THE FEDERAL RULES OF CIVIL PROCEDURE AS A VINDICATOR OF CIVIL RIGHTS

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How are we to judge a system of procedure? Fifty years ago, the framers of the Federal Rules of Civil Procedure measured those Rules against a now-familiar criterion: they asked, what procedure will most efficiently foster decisions on the merits?¹ Thus, Judge Clark called the Rules "but means to an end, means to the enforcement of substantive justice."² Attorney General Homer Cummings told the House Judiciary Committee that "[t]he courts are established to administer justice, and you cannot have justice if justice is constantly being thwarted and turned aside or delayed by a labyrinth of technicality."³ William D. Mitchell, Chairman of the Advisory Committee, told that same House Committee that "these rules attempt . . . to get rid of technicalities and simplify procedure and get to the merits."⁴

In short, it is fair to say that the Rules reflect an attempt to "devise standards that efficiently tend the gates of the federal court system without excluding claims for merely technical reasons."⁵ The success of the attempt may be judged by the Rules' effect of "permitt[ing] the federal courts to open their doors to a new host of rights seekers,"⁶ and in particular those proceeding on novel grounds. The Rules themselves

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¹ See Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 497 & n.11, 501 & n.29 (1986). Other values that the reformers sought to realize were economy and speed of disposition, *see, e.g.*, FED. R. CIV. P. 1, a unification of procedure throughout the federal courts, and the spurring of procedural reform in the states. *See Rules of Civil Procedure for the District Courts: Hearings on S.J. Res. 281 Before a Subcomm. of the Senate Comm. on the Judiciary*, 75th Cong., 3d Sess. 14-15 (1938) (statement of Arthur T. Vanderbilt).

² Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 551 (1939).

³ *Rules of Civil Procedure for the District Courts: Hearings on H.R. 8892 Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. 2 (1938) [hereinafter *House Hearings*]. "Courts exist to vindicate and enforce substantive rights. Procedure is merely the machinery designed to secure an orderly presentation of legal controversies." Cummings, *Immediate Problems for the Bar*, 20 A.B.A. J. 212, 212-13 (1934).

⁴ *House Hearings*, *supra* note 3, at 24. "The books are full of meritorious cases destroyed by technicalities. The whole trouble with our present practice rules is that they are too technical, too much emphasis laid on form and practice, not the ultimate end. What you are really after is the truth and the merits of the case." *Id.*

⁵ Note, *Plausible Pleadings; Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 644 (1987).

⁶ Resnik, *supra* note 1, at 500.

are testimony enough to the framers' desire to accommodate decidedly novel claims of right.⁷ Even were they not, it would only be necessary to reflect on the New Deal,⁸ legal-realist⁹ cast of some of the key actors in the procedural reform movement to convince ourselves of their commitment to adjudication on the merits of *every* claim, however unprecedented or hard to prove.

In the intervening years of practice under the Rules, procedure has been called upon to meet numerous challenges that the reformers could not have contemplated,¹⁰ and it is perfectly meet that we reconsider their drafting decisions today in light of those challenges. It seems to me, however, that the first question, the *threshold* question, if you will, is that familiar question of criteria: have our goals with respect to procedure diverged from those of the framers? And if so, what is it that we now expect a successful system of procedure to accomplish?

One of the contemporary challenges facing the federal courts is said to be the so-called "caseload explosion."¹¹ That very characterization, of course, obscures important questions about the success and functioning of the courts: which members of society are bringing greater numbers of federal suits,¹² why are they doing so,¹³ and what

⁷ Compare, for example, Rules 8 (liberal pleading rules), 13 and 14 (joinder of claims and parties), and 23 (class actions) of the Federal Rules with their far more restrictive counterparts in Code practice.

⁸ "The federal rules ultimately were passed as New Deal legislation." Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981).

⁹ See Note, *supra* note 5, at 645-47; see also Resnik, *supra* note 1, at 502 (discussing the drafters' ideological motivations).

¹⁰ Professor Resnik has astutely observed that "one of the prototypical lawsuits for which the 1938 Federal Rules were designed was the relatively simple diversity case . . . between private individuals or businesses in which tortious injury or breach of contract was claimed, private attorneys were hired to represent the parties, and monetary damages were sought." Resnik, *supra* note 1, at 508; see also Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307, 308 (1973) (discussing the class action as a necessary procedural response to the emergence of the modern multi-transaction, "mass production" type of legal claims).

¹¹ See generally R. POSNER, *THE FEDERAL COURTS* 59-93 (1985) (describing the federal courts system and arguing that "the system is on the verge of being radically changed for the worse under pressure of the rapid and unremitting growth in caseload"); Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 232 (1976) (commenting on the rising caseloads of federal courts and the threat such developments pose to the integrity of the law and the adjudicatory process).

¹² Judge Posner, who traces the explosion of the district court caseload to 1960, recently has noted that civil rights cases contributed less to that explosion than is generally believed:

[I]f the federal courts had not enlarged the rights of state and federal prisoners, if Congress and the courts had not enlarged the rights of people claiming violations of their civil rights, and if Congress had adjusted the minimum-amount-in-controversy requirement for diversity cases to keep pace with the falling value of the dollar . . . district court filings in 1983 . . . [would still have grown to] more than two and a half times what they

would be the social and political costs of denying them access to a federal forum for resolution of their disputes?¹⁴ Leaving those questions to one side, it is evident that the growth in the federal civil docket has fueled demands that the Rules be revised or reinterpreted in such a way as to encourage quick and economical dispositions. The criterion of successful judicial functioning implicit in these demands—namely, efficiency—may well deserve our attention, and I do not intend to dispute its merits here. What concerns me, rather, is that otherwise legitimate efficiency-based arguments are being pressed into the service of a political agenda hostile to the *substantive* rights of certain classes of federal litigants. This is a development that cannot be reconciled with the founding purposes of the Rules, and it calls for some investigation before we acquiesce in it.

Of course, the desire that disposition be expeditious and economical is by no means new. Roscoe Pound, in 1906, complained about judicial inefficiency.¹⁵ The Rules themselves have always provided that they are to be “construed to secure the just, speedy, and inexpensive determination of every action.”¹⁶ This kind of efficiency coexists perfectly well with the value both Dean Pound and the framers placed on “enforc[ing] . . . substantive justice.”

The new criterion against which procedural rules are being measured, on the other hand, is quite different from the earlier, substantively neutral, desire for efficiency. The drafters of the Rules were primarily concerned with preserving substantive justice from the onslaught of an outcome-determinative procedural quagmire, and valued procedural efficiency chiefly as a means to that end. The priority of these values and their relationship as means and ends now appears to have

were in 1960.

R. POSNER, *supra* note 11, at 87 (1985). If the number of civil rights filings alone had remained at 1960's level, civil filings would have been 3.6 times larger in 1986 than in 1960. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C-2 (1986).

¹³ A number of commentators believe that the very *success* of the federal courts' functioning attracts litigants. See Resnik, *supra* note 1, at 495 n. 6.

¹⁴ See Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 300 (1973) (arguing that greater accessibility to federal court provides “a valuable escape valve, preventing explosive reactions during a period of boiling social change”).

¹⁵ See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 406 (1906), reprinted in 35 F.R.D. 273, 287 (1964). Judge Higginbotham has made the point that Dean Pound's “primar[y] concern[.]” in his 1906 address was with “assuring justice and improving its quality for all of our citizens.” Higginbotham, *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134, 134 (1976).

¹⁶ FED. R. CIV. P. 1.

been reversed. Much of the contemporary discussion on procedural efficiency implies that a successful federal court system is one which most effectively *excludes* certain kinds of substantive claims. Efficiency has taken on a value of its own. My comments will be geared to demonstrating that this is so, and to arguing that, while the contemporary success of the Federal Rules may be assessed against a variety of valid criteria, any criterion with a substantive bias ought not be among them.

We will be justified in speaking of a "substantive bias" in the contemporary application of procedural rules if we find that particular classes of substantive claims consistently receive less favorable treatment than others at the hands of those rules. A trend toward such a disparity of treatment, in fact, can be discerned. Increasingly, particular classes of substantive rights are taking on a disfavored status in our federal courts. This development has not proceeded on the basis of any reasoned judicial or legislative judgment that claims to enforce those rights are less deserving of disposition on their merits than are other substantive claims,¹⁷ and indeed has proceeded in many instances in the face of a strongly declared congressional policy specifically favoring the substantive rights in question.¹⁸

The substantively disfavored claims of right to which I refer appear to fall under the rubric of what Professor Chayes has called "public law litigation." Professor Chayes uses the term "public law litigation" to refer broadly to challenges to the action not only of legislative bodies but, more significantly, of "state and federal administrative agencies and large private institutions."¹⁹ Chief among the rights encompassed under this heading are those arising under the civil rights laws, and I will confine my discussion largely to civil rights claims.²⁰

¹⁷ Not even the prophets of the "caseload explosion" are so bold as to suggest directly that civil rights claims are less "deserving" of judicial attention than other claims. See, e.g., Kirkham, *Complex Civil Litigation — Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 200 (1976) ("The essential role of the court in civil rights cases speaks for itself . . ."). The depreciation of such claims comes about instead through indirection. See Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 58-59 (1982) (arguing that the Court's tendency to erect procedural obstacles to "public law . . . adjudication" means that "the substantive choice is made sub rosa, without explicit consideration of the policy issues" involved).

¹⁸ See *infra* notes 52 & 56 and accompanying text (discussing the legislative purpose of § 1988).

¹⁹ Chayes, *supra* note 17, at 60. See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) (analyzing litigation involving the determination of public law issues and the application of regulatory policy to specific situations).

²⁰ Other sources of public law litigation dating from the same period as the Civil Rights Act of 1964 include the Clean Air Act, Clean Water Act, Truth in Lending Act, Consumer Products Safety Act, Occupational Safety and Health Act and Freedom of Information Act. See Chayes, *supra* note 17, at 6 & nn.10-15.

While it is beyond the scope of this Article to speculate as to the deeper political causes of this trend toward the stigmatizing of certain claims of right in the federal courts, I do hope to make a convincing case not only of its existence, but also of a certain correlation between the emergence of a substantive bias in our procedure and the development of a school of thought that elevates ideals of efficiency over the adjudicatory ideals that motivated the framers of the Rules. Case-filing statistics are a crude first indicator of this trend. Those statistics show that in the early days of the Federal Rules, the number of civil rights filings as a proportion of all civil filings grew steadily. The earliest data available put civil rights filings at a half of one-tenth of a percent in fiscal years 1943, 1944 and 1945.²¹ That percentage grew to one-quarter of a percent in 1950, one-third of a percent in 1955, and nearly one-half of a percent by 1960 (0.47%). Civil rights filings grew steadily, in both relative and absolute terms, with the enactment of new protective legislation; they jumped to nearly one and one-half percent of all civil filings in 1965, then to over four percent in 1970; finally, they peaked at eight and two-thirds percent in 1977.

Since 1977, however, a steady retreat has become evident, as filings fell to 6.8 percent in 1980 and to 6.4 percent by 1985.²² A myriad of explanatory factors lie behind this decline, not all of which are related to a substantive bias in the courts. Nonetheless, the vindication of civil rights is no less crucial to the well-being of the nation as a whole than to plaintiffs individually, and it is significant that, during this time of concern with the "caseload explosion," the federal courts have accorded a diminishing priority to this important class of cases. This crude statistical trend will take on much greater significance if we can point to a specific procedural jurisprudence which directly impinges upon the accessibility of a federal forum to civil rights claimants. Under two rules of especial importance to civil rights claimants, Rules 11 (certification of pleadings) and 23 (class actions), such a jurisprudential

²¹ The statistics on federal caseloads contained in this paragraph and the next have been compiled from various years of the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C-2 (for fiscal years 1943-44, Table 6). Until 1960, civil rights filings were reported under "private cases," while thereafter they have been broken down into "U.S. cases" and "private cases." For the sake of uniformity, the figures for "private cases" have been used across the board.

²² Since 1980, the percentage has hovered between roughly six and one-half and seven and one-half, and these variations may not hold statistical significance. In absolute terms, moreover, civil rights filings increased by 1986 to nearly 18,000, as compared to about 11,000 in 1977, the year of their peak share of the docket. Nonetheless, in view of the importance of civil rights to our constitutional order, it is a matter of some concern that cases seeking to vindicate such rights are apparently taking a reduced priority on the federal docket for the first time since 1940.

construction is, in fact, evident.

As originally enacted, Rules 11 and 23 were prime embodiments of the drafters' abstract ideal of the role of procedure. The ideal that procedural rules should advance the disposition of claims on their merits lay behind both the simplified pleading requirements which implicitly informed original Rule 11 and the liberal provision for joinder of parties which was taken to its furthest development in Rule 23. Both Rules, to be sure, had regard for the legitimate concerns of efficiency. The purpose of original Rule 11 was to bar the courthouse door to groundless claims and claims "interposed for delay,"²³ while Rule 23, like its predecessor, Equity Rule 38,²⁴ was intended in large part to foster judicial economy by avoiding a multiplicity of suits.²⁵ Importantly, however, efficiency did not obstruct the principal goal of the Rules, which was the vindication of substantive rights. It is disheartening to be forced to conclude that this is no longer the case, but I believe that as we now examine the subsequent history of these two Rules more closely, that conclusion is inevitable.

I. RULE 23

Rule 23 was rewritten in 1966 largely for the reason that the categories of class actions maintainable under the original Rule 23 had proven "obscure and uncertain" in practice.²⁶ The amendment of a procedure under which it had turned out to be easy "to make a mistake which will finally prejudice your rights"²⁷ was fully in keeping with the spirit that motivated the drafters in 1938. Only later did the substantive bias of which I have spoken make itself felt.

As a preliminary matter, the special dependence of civil rights (and other public rights) litigation on the device of the class action must be noted. The device of the class action is closely associated with the

²³ The Rule originally read, in relevant part:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action

FED. R. CIV. P. 11 advisory committee notes to the 1983 amendments.

²⁴ See FED. R. CIV. P. 23 advisory committee note.

²⁵ See J. STORY, EQUITY PLEADINGS § 76 *a* (10th ed. 1982).

²⁶ See FED. R. CIV. P. 23 advisory committee note to the 1966 amendments.

²⁷ Clark, *supra* note 2, at 551.

figure of the "private attorney general."²⁸ Congress has created, and the courts have implied,²⁹ private rights of action under a variety of statutes which are thought to be so vital as to justify enhanced enforcement, above and beyond that which the Executive branch is able or willing to undertake. Fee-shifting statutes, including section 1988 of Title 42 of the United States Code, have been enacted with the same aim.³⁰

Not only important statutory causes of action, but many significant cases arising directly under the equal protection and due process clauses have been brought as class actions.³¹ In some of those cases, full relief would have been impossible were it not for plaintiffs' ability to proceed as a class.³² This was certainly true of the struggle against segregation

²⁸ See generally Garth, Nagel & Plager, *The Institution of the Private Attorney General*, 61 S. CAL. L. REV. 353, 355 (1988) (discussing the ideology and role of the private attorney general during the last 40 years); see also Chayes, *supra* note 17, at 27-28 (noting that "the class action device confirmed the self-image of public interest lawyers as spokesmen for large groupings toward which they had duties and responsibilities different from those of the ordinary lawyer-client relationship.").

²⁹ The Court's jurisprudence on implying a private right of action in the face of congressional silence is set forth in *Cort v. Ash*, 422 U.S. 66, 77-85 (1975) (finding no implied cause of action under 18 U.S.C. § 610), and its progeny. See *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810-11 (1986) (discussing "the settled framework for evaluating whether a federal cause of action lies"). The Court's fourfold test implicitly recognizes that *group* rights, and not merely those of individuals, are frequently at stake in declaring the availability of a private right of action. See *Cort*, 422 U.S. at 78 (first prong of test asks whether plaintiff is "'one of the class for whose *especial* benefit the structure was enacted'" (quoting *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916))).

³⁰ The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), evinces an unambiguous preoccupation with

[t]he effective enforcement of Federal civil rights statutes[, which] depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right.

H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976).

³¹ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (three of the cases consolidated before the Supreme Court were brought as federal class actions; the fourth was brought in Delaware state court); *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) (class action decided on same day and on same grounds as *Brown*).

³² Judge Weinstein has noted that "[t]he impact of class suits in civil rights cases is substantial. Precedent alone never has the effect of a judgment naming a particular class of which a person is a member. Very often, a class action permits the judge to get to the heart of an institutional problem." Weinstein, *supra* note 14, at 304. The contrary argument, that class certification of civil rights cases is unnecessary to the protection of plaintiffs since the court may order "group relief in individual suits that demonstrate group injuries," Wilton, *The Class Action in Social Reform Litigation*, 63 B.U.L. REV. 597, 615 (1983), is not compelling from the viewpoint of an experienced civil rights litigator. Frequently, a court will decline to order class-wide relief, in the

in public education. In the face of massive official resistance to local implementation of the Court's decision in *Brown*, the civil rights attorney could never count on school officials to construe a court order admitting enumerated individual plaintiffs to a segregated school as an order to desegregate. In many other cases, particularly those seeking to vindicate novel rights in the face of majoritarian hostility, the very ability to proceed required the institution of a class action. Again, the desegregation cases provide an object lesson. A lone plaintiff was extremely vulnerable to the pressure of intimidation by state and local officials, and it was not above those officials to bring such pressure to bear.³³

The disproportionate reliance of civil rights claimants on class suits is graphically illustrated by a sample consisting of all 109 cases brought as class actions in the Northern District of California which were closed between the years 1979 and 1984.³⁴ More than half (56) of those suits were classified as employment discrimination and other civil rights cases, while another quarter (27) were other types of public law litigation. The bulk of the remainder were securities and antitrust claims. Only one of the class suits in the sample was a products-liability case.

In view of the close identification of the class action with public rights claimants generally, and civil rights claimants in particular, it is clear that procedural obstacles to class litigation will have a disproportionately negative impact on those classes of rights-seekers. And, in fact, a very striking statistical trend is discernible over the past fifteen years in regard to the number of class-action complaints filed in the federal courts. That number peaked ten years after the liberalization of Rule 23, when, in 1976, it stood at 2.7% of all civil filings. In absolute terms, this amounted to fewer than 3,600 class suits nationwide. The proportion of new civil actions brought as class actions dwindled to barely three-tenths of one percent,³⁵ or fewer than 750, by 1986, the most

conviction that it lacks the authority to do so when the class has not been certified. If the decree is not framed in class terms, its stare decisis value may be only as great as the defendant's good will and the limited enforcement resources of the members of the uncertified class. Considerations such as these led the NAACP to bring its school-desegregation suits as class actions.

³³ For instance, in the protracted litigation aimed at gaining equal pay for black school teachers, the NAACP frequently was unable to enlist plaintiffs unless local teachers had agreed to guarantee the volunteer a year's pay.

³⁴ See Garth, Nagel & Plager, *supra* note 28, at 355-56 & nn. 5-6.

³⁵ In 1976, 3,584 cases were filed as class actions. That number fell more than 50%, to 1,568, by 1980, amounting to 0.9% of all civil filings that year. By 1986, only 736 cases were filed as class actions, less than 0.3% of civil filings. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table 33 (1982); Garth, Nagel & Plager, *supra* note 28, at 370 n.60.

recent year for which statistics are available.

A variety of explanations have been advanced to account for this decline. Among those explanations, political ones are certainly important: for instance, the outgoing administration's curtailed enforcement activity in such areas as civil rights, environmental protection, and anti-trust,³⁶ and restrictions on the bringing of class actions by attorneys funded through the Legal Services Corporation (LSC).³⁷ Yet the most direct explanation, to my thinking, lies in the hostility which class litigation has generated in some judicial and academic quarters.

The controversy over Rule 23 appears to have centered on its relationship to "the changing role of the federal district judge who must shoulder the heavy burdens of class actions. The assertion is that cases are now brought that are totally unmanageable and have a longer life expectancy than many of the judges asked to adjudicate them"³⁸ The most virulent attacks on Rule 23 have been reserved for the so-called "small claim" class action under Rule 23(b)(3), which is said to bestow benefits primarily upon class counsel in the form of hefty fee awards.³⁹ According to common lore, members of the class, on the other hand, learn of the existence of the case only when a check for two or three dollars arrives by mail. Finally, we are told that the courts have found these "small claim" class actions "extremely resistant to expeditious processing."⁴⁰

Whether or not the claims made in regard to subsection (b)(3) suits are accurate, it is important to observe that class actions in public-law litigation are of an entirely different breed. Public-law suits typically seek injunctive or declaratory relief rather than damages,⁴¹ and, when successful, produce far more than merely gratuitous benefits for class members. Nonetheless, complaints about the disproportionate bur-

³⁶ See Garth, Nagel & Plager, *supra* note 28, at 385. The authors' empirical research suggests that private class actions frequently ride piggyback on government investigations and enforcement activities, *see id.* at 376-77, and they draw the conclusion that "the private attorney general depends in substantial measure on activities of the regulatory state." *Id.* at 384.

³⁷ See 45 C.F.R., § 1617 (1987) (requiring approval for any class action brought by a staff attorney and providing guidelines for such approval). In the sample of class actions brought in the Northern District of California, it was found that nearly one-third (15 of 46) were brought by lawyers funded through LSC. *See* Garth, Nagel & Plager, *supra* note 28, at 369. The drop in appropriations for legal services is thus another factor in the decline in class action filings. *See id.* at 370.

³⁸ A. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS 3 (2d ed. 1977).

³⁹ *See, e.g.,* Kirkham, *supra* note 17, at 205-08 (discussing "the so-called consumer class actions").

⁴⁰ Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 666 (1979) (footnote omitted).

⁴¹ *See* Wilton, *supra* note 32, at 600.

dens that class actions impose upon the courts often blur the distinction between the allegedly unsavory qualities of the "small claims" suit and the altogether unrelated characteristics of other class litigation. Serious students of Rule 23 are not led astray by this confusion, but an atmosphere of hostility is subtly created.

If only efficiency were at stake in the class action controversy, one would be surprised at the dearth of empirical data in support of the claim that Rule 23 is not doing the job it was meant to do, namely, providing economies of scale.⁴² The stakes evidently run much deeper. At bottom, I believe, the attack upon the class action device serves the same agenda that animates the contemporary challenge to the legitimacy of judicial review on the model of *Brown v. Board of Education*.⁴³ The critique of what is vaguely called "judicial activism,"⁴⁴ currently so popular in some circles, extends not only to the exegesis of unenumerated rights in constitutional interpretation, but equally to the remedial role that the federal courts have played since *Brown* when faced with governmental and bureaucratic abuses in connection with schools, prisons, mental institutions, police departments, trade unions, and other institutions.⁴⁵ The argument against the injunctive class action,⁴⁶ in sum, boils down to the substantive argument that the federal courts should refrain from enforcing public rights in "class-wide" lawsuits, whether or not those lawsuits are class actions in *form*.

In an attempt to reduce the incidence of judicially-supervised in-

⁴² Professor Miller has noted that "[t]he available information . . . indicates that rule 23 is achieving some of its intended purposes and may well be providing systemwide economies in several contexts, even though small-claim, large-class damage cases have proven extremely resistant to expeditious processing." Miller, *supra* note 40, at 666 (footnote omitted). More recently, another commentator has stated that, "by reducing the probability of multiple suits, the class action is the most economic way to resolve controversies in social reform litigation." Wilton, *supra* note 32, at 598.

⁴³ 347 U.S. 483 (1954).

⁴⁴ In view of its willingness to reopen settled questions of constitutional law, it must be questioned whether the Rehnquist Court is any less "activist" than its more liberal predecessors.

⁴⁵ See Glazer, *Should Judges Administer Social Services?*, 50 PUB. INTEREST 64, 64 (Winter 1978) (criticizing "judiciary's intervention into the administrative details of institutions in order to implement the enjoyment of [constitutional] right[s]"); see also Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 694 (1982) ("The only legitimate basis for a federal judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body."); Diver, *The Judge as Political Powerbroker*, 65 VA. L. REV. 43, 103-105 (1979) (discussing possible effects on judicial legitimacy when judicial intervention is deemed to be direct political activism). On the link between right and remedy in public law litigation, see Chayes, *supra* note 17, at 45-56.

⁴⁶ Professor Fiss has coined the phrase "structural injunction" in this context. See O. FISS & D. RENDELMAN, *INJUNCTIONS* ch. 9 (2d ed. 1984).

junctive relief in federal public law litigation, the Reagan Administration focused on reducing the opportunity of parties in need of such remedies to litigate in a federal forum. Despite the best efforts of the Administration, the private attorney general has not been entirely wiped out.⁴⁷ Nonetheless, class action litigation and the consequent vindication of class-wide rights have suffered greatly at the hands of a hostility that veils itself in a cloak of neutral efficiency.

This hostility finds expression in the United States Supreme Court's recent decision in *Evans v. Jeff D.*,⁴⁸ a case which cast a chill over all civil rights litigation, but which falls particularly on class litigants. In *Jeff D.*, a Legal Aid attorney represented a class of handicapped minors seeking injunctive relief against Idaho state officials. After two and a half years of litigation, the defendants agreed to provide all the relief sought by the class, but on the condition that plaintiffs' attorney waive his attorney's fee under section 1988. While his ethical obligation to his clients compelled him to accept this offer, plaintiffs' attorney expressly conditioned the fee-waiver provision upon approval by the district court. The court approved the settlement under Rule 23(e), but denied plaintiffs' attorney's motion for attorney's fees.

At stake, quite clearly, is the vitality of the institution of the private attorney general. Financial incentives, it may be, are not by themselves enough to encourage vigorous private enforcement activity.⁴⁹ They nevertheless play a key role both in an attorney's decision to undertake the vindication of public rights and in his continuing ability to do so. A majority of the Court, however, was of the view that "a general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights . . . by reducing the attractiveness of settlement."⁵⁰ Only in a footnote did the Court address Congress's foremost concern in enacting section 1988:⁵¹ the provision of counsel to vindicate the civil rights of those who "cannot afford legal counsel" and are therefore "unable to

⁴⁷ See Greve, *Why "Defunding the Left" Failed*, 89 PUB. INTEREST, 91, 91-92 (Fall 1987).

⁴⁸ 475 U.S. 717 (1986).

⁴⁹ If they were, one would expect the number of class actions since 1975 (when the Court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), spurred Congress's enactment of a variety of fee-shifting statutes) to have grown, not shrunk. Garth, Nagel and Plager, *supra* note 28, suggest that a truly vital role for the private attorney general will not emerge until reformers recognize the close nexus between private and public enforcement measures. See *id.* at 394.

⁵⁰ *Jeff D.*, 475 U.S. at 732.

⁵¹ See *id.* at 743 (Brennan, J., dissenting) (citing the Civil Rights Attorney's Fees Awards Act of 1976, 32 U.S.C. § 1988 (1982)).

present their cases to the courts.”⁵² The Court acknowledged the possibility that permitting fee-waivers might cause “the pool of lawyers willing to represent plaintiffs in [civil rights] cases [to] shrink,” but found an absence of “documentation to support such a concern,” and ultimately speculated that “the likelihood of this circumstance arising is remote.”⁵³

This is a curious denouement. If the majority is correct in its premise that “parties to a significant number of civil rights cases will refuse to settle if liability for attorney’s fees remains open,”⁵⁴ then one can only expect that awards of fees under section 1988 will become the exception instead of the norm, resulting in a sharp decline in the availability of legal representation for civil rights claimants. The dissent finds this proposition “[embarrassingly] obvious,” and the majority’s disregard of it “puzzling.”⁵⁵ In particular, it is obvious that the encouragement of settlement becomes a moot consideration as class actions cease to be filed due to an absence of willing and financially able class counsel.

As long as we assume the procedural neutrality of the contemporary version of the efficiency argument, it is puzzling that the diffuse judicial policy of encouraging negotiated settlements should have been elevated above a clear and precise congressional policy favoring the provision of “effective access to the judicial process” to civil rights claimants.⁵⁶ The result in *Jeff D.* is not puzzling, however, if we take seriously the existence of a substantive agenda which, cloaked in arguments of efficiency, disfavors the vindication of civil rights in the federal courts. In furtherance of a controversial theory of judicial competence, the Court has taken a significant step toward eliminating from the federal docket a class of important public-law litigation. *Jeff D.* not only guarantees that fewer suits will be brought to enforce the civil rights laws, and in particular fewer class suits, but that in those increasingly rare cases which are brought judicial involvement in remedial measures will likely be limited to the approval of a settlement under Rule 23(e).

If the substantive bias evident in the application of Rule 23 arises indirectly out of the fact that civil rights litigants rely upon class suits disproportionately, Rule 11 has demonstrated such a bias even though it is in all respects facially neutral.

⁵² H. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976).

⁵³ *Jeff D.*, 475 U.S. at 741, 742 n.34.

⁵⁴ *Id.* at 736 (footnote omitted).

⁵⁵ *See id.* at 760 (Brennan, J., dissenting).

⁵⁶ *See* H. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976).

II. RULE 11 SANCTIONS

Rule 11, providing for sanctions against attorneys who fail to meet certain minimum duties of inquiry, lay essentially dormant until its amendment in 1983. (I say "essentially" rather than "entirely" because I was myself among those who made use of the original Rule 11, as will appear shortly.) Of those changes wrought by the 1983 amendment, three stand out in importance.⁵⁷ First, the amendment clarifies the standard against which an attorney's submissions are to be measured, by requiring the attorney to certify to his belief that those submissions are "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Second, the amendment further clarifies that standard by requiring that belief to be founded upon "reasonable inquiry." Finally, amended Rule 11 has taken on a mandatory cast, leaving the form of the sanction, but not its imposition, to judicial discretion.

The amendment of Rule 11 was "part of an effort to reduce delays and expenses in litigation, and to dam the flood of litigation that is threatening to inundate the courts."⁵⁸ Many question whether it has succeeded in meeting the goal of reducing delay and expense. They argue that satellite Rule 11 proceedings may actually multiply the costs of litigation.⁵⁹ It is the second goal, however, that of "damming the flood of litigation," that I propose to address here. I am by no means averse to imposing sanctions to deter the assertion of legal theories or factual premises which *no* reasonable lawyer could have thought plausible,⁶⁰ or which are made in bad faith, and in fact I imposed sanctions on such grounds on several occasions *prior* to 1983.⁶¹ The availability

⁵⁷ See FED. R. CIV. P. 11 advisory committee note; Amendments to Rules, App. C, 97 F.R.D. 165, 190, 192 (1983) (letter from Walter R. Mansfield) (setting forth reasons for amendment); Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 4-9 (1985) (providing a brief discussion of rules changes); see also Schwarzer, *Sanctions under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 186-97 (1985) (discussing policies underlying the changes).

⁵⁸ Carter, *supra* note 57, at 4.

⁵⁹ See, e.g., Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 195 (1988) (noting that "satellite litigation" allows litigants to challenge sufficiency of opponents' papers irrespective of the actual merits); Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23, 23-24 & n.123 (1985) (arguing that hostility between lawyers hinders settlement).

⁶⁰ See Note, *supra* note 5, at 650 (proposing this standard).

⁶¹ See *Nemeroff v. Abelson*, 469 F.Supp. 630, 640 (S.D.N.Y. 1979) (Carter, J.), *aff'd in part and rev'd in part*, 620 F.2d 339 (2d Cir. 1980), *cited in* FED. R. CIV. P. 11 advisory committee note, *on remand*, 94 F.R.D. 136 (S.D.N.Y. 1982) (Carter, J.), *aff'd*, 704 F.2d 652 (2d Cir. 1983); *North Am. Foreign Trading Corp. v. Zale Corp.*, 83 F.R.D. 293, 298-99 (S.D.N.Y. 1979) (Carter, J.), *cited in* FED. R. CIV. P. 11 advisory committee note.

of sanctions provides district judges with a useful tool by which to control our dockets. My objection is that, in application, amended Rule 11 has not been wielded neutrally, but rather has exhibited a substantive bias against civil rights claimants.

A recent nationwide survey⁶² of reported Rule 11 decisions between August 1983 and December 1987 shows that motions for sanctions are most commonly made, and most frequently granted, in civil rights cases.⁶³ Of 680 motions for sanctions which resulted in published opinions, more than 28% were brought in civil rights and employment discrimination cases.⁶⁴ Plaintiffs were the target of 86% of such motions, and sanctions were granted against plaintiffs *over 70% of the time*.⁶⁵ (By comparison, on a sample-wide basis, Rule 11 violations were found less than 58% of the time.)⁶⁶ The next largest category, securities fraud and RICO claims, accounted for not many more than half as many sanction motions (15.2%). Such motions targeted plaintiffs 84% of the time, but resulted in sanctions against plaintiffs in only 45.5% of the cases.⁶⁷

The reasons for this extraordinary substantive bias of Rule 11 appear to be two-fold. First, the revised Rule is so drafted as to invite departures from the liberal pleading regime embodied in the Federal Rules of Civil Procedure. Where Rule 8 requires a pleader to furnish "a short and plain statement of [her] claim showing that [she] is entitled to relief," but avoids the pitfalls of the Codes, under which a pleader failed at her peril to specify her legal theory,⁶⁸ Rule 11 provides a strong incentive to fix on, and articulate, a legal theory at the pleading stage. Such a *de facto* pleading requirement, wholly at odds with the general tenor of the Rules, must exact a toll in intimidation from those who are seeking to vindicate novel rights by means of untried strategies. I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal⁶⁹ would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the

⁶² See Vairo, *supra* note 59, at 234.

⁶³ See *id.* at 200-201; see also Note, *supra* note 5, at 631 & n.7 (noting that sanctions are more likely in public interest litigation than in other federal litigation).

⁶⁴ See Vairo, *supra* note 59, at 200-201.

⁶⁵ See *id.*

⁶⁶ See *id.* at 199.

⁶⁷ See *id.* at 201.

⁶⁸ Unlike the Codes, Rule 8 does not require a complaint to articulate, or adhere to, a legal theory. See 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1219 (1969 & Supp. 1987).

⁶⁹ See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

start.⁷⁰

Similarly at odds with the underlying assumptions of the Federal Rules is Rule 11's tendency to require the pleading of facts with specificity. As one commentator has noted,

[t]he current pleading standards allow pleading on information and belief, and they permit complaints to stand if the pleader could potentially prove a set of facts supporting a claim for relief. Moreover, if a complaint indicates the transaction or occurrence upon which its claims are based, it need not state all material facts. The liberal pleading regime also offers liberal discovery for inchoate claims, which frequently opens up fruitful lines of inquiry into fact or legal theory by providing access to material facts or information in another party's hands. Rule 11, by contrast, may be read to authorize sanctions for factually undeveloped pleadings regardless of the potential for finding additional factual support through discovery.⁷¹

The same commentator points out that a complaint may fail to plead some material fact on the basis of a good faith legal argument that an element of proof hitherto essential to a claim is no longer to be required.⁷² Rule 11's reintroduction of the Codes' strict law/fact distinction into the pleading stage runs the risk of dissuading litigants from bringing the kind of cases out of which important doctrinal changes are born. Finally, Rule 11's requirement of factual certification poses yet another conflict with Rule 8, since a plaintiff who states a claim under the latter rule must be given the opportunity to discover evidence in support of his claim,⁷³ while one who signs a complaint that is not already "well grounded in fact" when it is filed is subject to sanctions under the former rule.⁷⁴

The second, and probably more pernicious, reason behind Rule

⁷⁰ Indeed, the NAACP did not commit itself to an unequivocal legal theory in the cases grouped together as *Brown* until those cases were reargued before the United States Supreme Court. See Carter, *The NAACP's Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083, 1089 (1988); see also R. KLUGER, *SIMPLE JUSTICE* 302-05 (1975).

⁷¹ Note, *supra* note 5, at 636 (footnotes omitted).

⁷² See *id.* at 637 (offering by way of example the development of the doctrine of *res ipsa loquitur*).

⁷³ See Vairo, *supra* note 59, at 197 (citing *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)).

⁷⁴ But see *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) ("a plaintiff does not have to be prepared to meet a summary judgment motion as soon as the complaint is filed"), *cert. denied sub nom.* *County of Suffolk v. Graseck*, 480 U.S. 918 (1987).

11's substantive bias is that it lends itself to decisions based upon judges' subjective "feelings" about classes of cases and litigants. Studies involving actual district judges have shown that we differ widely in our judgment as to whether sanctions are warranted under identical circumstances.⁷⁵ To provide some indication of how subjective judgments work against civil rights claimants, attention is called to a recent decision that ordered local counsel affiliated with the NAACP to pay some \$54,000 in sanctions to the federal government.⁷⁶ This penalty arose in conjunction to a lengthy trial of charges that the Army engaged in discriminatory civilian employment practices at Fort Bragg. Interestingly, the court had earlier decided the bulk of a series of summary judgment motions in favor of plaintiffs.⁷⁷ Nonetheless, the district judge held a peculiar view of Title VII litigation. While recognizing that "evidence of illicit intent may be extremely difficult to obtain, whether because employers are conscious of their bias and therefore likely to hide it, or because they are exercising unconscious bias through a discretionary decision-making process,"⁷⁸ the judge took the view that

[c]harges of racism, if proved, carry an enormously stigmatizing effect. Accordingly, such charges should only be leveled after careful investigation, thoughtful deliberation, and never without a reasonable basis in law and fact. This admonition becomes increasingly true as the number and intensity of the charges increase.

. . . .

. . . [T]he court finds it must hold that to the extent that any racism was proven in this case, such discrimination was generally perpetrated by the plaintiffs upon the defendant, not the reverse, for it was the plaintiffs who consistently saw

⁷⁵ See S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 17-18, 37-39 (1985) (292 responding district court judges varied in their opinions whether to grant Rule 11 sanctions in hypothetical cases); cf. Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 316-17 (1986) (judges participating in symposium workshop differed widely on assessment of merits of hypothetical case).

⁷⁶ See *Harris v. Marsh*, 679 F. Supp. 1204 (E.D.N.C. 1987) (James C. Fox, J.). Additional sanctions of \$30,000 were levied against two of the plaintiffs.

⁷⁷ See *id.* at 1228-30. The two cases consolidated for trial had originally involved six named plaintiffs and forty-four intervenors. Eleven intervenors moved for voluntary dismissal prior to trial, and thirteen more while the court was taking testimony. These withdrawals apparently followed a series of unfavorable evidentiary rulings. Finally, by agreement of the parties, all substantive claims but those of plaintiff Blue were dismissed, as were all of defendant's claims for sanctions save those of Blue and Beula May Harris. In consideration for these dismissals, defendant agreed to pay a lump sum of \$75,000, less certain expenses. See *id.* 1229-37.

⁷⁸ *Id.* at 1221.

every criticism and action in a blindly racial context.⁷⁹

On the basis of his novel view that the bringing of any but an airtight employment discrimination suit constitutes a kind of reverse racism, the judge warned these and future litigants not to assert their rights under the Civil Rights Act unless they could point to a "smoking gun." While the subjective feelings of a judge are largely responsible for such an outcome, it is the language of the amended Rule which authorizes it.

III. CONCLUSION

Fifty years ago, the framers of the Federal Rules of Civil Procedure measured the success of their project against their vision of a system of practice in which adjudication on the merits took priority over all other goals. It is one measure of their success that the Rules they drafted played an important role in allowing hitherto unaccustomed claims of right to come before the federal courts. Under the new Rules, too, the federal district courts rose to unequalled eminence in the promulgation of substantive doctrine. While much has changed since 1938, it is hard to dispute the reformers' credo that courts function best when they resolve substantive controversies on the basis of substantive law.

Today, a different credo has emerged. Its adherents, not satisfied with courts that do "substantive justice," claim that the federal courts are in crisis. But what kind of crisis? Is it a crisis of legitimacy? Not at all; quite the contrary, it appears to be a crisis of popularity. I have tried to suggest that the doomsday cries of the efficiency mongers mask a hidden agenda, an agenda that seeks to limit the access to justice of some rights-holders, but not others. In our system of representative democracy, it is the role of the courts to protect the rights of politically-excluded minorities; yet precisely in these times, when the protection of the courts is most needful, it is the disempowered who are sacrificed on the altar of a substantively biased notion of efficiency.

As we reconsider the wisdom of the Rules in 1988, we must take special care to heed only those arguments of efficiency that evenhandedly promote the disposition of claims on their merits. As the examples of Rules 11 and 23 prove, it is not always an easy matter to discern a substantive bias in the language of a procedural rule. The difficulty in doing so, however, does not absolve us of our obligation to preserve the fairness and neutrality of our system of practice in the federal district courts. It is time that we renew our adherence to the

⁷⁹ *Id.* at 1221, 1227.

tenet which guided the framers of the Rules in their quest for substantive justice in the federal courts.