Notre Dame Law Review

Volume 73
Issue 4 *Federal Civil Practice and Procedure*

Article 2

6-1-1999

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David L. Shapiro

ARTICLES

CLASS ACTIONS: THE CLASS AS PARTY AND CLIENT

*David L. Shapiro**

I. INTRODUCTION

Perhaps the most dramatic development in civil procedure in recent decades has been the growth of interest in the class action as an actual and potential means of resolving a wide range of disputes. This interest, of course, extends far beyond the bounds of civil procedure itself into the domains of substantive tort and contract law, federalism, and the proper interpretation of the constitutional guarantee of due

* William Nelson Cromwell Professor of Law, Harvard University.

I would like to thank Rachel Brand for her research assistance, and Robert Bone, Bruce Hay, Susan Koniak, Daniel Meltzer, and David Rosenberg for their generous and helpful counsel and advice.

I have in recent years been involved in several class action cases, including unsuccessful attempts to persuade the Supreme Court to grant certiorari in two cases, *see In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied sub nom.* Grady v. Rhone-Poulenc Rorer, Inc., 116 S. Ct. 184 (1995), and Kamilewicz v. Bank of Boston Corp., 92 F.3d 506 (7th Cir.), *reh'g denied*, 100 F.3d 1348 (7th Cir. 1996) (7–5 vote), *cert. denied*, 117 S. Ct. 1569 (1997), and to persuade the Fifth Circuit that certification of a class was appropriate in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

I hope that my involvement in these cases was not a factor in the unfortunate (and in my view erroneous) results; my disappointment in the outcome in each has been somewhat eased by the support for our position in several law review comments. *See, e.g.*, Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1270–80 (1996) (discussing *Kamilewicz*); Case Comment, 109 HARV. L. REV. 870 (1996) (discussing *Rhone-Poulenc Rorer*); Case Comment, 110 HARV. L. REV. 977 (1997) (discussing *Castano*).

In any event, I believe that the views here expressed have not been affected by the particular role I played as an advocate in those cases. These views, however, are the result not only of my reading, teaching, and general reflection in the field, but also of what I have learned as a participant in litigation.

process. Indeed, it is partly through the class action device that we may be witnessing, and taking part in, a sea change in our understanding of both substantive and procedural law.[1]

Small wonder then, that the significance of the class action, and its proper bounds, have become the topic du jour for academic and judicial conferences, for a whole range of law school courses, and for legal journals.[2] Is there a law review out there somewhere—aside per-

1 Three developments in 1997 were of high public visibility and served to increase the level of interest in the class action technique. The first was the settlement agreement reached between a group of state attorneys general and the tobacco industry—an agreement that, at this writing, is contingent on congressional approval. This agreement contains many controversial and important provisions, but for present purposes, the most significant is the stipulation that in the absence of the defendant's consent, there may be individual lawsuits arising from the past conduct of one or more tobacco companies, but no class actions or other aggregation devices. *See* Stephen Labaton, *Limits on Lawsuits and Damage Claims Could Bring Years of Legal Fights,* N.Y. TIMES, June 22, 1997, at A14; *Excerpts From Agreement Between States and Tobacco Industry,* N.Y. TIMES, June 25, 1997, at A18.

Second, the Supreme Court, in June 1997, decided that a class of persons whose present or potential claims were based on exposure to asbestos products manufactured by a group of defendants could not be certified as a "settlement class" under the criteria laid down in FED. R. CIV. P. 23. *See* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (emphasizing that the requisites for certification of a settlement class were especially stringent and that potential conflicts and other problems in the case before it constituted a clear bar to certification, and explicitly rejecting the holding of the court below that a class could *never* be certified for settlement purposes unless it met all the requirements for a litigating class under Rule 23).

Finally, in August 1997, a jury in the first phase of a class action suit found that Dow Chemical Company had knowingly misled the public by concealing information about the health risks of silicone breast implants. *See* Barry Meier, *Dow Chemical Deceived Women on Breast Implants, Jury Decides,* N.Y. TIMES, Aug. 19, 1997, at A1.

2 A full bibliography of those publications devoted in whole or substantial part to the use of class actions in litigation would warrant a sizable appendix. But a listing of books and articles I have found helpful—some of which are long and detailed, while others, though short, are incisive and provocative—may serve a dual purpose: to provide a brief, accessible bibliography for those interested in further research and to furnish a single, easily consulted source of cross-reference for later citations in this essay.

With apologies to those important works that have been inadvertently omitted, the list includes:

JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) [hereinafter YEAZELL, GROUP LITIGATION]; Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform,* 73 VA. L. REV. 845 (1987); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation,* 70 B.U. L. REV. 213 (1990) [hereinafter Bone, *Litigative Forms*]; Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion,* 67 N.Y.U. L. REV. 193 (1992) [hereinafter Bone, *Nonparty Preclusion*]; Robert G. Bone, *Statistical*

Adjudication: Rights, Justice, and Utility in a World of Process Scarcity, 46 VAND. L. REV. 561 (1993) [hereinafter Bone, *Statistical Adjudication*]; Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23,* 39 ARIZ. L. REV. 461 (1997); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 COLUM. L. REV. 1343 (1995); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process,* 71 N.Y.U. L. REV. 13 (1996); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction,* 80 CORNELL L. REV. 811 (1995); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest,* 4 J. LEGAL STUD. 47 (1975); Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal,* 10 J.L. & COM. 1 (1990); Eric D. Green, *Advancing Individual Rights Through Group Justice,* 30 U.C. DAVIS L. REV. 791 (1997); Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little,* 48 HASTINGS L.J. 479 (1997); Geoffrey B. Hazard, *The Effect of the Class Action Device Upon the Substantive Law,* 58 F.R.D. 299 (1972); Samuel Issacharoff, *Class Action Conflicts,* 30 U.C. DAVIS L. REV. 805 (1997); Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims,* 1996 SUP. CT. REV. 219; Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684 (1941); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Prods., Inc., 80 CORNELL L. REV. 1045 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement,* 82 VA. L. REV. 1051 (1996); Larry Kramer, *Choice of Law in Complex Litigation,* 71 N.Y.U. L. REV. 547 (1996); John Leubsdorf, *Co-opting the Class Action,* 80 CORNELL L. REV. 1222 (1995); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform,* 58 U. CHI. L. REV. 1 (1991); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23,* 80 CORNELL L. REV. 858 (1995); Francis E. McGovern, *An Analysis of Mass Torts for Judges,* 73 TEX. L. REV. 1821 (1995); Carrie J. Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road,* 80 CORNELL L. REV. 1159 (1995); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act,* 64 TEX. L. REV. 1039 (1986) [hereinafter Mullenix, *The Mass-Tort Case*]; Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments,* 39 ARIZ. L. REV. 615 (1997) [hereinafter Mullenix, *Constitutionality*]; Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced,* 88 NW. U. L. REV. 579 (1994) [hereinafter Mullenix, *Paradigm Misplaced*]; George L. Priest, *Procedural versus Substantive Controls of Mass Tort Class Actions,* 26 J. LEGAL STUD. 521 (1997); Robert L. Rabin, *Continuing Tensions in the Resolution of Mass Toxic Harm Cases: A Comment,* 80 CORNELL L. REV. 1037 (1995); Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation,* 98 YALE L.J. 813 (1989) [hereinafter Rabin, *Tort System*]; Judith Resnik, *Aggregation, Settlement, and Dismay,* 80 CORNELL L. REV. 918 (1995); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991) [hereinafter Resnik, *From "Cases to "Litigation"*]; Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry,* 30 U.C. DAVIS L. REV. 835 (1997) [hereinafter Resnik, *Litigating and Settling*]; Deborah L. Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183 (1982); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means,* 62 IND. L.J. 561 (1987); [hereinafter Rosenberg, *Class Actions*]; David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass Exposure Cases,* 71 N.Y.U. L. REV. 210 (1996) [hereinafter Rosenberg, *Individual Justice*]; David Rosenberg, *Of End Games and Open-*

haps from such esoteric publications as the JAG Journal—that has managed to keep its pages unsullied by the controversies that the class action device has generated?

Always in the foreground of any discussion of the class action, or at least well within view, is the continuing debate between the advocates of individual autonomy in litigation and the proponents of what has been praised as "collective" justice.[3] And as always in such debates, there are those who strive for accommodation, or who describe the debate as presenting a false dichotomy—on the ground, for example, that aggregation of claims through such devices as the class action is in truth the wisest and most efficient way of promoting individual justice.[4]

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ings in Mass Tort Cases: Lessons from a Special Master, 69 B.U. L. REV. 695 (1989) [hereinafter Rosenberg, *End Games*]; Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action,* 71 N.Y.U. L. REV. 186 (1996); George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions,* 71 N.Y.U. L. REV. 258 (1996); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts,* 44 STAN. L. REV. 815 (1992); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective,* 80 CORNELL L. REV. 941 (1995); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order out of Chaos,* 80 CORNELL L. REV. 837 (1995); John A. Siliciano, *Mass Torts and the Rhetoric of Crisis,* 80 CORNELL L. REV. 990 (1995); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent,* 1989 U. ILL. L. REV. 69; Thomas E. Willging, et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges,* 71 N.Y.U. L. REV. 74 (1996); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief,* 71 N.Y.U. L. REV. 439 (1996); Charles W. Wolfram, *Mass Torts—Messy Ethics,* 80 CORNELL L. REV. 1228 (1995); Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation,* 39 ARIZ. L. REV. 687 (1997) [hereinafter Yeazell, *Defendant Classes*]; Patricia Anne Solomon, Note, *Are Mandatory Class Actions Unconstitutional?,* 72 NOTRE DAME L. REV. 1627 (1997).

3 In the works cited *supra* note 2, writings of those who lean toward the former (individual autonomy) side of the debate include Epstein, Solomon, and Trangsrud. *See also* Abraham, *supra* note 2, at 847 ("[T]he move toward collective [as opposed to individual] responsibility in tort law is not, on the whole, a sensible development."). Among the writings cited *supra* note 2 that look more to a "collective" approach are those of Bone, Hay, Macey & Miller, Rosenberg, and Weinstein.

4 Of the works cited, several of those I would put in the "collective" camp portray the use of techniques of collectivization as the best means of promoting individual justice. *See, e.g.,* WEINSTEIN, *supra* note 2; Rosenberg, *supra* note 2. In addition, a number of the works cited *supra* note 2, including those of Coffee, Cooper, Marcus, McGovern, and Resnik, recognize the changes that are occurring, evaluate the defects and virtues of those changes, and make recommendations for safeguarding both individual and group interests.

For reasons explained below, I agree with the idea that individuals are often better served by a collective approach to the treatment of class actions. But the two approaches I have described are necessarily in some tension, especially if one accepts

It is not easy to wade into this debate in mid-stream, especially if one wants to do more than to summarize positions already staked out. But in my contribution to this Issue, I have been moved to take the plunge (to pursue the watery metaphor for the last time), in part to try to work through the controversy for myself—a revered mentor once told me that he never was sure of what he thought until he had heard himself speak—and in part because of my own special concerns for the institutional aspects of such problems.[5] It is these latter concerns that have, in my view, been slighted (though certainly not wholly neglected) in the debate.

To be more concrete, the principal focus of the debate, both in the courts and in more academic forums, has been the extent to which the class action (or other roughly comparable joinder devices) should be viewed as not involving the claimants as a number of individuals, or even as an "aggregation" of individuals, but rather as an entity in itself for the critical purposes of determining the nature of the lawsuit, the role of the lawyer and the judge, and the significance of the disposition.[6] But if—as I have concluded and will try to convince you in the pages that follow—the "class as entity" forces should ultimately carry the day, substantial institutional problems remain when it comes to implementation. These problems, which are also addressed here, include issues of federalism, the proper mix of rules and standards, and the allocation of functions between the legislative and judicial branches.

My goal in this essay, then, falls into two parts. First, I will address the question of the class action in modern litigation and its relation to our strong traditions of individualism and autonomy. The second part of the essay builds on the conclusion of the first: that the notion

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the view that a significant value of a procedural system is the "dignitary" function of facilitating individual participation in the process even when unfettered participation may run counter to the interests (and majority wishes) of a group of which the individual is a member, or may consume significant public resources. For a discussion of such dignitary values, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–54, 57 (1976). *But cf.* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 57–59 (1997) (discussing, *inter alia*, the absence of empirical evidence supporting the value of dignitary participation).

5 *See, e.g.*, David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 551–72 (1988).

6 The idea of an "entity" approach was perhaps most lucidly suggested in a thoughtful and provocative discussion by Edward Cooper. *See* Cooper, *supra* note 2, at 26–32. The ramifications of the entity model are developed *infra* text accompanying notes 53–80.

of the class as entity should prevail over more individually oriented notions of aggregate litigation. The institutional questions raised by such a conclusion, as suggested above, include: (a) the proper role of national law in working through these implications; (b) the proper mix of rules and standards in laying down the course to be followed by litigants, lawyers, and judges; and (c) the proper allocation of responsibility between the branches of government (whether at the state or the national level) for charting that course. This second part, I hope, will bring down to the level of worldly problems the often abstract, and even abstruse, discussions among scholars both about federalism and about the nature of law and lawmaking.

This is an ambitious undertaking, and if fully explored and developed, would comfortably fill the covers of a good-sized book. But my project is more modest, in that my goal is to suggest rather than to resolve, and to stimulate others to criticize or defend, and even more optimistically, expand on some of these ideas.

II. THE CLASS AS ENTITY OR AS AGGREGATION

A. Two Models of the Class Action

In the interest of oversimplification, take two models of "group litigation."[7] The first—what might be called the aggregation model—sees the various joinder devices, including the class action, as essentially techniques for allowing individuals to achieve the benefits of pooling resources against a common adversary. Under this view, the individual who is part of the aggregate surrenders as little autonomy as possible (although some sacrifices are undoubtedly inevitable if the group effort is to have any utility and to afford any economies of scale). Thus the individual retains his own counsel, retains the right to leave the group before, during, and after the litigation, and can insist on playing a significant role in the operations of the group so long as he chooses to remain a part of that group.

7 The comparisons drawn here, and to some extent the views expressed, are analogous to those of Abram Chayes in his pathbreaking article, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). But there are some differences (aside from the obvious). Perhaps most important, Chayes focused on what was properly viewed as "public" litigation—litigation that characteristically involved attempts to reconstitute, or even reconceive, the mission of public institutions of many kinds. The litigation I deal with here is, for the most part, essentially "private" in that it generally involves traditional claims of tort and contract against private defendants. The difference from the traditional private dispute is that the cases studied here involve the claims that one or more private wrongdoers have caused injury to a large number of individuals by a single act or a related series of acts.

The second, in a phrase borrowed from Professor Cooper,[8] I call the "entity" model. In this view, which is clearly more appropriate in the class action context than in the context of such other joinder devices as consolidation or even massive intervention, the *entity* is the litigant and the client. Moreover, in the situations in which class action treatment is warranted, the individual who is a member of the class, for whatever purpose, is and must remain a member of that class, and as a result must tie his fortunes to those of the group with respect to the litigation, its progress, and its outcome. Of course, even this entity model does not deny the class member the opportunity to seek private advice, or to contribute in some way to the progress of the litigation, but it severely limits such aspects of individual autonomy as the range of choice to move in or out of the class or to be represented before the court by counsel entirely of one's own selection.

Neither of these models may exist in its unadulterated form in the real world of litigation at the present time, nor may they ever exist in such form. But they help to pose the conflict that in my view is both immanent and imminent—a conflict that has already engaged the energies of courts and commentators at least since the reemergence of the class action in the 1960s.[9]

B. The Focus of Discussion

In working through the relative virtues of these models, I have chosen to limit my analysis in several ways. First, in an effort to focus on those disputes that are occurring in the world, and on the procedural device that puts the conflict in its starkest form, this essay concentrates on the plaintiff class action. As Stephen Yeazell has shown in his informative history of the class action, defendant classes with a pre-existing coherence were often litigants in the early stages of class action development,[10] but today defendant class actions are rare and pose special problems of representation and due process that are beyond the scope of this paper.[11] Plaintiff class actions, on the other

8 *See* Cooper, *supra* note 2, at 26.

9 Yeazell, *Defendant Classes*, *supra* note 2, at 694, notes the dormancy of the class action as a litigating device from the mid-eighteenth to the mid-twentieth century.

10 YEAZELL, GROUP LITIGATION, *supra* note 2, ch. 2; *see also* Yeazell, *Defendant Classes*, *supra* note 2, at 687–90.

11 While I do not have precise statistics, anyone reasonably familiar with the case law of class actions would, I think, agree that plaintiff class actions far outnumber defendant class actions.

Indeed, there is a question whether Rule 23(b)(2) even applies to defendant class actions. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 72, at 515 (5th ed. 1994). And defendant class actions also present more difficult problems both of ade-

hand, are the center of current interest across a broad range of litigation, beginning in the 1960s and 1970s with institutional and other civil rights actions, and moving into the late 1980s and 1990s with claims of civil wrong brought primarily (but not exclusively) against private defendants.

Second, my primary attention within the domain of plaintiff class actions will be devoted to the "mass tort" because, once again, this has been the principal area of current debate. The notion of a mass tort, however, is broadly defined to embrace any civil wrong (other than a breach of contract[12]) to a significant number of people—a number large enough to constitute a class under prevailing standards.[13] Thus, included within the scope of a mass tort would be a single incident, like a plane crash; a cause of action based on allegations of toxic harm or other product liability with either a short or long latency period, and with or without a "signature" injury (like asbestosis in the case of exposure to asbestos); allegedly wrongful conduct that causes a small injury to a large number (like a conspiracy to fix prices on a relatively inexpensive product that people buy infrequently); and allegedly wrongful conduct that causes a very substantial harm to every injured individual.[14]

Even this broad definition is not meant to exclude the possible applicability of the points developed here outside the sphere of mass torts. Indeed, given the overlap of tort and contract in many areas, any such exclusion would surely be artificial. Thus, if the suggestions here are valid in the context of mass tort, they should also be relevant in cases sounding in contract—for example, cases in which the sole

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quacy of representation—because of the uncertainty that the defendant or defendant's counsel is willing or able to represent a class—and of territorial jurisdiction. On the latter issue, see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985).

12 The distinction between tort and contract is one that is often debated and sometimes denied. The distinction is especially hard to draw when the alleged tort arises, as it so often does, in the context of a contractual arrangement and when the tort claim is combined with a claim of breach of express or implied warranty. In this essay, I include this important group of cases within the category of mass torts.

13 On the question of numerosity, and its relation to context, see WRIGHT, *supra* note 11, § 72, at 510.

14 The discussion in this essay assumes that the civil tort system will continue to play a major role (whether because of inertia or more justifiable grounds of social policy) in achieving the goals of deterrence and compensation. Other possibilities have been discussed and advocated. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2252 (1997) (suggesting that the fairest and most efficient means of compensation may be a "nationwide administrative claims processing regime"); Abraham, *supra* note 2, at 898–906 (discussing virtues and defects of expanded insurance programs); Rabin, *Tort System*, *supra* note 2, at 829 (suggesting move toward a "focused, no-fault" insurance system).

theory underlying the claim is that the defendant broke a binding promise to confer a financial benefit on a large group of people.

C. Preliminary Notes on the Implications of the Second Model

As even the casual reader has probably already gleaned, my conclusion is that of the two models outlined above, the second (of the class as entity) is the more appropriate in the class action setting.[15] This brief section elaborates a bit on the conclusion and what it means, and the following sections attempt to defend it and to explore some of its most significant ramifications for the nature of the class action suit.

1. This conclusion is not quite so radical as it may seem at first, since the idea of the collectivity as an entity is a familiar one in other settings. Thus, a whole range of voluntary private associations—congregations, trade unions, joint stock companies, corporations—and on a less "voluntary" level, municipalities and other governmental entities, have long been recognized as litigants in their own right—entities whose members may have at best only a limited say in what is litigated, in who represents the organization, and on what terms the controversy is ultimately resolved. Indeed, the rise of those organizations has been noted as one of the reasons for the decline of the class action from the mid-eighteenth to the mid-twentieth century.[16]

The analogy is not perfect, of course. Shareholders in a corporation, for example, have *chosen* to become a part of the corporation for a variety of reasons—to tie their fate (to the extent of their investment) to that of the business entity in which they have invested, and they retain the ability to sell their stock at any time, thus settling for their losses (or gains) to the date of sale. A member of a class that exists only for the purposes of a litigation may be dragged kicking and screaming into a lawsuit he does not want, or at least would prefer to conduct on his own.

But some of these entities are not so "voluntary" after all. The trade union is an organization that may be an employee's representative in both collective bargaining and litigation because a majority of fellow workers (of which the individual was not one) selected the union as its bargaining representative, and the only fully effective way

15 Even if this view is accepted, the difficult question remains whether, at least in some circumstances, it is wiser to regard a class action as coming closer to the aggregation model. For reasons elaborated below, *see infra* text accompanying notes 116–35, I believe Rule 23 should be revised to make it adaptable to both models.

16 *See* YEAZELL, GROUP LITIGATION, *supra* note 2, at 194–95, 210–12; Bone, *Litigative Forms*, *supra* note 2, at 223.

of "withdrawing" may be the unpalatable one of leaving the job.[17] Similarly, to escape the consequences of being part of a municipality for certain purposes, one cannot simply sell one's stock; the dissatisfied individual's only option (if he fails to persuade his fellow residents) is to move home and family somewhere else.[18]

2. The extent to which the entity model is applicable depends on the extent to which the controversy is suitable for class treatment. Thus, assuming the class is of sufficient size, it may well be that only certain aspects of a dispute—perhaps only one of a great many (for example, the time when certain controlling events occurred)—are suitable for class treatment.[19] Or it may be that virtually every aspect of the controversy, including not only all questions of liability but of damage as well, either warrant or demand such treatment. In either event, the applicability of the entity model will extend only as far as class treatment requires.

3. Finally, an intermediate level of class treatment may be called for: the creation of subclasses.[20] For example, if a product defect is the subject of a claim by a large group of automobile purchasers, the interests of those who bought only one or two cars may sufficiently diverge from the interests of "fleet purchasers" to mandate the creation of essentially two classes of plaintiffs.[21] In such cases, the entity

17 Under the provisions of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), 159 (1994), a majority of the employees in a designated bargaining unit may select a bargaining representative who will then represent *all* the employees in the unit, including those who voted against representation. (Individual employees do not surrender all options short of quitting, however. Thus, an employee may, at least in theory and often in practice, remain at work when his union calls a strike.)

18 I do not mean to suggest that all involuntary groups are socially beneficial—only that a claim of "involuntariness" is not necessarily fatal to the value of treating an individual as part of a group, both from the standpoint of society and that of the individual. As Susan Koniak has reminded me in commenting on an earlier draft, a company town organized and run by one's employer has less to be said in its favor than a truly public municipality. Just so, when a class is defined primarily by the adverse party (say in the course of settlement negotiations), the class may be far from optimal in terms of coherence and truly shared interests and concerns. The topic is a large one that is only touched on here.

19 On whether class treatment should be available for one aspect of a case if that aspect does not "predominate" with respect to the controversy as a whole, see *infra* text accompanying notes 131–32.

20 On the value of subclasses in ensuring the proper treatment of divergent interests, see *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2250–51 (1997). But as Justice Breyer noted in his partial dissent in that case, subclassing is not costless; it may be inefficient and may adversely affect the ability of the plaintiff class to negotiate a fair settlement. *See Id.* at 2255–56 (Breyer, J., concurring in part and dissenting in part).

21 *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995) (disapproving certification of settlement class and ap-

approach would relate to each separate subclass, not (at least in the normal course) to all the subclasses aggregated as one overriding group.

D. The Case for the Entity Model

The conclusion that the entity model is preferable is not an easy one for a person like me, who believes in the virtues of autonomy and individual choice.[22] If, as has been forcefully argued, those virtues include the value to the individual of a personal "day in court"—of the ability to participate in the fullest sense in the adjudication of a claim of right—the conclusion becomes an especially difficult one. The point, however, is far from self-evident: if such participation is not cost-effective, and would be seen by the vast majority of those similarly affected (as well as by their adversary) to run counter to their own objective of a fair and effective outcome, then the argument proceeding from the value of autonomy may be flawed. Nevertheless, the argument has in significant part animated the notions of fair process that have resulted in such landmark decisions as *Phillips Petroleum Co. v. Shutts*[23] on the rights of class members to notice and to opt out of the class, as well as *Martin v. Wilks*[24] on the invalidity of binding a nonparty, non-class member to a class action settlement even if the nonparty may have had motive and opportunity to take part in the proceeding.[25] Thus, whatever one concludes about its empirical support or normative strength, the argument is one that needs to be reckoned with.

1. The most helpful starting point may reside in the "small claim" class action—an action defined here to embrace those cases in which the claim of any individual class member for harm done is too small to provide any rational justification to the individual for incurring the

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proval of settlement, and noting that "[a]t the very least," there should have been certified subclasses separating the fleet owners from the individual owners).

22 *See, e.g.*, Shapiro, *supra* note 5, at 545–50.

23 472 U.S. 797 (1985).

24 490 U.S. 755 (1989).

25 In that part of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n)(1) (1994), Congress attempted to overrule certain aspects of *Martin v. Wilks* by providing that in the context of a judgment in an employment discrimination case, a nonparty will be bound by that judgment if the nonparty received adequate prior notice of the proposed judgment and its consequences and was afforded a reasonable opportunity to present objections. But to reflect its awareness of the constitutional issues presented by this provision, Congress included (presumably superfluous) language that nothing in the subsection shall "authorize or permit the denial to any person of the due process of law required by the Constitution." 42 U.S.C. § 2000e-1(n)(2)(D).

costs of litigation. As an example of such a case, take a claim on behalf of many purchasers that defendants have engaged in a price-fixing conspiracy to violate the federal antitrust laws. The case would easily fit the small claims category if, even after damages are trebled, the amount due any single purchaser would not exceed, say, $100.[26]

In such cases, I submit—and some others who would certainly not go beyond this point may well agree[27]—that the soundest approach is to view the cause of action as essentially a group claim fitting the characteristics of the second model, with all the consequences that entails. Assuming that public prosecutors are not to constitute the sole means of enforcement in these cases, the small claim class action strikes me as one that serves the purpose not of compensating those harmed in any significant sense, or of providing them a sense of personal vindication, but rather, and perhaps entirely, the purpose of allowing a private attorney general to contribute to social welfare by bringing an action whose effect is to internalize to the wrongdoer the cost of the wrong. The purpose of the action, in other words, is solely to deter the kind of wrong that causes a small injury to a large number (just as the availability to an individual of a private civil action to recover for a substantial injury can serve to deter the wrongful conduct of those who would cause an equivalent social harm, but in the form of a large injury to only one victim). Although some actions of this kind may not be justifiable except as a means of contributing to the income of lawyers, surely others are fully warranted, and the question whether the action should be allowed to go forward is quite different from the question of the nature of the action once it is certified on behalf of a plaintiff class.[28]

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26 The hypothetical is derived from the facts of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Of course, some of those injured might prefer that the suit not be brought at all because they are financially tied in with the defendants or because they believe such suits ought to fall within the sole province of public prosecutors. But unless this group is in a majority, they presumably cannot thwart the action, whether they opt out or not, and they can always register their disapproval either actively (by objecting to certification) or passively (by not picking up their check if the class prevails).

27 *See, e.g.*, Epstein, *supra* note 2, at 6–7; Trangsrud, *supra* note 2, at 76.

28 On the question whether the action should be certified as a class action at all, I was distressed by the terms of proposed Rule 23(b)(3)(F) as put forward for comment by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference in the summer of 1996. *See* PROPOSED RULES: AMENDMENTS TO FEDERAL RULES, 167 F.R.D. 523, 559 (1996) (proposed amendments to Rule 23). This proposal, which is also discussed below, appeared to be based on the premise that the desirability of a small claim class action under Rule 23(b)(3) should depend to a significant extent on

That it makes eminent sense to view the class as the aggrieved claimant in such instances (with the implications suggested in the models already described and more fully developed below) strikes me as more than a trivial conclusion. It suggests that notions of individual choice, autonomy, and participation—and their resonance in the constitutional guarantee of due process—are not so rigid that they cannot yield to practical arguments about the nature of the case, the character of the wrong complained of, and the individual interests at stake, as well as the countervailing interests and preferences of others. Of course, the notion that due process, and the values underlying it, are capable of such interpretation and application is well accepted in our jurisprudence, even if there is no solid consensus on the appropriate balance in particular instances.[29]

2. I pass over briefly, but not without emphasis, cases covered by the first two subsections of Federal Rule 23(b), in many (if not most) of which the class must in essence stand or fall as a unit because of the truly indivisible interests of the class members (say as holders of a particular class of stock or other certificate in an enterprise[30]) or because the granting of equitable relief to one or more class members is bound to affect the group as a whole.[31] Indeed, the knowledge that

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the balance between the stake of each *individual* class member and the costs of the litigation. *See infra* note 127.

This proposal, which at this writing seems headed for the discard pile, was criticized by many commenters. My own criticism was set forth in a letter to Peter McCabe, Secretary of the Committee.

> [w]hether a class action is warranted in such a case depends not on the magnitude of the wrong to any individual . . . but rather on such issues as the alternative means of internalizing the costs of the defendant's wrongful activity and the social value of internalizing those costs (that is, the need for effective deterrence).

Letter from David Shapiro to Peter McCabe, Secretary of the Standing Committee on Rules of Practice 3 (Jan. 9, 1997) (on file with author).

29 The leading modern case articulating the need to strike such a balance in determining the scope and applicability of the procedural due process requirement is *Mathews v. Eldridge*, 424 U.S. 319 (1976). The decision has not gone without criticism, especially on the grounds that it pays insufficient attention to non-instrumental process values. *See, e.g.*, Mashaw, *supra* note 4.

30 *See, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

31 In certain cases in which injunctive relief is sought, a class of people will be affected if the relief is granted, whether the action is brought in form as an individual action or as a class action. One example is a case in which a pupil in a school system demands an injunction that requires her to attend a segregated school; the effect of the injunction, if granted, will necessarily be to alter the structure of the school system. As another example, consider a case in which a professional athlete complains that a particular employment practice violates the antitrust laws and seeks to enjoin continuation of the practice. The effect of the injunction will inevitably extend to

these actions generally involve the group as an entity may well have led the rulemakers in 1966 to make such classes "mandatory" (not open to opt-out) and to leave questions of the necessity, scope, and form of notice to the discretion of the certifying court.[32]

3. Remaining for consideration are the cases that, in the view of most, are the hardest to bring within the second model, and indeed the rulemakers in 1966 expressed doubt that such cases were appropriate for class action treatment at all.[33] (This category should probably include the cases that, for most class members, involve only small claims but are sufficiently mixed that a significant number of claims, even after discounting for the costs of individual litigation, are more substantial.) Perhaps the most challenging of these cases is one involving a mass tort in which there are a large number of victims, all of whom have suffered, or are threatened with, substantial injury as a result of the defendant's conduct and who would be likely (if the class

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other athletes within the league. *See, e.g.*, Robertson v. National Basketball Ass'n, 556 F.2d 682 (2d Cir. 1977); *see also* Rhode, *supra* note 2, at 1195–97.

It is less clear that the fate of the class is a "unitary" one in some of the cases that may fall within Rule 23(b)(1) if that subdivision extends to actions for monetary relief solely on the ground that the defendant's assets may not be sufficient to cover all claims. Although the question has not been resolved by the Supreme Court, some lower courts have applied this subdivision in such cases in order to preclude class members from opting out. *See In re* Asbestos Litigation, 90 F.3d 963 (5th Cir. 1996), *vacated sub nom.*, Flanagan v. Ahearn, 117 S. Ct. 2503 (1997), *judgment reinstated*, No. 95-40635, 1998 U.S. App. LEXIS 1114 (5th Cir. Jan. 28, 1998); Ortiz v. Fibreboard Corp., 117 S. Ct. 2503 (1997) (remanding to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997)). For a vigorous defense of the appropriateness of using Rule 23(b)(1)(B) in such "limited fund" cases, see Opinion Affidavit of David Rosenberg, *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W. Va. 1997) (Civ. Action No. 2:97-0102) (filed May 1997).

32 Professor Bone has explored the historical foundation of the idea that certain kinds of group interests have an "impersonal" quality that is especially appropriate for group litigation and that affords less basis for concern about issues of individual autonomy and control. *See, e.g.*, Bone, *Litigative Forms*, *supra* note 2, at 218, 234–87. *Cf.* Bone, *Nonparty Preclusion*, *supra* note 2, at 288–89 (concluding, on the basis of theory, "informed by history," that "the extent of an individual's right of participation in litigation should vary with the type of case"). Although my perception of the virtues and desirability of the entity model may be broader than his, I have found his historical discussion and thoughtful analysis of the nature of individual and group rights most helpful in my own thinking.

33 The Advisory Committee Note to the 1966 amendments said that class actions would "ordinarily not [be] appropriate" in mass tort cases because of the likelihood that a significant question of damages, liability, and defenses to liability would affect different individuals in different ways. PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 39 F.R.D. 69, 103 (1966) (advisory committee's notes on proposed Rule 23).

action format did not exist) to bring individual actions seeking redress.

It is important, in considering the soundest approach to the "class" aspects of such cases, to begin with an assumption about the nature of the class action. Thus, despite the misgivings of the rulemakers in 1966, we should assume that some aspects of the class members' claims have properly been certified for class treatment because of the characteristics of those aspects—characteristics sufficiently shared by all members of the class (or subclass). In some instances, the aspects may be relatively narrow in proportion to the case as a whole. For example, was a particular assertion in a proxy statement sufficiently misleading to bring all other questions of potential liability and damage into play? In others, the aspect may be substantial—the "proximate cause" of an airplane accident, for example—even though difficult individual questions of damages may remain. And in still others, the common aspects may extend to all or most of the case, including individual damages—perhaps most clearly where such damages are concededly identical for every class member or may be determined simply through application of a formula based on the extent of an individual's activities.

Even if we start with this assumption, the argument for the first model—treating the class action as essentially an aggregation of individual actions for purposes of convenience—is strong. After all, if each individual claim is substantial, each potential claimant probably has both the motive and the wherewithal (given the blessings of the contingent fee) to bring a separate action, an action in which he chooses his own counsel, develops his own strategy, decides when and whether to settle, and does all the other things that constitute the core of litigation as we know it. Why should that claimant be deprived of an interest that many view as rooted in due process and some view as firmly entrenched in natural law? To paraphrase Larry Kramer, writing in a related context, such a claimant should be no worse off in terms of the range of litigating and related choices open to him than a victim of a one-on-one automobile accident or any other tortious conduct unless somehow the mass tort is *substantively* different from the one-on-one wrongful act.[34] Such a difference is "conceptually possible," he wrote, but "[n]o one has made or developed this argument . . . [and] I do not see the ground for it as a matter of policy."[35]

There are responses on several levels that, for me at least, are ultimately convincing despite my own reluctance to be convinced.

34 Kramer, *supra* note 2, at 572.

35 *Id.*

First, as a predicate to the "substantive" issue that Kramer raises, it is important to stress the considerations of efficiency that serve in the aggregate to offer a substantial promise of a better substantive outcome for a class member—and certainly for the average class member—than as a litigant in a series of individual actions. These efficiencies have been chronicled by others.[36] They embrace such economies of scale as (1) the pooling of both resources and information; (2) the reduced counsel costs resulting from having lead counsel doing the bulk of the work for a large group; and (3) the saving of resources—as well as the distributional equities—that are bound to flow from a system that allocates compensation to victims on the basis of expected average harm, as compared to the vastly greater expense and "luck of the draw" that play a role in the outcome in each of a series of individual adjudications.[37] If we attribute rationality to victims (and put to one side the possibly separate interests of their lawyers), many if not most class members would doubtless see these efficiencies and distributional equities as critical to their choice of models, especially if the choice has to be made "behind a veil" of a substantial degree of ignorance about the outcome of their own individual action.[38]

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36 *See, e.g.*, LOUIS KAPLOW, ACCURACY IN ADJUDICATION, forthcoming *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW; Bone, *Statistical Adjudication, supra* note 2; Rosenberg, *Class Actions, supra* note 2, at 563–73; Rosenberg, *Individualized Justice, supra* note 2, at 236–52; *see also* Marc S. Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1158–60 (1996) (summarizing problems of the present tort system, individual compensation including transaction costs, misallocation of compensation, a shortage of institutional capacity, and impaired information transmission); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984) (criticizing the tort system's "private process" and calling for broad reform); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 575 (1997) (developing the thesis that "the amount of litigation is socially inappropriate" because of "fundamental differences between private and social incentives to use the legal system").

37 Some savings may be achieved in individual litigation through use of the doctrine of nonmutual issue preclusion. In general, however, the erosion of the mutuality doctrine in recent decades has been limited to allowing a nonparty to claim the *benefits* of a prior litigation (subject to a number of conditions that are not always easy to meet), but (in the absence of special circumstances) not to be *burdened* by the outcome of a litigation in which he did not participate. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 27–29, 43–63 (1982). For a powerful presentation of the historical and theoretical support for broader application of preclusion doctrines *against* nonparties—see Bone, *Nonparty Preclusion, supra* note 2.

38 The quoted phrase is originally that of John Rawls in his noted book, A THEORY OF JUSTICE 136–42 (1971), and has been developed and applied in this context by David Rosenberg in several articles forcefully advocating the averaging of damages in

But the argument for efficiency may justify aggregation without mandating or even warranting adoption of the entity model. And the efficiency arguments may be balanced by the hazards in any process of group litigation in which individuals and their own lawyers play little or no role: that the attorneys for the group and their adversaries (the defendants) will manage to pick up most of the goodies at the settlement table, leaving only the scraps for the almost anonymous and faceless members of the injured class.[39] Although I believe these hazards tend to be overstated by some critics of class action settlements, it remains important to make a *substantive* case for different treatment of a mass tort. To be sure, the question then becomes essentially one of substantive tort law, but I regard it as inappropriate (and even counter-productive) to consider any major procedural issue in a vacuum. Procedure, in my view, is primarily the *means* of determining substantive rights and liabilities, and this subordinate role is especially significant in an area that is as dynamic as that of modern tort law.

This task is complicated by the fact that mass torts can take so many forms, in terms of the nature of the harm, its causes, and the extent of individual damage. My own doubts that there is a convincing across-the-board argument for different substantive treatment lead me to use only a few examples (but important ones) as my point of departure. Perhaps the strongest example involves the mass toxic tort in which a large number of individuals, as a result of exposure to a

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mass tort class action cases. *See, e.g.*, Rosenberg, *Individualized Justice*, *supra* note 2, at 241–44 & n. 83. For other valuable discussions of the costs, benefits, and techniques of averaging damages within the group—from the standpoint of both social and individual welfare see Bone, *Statistical Adjudication*, *supra* note 2, and KAPLOW, *supra* note 36.

The concept of a choice made "behind the veil," as I understand it in this context, is not one that connotes a withholding of information from the individual by lawyers, experts, or judges. (Indeed, the existence of such information about known differences among potential or actual claims may undermine the appropriateness of class treatment on some or all issues.) Rather, the concept assumes that in light of the controlling law and the facts as known, or reasonably accessible, a rational, normally risk-averse actor would prefer class treatment (even with an accompanying averaging of outcomes) to the heavy costs and highly uncertain results of individual action—although that same individual might well oppose class treatment if he could *know* the outcome of his individual lawsuit.

39 Many commentators have written of the hazards of settlements in class action cases—of the dangers that class members' interests will take a back seat to the interests of the defendants and of lawyers for the class, and that judges will not have the incentive to review such settlements with the rigor necessary to protect class interests. *See, e.g.*, Coffee, *supra* note 2; Koniak, *supra* note 2; Trangsrud, *supra* note 2, at 82–64; Wolfman & Morrison, *supra* note 2.

potentially harmful chemical (produced by a smaller number of manufacturers), allege injury in the form of an increased risk of incurring a "non-signature" disease.[40] Putting to one side all problems of choice of law in our complex federal system (problems that will be considered later), I see this "wrong" as substantively different from the one-on-one tort (say, a car accident) in several significant respects.[41]

First, while there is seldom any question whose car hit whom in the auto accident case, there may often be a total lack of proof as to whose product affected which class member in the toxic tort case, and thus the most meaningful way of addressing the issue of exposure is with respect to the class as a whole. If defendant A had a one-third market share of a fungible product that was evenly distributed throughout the affected area by all manufacturers, we can say with considerable confidence that defendant A was responsible for one-third of the class's exposure to the product, even though we can only say with respect to any individual class member that (absent other in-

40 Many instances could be cited, but perhaps the best known involves the claims of Vietnam veterans and their families that they were exposed to harmful contaminants as the result of the use of Agent Orange as a defoliant in the Vietnam War. For an extraordinarily readable and informative recounting and analysis of the *Agent Orange* litigation, see PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (enlarged ed. 1987).

The question whether someone who has been exposed to a particular product has incurred an increased risk of harm as a result of that exposure may arise before or after the harm has occurred. (The harm may be a signature disease, like asbestosis, or a non-signature disease, like lung cancer.) If the harm has not yet occurred, there is a question as to whether there is a *present* cause of action based on the probability of future harm. That question is governed by the applicable substantive law; there is surely no constitutional bar to recognition of a cause of action based on an increased risk of future physical harm (a risk that can result in present psychological and even financial burdens), and as indicated below, there may be strong policy reasons for according such recognition.

41 For the discussion that follows, I am especially indebted to the pioneering works by David Rosenberg, several of which are cited *supra* note 2. *See also* Rosenberg, *Causal Connection, supra* note 36. This last cited article played an important role in Judge Weinstein's analysis of the issues of liability in the Agent Orange litigation. *See In re* Agent Orange Prod. Liability Litigation, 597 F. Supp. 740, 833–38 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

A recent Columbia Law Review symposium dedicated to Judge Weinstein included several articles exploring the implications of his approach for the development of liability and compensation rules in mass tort cases. *See, e.g.*, Margaret A. Berger, *Eliminating General Causation: Notes Toward a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 1217 (1997); John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034 (1997).

formation) there is one chance in three that he was exposed to the product of defendant A.[42]

Second, similar points can be made with respect to other aspects of the tort. Thus if we focus on the question of causation of a "non-signature" disease, we may not have sufficient data to say with any reasonable degree of assurance (and certainly not by a preponderance of the evidence) that an individual's exposure to the defendant's product was in fact the cause of his disease. Yet with the same data, we may be able to say with considerable confidence that a specified increase in the rate of the disease *with respect to the class as a whole* was caused by exposure to the product in question—that X members of the class would not have contracted the disease in the absence of exposure.[43]

The thrust of these points is that even though it may make little sense, in terms either of the traditional view of tort law or of the aims of the tort system, to allow individual recoveries in individual actions against individual defendants, it makes eminent sense, in light of the goals of effective deterrence and reasonable compensation, to make (or agree to) an award—often and inevitably based on probabilistic calculations—to the class as a whole.[44] Surely, if this is so, the "mass tort" of this kind is *substantively* different from the auto accident case.

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42 True, the statement about the *individual* class member may (under the given assumptions) be asserted with equal assurance. But the desirability of making that fact a basis of liability (say, for one-third of the plaintiff's damages) is far shakier if the tort is not viewed as "collective" in nature. For example, consider a tort that does not have this collective character. If we are reasonably sure, on the basis of all available information, that the chances are only one in three that B was hit by A's car (rather than by that of another driver), it is far more debatable—as well as a more radical departure from our tradition—to hold A liable for one-third of B's damages.

43 Each of these factors can, of course, be complicated by changing the facts, so that for example, the product is not entirely fungible (as in the Agent Orange litigation, where the products of different manufacturers contained widely varying percentages of dioxin contamination); the degree of exposure varies from one class member to another; or the class members themselves vary with respect to such relevant behavior as smoking, urban or rural residence, etc. But these complications do not necessarily make the point inapplicable or irrelevant; rather, they may make the process of determining the extent of liability and damage more complex and may require the creation of subclasses.

44 Deterrence may be the sole value served in the "small claim" case, but its significance should not be downplayed in torts involving substantial harm to individuals. (Indeed, in the view of some, deterrence remains the primary justification for a civil tort system in such cases.) And surely, a more acceptable level of deterrence is achieved by assessing the costs of injury avoidance in the light of the reasonably foreseeable harm to the entire class of victims rather than on the basis of the disparate recoveries (and failures to recover) that may be anticipated in lawsuits brought by a self-selected fraction of those injured.

And the difference is one militating strongly in favor of the second model.

Other mass torts may present a less persuasive case for such differentiation. But even the closest case to the one-on-one auto accident—the airplane crash or other "single episode" disaster—does present certain distinguishing factors. For example, while an award of punitive damages to an individual plaintiff in an auto accident case may not present serious problems of overdeterrence if the award is properly calibrated, separate awards of punitive damages to each individual injured in a mass accident case, if made without regard to other comparable awards, may wholly frustrate the goal of achieving an acceptable level of deterrence.[45]

Even apart from punitive damages, the uncertain and, to some extent, arbitrary and random nature of jury awards in individual actions involving a mass accident may result in inequitable compensation to the individual plaintiffs (too much to some, too little to others). And unless the average recovery in those cases that do go to judgment and that set the pattern for later settlements is reasonably related to actual harm, the sum of individual damages may bear little resemblance in total to the amount that will serve the goal of effective deterrence. Moreover, the problem is aggravated, if liability is not determined on a basis common to the class (either through a class action or through some application of preclusion principles[46]), by the possibility that liability will itself be found in some cases and not in others.

In sum, there is a strong case for the view that a mass tort is, and should be treated as, substantively different from a one-on-one tort from the perspective of both major objectives of the tort system, and

45 There is wide disagreement on whether, and to what extent, the concept of punitive damages has any place in a system of private civil remedies. After all, the award of punitive damages to a plaintiff has the characteristics of a windfall because it is unrelated to the injury done to that plaintiff and may far exceed the monetary loss attributable to that injury. Perhaps the strongest justification for such an award lies in the need to make up for the underenforcement likely to occur when each injured individual must pursue his own remedy. But punitive damage awards may result in overdeterrence too, for example, if most of those injured in a mass accident bring separate suits and obtain sizable punitive damage awards, each of which is made without regard to other suits and other awards.

For excellent analyses of the role of punitive damages in civil cases, see ALI, ENTERPRISE LIABILITY FOR PERSONAL INJURY, ch. 9 (1991); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

46 With respect to the availability of preclusion principles in such cases, see *supra* note 37.

that such treatment would (or at least should) be recognized as desirable by the members of the affected class.

Thus far, the problem has been primarily addressed from the standpoint of the members of the class, whose interests in autonomy and in individual choice have been the major factors weighed against the gains to class members from entity treatment. But the broader social interests at stake need to be recognized too, since the measure of efficiency and due process does require a balancing of the interest of the individual against the other social concerns that are affected.[47] In this case, the second model seems preferable both for the administration of the civil justice system and for the interests of litigants other than the plaintiff class. For the system itself, the ability to resolve a mass dispute in a single, consolidated proceeding, while not without difficulties of management and control,[48] offers distinct advantages over the task of managing scores, or even thousands, of suits in state and/or federal courts throughout the country.[49] As for the party or parties opposing the class, they may perhaps lose the power to wear down each *individual* opponent with superior resources, but such a loss is not one that should cause distress to those who seek to optimize social welfare.[50] The gain is that the overall outcome will either exonerate the defendant in a single, fully, and thoroughly litigated proceeding or, if fault is found and if adequate safeguards are observed, will end in an award more likely to approximate the actual measure of harm caused by the wrongful conduct than could the sum total awarded in a relatively arbitrary group of individual actions that are filed and pursued to judgment.

A related point bears on the question of individual choice and autonomy. Limits not only on individual resources, but on public re-

47 *See supra* note 29 and accompanying text; *see also* Metro-North Commuter R.R. v. Buckley, 117 S. Ct. 2113, 2120 (1997) (emphasizing the importance of considering the social costs of enforcing individual claims).

48 For a case in which certification of a nationwide class was denied on the basis, inter alia, of the asserted unmanageability of an action involving a huge class of people whose claims varied both factually and with respect to the governing law, see *Castano v. American Tobacco Co.*, 84 F.3d 734, 740–45 (5th Cir. 1996).

49 These advantages underlie the current statutory provision for pretrial consolidation of related litigation brought in different federal districts, *see* 28 U.S.C. § 1407 (1994), as well as the more ambitious and far-reaching proposals for consolidation made in several studies—notably in ALI, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994) [hereinafter ALI Study].

50 This perceived (and perhaps misperceived) disadvantage of the class action to the party opposing the class may well have been a major reason why a ban on class actions (in the absence of the defendant's consent) was a key provision of the agreement with the tobacco companies referred to above. *See supra* note 1.

sources as well may mean that the possibility of litigation by each victim of a mass tort, leading to a reasonably prompt disposition of each such case, represents more a dream than a reality for many members of the class.[51] Thus the choice is not so much between two workable models as between a model that offers some hope of a reasonably prompt and fair disposition and one that does not.

In the end, however, one's choice between models may turn not so much on striking a balance among factors that are hard if not impossible to quantify but on less tangible, more subjective considerations. Thus, my own belief in the worth of the individual and the virtues of autonomy does not carry me as far as it does those who would place the highest premium on the individual's unfettered claim to his personally shaped "day in court." In the context of litigation, my thinking is influenced by the high cost of giving free rein to such a claim and by skepticism about its practical value in a realm dominated by expense and delay, uncertain outcomes, and professional representatives who make decisions for their clients at least as often as they follow their clients' instructions. This skepticism seems to me especially warranted when the client is an individual and not a sophisticated, repeat-playing entity.

E. Some Further Aspects of the Entity Model

I hope the discussion so far has at least opened your mind to the possibility that the second model—one that focuses on the class as the entity in litigation (both as party and as client) with respect to those matters suitable for class treatment—is the preferable one. If so, the next step, as part of the argument *and* as part of understanding its implications, is to consider what the practical consequences of adopting that model would be. These consequences cover a broad range, from the nature of the class action itself to the role of counsel and the court, to the formulation of the substantive standards of determining liability and the measure of relief.[52]

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51 Indeed, litigation that is individual in form may well be "collective" in substance in view of the almost inevitably interdependent nature of such actions in the mass tort context.

52 Institutional questions of how the tasks of implementation should be allocated will be examined *infra* Part III.

After reading an earlier draft of this article, Robert Bone asked a question that was both probing and hard to answer: to what extent is the "entity" concept meant to be simply descriptive of a conclusion and to what extent do I see it as having normative force of its own? The best response I can give is that, while the term is designed primarily to represent a conclusion based on a range of policy considerations, the conclusion has tended in my thinking to take on a life of its own and to generate

1. To begin, at least three aspects of class treatment need to be reconsidered. First, there is a growing school of thought, reflected in both academic commentary and judicial decision, that certification of a "mass tort" action under Rule 23(b)(3) should be limited to "mature" torts—those that have been through the grinder of individual litigation in which courts and litigants have been able to develop both expertise and experience in determining whether the defendant is liable and, if so, how to arrive at the appropriate measure of damages or other relief.[53] Until then, it is argued, everyone is engaging only in guess work, and the possibility of a fair disposition—and especially of a fair settlement—for the injured class as a whole is very low.

But if the second model is indeed preferable, it makes little sense to defer class certification of what appears to be a mass tort, suitable in some respects at least for class treatment, until the requisite number of individual actions have been ground through the system. To the extent that the early plaintiffs in such a process may find it especially difficult to establish a case for liability or substantial damages, the class becomes analogous to the soldier ants who, in their travels, reportedly manage to cross even raging torrents by walking over the corpses of those representatives who find themselves in the vanguard of the advancing army.[54]

An alternative, more consistent with the second model yet retaining many of the advantages of the "maturity" theory, might be to allow provisional certification of a class action when such a tort is brought to the courts, to ensure adequate development of information through discovery and even some form of trial (or multiple "bellwether" trials[55]), and then if the appropriateness of class treatment is confirmed, to provide that all members of the class—including those who litigated in the vanguard—shall share in the benefits of the ulti-

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some further ideas. This ambivalence may well be desirable, but in any event I find it virtually inescapable.

53 *See, e.g., Castano*, 84 F.3d at 740, 747; McGovern, *supra* note 2, at 1841–45.

54 For criticism of the notion that the "maturity" of the asserted tort should be an important factor in deciding whether to certify a class action, for example, Rosenberg, *End Games, supra* note 2, at 707–13, and Case Comment, 110 HARV. L. REV. 977, 979–81 (1997).

55 The phrase is from a recent decision, *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997). In this case, the district court, in a toxic waste litigation involving 3000 individual plaintiffs and intervenors, had ordered trial of 30 "bellwether" cases, 15 to be selected by plaintiffs and 15 by defendants. In reversing this order, the court of appeals said that such trials can be useful but insisted on assurance that they would be representative, and further suggested that such assurance might be obtained by scientific sampling methods. *Id.* at 1020–21. On the value of scientific sampling techniques in determining aggregate damages, see Saks & Blanck, *supra* note 2.

mate disposition as to liability and damages on whatever basis is ordered or agreed to for the class as a whole.[56]

A second important aspect of the class action device—the "right" to notice—should be reexamined in terms of the real costs and benefits involved.[57] In those cases involving substantial harm to individuals, even viewing the class as the sole litigating party does not undermine the value of requiring individual notice to all those who can be identified with reasonable effort, so long as the cost is not so high as to sound the death knell of the action.[58] If it is, then the arguments for viewing the class as the litigant militate in favor of more selective notice, so long as an adequately representative group of the class (or of each potential subclass) is notified. Alternatively, it might be feasible—as in the case of a request for preliminary relief—to have some measure taken of the merits of the suit and, on that basis, to have some or even all of the costs of notice imposed on the defendant (to be deducted from any ultimate recovery).[59]

In the case of the "small claim" class action, requiring notice to all those members whose whereabouts are reasonably accessible seems even less sensible. The interest of the individual in the case is relatively low, as is the corresponding likelihood that any member of the class will wish to spend the time and energy to monitor the action or

56 The "immaturity" of a tort, however, may be relevant to the fairness of a settlement, since the lack of information and experience may bear on the ability to estimate the value of the class claim (or the issue certified for class treatment) with reasonable accuracy. Thus, it may be inappropriate to approve a settlement in such a case if there has been inadequate discovery or other exchange of information relevant to an appraisal of the agreement reached. *But cf. infra* note 133 (discussing Bruce Hay's analysis).

57 I pass over with only this brief reference, the problem that notice to class members may fall far short of explaining in accessible English what is at stake. The task of formulating notice that tells class members what the dispute is all about, what they may gain or lose, and what role they may play is not easy, but it is critical.

58 The notion that a ruling with respect to notice could impose such high costs on the plaintiff class representatives as to force termination of the action was recognized in a number of "small claim" class actions after adoption of the 1966 amendments. But the Supreme Court held in *Eisen* that even in such a case, the rigorous notice requirements of the rule (as interpreted by the Court) had to be observed, and the costs of notice could not be imposed on the defendant. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175–76 (1974).

Adoption of the proposal in text may warrant a requirement of some sort of security (as in the case of a preliminary injunction) in order to give a measure of protection to the defendant who is ultimately vindicated.

59 The Supreme Court in *Eisen*, 417 U.S. at 177–79, rejected this approach as inconsistent with Rule 23. *But see* Willging et al., *supra* note 2, at 176 (reporting that despite the *Eisen* decision, ways are often found to avoid imposing the full costs of notice on the plaintiff class representatives).

will object to the very idea of class treatment. In these circumstances, to insist on the widest possible notice is to use "due process" notions as a method of effectively defeating the claim at the threshold and depriving the polity of any social value it might have. It is far better to provide for sufficient notice to make a *representative* group aware of the action, so that the opportunity to object either to certification or to the progress or handling of the action is not lost, while keeping the cost of such notice within manageable bounds.[60]

Although Rule 23, as interpreted by the Supreme Court, appears to block these changes, broader and more flexible notions of due process, as articulated in such landmark cases as *Mullane*,[61] do not. Here again, the conception of due process has proved sufficiently sensitive to practical needs to be adaptable to the costs and benefits involved and to the substantive interests at stake.

Finally, the need for, and scope of, the opt-out right needs to be reconsidered. In the early jurisprudence of class actions, as represented by such cases as *Ben Hur*[62] and *Hansberry*,[63] the focus of due process considerations appeared to be the adequacy of representation; the ability to opt out was not emphasized, or even discussed. Indeed, even in the context of the first model I have posited, the notion of the representative quality of the class action (similar to an action in which a guardian represents a ward or a trustee a beneficiary) suggested that the key to the satisfaction of due process requirements was *only* the adequacy of representation; notice to class members was not a prerequisite, and a fortiori, neither was the opportunity to opt out.

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60 If the claim is viewed as essentially that of the class as an entity, then at least in some instances, effective relief could be devised that would benefit the class as a whole without the heavy costs of ascertaining the identity of every individual class member and then distributing some part of the award to each such individual. In a small claim class action, for example, a means might be found of internalizing to the defendant the cost of the wrong (and thus achieving the desired deterrent effect) by ordering the establishment of a fund to lower the cost of purchase (or provide other services) to class members in the future.

Indeed, in small claim class actions, even representative notice may be of little value in comparison to such relatively untried techniques as having the court appoint an advocate for the class, or giving an existing entity—like a trade union or consumer organization—an incentive to safeguard the interests of the class.

61 In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), still the leading case on the requirement of notice, the Court stressed a variety of practical considerations in holding that the expense of notification should be kept within reasonable bounds, and noted that it was justifiable to take "reasonable risks" that notice might not actually reach every interested person. *Id.* at 319. (*Mullane* itself was not in form a class action.)

62 Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

63 Hansberry v. Lee, 311 U.S. 32 (1940).

Thus, it is not surprising that when the rulemakers drafted the revision of Rule 23 in 1966, they did not hesitate to provide that in (b)(1) and (b)(2) actions, neither notice to every class member nor the ability to opt out was to be required; indeed, the rule as written appeared to preclude the ability to opt out. However, the (b)(3) action—seen as an experiment and an addition to the traditional class action—was viewed differently, and so both notice and opt-out rights were guaranteed. Some years later, these requirements were constitutionalized, at least in the context of Rule 23(b)(3), on the basis of the briefest of discussions (and essentially in dictum) in the *Shutts* case.[64]

Yet if the argument for entity treatment of the class is a persuasive one in the case of all matters properly subject to class treatment, including those falling under Rule 23(b)(3), then it may well be that an unconditional opt-out "right" is inappropriate with respect to any issue or set of issues that is suitable for class treatment. If there is a clear need for an unconditional right to opt out, one wonders about the soundness of the underlying decision to allow class treatment. On the other hand, a conditional or limited ability to opt out may serve the interests of the individual who (wisely or unwisely) insists on going it alone, without undermining the interests of the group as a whole, and may improve the level of monitoring of class counsel, and of the action as a whole, and enhance the fairness of a settlement.[65] Moreover, with respect to the need for effective monitoring of the class representative, holding the class together may offer more assurance that those who care most about the outcome will work from within to achieve the best possible result.

2. Just as the second model requires rethinking some important aspects of the class action certification process, so it warrants a careful study of the proper relations between lawyer and client with respect to the class action aspects of a controversy. Indeed, it has been forcefully suggested that, as the Supreme Court has recognized that a class action does not become moot upon the expiration of the substantive claim of the designated class member,[66] so we should reexamine the question whether a class action should be required to have a designated member as plaintiff in order to establish initial standing.[67] But no matter how that question is resolved—and perhaps the retention of the traditional form has relatively few costs and does help to pre-

64 Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); *see infra* text accompanying notes 111–12.

65 *See infra* note 128 and accompanying text.

66 *See* Sosna v. Iowa, 419 U.S. 393 (1975); United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

67 *See* Macey & Miller, *supra* note 2, at 61–96.

serve the comfortably familiar appearance of more traditional litigation[68]—if the class is seen as the litigating entity, then it should be regarded not only as the party plaintiff but as the client. The analogy to cases involving such entity plaintiffs as corporations and trade unions may make the point more tolerable and understandable.

Others have written in some detail about this need to focus on the precise nature of the lawyer's professional responsibility in class actions,[69] while still others have suggested that special treatment is unwarranted and inappropriate.[70] But even if the categories of individual and class representation should not (and cannot) be watertight, the notion of paying special attention to ethical issues in the class action context has merit in several respects. For example, the dangers of conflicts between the individual and the class may make it as inappropriate for a lawyer to represent *both* the class and individual members as to represent separate litigants.[71] Similarly, though communications between individual members and the class lawyer may be both appropriate and necessary, the interests of the class may well preclude such communications from being considered privileged with respect to the class as a whole. And if class actions are to prove viable,

68 Congress has recently attempted to give content to the "lead plaintiff" notion in federal securities cases. The Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77–78 (Supp. 1997), seeks to ensure that the lead plaintiff in such litigation will be the shareholder with the largest stake in the outcome (usually an institutional investor). This provision, along with others in the Act, was evidently designed to help curb perceived abuses in such litigation—in this instance by trying to assure proper monitoring of plaintiffs' counsel by a shareholder with the interest and capacity to keep a close watch on the case. (Such monitoring is not, in my view, in any way inconsistent with the entity model advocated here.)

For discussion of the 1995 Act, see Jill S. Fisch, *Class Action Reform: Lessons From Securities Litigation,* 39 ARIZ. L. REV. 533 (1997) (suggesting, inter alia, that institutional investors may have investment objectives different from those of individual investors and that such institutional investors are themselves not exempt from the dangers of collusive action with the defendant).

69 See, *e.g.,* WEINSTEIN, *supra* note 2, ch. 4; Macey & Miller, *supra* note 2, at 96–103; Menkel-Meadow, *supra* note 2.

70 *See e.g.,* Mullenix, *Paradigm Misplaced, supra* note 2, at 582–89.

71 Just as the "entity" model bears some resemblance to the notion of a corporation acting for its shareholders, *see supra* text accompanying note 16, so too the suggestion in the text is analogous to the problems of conflict that may arise when a lawyer for a corporation also undertakes to represent one of its employees.

Other problems that have been recognized in related contexts are analogous to the problems in representing a class. For example, a lawyer should not represent two clients who are each dealing with the same third person in a situation in which the interests of the two clients are potentially in conflict. And in some instances, such as an internecine struggle within a corporation, a lawyer for the corporation may be obligated to remain neutral. (My thanks to Susan Koniak for these analogies.)

special consideration may be required with respect to such matters as "maintenance," "solicitation," and the financing of litigation.

This approach does not imply that class members should be deprived of a significant role in litigation brought on behalf of the class. Even if the class is the relevant litigating entity, it is not one that can act, think, or communicate on its own. In the case of a trade union or corporation, there are preexisting individuals who have been authorized to speak for the entity and who normally would be the ones to work with counsel. In the case of a class that is, in effect, created for purposes of a particular litigation, there is likely to be no preexisting structure, and methods should be devised for creating that structure and endowing it with the widest representation consistent with efficient case management.[72] The precise role of any such group in the conduct or settlement of the case, and the need to take periodic samplings of the entire class, are important issues that fall outside the scope of this analysis, but the basic point remains: the class (like other litigating entities) is the client, and its members should play a role not as clients themselves but as representatives of the client.

3. Preference for the second model requires at least some rethinking of the role of the judge in dealing with issues certified for class treatment. The need for the judge to play a more active part than in conventional litigation at the critical stages of a class action, and especially in passing on the fairness of a settlement, is reflected in Rule 23 itself,[73] in the cases,[74] and in the literature.[75] How, then,

72 In some notable class actions—the Agent Orange controversy, for example—insufficient attention was paid to ways of requiring lawyers for the class to keep in touch with a range of class representatives. While considerations of efficiency and of the interests of the class as a whole must be factored in, the need for such communication is not obviated by recognition that the class is the represented entity; on the contrary, its value—as one means of assuring that class counsel will fulfill their duty to the class—may well be enhanced once the significance of the "designated" plaintiff as representative is either eliminated or reduced in importance.

For what is probably still the best analysis of the issue of communication and related issues, as well as of a range of suggested approaches, see Rhode, *supra* note 2.

73 FED. R. CIV. P. 23(d), (e); *cf.* MANUAL FOR COMPLEX LITIGATION § 30 (3d ed. 1995) (providing guidelines for the management of class actions).

74 *See, e.g., In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995); *In re* Corrugated Container Antitrust Litig., 643 F.2d 195 (5th Cir. 1981). In both cases, the court of appeals, in rejecting a settlement approved by the district court, emphasized the obligation of the district judge to ensure the fairness of the settlement and of the fees to be awarded to class counsel.

75 *See, e.g.*, WEINSTEIN, *supra* note 2, ch. 5; Kahan & Silberman, *supra* note 2 (addressing the extent of a state court's obligations in considering a settlement involving exclusive federal claims); Resnik, *Litigating and Settling, supra* note 2 (addressing the responsibility of judges for insuring fairness of settlements); Schwarzer, *supra* note 2

would that role be affected if the interest to be protected is viewed as that of the class (or subclass) as a whole, with the interests and concerns of particular members of the class being seen less as ends in themselves than as an aspect of the treatment of the class of which they are a part? In some instances, the difference might be insubstantial, but in others, the difference might well be outcome determinative. For example, even if one or more class members could persuade the judge that they would do better if allowed to proceed individually and thus that a proposed settlement is "unfair" to them, the judge who had already decided to certify a class, and who remained convinced that the certification was sound,[76] might well conclude that the interests of the vast majority of class members—and thus of the class as a whole—nevertheless warranted both retaining the class in its existing form and approving a settlement or compromise that maximized class interests. Such reasoning would be harder to justify if the class were viewed as simply an aggregation of individuals for purposes of litigation and negotiation.[77]

4. Finally, and perhaps of greatest importance, recognition of the entity model entails rethinking of the nature of the applicable substantive law governing the determination of liability and the scope of an appropriate remedy. Consider the mass "toxic tort" in which a large number of people have been exposed to a product and to a resulting increased risk of, say contracting a particular disease. Viewing such a tort as affecting the class of exposed people as an "entity" rather than as just an aggregation of individuals might lead to a number of substantive conclusions. For example, the tort might more

(addressing the issues to be considered by the court in deciding whether to approve a dismissal or compromise).

76 Such a showing, especially by a significant number, might persuade the judge that the original certification needed to be reconsidered, or that an additional subclass should be created.

77 Again, the analogy to the interests of a bargaining unit as a whole in the terms of a negotiated agreement offers a useful (if not perfect) analogy, especially if one recalls that individual members of the unit may be unhappy not only with the terms of an agreement but even with the very existence of a bargaining unit represented by a particular union. (True, the "duty of fair representation" operates as a constraint on the ability of a bargaining representative to subordinate the interests of the individual to those of the group, but that constraint in itself has significant limits. Clearly, the duty does not preclude reasonable tradeoffs, for example, of benefits for skilled workers in exchange for benefits for the less skilled, or of larger dollar increases per average employee in exchange for percentage increases that would provide greater increases to some members.) *See supra* note 17.

For general discussion of the authority of the bargaining representative, and the limits on that authority, see JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS 96–150 (1988).

readily be viewed as occurring at the time of exposure, whether or not the exposure has caused ascertainable physical injury to particular class members;[78] the determination of liability might turn on a decision that the increase in risk to the *class as a whole* was more than minimal; the amount properly assessed against the defendant might turn on the best available evidence of the percentage increase in the risk *to the entire class*; and any recovery might take the form (at least in significant part) of an insurance fund from which each class member can draw benefits if and when the anticipated harm occurs. Moreover, the very concept of a tort committed against the entire class, with the incidents I have suggested, militates strongly against the idea of having the laws of different jurisdictions apply to different members of the class. A single applicable law is almost a sine qua non.[79]

III. The Institutional Implications of the Entity Approach

A. *The Implications for Federalism*

In a recent study of the defects and virtues of American federalism, I suggested that given our constitutional structure and the policies underlying it, the burden of adopting a "national" solution when one is not mandated by the Constitution itself, should rest on the advocates of such a solution.[80] (And, given the large area in which questions of allocation of power are left to the discretion of the lawmakers,[81] the assignment of this burden is significant.)

78 The problem of whether the substantive law recognizes a cause of action for mental distress (and such related claims as the need for medical monitoring) caused by exposure to a harmful product arose in two recent Supreme Court cases, in very different contexts. In *Metro-North Commuter Railroad v. Buckley*, 117 S. Ct. 2113 (1997), the Court interpreted the Federal Employers Liability Act not to permit recovery by "exposure-only" plaintiffs when no manifest physical injury had occurred and stressed its understanding of common law principles in reaching this result. In *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2243 (1997), the Court simply noted that under some potentially applicable laws, "exposure-only" plaintiffs might not have a viable cause of action. *See generally supra* note 1.

79 On the need for a single applicable law in the mass tort context, compare ALI Study, *supra* note 50, at 305 (proposing federal choice of law standards for multistate tort and contract cases), *with* Mullenix, *The Mass-Tort Case, supra* note 2, at 1095 (proposing, inter alia, congressional authorization for the development of federal common law in mass tort cases), *and* Kramer, *supra* note 2 (criticizing proposals for special treatment of choice of law issues in mass tort cases).

80 David L. Shapiro, Federalism: A Dialogue 119–21 (1995).

81 *See id.* at 76 & n.73, 118–19. Even with the important judicial limitations placed on the scope of national power by the Supreme Court in the few years since my study was published, *see, e.g.*, Printz v. United States, 117 S. Ct. 2365 (1997); City of Boerne v. Flores, 117 S. Ct. 2157 (1997); United States v. Lopez, 115 S. Ct. 1624

If the entity theory is a persuasive one, it does not follow that a national solution is always preferable for any matter that is appropriate for class treatment.[82] Many incidents affecting significant numbers of people occur largely or entirely within a single state. At least when those affected are primarily residents of that state (as, for example, in the case of a toxic tort affecting only a particular residential area), surely there is no justification for bringing in heavy national artillery. Even if the incident within a single state does affect a significant number of "out-of-staters," as in a mass disaster like the fire at the Dupont Plaza Hotel in Puerto Rico,[83] it may not follow that the applicable law governing liability should be national. The line between such incidents affecting mostly "in-staters" and those affecting people from all over may be too arbitrary to warrant national preemption of local rules governing conduct and liability. But the danger that the hotel's liability would vary from one injured person to another depending on the fortuity of that person's domicile (if that is the forum's choice of law rule) does suggest the value of a national decision that those aspects of the case suitable for class treatment should be governed by a single applicable law—most reasonably the law of the place where the injury occurred.[84]

In some mass disaster cases—for example, one involving a plane crash on an interstate flight—the location of the crash and of the resulting injuries is, surely, more fortuitous than the location of a hotel fire. Thus in such a case, especially one involving an inherently interstate activity (like transportation across state lines), the case may be a strong one for national intervention going beyond the formulation of a choice of law rule. If, for example, a plane on an interstate flight crashes into a mountain in Tennessee as a result of faulty equipment or pilot error, is there any reason why Tennessee law should apply to questions of liability and/or damages when Tennessee had little or no regulatory control over the activity in the first place?[85]

(1995), the scope of discretion left to the policymakers is still very broad (and in my view, desirably so).

82 Of course, such issues can and do arise in contexts that have long been the subject of national law—antitrust and securities regulation, for example.

83 For a description of the litigation that followed this disastrous fire, and of the ultimate settlement, see Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis,* 59 BROOK. L. REV. 961, 976–77 (1993). Since the hotel was a resort whose guests came from many places outside Puerto Rico, many of those injured or killed by the fire were nonresidents of the Commonwealth.

84 *See* ALI Study, *supra* note 49, § 6.01, cmt b.

85 Admittedly, the range of possible cases is considerable, as is the degree of state regulatory control and interest. The state may have a much greater interest in the applicability of its law to an accident involving the passengers on an interstate bus trip

At the other end of the spectrum from, say, the pollution of the wells in a local community is the mass toxic tort affecting users of a product in virtually every state and some foreign countries. In such a case, there are strong policy reasons favoring uniform treatment of all those exposed to the risks created by the defendant's conduct, and given the dispersion of people harmed, it makes little sense for the applicable law to be that of any particular state. Should the legal rights of a Massachusetts resident in such a case (a) be different from those of a Vermont resident, or (b) depend on the particular state in which the defendant was acting when the product was manufactured or released?[86] And what if the product was a fungible one, produced by several manufacturers located in different states, with no way of telling with any reasonable level of confidence who was exposed to whose product? Surely, such an example would be an appealing one for a nationally applicable set of substantive rules even under my first model of a class action.[87] Acceptance of an entity theory along the lines suggested here makes the case for a uniform national set of substantive rules an even more compelling one.

Indeed, once the virtue of a uniform set of rules is recognized in such cases, policymakers can begin to think more seriously about the value of a shift away from the conventional tort system to a system involving some form of administrative handling of claims—perhaps even a system rooted more in notions of first party (or some mix of first and third party) insurance than in received notions of liability based on fault.[88] While such speculation is beyond the scope of this essay and more properly within the domain of those whose central concern is the prevention and remediation of accidents, the conditions for considering that course can only be present when the need for uniform national treatment is accepted as a predicate.

(and a somewhat greater interest if the passengers were riding an interstate train) than it would have in a crash on an interstate plane trip.

86 To be sure, the policy considerations here do not run entirely in the direction of a national rule. It may be argued, for example, that local lawmakers should be able to choose the level of protection for their residents, or of liability for their industries. But for me, the balance in this context tilts in favor of a national rule.

87 The first model, which is based on the view that a class action is but an aggregation of individual actions, is more fully described above at text accompanying notes 7–8.

88 For discussion of the pros and cons of various insurance-based alternatives to existing tort rules, see, for example, STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS (1989); Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993); Rosenberg, *End Games*, *supra* note 2, at 726–30.

B. The Allocation of Lawmaking Responsibility Between Courts as Adjudicators and Either Courts or Legislatures as Rule Promulgators (the Question of Rules v. Standards)

The relative virtues of rules and of standards have furnished the battleground for some of the richest and most varied debates in the realms of both theoretical and applied jurisprudence.[89] Advocates of increased reliance on rules—prescriptions thought to speak with suffi-

89 Once again, an exhaustive bibliography of relevant scholarly work bearing on this topic would take a full-sized appendix, but a briefer one may be of use for purposes of research, as well as for internal cross-reference herein. Books and articles that deal with the rules-standards debate (and with related questions of formalist and positivist approaches to law) and that I have found especially helpful, include: H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 42–61, 247–61 (1990); FREDERICK SCHAUER, PLAYING BY THE RULES (1991); ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 19–38, 136–75 (1982); J. M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL. STUD. 257 (1974); Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); Stanley Fish, *The Law Wishes to Have a Formal Existence*, *in* THE FATE OF LAW 159 (Austin Sarat & Thomas R. Kearns eds. 1991); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789 (1991); Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419 (1992); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991 (1994); Joseph W. Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985); Mark V. Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992); Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717 (1991); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431 (1985) [hereinafter Wilson, *Formalism*]; James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773 (1995).

Scholarly efforts to bring the debate down to cases—to focus intensively on the issues in a particular context—are a good deal less common (although many of the works listed above contain valuable illustrations). One interesting recent study, in an area of my own interests, is Alan K. Chen, *The Ultimate Standard: Qualified Immunity in an Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995) (urging a transition from standards to rules in the area of qualified official immunity from suit under 42 U.S.C. § 1983 (1994)). Another incisive and valuable study in a different area and with a different perspective is Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990).

cient clarity to enable actors to predict in advance the lawfulness of their conduct—emphasize such arguments as the value of predictability in planning, the lower costs of interpretation and application when prescriptions are clear, and the decrease in the potentially arbitrary power of the decisionmaker when her discretion is narrowed.[90] Critics of rule-based approaches to law cover an even broader range. At one end of the spectrum are the rule-skeptics, who argue that rules cannot truly increase predictability but only serve to mask the exercise of discretion by decisionmakers.[91] Operating in a different sector of this tradition are those who acknowledge that rules do confine discretion but argue that such confinement all too often serves to prevent just results by the over- or under-inclusiveness of the rules themselves—by their inability to forecast the infinite variety of problems that will arise in their administration and by their narrowing of the necessary discretion to deal with those problems.[92] A group harder to classify, except perhaps as working within the utilitarian tradition, includes those who see rules as more appropriate when, for example, the costs of formulation are relatively low and the costs of interpretation and application relatively high, or when the value of predictable planning is great.[93]

To some extent, the debate is between advocates of legislative supremacy and those who favor administrative or judicial discretion in applying flexible standards—a debate, in other words, involving the roles to be played by the various branches of government. Thus, to complicate the issues, one can believe in the value of legislative enactment of flexible standards, vesting the courts (or agencies) that apply those standards with authority to develop the more particular rules that will in turn govern private conduct. Or, one may believe that discretion should always remain in the decider of the case at hand—for example by refusing to elaborate on the meaning of negligence so that a jury will not be restrained in determining whether due care was exercised in the case before it.

In areas that come within the procedural realm, or that touch on that realm, the issues are complicated in a different way. In virtually every American jurisdiction, courts have significant rulemaking au-

90 *See, e.g.*, Schauer, *Formalism*, *supra* note 90; *cf.* Wilson, *Formalism*, *supra* note 89, at 484 (concluding at 484, with two cheers for formalism, but not a third).

91 Few present day scholars would probably lay claim to the title of total rule skeptic (just as few would lay claim to the legacy of Langdellian formalism), but intimations of considerable rule skepticism may be found in several works, including Balkin, *supra* note 89; Fish, *supra* note 89; Grey, *supra* note 89; Tushnet, *supra* note 89.

92 *See, e.g.*, Frickey, *supra* note 89; Singer, *supra* note 89.

93 *See, e.g.*, Ehrlich & Posner, *supra* note 89; Kaplow, *supra* note 89.

thority in procedural matters, and that authority is generally shared with the legislature.[94] Thus the question of reliance on rules or standards is only in part a question of allocation of authority between branches. Often, the question is whether the courts should deal with the problem as fully as possible in the exercise of their "legislative," or rulemaking, authority, or should leave the matter to be worked out through a common-law process that may or may not give more precise content to open-ended standards. To take an example outside the topic of class actions, the question may arise as to the admissibility of evidence whose relevance may be outweighed by its potentially prejudicial effect. Should a judicially legislated "rule of evidence" consist only of an open-ended statement—for example, when potential prejudice outweighs relevance the evidence should be excluded?[95] If so, should the courts in administering that rule develop a set of more concrete "sub-rules" that increases predictability but reduces judicial discretion? If not, should the legislated rule attempt to give a partial or even exhaustive list of more specific cases in which evidence should be excluded on this ground?[96]

This discussion may help set the stage for the problem at hand. Assume, at least while reading this section, that the case for the entity model is a persuasive one, that courts have been flirting with the ideas implicit in the model, but that the existing standards and rules tend to favor a more individualistic approach to litigation—that there must be a fairly substantial shift in our thinking about litigation for the entity model to gain ground (and that to some extent that shift may have to infiltrate our notions of procedural due process). To what extent should we look to the common law to move incrementally in the direction of this new model—or even to remain in the limbo of case-by-case application of different approaches—and to what extent should

94 New Jersey may be one of the few jurisdictions (if not the only one) in which the governing law has been construed to exclude legislative power over judicial practice and procedure. *See* Winberry v. Salisbury, 74 A.2d 406 (N.J. 1950), *discussed in* RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 674–75 (4th ed. 1996) [hereinafter HART & WECHSLER].

95 *See* FED. R. EVID. 403.

96 For examples in which the Federal Rules of Evidence have either added to or displaced the broad standard of Rule 403 with more detailed rules addressing the prejudice/relevance issue, see Rule 404 (character evidence not admissible to prove conduct; exceptions; other crimes); Rule 412 (evidence of prior sexual behavior in sex offense cases); Rule 413 (evidence of similar crimes in sexual assault cases); Rule 414 (evidence of similar crimes in child molestation cases).

we seek the enactment of rules (whether by legislatures or by courts[97]) that will set us more firmly and more rapidly on the new course?

Implicit in this phrasing of the question is a premise that should be made explicit. I do not include myself among those rule skeptics who argue that the formulation of rules is not only undesirable but unavailing—that discretion cannot be effectively cabined by such enactments. Rather, I find convincing the view of scholars like H.L.A. Hart, who have urged that rules have cores, penumbras, and limits: even though they cannot be self-applying, they can and do serve effectively to restrict the choices open to those who apply them.[98]

By rejecting rule skepticism and embracing some degree of preference for rules, I am aligning myself with those who are part of an emerging neo-formalist (perhaps a better phrase is "neo-formalizing") approach.[99] This approach does not embrace the theory that rules are themselves derived from a set of axiomatic principles, and that the rules in turn, as a matter of syllogistic logic, determine outcomes as soon as the facts are discerned. Rather, it recognizes the significant role played by questions of policy in the formulation of both standards and rules, and the significance of interpretation in the application of those rules and the determination of their proper limits. The approach, then, is as far from mechanical jurisprudence as the new realism is from the extreme view that any talk about government under law is only a sham.[100]

There are undoubtedly advantages in leaving developments to the common law tradition, with room for both incremental movement and continuing discretion.[101] For example, such an approach can pour new wine into old bottles so artfully that even those who watch these matters closely may wake up to the magnitude of the shift only after it is an accomplished fact. Moreover, even if the shift is perceptible while it is going on, it is more likely to respond to the needs and demands of particular cases than a set of rules formulated in advance.

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97 That issue is more fully explored *infra* Part III.C.

98 *See* HART, *supra* note 89, ch. VII.

99 Perhaps the foremost American scholar to advocate a sophisticated, nuanced version of a formalistic approach is Frederick Schauer. *See, e.g.*, SCHAUER, *supra* note 89; Schauer, *supra* note 89.

100 For an insightful discussion of the contribution of a formalist approach in one area—that of constitutional interpretation, see Fallon, *supra* note 89, at 14–17, 28–30, 48–51. *Cf.* Sebok, *supra* note 89 (defending both positivism and formalism against their harsher critics); Segall, *supra* note 89, at 1042 ("The rule of law cannot exist without significant notice of what the law requires. . . . The rule of law, however, requires both judicial restraint and judicial discretion.").

101 *See* Schuck, *supra* note 2 (analyzing the pros and cons of common law policymaking in this area).

And finally, if the matter under consideration relates in significant part to the conduct and character of litigation, the need for predictability is plainly less than in those areas of primary conduct that require clarity in order to facilitate the planning of people's affairs.

Nevertheless, I lean toward heavier reliance on the "legislative" rulemaking process as integral to development of the entity model, and I do so for several reasons. First, the shift contemplated is one of sufficient magnitude to be worthy of open debate: is it a good idea, at least in some contexts, and if so, how fast should we go and where should we begin? Such a debate should take place openly in the context of legislative rulemaking, not in a shadowy setting where we are not even sure what is happening. Second, and closely related, the question of the appropriateness of moving to this model (or of continuing a process already begun) strikes me as too bound up with issues involving our fundamental values to be left primarily to judges acting in the common law tradition.[102] Third, there is an interplay between this issue and the issue of federalism discussed in the previous section. If developments at a national level are an important part of the process of change, the use of a common-law approach is especially suspect. To the extent the questions are procedural, federal "common law" rules will not (and in my view, should not) trump state rules under the *Erie* doctrine,[103] if the rules in any way collide with policies of importance to the states. And many of these issues arise in areas where the existing rules governing liability are themselves furnished

102 I have argued in another context—involving the adoption of "strong" paternalist rules governing human conduct—that "legislative" action is more appropriate than judicial development for a major departure from traditional and accepted values, so long as the question is not one of constitutional dimension. *See* Shapiro, *supra* note 5, at 551–72.

103 Erie R.R. v. Tompkins, 304 U.S. 64 (1938); *see also* Hanna v. Plumer, 380 U.S. 460 (1965); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958). To oversimplify one of the most complex evolutions of doctrine in the realm of judicial federalism, *Erie* held that unless a valid federal law otherwise required, state substantive law is controlling in a federal court whether that state law is codified law or common law. *Byrd* stated that, in a federal court case governed by *Erie*, a federal practice must yield to state law when the state law is "bound up with state-created rights and obligations." *Byrd*, 356 U.S. at 535. And *Hanna* held this doctrine inapplicable when the matter in question was within the scope of a federal rule promulgated by Congress in the exercise of its legislative authority over federal procedure, or by the Supreme Court in the exercise of its delegated power to promulgate rules of federal procedure. Thus, the "legislative" power of the federal courts to "trump" state law by adopting a procedural rule is greater than their power to do so by a "rule" developed in the course of adjudication.

For a fuller, less simplistic analysis of these and related cases, see HART & WECHSLER, *supra* note 94, at 714–31.

by state law. To the extent the questions are "substantive," principles of both federalism and separation of powers have long been recognized as militating in favor of a limited role for federal common law.[104]

Of course, a preference for the adoption of rules does not deny the value of proceeding slowly or of leaving some scope for judicial creativity in interpreting and applying the rules.[105] Rules, as H.L.A. Hart has noted, are generally "open-texture[d]" at the margins, and leave room for the exercise of judgment.[106] Moreover, the first major efforts at rulemaking need not be comprehensive; rather, they could start in areas where the case for an entity approach is least controversial—the small claims of a very large number, for example—and then perhaps move into more controversial areas raising more serious and debatable issues of the effect on individual litigating autonomy and choice.

C. The Allocation of the Rulemaking Task Between Courts and Legislatures

A final, but critical, set of questions about the institutional implications of the suggested approach involves the allocation of authority between the legislative and judicial branches. To say that rules have an important role to play is not to resolve those questions in an area where courts as well as legislatures have significant rulemaking authority. Rather, it is necessary to look hard at the proper limits of judicial authority over "procedure" and at the interplay between that authority and legislative power to fashion rights, obligations, and remedies.

This set of questions can arise in any jurisdiction, state or federal, that draws similar distinctions between judicial and legislative rulemaking authority. But the problem is of particular importance and interest at the federal level both because of the nationwide conse-

104 For discussion of the sources, role, and appropriate scope of federal common law, and a bibliography of the leading scholarly studies in the area, see HART & WECHSLER, *supra* note 94, ch. VII.

105 A number of scholars have pointed out that the comparative value of rules and standards will vary with the context—with such questions as relative cost, the need for predictability, and the appropriateness of judicial discretion. *See, e.g.*, HART, *supra* note 89, ch. VII; Ehrlich & Posner, *supra* note 89; Kaplow, *supra* note 89.

106 HART, *supra* note 89, at 133, 252. A postscript in the second edition of this work, *id.* at 238–76, contains an illuminating discussion of the differences and similarities between Hart's view of the room for discretionary judgments at the margin of rules, and Ronald Dworkin's view that the law is never really incomplete. Whoever has the better of this debate, there is no doubt that a judge has more flexibility at the margin of a rule than at its core.

quences of federal action and because of the reluctance (discussed above) to rely on federal common law as a vehicle for the development of substantive rules. For these reasons, the discussion that follows will center on the questions of allocation of authority between the *federal* legislative and judicial branches.

Few would disagree, I think, that certain areas of change, if they are to take place at the federal level, must be the responsibility of the legislature.[107] For example, if there is to be federal law governing the rights and duties of injurers and victims in the realm of mass toxic torts, surely the definition of the tort—when actionable injury has occurred, the bases of liability, the standard of proof, and the measure of recovery—are substantive matters appropriate not for judicial rulemaking but for legislative action. The harder questions arise in the twilight sphere presented by such issues as the grounds for class treatment, the requisites of notice and adequate representation, the limitations that should be imposed on the opportunity to opt out of the class, and the conditions under which settlements should be approved or disapproved.

Scholars have debated for decades the proper scope of the rulemaking power vested in the Supreme Court under the Rules Enabling Act (REA).[108] And with respect to the class action provisions of

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107 I leave to others the assessment of the political factors that may encourage or discourage legislative action at either the state or federal level. While this question is surely a basic one in considering what can in fact be accomplished, I do not share the view that a matter properly for the legislative branch should be taken over by the courts because political pressures render the legislature incapable of action. If those pressures do lead to inertia on an issue that is properly one for the legislature, the answer is to try to overcome that inertia, not to evade it by looking to an inappropriate source for the change that is sought. *See also infra* text accompanying note 115.

Of course, the matter is not quite so simple. There are times when the very existence of legislative inertia may signal the need for constitutional protection of those who do not have the legislative clout to receive the treatment to which they have a just claim. Such a problem (like that of the underrepresentation of certain groups in the legislature) may well be viewed as one of constitutional dimension warranting judicial action. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 77–78, 120–24 (1980). But nothing in the topic under discussion here rises to that level. On the contrary, some of the ideas advanced in this essay will raise serious constitutional questions of their own if and when they are adopted.

108 The critical provision of the Act vesting rulemaking authority in the Supreme Court is 28 U.S.C. § 2072 (1994), which states, inter alia, that the Court has the power to prescribe rules of practice and procedure, subject to the limitation that "[s]uch rules shall not abridge, enlarge or modify any substantive right."

An excellent summary of the debate—which includes references to leading cases and commentaries, as well as detailed analyses of the "relation back" provisions of FED. R. CIV. P. 15(c) and of the ownership requirements of FED. R. CIV. P. 23.1 (gov-

Rule 23, concerns about the substantive impact of the rule have been intensified by the controversy over recent proposals for change.[109]

My own take on this issue stems from a view of the Enabling Act as a more limited delegation of authority than the Supreme Court itself has recognized in such decisions as *Sibbach*[110] and *Hanna*.[111] I am persuaded by Stephen Burbank's extensive study, that in granting a limited power to promulgate rules, Congress was concerned more about protecting its own prerogatives as an elected national legislature than about the danger that the rules would run afoul of the powers of the states as expressed in the Rules of Decision Act.[112] (Thus, a question of the proper limits of the rulemaking power under the REA is presented as much by a rule's applicability in the context of a federal claim as in that of a state law claim in a diversity case.[113]) I also find

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erning derivative actions)—may be found in 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE §§ 4509, 4510 (1996).

109 For recent scholarly discussion of the validity and substantive impact of Rule 23, and of various proposed amendments to the rule, see, for example, Carrington & Apanovitch, *supra* note 2; Marcus, *supra* note 2; Mullenix, *Constitutionality*, *supra* note 2; Priest, *supra* note 2.

The article by Priest, *supra* note 2, is especially noteworthy in its critique of what is described in the opening summary as "recent reform efforts . . . to impose substantive controls on mass tort class actions through procedural means." *Id.* at 522. Contending that certification of a case for class action treatment confers "unfair negotiating power" on the plaintiff class, Priest urges that certification should not be allowed if the court determines at the pre-certification stage that "the underlying substantive claim is without merit." *Id.* at 573.

In its recent decision in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), the Court noted the constraints imposed by the Enabling Act on the scope of the judicial rulemaking power. *See Id.* at 2244.

110 Sibbach v. Wilson & Co., 312 U.S. 1 (1940).

111 Hanna v. Plumer, 380 U.S. 460 (1965).

112 *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1098–1130, 1187 (1982).

The Rules of Decision Act, 28 U.S.C. § 1652 (1994), states that except as the federal constitution, treaties, or statutes otherwise require or provide, "[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

113 Thus the distinction drawn by the Court between the meaning of FED. R. CIV. P. 3 in diversity and federal question cases is, in my view, especially baffling. *See* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 701–02 (1988). *Compare* Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (stating that Rule 3 does not control the running of the statute of limitations in a diversity case), *with* West v. Conrail, 481 U.S. 35 (1987) (stating that Rule 3 does control on that issue in a federal question case).

The question of the validity under the REA of the contemporaneous ownership requirement of FED. R. CIV. P. 23.1(1) (that in a derivative action, the plaintiff must have been a shareholder at the time of the wrong complained of) should be the same

persuasive the arguments of John Ely, that the provision in the REA limiting rules promulgated pursuant to it to those that do not "abridge, enlarge or modify" any substantive right carves out of the Court's authority at least some of Congress's power to legislate in the "uncertain area" between substance and procedure.[114]

Moreover, my view of the appropriate interpretation of the REA is buttressed by my belief that this interpretation represents a sound allocation of policymaking responsibility. Many would surely disagree, and would place more trust in the disinterestedness and/or expertise of judges, learned academics, and experienced practitioners than in the inevitably political process of producing (or blocking) legislation. But I put more emphasis on the role of the elected legislature in effectuating major shifts in substantive rights and liabilities,[115] and am at the same time more skeptical about the sharpness of the claimed distinction between "non-political" rulemaking and "political" legislative action or inaction. Thus, even assuming that Congress may delegate its *entire* power over rulemaking to the courts—with all the substantive baggage that would attend such a delegation—I would not favor the transfer.

Under this view of the REA, Rule 23, as it now stands, raises some grave questions of validity, and using the rule to compel movement toward an entity model would be even more problematic. These concerns may be illustrated by indicating some of the problems of rulemaking presented by the existing rule and some of those presented by the recently proposed amendments.

At least three examples of questions raised by the existing rule come to mind. First, as noted above, Rule 23(c) has been interpreted to require that, at the outset, notice be sent to every class member whose whereabouts can be identified with reasonable effort.[116] Thus

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in a federal question case as in a diversity case. For discussion of the REA issue as applied to this subdivision of the rules, see HART & WECHSLER, *supra* note 94, at 729 n.4, and authorities there cited.

114 *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 718–38 (1974). *But see* Burbank, *supra* note 112, at 1107–08. As Ely noted, to read the power delegated to the Supreme Court to be coextensive with congressional power over federal practice and procedure is, in effect, to read the provision quoted in text out of the statute (except, perhaps, as a statement of emphasis: we mean procedure and not substance). The evidence mustered by Burbank in opposition to this normal and useful canon of statutory interpretation—not to read statutory language as surplusage—is, in my view, not compelling.

115 *See supra* notes 102, 107.

116 *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); *supra* text accompanying notes 58–60. The reading of the notice provision of Rule 23(c)(2) was surely a plausible, if not the most natural one, but as Karen Moore has argued, even a court that

if one can imagine a class that consists of everyone in the Manhattan telephone directory and that satisfies every requisite for certification, the action cannot go forward as a class action without personal notification to every member. Of course, Rule 23 adds nothing of significance if the Constitution always requires such universal notice, but I doubt that it does.[117] Thus if the action is a "small claim" class action, the costs of notice imposed by the rule (and by no other law) may well be so prohibitive as effectively to deprive the class of its claim. While it remains theoretically possible for an individual to sue, there is little practical likelihood that such a suit will be filed, and in any event, if the entity theory is sound, the entity itself has a claim that it has lost as a result of the rule.

Second, the rule as now written contains a provision mandating an opt-out right for individual class members in all cases coming within the provisions of Rule 23(b)(3).[118] Here, in view of the *Shutts* decision,[119] perhaps a stronger case can be made for the view that the provision of the rule adds nothing to existing constitutional requirements. But the relevant language in *Shutts* is suspect on a variety of grounds—for example, it was not truly necessary to the result;[120] it found little or no support in the Court's prior class action jurisprudence;[121] it contained no justification or even explanation for the conclusion reached; and it may well be limited in any event to cases in which the members of the class are beyond the territorial jurisdiction of the forum,[122] so that the constitutional holding would not apply,

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adheres to a "plain meaning" approach to the interpretation of statutes, should be willing to take a less constraining approach to the interpretation of procedural rules that it has promulgated. *See* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1091–1109 (1993).

117 *See supra* note 61 (regarding the discussion of the *Mullane* decision).

118 FED. R. CIV. P. 23(c)(2) provides that in any class action maintained under subdivision (b)(3), the notice to each class member shall state that "the court will exclude the member from the class if the member so requests by a specified date."

119 Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

120 Since in *Shutts* itself reasonable notice and opportunity to opt out *had* been given to each class member, the Court could have upheld the exercise of jurisdiction over class members without deciding whether such notice and opportunity were prerequisites of due process. That question could (and probably should) have been reserved for a case in which the answer would have made a difference.

121 As noted *supra* text accompanying notes 62–63, the Court's prior class action jurisprudence had stressed the adequacy of representation as the precondition to the entry of a judgment binding the class as a whole; notice and the opportunity to opt out had not been discussed.

122 *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789, at 255 (2d ed. 1986).

for example, in a case in which a nationwide class and nationwide service had been authorized by a federal law.[123]

If the opt-out right is not constitutionally mandated, and if the entity model is one clearly validated by the governing substantive law, would not the substantive interests of the class as a whole be severely undermined and potentially destroyed if individual members could opt out at will? Further, might not such action either destroy the integrity of the class or deprive it of some or all of its strongest members?

Third, consider the requirement of present Rule 23(b)(3) that a class may be certified under its provisions only if the "questions of law or fact common to the class predominate over any questions affecting only individual members."[124] This requirement has generally been understood (and I think correctly) to override the possibility of certification of a class on particular issues under Rule 23(c)(4) unless those issues are found to "predominate" over the individual issues in the case.[125]

Pursuant to this provision, then, class status would have to be denied in a case where, say, there was ample warrant to certify a class on the question of the defendant's liability-creating conduct toward its

123 In a recent case, the Supreme Court granted certiorari to consider some of the questions raised by *Shutts* with respect to the scope of the constitutional "right" to opt out of a class action, but then dismissed the writ as improvidently granted on the ground that the federal constitutional issue had not been properly presented to the state supreme court. *See* Adams v. Robertson, 117 S. Ct. 1028 (1997).

As this article was being submitted to this Review, two pieces appeared that deal with the topic discussed in the text and that take a different view of the opt-out issue: Issacharoff, *supra* note 2, and Solomon, *supra* note 2. In the concluding section of her Note, Solomon states that "[u]ltimately, the constitutionality of mandatory class actions is a choice between pragmatism and individual rights," *id.* at 1645, and having so described the conflict, chooses the latter. In the summary of his study, Issacharoff concludes that a "meaningful right to opt out" accomplishes two objectives: "First of all, it is a signal to other attorneys that there is a deal in the works and that the deal may be cooked. Second, it preserves judicial integrity by removing the Star Chamber aspects of the worst class action practice." Issacharoff, *supra* note 2, at 833.

124 FED. R. CIV. P. 23(b)(3). This subdivision of the rule also requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." *Id.*

125 *See, e.g.*, Castano v. American Tobacco Co., 84 F.3d 734, 745–46 n. 21 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial. . . . . Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3) . . . .") (citations omitted); Mullenix, *The Mass-Tort Case, supra* note 2, at 1038–39.

members, but the Court was properly persuaded that this question was not predominant in view of such individual questions as contributory negligence, express or implied consent, and/or damages. In such a case, an entity theory of the class action might fairly support a class claim for a declaratory determination of liability-creating conduct, but the effect of the rule would be to deprive the class of that claim.

When we turn to the controversial proposals for amendment of the rule—proposals that, with one exception not relevant here, have been tabled—several illustrations might be given.[126] But perhaps the most striking illustration arose from the effort of the proposed amendment to discourage class actions when the claims of *individual* class members were small and the problems of litigation were large. Assuming this proposal was not merely hortatory but was designed to have bite, would not the effect of its adoption have been to deny the very existence of a class with a "small claim," whether or not that claim was one properly belonging to the class as a matter of substantive law? Once again, if the entity theory has any basis, to say that a claim may nevertheless still be asserted by individual members of the class is both practically of little or no value and irrelevant to the denial of the class claim itself.

It may be that these arguments are overstated. After all, one who has a just claim may find himself out of court because without the discovery that is unavailable unless a claim is filed, he cannot make the allegations required by the pleading requirements, say, of Rule 9(b). But my response would be that any provision of a rule that does more than instruct litigants about how to go about asserting and prosecuting claims and defenses (and all the incidents of doing so) and that raises significant barriers to their assertion must be carefully vetted under the REA. It may be that the rule is so clearly warranted by the need to run a judicial system efficiently and fairly, and the effect on the assertion of a just claim under the governing substantive law so

126 One of these proposed changes would have added to the relevant factors to be considered under Rule 23(b)(3) the "maturity" of any related litigation, *See* 167 F.R.D. 523, 559 (1996). This is a cryptic change described in the Advisory Committee Note as

> reflect[ing] the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate . . . [but not if] individual litigation continues to yield inconsistent results, or . . . demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Id. at 562–63.

For criticism of this "maturity" concept, see *supra* text accompanying notes 53–56.

marginal, that the rule should pass muster under even the close scrutiny that I would favor. But if not, it may have no place in a set of rules promulgated under the power granted by Congress.

Even if this view of the REA is too confining to be accepted by the courts themselves or by those who monitor them as observers or litigators, it can perhaps set the stage for a closer look at the proper role of Rule 23 (and its parallels in those states whose rules are judicially promulgated). For even one who takes a broader view than I do of the scope of the judicial rulemaking power should, I believe, balk at the use of that power either to endorse or to reject the entity theory advanced here.

What, then, is the contribution that a provision like Rule 23 can make? In my view, the rule should be framed in a way that does not place unreasonable roadblocks in the way of movement toward an entity model by responsible policymakers, nor should it impede recognition of the present force and effect of the model in the administration of class actions. At present, the rule may well fail both of these criteria.

Several examples, some of which have been flagged in the preceding sections, may illustrate the point. First, the present rule, as interpreted, sets up a barrier to a small claims class action—the barrier of excessively costly and unnecessary notification—that effectively negates the recognition of a class claim in such cases whether or not such a claim is properly one attributable to the class as an entity and deserves recognition as a matter of substantive law. Also, the proposal to deny class status to such claims when individual stakes seem too small to be worth the cost of litigating went even further in denying the availability of a class claim on what is essentially an irrelevant basis if the entity theory has bite, i.e., that no individual member of the class would be likely to pursue the claim on his own.

Second, as noted above, the rule's present treatment of opt-out rights—prohibiting them in actions under (b)(1) and (b)(2) and requiring them in actions under (b)(3)—seems at odds with the concept of an entity model. If the model is a sound one in a (b)(3) setting, then recognition of an absolute opt-out right in that context would undermine the validity of class treatment itself.[127] On the other hand, a conditional or limited ability to opt out as part of a

127 Also, the likelihood that a significant percentage would choose to opt out may be an indication that class treatment is *not* appropriate.

litigated or negotiated outcome may be consistent with class treatment of a claim or issue.[128]

In (b)(1) or (b)(2) cases, conditional or limited opt out rights may also make sense in the context of a negotiated or litigated outcome, although the nature of these actions makes this possibility less likely. (Indeed, opting out in many such cases may be pointless as a practical matter.[129]) Take, say, a case in which an injunction is sought, on behalf of a class of shippers, against a particular practice by a carrier. If some of the shippers in the class would prefer to have the practice continued as to them, the class might be defined at the outset to exclude those shippers, but it might also be appropriate for the action to go forward with them as a part of the class (in order to postpone decision until further information is acquired), and then to allow shippers who so desire to escape some or all of the "benefits" of the decree ultimately awarded or agreed upon.[130]

As a final point about present Rule 23, it seems unnecessary to bar class certification on particular issues under Rule 23(c)(4) unless there is a prior determination under 23(b)(3) that class claims predominate over the individual aspects of the case. Suppose in a "mass toxic tort" case, the only question suitable for class treatment, in view of the widely varied individual facts about exposure, possible causes of particular harms, and other factors, is whether exposure to a particular product increases the risk of incurring a particular disease. If the answer to that question is no, all other questions cease to be of significance, and the certification of that question for full-blown, non opt-out class treatment may be the fairest and most efficient way to deal with it. But that approach would be unavailable under the present rule if that issue did not predominate over the questions of individual exposure and harm.

All these concerns suggest that Rule 23 should be revised to facilitate return to the fundamental point developed by the Supreme Court over half a century ago—that the constitutional propriety of class action treatment, and the binding effect of a judgment on the members

128 Rosenberg, *Class Actions*, *supra* note 2, at 594, suggests that the ability to opt out might be subject to such conditions as specified limits on the lawyer's fee paid to one who opts out and a requirement that the individual make some contribution to the common costs incurred by the class in litigating (and negotiating) with respect to the claim. Other possible conditions might include caps on recovery and limits on punitive damage awards.

129 *See supra* note 31 and accompanying text.

130 I am assuming that the practice may be discontinued as to some but not as to others, both as a practical matter and consistently with the controlling law.

of the class, turns on the issue of adequate representation.[131] If that point were to become the heart of a recrafted rule, facilitation of the use of the class action as a fair and powerful litigating device would be greatly enhanced. To do so, I believe, calls for a number of steps, many if not all of which could be recognized in the rule itself. These include:

- Focusing on the adequacy of counsel (rather than worrying about the named representative);
- Recognizing that adequacy requires consideration not only of counsel's experience and ability but also of the potential existence of conflicts either within the represented group or between that group and outsiders also represented by the same counsel;[132]
- Making sure that counsel remains responsible to the class as a whole by establishing channels of communication with a sufficiently representative group of class members and by allowing that group to be heard at critical stages of the process in order to be sure that the class is not being manipulated either by counsel or by the adversary;
- Developing explicit techniques to explore both the fairness of settlements in overall terms and in terms of distributions to be made among class members, as well as techniques to insure against disproportionate counsel fees.[133]

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131 *See* Hansberry v. Lee, 311 U.S. 32 (1940).

132 Among the leading scholarly studies of the range of conflicts problems that can be presented when counsel represents a diverse, largely anonymous class with potentially conflicting interests (interests that many class members may not even be aware of), or represents both the class and individuals within or outside the class, are Coffee, *supra* note 2; Koniak, *supra* note 2; and Rhode, *supra* note 2. The danger of such conflicts requires close judicial scrutiny and continual judicial oversight, and may also require the appointment by the court of additional counsel to safeguard class interests and to alert the court to the possibility of collusive settlements.

For a novel approach to the representation problem, involving the auctioning of a class claim for compensation to the highest bidder, see Macey & Miller, *supra* note 2 (discussed *infra* note 133).

133 For a suggested checklist of issues to be considered in deciding whether to approve a settlement, see Schwarzer, *supra* note 2, at 843–44.

One of the most interesting, and promising, studies in this area is Hay, *supra* note 2. Hay argues persuasively, both through analysis and illustration, that the likelihood of inappropriately low settlements, which benefit counsel unduly at the expense of the class, may be very substantially reduced by adoption of the following rule: that the net fee to class counsel resulting from the settlement should be no greater than the fraction of the class recovery that counsel would have collected as a fee if the case had not been settled but rather had been litigated. This approach is designed to ensure that the net recovery to the class in a settlement is at least as large as the net recovery

To insure adequate representation, as this partial list suggests, requires not only a concentrated focus on counsel for the class but also an explicit and detailed elaboration of the role of the court in seeing that counsel does her job of representing the class fairly and effectively. Indeed, on some occasions, this may require the employment by the court itself of separate counsel to oversee, to challenge, and to advise.[134]

IV. CONCLUSION

The reader of this essay may view the ideas advanced here as constituting a radical departure from traditional notions or, at the other extreme, as just a rehashing of developments that have long been in the making. My own view is a blend of these polar reactions. For some time, we have been moving—both out of necessity and out of a sense of what is sound policy—toward the idea that the class action device is both important and different. But we have not been fully candid with ourselves. Some judges and commentators have at times insisted that we are dealing with nothing more than another aggregation technique in which the individual should (or even must) retain full autonomy and freedom of choice. Others have urged a kind of

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in the absence of settlement. Although it may require the court to estimate the net recovery to the class in the absence of settlement, Hay shows that even a substantial error in that estimate will lead to a much smaller gap between the appropriate settlement figure and the *actual* net recovery in the absence of a settlement.

If Hay's thesis is sound and is implemented, many of the criticisms of class actions that are based on the hazard that class counsel will profit at the class's expense will be severely blunted.

A more radical proposal that has attracted scholarly interest (and, in my view, deservedly so), but as a practical matter is unlikely to be implemented, is to facilitate the auctioning of certain class claims to the highest bidder, with the proceeds of the auction to be distributed among the members of the class. *See* Macey & Miller, *supra* note 2, at 106–16. The winning bidder would then be sole owner of the entire claim, thus eliminating any problems of conflicts within the class, and if the winning bidder were herself counsel in the case, eliminating any potential conflict between lawyer and client. Of course, adoption of any proposal of this kind would require virtual abandonment of some traditional notions of professional ethics relating to such practices as barratry and maintenance.

134 Other proposals for explicit requirements designed to insure adequate representation—including, for example, the kinds of disclosures that must be made in any settlement agreement submitted for approval—are worthy of joint consideration by practitioners, judges, experts on procedure and legal ethics, and informed, concerned lay.

For a recent update on current studies of mass tort litigation by both the House Judiciary Committee and a working group appointed by Chief Justice Rehnquist, see 66 U.S.L.W. 2550, 2551 (1998).

entity model while insisting that it is fully consistent with traditional notions of individual choice.

I am concerned that both of these viewpoints may make it more difficult for the class action to realize its full potential. If we can accept the notion that in a proper context, the class itself is—or at least should be—the claimant, and the represented litigant, we will be in a far better position to talk about the changes that are needed to realize this goal, and the institutional problems that must be confronted in attempting to implement those changes.