

A NEGATIVE RETROSPECTIVE OF RULE 23

SCOTT DODSON*

INTRODUCTION	917
I. LOOKING BACK TO WHAT WAS NOT	919
A. <i>The First Era: 1962–1966</i>	919
B. <i>The Second Era: 1991–1998</i>	921
C. <i>The Third Era: 2011–2017</i>	925
II. THROUGH THE LOOKING GLASS	927
III. REASSESSING RULE 23	929
IV. REFLECTIONS ON RULEMAKING	930
CONCLUSION	936

INTRODUCTION

In this fiftieth anniversary of the modern incarnation of the federal class-action rule, one thing is certain: Controversy over Rule 23 has not waned.¹ Such controversy naturally invites periodic retrospectives, which usually take the form of positive historical accounts of changes actually made to class-action practice by rulemakers or courts.²

* Copyright © 2017 by Scott Dodson, Associate Dean for Research and James Edgar Hervey Chair in Litigation, UC Hastings College of the Law. Special thanks to Judge Robert Dow, Mary Kay Kane, Bob Klonoff, Rick Marcus, Troy McKenzie, and Morris Ratner for comments (which of course should not be taken as agreement with my arguments or conclusions), and to other participants at the N.Y.U. Center on Civil Justice Conference, the Bay Area Civil Procedure Forum, and the SEALS Civil Procedure Roundtable.

¹ See Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 80 (1994) (“[F]ederal class-action practice has triggered much controversy.”); Bruce Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377 (2000) (“[C]lass actions are without doubt the most controversial subject in the civil process today.”).

² See generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (documenting the modern development of the class action from the perspective of social and cultural changes in America); David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587 (2013) [hereinafter Marcus, *History*] (offering an account of class actions from 1966 to 1980 from political and theoretical perspectives); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979) (chronicling the evolution of Rule 23 in light of politics and rhetoric); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991) (cataloging changing attitudes toward aggregation of mass torts from 1966 to 1990). Two retrospectives have acknowledged rule-amendment failures from discrete time periods. See

In this essay, I chart a negative retrospective of Rule 23 rulemaking from the 1960s to the present. Rather than focus on what was, I examine what was *not*, by excavating major amendment proposals to Rule 23 that were seriously considered but never adopted. Like Alice through the looking-glass, this perspective views the history of Rule 23 based on a different world: what the rulemakers rejected as opposed to what they approved. This negative history leads to three contributions.

First, it projects what kind of Wonderland Rule 23 might have resembled had those rejected proposals become law. Those proposals would have produced a Rule 23 focused on compensation and individual-litigation rights, facile settlement of class actions, and judicial discretion to balance the costs and benefits of class litigation. Contrasted with Rule 23's positive history, Rule 23's negative history highlights some of the choices rulemakers have made and shows just how far Rule 23 has come.

Second, it enriches our understanding of Rule 23's positive history. In particular, the negative history buttresses the claim that Rule 23 is intimately tied to changing social and cultural norms.³ It also hints at a trend in Advisory Committee preferences from rules and prescriptions to standards and discretion,⁴ and it exposes the ongoing and unresolved tension between the regulatory/enforcement and the procedural/efficiency functions of class actions.⁵

Third, it speaks to the rulemaking process generally. Rule 23's negative history reveals an Advisory Committee that is highly deferential to the U.S. Supreme Court, leading to the perception that the Advisory Committee sees itself more as a follower than as a leader. And it documents an increasing preference for "amendment minimalism" (by which I mean incremental rather than infrequent amendment), perhaps explained in part by changes to the membership of the Advisory Committee, to the rulemaking process, and to the politicization of procedure.

In all, this negative retrospective lends credence to the conclusion that the time for dramatic amendments to Rule 23—or perhaps any other rule—is largely over.⁶

Richard Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637 (2013) [hereinafter Marcus, *Shoes*] (discussing various abandoned proposals); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323 (2005) (focusing on the rulemaking efforts of the 1990s and 2000s).

³ Resnik, *supra* note 2, at 6.

⁴ See *infra* text accompanying notes 89–91.

⁵ See Marcus, *History*, *supra* note 2, at 593–94.

⁶ See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 898 (1990) ("The 1950s and 1960s

I

LOOKING BACK TO WHAT WAS NOT

This Part offers a historical account of three eras of rejections to significant amendment proposals to Rule 23: (A) the 1962–1966 rejections of an opt-in requirement for Rule 23(b)(3) and of Professor Chafee’s simplified unitary model; (B) the 1991–1997 abandonment of proposals to add a “just ain’t worth it” factor and to create a separate and lightened certification requirement for settlement classes; and (C) the present Advisory Committee’s shelving of its attempt to address ascertainability.⁷

A. *The First Era: 1962–1966*

Rule 23, adopted in 1938 as part of the original federal rules, lay dormant for several decades until the Advisory Committee on Civil Rules began work on a major set of amendments in 1960. At the time, a movement was afoot to update the Rules and improve their efficacy through an “overarching theme” of liberal joinder, and Rule 23 was the “centerpiece” of this theme.⁸ Wide dissatisfaction with the cumbersome and outmoded Rule 23 categories set in 1938 led the Advisory Committee to consider a “cleaner, more flexible rule” that reflected judicial practice and offered opportunities for judicial experimentation.⁹

The Advisory Committee recognized that class actions had gone largely unused before 1960 but saw potential for greater use of Rule 23 in two kinds of cases.¹⁰ First, the Advisory Committee was especially interested in encouraging the use of Rule 23 for civil-rights cases like *Brown v. Board of Education*¹¹ and for enforcing substantive law

were, in short, the golden age of court rulemaking.”); Richard Marcus, “*Looking Backward*” to 1938, 162 U. PA. L. REV. 1691, 1696–98 (2014) (emphasizing the “heroic” nature of civil-rights class actions in the 1950s and 1960s); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 5 (2016) (concluding that the 2015 discovery amendments “seem to confirm the view that the rules amendment process is unlikely to yield significant changes to the Federal Rules of Civil Procedure”).

⁷ As support for what was going on during Advisory Committee deliberations, I have relied in part on agenda books, minutes, and conference notes prepared by members of the Advisory Committee. I recognize that these may not fully reflect what the Advisory Committee was thinking or deciding, but in some cases they are the best available evidence.

⁸ Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 293–94 (2014).

⁹ Marcus, *History*, *supra* note 2, at 604–05.

¹⁰ Miller, *supra* note 8, at 294.

¹¹ 347 U.S. 483 (1954); see David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 783 (2016) (“Rulemakers had desegregation litigation in mind as they revised Rule 23 in the early 1960s.”).

in other contexts.¹² Second, the Advisory Committee realized the virtue of Rule 23 in making negative-value suits financially feasible.¹³

But nothing more specific was on the Advisory Committee's mind in the 1960s,¹⁴ and the Advisory Committee certainly could not predict how litigation would change.¹⁵ It is fair to say that the Advisory Committee recognized both procedural and regulatory attributes of Rule 23 and attempted to encourage class practice in light of each.¹⁶ But the Advisory Committee did not attempt to resolve the normative theory of Rule 23; rather, discussions focused on how protective to be of absent class members.¹⁷

The focus on the protection of absent class members did generate vigorous debate between those who prioritized individual-litigation rights and argued for the elimination of (b)(3), and those who preferred the opposite and understood that individual litigation was useless for negative-value claims.¹⁸

In the course of these debates, the Advisory Committee considered, and rejected, two important amendment proposals. The first was Professor Chafee's proposal to collapse the class-action categories into a more flexible unitary standard dependent upon the existence of a common question, similar to the old Equity Rule 38.¹⁹ Despite the admitted problems with the categories of the original Rule 23, the Advisory Committee, according to Reporter Benjamin Kaplan, was concerned that the collapse of the categories into a highly discretionary rule "would not have been helpfully informative" and may have led to courts using class actions only sporadically.²⁰ The Advisory Committee ultimately voted against the proposal, in large

¹² Miller, *supra* note 8, at 295 ("The Rules Advisory Committee also understood that making the class form more functional would make it more useful for enforcing the public policies embedded in the antitrust, securities, civil rights, and other substantive federal and state laws extant at the time.").

¹³ Benjamin Kaplan, *A Prefatory Note to "The Class Action—A Symposium,"* 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

¹⁴ Public Hearing: Proposed Amendments to the Federal Rules of Civil Procedure Rule 23, at 64 (Jan. 17, 1997) (Testimony of Arthur R. Miller), in 3 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 475, 538 (May 1, 1997) [hereinafter WORKING PAPERS].

¹⁵ See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 14 (1996); Miller, *supra* note 8, at 295.

¹⁶ See Marcus, *History*, *supra* note 2, at 599–600, 608.

¹⁷ *Id.* at 605.

¹⁸ Rabiej, *supra* note 2, at 335–36.

¹⁹ ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 281 (1950).

²⁰ Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386 (1967).

part because the Advisory Committee preferred clearer rule guidance to greater judicial discretion.²¹

The second rejected amendment was the opt-in proposal.²² The opt-in model had been proposed as a way to ensure that a defendant would be subject to liability only for the claims of plaintiffs who affirmatively press them, and to ensure that plaintiffs' individual litigation rights would be preserved.²³ But the Advisory Committee rejected the proposal because of the opt-in mechanism's propensity to "freez[e] out the claims of people—especially small claims held by small people—who . . . will simply not take the affirmative step."²⁴

In rejecting the opt-in proposal, the Advisory Committee prioritized plaintiff-centric compensatory goals over defense interests and class-member-consent concerns.²⁵ The Advisory Committee had in mind negative-value suits, for which an opt-in mechanism might indeed leave claims unpursued. It is unclear whether the Advisory Committee contemplated (or could have contemplated) the relative merits of an opt-in model for mass torts or other kinds of cases.²⁶

B. *The Second Era: 1991–1998*

Over the next few decades, federal legislation expanded, class-action practice flourished, courts construed Rule 23 liberally, and the "settlement only" class became commonplace.²⁷ Not all were happy with these developments.²⁸ Defense groups spearheaded a political

²¹ See *id.*

²² For more detailed coverage, see Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171, 177–79 (2016).

²³ See Kaplan, *supra* note 20, at 397.

²⁴ *Id.* at 397–98.

²⁵ See *id.*

²⁶ See Rabiej, *supra* note 2, at 340–41.

²⁷ See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15–17 (2000) (reporting that "judicial decisions in cases brought soon after the adoption of the revised Rule 23 came down on the side of a liberal application of the class action rule"); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736 (2013) (documenting the rise of "major class actions" in the 1980s); Marcus, *History*, *supra* note 2, at 626–43 (systematically analyzing class-action litigation and settlement during the 1970s and 1980s).

²⁸ See Edward H. Cooper, *Federal Class Action Reform in the United States: Past and Future and Where Next?*, 69 DEF. COUNSEL J. 432, 433 (2002) ("Detractors . . . talked instead of the compulsion to settle unfounded class claims . . . [S]ubstantive law objections also were voiced.").

counterrevolution to scale back class actions.²⁹ Nevertheless, rulemakers declined to pursue reform in the 1970s and 1980s.³⁰

In 1991, the Judicial Conference formally asked the Advisory Committee to study whether Rule 23 was up to the challenges presented by mass-tort litigation and the expansion of federal litigation.³¹ The Advisory Committee did so, and its deliberations spanned the gamut of proposals.

In this context, the Advisory Committee published two significant proposals for public comment in 1996.³² The first, a new (b)(3)(F), would have added a requirement that “the probable relief to individual class members justifies the costs and burdens of class litigation.”³³ The published proposed Advisory Committee note explained that “[i]f the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient adjudication. . . . If probable individual relief is slight . . . the core justification of class enforcement fails.”³⁴

This proposal reflected the Advisory Committee’s apparent judgment that Rule 23 was primarily for individual compensation and not regulatory deterrence,³⁵ and it was spurred by the concern that some class actions were being used to enrich plaintiff’s lawyers rather than to compensate claimants.³⁶ The costs considered would have included

²⁹ See Miller, *supra* note 2, at 679; Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation* 4 (Univ. Pa. Law Sch. Pub. Law & Legal Research Paper Series, Paper No. 15-12, 2015).

³⁰ See Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 963 (1998) (“The Advisory Committee deliberately chose to pretermitt reexamination of Rule 23 from the effective date of the 1966 amendments until 1991.”); Burbank & Farhang, *supra* note 29 (manuscript at 19–20) (noting that the Advisory Committee undertook six years of study of Rule 23 in the 1970s but produced no amendment proposals). Not everyone was so inactive. See generally David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. (forthcoming 2017) (documenting the Justice Department’s attempt to push class-action reform).

³¹ Proposed Rules, 167 F.R.D. 535, 536 (1996).

³² Preface, in 1 WORKING PAPERS, *supra* note 14, at vii, vii.

³³ Materials from Civil Rules Meeting 5 (Mar. 2012), in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 529, 533 (Oct. 30–31, 2014) [hereinafter OCT. 2014 AGENDA BOOK]; Proposed Amendments to the Federal Rules of Civil Procedure, in 1 WORKING PAPERS, *supra* note 14, at 143, 144; accord Comment on Proposed Changes to Rule 23 (Aug. 7, 1996), in 1 WORKING PAPERS, *supra* note 14, at 297, 299–300.

³⁴ Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 33, at 152. The note may have been phrased to stimulate, not settle, debate. Cooper, *supra* note 30, at 931.

³⁵ See, e.g., August, 1996 Rule 23 Proposals 17–18 (Apr. 15, 1997), in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 235, 251–52 (Oct. 6–7, 1997) [hereinafter OCT. 1997 AGENDA BOOK].

³⁶ See Rabiej, *supra* note 2, at 356.

costs to litigants and to the judiciary and the diversion of resources away from other cases.³⁷

The second significant amendment would have created a separate certification authorization in new (b)(4) for settlement classes “even though the requirements of subdivision (b)(3) might not be met for purposes of trial.”³⁸ The (b)(4) proposal was meant to overturn a line of Third Circuit cases holding that a class could be certified for settlement only if certifiable for trial³⁹ and “restore” the normal practice of the lower courts to certify for settlement.⁴⁰

These two proposals generated “much controversy,”⁴¹ but the vocal and voluminous public comments “did not generate many surprises”⁴² for the Advisory Committee because it had already considered most of the issues in its deliberations.⁴³ Nevertheless, the Reporter’s Memorandum suggests that the reactions counseled rulemaking caution.⁴⁴ One could conclude that the Advisory

³⁷ *Id.* at 359.

³⁸ Comment on Proposed Changes to Rule 23, *supra* note 33, at 300–01; Materials from Civil Rules Meeting 5–6 (Mar. 2012), in OCT. 2014 AGENDA BOOK, *supra* note 33, at 529, 533–34; Proposed Amendments to the Federal Rules of Civil Procedure, in 1 WORKING PAPERS, *supra* note 14, at 145.

³⁹ *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996); *In re GM Corp.*, 55 F.3d 768, 797 (3d Cir. 1995).

⁴⁰ August, 1996 Rule 23 Proposals 29 (Apr. 15, 1997), in OCT. 1997 AGENDA BOOK, *supra* note 35, at 235, 263; *accord* Draft Minutes of the Civil Rules Advisory Committee 32 (Oct. 6–7, 1997), in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 144, 175 (Jan. 8–9, 1998) [hereinafter JAN. 1998 AGENDA BOOK]; Proposed Amendments to the Federal Rules of Civil Procedure, in 1 WORKING PAPERS, *supra* note 14, at 153.

⁴¹ Draft Minutes of the Civil Rules Advisory Committee 2 (Mar. 20–21, 1997), in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 38, 39 (May 1–2, 1997) [hereinafter MAY 1997 AGENDA BOOK]. For a summary of the public comments, see Reporter’s Note, in 1 WORKING PAPERS, *supra* note 14, at 311. The (b)(4) proposal in particular received withering academic criticism. *See, e.g.*, Public Hearing: Proposed Amendments to the Federal Rules of Civil Procedure, Rule 23, at 114 (Nov. 22, 1996) (Testimony of John C. Coffee), in 3 WORKING PAPERS, *supra* note 14, at 11, 124; Samuel Issacharoff, Douglas Laycock & Charles Silver, Statement Concerning the Proposed Amendments to Rule 23 (Dec. 16, 1996), in 4 WORKING PAPERS, *supra* note 14, at 497, 499–500; Steering Committee to Oppose Proposed Rule 23 (May 28, 1996), in 2 WORKING PAPERS, *supra* note 14, at 1, 4–5.

⁴² Reporter’s Memorandum of the August, 1996 Rule 23 Proposals 1 (Apr. 15, 1997), in MAY 1997 AGENDA BOOK, *supra* note 41, at 49, 49.

⁴³ Draft Minutes of the Civil Rules Advisory Committee 2 (Mar. 20–21, 1997), in MAY 1997 AGENDA BOOK, *supra* note 41, at 38, 39.

⁴⁴ *See* Reporter’s Memorandum of the August, 1996 Rule 23 Proposals 1 (Apr. 15, 1996), in MAY 1997 AGENDA BOOK, *supra* note 41, at 49, 49 (“The many and various cogent expressions of deeply held views, however, demonstrate anew the difficulty of choosing between opposing values.”).

Committee abandoned these proposals primarily because they generated controversy rather than because they were unwise.⁴⁵

In addition, the Supreme Court granted certiorari in the Third Circuit case (by then called *Amchem*)⁴⁶ causing the Advisory Committee concern that further consideration of the (b)(4) proposal was now not “ripe.”⁴⁷ The Advisory Committee notes reflect agreement on deferring consideration until after the Court’s decision,⁴⁸ at least in part because the expected decision would “provide a much more secure foundation for further consideration of settlement classes.”⁴⁹ Accordingly, the Advisory Committee kept the (b)(3)(F) proposal for further study and put the (b)(4) proposal on hold pending *Amchem*.⁵⁰

By fall 1997, the Supreme Court had decided *Amchem*⁵¹—and held that although a “settlement-only” class need not show trial manageability for superiority purposes, the class nevertheless must satisfy Rule 23(a) and the other requirements of Rule 23(b)⁵² *Amchem*’s holding was more limited than the pending Advisory Committee proposal for Rule (b)(4); *Amchem* exempted only the trial-manageability factor from settlement certification, whereas the Rule 23(b)(4) proposal potentially softened the predominance requirement as well.

After *Amchem* was issued, the Advisory Committee dutifully returned to both pending rule proposals.⁵³ As for (b)(3)(F), the Advisory Committee quickly voted to abandon further consideration.⁵⁴ As for (b)(4), the Advisory Committee’s Agenda Book noted that *Amchem* did not fully address the settlement-certification

⁴⁵ See Rabiej, *supra* note 2, at 367 (observing that the “cumulative adverse comments effectively doomed the proposed amendments”).

⁴⁶ See *Amchem*: First Thoughts, in OCT. 1997 AGENDA BOOK, *supra* note 35, at 163, 163.

⁴⁷ August, 1996 Rule 23 Proposals 30 (Apr. 15, 1997), in OCT. 1997 AGENDA BOOK, *supra* note 35, at 235, 264.

⁴⁸ Draft Minutes of the Civil Rules Advisory Committee 4 (Mar. 20–21, 1997), in MAY 1997 AGENDA BOOK, *supra* note 41, at 38, 41; Reporter’s Memorandum of the August, 1996 Rule 23 Proposals 2–3 (Apr. 15, 1996), in MAY 1997 AGENDA BOOK, *supra* note 41, at 49, 50–51.

⁴⁹ Draft Minutes of the Civil Rules Advisory Committee 12 (May 1–2, 1997), in OCT. 1997 AGENDA BOOK, *supra* note 35, at 99, 110.

⁵⁰ Draft Minutes of the Standing Committee 19–20 (June 19–20, 1997), in OCT. 1997 AGENDA BOOK, *supra* note 35, at 11, 29–30.

⁵¹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

⁵² See *id.* at 620.

⁵³ See *Amchem*: First Thoughts, in OCT. 1997 AGENDA BOOK, *supra* note 35, at 163, 163–67; Rule 23 Issues Revisited 8–14 (Oct. 1997), in OCT. 1997 AGENDA BOOK, *supra* note 35, at 143, 150–56.

⁵⁴ Draft Minutes of the Civil Rules Advisory Committee 29 (Oct. 6–7, 1997), in JAN. 1998 AGENDA BOOK, *supra* note 40, at 144, 172.

changes contemplated in the proposal⁵⁵ but nevertheless concluded that *Amchem* had diminished the need for rulemaking:

Adopting a rule simply to confirm the Supreme Court’s interpretation of Rule 23 is tricky business. If the only purpose is to enshrine the Court’s ruling, the value of giving clear notice is offset by the risk that the rule will be misinterpreted. And it will be difficult to be sure that any proposal simply confirms the Supreme Court’s opinion as it will come to be interpreted in the future.⁵⁶

In particular, the Advisory Committee determined that *Amchem* offered a model for dealing with class settlements that might work effectively and thus preclude the need for rulemaking,⁵⁷ and so the Advisory Committee decided to defer further action until courts had had an opportunity to experiment with *Amchem*’s holding.⁵⁸

C. *The Third Era: 2011–2017*

For the next fifteen years or so, the Advisory Committee did not touch class certification.⁵⁹ In 2011, however, the Advisory Committee formed a Rule 23 Subcommittee to evaluate the desirability of amendments to Rule 23.⁶⁰ Over the next five years, the Advisory Committee and the Rule 23 Subcommittee considered—but ultimately abandoned or tabled—several reformative and fundamental amendments.⁶¹

One such proposal focused on ascertainability. In the last few years, most circuits have read into Rule 23 an implied requirement of

⁵⁵ See *Amchem*: First Thoughts (“The Court notes, but does not reach, additional problems presented by the *Amchem* case itself—particularly the problem of claimed conflicts of interest affecting class counsel”), in OCT. 1997 AGENDA BOOK, *supra* note 35, at 163, 165–66.

⁵⁶ *Id.* at 164.

⁵⁷ Materials from Civil Rules Meeting 8 (Mar. 2012), in OCT. 2014 AGENDA BOOK, *supra* note 33, at 529, 536.

⁵⁸ Draft Minutes of the Civil Rules Advisory Committee 32–33 (Oct. 6–7, 1997), in JAN. 1998 AGENDA BOOK, *supra* note 40, at 144, 175–76.

⁵⁹ In 2001–2006, the Advisory Committee did study and propose, and the Supreme Court ultimately approved, amendments to Rule 23 that focused on class mechanics rather than certification. See Materials from Civil Rules Meeting 6 (Mar. 2012) (considering and proposing amendments to Rule 23(g) and (h)), in OCT. 2014 AGENDA BOOK, *supra* note 33, at 529, 534; cf. Rabiej, *supra* note 2, at 368 (reporting that attention focused “on the ‘nuts and bolts’ of the process, rather than on substantive certification standards”).

⁶⁰ Rule 23 Subcommittee Report 1, in OCT. 2014 AGENDA BOOK, *supra* note 33, at 499, 499.

⁶¹ For example, the Rule 23 Subcommittee considered the settlement-certification proposal abandoned in 1997, see Materials from Civil Rules Meeting 8–9 (Mar. 2012), in OCT. 2014 AGENDA BOOK, *supra* note 33, at 529, 536–37, but ultimately abandoned it again, see Draft Minutes of the Meeting of the Advisory Committee on Civil Rules 23–24 (Nov. 5, 2015), in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 41, 63–64 (Apr. 14–15, 2016) [hereinafter APR. 2016 AGENDA BOOK].

“ascertainability”—that class members be objectively and feasibly identifiable.⁶² The Agenda Book called the issue “really important,”⁶³ and the Advisory Committee put it on the front burner.⁶⁴ In June 2015, the Rule 23 Subcommittee reached agreement that the strong form of ascertainability advocated by the Third Circuit⁶⁵ should be disapproved, and it set to work drafting a sketch.⁶⁶ At a subsequent mini-conference on a number of Rule 23 proposals, participants seemed to agree that a rule amendment addressing ascertainability was needed, but, unsurprisingly, the plaintiff and defense lawyers could not agree on what the rule should say.⁶⁷

The November 2015 Agenda Book suggests that the mixed reaction at the mini-conference, coupled with the nascence of the issue among the circuits, convinced the Rule 23 Subcommittee to put rule proposals on hold to allow “the ‘common law’ of ascertainability [to] evolve and emerge.”⁶⁸ The Agenda Book also suggests that the Rule 23 Subcommittee, while recognizing that interest in ascertainability remained high, reached consensus that “it would be prudent to leave this topic to development in the case law” and that “rulemaking on this subject not be pursued.”⁶⁹ The Rule 23 Subcommittee recom-

⁶² See, e.g., *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657 (7th Cir. 2015); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 524 (6th Cir. 2015); *Carrera v. Bayer Corp.* 727 F.3d 300, 305–12 (3d Cir. 2014).

⁶³ Notes on Meeting and Conference Call of the Rule 23 Subcommittee and Advisory Committee on Civil Rules 3–4 (May 19, 2014), in OCT. 2014 AGENDA BOOK, *supra* note 33, at 515, 517–18.

⁶⁴ Draft Minutes of the Meeting of the Advisory Committee on Civil Rules 30 (Apr. 9, 2015), in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 23, 52 (Nov. 5–6, 2015) [hereinafter NOV. 2015 AGENDA BOOK]; Rule 23 Subcommittee Report 8–13, in OCT. 2014 AGENDA BOOK, *supra* note 33, at 499, 506–11.

⁶⁵ See *Carrera*, 727 F.3d at 306–10 (finding proposed class-member affidavits insufficient to satisfy ascertainability).

⁶⁶ See Notes of Subcommittee Conference Call 7 (June 26, 2015), in NOV. 2015 AGENDA BOOK, *supra* note 64, at 275, 281. The sketch is available at Memorandum Prepared for Mini-Conference 30–33 (Sept. 11, 2015), in NOV. 2015 AGENDA BOOK, *supra* note 64, at 187, 216–19.

⁶⁷ See Notes of Mini-Conference on Class Actions 15–16 (Sept. 11, 2015), in NOV. 2015 AGENDA BOOK, *supra* note 64, at 163, 177–78.

⁶⁸ See Rule 23 Subcommittee Report 30–35, in NOV. 2015 AGENDA BOOK, *supra* note 64, at 87, 116–21 (first citing *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015); then citing *Mullins v. Direct Dig., LLC*, 795 F.3d 654 (7th Cir. 2015); and then citing *Byrd v. Aaron’s, Inc.*, 784 F.3d 184 (3d Cir. 2015)).

⁶⁹ Notes of Subcommittee Meeting 2 (Sept. 11, 2015), in NOV. 2015 AGENDA BOOK, *supra* note 64, at 151, 152; Notes of Subcommittee Conference Call 1–2 (Sept. 25, 2015), in NOV. 2015 AGENDA BOOK, *supra* note 64, at 137, 137–38.

mended that the Advisory Committee put the issue on hold,⁷⁰ and the Advisory Committee agreed.⁷¹

The Rule 23 Subcommittee did continue to monitor developments, but intervening decisions kept the issue on hold. In February 2016, the Rule 23 Subcommittee, as reflected in the April 2016 Agenda Book, noted a cert petition filed in an ascertainability case and reasoned that a cert grant “would be a strong reason for the Subcommittee not to return to the issue until the Court had decided.”⁷² In April, after the Court denied certiorari, the Agenda Book reflects the Rule 23 Subcommittee’s note of some recent circuit decisions⁷³ that seemed to break with the Third Circuit’s strong ascertainability requirement and the possibility that two class-action cases on the Court’s docket might also speak to the issue (they didn’t).⁷⁴ Accordingly, the Rule 23 Subcommittee kept the issue on hold.⁷⁵

In May 2016, the Advisory Committee reported to the Standing Committee that it had put ascertainability on hold.⁷⁶ The Standing Committee Agenda Book suggests that the Advisory Committee did so because of “the evolving state of [ascertainability] doctrine in the lower courts, and the initial difficulties the Rule 23 Subcommittee encountered in drafting possible amendments to address this issue.”⁷⁷

II THROUGH THE LOOKING GLASS

I turn now to what Rule 23 might have looked like had these proposals been adopted. Putting the paradoxes of time travel to the side for this thought experiment, a different course of history plausibly could have produced a Rule 23 with the following features:

- (1) an opt-in mechanism available or required for (b)(3);

⁷⁰ Rule 23 Subcommittee Report 3, in NOV. 2015 AGENDA BOOK, *supra* note 64, at 87, 89.

⁷¹ Draft Minutes of the Meeting of the Advisory Committee on Civil Rules 24 (Nov. 5, 2015), in APR. 2016 AGENDA BOOK, *supra* note 61, at 41, 64.

⁷² Notes of Conference Call 2–3 (Feb. 5, 2016), in APR. 2016 AGENDA BOOK, *supra* note 61, at 127, 128–129.

⁷³ Rule 23 Subcommittee Report, in APR. 2016 AGENDA BOOK, *supra* note 61, at 95, 112 (noting the cases of *Mullins*, 795 F.3d 654, and *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015)).

⁷⁴ *Id.* (noting the certiorari grants in *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015) and *Tyson Foods, Inc. v. Bouaphakeo*, 135 S. Ct. 2806 (2015)).

⁷⁵ *Id.*

⁷⁶ Report of the Advisory Committee on Civil Rules 10–11 (May 12, 2016), in AGENDA BOOK OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 251, 260–61 (June 6–7, 2016) [hereinafter JUNE 2016 AGENDA BOOK].

⁷⁷ *Id.*

- (2) settlement-certification standards that are significantly lighter than trial-certification standards, even as modified by *Amchem*;
- (3) more judicial discretion in certification generally and the erosion or relaxation of formal categories; and
- (4) certification-decision consideration of the social and administrative (including pretrial litigation) costs of class actions.

I want to make two points here. The first is that these features, even taken together, are not beyond reason. Serious and credible arguments have been made in support of these positions throughout the last fifty-plus years. The opt-in argument has resurfaced several times since it was seemingly put to rest in 1966, and it has an ancient pedigree with global support.⁷⁸ The settlement-certification issue, which first died in 1997, was resurrected by the current Advisory Committee (though it again was abandoned),⁷⁹ and its pragmatism has its defenders.⁸⁰ Likewise, reconsideration of the (b) classifications has been on the agenda multiple times.⁸¹ And the costs of class actions present a perennial and compelling backdrop to reform efforts. A civil-justice system rationally could choose this kind of Rule 23 as its class-action regime. Indeed, one could argue that certain nonclass aggregation practices, such as MDL and collective actions, exhibit these features.⁸²

The second point is that, while these features are within reason, they do depart dramatically from the current rule. The current rule attempts to offer, without prioritization, procedural efficiency, claimant compensation, and regulatory enforcement. Although the housekeeping provisions grant substantial discretion to district judges, Rule 23's certification standards remain formalist, even in the face of the costs of class litigation and the compelling efficiencies of settlement. And its protection of absent class members through opt-out and notice mechanisms remains fairly minimal.⁸³

⁷⁸ See Dodson, *supra* note 22, at 177–82, 210–11 (tracing the history of opt-in mechanisms and proposals in U.S. law and identifying foreign opt-in laws).

⁷⁹ Draft Minutes of the Meeting of the Advisory Committee on Civil Rules 23–24 (Nov. 5, 2015), in APR. 2016 AGENDA BOOK, *supra* note 61, at 41, 63–64.

⁸⁰ See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 867–68 (1999) (Breyer, J., dissenting) (favoring a more pragmatic settlement-certification standard).

⁸¹ See Materials from Civil Rules Meeting 4–9 (Mar. 2012), in OCT. 2014 AGENDA BOOK, *supra* note 33, at 529, 532–37 (documenting the Advisory Committee's repeated consideration of amendments to Rule 23(b)).

⁸² See generally Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) (examining MDL); Dodson, *supra* note 22, at 203–05 (examining collective actions).

⁸³ See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 137, 147–48, 173–75 (2009) (discussing procedural due process concerns related to class action litigation).

The negative Rule 23, by contrast, is one that prioritizes individual-class-member compensation and greater protections and rights for absent class members, that focuses on more facile settlement of class actions for efficiency purposes, that recognizes and internalizes the costs and hassles of class litigation for defendants and the courts, and that grants far greater discretion to district judges to balance all of these issues. Whatever their respective virtues, these two visions exhibit substantial dissimilarity.

III REASSESSING RULE 23

Rule 23's negative history need not speak solely to what was not. The rejected amendments also bolster conclusions about Rule 23's positive history.

In particular, the negative retrospective adds weight to Judith Resnik's claim that the history of Rule 23 is connected to changing social and cultural norms.⁸⁴ The 1960s legal elites saw the power of aggregation as a way to enhance procedural efficiency and substantive law, and so the Advisory Committee rejected attempts to hamstring class actions.⁸⁵ By the 1990s, class actions had become ingrained in litigation culture for efficiency purposes but were seen as overbearing and overused.⁸⁶ The 1990s Advisory Committee therefore proposed amendments to refocus Rule 23 and scale it back when its costs were too high, while simultaneously promoting its efficiency and compensatory goals in settlement certification.⁸⁷ Now in the new millennium's age of judicial discretion, the current Advisory Committee seems content to allow the courts to take the lead on interpreting, implementing, and managing Rule 23 certification standards.⁸⁸

Rule 23's negative history also reveals a trend in class-action preferences away from rule-based prescriptions and toward judicial discretion and common-law development.⁸⁹ By rejecting the proposal to

⁸⁴ See generally Resnik, *supra* note 2 (documenting the impact that cultural-norm changes from the 1970s to the 1990s had on class-action development).

⁸⁵ Cf. Miller, *supra* note 8, at 295 (reporting that the Advisory Committee understood that Rule 23(b)(3) was new, expansive, and beyond what class actions had done in the past).

⁸⁶ See Rabiej, *supra* note 2, at 328–29; Resnik, *supra* note 2, at 6.

⁸⁷ See Rabiej, *supra* note 2, at 356–59.

⁸⁸ See, e.g., Notes of Subcommittee Conference Call 1–2 (Sept. 25, 2015), in Nov. 2015 AGENDA BOOK, *supra* note 64, at 137, 137–38; Notes of Subcommittee Meeting 2 (Sept. 11, 2015), in Nov. 2015 AGENDA BOOK, *supra* note 64, at 151, 152.

⁸⁹ For a wide-ranging exegesis of trends in judicial discretion, see generally Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003), which sets out a typology of judicial discretion in the context of the federal rules and their

replace class-action categories with a flexible unitary standard, the 1960s Advisory Committee elevated clear rule guidance over judicial discretion.⁹⁰ The 1990s Advisory Committee, by contrast, would have injected significant discretion back into certification decisions by granting district judges more leeway in denying certification based on undefined costs and in settling class claims despite noncompliance with (b)(3). And the 2010s Advisory Committee seems content to leave various Rule 23 issues to common-law development.⁹¹

Finally, the rejected amendments to Rule 23 confirm the ongoing and unresolved tension between the regulatory/enforcement function and the procedural/efficiency function of class actions.⁹² This tension, perhaps only superficially appreciated in 1966,⁹³ was more fully debated in the 1990s but was left unresolved by amendment failure,⁹⁴ and the 2010s Advisory Committee appears to have no inclination to resolve the tension through rulemaking.⁹⁵ It seems likely, at this point, that Rule 23 will continue to serve somewhat disparate functions without much normative guidance.⁹⁶

IV REFLECTIONS ON RULEMAKING

Extrapolating beyond Rule 23 is hazardous, especially given Rule 23's near-substantive and extremely politicized status. Yet Rule 23's

development over time. For a discussion of discretion in the context of Rule 23, see Bone, *supra* note 1, at 93–96.

⁹⁰ See Kaplan, *supra* note 20, at 386–87 (criticizing Chafee's model on this ground); see also Bone, *supra* note 1, at 90–91 (noting this rule-based preference). Admittedly, the rulemakers were not resistant to judicial discretion generally, even in the context of Rule 23, see *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1319, 1628–29 (1976) (“The effect of the revision of rule 23 in 1966 was to grant great discretion to trial judges . . .”), which itself was steeped in equity tradition. See generally YEAZELL, *supra* note 2 (recounting the equitable roots of class actions).

⁹¹ See Notes of Subcommittee Meeting 2 (Sept. 11, 2015) (putting ascertainability amendment proposals on hold in order to “leave this topic to development in the case law”), in NOV. 2015 AGENDA BOOK, *supra* note 64, at 151, 152.

⁹² See Marcus, *History*, *supra* note 2, at 593–94 (describing these two competing functions).

⁹³ See *id.* at 605–06 (noting that few members “grasped Rule 23's substantive implications”).

⁹⁴ See, e.g., Rule 23 Proposals 17–18 (Apr. 15, 1997) (expressing some doubt about “[t]he value of class-action enforcement of public values”), in OCT. 1997 AGENDA BOOK, *supra* note 35, at 235, 251–52.

⁹⁵ Additionally, an amendment sketch on cy pres provisions in class settlements, which would have elevated the regulatory-deterrence feature of Rule 23, was abandoned in 2016. See Draft Minutes of the Meeting of the Advisory Committee on Civil Rules 25 (Nov. 5, 2015), in APR. 2016 AGENDA BOOK, *supra* note 61, at 41, 65.

⁹⁶ For an encouragement of normative class-action rulemaking despite generated controversy, see Bone, *supra* note 1, at 97–98.

negative history lends credence to two interrelated observations about the rulemaking process generally that are worthy of mention and discussion.

First, Rule 23's negative history shows an Advisory Committee that is highly deferential to courts, and especially the U.S. Supreme Court.⁹⁷ In two of the three eras described above, the Advisory Committee abandoned legitimate amendment proposals at least in part because the Supreme Court might issue a ruling on the matter.⁹⁸ Indeed, in both instances, the Agenda Books indicated that it would be imprudent to proceed,⁹⁹ and, even *after* the Court's decisions, the Advisory Committee continued to let the issues lie.¹⁰⁰ This is true even when the Court delivers highly formalistic decisions dependent upon the way the rules are phrased.¹⁰¹

Deference to the Supreme Court is certainly understandable. The Chief Justice chairs the Judicial Conference, regularly meets with the Standing Committee Chair, and appoints members of the Advisory

⁹⁷ Others have noted this deference in the Rule 8 context. *See, e.g.*, Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 466 (2013) ("It had its chance to lead . . . but, for whatever reason, did not do so. So now, with pleadings at least, the Committee must play from behind."); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 87 (2010) (urging Advisory Committee members to "determine whether they will reassert their role as independent architects of the Federal Rules, accept that an aspect of their responsibility now may be to codify the Court's Federal Rule decisions, or simply remain silent and defer to case development").

⁹⁸ *See supra* text accompanying notes 46–50, 72–74.

⁹⁹ *See* Notes of Conference Call 3 (Feb. 5, 2016) (stating that the possibility of a cert grant "would be a strong reason for the Subcommittee not to return to the issue until the Court had decided"), in APR. 2016 AGENDA BOOK, *supra* note 61, at 127, 129; Rule 23 Proposals 2–3 (Apr. 15, 1997) ("It would be folly to attempt to go forward with a rule before the Supreme Court decision."), in MAY 1997 AGENDA BOOK, *supra* note 41, at 49, 50–51.

¹⁰⁰ *See Amchem*: First Thoughts, in OCT. 1997 AGENDA BOOK, *supra* note 35, at 163, 164, 167; Report of the Advisory Committee on Civil Rules 10–11 (May 12, 2016), in JUNE 2016 AGENDA BOOK, *supra* note 76, at 251, 260–61; *cf.* Report of the Advisory Committee on Civil Rules 10 (May 12, 2016) (putting pickoffs again on hold after the decision, even though the decision left many issues unaddressed, to "monitor[] activity in the lower courts"), in JUNE 2016 AGENDA BOOK, *supra* note 76, at 251, 260; Rule 23 Subcommittee Report 3, 36–37 (putting the pickoff issue on hold in light of a pending Supreme Court decision), in NOV. 2015 AGENDA BOOK, *supra* note 64, at 87, 89, 122–23. The Advisory Committee's abandonment of Rule 8 changes after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), offers additional evidence of this point. *See generally* Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483 (2013) (surveying the Advisory Committee's consideration, and rejection, of Rule 8 amendment proposals after *Twombly* and *Iqbal*).

¹⁰¹ *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 351 (1999) (analyzing *Amchem*).

Committee.¹⁰² The Supreme Court is the congressional delegate of the “power to prescribe” the rules, and any approval must pass through the Supreme Court.¹⁰³ And judges and practitioners—the primary composition of Advisory Committee membership—are used to looking to the Supreme Court as the ultimate authority on the law.¹⁰⁴ Perhaps these structural features induce the Advisory Committee to see itself more as a follower than a leader.

Yet good reasons might support less deference to the Supreme Court in matters involving the civil rules. The Supreme Court justices are far removed from federal trial-level civil practice.¹⁰⁵ The Court considers rule interpretation and application in isolation from other rules, in the context of a specific fact pattern, cabined by the parties’ arguments, and usually within the timeframe of a single Term. By contrast, the Advisory Committee members are experts in trial-level procedure.¹⁰⁶ And the Advisory Committee has the institutional luxury of considering how the rules fit together as a package, with the benefit of time, evidence, deliberation, and broad input. Relative institutional capacities might suggest the Supreme Court should let the Advisory Committee take the lead by eschewing broad rule interpretations or even denying certiorari in cases presenting issues more capably resolved by the rulemaking process.¹⁰⁷

But the opposite seems true in practice. The Supreme Court frequently fills the vacuum left by Advisory Committee inaction—

¹⁰² *About the Judicial Conference*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> (last visited July 1, 2017).

¹⁰³ 28 U.S.C. § 2072(a) (2012).

¹⁰⁴ See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 739 (2016) (“And at the pinnacle of legal prestige is the U.S. Supreme Court, which commands the utmost gravitas.”).

¹⁰⁵ See, e.g., Transcript of Oral Argument at 17, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015) (“I can’t remember my civil procedure course.” (quoting Breyer, J.)).

¹⁰⁶ See *Membership of the Committees on Rules of Practice and Procedure*, U.S. COURTS, <http://www.uscourts.gov/sites/default/files/committee-roster.pdf> (last visited July 1, 2017) (identifying as members three tenured law professors with expertise in civil procedure, four private-practice civil litigators, the Principal Deputy Assistant Attorney General in charge of the Department of Justice’s Civil Division, seven federal district judges, one state judge, and one federal appellate judge).

¹⁰⁷ Some scholars have recently argued for greater Supreme Court deference to rulemakers. See generally Scott Dodson, *Should the Rules Committees Have an Amicus Role?*, 104 VA. L. REV. 1 (2018) (urging an amicus role for the Advisory Committee before the Court); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 943–48 (2011) (arguing for more court deference to rulemaking materials and statements); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012) (advocating for a referral procedure by which the Court sends interpretative questions to the Advisory Committee for rulemaking).

eagerly in the Rule 23 context—and often in new or controversial ways.¹⁰⁸ Commentators have noted that the Court’s recent decisions seem to reflect legal interpretations or policy values that might be different from those held by rulemakers.¹⁰⁹ As the Court takes the lead, it hardens interpretive precedent and policy choices that become more difficult for the Advisory Committee to change and that entrench the Advisory Committee’s role as follower.¹¹⁰

Second, the Advisory Committee’s deliberations on failed Rule 23 amendments reveal an increasing preference for modest changes, what I’ll call “amendment minimalism.” I do not mean to overstate this observation, and I acknowledge that the trend is not perfectly clean. But the 1960s Advisory Committee was unabashedly reformist and visionary, and even the amendments it rejected encompassed dramatic (if backward-looking) changes.¹¹¹ By the 1990s, however, the Advisory Committee’s approach was quite different. Although some of the proposals of the 1990s were aggressive and innovative, they all, save one, were failures.¹¹² As a 1990s Agenda Book reflected, in stark contrast to the 1960s: “[R]ule change here ought to proceed with caution, in increments.”¹¹³ And by the 2000s, the Advisory Committee favored narrow, shopworn, or uncontroversial proposals to codify existing doctrine or best practices.¹¹⁴

¹⁰⁸ See, e.g., *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046–47 (2016) (explaining how representative samples could be used to meet the commonality and predominance requirements for certification of Rule 23(b)(3) class); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (refusing to allow statistical models to satisfy the predominance requirement for certification of a class seeking to establish class-wide relief); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (interpreting the commonality requirement to demand a contention “of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke”); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (construing the scope of Rule 23 to “create[] a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action”).

¹⁰⁹ See, e.g., Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1738 & n.35, 1742, 1747–49 (2014) (suggesting the Court is captured by corporate interests).

¹¹⁰ The 2010s Advisory Committee initially considered responding to the sweeping certification decision in *Dukes* but quickly placed the issue on the back burner. See Notes of Meeting Rule 23 Subcommittee 2–3 (Jan. 9, 2014), in OCT. 2014 AGENDA BOOK, *supra* note 33, at 521, 522–23.

¹¹¹ See *supra* text accompanying notes 8–26 (presenting an overview of the 1960s era Advisory Committee).

¹¹² See *supra* text accompanying notes 27–58 (presenting an overview of the 1990s era Advisory Committee).

¹¹³ Comment on Proposed Changes to Rule 23, *supra* note 33, at 299.

¹¹⁴ Cf. Reporter’s Notes on Rule 23 Subcommittee 76 (Dec. 4, 2000) (“[Amendment proposals] should offer strong prospects for surviving the Enabling Act process; if possible,

To its credit, the Advisory Committee is sensitive to the limits on its rulemaking authority under the Rules Enabling Act, both out of sense of modesty and out of a concern for litigation over the validity of rules,¹¹⁵ and some amendment rejections do seem grounded in a reluctance to test the boundaries of that authority.¹¹⁶ But there is a more general trend of minimalism going on that cannot be justified by authority constraints.

One explanation for this trend might be the changing nature of the Advisory Committee membership and the rulemaking process. The 1960s Advisory Committee was comprised of an agenda-driven but balanced array of practitioners, judges, and academics.¹¹⁷ Its proceedings were predominantly internal: The Advisory Committee generated its own agenda, drafted and considered its own proposals, voted internally on whether to adopt them, and then reported the results.¹¹⁸

Today's rulemaking process is quite different.¹¹⁹ Since the 1980s, the Advisory Committee has skewed disproportionately toward active federal judges,¹²⁰ who tend to be cautious and incremental and who tend to trust judicial discretion.¹²¹ The Rules Enabling Act now requires more transparency and public participation in the rulemaking process,¹²² and the 1990s Advisory Committee consciously shifted

we should hope to advance proposals that will survive in higher proportion than the proposals that were published for comment in 1996.”), in *AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES* 108, 108 (Mar. 12, 2001).

¹¹⁵ See Rabiej, *supra* note 2, at 389 (reporting Advisory Committee restraint when amendments “might test the limits of its rulemaking authority, inviting litigation over the rules themselves”).

¹¹⁶ See, e.g., Rule 23 Subcommittee Report 46–47 (noting “uneasiness about the proper limits of the rulemaking authority” regarding a cy pres rule), in *NOV. 2015 AGENDA BOOK*, *supra* note 64, at 87, 132–33.

¹¹⁷ See Resnik, *supra* note 2, at 7–8 (noting the composition of the 1960s Advisory Committee).

¹¹⁸ See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1106–09 (2002) (describing the rulemaking process prior to the 1988 amendments to the Rules Enabling Act).

¹¹⁹ See *id.* at 1103–04 (providing an overview of the current rulemaking process).

¹²⁰ See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1566–76 (2015) (offering empirical evidence on the Advisory Committee's membership-change trends over time). For a list of the current membership, see Membership of the Committees on Rules of Practice and Procedure, *supra* note 106.

¹²¹ One awkward discussion of ascertainability notes that some recent judicial decisions on ascertainability had been written by active members of the Advisory Committee. See Notes of Subcommittee Conference Call 1 (Sept. 25, 2015), in *NOV. 2015 AGENDA BOOK*, *supra* note 64, at 137, 137.

¹²² See Struve, *supra* note 119, at 1110 (describing the amendments to the Rules Enabling Act that “include[] a number of provisions designed to further a notice-and-comment rulemaking process”).

from purely internal committee deliberations to seeking early and broad input of outside groups from academia, the bench, and the bars.¹²³

At the same time, civil procedure has become increasingly polarized and politicized.¹²⁴ Industry and interest groups aggressively lobby the Advisory Committee regarding particular proposals,¹²⁵ and the level of public participation in the comment period is extraordinarily high.¹²⁶ This politicization means that consensus is rarely possible and that the Advisory Committee is open to criticism on even relatively minor changes.¹²⁷

This milieu has led to rulemaking small ball.¹²⁸ In 1997, the Advisory Committee minutes reflected the following assertion: “The ideal rule change is one that is purely procedural, that ‘creates peace,’ and is satisfactory to all sides of a dispute.”¹²⁹ Reporter Ed Cooper has written that “the surest form of rulemaking [is] by adopting—and perhaps clarifying and regulating—the best current practices”¹³⁰ and

¹²³ Rabiej, *supra* note 2, at 348–49.

¹²⁴ See Robert G. Bone, “To Encourage Settlement”: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, 102 Nw. U. L. REV. 1561, 1612 (2008) (“Since the 1980s the court rulemaking process has become increasingly politicized . . .”). See generally Richard Marcus, *Procedural Polarization in America?*, 18 ZZPINT 303 (2013) (detailing the polarization of procedural rulemaking).

¹²⁵ See Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 843–55 (1991) (describing lobbying efforts targeting Advisory Committee members).

¹²⁶ The 2013 discovery proposals, for instance, generated more than 2300 comments. See Steinman, *supra* note 6, at 19, 23. To its credit, and in some contravention of the pressure-based obstacles to rulemaking, the Advisory Committee successfully pushed through a modest amendment package. See *id.* at 26–27. But this exception proves the rule: If such controversy attends even modest amendments, how insurmountable must be the resistance to more substantial amendments? See Draft Minutes of Civil Rules Advisory Committee Meeting 11 (Apr. 10–11, 2014) (abandoning more substantial discovery proposals in part on the ground that “[s]uch widespread and forceful opposition deserves respect”), in OCT. 2014 AGENDA BOOK, *supra* note 33, at 39, 49.

¹²⁷ The Advisory Committee has been stung before. Its 1983 amendment to Rule 11 was widely seen as a mistake, and it was blindsided by the uproar—justified or not—over its 1990s amendments to the discovery rules. See Marcus, *Shoes*, *supra* note 2, at 639–40 (reporting commentary that the 1983 amendment to Rule 11 was a “disaster” and that the 1990 discovery amendments generated opposition that the Advisory Committee did not anticipate (quoting Professor E. Donald Elliot)).

¹²⁸ See Freer, *supra* note 97, at 466 (agreeing “that the politicization of judicial rulemaking would channel [the Advisory Committee’s] efforts into noncontroversial, largely meaningless efforts”).

¹²⁹ Draft Minutes of the Civil Rules Advisory Committee 2 (May 1–2, 1997), in OCT. 1997 AGENDA BOOK, *supra* note 35, at 99, 100.

¹³⁰ Cooper, *supra* note 28, at 435. *But cf.* Draft Minutes of the Committee on Rules of Practice and Procedure Meeting 20 (June 19–20, 1997) (defending a wait-and-see approach because “the courts of appeals may resolve many of the problems through the development of case law”), in OCT. 1997 AGENDA BOOK, *supra* note 35, at 11, 30; Notes of

by inculcating a first-do-no-harm principle.¹³¹ Perhaps this is as it should be,¹³² but it is a far cry from the rulemaking of 1966.

CONCLUSION

I mean to observe rather than criticize, and my primary aim has been to use the negative retrospective of Rule 23 as a tool for more precise observation. Rule 23 has had a turbulent history, and spotlighting the changes that were not made seems important to considering this history.

In particular, recovering Rule 23's negative history offers greater appreciation for what Rule 23 has become today and how it has evolved to accommodate changing legal and political norms. The history supports a trend away from rule-based certification requirements and toward judicial discretion and common-law development. And it exposes the unresolved tension about the nature of Rule 23 as an efficiency or regulatory device.

In addition, consideration of amendment proposals that were not adopted offers tentative support for broader assessments of the Advisory Committee, including the characterization of an Advisory Committee that looks to follow rather than lead and that proceeds with caution and moderation when it acts.

Subcommittee Conference Call 7 (Sept. 25, 2015) (“Perhaps doing nothing is safer than making a rule change when there is not actual evidence [of a problem].”), in *Nov. 2015 AGENDA BOOK*, *supra* note 64, at 137, 143; Rule 23 Subcommittee Report 4–5 (declining to move forward with issue class proposals because “[t]he various circuits seem to be in accord”), in *Nov. 2015 AGENDA BOOK*, *supra* note 64, at 87, 90–91.

¹³¹ See Cooper, *supra* note 30, at 924 (“A reasonably safe way to avoid wrong predictions is to make no predictions.”); Cooper, *supra* note 15, at 14 (“And if there is room to improve, there also is room to confuse, weaken, or even do great harm.”).

¹³² See Marcus, *Shoes*, *supra* note 2, at 637 (“Amendments do not and should not happen often. Amending the rules is not easy and should not be.”); *cf.* Rule 23 Subcommittee Report 35 (suggesting that rulemaking should sometimes take a backseat to caselaw development), in *Nov. 2015 AGENDA BOOK*, *supra* note 64, at 87, 121.