and procedure. They are radical tort reform. Doubtless, a strong case can be made for radical law reform to deal with the social, economic, and political problem of mass torts.⁷⁷ We do not here question the need for reform, but challenge the propriety of effecting such reform by rule of court.

THE THEORETICAL AND PRACTICAL BASES OF THE RULES ENABLING ACT

We then return to examine the proposition with which we began, that the Court cannot constitutionally employ its rulemaking power to achieve such substantive aims. As we noted above, the Court has never enforced the principle limiting its power.⁷⁸ As we will shortly report, otherwise responsible officers have sometimes disregarded it.⁷⁹ For these reasons, it seems timely to review the elementary principles of constitutional law and the practical political considerations underlying the statutory language of the Rules Enabling Act.

The theoretical limits of the Court's rulemaking power are derived from first principles of constitutional law so familiar that they are easily overlooked. Those principles are that Article III judges are to decide cases or controversies, i.e., to enforce the rights and duties of citizens by applying law to facts. Life tenure is conferred upon them to assure fearless judicial decisions, but that condition of employment also limits the roles that federal judges can legitimately perform. Because of their independence from democratic politics, Article III courts may perform political functions only if incidental to the Article III mission. That a function is socially useful or economically beneficial is not alone a sufficient reason to employ Article III institutions to perform it.

VOLUME I (1997).

77. See, e.g., Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 YALE L.J. 813, 827 (1989) (reviewing PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURT* (1987)) (advocating the creation of administrative agencies by the legislature to deal with mass torts).

78. Twice, four Justices have dissented from decisions upholding the validity of challenged rules of procedure, but never has the Court held a rule invalid. The two cases were *Sibbach v. Wilson*, 312 U.S. 1, 16-18 (1941) (Frankfurter, J., dissenting) and *Business Guides v. Chromatic Communications Enters.*, 498 U.S. 533, 565-69 (1991) (Kennedy, J., dissenting). See also *Marek v. Chesny*, 473 U.S. 1, 37-38 (1985) (Brennan, J., dissenting).

79. See *infra* text accompanying notes 93-101 and 105-14.

It is implicit in these principles that, as Judge Posner has noted, there is no power in the federal judiciary to compel individuals to settle their grievances.⁸⁰ Social peace is not the Article III mission. Dispute resolution is a by-product, not the objective, of the federal courts' decisions. It is, we may hope, a large by-product because for every carefully wrought judicial decision, there may be hundreds or thousands of matters that are privately resolved "in the shadow" of the law.⁸¹ Private dispute resolution depends to an important degree on the effectiveness of courts in the performance of the Article III mission of rendering accurate judgments in contested cases and controversies.⁸²

Making law is also an activity incidental to the mission of Article III courts. Law is made when courts decide cases, but life-tenure judges hold no commission to enact laws creating, modifying, or abrogating the rights and duties defining relationships between citizens in a democratic society. There is an important constitutional and practical political difference between the making of law bound to and limited by decisions in cases that a court is called to decide and the voluntary articulation of legal texts uttered as commands to control future conduct and relations. We accept the former because it is necessary, but not the latter because we have little need of what Geoffrey Hazard denotes as "undemocratic legislation."⁸³

Procedural legislation by federal judges is therefore constitutionally exceptional. It has, it is true, been contended by no less an authority than John Henry Wigmore that courts have inherent authority to utter procedural rules to command future conduct of lawyers and parties in judicial proceedings.⁸⁴ Perhaps such constitutional authority is appropriate in the schemes of state governments, especially those in which high judicial office is filled by vote of the people. But no such power has ever been claimed by or for the purposely elitist federal courts and where such power has been conferred by state constitutions, it has always been narrowly confined to the management by the courts of their own internal

80. See *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 658 (7th Cir. 1989) (Posner, J., dissenting) (stating that "[t]here is no federal judicial power to coerce settlement").

81. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 228 (1982).

82. See generally Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 51 (1996).

83. Geoffrey C. Hazard Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284, 1287 (1978) (reviewing JACK B. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* (1977)).

84. John H. Wigmore, *All Legislative Rules for Judicial Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). Cf. *Winberry v. Salisbury*, 74 A.2d 406 (N.J. 1950). But see Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926); Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rulemaking: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951).

operations.⁴⁵

There are now perhaps two hundred national constitutions in operation around the world.⁴⁶ It is doubtful that even one could be found to confer authority on a judicial institution to enact prospective laws creating new contractual relationships between citizens, abrogating or diminishing liabilities owed by some citizens to others in regard to events and relations external to judicial proceedings, transforming the jurisprudential premises of the legal order, or altering the relationships between branches or levels of the governmental structure. It is quite possible that proposed paragraph (b)(4) would violate every constitution in the world.

There is a practical reason that this is universally so: wherever law is important, it is important to preserve the independence of the judiciary from direct involvement in the factional politics that is an endemic threat to that independence. John Marshall was guilty of hyperbole in identifying a "dependent judiciary" as "the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people,"⁴⁷ but his point has been taken wherever constitutions intended to be enforced have been written.

All constitutions, including our own, depend on the self-discipline as much as the moral courage of the judiciary. In no sphere of judicial work is that discipline more timely than in regard to judicial rulemaking. When the Supreme Court promulgates rules of court, it is necessarily the judge of its own work. If the Court exceeds its authority, there is no effective authority available to correct it. While in our federal scheme, Congress has an opportunity to set rules of court aside, and the Supreme Court may sometimes have relaxed its guard against its own transgressions in the belief that Congress would prevent it from abusing its power, it is obvious, and recent experience with Rule 26 strongly confirms,⁴⁸ that even Congress does not sit to judge the judges' rules. As Judge Dolores Sloviter has cautioned, because checks on the judiciary are few, they "must be particularly sensitive to the need to check" themselves.⁴⁹ With respect to rules made pursuant to the Rules Enabling Act, that duty falls in the first instance on the committees who advise the Judicial Conference and the Court. Stephen Burbank has rightly said that "[b]oth the Supreme Court and Congress have a right to expect more of those to

85. See, e.g., WYO. CONST. art. V, § 2. See generally Eugene B. Tolman, *Historical Beginnings of Procedural Reform Movement in This Country—Principles to Be Observed in Making Rules*, 22 A.B.A. J. 783 (1936).

86. William W. Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933, 933 (reporting nearly 160 written constitutions). The breakup of the Soviet Union and Yugoslavia has since resulted in an additional score. In addition, there may be as many as twenty constitutional republics established in other nations in the last twelve years.

87. John Marshall, Address to Virginia State Constitutional Convention of 1829–30, quoted in *O' Donoghue v. United States*, 289 U.S. 516, 532 (1932).

88. See generally Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994).

89. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 580 (3d Cir. 1985) (Sloviter, J. dissenting) (en banc).

whom the primary responsibility for rulemaking has been entrusted" to take seriously the constitutional limits of their role.⁹⁰

The Court should keep always in mind that the absence of effective correction for indiscipline does not mean that those who make rules of court are beyond any accounting. The price of indiscipline in rulemaking will not be paid immediately in the form of invalidation by another body, but will be paid over time in other coin. It will be paid primarily in the erosion of trust and respect, in the willingness of citizens, the bar, and the political branches of government to accept the authority of a Court seen as trespassing on the right of the people to govern themselves. Especially if the Court makes questionable or bad law, it will as an institution pay a high political price.

It is partly because the Court sits in judgment on its own power that there is so little precedent defining the limits of the rulemaking power.⁹¹ There may be some who would advise the Court to disregard mere exhortations, even those of constitutional origin, and make whatever law seems most convenient or gratifying at the moment, leaving the nation and others who come later the burden of paying the price. In the long run, as they say, we'll all be dead. Doubtless there are occasions of grave political crisis when public officers having power to relieve a crisis ought act despite uncertainty about the legitimacy of their actions.⁹² But proposed paragraph (b)(4) addresses no such urgent national crisis. To enact it in violation of the Court's solemn, self-enforced duty to observe the limits of its own power cannot be justified.

Moreover, the Court and those who advise it need to keep in mind that its rulemaking process has been embattled in recent years.⁹³ In considering the politics of federal judicial rulemaking, it is necessary to ask the awful question, "how many divisions has the Pope?" The answer is very few. In 1983, the National Association of Process Servers proved to have more influence with Congress in shaping the text of Rule 4 than did the Judicial Conference and its committees,⁹⁴ a clear signal that

90. Burbank, *supra* note 16, at 431. The present Reporter is cognizant of the problem. See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996).

91. 28 U.S.C. §§ 2071-72 (1994).

92. Executive branch officials often need to avert or ameliorate crises before the judiciary can pass on the constitutional validity of their actions. See, e.g., The War Powers Resolution, 50 U.S.C. §§ 1541-48 (1994) (having limited success in restraining presidents from committing troops abroad in the absence of a congressional declaration of war); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (finding implicit congressional authorization of executive action during Iran hostage crisis).

93. For observations on the state of judicial rulemaking, see Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991); Charles A. Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1 (1994); Charles Gardner Geyh, *Paradise Lost, Paradise Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996).

94. Federal Rules of Civil Procedure Amendment Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527. The story is told in Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183 (1987).

the judicial rulemaking institutions were not held in the highest esteem on Capitol Hill. In 1988, Congress amended the Rules Enabling Act in expression of its dissatisfaction with the Court's rulemaking;⁹⁵ the House of Representatives voted to abolish the supersession clause,⁹⁶ a significant feature of the rulemaking process.⁹⁷ Further, in 1990, even with the support of the American Bar Association, the Judicial Conference was unable to dissuade Congress from enacting the ill-conceived Civil Justice Reform Act⁹⁸ which grievously disrupted the scheme put in place by the Court's rules.⁹⁹ The Congress enacting that legislation was not far removed from repealing the Rules Enabling Act. Judicial rulemakers may well already be, as Linda Mullenix has said, "go[ing] the way of the French aristocracy."¹⁰⁰ That destiny seems likely, and even warranted, if the Court ill-advisedly oversteps its role. Ronan Degnan in 1962 cautioned those drafting the Federal Rules of Evidence: "[c]ommon prudence should tell the rulemakers that reaching for too much may cost them everything."¹⁰¹

Yet another consideration of both theoretical and practical significance is that Article III institutions are not well-suited to the task of enacting substantive laws. The political branches of government have procedures for lawmaking to which those of the committees of the Judicial Conference of the United States are a poor imitation. Those procedures are designed not only to inform legislators about the merits of pending legislation, but also to accommodate the desires and demands of affected groups or interests to participate in and influence the process by which substantive rights and duties are created, modified, and abrogated.

Article III institutions are not adept at such procedures. Indeed, for the first half century of its existence, the federal rulemaking process was doggedly non-participatory; rulemakers sought to minimize public exposure of their deliberations to underscore and preserve their independence from factional politics. For about a

95. Judicial Improvements and Access to Justice Act of 1988, Act of Oct. 7, 1988, Pub. L. No. 100-702, 102 Stat. 4642. The present problem was forecast by Paul D. Carrington. See *Proposed Deletion of Supersession Provision by the Rules Enabling Act Amendments of 1988: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 2, at 1260-61 (1987) (statement of Paul Carrington).

96. H.R. REP. NO. 90-422, at 13, 16-17, 22-23 (1985).

97. Cf. *Henderson v. United States*, 116 S. Ct. 1638 (1996).

98. 28 U.S.C. §§ 472-73 (1994).

99. See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379-82 (1992); Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 952-66 (1996).

100. See Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991). The rulemakers have also been given counsel of caution by Laurens Walker, *A Comprehensive Reform for Federal Rulemaking*, 61 GEO. WASH. L. REV. 455, 462-63 (1993), and Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993).

101. Ronan Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 301 (1962).

decade, and especially since the 1988 revisions of the Rules Enabling Act,¹⁰² the rulemakers have strived to fit themselves for participation in policymaking by adopting procedures resembling those employed by Congressional committees and federal administrative agencies when rulemaking. Their public meetings and hearings on proposed rules and the comments they produced have helped rulemaking committees make better rules.

But there is less there than meets the eye. No one should mistake a committee of the Judicial Conference of the United States for a genuine instrument of democratic politics. Not yet have rulemaking committees become responsive to the influences to which Congress and the Executive are subject, for the reason that those committees are largely staffed by Article III judges who are, thanks be, almost impervious to the coercions of popular will. Although often accused of having a secret agenda to serve special interests of one kind or another, there is compelling evidence that the rulemaking committees have generally over the years maintained a steady eye on the simple aims stated in Rule 1.¹⁰³ Nevertheless, it cannot be denied that if judges are to choose among policies extrinsic to the process of litigation, "they will choose to advance those policies that are their special province and to subordinate those that are not."¹⁰⁴

The disability of Article III judges for the practice of democratic politics was recently illustrated by the action of the Judicial Conference of the United States derailing the proposal to restore the size of civil juries to twelve.¹⁰⁵ The federal civil jury, as the reader knows, was displaced a quarter century ago by the half-jury after the Court upheld a local rule of court effecting that change.¹⁰⁶ The Court's argument for sustaining the local rule was, again to quote Geoffrey Hazard, "monumentally unconvincing";¹⁰⁷ its decision allowed local district courts to make juries less representative, more erratic and harder to predict (and thus an impediment to settlement), and also doubled the impact of the peremptory challenges limited by Congress.¹⁰⁸ Had the electorate or even the bar had any influence, it seems unlikely that the halving of the jury would have been seriously considered. No notice was taken by the Court¹⁰⁹ or the district judges engaged in halving the jury that the institution was embedded in the Seventh Amendment because the people of the

102. See *supra* text accompanying notes 95–100.

103. See Marcus, *supra* note 74.

104. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1191–92 (1982).

105. 1996 PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (forthcoming).

106. See *Colgrove v. Battin*, 413 U.S. 149 (1973). For a brief account of the emergence of the halved jury, see Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 51–56 (1990). There are still a few districts using full juries.

107. FLEMING JAMES JR. & GEOFFREY C. HAZARD JR., *CIVIL PROCEDURE* § 8.12, at 453 (3d ed. 1985).

108. The number of peremptory challenges provided by federal law is of course unaffected by the local rules and stands at three per party. See 28 U.S.C. § 1870 (1994).

109. See *Colgrove v. Battin*, 413 U.S. at 149.

United States insisted on moderating the power of the life-tenure judges created in Article III.¹¹⁰ In 1991, the Court promulgated rules amendments acknowledging what had been done.¹¹¹ At no time did the Court or its advisors seriously consider any views of the jury other than that of the judiciary. When at last a rulemaking committee responded to the popular view¹¹² and voted to restore the jury to full size,¹¹³ its recommendation was rejected by the Judicial Conference with no reasons given. A lesson taught is that if the federal judiciary prefers halved juries, juries will continue to be halved, whatever the bar and the people may think. Such indifference to the will of the governed is entirely appropriate when judges are deciding cases or controversies, and it is also appropriate when making rules of a technical nature serving to promote just, speedy, and inexpensive enforcement of rights and duties, but it is inappropriate in an institution abridging or modifying those rights and duties.

The independence of the judiciary is an advantage in making narrowly procedural rules governing the conduct of parties and their lawyers in court because it advances the formation of general principles of procedure expressing the values of due process of law.¹¹⁴ In 1994, the American Bar Association in its dismay over Rule 26 disclosure requirements urged that the composition of rulemaking committees be revised to include more lawyers.¹¹⁵ What their proposal overlooked was that the recommendations of a committee of lawyers would carry meager influence with the Judicial Conference, the Court, or Congress, all of whom would have cause for concern that the lawyers on such a committee were actively advancing their own interests or those of their clients.

The strength of the rulemaking idea is that Article III institutions are less vulnerable to factional political interests of the sort customarily advanced by lobbyists to gain specific advantages for the particular classes of lawyers or the litigants whom they represent. Although it is no longer uncommon for people to try, one cannot lobby Article III judges in the ways that one might lobby a committee of Congress to gain an advantage for a "special interest." Experience with civil procedure fashioned by factional democratic politics, such as the ABA proposal would enhance, was generally adverse; the extreme example was the so-called Throop Code that displaced the simpler Field Code in New York with a

110. See Carrington, *supra* note 99, at 950–51. See generally Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

111. FED. R. CIV. P. 47–48.

112. Many judges shared the common view that the proper and historical size of a jury is twelve. See, e.g., Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 31–35 (1993).

113. See 116 S. Ct. 378, 379 (1995) (proposed amendment to FED. R. CIV. P. 48).

114. See Carrington, *supra* note 3, at 299–310.

115. Pre-Trial Practice in the 90's and Coping with New Federal Rules of Civil Procedure and the Civil Justice Reform Act, Section of Litigation, ABA Annual Meeting, Aug. 8, 1994. See also *Administration Opposes New Disclosure Rule*, NAT'L L.J., July 26, 1993, at 5 (stating that the ABA Board of Governors was opposed to the Rule 26(a)(1) automatic disclosure provision).

procedural system of daunting complexity.¹¹⁶ Such complexity tends to result when influential factions are given tactical advantages over their usual adversaries in litigation.

Yet another consideration of constitutional character is that if the Court or the Judicial Conference were ill-advisedly to place themselves in the role of making laws evoking a high level of political partisanship and lobbying activity, they would be transformed by the activity. The Court would follow the Civil Rules Committee and become more like Congress. Notwithstanding the existence of *amici curiae*, the Court is not equipped to receive and absorb the information and the influences that are the stuff of democratic policy-making. The more substantive its enactments, the less the Court can rely on the presumed technical expertise of the Civil Rules Committee and the more the Court will need to employ its own political judgment. No Court legislating substantive law is likely to rely for long on subordinate committees to keep it informed about the social, economic, and political consequences for which it is asked to take responsibility, and it is unlikely to accept the recommendations of subordinate committees without considering afresh the merits not only of rules proposals, but of other alternatives coming from other sources. To the extent that the Court responds to recommendations of substantive law reforms in masquerade, the more it will need to afford participatory opportunities to ever more diverse groups seeking to help shape that judgment. On several occasions in recent years, the Court has received argument in opposition to the promulgation of proposed rules.¹¹⁷ That practice is likely to increase in frequency as a result of the 1988 amendments to the Rules Enabling Act because the enhanced openness of the process has brought increased demands for participation. The Judicial Conference and its committees must inevitably become increasingly redundant as the Court comes to conduct its own legislative hearings and do its own drafting.¹¹⁸

116. For a brief description of the Throop Code, see ROBERT MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 55–56 (1952).

117. For examples, the British Embassy filed an objection to the 1991 proposal to amend Rule 4, and the American Bar Association filed a statement in opposition to the 1993 revision of Rule 26. See also *supra* text accompanying notes 105–14.

118. Anyone doubting this observation might consult the numerous dissenting opinions filed over the years in opposition to the promulgation of particular revisions of the Rules. See, e.g., Amendments to the Federal Rules of Civil Procedure for the United States District Courts, 374 U.S. 861, 865–70 (statements of Black and Douglas, JJ., dissenting from adoption of amendments to Federal Rules of Civil Procedure 4, 50, and 56, on grounds that the proposed rules changes “substantially affect the rights of litigants in lawsuits” and are in practical effect the “equivalent of new legislation which the Constitution requires to be initiated in and enacted by the Congress and approved by the President”); Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 997–1001 (1980) (Powell, J., with whom Stewart and Rehnquist, JJ. joined, dissenting from adoption of the amendments to Federal Rules of Civil Procedure 26, 33, 34 and 37, on the basis that the changes proposed did not go far enough to meet the needs of civil justice reform); *Amendments to Federal Rules of Civil Procedure*, 507 U.S. 1089, 1096 (1993) (Scalia, J., with whom Thomas, J. joined, dissenting from the Court’s adoption of amendments to Rules 26, 30, 31, and 37 on the ground that the proposals will increase litigation costs,

In addition, as the Court's rules modify substantive rights and duties, the more aggressive will be the efforts of factional interests to establish relationships with Justices, and the more concerned the Justices will become with marshaling public acceptance and support for their enactments.¹¹⁹ Would the Court enacting new principles of contracts or torts accept *ex parte* communications as Senators and committee members do? Would lobbyists be issued badges of access to the corridors of the Court? Would they be received in the chambers of individual Justices? Would Justices allow themselves to go junketing with lobbyists favoring or opposing a particular rule of court? Would Justices need at least one law clerk performing the role of legislative assistant who is adept at spin-doctoring? And is it not likely that Justices would seek and perhaps find new means of bringing pressures to bear on one another to secure legislative enactments and on Congress to protect their enactments from unwelcome revision on Capitol Hill? Would they go on speaking tours? Divide into parties? Send their staffs to work the corridors of Congress?

Finally, at the end of the process making substantive legislation comes a Faustian moment when the judge-legislator must express a substantive preference for the interests of one faction over another, choosing between labor and capital, or between investors and brokers, or consumers and manufacturers, or environmentalists and those who use and consume natural resources, and so forth. Granted that the Supreme Court reflects in a general way the politics of the presidents who appoint its members, it presently remains an institution independent of any enduring ties to any of the various factions just mentioned. Trust in the Court is a precious national treasure. That trust rests in large measure on our shared belief that Article III judges decide cases or controversies on the merits, without regard for who the parties might be in part because they have no continuing ties to factions of the sort that democratic legislators nurture. That trust is at risk when the Court elects to enact laws favoring one special interest over another.

We of course cannot say that all these imaginary horrors would occur if paragraph (b)(4) were added to Rule 23. But they are all foreseeable secondary consequences of the Court's departure from its assigned role. None are likely to occur if the Court sticks in rulemaking to the narrowly technical task of expressing general principles derived from the values embodied in the constitutional principle of due process of law, technical matters on which its advisory committees have some plausible claim to competence. And if it restrains lower federal courts from relying upon rules that it has promulgated to legitimate such manifestly substantive activities as tort reform.

OBSERVING (AND NOT OBSERVING) THE LIMITS OF THE COURT'S AUTHORITY

Proposed paragraph (b)(4) is politically controversial, supported by some

burden the district courts, and harm the adversary system).

119. These problems were noted in Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

factions and opposed by others.¹²⁰ That is a solid proof of its substantivity in the pragmatic sense. When large political forces are marshaled in support of or in opposition to a proposed amendment to a rule, it is time to ask why. The answer will generally be because the proposal has important effects extrinsic to the process by which the courts decide cases or controversies in accordance with law. When that appears to be the case, it is time for the Civil Rules Committee and the Judicial Conference to redirect those factional interests to Capitol Hill, where they belong.

Although never articulated, this practical wisdom has in the past guided the behavior of the Civil Rules Committee. It has never recommended a rule revision to which there was stout, principled opposition by persons aggrieved by its prospective substantive consequences. The 1993 revision of Rule 30 to permit the use of videotape in recording depositions¹²¹ was opposed by the national organization of court reporters and the disclosure provisions of Rule 26¹²² were opposed by the bar, but these reforms were incontestably procedural in character, having no effect on rights or duties bearing on relations and events outside federal judicial proceedings.

On the other hand, some who should have been sensitive to the pragmatic constitutional politics of judicial rulemaking have not been. Like all jurisdictional restraints, the injunction against substantive legislation by the Court is easily forgotten by those seeking to make what they believe to be good law. For example, Judge Charles Clark, the first Reporter to the Civil Rules Committee, forgot as evidenced when the Advisory Committee had to restrain him from including in Civil Rule 3 a doctrine of limitations law.¹²³ Limitations law, while it is often characterized as procedural for some purposes,¹²⁴ has little to do with the operations of the courts in performing their constitutional mission, and it was quite clear that Congress did not intend to confer on the Court authority to enact limitations law.

The 1937 Advisory Committee served by Judge Clark itself forgot the limits of its commission when it recommended the promulgation of Rule 68 on offers of judgment,¹²⁵ apparently without considering that it might violate the statutory injunction against substantive rules of court. It is understandable that the committee overlooked the issue in regard to the original Rule 68 because that rule was so trivial in its effect. Possibly it could have been justified as a procedural rule implementing Congressional legislation on the taxation of fees.¹²⁶ On the other

120. This was evident at the hearings on the proposed rule; transcripts are available from the Administrative Office of the United States Courts. See the other articles in this symposium issue.

121. FED. R. CIV. P. 30(b)(2).

122. FED. R. CIV. P. 26(a)(1).

123. Burbank, *supra* note 104, at 1136-37. Judge Clark believed that the Rules Enabling Act "authorized a Rule having the effect of tolling a state or federal statute" by the filing of a complaint and that such a rule would be controlling "except as against statutes that had been interpreted to require service of process." *Id.* at 1159 n.620.

124. Carrington, *supra* note 3, at 290.

125. FED. R. CIV. P. 68.

126. See 28 U.S.C. § 1920 (1994).

hand, Rule 68 is merely an inducement to litigants to withdraw from court and has nothing to do with the internal operation of the institutions in deciding cases or controversies; and it appears to modify rather than elaborate the controlling Congressional legislation on fee-shifting.¹²⁷ Hence, it would seem that Rule 68 was from its beginning an invalid rule of court, albeit an almost completely harmless one.

The American Bar Association was itself the progenitor of the Federal Rules Enabling Act,¹²⁸ yet it also sometimes forgets that the Act limits the rulemaking power of the Court. During the decade of the 1980s, the Association recommended three reforms. The first led to the promulgation of revised Rule 11 in 1983, a rule proving to have significant unintended substantive consequences.¹²⁹ The second was a revision of Rule 45 to include, among other features, a provision imposing liability on lawyers who abuse the subpoena power.¹³⁰ That request was fulfilled in the 1991 revision,¹³¹ but not without some soul-searching on whether tort law regarding abuse of process could be included in the Rules. It was concluded that the proposal was sufficiently narrow and sufficiently pertinent to in-court misconduct of lawyers that it met the test as a procedure rule within the authority conferred by the Rules Enabling Act. The third was that Rule 64 be modified to enact a federal law of provisional remedies.¹³² That proposal was promptly tabled by the Civil Rules Committee as beyond the reach of the Supreme Court's legislative powers, as it clearly was.

Even the Court itself has not always been attentive to the limits of its powers. It has on several occasions comforted itself that Congress has an opportunity to review the rules it promulgates, and has brushed away challenges to particular rules with the casual observation that Congress would not allow it to promulgate an invalid rule.¹³³ It is true, as we previously noted, that on occasion Congress has interceded to derail a promulgated rule it disapproved.¹³⁴ But the Court's idea that Congress has somehow approved rule changes that it does not derail should be

127. The "American Rule" was expressed in the Fees Act of 1853, Act of Feb. 26, 1853, 10 Stat. 161. An antecedent decision was *Arcambel v. Wiseman*, 3 Dall. 306 (1796).

128. Burbank, *supra* note 104, at 1043-68.

129. See generally Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677 (1996).

130. See AMERICAN BAR ASS'N HOUSE OF DELEGATES, FORMAL RESOLUTION 10-11 (1985).

131. FED. R. CIV. P. 45(c)(1).

132. AMERICAN BAR ASS'N HOUSE OF DELEGATES, LITIGATION SECTION REPORT NO. 107 (1986).

133. See, e.g., *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533 (1991). The Court observed that Congress had at least seven months to look Rules over before they go into effect. *Id.* Furthermore that a challenge to a Rule can only succeed if "Congress erred in [its] prima facie judgment that the Rule...transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)). However, as the following discussion will demonstrate, the Court's reliance on Congress to serve as an effective oversight body is misplaced.

134. For example, see *infra* text accompanying notes 147-52, concerning Congress's intervention of the Court's proposed Rule 4 in 1982. See also *supra* note 94.

reappraised by the Court in the light of the events of 1993 regarding the changes made in Rule 26. Readers will likely recall the brouhaha raised by members of the bar who felt that fundamental values were threatened by the disclosure requirements authorized by that amendment.¹³⁵ The United States House of Representatives voted unanimously to derail the Committee's proposal and substitute one of its own.¹³⁶ The House bill was brought before the Senate Judiciary Committee on the day before adjournment when that committee was acting under a rule requiring unanimity. When Senator Metzenbaum objected to the House bill, that killed it. And so Rule 26 became law as the result of its support by a single Senator voting against a unanimous House, a House that would have been joined by an almost unanimous Senate if the matter had ever reached the Senate floor. The final vote was thus one Senator against the world, with the one Senator prevailing. It would therefore be preposterous to argue that Congress in any degree approved Rule 26. By the same token, Congress in no useful sense approved the 1983 version of Rule 11, although the Court over strong dissent treated Congressional inaction on that rule as an endorsement of its authority to promulgate a Rule authorizing an imposition of costs on a party represented by counsel.¹³⁷

The Court has also sometimes been less than fully attentive to the limits of its authority in interpreting the rules it has promulgated. *Marek v. Chesny*,¹³⁸ in which the Court re-wrote Rule 68, is an example. The court of appeals there held (rightly in our view) that an interpretation of Rule 68 to include attorneys' fees would make the rule *pro tanto* invalid as an abridgment of substantive rights.¹³⁹ The Court reversed, relying in part on the rule, but also on the Civil Rights Act¹⁴⁰ adopted after Rule 68 as the legislative source of the doctrine it applied to sustain a taxation of fees against a civil rights claimant who had declined a favorable offer of judgment.¹⁴¹ The result was a bizarre principle that shifts fees or not according to subtle differences in the language of diverse federal enactments.¹⁴² The issues raised in *Marek* would better have been left entirely for Congress, where in fact they presently reside.¹⁴³ A prudent Civil Rules Committee might consider the repeal of Rule 68.

135. See Carrington, *supra* note 88, at 307-09.

136. Civil Rules Amendments Act of 1993, 139 CONG. REC. H8744-01 (daily ed. Nov. 3, 1993).

137. See *Business Guides*, 498 U.S. at 551-52. Four Justices dissented on the ground that such a rule would be substantive. *Id.* at 554, 564-69. In the context of Rule 11, the dissent remarked that "[u]ntil now, it had never been supposed that citizens at large are, or ought to be, aware of the contents of the Federal Rules of Civil Procedure, or that those Rules impose on them primary obligations for their conduct." *Id.* at 564 (Kennedy, J., dissenting).

138. 473 U.S. 1 (1985).

139. 720 F.2d 474, 479 (7th Cir. 1983).

140. Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1994)).

141. *Marek*, 473 U.S. at 9-12.

142. For a description, see Justice Brennan's dissenting opinion. *Id.* at 43-48 (Brennan, J., dissenting).

143. For discussion, see Carrington, *supra* note 99, at 991-93.

For another example, in *Omni Capital International v. Rudolf Wolff & Co.*,¹⁴⁴ the Court referred to the rulemakers the issue of whether federal long-arm jurisdiction should be extended over foreign defendants having minimum contacts with the United States, but not with any individual state.¹⁴⁵ The Court did not consider whether such a rule would be within the rulemaking power. The issue thus presented to them in *Omni Capital* appeared to the rulemakers to be a close question, perhaps not within their purview; the Civil Rules Committee would have preferred for Congress to respond to the legislative need identified by the Court, and diffidently called the attention of Congress to the uncertain authority with which it proposed Rule 4(k)(2), a provision that became law in 1993.¹⁴⁶ This was the suggestion of congressional staff to whom the problem was presented.

On the other hand, while the Court was on those occasions heedless of the limits of its rulemaking authority, it has on at least one recent occasion been perhaps overly sensitive to an issue of rulemaking power. In 1991, the Judicial Conference recommended a change in Rule 4 authorizing service of a requested waiver of formal service of process backed by a provision for shifting the costs of formal service in cases in which the defendant refused the waiver of service without justification, thereby incurring needless cost.¹⁴⁷ One contemplated use of that provision was to eliminate the sometimes substantial and unnecessary cost of translating a complaint in order to formally serve it in a foreign country on a multinational corporation doing substantial business in the United States. That purpose was clearly within the pale of the rulemaking authority of the Court. Moreover, the rulemakers were right that if Toyota, for example, wants a complaint translated into Japanese,¹⁴⁸ it should be no more able to impose that cost on an American plaintiff injured in America than are General Motors or Ford.

However, at the last moment, the British Embassy, of all people, objected to this revision of Rule 4, contending to the Court that it violated the Hague Convention providing that a summons served in a signatory nation must be translated and transmitted through the Central Authority of the nation in which service is to be effected.¹⁴⁹ That treaty is silent on the question of the costs of the translation.¹⁵⁰ It was surely no purpose of the Senate in ratifying that Convention to

144. 484 U.S. 97 (1987).

145. *Id.* at 108, 111.

146. See Proposed Amendments to the Federal Rules of Civil Procedure, 113 S. Ct. 609, 631 (1993) ("Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2).").

147. The proposed amendments to Rule 4 were submitted by the Judicial Conference to the Supreme Court on November 19, 1990. 19 FED. R. SERV. 3d, at 1xxx1. This proposal was not transmitted to Congress, pending further consideration by the Court. 134 F.R.D. 526 (1991).

148. See, e.g., *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989).

149. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, opened for signature Nov. 15, 1965, art. 2, 20 U.S.T. 361, 658 U.N.T.S. 163, 28 U.S.C.A. FED. R. CIV. P. 4 (Supp. 1986) [hereinafter Convention on Service Abroad]; see also Joseph Weis, *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903 (1989).

150. See Convention on Service Abroad, *supra* note 149, at art. V.

give foreign defendants the right to impose a needless cost on American plaintiffs, a cost not incurred by plaintiffs suing the business competitors of those foreign defendants.¹⁵¹ Nevertheless, the Court declined to promulgate the rule as proposed by the Conference, in effect yielding to, without accepting, the British contention that the request for a waiver backed by a fee-shifting provision was tantamount to service by mail in a country forbidding that form of service. Revised Rule 4 was at last promulgated in 1993,¹⁵² but foreign defendants are exempt from the cost-shifting provision.¹⁵³ It is thus one of the xenophilial provisions of our law that may explain the extraordinary success of foreign litigants in American courts.¹⁵⁴ Perhaps the Court was wise to remove the rulemaking process from the line of political fire mounted by the British government at so minor a provision, but the result is an unjust asymmetry in our law that the Court was empowered to correct.

Thus, despite instances of acute sensitivity, neither the American Bar, nor the Court, nor the Civil Rules Committee nor its Reporters have been consistently faithful to the limits of judicial rulemaking. Rule 23 has provided more than its share of occasions when the issue of authority under the Rules Enabling Act was presented. The committee recommending the 1938 version of the rule was uncertain of its validity.¹⁵⁵ In light of the decision in *Erie R. v. Tompkins*,¹⁵⁶ the committee reconsidered whether its proposal might be too substantive as a displacement of the state law of judgments.¹⁵⁷ It was chiefly concerned about the provision in its rule disallowing a derivative action by a shareholder who was not a shareholder at the time of the transaction of which he complained. Noting that their proposed rule was based on long-standing federal equity practice, the committee concluded that the question of its validity as a displacement of state law in diversity litigation should be left to the courts. Implicit is the assumption that the text of the rule would have no bearing on the res judicata effect of the judgment.

The 1966 revision of Rule 23 created no factional political stir and was not viewed by those who studied and recommended it as having large social and political consequences.¹⁵⁸ The reform was part of a general revision of the rules bearing on parties and was animated by concern for the management of civil rights

151. See J. Dickson Phillips & Paul D. Carrington, *Reflections on the Interface of Treaties and Rules of Procedure: Time for Federal "Long-Arm" Legislation*, LAW & CONTEMP. PROBS., Summer 1994, at 153, 157.

152. See Amendments to the Rules of Civil Procedure, 507 U.S. 1103, 1103-11 (1993).

153. FED. R. CIV. P. 4(d).

154. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996).

155. See ADVISORY COMM. ON THE RULES FOR CIVIL PROCEDURE, Report 60 (1937) (declining to rule on "effects" of judgments on persons who are not parties).

156. 304 U.S. 64 (1938).

157. FED. R. CIV. P. 23 advisory committee's supplementary notes (1938).

158. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386-87 (1967).

litigation involving injunctions applicable to large numbers of citizens.¹⁵⁹ Its heart was clause (b)(2) bearing on class actions seeking injunctive or declaratory relief.¹⁶⁰ Clause (b)(3) was a re-writing of the former clause (a)(3) covering what was then known as the spurious class action. The spurious class action was a device useful in cases in which numerous claims rested on a common contention and parties making the claims elected to join in a single action, but were sufficiently numerous that it was infeasible to conduct the litigation with each claimant asserting the autonomy customary in conventional adversary litigation.¹⁶¹ It was not a means of adjudicating the rights of any person not joined as a party.

The need in 1966 to revise the spurious class action was occasioned in part by the erosion of the requirement of mutuality as a precondition to what was then known as collateral estoppel and now known as issue preclusion.¹⁶² The development's relation to Rule 23 was called to public attention when a district court in Colorado,¹⁶³ after finding for a plaintiff miner who had alleged that the price paid for his minerals by Union Carbide was fixed in violation of the antitrust laws, sent out a notice to all other miners working the slopes of the Rocky Mountains that they might join in the litigation and thus get the benefit of a previous determination that Union Carbide was guilty of price-fixing. The late comers would be required to prove only that they had, like the original plaintiff, sold minerals at an artificially low price.¹⁶⁴ And of course all would receive triple damages. While the court of appeals affirmed,¹⁶⁵ and the Supreme Court denied certiorari,¹⁶⁶ there were those who regarded this outcome as unjust to Union Carbide, who would clearly have been unable to use a finding in its favor to preclude reassertion of identical claims by the unjoined miners.

The new clause (b)(3) was recognized by the Committee as a novel invention—the novel feature being the provision for notice and opt-out in lieu of formal joinder of each member of the class.¹⁶⁷ Under the amended (b)(3), Union Carbide, for example, could have requested that the unjoined miners all be asked to take a position either in or out of the action. It was supposed that those who opted out would not only be excluded from any judgment rendered in favor of other

159. See FED. R. CIV. P. 23 advisory committee's note (1966). See also John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions*, in ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, VOLUME 2, at 264, 266 (1997) (contending that the "energizing force" which motivated the 1966 revisions to Rule 23 was the desire "to create a class action system which could deal with civil rights and, explicitly segregation").

160. Kaplan, *supra* note 159, at 386–94.

161. William Wirt Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878 (1932).

162. RESTATEMENT (SECOND) OF JUDGMENTS §§ 27–28 (1980).

163. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 562 (10th Cir. 1961).

164. *Id.* at 589.

165. *Id.* at 590.

166. 300 F.2d 561, *cert. denied sub nom.*, *Wade v. Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962).

167. Kaplan, *supra* note 158, at 397–98.

members of the class, but that they would also have no access to issue preclusion as an indirect means of securing that benefit.¹⁶⁸ A review of the Committee's deliberations indicates that the Committee would not have recommended (b)(3) had it not hit upon the idea of notice and opt-out¹⁶⁹ embodied in clause (c)(2) of the rule. Although (c)(2) requires only that the notice be "the best practicable under the circumstances" and sent only to those members "who can be identified through reasonable effort,"¹⁷⁰ it was clearly understood in 1966 that no class member could possibly be bound to a judgment who was not given actual notice of the proceeding and in a position to exercise intelligently the choice to opt out.¹⁷¹

It appears likely that some members of the 1966 Committee were moved in part to support the new provision as a means of enabling a large class of persons, having each experienced modest harms resulting from a single misdeed of the defendant, to gain the economies of aggregation. Over two decades before, Harry Kalven and Maurice Rosenfield had made a powerful argument that such an aggregation should be permitted as a means of deterring many forms of predatory conduct.¹⁷² Knowing that no single person harmed by their illicit practice could have a claim large enough to be viable, firms could engage in predation with impunity; aggregative litigation, Kalven and Rosenfield hoped, could dispel that knowledge and impunity and thus deter predation. While there appears to have been relatively little discussion of the Kalven and Rosenfield thesis in the Committee, (b)(3) was responsive to their concern,¹⁷³ and class actions to recover money to compensate consumers, investors, or victims of environmental and toxic torts have become common in circumstances in which a single claim would be financially non-viable.¹⁷⁴

There was opposition within the Civil Rules Committee to the recommendation of clause (b)(3). The prescient concern expressed was that defendants might prefer to litigate class actions for the purpose of securing res judicata defenses assertable against individual members of the class too slow to recognize that their interests were inadequately represented by class counsel.¹⁷⁵ The response to this concern was set forth not in the text of the new clause, but in the Advisory Committee Notes.¹⁷⁶ Those notes emphasized that the rule requires that

168. CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 520 (5th ed. 1994).

169. Frank, *supra* note 159, at 269-70.

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

171. Frank, *supra* note 159, at 269 (quoting the Hon. Charles E. Wyzanski). One of the first cases to explicitly refute this notion was *In re Agent Orange Prods. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983) (approving class composed of all persons exposed to defoliant agent in Vietnam, whether or not presently ill).

172. See Harry Kalven Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

173. See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COMMERCIAL L. REV. 497 (1969).

174. See 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, CIVIL §§ 1782-1788 (2d ed. 1982); WILLGING ET AL., *supra* note 35.

175. See Frank, *supra* note 159, at 268.

176. FED. R. CIV. P. 23 advisory committee's note (1966). In referring to the notes, we

questions common to the class predominate over the questions affecting individual members. This was thought to exclude the possible use of the rule in mass tort cases because "significant questions, not only of damages, but of liability and defenses of liability, would be present, affecting the individuals in different ways."¹⁷⁷ Moreover, the committee asserted that mass tort cases can better proceed through the use of test cases¹⁷⁸ or multi-district consolidations of individual actions;¹⁷⁹ hence the class action is not superior to such other methods as required by the text of (b)(3).

No one in 1966 suggested that the proposed clause (b)(3) would be invalid as exceeding the power of the Court under the Rules Enabling Act.¹⁸⁰ In fact, little if any consideration was given to that possibility. One reason for this was that the rulemaking power of the Court was still in its honeymoon stage. There was at that time great enthusiasm for the 1938 Rules and no one was disposed to question their source.¹⁸¹ Indeed, the Rules had been replicated in many states, sometimes *in haec verba*.¹⁸² The Supreme Court in 1965 dicta loosely equated its rulemaking power with the power of Congress over the federal courts and suggested that a rule would be valid so long as it could be "rationally classified" as procedural.¹⁸³ Not yet under consideration were the Federal Rules of Evidence that would be proposed at the end of the decade and would go far to unravel the political invulnerability previously enjoyed by the rulemaking process when Congress endorsed the view that the law of evidentiary privilege is substantive.¹⁸⁴ So 1966 was still a relaxed

do not mean to "privilege" them. Resnik, *supra* note 6, at 2219. We take Professor Resnik's point that the notes bear some resemblance to expressions of original intent by those who made the Constitution in 1787. On the other hand, Committee Notes are a secondary part of the material promulgated by the Court, and are intended as explanations of legislative purpose entitled to some weight in the interpretation of ambiguous language in the texts of rules. They are intended to bear the same status as the commentary accompanying the Uniform Commercial Code and other similar enactments. See *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

177. FED. R. CIV. P. 23 advisory committee note (1966).

178. See, e.g., *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974).

179. 28 U.S.C. § 1407 (1994).

180. But there was argument that (b)(3) extended the subject matter jurisdiction of the federal courts in violation of FED. R. CIV. P. 82. See Kaplan, *supra* note 158, at 399.

181. JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975).

182. John B. Oakley & William Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

183. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). The issue before the Court was one of federalism, not separation of powers; the Court decided that Rule 4 applied in a diversity case despite an apparent conflict with local state law. For contemporaneous criticism, see John McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 901-03 (1965). See generally Mary Kay Kane, *The Golden Wedding Years: Erie R. v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671 (1988).

184. See Arthur J. Goldberg, *The Supreme Court, Congress, and the Federal Rules of Evidence*, 5 SETON HALL L. REV. 667 (1974); Jack Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 373

time for federal rulemakers.

But the important reason for the absence of concern regarding the validity of the 1966 reform was that no one favoring the addition of paragraph (b)(3) envisioned the uses to which that text would in time be put. Benjamin Kaplan, the Reporter, affirmed that the new provision was "well confined."¹⁸⁵ Charles Alan Wright predicted that few cases would be brought under that provision.¹⁸⁶ The 1966 Committee was not indifferent to the issue of its authority under the Rules Enabling Act, and spoke to the question in explaining its modification of Rule 19,¹⁸⁷ but as long as Rule 23 had no application to mass torts, there seemed no cause to be concerned about its legitimacy.

The Committee apparently gave little attention to the settlement of (b)(3) actions. Subdivision (e) requiring court approval of dismissals remained in its 1938 form as a vestige of traditional equity practice applicable to all class actions and derivative suits and was intended to protect members from an improvident or corrupt dismissal of their claims by class counsel. Assuredly, no one in 1966 considered the possibility of an action being certified as a class action for the sole purpose of approving a settlement under that subdivision, thereby ostensibly conferring a *res judicata* effect on an essentially non-judicial resolution of the claims of thousands and even millions of non-parties.

To the extent that the effect of paragraph (b)(3) of the 1966 rule was to accommodate the problem posed by the belated joinder of those miners working the slopes of the Rockies, there seems to be little question that it, with the notice and opt-out feature of paragraph (c)(2), was a rule of procedure within the meaning of the Rules Enabling Act. Moreover, facilitating the aggregation of claims for smaller harms, as advocated by Kalven and Rosenfield in order to make trials economic in cases involving numerous and identical small claims, fit comfortably with the aims of procedural law reform as advanced by the Rules Enabling Act and expressed in Rule 1, even though it was known that "the rule would stick in the throats of establishment defendants."¹⁸⁸

More questionable, however, were some of the uses to which the text of the 1966 version of Rule 23 was soon put by lower federal courts.¹⁸⁹ As Charles Alan

(1969).

185. Kaplan, *supra* note 158, at 395.

186. Charles A. Wright, *Recent Changes in the Federal Rules of Civil Procedure*, 42 F.R.D. 437, 567 (1966).

187. Kaplan, *supra* note 158, at 369. That issue was resolved in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). The argument for the invalidity of Rule 19 rested on the assumption that the labels "necessary" and "indispensable" were expressions of substantive law that cannot be modified by rule of court. It prevailed in a court of appeals. *Provident Tradesmens Bank & Trust Co. v. Lumbermans Mut. Cas. Co.*, 365 F.2d 802 (3d Cir. 1966). For criticism, see Kaplan, *supra* note 158, at 371-75.

188. Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2127 (1989).

189. See generally Comment, Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

Wright has said, the rule has been put "in jeopardy" by "those who embrace it too enthusiastically."¹⁹⁰ Illustratively, some courts found authority in the new rule for the creation of something called a "fluid recovery," i.e., one that disconnected the class remedy in a (b)(3) action from any individual entitlements of class members.¹⁹¹ Others found authority for shifting the cost of notice to members of the class from the class representative to the defendant. In due course, the Court hemmed in some of the more extravagant interpretations of the new rule.¹⁹² Lower courts became more cautious.¹⁹³

Numerous proposals were, however, advanced for the further revision of the 1966 rule.¹⁹⁴ Prudently recognizing the vulnerability of the rulemaking process, the Civil Rules committee tabled those proposals, effectively referring them to Congress. Yet, the question of revision of Rule 23 recurred.¹⁹⁵ In the 1980s, two sections of the American Bar Association simultaneously advanced suggested reforms of the rule; the two proposals were so at odds that the ABA House of Delegates took no position on them, but referred the issue to the Civil Rules committee, where they were tabled along with all earlier suggestions. The Committee was at that time unanimous in the view that Rule 23 was too politically freighted to bear treatment by the apolitical process associated with Article III institutions. And the issues then posed were, at least for the most part, less subject to factional political dispute than is the present proposed Rule 23(b)(4).

Nevertheless, lower federal courts have since 1984 continued to extend Rule 23 beyond its legitimate bounds, particularly in regard to the approval of settlements in class actions not meeting the requirements of paragraph (b)(3) and certified for settlement only.¹⁹⁶ Peter Schuck has labeled the era "a period of desperate improvisation" to solve the problem of repetitive mass tort litigation.¹⁹⁷ It appears, however, that only a few members of the federal judiciary were the

190. WRIGHT, *supra* note 168, at 508. *Accord* Wilcox v. Commercial Bank of Kansas City, 474 F.2d 336, 347 (10th Cir. 1973).

191. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259-63 (5th Cir. 1974).

192. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). *See* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, CIVIL § 1754 (2d ed. 1982).

193. *See, e.g.*, *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982). However, recent decisions by some lower courts may signal a reversal of this trend. *See e.g.*, Castano v. American Tobacco Co., 160 F.R.D. 544, 548, 559-60 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

194. WRIGHT, *supra* note 168, at 509.

195. *See, e.g.*, NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, *Model Class Actions Act of 1976*, 12 U.L.A. 102 (1996); H.R. 5103, 96th Cong., 1st Sess. (1979).

196. A pioneering decision was *In re* Baldwin-United Corp., 105 F.R.D. 475 (S.D.N.Y. 1984). The pivotal case may be *In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989). *See also* *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 846 F. Supp. 330 (E.D. Pa. 1993), *rev'd*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995). For a good account of the extension of Rule 23, see Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993).

197. Schuck, *supra* note 56, at 948.

innovators.¹⁹⁸ Possibly, some have been animated by the ambition to decide cases of elevated importance; Judith Resnik reports that "some federal judges are 'offended' when asked to think about as 'small' a problem as that of a single individual."¹⁹⁹ Whatever the driving force, federal judges have been approving settlements justified by highly dubious interpretations of the text of Rule 23 and relying heavily on the fact that the present text does not explicitly forbid the practice.²⁰⁰ Bucking the trend, the United States Court of Appeals for the Third Circuit has recently set aside two such approvals.²⁰¹

The Third Circuit, in setting aside the approval of the settlement in *Georgine* suggested the possibility that the absence of legislative authority to impose global peace on mass tort litigation might be supplied by an amendment to Rule 23.²⁰² In making that suggestion, the court was inattentive to the statutory and constitutional limitations on the rulemaking power.

It seems likely that chronic inattention to the constitutional limits of rulemaking continues in some measure to reflect the casual words of the Court in *Hanna v. Plumer*, decided in the halcyon days of 1965. In *Hanna*, the Court was confronted with a challenge to Rule 4 based on its apparent conflict with an otherwise applicable state law. The issue was one of federalism: did *Erie* require federal courts to apply a state rule of procedure in a diversity case? Justice Harlan, concurring, caricatured the opinion of the Court as one holding that a rule is valid if "arguably procedural."²⁰³ The dictum was later invoked by the chair and the reporter of the Civil Rules Committee in defending the validity of a proposed reform of Rule 68. Stephen Burbank rightly declared this application of *Hanna* to be "wrong and wrong-headed." It is wrong," he said, "because the Court in *Hanna* did not intend its constitutional test to do double duty, so that if it is satisfied, one need not even inquire about the validity under the Rules Enabling Act. It is wrong-headed because central to the Court's presumption of validity was the premise that the rulemakers take questions of power seriously. Whatever one may think of that presumption in the context of adjudication, it has no proper place in rule formulation."²⁰⁴

CONCLUSION

It is not our purpose here to argue the social, political, and economic merits of

198. See Menkel-Meadow, *supra* note 60, at 1183.

199. Resnik, *supra* note 6, at 2229.

200. Roger Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985); but see Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 91-97 (1989).

201. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), cert. granted *sub nom.*, *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996); *In re GM*, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995).

202. 83 F.3d at 634-35. In a concurring opinion, Judge Wellford suggests a similar approach. *Id.* at 635.

203. *Hanna v. Plumer*, 380 U.S. 460, 476 (1965).

204. Burbank, *supra* note 16, at 432.

the settlement-only class action device. We do not doubt the burgeoning problem of mass tort litigation.²⁰⁵ We incline to the belief that a law bearing some resemblance to proposed Rule 23(b)(4) would be desirable if it could foreclose or diminish the need for individual consideration of large numbers of possible tort cases. Global peace is a good idea. But when and if such a law is made, it should be enacted by officers who have been elected by the people, or who are at least more accountable to the people than Justices holding office for life. We say this not because we perceive that Congressmen and the people they represent are wiser than Justices, but because those whose substantive rights must be modified and re-arranged to resolve mass tort problems expeditiously ought share in the responsibility for what their legislators do and ought have the means of correction at hand if they disapprove of the re-arrangement. That is the essence of democratic government, and it is what is inevitably lacking in any federal judicial rulemaking process.

Imaginably, some source of authority other than a rule of court might be identified for judicial innovation of the settlement-only class action. In fashioning remedies case by case, federal courts may fashion principles of equity entitled to prospective effect through the familiar process of *stare decisis*.²⁰⁶ But as the Court emphasized in *Alyeska Pipeline Service Co. v. Wilderness Society*,²⁰⁷ that power, too, is limited. There is no federal common law of remedies standing independently of Congressional legislation and applicable to the enforcement of state-created rights.²⁰⁸ Whether a settlement-only class action could be justified as a new principle of federal equity seems at best doubtful, and we note the possibility only to distinguish that issue from the one we address. We limit our contention to the unsuitability of the rulemaking power of the Court.

As we have observed, the proposed provision would create contracts, restrict tort remedies, redefine agency relationships, diminish the value of some intangible property rights while enlarging others, transform the jurisprudential premises of our legal system, pit claimants against one another, create an alternative to voluntary bankruptcy proceedings, and alter the relationships between state and federal law, and between Congress and the Court. Meanwhile, it does nothing to advance the Article III mission of deciding cases or controversies on the law and the facts. Whatever the need for better means to resolve mass torts, the conduct of the federal courts in approving settlements in cases not certifiable under paragraph (b)(3) derives no legitimacy from Rule 23 or from any other rule that might be promulgated by the Supreme Court.

The present Rule 23 was the product of its time; if it overreached the

205. For elaborate consideration, see LINDA S. MULLENIX, *MASS TORT LITIGATION: CASES AND MATERIALS* (1996).

206. *See, e.g., Ex parte Patterson*, 253 U.S. 300 (1920). *See also* Marcus, *supra* note 74, at 879-91.

207. 421 U.S. 240 (1975). The Court there reversed a decision adopting a "private attorney general" exception to the general "American rule" barring taxation of attorneys' fees. The Court held that only Congress can authorize such exceptions. *Id.* at 263.

208. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *cf. State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 587 (1967).

jurisdiction of the Court under the Rules Enabling Act, it was not known at the time, there was no one to object, and the adverse political consequences to the Court and its rulemaking process were not present. In the environment of 1997, the constitutional considerations we have identified stand out. It is now quite clear what is at stake and it is substance, not procedure. The present Civil Rules Committee and the Court ought now recall the advice of the draftsman of 1966, Benjamin Kaplan, to keep the rulemaking process clear of public political contests.²⁰⁹ If legislation is needed to legitimate and regulate the settlement-only class action, there is an institution available to respond to the need. That institution is not the Supreme Court, but Congress. Congress, too, will be bound by such noisome constitutional considerations as those we have identified, and it will be time enough to involve the Supreme Court when it must decide whether Congress in a contested instance overreached its powers.

While the Civil Rules Committee, like the rest of us, is free to make proposals to Congress regarding the mass tort problem, it should not ask the Court to enact its 1996 proposals. If it is tempted to disregard this advice, the analogy to the French aristocracy's doom is worthy of the Committee's attention.²¹⁰

209. Letter to Dean Acheson, Mar. 2, 1967, *reprinted in* 137 U. PA. L. REV. 1964 (1989): ["To involve the Committee in public debates of that sort creates a possibility of putting at risk the reputation for impartiality and scientific skill which the Federal Rulemakers have been at pains to build since 1930."]

210. Burbank, *supra* note 16, at 432.

