

# THE PAST AND FUTURE OF DEFENDANT AND SETTLEMENT CLASSES IN COLLECTIVE LITIGATION

Stephen C. Yeazell\*

For most purposes one needs to know only three things about the history of class litigation. First, for a procedural device constantly accused of being a dangerous innovation, group litigation has a remarkably deep history. Second, the depth of its history should not blind us to the often unpredictable role played by class litigation and its predecessors. Finally, although collective litigation has frequently mediated tensions arising from the emergence of new social groups, it has not consistently or inherently favored those groups—as often suppressing as empowering marginal or emerging groups. The next pages illustrate each of these points. If accepted, these arguments also illuminate the most recent cause célèbre of group litigation—the settlement class. Hailed as a brilliant answer to litigation problems<sup>1</sup> caused by mass torts and denounced as a lawless betrayal of professional ethics,<sup>2</sup> the settlement class illustrates both the ambivalence of the historical record and refusal of group litigation finally to ally itself with either dominant or subservient social groups. The spectacle of the settlement class also shows how little sense we can make of procedural rules if we fail to put them in the context of their economic dynamics.

## I. COMMUNITIES AT LAW<sup>3</sup>

Like all good histories, this one will oversimplify by dividing the history of group litigation into three parts. In a similarly traditional way the first part will begin as close as one can get to prehistory, as group litigation emerges from

---

\* Professor of Law & Associate Dean, UCLA School of Law. I owe thanks for helpful suggestions to Ruth Fisher, Gary Schwartz, Clyde Spillenger, and Kent Syverud.

1. See, e.g., “Every decade presents a few great cases that force 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.” *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 616 (3d Cir.) (suggesting that but for the rigidity of Rule 23, the settlement class would be an efficient answer to mass torts), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996).

2. Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222 (1995).

3. This section and the next rely heavily on my earlier work in this field, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987) [hereinafter cited as *YEAZELL, MEDIEVAL AND MODERN*].

primeval mists. In the case of group litigation those mists are respectably ancient (though not primeval in any technical sense). As with most of English law, the thread disappears before it reaches the murky violence of pre-Norman Britain. The earliest published sources available to me come from 1199, in the court of the Archbishop of Canterbury.<sup>4</sup> On the eve of the thirteenth century, Martin, the rector of a parish, brought suit against four of his parishioners—as representatives of the rest—asserting his right to certain parochial fees. I am sad to say that Father Martin was in part insisting that his parishioners carry the bodies of their dead several miles to a place where he could bury them for a customary fee; alternatively, he was benevolently prepared to let them bury their deceased in a nearby chapel graveyard—so long as they remitted to Martin the same customary burial fee as he would have earned had he conducted the service himself. Not an edifying or happy tale.

For most of us, a twelfth-century case (even a late twelfth-century case) is enough to demonstrate the antiquity of group litigation. But *Martin v. Parishioners* stands for another proposition as well. It involves a defendant class. Medieval rectors were not necessarily men of wealth or great power, but, unlike their miserably paid curates, they did have legal entitlement to the tithes and associated fees of their benefices. As compared with their average parishioner (who was almost inevitably a villein or very modest freeholder), they were people of social standing and power. In *Martin v. Parishioners*, we see group litigation deployed downward in the social scale, against a group of persons likely less powerful than the plaintiff. One must not exaggerate this deployment by imagining it an instrument of dreadful oppression. Tithes and other church fees were no less, but also no more, than taxes, supporting one of the two social institutions that kept the high medieval world from descending into the aimless violence of the darkest ages. For the defendant class, the burial and other fees were likely a resented indignity, but not a crushing burden.

Nevertheless, one cannot easily fit *Martin v. Parishioners* into the phrase attributed to Judge and Professor Benjamin Kaplan—as an instance of the “class action playing its historic role of taking care of the little guy”<sup>5</sup>—unless one understands “taking care of” in a singularly ironic sense. Instead, class litigation is being used here by a social superior to enable him easily to enforce a tax that might otherwise be difficult to collect—since it would require suits against many individual parishioners. Representative litigation is reinforcing the power of established authority, not empowering a heretofore powerless group.

One example does not an era make. Medieval group litigation was not a systematic instrument of oppression. It was not a systematic instrument of anything. One can find about equal numbers of plaintiff and defendant groups, and some of the plaintiff groups seem to use litigation as a weapon in struggles with social superiors. Indeed, in a small handful of these suits, the plaintiffs explicitly seek to

---

4. Martin, Rector of Barkway v. Parishioners of Nuthamstead, in SELECT CASES FROM THE ECCLESIASTICAL COURTS OF THE PROVINCE OF CANTERBURY, c. 1200–1301 (Norma Adams & Charles Donahue, Jr. eds., 1981).

5. Marvin Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ABA ANTITRUST L.J. 295, 299 (1966) (the class action's “historic mission [was] taking care of the smaller guy”) (quoting then-Professor, and Civil Rules Committee Reporter, Benjamin Kaplan).

represent "the poor and middling" citizens of a town or village.<sup>6</sup> Perhaps the most common party alignment was class-neutral, to use an anachronistic term: plaintiffs and defendants occupying approximately equivalent social positions were suing—two villages arguing over who had to repair dikes, parishioners suing one of their fellows for unpaid sums in support of the parish church, and the like.<sup>7</sup>

This point about class neutrality of medieval group litigation can be extended to most of its characteristics that, to a modern observer, seem most remarkable, problematic, and intriguing: none of the terms in which we seek to interrogate this phenomenon would have made sense to contemporaries. Groups pervaded the landscape, yet there was virtually no sustained thinking about the internal constitution or external relations of such groups.<sup>8</sup> In group litigation this manifests itself in complete lack of concern about the issues of representation, conflict, and binding adjudication that form the center of modern debate. If, noting the durability of many medieval groups, we seek instead to inquire whether these collective litigants are a form of proto-corporation, we meet another blank wall, for neither they nor the crown (which profited handsomely from what we would now call charters of incorporation) seem to have thought in those terms. Nor do we gain a sense of the internal relations of these groups. Maitland worried long about the absence of any legally enforceable right of contribution by the members of a group sued for damages, and concluded that these entities that appeared to be corporations really weren't.<sup>9</sup>

But, like many mysteries, the lack of answers may testify more to the limitations of the questioners than to the failings of those questioned. They simply would not have understood why the questions we put were troubling. A prominent political and social historian of medieval Europe has written a book entitled *Kingdoms and Communities in Medieval Europe*.<sup>10</sup> Her title captures the point: the high medieval world can be understood as a network of communities, linked to each other by overlapping jurisdictions and at the top by a common allegiance. Of course, there would be disputes about the rights and obligations of these communities, but those rights—not the standing of the community—would be at the heart of most litigation. It would have made as little sense to medieval lawyers to ask about the litigative standing of communities as it would to ask a modern lawyer why individuals can litigate.

In modern law questions of standing are fairly exotic; we do not ask in every civil lawsuit why the individual litigant can bring the suit. One can reverse this point for medieval English law. For example, in 1125 a writ of Henry III took to task the archbishop of Canterbury.<sup>11</sup> It seems that one of Henry's vassals, abroad on

6. THOMAS MADOX, "FIRMA BURGI," OR A HISTORICAL ESSAY CONCERNING THE CITIES, TOWNS, AND BOROUGHES OF ENGLAND, TAKEN FROM RECORDS 96 n.b (1726).

7. See examples collected in YEAZELL, *MEDIEVAL AND MODERN*, *supra* note 3, at 38–71.

8. The notable exception was the monastic group. Ruled by their own internal constitutions (chiefly the Benedictine Rule and its successors), the monasteries enjoyed essentially corporate status in lay courts.

9. 1 SIR FREDERICK POLLUCK & FREDERIC MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 616–17* (2d ed. 1898) (rptd. 1968).

10. SUSAN REYNOLDS, *KINGDOMS AND COMMUNITIES IN WESTERN EUROPE 900–1300* (1984).

11. *Close Rolls of Henry III, 1254–56*, quoted and discussed in Helen Maud Cam, *The Community of the Vill*, in *MEDIEVAL STUDIES PRESENTED TO ROSE GRAHAM 1* (V. Ruffer

royal business, had received a complaint from some of his tenants that the archbishop had refused them the right of what we might now call group litigation. The writ commanded the archbishop to recognize this widespread custom in his own courts: "according to our law and custom of the realm...villages and communities of villeins...ought to be able to prosecute their pleas and complaints in our courts and in those of others through three or four of their number."<sup>12</sup> We have no record of the archbishop's reply, but his and other courts did in fact recognize such litigation for the next five centuries—when something quite momentous happened. The change was so complete that by 1700 any group coming into court had its credentials checked, having to offer a reason for its ability to litigate collectively rather than individually.

## II. REPRESENTING INTERESTS

The change came as part of vast religious, political, and economic upheavals in the sixteenth and seventeenth centuries: the beheading of a monarch, the overthrowing of a church, and the beginnings of modern agriculture and a financial and mercantile expansion. As part of this change a new institutional form emerged—the corporation. We must not rush to anachronistic assumptions. The business corporation was still several centuries in the future, and corporateness did not imply, for example, limited liability or the power to issue stock. And the leading corporation case of the sixteenth century—the leading corporation case before the nineteenth century, for that matter, involved the effort to form a charitable institution—Sutton's Hospital. In *The Case of Sutton's Hospital*,<sup>13</sup> Sir Edward Coke worked his customary uncandid legal magic with medieval precedents, and turned the chaotic practice of medieval group formation and litigation into what has come to be known as the grant theory of the corporation. In this theory, corporateness comes as a privilege, given by the state to the incorporators. Among the privileges bestowed by incorporation is the power to sue or be sued in corporate name. Coke, having so opined, could then recharacterize most of medieval group litigation as instances of prescriptive incorporation: if only corporations could bring representative actions, then all representative actions must involve corporations. So much for four hundred years of consistent contrary practice.

The real power of Coke's characterization lay, however, not in its distortion of the historical record but in its effect on future group litigation. If such a power came only by grant, then informally organized groups, lacking such a grant, could not bring representative litigation—or could not do so without special justification. Modern group litigation emerged as lawyers and judges articulated special justifications for group litigation.

That justification came in a series of seventeenth- and eighteenth-century Chancery cases.<sup>14</sup> Most of these represented the remnants of disputes that would have been familiar to a medieval lawyer: parishioners and rural tenants struggling with their secular and religious superiors over the content of customary obligations.

---

& A.J. Taylor eds., 1950), reprinted in HELEN MAUD CAM, LAW-FINDERS AND LAW-MAKERS IN MEDIEVAL ENGLAND 71, 79–80 (1962).

12. *Id.*

13. 10 Co. Rep. 1a, 77 Eng. Rep. 937 (Ex. 1612).

14. YEAZELL, MEDIEVAL AND MODERN, *supra* note 3, at 132–96.

What tithes were due from a parish of lead miners? What customary fees were due from copyholders (who held land on evidence of a "copy" of an entry in a manorial roll) when they succeeded to their father's holdings? Because these matters affected groups, it made sense to treat them as class actions. Because, however, the groups involved were not corporations, the newly rigid legal doctrine required an answer to the question of how a few members of the group could bring representative actions that would bind all. In the course of seventy-five years, English courts gave two answers to these questions, neither entirely candid and both still present in the modern class action.

The first answer sounds quite modern. Dealing with an untidy series of lawsuits between a parson and his flock of lead miners, the Chancellor brushed aside what we would now describe as a claim of due process by noting that unless representative litigation bound those represented, "if the defendant [class] should not be bound, suits of this nature... would be infinite and impossible to be ended."<sup>15</sup> This observation grounds the representative litigation in expediency, what we should now call efficiency. But arguments from efficiency have a way of goring many oxen. When wielded by plaintiffs representing countless thousands of charge-card holders suing to enforce a federal regulation about the typeface required in disclosing interest rates,<sup>16</sup> arguments about efficiency sounded preposterous to the defendant. When wielded by asbestos defendants seeking to justify a global settlement that included those still unaware of their exposure or injury, the argument from efficiency sounded preposterous to many who championed the plaintiff's causes.<sup>17</sup> The difficulty of the argument from efficiency is that it has little to say about what other considerations efficiency should trump. At some level individualized justice is inherently inefficient in its retail form. Requiring individualized consideration of every claim does waste a lot of time—and may make it impossible to get to other, more pressing social goals. But we surely want to do it in some cases, some of the time. What group litigation has been searching for since the late seventeenth century is an understanding of which cases call for this sort of inefficiency.

Unfortunately for us, the seventeenth-century search came in cases that seem especially foreign to modern ears. The largest groups of early modern cases sound particularly antique. One group of cases involves copyholders suing manorial proprietors about the terms of their tenure. Copyholders were the successors of villein tenants who, theoretically, held at the will of the lord. Lordly will, however, had a way of getting written down—often at the instance of the lord—and, once written, to give rights both to the lord and to the tenant, however theoretically incapable of exercising rights that tenant was. This memorialization eventually turned the great grandchildren of villeins into the holders of inheritable estates. In the seventh-century copyhold disputes the fight was over important collateral aspects of copyhold: what up-front payment could the lord demand as the price of recognizing an heir to the copyhold estate? Exotic though this issue sounds to us, it had enormous importance for both sides. If the lord could charge essentially market prices, copyhold tenure would be relatively insecure, because at the death of the

---

15. *Brown v. Vermuden*, 22 Eng. Rep. 796, 797 (Ch. 1676).

16. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

17. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Koniak, *supra* note 2; Leubsdorf, *supra* note 2.

present holder the plot would be likely to change hands. Conversely, if the copyholder could keep the "fine," as the price of succession was called, sufficiently low, copyhold would begin to approximate fee simple. Put in another way, the issue at stake was whether the proprietor or the copyholder would stand to capture increases in the value of the land. In such cases seventeenth-century courts regularly recognized a few copyholders suing—or being sued—on behalf of the rest. The questions that most concerned the Court of Chancery—in which all these actions had become concentrated—were substantive: interpreting the manor's custom, which, in theory, determined the amount of the fine.

Though the cases in this respect sound resolutely medieval, elsewhere the early modern cases brought change in the medieval patterns. One sign of the self-consciousness brought by the new awareness of corporate law was the Chancellor's treatment of representation. Lord Nottingham's notebooks contain a passage that would surprise a student of medieval group litigation and would make the blood of a modern plaintiff's lawyer run cold. In describing the procedure he had developed,<sup>18</sup> Nottingham notes that the "multitude" of tenants may be represented by "any three in the name of the rest, so [long] as they produce before the Register a sufficient authority to enable them to sue in the name of the rest, and so as they be responsible for costs."<sup>19</sup> This requirement of explicit representative authority looks markedly different both from the easy medieval practice in which either self-appointed or even adversary-appointed representatives stand for the group and from modern practice in which class representatives stand for thousands, thousands who may in some cases<sup>20</sup> receive no notification of the action.

Before one leaps to anachronistic conclusions, however, it helps to recall the setting of these cases. The copyholders usually comprised a relatively small group—no classes in the thousands or tens of thousands—all of whom were known or easily knowable to each other. It may have been difficult to persuade any given copyholder to give authority for the suit, but Nottingham's requirement was not a command of impossibility. It assured that the suit would bind, but it did not render the suit practically impossible, as such a requirement would today for most class actions.

Another reason not to make too much of Nottingham's requirement is its relatively brief life. Chancery was chaotic, and even a great Chancellor like Nottingham, the parent of modern equity, exercised an influence that did not always outlast his active life. The quotation concerning the authority of the representatives comes not from a case, but from Nottingham's notebooks, published only in 1965. He may have been prepared to require explicit authorization from copyholders, but his successors seemed ready to embrace a quite different, and quite revolutionary notion of representation.

In 1722, Chancery decided *Chancey v. May*,<sup>21</sup> which off-handedly, perhaps

18. In fact it is quite unclear whether Nottingham had "developed" the procedure described here or whether it was instead a memorialization of older practice. I have found no hard evidence on this question but, for reasons set forth elsewhere, I believe Nottingham is innovating here. YEAZELL, *MEDIAVAL AND MODERN*, *supra* note 3, at 148.

19. LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROBLEMENA OF CHANCERY AND EQUITY" 95 (D.E.C. Yale ed. 1965) [hereinafter LORD NOTTINGHAM].

20. I have the so-called Rule 23(b)(1) and (2) suits in mind, where the current rule does not require notice to the class members as a prerequisite of bringing suit.

21. 24 Eng. Rep. 264 (Ch. 1722).

unconsciously, suggested a remarkably modern justification for group litigation. The setting as well as the justification were new. The first quarter of the eighteenth century saw a commercial revolution, marked by the growth of a stock market and by rampant securities fraud and mismanagement of the enterprises whose stock was being traded on the new exchanges. The inevitable stock market crash came in 1718, as what came to be known as the South Sea Bubble burst. In its wake followed the inevitable lawsuits, of which *Chancey* was one. In *Chancey*, some holders of the Temple Mills Brass Works, on behalf of themselves and the other owners, sued former managers of that enterprise, alleging various forms of mismanagement and embezzlement. Defendants objected that all of the owners had to be named parties—else they would be exposed to multiple actions. Notice the change in social context. We see, not a village, but, to use an anachronistic term, the shareholders of a publicly traded company. They are bound not by social setting and in daily life, but by economic interest alone. We have, to continue the anachronistic analogy, a “(b)(3)” class.<sup>22</sup>

Chancery, almost certainly unconscious of what it was about, rose—or, as some would have it, sank—to the occasion, brushing aside defendants’ objections in terms that sound modern even in their uncertainty of just what group litigation is about; explaining why the defendants’ demurrer for want of parties should be disallowed, the opinion in its entirety notes:

1st. Because it was in behalf of themselves and all others the proprietors of the same undertaking, except the defendants, and so the rest would were in effect parties.

2d.y, Because it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise,; and no coming at justice, if all were to be made parties.<sup>23</sup>

These sentences are stunning both in their sweep and in their inconsistency. The first hints at the idea of the interest class, in which absentees are bound because adequately represented by those who share identical interests. In such a model—from which both class actions and governmental institutions derive—legitimacy springs not from direct consent but from the adequacy of representation. The second sentence looks in a different direction, suggesting that representative litigation is at best a poor solution to an otherwise insoluble problem; in this vision expediency supplies the justification, and the tone suggests that if we could avoid the necessity to resort to this procedure we would.

To make things worse, the two principles have their most violent collision in matters where one of the principles threatens to submerge the other. On one hand, there are many modern cases where we may be fairly sure that interests are identical—but there don’t seem to be any pressing reasons of practicability that point toward collective litigation. Some mass tort litigation may provide an example. On the other side stand cases in which we permit collective litigation, but where we can feel uneasily sure that the interests of the represented absentees and the representative parties are in some conflict: the modern (b)(2) classes frequently

---

22. FED. R. CIV. P. 23(b)(3) is most often deployed in cases of widely dispersed individuals seeking damages.

23. 22 Eng. Rep. 268 (Ch. 1722).

involve such problems.<sup>24</sup> We haven't entirely decided which of these models best captures our feelings about the matter. As I shall argue at the end of this essay, the contemporary settlement class arouses such strong feelings because it brings these two veins of thought into direct and violent collision; to see how that happens, we must understand the connection between the modern class action and its economic engine.

### III. THE ECONOMIC DYNAMICS OF THE MODERN CLASS ACTION

From 1722 to 1967 is a long jump in many respects, but with *Chancey v. May* as a springboard, one can make the leap without straining. The ease of the transition flows from two circumstances. First, in the century and a half after *Chancey* collective litigation went into a deep sleep from which it emerged only after being rediscovered by Zechariah Chafee,<sup>25</sup> Harry Kalven and Maurice Rosenfield,<sup>26</sup> and being ushered into the brave new world by Benjamin Kaplan.<sup>27</sup> I have elsewhere attributed this hibernation to some broad changes in the political culture;<sup>28</sup> Robert Bone has attributed the phenomenon to more specific aspects of legal ideology.<sup>29</sup> Whatever the causes, however, all agree that at the start of this century group litigation was neither a widely used nor a well-known procedural device: a sure sign of this obscurity is that for a century and more everyone who wrote about it could be fairly characterized as an academic, and indeed an academic with a penchant for antiquarian obscurity. Joseph Story (whom I claim as an academic by virtue of his absentee professorship at Harvard Law School) treated it in a particularly obscure fashion in his *Equity Pleadings* (1838) and *Equity Jurisprudence* (1836) with a great show of learning but not much sense of what this device might be good for. A century later, Zechariah Chafee, who understood the representative suit as well as anyone in a century, could write, "The situation is so tangled and bewildering that I sometimes wonder whether the world would be any worse off if the class-suit device had been left buried in the learned obscurity of [Frederick] Calvert[, a nineteenth-century treatise writer]".<sup>30</sup>

In fact, the only thing the U.S. Supreme Court could think of to do with the class suit during this time was to settle the conflicting claims of two groups of Methodist preachers, divided over slavery, who lay claim to a pension fund.<sup>31</sup> Holding that the suit could proceed on a representative basis, with the result binding the absentees, the Court indicated considerable confusion about the justification for its result but pointed in the general direction of representative

---

24. Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

25. ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY passim* (1950).

26. Harry Kalven, Jr., & Maurice Rosenfield, *The Contemporary Functions of the Class Suit*, 8 U. CHI. L. REV. 684 (1941) (arguing that the class suit permitted the representative plaintiff to serve as a private attorney general, maximizing the enforcement of the regulatory statutes created in the New Deal).

27. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 377 (1967).

28. YEAZELL, *MEDIEVAL AND MODERN*, *supra* note 3, at 197-232.

29. Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990).

30. CHAFEE, *supra* note 25, at 200.

31. *Smith v. Swormstedt*, 57 U.S. 288 (1853).

litigation. It reached a similar result in *Supreme Tribe of Ben Hur v. Cauble*,<sup>32</sup> holding that representative litigation could bindingly resolve a challenge to the reorganization plan of a fraternal lodge. Such scattered cases did not suggest either an important or a controversial role for collective litigation.

New life came from two sources. In 1895, the U.S. Supreme Court, in a suit with no class connotations, applied the "common fund" doctrine, drawn from the annals of restitution.<sup>33</sup> A bond holder had, in vindicating his own interests, created a fund from which all bond holders could collect. The Court held that the successful plaintiff could tap that fund and pay his lawyer's fee. Subsequent cases have extended this right of "contribution" to include amounts beyond the fee originally contracted for with the lawyer's client.<sup>34</sup> Without *Greenough*, half of the modern class action would lack its driving engine. As applied in subsequent cases, *Greenough* gives to a successful plaintiff's lawyer a claim on a fund created by a class judgment.<sup>35</sup> By extension this doctrine also gives the attorney bargaining power in discussions of a settlement by making the lawyer one of the stake-holders: her fee is at stake as well as the amount of the class recovery.

It is difficult to overstate the importance of *Greenough* when its principle is harnessed to the contingent fee. It creates the potential for nothing less than a market in claims: if a lawyer can identify a cohesive class, find a representative plaintiff, and secure class certification, that lawyer is then in a position to represent the claims for the entire class. In that representation the lawyer will have a claim for a fee from any amounts recovered. Indeed, it is well-established (though often-criticized) law that the lawyer may bargain separately over the class's recovery and her own fee.<sup>36</sup> The incentives thereby created are very powerful. The lawyer wants class certification because with it comes *Greenough* entitlement to a fee from any class recovery. Linked with the contingent fee, *Greenough* creates lawyer-entrepreneurs who could, in theory, create a market in small claims. Traditional understandings of legal ethics would call this champerty and barratry; Milton Handler has gone further, labelling it "legalized blackmail."<sup>37</sup> John Coffee has articulated a powerful alternative view. Coffee argues that in securities fraud classes, plaintiffs suffer because their lawyers lack the resources to pursue what are frequently complex cases. Put more briefly, Coffee argues that this emerging market is undercapitalized.<sup>38</sup> In Coffee's view the emergence of a plaintiffs' class action bar more efficiently capitalizes this market, making possible the more rational—and greater—investment that the claims deserve. But whether damned or praised, the combination of the contingent fee and the lawyer's claim in restitution

32. 255 U.S. 356 (1921).

33. *Trustees v. Greenough*, 105 U.S. 527 (1881).

34. *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

35. John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974); John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

36. The Supreme Court has so held in *White v. New Hampshire Dep't of Employment*, 455 U.S. 445, 453 n.15 (1982) (rejecting the contrary rule suggested in *Prandini v. National Tea Co.* 557 F.2d 1015 (3d Cir. 1977)).

37. Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Law—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

38. John C. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

is extremely powerful.<sup>39</sup>

If *Greenough* is the engine for the modern class action, the 1966 revision of the Federal Rules of Civil Procedure are the wheels. This revision, which abandoned efforts to put representative litigation into abstract categories, described itself as putting the class action into "practical terms."<sup>40</sup> It is difficult to take a stance against practicality, especially when the apparent alternative is antiquarian obscurity.<sup>41</sup> But at the same time they espoused practicality, the drafters of the 1966 Amendments listed so many, apparently contradictory, factors that a judge might take into account in granting or denying class status that it is difficult to predict the certification of classes from a reading of the rule.

Moreover, they wrote a rule that in some respects put the history of representative litigation upside down. Only three sorts of class suits were permitted. The first consisted of class litigation by necessity: suits in which the failure to proceed with aggregated litigation would result either in futility or contradiction. In such actions—relatively rare in the modern history of the class action—proceeding with independent suits will either run the risk of contradictory judicial commands or will predictably make relief turn on a race to the courthouse. Such Rule 23(b)(1) suits solve, fundamentally, problems of the judicial system's own creation. This portion of the rule is thus a "classical," joinder rule, aimed at fixing a condition created by other aspects of the procedural system.

Not so with the other two categories. Rule 23(b)(2) speaks of a party opposing the class that "has acted or refused to act on grounds generally applicable to the class, *thereby* making appropriate final injunctive relief...."<sup>42</sup> At one level the underline phrase is a truism—in a system of law, like cases should be treated alike. At another level, it is a bit of procedural hubris. No legal system will treat all like cases alike, unless one accepts the courts' definition of which cases are alike. And in a mass society, hundreds of potential defendants will always be treating hundreds of thousands of potential party-opponents alike. What the drafters had in mind, of course, was a more limited and focused issue: that of race-based classifications; although the committee notes say that the rule is not so limited, all the illustrations are drawn from civil rights cases. In such cases the defendants were treating individuals in a certain way *because* they belonged to a social group. Perhaps because the drafters had such cases in mind, they did not require notice and consent from the class members; such a requirement would have made it more, not less, difficult to bring actions seeking enforcement of civil rights, and it might also have opened the door to intimidation of class members. Yet as civil rights litigation has matured, the failure to require inquiry into the wishes of class members has drawn criticism.<sup>43</sup> The grounds for the criticism are easy to understand: in such situations there are often several plausible courses of action

---

39. When those outside the legal system look at the American class action, seeking to adapt it to other legal systems, they frequently overlook the important role played by the contingent fee. Without the contingent fee and *Greenough*, the class action would be a relatively minor joinder device.

40. FED. R. CIV. P. 23 advisory committee's note.

41. The preceding federal rule had classified all representative suits as either "true," "hybrid," or "spurious," a taxonomy that few professed to understand, and by which courts confessed themselves baffled.

42. FED. R. CIV. P. 23(b)(2) (emphasis added).

43. Bell, *supra* note 24.

that would improve the situation of the class members, yet the representatives are seeking, in the name of the class, only one avenue of relief.

If the (b)(2) class suffers from a too-quick definition of the class interest, the opposite problem besets the final category—the (b)(3) class. This final residual category grants class treatment if “the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members,” but only if the case can also jump through a series of subsidiary hoops. This provision in theory opened the class action to many new variations, and the drafters, aware that they could not foresee all its ramifications, sought to cabin it in two ways. First, they opined in the committee notes, that “a ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action.” That opinion has now been largely overruled by a series of cases summarized in the next section. Secondly, the drafters required individual notice to the members of such classes who could be identified and located.”

The result of this notice requirement is to handicap the (b)(3) class actions. In the world of practice, the handicap has two results. First, it typically excludes from class treatment those claims large enough to have warranted the engagement of an individual lawyer; receiving notice of such a class action, the lawyer will opt out.<sup>44</sup> Rule 23(b)(3) actions have consequently—until very recently—been confined to “small claims” actions, in which large numbers of persons with relatively small claims—claims that would be uneconomical to prosecute individually—have been aggregated by broker-lawyers. Second, the notice and opt out provision of Rule (c)(2) has effectively created a minimum-capitalization requirement for plaintiffs’ law firms prosecuting class actions. Such firms must have the capacity to front the costs of notice for class actions of the (b)(3) variety. One can take two quite divergent views of this requirement. I have already noted John Coffee’s argument that plaintiffs’ lawyers are often undercapitalized. If one accepts this view, the notice requirement creates, procedurally, a minimum capital requirement: only a firm whose resources can absorb the often-considerable costs of notice will take on such litigation.<sup>45</sup> Moreover, a defendant may underwrite the costs of a settlement notice, thus supplying part of the capital necessary to reach a binding adjudication. In fact, within the plaintiffs’ bar this requirement is seen with deep suspicion, as a procedural hurdle erected chiefly for the purpose—or at any rate with the predictable result—of making impossible many claims that might be both meritorious and viable were it not for this requirement. The Supreme Court has itself said as much.<sup>46</sup>

---

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

45. See, e.g., *In re Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) (in which all plaintiffs’ lawyers refused to serve on steering committee when district judge proposed to convert litigation into a Rule 23(b)(1) class).

46. If one accepts this position, it suggests the delicious spectacle of the defendants’ bar campaigning for abandonment of the notice requirement. In fact, the settlement class—discussed in the next section—elliptically approaches such a position. Rule 23(e) requires notice to “all” class members in the event of a settlement, but the requirements of such notice are less stringent than with the pre-certification notice of Rule 23(c)(2), as interpreted in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

47. *Eisen*, 417 U.S. 156. “No competent attorney would undertake this complex antitrust action to recover [the amount at stake for any individual plaintiff.] Economic reality dictates that [this suit] proceed as a class action or not at all.” *Id.* at 161.

Standing back from Rule 23 one sees the history of group litigation reflected, but the reflection has some notable distortions. Courts have sporadically entertained claims by and against groups. Occasionally they have conditioned that entertainment on the group's showing of its cohesiveness and agreement on the goals of the suit.<sup>48</sup> But when they have asked for such indicia of consent it has been because the suit sought relief in some non-monetized, multi-valent aspect of life—the adjustment of relations with a long-term landlord or spiritual adviser. When, by contrast, the object has been some fairly straightforward financial advantage—recovery of money from faithless managers<sup>49</sup>—we are not able to detect requirements of notice. From this historical perspective Rule 23 has things upside down. That is not in itself an objection to a notice requirement. But were I asked to make a due process argument for notice and asked to decide whether such an argument was easier to make in the context of an employment discrimination suit or in an effort to collect alleged overcharges from a stock broker, I would think my decision easy—and contrary to the command of Rule 23.

The key to this distortion, if that is what it is, lies in a topic untouched by the rules but which drives most modern civil litigation—the financing of litigation. Unregulated by procedural rule, lawyers' fees drive many kinds of litigation but none more than class actions. Rule 23(b)(3) created an enormous potential market in legal claims, particularly in small claims.<sup>50</sup> Without a governor, this engine would likely result in large numbers of class actions and, arguably, over-enforcement of law. In predicating private attorney general theories of the class action, most writers have focused on areas where under enforcement was either demonstrable or arguable.<sup>51</sup> With the notice requirement, Rule 23(b)(3) created the opposite threat. While never quite saying so, we have in the twentieth century been prepared to tolerate quite a lot of uncompensated legal harms: the shirt ruined by the dry cleaners, the small debt uncollected, the overcharge by the bank or credit card company. Although in theory small claims courts supply a remedy in these cases, in most of them the transaction costs of securing and collecting a judgment will make this route unattractive. The critical among us can point to pervasive small-scale injustices tolerated; the optimistic to the likelihood of such harms washing out over a lifetime, as any given individual is both beneficiary and sufferer from such a regime.

Whether one likes this situation or not, it is inarguable that it might have changed significantly under the most expansive imaginable role for Rule 23.<sup>52</sup> In a mass society subject to a high degree of legal regulation, hundreds of thousands of transactions that might be subject to legal challenge arise daily. Were lawyers able easily to aggregate the claims involved, such suits might become a plague on the

48. See *supra* note 19 and accompanying text. See LORD NOTTINGHAM, *supra* note 19.

49. *Chancey v. May*, 24 Eng. Rep. 265 (Ch. 1722).

50. Large claims will escape either because they fail the test of Rule 23(b)(3)(A) and (B) ("the interest of the parties in individually controlling...the actions") ("the extent and nature of any litigation...already commenced"), or because the parties opt out.

51. *Kalven & Rosenfield, supra* note 26; John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983).

52. Even as things stand, one commentator argued that Rule 23 effected such a substantial change in the relative powers of economic groups as to violate the Rules Enabling Act. John M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974).

land and cause a fundamental change in the extent to which legal rights found enforcement. How were the drafters to deal with this possibility? An easy answer is that they might raise the price of organizing such a group. Requiring individual notice created a procedural tax on the organization of otherwise unaffiliated "interest" classes in small claims cases. It put a quite effective brake on their incidence and thus left largely unaffected the regime of legal enforcement of small claims. Though doctrinally untidy, the solution is understandable, and group litigation has never stood high on an index of doctrinal tidiness.

The other category of claim—the large claim in the mass tort—the drafters sought to deal with by the advisory committee note just cited. More fundamentally, they might have thought that such claims would not be brought as class actions because the legal market would supply individual lawyers for such clients—because their injuries would be sufficiently serious to warrant damage claims that would economically justify individual prosecution. As things have developed, they were only half right—and perhaps only a quarter so. The next section traces the most modern developments.

#### IV. MASS TORTS, THE SETTLEMENT CLASS, AND THE CIRCLE OF HISTORY

The first change is in the development of the mass tort class action. The drafters of Rule 23 appear to have had in mind the airplane or train crash in which many are killed or seriously injured in a single episode. In practice the mass tort class action has most frequently involved even more complex cases. In some of these—the asbestos and cigarette cases come to mind—a large number of individual lawsuits have developed the factual information and legal theories. Class actions have then entered to consolidate claims in these "mature" tort cases. In a few other cases the class action has entered as the initial assertion; this pattern has proved rarer than that of the mature torts.

Whether with mature or "immature" torts, the plaintiffs' bar has responded with vigor. Recent imaginative class actions include those claiming damages for allegedly defective silicone breast implants,<sup>53</sup> another seeking damages on behalf of all hemophiliacs infected as a result of blood transfusions carrying the AIDS virus,<sup>54</sup> and another brought on behalf of all "nicotine-dependent" persons in the United States.<sup>55</sup> The merits of these cases<sup>56</sup> and their certifiability under existing understandings of Rule 23<sup>57</sup> is for our purposes beside the point: their importance in

---

53. See *In re Dow Coming Corp.*, 86 F.3d 482 (6th Cir. 1996) (reciting history of complex litigation and failed settlement).

54. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (granting mandamus to order decertification of indicated class).

55. *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *reversed and remanded*, 84 F.3d 734 (5th Cir. 1996).

56. Some accounts have suggested that the science underlying the breast implant claim was dubious. Compare MARCIA ANGELL, *SCIENCE ON TRIAL* (1996) (characterizing legal system's "utter disdain" for scientific evidence in the case) with Michael Unger, *New Studies Enter Fray on Implants*, *NEWSDAY*, Nov. 19, 1996, at A51 (representatives of women's groups refuting "numerous recent studies that found no connection between...implants and...health problems").

57. The appellate court that reversed the certification in *Castano* held that the district court had abused its broad discretion in ruling that class treatment was appropriate because it had failed adequately to take into account variations in state law and because it had not

this inquiry is that they bespeak an aggressive, well-organized, and relatively well-financed plaintiffs' class action bar.

This initiative by plaintiffs' lawyers has brought forth the development to whose analysis I want to devote this section—the return of the defendant class. In many respects this development returns the class action to its earliest days, for reasons I shall try to explicate.

In several cases, one of them highly publicized, courts have certified “settlement classes,” and ratified pre-filing agreements reached between defendants and the now-certified plaintiff class. These cases have drawn substantial comment that has sharply polarized the legal community.<sup>58</sup> At least two of these district court opinions have been reversed on the ground that Rule 23 simply didn't provide for such a mechanism.<sup>59</sup> Those reversals have led, in turn, to a draft amendment to Rule 23 that would explicitly authorize settlement classes, a draft that has itself now drawn fire.<sup>60</sup>

For the purposes of this account, I do not wish to take sides in this controversy. Instead, I want to argue that the phenomena itself marks the return of the class action to its historical roots, as a procedural device that is as likely to bite as to assist a plaintiff class. Otherwise put, the settlement class is a new disguise for the defendant class, the group that finds itself involved in representative litigation at the instance of its opponent. More fundamentally, the combination of the mass tort class action and the settlement class make basic changes in the economic dynamics of modern litigation, putting plaintiffs' and defendants' bars in unfamiliar roles. Because they do so, they reverse the ordinary roles of counsel and of class litigation. This point may not be clear—indeed, it may be contested or flatly wrong—so I want to lay out the analysis with enough care that clearer minds may illuminate the discussion.

Consider the situation of a party with a potentially large litigation exposure. For illustrative and dramatic purposes, suppose this defendant makes a widely distributed product now claimed to be the cause of some health problem: asbestos or cigarettes are concrete examples. Without the mass tort, the defendant's predictable strategy is to await individual claims, trying some to get a sense of the way they will play to juries, settling others and refining its strategy as it awaits the long haul of a large number of cases. Its position will be defensive and its strategy

---

analyzed the way in which an eventual trial would be conducted. *Castano*, 84 F.3d at 740.

58. Some of the titles in a *Cornell Law Review* Symposium suggest reactions ranging from unsettlement to outrage: John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Richard Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Prods., Inc.*, 80 CORNELL L. REV. 1045 (1995). At another symposium, one eminent lawyer characterized the settlement class as “res judicata for sale at bargain basement rates.” Remarks of John Frank, Esq., New York University School of Law Research Conference on Class Actions (April 1995).

59. *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), cert. granted *sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996).

60. Letter from Prof. Susan P. Koniak, Boston University School of Law, to the Hon. Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure (May 28, 1996) (on file with author); Letter from Paul D. Carrington, Duke University School of Law, to the Advisory Committee on Civil Rules (Dec. 18, 1996) (on file with author).

attritional. In part, that stance will be a matter of tactics: an organized institution can often out-wait large numbers of scattered individuals.

In part, however, that position will be a strategy of default. As a rational economic actor<sup>61</sup> the defendant wants a single, comprehensive, predictable settlement, one that will enable it to pay out claims in the knowledge that it has paid all claims and can move on with its institutional life.<sup>62</sup> Above all, it wants to avoid multiple rounds of escalating claims. Yet, given the legal system, the firm has no way of entering into a global settlement with the universe of claimants. Even if it were to decide for business, moral, or other grounds that it was prepared to pay substantial damages, it would have no way—outside bankruptcy<sup>63</sup>—to control the amount of those damages. Announced willingness to pay a settlement of a particular amount is likely only to generate new claims that will use that settlement as a floor for negotiations.

Enter the settlement class. In fact, enter several different sorts of settlement classes. To make the story simplest (and quite unhistorical), imagine that the defendant is approached by a lawyer with whom it has had no prior dealings. That lawyer says that she represents the universe of unfiled claims against the defendant—all persons who have ever used the product and who have or might develop injuries from it, save those who have already filed claims for such injuries. Negotiations ensue and the defendant and the still-uncertified representative for the plaintiff class arrive at a global settlement arrangement: the defendant will pay each person who produces appropriate proof of an injury some amount or some proportion of actual damages, and will set aside a trust fund for those who yet manifest no injury but who might be expected to do so in the future. In this purest form of the settlement class, lawyer and defendant make no separate arrangement for lawyers' *Greenough* payment; the only understanding is that the lawyer will claim her fee as a "tax" on each damage payment as it is made to the members of the plaintiff class.

Put aside the question of whether the present Rule 23 authorizes such a procedure. Were it to do so, both sides would have something to gain. From the defendant's standpoint, it is a business planner's dream. A massive and contingent liability has become knowable; indeed, the defendant has probably improved its credit worthiness with such an agreement, for so long as *res judicata* can bar other claims, it has gained control of a great business uncertainty. Plaintiffs too have gained something. Provided the numbers are right, plaintiffs gain much in the certain collectibility of a judgment. Indeed, the settlement may increase collectability because the business future of the defendant is more predictable, and credit thrives on predictability. In some cases the ready availability of payments may make possible medical treatments otherwise deferred or foregone. Enormous social costs have also been saved. One can even imagine a scheme in which the government encourages such settlements by contributing a portion of the estimated

---

61. Because such defendants are typically large institutions, one need not make very heroic assumptions to posit a rational economic actor: if nothing else, the constraints of corporate law compel such behavior.

62. A possible exception would be if the defendant is likely to be put out of business by such a settlement. Even in this situation, however, a comprehensive settlement, with the attendant solace offered by bankruptcy, is preferable to being nibbled to death by minnows.

63. John Coffee has argued that bankruptcy proceedings cope somewhat better with the problem of collective action seen in the settlement class. Coffee, *supra* note 17.

savings in litigation costs as a pot-sweetener.<sup>64</sup>

Because it is such a dream scenario, however, the settlement class may tempt defendants not to wait for fate and for their Princess Charming on the plaintiff's lawyer's horse to ride in. Instead, the defendant may actively seek such a champion, by identifying her in advance and by approaching her with a settlement offer and with the request that she represent the plaintiff class. At this point two things have happened. First, the "plaintiff" class has, in effect, become a defendant class: it is disposed of, not proposing. Defendants, not plaintiffs, are identifying the plaintiff class. Second, suspicion hangs heavy in the air, the suspicion that the defendant has picked not the best but the hungriest and most pliable lawyer, has, in fact, picked the plaintiffs' lawyer for them. Is this an insoluble conflict of interest?

Reflecting on the medieval experience with representative litigation may in this instance help clarify our thinking. I have said that medieval representative litigation saw roughly equal numbers of plaintiff and defendant classes.<sup>65</sup> Were they simply blind to what appears to many to be a serious problem of conflict of interest on the part of the lawyer? We don't know precisely, but the appearance is that the defendant classes were sued directly: it was up to the defendants to find lawyers who were then presumably as devoted to their clients' interests as lawyers ever are. Suppose an adaptation of this medieval scheme to modern circumstances. A defendant genuinely wishing to create a global settlement could approach not a lawyer (and certainly not a lawyer already representing a plaintiff with interests adverse to those of defendant) but unrepresented parties<sup>66</sup> and offer them terms, on behalf of the class, notifying them that they would have to obtain representation. If the plaintiff picked up the suggestion, something like real bargaining would begin. If it did, we could be reasonably sure that the final settlement would be better than that originally proposed. We can also be reasonably sure that the defendant's action would precipitate a frenzy of lawyers' bidding for the representative rights. That picture would be neither sedate nor pretty; it would, however, create a real market in plaintiffs' claims. Moreover, such a settlement has some attractions for a defendant. It avoids the risk of bankruptcy, with its associated high transaction costs. For a defendant with a problem product but otherwise healthy prospects, facing up to the problem outside bankruptcy may be both ethical and prudent.

There are undoubted practical problems here. How would defendant select these "class" representatives? How many would it have to notify to rid itself of the suspicion that it had merely substituted gullible parties for hungry lawyers? Moreover, such a step would carry some real risks for the defendant. Most immediately and obviously, the defendant would be notifying previously quiescent plaintiffs not only that they had claims but that the defendant thought those claims viable. Such risks may explain why defendants aren't lining up to try this scheme. But a defendant willing to run such risks would also make its offer more credible. Such a procedure might open the way to a settlement class procedure that did not have insuperable conflict problems. Plaintiffs would be represented by a lawyer of their own choosing—quite likely a lawyer that had emerged from a process of

---

64. In an entirely utopian world, such a subsidy might come partly from court costs saved and partly from the Medicare trust funds, on the ground that the settlement had replaced or prevented medical payments that would otherwise be borne by Medicare.

65. See *supra* note 6 and accompanying text.

66. Canons of ethics prohibit directly approaching a represented party. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1995).

essentially competitive bidding by those lawyers contacted by the initial group of plaintiffs to whom defendant had made its offer of settlement.

Contrast this hypothetical class with the final, and most controversial form, of the settlement class, in which the defendants approach a lawyer already conducting litigation on behalf of one or several clients, and propose that the lawyer take on the additional representation of unfiled claims, thus achieving a global settlement. That is essentially what happened in *Georgine*.<sup>67</sup> Whatever one thinks of the fairness or desirability of the settlement arrived at in *Georgine*, it has far more conflict issues than does the “purer” settlement class envisioned above. If nothing else, it may help to clarify our thinking about the settlement class if one does not think of *Georgine* as its exclusive or prototypical instance but as an extreme, perhaps pathological, instance.

It may also help if one recognizes that the settlement class is for most purposes a defendant class, and that the typical roles of counsel are therefore reversed. For thirty years, the plaintiffs’ bar has criticized the class action only for failing to go far enough; conversely, the defendants’ bar has been hard pressed to say a civil word about it. The settlement class reverses the dynamics. In the past year I have heard hard-bitten members of the defendants’ bar waxing almost lyrical about the settlement class and its possibilities, and similar members of the plaintiffs’ bar denouncing it as a work of the devil. The key lies in its reversal of the dynamics of litigation. Where the “ordinary” class action empowers plaintiffs by overcoming the otherwise prohibitive transactions costs of aggregating them, the settlement class works such an empowerment for defendants, massing potential future plaintiffs into a single present group with whom negotiation is possible. Because the empowerment shoe is on the other foot, if I may mangle my metaphors hopelessly, the procedure takes on a different aspect.

## V. REPRESENTATIVE LITIGATION AND THE IDEA OF PROCEDURE

The settlement class thus returns group litigation to its historical roots, as an engine that could be used by—but also against—unincorporated persons. In its distant past, the class action was not an inherently empowering procedure: however attractive, that idea is a historical myth. One cannot accurately identify it as an exclusive tool of the downtrodden. On the other hand, it would be equally wrong to conceive of representative litigation as, in Robert Covers’ term, transsubstantive. It has never covered a broad enough range of situations to warrant that term. I don’t mean thereby to damn with faint praise; the same point could be made of interpleader and of intervention, neither of which is suspected as a tool of iniquity. We may have advanced to a state of procedural maturity sufficient to allow us to recognize that transsubstantivity is, like purity of heart, a virtue to which procedure may aspire rather than a necessary condition of existence. Having already confessed to one heresy, I should perhaps reveal entirely the depths of my procedural depravity. Not only do I doubt that the defendant class is under all conditions illegitimate, but I believe that it may in some respects strengthen the place of the class action in the procedural firmament.

So long as representative litigation is seen exclusively as a tool of

---

67. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Penn. 1994).

empowerment, as an instrument of the plaintiffs' bar, both civil discussion and rational consideration of its shape will remain impossible, for each proposed change inevitably increases or reduces the power of a definable group of parties. Under such circumstance the fate of reform proposals is predictable: stalemate. One can see this point in the admirably inclusive discussions conducted by the civil rules advisory committee over the past few years. With virtually every interested segment of the bar, bench and academia represented, the only clear message that emerged was: don't change anything very much. The rules committee tried to follow that advice—at least that is how I read the presently circulating draft—but even that proposal has elicited strong protests. Paul Carrington has argued that such gridlock is a sign of an excessively politicized rule-making process, of a bar that has undervalued the achievement of the rule-making process generally,<sup>68</sup> and perhaps of a rules advisory committee that has not fully understood the wisdom embodied in the Rules Enabling Act. I lack the experience or study to evaluate these claims, but in the case of the class action I believe the reason lies as much in the history of the device as it does in the process of rule-making itself.

If, however, the settlement class in some form becomes an accepted part of the class action, two things will occur. Because no longer exclusively a tool of the plaintiffs' and the scourge of the defendants' bar, the class action will become a real procedural tool whose shape can be discussed without knowing one's party affiliation or views about the progressive income tax. Conversations about class actions can sound like discussions of impleader, rather than like those about abortion. Much passion may be lost, but much clarity may be gained. If such discussion occurs, the first thing it can address is the part of the Rule that we have backwards: its treatment of notice. The notice requirement of Rule 23 is probably insufficient with regard to some class actions and excessive in regard to others—and the Rule inverts the order of its emphasis. Once Rule 23(c)(2) ceases its function as the finger in the dike threatening to inundate defendants, they can more sensibly discuss its role. In constitutional law we have, at least since *Mullane v. Central Hanover Bank & Trust*,<sup>69</sup> been dedicated to the proposition that the elaborateness of the notice ought to approximate the issues at stake. Nowhere but in class actions is that proposition controversial.

Second, it may become possible to think more clearly about the linkage between litigation finance and procedural change. I once heard a member of the clergy say that in contemporary U.S. society it is much easier to talk about sex than about money. Discussions of the class action would not have changed the speaker's mind. Changes to Rule 23 are discussed without any reference to *Greenough* or to the lodestar principle. Given the strictures of the Rules Enabling Act, such discreet silence may be tactful, but it does not produce much illumination. We need, quite frankly, to talk about how much law enforcement we can afford, how much it costs us to get it, and who ought to bear that cost. It may be that such discussions have to occur outside the Civil Rules Committee, but it would not be beyond the wit of humankind to devise fora in which such conversations could occur: I hope some of it will begin in these pages. If it does, this meeting will have amply repaid the effort and investment of its organizers.

---

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

69. 339 U.S. 306 (1950).