

THE DOMAIN OF COURTS

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INTRODUCTION

I have been invited to comment on Judge Carter's paper and on the conference proceedings. My concerns are threefold. First, many proceduralists seek to invoke the views of the drafters of the Federal Rules to advance visions of what the Rules should look like and how those Rules should be interpreted. Constitutional law scholars have already made plain the complexities of analysis based upon "framers' intent." We proceduralists should learn those lessons and be reluctant to draw too much meaning from "the framers." Moreover, whatever one believes about analysis based upon intent, the utility of that approach in the context of the Federal Rules is exceedingly questionable. Given the process of rule enactment, the statutory and self-proclaimed limits of the Advisory Committees, and the self-described minimal involvement of the Judicial Conference and of the Supreme Court, privileging the words of the Advisory Committee notes and the supposed intent behind those words becomes all the more suspect.

Second, a remarkable aspect of this conference has been the repeated references to the "political" aspects of the Federal Rules of Civil Procedure. From a variety of perspectives, many of the speakers have made comments about the political implications of various Rules. Others, seeming to accept the political content of the Rules, have warned that "we" (that is, all litigants) are safer when the facade, if not the reality, is maintained that "neutral" Rules are applied to "anonymous" (that is, not identifiable in advance) plaintiffs and defendants. I believe we cannot and should not ignore the political content and consequences of procedural rules. Over the last decade, a variety of powerful "repeat players" have sought, sometimes openly, to influence "court reform" efforts. By and large, that work has been done not by letters written to the Advisory Committee on Civil Rules, but rather by lobbying efforts directed towards legislatures and the public, by well-

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financed media campaigns, and by support for conferences and meetings to address and describe the "litigation crisis." However appealing might be the notion that writing the Rules of Civil Procedure (in contrast to the Rules of Criminal Procedure) is a "neutral" task with diverse consequences on anonymous and interchangeable civil plaintiffs and defendants, that description is no longer available. "Tort reform," among other events of the last decade, has denied us the refuge of a comforting image.

Finally, fifty years after the Federal Rules were enacted, we must wonder about whether litigation of individuals' cases will be available fifty years hence. During these past five decades, federal courts have become less willing to attend to small cases and to individual problems. Increasingly, these cases are diverted—to state courts, to agencies, to alternative dispute resolution, to settlement, to management, to arbitration. Increasingly, those cases that remain in the federal system are aggregated—by multi-district litigation, by bankruptcy, by interpleader, by class action, by consolidation, by informal procedures. Increasingly, federal judges complain that they do not have time (and some say interest) for cases of small value, for cases that seem only to raise individual claims of wrongdoing. The pressures for aggregation and its growing popularity affect perceptions about the utility of having federal courts address individual claims.

I. JUDGE CARTER'S THESIS

It is a pleasure to be asked to speak about a paper that acknowledges and explores the political and social impact of rules of procedure. Judge Carter's voice is a distinctive one in the late 1980s. He asks that we measure federal rules against a standard different than that proposed by many of his colleagues—on and off the bench, in practice and in the academy. As Judge Carter has explained, the issue that dominates most discussions of procedure today is whether the Rules enable speedy dispositions and help to control judicial workload. Managerial judging, alternative dispute resolution, and judicial involvement in settlement are all justified as efforts to achieve those goals.

In contrast, Judge Carter offers other goals for a federal rule system: that it provide ready access to courts and the opportunity for the heretofore silent to make new claims of legal right. Further, Judge Carter challenges the assumption that contemporary rule revisions and criticisms are fueled solely by a "neutral" agenda of what he calls "efficiency" and what I would call "economy." Judge Carter claims that many contemporary reforms are designed to "*exclude*]" certain kinds of

substantive claims.”¹ As a consequence, the thrust of his paper explores the question of whether the revisions of the Rules display a “political agenda hostile to the *substantive* rights of certain classes of federal litigants.”²

Judge Carter’s answer is yes, and he relies principally on two examples. First, Judge Carter points to court interpretations of the class action rule, Rule 23. Those interpretations have made such suits more difficult to bring and, when coupled with the Supreme Court’s ruling in *Evans v. Jeff D.*,³ mean that plaintiff lawyers who represent classes are often faced with painful choices between their fees and settlements that provide relief for their clients. Judge Carter’s second example is the recent revision of Rule 11 and its application to plaintiffs’ attorneys, whom, he believes, are held to unduly restrictive pleading requirements that chill the bringing of novel claims.

II. THE PROBLEMS OF “FRAMER’S INTENT”

Judge Carter, like myself and many others here, is intrigued by what those in the 1930s who wrote the Federal Rules were thinking. Judge Carter argues that the rule drafters intended to provide ready access to a variety of litigants who are now being closed out. I tend to agree with him that, at least some of the time, some of the people who worked on the Rules claimed that the 1938 Federal Rules were designed to make the filing of cases easier than it had been and were designed to enable dispositions “on the merits.”⁴

The problem, of course, is one that constitutional law scholars have helped us all to see: the difficulty of divining the intent of any group of people—the framers of the United States Constitution, the members of Congress who enact legislation, the drafters of the Federal Rules. The members of the committee that drafted the Federal Rules were a diverse lot; a couple of voices, including that of Charles Clark, dominate the published literature, and it is difficult to establish the existence of shared intentionality.

There is a second problem with the effort to claim that we, in 1988, should “renew our adherence to the tenet which guided the fram-

¹ Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2182 (1989) (emphasis in original).

² *Id.* at 2181 (emphasis in original).

³ 475 U.S. 717 (1986).

⁴ See Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 560 (1939); Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 30 (1938); see also Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498-507 (1986).

ers of the Rules in their quest for substantive justice in the federal courts.”⁵ The Federal Rules—like the United States Constitution—have been amended over time. Significant changes were made in 1966 and again in the 1980s. Should we adhere to the intent of the 1966 drafters? What if their intent differed from that of the 1930s drafters? And what is to be made of the intent of those who crafted the 1980s amendments at which Judge Carter levels his criticism? Or local variations on those Rules?⁶ In other words, in reality there are many sets of rules, one sitting atop another, and some sitting more comfortably than others.

I raise these concerns mostly to show how this line of criticism can be avoided. My suggestion is for Judge Carter (and for all of us) to make claims directly for “substantive justice in the federal courts.”⁷ We don’t need to believe (although we might) that Charles Clark thought substantive justice was central for *us* to believe that substantive justice is central. We don’t need to debate the beliefs and intent of the 1930s rule drafters in order to claim that the Federal Rules should neither be written nor construed in a manner that systematically limits opportunities in court for blacks, other minorities, women, the poor, and others who are oppressed. While it is nice (and may be accurate in some instances) to believe our predecessors shared concerns for these groups, the legitimacy of our concerns for such groups does not hinge upon our predecessors’ visions.

III. THE CRIMINAL RULE ANALOGY

I (and my colleagues Robert Cover and Owen Fiss) believe that the delineation between “civil” and “criminal” procedure is often artificial; much is to be learned from thinking about civil and criminal procedure together.⁸ The thesis is not that the rules are or ought to be the same in all instances but that the theoretical questions addressed by the two sets of rules are the same and that different resolutions merit analysis. Just as fifty years ago, we learned that “law” and “equity” could well be understood together, so now, we may also see more clearly the convergence between “civil” and “criminal” rules of procedure.

Join with me for a moment and think about “criminal” procedure. When drafting criminal rules, we know up front that there are some

⁵ Carter, *supra* note 1, at 2195-96.

⁶ See Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2019-21 (1989).

⁷ Carter, *supra* note 1, at 2195-96.

⁸ For teaching materials that take this approach, see generally R. COVER, O. FISS & J. RESNIK, *PROCEDURE* (1988).

rules that will be used exclusively by the prosecution—the United States—and some designed exclusively for criminal defendants, who, as a class, are poor and typically represented by counsel paid for by the government.⁹ We know a power imbalance exists, and we write rules to take into account our understanding of the resources of the two sides of a criminal case.

Let me provide two examples. First, the “other” Rule 11, Rule 11 of the Federal Rules of Criminal Procedure—which provides for guilty pleas. Judges are given a specific role in the settlements of criminal cases. Judges are not supposed to intervene directly in the negotiations,¹⁰ but are expected to inquire about the state of mind of a defendant—to insure that a plea is “voluntary” and “knowing” and to try to protect the defendant from either overreaching by the prosecution or inadequate representation by defense counsel.¹¹ Unlike settlement on the civil side, in which judges are generally supposed to enter consent decrees without inquiry into the underlying agreement,¹² judges on the criminal side are given responsibility for supervision and for intervention, when necessary—in recognition of problems of disparate power.

A second example comes from the criminal discovery rules, which provide for fewer rights of access to information than do the civil discovery rules. A common explanation for not providing criminal defend-

⁹ See 18 U.S.C. § 3006A (1976) (provision for adequate representation of defendants). From July 1, 1986 to June 30, 1987, 41.3% or 22,361 criminal defendants were provided with appointed counsel under the Criminal Justice Act. Of those, 12,850 were represented by private attorneys; 9,511 were assigned counsel via the Federal Public Defender or Community Defender Programs. Telephone conversation with staff of the Criminal Branch, Statistical Analysis and Reports Division, Administrative Office of the United States Courts (Sept. 27, 1988).

¹⁰ The Advisory Committee to the 1974 amendments commented that:

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office.

FED. R. CRIM. P. 11 Advisory Committee's note to 1974 amendments. In 1979, Rule 11 was amended to permit conditional guilty pleas in which a defendant may agree to plea conditional upon judicial acceptance of a particular sentence. See FED. R. CRIM. P. 11 (e) (2-4).

¹¹ The judge must also ensure that the prosecutor provides a factual basis for a plea and that the defendant is aware of the rights of trial by jury and representation by counsel. In some respects, the requirements of the Federal Rule are broader than the constitutional requirements. Compare FED. R. CRIM. P. 11 with *Henderson v. Morgan*, 426 U.S. 637 (1976) and *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) and *Boykin v. Alabama*, 395 U.S. 238 (1969) and *McCarthy v. United States*, 394 U.S. 459 (1969).

¹² In class actions and in a few other situations, judges must approve the consent decree. See FED. R. CIV. P. 23 (e). For examination of judicial involvement in consent decrees, see Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 48.

ants with complete access to prosecutors' files is the argument that criminal defendants, as a group, are likely to lie and to cheat, to tamper with evidence, to coerce and (some argue) to harm or even to kill potential witnesses.¹³ The criminal discovery rules are structured with these views in mind.

This is not the place to argue the success of judicial supervision of guilty pleas or the propriety of limited criminal discovery. Rather, my point here is that we have some degree of acceptance of—if not comfort with—the idea that the Federal Criminal Rules embody substantive visions about the power disequilibrium between prosecution and defense and between defendant and judge. The Criminal Rules acknowledge who the parties are going to be and try to take the identity of the parties into account, up front. In other words, the Federal Criminal Rules (like criminal procedure in general) are understood to have political agendas.

The political content of the Criminal Rules is reflected in the Criminal Rule drafting process. It is widely recognized that the United States Department of Justice is the critical "repeat player" (to borrow Marc Galanter's phrase).¹⁴ I have often been told that, if "Justice" is unhappy about a rule change, the change doesn't go forward. (Congress plays an interesting and distinctive role in the criminal federal rule drafting process; in light of the recent revisions to the Rules Enabling Act, perhaps we should urge Northeastern University Law School, and Steve Subrin, to convene another conference on that issue.)

Let's return to the more familiar terrain of the Federal Rules of Civil Procedure. On the civil side, two theories—of neutrality and of anonymity—govern. By "neutrality," I mean that in theory on the civil side, the Rules have virtually no political content. Indeed, Judge Carter claims that the 1938 drafters' desire for efficiency was (in contrast to the current one) "substantively neutral."¹⁵ That claim is made problematic by the histories of civil rule drafting written by Professors Steve Subrin, Steve Burbank, Steve Yeazell, and Bob Bone,¹⁶ all of whom

¹³ See, e.g., FED. R. CRIM. P. 16(e) Advisory Committee's note to 1966 amendments (courts may restrict access to information to protect the "safety of witnesses and others"); cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1180-85 (1960) (arguing for broad discovery rights for criminal defendants).

¹⁴ See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

¹⁵ Carter, *supra* note 1, at 2181.

¹⁶ See S. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989); Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015

demonstrate that rule drafters have always had visions that (at least these days) many of us would describe as "political."

A second feature of the civil side is an assumption of "anonymity" or interchangeability. By that I mean that, in theory, one never knows in advance in a civil case whether one will be a plaintiff or defendant; that in one case, a particular litigant may be a plaintiff, while in the next; a defendant. Further, with trans-substantive pleadings, one never knows the kind of case that may be involved. With these theories of anonymity and neutrality, one can make claims that—whatever the rules—we all suffer them equally, and thus that the Federal Rules of Civil Procedure have no political content.¹⁷

But neither the theory of neutrality nor the theory of anonymity turns out to be as true in practice as in theory. In practice, civil rights claimants are blacks or women or minorities, and, in civil rights cases, by statutory or constitutional definitions, the defendants can only be those acting "under color of state law" — i.e., governmental entities or those who work for state and local governments. Although, in some kinds of cases, corporations may be either plaintiffs or defendants, corporations are the defendant employers in Title VII cases. In tort litigation, corporations are more frequently the defendants than the plaintiffs.

Although certainly more subtle than the divisions in the criminal law, the civil side resembles the criminal rules in this respect: in a substantial category of cases we can know up front the identity of those who will be the "plaintiffs" and the "defendants." Thus we can ask as Judge Carter does so well: will this rule help or hurt plaintiffs in general and civil rights plaintiffs in particular? In short, we do not all suffer the civil rules equally, and Judge Carter's paper helps us to understand that.

(1982); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

¹⁷ For earlier comments that raise but then reject the idea of unequal effects of the Rules of Civil Procedure, consider Justice Jackson's concurrence in *Hickman v. Taylor*, 329 U.S. 495 (1947):

It happens in this case that it is the plaintiff's attorney who demands such unprecedented latitude of discovery and, strangely enough, *amicus* briefs in his support have been filed by several labor unions representing plaintiffs as a class. It is the history of the movement for broader discovery, however, that in actual experience the chief opposition to its extension has come from lawyers who specialize in representing plaintiffs, because defendants have made liberal use of it to force plaintiffs to disclose their cases in advance. Discovery is a two-edged sword and we cannot decide this problem on any doctrine of extending help to one class of litigants.

Hickman, 329 U.S. at 515 (citations omitted).

Judge Carter's contribution is to focus our attention on the political character of civil rule drafting. My purpose is to press that focus further in the hope that we, all students of the Federal Rules, will turn our attention to understanding and analyzing the political agendas of the Rules: to see the values embodied in procedural systems that stress either "getting to the merits" or case disposition, the value of systems that give trial judges ever-growing discretion, the values that contract opportunities for appellate review, the values that prize settlement over adjudication. I hope that we will turn our attention to the roles of the Department of Justice and other interest groups—the corporate bar, the civil rights bar, the trial lawyers' association, the federal judges—in the creation, critique, and implementation of the Federal Rules.

One intriguing aspect of this conference has been the repeated references to the political and social implications of the Federal Rules of Civil Procedure. As Professor Subrin said, "procedure has been political all along."¹⁸ During the conference proceedings some participants questioned the advisability of making plain the political dimension of rulemaking. The theories of "neutrality" and "anonymity" are attractive. Indeed, one could argue that tort victims and tortfeasors share an interest in maintaining the appearance of neutrality and anonymity. The claim is that both sides to a dispute would be more vulnerable if the social effects of rules were made visible.

I am sympathetic to the desire for safe harbors; I understand the attraction of the appearance of neutrality and the fear that some vulnerable groups, such as civil rights claimants, might be all the more vulnerable if rule changes were proposed at their behest. But it has not been civil rights litigants who have sought open politicization of the rulemaking process. Rather, powerful repeat players have begun to speak of "court reform"—to change the rules of procedure so as to achieve specific substantive effects. Some of this repeat playing is overt; advertisements in newspapers promote control over juries and blame litigation for many of the ills of society. Some of the repeat playing is more subtle; insurance companies and corporations have funded surveys and conferences at "neutral" settings such as law schools and think tanks—all with the aim of exposing the civil justice system's ills and of "reforming" the Rules.

In short, the politicization of rulemaking has already happened—caused not by the vulnerable of the society but by the powerful.

¹⁸ Remarks by Prof. Subrin at Conference, Oct. 6, 1988; *see also* Subrin *supra* note 6, at 2050 (stating that "procedural discourse and reform in this country have always had a substantial political dimension," and that political issues are inherent in "many individual procedural rules or clusters of rules").

Yet, as Judge Carter, Professor Burbank, Professor Carty-Bennia, Professor Minow, and Judge Weinstein have demonstrated, it is the vulnerable who are being hurt by revision of "neutral," "anonymous" rules, and we must all take responsibility for exploring the impact of civil rule making on the diverse participants in the civil justice system.

IV. AGGREGATION AND INDIVIDUALIZATION

Judge Carter's paper calls for investigation of the hostility towards class action litigation. Judge Carter is concerned about the doctrinal limits imposed upon class actions, and he believes that such legal developments evidence growing hostility to class actions in general and to civil rights litigants in particular. I believe that Judge Carter is correct to speak in terms of hostility, but I suggest that the hostility is both broader and a bit different than he suggests. In my view, rulemakers and courts are, if not hostile to, at least disinterested in not only civil rights class actions but also many kinds of individual cases.

As we approach the end of the twentieth century, I find a decreasing interest in paying attention to individual problems, to the adjudication of small disputes and individual cases. In a system such as the current one, an individual litigant can compel at least one high prestige government employee (to wit, a federal trial judge) and sometimes even three (that is, an appellate court) to attend to her claim of illegality.

Increasingly, however, there is an unwillingness to accord such societal resources to respond to individual problems. In other words, multi-party, multi-claim cases (let me call these lawsuits "aggregate" claims) have begun to seem more important, and individual cases (those involving a single individual, a lone social security applicant, a single tort victim, a small commercial claim) have begun to seem "less" important.

There is a tension between processes based upon individuals and those predicated upon groups. As is familiar, English-United States jurisprudence has espoused individuality as a central premise. The rhetoric of courts speaks of a specific, injured plaintiff suing an identified defendant, with a third party, judge or jury, imposing a resolution. But, in reality, the pressures to aggregate are everywhere. Sixty thousand asbestos injuries. Two-hundred-fifty thousand Dalkon shield injuries. The shareholders of a company, the children in a school, the inhabitants of a prison. Whether by administrative processing, class action, liberal rules of joinder, interpleader, or bankruptcy, increasingly the unit of a case is not a single plaintiff or defendant but groups, entities, and conglomerates, on both sides of cases.

Thus, while I agree with Judge Carter that developments in Rule

23 jurisprudence have limited class actions, I must note that the courts have been embracing other forms of group litigation—via multi-district litigation, alternative dispute resolution procedures, and other mechanisms. Indeed, Professor Linda Silberman explores the use of masters and magistrates to accomplish this end.¹⁹

I am concerned about the hostility to and trivialization of individual claims. I have often heard from federal judges that they don't have the time to spend on a small claim—that it's not "worth it," that their time (and they) are too important for prisoners,²⁰ social security claimants, and other rights-seekers under a variety of federal statutory schemes.²¹ Some prominent members of the bench and the bar advocate sending such cases to magistrates, to agencies, to specialized courts, to lower prestige institutions.²² I see this pattern of disinterest in individual cases reflected in a variety of proposals to limit the jurisdiction of the federal courts, and I believe that current proposals to curtail appeal-as-of-right, from the trial court to the appellate court, are also linked to this growing disinterest in attending to individual claims.²³

I think that the problem Judge Carter flags is somewhat more complex in that there is both hostility to some kinds of group claims and to some individual claims. One must assess how the contemporary efforts to deal with cases in the aggregate and the contemporary disinterest in individual cases fit with his description of hostility to class actions.²⁴ Is the hostility really to classes, qua classes, or is the hostility

¹⁹ See Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131 (1989).

²⁰ Long before the current "workload" debate, some federal judges thought prisoners should not be their focus. See Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172 (1948) (habeas corpus litigation had "imposed upon the federal judges a wholly unnecessary burden of work").

²¹ See, e.g., Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 238 (1976) (cases arising under various federal statutes, such as the Social Security laws, can be handled "by someone far less qualified than a judge"); Remarks by Justice Antonin Scalia Before the Fellows of the American Bar Foundation and the National Council of Bar Presidents (Feb. 15, 1987) (on file with *University of Pennsylvania Law Review*) ("today the federal courts are full of 'minor' and 'routine' cases about 'mundane' matters 'of less import' or even 'overwhelming triviality.'"); see also Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 922 (discussing Justice Scalia's comments). In 1987, 6,714 social security cases and 2,589 habeas corpus cases were referred to magistrates. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 36-37 (1987).

²² See, e.g., R. POSNER, *THE FEDERAL COURTS* 147-60 (1985) (discussing proposals to create specialized federal courts); Remarks by Justice Antonin Scalia, *supra* note 21, at 8 (proposing that certain classes of agency adjudication be made final at the administrative stage).

²³ See Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 603-24 (1985).

²⁴ See Carter, *supra* note 1, at 2188-90.

to the rights sought? It seems to me that, given Judge Carter's view of Rule 11, his stronger argument is that the hostility is to the rights sought to be protected rather than to the mechanism (in his example, the class action) which is used.

Before concluding, I want to clarify my interest in individual and aggregate claims. I am not arguing that the individual, as the unit, is per se good and group claims are per se bad, or vice versa. Rather, I wish to make five points. First, pressures to aggregate are leading us toward group, rather than individual, processing. Second, our perceptions of the propriety and desirability of group processes are changing. Only twenty-two years ago, in 1966 when Rule 23 was amended, the Advisory Committee stated that class action treatment was inappropriate for mass torts because individual issues would predominate.²⁵ Today, group processing of a variety of tort actions is increasingly acceptable. Less than twenty years ago, Professor Geoffrey Hazard spoke of how group litigation (specifically class actions) "offends the sense of individualization that is very important."²⁶ Today, some federal trial judges are "offended" when asked to think about as "small" a problem as that of a single individual. Thus, and third, the pursuit of group-based processes for courts alters our perceptions of the value, desirability, and utility of having federal judges in federal courts respond to individual claims. Fourth, this devaluing of individual claims leads in turn to the creation of mechanisms to dispose of such cases quickly—by increasing pressures to settle, by sanctioning lawyers who litigate aggressively, by shifting decisionmaking authority to magistrates and arbitrators, and by limiting access to appellate courts. Fifth, it is precisely this decisionmaking *en masse*, in group cases of whatever genre, that exposes so vividly what is always true but may have been less visible: that application of rules of law to given cases is law-generative and hence that courts are (of course) lawmakers. As judges become more aware of their own lawmaking activities, they become (understandably) nervous. Law generation is difficult—as congressional inactivity frequently demonstrates. Judicial concerns for judicial lawmaking, coupled with sprawling records and often unclear statutes and Supreme Court precedents, make ever more attractive the alternatives to adjudication. Many judges are saying in effect, "Let the parties settle," for if

²⁵ See FED. R. CIV. P. 23(b)(3) Advisory Committee's notes to 1966 amendments. For discussion of the use of Rule 23 in tort actions during the past decade, see Note, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461, 462-83 (1988) (authored by Bruce H. Nielson).

²⁶ Hazard, *The Effect of the Class Action Device upon the Substantive Law*, 58 F.R.D. 307, 308 (1973).

the parties can agree at least their decision can be rationalized as in service of the parties' interests. Increasingly, judges want parties' decisions to replace adjudication.

CONCLUSION

For me, the central issue—as we contemplate the last fifty years and look forward to the future—is how to maintain that phenomenon called “adjudication” in the face of the pressure either to make quick inexpensive decisions in individual cases or to aggregate and create “mega” cases. At both ends—the cheap, quick decisionmaking and the mega-cases—the act of adjudication becomes problematic. On the one hand, judges try to act more like arbitrators, mediators, settlers, and managers. And, in the few cases that they are willing to adjudicate, the unit of the case is so large that the claim to adjudication—to rational factfinding based upon a limited record—weakens. Increasingly, the line between agency and court and between court and its alternatives, such as mediation or arbitration, blurs. The question for all of us is whether to rejoice in the diminishing of such distinctions or whether to try to “hold the line” and attempt to structure distinctive tasks for judges and courts. In sum, the challenge for the next fifty years of federal rulemaking is how to describe the domain of courts.