

**COMPETING IDEOLOGIES AT THE FORMATION OF
THE FEDERAL CLASS ACTION RULE: LEGAL PROCESS
VERSUS LEGAL LIBERALISM**

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“You can’t do people that way.”

– John P. Frank, quoting Justice Black’s possibly
Alabaman response to a plain injustice.¹

“As the attitude changes, decisions will change.”

– Albert Sacks, arguing against a restrictive class
action rule.²

ABSTRACT

In 1966, the Supreme Court promulgated a new procedural rule for class actions in federal court. Amended Rule 23 was a considerably different mechanism than its predecessor. It was more inviting of class action litigation but also incorporated new mechanisms for protecting class members. This was not an unreasonable trade-off, and one can imagine a group of rule-makers – elite academics, federal judges, prestigious attorneys – peaceably striving to write a rule that could balance individual class members’ interests with the interests of the class as a whole. But this is not what happened. The Rule 23 of today is an accord between two rival sects of mid-century legal thinking. The Legal Process tradition considered federal courts one of many institutions in society for mediating conflict, though the one uniquely capable of employing neutral reasoning to do so. Harvard

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1. *Bork Nomination Day 8, Part 3*, C-SPAN, at 2:16:44 (Sept. 23, 1987), <https://www.c-span.org/video/?10173-1/bork-nomination-day-8-part-3>.

2. *Transcript of Session on Class Actions 32* (Oct. 31–Nov. 2, 1963), microformed on CIS-7104-53 (Cong. Info. Serv.) [hereinafter Fall 1963 Transcript].

Law School professors Benjamin Kaplan and Albert Sacks argued that a flexible, robust class action rule was needed to solve the complex, large-scale problems American society was increasingly facing. Attorney John P. Frank, a litigator and civil libertarian, fought vigorously against anything but the narrowest rule. Legal liberalism, Frank's camp, tended to view federal courts in their capacity to enforce substantive principles, and Frank argued that the Constitution and American legal tradition forbade a rule that might deprive an individual of the opportunity to litigate her own interests. It was a duty of the rule-maker, for Frank, not to enact a rule that would violate what he identified as a principle of individualized adjudication. The balance the current rule strikes, including the opt-out mechanism, is a product of their compromise.

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I. BACKGROUND

A. *Historical Background*

In the 1934 Statutes at Large, couched between one law giving the Postmaster General authority to set limits on “the transmission in the mails of poisonous drugs and medicines” and another creating “a commission to be known as the ‘Federal Communications Commission,’” is the Rules Enabling Act.³ The Act delegated to the judiciary for the first time the power to create a single body of rules of procedure for all civil actions in federal district courts.⁴ This imposed a new responsibility on the judiciary. Federal courts until then had employed their own procedural rules for questions of equity but used local state procedure in cases involving questions of law.⁵ To carry out the new obligation, the Supreme Court created an “Advisory Committee” in 1935 to “prepare and submit to the Court a draft of a unified system of rules.”⁶ This Committee drafted the original Federal Rules of Civil Procedure (“FRCP” or “Federal Rules”).

An Advisory Committee existed in some form until 1955 or 1956, when the Court discharged it.⁷ In 1958, with some push

3. Act of June 19, 1934, Pub. L. No. 73-414, 48 Stat. 1063; Rules Enabling Act, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072) (2016)); Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

4. Rules Enabling Act, 48 Stat. 1064. The Rules Enabling Act imposed two important limitations. *See id.* The “rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant” and would be subject to modifications by Congress. *See id.* *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing a detailed history of the Rules Enabling Act).

5. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 926–43 (1987).

6. Order for Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774–75 (1935).

7. Order Discharging the Advisory Committee, 352 U.S. 803 (1956). *See generally* Report of

from Chief Justice Earl Warren, Congress assigned rulemaking to the Judicial Conference of the United States, a body of federal judges it created in 1922 to survey and assess the “condition of business in the courts” and to distribute judges according to the needs of the various dockets.⁸ The 1958 law ordered the Conference to continuously study federal court procedure for the purpose of keeping it up to date. The law’s guiding criteria were “simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay”⁹ To these ends, it directed the Judicial Conference to periodically submit recommendations for rule changes to the Supreme Court, which would reject, modify, or transmit unaltered those changes to Congress.¹⁰ The law effectively ratified the Court’s prior method of rulemaking, which relied on input from legal academics, private attorneys, and judges for the formulation of rules of procedure but kept final rulemaking authority in the hands of the appointed justices.¹¹

Questions of whom to entrust with rulemaking power and how to achieve simple, just, efficient procedure are difficult ones. But these issues did not interest Congress. The Federal

the Proceedings of the Annual Meeting of the Judicial Conference of the United States (Sept. 1955) (showing the disbanding of many Supreme Court appointed committees).

8. Act of July 11, 1958, Pub. L. No. 85-513, 62 Stat. 497. The original law was Act of Sept. 14, 1922, ch. 306, § 2, Pub. L. No. 67-298, 42 Stat. 837, 838 (codified at 28 U.S.C. § 331) (2016)); *see also* Act of July 5, 1937, Pub. L. No. 75-179, 50 Stat. 473 (providing for the representation of the United States Court of Appeal for the District of Columbia on the annual conference of senior circuit judges); Act of Aug. 28, 1956, Pub. L. No. 85-202, 71 Stat. 47 (allowing district judges to be members of the conference); PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 30-39 (1973).

9. 104 CONG. REC. 8002 (1958). Representative Kenneth Keating, a Republican from New York and Harvard Law School graduate, argued that the law would “reduce the danger that our judicial procedure might become unworkable or outmoded, alleviate the burden on the Supreme Court, and promote the fair and expeditious administration of justice.” *Id.*

10. *Id.*

11. *Id.* Keating noted early in his argument for the underlying bill that “[e]nactment of this measure will in no way remove the court’s rulemaking responsibility. It simply removes the burden of initial study and investigation.” *Id.* Justices Black and Douglas would later protest that requiring the Supreme Court to validate procedural rules could lead to the “embarrassment of having to sit in judgment on constitutionality of rules which we have approved” Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 861, 870 (1963); 109 CONG. REC. 1037 (1963).

Rules had not been changed in twelve years and the 1958 bill passed with no disagreement.¹² After World War II, the workload burdening courts had begun to increase. The volume of statutes regulating private activity ballooned¹³ and tort law in the states was expanding.¹⁴ States were enacting reforms to improve judicial administration.¹⁵ California established a central body to manage its court administration in 1961.¹⁶ A year later, New York reorganized its courts and overhauled its civil procedure law.¹⁷ In 1957, a group of federal judges released a report about “the serious threat to effective judicial administration created by the complex protracted cases arising particularly in the anti-trust field.”¹⁸ The judiciary responded in 1962 and established a committee to consider using pre-trial and discovery devices to manage “multiple litigation,” actions arising in different districts involving overlapping parties and issues.¹⁹ In 1968, this led to the creation of the Judicial Panel for Multidistrict Litigation—a panel of judges that consolidates complex, federal cases to resolve common pre-trial issues.²⁰

Three months after Congress enacted the 1958 law, the Judicial Conference created the Standing Committee on Rules of Practice and Procedure (“Standing Committee”) and five advi-

12. 109 CONG. REC. 1037; 104 CONG. REC. 12769 (1958); 104 CONG. REC. 12651 (1958) (H.R. 10154 was included under a category of bills considered by the Senate Judiciary Committee “to be noncontroversial or subject to only limited debate.”).

13. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 192–204 (2002).

14. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 131–35 (2001).

15. AMERICAN BAR ASSOCIATION, SECTION OF JUDICIAL ADMINISTRATION, *JUSTICE CALLING* 27–83 (1958) (describing conditions, issues and proposed changes for judicial administration of various states).

16. LARRY L. SIPES, *COMMITTED TO JUSTICE: THE RISE OF JUDICIAL ADMINISTRATION IN CALIFORNIA* (2002).

17. JUDICIAL CONFERENCE OF THE STATE OF N.Y., *EIGHTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK* 11 (Jan. 31, 1963).

18. Irving R. Kaufman, *Report on Study of the Protracted Case*, 21 F.R.D. 55, 55 (1957).

19. Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 623 (1964).

20. Act of Apr. 29, 1968, Pub. L. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (2016)). See generally John F. Nangle, *From the Horse’s Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 DEF. COUNS. J. 341 (1999) (explaining the Judicial Panel for Multidistrict Litigation’s duties and operations).

sory committees.²¹ The advisory committees were to submit recommended amendments to the Standing Committee, which would screen and then transmit those changes to the Supreme Court.²² In 1960, the Court announced committee memberships.²³ The Advisory Committee on Civil Rules (“Advisory Committee” or “Committee”), comprised eight lawyers, four professors, and three judges, though these ratios would change.²⁴ Former Secretary of State Dean Acheson was named chairman.²⁵ Benjamin Kaplan, who taught civil procedure at Harvard, was named reporter, which entailed drafting the rules in accordance with the Committee’s instruction.²⁶

The Committee began evaluating the rules informally in the summer of 1960, first considering amendments proposed by a 1955 committee.²⁷ An August memorandum from Acheson to the Committee members framed the job fairly meagerly, but at the committee’s first meeting, Chief Justice Warren spoke with more ambition.²⁸ He told the Committee, “We are falling behind, day by day, in most of the metropolitan centers in keeping up with our judicial functions and certainly one of the great factors in this field is having an adequate and efficient set of rules.”²⁹

The Committee heeded Warren’s tone. The Court was able to transmit to Congress amendments to five rules in 1961 and changes to twenty-four additional rules in the beginning of

21. ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-7 (Sept. 17-19, 1958). Advisory committees existed for civil, criminal, admiralty, and appellate rules, as well as general orders of bankruptcy. *Id.*

22. Press Release, U.S. Supreme Court 3 (Apr. 4, 1960).

23. *Id.*

24. *Id.*

25. *Id.*

26. COMM. ON RULES OF PRACTICE & PROCEDURE, MINUTES OF THE AUGUST 1960 MEETING OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 1 (Aug. 30, 1960).

27. ADVISORY COMM. ON CIVIL RULES, MINUTES OF THE DECEMBER 1960 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 7 (Dec. 5, 1960). For access to Advisory and Standing Committee reports and minutes, see *Records and Archives of the Rules Committees*, U.S. CTS., <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees> (last visited Feb. 14, 2018).

28. See ADVISORY COMM. ON CIVIL RULES, *supra* note 27, at 2-3.

29. *Id.* at 3-4.

1963.³⁰ By then the Committee had already held one of the three meetings in which the Class Action Rule was discussed and members were actively debating the form that amended Rule 23 should take.³¹

*B. Overview of the 1938 Rule*³²

Since 1938, when the Federal Rules of Civil Procedure were first promulgated, Rule 23 has dictated the route and requirements for bringing an action in federal court on behalf of or against a group of individuals, better known as a class. Under the framework of the original 1938 Rule 23, for a suit to go forward two prerequisites had to be met. First, the individuals constituting the class had to be so numerous that it would be impracticable for them to litigate individually.³³ Second, one or more of the members must have been capable of adequately representing the relevant interests of the class as a whole.³⁴ These two requirements, later labeled “numerosity” and “adequacy of representation,” would remain in the post-1966 rule.³⁵

If the two prerequisites were satisfied, an action could go forward only if it fell into one of three categories: true, hybrid, or spurious. The categories were defined formalistically, according to the “character of the right sought to be enforced for or against the class.”³⁶ If the right in question was “joint, or

30. The first changes were transmitted from a letter of transmittal at 368 U.S. 1009 (Apr. 17, 1961), and made effective at 107 CONG. REC. 6524 (1961). The second changes were transmitted from a letter of transmittal at 374 U.S. 861 (1963) and made effective at 109 CONG. REC. 4639 (1963).

31. ADVISORY COMM. ON CIVIL RULES, STATEMENT ON BEHALF OF THE ADVISORY COMMITTEE ON CIVIL RULES 1 (1962).

32. For descriptions and explanations of the original Rule 23, see David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 671-74 (2011); Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1937-42 (1998); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 213-66 (1967).

33. FED. R. CIV. P. 23(a) (1938).

34. *Id.*

35. FED. R. CIV. P. 23(a) (1966).

36. FED. R. CIV. P. 23(a) (1938).

common, or secondary," the class action was labeled "true."³⁷ If the rights were "several" and tied to some property, the class action would be "hybrid."³⁸ If the "several" rights merely involved some "common question of law or fact" and common relief was sought, the action would be "spurious."³⁹

The purposes of the original class action rule were narrow. It was not drafted as a general device for enabling the variety of mass litigation that became common in the last quarter of the twentieth century.⁴⁰ The "true" class action was designed to allow for adjudication on associations. The rule carved out an exception to the principle that a judgment could not be valid against an individual's interest unless that person was present in court during the proceedings.⁴¹ Where the association was large or the number of rights holders numerous, bringing them all before the court would be "impracticable." The true class action allowed a few members to stand in for the absent others.⁴² The rights listed, "joint, or common, or secondary," were intended to encompass the types of interests one could have in an association.⁴³ An action under this provision was "true" because, in the instances the rule described, a suit could *only* proceed as a class action.⁴⁴ In contrast, the rights at stake in the "hybrid" and "spurious" provisions could be severed, so those provisions worked differently.⁴⁵ A class suit would

37. *Id.* at 23(a)(1).

38. *Id.* at 23(a)(2).

39. *Id.* at 23(a)(3).

40. See John G. Harkins, Jr., *Federal Rule 23 – The Early Years*, 39 ARIZ. L. REV. 705, 710 (1997) ("In short, expediency more than efficiency served to justify the class device.").

41. See *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363 (1921); *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853); *Hazard et al.*, *supra* note 32, at 1940; *Marcus*, *supra* note 32, at 671-72; James Wm. Moore & Marcus Cohn, *Federal Class Actions – Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 559 (1938).

42. See *Hazard et al.*, *supra* note 32, at 1938.

43. *Id.* An example of a "joint" right would be a representative of an unincorporated association. An example of a "common" right would be a creditor, broadly construed. A "secondary" right would be the rights of a stockholder. James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 572-73 (1937).

44. 2 JAMES WM. MOORE & JOSEPH FRIEDMAN, *MOORE'S FEDERAL PRACTICE* 2236 (1938); *Hazard et al.*, *supra* note 32, at 1940.

45. See *Hazard et al.*, *supra* note 32, at 1938.

never be required to resolve the matter. Rather, the hybrid and spurious suits functioned to permit consolidation by *inviting* parties with severable rights to intervene in the lawsuit.⁴⁶ The spurious rule existed largely to exploit a jurisdictional loophole that allowed a party to intervene regardless of the amount of their claim or their citizenship, thereby offering “the possibility of cleaning up a litigious situation.”⁴⁷

The three-part division did more than merely group classes according to an abstract breakdown of rights into joint, common, secondary, or several.⁴⁸ James W. Moore, the rule’s principal drafter, intended that there be different consequences for federal jurisdictional requirements.⁴⁹ Moore also envisioned that the effect of a judgment on absent class members would depend on which provision a suit proceeded under.⁵⁰ These were not included in the text of the rule because the other rule-makers felt that controlling for those issues transgressed the proper limits of procedural law, but Moore included them in his treatise on civil procedure and they were nonetheless influential in practice.⁵¹ The scheme Moore developed worked as follows: judgment in a true class action would be binding on every class member, whether or not the individual had appeared in court, and the amount in controversy would equal the entire amount in dispute.⁵² A judgment following a hybrid

46. See Moore, *supra* note 43, at 572–75. The original federal rules were designed to be a simpler, more efficient alternative to the prior procedural systems in which a particular rule existed for the substantive claim being asserted. Often separate suits were required to resolve conflicts over a single package of facts (e.g., multiple claims in two-party litigation or three or more parties litigating the same issue). The FRCP accomplished simplification in part by embodying a relaxed attitude toward party joinder, permitting the consolidation of numerous parties in a single litigation. Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L. J. 1291, 1319–20 (1935); see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 954 (1987).

47. Moore, *supra* note 43, at 575.

48. Hazard et al., *supra* note 32, at 1938.

49. See MOORE & FRIEDMAN, *supra* note 44, at 2235–45.

50. *Id.* at 2235 (“The jurisdictional requisites and the effect of the judgment, though not stated by the rule, vary also with the type of class action.”).

51. *Id.* at 2283; Moore, *supra* note 43, at 571–72; see Hazard et al., *supra* note 32, at 1938.

52. MOORE & FRIEDMAN, *supra* note 44, at 2284–91; see *id.* at 2284 (stating that judgment in

suit would bind absent parties only with respect to claims affecting the contested property.⁵³ For a spurious suit, no absent parties would be bound, “only those actually before the court.”⁵⁴ Additionally, in spurious and hybrid suits, Moore would not permit the aggregation of class members’ claims to satisfy the requisite amount in controversy; however, once federal jurisdiction was established, later interveners would not have to meet the diversity or amount-in-controversy requirements.⁵⁵

The original FRCP class action rule derived largely from the small body of existing law of group litigation⁵⁶: two earlier rules of procedure for federal courts of equity (Rule 38 and Rule 48);⁵⁷ two commentaries on representative actions, one by Justice Joseph Story and one by Thomas Atkins Street;⁵⁸ and the few precedential federal cases that dealt with class action situations.⁵⁹ The 1938 rule was also developed to fit with contemporary state and federal laws that created a right applicable to a class of people, like statutes that gave shareholders, creditors, or members of an association a right to sue.⁶⁰

An additional source of the original Rule 23 was broadly theoretical. It made a smaller contribution than did the others,

true class action should be “conclusive as to class”); *id.* at 2295 (permitting aggregation of claims for true class actions because “the concept of totality is inherent in the claim or right involved”).

53. *Id.* at 2293 (“Insofar as the proceedings operate in rem they are conclusive; insofar as they are in personam they do not bind those not parties.”).

54. *Id.* at 2291–92.

55. *Id.* at 2297–99.

56. See Hazard et al., *supra* note 32 (covering the roots of the original Rule 23).

57. *Id.* at 1901; U.S. SUPREME COURT, THE NEW FEDERAL EQUITY RULES 97, 104–05 (1913); Rules of Practice for the Courts of Equity of the United States, Rule 38 (1882–1923) (repealed 1938).

58. See JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THERETO, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA 2 (John Gould ed., 9th ed. 1879); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS §§ 72–134 (2d ed. 1840); 1 THOMAS ATKINS STREET, FEDERAL EQUITY PRACTICE §§ 336–54, 539 (1909).

59. See Hazard et al., *supra* note 32, at 1939–42.

60. MOORE & FRIEDMAN, *supra* note 44, at 2221 n.1, 2238, 2240 (noting the use of the class action device in cases involving the Tennessee Valley Authority, the Bituminous Coal Code, and the Bankhead Act state shareholder laws, and state receivership laws).

but is noteworthy because it would be jettisoned from the 1966 amended rule. By grouping classes by the character of the right sought to be enforced the original Rule 23 assumed that the individuals who made up a class had pre-determined “jural relationships.”⁶¹ The term, used by Moore in his influential treatise, was borrowed from Wesley Hohfeld.⁶² Hohfeld theorized in 1913 that eight fundamental “jural relations” populated the universe of legal relationships.⁶³ These relations mapped onto an archetypal triangle, comprising two citizens and the state, which represented the structure of American law. In this schema, one citizen would have one of eight legal, or jural, relations toward the other and the other citizen would have a corresponding relation.⁶⁴ The disposition of the state toward the individuals, whether the state favored or disfavored the first individual’s action toward the second, determined the individuals’ jural relationship and served as a general legal guidepost for the two, regardless of whether they ever litigated their respective rights in a courtroom.⁶⁵

Within this framework, the old class action rule treated rights or relations among class members as a priori. Prior to the initiation of a typical, non-representative lawsuit, a party had a “right sought to be enforced for or against” them;⁶⁶ in a class action suit, the members of the class shared a pre-lawsuit position. The true-hybrid-spurious division was in part an attempt to identify proper groupings of individuals according to the variety of the preexisting relations they shared vis-à-vis some opposing party. Under the framework laid out in

61. *Id.* at 2235 (using this term in the treatise when introducing the three types of class actions under Rule 23).

62. ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 246 (1950) (“This tribute to the memory of Wesley Hohfeld would be more suitable in a law review article than in an enactment which is to guide the actions of practical men day in and day out.”).

63. Arthur L. Corbin, *Jural Relations and Their Classifications*, 30 *YALE L.J.* 226, 229 (1921); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 28–30 (1913).

64. Corbin, *supra* note 63, at 230.

65. *Id.* at 231 (“Each rule helps us to determine, with more or less certainty, what will be the future physical conduct of the state agents.”).

66. *FED. R. CIV. P.* 23(a) (1938).

Moore's treatise, that preexisting relation would determine how the rules of federal jurisdiction would operate and whether absentees could be bound by a judgment.⁶⁷

II. THE DEVELOPMENT OF A NEW RULE 23

A. *Committee Views on the Original Rule*

For the members of the Advisory Committee, Rule 23 was a risible procedural contraption. Legal realism had exploded the sort of formalism embodied in Hohfeld's divisions⁶⁸ and the rule-makers were unsympathetic and unconcerned with the "jural relations" rationale underlying the classification. More damning, the rule-makers uniformly believed that categorizing class actions by the nature of pre-established rights worked terribly. They felt the rule was difficult to understand and led to varying judicial interpretations and inconsistent applications. The Advisory Committee's first memo to committee members discussing class actions stated that "after useful experience with an ingenious attempt at strict definition, the time is ripe to move to the next stage of development."⁶⁹ The members agreed.⁷⁰ Charles Joiner, reporting on behalf of a conference of the Third Circuit judges, complained of the "glib category handles of the present 'true,' 'hybrid,' 'spurious' class actions that each lawyer and judge likes to mouth, but which mean different things to different persons."⁷¹ John P. Frank,

67. Morton Horwitz locates Hohfeld between the "pre-World War I Progressive legal culture" and the older, formalistic, analytical jurisprudence. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 152-53 (1992). Hohfeld, by Horwitz's account, "appears to be one of the pioneering attempts by a Progressive legal thinker to deconstruct the abstract character of orthodox conceptions of property." *Id.* at 153. Hohfeld's work was progressive because "it contributed to the subversion of absolute property rights and substituted a vision of property as a social creation." *Id.* at 154.

68. FRIEDMAN, *supra* note 13, at 493.

69. Preliminary Memorandum from the Advisory Comm. on Civil Rules, Tentative Proposal to Modify Provisions Governing Class Actions—Rule 23, EE-37 (May 28-30, 1962), *microformed on* CIS-6309-44 (Cong. Info. Serv.) [hereinafter Tentative Proposal (1962)].

70. *Id.*

71. Report from the Twenty-Seventh Annual Judicial Conference, Third Judicial Circuit of the U.S. to the Standing & Appellate Comms., Third Judicial Circuit of the U.S., Proposed Amendments to the Federal Rules of Civil Procedure—A Step Forward 6 (Sept. 28, 1964), *mi-*

who would be the central antagonist in the rule's development, concurred:

I am strongly and solidly for a total overhaul of the rule as to class actions.

. . . .
. . . I have been in perhaps 10 class actions in the past two years, and in none of them have judges or counsel—including me—had more than a vague idea of what we were doing. A rule or procedure which turns every case under it into a protracted debate over the meaning either of Professor Moore or Professor Wright and of their application to the case at bar is no good. The bar and the country deserve a more intelligible remedy than this—if we are capable of providing one, and I hope we are.⁷²

Charles Wright agreed, and Moore probably did as well.⁷³ In his 1963 hornbook on procedure, Wright faulted the rule for being abstruse.⁷⁴ In a letter to Frank and the Committee, Wright wrote that he had found twenty-four cases, “a lot” by his measure, in which judges had misapplied the rule.⁷⁵ Even evidence of the Rule's endorsement spoke against its design.

croformed on CIS-7004 (Jud. Conf. Records, Cong. Info. Serv.).

72. Letter from John P. Frank to Benjamin Kaplan, Professor, Harvard Law Sch. 7-8 (May 1962), *microformed on CIS-6310 (Jud. Conf. Records, Cong. Info. Serv.)* [hereinafter Letter from Frank to Kaplan].

73. James W. Moore, like Wright, was on the 1960s Advisory Committee, but was silent on the efficacy and theoretical soundness of the old rule. His agreement with Frank's statement may be presumed from his failure to support the rule he designed and his participation in the construction of an alternative. *See* Fall 1963 Transcript, *supra* note 2, at 46-51. One can only speculate about how Moore felt personally in the face of the ubiquitous, often impassioned abuse directed toward the old rule.

74. *See* CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 272 (1963) (“The difficulty,” he explained, “comes from the tripartite classification of class suits, a classification so conceptual and so obscure that no one can apply it with assurance, though vast consequences are thought to stem from it.”).

75. Letter from Charles Alan Wright to John P. Frank 2 (April 17, 1962), *microformed on CIS-6310 (Jud. Conf. Records, Cong. Info. Serv.)*.

Professor Geoffrey Hazard noted that perhaps dysfunction was the Rule's greatest strength, since "its very murkiness has deterred widespread use" of a mechanism that Hazard suggested should be used with restraint.⁷⁶

The chief source of the old rule's malfunction lied in its intention that the categories determine at the outset which lawsuits would lead to binding judgments on absent class members and which would not. Some courts abided by Moore's approach strictly, only entering a binding judgment if the class rights could be labeled joint, common, or secondary, even where a class-wide judgment seemed appropriate because of the similarity of interests.⁷⁷ Conversely, in other cases where the interests of the class members overlapped, but the rights looked several, courts entered binding judgments or adjudicated under the true class action provision.⁷⁸ Adding further confusion, the Supreme Court suggested alternative criteria. In *Hansberry v. Lee*, decided just two years after Rule 23 was first promulgated, Justice Harlan Stone wrote that a class action judgment would not necessarily be unconstitutional provided there were procedural protections in place to ensure that the issue resolved was narrow and common to the whole class and the class representatives shared the same interests as the absent members.⁷⁹ A second issue was the practice, under the

76. Letter from Geoffrey Hazard, Jr., Professor of Law, Univ. of Cal., to Benjamin Kaplan, Professor, Harvard Law Sch. 4 (Apr. 3, 1962), *microformed on* CIS-6310 (Cong. Info. Serv.) [hereinafter Letter from Hazard to Kaplan].

77. See Tentative Proposal (1962), *supra* note 69, at EE-44 to 45 (citing *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945)) (though an issue of fraud was common to all class members, their rights were deemed "several" and therefore only interveners were bound by the judgment).

78. See *id.* at EE-46 to 48 (first citing to *Sys. Fed'n No. 91 v. Reed*, 180 F.2d 991 (6th Cir. 1950) (where a nonunion employee sought to enforce a prior judgment enjoining the employer against impartial treatment); then citing *Wilson v. City of Paducah*, 100 F. Supp. 116 (W.D. Ky. 1951) (where a black student sought entrance to a previously desegregated school); and then citing *Pentland v. Dravo Corp.*, 152 F. 2d 851 (3d Cir. 1945) (where a taxpayer sought to invalidate a wrongful assessment)); see also CHAFEE, *supra* note 62, at 244-58.

79. 311 U.S. 32, 43 (1940) ("Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the

original rule's classification scheme, known as one-way intervention. Because a spurious class action did not bind absent class members, members would sometimes wait until a judgment was entered.⁸⁰ If the judgment was favorable, members would intervene to obtain the benefit of the judgment, or, if the judgment was unfavorable, they would stay out of it and remain unbound.⁸¹

There appears to have been almost no support for maintaining the original formulation of Rule 23.⁸² There was no contingent of formalists to argue for the validity of casting procedural rules according to the parameters of abstract legal rights and remedies, and nearly everyone who spoke up on the issue held the view that the old class action rule failed to work in a courtroom.

B. *The Opening Salvo: The Tentative Proposal*

On the question of whether or not to discard the old rule there was a consensus, but on the direction to take a new rule the Committee would be embattled. The opening salvo in this

same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue."); see Tentative Proposal (1962), *supra* note 69.

80. CHAFEE, *supra* note 62, at 280, 285; Tentative Proposal (1962), *supra* note 69, at EE-58.

81. See CHAFEE, *supra* note 62, at 280, 285; Tentative Proposal (1962), *supra* note 69, at EE-58.

82. Of the responses of twenty-seven judges, legal academics, and practicing lawyers to a proposal of the new class action rule, none favored keeping the tripartite division and four explicitly supported its retirement. See Standing Committee on Rules of Practice and Procedure, Communications Received on March 1964 Draft of Amendments to Civil Rules (undated), *microformed on* CIS-7006 (Cong. Info. Serv.). Those who explicitly opposed the old classification were George Fraser (law professor), William R. Fishman (attorney), Charles M. Berkson (attorney), and Charles J. Biddle (attorney). Overwhelmingly, their complaints centered around the proposed Rule 23.1, which dealt with suits by stockholders. Relatively few commented directly on Rule 23. The Federal Bar Association and the American College of Trial Lawyers, though objecting to changes proposed, nonetheless recognized the old rule as flawed. Joseph Langbart, Chairman, Subcomm. on the Rules of Civil Procedure, Fed. Bar Ass'n, Report on the Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts 11 (1964), *microformed on* CIS-7003 (Cong. Info. Serv.); Bd. of Regents of the American College of Trial Lawyers, Suggestions and Comments of the Board of Regents of the Am. Coll. of Trial Lawyers, Pertaining to Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts 15-19 (Apr. 26, 1965), *microformed on* CIS-7007 (Cong. Info. Serv.).

contest was the longest of ten proposed rule changes circulated to Committee members in February or March of 1962 titled, "Tentative Proposal to Modify Provisions Governing Class Actions—Rule 23".⁸³ It marked the beginning of a second round of amendments to the FRCP and was mailed out again prior to the first meeting of the new phase, held in May of 1962, along with letters to Kaplan from the Committee members' responding to the proposal.⁸⁴ Benjamin Kaplan, the Committee's reporter, probably drafted the Tentative Proposal, as he was the one who mailed it out. Whether Kaplan received input from his Harvard colleague, Albert Sacks, who would soon become the associate reporter, is unclear.⁸⁵

The Tentative Proposal contained a single, brief rule for all non-shareholder class actions that blended a variation of the spurious provision and the prerequisites of numerosity and adequacy of representation.⁸⁶ In essence, the proposed rule would permit aggregation on the basis of a "common question." A class action would be maintained when there was "a question of law or fact common" to numerous persons, one or more of whom could adequately represent the claims of the others.⁸⁷ This language drew from the spurious provision, although there the "common question of law or fact" had to "af-

83. Tentative Proposal (1962), *supra* note 69, at EE-1.

84. ADVISORY COMM. ON CIVIL RULES, TENTATIVE AGENDA: MEETING OF MAY 28-30 (1962), *microformed on* CIS-6307 (Cong. Info. Serv.) [hereinafter TENTATIVE AGENDA]. Letters from committee members to Kaplan responding to the proposed rule changes are *microformed on* CIS-6310 (Cong. Info. Serv.). Because all of the responses are addressed to Kaplan, it seems probable that he was the circular's principal author, though he may have had input from Albert Sacks, a colleague at Harvard. Though Sacks was not a Committee member at the time the Tentative Proposal was circulated, he would soon after join the Committee during the discussions of class actions, and became the Associate Reporter, giving him drafting responsibilities. Starting in March of 1963, just after the second and most important meeting, memos to the Committee include the initials of both Kaplan and Sacks. Circular from B.K. and A.M.S. to the Chairman and Members of the Committee Including Explanatory Memorandum, Proposed Amendments, and Committee's Notes (Mar. 18, 1963), *microformed on* CIS-8004 (Cong. Info. Serv.). Additionally, the author of the Tentative Proposal tends to speak in the first person plural. This may suggest collaborators, though Kaplan may have merely been speaking on behalf of the group.

85. Tentative Proposal (1962), *supra* note 69, at EE-1.

86. *See id.* at EE-5.

87. *Id.*

fect the several rights,” and the class members had to be seeking common relief.⁸⁸ The Tentative Proposal’s rule also included discretionary judicial mechanisms under a separate subdivision titled “Protective Measures.”⁸⁹ A judge could, at any time prior to judgment, “impose terms” to protect absent members, direct notice to class members, or order the pleadings amended to narrow the scope of the class.⁹⁰

The authors of the Tentative Proposal did not hide their vision of expanding class action litigation. “[W]e see the class action device as having a potentiality for healthy growth to cope with an ever increasing volume of litigations involving large groups of individuals.”⁹¹ They explicitly sought to reformulate “the definition of Rule 23 essentially in the terms of the existence of a common question.”⁹² Where there was “solidarity of interest among the class members” and the class was “adequately and faithfully represented in the action,” a class action judgment should be presumptively binding on all of the absent class members.⁹³ The authors sought a rule to expand the class action that would make it easier to aggregate parties, as well as bind absent class members.

While the inviting character of a class action rule based on a “common question” was a substantial break from the older rule, and arguably went against the notion that class actions were an exceptional form of adjudication,⁹⁴ states were already employing similar measures. The New York class action rule permitted aggregation where “the case involves a question of common or general interest of many persons *or where*” the class was too numerous to practicably bring all the litigants

88. *Id.* (“(a) WHEN CLASS ACTION MAINTAINABLE. When there is a question of law or fact common to persons of a numerous class whose joinder is impracticable, one or more of them whose claims or defenses are representative of the claims or defenses of all and who will fairly and adequately protect the interests of all may sue or be sued on behalf of all.”).

89. *Id.* at EE-5 to 6.

90. *Id.*

91. *Id.* at EE-2.

92. *Id.*

93. *Id.*

94. See *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

together.⁹⁵ Both pre-1938 Equity Rules for representative actions were brief.⁹⁶ And Justice Stone's dictum in *Hansberry* seemed to gesture invitingly to a broader rule.⁹⁷

In the context of federal court litigation, however, the protections afforded absent class members were weak. The measure allowing a judge to amend pleadings was a watered down version of a proposed amendment from 1955 that had addressed the protection of absent interests in greater detail.⁹⁸ Additionally, except for shareholder class actions, the rule included no firm requirement that absent class members receive notice of their inclusion in the lawsuit.⁹⁹ The original Rule 23 required notifying class members in the case of dismissal or compromise of true class actions and made it optional only for spurious and hybrid actions, when members might not be bound.¹⁰⁰ The Tentative Proposal reasoned that including a stronger notice requirement was unnecessary because judges would have a strong incentive to provide it; without notice they would risk collateral attacks from bound members who were not properly informed.¹⁰¹ This prediction, of course, was speculative. The more likely reason was simply the preference "to leave the question of notice, including its character and timing, to the discretion of the judge on the firing line."¹⁰² It was "plain" to the author(s) "that the considerations will vary from case to case."¹⁰³

The strongest objection to the Proposal's draft rule was voiced by John P. Frank, an attorney from an Arizona law

95. HERBERT M. WACHTELL, *NEW YORK PRACTICE UNDER THE CPLR* 81 (1963).

96. See Hazard et al., *supra* note 32, at 1924; Rule 48 of the Rules of Practice for the Court of Equity of the United States, 42 U.S. (1 How.) Iv, Ivi (1842), reprinted in JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES* 103-05 (W.H. Anderson Co., 1913); Rule 38 of the Rules of Practice for the Court of Equity of the United States, 33 S. Ct. xix, xxix (1912).

97. See 311 U.S. at 43.

98. See Tentative Proposal (1962), *supra* note 69, at EE-7.

99. *Id.* at EE-4.

100. *Id.* at EE-5.

101. See *id.* at EE-11.

102. *Id.* at EE-12.

103. *Id.*

firm. Writing against the Proposal's "common question" core language, he proposed the Committee adopt a conservative rulemaking philosophy.¹⁰⁴ Frank drew a distinction between "goals or objectives" and "consequences."¹⁰⁵ For Frank, a proper rule would be one that allowed the adjudication of suits where the number of people involved made joinder impossible or a class action could be used to overcome jurisdictional limitations.¹⁰⁶ This definition confined the scope of a class action lawsuit to the factual contexts of Supreme Court rulings on class actions. In *Smith v. Swormstedt*, decided in 1853, the Supreme Court allowed the use of a class action to resolve a dispute between factions of the Methodist Episcopal Church divided over slavery.¹⁰⁷ A few plaintiffs sued on behalf of fifteen hundred "travelling and worn out preachers" who, under a unified church, had been entitled to funds connected to a publishing operation the Church owned.¹⁰⁸ The Court's principal justification for allowing the named complainants to sue on behalf of the travelling preachers was the impossibility of joining each preacher individually, though it also mentioned the commonality of the rights (there was a single fund at issue) and the presence of adequate representation.¹⁰⁹ Frank's response to the Tentative Proposal explicitly cited this case as the classic instance in which the impossibility of joining all of the required parties necessitated a class action.¹¹⁰ In noting jurisdictional bars, Frank referred to the case *Supreme Tribe of Ben Hur v. Cauble*, which involved litigation over the reorganization of a nationwide fraternal society that insured its members.¹¹¹ The Court held that a class action could go forward where the citizenship of a class member, not a repre-

104. See Letter from Frank to Kaplan, *supra* note 72, at 8-9.

105. *Id.*

106. *Id.*

107. 57 U.S. 288 (1853).

108. *Id.* at 298-300.

109. *Id.* at 302-05.

110. Letter from Frank to Kaplan, *supra* note 72, at 8.

111. 255 U.S. 356 (1921).

sentative, was identical to that of an opposing party, even though overlapping citizenship normally barred federal court diversity jurisdiction.¹¹²

For Frank, these suits represented the only appropriate “objectives” for a committee writing a rule to facilitate future group-based lawsuits; that is, to devise a rule that only permitted suits similar to the two Supreme Court cases he cited.¹¹³ Other “consequences” — “[b]inding the class” and “[r]endering justice more economically” — were unimportant.¹¹⁴ “They must be taken into account,” Frank opined,

in devising a new rule but they are not primary purposes of a class action. We set out to have a class action for the sake of the objectives, not for the sake of binding non-participants or of speeding trials. The free choice of the individuals is more important than the economy goal as an objective. If 100 families are bereaved by an explosion, society owes each of them the opportunity for individual disposition of their claims if they want it.¹¹⁵

Frank additionally made it clear that “[t]he presumption should be against binding non-participants — this binding effect is a consequence, not an object.”¹¹⁶

The other Committee members who responded to the Tentative Proposal fell somewhere between Kaplan and Frank and tended to be more circumspect about what a revised rule ought to look like. Professor Hazard dramatized the Tentative Proposal as expressing the position: “We aren’t prepared to state what class actions are all about, except that they involve large groups having common legal claims or defenses and that

112. *Id.* at 366–67.

113. Letter from Frank to Kaplan, *supra* note 72, at 8.

114. *Id.*

115. *Id.* at 8–9.

116. *Id.* at 9.

protection for the class is important. The courts are free to experiment with a view to working something out.”¹¹⁷ Professor David Louisell was perhaps the most astute:

I think we should discuss our objectives in this area [T]o disassemble the elaborate structure of Rule 23 without a pretty well established consensus as to where we want to go, and why, could be quite unfortunate. Is the class suit of increasing importance today? Should we as rule-makers exercise especial care not to inhibit its possibly increasing value in relation to the complexities of modern group-dominated society? As rule-makers, may we legitimately seek to enhance recognition of the value of the class suit, to the end that its function will not increasingly be obliterated by legislative substitution of the remedies of administrative law?¹¹⁸

Given the polarity of Frank’s and Kaplan’s views, the Committee would never seriously address Louisell’s concerns.

C. *The March 1963 Preliminary Draft*

Class actions were on the agendas of three Advisory Committee meetings. The first was held in May of 1962, just after the Tentative Proposal was re-circulated; the second, in February of 1963; the third, in the fall of 1963 – on the last day of October and the first day of November.¹¹⁹ By the first meeting,

117. Letter from Geoffrey Hazard to Benjamin Kaplan 4 (Apr. 3, 1962), *microformed on* CIS-6310 (Cong. Info. Serv.).

118. Letter from David Louisell to Benjamin Kaplan (Apr. 20, 1962), *microformed on* CIS-6310 (Cong. Info. Serv.).

119. Advisory Comm. on Civil Rules, Statement to the Chairman and Members of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S. 11-13 (July 18, 1962) [hereinafter *Advisory Committee Report* (July 18, 1962)] (reporting to the Standing Committee that the May 1962 meeting accomplished only preliminary work on the issue of joinder of parties and claims and making no mention of class actions).

some members had already expressed opinions on amending Rule 23 in letters to Kaplan, but that meeting probably did not include much discussion on class actions.¹²⁰ A month after the second meeting, a preliminary draft rule was circulated that shared core features with the final product: a list of prerequisites for finding a class, a functional division of class actions into three categories, a process for recognizing or certifying a class, and a more detailed set of orders a judge could employ to manage a class action suit.¹²¹ These proposed additions would form the background for the debates in the pivotal fall 1963 meeting.

1. *23(c): The binding effect provisions & certification*

The working draft rule discussed at the second meeting contained a variation of the spurious rule that explicitly allowed the judge to determine case-by-case the binding effect of the judgment entered.¹²² The Tentative Proposal's scheme had been similarly structured. It included a "common question" provision and implicitly left it up to the judge to tailor the scope of a judgment.¹²³ After a lengthy discussion during the second meeting, the Committee apparently rejected this

120. *Id.*

121. ADVISORY COMM. ON CIVIL RULES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE OF THE U.S. DISTRICT COURTS (1963), *microformed on* CIS-7006 (Cong. Info. Serv.) [hereinafter Preliminary Draft (1963)]. Discerning how the Committee broke away from the Tentative Proposal's simpler draft is difficult. Transcripts from the February 1963 meeting are unavailable, and letters that date to around that time are sparse. References are made in the third meeting to matters discussed and conclusions reached in the prior gathering, suggesting the focus of the second meeting was on correcting the problems that plagued the old rule. This sheds light on the inclusion of a certification process and judicial orders, but one can only speculate on the reasons for returning to a three-part division.

122. Fall 1963 Transcript, *supra* note 2, at 20, 27.

123. The issue of binding effect was intentionally left out of the first draft rule. The draft note justifies the exclusion by asserting that "the question of binding effect can only come up for effective decision in a later action." Tentative Proposal 1962, *supra* note 69, at EE-27. However, the judge in all drafts is given the authority to exclude members and "de-certify" the suit as a class action. The language in the first draft in Subsection (c), "PROTECTIVE MEASURES," reads: "When appropriate, the court, at any time prior to judgment, may order that the pleadings be amended to eliminate therefrom all references to representation of absent persons and that the action proceed accordingly." *Id.* at EE-6.

scheme.¹²⁴ It failed to solve the problem of one-way interventions and left unsettled the propriety of entering binding judgments.¹²⁵ Kaplan and Sacks therefore included in the Preliminary Draft, under subsection (c), a “tradeoff” solution the Committee had arrived at in the second meeting.¹²⁶ Early in the litigation, the judge would have to determine by order whether or not a class existed; if one did, the eventual judgment would bind the entire class and not merely named parties and interveners.¹²⁷ Sacks, who along with Kaplan had preferred leaving the scope of a judgment to judicial discretion, summarized the underlying logic.¹²⁸ Under the old framework, the decision to allow a suit to proceed as a hybrid or true class action was harmless (some said meaningless) because absent class members would not be bound by the final judgment.¹²⁹ The class action had the same effect on them as a non-class suit.¹³⁰ Forcing a judge faced with a prospective class action to determine the binding effect early on would “bring home . . . the seriousness” of class litigation and screen out conflicts that were inappropriate for resolution on a class basis.¹³¹ Requiring a certification decision early also “put the two sides on a parity” by depriving an absent class member of the opportunity to wait until a judgment to intervene, thereby ending the practice

124. See Fall 1963 Transcript, *supra* note 2, at 20.

125. See *id.* at 20, 32.

126. The draft circulated before the fall 1963 meeting accomplished the trade-off in subsection (c), which contained three subdivisions. Subdivision (c)(1) ordered the court to “determine by order whether [a class action] is to be maintained as such” as “soon as practicable after the commencement and before the decision on the merits.” This determination could be made conditionally. The second part, (c)(2), stated that a judgment would extend to all members of the class whether or not it was favorable. Explicitly applying the judgment to all parties would prevent the practice of one-way intervention. Subdivision (c)(3) allowed a class action to proceed on the basis of particular issues, like liability, and permitted the further division of the class into subclasses. Preliminary Draft (1963), *supra* note 121, at EE-2-3.

127. See Fall 1963 Transcript, *supra* note 2, at 20-21; Preliminary Draft (1963), *supra* note 121, at EE-2 to 3.

128. Fall 1963 Transcript, *supra* note 2, at 31-32.

129. *Id.*

130. *Id.* at 32.

131. *Id.* at 31.

of one-way intervention.¹³²

2. *23(b): The functional three-part division*

Though the Tentative Proposal had contained a single form of class action based around “common questions,” the Preliminary Draft returned to a three-part division, though the subdivisions—(b)(1), (b)(2), and (b)(3)—were designed to be functional rather than follow from formal rights. A gap in documentation makes it impossible to pinpoint when and for what reasons the Committee decided to abandon a single class action rule.¹³³ Subdivisions (b)(1) and (b)(3) were rough functional analogs to the true and spurious class action provisions. Like the true class action, 23(b)(1) was designed to aggregate a large number of “necessary parties.”¹³⁴ Subsection (b)(2) was completely novel, designed almost exclusively so judges could enter injunctions in segregation cases where the class was challenging a policy of racial discrimination.¹³⁵ It allowed the maintenance of a class suit where “the party opposing the class has acted or refused to act on grounds generally applica-

132. *Id.* at 32; Preliminary Draft (1963), *supra* note 121, at EE-16 to 17.

133. There is a gap in documentation between the first meeting, held in May 1962, and the circulation of a second draft, in March 1963, which followed the second meeting held in February 1963. A prefatory letter for the March 1963 draft makes it clear that the certification provision, subdivision (c), was an innovation of the second meeting. Preliminary Draft (1963), *supra* note 121, at EE-2 to 3. But the letter does not treat the three-part division as novel, suggesting that it had been introduced and settled on before or possibly during the second meeting in February 1963.

A report to the Standing Committee dated July 18, 1962 indicates the Advisory Committee did only preliminary work on issue of joinder of parties and claims, which included Rule 23. ADVISORY COMM. ON CIVIL RULES, REPORT TO STANDING COMMITTEE 11-12 (1962). A report dated a year later notes that following the first meeting “[r]evised and amplified drafts were thereafter prepared, considered in intra-Committee correspondence, and discussed at [the second] Committee meeting on February 21-23, 1963.” ADVISORY COMM. ON CIVIL RULES, REPORT TO STANDING COMMITTEE 9 (1963). The specific reasons for the shift away from a singular rule are unclear. Exchanges between the members between May of 1962 and February of 1963 may have produced a rule containing the division. Or perhaps the reporters included a non-contentious rule in an unavailable draft circulated just before the second meeting.

134. The note explaining the rule included in the draft stated that (b)(1) operated along the lines of Rule 19, the necessary parties rule. Preliminary Draft (1963), *supra* note 121, at EE-7 to 11.

135. *See* Marcus, *supra* note 32, at 702-08.

ble to the class thereby making appropriate specific or declaratory final relief with respect to the class as a whole.”¹³⁶

Subdivision (b)(3), the spurious rule’s analog, was a residual, flexible category, designed not for the prototypical class action situations, but for disputes where a class action might provide a “convenient and desirable” route for a suit to proceed.¹³⁷ Unlike the Tentative Proposal draft, which permitted a class action merely on the basis of “a question of law or fact common to persons of a numerous class,” under the Preliminary Draft an action could only go forward if the common questions “predominate[d] over any questions affecting only individual members” and the court was “satisfied that a class action will facilitate the fair and efficient adjudication of the controversy.”¹³⁸ The note accompanying the draft rule explained that where common questions predominate, a class action would afford “economies of time, effort, and expense, and promote uniformity of decisions as to persons similarly situated.”¹³⁹ The note listed fraud and anti-trust suits as possibly suitable cases, and stated that multiparty litigation based on a “mass accident” would be “on its face not appealing for a class action” because of the variability of individualized issues like damages and liability.¹⁴⁰ The rule also instructed the judge to weigh the gains of aggregation against three factors: the interests of individual class members in prosecuting or defending separate actions, other available methods of adjudication, and the “procedural measures which may be needed in the conduct of the action.”¹⁴¹ The note also directed the judge to consider the practical possibility of class members prosecuting or defending individually where the size of each claim was

136. Preliminary Draft (1963), *supra* note 121, at EE-1 to 2. David Marcus has detailed and explained the historical development of Rule 23(b)(2). *See generally* Marcus, *supra* note 32 (detailing and explained historical development of Rule 23(b)(2)).

137. Preliminary Draft (1963), *supra* note 121, at EE-12.

138. *Id.* at EE-2, EE-13; Tentative Proposal (1962), *supra* note 69, at EE-5.

139. Preliminary Draft (1963), *supra* note 121, at EE-13.

140. *Id.* at EE-13 to 14.

141. *Id.* at EE-3 (draft of Rule 23(b)(3)).

small.¹⁴²

3. 23(d): Orders for judicial management

A set of administrative tools were included in subdivision (d) because the old rule was seen as failing to give judges sufficient power to control mass litigation.¹⁴³ In subdivision (d), a judge was authorized to structure the proceeding to prevent repetition and excessive complication, require that parties direct notice of the action to absent class members, impose conditions on the representatives or interveners, or order the pleadings amended to broaden or narrow the representative's scope.¹⁴⁴ Unlike the original rule, under which notifying absent class members was required for the true class action, none of the aforementioned judicial orders were mandatory.

D. The Fall 1963 Meeting

The existing transcript for the fall two-day meeting is an incredible document. Various rule-makers presciently articulated potential advantages and problems that would only later become clear in the literature. Equally impressive, and more to the point, was the intensity of the conflict, which tended to pit John Frank against Kaplan and Sacks. One senses at times that Frank was perceived as stubbornly holding up progress. While others raised objections to specific problems the rule might precipitate, Frank tended to lob general grievances. The second day began with one committee member remarking that so far Frank had been "very delightful in his presentation and forcefully unpersuasive in his result."¹⁴⁵ But Kaplan and Sacks's drafts had introduced novel models for class action rules. Additionally, the duo's responses to criticism displayed a trailblazing spirit and an occasionally grandiloquent style; a

142. *Id.* at EE-14.

143. *Id.* at EE-18 to 19.

144. *Id.* at EE-3.

145. Fall 1963 Transcript, *supra* note 2, at 34 (comment by Prof. Sheldon D. Elliott).

style which may have won Frank some sympathizers.

Debate commenced on subsection (b)(3), the “common question” provision. George Doub, who had headed the Civil Division at the Department of Justice from 1956–1960¹⁴⁶ and tended to side with Frank, cut to the bone of contention.¹⁴⁷ He asked Kaplan whether or not the “mass accident situation” would fall within the scope of the rule.¹⁴⁸ Kaplan responded “without,” arguing that the requirement that common questions “predominate” individual differences would prevent mass accident litigation from being resolved under Rule 23.¹⁴⁹ Frank stepped in, moving away from Doub’s concrete question to speak to the provision’s fundamental inadequacies. “The class action,” Frank began, “must be regarded as an exception, because it deprives a citizen of his right to his trial and to his day in court.”¹⁵⁰ The central problem for Frank was that the draft rule took an already suspect device—the “spurious” or “common question” class action—and made it binding on the class.¹⁵¹ The consequence would be that “in an overwhelming proportion of the cases, the individual’s right will be sacrificed.”¹⁵² This result would be largely due to the opportunities that the rule created for fraud and misuse.¹⁵³ “[T]here are just more ways of cheating people with class actions than with any other rule that I’ve been able to put my finger on,” Frank said.¹⁵⁴ A defendant with broad liability would be able to easily secure a favorable ruling against a sea of potential claimants by orchestrating litigation against weak counsel in a provincial forum where a prideful judge could resolve the entire dispute

146. *Former Assistant Attorneys General*, U.S. DEP’T JUST., www.justice.gov/civil/common/aag_legacy.html (last updated Feb. 14, 2017).

147. Fall 1963 Transcript, *supra* note 2, at 4.

148. *Id.*

149. *Id.* at 4–5.

150. *Id.* at 8.

151. *Id.* at 28 (“But to give [the spurious class action] up is one thing; to make the same thing we just abandoned *res judicata* is a lot more drastic . . .”).

152. *Id.* at 8.

153. *Id.* at 8, 37, 43, 45.

154. *Id.* at 8.

locally.¹⁵⁵ Frank argued that devices already existed to efficiently dispose of mass accident cases,¹⁵⁶ and indicated that the Coordinating Committee for Multiple Litigation was actively developing better ones.¹⁵⁷

Against this criticism, Kaplan argued that mechanisms built into the rule would protect absent class members from being unfairly swept into binding adjudication.¹⁵⁸ Contrary to Frank's and Doub's concerns, the rule would not be "an invitation to that kind of [mass accident] litigation" because the factors the judge had to consider excluded those kinds of actions.¹⁵⁹ In addition to the four prerequisite considerations, a judge had to find that the case could "be fairly and efficiently managed" and had to consider the "comparative advantages of other available methods" of adjudication.¹⁶⁰ Most significant for Kaplan was the language he had pointed to in his answer to George Doub. The requirement that common issues predominate over individuals' issues would preclude mass accident suits, because crucial issues would vary by person.¹⁶¹

Frank was unconvinced. The safeguards failed to address the more basic error: the rule's sacrifice of individual rights violated tradition. The history of class action law, which Frank saw in terms of Supreme Court case law, prohibited its application to mass accident scenarios.¹⁶² At one point Frank argued that the (b)(1) provisions, which modernized the true class action, were legitimate because they had in effect been "devised for us by the Supreme Court" in *Smith v. Swormstedt* and *Supreme Tribe of Ben Hur v. Cauble*, decisions Frank described as "terribly careful, thought-through exceptions to the general principle" of individualized litigation.¹⁶³ "In the mass accident

155. *Id.*

156. *Id.* at 15.

157. *Id.* at 15, 43.

158. *Id.* at 20.

159. *Id.* at 12.

160. *Id.* at 11, 22.

161. *Id.* at 4.

162. *See id.* at 26-27.

163. *Id.* at 27.

field,” Frank declared, “I could not be persuaded, I think, ever to allow a mass accident to be treated as a straight class action It’s not a valid social need at all.”¹⁶⁴ He moved to vote for excising the (b)(3) “common question” provision entirely.¹⁶⁵

As other committee members pointed out, Frank’s history was partial. It ignored examples of mass accidents that had been resolved collectively in a single forum. Judge Wyzanski pointed to the “Andrea Doria,” referring to a mass settlement to cover injuries following the sinking of an Italian cruise liner off the coast of Massachusetts in 1956.¹⁶⁶ James Moore mentioned, though not to refute Frank, a mass settlement that arose out of the Hartford circus fire, which killed around 170 people and injured 500.¹⁶⁷ And Judge Thomsen noted a pending case over a cholesterol reducing drug, MER/29, which consequently injured thousands of people.¹⁶⁸ Beyond these were electrical equipment anti-trust cases,¹⁶⁹ the impetus behind the Coordinating Committee of Multiple Litigation, and segregation litigation. While Frank was correct that the Supreme Court had never validated the use of class action to resolve multiple disputes arising from a mass accident, the assertion that there was no “valid social need at all” was questionable.¹⁷⁰

164. *Id.* at 9–10.

165. *Id.* at 10.

166. *Id.* at 43; *The Andrea Doria Settlement*, TIME, Feb. 4, 1957, at 88; *Underwriters Confirm Pact in Doria Loss*, CHI. TRIB., Jan. 23, 1957, at F1. See *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960) (calling the litigation “multiple-claim-inadequate-fund-proceeding.”).

167. Moore felt that the Andrea Doria and Hartford circus fire were unique because the liable entities had limited funds. Fall 1963 Transcript, *supra* note 2, at 51; HENRY S. COHN & DAVID BOLLIER, THE GREAT HARTFORD CIRCUS FIRE: CREATIVE SETTLEMENT OF MASS DISASTERS 14 (1991).

168. See Fall 1963 Transcript, *supra* note 2, at 44; Paul D. Rheingold, *The MER/29 Story – An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 116 (1968).

169. Fall 1963 Transcript, *supra* note 2, at 52 (discussion by Wyzanski). See generally Neal & Goldberg, *supra* note 19 (describing the judicial proceedings that followed after over 1800 treble damage actions were filed against the electrical equipment industry in 1961).

170. See, for example, the list of multi-party-single incident situations described in *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 767–68 (1958).

For Kaplan and Sacks, the opposite was true. Both argued that the state of the rule's development necessitated a broad, binding "common question" provision.¹⁷¹ Neither could sympathize with Frank that the potential over-expansiveness of the rule was a serious risk.¹⁷² Kaplan, reacting to Frank's proposal to remove (b)(3), said he "would consider the elimination of those lines to be so retrograde a move that I don't think we could go to the public with a rule so truncated."¹⁷³ His sentiments were explicit and blunt: "We are in the midst of a very important development which will enable courts to deal with diffuse litigation, and when you put a negative to (b)(3) you are chopping off that development with a knife."¹⁷⁴ "I really feel very deeply that you cannot—it's almost a case of overwhelming force—the cases establish this—you cannot cut off the evolvement of the spurious [class] action."¹⁷⁵ "[T]o cauterize the whole thing—to cut it off and say no it can't grow in this direction—seems to me really basicly [sic] unfriendly to humane procedure."¹⁷⁶ Sacks echoed Kaplan's position, though in a more tempered tone. He argued that the contradicting applications of the spurious rule—some judges found it binding on a class, others refused—indicated that the class action was a developing field of law.¹⁷⁷

Now the point that I think that is making most strongly, and the one that deserves the most careful thought, is what should our general attitude be toward this existing development. If you simply knock out the proposed 23(b)(3) . . . you bring the development to an end. What

171. Fall 1963 Transcript, *supra* note 2, at 16-17.

172. *Id.* at 9-10, 16-17.

173. *Id.* at 10.

174. *Id.* at 18.

175. *Id.* at 20.

176. *Id.* at 21.

177. *Id.* at 16.

you're saying is the Committee is against that development which has been taking place.¹⁷⁸

This prompted Doub to ask why, if development had occurred under the old rule, a broader rule was needed.¹⁷⁹ If the uses of the class action could develop under a restricted rule, the Committee would be less justified in providing an expansive replacement. Sacks responded that leaving out (b)(3) would stall the evolutionary development that the class action, especially under the spurious rule, was then experiencing.¹⁸⁰ He admitted that the procedural device might have problems, "But," he said,

we're not talking here, in other words, about a (b)(3) which adds something to the existing practice in toto. In other words, if you knocked this out you would just go back to the existing practice. We're talking about a reformulation of the existing practice, and if you knock it out it is clearly retrogressive in that sense—that you are putting an end to a series of cases that are now possible, now going forward, about which courts are learning as they go and exercising judgment as to which ones should be permitted and which ones should not be.¹⁸¹

Frank took issue with this view of history. In his eyes, to allow a binding class action on a basis as broad as "common questions of law or fact" would violate the historical limits of the rule. "What we're doing here," Frank argued "is working a plain revolution, because we're taking actions which would not have been *res judicata* and we're making them *res judica-*

178. *Id.* at 16-17.

179. *Id.* at 17.

180. *Id.* at 17.

181. *Id.* at 17-18.

ta.”¹⁸² Sacks in fact agreed, albeit obliquely. The class action case law might prove Frank correct today, but they were not writing a rule only for present litigation.

If you feel it's unfair to bind litigants to an airplane accident on the basis of one class representative, on which I think most lawyers and judges today would feel very strongly, you say you can't have a class suit. If the time ever comes when that attitude changes, and this is a changing attitude, this conflict between the desire to manage complex litigation and the desire to have the individual have his day in court—this is a clash that goes on all the time. As the attitude changes, decisions will change.¹⁸³

Frank and Doub were not alone in objecting to Kaplan's rule, but other Committee members were more restrained or precise in their complaints. Charles Joiner, who generally supported the (b)(3) provision, thought that the draft did not “sufficiently emphasize the ‘rights’ of a person to bring and maintain a separate action,” which he distinguished from the issue dealt with in subdivision (c), a judgment's binding effect.¹⁸⁴ He suggested the rule more clearly articulate a member's right to pursue a separate action.¹⁸⁵ Judge Roszel Thomsen, who also supported a more expansive class action device, was concerned that the rule as written would allow anything to be considered a class action.¹⁸⁶ Doub stressed this shortfall,¹⁸⁷ and Dean Acheson at one point summarized the tension, saying that though there was consensus on a rule that allowed for some growth, the draft rule “perhaps opened the door too

182. *Id.* at 18.

183. *Id.* at 32.

184. *Id.* at 19 (showing Joiner's support for the (b)(3) provision).

185. *Id.*

186. *Id.* at 21–22.

187. *Id.* at 32.

wide [for] growth.”¹⁸⁸ Judge Charles Wyzanski noted that nothing in the rule prevented a judgment in a federal court from binding a class member who had initiated, but not yet concluded, a state court suit covering the same dispute.¹⁸⁹ This, in his view, could deprive the individual of substantive rights.¹⁹⁰ Though he felt (b)(3) had to be retained, he suggested adding language to compel judges to make specific findings demonstrating that resolving the suit as a federal class action would be fair to other prospective or ongoing actions.¹⁹¹ James Moore expressed the same concern.¹⁹²

Dean Acheson sought to strike a balance on the second day of the meeting after putting to vote a motion that Frank made the day before to exclude (b)(3). In the transcript, Acheson does not count the votes, as he does for other motions, but merely states, “That amendment is lost.”¹⁹³ This quieted Frank’s total opposition and the Committee was able to shift its attention away from debating the inclusion of a “common question” provision and toward grappling with the problems Wyzanski and Moore had identified.¹⁹⁴ A solution arose after Kaplan pointed out that the Note specified that the judge could exclude from the class any individuals who had already initiated separate suits or who “within a period of blank months set by the judge, [would] proceed to start their own litigation.”¹⁹⁵ Attempting to correct a confusion by Doub, Judge Wyzanski misinterpreted this as being litigant driven: “Ben’s suggesting that the class might include all those who did not protest within x days.”¹⁹⁶

188. *Id.* at 20.

189. *Id.* at 26.

190. *Id.* at 26, 29–30.

191. *Id.* at 39–40.

192. *Id.* at 46. Kaplan’s response to the concern was that the issue already existed under the “true” class action, that it was an unavoidable problem of class action litigation, and that ancillary jurisdiction and further case law would sort it out. *Id.* at 26, 47–48.

193. *Id.* at 40.

194. *Id.*

195. *Id.* at 42.

196. *Id.* This is not to suggest that an opt-out scheme had never been conceived before.

Following this remark, the Committee developed an opt-out mechanism that mollified Frank, if temporarily.¹⁹⁷ A motion was made by Wyzanski, at Frank's request, to rewrite (b)(3) so as to exclude any individuals who either protested within a specified period or failed to get reasonable notice.¹⁹⁸ This would permit a broadly binding class action while still allowing individuals to pursue litigation on their own terms. With eight votes, the motion passed.¹⁹⁹ In a class action under (b)(3), though not under the other provisions, class members would have to both be notified and given the opportunity to opt out.²⁰⁰

For some, however, this solution went too far. Sacks felt it would be imprudent to categorically deprive the judge of a residual power to bind an individual who does not want to be a class member.²⁰¹ Judge Oberdorfer also objected, arguing that in large-scale cases a judge might need the authority to bind litigants to prevent duplicative discovery.²⁰² Oberdorfer then moved to amend Wyzanski's motion to allow the court to include protesting members where "compelling considerations require their inclusion."²⁰³ The motion to qualify a member's right to exit the class failed, receiving only four votes and the meeting moved on.²⁰⁴ Nonetheless, a draft circulated after the

197. Frank was subdued for the duration of the meeting on the (b)(3) provision. But he continued to argue for a narrower (b)(2) provision. *See id.* at 58-65. He argued that this provision, as it stood, would allow insurers to escape liability in "mass accident" cases by obtaining declaratory judgments holding that coverage did not extend to those injured. *See id.*

198. *Id.* at 56.

199. *Id.* It is not clear how many members attended the fall meeting. In May of 1962, the Committee had fifteen members, plus Kaplan as the reporter. *See TENTATIVE AGENDA, supra* note 84. In February of 1965 the Committee had twelve members, plus Kaplan and Sacks as reporter and associate reporter. Minutes of the 1965 Meeting of the Committee, cover page (Feb. 25, 1965). In the transcript for the fall meeting, fourteen individuals spoke: James W. Moore, John P. Frank, Charles Wyzanski, Sheldon Elliott, George Doub, Charles Joiner, Charles Oberdorfer, Roszel Thomsen, David Louisell, Charles Alan Wright, Arthur Freund, Dean Acheson, Benjamin Kaplan, and Albert Sacks. *See generally* Fall 1963 Transcript, *supra* note 2.

200. Fall 1963 Transcript, *supra* note 2, at 54-55.

201. *Id.* at 53.

202. *See id.* at 57-58; *see also id.* at 53 (showing Charles Joiner making a similar point).

203. *Id.* at 58.

204. *Id.*

fall 1963 meeting included a qualified right to opt out.²⁰⁵ The opt-out provision stated that a court should exclude members who request exclusion, “unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reason therefor [sic].”²⁰⁶ Kaplan and Sacks explained in the accompanying memo to the Advisory Committee that they gave the “proposal a second look, and believe it to be too rigid” because it gave “any protestant an absolute right to opt out.”²⁰⁷ The rule enacted in 1966, however, did not condition a class members’ right to opt out of a (b)(3) class action.²⁰⁸

III. THE OPPOSING IDEOLOGIES BEHIND THE CLASS ACTION RULE

The debate over amending Rule 23 did not occur in a vacuum. Specific currents of post-realist legal thought underlaid the arguments of the protagonists and fed competing conceptions of what kind of class action ought to be available to Americans. Benjamin Kaplan and Albert Sacks belonged to the Legal Process tradition, which originated at Harvard Law School in the 1950s and treated the legal order as a flexible forum for resolving the disputes that inevitably arise as society progresses. John Frank, by contrast, belonged to a mid-century tradition of legal liberalism, which emphasized the rights-protecting function of federal courts. Kaplan’s and Sacks’s views dominated, but Frank’s liberalism forced the inclusion of important, limiting checks. The rule we have today is not merely a product of the clash and compromise of these actors’ views, but also a mediation of fundamentally different perspectives on American law.

205. See ADVISORY COMM. ON CIVIL RULES, PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS WITH ADVISORY COMMITTEE’S NOTES, EE-4 (1964), *microformed on* CIS-7003 (Cong. Info. Serv.).

206. *Id.*

207. Memorandum from Benjamin Kaplan & Al Sacks to the Chairman & Members of the Advisory Comm. On Civil Rules, Completion of Work of Committee Meeting of October 31–November 2, 1963, at 6 (Dec. 2, 1963), *microformed on* CIS-7104 (Cong. Info. Serv.).

208. FED. R. CIV. P. 23.

A. *Legal Process Theory*

Legal Process Theory has its roots in a course taught at Harvard Law School beginning in the 1950s, first by Henry Hart and then jointly by Hart and Albert Sacks.²⁰⁹ *The Legal Process* also names the manuscript used to teach the course, which Hart and Sacks contracted to publish as a casebook but never saw a version go to print.²¹⁰

Legal Process Theory is not a discrete philosophy, but an umbrella term for a constellation of ideas that embody a legal methodology.²¹¹ It was an *attitude* toward legal problems cultivated and disseminated by a group of elite, legal educators in postwar America who were dissatisfied with the moral ambivalence and groundlessness of legal realism.²¹² Legal Process responded by theorizing law as the process in which conflicts are resolved by the application of neutral, principled reasoning.

Legal Process takes humans as purposeful, and human interests as fundamentally interconnected, and it directs its focus on the proper function and conceptualization of the arrangements needed for connected individuals to achieve their ends. These formal and informal institutions engender society's de-

209. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at lxxxv-lxxxvii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

210. *Id.* at lxxxvii. This did not stem its influence though. Legal Process Theory was not disseminated through journals, major legal tracts or Supreme Court decisions, but by being taught to America's legal elite, first at Harvard and later at other law schools. Harvard offered the course for thirty years, where future influential lawyers, judges, and legal academics—including five Supreme Court justices—took it and mimeographs of manuscripts circulated to other law schools that adopted the text and taught a Legal Process class. Anthony J. Sebok, *Legal Realism and Legal Process: Reading the Legal Process*, 94 MICH. L. REV. 1571, 1572 (1996) (reviewing HART & SACKS, *supra* note 209).

211. See Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 662-65 (1993).

212. *Id.* at 604-05. Prior to World War II, legal realism had been a progressive force, but by its terms it could not judge the evils of Nazism and totalitarianism nor elevate or justify the activity of judges. WRIGHT, *supra* note 74, at 282-84; see also EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 235 (2000) (Hart agreed with critics "of legal realism who charged that identifying law with government behavior and removing moral elements from legal analysis were philosophically inadequate and practically dangerous.").

velopment. Within the legal domain, principled reasoning makes this possible; reason is the legal institution's *élan vital* and a court's capacity to use it to resolve society's disputes distinguishes it from the political bodies.²¹³ These core features—the interconnection of purposeful individuals, institutional competence and institutional settlement, and reasoned elaboration—are discussed below, along with a more peripheral characteristic, the privileged position of judicial problem-solving, which is important for mapping Legal Process onto the development of Rule 23.

1. *The background: Interconnected interests*

Legal Process Theory begins with loosely empirical assumptions about human interconnectedness.²¹⁴ The view that individual purposes are achieved through interdependence²¹⁵ assumes broad overlapping purposes among individuals, “common enterprise[s]” which generate both a need for institutions through which individuals can harmonize their pursuits and as well as methods for clarifying and changing those institutions.²¹⁶ There must exist “*constitutive or procedural understandings or arrangements about how questions in connection with arrangements of both types are to be settled.*”²¹⁷ This suggests a legal apparatus, particularly in the private sphere.

213. Legal Process is an attitude “premised, in every instance, on the belief that those who respect and exercise the faculty of reason will be rewarded with the discovery of a priori criteria that gives sense and legitimacy to their legal activities.” Duxbury, *supra* note 211, at 605. There is some irony in the fact that while Legal Process owed much to a faith in reason, many European intellectuals were at the time struggling with an opposing problem of the failure of rationality. See, e.g., THEODORE W. ADORNO & MAX HORKHEIMER, *DIALECTIC OF ENLIGHTENMENT* (Herder & Herder trans., 1972); see also HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

214. “The starting point of the response which human beings seem invariably to make to the basic conditions of human existence is to recognize the fact of their interdependence with other human beings and the community of interest which grows out of it.” HART & SACKS, *supra* note 209, at 2.

215. *Id.* at 4 (“[H]uman beings striv[e] to satisfy their respective wants under conditions of interdependence.”).

216. *Id.* at 3–4.

217. *Id.* at 3.

The “common enterprise inevitably generates questions of common concern which have to be settled, one way or another, if the enterprise is to maintain itself and to continue to serve the purposes which it exists to serve.”²¹⁸

2. *The structure: Institutional competence & institutional settlement*

In a state of interdependence, keeping a diverse body of interconnected interests stable and working entails institutional competence.²¹⁹ For Legal Process the range of valid forums in which “questions” or ambiguities can be resolved is therefore wide: “private ordering,” legislatures, courts, administrative bodies, and arbitration are all valid institutions for resolving disputes.²²⁰ In the end what matters for any set of problem-resolving procedures, formal or informal, is its efficacy with respect to some common or general interest.²²¹

Institutional competence is a descriptive idea. Legal Process’s normative variation of this is institutional settlement. “The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.”²²² If Legal Process had claimed a single motto, this

218. *Id.* at 4.

219. See Sebok, *supra* note 210, at 1574 (quoting Gary Peller, *Neutral Principles in the 1950’s*, 21 U. MICH. J.L. REFORM 561, 594 (1988)) (There is “a kind of natural, functional correlation between different kinds of disputes and different kinds of institutions, so that the categories of dispute could be matched up with the kinds of institutional procedures corresponding to them.”).

220. Duxbury, *supra* note 211, at 659–60. The division of the text reflects this. *The Legal Process* is divided into seven chapters, the first broadly theoretical and introductory, and the next five each focusing on a particular institution—private ordering, courts, direct popular law-making and elections of public officials, legislatures, and the executive branch and administrative agencies—and the seventh focusing on statutory interpretation. HART & SACKS, *supra* note 209, at xv–xxxviii.

221. HART & SACKS, *supra* note 209, at 102 (“[T]he ultimate test of the goodness or badness of every institutional procedure and of every arrangement which grows out of such a procedure is whether or not it helps to further this purpose.”).

222. *Id.* at 4.

would be it. For Hart and Sacks, it was a principle forceful enough to dissolve the hugely debated intellectual conundrums arising out of the apparently dualistic nature of the law: law as something which compels people to act a certain way as well as a description of some social facts about the way society is ordered.²²³

The reasoning behind the principle of institutional settlement lies in Lon Fuller's application of American pragmatism to judicial problems. Fuller taught at Harvard Law School at the same time as Hart, Sacks, and Kaplan.²²⁴ For Fuller, one cannot accept law as order, law as something that "is," without also accepting it as good order, as a plan infused with "ought."²²⁵ "[A]ny form of social order," Fuller wrote, "contains, as it were, its own internal morality."²²⁶ The purposes

223. Andrei Marmor has illustrated the contours of the conundrum nicely. See ANDREI MARMOR, *PHILOSOPHY OF LAW* 1-2 (2011). In 2008, signs on California highways displayed the message: "Hands Free Phone, July 1st, It's the Law!" *Id.* This told drivers two things. *Id.* One is factual in nature: some set of activities had occurred in the state capitol that had led to the addition of some words about driving and cellphones and hands-free devices to the repository of California laws. *Id.* The other is instructive in nature: drivers were being told not to behave in a particular way as of the first of July, namely drive while holding their cellphones. *Id.* In Marmor's language, the first concerns legal validity whereas the second concerns legal normativity. *Id.* At the beginning of *The Legal Process*, Hart and Sacks wrote:

[C]ountless pages of paper and gallons of printer's ink have been expended in debate about whether law is something which 'is,' . . . or something which involves elements of what 'ought' to be But . . . the only important elements of 'is' in the law are consequences simply of the principle of institutional settlement.

HART & SACKS, *supra* note 209, at 4-5. The descriptive-prescriptive duality of law had no real import for Legal Process. "When the principle of institutional settlement is plainly applicable, we say that the law 'is' thus and so, and brush aside further discussion of what it 'ought' to be. Yet the 'is' is not really an 'is' but a special kind of 'ought'." *Id.* at 5. But the reasoning is circular. One ought to accept some decision, an institution's output, if it is the result of the accepted way in which the institution arrives at decisions like those, provided the institution is competent. That raises the question: How should we identify which procedures are duly established? As a normative principle, the logic appears incomplete. How can a decision be assessed absent any moral or qualitative consideration of an institution's role in society? Doesn't the principle of institutional settlement "confuse the question of ultimate value with that of selecting the most effective means for realizing an immediate purpose[?]" Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697, 699 (1956).

224. Charles Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 16-18, 36-39 (2013); Kenneth I. Winston, *The Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law*, 8 OX. J.L. STUD. 329, 329 (1988).

225. See Winston, *supra* note 224, at 335.

226. Fuller, *supra* note 223, at 704.

and morality infused in law are like its genetic code. They give law its form, the “is,” and its deeper function, roughly the “ought,” structuring law and at the same time defining the ends it seeks.²²⁷ And, just as genomes are not static, passive containers of hereditary information, neither are embedded purposes and morality frozen or set. They develop in time. A particular legal order is an iteration in a series of bidirectional exchanges between a current form of law and changing desires and material conditions.²²⁸ That law for Legal Process is a *process* means not only that a body of laws is dynamic, but that the purposes and morality that structure and guide a legal order are always in flux. Hart and Sacks reject dividing law as society’s structure from law as a plan for how society ought to work because the division cannot appreciate that law encompasses a process by which individual and group purposes are both pursued and actualized through the social apparatus.²²⁹

3. *The activity: Reasoned elaboration*

The Legal Process casebook explores the proper methods of resolving problems within each of the institutions to which it devotes a chapter.²³⁰ For Hart and Sacks, a court is institutionally competent—effecting those social purposes properly within the remit of the judiciary—to the extent that a judge em-

227. Winston, *supra* note 224, at 340.

228. A judge, for Fuller, could not apply the law without understanding the purposes of law and must embrace “his responsibility for making law what it ought to be.” Lon L. Fuller, *Positivism and Fidelity to the Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 647 (1958); Winston, *supra* note 224, at 339–40.

229. HART & SACKS, *supra* note 209, at 6. A second reason Hart and Sacks do not provide a substantial mooring for the principle of institutional settlement is practical. Legal Process was as much a description of sociological-legal mechanics as it was a guide for future attorneys and lawmakers and *The Legal Process* was directed at them rather than professional legal theorists. The principle of institutional settlement demanded that those working within the law understand and appreciate the proper institutions for a given legal dispute. Lawyers and judges must pay “attention to the constant improvement of all of the procedures which depend upon the principle in the effort to assure that they yield decisions which are not merely preferable to the chaos of no decision but are calculated . . . to advance the larger purposes of society.” *Id.*; see also *id.*, at lxxxvi, 6.

230. See generally *id.*

ploys “reasoned elaboration.”²³¹ Reasoned elaboration is the principle of institutional settlement in action.²³² It demands that the judge “resolve the issue before him on the assumption that the answer will be the same in all like cases.”²³³ This duty requires judges to *articulate*, to explicitly consider whether the dispute being resolved is properly judicial, and to also consider whether other forums or institutions are available.²³⁴ A judge’s decision should accord with prior, established decisions; that is, “elaborate the arrangement in a way which is consistent with other established applications of it” and do so in a way that “best serves the principles and policies [the law] expresses.”²³⁵ For Legal Process, a principled, well-reasoned judicial decision is one self-similar shape in the larger fractal that constitutes and embodies the realization of society’s broadest purposes.²³⁶

If for Legal Process the purposes or morality in society’s law are only fully realized in their pursuit, a properly reasoned decision is essential at different levels. It achieves some particular substantive resolution for the parties involved, but it also works out some broader societal purposes. At the same time the decision defines and realizes particular ends being sought by the competing parties, it articulates and gives shape to the societal purposes and morality that are embedded in the law. It is this that reasoned elaboration, in its institutional context,

231. Duxbury, *supra* note 211, at 661–62. Reasoned elaboration is the ideal method for judge-made, common law. A similar variant for interpreting statutes is called “purposive interpretation,” *see id.* at 667, which is not addressed in this paper.

232. *Id.* at 663.

233. *Id.* at 662.

234. HART & SACKS, *supra* note 209, at 146–47.

235. *Id.* at 147.

236. According to Hart and Sacks:

Not only does every particular legal arrangement have its own particular purpose but that purpose is always a subordinate one in aid of the more general and thus more nearly ultimate purposes of the law. Doubts about the purposes of particular statutes or decisional doctrines, it would seem to follow, must be resolved, if possible, so as to harmonize them with general principles and policies.

Id. at 148. For a view of law as a fractal, see generally Andrew Morrison Stumpff, *The Law is a Fractal: The Attempt to Anticipate Everything*, 44 LOY. U. CHI. L.J. 649 (2013).

accomplishes. "The organizing and rationalizing power of this idea," Hart and Sacks write, "is inestimable."²³⁷

4. *Privileging judicial activity*

The last feature of Legal Process worth noting is its "peculiar preference" for the judicial institution.²³⁸ Though *The Legal Process* deals with a range of institutions, it treats courts as especially competent²³⁹ and is critical where courts "pass the buck to the legislature."²⁴⁰

B. *Kaplan's Legal Process*

Benjamin Kaplan also held Legal Process views, and specifically toward procedural rulemaking. This is made most apparent in a 1960 lecture he gave contrasting West German and American civil procedures.²⁴¹ At the time he spoke, New York was considering comprehensive reforms to its court system, including the first major revisions to its civil procedure in a century.²⁴² Kaplan directed his remarks to this effort, describing lessons that could be extrapolated from West Germany.²⁴³

237. HART & SACKS, *supra* note 209, at 148.

238. Duxbury, *supra* note 211, at 661.

239. Sebok, *supra* note 210, at 1579, 1587. The casebook is "implicitly but aggressively 'adjudication-centered,'" apportioning 42% of its content to common law enforcement and statutory interpretations. *Id.* at 1579.

240. Duxbury, *supra* note 211, at 661 (quoting Duxbury's copy of THE LEGAL PROCESS at 488). At one point in the book, the author rails against a Supreme Court ruling that refused to endorse a theory of federal common law negligence where the relevant state law appeared inadequate and Congress had not legislated on the issue. *See also* HART & SACKS, *supra* note 209, at 524 (critiquing *United States v. Standard Oil Co.*, 332 U.S. 301, 317 (1947)). *United States v. Standard Oil Co.* is discussed in a section titled, "The *Standard Oil* Case: Herein the Myth of An All-Competent and Indefatigable Congress." *Id.* at 522. The editors conclude that,

[d]uring the forties and fifties there has grown up, and been fostered sometimes by the same writers, a myth of legislative omni-competence reaching on occasion heights of fantasy beyond any which the earlier myths every attained. It can safely be predicted that this latter-day myth is destined for an even more drastic debunking in the sixties.

Id.

241. Benjamin Kaplan, *Civil Procedure – Reflections on Comparisons of Systems*, 9 BUFF. L. REV. 409, 409 (1960).

242. JUDICIAL CONFERENCE OF THE STATE OF N.Y., *supra* note 17, at 26–27.

243. Kaplan, *supra* note 241.

Kaplan admits that a country's constitution and the historical development of its law will constrain its procedure, but he emphasizes that the latter could not be reduced to a function of the former.²⁴⁴ The civil court system was principally a site for the application of reason to efficiently resolve conflicts.

Fundamentally the systems seek to promote the use of reason in the process of adjudication. But this purpose does not delimit a single, narrow road to its attainment, for there are a number of plausible ways of going about garnering, presenting, and considering proofs and reasoned arguments so that substantive norms may be cogently applied to the resolution of disputes. Moreover the aim of reasoned decision must be held in balance with a host of other aims including speed and economy. Each system can thus be viewed as a vector of considerations: the considerations are similar but the values assigned to them in the systems differ, the vectors differ.²⁴⁵

Kaplan saw a body of civil rules as one institution for achieving basic societal purposes. "In the end," he stated, "the mélange of rules and habits which together make up a procedural system somehow accords with the larger patterns of the society which the system serves."²⁴⁶

According to Kaplan, American procedure compared to the German system tended to have more restrictive rules for pleading, inflexible timing requirements, and complex rules for evidence. He highlighted the benefits of giving judges "of paternalistic bent" broad powers to steer cases, which he contrasted to a system in which litigation is fueled by the "free-

244. *Id.* at 417-18.

245. *Id.* at 431.

246. *Id.* at 432.

wheeling energies of counsel . . . in adversary confrontation before a detached judge."²⁴⁷ He complained about the emphasis on trial as the primary focus of conflict resolution. Kaplan compared the "elaborate and time-consuming contests called trials" to the "episodic" nature of Germany's judicially managed "conferences."²⁴⁸ Rather than building up to a single "concentrated" event formatted and structured in advance, German procedure, which proceeded in an unspecified number of informal conferences between the counselors and a judge, allowed a dispute to unfold and resolve more organically.²⁴⁹ The American system allotted too many resources toward individual disputes, using "expensive and brittle tools to do a meticulous job on the particular case."²⁵⁰ The trade-off came at the cost of fewer cases, "excessive delay, heavy expense, settlements artificially induced," and a general inadequacy in the face of "the need for mass output."²⁵¹ "Constituted and manned more or less as it now is," Kaplan declared, "our court system will continue to have decidedly limited capacities for effective work satisfactory to the litigants and compatible with the larger claims of society."²⁵²

Kaplan called rulemaking a "powerful instrument . . . for the continuing betterment of procedure," and he urged rule-makers to experiment.²⁵³ The goal, after all, was to choose the rules that produced the best consequences, defined "in the light of purposes felt or perceived."²⁵⁴

We see turbulences and strifes arising in society
for which we have no solutions that promise to
be durable, and so we try to set up neutral

247. *Id.* at 431.

248. *Id.* at 410, 419, 424.

249. *Id.* at 419.

250. *Id.* at 426.

251. *Id.*

252. *Id.*

253. *Id.* at 429-30.

254. *Id.* at 432.

mechanisms by which the contending parties may be brought to adjustments however temporary these may turn out to be Looking about my own law school, I find a strong involvement in process, in the assessment of the strengths and weaknesses of particular methods of reaching adjustments up and down the line of private and governmental activity. There is a similar concern among lawyers generally.²⁵⁵

Of course, not every lawyer subscribed to this.

C. *Frank's Legal Liberalism*

Frank's profile is of an individual who was marginalized from legal academia, of someone who supported the power of federal courts to aggressively protect unbending constitutional rights that were deeply rooted in American history and tradition, and of someone who saw himself as an advocate, in and out of the courtroom, for those who had suffered injustice. Though he does not easily reduce to any one current of thought, his outlook generally places him within the tradition of mid-century legal liberalism. Most broadly, this was a "trust in the potential of courts, particularly the Supreme Court, to bring about 'those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy change with nationwide impact.*'"²⁵⁶ Legal liberals were not unrestrained in seeking these ends though. As Louis Michael Seidman has maintained,

Precedent, text, tradition, procedural regularity,
and the other standard tools of legal analysis did

255. *Id.* at 430.

256. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996) (quoting GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 4 (1991)).

not have to be interpreted with a stolid lack of imagination, but they did pose outer limits on what could be accomplished. Law was not simply the means by which a liberal program could be implemented; it had claims of its own that demanded respect.²⁵⁷

In many ways Frank was in the vanguard of this tradition, often in the trenches for crucial Supreme Court cases whose decisions extended constitutional rights to marginalized individuals.

Frank believed early on in the role of the court protecting individual rights. At age twenty-five, Frank was the sole clerk for Justice Hugo Black.²⁵⁸ When the Court was faced with determining the constitutionality of a conviction based on a military curfew imposed on Japanese-Americans,²⁵⁹ Frank pleaded in a note to Black to invalidate the curfew, arguing that it was “a foremost principle of constitutional law,” that “in America guilt must be personal and that no man should be convicted because of his associations.”²⁶⁰ Frank’s attitudes owed much to Justice Black, whose jurisprudence tended to treat the federal judiciary as responsible for aggressively policing violations of civil liberties.²⁶¹ The two maintained a life-long friendship and Frank authored numerous biographical pieces on the Justice.²⁶²

257. Louis Michael Seidman, *J. Skelly Wright and the Limits of Liberalism*, 61 *LOY. L. REV.* 69, 72 (2015).

258. JOHN P. FRANK, *INSIDE JUSTICE HUGO L. BLACK: THE LETTERS* 1 (2000).

259. See *Hirabayashi v. United States*, 320 U.S. 81, 85–87 (1943).

260. Stanley G. Feldman, *Christmas Cards from JPF*, 35 *ARIZ. ST. L.J.* 219, 237–38 (2003) (citing *Hirabayashi*, 320 U.S. 81). Though the Supreme Court allowed the curfew, Frank was posthumously vindicated in 1987 when the Ninth Circuit vacated *Hirabayashi*’s conviction. *Hirabayashi v. United States*, 828 F.2d 591, 594 (9th Cir. 1987).

261. See HOWARD BALL, *HUGO L. BLACK: COLD STEEL WARRIOR* 210–36 (1996); JAMES J. MAGEE, *MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT*, at xi–xii (1979); ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 488–501 (1994); Irving Dilliard, *The Individual and the Bill of Absolute Rights*, in *HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM* 97–132 (Stephen Parks Strickland ed., 1967); see also, e.g., *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting) (arguing for a complete application of the Bill of Rights).

262. See generally FRANK, *supra* note 258, at 2; JOHN P. FRANK, *MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS* (Alfred A. Knopf ed., 1949); John P. Frank, *Hugo L. Black*, 197 *LAW &*

Frank agreed with Black that history demonstrated that the Fourteenth Amendment incorporated all of the Bill of Rights and he endorsed vigorous First Amendment protections.²⁶³ Some of his positions on the Court's role of vindicating individual rights went farther than Black himself had gone. In one piece, for example, Frank offered radical correctives to what he saw as the courts' failure to meet the founders' expectations concerning the use of judicial review of national legislation to guard constitutional rights. He suggested eliminating the political question doctrine because it limited courts' capacity to decide constitutional issues. And he called for relaxing standing requirements and creating a presumption of unconstitutionality where laws were challenged as violating basic civil liberties.²⁶⁴

Frank later became involved in the civil rights movement, advising Thurgood Marshall and working with the NAACP to challenge the constitutionality of racial segregation.²⁶⁵ In *Sweatt v. Painter*, a precursor to *Brown v. Board of Education* in which the NAACP successfully challenged the University of Texas Law School's whites-only admission policy,²⁶⁶ Frank co-authored the influential amicus brief for the Committee of Law Teachers Against Segregation in Legal Education.²⁶⁷ The

SOC'Y ORDER 1 (1971); John P. Frank, *Hugo L. Black: He Has Joined the Giants*, 58 A.B.A. J. 21 (1972); John P. Frank, *Justice Black and the New Deal*, 9 ARIZ. L. REV. 26 (1968).

263. FRANK, *supra* note 258, at 35.

264. John P. Frank, *Review of Basic Liberties*, in *SUPREME COURT AND SUPREME LAW* (Edmond Cahn ed., 1968).

265. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 275, 535 (1976); John Q. Barrett, *Teacher, Student, Ticket: John Frank, Leon Higginbotham, and One Afternoon at the Supreme Court—Not a Trifling Thing*, 20 YALE L. POL'Y REV. 311, 312–13 (2002). See generally John P. Frank, *Can Courts Erase the Color Line?*, 21 J. NEGRO ED. 304 (1952), reprinted in 2 BUFF. L. REV. 28 (1952) (transcribing Frank's address, following Thurgood Marshall's, at Howard University's National Conference on The Courts and Racial Integration in Education). Frank also co-wrote a lengthy article on the constitutional and legislative histories of the Fourteenth Amendment. John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 131 (1950).

266. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

267. Brief of Amici Curiae in Support of Petitioner, *Sweatt v. Painter*, 338 U.S. 865 (1949) (No. 44 1949), 1950 WL 78683. Frank also arranged for A. Leon Higginbotham, Jr., who had been a student in a civil procedure course Frank had taught, to attend the oral argument. Bar-

brief argued that the Court in *Plessy v. Ferguson* “had *de facto* overruled the Fourteenth Amendment” which categorically proscribed laws imposing racial classifications.²⁶⁸ Frank also wrote the petitioner’s brief while serving as co-counsel for Ernesto Miranda in the Supreme Court case that established the *Miranda* warning, requiring police to apprise suspects in custody of their basic constitutional rights.²⁶⁹

Frank viewed questions of law as questions of justice. He volunteered continuously throughout his career.²⁷⁰ Janet Napolitano, once his protégé, claimed that Frank had the “largest commitment to pro bono service of any lawyer” she had known.²⁷¹ Frank volunteered to advise Anita Hill when she testified before the Senate Judiciary Committee’s hearing on the nomination of Clarence Thomas.²⁷² After the hearing, according to Hill, Frank was in tears and told her that her testimony was of historical significance.²⁷³ During the nomination of Robert Bork, Frank testified in front of Congress and denounced the nominee as a judicial extremist.²⁷⁴ He objected to Bork’s failure to rule for minorities or a smaller party. “If you pull together his whole career as a judge,” Frank concluded,

there is a remarkable void. The life of no average American who works for a living, or his family, is better, richer, happier, safer, or in any way more secure because of Judge Bork’s opinions and his years of judicial service. I realize that it would not occur to Judge Bork to think that this

rett, *supra* note 265, at 314–15.

268. George Paul, *John Frank and the “Law Professor’s Brief,”* 35 ARIZ. ST. L.J. 219, 259 (2003); Brief of Amici Curiae in Support of Petitioner, *supra* note 267, at 21.

269. GARY L. STUART, *MIRANDA: THE STORY OF AMERICA’S RIGHT TO REMAIN SILENT* 44–50 (2004); *Miranda v. Arizona*, 384 U.S. 436 (1966).

270. See generally Janet Napolitano, *John P. Frank’s Pro Bono Activities*, 35 Ariz. St. L.J. 219, 229 (2003) (outlining Frank’s pro bono contributions throughout his career).

271. *Id.* at 229.

272. Anita Hill 20 Years Later, C-SPAN (Oct. 15, 2011), www.c-span.org/video/?302079-1.

273. *Id.*

274. *Bork Nomination Day 8, Part 3, supra* note 1, at 2:17:17.

was relevant, but I hope that this committee thinks it is relevant because it is part of the task of the office even of the highest court in the land to do justices among people and I don't think that thought has ever crossed Judge Bork's mind.²⁷⁵

"You may think it's silly sentimentality," he went on to say, "but I was nurtured by Justice Black and I don't think it's silly sentimentality."²⁷⁶

His character, as much as his legal ideology, set Frank apart from Kaplan and Sacks. Frank had attended and taught at Yale Law School, and had published prolifically, but the faculty viewed his scholarship as superficial, too historical, and oddly hagiographic of Justice Black.²⁷⁷ After penning an article lamenting the difficulty for accused communists in finding legal representation, alumni began to perceive him as sympathetic to communism.²⁷⁸ He was denied tenure in 1954 and moved to Arizona, in part because he suffered from recurrent asthma attacks, joining the firm Lewis & Roca as a litigator.²⁷⁹ So while Kaplan and Sacks arrived to Committee meetings from Harvard Square, Frank hailed from a private firm in the Western badlands.

IV. LEGAL PROCESS, LEGAL THEORY, AND REWRITING THE CLASS ACTION RULE

After the fall Committee meeting, Frank continued to lobby for the individual's day in court. "This is, as I see it, his Constitutional right," Frank wrote, noting that the rule-makers needed to keep in mind that "courts are created for people rather

275. *Id.*

276. *Id.* at 2:57:33.

277. Timothy R. Verhoff, *Featured Alumni: John P. Frank '40*, 23 GARGOYLE 7, 7 (Summer, 1992).

278. LARA KALMAN, *LEGAL REALISM AT YALE: 1927-1960*, at 194-95 (1986).

279. Verhoff, *supra* note 277.

than the people created for courts."²⁸⁰

For those of a Legal Process mindset, this argument was dubious. In any society, institutions arise to allow humans to achieve societal purposes. The courts were one of these institutions, though there was a broad sense in the 1950s and 1960s that they were struggling with increasingly burdensome workloads.²⁸¹ Kaplan and Sacks wanted to reform the rules in terms of the courts' institutional fitness to resolve the increasingly complex disputes that were arising out of a highly technological postwar consumerist society. A flexible class action rule with the capacity to aggregate litigants could resolve conflict by means of adjudication on a larger scale. For Legal Process, questions of "common concern . . . have to be settled, one way or another, if the enterprise is to maintain itself and continue to serve the purposes which it exists to serve."²⁸² If there were conflicts involving numerous individuals with common interests, courts had to develop procedural mechanisms that could adequately resolve them. Kaplan and Sacks believed that the spurious class action was evolving to do just that and they were adamant in their opposition to excising it.²⁸³

Of course, a belief that courts should solve disputes on a class-wide basis assumed a confidence that courts were capable of doing so. In part, faith that an elastic class action device would work was a reflection of Legal Process's general preference for the judicial institution. But that preference had a deeper logic. Judges for Kaplan and Sacks occupied a privileged position: they employed reasoned elaboration. Courts, by mediating conflicts with reason, could effect their institution's goals and further the interests of society. Class actions would expand the impact radius of a well-articulated decision; greater numbers of individuals in society would receive more

280. Letter from John P. Frank to Benjamin Kaplan, Professor, Harvard Law Sch. 2 (Jan. 16 1964), *microformed on* CIS-7003 (Cong. Info. Serv.).

281. JUSTIN CROW, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 240-43 (2012).

282. HART & SACKS, *supra* note 209, at 4.

283. Tentative Proposal (1962), *supra* note 69, at EE-53.

consistent direction regarding their legal rights. Reasoned elaboration explains why Sacks and Kaplan were eager to give judges expansive discretion. A list of guiding, neutral criteria for managing a lawsuit would assist the judge in reasoned elaboration. Imposing “rigid” requirements that members be notified and given an opportunity to opt out, and making a judgment automatically binding on the entire class, would hamstring a court’s ability to resolve disputes, particularly ones with novel features. Kaplan and Sacks opposed all of the proposed provisions that mandated a particular action rather than leaving it to the judge’s analysis.²⁸⁴ In the summary defense Kaplan gave of the broad draft rule in the Tentative Proposal, he emphasized that the relevant “considerations will vary from case to case.”²⁸⁵

For Legal Process, Frank’s apprehension that the rule would not square with a particular constitutional value or principle was a second order concern. Kaplan and Sacks viewed constitutional doctrines as an important set of ordering principles, but only one set nonetheless. In the realm of rulemaking, more basic matters took priority. “Fundamentally,” as Kaplan said, a procedural system “seek[s] to promote the use of reason in the process of adjudication.”²⁸⁶ Their task as rule-makers was to ensure the institution functioned to permit the realization of the broader purposes it served, which for a court meant the adjudication of a wide range of disputes in a principled, reasoned way.

Frank saw the institutional role of the federal courts differently. As a litigator, Frank no doubt accepted that a core function of federal courts was to resolve private disputes.²⁸⁷ He

284. *Id.* at EE-2.

285. *Id.* at EE-12.

286. Kaplan, *supra* note 241, at 431.

287. John P. Frank, *Federal Diversity Jurisdiction – An Opposing View*, 17 S.C. L. REV. 677, 677 (1965) (arguing against a proposal by the ALI to narrow diversity jurisdiction because federal courts play crucial role for resolving disputes). Interestingly, Edward Purcell argues persuasively that narrowing diversity jurisdiction fits with the principles of Legal Process, particularly those explicated by Herbert Wechsler, who was head of the ALI at the time. My analysis suggests that Kaplan and Sacks, in pushing for an expansive class action rule, did not show

was, however, acutely sensitive to the substantive limits on the ways courts could do so.²⁸⁸

Frank's concept of class action rulemaking relied on Supreme Court class action case law and he treated the decisions in *Smith v. Swormstedt* and *Supreme Tribe of Ben Hur v. Cauble* as restrictions.²⁸⁹ They defined the proper purposes and scope of federal class actions. Those cases operated as pinholes in a protective screen that let in a few points of light but otherwise blocked litigation out.²⁹⁰ The instances in those cases were exclusively those in which class actions had been explicitly permitted; under different circumstances, a class action would be inappropriate. But this was not the only viable interpretation of the case law. In both decisions, the Supreme Court permitted rather than rejected contentious, novel uses of the class action mechanism.²⁹¹ One could have read those cases as a constitutional opening, allowing for the expansion of class action litigation. Frank did not interpret the cases in this way.

Behind Frank's interpretation of the case law lied deeper motivating principles. He explicitly prioritized the "free choice of the individuals" over "the economy goal" — the latter was not even an appropriate *goal* for rule-makers to pursue.²⁹² Frank repeatedly referred to the rights of individuals to pursue their own litigation and argued for the prevailing need to protect absent class members.²⁹³ In his view, class actions were a rare exception to a substantive principle, rooted in the Constitution and American legal tradition, of individualized adjudication.

This approach impeded a flexible, potentially powerful class action rule and clashed with Legal Process's tendency to view

the same federalism concerns. PURCELL, *supra* note 212, at 273.

288. In this way, Frank is similar to his contemporary Judge J. Skelly Wright as depicted by Louis Michael Seidman. Seidman, *supra* note 257, at 70.

289. Fall 1963 Transcript, *supra* note 2, at 27; Letter from Frank to Kaplan, *supra* note 72, at 8.

290. Fall 1963 Transcript, *supra* note 2, at 27.

291. See 57 U.S. 288, 310-13; 255 U.S. 356, 366-67.

292. Letter from Frank to Kaplan, *supra* note 72, at 9.

293. Fall 1963 Transcript, *supra* note 2, at 8, 15, 28, 37, 43, 45.

human interests as interconnected, but Kaplan and Sacks might not have disagreed with the content of the general principle. It was rather that they could not lend it priority because Legal Process did not integrate substantive principles in this way. Recall the principle of institutional settlement: decisions that are the “duly arrived at result of duly established procedures” are to be binding.²⁹⁴ Basic, substantive principles of law, what the law ought to be, was to be determined in its operation.²⁹⁵ Legal Process, which viewed society as developing, as moving forward, treated law as always “becoming.”²⁹⁶ Improving judicial procedures was necessary to allow the court system to cope with new pressures, and modernizing procedure would improve the legal order, but doing so would also facilitate the achievement of *good* order.

Thus, Kaplan and Sacks reacted against Frank’s insistence on individualized adjudication on the grounds that substantive principles of law were to be realized in the legal process. As a procedure’s ability to resolve conflict improves, so does the law’s capacity to shape society’s morality and purposes. This would occur in the prosecution of cases through courts; imposing them onto the process a priori, as Frank was trying to do, was anathema to them. Hence Kaplan’s objection to Frank’s proposal to excise (b)(3). “[T]o cut it off,” he said, “and say no it can’t grow in this direction” was “unfriendly to humane procedure” because it was the organic development of law that provided the realization of substantive principles.²⁹⁷ This also explains Sacks’ firm opposition to embedding in the rule a prohibition against adjudicating mass accidents. “[A]s attitude changes,” Sacks said, “decisions will change.”²⁹⁸ A principle of individualized adjudication, even if validly recognized, might not be the law forever. Sacks was emphatic that Rule 23 was not substantive law. At one point during the fall

294. HART & SACKS, *supra* note 209, at 4.

295. *Id.* at 5.

296. Barzun, *supra* note 224, at 2.

297. Fall 1963 Transcript, *supra* note 2, at 21.

298. *Id.* at 32.

meeting he said—to a committee with “Procedure” in its title—“This is a procedural device.”²⁹⁹ To build a substantive principle into the process through which substantive principles were to be realized would be an inversion, or violation, of the principle of institutional settlement.

The pragmatism of Kaplan and Sacks framed their target rule. Kaplan praised German procedure as a system that empowered judges to resolve disputes flexibly, without complex rules cramping the process.³⁰⁰ In the initial draft, set out in the Tentative Proposal, a barebones rule aggregated litigants on a “common question” basis, left the scope of a binding judgment to judicial discretion, and imposed no safeguard restrictions on an adjudicating judge.³⁰¹ Other rule-makers rejected this as too loose and unresponsive to the problem of one-way intervention. The draft rule circulated in March 1963—before the fall meeting—was less open ended, following a three-part division and forcing the judge to determine the scope of the binding class action early.³⁰² Kaplan and Sacks objected to narrowing judicial leeway to tailor a binding judgment, but seemed to have acceded the need to prevent one-way interventions.³⁰³ But in the face of complaints that the rule did too little to protect absent class members, their response universally was to add in considerational criteria. These, unlike firm limitations or automatic mechanisms, were grist for the mill of reasoned elaboration. Considerations could serve as practical guides to judges as they responded, with a “neutral mechanism,” to the “turbulences and strifes arising in society.”³⁰⁴

John Frank was not, philosophically, a pragmatist.³⁰⁵ Kaplan and Sacks imported tenets of Legal Process into their attitudes toward rulemaking. Frank, by contrast, drew from his com-

299. *Id.* at 17. The copula is underlined in the transcript. *See id.*

300. Kaplan, *supra* note 241, at 419, 424, 426, 429–32.

301. Tentative Proposal (1962), *supra* note 69, at EE-1.

302. Preliminary Draft (1963), *supra* note 121, at EE-1 to 4.

303. Fall 1963 Transcript, *supra* note 2, at 31–32.

304. Kaplan, *supra* note 241, at 430.

305. *See* Barzun, *supra* note 224, at 3 n.5 (calling Legal Process “anti-foundationalist”).

mitment and experience as a courtroom attorney where he had sought to ameliorate some injustice by arguing that a constitutional right had been violated. For him, the moral implications of a legal arrangement or particular judicial decision mattered. Essentially his objection to Bork's nomination was that the judge had applied the law immorally. Following Black, Frank embraced the substantive principles of constitutional law.³⁰⁶ His conviction that federal courts had a duty to promote and uphold particular ends, namely the protection of individual liberties, inflected his thinking about procedural rulemaking. Substantive principles from American legal tradition and constitutional law existed outside of the procedural arrangement and needed to be built into any procedure. Frank could not trust that the proper ends, defined by the principle of individualized adjudication, would be achieved through the application of so-called neutral principles. Legal procedure needed to be constrained from without, because a judge's use of ostensibly neutral reasons to resolve a conflict was no assurance that the judgment would conform to constitutional imperatives. In the class action rulemaking context, procedure could not by virtue of its own activity achieve the ends that the principle of individualized adjudication required.

CONCLUSION

In the end, Legal Process got much of what it had preferred, a broad rule that empowered a judge to aggregate litigants liberally. But it did not achieve everything. The final rule was far from the initial draft rule, which grouped a class purely on the basis of a "common question" and provided no mandatory safeguards. John Frank, as an advocate, won exactions through his tenacity and in his proclivity to identify substantive constitutional rights. That the procedural rule for class actions, and not just post-1966 case law, incorporates a mandate that (b)(3) class members be notified and given the opportuni-

306. See *Bork Nomination Day 8, Part 3*, *supra* note 1.

ty to opt out of class-wide litigation was a concession to Frank's principle of individualized adjudication.³⁰⁷

307. It was also victory for, and won in part by, Wyzanski and Moore, who were concerned about the integrity of the boundaries of state and federal jurisdiction. Both sought the notice and opt-out requirements to permit parties to litigate in state court. *See* Fall 1963 Transcript, *supra* note 2, at 26; Moore & Cohn, *supra* note 41, at 575.