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# Revolution v. Evolution in Class Action Reform

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## REVOLUTION V. EVOLUTION IN CLASS ACTION REFORM\*

RICHARD MARCUS\*\*

*It is widely agreed that the federal-court class action became a somewhat revolutionary device after Rule 23 was amended in 1966. Since 1966, further substantial changes to the rule have been considered by the rulemakers, but more proposals have been discarded than adopted. Meanwhile, a major battle has emerged about whether class actions should primarily or solely be designed to achieve deterrence or limited to a compensatory function. That division has been central to many current debates, such as the issue of “no injury” class actions, whether courts could certify classes only after determining that they were “ascertainable” by an identified administratively feasible method, and whether the idea of cy pres could be used to justify class actions in which the defendant paid a large amount, but the class members themselves received little or nothing and the funds were instead used for good works of some relevant sort.*

*Changes to Rule 23 in the last half century have not directly addressed these hot-button issues. But judicial decisions—including some by the Supreme Court—have tackled some of these issues, and Congress has adopted legislation to address some alleged class action abuses, such as “coupon settlements.”*

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Since 1996, I have served as Associate Reporter of the Advisory Committee on Civil Rules. In that role, I was present for the end of the first episode of class action rule reform in 1996–1998, and directly involved in the second and third episodes. To a substantial extent, I draw on those experiences in this Article. As a consequence, it is a travelogue of the reform trail. But I am speaking only for myself, not for the Advisory Committee or anyone else.

At several points in this Article, I do rely on official documents of the rulemaking process such as agenda books for meetings of rules committees. These materials are publicly accessible on the website of the Administrative Office of the U.S. Courts: [www.uscourts.gov](http://www.uscourts.gov). In addition, on occasion I report on events in which I was involved, and I do sometimes do not cite to those official documents (some of which I authored) because I am reporting on events in which I was personally involved.

*This Article explores the last half century of class action reform in terms of whether further “revolutionary” changes will occur in federal class action practice. It finds that although the rulemakers looked at some aggressive changes in the 1990s, those amendment ideas were eventually jettisoned, and the changes actually adopted have been evolutionary rather than revolutionary.*

*That trend continues with the most recent amendment package, which may go into effect on December 1, 2018; the rulemakers are not embracing dramatic changes to the rule. Meanwhile, the possible sources of “revolutionary” change lie elsewhere. Some worry that the Supreme Court will deliver shocks to class action practice by deciding cases, though in recent terms it has not proved to be as adventurous as some thought it might. Congress has pending before it legislation that seemingly would make a fairly “revolutionary” commitment to limiting class actions to the compensatory purpose, and disavowing the deterrence purpose endorsed by many. The fate of that proposed legislation is uncertain as of this writing.*

*Though action by Congress or decisions by the Supreme Court might produce “revolutionary” change for class actions, this Article suggests that technology may instead be the most important source of major change. In the wired world of the twenty-first century, the “headless” class action of the past may be replaced by the “wired” class action in which class members have regular contact with one another and class counsel. That could work a genuine revolution.*

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## INTRODUCTION

Legal change is usually evolutionary, though those who do not like a certain change are sometimes prone to term it “radical” or “revolutionary” as a way of emphasizing its importance and generating opposition. But at least some legal changes do turn out to be fairly revolutionary.

One such revolutionary change was the 1966 amendment of Rule 23. John Frank, a member of the committee that drafted the 1966 rule, said it was “the most radical act of rulemaking since the Rule 2 ‘one form of action’ merger of law and equity.”<sup>1</sup> As Judge Posner observed in 2014:

The class action is an ingenious procedural innovation that enables persons who . . . are too numerous for joinder of their claims alleging the same wrong committed by the same defendant or defendants to be feasible, to obtain relief as a group, a class as it is called. The device is especially important when each claim is too small to justify the expense of a separate suit, so that without a class action there would be no relief, however meritorious the claims.<sup>2</sup>

But Professor Redish, the chief academic critic of class actions, warns: “The modern class action may be appropriately analogized to the invention of fire. If used properly, it can significantly advance societal goals. If misused, however, it quickly degenerates into something that causes significant harm.”<sup>3</sup>

Charles Alan Wright characterized the 1938 version of Rule 23 as “a bold and well-intentioned attempt to encourage more frequent use

1. John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 325 n.10 (2005) (quoting Minutes, Advisory Committee On Civil Rules 15 (Apr. 28–29, 1994), [http://www.uscourts.gov/sites/default/files/fr\\_import/CV04-1994-min.pdf](http://www.uscourts.gov/sites/default/files/fr_import/CV04-1994-min.pdf) [<https://perma.cc/3QSH-XBN8>]).

2. *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014).

3. Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659, 1660 (2014) (footnote omitted).

of class actions.”<sup>4</sup> But that seems to overstate the transformative character of the original Rule 23. “The current era of class action litigation began on July 1, 1966,” when Rule 23 was substantively rewritten.<sup>5</sup> Writing as the rule amendments went into effect, Judge Frankel forecast that “it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23.”<sup>6</sup> We have now completed a half century operating under the revised rule, a noteworthy event examined in a number of quasi-celebratory conferences.<sup>7</sup> Though the 1966 rule change was hotly debated, it is unlikely that those involved in drafting it foresaw its revolutionary potential. For example, Professor Wright, who was intimately involved in the reform effort, initially expected the new provisions authorizing damages class actions would be employed very rarely,<sup>8</sup> though he recognized by 1969 that his prediction was wrong.<sup>9</sup> Other legal developments—largely an explosion of new claims not previously recognized—played a very significant role in magnifying the importance of the 1966 amendment.

Whatever their foresight about the rule’s actual consequences, after 1966 the rulemakers reportedly adopted a “moratorium” on changing the rule again to see how it worked out.<sup>10</sup> Actually, that moratorium was fairly brief. By 1971 or so, the committee directed a study of the rule,<sup>11</sup> but the Advisory Committee on Civil Rules (the “Advisory Committee”) abandoned the effort in 1977.<sup>12</sup> Whether or not heeding Judge Frankel’s forecast,<sup>13</sup> the Advisory Committee did stay its hand for about a generation before taking up the idea of

4. Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 170 (1969).

5. David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 588 (2013).

6. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52 (1967).

7. See Symposium, *1966 and All That: Class Actions and Their Alternatives After Fifty Years*, 165 U. PA. L. REV. 1495 (2017); Conference, *Rule 23 @ 50: The 50th Anniversary of Rule 23*, 92 N.Y.U. L. REV. 767 (2017).

8. See Charles Alan Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 552, 567 (1966) (predicting that not very many class actions would be certified under Rule 23(b)(3)); see also Rabiej, *supra* note 1, at 334 & n.43 (reporting Wright’s view, and observing that it was one of the rare instances when Wright was wrong about a legal development).

9. See Wright, *supra* note 4, at 179 (recognizing that his earlier prediction that Rule 23(b)(3) would be little used had “proved quite ill-founded”).

10. Rabiej, *supra* note 1, at 328 (referring to “a self-imposed moratorium on further amendments”).

11. See D. Marcus, *supra* note 5, at 615.

12. See *id.* at 618–19.

13. See *supra* text accompanying note 6.

changing the rule another time. Later in the 1970s, the Carter administration developed a class action legislative package that would, if adopted, have had a fairly revolutionary potential.<sup>14</sup> But that legislative initiative did not reach fruition.

The rulemakers' moratorium ended in 1991, when the press of mass tort litigation in general and asbestos personal injury litigation in particular prompted the Judicial Conference to ask the Standing Committee on Rules of Practice and Procedure to direct the Advisory Committee to consider changes to the rule.<sup>15</sup> There followed, by the end of that decade, the first episode of consideration of rule-amendment ideas, largely focused on the certification standards for Rule 23(b)(3) class actions, the most revolutionary feature of the 1966 rewrite. Eventually, all the draft changes to the certification standards in Rule 23(b) were withdrawn. Then, in 2000–2002, a second episode produced changes in what could be called the procedural handling of class actions; these changes went into effect in 2003. Though they generated much commentary, nobody really thought them revolutionary.

Meanwhile, other actors have also been involved in the reform effort. The Supreme Court has, in the twenty-first century, decided quite a large number of class action cases. Although the outcomes were a mixed bag from the perspective of plaintiff and defense lawyers, the overall trend was not to the plaintiffs' liking.<sup>16</sup> Against this background, the Advisory Committee embarked on its third serious consideration of changing Rule 23 in 2011, leading to the draft amendments published for comment in August 2016. If adopted, they could go into effect on December 1, 2018.

This Article focuses on the most recent and ongoing amendment effort. To provide context, however, it first introduces the central tension between compensation and deterrence that remains an enduring ambiguity, and profiles the evolution of the rule through the

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14. See David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. 1531, 1531 (2017).

15. See Memorandum from Patrick E. Higginbotham, Chair, Advisory Comm. on Civil Rules, to Honorable Alicemarie H. Stotler, Chair, Standing Comm. on Rules of Practice and Procedure (May 17, 1996), reprinted in 167 F.R.D. 535, 535–36 (1996) (transmitting Rule 23 revisions that “result from a course of Committee study that began when, in March, 1991, the Judicial Conference requested that [the Standing] Committee ‘direct the Advisory Committee on Civil Rules to study whether Rule 23, F.R.C.P. be amended to accommodate the demands of mass tort litigation.’”).

16. See generally Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 504–16 (2016) (reviewing these developments).

earlier rulemaking episodes. The Article then turns to the current reform effort, reporting on the variety of ideas considered and laid aside, and the ways in which the central tension about the rule's "true goal" remains somewhat unresolved. It then contrasts the rulemakers' evolutionary orientation with the potentially more dramatic changes that might emanate from the Supreme Court or Congress, or result from developments in technology. The Article concludes that what might be called the rulemakers' studied effort to avoid monocular embrace of either compensation or deterrence will likely continue for some time. Radical change from the rulemakers is not upon us.

#### I. THE TENSION BETWEEN COMPENSATION AND DETERRENCE

The age-old conception of private civil litigation is that it was designed to provide compensation. Law enforcement was a public function, and undertaken by government. But over the last seventy-five years, the idea of private enforcement of public law has become a central feature of American law, one of the features that makes the American class action distinct in the world. It was not always so in America.

In a veto message in 1940, President Roosevelt asserted that "[a] 'truth in securities' act without an administrative tribunal to enforce it or a labor-relations act without an administrative tribunal to administer it, or rate regulation without a commission to supervise rates would be sterile and useless."<sup>17</sup> Actually, the private attorney general, an idea developed in the early 1940s,<sup>18</sup> offered another way. And Roosevelt's first example became an early vehicle for private enforcement implementation, as the courts began in 1946 to entertain "implied" claims for violation of the 1934 Securities Exchange Act,<sup>19</sup> a practice the Supreme Court blessed in 1964.<sup>20</sup> Only in the Private

17. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (quoting 86 CONG. REC. 13,942, 13,943 (1940) (Walter-Logan Bill—Veto Message)).

18. William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2130 & n.2 (2004) (noting that Judge Jerome Frank introduced the phrase in 1943).

19. See *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946) (finding an implied private cause of action in the Securities Exchange Act). Note that in 1949, the Supreme Court said that the derivative action was the "chief regulator of corporate management." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949). Without meaning to detract from that device, it is difficult to think that a contemporary lawyer would say the same.

20. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

Securities Litigation Reform Act of 1995 (“PSLRA”)<sup>21</sup> did Congress, somewhat grudgingly, recognize the importance of securities fraud litigation. When the Court interpreted the PSLRA pleading requirements in 2007, Justice Ginsburg began by invoking that history: “This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission.”<sup>22</sup>

Class actions could magnify the effect of private enforcement.<sup>23</sup> As Professors Burbank and Wolff have urged, that is a questionable goal of a rule of civil procedure: “Rule 23 does not set policy on the propriety of aggregate remedies as a means of accomplishing regulatory goals—and it could not possibly do so.”<sup>24</sup> Nevertheless, the 1966 revision to the rule seems to have bolstered private enforcement. Consider securities fraud. As Professor Coffee has noted: “Although Rule 10b-5 dates back to 1942, it did not truly become important until the modern class action was authorized by the revisions to Rule 23 of the Federal Rules of Civil Procedure, adopted in 1966.”<sup>25</sup> The prospect for private enforcement across a wider range of topics emerged in roughly the decade after 1966 due to the multiplication of private causes of action with a seemingly regulatory purpose.<sup>26</sup>

21. Private Securities Litigation Reform Act of 1995, Pub L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2012)).

22. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

23. See JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 175 tbl.9.1 (2015) (comparing dollar amounts recovered by the SEC and private class actions; the figure obtained through private class actions dwarfs the SEC recoveries).

24. Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 21 (2010).

25. John C. Coffee, Jr., “Loser Pays”: *The Latest Installment in the Battle-Scarred, Cliff-Hanging Survival of the Rule 10b-5 Class Action*, 68 SMU L. REV. 689, 689–90 (2015) (footnote omitted).

26. Thus, Professor Miller, who was present during the creation of the 1966 amendment as an assistant to Reporter Benjamin Kaplan (and was later himself Reporter to the Committee) in 2014 offered the following recollection of how matters stood as the 1966 amendments were under study:

Those were relatively simple days in the world of litigation. The Committee obviously could not predict the great growth in complicated federal and state substantive law that would take place in such fields as race, gender, disability, and age discrimination; consumer protection; fraud; products liability; environmental safety; and pension litigation, let alone the exponential increase in class action and multiparty/multi-claim practice that would flow from the expansion of those legal subjects.

Frequently, legislatures—led by Congress—banned or required certain practices and also authorized private suits by those claiming injury due to the malefactor’s failure to obey the law. Often these statutes also promised a minimum recovery (sometimes labeled a “penalty”) and an award of attorney fees for the successful plaintiff.<sup>27</sup>

The usual object of these regulatory efforts was a corporation. As Professor Hodges says in his massive recent book on how law affects corporate behavior, the American legal architecture is “somewhat unique,”<sup>28</sup> noting “the strong adherence in the United States to the ideologies of deterrence and private enforcement.”<sup>29</sup> But “[i]n contrast to the vast doctrinal literature on the theory and practice of private enforcement and class actions in the USA, . . . [t]here is almost no direct evidence on the *actual* effect of private enforcement of law, or on *how* litigation actually affects corporate decisions.”<sup>30</sup> As Professor Fitzpatrick has recently observed, there is “virtually no empirical evidence that consumer class actions have any effect on corporate behavior.”<sup>31</sup>

Professor Hodges also emphasizes the remarkable costs and risks of American litigation and recognizes that the prospect of being sued in the U.S. does supposedly affect corporate conduct.<sup>32</sup> As Professor

Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 293–95 (2014).

27. See Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 104 n.5 (2009) (offering examples of federal statutes imposing statutory damages). Professor Scheuerman observes: “When combined with the procedural device of the class action, aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent.” *Id.* at 104.

28. CHRISTOPHER HODGES, *LAW AND CORPORATE BEHAVIOUR: INTEGRATING THEORIES OF REGULATION, ENFORCEMENT, COMPLIANCE AND ETHICS* 67 (2015).

29. *Id.* at 70.

30. *Id.* at 70–71. Professor Hodges adds, “[t]he basic assumption is that since economic theory postulates that the imposition of a financial penalty *will* deter later wrongdoing, it must be so.” *Id.* at 71.

31. Perry Cooper, *Are Class Actions About Compensation or Deterrence?*, 16 CLASS ACTION LITIG. REP. (BNA) 1249, 1249 (2015) (quoting Fitzpatrick). Professor Fitzpatrick added that there is also no evidence that class actions do not have a deterrent effect. *Id.*

32. HODGES, *supra* note 28, at 79 (reporting that U.S. corporate chief executives and small business owners say that they have closed companies, discontinued products, or decided not to release new products due to the risk of lawsuits). It must be emphasized that one need not accept the claim that fear of litigation produces these results at face value.

To the extent the prospect of litigation has played a major role in such decisions, class actions are hardly the only reason. Besides class actions, the U.S. legal system operates under a set of rules that are extremely plaintiff-friendly compared to the regimes in the rest of the world—lax pleading requirements, very broad discovery without the need

Fitzpatrick also observed: “You would expect a rational actor to avoid litigation.”<sup>33</sup> What we seem to have here is a recurring conundrum. Both the plaintiff and the defense camps say that litigation in general, and class actions in particular, do affect corporate conduct. The debate is about whether that is a good thing.

From what one can call the plaintiff perspective, it must be true that more law enforcement is a good thing. Even the proponents of economic analysis of law, however, can resist overstating the value of the deterrent effect. Writing over forty years ago, for example, Professor Dam recognized that “a penalty system that induced enforcers to invest resources up the value of an optimal penalty would lead to inefficient overenforcement.”<sup>34</sup> Thus, “[t]o the extent the class action frees the lawyer from weighing the interests of injured class members, the result may be inefficient overenforcement.”<sup>35</sup>

The defense-side argument is that this sort of overenforcement happens all the time, particularly due to class actions. Plaintiff class action lawyers not only force changes in behavior that do not benefit members of the class (and may be harmful to the interests of some class members), the view goes, they also profit hugely off their “clients”’ claims. Hence the repeated assertion that class actions benefit only the lawyers and the antagonism to such devices as “coupon settlements” in class actions.<sup>36</sup> Balanced against the enforcement value of litigation in general, and class actions in particular, the defense argument is that corporations usually aspire to be good citizens and adhere to legal rules. That conclusion is also dubious, according to Professor Hodges’ book.<sup>37</sup> Nonetheless, articles about the importance corporations place on compliance are rife in the

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for advance judicial authorization, the right to jury trial and the resulting limits on judges’ deciding plaintiffs lacked sufficient evidence, frequent grounds for recovery of large amounts for emotional distress, occasional grounds for recovery of punitive damages, and the American Rule under which the successful defendant ordinarily cannot recover its attorney fees from the plaintiff.

33. Cooper, *supra* note 31, at 1249.

34. Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61 (1975). For a sophisticated contemporary law and economics analysis of how a variety of other matters—filing fees, loser pays rules, and burdens of proof—bear on optimal private enforcement, see LOUIS KAPLOW, OPTIMAL DESIGN OF PRIVATE LITIGATION 1–8 (Harvard Law Sch., Discussion Paper No. 928, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3017443](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017443) [<https://perma.cc/G9LG-RDMQ>].

35. Dam, *supra* note 34, at 61.

36. See 28 U.S.C. § 1712 (2012) (limiting the attorney fees paid class counsel who negotiate coupon settlements of securities fraud class actions).

37. See HODGES, *supra* note 28, 655–706 (emphasizing that corporate ethics and ethos are the prime ingredients of corporate compliance).

professional literature.<sup>38</sup> Taken to its logical conclusion, this view might suggest that *no* enforcement effort—public or private—is needed at all.<sup>39</sup> But that is clearly unworkable. Indeed, one can imagine even the most ethical corporate CEO wanting enforcement to ensnare her scofflaw corporate competitors.

In sum, the strongest arguments from the two sides present diametrically opposite views. The plaintiff-side view is that without private enforcement, American companies would run roughshod over the legal rights of consumers, investors, employees, and everyone else. And the class action is an essential ingredient in this enforcement effort. The defense-side view, on the other hand, is that compliance is a result of the internal ethics of the company, while private litigation—particularly class actions—is a tax on the producers of goods and services that enriches lawyers but has no other effect (except sometimes depriving the public of goods or services).

At least some contemporary private enforcement seems difficult for the plaintiff side to justify in a wholehearted manner. For example, consider the existence of private rights of action for penalties. Surely some of the noisome things that justify suits under such statutes seem minor. In this vein, Judge Easterbrook recently noted in a class action that “[t]his is another of the surprisingly many junk-fax suits under . . . the Telephone Consumer Protection Act.”<sup>40</sup>

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38. For example, the May 2016 issue of the Metropolitan Corporate Counsel contained a number of articles about the high importance of vigilance regarding corporate compliance. *See, e.g.,* Yogesh Bahl, *Continuous Compliance Improvement Using Psychology and Behavior*, METROPOLITAN CORP. COUNS., May 2016, at 37, 37. An interview in the magazine is entitled “Enforcement Goes Into Hyperdrive,” with the tagline “In today’s stormy risk environment, a strong culture is the safest harbor.” Richard H. Girgenti & Timothy P. Hedley, *Enforcement Goes Into Hyperdrive*, METROPOLITAN CORP. COUNS., May 2016, at 8, 8. Similarly, the former general counsel of General Electric has written of “the inside counsel revolution that began in the late 1970s and that has increased in scope and power ever since.” Benjamin W. Heineman, Jr., *The Inside Counsel Revolution*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Mar. 29, 2016), <https://corpgov.law.harvard.edu/2016/03/29/the-inside-counsel-revolution> [<https://perma.cc/C289-2D4G>]. It has been asserted as well that insurance companies foster corporate compliance. *See, e.g.,* Shauhin Talesh, *Data Breach, Privacy, and Cyber Insurance: How Insurance Companies Act as “Compliance Managers” for Business*, 43 L. & SOC. INQUIRY (forthcoming 2018) (manuscript at 1) (on file with the North Carolina Law Review) (asserting that “insurance companies play a critical, yet unrecognized, role in assisting organizations in complying with privacy laws”).

39. Of course, if the inclination of the public enforcers to enforce abates, the compliance efforts of the companies may abate also. On this point, the transition from the Obama administration to the Trump administration may usher in a striking contrast in attitudes toward governmental efforts to force corporations to comply with the law.

40. *Chapman v. First Index, Inc.*, 796 F.3d 783, 784 (7th Cir. 2015); *see also* *Sask. Mut. Ins. Co. v. CE Design, Ltd.*, 865 F.3d 537, 539 (7th Cir. 2017) (describing the proposed

And a defense-side lawyer has said that “[t]he TCPA has become a boon to plaintiffs’ lawyers” due to the high cost for defendants of going through a full case.<sup>41</sup> Professors Burbank and Wolff have noted that “[t]here is no reason to believe that the drafters and promulgators of the 1966 revisions to Rule 23 anticipated the potentially destructive relationship between the damages class action and the creation of statutory penalties.”<sup>42</sup> One might say the synergy between penalty claims and the class action enables plaintiff lawyers to use the litigation nuclear weapon to kill a gnat. Presented with a request for class certification in an action for “a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class” under the Truth in Lending Act (“TILA”) over forty years ago, Judge Frankel simply refused.<sup>43</sup>

These difficulties might well prompt the sensible to favor public enforcement over private enforcement. Sensible regulators would not seek to destroy regulated enterprises for no good reason; the whole idea of prosecutorial discretion is that applying every rule to the hilt is untenable. Partly in recognition of this preference, governmental enforcers often have a freer hand in court than private litigants. For example, the EEOC need not satisfy Rule 23 when suing in its own name.<sup>44</sup> But there is no particular reason to think that private enforcement is unimportant. Professor Gilles uses as an illustration litigation involving a payday lender. After federal regulators settled for \$325,000 in fines and penalties, a nationwide class action produced a settlement for \$54.5 million in cash and debt forgiveness.<sup>45</sup> Professor Coffee has carefully compared the results of SEC actions and class action recoveries and found that the private litigation often produced

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class representative in a junk fax case as “an Illinois corporation whose business now appears to center on litigating claims under the federal Telephone Consumer Protection Act”).

41. Daniel R. Stoller, *CVS Subsidiary Swallows \$9.25M Class Junk Fax Pill*, 17 CLASS ACTION LITIG. REP. (BNA) 1308, 1308 (quoting David Almeida, partner at Sheppard, Mullin, Richter & Hampton LLP).

42. Burbank & Wolff, *supra* note 24, at 74.

43. *Ratner v. Chem. Bank N.Y. Tr. Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972). Congress later amended the statute to limit the size of the penalty in a TILA class action. Amendments to the Truth in Lending Act, Pub. L. No. 93-495, sec. 408, § 130, 88 Stat. 1517, 1518–19 (1974) (codified as amended at 15 U.S.C. § 1640 (2012)).

44. *EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791, 797 (5th Cir. 2016) (“[T]he EEOC is not required to adhere to Rule 23 when bringing ‘an enforcement action . . . in its own name.’” (omission in original) (quoting *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 323 (1980))).

45. Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1542 (2016).

much larger amounts.<sup>46</sup> And Professors Choi and Pritchard have found that the “conventional wisdom that the SEC targets disclosure violations more precisely” than private plaintiffs’ lawyers is wrong.<sup>47</sup> Professor Clopton, meanwhile, has elegantly explored the more general question of “redundant” public-private enforcement.<sup>48</sup> And, as Professor Lemos has recently observed, public enforcement may raise its own problems of accountability.<sup>49</sup>

Another wrinkle to this debate is very pertinent nowadays. As Professor Farhang pointed out, private enforcement may look desirable to legislators because it is not dependent on the preferences of the executive, which can shift over time.<sup>50</sup> If elections cannot blunt private enforcement, then one need not rely entirely on agencies’ willingness to enforce. In the Obama administration, some argued that the administration’s orientation was unduly pro-enforcement. *The Economist*, for example, reported in 2014 that the U.S. government was “criminalizing the American company” and described a strategy called “derisking” as “a pre-emptive cringe in the face of American regulation.”<sup>51</sup> There are some indications that things are very different in the Trump administration. For example, reports indicate that the Consumer Financial Protection Bureau might be a target because it “has been a little too effective in pursuing wrongdoing by banks, consumer credit reporting companies, credit issuers and student loan collectors.”<sup>52</sup> The very people responsible for governmental enforcement reportedly “dread” the attitudes and policies of the new administration.<sup>53</sup>

The unique features of U.S. litigation<sup>54</sup> mean that private enforcers need not be secondary to public enforcers, at least when

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46. See COFFEE, *supra* note 23, at 175 tbl.9.1.

47. Stephen J. Choi & A.C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. EMPIRICAL LEGAL STUD. 27, 29 (2016).

48. See Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 285 (2016).

49. See Margaret Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 929 (2017).

50. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATIONS AND PRIVATE LAWSUITS IN THE U.S.* 34–37 (2010).

51. *A Mammoth Guilt Trip*, *ECONOMIST*, Aug. 30, 2014, at 21; *Poor Correspondents*, *ECONOMIST*, June 14, 2014, at 77 (reporting on “derisking” efforts to banks).

52. Gretchen Morgenson, *A Watchdog Too Good at its Job*, *N.Y. TIMES*, Feb. 12, 2017, at BU1; Alan Rappoport, *Consumer Watchdog Faces Attack by House Republicans, Memo Reveals*, *N.Y. TIMES*, Feb. 10, 2017, at A14.

53. Michael D. Shear & Eric Lichtblau, *Civil Servants Sense “Dread” in Trump Era*, *N.Y. TIMES*, Feb. 12, 2017, at A1 (referring to worries among staff when the president “recruited cabinet secretaries hostile to the agencies they lead”).

54. See *supra* note 32 and accompanying text.

compared to enforcement outside the U.S. A striking illustration is provided by the ongoing litigation about Volkswagen air pollution devices. As is well-known, an avalanche of class action and other litigation against VW occurred in U.S. courts, eventually concentrated in U.S. District Court in San Francisco and leading to a settlement that provided a buy-back benefit to American purchasers of the affected cars. As reported by the *New York Times*, “Volkswagen owners in the United States will receive about \$20,000 per car as compensation for the company’s diesel deception. Volkswagen owners in Europe at most get a software update and a short length of plastic tubing.”<sup>55</sup> A German purchaser of a VW asked: “Why are they getting so much and we’re getting nothing?”<sup>56</sup> The EU Commissioner of Industry told a German newspaper that “Volkswagen should voluntarily pay European car owners compensation comparable with that which it will pay U.S. consumers.”<sup>57</sup> That seemingly did not happen, and the *Financial Times* reported in January 2017 that a major part of the reason was that “US-style class action lawsuits do not exist in Germany.”<sup>58</sup> Moreover, there have been indications that governmental regulators in Europe responded less vigorously to VW’s behavior than parallel officials in the U.S.

The foregoing presents at most a tiny introduction to the vast literature about the competing virtues and vices of private enforcement. As Professor Mullenix has said in a slightly different context, this debate “inevitably deteriorates into a boilerplate conclusory swearing contest between rule supporters and opponents.”<sup>59</sup> Meanwhile, “academics writing in this area either have been so ideologically committed to the private attorney general concept or so implacably opposed to it that, in either case, they have missed the divergences between theory and practice.”<sup>60</sup> Little wonder, then, that the framers of the modern class action rule—presented with the choice between a compensation and deterrence rationale—chose to “muddle through without picking sides.”<sup>61</sup> As we shall see, the debates during the current rulemaking effort significantly reflect

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55. Jack Ewing, *New Strategy Against VW*, N.Y. TIMES, Aug. 16, 2016, at B1.

56. *Id.*

57. Robert A. Weninger, *The VW Diesel Emissions Scandal and the Spanish Class Action*, 23 COLUM. J. EUR. L. 91, 99 (2016).

58. Patrick McGee, *VW Sued in Germany Over Car Emission Test Scandal*, FIN. TIMES, Jan. 4, 2017, at 3.

59. Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 (1997) (discussing the Rules Enabling Act).

60. COFFEE, *supra* note 23, at 219.

61. D. Marcus, *supra* note 5, at 597.

competing conceptions of this divide, and one could say that there is again a studied effort by the rulemakers to avoid embracing the strongest position on either side.

## II. THE FIRST TWO EPISODES OF RULE 23 REFORM

Between 1966 and 1991, much happened as class action practice evolved and matured. After an initial burst of enthusiasm, much uneasiness developed, leading to something of a retreat from the broadest use of class actions.<sup>62</sup> In addition, there were legislative proposals to make major revisions in the handling of class actions.<sup>63</sup> But the rule remained unchanged.

The most significant development was that, with increasing frequency, the parties reached a settlement before the court decided whether to certify the class, and the possibility of “settlement class certification” appeared. By the time mass torts emerged in the 1980s, defendants realized that class action settlements could offer an upside because their binding effect could permit an enterprise to close its books on an episode at a fixed expense.<sup>64</sup> At the extreme, such arrangements could be seen as substituting a court-approved remedy for the tort law regime that would otherwise apply.<sup>65</sup>

Class action claims administration emerged as something of an industry unto itself. In the settlement setting, exacting claims requirements could come close to turning victory into defeat. Claims rates following settlements were often low.<sup>66</sup> Even sophisticated class members often did not apply for the money due them from a settlement fund.<sup>67</sup> Sometimes the claims processes themselves seemed

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62. For discussion, see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 676–82 (1979).

63. See *supra* text accompanying note 14.

64. On this topic, see John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 370–75 (2000).

65. For discussion, see Richard L. Marcus, *They Can’t Do That, Can They? Mass Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 859 (1995).

66. See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 119 (2007) (“It is not unusual for only 10 or 15% of the class members to bother filing claims.”); cf. *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 92–93 (3d Cir. 1985) (holding that class counsel did not have a fiduciary duty to follow up with another notice after notice by first class mail resulted in submission of claims by only 12% of class members).

67. See, e.g., James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411, 413 (2005) (describing failure of financial institutions to make claims in securities class actions).

almost to be designed to deter claims.<sup>68</sup> Sometimes settlement agreements would include “reversion” provisions that permitted the defendant to get back unclaimed funds at the end of the claims period,<sup>69</sup> which possibly gave it an incentive to make the claims process arduous. Class counsel, meanwhile, might be able to claim attorney fees based on the face “value” of the claims fund created for the class rather than the relief actually received by class members who submitted claims.<sup>70</sup> This is not to say that such practices were pervasive or even frequent, but this collection of concerns did tend to besmirch the reputation of American class actions.

In terms of potentially revolutionary change, the first two experiences with amending Rule 23 produced an evolution away from revolution that has continued through the most recent episode.

#### A. 1991–1998

In 1991, after a quarter century of muddling through without picking sides in the compensation/deterrence debate, the Advisory Committee was asked to study possible changes to Rule 23,<sup>71</sup> and it embarked on a five-year study of ideas for changing the rule. At first, rather aggressive changes were given serious consideration. The first draft considered by the Advisory Committee retained Rule 23(a) unchanged but collapsed the categories under Rule 23(b) into a single superiority inquiry that invited consideration of seven factors.<sup>72</sup> It also

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68. See, e.g., *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014) (describing the online claim form in a consumer class action as “bound to discourage filings”).

69. For an early example of a reversion provision in a litigated case, see *Boeing Co. v. Van Gemert*, 444 U.S. 472, 477 (1980) (unclaimed funds in class action would revert to defendant after claims period).

70. See *id.* at 482 (holding that counsel fees should be charged against the entire damages award in a class action, even though many class members did not claim their share).

71. See Memorandum from Patrick E. Higginbotham to Honorable Alicemarie H. Stotler, *supra* note 15, at 535.

72. See 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 3–18 (May 1, 1997) [hereinafter 1 WORKING PAPERS], <http://www.uscourts.gov/sites/default/files/workingpapers-vol1.pdf> [<https://perma.cc/B6G4-P795> (staff uploaded archive)]. The four-volume compilation of the various drafts considered, minutes of the pertinent meetings, transcripts of the various hearings, and written comments submitted during the public comment period, is an invaluable source on the development of the 1996 package of draft amendments.

It is worth noting that during the 2011–2017 reform episode there was at least one proposal for a comprehensive rewriting of the certification standards in Rule 23(a) and (b). See Letter from Adam Steinman, Professor, Univ. of Ala. Sch. of Law, to Edward Cooper, Robert Klonoff & Richard Marcus, Members, Rule 23 Subcomm. (Feb. 24, 2015), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0003> [<https://perma.cc/7FWG-AKLM>] (follow attachment).

broadened the right to opt out to all class actions but provided that allowing opt-outs was discretionary with the court, which could condition exclusion on a prohibition against assertion of certain claims that would be concluded by the class action.<sup>73</sup> The amendment would also have adopted a uniform notice requirement for all class actions, to be given in a manner subject to the court's discretion.<sup>74</sup> In addition, it dealt explicitly with such questions as deciding the merits before class certification<sup>75</sup> and immediate appeal of the class-certification order.<sup>76</sup>

Frankly, in light of what has happened since, this early discussion draft appears fairly aggressive, if not revolutionary. Features of it resemble proposals made before the Advisory Committee began work.<sup>77</sup> It would have introduced a whole new ball game into the question of whether a case should be certified as a class. It would have made predominance of common questions—so important in current practice—only a factor in assessing superiority, not the major factor as it has been in most cases to date.

This initial draft was only a starting point. It was succeeded by further drafts and meeting minutes that fill some 275 pages of the compilation of the Committee's class action work.<sup>78</sup> Ultimately, it led to the publication of a proposed amendment package in 1996.<sup>79</sup> As Professor Mullenix viewed it, during this period the Committee "moved from a wholesale rule revision to a more 'minimalist' approach to revamping the existing class action rule"<sup>80</sup>—from a possibly revolutionary to an evolutionary posture. Nevertheless, what it proposed was denounced as revolutionary. A Steering Committee to Oppose Proposed Rule 23 was organized by a dozen prominent law professors (including one former Reporter of the Committee), and it

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73. See 1 WORKING PAPERS, *supra* note 72, at 6–7.

74. See *id.* at 7–8.

75. See *id.* at 9–10.

76. *Id.* at 11–12.

77. See AM. BAR ASS'N SECTION OF LITIG., REPORT & RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CLASS ACTION IMPROVEMENTS, *reprinted in* 110 F.R.D. 195, 200–03 (1986). The ABA's recommendation proposes replacing Rule 23(b) with a single category keyed to whether a class action would be superior and making that determination turn on multiple factors. It also called for notice in all class actions and made opting out discretionary with the court. It also explicitly authorized pre-certification resolution of merits motions.

78. See 1 WORKING PAPERS, *supra* note 72, at 19–296.

79. See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, 167 F.R.D. 523, 540–66 (Aug. 1996).

80. Mullenix, *supra* note 59, at 616. For an intriguing retrospective on the various more aggressive amendment ideas for Rule 23, see Scott Dodson, *A Negative Retrospective on Rule 23*, 92 N.Y.U. L. REV. 917, 921–25 (2017).

submitted a six-page critique of the preliminary draft that was eventually signed by 144 law professors.<sup>81</sup> Many witnesses appeared at the public hearings to object to the amendment proposals. Eventually Judge Niemeyer, the Chair of the Advisory Committee, had all the material generated in the amendment effort published as a four-volume set.<sup>82</sup>

Much of the controversy resulted from the proposal to add a new factor (F) to the list of considerations bearing on whether to certify under Rule 23(b)(3): “whether the probable relief to individual class members justifies the costs and burdens of class litigation.”<sup>83</sup> Although the amendment proposal came with an introduction that recognized the potential importance of deterrence as a justification for class certification,<sup>84</sup> this provision became a lightning rod in the public comment period. For example, the opposition letter signed by 144 law professors observed:

Proposed Rule 23(b)(3)(F) ignores the importance of deterring wrongful conduct that injures each individual slightly but in the aggregate costs society a good deal. Rule 23(b)(3) was conceived originally as a procedural device to facilitate the enforcement of laws that prohibit socially costly behavior that

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81. See 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 1–9 (May 1, 1997) [hereinafter 2 WORKING PAPERS], <http://www.uscourts.gov/sites/default/files/workingpapers-vol2.pdf> [<https://perma.cc/SY4M-V2VR> (staff uploaded archive)].

82. See *supra* note 72.

83. See Preliminary Draft of Proposed Amendments, 167 F.R.D. at 559. The other principal concern of the law professors was a proposal to add a new Rule 23(b)(4), authorizing certification of a (b)(3) class for purposes of settlement “even though the requirements of subdivision (b)(3) might not be met for purposes of trial.” *Id.* at 559. The professors objected that this proposal was standardless and “lends official approval to an extremely controversial practice, one plagued by serious agency problems and risks of collusion.” 2 WORKING PAPERS, *supra* note 81, at 1.

84. The official publication included draft minutes from the Advisory Committee meeting:

Class actions have become an important element of private attorney-general enforcement of many statutes. . . . [T]here may be indirect benefits to the public at large in deterring wrongdoing, and in some cases, it may be desirable to force disgorgement of wrongful profits without regard to individual benefits. The question is in part whether it is wise to rely on private enforcement through Rule 23 rather than specific Congressionally mandated private enforcement devices—and whether the question is different as to statutes enacted before Rule 23 enforcement had become well recognized than as to more recent statutes.

Preliminary Draft of Proposed Amendments, 167 F.R.D. at 541.

involves small wrongs to large numbers of people. Proposed Rule 23(b)(3)(F) would operate to defeat those same laws.<sup>85</sup>

After the public comment period, the Advisory Committee met to consider the response. As reflected in the minutes:

Perhaps the greatest attention was drawn by proposed Rule 23(b)(3)(F), which would allow a court to deny class certification because the probable relief to individual class members does not justify the costs and burdens of class litigation. The reactions to this proposal demonstrated that it goes to the very heart of the purpose of Rule 23.<sup>86</sup>

After a discussion about “philosophical questions as to the proper role of Rule 23”<sup>87</sup> and “cosmic choices about public law regulation through Rule 23,”<sup>88</sup> the Committee decided not to recommend adoption of that factor (or any other change to Rule 23(b)(3)) but to continue considering it. At its fall meeting in October 1997, after a discussion about “a philosophical chasm on small-claims classes,” the Committee voted (with one dissent) to abandon further consideration of this factor.<sup>89</sup> More generally, of all the features of the preliminary draft of possible amendments, only Rule 23(f), on discretionary review of class-certification decisions, went forward. Perhaps one could say the Committee continued “muddl[ing] through.”<sup>90</sup>

### B. 2000–2003

In 2000, the Advisory Committee resumed working on Rule 23. As introduced when the resulting amendment proposals emerged in 2001, “[t]he class action rule ha[d] been the subject of close study by the Civil Rules Advisory Committee over the past ten years.”<sup>91</sup> This time, the Committee “turned its attention away from the substantive standards for certification to matters of process and procedure.”<sup>92</sup>

85. 2 WORKING PAPERS, *supra* note 81, at 6.

86. Minutes, Advisory Committee On Civil Rules 4 (May 1–2, 1997), [http://www.uscourts.gov/sites/default/files/fr\\_import/cv5-97.pdf](http://www.uscourts.gov/sites/default/files/fr_import/cv5-97.pdf) [<https://perma.cc/9K3W-7CEJ>].

87. *Id.* at 9.

88. *Id.* at 19.

89. Minutes, Advisory Committee On Civil Rules 21 (Oct. 6–7, 1997), [http://www.uscourts.gov/sites/default/files/fr\\_import/cv10-97.pdf](http://www.uscourts.gov/sites/default/files/fr_import/cv10-97.pdf) [<https://perma.cc/ZL7W-JZ7Z>].

90. See D. Marcus, *supra* note 5, at 597.

91. Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil and Criminal Procedure and Rules of Evidence, 201 F.R.D. 560, 587 (Aug. 15, 2001).

92. *Id.* at 590.

Thus, the proposed amendments did not on their face seem to engage with the challenging question of the purpose of class actions.<sup>93</sup>

Nevertheless, somewhat similar concerns emerged from the public hearings. One proposed amendment would have called for “notice by means calculated to reach a reasonable number of class members” whenever a class action was certified.<sup>94</sup> Previously, the only notice required upon class certification was in Rule 23(b)(3) class actions, which meant that actions certified under Rule 23(b)(1) or 23(b)(2) could proceed to judgment without there ever having been notice to class members. The new provision was explained by a draft Committee Note:

Members of classes certified under Rules 23(b)(1) or (b)(2) cannot request exclusion, but have interests that should be protected by notice. These interests often can be protected without requiring the exacting efforts to effect individual notice to identifiable class members that stem from the right to elect exclusion from a (b)(3) class.<sup>95</sup>

Though this addition to the rule may seem moderate, it met with strong resistance, particularly among the civil rights community. The concern was that even a very moderate notice requirement would deter lawyers from taking civil rights cases and thus defeat the law-implementation purpose of class actions.<sup>96</sup> After the public comment period, this directive was removed, and there still is no requirement in the rule of any notice to class members in (b)(1) or (b)(2) cases unless they are settled.

### III. THE EVOLUTION OF THE 2016 PACKAGE: OUTREACH AND ISSUES DEFERRED

In 2011, the Advisory Committee again returned to Rule 23. In part, that was because enough time had passed since the 2003 amendments to permit reflection on the operation of the rule as

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93. Among the changes were a modification of the rule’s timing requirement from directing that class certification be decided “as soon as practicable” to calling for decision “at an early practicable time,” requiring that the order certifying a class describe the class claims and defenses, and directing that notice of certification be in “plain, easily understood language.” The package also contained new subdivisions 23(g) (appointment of class counsel) and 23(h) (attorney fee awards in class actions). *Id.* at 603–06.

94. *See id.* at 606.

95. *Id.* at 611.

96. *See* Report of the Civil Rules Advisory Committee, in *AGENDA BOOK OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 1*, 145–58 (June 2002), [http://www.uscourts.gov/sites/default/files/fr\\_import/ST2002-06%282%29.pdf](http://www.uscourts.gov/sites/default/files/fr_import/ST2002-06%282%29.pdf) [<https://perma.cc/CSW7-T92R>].

amended that year. In part, that was because Congress had in 2005 passed the Class Action Fairness Act (“CAFA”), which made a review of practice under the new statute appropriate. In part, that was because the Supreme Court had decided quite a few class action cases, and examination of the operation of the rule in light of those cases seemed warranted. The task was assigned to a Rule 23 Subcommittee.

As it was in 1991–2001, the process was deliberative. By spring 2012, the Subcommittee had identified a series of “front burner” issues: (1) settlement class certification; (2) consideration of the merits in connection with class certification; (3) issue classes; (4) criteria for settlement review; and (5) monetary relief in actions certified under Rule 23(b)(2).<sup>97</sup> Shortly thereafter, the Advisory Committee’s full energies were absorbed by the completion and public comment process regarding the discovery and related amendments that went into effect in 2015.<sup>98</sup>

In 2014, the Subcommittee resumed work on Rule 23. One part of this work involved outreach. Members of the Subcommittee attended and participated at more than a dozen bar gatherings involving a broad array of litigators.<sup>99</sup> Within the Committee, this

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97. Rule 23 Subcommittee Report, *in* AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 449, 455–64 (Mar. 2012), [http://www.uscourts.gov/sites/default/files/fr\\_import/CV2012-03.pdf](http://www.uscourts.gov/sites/default/files/fr_import/CV2012-03.pdf) [<https://perma.cc/B4H8-DJD8>].

98. The 2015 amendments attracted an unprecedented amount of interest. More than 2,300 written comments were submitted between August 2013 and February 2014. Each of the three public hearings was oversubscribed, and some 120 witnesses testified in the hearings. The Senate Judiciary Committee held a hearing on the amendment package on November 5, 2013, before the Advisory Committee had even held its first hearing. Shortly after the amendments went into effect, Chief Justice Roberts devoted most of his year-end message to the rule changes.

99. *See* Report of the Advisory Committee on Civil Rules, *in* AGENDA BOOK OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 189, 190–91 (Jan. 2016), <http://www.uscourts.gov/sites/default/files/2016-01-standing-agenda-book.pdf> [<https://perma.cc/7FRX-QALU>] (listing the following events: (1) ABA 18th Class Action Institute, Chicago, Oct. 23–24, 2014; (2) Lawyers for Civil Justice Membership Meeting, New York, Dec. 4–5, 2014; (3) Impact Fund 13th Annual Class Action Conference, Berkeley, Feb. 26–27, 2015; (4) George Washington University Roundtable on Settlement Class Actions, Washington, Apr. 8, 2015; (5) ALI discussion of Rule 23 issues, Washington, May 17, 2015; (6) ABA Litigation Section meeting, San Francisco, June 19, 2015; (7) American Association for Justice Annual Meeting, Montreal, July 12, 2015; (8) Civil Procedure Professors’ Conference, Seattle, July 17, 2015; (9) Duke Law Conference on Class-Action Settlement, Washington, July 23–24, 2015; (10) Defense Research Institute Conference on Class Actions, Washington, July 23–24, 2015; (11) Rule 23 Subcommittee Mini-Conference, DFW Airport, Sept. 11, 2015; (12) National Consumer Law Center Consumer Class Action Symposium, San Antonio, Nov. 14–15, 2015; (13) Association of American Law Schools Annual Meeting, New York, Jan. 8, 2016).

effort was sometimes jokingly referred to as the Subcommittee's "Grand Tour," but it paid dividends in providing nuance to the Subcommittee's understanding of the issues. Indeed, this outreach was even commented upon favorably by some who appeared before the Advisory Committee during the public comment period addressing the preliminary draft of proposed amendments.<sup>100</sup>

In September 2015, the Subcommittee held a mini-conference with lawyers from a spectrum of backgrounds to discuss its evolving list of issues. As of that point, the topics focused upon were: (1) "frontloading" of specifics about proposed settlements; (2) expanded treatment of the settlement approval criteria; (3) guidance in handling cy pres provisions; (4) improvements in the rules regarding objections by class members to proposed settlements; (5) class definition and "ascertainability"; (6) settlement class certification; (7) issue class certification; (8) notice methods attuned to twenty-first century communication realities; and (9) pick-off settlement offers to the named plaintiff early in proposed class actions.<sup>101</sup>

At its November 2015 meeting, the Advisory Committee approved removing several of these issues from the active agenda, and perhaps entirely removing them from the agenda<sup>102</sup>: cy pres, ascertainability, settlement class certification, issue classes, and pick-off offers. Although some of these issues are remote from the central tension between compensation and deterrence, in general they have overtones of that conundrum and illustrate the ongoing challenge of emphatic embrace of either the pure compensation or the pure deterrence rationale. In particular, cy pres, ascertainability, and the "no injury" class especially point up the compensation-deterrence tension, so they merit a closer look.

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The Subcommittee received more than twenty-five written submissions about possible changes to Rule 23 during the time it was considering possible rule change ideas. *Id.* at 191.

100. See Summary of Comments and Testimony, in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 131, 132–33 (Apr. 2017), [http://www.uscourts.gov/sites/default/files/2017-04-civil-agenda\\_book.pdf](http://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf) [<https://perma.cc/NYA6-WYX3>] (summarizing testimony at hearings).

101. See Memorandum Prepared for Mini-Conference, in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 187, 187–88 (Nov. 2015), [http://www.uscourts.gov/sites/default/files/2015-11-civil-agenda\\_book\\_0.pdf](http://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book_0.pdf) [<https://perma.cc/L5T3-PGB4>].

102. See Rule 23 Subcommittee Report, in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 101, at 87, 89–91.

A. *Cy Pres*

At almost the same time that Rule 23 was transformed in 1966, the Supreme Court of California confronted a proposed state court class action involving alleged overcharges by Yellow Cab in Los Angeles, supposedly accomplished by setting the meters to charge a rate higher than was authorized by the Public Utilities Commission.<sup>103</sup> The named plaintiff in *Daar v. Yellow Cab Co.*<sup>104</sup> alleged that he had ridden in cabs and paid the inflated rate, and he sued on behalf of a class of all those who had also paid the inflated rate.<sup>105</sup> The problem was that, although Yellow Cab had records from which the amount of the overcharges could be calculated, there was no obvious way to identify the other passengers who had paid the inflated rates.<sup>106</sup> The trial court held that it was not a proper class action under California standards.

The state supreme court held that the case was a proper class action even though the specific identities of mulcted passengers could not then be determined. Its rationale emphasized the deterrence objective:

[A]bsent a class suit, recovery by any of the individual taxicab users is unlikely. . . . It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit allegedly injured parties to recover the amount of their overpayments is to be preferred over the foregoing alternative.<sup>107</sup>

In a footnote, the court recognized that the Attorney General of California, as *amicus curiae*, had proposed that the solution to this problem was to have the total amount of the overcharges deposited with the trial court, permit class members to obtain reimbursement by presenting proof that they had been overcharged, and direct that the uncollected portion of the money escheat to the state as abandoned funds at the end of seven years.<sup>108</sup> The Supreme Court said that this idea was “prematurely raised,” and that the trial court should “determine the manner in which any further proceedings will be conducted.”<sup>109</sup> Thereafter, the parties settled with a provision that

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103. See *Daar v. Yellow Cab Co.*, 433 P.2d 732, 735–36 (Cal. 1967).

104. 433 P.2d 732 (Cal. 1967).

105. *Id.* at 736.

106. *Id.* at 740.

107. *Id.* at 746.

108. See *id.* at 746 n.15.

109. *Id.*

some \$950,000 of the settlement amount be provided by having Yellow Cab lower its meters below the authorized fare.<sup>110</sup>

From this acorn, a mighty oak of *cy pres* doctrine and creativity has grown. As the Ninth Circuit put it in a 2017 decision, defense arguments against certification in that case ran up against “our court’s longstanding *cy pres* jurisprudence.”<sup>111</sup> So also elsewhere; the prevalence of *cy pres* arrangements proliferated to a possibly unnerving point. As a 2007 article in the *New York Times* put it: “Judges all over the country have gotten into the business of doling out leftover class action settlement money, sometimes to organizations only tangentially related to the subject of the lawsuit. Hospitals are popular, as are law schools and legal aid societies.”<sup>112</sup> Sometimes charities even lobbied judges to obtain favorable treatment.<sup>113</sup> Uneasiness with these practices understandably rose.

Two very different conceptions of the *cy pres* phenomenon can be imagined.

*Maximalist use of cy pres:* In a case like *Daar*, *cy pres* seems to approach a perfect solution. On the one hand, although it is not guaranteed that the beneficiaries of the lowered taxi meter rates are exactly the same people who paid the higher rates during the earlier period, it is likely that many of them are. More generally, the benefits are conferred on users of taxis in Los Angeles, which corresponds pretty closely to the class definition.

Beyond that, and in a sense more significantly from the perspective of the adherent of the maximalist view, this method denies the wrongdoer the spoils of the wrongdoing. As Professor Tidmarsh put it recently: “I take as a given the basic argument for *cy pres* relief: courts should attempt to achieve the greatest feasible level of deterrence.”<sup>114</sup> That objective, of course, does not depend on delivering the money to the victims, much as that result may be applauded. Realism shows that (as in *Daar*) it may be very difficult or

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110. See 4 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* 30 n.13 (4th ed. 2002) (describing settlement). It is important to note that in federal court *cy pres* provisions are limited to settlement situations. The California court could authorize this sort of substantive remedy as part of its class action process, but trying to do the same thing by rule in the federal court system would raise serious questions about the rulemaking power.

111. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017).

112. Adam Liptak, *Doling Out Other People’s Money*, *N.Y. TIMES*, Nov. 26, 2007, at A14.

113. See *id.*

114. Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 *GEO. WASH. L. REV.* 767, 773 (2014).

impossible to identify all the victims. Surely that circumstance should not enable the wrongdoer to retain the spoils.

The argument can be carried further. If the cost or difficulty of identifying the victims makes that prospect uninviting, one may identify organizations that serve the public interest that are in dire need of funding. *Cy pres* funding could be an important source of that funding. In California, there is even a statute that directs that the court order class action funds left unclaimed to be paid to nonprofit organizations that benefit the class or promote the law consistent with the objectives of the claim asserted in the case, or alternatively to “child advocacy programs; or nonprofit organizations providing civil legal services to the indigent.”<sup>115</sup> At least in California, then, state court judges are supposed to deploy unclaimed class action funds to “Good Works” of the sort blessed by the legislature. The Advisory Committee has been urged to foster use of *cy pres* to achieve similar ends, at least in the settlement setting.<sup>116</sup>

Putting aside issues of self-dealing (“Let’s direct the money to the judge’s favorite charity”), this activity might be unnerving to

115. CAL. CIV. PROC. CODE § 384(b)(3)(C) (West, Westlaw through Ch. 2 of 2018 Reg. Sess.).

116. See, e.g., Letter from Christine Pedigo Bartholomew, Assoc. Professor of Law, Univ. at Buffalo Law Sch., to Rebecca A. Womeldorf, Rules Comm. Support Office (Apr. 7, 2015), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0017> [<https://perma.cc/K9NA-52W0>] (follow attachment) (submitting a draft of her article *Saving Charitable Settlements*, 83 *Fordham L. Rev.* 3241 (2015), which asserts that “[c]haritable settlement challengers raise basic questions about whether the purpose of a damages class action is compensation or social justice,” *id.* at 3245, and that “[t]he better view is that compensation is just a by-product of a class action’s regulatory function,” *id.* at 3258); Letter from Jocelyn D. Larkin, Exec. Dir., Impact Fund, to Comm. on Rules of Practice & Procedure 4 (Feb. 27, 2017), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0063> [<https://perma.cc/7LNL-GBZZ>] (follow attachment) (noting that “*cy pres* funds are providing, in many cases, a vital source of funding to legal services programs across the country”); Letter from Sheila O’Sullivan, Exec. Dir., & Noah C. Samuels, Deputy Dir., NW Consumer Law Ctr., to the Advisory Comm. on Rules of Civil Procedure 2 (May 15, 2015), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0021> [<https://perma.cc/6E54-JD4Y>] (follow attachment) (asserting that “[c]y pres awards are a crucial source of funding for organizations like the Northwest Consumer Law Center . . . , which strengthens our economy by empowering and protecting the consumers who contribute to it every day”); Letter from Nat’l Legal Aid & Def. Ass’n et al., to Comm. on Rules of Practice Procedure 4 (Sept. 8, 2015), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0026> [<https://perma.cc/87L8-4FYX>] (follow attachment) (referring to *cy pres* grants as “a critical funding source for legal services organizations and foundations”); Letter from Diane L. Webb, Chief Program Officer & Gen. Counsel, Legal Aid at Work, to Comm. on Rules of Practice and Procedure 3 (Feb. 15, 2017) <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0086> [<https://perma.cc/86PT-ZQDW>] (follow attachment) (asserting that “*cy pres* is essential to our organization’s mission and its continued sustainability”).

many judges. One might almost regard it as a form of taxation by courts that intrudes on the legislature's authority to make appropriation choices.<sup>117</sup> Concerns have arisen about federal agencies or the executive using funds for purposes not authorized by Congress.<sup>118</sup> Judicial "funding" may seem even more dubious. But were one to embrace fully the deterrence rationale for class actions and disregard the compensation goal, this maximalist attitude could support regular use of settlement funds properly taken from wrongdoers to do Good Works.

*Minimalist use of cy pres:* As one would expect, this approach is very different from the maximalist use. The starting point is that it is very rare (or perhaps unknown) that any class action claims process achieves 100% payout. The Advisory Committee was repeatedly told that during the public comment period.<sup>119</sup> There's always somebody who doesn't cash the check.<sup>120</sup> In view of that recurrent reality, disregarding the problem of a residue after the claims process may be creating more problems.

The American Law Institute Aggregate Litigation Principles grappled with these issues and concluded that settlement funds "are presumptively the property of the class members."<sup>121</sup> Of course, that view need not be absolute; the possibility that the undistributed residue would revert to the defendant points to a different view.<sup>122</sup> From its starting point, the ALI reasoned that ordinarily the remaining funds should be paid to class members as additional

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117. For an example of such an argument, see Judge Brown's dissenting opinion in *Keepseagle v. Perdue*, 856 F.3d 1039, 1058–79 (D.C. Cir. 2017). The case involved disposition of the \$380 million residue of funds allocated by Congress to settle a class action. *Id.* at 1058. Judge Brown argued that the distribution of this money violated the Constitution's Appropriations Clause, asserting that "this case exposes a peril to the public fisc with which the framers never reckoned: *cy pres*." *Id.* at 1059.

118. See, e.g., Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1686–1701 (2017) (discussing efforts by the executive to underwrite large-scale economic entitlements without clear statutory authority).

119. See Summary of Comments and Testimony, *supra* note 100, at 134–44 (summarizing testimony and comments received).

120. See, e.g., Michael R. Pennington, Transcript of Proceedings, Advisory Committee Meeting on the Rules of Civil Procedure 8 (Feb. 2017), [http://www.uscourts.gov/sites/default/files/transcript\\_of\\_2-16-17\\_hearing\\_0.pdf](http://www.uscourts.gov/sites/default/files/transcript_of_2-16-17_hearing_0.pdf) [<https://perma.cc/C337-Q8RF>] (asserting that claims rates will always be lower than 100%).

121. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. b (AM. LAW INST. 2010).

122. The ALI view rejects reversion because it "would undermine the deterrence function of class actions." *Id.*

compensation unless that is infeasible.<sup>123</sup> Thus, cy pres could be employed only when—either because of the cost of distribution or because class members cannot be identified—additional payments to class members are not possible. In those cases, payment should be to “a recipient whose interests reasonably approximate those being pursued by the class.”<sup>124</sup> Obviously, the ALI approach hews rather closely to the compensation orientation and is “minimalist” because it permits payment to others only when there is no feasible alternative.

Eventually, the Advisory Committee decided not to address cy pres by rule amendment.

### B. Ascertainability

For decades, it has been recognized that a class must be defined. It does not suffice for a court to certify a class of “all those similarly situated” to the plaintiff. One must explain what similarity suffices. Indeed, since 2003 Rule 23 itself has said that the court’s certification order “must define the class.”<sup>125</sup> That can be important when it comes time to send notice of certification to the class.<sup>126</sup> It also is important when there is a settlement<sup>127</sup> or the court is considering class counsel’s request for attorney fees.<sup>128</sup> The definition is also central to the preclusive effect of the class action judgment.<sup>129</sup>

One simple way might be to define the class as “all those injured by defendant’s actions,” or something of the sort. But that creates the “fail-safe” problem, because the existence of the class depends on the plaintiff winning.<sup>130</sup> In another sort of case, one might define the class

123. One could contend that these class members would be unjustly enriched. But as the ALI recognized, “few settlements award 100 percent of a class member’s losses, and thus it is unlikely in most cases that further distributions to class members would result in more than 100 percent recovery for those class members.” *Id.*

124. *Id.* § 3.07(c).

125. *See* FED. R. CIV. P. 23(c)(1)(B).

126. *See id.* 23(c)(2)(B) (directing “individual” notice in (b)(3) class actions).

127. *See id.* 23(e)(1) (saying that “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal [for settlement]”).

128. *See id.* 23(h)(1) (directing that notice of a motion for a fee award “must be . . . directed to class members in a reasonable manner”).

129. Rule 23(c)(3) says that for (b)(1) and (b)(2) classes the judgment must “include and describe those whom the court finds to be class members.” For (b)(3) classes, the judgment must “include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.”

130. As the Sixth Circuit put it:

The class the district court initially certified was flawed in that it only included those who are “entitled to relief.” This is an improper fail-safe class that shields the putative class members from receiving an adverse judgment. Either the class

as including all those wishing to engage in certain types of activity. Along these lines, the First Circuit found it sufficient to describe a class in a suit about police surveillance of a class consisting of all persons “who wish to . . . engage, in the City of Fall River, in peaceful political discussion . . . without surveillance.”<sup>131</sup> But the definition of a class dependent on the subjective state of mind of class members early was found too problematical.<sup>132</sup> More objective criteria are needed.

Objective criteria may sometimes be hard to apply as well, however. Recall *Daar*, the 1967 California Yellow Cab case.<sup>133</sup> The named plaintiff alleged that Yellow Cab had set its cab meters in Los Angeles at a rate higher than authorized and thus overcharged passengers over an extended period. In reviewing the trial court’s refusal to recognize a class action, the Supreme Court of California said that its first job was to determine “whether [the complaint] sets forth facts sufficient to show the requisite ascertainable class.”<sup>134</sup> The problem was that the plaintiff could not point to a method of determining who had taken Yellow Cab cabs during the pertinent period. The court found this difficulty unimportant:

Defendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit. . . . The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the class. Presumably an accounting in the suit at bench will determine the total amount of the alleged overcharges; any judgment will be binding on all the users of taxicabs within the prior four years. However, no one may recover his separate damages until he comes forward, identifies himself and proves the amount thereof.<sup>135</sup>

Lately, that “ascertainability” problem has assumed considerable importance in consumer deception suits. The Third Circuit has

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members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment.

Randleman v. Fid. Nat’l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011).

131. *Yaffe v. Powers*, 454 F.2d 1362, 1364 (1st Cir. 1972) (omission in original).

132. *See, e.g., Simer v. Rios*, 661 F.3d 655, 669 (7th Cir. 1981) (refusing to certify a class of all those “chilled” from applying for governmental aid by an improper requirement for applying).

133. *See supra* notes 103–10 and accompanying text (discussing *Daar v. Yellow Cab Co.*).

134. *Daar v. Yellow Cab Co.*, 433 P.2d 732, 739 (Cal. 1967)

135. *Id.* at 740.

insisted in such a case that, in order to obtain class certification, the plaintiff specify an “administratively feasible” method for identifying actual consumers who bought the product in question.<sup>136</sup> A California district judge has reacted that this decision “eviscerates low purchase price consumer class actions in the Third Circuit.”<sup>137</sup> The Seventh Circuit has rejected the “heightened” ascertainability requirement,<sup>138</sup> and other courts seem to have sided more often with the Seventh Circuit.<sup>139</sup>

It is difficult to detach this debate from the underlying uneasiness about the real purposes of the class action device. If it is entirely to deter, one could probably design reasonably accurate measures of “unjust” profit for the producer of mislabeled consumer products. But if the main goal is to compensate those actually misled, that solution is incomplete. And some recommended versions of an ascertainability “fix” surely seemed to be overbroad. At least one proposal was to add an ascertainability requirement to Rule 23(a), which applies to all class actions, including injunctive relief class actions under Rule 23(b)(2).<sup>140</sup> As the Third Circuit has recognized, its ascertainability jurisprudence does not apply to such cases.<sup>141</sup>

After considerable discussion, the Advisory Committee decided not to attempt to resolve the ascertainability debate by rule amendment. During the public comment process, some urged that it do so while others praised the Committee for desisting.<sup>142</sup> The Committee has not since taken up the issue.

### C. “No Injury” Classes

The concept of legally compensable injury is surely a challenging one. The gradual recognition of tort claims for infliction of emotional

136. *Carrera v. Bayer Corp.*, 727 F.3d 300, 304 (3d Cir. 2013) (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012)).

137. *McCrary v. Elations Co.*, No. EDCV 13–00242, 2014 WL 1779243, at \*8 (C.D. Cal., Jan. 13, 2014).

138. *Mullens v. Direct Dig., LLC*, 795 F.3d 654, 657 (7th Cir. 2015).

139. *See, e.g., In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017).

140. *See, e.g.,* Letter from Lawyers for Civil Justice, to Advisory Comm. on Civil Rules 6 (Oct. 3, 2016), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0039> [<https://perma.cc/4XZW-Q7EC>] (follow attachment) (recommending the addition of a new Fed. R. Civ. P. 23(a)(5): “The members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden”).

141. *See Shelton v. Bledsoe*, 775 F.3d 554, 561 (3d Cir. 2015) (noting that ascertainability is not required for certification of a class seeking only injunctive relief).

142. *See* Summary of Comments and Testimony, *supra* note 100, at 182–84.

distress is one illustration. On the other hand, certain kinds of harms seem obvious candidates for legal protection. For example, racial discrimination is almost surely thought to inflict compensable harm whether or not it produces physical or economic harm.

But there may be claims that seem far from that model, particularly in regard to some statutory claims. Consider the Telephone Consumer Protection Act, 1991 legislation amended by the Junk Fax Prevention Act in 2005.<sup>143</sup> Although it would seem that the day of junk faxes has passed—who really uses the fax machine anymore?—junk fax lawsuits have multiplied. According to the *Wall Street Journal*, only forty-four such suits were filed in 2009, but that number rose to 1,136 cases in 2012 and 4,860 in 2016.<sup>144</sup> “The dollar amounts awarded from the cases can be large, particularly in the small percentage of cases certified as class actions.”<sup>145</sup> As Judge Easterbrook recently noted,<sup>146</sup> it is surprising how many junk fax class actions there are.

There may be a viable question whether the harm of receiving a junk fax is sufficient to support a suit. There may be some modest expense, but it is difficult to regard as comparable to suffering racial discrimination. The plaintiff quoted in the *Wall Street Journal* story explained that “[i]t’s super annoying.”<sup>147</sup> In a 2016 case defense-side lawyers hoped would put an end to such class actions, the Supreme Court held that a statutory claim must be based on a “concrete” injury, but its decision did not entirely resolve the matter.<sup>148</sup>

Meanwhile, the Advisory Committee was urged to revise Rule 23 to put an end to the “no injury” class action.<sup>149</sup> The submission directly countered the deterrence argument for class actions on behalf of low value claims: “[P]rivate enforcement of regulation tends to overdeter legitimate behavior and can hamstring governmental attempts to regulate public risks. Unchecked private enforcement can also disrupt the balance that regulatory agencies strive to achieve

143. See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (codified as amended at 47 U.S.C. § 227 (2016)).

144. Sara Randazzo, *Taking Unwanted Faxes to Court*, WALL ST. J., Mar. 25, 2017, at B4.

145. *Id.*

146. *Chapman v. First Index, Inc.*, 796 F.3d 783, 784 (7th Cir. 2015).

147. Randazzo, *supra* note 144, at B4.

148. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

149. See Letter from Lawyers from Civil Justice, to Advisory Comm. on Civil Rules & Rule 23 Subcomm. 5 (Mar. 14, 2016), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0033> [<https://perma.cc/GNT5-C96C>] (follow attachment).

through their own regulation and enforcement.”<sup>150</sup> In support, the submission relied on a study by Professor Shepherd to show that “no injury” class actions during the period from 2005 to 2015 had resulted in defendant payouts of some \$4 billion, but that only about nine percent of that amount actually found its way into the pockets of class members.<sup>151</sup>

The Shepherd study found that about 20% of the identified class actions could be classified as “no injury” because the researchers concluded that they exhibited at least one of the following four conditions: (1) the plaintiffs suffered no actual or imminent concrete harm giving rise to an injury-in-fact; (2) the only harm was a technical statutory violation; (3) any economic loss was negligible or infinitesimal; or (4) the sought recovery was typically unrelated to compensating plaintiffs for economic or other harm.<sup>152</sup> One might speculate that the level of claiming by class members in such suits might be low; in any event, the report concluded that it was in fact usually low.

Plaintiff lawyers, meanwhile, reportedly received over one third of the settlement amounts in these “no injury” cases.<sup>153</sup> From the standpoint of compensation, then, these class actions do not perform. “Moreover, although plaintiff compensation is irrelevant to whether defendants are deterred from future harmful behavior, achieving deterrence through private class actions is exceptionally imprecise and inefficient.”<sup>154</sup> Actions by public enforcement authorities are preferable, Professor Shepherd explained, particularly because guaranteed awards and attorney’s fee recoveries in private actions encourage “frivolous suits in order to extort settlements.”<sup>155</sup>

There are reasons to suspect that private profit-seeking enforcement can produce anomalous incentives and outcomes. Perhaps some spam fax suits fit that model. And taking a firm stand on limiting class actions to compensatory goals might support changing Rule 23 to prevent overenforcement. But picking and

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150. *Id.* at 3 (footnote omitted).

151. JOANNA SHEPHERD, AN EMPIRICAL SURVEY OF NO-INJURY CLASS ACTIONS 1–2 (Emory Univ. Sch. of Law, Legal Studies Research Paper Series No. 16-402, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2726905](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905) [http://perma.cc/8MLQ-Q3EE].

152. *Id.* at 1.

153. “[A]lthough 60 percent of the total award may be available to class members, in reality, they typically receive less than 9 percent of the total. In comparison, class counsel receives an average of 37.9 percent of available funds, over 4 times the funds distributed to the class.” *Id.* at 2.

154. *Id.* at 4.

155. *Id.*

choosing between the “valid” and “frivolous” statutory claims would be a curious feature of a procedure rule. And the Advisory Committee did not take up this suggestion.

#### IV. THE ACTUAL 2016 PACKAGE

As Professor Fitzpatrick has observed, the Advisory Committee’s actual amendment package is “pretty modest stuff.”<sup>156</sup> The Committee proposed amendments primarily designed to (1) require “frontloading” of information regarding proposed class action settlements;<sup>157</sup> (2) articulate a relatively short list of “core” considerations bearing on whether a proposed settlement should be approved as “fair, adequate, and reasonable”;<sup>158</sup> and (3) curb or defeat the efforts of “bad faith objectors” to exploit the settlement process for personal gain.<sup>159</sup>

At least some were disappointed at the modesty of the package.<sup>160</sup> In addition, even though the “modest” package did not include any of the issues central to the tension between compensation and deterrence, the public comment period provided examples of people reading positions on these issues into the package.

*Cy pres*: The Committee Note regarding the “frontloading” provision calls for the parties to present details bearing on the proposed settlement up front. Among other things, it observes that “because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds.”<sup>161</sup> As noted above, there are different visions of *cy pres*. At a pragmatic level, one could regard the invitation to address the question of disposition of a residue of settlement funds as tending

156. Perry Cooper, *Solutions Afoot for Curbing Class Action Gadflies*, 17 CLASS ACTION LITIG. REP. (BNA) 699, 700 (quoting Brian Fitzpatrick).

157. See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 212–13 (Aug. 2016) [hereinafter Preliminary Draft], <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0002> [<https://perma.cc/8GAD-BKUE>] (follow link to view document) (proposed amendment to Rule 23(e)(1)).

158. See *id.* at 213–14.

159. See *id.* at 215–17. There are other features to this package, including extending the time for filing a request for appellate review under Rule 23(f) to 45 days in cases in which the federal government is a party, *id.* at 217, and recognizing the wider variety of methods of giving notice to class members available in the twenty-first century, a subject examined in Section V.C. below, see *id.* at 211–12.

160. See Summary of Comments and Testimony, *supra* note 100, at 182–91 (recounting additional issues brought up by commenters).

161. Preliminary Draft, *supra* note 157, at 222–23. This comment was followed by a further observation: “Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation.” *Id.* at 223.

toward the “minimalist” view.<sup>162</sup> Failure to address this question might often burden the case at a later stage. Moreover, addressing it in a way that is accessible to class members could support arguments that they had in a sense assented to this disposition of unclaimed funds. If one regards the funds as the property of the class members, that could be important.

“*Claims rate*”: As the study by Professor Shepherd<sup>163</sup> suggests, much attention may focus on the extent to which class members actually claim and collect settlement funds. The proposed amendment to the settlement approval standards included consideration of “the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required.”<sup>164</sup> The proposal also invited attention to “the terms of any proposed award of attorney’s fees, including timing of payment.”<sup>165</sup>

The Committee Note followed up on those rule provisions. It observed that “[i]f the notice to the class calls for submission of claims before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important to provide that the parties will report back to the court on actual claims experience.”<sup>166</sup> It also observed that “[p]rovisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.”<sup>167</sup>

The idea of deferring payment of some of the attorney’s fee award corresponds to some suggested ways of dealing with the potentially corrupting effect of *cy pres* arrangements. If the attorney’s fee is set as a percentage of the “fund” without regard to whether any of the class members actually get the money, that could rob class counsel of the incentive to make efforts to get money to the class members. Professor Wasserman has suggested that reducing class counsel’s attorney’s fees in light of the actual payout to class members would be a desirable idea.<sup>168</sup> To do so would call into question situations where the attorney’s fee award to class counsel exceeded the payout to class members. But to do so rigidly might erode the

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162. See *supra* text accompanying notes 119–24.

163. See *supra* text accompanying notes 151–55.

164. Preliminary Draft, *supra* note 157, at 214 (proposed Rule 23(e)(2)(C)(ii)).

165. *Id.* (proposed Rule 23(e)(2)(C)(iii)).

166. *Id.* at 222.

167. *Id.* at 227.

168. See Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 136–40 (2014).

value of class actions that produce creative compensation schemes like the reduced fare fix in *Daar*.<sup>169</sup>

Despite the caution in the proposals, some who commented reported that they feared that these amendments would inadvertently adopt the compensatory rationale.<sup>170</sup>

“*No injury*” class: Others took the reference to “claims rate” as leading to the conclusion that the rule should make clear that the court had to define the class in a way that ensured that every member had Article III standing.<sup>171</sup> But that does not appear to be a

169. See *supra* text accompanying notes 103–110.

170. See, e.g., Letter from Julie Braman Kane, President, Am. Ass’n for Justice, to Rebecca A Womeldorf, Sec’y, Comm. on Rules of Practice and Procedure 4–7 (Feb. 14, 2017), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0066> [<https://perma.cc/B3NL-YQ75>] (follow attachment) (warning that the reference to “claims rate” and the suggestion of deferring fee awards could be misconstrued to have broad application); Letter from DRI, to Advisory Comm. on Civil Rules 5–6 (Feb. 7, 2017), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0072> [<https://perma.cc/NSM4-BVFL>] (follow attachment) (stating that claims rate is not an appropriate consideration when considering the fairness of a settlement because what matters is the relief offered, not how many class members claim that relief); Letter from Scott L. Nelson & Allison M. Zieve, Pub. Citizen Litig. Grp., to Advisory Comm. on Rules of Civil Procedure 3 (Feb. 15, 2017), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0081> [<https://perma.cc/X9YS-FH9Y>] (follow attachment) (urging that the criterion about distribution of relief should be clarified to make clear that no absolute rule requiring complete distribution is mandated); Thomas Sobol, Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure 15–16 (Jan. 4, 2017), [http://www.uscourts.gov/sites/default/files/2017-01-04-transcript\\_of\\_civil\\_rules\\_hearing\\_in\\_phoenix\\_0.pdf](http://www.uscourts.gov/sites/default/files/2017-01-04-transcript_of_civil_rules_hearing_in_phoenix_0.pdf) [<https://perma.cc/ZA2A-AHYB>] (saying that there is a risk that the amendment referring to claims rate would be interpreted to say that, for all cases, there is an absolute standard of distribution effectiveness, and that the court should reject any proposal that does not satisfy that absolute standard); Letter from Hassan A. Zavareei, Tycko & Zavareei LLP, & Gary E. Mason, Whitfield Bryson & Mason LLP, to Comm. on Rules of Practice and Procedure 1–2 (Feb. 13, 2017), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0065> [<https://perma.cc/X2HG-RMH7>] (follow attachment) (urging that the amendment and Note improperly overemphasize claims rates and are not consistent with current law because they make claims rate the most important factor in determining fees).

171. See, e.g., Memorandum from Yvonne McKinsey & Anthony Vale, Pepper Hamilton LLP, to Comm. on Rules of Practice and Procedure 2–4 (Feb. 15, 2017), <https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0069> [<https://perma.cc/8QSA-GHQ9>] (follow attachment). This comment agrees that “the relief that the settlement is expected to provide to class members is a central concern.” *Id.* at 2. But it asserts that the rule does not go far enough and fails to address directly a concern that has come to the fore in consumer class actions, which are brought based on technical violations of a law but without any real injury. *Id.* at 2–4. The commenters argue the rule should be clarified to make it clear that the class definition limits membership to those with Article III standing. *Id.* at 3–4. They state that one way to do that would be to amend Rule 23(a)(3) on typicality to insist that all members of the class have an injury similar to that alleged by the proposed class representative. *Id.* at 4.

constitutional requirement,<sup>172</sup> and the amendment package does not require it by rule either.

## V. OTHER POTENTIAL SOURCES OF REVOLUTIONARY CHANGE

The sensitivity of observers about dramatic changes resulting from the current amendment package suggests considering the potential of other actors to effect revolutionary change.

### A. *The Supreme Court*

As Professors Burbank and Farhang show in their recent book, the Supreme Court has recently curtailed private enforcement in federal court.<sup>173</sup> Whether this is a revolutionary development could be debated, but it is clear that the quantity of its class action decisions has recently been considerable. By way of contrast: “Between 1980 and 1997, the Supreme Court issued only two decisions with lasting importance for class action doctrine.”<sup>174</sup> But in the last decade the Court has issued multiple decisions, some of which have had important implications.<sup>175</sup> To some extent, it may be that the practicing bar’s treatment of these decisions partakes of what I have called “*Comcast Bombast*.”<sup>176</sup> But surely some of these decisions have had a major impact on class action practice.<sup>177</sup>

In a way, one could find in the Court’s decisions some features that resemble features of the Advisory Committee’s amendment

172. See *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015) (holding that there is no constitutional requirement that all class members satisfy Article III so long as at least one class representative does satisfy it).

173. See STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* 130–81 (2017) (discussing procedural “retrenchment” by Supreme Court decision).

174. D. Marcus, *supra* note 5, at 644.

175. For discussion, see Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 745–823 (2013).

176. The reference is to *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). See also Marcus, *supra* note 16, at 512–16 (describing seeming overstatements about the significance of some Supreme Court decisions).

177. Primary among those decisions are rulings that enable businesses to insert arbitration clauses into their contracts with customers and forbid class action litigation as well. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013) (enforcing class action waiver in the face of arguments that only a class action would allow any litigation due to the expense of proving the statutory claim); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (upholding applicability of class action waiver in arbitration provision in contract for cell phone service); cf. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013) (holding that an arbitrator’s decision to allow class arbitration cannot be overturned if it was based on the arbitrator’s interpretation of the parties contract).

package. The package includes a “frontloading” provision with regard to judicial review of proposed settlements,<sup>178</sup> and Professor Freer has said that “there is a clear trend toward ‘front-loading’ class litigation” in the Court’s decisions.<sup>179</sup> But it can hardly be said that the rulemaking process has responded strongly to the Court’s decisions, unless one counts its decision not to proceed with a possible rule provision on settlement classes after the Court’s decision in *Amchem Products, Inc. v. Windsor*.<sup>180</sup>

Characterizing the Court’s class action jurisprudence can be a bit challenging. Professor Mullenix, at least, asserted that during the thirty years Justice Scalia (not a great fan of class actions) served on the Court, “well more than half of [the Court’s class action] decisions are fairly characterized as favoring plaintiffs’ interests in class litigation. If anything, the Court has been more pro-plaintiff in its class action jurisprudence than pro-business.”<sup>181</sup>

Dire warnings, however, often attend the Court’s consideration of class action issues. The Court’s 2015 term, for example, was characterized as presenting “existential threats to the class action device.”<sup>182</sup> A year later, however, Professor Issacharoff characterized the 2015 term as “the term that wasn’t.”<sup>183</sup> The same lawyer who had a year before foreseen “existential threat[s]” to the class action concluded after the term was finished that “the era where the Supreme Court is interested in radically curbing the class action device is over.”<sup>184</sup> Similarly, Dean Chemerinsky said of that term that “the biggest news for class actions was what didn’t happen.”<sup>185</sup>

178. See *supra* text accompanying note 157.

179. Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 723 (2015).

180. 521 U.S. 591 (1997). For discussion of the 1996–1998 amendment episode with regard to proposed Rule 23(b)(4) on “settlement class certification” see *supra* text accompanying notes 79–90.

181. Linda Mullenix, *False Narratives: Justice Scalia’s Impact on Class Action Litigation*, 17 CLASS ACTION LITIG. REP. (BNA) 568, 568 (2016).

182. Perry Cooper & Kimberly Robinson, *Class Action War Heads to SCOTUS*, 16 CLASS ACTION LITIG. REP. (BNA) 1041, 1041 (2015) (quoting Deepak Gupta).

183. Perry Cooper, *Class Actions at SCOTUS: The Term that Wasn’t*, 17 CLASS ACTION LITIG. REP. (BNA) 751, 751 (2016) (quoting Samuel Issacharoff).

184. *Id.* (quoting Deepak Gupta).

185. Erwin Chemerinsky, *A Class Action Shift*, TRIAL, Sept. 2016, at 54. He added: “The Court did not impose additional restrictions. More generally, Justice Antonin Scalia’s death likely means that there is no longer a majority on the Court to limit class actions.” *Id.*; see also Perry Cooper, *Supreme Court Scorecard: Not the Class Action Rout Defendants Had Hoped For?*, 17 CLASS ACTION LITIG. REP. (BNA) 560, 560–61 (2016) (presenting chart showing plaintiffs as “winners” in more cases than defendants).

*B. Action by Congress*

Congress can fuel class action filings by enacting penalty statutes with private enforcement provisions. Congress can also enact class action limitations. In 2005, it passed CAFA, which opened federal courts to a larger swath of state law class actions.<sup>186</sup> Specifics in the bill dealt with such particular matters as “coupon settlements.”<sup>187</sup> Much as the legislative debate was heated, CAFA was not a revolutionary bill, though it has some consequential provisions.

The current Congress, however, has taken up possible legislation that might have a significant impact on class actions—the Fairness in Class Action Litigation Act of 2017.<sup>188</sup> One could say that several provisions of the bill represent a strong endorsement of the “compensation” purpose for class actions, and a corresponding rejection of the “deterrence” justification for these lawsuits. That is not a criticism of the legislation but instead recognizes that Congress might grasp the nettle in a way that the Advisory Committee has not done.<sup>189</sup> The stated purpose of the legislation is to “diminish abuses in class action . . . that are undermining the integrity of the U.S. legal system.”<sup>190</sup>

Moreover, the pending legislation has several features that correspond with topics that have arisen during the Advisory Committee’s recent class action work. Thus, it contains a provision that seemingly addresses one aspect of the *cy pres* question, commanding that “[i]n no event shall the attorneys’ fee award exceed the total amount of money directly distributed to and received by all class members.”<sup>191</sup> The bill additionally contains a provision that seems directly addressed to the ascertainability question.<sup>192</sup> It also contains a requirement that seems addressed to the “no injury”

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186. For analysis, see Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1788–1808 (2008).

187. See 28 U.S.C. § 1712 (2012).

188. H.R. 985, 115th Cong. (2017) (as passed by House, Mar. 9, 2017).

189. See Part I.

190. H.R. 985 § 102.

191. *Id.* § 103 (proposing new 28 U.S.C. § 1718(b)(2)).

192. See *id.* (adding a new 28 U.S.C. § 1718(a), providing as follows: “A Federal court shall not issue an order granting certification of a class action seeking monetary relief unless the class is defined with reference to objective criteria and the party seeking to maintain such a class action affirmatively demonstrates that there is a reliable and administratively feasible mechanism (a) for the court to determine whether putative class members fall within the class definition and (b) for distributing directly to a substantial majority of class members any monetary relief secured for the class.”).

question.<sup>193</sup> Indeed, a somewhat similar proposal was made to the Advisory Committee.<sup>194</sup> Additional provisions of the bill require that any attorney's fees awarded to class counsel not be paid until distribution to the class of monetary recoveries.<sup>195</sup>

It is uncertain whether this proposed legislation will ultimately be adopted.<sup>196</sup> If it is enacted, there will likely be a need for the courts to interpret its requirements. But it is also likely that many would describe some features of it as revolutionary, not evolutionary.

### C. Technology

Tech gurus routinely tell everyone else that they are going to “disrupt” everything with their Digital Revolution. Lawyers are not immune. It seems that digital technology has had a greater effect on

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193. *See id.* (adding a new 28 U.S.C. § 1716(a) that would provide: “A Federal court shall not issue an order granting certification of a class action seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives.”). This provision seems out of step with the rulings of courts. *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 14 (1st Cir. 2015).

194. *See* Lawyers for Civil Justice, *supra* note 140, at 4 (proposing that Rule 23(a)(3) be amended as follows: “the claims, or defenses, and type and scope of injury of the representative parties are typical of the claims, or defenses, and type and scope of injury of the class”).

195. H.R. 985 § 103 (proposing new 28 U.S.C. § 1718(b)(1)). The bill also contains a provision dealing with issues classes, something the Advisory Committee considered but did not include in its amendment package. Thus, H.R. 985 would add a new 28 U.S.C. § 1720(a) providing:

A Federal court shall not issue an order granting certification of a class action with respect to particular issues pursuant to Rule 23(c)(4) of the Federal Rules of Civil Procedure unless the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites of Rule 23(a) and Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3).

*Id.*

196. Interestingly, a group of conservative Republican representatives called the House Liberty Caucus issued a statement on March 9, 2017, the date the House passed the bill, strongly opposing it, partly on the ground that class actions are preferable to direct government regulation:

Class action lawsuits are a market-based solution for addressing widespread breaches of contract, violations of property rights, and infringements of other legal rights. They are a preferable alternative to government regulation because they impose damages only on bad actors rather than imposing compliance costs on entire industries.

Press Release, House Liberty Caucus, House Liberty Caucus Statement on H.R. 985, Fairness in Class Action Litig. Act of 2017 (Mar. 9, 2017) <https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/58c3277d86e6c02103c56eec/1489184638338/3-9-17+HLC+statement+on+HR+985+-+FINAL.pdf> [<https://perma.cc/3FBX-8UFA>].

doctors than on lawyers,<sup>197</sup> and I have argued that the effect of communications breakthroughs on the legal profession has been more evolutionary than revolutionary.<sup>198</sup>

At the same time, it is hard to deny that technology has affected litigation in important ways. For one thing, it has made vastly more information potentially available through discovery, leading to amendments in 2006 to the rules.<sup>199</sup> Amidst these discovery challenges, there may be good news for class actions. As Elizabeth Cabraser has recently said, electronic communications provide the prospect of a “complete revolution in the relationships between members of the class, their counsel and the court.”<sup>200</sup> Although class counsel formerly would communicate with class members only once or twice over the life cycle of a class action, “[w]e are in a completely different situation today and that process has accelerated so quickly that many of us don’t fully even realize yet where we are.”<sup>201</sup> This is of particular relevance to the current amendment package, which focuses on management of proposed class action settlements. According to Professor Issacharoff: “By the time you get to the class settlement, the old image that we have that these are anonymous, non-participating individuals, gives way to a very active block of participation.”<sup>202</sup>

There is an interesting parallel in reactions to the current Rule 23 amendment package. One feature of the package is an effort to take account of this transformation of communications technology as it relates to class action notice. In 1974, the Supreme Court seemed to say that the rule required individual notice of class certification in a Rule 23(b)(3) class action to be by first class mail.<sup>203</sup> That was the ordinary way of communicating about a wide variety of topics forty

197. See Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263, 265–73 (2009) (contrasting effect of technology on medical practice and legal practice).

198. See Richard Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. L. REV. 1827, 1829 (2008). For a more recent report, see Steve Lohr, *I, Robot, Esq? Not Just Yet*, N.Y. TIMES, Mar. 20, 2017, at B1 (reporting that even recent artificial intelligence breakthroughs have not replaced the individual one-on-one tasks of many lawyers).

199. For discussion, see Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 7–19 (2004).

200. Perry Cooper, *Points for Participation: Class Members Increasingly Active*, 18 CLASS ACTION LITIG. REP. (BNA) 89, 89 (2017) (quoting Cabraser).

201. *Id.* (quoting Cabraser). The story notes that Cabraser reportedly makes a point of personally responding to every email from a class member in the VW case in which she is lead plaintiffs’ counsel. *Id.*

202. *Id.* (quoting Issacharoff).

203. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–75 (1974).

years ago. But that has changed. Consider, for example, a recent Ninth Circuit case:

Initial e-mail notice of the settlement was provided to some 35 million class members. Notice was mailed to more than 9 million class members whose email addresses were invalid such that the email notice “bounced back.” . . . . The notice encouraged class members to visit the class website for more details. In response to the notice, 1,183,444 claims were submitted.<sup>204</sup>

The Ninth Circuit case was not an anomaly; use of more “modern” methods of giving notice to class members has grown in recent years. So the current amendment package recognized this change in society by stating with regard to notice of certification in (b)(3) class actions that “[t]he notice may be by United States mail, electronic means, or other appropriate means.”<sup>205</sup> The accompanying Committee Note attempted to explore and evaluate the concerns that would bear on using one or another form of notice.<sup>206</sup>

Somewhat surprisingly, this proposal generated at least as much controversy as any other piece of the package. Several very prominent and well-respected notice professionals vehemently denounced the proposed change as fostering a “race to the bottom” in which inexperienced bottom feeder vendors would win out over reputable providers by offering to provide effective notice at rock-bottom rates.<sup>207</sup> Others commented that they supported the amendment because it recognized current realities.<sup>208</sup> Despite these adverse comments, the Rule 23 Subcommittee resolved after the public comment period to adhere to its proposal, though with a change to recognize that more than one method of giving notice might be suitable in a given case.<sup>209</sup>

It may be that electronic communications could affect class action practice more broadly, and even supplant it to some extent.

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204. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015).

205. Preliminary Draft, *supra* note 157, at 211–12.

206. *Id.* at 218–20.

207. See Summary of Comments and Testimony, *supra* note 100, at 134–44 (summarizing testimony and comments on this amendment proposal).

208. See *id.*; see also Alexander Aiken, Comment, *Class Action Notice in the Digital Age*, 165 U. PA. L. REV. 967, 971–72 (2017) (endorsing proposed amendment regarding manner of giving notice).

209. See Rule 23 Subcommittee Report, in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 100, at 103, 105 (reporting a proposal to change the amendment to say: “The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.”).

One alternative is something like the “mass action” that CAFA classified as a class action for purposes of its jurisdictional provisions.<sup>210</sup> Such collaborative litigation may be fostered by contemporary communication methods. Recall that European customers of VW reportedly have complained that American purchasers are getting a better deal through class action settlements.<sup>211</sup> As the *New York Times* has reported, “[l]awyers in Berlin, Paris and elsewhere in Europe are teaming up with new online services to recruit clients en masse to try to get around the usual restrictions on consumer lawsuits.”<sup>212</sup> This new form of litigation is possible because “the internet has made it possible to recruit huge numbers of consumers who have similar gripes.”<sup>213</sup> Professor Coffee has reported on somewhat similar high-tech efforts to recruit groups of plaintiffs to sue VW for securities fraud.<sup>214</sup>

#### CONCLUSION

In sum, revolutionary change to class action practice is not currently emerging from the rules process. Some have urged the Advisory Committee to move more aggressively, both to insist that the device be limited purely to compensatory purposes and to fortify the deterrence rationale. Instead, the current package does not include rule provisions directly addressing such issues as cy pres, ascertainability, and the “no injury” class action. It may be, as Professor Bone has recently written, that a complete resolution of those sorts of issues depends on developing “a normative theory of adjudicatory legitimacy.”<sup>215</sup> But just as the original framers of the modern class action chose to “muddle through without picking sides” in the debate on the “true” purpose of class actions,<sup>216</sup> the current rulemakers have not rushed to resolve those debates. Indeed, as things now stand, it seems that the entity most likely to take a firm position is Congress, which has pending legislation that seems

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210. See 28 U.S.C. § 1332(d)(11)(B)(i) (2012) (describing a “mass action” as any action “in which the monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact”). As a possible example, see *Burr & Forman v. Blair*, 470 F.3d 1019, 1023 (11th Cir. 2006) (suit on behalf of 3,000 plaintiffs for toxic contamination).

211. See *supra* text accompanying note 56.

212. Ewing, *supra* note 55, at B1.

213. *Id.*

214. See John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture and Incentives*, 165 U. PA. L. REV. 1895, 1908–11 (2017).

215. See Robert G. Bone, *Justifying Class Action Limits: Parsing the Debate Over Ascertainability and Cy Pres*, 65 KAN. L. REV. 913, 954 (2017).

216. See D. Marcus, *supra* note 5, at 597.

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forcefully to embrace the compensation rationale.<sup>217</sup> Besides that, the most likely source of revolutionary change for class action practice may not be legal change, but technological innovation.<sup>218</sup>

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217. *See supra* text accompanying notes 189–95.

218. *See supra* text accompanying notes 197–214.

