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# PUBLIC LAW LITIGATION AND THE FEDERAL RULES OF CIVIL PROCEDURE

*Carl Tobias* †

The public interest litigant is no longer a nascent phenomenon in American jurisprudence. Born of the need of large numbers of people who individually lack the economic wherewithal or the logistical capacity to vindicate important social values or their own specific interests through the courts, these litigants now participate actively in much federal civil litigation: public law litigation.<sup>1</sup> Despite the pervasive presence of public interest litigants, the federal judiciary has accorded them a mixed reception, particularly when applying the Federal Rules of Civil Procedure. Many federal courts have applied numerous Rules in ways that disadvantage public interest litigants, especially in contrast to traditional litigants, such as private individuals, corporations, and the government.

These developments were not inevitable. Most of the Rules, as adopted originally in 1938 and as amended subsequently, did not anticipate, but were compatible with, public law litigation and public interest litigants' involvement in federal civil litigation. Indeed, certain ideas underlying the Rules as a set of litigating principles may have facilitated public law litigation and public interest litigants' expanding participation in civil suits. Nonetheless, a number of judges has enforced numerous Rules in ways that adversely affect these litigants and which now constitute a discernible pattern. The fiftieth anniversary of the Federal Rules affords an auspicious occasion to explore the federal courts' application of the Rules to public law litigation and the consequences of that judicial treatment.

The first section of this Article surveys the history of the Rules and chronicles the rise of public interest litigants and their growing involvement in federal civil litigation. The review shows that nearly

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† Professor of Law, University of Montana. Thanks to Rich Freer, Bill Luneburg, Rick Marcus, Michael Risinger, Peggy Sanner, and Allan Stein for valuable suggestions, to Brenda Numerof and Kathy Rightmyer for helpful research assistance, to the Harris Trust for generous continuing support, and to Violet Pasha for typing this Article. Errors that remain are mine.

<sup>1</sup> Public law litigation comprises lawsuits which seek to vindicate important social values that affect numerous individuals and entities. For discussion of much of this litigation's salient characteristics, see *infra* notes 54-82 and accompanying text. Public interest litigants are people or entities that pursue such litigation. For helpful, recent analysis of public law litigation and public interest litigants, see N. ARON, *LIBERTY AND JUSTICE FOR ALL PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* (1989).

all of the Rules, as promulgated in 1938 and as revised thereafter, were consistent with, and even may have promoted, public law litigation and public interest litigants' increasing activity. When the coalescence of numerous developments significantly transformed the character of considerable federal civil litigation, federal courts confronted many unforeseeable issues for whose resolution the Rules afforded little guidance. The second part of the Article, therefore, analyzes how the federal judiciary has addressed a number of these issues. The evaluation reveals that many courts have enforced numerous Rules in ways that have adversely affected public interest litigants. Indeed, application of all these Rules may have had cumulative impacts and even chilling effects on the litigants. Because the assessment also indicates that courts can and should enforce the Rules with greater solicitude for public interest litigants, the final section offers suggestions for so applying them and for future work on the Federal Rules and public law litigation during the next half-century of the Rules' application.<sup>2</sup>

## 1

HISTORY OF THE FEDERAL RULES AND PUBLIC  
LAW LITIGATION

## The half-century history of the Federal Rules of Civil Procedure

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<sup>2</sup> I recognize that the advisability and the validity of certain forms of public law litigation inspire controversy. For discussion of Supreme Court treatment of some of the litigation, see Chayes, *The Supreme Court, 1981 Term-Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) [hereinafter Chayes, *Foreword*]; Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984). For a thorough list of commentary, much of which analyzes the advisability and validity of public law litigation, see Fallon, *supra*, at 1 n.1, 2 n.3. For representative treatment criticizing the litigation, see generally D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978). For representative treatment favoring the litigation, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter Chayes, *Public Law Litigation*]; Fiss, *The Supreme Court, 1978 Term-Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). Cf. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) (representative, comparatively neutral treatment). For purposes of this Article, it is preferable to leave open the question of legitimacy and to admit that it may be insolvable. This approach does not purport to resolve the very proposition some have contended must be proved, and cogent arguments against the validity of public law litigation have been posited. Barring dramatic reversals on the order of Congressional repeal of the civil rights laws, however, litigants will not cease seeking to vindicate important social values implicated by the litigation and judges will not stop entertaining those suits. Thus, it is realistic to assume that some public law litigation will be pursued and to explore how it might be treated most efficaciously. One need not necessarily favor such litigation to support its effective resolution when the litigation instituted. This study and the work proposed for the future, by collecting and analyzing data, should contribute to more informed debate while indicating contexts in which public law litigation is more or less advisable and perhaps inappropriate.

divides into four time frames for the purpose of examining developments relevant to the Federal Rules and public law litigation. The first period includes the events leading to, and attending, the adoption of the Rules in 1938. The second period encompasses the initial quarter-century of experience with application of the Rules. The third period involves the developments contributing to the rise and growth of public law litigation—essentially from the mid-1960s until the mid-1970s. The fourth period includes events leading to the expansion of public law litigation and the responses to that increase, including the perceived “litigation explosion,” by those responsible for drafting and applying the Rules.

#### A. Adoption of the Federal Rules in 1938 and a Look at Public Law Litigation

The events preceding and accompanying the promulgation of the Federal Rules in 1938 warrant considerable examination.<sup>3</sup> Recent research has expanded substantially understanding of these developments;<sup>4</sup> the events have significant implications for what happened subsequently. During the early twentieth century, increasing disenchantment with common law and code practice and procedure prompted widespread calls for procedural reform.<sup>5</sup> Beginning approximately with Roscoe Pound’s 1906 address to the American Bar Association (ABA), entitled “The Causes of Popular Dissatisfaction With the Administration of Justice,”<sup>6</sup> support for procedural change gradually grew. It is important to understand, however, that numerous advocates were united only by the desire for some change.<sup>7</sup> The proponents held quite diverse views on the

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<sup>3</sup> For discussion of developments leading to and surrounding adoption of the Rules in 1938, I rely most below on Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From The Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989); Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

<sup>4</sup> Recent valuable work is cited *supra* note 3. Although it has expanded understanding, this does not necessarily mean that the work is consistent. Total reconciliation is not attempted here; rather, I provide multiple “accounts” of the history.

<sup>5</sup> For analysis of these developments and those that preceded them, see Bone, *supra* note 3, at 3-114; Burbank, *supra* note 3, at 1035-48; Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311 (1988); Subrin, *supra* note 3, at 914-21, 926-61.

<sup>6</sup> See *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 409-13 (1906) [hereinafter A.B.A. Rep.]. This is a rough approximation of time; Professor Pound’s address was not the sole cause of what happened. For more discussion of the developments, see sources cited *supra* note 5.

<sup>7</sup> Champions of reform eventually included such disparate luminaries of the American legal community as Pound; William Howard Taft, Chief Justice of the United States Supreme Court; Thomas Shelton, a Virginia business lawyer who was the first head of

forms that such reform might take, and these perspectives ranged across a broad spectrum:

Ironically, many strands of the ideology of conservatives who initially sponsored the [statute authorizing adoption of the Rules] coalesced with the ideas of liberals who later participated in its enactment and implementation. This is most notably true with respect to expanding judicial power, trusting experts, their lack of faith in juries, and their overall attraction to equity practice.<sup>8</sup>

Thus, a reform having conservative political origins came to fruition as "New Deal, liberal legislation"<sup>9</sup> when Congress passed the Rules Enabling Act of 1934.<sup>10</sup> That statute authorized the Supreme Court to promulgate Rules of procedure (subject to Congressional disapproval) governing resolution of civil litigation in the federal district courts.<sup>11</sup> In 1935, the Court appointed the Advisory Committee on the Civil Rules (Advisory Committee), whose Reporter was Charles Clark, and which included four additional faculty members from elite law schools as well as nine attorneys, nearly all of whom practiced in large private law firms and were active in the ABA or the American Law Institute.<sup>12</sup> The Advisory Committee began drafting the Rules that year and submitted its proposals in 1937 to the Supreme Court.<sup>13</sup> The Court, minimally changing the Committee's work, transmitted the Rules as modified in December to the Attorney General, who tendered them in January 1938 to Congress, and the proposals became effective "by congressional inaction" that September.<sup>14</sup>

In formulating the Federal Rules, the Advisory Committee apparently had certain objectives for the Rules as a general set of litigating principles and with respect to some specific procedural areas

the ABA Committee on Uniform Judicial Procedure; and Charles Clark, Dean of the Yale Law School. See Subrin, *supra* note 3, at 944-73 (analysis of the growing support for reform and the role that each person played). Cf. Burbank, *supra* note 3, at 1045-98 (analysis of background developments).

<sup>8</sup> Subrin, *supra* note 3, at 969 (citations omitted).

<sup>9</sup> *Id.* at 944.

<sup>10</sup> See 28 U.S.C. §§ 2072-2074 (1988 amendment). Cf. Burbank, *supra* note 3, at 1045-98 (exhaustive analysis of events leading to passage).

<sup>11</sup> See Burbank, *supra* note 3, at 1098-1184 (reinterpreting the statute in light of pre-1934 history).

<sup>12</sup> For analysis of Clark, and other members of the Advisory Committee, as well as their viewpoints, see Resnik, *supra* note 3, at 498-507; Subrin, *supra* note 3, at 961-82. See also Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) (for more discussion of Clark's views); Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976) (same).

<sup>13</sup> See Resnik, *supra* note 3, at 498-515 (analyzing the Committee's work on the proposals); Subrin *supra* note 3, at 961-83 (same). See also Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975) (analysis of the Committee's work from 1938 until 1975).

<sup>14</sup> Subrin, *supra* note 3, at 973. See also Resnik, *supra* note 3, at 494 n.1.

and Rules.<sup>15</sup> These objectives are complex, subtle, and potentially inconsistent—and each procedural field and Rule had its own discrete history.<sup>16</sup> Nevertheless, it is possible to explore considerations most relevant to later developments, while suggesting a number of plausible accounts of the Advisory Committee's efforts.<sup>17</sup>

The Committee intended the Rules as a whole to provide a "trans-substantive code of procedure . . . procedure generalized across substantive lines . . ."<sup>18</sup> It also meant the Rules to elevate substance over form or, in Charles Clark's own words, for procedure to become the "Handmaid of Justice."<sup>19</sup> Numerous procedural areas and Rules, such as the pleading requirements, embodied what has been "labelled the 'liberal ethos,' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery."<sup>20</sup>

The goals of simplicity and non-technical approaches to procedure resemble the idea of the "liberal ethos." The Advisory Committee's attempt to circumscribe the number of steps in a lawsuit and the provision for open-ended discovery exemplify these objectives.<sup>21</sup> The concept of uniformity among federal district courts, between federal and state courts, and among the states represents a variation on the idea of simplicity.<sup>22</sup> Implicit in these three kinds of

<sup>15</sup> I examine principally below the Rules as a set of litigating principles, supplementing that with analyses of specific procedural areas or Rules when warranted for purposes of clarifying concepts to be addressed in this Article. There are restrictions on this endeavor. It relies on secondary, published commentary and certain Rules. There are also limits to historical inquiry, such as attempting to divine the "intent" of fourteen drafters working 50 years ago, each of whom might have had his own agenda. See Resnik, *supra* note 3, at 498-99, 508.

<sup>16</sup> All of these objectives cannot even be identified. Full analysis of the objectives that would be a mammoth task which is beyond the scope of this Article and fortunately unnecessary. For helpful suggestions as to specific Rules and their discrete histories, see Subrin, *supra* note 3, at 923.

<sup>17</sup> The accounts are overlapping, intertwined, and not totally compatible. I mention some inconsistencies below and attempt to reconcile others.

<sup>18</sup> Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975). Accord Resnik, *supra* note 3, at 512; Subrin, *supra* note 3, at 944.

<sup>19</sup> See C. CLARK, PROCEDURE—THE HANDMAID OF JUSTICE (1965); accord Moore, *The New Federal Rules of Civil Procedure*, 6 I.C.C. PRACT. J. 41, 42 (1938); Subrin, *supra* note 3, at 944.

<sup>20</sup> Marcus, *supra* note 12, at 439.

<sup>21</sup> See Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1649-50 (1981) (lawsuit's steps); Resnik, *supra* note 3, at 500-01 (open-ended discovery); Subrin, *supra* note 3, at 977-78 (same). For instance, a lawyer who had filed a pleading with any "good ground to support it [could] pretty much discover to his or her heart's content." Subrin, *supra*, at 1650. This would permit "all available data [to] be laid before the tribunal trying the case in order to enable it to do justice." Holtzhoff, *The Origins and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1060 (1955). The pleading regime also reflected simple, non-technical approaches, see Marcus, *supra* note 12, at 439-40.

<sup>22</sup> See Subrin, *supra* note 21, at 1650.

uniformity was another: a single set of Rules to govern all cases, meaning that law and equity would be merged. Indeed, Professor Subrin has convincingly argued that the "underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law" and that the "Federal Rules went beyond equity's flexibility and permissiveness in pleading, joinder, and discovery."<sup>23</sup>

Professor Resnik has stated that contemporaneous commentary suggests that the drafters acted on a series of assumptions about the composition of the federal court caseload, the possibilities of professionalism, and the scope of the judicial role.<sup>24</sup> She has observed that the private damage suit litigated by private attorneys apparently served as an important paradigm for which the Committee drafted the Rules.<sup>25</sup> According to this view, litigation involves private parties possessing equivalent resources who, with their lawyers, maintain considerable control over the litigation.<sup>26</sup> As to the respective responsibilities and roles of attorneys and judges, the Advisory Committee seemed to have had abiding faith in the efficacy of adjudicatory procedures and to have relied on the concept of lawyer-based adversarialism.<sup>27</sup> The drafters apparently trusted attorney self-regulation, especially during pretrial discovery, and endorsed

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<sup>23</sup> Subrin, *supra* note 3, at 922 (citations omitted). Cf. Clark & Moore, *A New Federal Civil Procedure-I. The Background*, 44 YALE L.J. 387, 415-35 (1935) (contemporaneous championing of single set of Rules governing law and equity). "The result is played out in the Federal Rules in a number of different but interrelated ways: ease of pleading; broad joinder; expansive discovery; greater judicial power and discretion; flexible remedies; latitude for lawyers; control over juries; reliance on professional experts; reliance on documentation; and disengagement of substance, procedure, and remedy." Subrin, *supra*, at 923-24 (citations omitted). That research also suggests that a procedural system dominated by equity is a mixed blessing. Although equity facilitates the creation of new rights, it fails to afford efficacious means to vindicate them while contributing to numerous pressing problems in American civil procedure. See *id.* at 925-26, 1000-02.

<sup>24</sup> See Resnik, *supra* note 3, at 508.

<sup>25</sup> "[O]ne of the prototypical lawsuits for which the 1938 Federal Rules were designed was the relatively simple diversity case: a dispute between private individuals or businesses in which tortious injury or breach of contract was claimed, private attorneys were hired to represent the parties, and monetary damages were sought." *Id.* But see Subrin, *supra* note 3, at 973 n.375 (Professor Resnik "severely undervalues" equity's dominance).

<sup>26</sup> See Resnik, *supra* note 3, at 508-15. Cf. *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1010 (1st Cir. 1988) (parties and counsel set own agenda in pretrial phase). The private two-party model failed to depict accurately certain statistical realities of that time, because the "United States was a party in a substantial percentage of the cases" on the civil docket in the federal courts. Resnik, *supra*, at 509. Even if the drafters were aware of this data, they may have discounted the information. Much government litigation involved liquor which declined dramatically with prohibition's repeal and relatively low visibility matters, such as enforcement of the internal revenue laws. See *id.* at 508-11.

<sup>27</sup> See Resnik, *supra* note 3, at 508-15.

increased judicial control, particularly vis-a-vis juries.<sup>28</sup>

The history of the Rules does not reveal whether the Advisory Committee specifically anticipated or intentionally provided for public law litigation in exactly those forms it now assumes. Although certain aspects of that history are unclear, the inquiry should be pursued, because it will shed important light on later developments. In the teens, the three most important forerunners of modern public interest litigants were litigating cases:<sup>29</sup> legal aid societies established in cities to assist the poor, the National Association for the Advancement of Colored People (NAACP), and the American Civil Liberties Union (ACLU).<sup>30</sup> By the late 1920s, Charles Clark observed that greater emphasis was being "placed upon the effect of legal rules as instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants."<sup>31</sup> After conducting a 1934 study of civil litigation in the federal courts, Clark stated that "to a large extent [those] courts may be considered as the courts for adjudicating various claims involving the central government. This tendency is certain to increase with all the new and various forms of federal legislation recently passed."<sup>32</sup>

It is important to remember, however, that the individual legal aid offices, the NAACP, and the ACLU had relatively few resources and consequently engaged in more limited activities than they would after 1965.<sup>33</sup> Moreover, the 1930s were the time before

<sup>28</sup> See *id.* at 512-15; 21 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5025, at 147-51 (1977) (increased judicial control); Subrin, *supra* note 21, at 1650 (attorney self-regulation during discovery); Subrin, *supra* note 3, at 968-73 (increased judicial control).

<sup>29</sup> Modern public interest litigants include entities, such as the Sierra Club and the Health Research Group, which vindicate important social values that affect large numbers of people.

<sup>30</sup> See N. ARON, *supra* note 1, at 6-23; COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE* 21-57 (1976) [hereinafter *BALANCING THE SCALES*]; Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 207, 209-24 (1976).

<sup>31</sup> Clark, *Fact Research in Law Administration*, 1 *MISS. L.J.* 324, 324 (1929).

<sup>32</sup> C. CLARK, *REPORT ON CIVIL CASES OF THE BUSINESS OF THE FEDERAL COURTS* 3-4 (1934). Indeed, Roscoe Pound, as early as his 1906 speech to the ABA, alluded, albeit obliquely, to the possibility of litigation resembling public law suits, in areas such as utility rate setting and workers' employment conditions. See *A.B.A. Rep.*, *supra* note 6. Professor Chayes suggests that the Advisory Committee intentionally crafted the Rules to provide for public law suits. See Chayes, *Public Law Litigation*, *supra* note 2. Cf. Subrin, *supra* note 3, at 961-73 (suggesting that for Clark one virtue of equity-based procedure was its ability to accommodate these cases).

<sup>33</sup> See Rabin, *supra* note 30, at 214-18. Legal aid societies concentrated their efforts on the "day-to-day problems of the poor." Houck, *With Charity for All*, 93 *YALE L.J.* 1415, 1440 (1984). Because the NAACP and the ACLU focused on "test cases" to conserve scarce resources, they litigated relatively few cases and even that litigation differed in certain respects from modern public law litigation. Moreover, labor unions were



many New Deal statutes were actually implemented, before federal power became highly centralized, before civil rights litigants were active, before federal courts evinced hospitality to rights seekers, before widespread judicial review of federal administrative agency action, before the 1966 "liberalization" of the class action rule, and before the "due process" revolution.<sup>34</sup> In short, the Advisory Committee apparently did not clearly foresee or consciously provide for public law litigation in the precise forms in which it exists today. This does not necessarily mean that the drafters' work was irrelevant. Indeed, in light of the Committee's identifiable objectives, the drafters' efforts probably were compatible with, accommodated, and even facilitated the public law litigation that arose.<sup>35</sup>

### B. The Federal Rules During the First Quarter-Century

The Federal Rules generally worked well and enjoyed a cordial reception for the first twenty-five years after their adoption in 1938.<sup>36</sup> The federal courts successfully applied the Rules, especially to the private damage suits that comprised a significant percentage of the federal docket.<sup>37</sup> The total number of amendments to the Rules was relatively small. Most of these were "clarifying" amendments; numerous others essentially honored the objectives of those who drafted the original Rules.<sup>38</sup> Many states implemented sets of Rules modeled after the Federal Rules, while nearly all of the other jurisdictions premised particular Rules on the Federal analogues.<sup>39</sup>

Clark undoubtedly was responsible for some of the perceived

practicing a form of group litigation, but it may have been more in the nature of private litigation, in the sense that many workers primarily pursued their own economic interests.

<sup>34</sup> See Resnik, *supra* note 3, at 512.

<sup>35</sup> Professor Burbank reached a similar conclusion after surveying most of the views mentioned above. See Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463, 1468 (1987). Cf. Resnik, *supra* note 3, at 512 n.18 (reaching similar conclusion).

<sup>36</sup> See, e.g., 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1008 (2d ed. 1987); Resnik, *supra* note 3, at 515-17; Subrin, *supra* note 3, at 910. In the following analysis, I rely most on Marcus, *supra* note 12, and Resnik, *supra*, and on the primary sources on which they rely.

<sup>37</sup> See Resnik, *supra* note 3, at 515-17. Numerous federal judges warmly praised the Rules' effectiveness. See Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 445 (1958).

<sup>38</sup> See Clark, *supra* note 37, at 445; Clark, *Clarifying Amendments to the Federal Rules*, 14 OHIO ST. L.J. 241 (1953) (clarifying amendments); Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 397, 397 n.2 (1976) (few amendments); Resnik, *supra* note 3, at 513 (commentary on 1947 debate over Advisory Committee proposal on work product animated by same assumptions as the original Committee that proposed Rules).

<sup>39</sup> See Clark, *supra* note 37, at 435; Hazard, *Undemocratic Legislation* (Book Review), 87 YALE L.J. 1284, 1287 (1978); Subrin, *supra* note 3, at 910. Cf. R. COVER, O. FISS & J. RESNIK, *PROCEDURE 1788* (1988) (discussing changes in rulemaking process instituted under Chief Justice Warren).

initial success of the Rules. He served as Reporter for the Advisory Committee until 1956 and was a member of the United States Court of Appeals for the Second Circuit from 1939 until 1959, serving as Chief Judge for his last five years.<sup>40</sup> Clark's writing, his service as Reporter, and his membership on an influential court gave him numerous opportunities to influence implementation of the Rules and to champion certain visions of them.<sup>41</sup> Clark was not alone, however. The Rules received considerable praise from the bench and the bar<sup>42</sup> and from numerous writers who appreciated the Rules' benefits and subscribed to the regime they instituted.<sup>43</sup>

There were, of course, some problems with implementation of the Rules during this period. The liberal pleading system and strategic exploitation of the Rules were especially problematic in complex or protracted litigation.<sup>44</sup> Courts and commentators found that there were difficulties attributable to the character of discovery, such as overly broad inquiries and judicial reluctance to enforce certain requirements rigorously.<sup>45</sup> Furthermore, some Rules which have become important to public law litigation, such as Rule 11 governing sanctions and Rule 68 pertaining to offers of judgment, fell into disuse, while others, like Rules 19, 23, and 24 relating to party joinder, were read narrowly.<sup>46</sup>

The antecedents of many of today's public interest litigants gradually grew from the time the Rules became effective.<sup>47</sup> Only in

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<sup>40</sup> See Marcus, *supra* note 12, at 433 n.3.

<sup>41</sup> For example, Clark successfully suppressed a "guerrilla attack" on the 1938 Rules' liberal pleading regime. See Marcus, *supra* note 12, at 445; Subrin, *supra* note 3, at 983. Even in 1963, Clark was able to assert that "[n]o criticism of major character now appears." Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE Soc'y 250, 254 (1963). Cf. Smith, *supra* note 12, at 954-55 (Clark applied the Rules flexibly, pragmatically, and sensitively, not always implementing his prior views or those of the Committee).

<sup>42</sup> See Clark, *supra* note 37, at 435, 443. Numerous examples are in the articles in the symposium *The Federal Rules of Civil Procedure: 1938-1958*, 58 COLUM. L. REV. 435 (1958).

<sup>43</sup> See Resnik, *supra* note 3, at 516; sources cited in note 42 *supra*.

<sup>44</sup> See, e.g., Marcus, *supra* note 12, at 441; Resnik, *supra* note 3, at 516 n.89; Subrin, *supra* note 3, at 982-84 and sources cited therein.

<sup>45</sup> See, e.g., *New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp.*, 16 F.R.D. 203, 206 (S.D.N.Y. 1954); Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958). Cf. *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1010-11 (1st Cir. 1988) (party/counsel control of pretrial phase generally thought sufficient after initial rules' adoption but problems with pretrial discovery and complex litigation soon became clear).

<sup>46</sup> See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (pts. 1 & 2)*, 81 HARV. L. REV. 356, 591 (1967-68) (party joinder Rules read narrowly); Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 35 (1976) (Rule 11 disuse); *infra* notes 241-47 and accompanying text (Rule 68 disuse).

<sup>47</sup> Approximately 80 percent of American cities with more than 100,000 residents

the 1960s, however, did these entities begin to secure the requisite resources to support substantial expansion of their operations and to plan extensively for the type of suits now considered public law litigation.<sup>48</sup> Many developments that led to the rise of modern public law litigation by the mid-1960s had not occurred or had been only faintly perceived. For instance, although Judge Jerome Frank coined the term "private attorney general" in 1943,<sup>49</sup> and Congress passed the Administrative Procedure Act in 1946,<sup>50</sup> significant restrictions, such as standing, ripeness, and mootness, impeded those who sought to challenge governmental activity in the federal courts throughout most of the twenty-five year period.<sup>51</sup> At the end of this time, Congress, the judiciary, and the Advisory Committee began easing these and other limitations on access to the federal courts<sup>52</sup> and began taking other actions conducive to public law litigation.<sup>53</sup>

### C. The Rise and Growth of Public Law Litigation From the mid-1960s Until the mid-1970s

#### 1. *Institutional Reform Litigation*

Between the mid-1960s and mid-1970s, numerous developments, some of which already have been mentioned, significantly changed the nature of considerable federal civil litigation.<sup>54</sup> These developments include the rise of "institutional reform" or "structural" litigation which differs from, and even reverses, many salient characteristics of traditional, private, two-party litigation.<sup>55</sup> Because

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had legal aid offices by 1958. See Houck, *supra* note 33, at 1438. The ACLU broadened significantly the scope of its litigation. See Rabin, *supra* note 30, at 210-14. The NAACP Legal Defense and Educational Fund "ran a string of successes through *Brown v. Board of Education* in 1954." See Houck, *supra*, at 1441.

<sup>48</sup> See Houck, *supra* note 33, at 1439-41; Rabin, *supra* note 30, at 212, 216-17. Correspondingly, very few of the kind of public interest litigants in substantive areas, such as environmental protection, which these entities prefigured, had organized or were actively involved in federal civil litigation. See Houck, *supra*, at 1442-43; Rabin, *supra*, at 224-27.

<sup>49</sup> See *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943); *cf.* *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940) (endorsing similar concept but not expressly using term).

<sup>50</sup> Pub. L. No. 404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

<sup>51</sup> These developments are analyzed in Professor Jaffe's 1965 classic, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION*. For additional discussion, especially of standing and challenges to agency decisionmaking, see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671-76, 1711-60 (1975); Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436-38 (1988).

<sup>52</sup> See *infra* notes 83-88, 94-99, 103 and accompanying text.

<sup>53</sup> These actions include, for instance, Congressional passage of civil rights and consumer protection legislation, see *infra* notes 89-93 and accompanying text.

<sup>54</sup> See Chayes, *Foreword*, *supra* note 2, at 6 (concise discussion of these developments); Resnik, *supra* note 3, at 512 (same). See also Chayes, *Public Law Litigation*, *supra* note 2 (more thorough discussion).

<sup>55</sup> I rely most here on recent, relevant cases, Chayes, *Public Law Litigation*, *supra* note

this kind of public law litigation departs so substantially from the traditional model,<sup>56</sup> and because some have questioned the legitimacy and advisability of institutional litigation,<sup>57</sup> the litigation deserves thorough examination.

Institutional reform litigation has "sprawling and amorphous" party structure.<sup>58</sup> Plaintiffs typically pursue relief that could affect numerous people not before the court as well as institutional, political, and economic structures.<sup>59</sup> Individuals frequently attempt to litigate their cases as class actions, a development arguably facilitated by the liberalizing 1966 amendment to Rule 23.<sup>60</sup> Defendants generally are large bureaucratic institutions or agencies of the federal, state, or local government, such as prisons or schools.<sup>61</sup> The subject matter of these lawsuits usually is the policy, practice, operation, or decisionmaking of those entities—in essence, a dispute over the conduct or content of public policy.<sup>62</sup> Challenges typically allege violation of a right<sup>63</sup> and urge the judiciary to enunciate and enforce public policies and values derived from governing constitutional or statutory law.<sup>64</sup> Plaintiffs often seek non-monetary, "pro-

2, the seminal work on such litigation, and the work of Professor Fiss, who has produced the clearest, most extensive work on such litigation. See, e.g., R. COVER, O. FISS & J. RESNICK, *supra* note 39; Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) [hereinafter Fiss, *Against Settlement*]; Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121 (1982); Fiss, *supra* note 2.

<sup>56</sup> The illegitimacy of this departure is one important contention of those who criticize the litigation. See, e.g., D. HOROWITZ, *supra* note 2, at 264. Even its most ardent advocates, such as Professors Chayes and Fiss, admit that the litigation "reverses" crucial characteristics of traditional concepts of adjudication. See Chayes, *Public Law Litigation*, *supra* note 2, at 1302; Fiss, *supra* note 2, at 31.

<sup>57</sup> For a representative sample of the literature, see the sources cited *supra* note 2. Cf. *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985) (representative judicial exposition).

<sup>58</sup> Chayes, *Public Law Litigation*, *supra* note 2, at 1302. Accord Fiss, *supra* note 2, at 18-24. For case examples, see *Geier v. Richardson*, 871 F.2d 1310, 1311, 1315-17 (6th Cir. 1989); *Lelsz v. Kavanaugh*, 98 F.R.D. 11, 12-13 (E.D. Tex. 1982).

<sup>59</sup> See, e.g., *Grubbs v. Norris*, 870 F.2d 343, 344 (6th Cir. 1989); *Duran*, 760 F.2d at 759. See also Chayes, *Public Law Litigation*, *supra* note 2, at 1302; Fiss, *supra* note 2, at 18-22, 27-28; *Fletcher*, *supra* note 2, at 635-41.

<sup>60</sup> See, e.g., *Hodge v. Dep't of Housing and Urban Dev.*, 862 F.2d 859, 860 (11th Cir. 1989); *Lelsz*, 98 F.R.D. at 12-13. See also Chayes, *Foreword*, *supra* note 2, at 6.

<sup>61</sup> See, e.g., *Grubbs*, 870 F.2d at 344 (state prison system); *Geier*, 871 F.2d at 1311 (state higher education system). See also Chayes, *Public Law Litigation*, *supra* note 2, at 1302; Fallon, *supra* note 2, at 1 n.1; Fiss, *supra* note 2, at 1-3, 18. Of course, there are exceptions. For example, the institution may be a private entity, like a corporation.

<sup>62</sup> See, e.g., *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989) (police lieutenants' examination); *Conner v. Burford*, 836 F.2d 1521, 1540-42 (9th Cir. 1988) (government decision). See also Chayes, *Public Law Litigation*, *supra* note 2, at 1302; Fiss, *supra* note 2, at 4, 9-10, 27-28.

<sup>63</sup> See, e.g., Fiss, *supra* note 2, at 9-10 (right); Fallon, *supra* note 2, at 3-4 (injury to interests).

<sup>64</sup> See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (civil rights plaintiffs vindicate civil and constitutional rights); *Ruiz v. Lynaugh*, 811 F.2d 856, 863 (5th

spective injunctive relief to prevent continued wrongdoing. . . ."<sup>65</sup> These remedies frequently affect many persons and entities not involved in the suit, require ongoing judicial participation, and are meant to reform the offending institution.<sup>66</sup>

The remedial stage of institutional reform litigation, therefore, is especially likely to differ significantly from private law litigation.<sup>67</sup> Courts must assemble predictive and legislative facts to formulate, implement, and monitor complex affirmative decrees governing large bureaucracies.<sup>68</sup> Performance of these tasks frequently requires novel sources of evidence, new mechanisms, and experimental processes.<sup>69</sup> The remedial phase may well evolve into a "long continuous relationship between the judge and the institution," lasting years after the entry of the initial decree.<sup>70</sup>

Judges generally play different, and frequently more active, roles in institutional reform litigation. Courts often assume greater responsibility for fact-gathering and analysis and for "determining

Cir. 1987) (Hill, R.M., J., concurring) (courts protect constitutional and statutory rights). See also Chayes, *Foreword*, *supra* note 2, at 2, 58; Fallon, *supra* note 2, at 1-5.

<sup>65</sup> Fallon, *supra* note 2, at 1 n.1. See, e.g., *Rivera*, 477 U.S. at 574 (civil rights plaintiffs vindicate rights that cannot be valued solely in monetary terms). Accord Chayes, *Public Law Litigation*, *supra* note 2, at 1292-96.

<sup>66</sup> See, e.g., *Grubbs*, 870 F.2d at 344, *Ruiz*, 811 F.2d at 863. Cf. Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 2 (1985) (litigation's "main point is to shape the form of future transactions and interactions"). See also Fallon, *supra* note 2, at 4-5; Fiss, *supra* note 2, at 2-3, 27-28, 36.

<sup>67</sup> See, e.g., Chayes, *Public Law Litigation*, *supra* note 2, at 1298-1302; Fiss, *supra* note 2, at 27-28. The liability stage differs less, although it requires more than a "pronouncement of the legal consequences of past events [and] to some extent a prediction of what is likely to be in the future." See Chayes, *supra*, at 1294. For a recent case that affords a sense of the remedial stage in such litigation and of how it differs from the liability phase as well as the complex, shifting party alignments in the litigation, see *Geier*, 871 F.2d at 1311, 1315-17.

<sup>68</sup> See, e.g., *Ruiz*, 811 F.2d at 863. See also Chayes, *Public Law Litigation*, *supra* note 2, at 1296-98, 1302; Fiss, *supra* note 2, at 27-28.

<sup>69</sup> Courts may consult informational sources other than the parties, such as parents of children who are residents in state institutions for persons considered mentally retarded. See, e.g., *Lelsz*, 98 F.R.D. 11. See also Fiss, *supra* note 2, at 25-26. Courts may employ adjuncts to judges, like special masters, to collect and analyze the requisite data or to promote the negotiation of decrees among litigants. See, e.g., *Grubbs*, 870 F.2d at 344. See also Berger, *Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978); Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986); Fiss, *supra*, at 26-27. For other mechanisms, see Chayes, *Public Law Litigation*, *supra* note 2, at 1300-01. Courts also may apply procedures not ordinarily associated with adjudication, such as forms of "Alternative Dispute Resolution." See Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986). For analysis of this procedure and other new processes, see McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986).

<sup>70</sup> Fiss, *supra* note 2, at 27. Accord Chayes, *Public Law Litigation*, *supra* note 2, at 1301-02. For examples of litigation now in its twenty-first year, see *Geier*, 871 F.2d at 1311; *Hodge*, 862 F.2d at 860.

the interests, shaping the issues, and designing the remedies involved in litigation."<sup>71</sup> Some judges and writers have stated that the courts may take into account all of the interests influenced by their decisionmaking, may consider policy arguments in addition to contentions premised on existing rights, and may accord diminished significance to precedent.<sup>72</sup> Courts are said to perform an "oversight function on behalf of the interests and groups as well as the individuals affected by the challenged bureaucratic actions,"<sup>73</sup> while the judge purportedly is a public officer "empowered by the political agencies to enforce and create society-wide norms, and perhaps even restructure institutions, as a way . . . of giving meaning to our public values."<sup>74</sup>

## 2. *Public Interest Litigation*

"Public interest" litigation resembles, but differs from, institutional reform litigation in certain respects.<sup>75</sup> Public interest litigation vindicates the ideological, political, or moral interests of numerous persons in attempting to insure that institutions behave lawfully.<sup>76</sup> One typical and important form of this litigation challenges the decisionmaking of federal administrative agencies.<sup>77</sup> During the 1960s, numerous observers with different political per-

<sup>71</sup> Dan-Cohen, *supra* note 66, at 35. Accord Chayes, *Public Law Litigation*, *supra* note 2, at 1296-1302; Fallon, *supra* note 2, at 1-5. Cf. Ruiz, 811 F.2d at 863 (judicial articulation).

<sup>72</sup> See, e.g., Dan-Cohen, *supra* note 66, at 35; Chayes, *Public Law Litigation*, *supra* note 2, at 1289-1302.

<sup>73</sup> Chayes, *Foreword*, *supra* note 2, at 60. The same writer earlier asserted that "in actively shaping and monitoring the decree, mediating between the parties, [and] developing his own sources of expertise and information, the trial judge has passed beyond even the role of the legislator and has become a policy planner and manager." Chayes, *Public Law Litigation*, *supra* note 2, at 1302.

<sup>74</sup> Fiss, *supra* note 2, at 31. The same writer stated more recently that the judicial duties are to "explicate and give force to the values embodied in authoritative texts such as the Constitution . . . to interpret those values and to bring reality into accord with them." Fiss, *Against Settlement*, *supra* note 55, at 1095.

<sup>75</sup> "Public interest" litigation is the term that I employ; however, it captures concepts drawn principally from the work of Professor Chayes and of the writers in administrative law listed below. See Chayes, *Foreword*, *supra* note 2; Chayes, *Public Law Litigation*, *supra* note 2; Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); Rabin, *supra* note 30; Stewart, *supra* note 51. Cf. Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835 (1989) (recent example of public interest litigation that reached the Supreme Court).

<sup>76</sup> See Jaffe, *supra* note 75, at 1045-46. Such litigation seeks to "redress injuries not easily definable in terms of personal, financial loss or other harms actionable at common law," while plaintiffs do not assert that the "defendant has breached a legal duty running personally to them." Fallon, *supra* note 2, at 4.

<sup>77</sup> For example, *Methow Valley* challenged decisionmaking of the United States Forest Service. For thorough treatment of the ideas in the remainder of this paragraph see Rabin, *supra* note 75; Stewart, *supra* note 51. For a concise version, see Tobias, *Rule 19*

spectives increasingly criticized the agencies. They claimed that agencies were "captured" by the very interests they were supposed to regulate, that agencies failed to achieve the goals for which they were established, and that agencies were ineffective or unresponsive.<sup>78</sup> Many courts, writers, and critics came to perceive considerable agency decisionmaking as an essentially legislative process in which the perspectives of all affected individuals and interests were evaluated in making a decision.<sup>79</sup> That understanding was rendered problematic, however, because the interests of many persons and entities were not advocated, much less considered.<sup>80</sup> Judges responded by relaxing restrictions on public participation in administrative processes and courtroom litigation and by rigorously analyzing agency decisionmaking.<sup>81</sup>

Finally, the pursuit of important social values is the unifying theme of much institutional reform and public interest litigation. This litigation can also facilitate realization of significant process values, such as those of a participatory and dignitary nature.<sup>82</sup>

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and the Public Rights Exception To Party Joinder, 65 N.C.L. REV. 745, 754-56 (1987). For discussion of other forms of public interest litigation, see Fallon, *supra* note 2, at 3-4.

<sup>78</sup> For a comprehensive catalog of these criticisms, see S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY ch. 3 (2d ed. 1985). See also Rabin, *supra* note 75, at 1266-72.

<sup>79</sup> This was an important theme of Professor Stewart's seminal 1975 article. See Stewart, *supra* note 51, at 1671-83. Cf. Airline Pilots Ass'n Int'l v. Civil Aeronautics Bd., 475 F.2d 900, 905 (D.C. Cir. 1973), *cert. denied*, 420 U.S. 972 (1975) (judicial articulation of theme).

<sup>80</sup> See Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 577-81 (1985); Rabin, *supra* note 75, at 1296-99; Stewart, *supra* note 51, at 1671-88, 1711-59.

<sup>81</sup> For examples of cases relaxing those restrictions, see Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615-17 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). For analysis of case law developments easing the restraints, see Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 362-69 (1972); Stewart, *supra* note 51, at 1723-56; Sunstein, *supra* note 51, at 1441-51. For examples of cases calling for rigorous judicial analysis of agency decisionmaking, see Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); Airline Pilots Ass'n Int'l v. Civil Aeronautics Bd., 475 F.2d 900, 905 (D.C. Cir. 1973), *cert. denied*, 420 U.S. 972 (1975). For analysis of case law developments requiring rigorous analysis, see Rabin, *supra* note 75, at 1300-15; Stewart, *supra*, at 1756-60, 1781-89. The lower federal courts even created a private attorney general exception to the American Rule, thus permitting attorneys' fees to be shifted from defendants to plaintiffs in public law cases. The Supreme Court, however, halted this development in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Congress responded to that determination by passing the Civil Rights Attorneys' Fees Awards Act of 1976. See 42 U.S.C. § 1988 (1982).

<sup>82</sup> Most of the early literature on process values is excerpted in R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE (1979). Cf. Burbank, *supra* note 35, at 1466-71 (catalog of later work).

### 3. *Judicial Activity*

Judicial recognition and expansion of substantive rights not previously acknowledged or extended so broadly were related to the rise and growth of the two types of public law litigation.<sup>83</sup> The United States Supreme Court ruled, for instance, that there was a right of privacy that invalidated proscriptions on contraceptives<sup>84</sup> and on abortions,<sup>85</sup> while it read the Fourteenth Amendment's Equal Protection Clause to require school desegregation<sup>86</sup> and reapportionment.<sup>87</sup> Correspondingly, the federal judiciary's heightened sensitivity to due process concerns "generated a myriad of cases involving a kaleidoscopic range of matters that were not within the standard litigation repertoire [before]—dress and hair codes, academic and government employment status, prisoners' rights, and welfare benefits. . . ."<sup>88</sup>

### 4. *Congressional Activity*

Considerable federal legislation implicated most of these developments.<sup>89</sup> During the 1960s and 1970s, the Congress enacted many statutes that some characterized as "social legislation" or "regulation."<sup>90</sup> Certain measures proscribed discrimination in education, employment, and housing.<sup>91</sup> Additional statutes provided

<sup>83</sup> In this paragraph, I rely most on Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984); Resnik, *supra* note 3; and relevant cases. Of course, judicial recognition and expansion of "procedural" rights also contributed to the litigation's rise and growth. See *supra* note 81 and accompanying text.

<sup>84</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>85</sup> See *Roe v. Wade*, 410 U.S. 113 (1973). *But cf.* *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3058 (1989) (characterizing women's right to abortion as a "liberty interest protected by the Due Process clause").

<sup>86</sup> See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>87</sup> See *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>88</sup> See Miller, *supra* note 83, at 6. This sensitivity reflected a revolution in thinking about entitlements and private rights typified by cases, such as *Goldberg v. Kelly*, 397 U.S. 254 (1970), and writing, like Reich, *The New Property*, 73 YALE L.J. 733 (1964). Indeed, the Supreme Court, in deciding important cases involving civil, administrative, and criminal procedure in the 1960s and early 1970s, evinced a view of adjudication that comported with important objectives embodied in the original Rules, such as lawyer-based adversarialism. See Resnik, *supra* note 3, at 516.

<sup>89</sup> For thorough treatment of the legislative activity, see Rabin, *supra* note 75, at 1278-95. For more concise treatment, see Chayes, *Foreword, supra* note 2, at 6; Miller, *supra* note 83, at 5.

<sup>90</sup> For discussions of "social legislation," see Vogel, *The "New" Social Regulation in Historical and Comparative Perspective*, in *REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS* 155 (T. McGraw ed. 1981); Lilley & Miller, *The New "Social Regulation,"* 47 PUB. INTEREST 49 (Spring 1977). *Cf.* R. LITAN & W. NORDHAUS, *THE REFORMING FEDERAL REGULATION* 44 (1983) (observing that 40 major statutes were enacted).

<sup>91</sup> See, e.g., Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-e17 (1982).



for environmental preservation and pollution control<sup>92</sup> and sought to protect consumers from unsafe products and from unfair commercial practices.<sup>93</sup> A number of enactments encouraged suit by their intended beneficiaries, such as those individuals or groups subjected to discrimination. Many measures liberally granted standing or authorized "citizen suits,"<sup>94</sup> while others provided for awards of attorneys' fees.<sup>95</sup> Moreover, much legislation mandated or invited affirmative judicial enforcement.<sup>96</sup> In fact, the Civil Rights Act of 1964<sup>97</sup> and the Voting Rights Act of 1965<sup>98</sup> were responsible for the twenty-five fold increase in the number of civil rights filings between 1960 and 1972.<sup>99</sup>

### 5. *The Rules*

The role of the Rules in the rise and expansion of public law litigation between the mid-1960s and mid-1970s is unclear. For most of this decade, the Rules continued to enjoy good, albeit less glowing, press and continued to function reasonably well.<sup>100</sup> There were comparatively few amendments to the Rules; a small number was substantive and most embodied the objectives of the 1938 drafters.<sup>101</sup> For example, even the "significant" 1970 amendments to the discovery provisions left the image of attorney control and cooperation essentially intact.<sup>102</sup> Certain changes made the Rules more flexible and permissive than before. Although the 1966 amendments governing compulsory party joinder, class actions, and intervention clearly liberalized these Rules, their importance to public

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<sup>92</sup> See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-34 (1982).

<sup>93</sup> See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2051-83 (1982 & Supp. III 1985).

<sup>94</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7604 (1983); Clean Water Act, 33 U.S.C. § 1365 (1986).

<sup>95</sup> See *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Appendix to opinion of Brennan, J., dissenting) (comprehensive compendium of fee-shifting legislation). Cf. Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906 (1982) (agency payment to public for costs incurred when participating in administrative proceedings).

<sup>96</sup> See Chayes, *Foreword*, *supra* note 2, at 6; Fallon, *supra* note 2, at 3.

<sup>97</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447 (1982)).

<sup>98</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1982)).

<sup>99</sup> See Miller, *supra* note 83, at 5 (citation omitted).

<sup>100</sup> See Cover, *supra* note 18, at 718; Hazard, *supra* note 39, at 1287; Resnik, *supra* note 3, at 515-16. The two major treatises in the civil procedure field, those of Professor Moore and of Professors Wright and Miller, maintained before the bench and bar a "vision of the Federal Rules as a coherent structure" while embracing the "flexibility of application" that permitted the Rules to serve numerous purposes. See Cover, *supra*, at 718.

<sup>101</sup> See Goldberg, *supra* note 38, at 397 n.2 (few amendments).

<sup>102</sup> See Miller, *supra* note 83, at 14-15.

law litigation may have been overstated.<sup>103</sup>

Some observers recognized that there were difficulties with the Rules as written and applied. Most of the problems in application witnessed during the first quarter-century intensified in the mid-1970s.<sup>104</sup> New difficulties, such as excesses in attorney use, and judicial implementation, of the class action device, also arose.<sup>105</sup> The greater number and complexity of civil suits caused mounting concern.<sup>106</sup> Moreover, certain perceived benefits of the Rules came to be seen as disadvantages, perhaps reflecting broadening disenchantment with some choices of the original drafters.<sup>107</sup>

It now appears most accurate that the Rules in conjunction with the developments examined above<sup>108</sup> afforded a congenial environment in which public law litigation could flourish.<sup>109</sup> The Rules and those developments apparently reflect a transformation in the conceptualization of certain litigation and many of its components, including the interest needed to initiate and impose liability in a lawsuit, the subject matter of a lawsuit, and the party structure, as well as the relief afforded and the role of judges in resolving disputes.<sup>110</sup> To be sure, the liberal ethos pervading the Rules as a whole and the liberality and flexibility that equity fostered in specific

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<sup>103</sup> For numerous examples of overstatement in the class action context, see Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979). Cf. Burbank, *supra* note 35, at 1479 ("the 1966 amendments made the triumph [of equity] complete").

<sup>104</sup> See *supra* notes 44-46 and accompanying text. This was especially true of discovery. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

<sup>105</sup> See Miller, *supra* note 103, at 676-79 (describing these excesses).

<sup>106</sup> See Marcus, *supra* note 12, at 440-44 (discussing pressures of managing litigation and increasing focus on discovery); Miller, *supra* note 83, at 2-3, 14-15 (discussing the litigation explosion and the need to control the pretrial process); Resnik, *supra* note 3, at 520-21, 524-26 (relevant data).

<sup>107</sup> This was true of the liberal pleading regime and attorney control over the pretrial process. See Miller, *supra* note 83, at 8-9, 14-15; Resnik, *supra* note 3, at 520-25.

<sup>108</sup> See *supra* notes 54-99 and accompanying text.

<sup>109</sup> This is not to say that public law litigation was predominant even at its apogee. This issue remains controversial, however, and its resolution depends substantially on how one defines such litigation. Compare Burbank, *supra* note 35, at 1468 (suggesting phenomenon never the norm) with Fiss, *Against Settlement*, *supra* note 55, at 1087 (suggesting predominant form of litigation today). For more discussion, relevant data, and some attempts at resolution, see *infra* notes 154-59, 164 & 415 and accompanying text.

<sup>110</sup> For instance, when a dispute over public policy is considered the subject matter of litigation, or a moral interest is considered adequate to intervene in a case, those concepts are much different than subject matter and interest as traditionally understood in private law suits. See *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989) (police lieutenants' examination subject matter and confident expectation of promotion to rank of lieutenant sufficient interest). Cf. *supra* notes 58-76 and accompanying text; *infra* text accompanying note 402 (more discussion of transformed conceptualizations).

Rules enabled public interest litigants to institute suit, successfully resist preliminary motions, conduct broad discovery, and reach the merits of their claims. Moreover, equity underlies numerous procedural measures employed in public law litigation, particularly when judges fashion a remedy in institutional litigation.<sup>111</sup> Equity also “emphasized joining all relevant parties and issues, amassing all relevant data, and permitting the chancellor, with a good deal of discretion, to order what was fair and just.”<sup>112</sup> On balance, it was the Rules, together with the developments enumerated, that made possible the rise and growth of public law litigation from the mid-1960s to the mid-1970s.

#### D. Public Law Litigation and the Rules Since the Mid-1970s

Numerous complex and occasionally inconsistent developments relevant to public law litigation and to the Rules have occurred since the mid-1970s.<sup>113</sup> The recent nature of these developments makes it difficult to secure sufficient perspective to afford a definitive account. It is possible, however, to describe the developments most important to public law litigation and to the Rules.

First, many perceive that the federal courts are experiencing a “litigation explosion.”<sup>114</sup> Important to this perception is the belief that litigants and lawyers overuse, misuse, and abuse the civil justice system.<sup>115</sup> Federal courts purportedly receive an overwhelming

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<sup>111</sup> See Chayes, *Public Law Litigation*, *supra* note 2, at 1292-96, 1303; see *supra* notes 67-70 and accompanying text.

<sup>112</sup> Subrin, *supra* note 3, at 968.

<sup>113</sup> In this subsection, I rely substantially on secondary accounts, especially Marcus, *supra* note 12; Miller, *supra* note 83; and Resnik, *supra* note 3; and on judicial opinions that help to illustrate relevant concepts.

<sup>114</sup> Some observe crises in the adversarial and civil justice systems. These are closely related, if not identical, to the “litigation explosion” which is the term used here to describe the phenomena. For concise descriptions which include similar litanies of the problems, see Marcus, *supra* note 12, at 440-44; Resnik, *supra* note 3, at 494-95; Subrin, *supra* note 3, at 910-12. The litigation explosion theme was first articulated clearly and comprehensively in several Supreme Court opinions of the mid-1970s and at the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (The Pound Conference). See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975); *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (A. Levin & R. Wheeler eds. 1979) [hereinafter *THE POUND CONFERENCE*]. It has been elaborated throughout the ensuing period and retains considerable persuasiveness today. For references to the copious commentary, see the sources cited in Marcus, *supra*, at 440-44; Resnik, *supra*, at 510-12. Professor Resnik traces Supreme Court pronouncements throughout the period. For a recent example, see W. REHNQUIST, 1988 YEAR END REPORT OF THE CHIEF JUSTICE (1988). Cf. H. REP. NO. R. 100-889, 100th Cong., 2d Sess. 23-24, reprinted in 1988 U.S. CODE CONG. & ADMIN NEWS 5982, 5983-84 (discussion of Congressional interest in, and action relating to, the litigation explosion).

<sup>115</sup> These were the theses of many of the addresses and much of the commentary in

number of civil filings,<sup>116</sup> too many of which are said to lack substantive merit or to exploit available procedural mechanisms like discovery for strategic advantage.<sup>117</sup> Of those lawsuits which are more legitimate, too great a number allegedly are overly complex, involving numerous parties, claims, and issues, and requiring months and years of pretrial activity.<sup>118</sup> These and other factors<sup>119</sup> are taken to cause unwarranted delay and cost, often perverting, and inhibiting participation in, the civil justice system.<sup>120</sup>

Despite widespread agreement that the number of civil filings has increased significantly, that a greater percentage of these suits are complex, and that complicated cases are more difficult to resolve,<sup>121</sup> many draw differing inferences from this information. These opinions range from dire predictions about the death of the civil justice system as it has existed<sup>122</sup> to optimistic observations that increased filings indicate satisfaction with the federal courts.<sup>123</sup> Writers have debated the nature as well as the implications of the "explosion." Some have disputed the size and duration of the current "explosion"<sup>124</sup> and whether "real litigation rates have in-

THE POUND CONFERENCE, *supra* note 114. A typical example is Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in *id.* at 23.

<sup>116</sup> See Marvell, *Caseload Growth—Past and Future Trends*, 71 JUDICATURE 151 (1987) (helpful data); Miller, *supra* note 83, at 2-3 (helpful data); Resnik, *supra* note 3, at 525 n.138 (same). Cf. *Chief Judge Motley Describes Court, Career; Reflects on National Impact of Landmark Cases*, Third Branch, Dec. 1985, at 1 (example of judicial concern about increasing caseloads).

<sup>117</sup> See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975); Marcus, *supra* note 12, at 441-43; Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579.

<sup>118</sup> See Marcus, *supra* note 12, at 441-43; Miller, *supra* note 83, at 6-11; Resnik, *supra* note 3, at 521-22, 526. Cf. Resnik, *supra*, at 495 n.6, 521 n.118 (data on time for case dispositions).

<sup>119</sup> One helpful, representative, but less than exhaustive, litany includes the "explosion in substantive law, photocopying, the types and difficulty of issues brought to courts, the increase in amounts of money involved, and 'the sheer number of parties.'" Subrin, *supra* note 3, at 912 (citing R. MARCUS & E. SHERMAN, *COMPLEX LITIGATION CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 1-7 (1985)). *Accord In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1011 (1st Cir. 1988); Miller, *supra* note 83.

<sup>120</sup> See *supra* note 117; see also Burger, *supra* note 115, at 31-32.

<sup>121</sup> See, e.g., sources cited *supra* notes 116 & 118.

<sup>122</sup> This tone appears in numerous addresses and much commentary in THE POUND CONFERENCE, *supra* note 114. See, e.g., Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, in *id.* at 211-12; Rifkind, *Are We Asking Too Much of Our Courts?*, in *id.* at 64.

<sup>123</sup> See Resnik, *supra* note 3, at 495 n.6. Opinions also exist in the "middle range," such as comparatively unconcerned observations that neither dramatic increases in litigation nor civil delay are unprecedented. See Marcus, *supra* note 12, at 440 n.46 (numerous sources).

<sup>124</sup> See, e.g., M. SELVIN & P. EBENER, *MANAGING THE UNMANAGEABLE* vi (1984); Ga-

creased."<sup>125</sup> Regardless of the reality, the perception that there is an explosion has led to considerable judicial, Advisory Committee, and Congressional activity important to public law litigation and the Rules.

There is a growing sense that the Rules work less effectively than before.<sup>126</sup> The liberality and flexibility of the Rules are said to have made possible an increasing civil caseload, more complex and time consuming lawsuits, and abuse, manipulation, and exploitation of the litigation process.<sup>127</sup> Recent concerns reflect disenchantment with certain objectives, choices, and ideas of the original Advisory Committee. In retrospect, the Committee seems to have premised its work on overly optimistic appraisals, unrealistic assessments, and misplaced trust or naivete.<sup>128</sup> The drafters' decision to leave the pretrial process essentially to attorneys illustrates all of these difficulties:

Given the realities of modern large-scale litigation, the rulemakers' expectations for a self-executing, cooperative pretrial

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lanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 9 (1983); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983). Professors Schwab and Eisenberg recently found national data and research on an important district to suggest that the image of a civil rights litigation explosion is overstated and borders on myth. See Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 642, 642-43 (1987). See also Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorneys Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988) (later study essentially confirms earlier findings).

<sup>125</sup> See, e.g., Friedman, *The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America*, 39 MD. L. REV. 661, 663 (1980). Cf. Galanter, *The Life and Times of the Big Six*; or, *The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 942-46 (business contract litigation contributing substantially to so-called litigation explosion). Moreover, minimal data apparently support the allegations of abuse, especially in discovery. See, e.g., Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 812-13 (1981); Miller, *supra* note 103, at 667; Resnik, *supra* note 3, at 523 n.130; Weinstein, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 429, 439 (1988).

<sup>126</sup> I rely most in this paragraph on Miller, *supra* note 83; Resnik, *supra* note 3; Subrin, *supra* note 3; and Subrin, *supra* note 21.

<sup>127</sup> See Marcus, *supra* note 12, at 441-43; Miller, *supra* note 83. Cf. ACF Indus., Inc. v. EEOC, 439 U.S. 1081, 1086-88 (1979) (Powell, J., dissenting from denial of certiorari) (increasing discovery abuse).

<sup>128</sup> The drafters' faith that adjudication would lead to truth and that more process would yield the best, or at least better, outcomes illustrates their undue optimism. See Resnik, *supra* note 3; see also Marcus, *supra* note 12, at 492; Subrin, *supra* note 21, at 1650. The view that procedure could be divorced totally from substance demonstrates their lack of realism. See Subrin, *supra*, at 1652; see also Burbank, *supra* note 35, at 1470-75. The Committee's unrealized hopes that the Rules' provisions for discovery, pretrial conferences and summary judgment would restrict cases' scope and conclude meritless litigation illustrate misplaced trust. See Subrin, *supra* note 3, at 975-91; see also Miller, *supra* note 83, at 14-15.

phase have proven to be somewhat naive. Attorneys have neither cooperated voluntarily to move through discovery nor policed each other by seeking sanctions for abusive discovery tactics.<sup>129</sup>

The drafters' goals of trans-substantive Rules and of uniformity now appear unworkable.<sup>130</sup> The ravages of time and unforeseen developments, such as the mobile nature of American society and the rise of the modern administrative state, have undermined other choices of the Committee.<sup>131</sup> The Advisory Committee failed to discern certain matters that now seem obvious and was responsible for omissions and oversights. The 1938 Rules made minimal provision for settlement, the manner in which ninety-five percent of the cases filed today are resolved.<sup>132</sup>

Courts, the Advisory Committee, and Congress have responded to the litigation explosion and litigation abuse by attempting to discourage filing, to facilitate expeditious resolution of suits, and to punish lawyer misconduct. As early as 1975, the Supreme Court warned lower federal courts about misuse of the litigation process by attorneys with frivolous claims and soon thereafter encouraged judges to impose sanctions to deter abuse of discovery.<sup>133</sup> The Court has admonished lower courts to exercise "restraint" in resolving threshold issues, such as standing,<sup>134</sup> and in considering imposition of relief while evincing such restraint itself in appropriate cases.<sup>135</sup>

Since the mid-1970s, numerous district courts have practiced

<sup>129</sup> Miller, *supra* note 83, at 15. The example also shows how some choices created conflicts—such as that between lawyer obligations to clients to be zealous advocates and to courts to insure smooth pretrial processes—and facilitated the subversion of objectives embodied in other choices.

<sup>130</sup> See Resnik, *supra* note 3, at 547-48; Subrin, *supra* note 3, at 985-91; Subrin, *supra* note 21, at 1650-51. Cf. Burbank, *supra* note 35, at 1474 (many current Rules "authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense"). Similarly, simple non-technical approaches seem insufficiently responsive to numerous demands of modern litigation, especially those posed by complex cases.

<sup>131</sup> Cf. Resnik, *supra* note 3, at 502 n.30 (difficulty of anticipating "Calder-like configurations" that pass today as lawsuits).

<sup>132</sup> See Resnik, *supra* note 3, at 498, 520 n.115.

<sup>133</sup> See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975); *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976). Cf. *Burger Says Vacancies Add to Judicial Deficit*, N.Y. Times, Dec. 30, 1985, at 12, col. 1 (Chief Justice urged more frequent imposition of sanctions in annual report to the judiciary); *supra* note 114 (Congressional response).

<sup>134</sup> For analysis of standing and citations to the relevant cases, see Chayes, *Foreword*, *supra* note 2, at 8-26; Fallon, *supra* note 2, at 13-59; Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984); Sunstein, *supra* note 51, at 1451-61.

<sup>135</sup> See *Lyons v. City of Los Angeles*, 461 U.S. 95 (1983) (example implicating standing and relief). For analysis of the admonitions and citations to the relevant cases, see Chayes, *Foreword*, *supra* note 2, at 45-56; Fallon, *supra* note 2, at 59-74. Indeed, the Court may be manipulating resolution of the threshold questions to avoid reaching remedial issues. See Chayes, *supra*, at 52-56; Fallon, *supra*, at 5.

“managerial judging.”<sup>136</sup> The courts have assumed more active roles in expediting the resolution of cases by employing pretrial conferences to set the pace of litigation, to structure issues, or to encourage settlement; by imposing restrictions on the scope and timing of discovery; and by levying sanctions for attorney abuse of the litigation process.<sup>137</sup> Many judges have experimented with Alternative Dispute Resolution, while others have created new procedures for complex litigation.<sup>138</sup> Most managerial judging has proceeded informally, but some has been conducted pursuant to recently promulgated local Rules.<sup>139</sup> The 1983 amendments to the Federal Rules and the second edition of the Manual for Complex Litigation formalized nearly all of the managerial practices followed.<sup>140</sup>

Although certain 1980 amendments of the Rules were intended to limit attorney abuse of the discovery process,<sup>141</sup> the 1983 amendments to Rules 7, 11, 16, and 26 sought to increase the responsibilities of attorneys, to enhance judicial control and management of litigation, to improve discovery, and to require imposition of sanc-

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<sup>136</sup> Valuable early studies include S. FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* (1977) and Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Cf. Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984) (providing another view of managerial judging's efficacy). Cf. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J. L. REF. 647, 675-78 (1988) (recent analysis).

<sup>137</sup> See, e.g. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 70 (1981); Resnik, *supra* note 136, at 391-400.

<sup>138</sup> See generally Lieberman & Henry, *supra* note 69 (analysis of Alternative Dispute Resolution); Resnik, *supra* note 3, at 534-36 (same). For discussion of some of the new procedures, see E. LIND & J. SHAPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* (1983); Resnik, *supra*, at 527, 534-36; Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980).

<sup>139</sup> See *In re San Juan Dupont Plaza Hotel Fire Litigation*, 857 F.2d 1007, 1011 (1st Cir. 1988) (bench relied on inherent powers to take more active approach to management of pending litigation); Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes in the Federal Rules*, 63 MINN. L. REV. 253 (1979) (managerial judging pursuant to local Rules); H.R. REP. NO. 100-889, 100th Cong., 2d Sess. 27-29 (1988), reprinted in U.S. CODE CONG. & ADMIN. NEWS 5982, 5987-89 (discussion of difficulties local Rules' proliferation has created, ongoing study of local Rules, and of efforts to reduce conflicts between local and national Rules and to open local rule making processes); Coquette, Squiers & Subrin, *The Role of Local Rules*, 75 A.B.A. J. 62 (Jan. 1989) (analysis by authors of local Rules study).

<sup>140</sup> See Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097 (1983), and the Manual for Complex Litigation, Second (1985).

<sup>141</sup> See Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997 (1980). Three Justices dissented from the order adopting the amendments because of their belief that the alterations would not prevent abuse and that “Congress’ acceptance of these tinkering changes [would] delay for years the adoption of genuinely effective reforms.” *Id.* at 1000.

tions when proper.<sup>142</sup> Rule 16 increases the district courts' power to manage lawsuits by employing pretrial conferences<sup>143</sup> and scheduling orders<sup>144</sup> and by imposing sanctions for violations of certain requirements.<sup>145</sup> Amended Rule 26 authorizes similar changes in discovery, empowering judges to restrict discovery in specific circumstances and to impose mandatory sanctions.<sup>146</sup> Amended Rule 11 supplements the provisions for managerial judging in Rules 16 and 26 by requiring compulsory imposition of sanctions for failure to conduct reasonable pre-filing inquiries and demands greater responsibility and accountability from attorneys.<sup>147</sup>

These developments, especially the 1983 amendments and the rise of managerial judging, depart significantly from the objectives and choices of the original Advisory Committee, changing and even reversing the initial work.<sup>148</sup> Certain changes apparently attempt to

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<sup>142</sup> See Order, *supra* note 140. For helpful discussions of the amendments, see A. MILLER, *THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984); Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1640 (1983). The amendment of Rule 7 merely makes motions subject to Rule 11's requirements and will only be treated in this Article in conjunction with Rule 11.

<sup>143</sup> See FED. R. CIV. P. 16(c). Matters appropriate for discussion at such conferences include issue formulation, advisability of pleading amendments, avoidance of unnecessary proof, and witness and document identification. Particularly important to public law litigation are the possibilities of settlement, of employing extra-judicial processes to resolve cases, and of using special procedures to manage suits involving "complex issues, multiple parties, difficult legal questions or unusual proof problems." FED. R. CIV. P. 16(c)(10). See also McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818 (1988).

<sup>144</sup> See FED. R. CIV. P. 16(b). Within 120 days of filing, the judge must issue a scheduling order imposing time restraints on party joinder, amendment of pleadings, submission of motions and completion of hearings and discovery.

<sup>145</sup> See FED. R. CIV. P. 16(f). Sanctions can be imposed upon litigants, attorneys, or both for failing to appear at, to be prepared for, or to participate in good faith in, pretrial conferences.

<sup>146</sup> See Order, *supra* note 140; FED. R. CIV. P. 26(b)(1) (judges may limit discovery found "unreasonably cumulative or duplicative" or "unduly burdensome or expensive" in light of the needs of the case); FED. R. CIV. P. 26(g) (requiring sanctions when attorneys fail to "reasonably inquire" before filing discovery requests, responses, or objections).

<sup>147</sup> See Order, *supra* note 140. The Rule states that a lawyer's signature on every filing, including pleadings, motions, and discovery papers, is a certification that the filing is premised on "reasonable inquiry," is well-grounded in fact and law, and is not submitted for any inappropriate reason. The Rule requires sanctions for violations of the certification requirements. FED. R. CIV. P. 11.

Closely related to the 1983 amendments were two abortive Advisory Committee attempts to amend Rule 68 to encourage settlement by permitting sanctions for the unreasonable rejection of settlement offers. A 1985 Supreme Court case may have effects similar to those intended by the two abortive attempts. See *Marek v. Chesny*, 473 U.S. 1 (1985); see also *infra* notes 241-74 and accompanying text.

<sup>148</sup> I rely most in this paragraph on Subrin, *supra* note 21, at 1650-52. For instance, Rules 11, 16, and 26 substitute court control for lawyer self-regulation, and Rule 26 limits considerably open-ended discovery. The proliferation of local Rules has under-



make the Rules work as initially intended or to correct earlier errors by adopting proposals rejected in 1938.<sup>149</sup> Additional developments may be efforts to fill gaps in the original Rules<sup>150</sup> or may constitute new understandings.<sup>151</sup>

Since the mid-1970s, Congress has evinced greater interest in certain of these issues, interest which culminated in the 1988 passage of the Judicial Improvements and Access to Justice Act.<sup>152</sup> That legislation modernizes much court rulemaking, increasing the processes and openness at all levels of the federal judiciary, while encouraging expanded experimentation with court-annexed arbitration, a principal form of Alternative Dispute Resolution.<sup>153</sup>

Public law litigation generally has increased, but the extent and timing of growth of specific types of public law litigation have varied. Public interest litigation has increased significantly since the mid-1970s.<sup>154</sup> Indeed, public interest litigants have become institutionalized participants in administrative proceedings and in courtroom litigation challenging agency activity.<sup>155</sup> Many suits today

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mined interdistrict court uniformity, while suggestions in the *MANUAL FOR COMPLEX LITIGATION, SECOND* (1985) and Rule 16 that several prototypical scheduling orders be developed for different kinds of cases have reduced intercase uniformity. Similarly, the rise of managerial judging and its formalization in Rule 16 illustrate attempts to adjust procedure to specific cases, thus eroding the trans-substantive premise of the original Rules. Moreover, the plethora of steps in lawsuits authorized by the 1983 amendments seriously threatens the drafters' efforts to simplify litigation.

<sup>149</sup> For instance, Rule 16 may be an effort to have pretrial conferences limit the scope of cases or ferret out meritless actions. The specific provision regarding issue formulation institutes an ideal similar to one suggested by Clark in 1935 but rejected by the Committee. See Subrin, *supra* note 3, at 978-79.

<sup>150</sup> This appears true of Rule 16's reference to settlement. See Resnik, *supra* note 3, at 496, 527.

<sup>151</sup> For example, the 1983 amendments candidly recognize that substance and procedure are inseparable. See Subrin, *supra* note 21, at 1650-51. For a valuable sense of changed conceptualizations of the judiciary's responsibilities for case management in the concrete context of application of Rules 16 and 26, see *In re San Juan Dupont Plaza Hotel Fire Litigation*, 857 F.2d 1007, 1011-13 (1st Cir. 1988).

<sup>152</sup> See PUB. L. No. 100-702, 102 Stat. 4642. Cf. H.R. REP. No. 100-889, 100th Cong., 2d Sess. 22-27 (1988), reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 5983-87 (discussion of growing Congressional interest, including increased intervention in rulemaking). During the relevant period, there have been criticisms and suggestions for reform of the rulemaking process. See, e.g., J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977); Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975). But see Hazard, *supra* note 39, at 1287-94.

<sup>153</sup> See 28 U.S.C. §§ 2071-2074, 2077 (1988) (provisions modernizing rulemaking); 28 U.S.C. §§ 651-658 (1988) (provisions regarding court-annexed arbitration).

<sup>154</sup> Increases in public interest litigation are difficult to document accurately because much relevant data need refinement. See Chayes, *Public Law Litigation*, *supra* note 2, at 1303. Numerous writers, however, acknowledge that public interest litigation has increased. See, e.g., Miller, *supra* note 83, at 7; Resnik, *supra* note 3, at 510-12.

<sup>155</sup> Public interest litigants' vindication of substantive and procedural rights afforded earlier by courts and Congress have contributed to these developments. See *supra* notes 83-99 and accompanying text.

contesting administrative decisionmaking have a "tripolar" party structure comprised of government, regulated interests, and public interest litigants.<sup>156</sup> The number, size, and types of public interest litigants, especially those with business or conservative orientations, have expanded.<sup>157</sup> These litigants have enjoyed considerable success on the merits, winning hundreds of cases,<sup>158</sup> and in securing attorney fee awards.<sup>159</sup>

Mass tort litigation has emerged as a new type of public law litigation since the mid-1970s.<sup>160</sup> Much of this litigation involves compensatory claims of large numbers of plaintiffs allegedly injured by defective products, such as Agent Orange and the Dalkon Shield.<sup>161</sup> Although certain aspects of mass tort cases resemble private two-party tort suits, they can pose complex party questions relating to plaintiffs, defendants, and absentees<sup>162</sup> as well as complicated issues involving relief.<sup>163</sup> The comparatively small

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<sup>156</sup> These cases often involve an even broader array of participants, such as local citizens or state agencies, especially when the government is charged with responsibility for enforcing the laws. See, e.g., *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984).

<sup>157</sup> See N. ARON, *supra* note 1, at 74-78, 115-21; Houck, *supra* note 33 (discussing the expansion generally and business-oriented entities specifically).

<sup>158</sup> Two successes discussed below involve management of public lands. See *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988); *Northern Alaska Envtl. Center v. Hodel*, 803 F.2d 466 (9th Cir. 1986). Cf. *Natural Resources Defense Council, Inc. v. EPA*, 705 F. Supp. 698 (D.C. C. 1989) (recent success). These litigants also have successfully challenged numerous deregulatory initiatives. See Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 426 n. 17 (1987) and sources cited therein.

<sup>159</sup> Some recent Supreme Court cases suggest that public interest litigants may be less successful in securing future attorney fee awards. See, e.g., *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), 478 U.S. 546 (1986). Cf. Resnik, *supra* note 3, at 518-19, 31-32 (discussing Court decisions making less attractive provisions of major fee-shifting legislation); see also *infra* note 284.

<sup>160</sup> See, e.g., *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989). See Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845, 849-93 (1987) (salient characteristics of mass torts); Marcus, *supra* note 136, at 671-75, 692 (analysis of "tort crisis" which now has eclipsed institutional reform litigation in significance); Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986) (helpful analysis of mass tort litigation); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984) (discussing problems peculiar to mass exposure accident claims).

<sup>161</sup> For helpful examination of those cases, see P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986); S. ENGELMAYER & R. WAGMAN, *LORD'S JUSTICE: ONE JUDGE'S BATTLE TO EXPOSE THE DEADLY DALCON SHIELD* I.U.D. (1985).

<sup>162</sup> Professor Mullenix, for example, found existing Rule 23 inadequate in such cases and recommended special federal legislation. See Mullenix *supra* note 160. Cf. Abraham, *supra* note 160, at 876-80 (problems with Rule 23's application in mass tort cases). *But cf. A.H. Robins*, 880 F.2d at 729-40 (courts increasingly rely on Rule 23 to solve problems mass tort cases create).

<sup>163</sup> See Marcus, *Apocalypse Now?* (Book Review), 85 MICH. L. REV. 1267 (1987) (discussing problems involved in structuring relief, especially judicial involvement in settle-

number of mass tort cases concluded to date, their complexity, and disparate judicial treatment of them make uncertain the future of mass tort suits.

Institutional reform litigation generally has decreased since the mid-1970s. It is unclear whether all types of institutional litigation, however, have declined. The number of civil rights class actions has plummeted from 1586 in 1975, to 798 in 1980, to 185 in 1986.<sup>164</sup> Nonetheless, plaintiffs continue to bring cases seeking reform of entities, such as prisons and schools. One district judge recently entered a far-reaching affirmative decree in a suit involving discrimination in housing and education by the City of Yonkers, New York, while a Texas district court ordered the Federal Bureau of Investigation to revamp its procedures for promoting Hispanics and members of other minority groups.<sup>165</sup> Although it is difficult to predict the future of institutional litigation, numerous recent developments suggest that it may be in jeopardy.<sup>166</sup>

Public interest litigants have brought, or sought to participate in, a growing number of federal civil cases to assert the rights, interests, or viewpoints of large, unorganized groups of people. This ac-

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ment negotiations, in the Agent Orange case). Cf. Pub. L. No. 100-702, §§ 201-203, 102 Stat. 4646 (1988) (legislation addressing multi-party, multi-forum problems in mass injury cases arising from single incidents, such as that in *In re San Juan Dupont Plaza Hotel Fire Litigation*, 857 F.2d 1007 (1st Cir. 1988)).

<sup>164</sup> See *The Rise and Fall of the Class Action Lawsuit*, N.Y. Times, Jan. 8, 1988, at C8, col. 1 [hereinafter *Class Actions*]; cf. Galanter, *supra* note 125, at 946 (class actions fell 73% from 1976 high of 3,584 to 971 in 1985); Marcus, *supra* note 136, at 688 (absolute number of institutional reform cases at height of popularity quite small); Resnik, *supra* note 3, at 511 (characterizing "structural reform" cases as "statistical rarities on the federal docket").

<sup>165</sup> See *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987); *Judge Orders Sweeping Changes in the FBI's Promotion System*, N.Y. Times, May 6, 1989, at 1, col. 2.

<sup>166</sup> See, e.g., Fallon, *supra* note 2, at 5. But cf. Chayes, *Foreword*, *supra* note 2, at 57 (even a Court opposed to public law litigation is reduced perforce to practicing such litigation).

Numerous ideas explain the discrepancies observed between public interest and institutional reform litigation (mass tort litigation remains too nascent for comment). For instance, public interest litigation apparently has increased, because much of it resembles traditional two-party private litigation—except one party is the government—and has been authorized by earlier statutory or case law. The decline in institutional litigation may be attributable to certain ways in which it contrasts with public interest litigation. For example, the relief sought in much institutional litigation continues to raise troubling questions of constitutional authority, federalism, and legitimacy. See *Ruiz v. Lynaugh*, 811 F.2d 856, 863 (5th Cir. 1987) (Hill, R.M., J., concurring); *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1019 (7th Cir. 1984). Institutional litigation also involves complex, and often intractable, problems, such as the difficulties of reforming a recalcitrant bureaucracy or of securing resources from fiscally strapped legislatures. For recent cases that afford a sense of these difficulties, see *Grubbs v. Norris*, 870 F.2d 343, 344 (6th Cir. 1989); *Twelve John Does v. District of Columbia*, 861 F.2d 295, 298-301 (D.C. Cir. 1988), *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986).

tivity has generated new forms, understandings, relationships, and difficulties. Indeed, public law litigation may have transformed conventional understandings of adjudication, of the judicial function, and of the components of a lawsuit. Public law litigation poses novel procedural difficulties whose resolution has proved problematic under the Federal Rules. The following section examines how the federal courts have applied numerous Rules to certain difficult issues that public law litigation raises. This examination should enhance appreciation of these procedural complications while suggesting possible approaches for treating them and promising avenues for future exploration.

## II

### JUDICIAL APPLICATION OF THE FEDERAL RULES TO PUBLIC LAW LITIGATION

#### A. Introduction

Judicial application of numerous Rules has adversely affected public interest litigants. This section will closely analyze Rule 8 (covering pleading), Rule 11 (governing sanctions), Rule 68 (relating to "offers of judgment" or settlement and payment of costs), Rule 19 (regarding compulsory joinder of parties), and Rule 24(a)(2) (respecting non-statutory intervention as of right). This section will also examine briefly the enforcement of other Rules that have been troubling for public interest litigants. Scrutiny of the application of Rules 8, 11, 19, 24(a)(2) and 68 elucidates concepts integral to public law litigation, particularly those that distinguish it from private, traditional litigation. Moreover, enforcement of the five Rules has significance for much public law litigation and considerable reliable data on their application exist. Analysis of these Rules permits comparatively detailed evaluation, but the five encompass sufficiently diverse procedural fields and are sufficiently numerous to afford some representativeness and to test out the hypothesis that courts have enforced the Rules in ways problematic for public interest litigants. Brief examination of other Rules indicates that the difficulties observed in judicial application of Rules 8, 11, 19, 24, and 68 to public law litigation are not peculiar to those Rules and suggests the existence of a pattern.<sup>167</sup>

#### B. Judicial Application of the Rules

##### 1. *Federal Rule 8*

Rule 8, governing pleading, requires the plaintiff to submit a

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<sup>167</sup> This Article briefly analyzes the other Rules because less reliable data exists on their application.

“short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>168</sup> The Rule was intended to clarify and simplify pleading practice as it had existed under the codes while generally deemphasizing the significance of the pleadings.<sup>169</sup> In 1955, the Advisory Committee rejected Ninth Circuit proposals that could have reinstated code-type pleading, and no serious recommendations for alterations have been made since.<sup>170</sup> In 1957, the Supreme Court placed its imprimatur on the liberal, flexible pleading regime embodied in the Rules: “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>171</sup> Thus, the Court rejected fact pleading, the “*bête noir* of the codes,”<sup>172</sup> and embraced notice pleading: “[a]ll the Rules require is ‘a short and plain statement of the claim’ that will give to defendant fair notice of what the plaintiff’s claim is and grounds upon which it rests.”<sup>173</sup>

Despite this apparent death knell for pleading practice, “defendants continued to make motions to dismiss and courts continued to grant them.”<sup>174</sup> Moreover, since the 1970s, numerous judges have imposed more rigorous requirements upon complaints filed in certain categories of cases, most importantly those alleging civil rights violations. Today every “circuit has articulated a requirement of particularity in pleading for civil rights complaints.”<sup>175</sup>

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<sup>168</sup> See FED. R. CIV. P. 8(a). Of course, if plaintiff’s complaint fails to meet the Rule’s requirements, defendant can move to have it dismissed under Rule 12(b)(6). I rely substantially here on Marcus, *supra* note 12, and pertinent cases; cf. Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 Mo. L. Rev. 677 (1984) (heightened pleading requirements in civil rights cases).

<sup>169</sup> See Marcus, *supra* note 12, at 439-40; Roberts, *Fact Pleading, Notice Pleading and Standing*, 65 CORNELL L. REV. 390, 396 (1980). For example, courts are to grant freely the opportunity to amend a pleading. See FED. R. CIV. P. 15(b).

<sup>170</sup> See Marcus, *supra* note 12, at 445; Subrin, *supra* note 3, at 983-84.

<sup>171</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (citations omitted).

<sup>172</sup> Marcus, *supra* note 12, at 435.

<sup>173</sup> *Conley*, 355 U.S. at 47.

<sup>174</sup> Marcus, *supra* note 12, at 434. After *Conley*, however, the “intense academic discussion” of pleadings that preceded it “stopped abruptly.” *Id.*

<sup>175</sup> *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C. Cir. 1984), *cert. denied sub nom.*, *Brennan v. Hobson*, 470 U.S. 1084 (1985); *accord Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985). Both of these opinions include comprehensive compilations of the relevant cases, as does Roberts, *supra* note 169, at 417-19. Courts have required specificity in several other areas, including cases that implicate governmental officials’ immunity. See, e.g., *Butz v. Economou*, 438 U.S. 478, 507-08 (1978) (warning lower federal courts of “artful pleading” and suggesting dismissal of complaints that fail to state compensable claim under Constitution); *accord Elliott*, 751 F.2d at 1479. Another area treated minimally here is complaints alleging conspiracies. See, e.g., *Ostrer v. Aronwald*, 567 F.2d 1216, 1217 (9th Cir. 1977); Marcus, *supra* note 12, at 450. Most of the cases assessed here come under the generic rubric of civil rights, a number of which invoke 42 U.S.C. § 1983. Cf. *International Caucus of Labor Comms. v. City of Chicago*, 816 F.2d 337,

Numerous courts have found insufficient civil rights complaints that include vague, speculative, or conclusory allegations and have demanded factual specificity concerning the behavior, especially motive and intent, alleged to have contravened plaintiffs' rights. The Third Circuit, perhaps in the vanguard of this development, has specified the requirements that civil rights plaintiffs must satisfy.<sup>176</sup> For example, this court has stated that a civil rights complaint will be dismissed if it "does not in any manner allege facts showing a nexus between acts of racial discrimination and the named individual defendants"<sup>177</sup> or it if does not "identify the particular conduct of defendants that is alleged to have harmed the plaintiffs."<sup>178</sup> The Third Circuit also recently observed that the "crucial questions are whether sufficient facts are pleaded to determine that the complaint is not frivolous and to provide defendants with adequate notice to frame an answer."<sup>179</sup>

Some courts have been even more demanding, requiring that there be a factual showing of actual discriminatory intent, that claims be supported with references to material facts, or that pleadings specify sufficient instances of misbehavior related closely enough in time to sustain an inference of liability.<sup>180</sup> Certain judges

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340 (7th Cir. 1987) (Cudahy, J., dissenting) (application of more rigorous requirements to complaint alleging First Amendment violation); Marcus, *supra*, at 447-49 (application of more rigorous requirements to complaints alleging securities fraud).

<sup>176</sup> See Marcus, *supra* note 12, at 449 ("leader in this movement has been the Third Circuit"). The then-Chief Judge of the Third Circuit recently acknowledged the court's "longstanding rule [imposing] a higher standard on civil rights complaints" and selectively reviewed the "long line of cases [establishing] that civil rights deprivations must be pleaded with more specificity than other civil complaints." District Council 47 v. Bradley, 795 F.2d 310, 316, 317 (3d Cir. 1986) (Aldisert, J., dissenting).

<sup>177</sup> United States v. City of Philadelphia, 644 F.2d 187, 205 (3d Cir. 1980); accord Albany Welfare Rights Org. Day Care Center v. Schreck, 463 F.2d 620, 623 (2d Cir. 1972), *cert. denied*, 410 U.S. 944 (1973).

<sup>178</sup> Ross v. Meagan, 638 F.2d 646, 650 (3d Cir. 1981); accord Darr v. Wolfe, 767 F.2d 79, 80 (3d Cir. 1985); Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).

<sup>179</sup> Frazier v. Southeastern Pa. Transit Auth., 785 F.2d 65, 68 (3d Cir. 1986). This articulation, the majority opinion in District Council 47 v. Bradley, 795 F.2d 310 (3d Cir. 1986), Colburn v. Upper Darby Township, 838 F.2d 663, 666-67 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989), and Freedman v. City of Allentown, Pa., 853 F.2d 1111, 1114-15 (3d Cir. 1988) may reflect a moderating trend in the Third Circuit, although any apparent moderation may be attributable to the composition of panels or the facts of specific cases. See Frazier, 785 F.2d at 67-68; cf. Bradley, 795 F.2d at 319 (Aldisert, J., dissenting) (Bradley "majority interpret[s] . . . four sentences [in Frazier] to eviscerate an entire line of relevant case law"). Cf. Scott v. Rieht, 690 F. Supp. 369, 370-71 (recent example of stringent approach's application by district judge in Third Circuit).

<sup>180</sup> See Hall v. Pennsylvania State Police, 570 F.2d 86, 89 (3d Cir. 1978) (requiring pleadings specifying instances of misbehavior); Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978) (requiring references to material facts); Parish v. N.C.A.A., 506 F.2d 1028, 1033-34 (5th Cir. 1975) (requiring actual discriminatory intent).

have analyzed complaints to determine whether plaintiffs were likely to prove their factual conclusions and have dismissed pleadings found deficient.<sup>181</sup>

One of the first cases imposing stricter pleading requirements in civil rights litigation articulated most of the reasons still offered for doing so:

In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policemen and citizens alike considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.<sup>182</sup>

Numerous courts have adopted one or more of these rationales, and some judges have embellished the justifications or created others. The Third Circuit, for instance, has reasoned that requiring greater specificity in pleadings protects local governments from the threat of “massive interference” produced by litigation pursued for political harassment as well as protects their “files from overbroad and irrelevant inquiries”<sup>183</sup> and the police from onerous discovery requests.

Heightened pleading requirements in civil rights cases contravene the letter and spirit of the Rules’ pleading system and other aspects of the Rules as well as Supreme Court pronouncements. Federal courts may lack the requisite authority to demand more stringent pleading in this class of suits.<sup>184</sup> The Advisory Committee explicitly prescribed stricter pleading only in Rule 9, when a plaintiff alleges fraud,<sup>185</sup> rejected elevated standards and fact pleading when adopting Rule 8 in 1938, and has modified none of these decisions.<sup>186</sup> The Committee has also preserved a liberal pleading sys-

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<sup>181</sup> See Marcus, *supra* note 12, at 463-70 (citing *Schreck* and *Jones v. Community Redevel. Agency* as examples of this phenomenon in context of fact pleading revival). Some federal judges have opposed the adoption of stricter requirements. See, e.g., *United States v. City of Philadelphia*, 644 F.2d at 207 (Gibbons, J., dissenting); cf. *Hobson v. Wilson*, 737 F.2d 1, 31 (D.C. Cir. 1984), *cert. denied sub nom.*, *Brennan v. Hobson*, 470 U.S. 1084 (1985) (“overly rigid application . . . could lead to dismissal of meritorious claims”).

<sup>182</sup> *Valley v. Maule*, 297 F. Supp. 958, 960 (D. Conn. 1968) *Accord.* *Jones v. Community Redevel. Agency*, 733 F.2d at 649; *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976); *Schreck*, 463 F.2d at 622.

<sup>183</sup> See *United States v. City of Philadelphia*, 644 F.2d at 204-05; cf. Marcus, *supra* note 12, at 436 (fact pleading is an effort to cope with litigation explosion, open-ended discovery, and limited use of summary judgment).

<sup>184</sup> See, e.g., *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985) (Higginbotham, J., concurring); *Rotolo*, 532 F.2d at 925-27 (Gibbons, J., dissenting).

<sup>185</sup> See FED. R. CIV. P. 9(b).

<sup>186</sup> See *Elliott*, 751 F.2d at 1482 (Higginbotham, J., concurring); *United States v. Gus-*

tem which is meant to serve limited functions. When a court dismisses a civil rights complaint at the pleading stage doubting the plaintiff's success on the factual merits, the court essentially requires the plaintiff to marshal evidence before discovery. This judicial approach contradicts conventional learning about what information plaintiff must produce and a court may consider at that stage.<sup>187</sup>

Even if plaintiffs bring too many frivolous civil rights cases—a proposition the validity of which has been challenged<sup>188</sup>—other mechanisms enable courts to achieve results similar to those accomplished by heightened pleading requirements. For instance, Rule 56, prescribing summary judgment, is available. Indeed, the Supreme Court's recent approval of expanded use of Rule 56 and the increased judicial control over discovery effected by amended Rule 26 enhance the attractiveness of these alternatives to elevated pleading requirements.<sup>189</sup>

Stringent pleading standards in civil rights actions may have important implications for plaintiffs. They violate tenets of fundamental fairness, imposing upon a whole class of lawsuits and claimants more onerous demands without justification. These stricter requirements resurrect the rejected regime of fact pleading, apply the discredited notion of "disfavored claims"<sup>190</sup> to a type of litigation the Supreme Court has found essential to liberty,<sup>191</sup> and impose burdens on a category of litigants least able to overcome them. Courts will dismiss numerous civil rights cases earlier in the litigation process than they otherwise might, and some of these dismissals will be improper. For instance, plaintiffs pursuing civil rights claims typically have substantially less resources and information than governmental defendants. Stringent pleading requirements could disproportionately affect civil rights litigants by demanding information in their complaints that they lack the money to secure or that

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tin-Bacon Div., *CertainTeed Prods.*, 426 F.2d 539, 542-43 (10th Cir.), *cert. denied*, 400 U.S. 832 (1970); *Thompson v. Village of Evergreen Park*, 503 F. Supp. 251, 252 (N.D. Ill. 1980); *see also* *Wingate*, *supra* note 168, at 692.

<sup>187</sup> *See, e.g.*, *Means v. City of Chicago*, 535 F. Supp. 455, 460 (N.D. Ill. 1982); *Hill v. City of Atlanta*, 91 F.R.D. 528, 532 (N.D. Ga. 1981); *Marcus*, *supra* note 12, at 462-71.

<sup>188</sup> *See, e.g.*, *Rotolo*, 532 F.2d at 927 (Gibbons, J., dissenting); *Wingate*, *supra* note 168, at 688 (challenging the proposition that civil rights cases are disproportionately frivolous).

<sup>189</sup> *See infra* notes 368-75 and accompanying text (discussion of Rule 56 indicating expanded use may pose difficulties for public interest litigants); *supra* note 146 and accompanying text (Rule 26). Amended Rule 16 (governing pretrial conferences) provides an additional alternative to enhanced pleading requirements.

<sup>190</sup> For discussion and criticism of this notion, *see* *Marcus*, *supra* note 12, at 471-73.

<sup>191</sup> *See, e.g.*, *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968); *But cf. infra* note 284 (Court's ambivalent civil rights jurisprudence).



would only be available upon discovery. Judicial application of the 1983 amendments, especially Rule 11, could have certain similar effects on public interest litigants.

## 2. *The 1983 Amendments with Special Reference to Federal Rule 11*

The 1983 amendments to the Federal Rules were intended to increase the accountability of attorneys and judicial control of lawsuits to enhance the discovery process, and to promote the imposition of sanctions when warranted.<sup>192</sup> Rule 16 permits district judges to manage litigation more thoroughly, particularly before trial, by providing for pretrial conferences and scheduling orders.<sup>193</sup> Rule 26 increases judicial control over the discovery process by authorizing limitations on its timing and scope.<sup>194</sup> Rule 11 states that an attorney's signature on a paper constitutes a certification that to the best of the attorney's "knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose."<sup>195</sup> The amendment to Rule 11 also mandates imposition of sanctions, such as attorneys' fees, for violations of its provisions.

This subsection will examine the application of Rule 11 in more detail than the application of the other 1983 revisions. Attorneys' vigorous use of Rule 11 and its compulsory nature have already led to approximately 1,000 opinions (and to thousands more that have not been reported) under the amendment. Numerous writers have assessed the Rule and have compiled considerable data on its application.<sup>196</sup> In contrast, Rules 16 and 26 afford fewer opportunities

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<sup>192</sup> See Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097 (1983). For the description of the amendments, I rely on the sources cited in notes 142-47 *supra*. For developments subsequent to the August 1983 amendment of Rule 11, I rely most on S. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (1989) [hereinafter *TASK FORCE REPORT*]; Tobias, *Rule 11 and Civil Rights Litigation*, 37 *BUFFALO L. REV.* 485 (1988-89); Vairo, *Rule 11: A Critical Analysis*, 118 *F.R.D.* 189 (1988); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 *HARV. L. REV.* 630 (1987) [hereinafter *Plausible Pleadings*] and the reported cases.

<sup>193</sup> See *FED. R. CIV. P.* 16; *cf. supra* notes 143-45 and accompanying text (more discussion of amendment).

<sup>194</sup> See *FED. R. CIV. P.* 26; *cf. supra* note 146 and accompanying text (more discussion of amendment).

<sup>195</sup> *FED. R. CIV. P.* 11. This Article does not examine Rule 11's prohibition upon papers filed for improper purposes, because few courts have imposed sanctions for the proscription's violation and it has less potential for chilling public law litigation than the reasonable prefilng inquiry requirements.

<sup>196</sup> See sources cited *supra* note 192; LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 *VAL. U. L. REV.* 331, 332 n.2 (1988). (comprehensive, recent compilation of additional secondary sources). Moreover, there is a new study conducted under the aus-

and incentives to invoke their provisions. Judicial activity under those amendments also is more discretionary and, thus, less likely to result in orders, much less reported decisions.

It remains too early to ascertain how courts will ultimately apply Rule 11 or to gauge all of the effects of such enforcement. Moreover, relying on reported opinions warrants considerable caution. For example, much judicial activity involving Rule 11, even orders imposing sanctions, has not been reported, while judges writing opinions calling for sanctions may marshal the facts in ways favorable to their determinations.<sup>197</sup> Nonetheless, the reported cases suggest some problematic trends in judicial application of the Rule. Those opinions can be instructive, as when their very publication is meant to serve as a deterrent.<sup>198</sup>

Recently compiled data on reported opinions indicate that sanctions have been sought from, and imposed upon, plaintiffs in public law litigation, especially civil rights and employment discrimination litigation, considerably more often than in other kinds of federal civil litigation.<sup>199</sup> Professor Nelken found that "although civil rights cases accounted for only 7.6% of the civil filings between 1983 and 1985, 22.39% of the Rule 11 cases involve civil rights claims."<sup>200</sup> Professor Vairo who surveyed the nearly 700 reported Rule 11 decisions rendered between August 1, 1983 (the amendment's effective date) and December 15, 1987, offered specific data regarding cases in which sanctions were requested and imposed:

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pices of the Federal Judicial Center. See T. WILLGING, *THE RULE 11 SANCTIONING PROCESS* (1988). The "Center for Constitutional Rights [also is preparing to undertake] a national project to gather information concerning implementation of Rule 11." See *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 871 n.4 (5th Cir. 1988); cf. G. JOSEPH, C. SHAFFER & P. SANDLER, *SANCTIONS: RULE 11 AND OTHER POWERS* (2d ed. 1988) (recent ABA publication surveying developing law of sanctions).

<sup>197</sup> See Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 *Geo. L.J.* 1313, 1339-40 (1986) ("without access to the pleadings, or to the parties' supporting papers, the court's opinion is the only source from which to discern the issues"). The Third Circuit Task Force which collected data on all Rule 11 activity for a one year period in the circuit warned that published opinions are a "hazardous basis for inferring effects," especially when it is clear that the law is developing and developing differently nationwide and when it is unclear whether law on the books or on computer is fairly representative of that applied by district courts. See *TASK FORCE REPORT*, *supra* note 192, at 3. For more suggestions regarding these issues, see *id.* at 4-6, 44-45, 55-58.

<sup>198</sup> A Chicago firm, for instance, reportedly spent thousands of dollars to reverse a small sanction because of peer pressure and concern for its reputation. See *Has the Profession's Attempt to Curb Ludicrous Litigation Actually Boomeranged?*, *N.Y. Times*, Mar. 11, 1988, at B11, col. 1 [hereinafter *Rule 11 Boomerang*].

<sup>199</sup> I rely in this paragraph on *TASK FORCE REPORT*, *supra* note 192; Nelken, *supra* note 197; Vairo, *supra* note 192.

<sup>200</sup> Nelken, *supra* note 197, at 1327. Professor Nelken also provided data on the "geography of Rule 11," the circumstances in which parties seek sanctions, and how courts resolve sanctions issues. *Id.* at 1326-29.

Civil rights and employment discrimination cases are the subject of 28.1% of the Rule 11 cases (191 of the 680 requests). Plaintiffs are the target of the sanction request in 165 of these cases, 86.4%, which is somewhat higher than average (78.8%). Plaintiffs are sanctioned in 71.5% of the cases in which they are the target, a figure that is a full 17.3% higher than the average for plaintiffs in all other cases (54.2%). Defendants are targeted in 13.6% of the cases, and sanctioned in 50% of these cases, but this represents only 6.8% of all civil rights and employment discrimination cases.<sup>201</sup>

The Third Circuit Task Force, which assessed all Rule 11 activity in that circuit from July 1, 1987 through June 30, 1988, provided similar data:

Civil rights and employment discrimination cases account for 18.2% (24/132) of the Rule 11 motions in the survey [28.1%]. Plaintiffs are the "targets" of 70.8% (17/24) of the motions in such cases [86.4%], and they are sanctioned pursuant to 47.1% (8/17) of such motions [71.5%]. [That rate] is considerably higher than the rate (6/71 or 8.45%) for plaintiffs in non-civil rights cases.<sup>202</sup>

Numerous courts' application of amended Rule 11 has jeopardized litigation seeking to vindicate new legal theories, less popular and test cases as well as suits which plaintiffs cannot easily plead and prove without data that defendants possess. When treating lawyers' responsibilities to conduct reasonable pre-filing inquiries into their cases' legal premises, judges have applied Rule 11 "zealously against plaintiffs in 'disfavored' lawsuits," many of which have been characterized as "very close cases."<sup>203</sup> For example, the federal ju-

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<sup>201</sup> Vairo, *supra* note 192, at 200-01. Professor Vairo also provided a "statistical profile of Rule 11," which considers whether the Rule is a defendant's tool, its possible chilling effect, its growth areas, and the circuit courts' role in enforcement. *Id.* at 199-203. Professor Vairo recently observed that "nothing substantially different has happened" since she completed her study. Telephone conversation with Professor Georgene Vairo, Fordham University, School of Law (Mar. 14, 1989). My own impressionistic survey of reported opinions and those on Lexis since Professor Vairo concluded her assessment indicates that the level of Rule 11 activity in civil rights cases has remained relatively constant, although plaintiffs apparently have been sanctioned at a somewhat lower rate. The Third Circuit Task Force found Professor Vairo's statistics "highly problematic" because of "under-inclusiveness and double-counting" and because of "possible biases in publication practices and possible differential rates of appeal." TASK FORCE REPORT, *supra* note 192, at 58.

<sup>202</sup> See TASK FORCE REPORT, *supra* note 192, at 59, 69. The Task Force also provided much data and many observations on Rule 11's application which are helpful, because it conducted the first empirical study of unreported Rule 11 activity.

<sup>203</sup> Vairo, *supra* note 192, at 217; see, e.g., *Jennings v. Joshua Independent School Dist.*, 869 F.2d 870, 878-79 (5th Cir. 1989); *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194 (7th Cir. 1985); cf. G. JOSEPH, C. SHAFFER & P. SANDLER, *supra* note 199, at 28-29 (many sanction cases are fact-intensive close calls).

diciary has enforced this part of the amendment with comparative stringency in employment discrimination and civil rights litigation,<sup>204</sup> even though courts generally have treated attorney obligations regarding the law leniently.<sup>205</sup> Correspondingly, numerous courts imposing sanctions in civil rights suits have premised their decisions on the finding that plaintiffs were pursuing frivolous legal theories.<sup>206</sup> Courts have sanctioned those who bring securities fraud, RICO, and related trade regulation cases much less often on this basis, although the law in these fields is only minimally more unsettled and dynamic than in civil rights.<sup>207</sup> A small number of judges has explicitly recognized these difficulties. For instance, "some judges are avoiding Rule 11 until 'the line between creativity and frivolity' is clarified."<sup>208</sup> One circuit judge remarked that "due process, unfortunately, is an area where creativity and frivolity sometimes threaten to merge."<sup>209</sup>

Courts in general have assessed more rigorously attorneys' responsibilities to inquire into their suits' factual bases than their legal premises, while judges have vigorously applied Rule 11 to civil rights cases, closely scrutinizing their factual bases and the litigants' pre-filing factual investigations.<sup>210</sup> The Seventh Circuit affirmed a

<sup>204</sup> See Tobias, *supra* note 192, at 492. Vairo, *supra* note 192, at 205. See, e.g., Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., dissenting) (criticizing majority for "consuming five dense paragraphs" to show plaintiff's due process theory "wacky"), *cert. dismissed*, 108 S. Ct. 110 (1988).

<sup>205</sup> Some judges have created a category of "technical" violations which are effectively ignored. E.g., Greenberg v. Sala, 822 F.2d 882 (9th Cir. 1987) (collection of relevant cases); Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (civil rights case in which the court subscribed to technical violation idea but expressly rejected special treatment of such claims). See generally Vario, *supra* note 192, at 205, 213-17.

<sup>206</sup> See, e.g., Napier v. Thirty or More Unidentified Fed. Agents, 855 F.2d 1080, 1091 (3d Cir. 1988); Goldberg v. Weil, 707 F. Supp. 357, 362 (N.D. Ill. 1989). See Tobias, *supra* note 192, at 492; Vairo, *supra* note 192, at 202; cf. *Plausible Pleadings*, *supra* note 192, at 640-42 (examples of judges' conflicting opinions on what constitutes frivolous legal theory).

<sup>207</sup> See Vairo, *supra* note 192, at 201-02. See, e.g., Morda v. Klein, 865 F.2d 782 (6th Cir. 1989); Creative Bath Prod. v. Connecticut Gen. Life Ins. Co., 837 F.2d 561 (2d Cir. 1988) (recent RICO cases).

<sup>208</sup> *Rule 11 Boomerang*, *supra* note 198 (quoting Judge Gerard Goettel of the Southern District of New York).

<sup>209</sup> Szabo, 823 F.2d at 1085 (Cudahy, J., dissenting); cf. Woodrum v. Woodward County, 866 F.2d 1121, 1127 (9th Cir. 1989) (upholding sanctions' imposition would operate to chill civil rights plaintiffs who argue in good faith for modification or extension of rights and remedies under 42 U.S.C. § 1983); O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987) (although statute of limitations is good defense to employment discrimination suit, appellate court defers to district judge's finding that Rule 11 not violated because plaintiffs had "non-frivolous legal arguments" for avoiding limitations bar).

<sup>210</sup> See Tobias, *supra* note 192, at 493; Vairo, *supra* note 192, at 205, 218-19; *Plausible Pleadings*, *supra* note 192, at 635-37.

trial court's decision to dismiss a civil rights action and to impose Rule 11 sanctions because plaintiff's counsel undertook insufficient factual inquiry and filed a "ponderous, extravagant, and overblown complaint."<sup>211</sup> The circuit court observed that the plaintiff "would have stated an actionable claim" had he introduced certain facts, but the plaintiff probably could only have uncovered those facts through discovery.<sup>212</sup> Correspondingly, judicial application of Rule 11's "grounded in fact" requirement has had the effect of demanding increased specificity in pleading, if only to resist potential sanctions motions.<sup>213</sup> The development of elevated fact pleading threatens the liberal pleading regime of the Rules. It also contravenes the longstanding understanding that plaintiffs need not adduce at the pleading stage facts that only may be available after discovery to which plaintiffs have been entitled.<sup>214</sup> Judge Pratt of the Second Circuit astutely described this "Catch 22": "no information until litigation, but no litigation without information."<sup>215</sup> In this situation and numerous others, plaintiffs not only lose their cases but they or their attorneys also may incur sanctions.

The federal judiciary has offered relatively little justification for its application of Rule 11. Practically no courts specifically address the compiled statistical data; only a few mention the treatment of civil rights litigants. Most judges merely state that they are implementing Rule 11's purposes, such as deterring frivolous litigation.<sup>216</sup> Some courts acknowledge that application of the Rule may pose general problems and difficulties specific to civil rights cases. Several judges, in the context of civil rights cases, express rather general concern that abuse of Rule 11 could "stifle the creativity of

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<sup>211</sup> *Rodgers*, 771 F.2d at 206 (quoting the district court's opinion).

<sup>212</sup> *Rodgers*, 771 F.2d at 205-08 (facts concerning police officer's intent and governmental policies).

<sup>213</sup> See *Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986); *Rodgers v. Lincoln Towing Serv.*, 596 F. Supp. 13, 20 (N.D. Ill. 1984). Judge Easterbrook, the author of *Szabo*, stated that it is not permissible to file suit and use discovery as the sole means of determining whether plaintiff has a case. See 823 F.2d at 1083. He later seems to have moderated that view by observing that Rule 11 does not modify the "'notice pleading' approach of the federal rules." See *Frantz v. United States Powerlifting Fed'n*, 836 F.2d 1063, 1073 (7th Cir. 1987). See generally Tobias, *supra* note 192, at 493-95 (more discussion of this and related issues examined in remainder of this paragraph).

<sup>214</sup> See *Oliveri*, 803 F.2d at 1279; *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987). Thus, plaintiffs could be disadvantaged similarly to the ways they are by judicial application of Rule 8. See *supra* notes 168-91 and accompanying text.

<sup>215</sup> *Johnson by Johnson v. United States*, 788 F.2d 845, 856 (2d Cir. 1986) (Pratt, J., dissenting) *cert. denied*, 479 U.S. 914 (1986). For analysis indicating that judicial decisions actually imposing sanctions have disadvantaged civil rights plaintiffs nearly as much as determinations finding them in violation of Rule 11, see Tobias, *supra* note 192, at 498-501.

<sup>216</sup> See, e.g., *Szabo*, 823 F.2d at 1082; *Johnson*, 788 F.2d at 854; *Lepucki v. Van Wormer*, 765 F.2d 86, 87 (7th Cir. 1985).

litigants in pursuing novel factual or legal theories"<sup>217</sup> while a few judges state that the imposition of sanctions might preclude access to the courts for civil rights plaintiffs.<sup>218</sup> Some judges urge caution in applying the Rule to civil rights suits.<sup>219</sup>

Judicial application of Rule 11 since its 1983 amendment has had numerous adverse implications, especially for civil rights plaintiffs. The frequency with which courts have imposed Rule 11 sanctions in civil rights cases has effectively revitalized the antiquated notion of "disfavored" claims.<sup>220</sup> This result contravenes Supreme Court pronouncements as well as Congressional substantive, procedural, and fee-shifting legislation indicating that civil rights litigation should receive solicitous judicial treatment.<sup>221</sup> Judicial application of Rule 11 has eroded basic understandings reflected in the 1938 Rules, such as liberal pleading and the predisposition to resolve disputes on the merits.<sup>222</sup> Some commentators fear that placing "excessive emphasis on sanctions may lead to the greatest evil of the past—the prospect of too many cases being dismissed or litigated with little regard to the merits."<sup>223</sup> Indeed, Judge Cudahy, when dissenting from a decision to remand for fact-finding on the Rule 11 issue, perceptively wondered whether the circuit panel appeared "almost at the point of saying that the main question before the court is not 'Are you right?' but 'Are you sanctionable?'"<sup>224</sup>

Such judicial application makes civil rights plaintiffs and their counsel particularly vulnerable to Rule 11 sanctions. Public law suits look and are less traditional and pose more difficult problems

<sup>217</sup> *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 885 (5th Cir. 1988); *see also Donaldson*, 819 F.2d at 1561.

<sup>218</sup> *See Woodrum*, 866 F.2d at 1127; *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986).

<sup>219</sup> *See Davis v. Crush*, 862 F.2d 84, 92 (6th Cir. 1988); *Szabo*, 823 F.2d at 1085-86 (Cudahy, J., dissenting). Increased solicitude for civil rights and employment discrimination plaintiffs appears in some recent Rule 11 opinions. *See, e.g., Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 935 (2d Cir. 1989); *Dickens v. Children's Mercy Hospital*, 124 F.R.D. 209, 211 (W.D. Mo. 1989). Nonetheless, a panel of the Second Circuit explicitly refused to accord special treatment under Rule 11 to civil rights litigation or to attorneys who represent poor or minority clients. *Oliveri*, 803 F.2d at 1280-81. Some judges have exhibited little solicitude for, and even hostility toward, such suits and lawyers. *See, e.g., Szabo*, 823 F.2d at 1083-84; *infra* note 227 and accompanying text.

<sup>220</sup> *See Vairo, supra* note 192, at 200-01, 232-33; *supra* notes 200-02 and accompanying text; *cf. supra* note 190 (discussing history and antiquated nature of notion).

<sup>221</sup> *See supra* note 191 and accompanying text (Court pronouncements); *supra* notes 81, 91, 95, 97-98 and accompanying text (Congressional legislation).

<sup>222</sup> *See supra* notes 20, 168-91 and accompanying text (basic 1938 understandings); *cf. supra* notes 212-15 and accompanying text (erosion of understandings).

<sup>223</sup> *Vairo, supra* note 192, at 232; *cf. Marcus, supra* note 12, at 436-37, 450-51, 492-93 (implying that undue emphasis on fact pleading could result in dismissals with insufficient regard for merits).

<sup>224</sup> *Szabo*, 823 F.2d at 1086 (Cudahy, J., dissenting). *Accord Yancey v. Carroll County*, 674 F. Supp. 572, 575 (E.D. Ky. 1987).

of proof than conventional private cases. Public law litigation is often premised on unique, relatively untested, or unpopular legal theories, thus making it peculiarly susceptible to the assertion that it is frivolous.<sup>225</sup> Similarly, many of these cases may be based on limited factual information, because the relevant data are difficult to collect, are in the hands of the defendant, or implicate the defendant's mental state and, therefore, can be secured only through discovery. The limited resources of those who pursue public law litigation and of their lawyers exacerbate these problems. They have little time or money to conduct investigations, to compile and analyze information, to research and articulate pertinent legal theories, or to make "ingenious and sophisticated" arguments that will successfully repel requests for sanctions.<sup>226</sup> For instance, a district judge "assessed nearly \$54,000 in sanctions against Julius Chambers, director of the NAACP Legal Defense and Educational Fund."<sup>227</sup>

Judicial application of Rule 11 may be chilling civil rights litigation, although this is an extremely controversial issue. The practically routine nature of Rule 11 motions by defense counsel in civil rights cases may dampen plaintiffs' enthusiasm to pursue these claims, and members of the "civil rights bar [view themselves] as the primary victims of Rule 11."<sup>228</sup> The threat of satellite litigation over, much less actual imposition of, sanctions may dissuade litigants from bringing suits and may deter attorneys from accepting cases that require factual development or involve novel questions of law. When lawyers file such cases, they may be reluctant to pursue

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<sup>225</sup> See *id.* at 1085-86 (due process is area where "creativity and frivolity sometimes threaten to merge"); *Eastway Constr. Corp. v. New York*, 637 F. Supp. 558, 575 (E.D.N.Y. 1986) ("first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts . . . eventually led to *Brown v. Board of Education*").

<sup>226</sup> See *Szabo*, 823 F.2d at 1086 (Cudahy, J., dissenting). Several circuits have recognized that resource constraints are relevant to sanctions decisionmaking. See *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195-97 (3d Cir. 1988); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 605 (1st Cir. 1988). See also *Plausible Pleadings*, *supra* note 192, at 643-48 (more discussion of ideas in text). The Third Circuit Task Force stated that its "speculations about civil rights plaintiffs prompt us to urge that more attention be given to the possibility that the amended Rule has a disproportionately adverse impact on the poor." TASK FORCE REPORT, *supra* note 192, at 72.

<sup>227</sup> See *Rule 11 Boomerang*, *supra* note 198; *Harris v. Marsh*, 679 F. Supp. 1204, 1391 (E.D.N.C. 1987). Another judge recently imposed a one million dollar sanction on a non-profit legal organization. See *Giving Law Teeth (And Using Them on Lawyers)*, N.Y. Times, Mar. 17, 1989, at B4, col. 2.

<sup>228</sup> See *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 871 n.4 (5th Cir. 1988) (quoted language drawn from memorandum prepared in connection with national project mentioned *supra* note 199); *Vairo*, *supra* note 192, at 217 (Rule 11 aggressively invoked against civil rights plaintiffs); *cf. Mary Anne Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99 (3d Cir. 1988) (counseling against Rule's routine invocation); TASK FORCE REPORT, *supra* note 192, at 60, 72 (sharing some concerns of civil rights bar about Rule 11 but finding that sanctions motions not routine in civil rights cases in Third Circuit).

new or unusual legal theories or to advocate with adequate vigor their clients' causes because of the threat of sanctions.<sup>229</sup>

Certain difficulties with Rule 11's application arose despite the protestations of the Advisory Committee and some courts; other difficulties mean that the gravest fears of the amendment's critics may be realized.<sup>230</sup> The Committee recognized the possibility for abuse of Rule 11 and expressly disavowed any intent to "chill an attorney's enthusiasm or creativity in pursuing legal or factual theories,"<sup>231</sup> yet these problems apparently have materialized.<sup>232</sup> Notwithstanding the Committee's suggestion that pleaders could continue to file without information only available upon discovery,<sup>233</sup> some courts have effectuated the "Catch 22" that the amendment's opponents feared most by reading Rule 11 in ways that require greater specificity in pleading.<sup>234</sup>

Finally, it is important to remember that the material above is premised on reported cases and, thus, may be skewed or represent the tip of the iceberg. Courts have imposed sanctions in many situations without reported opinions, while in other instances the threat of sanctions may have been used informally to cajole, discourage, or bludgeon certain litigants and attorneys.<sup>235</sup> Indeed, a number of lawyers who litigate public law cases believe that Rule 11 constitutes an ongoing threat to their efforts, while specific anecdotes involving

<sup>229</sup> See Nelken, *supra* note 197, at 1340-44; Vairo, *supra* note 192, at 214, 217; *Plausible Pleadings*, *supra* note 192, at 643, 648.

<sup>230</sup> Critics feared most the "Catch-22," mentioned *supra* note 214 and accompanying text and *infra* note 234 and accompanying text. See Vairo, *supra* note 192, at 220; Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987) (discussion of other concerns of critics, such as chilling adversarial zeal); Nelken, *supra* note 197, at 1338-39 (same).

<sup>231</sup> See FED. R. CIV. P. 11 advisory committee note on 1983 amendments, *reprinted in* 97 F.R.D. 165, 199 (1983); see also Nelken, *supra* note 197, at 1339 (additional, related statements of the then-Committee chair and then-Reporter). Numerous judges have subscribed to these propositions. See, e.g., Thomas, 836 F.2d at 885; Donaldson, 819 F.2d at 1561.

<sup>232</sup> See *supra* notes 225-29 and accompanying text. The actual chilling effect, like informal threats to impose sanctions, is difficult to document. See *infra* note 236. See generally Tobias, *supra* note 192, at 503-06 (review of relevant information concluding that insights of informed observers, reasonable inferences drawn from Rule 11 experience to date, and accumulating anecdotal evidence show that there has been some chilling and considerable likelihood of recurrence).

<sup>233</sup> See advisory committee note, *supra* note 231, 97 F.R.D. at 198-201; see also *Plausible Pleadings*, *supra* note 192, at 634-35.

<sup>234</sup> See Vairo, *supra* note 192, at 220; *supra* notes 213-15 and accompanying text.

<sup>235</sup> See *supra* note 197 and accompanying text (difficulties in relying on unreported opinions). The assertion as to the threat of sanctions is premised on conversations with members of the public interest bar. For an example of a threat that was carried out in the context of Rule 16, see *infra* note 240 and accompanying text. The Third Circuit Task Force observed that "approximately sixty percent of the total Rule 11 iceberg and two thirds of the sanctions iceberg do not appear on the screen," but warned that data for one year in one circuit were a "weak base for drawing inferences in other parts of the country." See TASK FORCE REPORT, *supra* note 192, at 59.



threats to impose sanctions abound.<sup>236</sup>

The considerations mentioned above also pertain to judicial application of the other 1983 amendments. Few reported cases implicate Rule 26 apparently because attorneys have resolved their discovery problems with Rule 37.<sup>237</sup> Rule 26, however, does warrant future examination as discovery is quite important to much public law litigation. Those who pursue public interest litigation often lack data that government and industry possess, while those who bring mass tort cases frequently need information about defendants' behavior only available through discovery.<sup>238</sup> Moreover, the discretion Rule 26 grants judges to tailor discovery to the needs of the case and to the resources of the litigants could affect public interest litigants, because they will nearly always have fewer resources, and greater need for information, than their opponents.<sup>239</sup>

There has been a number of reported cases under Rule 16 governing pretrial conferences—but too few to reveal meaningful patterns. Rule 16 determinations are likely to be peculiarly fact-specific and of limited value, absent a full understanding of the issues at stake, while much judicial activity under Rule 16 is discretionary and of low visibility. The courts' activity can have important implications for public interest litigants, as when judges offer suggestions regarding settlement that range from polite recommendations to less than subtle demands. For example, the Seventh Circuit recently found that Rule 16 did not authorize a district judge to hold an attorney in criminal contempt for refusing to submit his client's civil rights action to a non-binding summary jury trial.<sup>240</sup> Thus, judicial

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<sup>236</sup> See *supra* note 228 and accompanying text (civil rights bar views itself as principal victim of Rule 11). The anecdotes were gleaned from conversations with members of the public interest bar. The exact nature of the threats and specific incidents are difficult to document, because suggestions that sanctions may be imposed can be quite subtle and because civil rights lawyers are understandably reluctant to jeopardize relationships with judges before whom they must subsequently appear. The study mentioned, *supra* note 199, may ameliorate some of these problems. See generally Tobias, *supra* note 192, at 501-02 (more discussion of these issues).

<sup>237</sup> See FED. R. CIV. P. 37.

<sup>238</sup> See Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549, 572 (1979) (public interest litigants lack data); cf. *supra* note 161 and accompanying text (mass tort cases).

<sup>239</sup> See FED. R. CIV. P. 26(b)(1). Cf. *The Summary Judgment Rule*, N.Y. Times, Aug. 17, 1987, at D2, col. 1 (observation by Professor Vairo that "it took a lot of time and discovery in the Ford Pinto case to uncover certain incriminating documents").

<sup>240</sup> The appellate court stated that Rule 16 was "not intended to require that an unwilling litigant be sidetracked from the normal course of litigation." The circuit court observed that the Rule's coercive use could alter the balance struck by Congress and the Supreme Court "between the needs for judicial efficiency and the rights of the individual litigant," by, for example, affecting "seriously the well-established rules concerning discovery and work-product privilege." *Strandell v. Jackson County*, 838 F.2d 884, 886-88 (7th Cir. 1988). But see *Homeowners Funding Corp. of Am. v. Century Bank*, 695 F.

activity under Rule 16 warrants future monitoring. Finally, although Rule 11 implicates issues of litigation financing, those questions are addressed more directly in three recent Supreme Court cases.

### 3. *Litigation Financing with Special Reference to Federal Rule 68*

Litigation financing has special significance for public interest litigants because they generally have relatively meager resources with which to pursue claims. The Supreme Court has recently applied three Rules—68, 23(e), and 54(d)—which implicate litigation financing. This subsection will analyze the Supreme Court's interpretation of Rule 68 more thoroughly because the issues raised in its decision resemble those in the case involving Rule 23(e). The opinion applying Rule 54(d) is simply narrow in scope.

Rule 68 relates to offers of judgment or settlement and the payment of costs.<sup>241</sup> The Rule, which has been amended minimally since its adoption in 1938, is intended to facilitate settlement and to minimize prolonged litigation by requiring a plaintiff who rejects a timely pretrial settlement offer more favorable than the ultimate judgment to pay post-offer costs.<sup>242</sup> However, Rule 68 "has rarely

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Supp. 1343, 1347 n.3 (D. Mass. 1988); *McKay v. Ashland Oil Co.*, 120 F.R.D. 43, 44-46 (E.D. Ky. 1988); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988); *but cf. G. Heileman Brewing Co., Inc. v. Joseph Oat Co.*, 871 F.2d 648, 656-57 (7th Cir. 1989) (appellate court affirmance of sanction imposed on party for failing to send corporate representative to court-ordered settlement conference).

<sup>241</sup> See FED. R. CIV. P. 68. See generally 7 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ch. 68 (1984) (analysis of the Rule from a private law perspective); 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE: CIVIL* §§ 300I-05 (1973) (same); Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1 (1985) (analysis of the Rule from a private law perspective including thorough evaluation of recent proposed amendments); Silverstein & Rosenblatt, *A Square Peg in a Round Hole: The Application of Rule 68 to Awards of Attorney's Fees in Civil Rights Litigation*, 16 CONN. L. REV. 949 (1984) (analysis of the rule from a public law perspective).

<sup>242</sup> Rule 68 reads:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made

been invoked and has been considered largely ineffective as a means of achieving its goals."<sup>243</sup> Nonetheless, the Advisory Committee recently proposed amending the Rule and the Supreme Court recently applied it in ways that could significantly affect public law litigation.<sup>244</sup>

The chief reason for Rule 68's perceived failure has been that throughout most of the Rule's existence judges and lawyers considered the term "costs" to exclude attorneys' fees.<sup>245</sup> The small amount at stake—court costs, filing fees and the like—discouraged parties' invocation of the Rule.<sup>246</sup> Thus the Advisory Committee, responding to increased dissatisfaction with the desuetude into which Rule 68 had lapsed and to the "litigation explosion," proposed amendment of the Rule in August 1983.<sup>247</sup> That proposal explicitly included reasonable attorneys' fees in post-offer costs and expenses<sup>248</sup> and specified that courts might reduce the sum awarded if they found expenses to be "excessive or unjustified under all of the circumstances."<sup>249</sup> Moreover, the proposed Rule expressly excluded from its purview class actions, a device important to pursuit of some public law litigation.<sup>250</sup>

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before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

<sup>243</sup> See proposed FED. R. Civ. P. 68 advisory committee note on 1983 Amendment, reprinted in 98 F.R.D. 363, 363 (1983).

<sup>244</sup> The analysis below differs from that of other Rules. It considers the Advisory Committee's work, provisions of the United States Code pertaining to fee-shifting, and the relationship among the Committee, the Supreme Court, and Congress with respect to Rule amendment. However, analysis of all of these is meant to enhance understanding of their interrelations and should afford insights for future work on the Rules.

<sup>245</sup> See *Marek v. Chesny*, 473 U.S. 1, 21-22 (1985) (Brennan, J., dissenting); Silverstein & Rosenblatt, *supra* note 241, at 956.

<sup>246</sup> See proposed advisory committee note, *supra* note 243, 98 F.R.D. at 363. Another reason identified for the Rule's disuse was that it "is a 'one-way street,' available only to those defending against claims. . . ." *Id.*

<sup>247</sup> *Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 339, 353, 361-67 (1983) [hereinafter *1983 Proposal*]. The reasons for amendment are in a document prepared by the Chairman and Reporter of the Advisory Committee. See W. MANSFIELD & A. MILLER, PROPOSED AMENDMENT OF RULE 68: BACKGROUND MEMORANDUM 8 (1984) [hereinafter *BACKGROUND MEMORANDUM*].

<sup>248</sup> "[T]he offeree must pay the cost and expenses, including reasonable attorneys' fees . . ." Proposed FED. R. Civ. P. 68 advisory committee note, reprinted in 98 F.R.D. at 353.

<sup>249</sup> See *id.* at 366. Use of the word unjustified was meant to "permit the judge to deny expenses altogether when, because of circumstances (for example, the . . . importance of the issues ('test case') . . . an award basically would be unfair." *Id.*

<sup>250</sup> See *1983 Proposal*, *supra* note 247, 98 F.R.D. at 363. Class actions were excluded because the offeree's rejection would "burden a named representative-offeree with the risk of exposure to heavy liability for costs and expenses that could not be recouped from unnamed class members [which] could lead to a conflict of interest between the

The 1983 proposal was very controversial and provoked sharp criticism from public interest litigants.<sup>251</sup> They primarily feared that implementation of proposed Rule 68 could have a chilling effect on civil rights litigation, either deterring its initiation or forcing premature, deficient settlements of actions that were commenced. Critics perceived the revision as a threat to the continuing operation of the Congressionally-adopted and Supreme Court-approved dual standard for shifting fees in civil rights cases. Under this dual standard, prevailing plaintiffs ordinarily recovered attorneys' fees, but successful defendants normally did not.<sup>252</sup> Opponents contended that application of the 1983 proposal could require public interest litigant plaintiffs who lost, and even those who prevailed, to assume post-offer attorneys' fees.<sup>253</sup> Granting the judiciary discretion to decrease fee awards failed to ameliorate these difficulties, because it was impossible to predict whether courts would choose to exercise such discretion. The amendment would force plaintiffs to estimate relatively early in a case, and often with too little data to make a sufficiently informed determination, the precise value of a settlement offer and exactly how a court might ultimately rule under the

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named representative and other members of the class." Proposed FED. R. CIV. P. 68 advisory committee note, 98 F.R.D. at 367.

<sup>251</sup> I rely most here on Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REF. 424 (1986); Silverstein & Rosenblatt, *supra* note 241; Simon, *supra* note 241.

<sup>252</sup> For example, the Senate Report accompanying the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), stated that successful plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" and that successful defendants should recover fees only when plaintiff's litigation was "clearly frivolous, vexatious or brought for harassment purposes." See S. REP. No. 1011, 94th Cong., 2d Sess. 4-5 (1976). Congress in passing such fee-shifting legislation meant to encourage vigorous private enforcement of civil rights laws and pursuit of new, complex legal theories which facilitate development of constitutional and statutory law. See *id.* Some of that legislation is not in the civil rights area. See *Marek v. Chesny*, 473 U.S. 44-46 (1985) (Appendix to opinion of Brennan, J., dissenting) (comprehensive compendium of fee-shifting legislation). The Court placed its imprimatur on the dual standard in several important opinions. See *International Federation of Flight Attendants v. Zipes*, 109 S. Ct. 2732, 2735 (1989); *Hensley v. Eckhart*, 461 U.S. 424, 429 n.2 (1983); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968).

<sup>253</sup> See Simon, *supra* note 241, at 14-16; Fiss, *Against Settlement*, *supra* note 55, at 1074, 1076-77 n.12; Silverstein & Rosenblatt, *supra* note 241, at 963. The lack of predictability attributed to the proposal's phrasing and to the advisory committee note were sources of difficulty. For instance, the 1983 Proposal, 98 F.R.D. at 361, spoke of an offer to settle for the "money or property or to the effect specified in [the] offer," while defendants typically make offers in monetary terms. Thus, would a judge rule in favor of a plaintiff who, having rejected a \$500 settlement offer, is "unable to prove actual damages at trial and recovers only nominal damages of \$1, but who nevertheless demonstrates the unconstitutionality of the challenged practice and obtains an injunction?" *Marek*, 473 U.S. at 32 n.48 (Brennan, J., dissenting); see also Fiss, *supra*, at 1080.

proposal.<sup>254</sup>

The Advisory Committee withdrew its 1983 proposal and issued a second one in August 1984.<sup>255</sup> The second proposal would have granted judges substantial discretion to impose appropriate sanctions, including attorneys' fees, when courts found that a settlement offer "was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation."<sup>256</sup> Thus, the 1984 revision was intended to respond to certain criticisms of the existing Rule and of the earlier proposal by importing amended Rule 11's sanctioning concepts.<sup>257</sup> Nonetheless, the 1984 version provoked many of the same criticisms as its predecessor, while creating some additional difficulties of its own.<sup>258</sup> Most importantly, the possibility that public interest litigants could be held responsible for post-offer attorneys' fees meant that the potential for chilling the initiation and continuation of public law litigation remained.<sup>259</sup>

The difficulties raised by the two rejected Advisory Committee proposals to revise Rule 68 could be realized with a 1985 Supreme Court decision. In *Marek v. Chesny*,<sup>260</sup> the Court considered the interrelation of Rule 68 and the Civil Rights Attorneys' Fees Awards Act of 1976.<sup>261</sup> That statute, in recognition of the need to facilitate meritorious civil rights litigation and of the resource disparities among litigants, permits prevailing plaintiffs to recover attorneys'

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<sup>254</sup> See Silverstein & Rosenblatt, *supra* note 241, at 964; *cf. Marek*, 473 U.S. at 32-33 (Brennan, J., dissenting) (criticizing majority's application of Rule 68 because it would have similar effects). Critics maintained that these problems could dissuade public interest litigants from commencing suits or lead them to settle prematurely for inadequate relief, chilling effects in direct contravention of Congressional policies reflected in fee-shifting statutes. See Silverstein & Rosenblatt, *supra*, at 962-65; Simon, *supra* note 241, at 14-16. Many other criticisms were lodged at the proposal. Some critics asserted that the process values inherent in public law cases are so important that the judiciary should not attempt to influence settlement in these suits in any way. See Fiss, *Against Settlement*, *supra* note 55, at 1085-90; Simon, *supra*, at 65-68, 75, 85; *cf. Edwards, Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 672 (1986) ("wholly inappropriate" to resolve "public law disputes in ADR systems that are totally divorced from courts").

<sup>255</sup> See *Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, reprinted in 102 F.R.D. 430, 432-37 (1984) [hereinafter *1984 Proposal*]. See also Simon, *supra* note 241, at 16-19, 28-53 (helpful analysis of the 1984 proposal).

<sup>256</sup> See *1984 Proposal*, *supra* note 255, 102 F.R.D. at 433.

<sup>257</sup> See *supra* notes 196-236 and accompanying text.

<sup>258</sup> For example, although the 1984 proposal placed more discretion in the judiciary with explicitly enumerated factors to guide the discretion's exercise, those changes did not necessarily afford public interest litigants greater certainty. See Simon, *supra* note 241, at 28-53 (thorough critique of the specific features of the 1984 version).

<sup>259</sup> See *id.* at 18-19, 40-44.

<sup>260</sup> 473 U.S. 1 (1985). For analysis of *Marek* and its implications, see Macklin, *Promoting Settlement, Foregoing the Facts*, 14 N.Y.U. REV. L. & SOC. CHANGE 575 (1986); Simon, *The New Meaning of Rule 68: Marek v. Chesny and Beyond*, 14 N.Y.U. REV. L. & SOC. CHANGE 475 (1986).

<sup>261</sup> 42 U.S.C. § 1988 (1982).

fees from defendants. The Supreme Court majority found that Rule 68 "costs" included attorneys' fees under the Civil Rights Fees Act and under other fee-shifting legislation which define costs to encompass such fees. Thus, "civil rights plaintiffs—along with other plaintiffs who reject" offers more favorable than their eventual recovery at trial will not be entitled to attorneys' fees for services rendered after they reject such offers.<sup>262</sup> The Court maintained that "merely subjecting" those who pursue civil rights cases to Rule 68's settlement provision would not "curtail their access to the courts or significantly deter" them from filing actions while declaring neutral the Rule's "clear policy of favoring settlement of all lawsuits."<sup>263</sup> The majority acknowledged that the application of Rule 68 in this context would require civil rights "plaintiffs to 'think very hard' about whether continued litigation is worthwhile."<sup>264</sup> Nevertheless, the Court found this effect of the Rule compatible with policies reflected in fee-shifting statutes because under those measures the degree of success secured is the most significant determinant in awarding fees.<sup>265</sup>

Justice Brennan's dissent identified numerous possible adverse implications of the majority's reading of Rule 68 for public law litigation and public interest litigants.<sup>266</sup> He criticized the majority for employing Rule 68's mechanical approach which merely compares the defendant's offer and the plaintiff's judgment. The majority's substitution of that rigid formulation for the Civil Rights Fees Act's discretionary inquiry into what is a reasonable fee in light of all pertinent considerations—an undertaking characterized as "acutely sensitive to the merits of an action and to antidiscrimination policy"<sup>267</sup>—inevitably would "require the disallowance of some fees that otherwise would have passed muster."<sup>268</sup> Justice Brennan asserted that interpreting the existing Rule to encompass attorneys' fees would create numerous skewed incentives to settle which directly conflict with the intent of Congress:<sup>269</sup> that "private attorneys general," who seek "vigorous enforcement of modern civil rights

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<sup>262</sup> *Marek*, 473 U.S. at 14.

<sup>263</sup> *Id.* at 10.

<sup>264</sup> *Id.* at 11.

<sup>265</sup> *See id.*

<sup>266</sup> *Id.* at 15. Justice Brennan reiterated a number of the criticisms directed at the two advisory committee proposals because the effects of their adoption would have resembled those of the majority opinion.

<sup>267</sup> *Id.* at 29 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980)).

<sup>268</sup> *Marek*, 473 U.S. at 30. For example, the plaintiff that recovered "only slightly less than the proposed amount in settlement" would be automatically prevented from recouping fees, even if plaintiff had secured "excellent results" in litigation that [would] have far-reaching benefit to the public interest." *Id.*

<sup>269</sup> *Id.* at 33-34.

legislation" and appear "before the court cloaked in a mantle of public interest," not "be deterred from bringing good faith actions to vindicate" fundamental civil rights.<sup>270</sup>

One helpful example of the chilling effect and uncertainty that could be engendered by the majority's approach is afforded in the dissent's reference to the existing Rule's ten day time limit on acceptance or rejection of settlement offers.<sup>271</sup> This time limit encourages a defendant who has violated the law to make low offers early in the litigation before a plaintiff can secure through discovery the requisite information to evaluate the strength of the case and the offer's reasonableness. These factors could force the plaintiff to accept an inadequate settlement, without being able to make an informed judgment, because of the great risk of having to assume automatically all post-offer attorneys' fees.<sup>272</sup>

The extant Rule's requirement that courts ascertain whether plaintiff's judgment was more favorable than defendant's settlement offer provides an equally troubling example. Defendants typically phrase settlement offers in monetary terms. Public interest litigant plaintiffs generally seek non-pecuniary, injunctive, or declaratory relief holding that certain procedures, practices, or policies of the defendant violate the Constitution or a statute. Monetary damages may be insignificant or irrelevant to these plaintiffs. Thus, judges will have to perform the complex tasks of quantifying any non-pecuniary relief that a plaintiff secures and of comparing it to defendant's monetary settlement offer. Justice Brennan observed that the "uncertainty in making such assessments surely will add pressures on a plaintiff to settle his suit even if by doing so he abandons an opportunity to obtain potentially far-reaching non-monetary relief—a discouraging incentive entirely at odds with Congress' intent."<sup>273</sup>

The Supreme Court's reading of Rule 68 could inhibit public interest litigants and public law litigation. The majority's interpretation, by producing uncertainty regarding attorney fee awards, may adversely affect public interest litigants, because their relative lack of resources makes them risk averse. Even if the litigants are not de-

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<sup>270</sup> *Id.* at 32 (citing S. REP. NO. 1011, *supra* note 252, at 4-5 (1976) and H.R. REP. NO. 158, 94th Cong., 2d Sess. 6 (1976)).

<sup>271</sup> *Marek*, 473 U.S. at 32.

<sup>272</sup> *Id.* at 32 n.48.

<sup>273</sup> *Id.* Indeed, the *Marek* majority's use of a monetary example to illustrate its reasoning may evince indifference to these problems as well as a lack of appreciation for the significance of non-monetary relief. *See id.* at 11. The Court recently has, however, exhibited concern about the difficulties and appreciation for the importance of non-monetary relief. *See Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486, 1492-94 (1989); *Blanchard v. Bergeron*, 109 S. Ct. 939, 945 (1989).

tered from commencing suits, they may feel constrained to settle prematurely. This interpretation could chill precisely that type of activity which Congress sought to promote by enacting fee-shifting legislation: the institution, and vigorous pursuit, of litigation seeking to enforce civil rights statutes, to vindicate important principles, public policies, and values which are not readily reducible to monetary form, and to challenge violations of the Constitution and statutes.<sup>274</sup>

The Supreme Court has similarly applied other Rules which implicate litigation financing. In *Evans v. Jeff D.*,<sup>275</sup> the Supreme Court analyzed the interrelation of the Fees Act and Rule 23(e), which requires judicial approval of decisions to compromise, dismiss, or settle class action litigation.<sup>276</sup> The Court's ruling allowed trial judges to approve settlements conditioned on plaintiffs' agreement to waive their attorneys' fees.<sup>277</sup> The majority relied partially on *Marek's* explicit rejection of the argument that civil rights cases ought to be treated differently from other civil suits for settlement purposes<sup>278</sup> while observing that preclusion of fee waivers could have the effect of "forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants."<sup>279</sup>

Justice Brennan, again in dissent, echoed some of the concerns he articulated in *Marek* and raised certain others.<sup>280</sup> He stated that

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<sup>274</sup> In a recent "case of first impression," a district judge stated that plaintiff, over defendant's vigorous opposition, established that the "long standing practice of Philadelphia's police officers . . . of engaging in warrantless searches of liquor licensed establishments, was unconstitutional," and commended counsel for achieving an "outstanding level of success." Nonetheless, plaintiff, who rejected a \$15,000 settlement offer and recovered a jury verdict of \$740, was denied post-offer attorneys' fees. See *Lawrence v. City of Philadelphia*, 700 F. Supp. 832, 835-36 (E.D. Pa. 1988). Several circuits have found that Rule 68 does not require prevailing civil rights plaintiffs to pay defendants' post-offer attorneys' fees. See *O'Brien v. City of Greer's Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989); *Crossman v. Marcoccio*, 806 F.2d 329, 333-34 (1st Cir. 1986), cert. denied, 481 U.S. 1029 (1987). See generally *Macklin*, *supra* note 260 (discussing post-*Marek* judicial application of Rule 68); *Simon*, *supra* note 260 (same).

<sup>275</sup> 475 U.S. 717 (1986).

<sup>276</sup> FED. R. CIV. P. 23(e). This provision states:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

*Id.*

<sup>277</sup> 475 U.S. at 737-38 ("It is not necessary to construe the Fees Act as embodying a general rule prohibiting settlements conditioned on the waiver of fees in order to be faithful to the purposes of that Act.")

<sup>278</sup> *Id.* at 732.

<sup>279</sup> *Id.* at 736-37. The Court did acknowledge, however, "that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases." *Id.* at 741 n.34.

<sup>280</sup> See *id.* at 743 (Brennan, J., dissenting).



allowing negotiated fee waivers would contravene Congress' purpose of providing economic incentives to attract competent attorneys for victims of civil rights violations who otherwise could not afford lawyers, thereby enabling the potential plaintiffs to act as "'private attorneys general,' vindicating the public interest."<sup>281</sup> Permitting civil rights defendants to condition settlement on a waiver of statutory attorneys' fees would diminish lawyers' expectations of recovering fees and their willingness to represent civil rights plaintiffs, making it more difficult for victims of discrimination to secure counsel.<sup>282</sup> These disadvantages could result, because fee waivers actually will affect lawyers alone. Most potential plaintiffs lack funds to pay attorneys' fees, so lawyers must rely exclusively on the Fees Act for remuneration. Plaintiffs, however, have no incentive to seek statutory fees and, therefore, may waive them in return for substantive relief. Justice Brennan cautioned that defendants will routinely demand fee waivers in future offers to settle civil rights cases and that the cumulative impacts of this practice would be to reduce the number of lawyers willing to accept civil rights cases and to make it more difficult for civil rights plaintiffs to secure counsel.<sup>283</sup> Thus, *Evans* and *Marek* might have certain synergistic effects: potential plaintiffs will file fewer civil rights cases, while the already miniscule percentage of suits tried will decline.<sup>284</sup>

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<sup>281</sup> *Id.* at 745.

<sup>282</sup> *Id.* at 754-55.

<sup>283</sup> *Id.* at 758-59. *But cf.* *City of Riverside v. Rivera*, 477 U.S. 561, 586 n.4 (1986) (Powell, J., concurring) (aware of no empirical study showing aggrieved persons have difficulty securing counsel in civil rights cases).

<sup>284</sup> See Resnik, *supra* note 3, at 532. Additional recent Supreme Court cases on attorneys' fees that do not involve the Federal Rules could have adverse effects on public interest litigation profound as those of *Marek* or *Evans*. See, e.g., *International Federation of Flight Attendants v. Zipes*, 109 S. Ct. 2732, 2736 (1989) (prevailing Title VII plaintiff can only recover attorneys' fees against intervenor whose "action was frivolous, unreasonable, or without foundation"); *Rhodes v. Stewart*, 109 S. Ct. 202 (1988) (summary reversal of attorney's fee award because civil rights plaintiff cannot be prevailing party when case rendered moot); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), 478 U.S. 546 (1986) (multipliers of lode star fee to compensate for assuming risk of loss impermissible under typical fee-shifting statute and specifically inappropriate in litigation under the Clean Air Act to enforce consent decree).

The Court has evinced somewhat greater solicitude for public interest litigants in other fee cases. See, e.g., *Missouri v. Jenkins*, 109 S. Ct. 2463 (1989) (eleventh amendment does not proscribe enhancement of fee award under 42 U.S.C. § 1988 against state to compensate for delayed payment); *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 109 S. Ct. 1486, 1493 (1989) (rejection of requirement that civil rights plaintiff must win litigation's central issue to be prevailing party under 42 U.S.C. § 1988); *Blanchard v. Bergeron*, 109 S. Ct. 939, 944 (1989) (contingent fee contract does not impose automatic ceiling on civil rights plaintiff's attorneys' fee award under 42 U.S.C. § 1988). The Court's ambivalence has been exacerbated by a clear lack of solicitude in other substantive and procedural rulings in the civil rights and employment discrimination areas issued just this term. See *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Lorance v. AT&T, Inc.*, 109 S. Ct. 2261 (1989); *Martin v. Wilks*, 109 S.

The Supreme Court's 1987 decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*<sup>285</sup> could have some similar, albeit more limited, impacts. In *Crawford Fitting*, the Court held that the federal courts lack discretion under Rule 54(d)<sup>286</sup> to award prevailing parties expert witness fees that exceed the thirty dollars per day prescription included in Section 1821 of Title 28 of the United States Code.<sup>287</sup> Justice Marshall, in dissent, argued that the majority's approach contradicted Rule 54(d)'s language and history. He also contended that its ruling was "ill-advised as a policy matter," because victorious litigants, who have incurred great expense due to the "unavoidable necessity of [procuring] expert witness testimony to establish or rebut" legal claims, should be able to invoke judicial discretion to recover such cost.<sup>288</sup> This rationale applies with special force to most public interest litigants, who have more need for, and less ability to pay, such experts than most litigants. Public interest litigants may lack scientific or technical information that the government has<sup>289</sup> or may lack the "in-house" expert capabilities that industry possesses.<sup>290</sup>

In sum, the Supreme Court's application of these three Rules implicating litigation financing could detrimentally affect public interest litigants and may chill public law litigation. It is too early to ascertain the ultimate effects of the Court's rulings.<sup>291</sup> Certain considerations, such as why individuals and attorneys choose to forgo suit, are very difficult to document. Nonetheless, it does appear that uncertainty generated by *Marek* and disincentives fostered by *Evans* may have deterred potential plaintiffs from undertaking public law

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Ct. 2180 (1989); *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115 (1989); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). *But see* *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989).

<sup>285</sup> 482 U.S. 437 (1987).

<sup>286</sup> FED. R. CIV. P. 54(d) ("costs shall be allowed as of course to the prevailing party" except when expressly provided for by statute).

<sup>287</sup> 28 U.S.C. § 1821 (1982) states, "a witness shall be paid an attendance fee of \$30 per day . . ."

<sup>288</sup> *Crawford Fitting*, 482 U.S. at 450.

<sup>289</sup> *See supra* note 238. Environmental public interest litigation provides a typical example.

<sup>290</sup> Most mass tort and sophisticated product liability litigation as well as much employment discrimination litigation require substantial "outside" expertise. It is interesting to note that the companion case in *Crawford Fitting* involved an employer's request for \$11,807 in witness fees from unsuccessful plaintiffs who alleged racial discrimination. *See Crawford Fitting*, 482 U.S. at 439.

<sup>291</sup> In *Evans*, 475 U.S. at 765-66, Justice Brennan, in dissent, offered several remedial suggestions, including the possibility of Congressional action. *Cf. Phillips v. Allegheny County*, 869 F.2d 234, 239 (3d Cir. 1989) (suggesting that if civil rights defendants abuse Rule 23(e), plaintiffs should timely raise with district judges who can employ managerial judging); N. ARON, *supra* note 1, at 129 (urging amendment because of adverse impacts on public interest litigants of *Evans* and *Marek*).

litigation.<sup>292</sup> Moreover, some district and circuit judges rely upon *Crawford Fitting* to limit witness fee awards even in civil rights cases when fees are sought pursuant to fee-shifting legislation.<sup>293</sup> Thus, as experience accumulates with lower federal courts' application of these Rules and with the practices of lawyers, parties, and potential litigants under the Rules, it should become easier to discern any adverse impacts on public interest litigants.<sup>294</sup>

#### 4. *The Party Joinder Amendments with Special Reference to Federal Rules 19 and 24*

The Federal Rules' party joinder provisions appear in Rule 19 (covering compulsory party joinder), Rule 23 (governing class actions) and Rule 24 (regarding intervention).<sup>295</sup> All three were included in the original 1938 Rules, and each was revised significantly in 1966.<sup>296</sup> This subsection will assess judicial application of Rules 19 and 24 in greater depth. Rule 19 is one of the few Rules that courts have applied in a way that clearly benefits public interest litigants, although such application has been problematic. Most public interest litigation today involves requests to intervene under Rule 24 filed by regulated entities, public interest litigants, or the government. Correspondingly, Rule 23 has engendered such controversy since 1966 that analysis of its judicial implementation may not yield trustworthy conclusions. Nevertheless, this subsection will treat Rule 23's application briefly.

##### a. *Federal Rule 19.* Rule 19 governs compulsory joinder of parties.

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<sup>292</sup> These assertions are gleaned from conversations with public interest litigants. For a sense of the post-*Marek* difficulties that can arise under Rule 68, see *Spencer v. General Electric Co.*, 706 F. Supp. 1234, 1240-44 (E.D. Va. 1989); *Lawrence v. City of Philadelphia*, 700 F. Supp. 832, 835-36 (E.D. Pa. 1988). Cf. *Phillips*, 869 F.2d at 235-40 (same as to post-*Evans* difficulties under Rule 23(e)). But cf. *id.* at 239 (not come to court's attention that civil rights defendants have persisted in demanding fee waivers).

<sup>293</sup> See, e.g., *Gilbert v. City of Little Rock*, 867 F.2d 1062 (8th Cir. 1989); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1575 (11th Cir. 1988); *Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987); *Central Delaware Branch, NAACP v. City of Dover*, 123 F.R.D. 85, 94-95 (D. Del. 1988).

<sup>294</sup> For example, numerous civil rights attorneys apparently have been able to avoid the potential effects of *Evans* by following Justice Brennan's suggestion that they "obtain agreements from their clients not to waive attorney's fees." *Evans*, 475 U.S. at 766. Recent theoretical work shows that fee-shifting can disproportionately affect those who are risk averse. See, e.g., *Rowe & Vidmar, Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. (forthcoming 1988); *Rowe, Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 164-70 (1984).

<sup>295</sup> See FED. R. CIV. P. 19, 23 and 24. See generally *Bone, supra* note 3 (helpful analysis of their histories); *Kaplan, supra* note 46 (same).

<sup>296</sup> See *Cohn, The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966); cf. *Kaplan, supra* note 46 (Reporter's analysis of original Rules, ostensible reasons for amendment, and revisions made).

The Rule asks whether absentees—individuals or entities not initially made parties to the litigation—should be added to ensure a fair resolution of the case.<sup>297</sup> Absentees are needed for just adjudication when the entities have an interest in the suit that could be adversely affected by resolution without them or when continuing without them could detrimentally affect those already parties.<sup>298</sup> When a court determines that an absentee is needed for just adjudication, the judge must ascertain whether joinder is feasible, an inquiry which entails consideration of subject matter jurisdiction, service of process and venue.<sup>299</sup> If the court finds joinder feasible, the absentee “shall be joined as a party in the action.”<sup>300</sup> When joinder is infeasible, the court must decide whether in “equity and good conscience” the plaintiff’s case should proceed without absentees or should be dismissed.<sup>301</sup> The considerations explicitly provided in Rule 19(b) guide this determination: the plaintiff’s need for a forum in which to pursue relief, the potential for prejudice to absentees’ interests if the litigation continues without them, the defendant’s concern that it not be exposed to multiple or inconsistent suits or responsibilities, and the interest of the public in efficacious resolution of controversies as well as additional factors that may be relevant to equity and good conscience.<sup>302</sup>

Much public interest litigation implicates Rule 19. For example, the Sierra Club recently challenged the National Park Service’s procedures for issuing permits to mine in Alaska’s national parks; the Club did not sue miners who had already secured permits.<sup>303</sup> A substantive decision favorable to the Sierra Club could have jeopardized these miners’ interests. The litigation raised two questions under Rule 19: first, did the Rule require that the absentee miners be brought into the litigation because their joinder was feasible?; and second, if joinder were not feasible, should the Sierra Club’s

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<sup>297</sup> See generally Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061 (1985) (analysis of Rule 19 from a private law perspective); Tobias, *supra* note 77 (analysis from a public law perspective).

<sup>298</sup> Factors relevant to ascertaining whether absentees are needed for just adjudication are in subsections 19(a)(1), (a)(2)(i) and (ii). See Tobias, *supra* note 77, at 774-78 & nn.144-77 (analysis of these factors and their application).

<sup>299</sup> FED. R. CIV. P. 19(a); see Tobias, *supra* note 77, at 778-79 & nn.178-80 (analysis of the “joinder limitations”).

<sup>300</sup> FED. R. CIV. P. 19(a).

<sup>301</sup> FED. R. CIV. P. 19(b); see Tobias, *supra* note 77, at 779-92 & nn.181-255 (analysis of that decision).

<sup>302</sup> See FED. R. CIV. P. 19(b). The characterization of the stated considerations is derived from the Supreme Court’s formulation in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-12 (1968). See Tobias, *supra* note 77, at 779-92 & nn.181-255 (analysis of factors relevant to equity and good conscience).

<sup>303</sup> See *Northern Alaska Envtl. Center v. Hodel*, No. J85-009 Civ. 2-3 (D. Ala. July 24, 1985), *aff’d on other grounds*, 803 F.2d 466 (9th Cir. 1986).

claim proceed without the absentees or should it be dismissed? The judge who tried this case, and courts hearing numerous other public law suits, have resolved these difficult party joinder issues by creating a "public rights exception."<sup>304</sup>

The public rights exception affords public interest litigants a forum in which to vindicate public rights by allowing plaintiffs' suits to continue without requiring joinder of absentees whose interests could be adversely affected by resolution in their absence. An important concomitant of the exception's application, however, has been the dearth of judicial concern for absentees' interests—interests that can be prejudiced substantially. In the worst case scenario, courts may have adjudicated absentees' interests without their having notice of the litigation.<sup>305</sup> In public law cases pursued during the last several years, large numbers of absentees, which had invested significant sums on preparing for contemplated natural resource exploration and development in reliance on governmental representations that the exploration and development were proper, were not ordered joined at the trial court level.<sup>306</sup> When public interest litigants convinced trial judges of the impropriety of governmental activity pertaining to absentee exploration and development, the courts effectively halted those operations. Accordingly, absentees have had to expend substantial resources on protracted litigation and even may lose all of their investments on exploration and development, should their contentions ultimately be rejected.<sup>307</sup>

Thus, federal judges have applied a public rights exception which facilitates public interest litigants' pursuit of their cases. Federal courts, out of apparent solicitude for plaintiffs' forum needs—a concern clearly and strongly expressed in Rule 19(b)—may have neglected an equally explicit and weighty concern in the same subsection, minimization of prejudice to absentees.<sup>308</sup> Even when judges

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<sup>304</sup> See *id.* See also Tobias, *supra* note 77, at 759-60 & nn.75-76 (listing cases in which the exception was applied) and at 759-69 & nn.75-123 (analysis of judicial articulation of the exception). The classic formulation which appears in half the opinions is: "when litigation seeks the vindication of a public right, third persons who may be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties." See, e.g., *Sierra Club v. Watt*, 608 F. Supp. 305, 324 (E.D. Cal. 1985) (quoting *Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919, 929 (11th Cir. 1982)).

<sup>305</sup> See *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988); *National Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 275-77, *aff'd on rehearing*, 676 F. Supp. 280, 283-84 (D.D.C. 1986), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987).

<sup>306</sup> See, e.g., *Conner v. Burford* (absentees allegedly invested millions of dollars exploring for oil and gas on public lands which they may be unable to recoup).

<sup>307</sup> The Ninth Circuit's "modification" of the district court's order apparently was an attempt to be responsive to these considerations in *Conner v. Burford*. See 836 F.2d at 1541.

<sup>308</sup> Most courts justify their application of the exception by appeals to public policy, such as governmental accountability for decisionmaking. See, e.g., *id.* at 1540-41 (con-

applying the public rights exception appear to resolve properly the compulsory party joinder question, it remains difficult to ascertain positively whether the courts correctly conducted the inquiry envisioned by Rule 19.<sup>309</sup> The uncertainty created by unclear judicial treatment has hampered absentees' planning while engendering prolonged litigation, wasting scarce private and public resources, and eroding the courts' credibility.<sup>310</sup>

b. *Federal Rule 24(a)(2)*. Rule 24(a)(2) governs non-statutory intervention of right.<sup>311</sup> It provides that, upon submission of a timely request, an absentee with a sufficient interest in the "property or transaction which is the subject" of the suit that could be adversely affected if the case is resolved without it shall be permitted to intervene, unless existing parties adequately represent its interest.<sup>312</sup> Thus, the concept of interest is integral to Rule 24(a)(2); it appears

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cern that "death knell" for "judicial review of executive decisionmaking" not sound and that two environmental statutes be enforced); cf. Tobias, *supra* note 77, at 764-65 (discussion of other justifications).

<sup>309</sup> The difficulties with these cases lie primarily in what courts omitted, assumed, or stated unclearly . . . . Moreover, it is often difficult to ascertain whether judges followed the rule's steps in resolving the joinder question, and a few judges apparently ignored or even violated the rule's explicit commands. Indeed, it is impossible to discern what some judges applying the exception in fact did.

Tobias, *supra* note 77, at 769.

<sup>310</sup> These problems do not necessarily mean that judges resolved the joinder issue erroneously. Indeed, a number of courts apparently made correct decisions and certainly effectuated rule 19's weighty concern for plaintiffs' forum needs. However, the reader of judicial opinions invoking the public rights exception cannot positively determine if most of the courts reached appropriate conclusions.

*Id.*

As this Article was in press, the Supreme Court issued an opinion interpreting Rule 19 in ways that could disadvantage public interest litigants. See *Martin v. Wilks*, 109 S. Ct. 2180 (1989). The Court permitted white firefighters, who claimed that they had been adversely affected by a consent decree governing employment practices between black firefighters and the City of Birmingham, Alabama, to challenge that decree in subsequent, separate litigation. The Court reasoned that it was preferable to require plaintiffs, such as the black firefighters, to join under Rule 19 anyone who could be practically prejudiced by the litigation, rather than require that absentees intervene under Rule 24. It is too early to discern all of *Wilks*' potential implications; however, the decision may disadvantage public interest litigants by, for instance, requiring that they incur great expense identifying and joining large numbers of absentees.

<sup>311</sup> FED. R. CIV. P. 24(a)(2). See generally Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721 (1968) (analysis of the Rule principally from a private law perspective); Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 NW. U.L. REV. 894 (1980) (same); Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.—C.L. L. REV. 31 (1979) (analysis from a public law perspective). I have not analyzed the application to public law litigation of Rule 24(a)(1), governing statutory intervention of right, because it is comparatively straightforward or of Rule 24(b), governing permissive intervention, because it is more discretionary, an easier case, and less instructive.

<sup>312</sup> FED. R. CIV. P. 24(a)(2).

explicitly in three requirements and implicates the fourth. The concept of interest is important to public interest litigants because they represent large numbers of unorganized people, such as the poor, who individually have interests that may appear relatively insubstantial, or they seek to vindicate comparatively intangible interests like that of the general public in clean air.

Much public interest litigation involves issues of intervention of right. In the case in which the Sierra Club questioned National Park Service procedures for issuing permits to mine in Alaska's national parks, the court ordered that the miners holding permits receive notice and an opportunity to request intervention in the apparent belief that they were entitled to intervene as of right in the lawsuit.<sup>313</sup> Correspondingly, public interest litigants often seek to intervene in litigation challenging governmental activity pursued by regulated entities, like energy companies.

Numerous courts have technically applied Rule 24(a)(2)'s four requirements to intervention requests of both private applicants and public interest litigants. Some courts have created presumptions as to the requirements' satisfaction or have developed judicial glosses on, or tests for, the requirements, which do not appear in the rule's text or in the Advisory Committee Note. Such treatment apparently reflects the Rule's essentially private law focus and a similar approach of the courts, which has adversely affected public interest litigants, both as plaintiffs and as potential intervenors.<sup>314</sup>

Nearly all courts read Rule 24(a)(2) to require that applicants submit timely intervention requests, show that they have the requisite interest in the pending litigation, demonstrate that resolution without them will impair their interests, and show that existing parties inadequately represent those interests. Moreover, most judges demand that prospective intervenors clearly satisfy all four of these requirements.

A number of circuit and district court judges has interpreted technically or narrowly the interest component of Rule 24(a)(2),<sup>315</sup>

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<sup>313</sup> See *supra* note 303 and accompanying text.

<sup>314</sup> When public interest litigants have sought to intervene in suits involving private interests and the government, the public interest litigants have enjoyed less success than private interests seeking to intervene in litigation public interest litigants have pursued against the government. Thus, public interest litigants have lost the opportunity to protect interests important to them, while the litigation they have brought has been complicated by the entry of absentees. This subsection emphasizes public interest litigants' requests to intervene, because their resolution poses greater difficulty.

<sup>315</sup> FED. R. CIV. P. 24(a)(2). The Rule speaks of an interest "relating to the property or transaction which is the subject of the action." The very language, "interest in the property," bespeaks a private law approach; public interest litigants often seek to vindicate something much less tangible and considerably less private, such as a moral or aesthetic interest.

demanding that potential intervenors have a significant, direct, legally protectable interest.<sup>316</sup> Moreover, three Justices of the Supreme Court recently subscribed to a similar formulation, stating that Rule 24(a)(2)'s "requirement of a 'significantly protectable interest' calls for a direct and concrete interest that is accorded some degree of legal protection."<sup>317</sup> A number of lower federal court judges have imposed even more stringent requirements, speaking in terms of an interest which the "substantive law recognizes as belonging to or being owned by applicants"<sup>318</sup> or demanding that potential intervenors possess interests equal to, or exceeding, that required for standing.<sup>319</sup>

Two recent Seventh Circuit opinions illustrate these restrictive approaches. One case involved an action brought by the United States to condemn private property for inclusion in the Congressionally authorized Indiana Dunes National Lakeshore.<sup>320</sup> The court denied intervention to a public interest group—with a thirty-year commitment to the creation of the Lakeshore, whose members had lobbied successfully for the legislation and used the area and which asserted that the government had abandoned acquisition efforts—because the organization lacked the only two legal interests the court treated as relevant in eminent domain proceedings.<sup>321</sup> The court stated:

While the Council's aesthetic and environmental interest in Cres-

<sup>316</sup> See, e.g., *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.), cert. denied sub nom. *Morial v. United Gas Pipe Line*, 469 U.S. 1019 (1984) (Rule 24(a)(2) requires a direct, significant, legally protectable interest in property or transaction subject of the action); *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982) (intervention of right requires direct, substantial, legally protectable interest in proceeding); *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983) (intervention prohibited when interest founded on what potential intervenors regard as enlightened public policy not legally protectable interest in contract at issue).

<sup>317</sup> *Diamond v. Charles*, 476 U.S. 54, 71, 75 (1986) (O'Connor, J., concurring, joined by Justices Rehnquist and Burger).

<sup>318</sup> *Athens Lumber Co. v. Federal Election Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982); accord *Heyman v. Exchange Nat'l Bank of Chicago*, 615 F.2d 1190, 1193 (7th Cir. 1980).

<sup>319</sup> See *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985), cert. denied, sub. nom. *Save the Dunes Council, Inc. v. United States*, 476 U.S. 1108 (1986) (exceeding standing); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (1984) (equal to standing). Cf. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (if justiciable case and controversy between parties, applicant need not demonstrate standing, although standing cases relevant to defining type of interest must assert). See generally *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986) (reserving for future decision question whether potential intervenor initially must satisfy standing).

<sup>320</sup> See *36.96 Acres of Land* 754 F.2d 855.

<sup>321</sup> "An eminent domain proceeding . . . considers only two legal interests. The first interest is that of the sovereign to exercise the power of eminent domain . . . . The second interest in an eminent domain proceeding is one of private ownership—essentially the ownership of the condemned property." 754 F.2d at 858.



cent Dune may indeed be legitimate and demonstrable, we cannot say that it is direct, substantial or legally protectable. Therefore, the Council's interest in ("guaranteeing the preservation of [Crescent Dune's] natural beauty,") . . . for public use is not the type of interest which justifies intervention under Rule 24(a).<sup>322</sup>

In the second case,<sup>323</sup> a public interest organization sought to vindicate its interest in the protection of "unborn" children and its "members' interest in adopting fetuses 'born alive' after abortions."<sup>324</sup> The group had been instrumental in securing legislation favorable to its views. The circuit court found that the group lacked a "direct and substantial interest sufficient to support intervention" in litigation challenging the legislation's constitutionality.<sup>325</sup> The court revealed its private law approach by flatly rejecting the proposition that the "interest factor must be broadly construed in public law cases where public interest organizations seek intervention"<sup>326</sup> and by concomitantly observing that "Rule 24(a) precludes a conception of lawsuits, even 'public law' suits, as necessary forums for such public policy debates" as those over abortion.<sup>327</sup>

The second intervention requirement asks whether the "action may as a practical matter impair or impede" the prospective intervenor's ability to protect its interest if the case proceeds in the applicant's absence.<sup>328</sup> Much of the above analysis of the interest requirement applies here. For example, the type of general, collective, or intangible "public" interests—like those in environmental quality or wilderness preservation—which public interest litigants typically champion, will less likely appear prejudiced as a practical matter than an individual, palpable, "private" interest, such as that in a contract. Thus, even when judges read the impairment requirement rather flexibly, finding sufficient the potential *stare decisis* effect of a judgment in an applicant's absence, that interpretation benefits public interest litigants less than those representing private interests.<sup>329</sup>

Rule 24(a)(2)'s third condition requires potential intervenors to

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<sup>322</sup> *Id.* at 859.

<sup>323</sup> See *Keith v. Daley*, 764 F.2d 1265 (7th Cir.), cert. denied sub nom. *Illinois Pro-Life Coalition v. Keith*, 474 U.S. 980 (1985).

<sup>324</sup> 764 F.2d at 1271.

<sup>325</sup> *Id.* at 1269.

<sup>326</sup> *Id.* at 1268.

<sup>327</sup> *Id.* at 1270. See *American Nat'l Bank & Trust v. City of Chicago*, 865 F.2d 144, 146-48 (7th Cir. 1989) (recent summarization of Seventh Circuit jurisprudence).

<sup>328</sup> See FED. R. CIV. P. 24(a)(2).

<sup>329</sup> Cases permitting intervention by private interests because industry members satisfy the practical prejudice condition are more the rule. Correspondingly, decisions allowing intervention by public interest litigants because they have met the requirement are more the exception. Compare *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 578 F.2d 1341 (10th Cir. 1978) and *Natural Resources Defense*

demonstrate that parties to the litigation do not adequately represent their interests.<sup>330</sup> A number of courts has been more willing to find the government a sufficient representative of public interest litigants than of private interests. The most stringent test, applied by some judges, requires that prospective intervenors, with purposes similar to the government litigant, prove collusion between the government litigant and other parties to the case, prove nonfeasance on the part of the government, or prove adversity of interest between the applicant for intervention and the government.<sup>331</sup> Numerous courts employ a presumption of adequacy when one party is a governmental entity responsible for representing the public, the public interest, or interests of the potential intervenor.<sup>332</sup> Moreover, a growing number of judges has premised the determination of adequacy of representation on the notion of the *parens patriae* developed in other contexts—the government is assumed to represent the interests of all citizens of the state.<sup>333</sup> Application of the *parens patriae* label, however, begs the question of adequacy of representation. The terminology and results in several recent cases reveal the detrimental impact on public interest litigants of the application reviewed and unclear judicial thinking. In those decisions, judges found that the government would be a sufficient representative of public interest litigants that sought to champion “public interests,” but the courts indicated or implied that the government could not adequately represent “private interests” asserted by others, such as industry.<sup>334</sup>

Intervention's fourth requirement is timeliness. Rule 24(a)(2)

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Council, Inc. v. Costle, 561 F.2d 904 (D.C. Cir. 1977) with Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983).

<sup>330</sup> See FED. R. CIV. P. 24(a)(2).

<sup>331</sup> See, e.g., Hoots v. Pennsylvania, 672 F.2d 1133, 1135 (3d Cir. 1982); Liddell v. Caldwell, 546 F.2d 768, 771 (8th Cir. 1976), cert. denied, 433 U.S. 914 (1977).

<sup>332</sup> See, e.g., United States v. City of Philadelphia, 798 F.2d 81, 90 (3d Cir. 1986); Keith, 764 F.2d at 1270; cf. United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 1982) (applying this presumption and the test appearing in the text accompanying note 331 *supra*); Lelsz v. Kavanagh, 98 F.R.D. 11, 16-17, 26 (E.D. Tex. 1982) (same).

<sup>333</sup> See generally United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 984-87 (2d Cir. 1984) (clear, comprehensive exposition of the *parens patriae* notion, as developed in other contexts, and a thorough compilation of cases).

<sup>334</sup> See, e.g., United Nuclear Corp. v. Cannon, 696 F.2d at 144 (government adequate representative of public interest group because group “asserts essentially the public interest rather than a personal interest” but inadequate to protect the interest of “private proprietors”); cf. Keith, 764 F.2d at 1270 (public interest litigant's assertion of essentially “personal” interests insufficient to intervene); Westlands Water Dist. v. United States, 700 F.2d 561, 563 (9th Cir. 1983) (public interest litigant's interest founded on “enlightened public policy” insufficient to intervene). Courts have occasionally found the government an adequate representative of private interests. See, e.g., Natural Resources Defense Council, Inc. v. New York Dep't of Env'tl. Conservation, 834 F.2d 60 (2d Cir. 1987).

merely states "upon timely application," and the Advisory Committee Note is silent on what timeliness means.<sup>335</sup> Nonetheless, many courts have embellished the requirement by developing four factors to consider in determining whether application is timely:

- (1) the length of time the prospective intervenor knew or reasonably should have known of its interests before it petitioned to intervene, (2) the prejudice to existing parties due to the failure to petition for intervention promptly, (3) the prejudice the prospective intervenor would suffer if not allowed to intervene, and (4) the existence of any unusual circumstances militating either for or against intervention.<sup>336</sup>

The development and application of the four considerations adversely affect public interest litigants. For example, private interests, such as regulated entities, have considerable time and money to monitor governmental activity that affects their interests, so they will know about litigation important to them. In contrast, the resource constraints of public interest litigants make it less likely that they will be aware of litigation implicating their interests and even if they are, it may be impossible to ascertain whether the relief entered will affect them. Indeed, public interest litigants have not learned of litigation's institution in certain cases involving compelling substantive issues, such as affirmative action.<sup>337</sup>

In short, the treatment of requests to intervene as of right

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<sup>335</sup> FED. R. CIV. P. 24(a)(2); FED. R. CIV. P. 24, advisory committee note, reprinted in 39 F.R.D. 109 (1966); see Note, *The Timeliness Threat to Intervention of Right*, 89 YALE L.J. 586 (1980) (analysis of timeliness).

<sup>336</sup> *United Nuclear Corp. v. Cannon*, 696 F.2d at 143-44; accord *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989); *Chiles v. Thomburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977); *EEOC v. United Air Lines*, 515 F.2d 946, 949 (7th Cir. 1975). Judicial development of the four factors and others may be justified on the basis of the Supreme Court's admonition that a trial court's timeliness determination is to be premised on consideration of "all the circumstances." *NAACP v. New York*, 413 U.S. 345, 365 (1973). Nonetheless, it is unclear why these factors were developed, when the Advisory Committee explicitly included some of them in Rule 24(b). Moreover, the factors essentially ask courts to reexamine certain matters that they expressly considered under the initial three requirements of Rule 24(a)(2) or were implicated in that treatment. This reexamination is particularly detrimental to public interest litigants, for example, because the nature of the interests they represent will make the interests themselves and prejudice to those interests appear insignificant, especially in contrast to other interests, such as industry interests.

<sup>337</sup> See *Jones*, *supra* note 311, at 43, 79-86 (cogent analysis of this problem in the affirmative action context); *BALANCING THE SCALES*, *supra* note 30, at ch. 4 (discussion of the resource constraints). For helpful, recent examples of the timeliness problems that can arise in related types of public law litigation, see *United States v. City of Chicago*, 870 F.2d 1256, 1263-64 (7th Cir. 1989); *Grubbs*, 870 F.2d at 345-46; *Chiles*, 865 F.2d at 1213. Ironically, the Supreme Court recently intimated that public interest litigants might file subsequent, separate suits challenging consent decrees resolving litigation in which they did not intervene. See *Martin v. Wilks*, 109 S. Ct. 2180 (1989).

under Rule 24(a)(2) reflects the private law phrasing of the provision and concomitant judicial thinking. Despite the admonitions of two of this nation's pre-eminent jurists, who advocated flexible, pragmatic application of Rule 24 to "other than traditional litigation,"<sup>338</sup> some judges have applied the Rule to public law litigation as if it were private litigation, while a number of courts has employed narrow, technical, or rigid approaches, creating unwarranted presumptions, glosses, or tests.<sup>339</sup> Judicial opinions offer relatively few explicit justifications for these interpretations, although courts may want to temper the litigation explosion, to achieve efficiency or to manage more effectively complex litigation, by limiting the number of parties.<sup>340</sup>

Such judicial treatment has had numerous adverse implications for public interest litigants. The relative ease with which those that represent "private" interests have gained access to public interest litigants' cases has complicated the litigants' ability to control their suits, and has increased their costs by delaying resolution of claims.<sup>341</sup> More importantly, the comparative difficulty that public interest litigants have encountered seeking intervention has had significant effects. When courts reject these entities' requests to intervene, the potential parties forfeit the valuable opportunity to participate in litigation that could adversely affect interests they consider significant, with concomitant losses in governmental accounta-

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<sup>338</sup> *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (Judge Friendly's recent admonition and example of flexible, pragmatic application); *Nuesse v. Camp*, 385 F.2d 694, 699-704 (D.C. Cir. 1967) (Judge Leventhal's similar treatment).

<sup>339</sup> Such treatment appears attributable substantially to the Rule's private law focus and concomitant judicial application. This does not necessarily mean that the results reached were incorrect or imply that the Rule was applied improperly, although these could be expected given the numerous grounds on which denial of intervention can be premised. Moreover, some courts, such as the ninth circuit, have applied Rule 24 in ways that are more responsive to public interest litigants. See *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 308-10 (9th Cir. 1989); *United States v. Oregon*, 839 F.2d 635, 637-39 (9th Cir. 1988); *United States v. Stringfellow*, 783 F.2d 821, 825-29 (9th Cir. 1986), *rev'd on other grounds sub nom.*, *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *United States v. Reserve Mining Co.*, 56 F.R.D. 408, 417-20 (D. Minn. 1972).

<sup>340</sup> For discussion of these and other justifications, see *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 530-34 (7th Cir. 1988); *Lelsz v. Kavanagh*, 98 F.R.D. 11, 21-23 (E.D. Tex. 1982). For additional reasons, see *supra* notes 320-27 and accompanying text.

<sup>341</sup> An "intervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." FED. R. CIV. P. 24, advisory committee note, 39 F.R.D. at 111. Such restrictions are rarely imposed on "private" intervenors. See *Stringfellow*, 480 U.S. at 380, 381-83 (Brennan, J., concurring) (analysis of implications of restrictions for intervenors of right); PRACTISING LAW INSTITUTE, COURT AWARDED FEES IN "PUBLIC INTEREST" LITIGATION chs. 7, 23 (1978) (discussion of public interest litigants' costs).

bility and in public acceptance of governmental activity.<sup>342</sup> In some circumstances, particular individuals or entities may be wholly unrepresented, while certain viewpoints may remain unarticulated. The denial of these intervention applications may deprive the federal judiciary of information, arguments, or perspectives it needs to make the best decisions. The considerations have special significance when the courts perform the exceedingly complex and delicate task of fashioning relief in institutional reform litigation, requiring the input and cooperation of all affected people, groups, and entities.<sup>343</sup> Judges are generalists, and courts and government litigants may not have adequate resources or the requisite expertise in certain fields, such as science or economics. Moreover, the government has no monopoly on what constitutes the public interest or on how to represent it most effectively in specific contexts. Indeed, the Rule as written, and as applied by a number of courts, may reflect an increasingly impoverished vision of considerable recent federal civil litigation and perhaps what it should represent in a modern democratic society.<sup>344</sup>

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<sup>342</sup> See, e.g., *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 473-75 (5th Cir.) (Williams, J., dissenting), *cert. denied sub nom. Morial v. United Gas Pipe Line*, 469 U.S. 1019 (1984) (in litigation deciding how much consumers will pay for electricity, consumers "must be allowed to participate [because] potent impact upon them"); *Northern Alaska Envtl. Center v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986) (National Park Service admitted violating National Environmental Policy Act and own regulations when approving mining in Alaska's national parks). For analysis of public accountability for and the acceptability of government decisions, see Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L. J. 572 (1973); Furrow, *Governing Science: Public Risks and Private Remedies*, 131 U. PA. L. REV. 1403, 1422-24 (1983).

<sup>343</sup> For example, individual institutional members, such as school teachers and prison guards, may have the best appreciation of the institutions in which they work and be uniquely situated to frustrate practical implementation of decrees by refusing to cooperate. Indeed, some public law cases involve controversial, and even volatile, issues like abortion and school desegregation, as to which emotions run high and there has been violence. In those situations, it is especially important to allow those who must "live with" the decision an opportunity to participate in its formulation. See Note, *Institutional Reform Litigation: Representation in the Remedial Process*, 91 YALE L.J. 1474 (1982). See also Thornburg, *Litigating, the Zero Sum Game: The Effect of Institutional Reform Litigation on Absent Parties*, 66 OR. L. REV. 843, 877-79 (1987).

<sup>344</sup> For discussion of one vision of considerable recent federal civil litigation, see *supra* notes 54-82 and accompanying text. Public values increasingly are the subject of adjudication in the modern state, because the courts, like the political branches, may provide an important forum for debate on issues of public moment. See Chayes, *Public Law Litigation*, *supra* note 2; Fiss, *Against Settlement*, *supra* note 55. For instance, it now could be unfair to relegate public interest entities that have won hard-fought victories in the political branches solely to the vicissitudes of government representation of their interests in litigation challenging those successes. E.g., *Keith v. Daley*, 764 F.2d 1265 (7th Cir.), *cert. denied sub nom.*, *Illinois Pro-Life Coalition v. Keith*, 474 U.S. 980 (1985); *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), *cert. denied sub nom.* *Save the Dunes Council, Inc. v. United States*, 476 U.S. 1108 (1986). Indeed, it may be disingenuous to so relegate a public interest group that pursued relief from the "polit-

c. *Federal Rule 23*. Rule 23, governing class actions, provides that a case can proceed as a class suit when the class is so numerous that joinder is impracticable, when the potential claims of the class members share common characteristics, when the person prosecuting the litigation has a claim typical of the class, and when that person is an adequate representative of the class members.<sup>345</sup> The class action device is the quintessential mechanism for pursuing public law litigation. Nonetheless, the class action has had such a checkered and controversial career since the 1966 amendment of Rule 23 that any attempt to draw conclusions about its judicial application is fraught with difficulty.<sup>346</sup> Professor Arthur Miller has observed that the bench and bar overused and abused class actions during the second half of the 1960s, that the period from approximately 1969 to 1974 witnessed considerable narrowing and some overreaction by the courts, and that the subsequent half-decade saw stabilization both in attorneys' use and judicial application of the device.<sup>347</sup> Moreover, during the 1980s, there has been a dramatic decrease in the number of class action suits filed, most precipitously in the area of civil rights.<sup>348</sup>

Judicial narrowing of the mechanism's use, courts' reticence to certify class actions, and uncertainty regarding fee awards engendered by cases like *Evans*,<sup>349</sup> apparently have contributed to this decline.<sup>350</sup> Indeed, the Supreme Court's application of Rule 23 in certain contexts illustrates the difficulties inherent in following an essentially private law approach to the Federal Rules. Professor Chayes has argued that the Court has treated "class representatives and members as classical individual claimants" for purposes of analyzing issues of notice, amount in controversy, authority of repre-

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ical" branches of government at judicial instigation or out of the group's possible concern for issues of judicial "equity, comity and federalism. See *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). See generally *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983) (public interest litigant's concerns respecting public policy on water use "should be addressed to the Executive or Legislative branches"). See also Sunstein, *supra* note 158, at 477 (odd to suggest that regulatory beneficiaries of Congressional statutory schemes must return to political process to remedy administrative illegality).

<sup>345</sup> FED. R. CIV. P. 23(a). The class action has inspired voluminous literature. See generally S. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987); Garth, Nagel & Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988); *Class Actions and Private Attorneys General*, 62 IND. L.J. 497 (1987).

<sup>346</sup> See *supra* note 114 and accompanying text (discussion of the 1966 amendment); Miller, *supra* note 103 (discussing the controversy over Rule 23); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 729-38 (4th Cir. 1989) (discussing controversy).

<sup>347</sup> See Miller, *supra* note 103, at 676-82.

<sup>348</sup> See *supra* note 164 and accompanying text.

<sup>349</sup> *Evans v. Jeff. D.*, 475 U.S. 717 (1986).

<sup>350</sup> See *Class Actions*, *supra* note 164.

sentatives, and standing.<sup>351</sup> These rulings may have arbitrarily limited operation of the class device as a mechanism for enforcing constitutional and statutory policies at the federal and state levels.<sup>352</sup> Correspondingly, Professor Abraham has stated that the Court's Rule 23 interpretations have impeded plaintiffs' efforts to invoke it and precluded a "considerable amount of federal class action litigation in mass tort cases."<sup>353</sup>

### 5. *A Miscellany of Additional Rules*

Judicial application of several other Rules apparently has adversely affected public interest litigants. The enforcement of the Rules—71, 60(b)(5), 52 and 56—will be explored briefly in this subsection.

Rule 71 states that when a court order is entered on behalf of someone not a party to the suit, that individual can enforce obedience to the ruling as if the person had been a party.<sup>354</sup> Certain public law litigation, such as school desegregation cases, can implicate the Rule when children or parents who did not participate in the initial suit assert that the school district is violating a decree entered in that litigation.<sup>355</sup> Some judges apparently have applied private law rationales when interpreting Rule 71, demanding that those who seek to invoke it satisfy requirements relating to standing or intervention, thus narrowly restricting the number of persons who can pursue relief.<sup>356</sup> For example, the fifth circuit rejected a request of members of the public, who were not parties to litigation brought by the federal government to enforce the Fair Housing Act, that a defendant which allegedly violated an order entered in the earlier litigation compensate the citizens.<sup>357</sup>

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<sup>351</sup> See Chayes, *Foreword*, *supra* note 2, at 28 (quotation); *id.* at 26-45 (remaining ideas in sentence).

<sup>352</sup> See *id.* at 28. In some situations, however, the Court has recognized class actions' value as mechanisms for treating "injuries unremedied by the regulatory action of government." See *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Cf. Hazard, *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 640 (1988) (federal courts have treated civil rights class suits more sympathetically than small claims damage class suits).

<sup>353</sup> See Abraham, *supra* note 160, at 877. *Accord* Mullenix, *supra* note 160, at 1047-60. *But cf.* In re *A.H. Robins Co.*, 880 F.2d at 734 (movement toward Rule 23's more liberal use in mass tort context).

<sup>354</sup> See FED. R. CIV. P. 71; see generally Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates An Injunction*, 1980 U. ILL. L. F. 971 (thorough treatment of Rule 71).

<sup>355</sup> See, e.g., *Spangler v. Pasadena City Bd. of Educ.*, 537 F.2d 1031 (9th Cir. 1976).

<sup>356</sup> See Rendleman, *supra* note 354, at 976-78 (analysis of judicial treatment and compilation of relevant cases).

<sup>357</sup> See *Northside Realty Assocs. v. United States*, 605 F.2d 1348, 1356-58 (5th Cir. 1979).

Judicial resolution of requests under Rule 60(b)(5) to modify consent decrees entered in institutional reform litigation has been related in certain respects to courts' application of Rule 71.<sup>358</sup> This provision states in pertinent part that courts may relieve parties from final judgments, orders, or proceedings if "it is no longer equitable that the judgment should have prospective application."<sup>359</sup> Numerous circuit courts have recently enunciated a standard for altering consent decrees agreed to in institutional reform cases which is less rigorous than the requirement imposed in other suits, because the "unique nature and demands of institutional reform litigation necessitate a more flexible approach to modification."<sup>360</sup> These courts state that, although a defendant cannot satisfy the longstanding standard of "unforeseen change in circumstances" imposed by the Supreme Court in private cases,<sup>361</sup> courts may permit modification:

if the defendant (1) can establish some change in circumstances has occurred from the time the decree was negotiated and approved; (2) convince the court that it has attempted to comply with the decree in good faith; and (3) asks for a modification that does not frustrate the original and overall purpose(s) of the decree . . . .<sup>362</sup>

Although the complex, delicate nature of institutional reform litigation may warrant somewhat greater flexibility, application of a less

<sup>358</sup> FED. R. CIV. P. 60(b)(5); see Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988) (helpful analysis of numerous aspects of consent decrees); *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1 (same); cf. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105, 1119-21, 1148-51 (1986) (modification motions "nominally brought" under Rule 60(b)(5) provision which "merely codifies preexisting law" and helpful analysis of modification in institutional reform context).

<sup>359</sup> FED. R. CIV. P. 60(b)(5).

<sup>360</sup> Ruiz v. Lynaugh, 811 F.2d 856, 861 (5th Cir. 1987); accord Hodge v. Dep't of Housing and Urban Dev., 862 F.2d 859, 861-64 (11th Cir. 1989); Plyler v. Evatt, 846 F.2d 208, 211-12 (4th Cir.), cert. denied, 109 S. Ct. 241 (1988); New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 969-70 (2d Cir.), cert. denied, 464 U.S. 915 (1983); Massachusetts Ass'n for Retarded Citizens v. King, 668 F.2d 602, 607-08 (1st Cir. 1981). Cf. Twelve John Does v. District of Columbia, 861 F.2d 295, 298-301 (D.C. Cir. 1988) (acknowledging more flexible standard and applying similar factors but enforcing them more strictly); Duran v. Elrod, 760 F.2d 756, 758-59 (7th Cir. 1985) (suggesting more flexible modification standard).

<sup>361</sup> See United States v. Swift & Co., 286 U.S. 106, 119 (1932); Jost, *supra* note 358, at 1107-13 (analysis tracing the development of that standard).

<sup>362</sup> Ruiz, 811 F.2d at 861 n.8; accord New York State Ass'n for Retarded Children, 706 F.2d at 969-70; Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120-21 (3d Cir. 1979), cert. denied sub nom., Thornburgh v. Philadelphia Welfare Rights Org., 444 U.S. 1026 (1980). The Supreme Court has issued in one case four differing opinions of a trial judge's power to alter a "consent decree," although only Justice Blackmun suggested a flexible approach and that was meant to effectuate civil rights litigants' interest. See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).



demanding standard means that those who seek institutional reform will encounter greater difficulty in securing meaningful relief and effective consent decrees, especially in retaining decrees. These complications will be exacerbated by the new Supreme Court opinion which permits third parties who have not intervened in employment discrimination litigation resulting in a consent decree that allegedly harms them, to challenge the decree in subsequent, separate litigation.<sup>363</sup>

Rule 52(a) provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness."<sup>364</sup> The Supreme Court held that the issue of intent to discriminate in employment under section 703(h) of the 1964 Civil Rights Act constitutes a "factual matter subject to the clearly-erroneous standard of Rule 52(a)" in *Pullman-Standard v. Swint*.<sup>365</sup> The effects of the Court's characterization have been to restrict appellate court inquiry into the state of mind of defendants who allegedly discriminate, thereby protecting those accused of discrimination, and to limit the procedural opportunities of individuals alleging discrimination, thereby making it more difficult for them to win their cases.<sup>366</sup> The ultimate impact of the *Swint* ruling remains unclear, although appellate courts have not restricted its application in reviewing findings of fact regarding discrimination solely to testimonial evidence or to cases arising under section 703(h) of the Civil Rights Act.<sup>367</sup>

Rule 56 governs motions for summary judgment. Courts grant these motions when pleadings, interrogatory answers, admissions,

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<sup>363</sup> See *Martin v. Wilks*, 109 S. Ct. 2180 (1989). See generally *Kramer*, *supra* note 358.

<sup>364</sup> FED. R. CIV. P. 52(a). See *Cooper, Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 644 (1988) (recent analysis of Rule's application); *Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635 (1971) (on appellate review).

<sup>365</sup> 456 U.S. 273, 288 (1982); see *Calleros, Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of Pullman Standard v. Swint*, 58 TULANE L. REV. 403 (1983) (analysis of *Swint*); *Resnik, Tiers*, 57 S. CAL. L. REV. 840, 998-1005 (1984) (same).

<sup>366</sup> See *Resnik, Precluding Appeals*, 70 CORNELL L. REV. 603, 617-19 (1985) (analysis contending that those phenomena extend broadly beyond the context of *Swint*); *Resnik, supra* note 365 at 1004-05 (same).

<sup>367</sup> See *Calleros, supra* note 365, at 408; *Resnik, supra* note 365, at 1004. Cf. *Scotts v. Memphis Fire Dept.*, 858 F.2d 289, 295-96, 303 (6th Cir. 1988) (appellate court reversal of trial judge's factual finding of pattern of intentional discrimination even under *Swint*'s clearly erroneous standard). *But cf. Walsdorf v. Board of Comm'rs for East Jefferson Levee Dist.*, 857 F.2d 1047, 1053 (5th Cir. 1988) (appellate court reversal of magistrate's factual finding of no intentional discrimination even under *Swint* standard). See also *Cooper, supra* note 364, at 665-66 (some circuits facilitate more searching review of findings of intent to discriminate under clearly erroneous rubric by insisting on detailed findings).

and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."<sup>368</sup> For many years, the federal courts exhibited considerable reluctance to grant summary judgment motions, particularly in complex cases.<sup>369</sup> During 1986, however, the Supreme Court encouraged the lower federal courts to grant such motions more liberally in what has been dubbed the "trilogy"—*Anderson v. Liberty Lobby, Inc.*,<sup>370</sup> *Celotex Corp. v. Catrett*,<sup>371</sup> and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>372</sup> One writer who surveyed the federal judiciary's application of summary judgment soon after issuance of the trilogy had difficulty ascertaining the overall effect of the procedural mechanism's expanded use.<sup>373</sup> Nonetheless, her review indicated that courts were granting summary judgment more freely than before in certain types of public law cases, especially those involving civil rights and employment discrimination.<sup>374</sup> Public interest litigants may be affected adversely by the Court's general suggestion that lower federal courts grant summary judgment more readily and by the Court's specific failure to separate the idea of predicting the trial record from the notion of sufficiency of the evidence.<sup>375</sup> The

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<sup>368</sup> FED. R. CIV. P. 56(c).

<sup>369</sup> See Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 745-46 (1974); Vairo, *Through the Prism: Summary Judgment and the Trilogy*, 3-11 (unpublished manuscript Nov. 1987). The leading Supreme Court cases contributing to this development were *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962).

<sup>370</sup> 477 U.S. 242 (1986).

<sup>371</sup> 477 U.S. 317 (1986).

<sup>372</sup> 475 U.S. 574 (1986). See Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 54 (1988) (helpful look at post-*Celotex* developments in lower courts and suggestions for future treatment of summary judgment); Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOKLYN L. REV. 35 (1988) (analysis of trilogy especially as could be applied to civil rights cases); Vairo, *supra* note 369, at 15-29 (analysis of the trilogy).

<sup>373</sup> See Vairo, *supra* note 369, at 41.

<sup>374</sup> See *id.* at 30-40. Professor Vairo listed more cases in each category granting or affirming summary judgment than cases denying or reversing it. Of course, the numbers were relatively small, so more time must pass before very reliable conclusions can be drawn. For a recent example of an appellate court's summary affirmation of a district judge's grant of summary judgment against a civil rights plaintiff, see *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989). Cf. *Healy v. N.Y. Life Ins. Co.*, 860 F.2d 1209 (3d Cir. 1988) (appellate panel affirmation of summary judgment in age discrimination case over dissent contending improper under *Celotex* and *Anderson*). Some courts, such as certain panels of the Third Circuit, have been more solicitous of plaintiffs in these cases. See, e.g., *Todaro v. Bowman*, 872 F.2d 43, 46-47 (3d Cir. 1989); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1232-33 (3d Cir. 1988); *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988).

<sup>375</sup> As to the general suggestion, Professor Vairo found that most circuit and district court judges clearly "have taken the Supreme Court's message to heart" and are "actively encouraging" summary judgment motions. Vairo, *supra* note 369, at 30; see, e.g., *Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied*, 480 U.S.

Court's conflation of these two concepts could result in a procedure which invariably benefits defendants. Regardless of which party moves for summary judgment, the plaintiff must tender proof which justifies a prediction of the record; this demand requires the plaintiff to assemble essentially the entire case and reveal much of that case to the defendant, although the defendant has no similar obligation.

In sum, the federal judiciary's application of numerous Rules has been problematic for public interest litigants. Most of this treatment involves the Rules as applied, not written, and poses particular difficulties for public interest litigants, often disproportionately affecting them. These judicial interpretations also appear to have had cumulative impacts on public law litigation. For example, a number of developments may have the synergistic effect of chilling public law suits, especially civil rights cases.<sup>376</sup> Although the precise nature of such application and all of its ramifications cannot be discerned, they are sufficiently clear to support the suggestions for the future which follow.

### III

#### SUGGESTIONS FOR THE FUTURE

##### A. Preliminary Conclusions and Suggestions for the Short Term

###### 1. *Preliminary Conclusions*

Nearly all of the problems for public law litigation and for public interest litigants identified involve judicial application of the Federal Rules, although a few difficulties appear attributable to the Rules as written.<sup>377</sup> The problems cluster primarily around timing

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932 (1987); see also Risinger, *supra* note 373 (thorough discussion of the Court's specific failure to separate the two concepts).

<sup>376</sup> Judicial application of Rules 8, 11, 68, and 23 could have that effect. Numerous other assertions could be posited, especially premised on the material above and the preliminary conclusions below, see *infra* notes 377-78 and accompanying text. This Article indicates that the whole is more than the sum of its parts. Courts have applied the Rules as observed for unclear reasons. Some justifications have been afforded in opinions or seem obvious, such as the litigation explosion. Others, which have not been articulated, probably range across a broad spectrum from inadvertence to insensitivity and even hostility toward public interest litigants. I certainly do not mean to suggest that the federal judiciary systematically set out to eliminate, or even to limit public law litigation. All I am saying is that courts applied the vast majority of Rules that I analyzed in ways that disadvantaged or disproportionately affected public interest litigants when most of the rules were susceptible to multiple, equally plausible interpretations.

<sup>377</sup> For example, the difficulties with Rule 24(a)(2) result both from judicial application and the phrasing of the provision. Although flexible application of the Rule as written could solve most problems observed, the Rule was widely acknowledged to have been "flawed in the amending." See, e.g., Kennedy, *Let's All Join In: Intervention Under Rule 24*, 57 Ky. L.J. 329, 374 (1969); Shapiro, *supra* note 311, at 757-64; Shreve, *supra* note 311, at 920 n.110; cf. Jones, *supra* note 311, at 48-86 (suggestions for amending rule

of acquisition of information, litigation financing, party joinder, and remedy formulation.<sup>378</sup> They also implicate issues of judicial case management, efficiency, and economy and of attorney responsibility as well as notions of "disfavored" litigation and of potential chilling effects on public interest litigants. These preliminary conclusions prompt a number of recommendations.

## 2. *Short-Term Suggestions*

The federal judiciary, the Advisory Committee, and the Congress should consider numerous short-term recommendations while additional information regarding the Rules' application to public law litigation is collected, analyzed, and synthesized. The federal courts should apply the Rules with greater solicitude for public interest litigants. Apparent judicial insensitivity to these litigants and mere inadvertence have created some of the difficulties. Courts seemingly have decided issues arising under the Rules that involve the litigants in a piecemeal fashion without reflecting on the cumulative impacts of such determinations.<sup>379</sup> Judges also have appeared more concerned about responding to certain problems, such as the litigation explosion or expeditious resolution of complex lawsuits, than about disadvantaging public interest litigants. Indeed, some courts, in apparent haste to achieve more dispositions or to conclude ostensibly "frivolous litigation," may have inadequately considered other important values, such as affording potential litigants an opportunity to be heard.

Many of the problems created can be ameliorated without straining either the language of the Rules or judicial credibility.<sup>380</sup>

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24 to accommodate public law litigation better). *Cf.* *Martin v. Wilks*, 109 S. Ct. 2180, 2187 (1989) (suggesting Rule 24(a)(2)'s application in ways favorable to civil rights litigation would require rewriting rather than interpretation).

<sup>378</sup> These are not the only areas in which problems cluster or the sole way to classify the difficulties. For example, the problems could be parsed in terms of timing: pretrial, trial, post-liability stage, post-judgment. Concomitantly, public interest litigation principally implicates party problems, while institutional litigation primarily involves questions of relief.

<sup>379</sup> *See supra* note 376 and accompanying text; *cf.* Resnik, *supra* note 136, at 444 (courts engage in managerial judging with little reflection on cumulative effects for adversary system or specific types of litigation).

<sup>380</sup> *See, e.g., supra* notes 184-89 and accompanying text (suggesting courts abandon heightened pleading requirements imposed under Rule 8 because they contravene Rules' letter and spirit and other mechanisms available to achieve similar results); *supra* note 377; Tobias, *supra* note 77 (suggesting courts abandon public rights exception to Rule 19 because judges can reach equally satisfactory results by applying existing rule and considering all relevant factors the rule requires to be considered); *but see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175-77 (1974) (Rule 23(c)(2)'s notice requirements cannot be read more flexibly). *But cf.* *Martin v. Wilks*, 109 S. Ct. 2180, 2187 (1989) (application of party joinder amendments more solicitous of civil rights litigation "would require a rewriting rather than an interpretation").

Judges can and should accord flexible and pragmatic interpretations to the Rules in public law cases.<sup>381</sup> Courts should also be sensitive to the special characteristics of public law litigation in contrast to private law litigation and should recognize the implications of applying the Rules to both types of suits.<sup>382</sup> For instance, vindication of fundamental civil rights and access to the civil litigation process are values many believe more significant than judicial economy. Correspondingly, courts ought to think imaginatively about ways of accommodating public law litigation without sacrificing important goals like expeditious dispute resolution. Courts could do so by applying mechanisms currently provided in numerous Rules, by employing the techniques tailored to specific types of litigation in the Manual for Complex Litigation, or by creating new procedural approaches.<sup>383</sup>

Certain of these suggestions also are relevant to the Advisory Committee's work. It should consider carefully, and provide for, public law litigation in the normal course of proposing amendments to specific Rules. Although the Advisory Committee, in the 1983 amendments and in its attempts to revise Rule 68, appeared insufficiently sensitive to public law litigation, the Committee can and should be more alert to public interest litigants' needs when contemplating future change. For example, it should remember that Rules which appear neutral can have different, and often disproportionate, impact on these litigants because of resource constraints.<sup>384</sup>

Congress should maintain as much interest in rulemaking, and

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<sup>381</sup> See *supra* note 338 and accompanying text (Judges Friendly and Leventhal champion flexible application of Rule 24 to "other than traditional litigation.").

<sup>382</sup> See *supra* notes 54-82 and accompanying text (salient characteristics of public law litigation). Important implications of applying the Rules to public law litigation will be the potential for disadvantaging public interest litigants because of their comparative lack of information and resources. See *supra* notes 251, 341 and accompanying text.

<sup>383</sup> For example, under existing Rule 24, public interest litigants' need to intervene and parties' needs for expeditious dispute resolution can be accommodated by permitting, but conditioning, the intervention. Correspondingly, if the remedial phase of institutional litigation is characterized by numerous parties, issues, and interests, it may be advisable to import techniques from administrative procedure, such as those used in notice-comment rulemaking. See generally *United States v. Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972); Pedersen, *Formal Records and Informal Rulemaking*, 85 *YALE L. J.* 38 (1975). For helpful suggestions regarding use of the Manual, see Simons, *The Manual for Complex Litigation*, 62 *ST. JOHN'S L. REV.* 493 (1988).

<sup>384</sup> The Committee's attempts to amend Rule 68, as well as the Court's application of that Rule in *Marek v. Chesny*, 473 U.S. 1 (1985), and its reading of the party joinder amendments in *Martin v. Wilks*, 109 S. Ct. 2180 (1989), illustrate such potential impact. Despite both entities' protestations that their efforts were neutral, they ignored the fact that civil rights plaintiffs challenging state action have vastly fewer resources than defendants. See Resnik, *supra* note 3, at 531. For an earlier, explicit refusal to take into account disproportionate effects on litigants with limited resources, see *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

continue to be as solicitous of public interest litigants, as it has in recent years. For instance, 1988 legislative branch action modernizing the rulemaking processes will have beneficial consequences. Congress itself, however, may want to monitor even more closely judicial application, and Advisory Committee amendment, of the Rules and should consider modifying specific judicial or Committee treatment with which it disagrees. For instance, Supreme Court interpretations of the interrelations between several Rules and the Civil Rights Fees Act may have so eroded Congress' underlying purposes in passing the legislation that amendment might now be appropriate.<sup>385</sup>

## B. Long-Term Suggestions

An important preliminary conclusion about the Rules' application to public law litigation is that we know too little to formulate definitive conclusions. It would be helpful to have clearer understanding of, and more information about, numerous considerations relating to the Federal Rules and to public law litigation. With that knowledge, even the most complex difficulties involving judicial application should be amenable to resolution.

### 1. General Information

a. *The Rules.* A more comprehensive and more refined appreciation of the Rules would facilitate future work. If the "history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms,"<sup>386</sup> and American proceduralists essentially tinker with the Rules in a never-ending cycle,<sup>387</sup> the Rules' history assumes considerable importance. Recent research, although helpful, creates its own difficulty by positing multiple, inconsistent accounts. Thus, these histories warrant attempts at reconciliation, while new work proceeds on the Rules.

The value choices reflected in the Rules must be explored, because they are crucial to judicial application. Were the 1938 Rules meant to be trans-substantive, to treat plaintiffs and defendants more equally, to favor merits resolution after full disclosure through discovery, to assimilate law into equity, or to increase judicial con-

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<sup>385</sup> The Court interpretations are *Marek and Evans*. Cf. Court Upholds Use of Rights Law But Limits How It Can Be Applied, N.Y. Times, June 16, 1989, at A1, A12, col. 3 (members of Congress will draft and support legislation meant to overturn recent court decisions on civil rights mentioned *supra* note 284).

<sup>386</sup> Resnik, *supra* note 365, at 1030.

<sup>387</sup> See Marcus, *supra* note 12, at 494; cf. Stewart, *supra* note 51, at 1779 (similar ideas regarding administrative procedure).

trol?<sup>388</sup> If the answers are affirmative, are they true today, and, if so, what are their implications for modern litigation?<sup>389</sup>

There should be additional work on the Rules as a set of litigating principles and on specific areas of procedure and particular Rules. For instance, were the party joinder Rules as drafted initially, and even as amended in 1966, premised on a vision of litigation which involves thousands of geographically dispersed parties and hundreds of complex issues?<sup>390</sup> If not, is more change now indicated?

The rulemaking process itself warrants additional work, although recent Congressional efforts to modernize the procedures should yield improvements. From that work, a jurisprudence of rulemaking should be developed. Courts, the Advisory Committee, and commentators should explore in greater detail whether more precise Rules can be written; if that proves impossible, what mechanisms could restrain the substantial judicial discretion afforded by the "general charters that today masquerade as rules"?<sup>391</sup> Some recent Advisory Committee activity could have empowered the federal judiciary at the expense of litigants and Congress.<sup>392</sup> The two abortive attempts to amend Rule 68 illustrate the effects of being insufficiently attentive to institutional responsibilities for rule-amending, to Congressional policies underlying fee-shifting legislation, and to the polycentric nature of rule-amending activity.<sup>393</sup>

<sup>388</sup> Correspondingly, were the 1938 drafters animated by New-Deal reformist tendencies, Realism, and professionalism? The answers probably are all of the above.

<sup>389</sup> For instance, if the original drafters favored a strong federal government because they viewed it as beneficent, what does that mean in the modern administrative state in which government is considered to be "part of the problem" by everyone from Ronald Reagan to Ralph Nader? Research on the Rules' history might fall within the ambit of work on the federal courts' history recently authorized by Congress. See H.R. REP. No. 100-889, 100th Cong., 2d Sess. 48-49 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 5982, 6008-09.

<sup>390</sup> Professor Miller persuasively argues that the 1966 drafters may not have contemplated Professor Resnik's "Calder-like configurations we call cases today." See Miller, *supra* note 103, at 669-76; see generally Resnik, *supra* note 3, at 502 n.30. Cf. Pub. L. No. 100-702, §§ 201-03, 102 Stat. 4646 (1988) (recent Congressional attempt to treat analogous party problems in mass accident context).

<sup>391</sup> Burbank, *supra* note 35, at 1474; cf. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (general discussion of difficulty in writing precise Rules).

<sup>392</sup> See *supra* notes 244-59 and accompanying text (Rule 68); Burbank, *supra* note 251 (same); Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983) (Rule 11).

<sup>393</sup> See *supra* notes 244-59 and accompanying text (Rule 68 and fee-shifting legislation); Friedenthal, *supra* note 12 (discussion of institutional rulemaking responsibilities); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393-405 (1978) (discussion of polycentricity). Indeed, the Supreme Court recently acknowledged that rulemaking has been "substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants." *Mistretta v. United States*, 109 S. Ct. 647, 665 n.19 (1989) (footnote omitted).

The process of rules revision should receive even greater scrutiny. Professor Lewis recently assessed those procedures and found that the "current institutional rulemaking machinery is plainly inadequate to the task of initiating needed proposals for the study of particular rules," and recommended that Congress reexamine the amendment process and reformulate or revitalize the existing mechanisms to make them more responsive to developments in litigation.<sup>394</sup> Other observers have suggested democratizing the Committee's composition or the rule-amending process by, for instance, appointing representatives of public interest litigants to the Committee or employing procedures similar to notice-comment rulemaking for rule-amending.<sup>395</sup> In 1988, Congress modernized the rulemaking procedures, while the Judicial Conference recently has modified certain of its rulemaking processes.<sup>396</sup>

b. *Public Law Litigation.* Although commentators have undertaken much valuable theoretical research into public law litigation and certain forms of such litigation now appear institutionalized, there is compelling need for a more thorough and refined appreciation of the theory and practice of public law litigation (a public law jurisprudence). Enhanced understanding would facilitate efforts to ascertain whether the litigation actually differs from private law cases in significant ways and whether it warrants special consideration under the Rules.

An attempt should be made to define public law litigation in terms of numerous salient characteristics. Because one definition cannot encompass the diverse forms that are included within the rubric of public law litigation, it is preferable to speak of salient or defining characteristics of that litigation.<sup>397</sup>

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<sup>394</sup> Lewis, *The Excessive History of Federal Rule 15(c) and its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1508-09, 1573 (1987). Another writer even more recently observed that Rule 11's 1983 amendment specifically and rulemaking generally have not been premised on sufficient data. See Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 6, notes 5-10, 83-87 and accompanying text (forthcoming 1989).

<sup>395</sup> For contrasting views of democratization, compare Hazard, *supra* note 39, at 1291-92, 1294 with Lesnick, *supra* note 152, at 580-81. Cf. Burbank, *supra* note 394, at note 81 (need to expand membership in club and expand activities beyond library); *supra* note 383 (notice-comment rulemaking procedures).

<sup>396</sup> See 28 U.S.C. §§ 2071-74, 2077 (1989) (Congressional modernization); R. COVER, O. FISS & J. RESNIK, *supra* note 39, at 1810 (recent Judicial Conference modification). See, e.g., *Procedures for the Conduct of Business By the Judicial Conference Committees On Rules of Practice and Procedure*, 120 F.R.D. 395 (1988).

<sup>397</sup> See Fallon, *supra* note 2, at 3. A number of these characteristics were examined above. See *supra* notes 55-82 and accompanying text. Efforts should continue, however, to develop others. Cf. Abraham, *supra* note 160, at 849-83 (recent example in mass tort context).



Creating some typologies also should be useful.<sup>398</sup> For instance, a typology of parties could be created. It might be helpful to categorize public interest litigants in terms of the individuals or interests the litigants represent; their areas of substantive expertise, such as natural resource preservation or consumer protection; or their principal purposes, such as litigating or lobbying legislatures or agencies.<sup>399</sup>

Developing a clearer vocabulary applicable to public law litigation will help judges, lawyers, and litigants talk more intelligently and intelligibly about the phenomenon. Available sources, such as judicial opinions and other legal writing<sup>400</sup> and work in non-legal fields,<sup>401</sup> can provide this vocabulary. A better appreciation of how certain aspects of public law litigation compare with their analogues in private law litigation should help to create the vocabulary. For example, if a dispute about public policy is considered the subject matter of a lawsuit, while a moral interest is deemed sufficient to participate in litigation, those concepts are considerably less tangible in public than in private law litigation.<sup>402</sup> Other disciplines can clarify understandings of concepts used imprecisely in law. For instance, conventional wisdom in the fields of political science and theory has suggested for some time that the "public interest" which the government claims to represent is best comprehended as consisting of numerous private interests.<sup>403</sup> This insight might mean that under Rule 24 the government should be considered an "adequate representative" of public interest litigants less often than before.<sup>404</sup> Moreover, it may be worthwhile to create new terminol-

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<sup>398</sup> Typologies are classification schemes employing subcategorization. Typologies could be useful in numerous ways. For example, on a practical level, a more sophisticated understanding of public interest litigants could help judges more effectively resolve Rule 24 intervention requests or construct representational frameworks in institutional litigation.

<sup>399</sup> I realize that certain considerations, such as public interest litigants' resources and funding sources which may be relevant to some Rules' application, could implicate privacy concerns. See Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51, 102-08 (1981).

<sup>400</sup> See, e.g., cases cited *supra* notes 311-44; Chayes, *Foreword*, *supra* note 2; Chayes, *Public Law Litigation*, *supra* note 2; Fallon, *supra* note 3; Fiss, *Against Settlement*, *supra* note 55.

<sup>401</sup> See, e.g., M. DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS* (1986); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); G. SCHUBERT, *THE PUBLIC INTEREST* (1962).

<sup>402</sup> Compare the interest considered sufficient to intervene in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) with the "property" spoken of in Rule 24, *supra* note 311.

<sup>403</sup> See, e.g., G. SCHUBERT, *supra* note 401; Gellhorn, *supra* note 81, at 360 (concern for the environment, for example).

<sup>404</sup> Nonetheless, courts have continued to find the government an adequate representative of public interest litigants that seek to represent the public interest. See *supra* notes 330-34 and accompanying text.

ogy to describe public law litigation. For example, Professor Chayes coined the term public law litigation in 1976,<sup>405</sup> while Professor Fiss has employed the term structural reform to describe certain types of institutional litigation.<sup>406</sup> It may now be appropriate to develop a "public law vision" of the Rules—one that simultaneously facilitates public interest litigants' vindication of important social values and takes into account the factors the Rules contemplate will be considered.

A catalog of the advantages and disadvantages of public law litigation should be compiled.<sup>407</sup> The very effort to define advantages and disadvantages may reflect political perspectives. For instance, public law litigation, which substantially improves the quality of an Interior Department decision to lease public lands, by affording endangered species of wildlife greater protection, but delays natural resource development on those lands for three years, could appear beneficial or detrimental depending on one's political viewpoint.<sup>408</sup> Even objectively identifiable advantages and disadvantages can pose difficulties, such as quantifying them for purposes of comparison. Nonetheless, there should be more work, especially aiming to identify additional benefits and costs, attempting to assign them weight in terms of relative importance, and refining understanding of their meaning.<sup>409</sup> For example, in litigation between the government and industry, numerous public interest litigants may have a strong interest in intervening to present their views, while the original parties could be as concerned about expeditious dispute resolution.<sup>410</sup> These conflicting interests might be accommodated by permitting one public interest litigant to intervene on behalf of all such litigants or by conditioning the participation of those allowed to intervene.<sup>411</sup>

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<sup>405</sup> See Chayes, *Public Law Litigation*, *supra* note 2.

<sup>406</sup> See Fiss, *supra* note 2, at 2.

<sup>407</sup> The principal benefit of public law litigation seems to be the improved decision-making of governmental institutions, while the principal detriments appear to be disruption of the institutions' operations and delay attributable to litigation.

<sup>408</sup> See, e.g., *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988); *Northern Alaska Envtl. Center v. Hodel*, 803 F.2d 466 (9th Cir. 1986).

<sup>409</sup> See Brunet, *Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978) (helpful effort in the context of Rule 24).

<sup>410</sup> The judiciary will share these interests in securing information to make the best decisions and in promptly concluding disputes. Perhaps the best treatment of these and additional concerns is Judge Friendly's opinion in *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984). Cf. *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 530-34 (7th Cir. 1988) (helpful analysis of these and related concerns).

<sup>411</sup> See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380, 383 (1987) (Brennan, J., concurring) (discussion of analogous possibilities and their benefits and disadvantages); *United States v. Reserve Mining Co.*, 56 F.R.D. 408, 419-20 (D. Minn. 1972) (same).

There should be attempts to reach more differentiated, refined understandings of public law litigation, particularly by placing in context numerous considerations delineated. For instance, public interest litigation primarily implicates party problems, while institutional reform litigation principally involves remedial questions.<sup>412</sup> Moreover, most public law litigation is imbued with process values, such as interests in participation and dignity, which means that it generally will be a less appropriate candidate for settlement than in other litigation.<sup>413</sup>

## 2. *Specific Information*

Information on federal civil litigation relevant to public law litigation and to the Rules should be explored. The Annual Reports of the Administrative Office of the United States Courts and the efforts of the Federal Judicial Center provide valuable information and promising points of departure, although additional sources should be consulted.<sup>414</sup> Some existing work includes general characterizations of the quantity of public law litigation.<sup>415</sup> Analysis of the pertinent information, which is tailored to public law litigation, however, is warranted. For instance, although data are available on the number of class actions filed annually, relatively little is known about the type of class actions these are, and class action suits comprise a comparatively small number of public law cases pursued.<sup>416</sup> Additional information relating to the following concerns would help facilitate future work: the Federal Rules under which problems arise for public interest litigants, why and how the difficul-

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<sup>412</sup> These characteristics are not always true. For instance, certain forms of institutional litigation can pose complex party problems involving adequate representation of affected interests, see Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982), and the generation of authoritative consent, see Fiss, *Against Settlement*, *supra* note 55, at 1078-82.

<sup>413</sup> See *supra* note 82 (litigation imbued with process values); *supra* note 254 (public law litigation inappropriate candidate for settlement).

<sup>414</sup> See T. Willging, *supra* note 196 (example of recent Rule 11 study conducted under Federal Judicial Center auspices). The data relied upon in compiling the MANUAL FOR COMPLEX LITIGATION, SECOND (1985) and those used in completing the American Law Institute's 1987 PRELIMINARY STUDY OF COMPLEX LITIGATION [hereinafter ALI STUDY] should be helpful. Moreover, Congress recently established a Federal Courts Study Committee which should generate valuable data. See Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644-45 (1988). For helpful discussion of difficulties entailed in empirical inquiry, see Marcus, *supra* note 136, at 686-91.

<sup>415</sup> Compare Resnik, *supra* note 3, at 511 ("statistical rarities on the federal docket") with Fiss, *Against Settlement*, *supra* note 55, at 1087 ("probably dominate the docket of a modern court system"). This discrepancy, however, appears attributable partly to the definition used.

<sup>416</sup> For helpful nascent efforts, and suggestions for the future, see Chayes, *Public Law Litigation*, *supra* note 2, at 1303; Simon, *supra* note 241, at 63 n.286. Cf. *supra* note 164 and accompanying text (class action data).

ties are created, the frequency with which they occur, the individuals and entities affected, and how federal courts have addressed the problems.<sup>417</sup> It is equally important to identify considerations pertinent to treatment of the difficulties, especially conflicts between public interest litigants' full participation in federal litigation and other goals of the civil justice system, such as judicial economy and fairness to parties. There should be estimates of the capacity of existing Rules or ancillary procedural mechanisms, such as provisions of the United States Code, to ameliorate or solve the problems.<sup>418</sup> If these measures are found deficient, the difficulties entailed should be compiled and preliminary surveys of potential solutions ought to be undertaken.

### C. More Definitive Conclusions and a Look Into the Future

When all of the information is collected and evaluated, more accurate conclusions in certain areas should follow. A significant question will be whether public law litigation differs from private suits in ways that warrant special consideration. At this juncture, some qualitative dimensions should supplement the quantitative material. Thus, even if public law cases are "statistical rarities on the federal docket,"<sup>419</sup> those suits' importance to the public may warrant special treatment. This significance may be gauged in terms of the public's interest in resolving controversial issues of great moment or the litigation's "impact on society and on attitudes toward the judicial function and role."<sup>420</sup> In light of the experience with the Rules' application described above and conservative prediction as to the future, public law litigation appears to differ from private disputes in ways that call for distinctive consideration under certain and perhaps all of the Rules.<sup>421</sup>

The more difficult question is what treatment to accord public

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<sup>417</sup> The analysis of judicial application of numerous Rules in the second section of this Article could serve as a starting point. For instance, that assessment indicates that Rules 16, 26, and 56 are promising candidates for future work.

<sup>418</sup> The ALI STUDY, *supra* note 414, at 7, found that the strength and weaknesses of existing mechanisms afforded a "context for potentially valuable procedural reforms."

<sup>419</sup> Resnik, *supra* note 3, at 511. I am not implying that Professor Resnik downplays the qualitative dimension.

<sup>420</sup> Chayes, *Public Law Litigation*, *supra* note 2, at 1303; Fiss, *Against Settlement*, *supra* note 55, at 1087.

<sup>421</sup> This conclusion is reasonable, even if the qualitative dimension, mentioned, *supra* notes 419-20 and accompanying text, is discounted. Inclusion of the qualitative element could be criticized as loading the question, although it actually responds in part to concerns regarding the legitimacy of public law litigation, allowing for negative resolution of the issue on that basis. *Cf.* Martin v. Wilks, 109 S. Ct. 2180, 2187 (1989) (refusal to accord civil rights litigation special consideration under party joinder amendments).

law litigation.<sup>422</sup> The answer will depend on numerous considerations applicable to specific Rules, to procedural areas, and to the Rules as a whole. One important set of factors involves the number and gravity of perceived problems, such as the Rules' language or judicial application, and the difficulties' amenability to amelioration or solution. Other relevant considerations include: the political and practical realities of implementing potential solutions and the receptivity of entities, such as the federal judiciary, the Advisory Committee, and Congress, responsible for instituting the requisite change.

These factors demand specific contextual analyses of variables relevant to each Rule and procedural area as well as a general overview. For example, problems resulting from deficient phrasing of Rules can be rectified easily with amendments by the Advisory Committee or by Congress.<sup>423</sup> Correspondingly, if the difficulties are attributable to judicial enforcement and courts are responsive to applying the Rules with increased solicitude for public interest litigants, the solutions should be relatively straightforward. For instance, judges should abandon the "public rights exception" and apply Rule 19 to resolve the pertinent party joinder question while drawing on administrative law procedures to create representative party frameworks in the remedial phase of institutional litigation.<sup>424</sup> If, however, the problems are more structural or systemic, in that the Rules as a set of litigating principles fail to accommodate effectively public law litigation or the federal judiciary is not receptive to applying the Rules with greater concern for public interest litigants, more fundamental change, such as promulgating a separate set of Rules for public law litigation, may be indicated.<sup>425</sup>

### CONCLUSION

The fiftieth anniversary of the Federal Rules of Civil Procedure has afforded an opportune occasion to analyze the federal judici-

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<sup>422</sup> Cf. ALI STUDY, *supra* note 414, at 239 (indicating comprehensive solution possible in area of complex litigation).

<sup>423</sup> It appears that few such problems will be found. See *supra* note 377 and accompanying text. Even Rule 24(a)(2), which was widely criticized as flawed in the amending, has not yet been deemed sufficiently troubling to require consideration of a possible amendment. Cf. *Martin*, 109 S. Ct. at 2187 (suggesting application of Rule 24(a)(2) more favorable to civil rights litigation would require rewriting).

<sup>424</sup> See *supra* note 379 (Rule 19); *supra* note 383 (representative party frameworks in institutional litigation).

<sup>425</sup> See *Martin*, 109 S. Ct. at 2187 (indicating Supreme Court's lack of receptivity to applying Rules with greater solicitude for civil rights litigation); Brazil, *supra* note 69, at 399-402 (discussion of separate procedural tracks); McGovern, *supra* note 69, at 478-91 (same); but see Fiss, *Against Settlement*, *supra* note 55, at 1087-89 (criticism of the two-track idea).

ary's application of numerous Rules to public law litigation. The evaluation indicates that many courts have enforced a number of Rules in ways that adversely affect public interest litigants. It also shows that federal judges can and should apply the Rules with considerably more solicitude for public interest litigants as the second half-century of the Rules' application opens.