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## Managing Mass Tort Class Actions: Judicial Politics and Rulemaking in Three Acts

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# Managing Mass Tort Class Actions: Judicial Politics and Rulemaking in Three Acts

TOBY S. GOLDBACH\*

*Judges take part in a variety of non-adjudicative tasks that shape the structure of litigation. In addition to their managerial functions, judges sit as administrative heads of court. They participate in civil justice reform projects and develop procedures for criminal and civil trials. What norms and principles ought to guide judges in this other work? In their casework we expect judges to be neutral and fair, setting aside politics and rationally following the law. Indeed, this article will demonstrate that there is good reason to insist on these qualities in both judges' case-related and broader court-related reform activities. To test this proposition, this article examines the work of judges who sat on the Advisory Committee for Civil Rules, the committee that evaluates and makes recommendations for rule amendments to the Federal Rules of Civil Procedure. In particular, this Article reviews the committee's nearly thirty-year effort to make rules for approving settlements in mass tort class actions. The review*

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*reveals politics and competition not only between judges and Congress for the authority to design rules of procedure, but also points to a lesser explored phenomenon, of competition between judges of the different levels of court.*

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INTRODUCTION<sup>1</sup>

Contemporary discourse about the judiciary tries to unpack the extent to which judges are ideological, policy-preferencing individuals, sitting on the left or right of a highly politicized U.S.<sup>2</sup> The Supreme Court confirmation hearings—those “grotesque”<sup>3</sup> “spectacles”<sup>4</sup>—are especially vital because it is assumed judges will vote in

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<sup>1</sup> This article relies on data collected from a review of all Agenda Books of the Advisory Committee of Civil Rules from 1990-2019, supplemented with a review of relevant meeting minutes and subcommittee reports. In addition to information on legal reforms, sociological data was collected with respect to committee meeting length, type of meeting (in person or teleconference), number of people and number of judges in attendance, location of committee meetings, whether Rule 23 was on the committee’s agenda, and number of pages in the agenda book devoted to a discussion of Rule 23.

<sup>2</sup> See, e.g., Adam Chilton et al., *The Endgame of Court-Packing* 11 (April 27, 2021), <https://ssrn.com/abstract=3835502>; Nelson Tebbe & Micah Schwartzman, *Re-upping Appeasement: Religious Freedom and Judicial Politics in the 2019 Term*, 2019-2020 ACS SUP. CT. REV. 115, 122; Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051, 2056–57 (2017); Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Introduce Ideology into Judicial Selection*, 60 J.L. & ECON. 559, 560 (2017); Jeanne Hersant & Cecile Vigour, *Judicial Politics on the Ground*, 42 L. & SOC. INQUIRY 292, 296 (2017); Anthony Niblett & Albert H. Yoon, *Judicial Disharmony: A Study of Dissent*, 42 INT’L REV. L. & ECON. 60, 70 (2015); David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 ARIZ. ST. L.J. 3, 40 (2018); Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 12 (2013); Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics*, 97 CORNELL L. REV. 191, 253 (2012); Brian Z. Tamanaha, *The Several Meanings of “Politics” in Judicial Politics Studies: Why Ideological Influence Is not “Partisanship,”* 61 EMORY L.J. 759, 762 (2012); Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341, 351 (2010); David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT’L L. & BUS. 383, 413 (2010); Timothy R. Johnson, *Justice David Stras, Judicial Politics and Federal Court Nomination Politics*, 95 MINN. L. REV. HEADNOTES 125, 129 (2011); Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, DUKE L.J., 1383, 1436 (2009); Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 L. & POL’Y 295, 295 (2006); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 264 (2005); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 33–49 (1998); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 1–7 (1993).

line with the party that nominates them.<sup>5</sup> Thus, a widely successful area of research on judicial behavior, “largely the province of political science,”<sup>6</sup> asks whether judges base their decisions on extra legal factors such as ideology and political preferences.<sup>7</sup> It is important to recognize that scholars are tough on judges precisely because our society expects judges to adhere to the role of neutral, impartial officiator.<sup>8</sup> Any judicial devolution into politics poses an existential threat to a morally sound legal institution.<sup>9</sup> Unfortunately, most investigations into the question about whether or not judges are political have remained tied to formal legal outcomes and institutions.<sup>10</sup> Notwithstanding over a century of scholarship challenging

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<sup>3</sup> Doreen St. Félix, *The Ford-Kavanaugh Hearing Will Be Remembered as a Grotesque Display of Patriarchal Resentment*, NEW YORKER (Sept. 27, 2018) <https://www.newyorker.com/culture/cultural-comment/the-ford-kavanaugh-hearings-will-be-remembered-for-their-grotesque-display-of-patriarchal-resentment>.

<sup>4</sup> Olivia B. Waxman, *Supreme Court Confirmation Hearings Weren't Always Such a Spectacle. There's a Reason That Changed*, TIME (Sept. 6, 2018, 10:57 AM) <https://time.com/5382104/brett-kavanaugh-supreme-court-confirmation-hearing-history/>.

<sup>5</sup> See, e.g., Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision*, WASH. POST (June 16, 2020, 8:06 P.M.) [https://www.washingtonpost.com/politics/courts\\_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html).

<sup>6</sup> Carroll Seron & Susan S. Silbey, *Profession, Science, and Culture: An Emergent Canon of Law and Society Research*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 30, 38 (Austin Sarat ed., 2004). See generally Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252 (1997); LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 25 (2013).

<sup>7</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 26–27 (2002); see also Epstein & Jacobi, *supra* note 2, at 351.

<sup>8</sup> Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1064 (1975).

<sup>9</sup> See Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DEPAUL L. REV. 299, 299–304 (1990). See generally Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989) (analyzing the history of the political question doctrine and its role within the judiciary).

<sup>10</sup> Seron & Silbey, *supra* note 6, at 30–31; see, e.g., Niblett & Yoon, *supra* note 2, at 70; SEGAL & SPAETH, *supra* note 7, at 1; LAWRENCE BAUM, THE PUZZLE

formalistic notions of law,<sup>11</sup> scholarship about judges has remained relatively stagnant, focusing on the judicial decision as the only place to find evidence of judicial politics.

Yet scholarship that focuses solely on judicial decisions operates on the basis of an outdated view of what judges do,<sup>12</sup> reflecting only the most visible and official portrait of judges' work.<sup>13</sup> It was forty years ago when Judith Resnik introduced the "managerial judge," arguing that judges did not simply adjudicate cases presented to them by adversarial parties.<sup>14</sup> Judges also took and continue to take part in a variety of managerial tasks, such as negotiating with parties

OF JUDICIAL BEHAVIOR 21 (1997); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, SUP. CT. REV. 301, 304 (2017); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 5 (2007); Keren Weinsahl-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel*, 8 J. EMPIRICAL LEGAL STUD. 556, 580 (2011); Harry Annison, *Interpreting the Politics of the Judiciary: The British Senior Judicial Tradition and the Pre-Emptive Turn in Criminal Justice*, 41 J.L. & SOC'Y 339, 348 (2014).

<sup>11</sup> Richard L. Abel, *Law and Society: Project and Practice*, 6 ANN. REV. L. & SOC. SCI. 1, 18 (2010); Rita J. Simon & James P. Lynch, *The Sociology of Law: Where We Have Been and Where We Might Be Going*, 23 L. & SOC'Y REV. 825, 826 (1989); Carroll Seron et al., *Is There a Canon of Law and Society?*, 9 ANN. REV. L. & SOC. SCI. 287, 299 (2013); Kevin E. Davis et al., *Indicators as a Technology of Global Governance*, 46 L. & SOC'Y REV. 71, 91 (2012); TRANSNATIONAL LEGAL ORDERS 11 (Terence C. Halliday & Gregory C. Shaffer eds., 2015).

<sup>12</sup> See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (examining trials in federal and state courts); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) (analyzing the role of judges in an environment where trial is seen as "error"); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017) (discussing multidistrict litigation's place in textbook discussions of civil procedure); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) (discussing judges' roles in multidistrict litigation); see also Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1204–05 (2009) ("The rules of civil procedure contemplate, and even encourage, settlement behavior at virtually every stage of litigation.").

<sup>13</sup> Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1334 (1995).

<sup>14</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982).

about the timing and scope of trial.<sup>15</sup> These activities shape the course of the litigation and influence outcomes,<sup>16</sup> but because they happen “off the record,” in judges’ chambers or conference settlement rooms, they do not produce the kinds of outcomes that function as source material for judicial behavior research.<sup>17</sup>

Similarly, judges’ reform work—work that is non-adjudicative and designed to maintain the operation and relevancy of the judicial system—remains out of view and understudied. Nevertheless, judges engage in a variety of non-case-related law making activities, including reforming sentencing guidelines,<sup>18</sup> establishing problem-

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<sup>15</sup> *Id.* at 378.

<sup>16</sup> *See, e.g.*, Gluck, *supra* note 12, at 1673.

<sup>17</sup> *See, e.g.*, William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO L.J. 371, 416, 431 (2001) (arguing that large complex aggregate litigation is more akin to transactional deal-making, while judges’ in-court role is limited to presiding over a hearing to review the settlement).

<sup>18</sup> *Mistretta v. United States*, 488 U.S. 361, 361 (1989); *see also* Jeffrey M. Shaman, *Judges and Non-Judicial Functions in the United States*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 512–33 (H. P. Lee ed., 2011); Redish, *supra* note 9, at 313.

solving courts,<sup>19</sup> and studying, drafting, and amending legal procedure.<sup>20</sup> Where Resnik's managerial judge's atypical activities affected the outcome of a dispute between parties,<sup>21</sup> judges' institutional work on procedural rulemaking and court reform has a broader impact, channeling possible substantive outcomes through particular procedural forms. While this work remains out of view, scholars have little opportunity to assess the politics and practices involved.

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<sup>19</sup> See generally PHILIP BEAN, *DRUGS AND CRIME* 86 (4th ed. 2014) (comparing drug courts in the U.S. and Britain); W. CLINTON TERRY, III ET AL., *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION* (W. Clinton Terry, III ed., 1999) (discussing judicial innovation and developments in the early drug courts); Bianca Easterly, *The Ties that Bind Beyond the Battlefield: An Examination of the Diffusion Patterns of Veterans Treatment Courts* 98 SOC. SCI. Q. 1622, 1623 (2017) (crediting Judge Sigurd E. Murphy, a retired U.S. Army brigadier general, and Judge Jack W. Smith, a retired U.S. Air Force colonel, as the first to offer specialized services for veterans); Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36 NEW ENG. J. CRIM. & CIV. CONFINEMENT 39, 40 (2010); GREG BERMAN ET AL., *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 34–38 (2005) (analyzing problem solving courts in America); Glade F. Roper, *Introduction to Drug Courts*, in *DRUG COURTS: A NEW APPROACH TO TREATMENT AND REHABILITATION* (James E. Lessenger & Glade F. Roper eds., 2007) (including articles discussing judges' responses to the problems faced in drug courts).

<sup>20</sup> See Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 530–32 (2001) (describing the Advisory Committee's role in Rule 26 Discovery reforms); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1171–83 (1996) (documenting the judiciary's increased role in statutory reform and rulemaking, and the consequent heightened level of interaction between the judiciary and Congress); Steven N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1861–62 (2014) (describing the social processes involved in promoting case management); Toby S. Goldbach, *Judicial Practice in Action: Court Reform and Responsive Judges in Canada*, in *THE RESPONSIVE JUDGE*, 229–32 (Tania Sourdin & Archie Zariski eds., 2018) (describing judges' efforts to establish Indigenous courts); see also Toby S. Goldbach, *Building the Aboriginal Conference Settlement Suite: Hope and Realism in Law as a Tool for Social Change*, 46 L. & SOC. INQUIRY 116, 117 (2021). But see Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach* 162 U. PA. L. REV. 1543, 1546 (2013) (arguing that the Supreme Court's "power to make procedural law constraining private enforcement through decisions . . . [has] been more consequential than its power to promulgate Federal Rules.").

<sup>21</sup> See Resnik, *supra* note 14, at 376–77.

Contrastingly, this Article examines the activities of judges who sat on the Advisory Committee for Civil Rules (“Advisory Committee”), the main rulemaking body that evaluates, provides notice of, and recommends reforms to the Federal Rules of Civil Procedure.<sup>22</sup> The Article focuses on judges’ efforts to make specialized rules for approving settlements in mass tort class actions,<sup>23</sup> illustrating multiple destinations for judicial politics in addition to the judicial decision. The Article demonstrates competition not merely between judges and Congress for the authority to make rules of procedure, but also points to a lesser-explored phenomenon, of competition within the “legal complex”<sup>24</sup> and between judges of the different levels of court.<sup>25</sup>

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<sup>22</sup> The current process for making rules for procedure comprises the following steps: The Judicial Conference’s Committee on Rules of Practice and Procedure, commonly known as the “Standing Committee,” delegates to its five advisory committees—including the Advisory Committee on the Rules of Civil Procedure—the task of studying the federal rules. 28 U.S.C. § 2073(a)(2). The various committees recommend rule revisions to the Standing Committee, which, following a period of notice and comment, may recommend amendments to the justices of the Supreme Court. The Supreme Court can then promulgate the new rule, which, unless Congress enacts legislation against it, will take effect on or after December 1. See *How the Rulemaking Process Works*, U.S. COURTS, <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rule-making-process-works> (last visited September 16, 2022).

<sup>23</sup> See, e.g., Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT’L L. 165, 166 (2001); Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 429 (1999); Alexandra D. Lahav, *Mass Tort Class Actions - Past, Present, and Future*, 93 N.Y.U. L. REV. 101, 111 (2017); Rubenstein, *supra* note 17, at 374; Anthony J. Scirica, *Introduction*, 148 U. PA. L. REV. 1859, 1859 (2000); Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943, 1943 (2000); Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179, 181–82 (2001).

<sup>24</sup> Lucien Karpik & Terence C. Halliday, *The Legal Complex*, 7 ANN. REV. L. & SOC. SCI. 217, 218 (2011).

<sup>25</sup> For the scant reflections on the legal system’s internal relations and politics, see Terrance C. Halliday, *Why the Legal Complex Is Integral to Theories of Consequential Courts*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 337 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 627–28 (2010); LEE EPSTEIN ET AL., *supra* note 6, at 11.

This Article takes a historical and socio-legal perspective to examine judges' work on procedural reform. It does not take a position on the normativity of adapting criteria for class certification in light of a settlement agreement; others have written on this issue.<sup>26</sup> Instead, the article asks whether judges engage in lawmaking activity outside of, or in addition to, their regular casework, and whether this work embroils judges in non-legal political contestations. We expect judges to be "fair minded, impartial, patient, wise, efficient, and intelligent," setting aside politics and rationally following the law, and there is good reason to insist on these qualities in judges' broader court-related activities as well.<sup>27</sup> Where judges craft rules for the operation of trials—thus affecting substantive entitlements—those activities ought to be guided by the familiar principles of neutrality, fairness, and independence from political pressure and persuasion.<sup>28</sup>

Moreover, because of the hybrid nature of private and public interests in mass tort class action litigation<sup>29</sup> and because of the prevalence of negotiated settlement as a way to resolve immense class

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<sup>26</sup> See, e.g., Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 951 (2014); MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 176–227 (2009); Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 167 (2009); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 511 (2013).

<sup>27</sup> Jeffrey Rachinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 1, 1 (2017).

<sup>28</sup> Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 102–03 (2018); Geyh, *supra* note 20, at 1201; Stempel, *supra* note 20, at 613; Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 L. & CONTEMP. PROBS. 229, 252 (1998); Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 773–74 (2017).

<sup>29</sup> See, e.g., Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, U. CHI. LEGAL F. 71, 88 (2003); Macey & Miller, *supra* note 26, at 561 (2013); DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* 85 (2000); Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 27–30 (2000).

actions,<sup>30</sup> it is critically important to assess the process by which procedure is made to regulate class action settlement agreements. As discussed in the next part, the Rules Enabling Act delegates authority for rulemaking to the Judicial Conference, establishing a democratically deliberative and participatory process for drafting and vetting rules.<sup>31</sup> However, as is the case in many areas of law, the rules “on the books” do not always translate to the way things happen “in action.”<sup>32</sup>

The Article proceeds as follows. Part I introduces judges’ *other* work—on procedural reform, rulemaking, and institutional change—and outlines three deficiencies with extant judicial politics scholarship as it relates to judges’ *other* work and settling aggregate litigation. Asking the reader to keep those concerns in mind, the remainder of the Article chronicles the Advisory Committee’s work to address the particular difficulties in settling aggregate claims through rules of procedure.

In December 2018, amendments to the rule governing class actions, Rule 23 of the Federal Rules of Civil Procedure, came into effect.<sup>33</sup> The amendments add detail to the requirements for evaluating settlements in class action litigation, such as factors that courts

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<sup>30</sup> See Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1685 (2008).

<sup>31</sup> Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1195 (1982); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1724 (2004) (noting that the 1988 changes to the Act “were designed to open [the process] up to more and more diverse points of view, make it more transparent, and diminish the need for congressional involvement . . .”).

<sup>32</sup> Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 34 (1910).

<sup>33</sup> JOHN G. ROBERTS, JR., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, H.R. DOC. NO. 115-119, at 30 (2018).

should consider in deciding whether settlements are “fair, reasonable, and adequate.”<sup>34</sup> In attempts to mitigate unwanted practices,<sup>35</sup> judges are now required to review any agreement—even oral agreements<sup>36</sup>—made in connection with the settlement.<sup>37</sup> Because of various unique concerns, judges of the Advisory Committee spent years trying to formulate rules for judicial review of class action settlement agreements before the 2018 revisions took effect.<sup>38</sup> In particular, the early work of the Advisory Committee focused on getting

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<sup>34</sup> FED. R. CIV. P. 23(e). For those unfamiliar with class actions, the notion of having to receive court approval of settlement agreements should seem strange. In the normal course, settlements represent private contracts between plaintiffs and defendants to end disputes. *See, e.g.*, Rubenstein, *supra* note 17, at 37. Courts whole-heartedly encourage settlements, and may even sanction parties who turn down reasonable offers to settle. *See, e.g.*, FED. R. CIV. P. 16 (regarding pretrial conference to facilitate settlement); *see also* Moffitt, *supra* note 12, at 1240. Settling a class action lawsuit, however, is not a simple transaction between plaintiffs and defendants. A class action lawsuit binds those with claims even if they were absent from the proceedings. Consequently, federal rules require a judge to hold a hearing to review the terms of the settlement. *See* FED. R. CIV. P. 23(e).

<sup>35</sup> *See, e.g.*, Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1926–27 (2002) (arguing that the incentive structure for settling class action litigation has the potential to illicit collusive practices or distorted behavior among self-interested lawyers in the market for the final disposition of grievances); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 386 (1999) (arguing that plaintiffs’ lawyers may sell out their clients’ claims in exchange for large contingency fees); John K. Rabiej, *The Making of Class Action Rule 23 - What Were We Thinking?*, 24 MISS. C. L. REV. 323, 356 (2005); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1277–79 (S.D. Ohio 1996); Erichson, *supra* note 26, at 960 (arguing that defendants’ lawyers negotiating a settlement for a class action that has not yet been certified can search for the lawyer offering the least for her client, constituting a reverse auction of the plaintiffs’ claims).

<sup>36</sup> Rabiej, *supra* note 35, at 377.

<sup>37</sup> Specifically, courts are now required to examine whether class counsel adequately represented the class, FED. R. CIV. P. 23(e)(2)(A), whether the agreement was negotiated at arm’s length, FED. R. CIV. P. 23(e)(2)(B), the methods for processing claims and distributing the settlement, FED. R. CIV. P. 23(e)(2)(C)(ii), attorney’s fees, FED. R. CIV. P. 23(e)(2)(C)(iii), and the treatment of class members relative to each other, FED. R. CIV. P. 23(e)(2)(D).

<sup>38</sup> *See generally* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006) (discussing the nature of the class action litigation process prior to 2018).

specific language in the rules to assist with the certification of “settlement class actions”—class actions that are brought to the court for certification at the same time as the request to approve the settlement.<sup>39</sup>

Like any good story or screenplay, the Advisory Committee’s work on fairness hearings and class action settlements can be recounted in three acts, correlating to three rule amendments published for public comment and subsequently promulgated in 1998,<sup>40</sup> 2003,<sup>41</sup> and 2018.<sup>42</sup> Part II, Act One of our story, examines the work of the Advisory Committee beginning in 1991 through to publication and promulgation of rule reforms in 1998. This first act also introduces the notion of proximate politics<sup>43</sup> by examining competition between judges of the Advisory Committee and the Supreme Court. Part III, Act Two of our story, examines the work of the Advisory Committee through to 2003, focusing on competition between Congress and the Judicial Conference for the authority to control when, where, and how class actions are heard.

In Part IV, the final act, all facets of the story’s conflict are brought to bear on the judges of the Advisory Committee as they contend with a Supreme Court fully intent on limiting the reach of class actions<sup>44</sup> and a Congress intent on curtailing powers of the federal judiciary. As Part IV demonstrates, judges achieved a final but partial success in their efforts to reform the rules of civil procedure to reflect the growing prominence of pre-litigation settlements in mass tort class actions. This nearly thirty-year saga, replete with contest and competition for the power to set rules for litigation, evidences a different kind of judicial politics, one that ought to be no less concerning merely because it happens outside of the courtroom.

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<sup>39</sup> *Id.* at 546; Rabiej, *supra* note 35, at 360–63.

<sup>40</sup> Amendments to Federal Rules of Civil Procedure, 523 U.S. 1221, 1221–22 (1997).

<sup>41</sup> Amendments to Federal Rules of Civil Procedure, 538 U.S. 1083 (2002).

<sup>42</sup> John G. Roberts, Jr., Proposed Amendments to the Federal Rules of Civil Procedure (Apr. 26, 2018), [https://www.supremecourt.gov/orders/courtorders/frcv18\\_5924.pdf](https://www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf). Amendments that became effective in 2007 and 2009 did not relate to fairness hearings and thus they will not be examined in this article.

<sup>43</sup> Halliday, *supra* note 25, at 337.

<sup>44</sup> Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1261 (2017).

## I. RETHINKING JUDICIAL POLITICS

Judges' lawmaking and court-related activities are not restricted to the courtroom. In addition to hearing cases, judges work to develop procedures through rules committees, by attending conferences and holding periods for public notice and comment.<sup>45</sup> Much of the work on judicial administration and court reform happens outside of the courtroom, behind the scenes in meetings, through reports or commissions, outside of the normal places we expect judges to do their work.<sup>46</sup> The outcomes of these rulemaking activities shape the structure of dispute resolution, influencing the way that facts, cases, and legal actors are processed through the legal system. Even where court opinions appear to be dramatic rulings on rules of procedure, they are often a culmination of "a world of practice"<sup>47</sup> both in and out of the courtroom.

There are therefore at least three deficiencies with extant judicial politics scholarship, which will be briefly expounded upon in this part. First, extant judicial behavior literature rests on a narrow view of judicial functions and judicial power.<sup>48</sup> If there are other sites of judicial lawmaking that happen outside of the courtroom, it follows that there may be other sites of judicial politics, other places where judges are letting non-legal factors influence their lawmaking endeavors. Second, the identification of conservative versus liberal politics that form the basis for judicial politics scholarship does not fit well with the interests at stake in class action and aggregate litigation.<sup>49</sup> Finally, judicial behavior literature scrutinizes only one site of competition—between the court and the other branches of government.<sup>50</sup> This case study evidences other *types* of interests and politics at play. These competitions and contestations, however, should be no less concerning to those who strive to achieve a "pure" legal system that operates solely on the basis of legal factors.

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<sup>45</sup> See discussion in Sections V, VI, and VII; see also Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* 64 LAW & CONTEMP. PROBS. 197, 197–201 (2001).

<sup>46</sup> Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 919 (1995).

<sup>47</sup> *Id.* at 925.

<sup>48</sup> See, e.g. Epstein & Knight, *supra* note 2, at 11.

<sup>49</sup> But see Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1526 (2017).

<sup>50</sup> Yeazell, *supra* note 28, at 229.

### A. *Other Sites of Judicial Lawmaking*

Since the enactment of the Rules Enabling Act in 1934,<sup>51</sup> U.S. federal judges have had the power to make “prospective, legislation-like rules”<sup>52</sup> for procedures controlling civil litigation in federal court.<sup>53</sup> Judges are restricted from effecting or modifying substantive rights but are able to prescribe “general rules of practice and procedure.”<sup>54</sup> In 1958, Congress amended the Rules Enabling Act, delegating to the Judicial Conference the ongoing responsibility to

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<sup>51</sup> Rules Enabling Act of 1934, 28 U.S.C. § 2072.

<sup>52</sup> Burbank & Farhang, *supra* note 49, at 1545–46.

<sup>53</sup> Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1058 (1955) (discussing how the act delegates authority to the Supreme Court to prescribe rules for district courts relating to “the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions . . .”).

<sup>54</sup> *Authority for Promulgation of Rules*, 28 U.S.C. § 2072(b) (1988). This article does not consider the legality or constitutionality of judicial rulemaking. On that issue, see Burbank, *The Rules Enabling Act of 1934*, *supra* note 31, at 1115 (noting that “[t]he Supreme Court has never satisfactorily explained . . . the place of court rulemaking in our constitutional framework” and that early cases discussing the sources and limits of rulemaking power “set a pattern of ambiguity that has not been departed from.”); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 9–15 (1958) (arguing that “no constitutional scheme which accepts judicial rule-making can be evolved rationally” without a range of issues including “uncertainty” in terms of application, an inability of courts to exercise their power, and an inability of courts to utilize techniques such as public hearings that involve interested parties in the development of law); Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUD. SOC’Y 250, 257 (1963) (promoting Justice Black’s philosophy of procedural rules in terms of its principal function to “serve as useful guides to help, not cluster, persons who have a legal right to bring their problems before the courts.”); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1735–39 (2004) (“[R]ulemakers have, by and large, taken seriously the Chief Justice’s assurance to Congress that they would observe the Enabling Act’s limitations . . . . The result of the judiciary’s self-restraint is likely to be few occasions of friction when the Court promulgates, and few overrides of, proposed Federal Rules of Civil Procedure in the future. But that same self-restraint, coupled with the discovery of the power of procedure by interest groups and Congress alike, seems destined to yield more proposals for ‘procedural’ legislation and hence the need for closer and more frequent cooperation with Congress.”).

study “the operation and effect”<sup>55</sup> of the rules. Further amendments to the Rules Enabling Act in 1988 formalized the rulemaking process, requiring rules committees to provide a period of notice and comment before rules could be officially promulgated.<sup>56</sup> Meanwhile, under the tenures of Chief Justices Burger and Rehnquist, judges have come to dominate the main rulemaking bodies.<sup>57</sup> While the initial Advisory Committee of the 1930s “did not include even one sitting judge,”<sup>58</sup> since the 1980s, current key committees consist

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<sup>55</sup> Congress enacted Section 331 of Title 28 of the United States Code. Governance & the Judicial Conference, Pub. L. No. 85-514, 28 U.S.C. § 331 (amended 1958).

<sup>56</sup> This effectively transformed the reform process into the agency-like rulemaking that exists under the *Administrative Procedure Act*. See Yeazell, *supra* note 28 at 247 (Regarding the 1988 revisions, Yeazell writes, “Most notably, these changes gave Congress and the public more time to decide what they thought of proposed rules and more information on which to base such a decision. Subsections (c) and (d) of 28 U.S.C. § 2073 regulate the consultative process preceding presentation of a proposed Rule to the Supreme Court. The statutory hallmarks are notice, an opportunity for public comment, and an explanation of recommendations, including dissenting views. In other words, the rulemaking process itself has become proceduralized. The obvious model was administrative rulemaking, and the statute roughly approximates that model.”). See also Geyh, *supra* note 20, at 1241 (“[W]hen the judiciary is acting as a rulemaker, it has more the look and feel of an administrative agency than a private lobbyist. That has led some scholars . . . to borrow from administrative law in search of solutions to the judiciary’s rulemaking woes.”); Burbank, *The Rules Enabling Act of 1934*, *supra* note 31, at 1193 (“[M]ost suggestions for reform [of the Rules Enabling Act] have concentrated on process. In this, would-be reformers have followed, often without acknowledging it, the path of administrative law.”).

<sup>57</sup> Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 *FORDHAM L. REV.* 37, 48 (2018) (“[U]nder Chief Justice Warren Burger and his successors, all of whom were appointed by Republican presidents, the Advisory Committee came to be dominated by federal judges appointed by Republican presidents and, among its practitioner members, by corporate lawyers.”).

<sup>58</sup> Burbank & Farhang, *supra* note 49, at 1587; see also Yeazell, *supra* note 28, at 237–38 (“Lawyer participation has declined as that of judges increased. Today, lawyers comprise just a bit more than a third of the members of the Advisory Committee on Civil Rules . . . . By 1985, the proportion had dropped to about twenty-five percent; over the last few years it has hovered between thirty-three and forty percent. The Committee that submitted the most recent proposed changes in the Rules of Civil Procedure consisted of fourteen members, five of whom were practicing lawyers—if one includes the Assistant Attorney General of the Civil Division in this category. Seven are judges—six of these from the federal

of a majority of judge members with judges acting as the chair of these committees as well.<sup>59</sup>

Notwithstanding this and other instances of judges' non-case-related law reform work,<sup>60</sup> judicial politics scholarship continues to replay the Legal Realist moment of the early twentieth century,<sup>61</sup>

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courts and one from a state court. The remaining two members are legal academics.”).

<sup>59</sup> The current Advisory Committee roster (effective to September 30, 2020) includes the Honorable John D. Bates, United States District Court for the District of Columbia as Chair, plus eight other judges, five lawyers, and three professors (two of whom act as reporters). RULES COMM., COMMITTEE ROSTER (2020).

<sup>60</sup> See generally William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305 (2011) (discussing the Sentencing Reform Act of 1984); Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 ME. B.J. 16 (2004) (discussing the Judicial Panel on Multidistrict Litigation); Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 TEX. L. REV. 915 (2017) (discussing “problem-solving” courts that “reflected and reinforced an ethos of individual, rather than social, responsibility that was transforming state welfare at the time into more market-inflected and minimalist governance programs.”); Jamie Rowen, *Worthy of Justice: A Veterans Treatment Court in Practice* 42 L. & POL'Y 78 (2020) (discussing Veteran Treatment Courts).

<sup>61</sup> For classic examples of Legal Realist scholarship, see Roscoe Pound, *The Call for a Realist Jurisprudence* 44 HARV. L. REV. 697, 701–08 (1931) (listing the five most pronounced ideals of current juristic realism); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453–54 (1930) (“[A] realistic approach would . . . put forward two suggestions on the making of such categories. The first of them rests primarily upon the knowledge that to classify is to disturb . . . . For this reason a realistic approach to any new problem would begin by skepticism as to the adequacy of the received categories for ordering the phenomena effectively toward a solution of the new problem . . . . The other suggestion of a realistic approach rests on the observation that categories and concepts, once formulated and once they have entered into thought processes, tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience.”); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1228–33 (1931) (summarizing Dean Pound's main findings regarding his indictment of “new legal realists”); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 824 (1935) (arguing that the “functional method,” when applied to the sciences, “has justified itself in every scientific field to which it has been actually applied,” and that functional redefinition of scientific concepts “has been the keynote of most significant theoretical advances in the sciences during the last half century.”); Jerome Frank, *Are Judges Human? Part One: The Effect*

targeting judges' role as adjudicators at trials and appeals. Yet the concern of the Legal Realists—that judges were deciding cases based on political preferences rather than on purely legal factors—does not abate merely because the place of lawmaking has changed.<sup>62</sup> The existence of a written decision should not be the factor that determines whether action is scrutinized and assessed. It behooves scholars to expand our understanding of the judicial function so that we have the opportunity to debate the norms and principles that guide judges in their reform work.

Viewed a different way, the power expressed through judicial decision making is the power to compel<sup>63</sup>—the power judges have to directly control the behavior of others through their declarations of winners and losers. However, the singular focus on compulsory power limits our understanding of other sources of power and places where judges participate in public affairs. In addition to their access to compulsory power, judges also have access to institutional and productive power through the law's more indirect and diffused mechanisms for exerting power and constituting social relations.<sup>64</sup> Through their institutional power, judges can exercise “indirect control over the conditions of action of socially distant others.”<sup>65</sup> How

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*on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 17–18 (1931) (“[I]f [lawyers and law teachers] would go into court and look at what was going on, they would see that the primary business of courts was to render specific decisions (i.e., specific judgments, orders and decrees); that law meant such specific decisions in concrete cases, not so-called legal rules and principles.”).

<sup>62</sup> See Yeazell, *supra* note 28, at 240; see generally Stempel, *supra* note 20 (discussing the etiology and controversy of the scope amendment).

<sup>63</sup> Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT'L ORG. 39, 51–52 (2005).

<sup>64</sup> *Id.* at 48 (“Those examining concrete institutions have shown how evolving rules and decision-making procedures can shape outcomes in ways that favor some groups over others; these effects can operate over time and at a distance, and often in ways that were not intended or anticipated by the architects of the institution. Similarly, scholars influenced by poststructuralism examine how historically and contingently produced discourses shape the subjectivities of actors; the very reason for genealogical and discourse-analytic methods is to demonstrate how systems of knowledge and discursive practices produce subjects through social relations that are quite indirect, socially diffuse, and temporally distant.”).

<sup>65</sup> *Id.*

exactly? At least one instantiation of judges' institutional power resides in their authority to set the rules for how the case unfolds before them.<sup>66</sup>

Why does judges' *other* work matter? Even though scholars tend to denigrate legal procedure as mundane or disconnected from the progressive potential of substantive law,<sup>67</sup> the history and current application of class action procedure is very much tied to the furtherance of equity and social justice outcomes. While a detailed description of the effect of procedure on substantive rights is beyond the scope of this Article,<sup>68</sup> it should suffice to note that historical accounts of the movement to make legal procedure trans-substantive and less technical was about protecting substantive outcomes and

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<sup>66</sup> Subrin & Main, *supra* note 20, at 1843–46.

<sup>67</sup> See Erik S. Knutsen et al. 2013. *The Teaching of Procedure Across Common Law Systems*, 51 OSGOODE HALL L.J. 1, 15, 28 (2013) (noting that in Canada, “there are only a small number of full-time academics who identify themselves as having a special research interest in civil procedure. Even fewer identify themselves as proceduralists” and in Australia “some law schools believed that civil procedure was insufficiently academic to justify being required for the law degree.”). See also Burbank, *The Rules Enabling Act of 1934*, *supra* note 31, at 1189 (“A number of commentators have argued that impact on rights claimed under the substantive law is or should be a central concern under the [Rules Enabling] Act.”).

<sup>68</sup> See, e.g., Subrin & Main, *supra* note 20, at 1853–56 (“Procedure is power, of course, so the stakes of choosing one over the other produces different winners and losers.”); Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1472 (1987) (“It is true that procedural rules are never neutral in their effects, if not their purposes. It is also likely that there has been more systematic misrepresentation about the value-free nature of procedural rules than about any other category in the traditional lexicon.”); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219–20 (1989) (noting the important political implications of legal procedure despite its reputation as neutral and apolitical); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1027 (2013) (arguing that the bifurcation of procedural versus substantive law “has obscured the dynamic nature of the relationship that frequently exists between the mechanisms of litigation and the underlying substantive law.”); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 720 (1975) (“Federal Rule 23 presents a procedural possibility which, once present, cannot help but shape and articulate substantive law.”).

rights.<sup>69</sup> Moreover, early amendments to the class action rule reflected the Advisory Committee's interest in supporting civil rights cases and providing access to courts as "part of the nation's growing commitment to social justice under the Constitution."<sup>70</sup> Litigants have since used class action settlement procedures to address suspected injuries from silicone gel-filled breast implants,<sup>71</sup> cancer caused by exposure to asbestos,<sup>72</sup> Native American land claims,<sup>73</sup> racial discrimination in the administration of federal farm loan programs,<sup>74</sup> and concussion-related football injuries.<sup>75</sup>

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<sup>69</sup> Holtzoff, *supra* note 53, at 1058–59 (arguing that the drafters sought "to strik[e] down the ancient shackles that bound legal procedure to a remote past" and "bring about the disposition of every case on the merits"); Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525, 1527 (2014) ("[T]he new rules were an attempt to make the requirements for going to court consist of simple, nontechnical language, designed to lower barriers to accessing courts and "promote adjudication on the merits."); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989) ("The drafters' commitment was to a civil practice in which all parties would have ready access to the courts and to relevant information, a practice in which the merits would be reached promptly and decided fairly."); Stephen M. Subrin, *Introduction*, 137 U. PA. L. REV. 1873, 1874–75 (1989); Carrington, *supra* note 25, at 617 (arguing that the new rules sought to "focus the courts' attention more on effective law enforcement and less on the intricacies of procedures . . .").

<sup>70</sup> Arthur Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQ. L. 1, 6 (2018). *But see* Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 761–762 (2018) [hereinafter Miller, *What Are Courts For?*] (questioning the utility of the class action mechanism for advancing social justice claims).

<sup>71</sup> *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp.), 887 F. Supp 1469 (1995) (N.D. Ala. Sept. 1, 1994).

<sup>72</sup> Judge Weiner of the Eastern District of Pennsylvania had at one time 125,000 Asbestos cases before him. *See* Gregory Hansal, *Extreme Litigation: An Interview with Judge WM Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 ME. BAR J. 16, 20 (2004); Stephen Labaton, *Judges Struggle to Control a Caseload Crisis*, N.Y. TIMES, Mar. 10, 1991, at E4.

<sup>73</sup> *Cobell v. Salazar*, 573 F.3d 808, 809 (D.C. Cir. 2009).

<sup>74</sup> *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000). The settlement, which provided cash payments and debt relief for approximately 20,000 farmers, totaled \$2.3 billion. *Id.*

<sup>75</sup> Initially started as a class action, concussion-related claims are now being resolved through multidistrict litigation. *See In re National Football League Players' Concussion Injury Litigation*, 962 F.3d 94, 95 (3d Cir. 2020).

To be clear, judges' work with the Advisory Committee represents only a small portion of the work that judges do on rules committees.<sup>76</sup> Rule 23(e), which addresses the procedure for settling class actions, textually, represents less than one percent of the Federal Rules of Civil Procedure. Nevertheless, settlement class actions present a unique and difficult challenge for courts<sup>77</sup> and, in the case of mass torts where injuries are connected to public incidents like the Exxon Valdez oil spill,<sup>78</sup> judicial review represents an important moment for the legal system to ensure justice is being done.<sup>79</sup>

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<sup>76</sup> See *How the Rulemaking Process Works*, U.S. Courts, <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited Sept. 17, 2022).

<sup>77</sup> See generally Erichson, *supra* note 26, at 951 (arguing that because plaintiffs do not yet have a certified class, there is an incentive for defendant's counsel to shop around for a plaintiff's lawyer willing to agree to a reduced settlement amount); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2001–04 (1998–1999) (discussing the “special concerns” pertaining to settlement class actions that are not present in ordinary class actions); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1366–67 (1995) (noting potential for collusion between plaintiff and defendant counsel); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 847–48 (2017) (“[Amchem and Ortiz] rejected any easy application of the class action mechanism to the complete resolution of mass harm cases that could not be folded into traditional class action criteria. [They] ushered in a wave of new mechanisms designed to deal with the complications of consensual settlement through Rule 23.”); Macey & Miller, *supra* note 26, at 200 (discussing some of the issues arising from the fact that when presenting the settlement to the court, the plaintiffs and defense are no longer adversaries; as such, the court can no longer rely on adversarial parties to discover and present information).

<sup>78</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471, (2008) (awarding the plaintiff class \$2.5 billion).

<sup>79</sup> Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1059 (2017). Additionally, the monetary amounts tied to class action settlements can be quite large. See EMORY G. LEE III & THOMAS E. WILLGING, IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 3, 6 (2008), [https://www.uscourts.gov/sites/default/files/preliminary\\_findings\\_from\\_phase\\_two\\_class\\_action\\_fairness\\_study\\_2008\\_1.pdf](https://www.uscourts.gov/sites/default/files/preliminary_findings_from_phase_two_class_action_fairness_study_2008_1.pdf) (reporting average settlement amounts at 9.5 million for all class settlements, where one-third involved tort, personal injury, and property damage cases); see also Emory G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the*

### B. *Conflicting Interests in Settling Aggregate Claims*

A second deficiency of judicial politics literature reflects the unique nature of aggregate litigation. On the surface, the political issues in class actions and mass tort litigation seem to align with the standard conservative-liberal, left-right policy debates. On the right, private individual control over adjudication—including the ability to settle—yields faster, cheaper, more efficient results.<sup>80</sup> On the left, privatized dispute resolution threatens public deliberation over shared norms and values.<sup>81</sup> Nevertheless, and notwithstanding numerous reproductions of these debates,<sup>82</sup> the politics of mass tort class action settlements is not straightforward as interests shift and overlap depending on one's vantage point. To demonstrate these claims, I briefly unpack the political interests at stake below.

A first set of debates—within scholarship examining aggregated and non-aggregated litigation—positions business interests and out-of-court dispute resolution on the right side of the political spectrum.<sup>83</sup> Negotiated settlements are said to protect business interests

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*Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1733–74 (2008) (noting that a self-assigned purpose of the Class Action Fairness Act of 2005 was to “provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”).

<sup>80</sup> See Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 689 (1997); Marc Galanter, *The Turn Against Law; the Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 294–97 (2002); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 22 (1991); see also Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L. J. 27, 113 (2003); Subrin and Main, *supra* note 20, at 1869; John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1884 (1989).

<sup>81</sup> See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–86 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648–50 (1995); Resnik, *supra* note 12, at 1000.

<sup>82</sup> See, e.g., Chris Brummer, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1067 (2004); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1428 (1995); Moffitt, *supra* note 12, at 1203–04; Mullenix, *supra* note 26, at 531; Redish, *supra* note 29, at 85.

<sup>83</sup> See Galanter, *supra* note 80, at 287–91.

and privatize rights.<sup>84</sup> Moreover, the assertion that there is too much litigation has been seen to be part of a calculated effort to discourage the enforcement of expanded rights statutorily created during the Civil Rights Era.<sup>85</sup> Similarly, Owen Fiss, Judith Resnik,<sup>86</sup> and other scholars who have adopted this line of reasoning, argue that private dispute resolution robs society of the opportunity to articulate shared norms and values.<sup>87</sup> Legal decisions do not just resolve disputes. They provide society with a moment to reflect on and recommit to values we collectively deem important. Both arguments lead to the conclusion that those left of center want trials, whereas “efficiency” is a code word for doing away with substantive rights.<sup>88</sup>

When it comes to aggregate litigation, however, the tables turn. Social justice advocates want aggregated claims because they allow plaintiffs to assert small claims where they would not otherwise have incentive to launch expensive litigation.<sup>89</sup> In contrast, corpo-

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<sup>84</sup> See Mullenix, *supra* note 26, at 554; Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure* at 75, 162 U. PA. L. REV. 1793, 1819 (2014).

<sup>85</sup> Galanter, *supra* note 80, at 289; Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1271–74 (2005); Menkel-Meadow, *supra* note 80, at 30; David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785, 1812–14 (2018).

<sup>86</sup> Judith Resnik has on multiple occasions delved into the issues raised by a lack of public involvement as a result of privatized procedures in contemporary litigation. See, e.g., Resnik, *supra* note 46, at 939–40; Resnik, *supra* note 79, at 1815; Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public’s Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1636 (2015).

<sup>87</sup> Fiss, *supra* note 81, at 1083–86; Mullenix, *supra* note 26, at 563–64.

<sup>88</sup> On the other hand, liberal-minded plaintiff advocates should not want trials because repeat players do better at trial than one-time individual claimants. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 119–22 (1974).

<sup>89</sup> Summary of Comments and Testimony, Agenda Item 4-B, Meeting of Advisory Committee on Rules of Civil Procedure, Apr. 25–26, 2017 at 133 [hereinafter *Agenda Book, Apr. 2017*] (“Public Justice believes that class actions are one of the most powerful tools for victims of corporate and governmental misconduct to seek and achieve justice.”); see also David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1574 (2017) (social justice advocates prefer the class action mechanism to individual litigation, even in circumstances where plaintiffs win large awards if defendants choose

rate defendants and those situated on the conservative end of the political spectrum prefer individualized litigation, because small awards may discourage plaintiffs from pursuing their grievances,<sup>90</sup> but also based on an interest in individual autonomy and control of the litigation process.<sup>91</sup>

The tables turn again when speaking of settling aggregated litigation. Social justice advocates want aggregated settlements.<sup>92</sup> Especially if the rules allowed for the criteria for settlement to be more relaxed than when certifying for litigation purposes, settling could avoid the difficulties of finding common issues or injuries in large, amorphous class actions.<sup>93</sup> On the other hand, plaintiffs do not benefit from settlements resulting from collusive behavior among plaintiff and defendant attorneys, which feature large attorney's fees and relatively small awards for class members.<sup>94</sup> Defendants also want aggregated settlements. Whether speaking of global settlements in multidistrict litigation or settling class action litigation in mass tort cases, most scholars believe that corporate commercial defendants will favor settlements because they provide predictability and finality to claims.<sup>95</sup> On the other hand, defendants may have an interest

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bankruptcy over further litigation); Miller, *What Are Courts For?*, *supra* note 70, at 754–55.

<sup>90</sup> Mini Conference on Class Actions, Agenda Item 6-B, Meeting of Advisory Committee on Rules of Civil Procedure, Nov. 5–6, 2015, at 179 [hereinafter *Agenda Book, Nov. 2015*] (summarizing comments of a defense-side lawyer who expressed concerns that class actions “exert huge leverage for compromise from defendants that have a strong basis for resisting claims on the merits.”).

<sup>91</sup> Resnik, *supra* note 46, at 923.

<sup>92</sup> *Agenda Book, Nov. 2015, supra* note 90, at 179–82 (summarizing comments of a plaintiff-side lawyer who expressed strong support for the settlement class idea); *see also* Rabiej, *supra* note 35, at 367 (“Class-action specialists supported the amendments, which facilitated the use of the class-action device.”).

<sup>93</sup> *See, e.g., Wal-Mart v. Dukes*, 564 U.S. 338, 345–46 (2011).

<sup>94</sup> Coffee, *supra* note 82, at 1349; Redish & Kastanek, *supra* note 38, at 547. For a discussion of collusion in the context of multi-district litigation, *see* ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 10–11 (2019).

<sup>95</sup> *See* Coffee, *supra* note 82, at 1373–75; Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903, 916–17 (2018); Issacharoff & Nagareda, *supra* note 30, at 1651. On the other hand, defense side lawyers have expressed concerns about easing class certification criteria for settlement purposes because it adds pressure to settle. *See, e.g., Agenda Book, Nov. 2015, supra* note 90, at 179.

in greater scrutiny of class action settlements, which would make it more difficult for plaintiff attorneys to bring unformed claims to court.<sup>96</sup>

By way of example of the ill-fitting confines of judicial behavior literature, take the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*.<sup>97</sup> Presumably, if defendants prefer global settlements that bind future plaintiffs no matter the extent of their injuries, then the decision should have been a victory for the plaintiffs. Writing the decision affirming the Third Circuit's decision to vacate the District Court's order approving the settlement was Justice Ginsburg.<sup>98</sup> However, joining her in the majority decision were Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, Justice Souter and Justice Thomas.<sup>99</sup> Moreover, denying certification for the class action did not mean that all of the claims were magically addressed individually. By the end of 2009, over fifty-thousand federal asbestos cases were still pending before the U.S. District Court for the Eastern District of Pennsylvania.<sup>100</sup> Meanwhile, one of the largest asbestos manufacturers was able to circumvent the entire process by filing in Chapter 11 bankruptcy and by paying claims at a fraction of their value.<sup>101</sup> While it may be the case that defendants benefit from global settlements, so too do plaintiffs, especially when their interests are considered relative to their BATNA, where in some cases, the best alternative to a negotiated agreement is no compensation at all.<sup>102</sup>

Fairness hearings to review settlement agreements in class action litigation further challenge standard classifications. The fairness hearing consists of an open, public hearing to review the details of

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<sup>96</sup> Coffee, *supra* note 82, at 1373–75.

<sup>97</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 591 (1997).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* Similarly, the Supreme Court's next decision on settlement class actions for asbestos related injuries, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 820 (1999), was written by Justice Souter, with Rehnquist, C.J., and O'Connor, Scalia, Kennedy, Thomas, and Ginsburg, JJ., joining.

<sup>100</sup> Bookman & Noll, *supra* note 28 at 771.

<sup>101</sup> *Id.* at 771–72.

<sup>102</sup> See generally Leigh L. Thompson et al., *Negotiation*, 61 ANN. REV. PSYCH. 491, 494–95 (2010) BATNA stands for the “best alternative to a negotiated agreement.” (“When one’s BATNA is better than an agreement one can reach with a particular negotiation counterpart, one should choose not to agree and exercise the BATNA instead.”).

an otherwise private settlement.<sup>103</sup> Absent class members become the public as the judge strives to protect the public interest reviewing the settlement for fairness and adequacy.<sup>104</sup> Moreover, concerns about privatized justice do not readily apply. Settlements are part of the court record and their review is part of an open hearing that accommodates public objectors.<sup>105</sup>

### C. *Other Types of Politics*

The third and final deficiency of extant judicial politics scholarship is that it does little to address the various kinds of contestations for power or the multiple and possibly conflicting incentives that judges have in their different roles.<sup>106</sup> Owen Fiss once wrote that the appropriateness of a passive role for the judiciary might be put into question by “inequalities in the distribution of resources.”<sup>107</sup> Fiss was concerned about the dynamic between the individual and “large aggregations of power,” and the mechanisms available to the judiciary to provide support in ways that gave meaning to public values.<sup>108</sup> Similarly, instead of only being concerned about how judicial interventions reflect liberal or conservative ideologies, it is prudent to examine other “aggregations of power” effecting the legal system<sup>109</sup> and whether public values are impacted as a result.

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<sup>103</sup> See William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1437 n.7 (2006).

<sup>104</sup> See Molot, *supra* note 80, at 52–53; Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1899 (2014).

<sup>105</sup> A 2004 study conducted by the Federal Judicial Center of close to 300,000 civil cases in 52 districts indicated that very few cases had sealed settlement agreements (0.44%). Of the 1,270 cases with sealed settlement agreements, class action settlements only represented six percent of those agreements (0.026% or 76 cases in a survey of a total of close to three hundred thousand cases). See Summary of Sealed Settlement Agreements in Federal District Court, Agenda Item 6, Meeting of Advisory Committee on Civil Rules, Oct. 28–29, 2004, at 250 [hereinafter *Agenda Book, Oct. 2004*].

<sup>106</sup> See EPSTEIN ET AL., *supra* note 6, at 67; RICHARD A. POSNER, HOW JUDGES THINK 11–14 (2010); Stempel, *supra* note 45, at 247–48 (arguing that members of the Advisory and Standing Committees may bring pre-existing political and ideological preferences to their work in rulemaking).

<sup>107</sup> Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 24 (1979).

<sup>108</sup> *Id.* at 43–44.

<sup>109</sup> Burbank & Silberman, *supra* note 80, at 699 (“The most important developments in civil justice . . . have concerned power: who has it and who should have it, both in litigation and in making the rules for litigation.”).

These other aggregations of power can be seen in the competition between trial and appellate courts for importance and relevancy,<sup>110</sup> as well as in inefficient organizational behaviors that produce incentives for promotion and the accumulation of personal power.<sup>111</sup> For instance, one potential site of struggle resides in trial versus appellate courts' competing interests for the final word.<sup>112</sup> Procedures that emphasize pre-trial motions and negotiated settlements influence the ability of courts to finish cases without a final disposition.<sup>113</sup> Because pre-trial rulings are usually not subject to appeal, the authority to control and manage the litigation process shifts to trial level judges. Similarly, cases that settle "guarantee that appellate courts will play no role in the suit . . . . Judicially encouraged settlement, to the extent that it succeeds, thus extends the reach of trial court power."<sup>114</sup> An additional source of competition, which forms the focus of this Article, resides in the struggles between rules committees and Congress, or between judges of the rules committee and judges of the Supreme Court, regarding whom has the power to authoritatively articulate the rules.<sup>115</sup>

With this expanded understanding of judicial politics, the remainder of this Article examines the Advisory Committee's efforts to draft a rule addressing settlement class actions. Again, I do not assess the normative value of easing certification criteria for settlement class actions. Instead, I describe the work of the Advisory Committee, its goals, accomplishments and failures, as well as the sources of conflict within and outside of the Judicial Conference.

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<sup>110</sup> See EPSTEIN ET AL., *supra* note 6, at 5 (arguing that judges, as participants in a labor market, are motivated by nonpecuniary incentives including "esteem, influence, self-expression, celebrity (that is, being a public figure), and opportunities for appointment to a higher court . . . ."); see also Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 631, 641 (1994).

<sup>111</sup> See Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 699–700 (1999).

<sup>112</sup> See Yeazell, *supra* note 110, at 642.

<sup>113</sup> See *id.* at 647.

<sup>114</sup> *Id.* at 656.

<sup>115</sup> Burbank & Farhang, *supra* note 49, at 1550, 1593–94 (both procedural and substantive-law changes contributed to the Federal Rules of Civil Procedure becoming "a site of struggle and contest by interest groups, legislators, rulemakers, and judges who seek to control the procedural playing field on which private enforcement proceeds . . . .").

## II. POLITICS IN RULEMAKING ACT ONE: SCOTUS WINS A BATTLE

Robert McKee and the late Syd Field are famous for delineating the structural elements required for successful Hollywood screenplays.<sup>116</sup> According to these “screenwriting gurus,”<sup>117</sup> a screenplay’s Act One should introduce the audience to the protagonist’s world and present the protagonist—here, the Advisory Committee and the judges who serve as committee members—with an initial challenge or call to action.<sup>118</sup> Often this challenge, which the protagonist fails at first, is repeated as the final confrontation in the climax.<sup>119</sup> By the end of the story, the protagonist, having endured multiple tests and challenges, finally prevails.<sup>120</sup>

In our Act One, judges of the Advisory Committee set out to create rules to help judges manage settlement approval—or “fairness hearings”—in class action litigation.<sup>121</sup> The Advisory Committee was particularly interested in delineating what information lawyers would need to present when requesting certification at the same time as bringing a settlement agreement to the judge for her review.<sup>122</sup> The Advisory Committee made bold recommendations, including a recommendation to revise Rule 23 so that judges could grant certification for the purposes of settling the class action, even if certification criteria might not be met if the matter proceeded to trial.<sup>123</sup> The Advisory Committee did not succeed in this first attempt, revisiting the matter as the final challenge in Act Three of the committee’s rulemaking saga (this Article’s Part IV).<sup>124</sup> Act One

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<sup>116</sup> Robert McKee even features as a character and the subject of light teasing in the 2002 satire, *Adaptation*, directed by Spike Jonze. ADAPTATION (Columbia Pictures 2002).

<sup>117</sup> Syd Field, ‘Screenwriting Guru’, *Dies Aged 77*, BBC (Nov. 18, 2013), <http://www.bbc.co.uk/news/entertainment-arts-24987804>.

<sup>118</sup> See SYD FIELD, SCREENPLAY: THE FOUNDATIONS OF SCREENWRITING 23 (rev. ed., 2005).

<sup>119</sup> See *id.* at 25.

<sup>120</sup> See *id.* at 25–26.

<sup>121</sup> See generally William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1435 (2006); DEBORAH R. HENSLER ET. AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (Rand Institute for Civil Justice 2000).

<sup>122</sup> See Burbank & Farhang, *supra* note 49, at 1499–5000.

<sup>123</sup> See discussion *infra* Section II.B, footnotes 163–67.

<sup>124</sup> See discussion *infra* Section IV.B.

tells the story of the Advisory Committee's initial call to action and its quest for a prominent place for settlements in the class action regime. This first act also demonstrates the proximate politics of rulemaking.

#### A. *But First . . . A Prologue*

In literature, an author might write a prologue to set up the story and provide the reader with context or other background information about important events or actions that took place before the start of the story. In our drama, several prior events bear mentioning. The development of fairness hearings implicates several histories including the creation of the Federal Rules of Civil Procedure, the evolution of "settlement class actions,"<sup>125</sup> and the expansion of court-connected ADR and judge-led settlements.<sup>126</sup>

Focusing here on making rules of civil procedure, the prologue to our story starts in 1938, when Equity Rule 38,<sup>127</sup> which allowed for class actions, was carried over as Rule 23 in the new Federal Rules of Civil Procedure. The new class action rule continued the equity practice of categorizing class actions as either "pure, hybrid, or spurious."<sup>128</sup> In a functionalist, realist vein, mid-twentieth century scholars argued that categorizing class actions was confusing and a vestige of technical rules that "distract[ed] attention from the real issues."<sup>129</sup> The first major revision to class action rules thus took place in 1966, when Rule 23 was "amended to 'open the courthouse

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<sup>125</sup> See Peter H. Schuck, *Mass Torts: An Institutional Evolutionary Perspective*, 80 CORNELL L. REV. 941, 964, 966 (1995).

<sup>126</sup> See Burbank & Silberman, *supra* note 80, at 695. Equity Rule 38, which allowed for class actions, was carried over and expanded as Rule 23 in the first trans-substantive iteration of the Federal Rules of Civil Procedure. See Holtzoff, *supra* note 53, at 1070.

<sup>127</sup> Equity Rule 38 of 1912 stated: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 669 n.24 (1979).

<sup>128</sup> Holtzoff, *supra* note 53, at 1070.

<sup>129</sup> Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 381 (1967).

door' to people whose individual stakes were too small to make litigation economically rational."<sup>130</sup> The 1966 amendments also clarified that dismissing a class action required court approval and notice to class members of any proposed settlement or "compromise."<sup>131</sup>

In the fifteen to twenty years surrounding the 1966 amendments, new federal legislation created substantive rights—including the Civil Rights Act of 1964 and 1968, the Voting Rights Act of 1965, and the Civil Rights Attorneys' Fees Awards Act of 1976—bolstering the number of claims that could be made using the class procedure.<sup>132</sup> Meanwhile, tort litigation on product liability, occupational health, and environmental disasters expanded.<sup>133</sup> Asbestos litigation was "a public health calamity of major proportions."<sup>134</sup> Millions of workers in the U.S. were exposed to asbestos, several hundred thousand died from exposure, and many more suffered from exposure-related illnesses.<sup>135</sup> Many of these tort cases proceeded through class action litigation.<sup>136</sup>

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<sup>130</sup> Burbank & Silberman, *supra* note 80, at 684; *see* Frank, *supra* note 66, at 1884.

<sup>131</sup> *See* Miller, *supra* note 127, at 669, 680.

<sup>132</sup> *See* Mullenix, *supra* note 26, at 518 n.27, 519 ("Between 1966 and the mid-1970s, federal courts were transformed by the influx of massive class action cases seeking remediation for alleged violations of various constitutional, federal, and state laws."); *see also* Weinstein, *supra* note 69, at 1912; Miller, *supra* note 127, at 670–71.

<sup>133</sup> *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1015 (1993); Mullenix, *supra* note 26, at 521; Schuck, *supra* note 125, at 947 (arguing that mass tort litigation arose both because of exposure to toxic substances, as well as mass manufacturing and distribution capabilities). *But see* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1618 (2004) ("Work accidents, followed by the early mass disasters and then automobile accidents each provided a new stage on which repeat players emerged to manage the resolution of personal injury disputes.").

<sup>134</sup> Issacharoff & Witt, *supra* note 133, at 1619.

<sup>135</sup> *Id.*

<sup>136</sup> For instance, Chief Judge Robert Parker certified a class action related to asbestos litigation. *Cimino v. Raymark Industries*, 751 F. Supp. 649, 652 (E.D. Tex. 1990). Parker presided over a 133-day trial. *Id.* at 653. The corresponding docket sheet was 529 pages, with 25,348 pages of transcript and 373 court orders. *Id.*; *see also* THOMAS E. WILLGING, APPENDIX C: MASS TORTS PROBLEMS &

In response to the increased attention on mass torts,<sup>137</sup> Chief Justice Rehnquist commissioned an ad hoc committee in 1990 to study the particular problems raised by asbestos litigation.<sup>138</sup> Based on the ad hoc committee’s recommendations, the Judicial Conference asked the Standing Committee to direct the Advisory Committee to study Rule 23 to discern whether it could accommodate the burdens of mass tort litigation.<sup>139</sup> And so begins our tale.

### B. *Early Attempts to Address Settlement Class Actions*

Rule 23 officially made it back onto the Advisory Committee’s agenda in February 1991, when the Advisory Committee reviewed a draft of an amended rule suggested by the Asbestos Task Force and American Bar Association Litigation Section.<sup>140</sup> At that time, the rule as it stood for “dismissal” of a class action simply stated: “A class action shall not be dismissed or compromised without the approval of the court . . . .”<sup>141</sup>

When new members—including Judge Patrick E. Higginbotham of the Court of Appeals for the Fifth Circuit as Chair<sup>142</sup>—joined the

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PROPOSALS: A REPORT TO THE MASS TORTS WORKING GROUP 37 (1999), [https://www.uscourts.gov/sites/default/files/masstapc\\_1.pdf](https://www.uscourts.gov/sites/default/files/masstapc_1.pdf).

<sup>137</sup> See Memorandum to Members of the Standing Committee and Civil Rules Advisory Committee and Introduction to Advisory Committee’s Working Papers Collected in Connection with Proposed Changes to Fed. R. Civ. P. 23 (Class Actions), Agenda Item III, Meeting of Advisory Committee on Civil Rules, May 1-2, 1997, at 1 [hereinafter *Agenda Book, May 1997*] (“Intentionally or not, we may be coming to rely on civil litigation not only for individualized dispute resolution, but also, through the class action device, to bring about changes in the safety of products . . . and in, the method for compensating broad segments of society affected by singular torts. Indeed, in a few instances, Congress has passed legislation relying on class action procedures.”).

<sup>138</sup> Marcus, *supra* note 89 at 1583; Marcus, *supra* note 95, at 907.

<sup>139</sup> Marcus, *supra* note 95, at 907.

<sup>140</sup> Minutes, Meeting of Advisory Committee on Civil Rules, Feb. 21-23, 1991, at 8.

<sup>141</sup> FED. R. CIV. P. 23(e), 28 U.S.C.A. (*as amended* Mar. 2, 1987, eff. Aug. 1, 1987).

<sup>142</sup> *The Hon. Patrick Higginbotham*, ST. MARY’S UNIV. SCH. LAW, <https://law.stmarytx.edu/academics/faculty/patrick-higginbotham/> (last visited Sept. 18, 2022). Judge Higginbotham was nominated to the United States District Court for the Northern District of Texas by Republican President Gerald Ford in 1975. *Patrick Higginbotham*, BALLOTPEdia, [https://ballotpedia.org/Patrick\\_Hig-](https://ballotpedia.org/Patrick_Hig-)

Advisory Committee in 1993, the committee invited class action experts to present on the latest issues.<sup>143</sup> John Paul Frank, a lawyer who sat on the Advisory Committee during the pivotal 1966 reforms, presented on the problems of requesting certification and approval of settlement at the same time, including collusion between lawyers and competition between rival class actions.<sup>144</sup> Frank noted that the requirement in Rule 23(c)(1) that a decision on class certification be made “as soon as practicable” was not being followed as lawyers worked toward presenting the class and settlement offer as a package.<sup>145</sup> As to using the class action mechanism to address mass torts,<sup>146</sup> Frank stated that “a significant part of the pressure to do something about Rule 23 arises from the impulse to have judges take more and more control of cases.”<sup>147</sup>

The Advisory Committee admitted that some of the problems might be more appropriate for a legislative solution and in 1994, decided that it needed further information.<sup>148</sup> The Advisory Committee opted to form a Rule 23 Subcommittee that would work with

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ginbotham/ (last visited Sept. 20, 2022). He was elevated to the Fifth Circuit appellate court in 1982, nominated by Ronald Reagan. *Id.* Judge Higginbotham was appointed by Chief Justice Rehnquist to act as chair of the Advisory Committee from 1993-1996. *The Hon. Patrick Higginbotham*, ST. MARY'S UNIV. SCH. LAW, <https://law.stmarytx.edu/academics/faculty/patrick-higginbotham/> (last visited Sept. 18, 2022).

<sup>143</sup> Minutes, Meeting of Advisory Committee on Civil Rules, Apr. 28-29, 1994, at 17 [hereinafter Minutes Apr. 1994].

<sup>144</sup> *Id.* at 16. “At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” FED. R. CIV. P. 23(c)(1)(A).

<sup>145</sup> Minutes Apr. 1994, *supra* note 143, at 17.

<sup>146</sup> While recognizing that “[s]omeway, somehow, we must have a way to dispose of mass disputes,” Frank asserted (and continued to assert for the next several years) that Rule 23 was not meant to deal with mass torts. Minutes Apr. 1994, *supra* note 143, at 18; FED. R. CIV. P. 23(b)(3) advisory committee’s note to the 1966 revisions (“A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions . . . would be present, affecting the individuals in different ways.”).

<sup>147</sup> Minutes Apr. 1994, *supra* note 143, at 16.

<sup>148</sup> *Id.* at 16, 21. Issues such as multidistrict consolidation and jurisdictional limits on diversity classes were felt to “lie beyond the reach of the Rules Enabling process.” *Id.* at 20.

the Federal Judicial Center.<sup>149</sup> By the mid 1990s, the Federal Judicial Center reported that in four districts that were part of its empirical study,<sup>150</sup> thirty-nine percent of the cases certified for class action were certified “for settlement purposes only.”<sup>151</sup> In eighteen percent of certified class actions, the proposed settlement “was submitted to the court before or simultaneously with the first motion to certify.”<sup>152</sup> In twenty-four of those twenty-eight cases, “the court approved the settlement without changes.”<sup>153</sup>

Because of the persistent appearance of “settlement class actions”—those actions where the proposed settlement is brought to the court at the same time as the request for certification—the Advisory Committee turned its attention to specifying the judge’s role in assessing settlements.<sup>154</sup> Various circuit courts had approached settlement class actions differently.<sup>155</sup> Some felt that because a settlement agreement would relieve the court of the obligation to conduct a trial, the criteria normally required to certify a class action might be relaxed. For instance, in *Weinberger v. Kendrick*,<sup>156</sup> a securities class action, the Court of Appeals for the Second Circuit noted that it had “long recognized that a district court’s disposition of a proposed class action settlement should be accorded considerable deference.”<sup>157</sup> Similarly, in an antitrust case before the Fifth Circuit, the court made note of the “general consideration that courts

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<sup>149</sup> *Id.* at 21.

<sup>150</sup> THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 7 (1996), [https://www.uscourts.gov/sites/default/files/rule23\\_1.pdf](https://www.uscourts.gov/sites/default/files/rule23_1.pdf). The four federal district courts were: the Eastern District of Pennsylvania; the Southern District of Florida; the Northern District of Illinois; and the Northern District of California. *Id.* at 4.

<sup>151</sup> *Id.* at 35.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* This was not a historical anomaly. In 2008, the Federal Judicial Center reported that tort claims comprised one third of all diversity class actions (contract and consumer protection claims were the majority of claims by number of lawsuits filed) and that of the cases not remanded to state court or voluntarily dismissed, nearly thirty percent settled. LEE & WILLGING, *supra* note 79, at 3.

<sup>154</sup> WILLGING ET AL., *supra* note 150, at 65.

<sup>155</sup> *See id.* at 34–35.

<sup>156</sup> *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982).

<sup>157</sup> *Id.* at 73.

favor settlement,”<sup>158</sup> and moreover that mechanisms to encourage settlement classes “are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge.”<sup>159</sup>

Other circuits took a more formal literal approach, finding that the rules as they appeared in the Federal Rules had to be applied in every instance without compromise.<sup>160</sup> The circuit court in *Amchem*, for example, recognized the immense burden asbestos litigation had put on the federal court system, and that the proposed settlement represented “a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue.”<sup>161</sup> Nevertheless, allowing a court to certify a class for the purposes of settlement when that same group could not be certified for litigation would exceed the language of the rules of procedure and cause “a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks.”<sup>162</sup>

In response, the Advisory Committee crafted a draft amendment that would have ended the controversy by explicitly allowing approval of a class “for purposes of settlement, even though the requirements . . . might not be met for purposes of trial.”<sup>163</sup> The Advisory Committee’s proposed new rule would relax the criteria for certification where the parties request certification and approval of a settlement at the same time.<sup>164</sup> The requirements for class certifica-

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<sup>158</sup> *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979).

<sup>159</sup> *Id.* at 174.

<sup>160</sup> See *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610 (3d Cir. 1996), *rev'd sub. nom.* *Amchem Prods. Inc., v. Windsor*, 521 U.S. 591 (1997); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Litig.*, 55 F.3d 768 (3d Cir. 1995).

<sup>161</sup> *Georgine*, 83 F.3d at 617 (Particularly because the settlement agreement bound potential future claimants, e.g. individuals who had been exposed to asbestos but whose injuries had not yet manifested).

<sup>162</sup> *Id.* at 618.

<sup>163</sup> ADVISORY COMM. ON CIV. RULES, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 37 (May 17, 1996) [hereinafter *May 1996 Report*].

<sup>164</sup> ADVISORY COMM. ON CIV. RULES, ADMIN. OFFICE OF THE U.S. COURTS, WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, VOLS. 1-4 (1997) [hereinafter WORKING PAPERS OF THE ADVISORY COMM.]. As Judge Niemeyer candidly wrote in the Advisory Committee’s May 1997 report to the Standing Committee, the addition

tion would have to be met, but the amendment authorized “evaluation of these prerequisites and requirements from the perspective of settlement.”<sup>165</sup> The Advisory Committee also proposed amendments to subdivision (e) “to confirm the common understanding that a hearing must be held as part of the process” of approving the settlement.<sup>166</sup>

The text of these aspects of the proposed rule read:

**(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.

**(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without hearing and the approval of the court, after notice of the proposed dismissal or compromise has been given to all members of the class in such manner as the court directs.<sup>167</sup>

In doing this early work to address settlement class actions, the Advisory Committee met at the Administrative Offices of the U.S. Courts in Washington, D.C. as well as at law schools.<sup>168</sup> Additionally, it met at resorts across the U.S., such as the five star Stein

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of a new Rule 23(b)(4) was made to overrule a specific contrary ruling rendered by the Third Circuit in an opinion that also recognized the possibility that Rule 23 might be amended in this respect. *See id.* at 47 (“[T]he Committee’s presentation suggests that all Rule 23(b)(4) does is reinstate the law as it existed prior to two decisions by the Third Circuit: *Georgine* and *In re General Motors Pick-Up Truck Fuel Tank Litigation*.”).

<sup>165</sup> *May 1996 Report*, *supra* note 163, at 36.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 37–38. While listed as a “type” of class action, the Advisory Committee explained, “Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class.” WORKING PAPERS OF THE ADVISORY COMM., *supra* note 164, at 153.

<sup>168</sup> In 1995, as it neared publishing new rules, the Advisory Committee held meetings in conjunction with conferences at New York University School of Law,

Eriksen Lodge in Park City, Utah, and the Cloister Sea Island on the Southeastern coast of Georgia.<sup>169</sup> Based on the information available,<sup>170</sup> Rule 23 was on the agenda of every meeting during this period, with the Committee devoting an average of 54 pages to the discussion of Rule 23.<sup>171</sup>

However, judges of the Advisory Committee may have traversed too far into the highest Court's territory when they indicated that their proposed amendments were intended to resolve the disagreement among the circuit courts.<sup>172</sup> The Advisory Committee's proposed Notes, which follow the recitation of the rules and which are included in most published sources of the Federal Rules of Civil Procedure, stated the following regarding the role settlements should have in the consideration of class certification: "Many courts have adopted the practice reflected in this new provision, some very

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University of Pennsylvania Carey Law School, and University of Alabama School of Law. See Samuel Estreicher, *Federal Class Actions After 30 Years*, 71 N.Y.U. L. REV. 1, 1 (1996); Edward Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 13 (1996). See WORKING PAPERS OF THE ADVISORY COMM., *supra* note 164, at *ix*.

<sup>169</sup> Between 1991 and 1998, on average, twenty-two people, including an average of nine judges, attended the Advisory Committee meetings with the highest attendance at thirty-nine and smallest at thirteen people. On the number of people at the meetings, thirteen people attended the February 1992 meeting of the Advisory Committee. See Minutes, Meeting of Advisory Committee on Civil Rules, Feb. 21, 1992, at 1. Thirty-nine attended the meeting of the Advisory Committee held at the University of Pennsylvania Law School on February 16 and 17, 1995. See WORKING PAPERS OF THE ADVISORY COMM., *supra* note 164, at 195. On the locations, see Draft Minutes, Meeting of Advisory Committee on Civil Rules, Mar 16-17, 1998, at 37 (Utah) and WORKING PAPERS OF THE ADVISORY COMM., *supra* note 164, at 179 (Georgia).

<sup>170</sup> Agenda books are only available starting in 1992, and three agenda books for meetings in 1994 and 1995 are not accessible through the U.S. Courts online archive. See *Agenda Books*, U.S. COURTS, [https://www.uscourts.gov/rules-policies/records-rules-committees/agenda-books?committee=All&year%5Bvalue%5D&order=field\\_date\\_updated&sort=asc](https://www.uscourts.gov/rules-policies/records-rules-committees/agenda-books?committee=All&year%5Bvalue%5D&order=field_date_updated&sort=asc) (last visited Sept. 17, 2022) (showing that the first available electronic agenda book is from November 1992).

<sup>171</sup> See Proposed Amendments to Rule 23, Agenda Item VI, Meeting of Advisory Committee on Civil Rules, Nov. 9-11, 1995 [hereinafter *Agenda Book, Nov. 1995*]. For instance, for the November 1995 meeting, discussion of Rule 23 comprised 130 pages of the agenda.

<sup>172</sup> See May 1996 Report, *supra* note 163, at 42.

recent decisions have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. *This amendment is designed to resolve this newly apparent disagreement.*<sup>173</sup>

### C. Plot Point: SCOTUS Grants Certiorari for Amchem

In May 1996, the Third Circuit released its decision in *Georgine v. Amchem Products, Inc.*<sup>174</sup> The court characterized the issues as no less than “forc[ing] the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other.”<sup>175</sup> The proposed settlement sought to address asbestos-related claims of up to two million individuals against twenty companies.<sup>176</sup> The Third Circuit called the settlement proposal “a brilliant partial solution to the scourge of asbestos that has heretofore defied global management.”<sup>177</sup> Nevertheless, the court sent the case back to the district court for decertification because it found that the class certification requirements were not met.<sup>178</sup>

In its decision, the Third Circuit made specific reference to the work of the Advisory Committee to address mass tort claims.<sup>179</sup> The court opined that creating reduced requirements for settlements in mass tort cases was properly the role of Congress, but it also could fall under the purview of the Advisory Committee.<sup>180</sup> The court wrote:

Another route would be an amendment to the Federal Rule of Civil Procedure 23. We are aware that the Judicial Conference Advisory Committee on Civil Rules is in fact studying Rule 23, including the matter of settlement classes. One approach the Rules

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<sup>173</sup> *Id.* at 42 (emphasis added).

<sup>174</sup> *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 615 (3d Cir. 1996), *rev'd sub. nom. Amchem Prods. Inc., v. Windsor*, 521 U.S. 591 (1997).

<sup>175</sup> *Id.* at 617.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 635.

<sup>179</sup> *See id.* at 627 (citing the Advisory Committee’s notes to Fed. R. Civ. P. 23(b)(3)).

<sup>180</sup> *See id.* at 634.

Committee might pursue would be to amend Rule 23 to provide that settlement classes need not meet the requirements of litigation classes.<sup>181</sup>

In the normal course when rule changes are underway, the Standing Committee of the Judicial Conference (the top of the committee hierarchy) reviews proposed rule changes and decides whether the proposed amendments merit publication.<sup>182</sup> Once amendments are published, they are subject to formal notice and comment, following which the rules are transmitted to the U.S. Supreme Court, which has the option to submit or withhold amendments to Congress for its enactment.<sup>183</sup> In this case, on November 1, 1996, approximately three months *after* publication of the proposed amendments to Rule 23—after the Standing Committee had decided that the amendments merited publication—the Supreme Court granted certiorari to the defendants in *Amchem*.<sup>184</sup>

The Supreme Court had not previously expressed interest in tort-related class action settlements, and granting certiorari in this case likely caught the judges of the Advisory Committee by surprise.<sup>185</sup> In the thirty years prior to these events—including following the 1966 amendments—the Supreme Court dealt with the issue of settlements in class actions twenty-two times, but only twice for tort-related settlements.<sup>186</sup>

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<sup>181</sup> *Id.* at 617.

<sup>182</sup> U.S. Cts., *How the Rulemaking Process Works*, <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference> (last visited Sept. 13, 2022).

<sup>183</sup> *Id.*

<sup>184</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997). *But see* Marcus, *supra* note 89, at 1575–89 (discussing *Amchem* and its attempt to use class action to settle claims of future claimants).

<sup>185</sup> Judge Paul Niemeyer of the United States Court of Appeals for the Fourth Circuit, who took over as chair of the Advisory Committee in October 1996, aptly stated the committee’s position: “I believe it is wise to defer any action on settlement classes until the Committee has the benefit of the Supreme Court’s anticipated opinion in this case.” WORKING PAPERS OF THE ADVISORY COMM., *supra* note 164, at 838.

<sup>186</sup> A Westlaw search on settlement class actions pre-*Amchem* (search for settlement, certification, and Rule 23) yielded twelve cases from the Supreme Court in the twenty years prior to *Amchem*. *See also* HENSLER ET AL., *supra* note 29, at 36 (noting *Amchem* was the Supreme Court’s first look at a mass tort class action).

The Advisory Committee still carried on with the three public hearings that had previously been scheduled for Philadelphia (November 1996), Dallas (December 1996), and San Francisco (January 1997).<sup>187</sup> It heard from eighty-five members of the public, including, for example, Professor Judith Resnik, who attended the first hearing in Philadelphia and testified to the importance of judges' role in reviewing settlements and bringing private dispute resolution into public spaces for review and comment.<sup>188</sup> In addition to public hearings, the process provided for a period of public comment, with written comments on the proposed amendments due by February 15, 1997.<sup>189</sup>

The Supreme Court's actions to interrupt the rulemaking process exhibits what Paul Carrington, reporter for the Advisory Committee from 1985-1992, called "dissatisfaction with [the Court's] modest share of the power to make procedural law."<sup>190</sup> The 1988 reforms to the Rules Enabling Act denoted a move toward a more democratic and "process-based account of the rule of law."<sup>191</sup> Procedural rulemaking is now required to be deliberative, participatory, inclusive, and transparent.<sup>192</sup> For example, the rulemaking process incorpo-

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<sup>187</sup> See PHILADELPHIA HEARING TRANSCRIPT, WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, VOL. 3 (1997), at 4–5 [hereinafter *Philadelphia Hearing Transcript*] (discussing plan to hold hearings in Philadelphia, Dallas, and San Francisco).

<sup>188</sup> See *id.* at 121–23 ("Rule 23 has a potential virtue . . . a virtue of structure and a role for judges and litigants and pushing them to the visible arena.").

<sup>189</sup> *Id.* at 6.

<sup>190</sup> Carrington, *supra* note 25, at 599. Carrington notes that Justice Scalia in particular was averse to relying on Committee Notes for uncovering the purpose of procedural rules, notwithstanding their scrutiny via the same public, deliberative process as the rules themselves. See *id.* at 620. Kevin Clermont and Stephen Yeazell tell a similar story of the Supreme Court's capture of the rulemaking process in the pleadings cases *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) ("The bone this Article picks with the Court is . . . that by blazing a new and unclear path alone and without adequate warning or thought it left the pleading system in shambles.").

<sup>191</sup> Bookman & Noll, *supra* note 28, at 767.

<sup>192</sup> See Clermont & Yeazell, *supra* note 189, at 846–47 (providing an opportunity for a "thorough airing of the choices" is the preferable process for amending rules of procedure); see also Bookman & Noll, *supra* note 28, at 780 (discussing

rates notice not merely that the rules may be changed—which effectively is what the legal community gets with a granting of certiorari—but also for publication of proposed new rules.<sup>193</sup> The process includes a period of public comment and democratic deliberation, and has a built-in mechanism for review by providing what is effectively a veto power to the Supreme Court and Congress.<sup>194</sup> Yet, the Supreme Court was not content to leave rulemaking to the committee process, notwithstanding the expertise,<sup>195</sup> amount of time, research, and the number of people who had been involved in working on the rule amendments.<sup>196</sup>

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how the Enabling Act model of procedural design emphasizes procedural fairness because it provides legitimacy to legal judgments); Resnik, *supra* note 86, at 1644–47.

<sup>193</sup> *How the Rulemaking Process Works*, U.S. CTS., <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rule-making-process-works> (last visited Sept. 19, 2022).

<sup>194</sup> See Carrington, *supra* note 25, at 657. Moreover, there may be good reason to leave rulemaking to the “experts”—judges and lawyers with trial experience—as the composition of the Supreme Court does not always include former trial judges. See Clermont & Yeazell *supra* note 189, at 851.

<sup>195</sup> See Bookman & Noll, *supra* note 28, at 777; see also A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10 (1958) (describing the Court’s expertise in rulemaking over Congress); Clermont & Yeazell, *supra* note 189, at 850–51 (2010) (noting the lack of experience of Justices on the Supreme Court with litigation procedure).

<sup>196</sup> The Advisory Committee met fifteen times between February 1991 and April 1996. In addition to the required period of notice and comment, the Advisory Committee sought feedback from the legal community before proposed amendments were officially published. The Advisory Committee met with members of the Standing Committee, law professors, lawyers from Attorney Generals’ offices, the American College of Trial Lawyers and the ABA Litigation Section, and with researchers from the Federal Judicial Centre. Transcripts of the three official public hearings comprise 762 pages. See WORKING PAPERS OF THE ADVISORY COMM., *supra* note 164, at Vol. 3.; COMM. ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 306 (2002), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST9-2002.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST9-2002.pdf) (“Judge Higginbotham pioneered the investigatory model that the Committee continues to use to good effect whenever it considers a complex issue. The model combines multiple informal opportunities for involvement by judges, interested academics, members of the bar, and bar organizations, with targeted empirical work.”); see also Rabiej, *supra* note 35, at 349 (explaining how Judge Higginbotham had the

Comparative law scholar, Mitchel Lasser, has examined institutional competition in the context of French and European high courts vying for the authority to control jurisprudence on “fundamental rights.”<sup>197</sup> There, multiple courts engaged in “a complex and highly charged set of interactions” for control of institutional power.<sup>198</sup> French and European judiciaries were cognizant of “powerful pressures” to engage in fundamental rights discourse and thus even courts which had not previously undertaken judicial review of legislative action were forced into “a mad scramble to master and direct the development of fundamental rights jurisprudence” or risk being “left intellectually and institutionally behind.”<sup>199</sup> Lasser presents a complex picture of “highly charged” institutional competition between courts, manifesting as proximate politics within the judicial system.<sup>200</sup>

Here, too, in the case of judges’ authority to craft rules of procedure, the timing and course of events suggests internal competition between judges at the different levels of courts. This case seems to indicate that, as with European judges, the judges of the U.S. Supreme Court were not content to let others direct the development of a complex and controversial area of law.<sup>201</sup> As between the Supreme Court’s unfettered discretion to comment on the state of the law and lower court judges’ authority to craft rules under the Rules Enabling Act, our Act One suggests that judges of the Supreme Court would prefer to vest power in themselves.<sup>202</sup>

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committee meet with the nation’s foremost class action and mass torts attorneys and judges to understand the reality of complex litigation).

<sup>197</sup> Mitchel de S.-O.-l’E. Lasser, *The Judicial Dynamics of the French and European Fundamental Rights Revolution*, in *CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE* 289–310 (Diana Kapiszewski et al. eds., 2013) (explaining how, in the French and European judicial systems, a “whole series of courts” which had not previously undertaken judicial review of legislative action were forced into “a mad scramble to master and direct the development of fundamental rights jurisprudence.”).

<sup>198</sup> *Id.* at 291.

<sup>199</sup> *Id.* at 289–90.

<sup>200</sup> *Id.* at 291.

<sup>201</sup> *See generally id.* at 289.

<sup>202</sup> Carrington, *supra* note 25, at 621 (“The Supreme Court has on several occasions chosen to disregard the text of the Civil Rules, the advice of those engaged in the rulemaking process, and even the text of the Constitution . . .”).

In June 1997, the Supreme Court affirmed the Third Circuit opinion, agreeing that the plaintiffs did not meet the threshold requirements for certification.<sup>203</sup> Justice Ginsburg did note that suggested reforms had been published for comment and that “voluminous public comments”<sup>204</sup> were made in response. Justice Ginsburg curiously noted that the Advisory Committee had “not yet acted on the matter,” and then went on to state, “[w]e granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification.”<sup>205</sup>

After seven years of deliberation, the Advisory Committee recommended one amendment to Rule 23 for the Judicial Conference’s approval.<sup>206</sup> The amendment did not touch upon the issue of settlements. Settlements, the particulars of fairness hearings, and their effect on class certification would have to wait until another day.<sup>207</sup>

### III. ACT TWO: CONFRONTATIONS WITH CONGRESS

As with any proper second act, our Act Two both begins and ends with the same conflict—confrontations between Congress and the Advisory Committee over the control of the rulemaking process.<sup>208</sup> In this act, judges of the Advisory Committee confronted the issue of judicial independence, risking at least the perception that judges are separate and removed from Congress.<sup>209</sup> We expect the judiciary to be impartial in respect of any dispute before them.<sup>210</sup> Consequently, judges must not be influenced by the other branches

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<sup>203</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

<sup>204</sup> *Id.* at 619.

<sup>205</sup> *Id.*

<sup>206</sup> New Rule 23(f) to allow for interlocutory appeals. Rabiej, *supra* note 35, at 349–50.

<sup>207</sup> Judge Niemeyer’s final word on the matter was to create a Mass Torts subcommittee and publish four huge volumes—the smallest is 734 pages—of archival material documenting the Advisory Committee’s work on class actions. See WORKING PAPERS OF THE ADVISORY COMM., *supra* note 164.

<sup>208</sup> For a discussion of conflicts between Congress and the Judicial Conference in other contexts, see Yeazell, *supra* note 28, at 229.

<sup>209</sup> See *id.* (noting that judges began drafting initial versions of the rules, moving away from their original roles as arbiter of the fairness of the rules).

<sup>210</sup> See *id.* at 239.

of government, and for the sake of the legitimacy of judicial institutions, must also appear to be at arm's length from the executive branch and legislature.<sup>211</sup> The public's perception of an independent judiciary is threatened when judges are seen to be lobbying House representatives and Senate members and wrangling with the different branches of government over who has authority to make rules for federal courts.<sup>212</sup>

#### A. *First Confrontation: Interlocutory Appeals*

Shortly after Judge Paul Niemeyer took over as chair of the Advisory Committee in 1996,<sup>213</sup> House Representative Henry J. Hyde (R-IL) introduced a bill that would authorize interlocutory appeals of decisions regarding class certification.<sup>214</sup> Yet, new Rule 23(f), which allowed for permissive interlocutory appeals of class certification orders, was the only proposal that the Advisory Committee was able to introduce following the 1996 notice and comment period that was otherwise derailed by *Amchem* and then *Ortiz*.<sup>215</sup> While new Rule 23(f) was proceeding through the Rules Enabling Act process, Congress decided that it was in the best position to address the

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<sup>211</sup> *See id.*

<sup>212</sup> *See id.* at 239–41.

<sup>213</sup> Judge Paul V. Niemeyer was appointed to the United States District Court for the District of Maryland in 1987 by President Ronald Regan and was elevated to the Court of Appeals for the Fourth Circuit in 1990 by George H.W. Bush. Judge Niemeyer has dissented from several key decisions conferring or upholding rights of LGBTQ+ individuals. Judge Niemeyer also dissented from the Fourth Circuit's en banc decision to uphold the lower court's injunction against President Trump's 2017 travel ban in *International Refugee Assistance Project, Inc. v. Trump*, 857 F.3d 554 (4th Cir. 2017). Judge Niemeyer chaired the Advisory Committee from October 1996 through to October 2000.

<sup>214</sup> Judicial Reform Act of 1998, H.R. 1252, 105th Cong. (1997); *see* Admin. Off. of the U.S. Cts. Off. of Pub. Affs., *Leadership Speaks Out on Judicial Issues*, 29 THIRD BRANCH 1, 1–3 (1997) [hereinafter *Leadership Speaks Out on Judicial Issues*]. Exceptions to the rule forbidding interlocutory appeals are listed in 28 U.S. Code § 1292 (Supp. 1992). H.R. 1252 proposed several reforms, such as allowing parties in civil litigation to remove an assigned judge as of right and requiring that a complaint made under the Judicial Conduct and Disability Act be referred to a different circuit. *Id.* at 3–4.

<sup>215</sup> *See* Rabiej, *supra* note 35, at 360 (noting that the committee waited to see whether the Supreme Court's handling of *Amchem* and *Ortiz* affected its decision-making); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 820 (1999), *rev'd* 134 F.3d 668 (5th Cir. 1998).

issue of interlocutory appeals as part of its reasoned response to specific instances of judicial abuse and “‘activist’ judges who overstepped their judicial bounds.”<sup>216</sup> The division between the purview of Congress and that of the judiciary is meant to be clear under the Rules Enabling Act.<sup>217</sup> Nevertheless, sponsor Representative Hyde described his bill as reforming “the procedures of the federal courts to ensure fairness in the hearing of cases . . . [and] assure that litigants in federal courts will be entitled to fair rules of practice and procedure leading to the due process of their claims.”<sup>218</sup>

In response, Judge Niemeyer wrote to Senators Hatch and Leahy to ask that they oppose the bill pending in the Senate.<sup>219</sup> Judge Niemeyer and Judge Anthony J. Scirica<sup>220</sup> also testified before congressional committees.<sup>221</sup> On their experiences, Judge Niemeyer politely reflected, “Bills to amend procedural rules directly seem to be introduced with greater frequency. Often the bills are introduced because

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<sup>216</sup> Admin. Off. of the U.S. Cts. Off. of Pub. Affs., *House Passes “Judicial Activism” Bill*, 30 THIRD BRANCH 1, 1–2 (1998); see also Admin. Off. of the U.S. Cts. Off. of Pub. Affs., *End of the 105th Congress Resolves Legislative Action*, 30 THIRD BRANCH 1, 2–3 (1998) (regarding Senate’s “judicial activism” bill, Senate Bill S. 2163); Burbank & Farhang, *supra* note 49, at 1507 (noting that between 1973 and 2014, Congress introduced sixty-eight bills aimed at “restrict[ing] opportunities and incentives for class actions.”).

<sup>217</sup> See NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 84 (2007).

<sup>218</sup> *Leadership Speaks Out on Judicial Issues*, *supra* note 214, at 2; see also Judicial Reform Act, H.R. 1252, 105th Cong. (1998) (the house passed the Judicial Reform Act, H.R. 1252 on April 23, 1998, while the Senate considered a stand-alone bill addressing interlocutory appeals).

<sup>219</sup> Draft Minutes of June 18–19, 1998 Meeting, Meeting of Advisory Committee on Civil Rules, Nov. 12–13, 1998, at 4 [hereinafter *Agenda Book, Nov. 1998*].

<sup>220</sup> Judge of the US Court of Appeals for the Third Circuit, and Chief Judge from 2003 to 2010. Judge Scirica was a member of the Advisory Committee from 1993–1998. He served as chair for both the Advisory Committee on Civil Rules Working Group on Mass Torts and for the Standing Committee on Rules of Practice and Procedure. In 2008, Judge Scirica was named Chair of the Executive Committee of the Judicial Conference of the United States. He is also a former member of the Judicial Panel on Multidistrict Litigation. *Anthony Scirica*, PENN CAREY LAW, <https://www.law.upenn.edu/faculty/ascirica/> (last visited Oct. 12, 2022); Debra Cassens Weiss, *3rd Circuit’s Judge to Chair Federal Courts’ Executive Committee*, ABAJOURNAL, (Apr. 25, 2008, 3:09PM) [https://www.abajournal.com/news/article/3rd\\_circuits\\_chief\\_judge\\_to\\_chair\\_federal\\_courts\\_executive\\_committee](https://www.abajournal.com/news/article/3rd_circuits_chief_judge_to_chair_federal_courts_executive_committee).

<sup>221</sup> *Agenda Book, Nov. 1998*, *supra* note 219, at Agenda Item II, p.2.

the sponsors do not know that the Enabling Act process can be invoked to pursue the same questions . . . .”<sup>222</sup> Judge Scirica was less sanguine. In January 1999, he relayed to the Standing Committee that it was “very important for the rules committees to uphold the integrity of the Rules Enabling Act and be vigilant against potential violations”<sup>223</sup> by Congress.

In reaction to their feedback, the Standing Committee briefly flirted with the idea of shortening the rulemaking process, but any proposal, such as shortening the time for public comment, faced strong opposition.<sup>224</sup> Committee members were also acutely aware that it would be difficult to reduce the amount of time the Supreme Court had to review proposed rule amendments.<sup>225</sup> In the end, Committee members were able to persuade the relevant members of Congress to drop the issue of interlocutory appeals.<sup>226</sup> The bill passed in the House and was referred to the Senate Committee on the Judiciary, but went no further.<sup>227</sup>

### B. *Mass Torts Working Group*

Meanwhile, in what may have been a concession to the Civil Rules Advisory Committee following *Amchem*, Chief Justice Rehnquist authorized the creation of a working group in February

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<sup>222</sup> *Id.*

<sup>223</sup> JUD. CONF. COMM. ON RULES OF PRAC. & PROC., MINUTES COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, at 2 (Jan. 1999); *see also* Draft Minutes, Agenda Item II, Meeting of Advisory Committee on Civil Rules, Nov. 12-13, 1998, at 3 (intimating that Congress would act when the committee process was ineffective: “There is some concern in Congress that the Advisory Committee has devoted too much time to the questions raised by the bills without reaching any final conclusion.”).

<sup>224</sup> JUD. CONF. COMM. ON RULES OF PRAC. & PROC., *supra* note 223, at 20.

<sup>225</sup> Draft Minutes, Meeting of Advisory Committee on Civil Rules, Apr. 19-20, 1999, at 20 [hereinafter *Agenda Book*, Apr. 1999].

<sup>226</sup> *Id.* at 3 (“The sponsors were persuaded to amend the bills so that the effect would be only to accelerate the effective date of the new Civil Rule 23(f) that the Supreme Court sent to Congress last spring.”).

<sup>227</sup> *See* Judicial Reform Act, H.R. 1252, 105th Cong. (1998), <https://www.congress.gov/bill/105th-congress/house-bill/1252>; Judicial Improvement Act, S. 2163, 105th Cong. (1998), <https://www.congress.gov/bill/105th-congress/senate-bill/2163>.

1998 to study mass torts for a one-year term.<sup>228</sup> The controversy following the publication of the 1996 rules amendments convinced members of other Judicial Conference Committees that the problems raised by mass tort litigation “cut across the jurisdictions and interests of the committee structure.”<sup>229</sup> The initial request to Chief Justice Rehnquist was thus for the establishment of a formal task force.<sup>230</sup> Rehnquist’s response, however, was to authorize an informal working group to be led by the Advisory Committee.<sup>231</sup> Chaired by Judge Scirica, the working group held its first meeting in Washington, D.C. in 1998.<sup>232</sup>

By 1999, the working group had held four meetings, at UC Hastings College of the Law in San Francisco, at University of Pennsylvania Carey Law School in Philadelphia, and at the Administrative Offices of the U.S. Courts in Washington, D.C.<sup>233</sup> In total, the working group met with eighty-one conference participants, including attorneys, litigants, judges, and law professors.<sup>234</sup> The working group presented a final report, short titled *Report on Mass Tort Litigation*,<sup>235</sup> to Chief Justice Rehnquist on February 15, 1999. By the time of the Committee’s April meeting, however, the Chief Justice had

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<sup>228</sup> *Agenda Book, Apr. 1999, supra note 225, at 9.*

<sup>229</sup> *Agenda Book, Nov. 1998, supra note 219, at Agenda Item II, p.5; see also* Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 90–91 (2008) (discussing the externalities of class actions); *see* Nagareda, *supra note 217, at xi, xiv, xviii.*

<sup>230</sup> *Agenda Book, Nov. 1998, supra note 219, at Agenda Item II, p.5.*

<sup>231</sup> *Id.*

<sup>232</sup> CIV. RULES ADVISORY COMM., MINUTES CIVIL RULES ADVISORY COMMITTEE, at 1, 3 (Mar. 1998). Members of the working group included Advisory Committee members Sheila Birnbaum (lawyer), Judge Lee H. Rosenthal of the U.S. District Court, Southern District of Texas, judges from the committees for Bankruptcy Administration, Court Administration and Case Management, Federal-State Jurisdiction, and Magistrate Judges, as well as the chair of the Panel on Multidistrict Litigation. *Id.* at 1.

<sup>233</sup> *Id.* at 3.

<sup>234</sup> *Agenda Book, April 1999, supra note 225, at 9.*

<sup>235</sup> CIV. RULES ADVISORY COMM., REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (Feb. 15, 1999).

not issued any response to the report, other than to allow the report and appendices to be made public.<sup>236</sup>

Among the working group's recommendations was another proposal for the creation of a Judicial Conference committee that would focus exclusively on mass torts.<sup>237</sup> This new committee would be able to draw on the experience of members across the various advisory committees "in a project considering legislative as well as rule-making solutions."<sup>238</sup> Nonetheless, the working group admitted that creating a committee focused exclusively on mass torts would "interject the judiciary into a very controversial area," and risk their "becoming entangled with highly politicized matters" that could potentially "outweigh the opportunities for constructive contributions."<sup>239</sup>

In March 1999, Congress attempted to legislate a solution to asbestos litigation with the Fairness in Asbestos Compensation Act of 1999 (S. 758) and the companion bill at the House of Representatives, the Asbestos Compensation Act of 2000 (H.R. 1283).<sup>240</sup> These reforms would have provided for an administrative solution to asbestos litigation by establishing a national claims facility to resolve asbestos injury claims.<sup>241</sup> The proposed legislation provided for an administrative office that would be funded entirely by defendant corporations and would have "help[ed] control excessive transaction costs by capping attorneys' fees expenses at 25% of the recovery."<sup>242</sup> Both bills died with the end of the 106th Congress.<sup>243</sup>

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<sup>236</sup> Draft Minutes of April 19-20, 1999 Meeting, Agenda Item II, Meeting of Advisory Committee on Civil Rules, Oct. 14-15, 1999, at 1.

<sup>237</sup> See Draft Minutes of October 14-15, 1999 Meeting, Agenda Item II, Meeting of Advisory Committee on Civil Rules, Apr. 10-11 2000, at 4 [hereinafter *Agenda Book, Apr. 2000*].

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Legislative Report, Agenda Item I-C, Meeting of Advisory Committee on Civil Rules, April 10-11, 2000, at 1-2.

<sup>241</sup> *Id.* at 1.

<sup>242</sup> *Id.*

<sup>243</sup> See Asbestos Compensation Act of 2000, H.R. 1283, 106th Cong. (2000), <http://www.congress.gov/bill/106th-congress/house-bill/1283> (showing that the bill's history stops after its introduction to the House in 1999); Fairness in Asbestos Compensation Act of 1999, S. 758, 106th Cong. (1999), <https://www.congress.gov/bill/106th-congress/senate-bill/758> (showing that the bill's history

In the end, all that the Mass Torts Working Group was able to accomplish was to cultivate expertise for a reconstituted ad hoc committee.<sup>244</sup> By October 1999, Judge Niemeyer decided that it was time to revisit Rule 23 and, to that end, authorized the creation of a Rule 23 Subcommittee.<sup>245</sup>

### C. *Rule 23 Subcommittee Attempts to Address Forum Shopping*

The Rule 23 Subcommittee quickly went to work crafting proposals for rule changes.<sup>246</sup> These proposed changes addressed judicial review of settlement agreements by introducing new Rule 23(e)(5), which included factors that a court would have to consider when reviewing proposed settlements.<sup>247</sup> Adapted from an opinion penned by the Mass Tort Working Group Chair, Judge Scirica,<sup>248</sup> these factors included “the probable time, duration, and cost of trial . . . the maturity of the underlying substantive issues . . . the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master . . . [and] the number and force of objections by class members.”<sup>249</sup>

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stops after its introduction in the Senate in 1999). Both bills were introduced and went no further.

<sup>244</sup> The Rule 23 Subcommittee took members from the former Mass Torts Working Group, including Judge Lee Rosenthal and lawyer Sheila Birnbaum. *See Agenda Book, Apr. 2000, supra* note 237, at 4. The efforts of the Mass Torts Working Group also prompted the Federal Judicial Centre to revise the Manual for Complex Litigation. *See Draft Minutes: Civil Rules Advisory Committee, April 2000, Agenda Item II, Meeting of Advisory Committee on Civil Rules, Oct. 16-17, 2000, at 2 [hereinafter Agenda Book, Oct. 2000].*

<sup>245</sup> *See Agenda Book, Apr. 2000, Draft Minutes: Civil Rules Advisory Committee, October 14 and 15, 1999, supra* note 237, at 4.

<sup>246</sup> *See Agenda Book, Apr. 2000, Draft Minutes: Rule 23 Subcommittee, February 18, 2000, supra* note 237, at 10–14.

<sup>247</sup> *See id.* at 10–11.

<sup>248</sup> *Compare Agenda Book, Oct. 2000, Review of Settlement: Revised Rule 23(e), supra* note 244, at 39–40, with *Krell v. Prudential Ins. Co. Am.*, 148 F.3d 283, 316–24 (3d Cir. 1998).

<sup>249</sup> *Agenda Book, Oct. 2000, Review of Settlement: Revised Rule 23(e), supra* note 244, at 39. The draft rules also included opt-out provisions following notice of the terms of settlement, appointment of class counsel and lawyers’ fees, and additional appeal provisions. *See id.* at 39–40.

The Rule 23 Subcommittee met in Washington D.C. (December 2000) and then in San Francisco (January 2001), where it met with five class action experts.<sup>250</sup> Following these meetings, the subcommittee made substantial changes to its proposals, which it then presented to the Advisory Committee at an unusual additional March meeting, added so that the subcommittee could receive additional feedback and still submit proposals to the Standing Committee for the June 2001 deadline.<sup>251</sup> The list of factors that was previously delineated in Rule 23(e)(5) was removed and included in the Committee Notes section instead.<sup>252</sup> What remained in terms of guidance to judges was “an explicit standard of review: the settlement must be “fair, reasonable, and adequate.”<sup>253</sup>

In its package of amendments submitted to the Standing Committee in May 2001, the Advisory Committee proffered a different Rule 23(e)(5), this time to address the problem of duplicative and competing class actions.<sup>254</sup> Under this set of reforms, a refusal to approve a settlement would preclude “approving substantially the same settlement... unless changed circumstances present new issues as to the fairness, reasonableness, and adequacy of the settlement.”<sup>255</sup> Combined with draft Rule 23(c)(1)(D)—precluding other courts from certifying a class that a federal court has refused to certify—and Rule 23(g)<sup>256</sup>—which gave federal courts the option

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<sup>250</sup> See Reporter’s Notes, Rule 23 Subcommittee, Meeting of Advisory Committee on Civil Rules, Mar. 12, 2001, at 76, 100 [hereinafter *Agenda Book, Mar. 2001*].

<sup>251</sup> See *id.* at 100.

<sup>252</sup> See *Agenda Book, Mar. 2001*, Proposed Rule 23(e), *supra* note 250, at 29–30. The March amendment package also included a revision to Rule 23(c)(1), which designates the timing for seeking class certification. See *Agenda Book, Mar. 2001*, Memorandum: Feb. 26, 2001, *supra* note 250, at 4–5. The revisions changed the language in the rule from “as soon as practicable” to “when practicable,” which the Subcommittee felt would bring the language of the rule in line with practice. See *id.* at 4.

<sup>253</sup> *Agenda Book, Mar. 2001*, Memorandum: Feb. 26, 2001, *supra* note 250, at 6.

<sup>254</sup> CIV. RULES ADVISORY COMM., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, May 14, 2001, at 48.

<sup>255</sup> *Id.*

<sup>256</sup> The proposed text read:

**(g) Related class actions** (1) When a person sues or is sued as a representative of a class, the court may—before deciding whether to certify a class or after certifying a class—enter an

of issuing an order prohibiting other courts from certifying a substantially similar class—this set of rules gave district courts the institutional authority to control the conditions of forum shopping.

These reforms, of course, touched directly on Congress's repeated attempts to introduce legislation allowing class actions to be removed from state court and litigated in federal court.<sup>257</sup> Judges were far from oblivious to Congress's work on these issues, being particularly concerned about the potential for increased workloads.<sup>258</sup> In a memo regarding the Judicial Conference's authority under the Rules Enabling Act, the Subcommittee wrote:

One response to these concerns is reflected in various bills framing federal legislation to deal with class actions in state courts. Legislative approaches to these problems are welcome. Great care will be required, however, to avoid the temptation to legislate in terms

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order directed to any member of the proposed or certified class that prohibits filing or pursuing a class action in any other court . . . In entering an order under this Rule 23(g)(1) the court must make findings that

(A) the other litigation will interfere with the court's ability to achieve the purposes of the class litigation,

(B) the order is necessary to protect against interference by other litigation, and

(C) the need to protect against interference by other litigation is greater than the class member's need to pursue other litigation.

(2) In lieu of an order under Rule 23(g)(1), the court may stay its own proceedings to coordinate with proceedings in another court, and may defer the decision whether to certify a class notwithstanding Rule 23(c)(1)(A).

(3) The court may consult with other courts, state or federal, in determining whether to enter an order under Rule 23 (g)(1) or (2).

*Id.* at 57.

<sup>257</sup> See, e.g., S. 248, 106th Cong. (1999), introduced by Senator Hatch on January 19, 1999; S. 353, 106th Cong. (1999), introduced by Senator Grassley on February 3, 1999; in the House: H.R. 967, 106th Cong. (1999), introduced by House member Sensenbrenner on March 3, 1999.

<sup>258</sup> See COMM. ON RULES OF PRAC. & PROC., SUMMARY REP. OF JUDICIAL CONFERENCE, 27 (2002) [hereinafter JUDICIAL CONFERENCE REP., 2002].

that sweep too much into federal courts without adequate opportunity for case-specific adjustment of the relationships between federal and state courts.<sup>259</sup>

D. *Final Act Two Confrontation: The Class Action Fairness Act*

The Advisory Committee published its Rule 23 reform package in August 2001.<sup>260</sup> Following this, the Advisory Committee held a conference at the University of Chicago Law School, plus two public hearings at which the committee heard from over forty witnesses.<sup>261</sup> Feedback from the Chicago meeting as well as from an informal call indicated that the Enabling Act likely did not provide authority for the rule changes that the Advisory Committee proposed.<sup>262</sup> The Advisory Committee unanimously decided not to proceed on any of the suggested revisions targeting federal versus state jurisdiction.<sup>263</sup> The Committee also deleted Judge Scirica's list of factors for settlement review from the Committee Notes section.<sup>264</sup>

In its report to the Standing Committee, the Advisory Committee included an eighteen-page memo explaining the history of the Advisory Committee's work and the problem of overlapping class actions.<sup>265</sup> Here and elsewhere, the Advisory Committee went to pains to stress that their reforms "address the process for managing a class action" rather than the "prerequisites or criteria for certification."<sup>266</sup> Presumably a focus on process distinguished this later work from the 1996 reform package.

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<sup>259</sup> See *Agenda Book, Mar. 2001*, Memorandum: Enabling Act Authority for Addressing Overlapping Class Actions, *supra* note 250, at 61.

<sup>260</sup> JUDICIAL CONFERENCE REP., 2002, *supra* note 258, at 8.

<sup>261</sup> See *id.* The committee also provided for an informal process for providing public comment directly on the issue of overlapping and competing class actions. See CIV. RULES ADVISORY COMM., MINUTES CIVIL RULES ADVISORY COMMITTEE 12 (Jan. 22-23, 2002).

<sup>262</sup> See JUDICIAL CONFERENCE REP., 2002, *supra* note 258, at 315.

<sup>263</sup> *Id.*

<sup>264</sup> See *id.* at 104.

<sup>265</sup> See *id.* at 302.

<sup>266</sup> *Id.* at 2.

As to duplicative class actions, by 2002, the Advisory Committee was recommending a congressional solution to forum shopping.<sup>267</sup> Even though diverting class actions could increase the federal judiciary's workload, additional control of class action litigation meant that federal judges would have more authority in articulating the law. As the Advisory Committee wrote, allowing federal courts to hear large multi-state class actions would "further the important principle that in a federal system, no one state's courts should make decisions that are binding nationwide even as to class members who were not injured in the forum state."<sup>268</sup>

In December 2003, the revised rules for Rule 23(c), (e), (g), and (h) came into effect, including the specific direction that a hearing must be held to review a proposed settlement, and that the court must find that the settlement is "fair, reasonable, and adequate."<sup>269</sup> Left to its own devices, Congress finally passed the Class Action Fairness Act<sup>270</sup> in 2005 ("CAFA") after a "long and messy legislative process."<sup>271</sup>

#### IV. ACT THREE: RETURN OF THE SETTLEMENT CLASS

In screenplays, act three presents the climax—the "fullest and furthest expression of the story's central conflict and the ultimate proof of the truth that underlies the story."<sup>272</sup> In our Act Three, judges of the Advisory Committee face their final battles, taking on Congress and the Supreme Court in a final and somewhat successful effort to reform the rules of civil procedure to reflect the growing

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<sup>267</sup> See *id.* at 301.

<sup>268</sup> *Id.* But see Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1584–86 (2008) (arguing that judges found ways to resist the implementation or extension of the Class Action Fairness Act).

<sup>269</sup> FED. R. CIV. P. 23(e)(1)(C) (2003).

<sup>270</sup> 28 U.S.C. §§ 1332(d), 1453, and 1711–1715 became law on February 18, 2005. See Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2005).

<sup>271</sup> Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1444 (2008); see also Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1823 (2008).

<sup>272</sup> AMNON BUCHBINDER, *THE WAY OF THE SCREENWRITER* 95–96 (2005).

prominence of pre-litigation settlements in mass tort class actions. If there is any “truth” to this story, it might be as follows: First, the work of the Advisory Committee is not merely a technical legal exercise but rather is fraught with competition for the exercise of authority.<sup>273</sup> Second, contrary to the literature that posits judges as rational, strategic, policy preferencing individuals, viewed over the twenty-seven year period that it took to stake a claim for settlement class actions, the Advisory Committee’s work presents as inefficient and irrational, especially in light of the movement of mass tort litigation to Multidistrict Litigation proceedings.<sup>274</sup> Nonetheless, after nearly thirty years of work on fairness hearings and Rule 23(e), judges of the Advisory Committee demarcated a place for settlement class actions in the reforms to the rules promulgated in 2018.<sup>275</sup>

#### A. *Settlement Class Actions . . . Again?*

Rule 23 made its way back onto the agenda at the November 2011 meeting of the Advisory Committee, under the heading: “Class Actions: Again?”<sup>276</sup> The memo to reintroduce Rule 23 to committee

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<sup>273</sup> See generally Jeffrey W. Stempel, Politics and Sociology in Federal Civil Rulemaking: Errors of Scope, 52 ALA. L. REV. 529, 530 (2001) (discussing politics involved in amending Federal Rules of Civil Procedure Rule 26 regulating discovery).

<sup>274</sup> See *id.* at 87–88; Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711 (2017); Andrew D. Bradt & D. Theodore Rave, *It’s Good to Have the “Haves” on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L. J. 73, 75 (2019); Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1298 (2020); Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1649 (2021); BURCH, *supra* note 94, at 9; Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2324–25 (2008); Mullenix, *supra* note 26, at 511. Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, CORNELL L. REV. (forthcoming).

<sup>275</sup> Multidistrict Litig. Subcommittee: Subcommittee Report, Agenda Item 8, Meeting of Advisory Committee on Civil Rules, Oct. 16, 2020, at 161.

<sup>276</sup> Should Class Actions Be Brought Back to the Agenda?, Agenda Item IX, Meeting of Advisory Committee on Civil Rules, Nov. 7-8, 2011, at 1 [hereinafter *Agenda Book, Nov. 2011*]. In posing this question, the Advisory Committee commented on the amount of time the committee had previously spent looking at the subject of class actions. The title also inauspiciously references the U.S. Supreme Court’s negative treatment of mass tort class actions. Why continue to work on Rule 23 to address class actions when the court continues to dismiss class actions

members stated that several factors prompted the Advisory Committee's renewed attention, including, firstly, the Supreme Court's erroneous decisions in several class action cases.<sup>277</sup> These cases included, most prominently, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, a diversity case where class action certification was sought in federal court to certify a claim based on New York state law.<sup>278</sup> In one version of proposed rules to "Fix Shady Grove," the Advisory Committee suggested amending the rule's language to demonstratively state that the discretion whether or not to approve certification resides with the federal district court.<sup>279</sup>

In early 2012, the Advisory Committee attended the Standing Committee's meeting, seeking to reignite discussion on class actions on the basis that enough time had passed since the 2003 amendments and since CAFA had come into effect to warrant a review of the rules' operation and effect.<sup>280</sup> The Advisory Committee assembled a panel, moderated by Judge Lee Rosenthal,<sup>281</sup> to discuss the press-

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based on mass tort claims? *See, e.g.*, Issacharoff, *supra* note 35, at 1941; Bradt, *supra* note 28, at 88; Bradt & Rave, *supra* note 44, at 1261; BURCH, *supra* note 94, at 2.

<sup>277</sup> *Agenda Book, Nov. 2011, supra* note 276, at 633–36 (stating that “[s]trong arguments can be made that the Court got it wrong . . .”). In the *Agenda Book*, the following cases are discussed (in order of appearance): *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); *Shady Grove Ortho. Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

<sup>278</sup> *See generally* *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393, 393 (2010).

<sup>279</sup> *Agenda Book, Nov. 2011, supra* note 276, at 643–44 (“[F]ederal courts should not be backed by a happenstance drafting choice . . . . The new language frees federal courts to decide this and similar questions without the pressure of a seeming linguistic mandate to certify no matter whether there is any federal interest in expanding the state-created claim beyond the limits set by state law.”); *see also* Wolff, *supra* note 104, at 1897.

<sup>280</sup> Notes from Jan. 5, 2012 Standing Comm. Rule 23 Panel, *Agenda Item 11-C, Meeting of Advisory Committee on Civil Rules, Mar. 22-23, 2012*, at 483 [hereinafter *Agenda Book, Mar. 2012*].

<sup>281</sup> Currently sitting as Chief Judge of the U.S. District Court for the Southern District of Texas, Chief Judge Rosenthal was appointed to the federal court in 1992 by George H. W. Bush. Chief Judge Rosenthal approved the settlement agreement in a class action alleging unconstitutional proceedings in bail hearings. *See* Texas Memorandum and Opinion Preliminarily Approving the Proposed Consent Decree and Settlement Agreement and Approving and Directing Issuance

ing issues related to Rule 23, including, again, the absence of a provision that specifically addressed settlement class actions.<sup>282</sup> The panelists argued that, especially in the case of mass tort litigation, the lack of guidance in the rules “has tended to push settlements . . . outside the court system,” or at least “outside judicial supervision under Rule 23(e).”<sup>283</sup> Judge Rosenthal boldly phrased her reflection, querying whether the panelists “are urging [the Committee] to reject the statement in *Amchem* that satisfying 23(e) is not a substitute for satisfying 23(a) and (b).”<sup>284</sup>

By March 2012, another Rule 23 Subcommittee was formed, this time under the leadership of Judge Michael W. Mosman.<sup>285</sup> The Subcommittee identified five issues for the Advisory Committee’s consideration, with settlement class certification listed as its first “front burner issue.”<sup>286</sup> The Subcommittee suggested drafting rules to explicitly overturn *Amchem*, stating, “At least some seem to think it would be useful to reconsider the Supreme Court’s attitude that Rule 23(e)’s fairness review is no substitute for full application of Rule 23(a) and (b) analysis of the cohesiveness of the class.”<sup>287</sup>

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of Class Notice, *ODonell v. Harris County*, No. 16-cv-01414 (S.D. Tex. Sept. 5, 2019).

<sup>282</sup> *Agenda Book, Mar. 2012, supra* note 280, at 54.

<sup>283</sup> *Id.* at 54, 490 (referencing *In Re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006). *In Re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606 (E.D. La. 2008) proceeded by way of consolidation by the Judicial Panel on Multidistrict Litigation).

<sup>284</sup> *Id.* at 491.

<sup>285</sup> Judge Michael W. Mosman, U.S. District Court for the District of Oregon, was appointed in 2003 by George W. Bush. He served as chief judge from 2016-2019. *Michael Mosman*, BALLOTPEdia, [https://ballotpedia.org/Michael\\_Mosman](https://ballotpedia.org/Michael_Mosman) (last visited Oct. 12, 2022).

<sup>286</sup> *Id.* at 455.

<sup>287</sup> *Id.* at 457. The Advisory Committee initially found hope in the Third Circuit decision *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), which it read as formulating a distinction between a review for certification versus for trial. Yet, again, the Advisory Committee’s interests were thwarted by the Supreme Court. Writing for the court in *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013), Justice Scalia wrote, “Repeatedly, we have emphasized that . . . ‘certification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.’”” *Id.* (internal citations omitted).

### B. *Preparing Rules for Notice and Comment*

By the Advisory Committee's April 2015 meeting, the Subcommittee<sup>288</sup> held four conference calls and presented at the ABA National Institute on Class Actions in Chicago.<sup>289</sup> The Subcommittee continued to be concerned about whether the benefits of amending Rule 23(e) outweighed the costs of "a period of uncertainty, particularly if it supersede[d] current prevailing case law in various circuits."<sup>290</sup> Nevertheless, the Subcommittee sketched out early drafts of amendments, including, again, a delineation of factors to consider when assessing whether a settlement was fair, reasonable, and adequate.<sup>291</sup>

Still determined to address the issue of certification for the purposes of approving a proposed settlement, the Subcommittee also resurrected Rule 23(b)(4) from the 1996 proposed amendments, now proffering two possible versions for a new and improved Rule 23(b).<sup>292</sup> For both versions, the Subcommittee suggested an approach that would "place primary reliance on superiority and the invigorated settlement review" and "remove emphasis on predominance when settlement certification is under consideration."<sup>293</sup> The proposed rule would effectively overrule the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* in the context of settlement

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<sup>288</sup> For this iteration, the subcommittee consisted of Judge Robert Dow (Judge of the US District Court for the Northern District of Illinois), who presented the Rule 23 Subcommittee's report, as well as two lawyers and two law professors. Report of the Rule 23 Subcommittee, Agenda Item 8-A, Meeting of Advisory Committee on Civil Rules, Apr. 9-10, 2015, at 73, 9 [hereinafter *Agenda Book, Apr. 2015*].

<sup>289</sup> *Agenda Book, Apr. 2015, supra* note 288, at 73; *see also* Marcus, *supra* note 95, at 922 n.99 (listing the dates and locations of the conference calls that took place before the Advisory Committee's April 2015 meeting).

<sup>290</sup> *Agenda Book, Apr. 2015, supra* note 288, at 247.

<sup>291</sup> *Agenda Book, Nov. 2015, supra* note 90, at 106. The Subcommittee proffered two versions. Alternative 1 listed four factors to "consider," making it more relaxed than Alternative 2, which *required* the presence of those factors. *Id.* at 113, 156. At the 2015 mini-conference, some participants saw these amendments as "a solution in search of a problem." *Id.* at 168.

<sup>292</sup> *Agenda Book, Apr. 2015, supra* note 288, at 258-59. Both versions of the new proposed Rule 23(b) included language that would have had judges assessing whether the proposed settlement was "superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.*

<sup>293</sup> *Id.* at 257-58.

class actions, by making explicit that the resolution of the dispute was more important than the question of whether issues common to the class outweighed issues affecting individual class members.<sup>294</sup>

In September 2015, the Rule 23 Subcommittee organized a mini conference at the Grand Hyatt in Dallas, Texas.<sup>295</sup> Among the nine items the Subcommittee put forward for the attendees' consideration was the issue of the how rigorous the court had to be in assessing class certification criteria.<sup>296</sup> The Subcommittee put its proposed Rule 23(b)(4) to the conference participants for their consideration, stressing that the holding in *Amchem* indicated that the fact of settlement is relevant to class certification.<sup>297</sup> The Subcommittee defended its resurrection of previously proposed Rule 23(b)(4) by explaining:

Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provides important support for the addition of subdivision (b)(4) . . . . Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).<sup>298</sup>

By April 2016,<sup>299</sup> the Subcommittee had a draft prepared for the Advisory Committee's approval. The draft no longer included Rule

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<sup>294</sup> *See id.* at 260–61.

<sup>295</sup> In preparation for the mini-conference, the subcommittee held seven conference calls, received submissions from twenty-five sources, and had representatives attend class action-themed conferences. Attending the mini-conference was the Subcommittee plus six judges, close to twenty lawyers and seven law professors. *Agenda Book, Nov. 2015, supra* note 90, at 163; *see also* ADVISORY COMM. ON CIV. RULES, List of Participants in the Civil Rule 23 Mini-Conference: September 11, 2015, [https://www.uscourts.gov/sites/default/files/list\\_of\\_participants\\_in\\_the\\_civil\\_rule\\_23\\_mini-conference.pdf](https://www.uscourts.gov/sites/default/files/list_of_participants_in_the_civil_rule_23_mini-conference.pdf).

<sup>296</sup> *Agenda Book, Nov. 2015, supra* note 90, at 179.

<sup>297</sup> *See id.* at 35–36.

<sup>298</sup> *Id.* at 126.

<sup>299</sup> In an effort to prepare draft amendments in time for the Standing Committee's June meeting, following the Rule 23 mini-conference and the Advisory Committee's November 2015 meeting, the Rule 23 Subcommittee held six conference calls and attended the January meeting of the Standing Committee.

23(b)(4).<sup>300</sup> However, the proposed language for the Committee Notes emphasized the unique situation presented by settlement class actions.<sup>301</sup> The amendments kept the language differentiating classes seeking to be certified as part of a settlement agreement.<sup>302</sup> Additionally, the revised Committee Notes would unambiguously state, “[a]lthough the standards for certification differ for settlement and litigation purposes . . . the court cannot make the decision regarding the prospects for certification without a suitable basis in the record.”<sup>303</sup> Ultimately, the Advisory Committee recommended six changes to Rule 23, “many of which concern[ed] settlements in class action lawsuits.”<sup>304</sup>

### C. Climax: Congress . . . Again?

Rule 23 was among four civil rules packages that the Standing Committee approved for public comment at its June 2016 meeting.<sup>305</sup> Meanwhile, in April, House Judiciary Committee Chairman Bob Goodlatte (R-VA) introduced a bill, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016.<sup>306</sup> Goodlatte described the bill as responding to a judiciary desperate but ineffective to stop class action abuses.<sup>307</sup> Here, too,

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*Agenda Book, Nov. 2015*, Report of the Rule 23 Subcommittee, *supra* note 90, at 95.

<sup>300</sup> The Current Preliminary Draft Package Recommended for Transmittal to the Standing Committee, Agenda Item A-1, Meeting of Advisory Committee on Civil Rules, Apr. 14-15, 2016, at 96.

<sup>301</sup> *See id.*

<sup>302</sup> *Id.* at 97.

<sup>303</sup> *Id.* at 102.

<sup>304</sup> Minutes, Agenda Item 1-B, Meeting of Advisory Committee on Civil Rules, Nov. 3-4, 2016, at 32.

<sup>305</sup> *Id.* at 3; *see also* COMM. ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE (2016), [https://www.uscourts.gov/sites/default/files/2016-08\\_preliminary\\_draft\\_of\\_rules\\_forms\\_published\\_for\\_public\\_comment\\_0.pdf](https://www.uscourts.gov/sites/default/files/2016-08_preliminary_draft_of_rules_forms_published_for_public_comment_0.pdf). In addition to receiving written comments, the Advisory Committee solicited feedback at public hearings in Washington, D.C. (November 3, 2016), Phoenix, Arizona (January 4, 2017), and in Dallas/Fort Worth, Texas (February 16, 2017).

<sup>306</sup> H.R. 1927 (114th) and introduced as Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017).

<sup>307</sup> H.R. REP. NO. 115-25, at 2 (2017).

Congress directly infringed on the judiciary's authority to draft rules for litigation procedure.<sup>308</sup> It proposed prohibiting federal courts from certifying class actions that sought monetary relief for personal injury or economic loss, unless class members suffered "the same type and scope of injury as the named class representative" or a "reliable and administratively feasible mechanism" was available to distribute monetary relief "directly to a substantial majority of class members."<sup>309</sup> The bill sought to regulate attorney's fees by prohibiting fees greater than the total amount distributed to class members and by requiring the withholding of fees until after class members recovered.<sup>310</sup> Finally, the bill required the Administrative Office of the U.S. Courts to collect information on disbursement of funds for the purpose of publishing an annual report.<sup>311</sup>

In response, on February 14, 2017, two days before the final public hearing on the 2016 rules amendments package, Judge David G. Campbell, Chair of the Committee on Rules of Practice and Procedure, and Senior Judge John D. Bates, Chair of the Advisory Committee, sent a letter to members of Congress expressing their concerns.<sup>312</sup> The judges directly addressed the issue of Congress's interest in amending rules of procedure, and pleaded with members of Congress to respect the delegation of rulemaking authority to the judiciary, writing:

The Judicial Conference has long opposed direct amendment of the federal rules by legislation . . . . This has not been a matter of protecting "turf," but instead has reflected a strong preference on the part of the judiciary for the thorough and inclusive procedures of the *Rules Enabling*

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<sup>308</sup> See Marcus, *supra* note 95, at 938.

<sup>309</sup> H.R. 985 at 4–5.

<sup>310</sup> *Id.* at 6.

<sup>311</sup> See Information Item: Legislation, Agenda Item III, Meeting of Advisory Committee on Civil Rules, Apr. 25–26, 2017, at 95.

<sup>312</sup> Letter from J. David G. Campbell and J. John D. Bates of the Jud. Conf. of the U.S. to Bob Goodlatte, Chairman of the Comm. on the Judiciary (Feb. 14, 2017), [https://www.uscourts.gov/sites/default/files/supplemental-materials-2017-06-standing-agenda-book\\_0.pdf](https://www.uscourts.gov/sites/default/files/supplemental-materials-2017-06-standing-agenda-book_0.pdf).

*Act . . . .* More than 80 years of experience has shown that the process works very well.<sup>313</sup>

On March 9, 2017, the House of Representatives narrowly passed H.R. 985, the Fairness in Class Action Litigation Act of 2017.<sup>314</sup> The bill was never passed by the Senate.<sup>315</sup>

Few changes were made to the proposed amendments following the period for public comment, and in 2017, the Advisory Committee recommended the proposed amendments to the Judicial Conference for approval.<sup>316</sup> The amendments to Rule 23(c), (e), and (f) were adopted by the Supreme Court and transmitted to Congress, and then came into effect on December 1, 2018.<sup>317</sup> After almost thirty years of work on settlement class actions, the Advisory Committee eked out a partial win in its efforts to create a distinct procedure for class actions that are brought to the court at the same time as their proposed settlement.<sup>318</sup> Rule 23(e) now explicitly refers to classes “proposed to be certified for purposes of settlement.”<sup>319</sup> Moreover, the Committee Notes put an end to the nearly thirty year saga by writing that while the court must have a “suitable basis in the record” for certifying a class, “*the standards for certification differ for settlement and litigation purposes.*”<sup>320</sup>

## CONCLUSION

The experiences of judges working with the Advisory Committee highlights the contested nature of procedural rulemaking. In addition to competition between the plaintiff’s and defendant’s bars to

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<sup>313</sup> *Id.* at 2.

<sup>314</sup> H.R. 985 at 19.

<sup>315</sup> Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/985/text>.

<sup>316</sup> Draft Minutes of the Jan. 3, 2017, Agenda Item I-A, Meeting of Committee on Rules and Practice and Procedure, June 12-13, 2017, at 31; Minutes, Meeting of Civil Rules Advisory Committee, Nov. 7, 2017, at 1.

<sup>317</sup> See Chart Tracking Proposed Rule Amendments, Agenda Item 1-B, Meeting of Committee on Rules of Practice and Procedure, June 12, 2018, at 50.

<sup>318</sup> See *id.*

<sup>319</sup> FED. R. CIV. P. Rule 23(e).

<sup>320</sup> FED. R. CIV. P. 23 Advisory Committee’s note to 2018 amendment at subdivision (e)(1) (emphasis added).

secure rules favorable to their interests, judges must contend with congressional politics and internal hierarchical politics between the different levels of courts. Judges' efforts to draft rules to reflect the prominence of settlements in mass tort class actions triggered the Supreme Court's attention. Consequently, rather than allowing the rulemaking process to proceed, and notwithstanding the deliberative democratic nature<sup>321</sup> of the procedures required under Rules Enabling Act, in 1996 the Supreme Court availed itself of its superior status and took discussion of Rule 23 off the table. Judges of the Advisory Committee—usually district and circuit court judges—continued to compete with the U.S. Supreme Court, often including proposals that directly or indirectly sought to overturn Supreme Court decisions.<sup>322</sup> Judges also lobbied and debated with Congress about multiple issues related to judges' authority to manage Rule 23 actions, including the timing of appeals, properly addressing duplicative actions in federal and state courts, and judicial monitoring of attorney's fees.<sup>323</sup>

Understandably, scholars who study judicial politics scrutinize judges' decisions. Scholars analyze the impact of decisions on the political realm,<sup>324</sup> and investigate behavioral or theoretical “determinants of their decisions”<sup>325</sup>—how judges decide and the factors that go into judicial decision-making. Yet exploring those practices of knowledge formation<sup>326</sup> without probing into the politics of judges' institutional work leaves crucial activities—including those that will affect substantive rights—unexamined. While socio-legal scholars argue that legal knowledge is produced socially, as it relates to judges and courts, scholars have unfortunately tended to limit their view to one set of practices.<sup>327</sup>

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<sup>321</sup> See generally David M. Ryfe, *Does Deliberative Democracy Work?*, 8 ANN. REV. POL. SCI. 49 (2005).

<sup>322</sup> See *supra* Sections IV.A, IV.B.

<sup>323</sup> See *supra* Sections III.D, IV.C.

<sup>324</sup> See generally DIANA KAPISZEWSKI ET AL., CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (2013).

<sup>325</sup> EPSTEIN ET AL., *supra* note 6, at 1.

<sup>326</sup> See, e.g., MARIANA VALVERDE, LAW'S DREAM OF A COMMON KNOWLEDGE (2003); Mariana Valverde, “The Honour of the Crown is at Stake:” *Aboriginal Land Claims Litigation and the Epistemology of Sovereignty*, 1 U.C. IRVINE L. REV. 955, 955 (2011).

<sup>327</sup> See *supra* Section I.A.

In contrast, this Article described judges' *other* work reforming procedures for the review of settlement agreements in mass tort class actions, and detailed the politics and practices involved. The Article demonstrated that procedural reform is not merely a technical legal affair. Rather, it involves politics and competition for the authority to articulate rules, competition that can arise both between Congress and the Judicial Conference, and as well as between the judges of committees and of the Supreme Court. While judicial behavior research studies the "distal politics" of party politics, more proximate politics are to be found in the power struggles within the "legal complex"<sup>328</sup> and between "large aggregations of power"<sup>329</sup> vying for the authority to articulate rules of legal procedure. Conservative or liberal judiciaries are not impervious monoliths, and competition for power within the legal system does not always present as judges' interests in deciding a case this or that way. Judges also have interests in more indirect instantiations of power, such as institutional power to guide and constrain the actions of others, or a structural power that derives from the social capacities of subjects positioned in relation to one another.<sup>330</sup> The politics and practices of judges' work on rulemaking and procedural reform of fairness hearings for class action settlements demonstrates that scholars must scrutinize not only their final dispositions, but also judges' work structuring and setting criteria for the way disputes are heard.

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<sup>328</sup> Karpik & Halliday, *supra* note 24, at 217.

<sup>329</sup> Fiss, *supra* note 107, at 43.

<sup>330</sup> See Barnett & Duvall, *supra* note 63, at 51–53.