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Mass and Repetitive Litigation

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MASS AND REPETITIVE LITIGATION IN THE FEDERAL COURTS

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I. INTRODUCTION

The topic of "Mass and Repetitive Litigation in the Federal Courts" is even more vast and unwieldy than the complex litigations it brings to mind. The implicit assignment to address the topic by contemplating the events that may occur over the next century is still more daunting. One hundred years will bring untellable changes to all of our social and political institutions, judicial and otherwise. Rather than attempt to meet the challenge by uttering bold prophecies of the circumstances that will confront our successors of the future, I will follow an easier course. This paper will select a few illustrations of mass and repetitive litigation and address them from the perspectives generated by smaller, more familiar, but nonetheless difficult problems of simple litigation.

If there is a conclusion, it can be stated as well at the outset as at the end. A century from now we will not have fully satisfactory means of resolving ordinary litigation, whether through tribunals similar to the present court system or through quite different institutions. The answers we will have reached for handling ordinary litigation will remain conditional and tentative, even as our procedure today is conditional and tentative. The practice we will have adopted for handling mass litigation will be even more clearly unsatisfactory and even more avowedly in a process of transition toward still different practice. We will have to keep trying and will do fairly well. If this conclusion seems the counsel of despair and pessimism, it should not. To the contrary, it is intended as an expression of faith and optimism.

The first step along the way in this adventure will require reflection on the interdependence between substantive and pro-

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cedural law, including the interdependence between the overall character of our procedural system and our ability to reduce repetitive litigation. Then it will be asked whether federal courts can make distinctive contributions in managing the problems that arise from mass and repetitive litigation. The next two steps are closely related. The reasons that traditionally lead to fragmentation of related litigation into separate suits remain the standard against which all departures must be measured. The forces that drive in the opposite direction, pushing toward unitary consideration and decision, likewise must be examined.

With this background, it is possible to explore a variety of means that might be used to reduce repetitive litigation. Despite the proliferation of devices that can be expanded from present practice or created afresh, there are really only two underlying strategies. The first is to coerce joint participation in unified proceedings. The second is to use the disposition of one proceeding to control the outcome of independent proceedings on some theory of representation that permits the acts of actual participants to bind nonparticipants. As will be seen, the seeming differences between these strategies may not be as great as they first appear. Whatever blend of these strategies is chosen and however they are elaborated into specific procedural devices, it seems likely that substantial sacrifices will be made in the quest for means to manage mass litigation and to reduce repetitive litigation.

One last preliminary observation may prove helpful. "Mass and Repetitive Litigation" provides a loose label that can embrace many different phenomena. At one end of the spectrum might be a single automobile accident that injures two people. Thinking about the rules of joinder and preclusion that should apply to this situation helps in thinking about the rules to apply in mass litigation, but it seems fair to assert that the potential suits present in this setting do not involve mass litigation and threaten repetitive litigation only at the bare threshold. The lawsuits that might arise out of the crash of a fully loaded passenger plane obviously qualify, but present problems very different from the problems growing out of decades of using asbestos, causing injuries and creating risks that have not yet played out. Quite different problems are presented by a price fixing conspiracy that injures many consumers, whether in small amounts over a brief period or in more significant amounts. Still different

problems are presented by litigation to eliminate segregation from a local school system, to reform a state prison system, to preserve important resources of the environment, or to strike down social security regulations affecting the benefits of millions. In the brief scope of this paper it will be possible only to touch on some of the myriad problems that these settings present.

II. The Interdependence Between Procedure and Substance and Between Procedure and Preclusion

A. *The Interdependence Between Procedure and Substance*

Whether dealing with mass litigation or the simplest of problems, neither procedure nor substance can be developed without considering the other.

Development of substantive rules must be shaped by the capacities of the agencies that will administer the rules. Consideration must be given both to the ability to implement a rule accurately in individual cases at acceptable cost and also to the ability to administer the rule in a setting that includes other litigation involving that rule or other rules. The decision whether to permit compensation for pain and suffering arising from a personal injury, for example, must take account of the ability of courts or other tribunals to generate meaningful evaluations of pain and suffering. Even if we are satisfied that reasonable evaluations can be made in individual cases, we should ask whether awards will be made to a sufficient number of those who suffer such injury to justify the enterprise.

Development of procedural rules may be shaped by substantive rules in a variety of ways. We may, for example, entertain serious doubts about the intrinsic propriety of allowing compensation for pain and suffering. Such doubts may be translated into procedural rules forbidding *per diem* pain and suffering arguments to the jury as a means of curtailing the actual operative effect of the compensation rule. In more general terms, we may tailor seemingly universal rules of procedure to the perceived needs of different categories of cases. Although it remains a matter of considerable dispute, an illustration is provided by the fact that in many courts the requirements of notice pleading are

quite different for antitrust claims than for negligence claims.[1]

This interdependent process of adjusting substance and procedure to each other will be one of the central features in accommodating the perceived needs of mass litigation. At times, the predominant adjustments will be made in the area of procedure. At other times the predominant adjustments will be made in the area of substance, often because of the conclusion that our system of adversary litigation simply is not capable of justly administering the substantive rules we now know. Since most of the ensuing discussion will focus on matters of procedure, it may be helpful to pause for a moment to offer the most obvious example of possible substantive adjustment.

The topic of mass litigation increasingly conjures up images of mass torts affecting dozens of victims caught up in a bus accident or literally millions of victims caught up in the use of a widely distributed product. It is now commonplace to wonder how long we will continue to adhere to court-administered remedies based on some concept of fault or defect. The sources of concern are in part intrinsic to the substantive enterprise of contemporary tort law, and in part interdependent with the realities of contemporary administration of tort law. At the level of intrinsic doubt, a single illustration suggests questions that have no conclusive answer. Imagine two fabulously successful rock music stars and two workers engaged in routine custodial work. One rock star and one custodian are injured simultaneously in exactly the same way by a single car as they stand at a street corner. At the same time, the other rock star and custodian suffer cerebro-vascular accidents that inflict upon them the same disabilities suffered by the automobile victims. The diversion of our collective social assets to care for and compensate these four different persons will be quite different if we assume ideal implementation of the remedies now theoretically available. The question whether this is the best outcome in its own terms seems open to fair debate.

However satisfied we may be with the abstract rules of tort compensation and noncompensation, if perfectly administered,

1. For detailed review of the variety of actual pleading practices, tailored to perceived differences in the needs of different substantive areas, see Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

those rules also are subject to question on the score of our procedural capacity to administer them. The doubts arise on many fronts. One doubt, perhaps the least troubling, goes to our ability to achieve fair administration of the rules in the routine disposition of each individual case; we accept and may praise our administration in relatively simple cases and simultaneously doubt our administration when judge or jury is called upon to resolve complex issues of fair scientific debate. Even at this level, however, the transaction costs of adversary litigation—with or without commercial insurance—are a source of deep discomfort, discomfort that cannot be dispelled merely by tinkering with the rules allocating the burden of counsel fees between the parties. At a similar level of procedure in the small, we should be equally troubled about our ability to achieve like treatment of like cases that go to trial. Examining the system as a whole, moreover, our ability to achieve like treatment of like cases seems yet more uncertain. Most people with claims never file suit; most suits that are filed never proceed to official disposition, by trial or otherwise; the system would collapse immediately if this were not so. The possibility that by these means we are achieving a like relationship between injury and redress for all tort victims is vanishingly small.

In conjunction with these doubts, concern also must be directed to the allocation of scarce judicial resources. Unless we can expand court capacity indefinitely—a proposition that few would champion—we must decide which problems have the highest call on the courts in terms of the intrinsic importance of the problems and of the relative capacity of courts to resolve the problems. Late twentieth-century tort litigation may not fare well in a dispassionate allocation of judicial resources.

Little valor is required to predict that one hundred years hence these problems will have been addressed by profound changes in the underlying rules of compensation for personal injury and in the system of administering compensation. Nonetheless, for years to come, courts will continue to struggle with these problems. Much of the discussion of mass and repetitive litigation must accordingly be devoted to them.

B. The Interdependence Between Procedure and Preclusion

The interdependence between procedure and preclusion de-

serves brief exploration in each of two directions. First, rules of procedure and preclusion can be developed together to reinforce or qualify each other. Second, the extent to which rules of preclusion can be expanded to foreclose ever more possibilities of repetitive litigation depends upon our judgment as to the overall quality of our procedural system.

The interdependence between the details of procedure and the details of preclusion can be illustrated easily. Rule 13(g)[2] permits but does not require cross-claims between coparties when the claims arise out of the transaction or occurrence that is the subject matter of the original action or a counterclaim. Exercise of party discretion established by this rule is strongly influenced by the choice between different possible rules of coparty preclusion. A rule that permits coparties to relitigate any issue decided in the original action as long as they did not become formal adversaries by the assertion of a claim between them maximizes the freedom of choice whether to cross-claim. A rule that permits relitigation only if the coparties were not in fact adversaries to an issue in the actual presentation of the case reduces the scope of freedom. A rule that permits nonmutual preclusion between coparties without regard to either of these limits exerts substantial pressure to cross-claim. When the judgment will be available to foreclose relitigation of an issue, the issue is at risk and assertion of the coparty's claim may be the only way to present it in a strategic posture that even comes close to the advantages of independent litigation and determination.[3]

Another illustration comes even closer to the heart of mass and repetitive litigation. The availability of nonmutual issue preclusion influences party joinder in many ways. A plaintiff who knows that a second potential defendant will be able to assert nonmutual defensive preclusion has a substantial incentive to join that defendant in the first action. The incentive is not the same as a rule requiring joinder; if the plaintiff believes that the strategic disadvantage of joinder is great, he remains free to sue one defendant alone and hazard the risks of nonmutual pre-

2. FED. R. CIV. P. 13(g).

3. The various possible rules of coparty preclusion and their consequences are described in 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D § 4450 (1981) [hereinafter WRIGHT, MILLER & COOPER].

clusion. A plaintiff who hopes to make nonmutual offensive use of a judgment won by another plaintiff, knowing that he will not be bound if the other loses, has every incentive to avoid joinder in the first suit. This problem is so obvious that nonmutual offensive preclusion commonly is denied if the second plaintiff could easily have joined the first action. This accommodation of joinder and preclusion rules awaits further development, as courts will need to determine how far strategic disadvantage should be counted in determining whether it was "easy" to join the first action. The accommodation, however, is plain.[4]

Adjustment of preclusion rules to the perceived capacities of our procedural system is a more elusive matter. At the most fundamental level, the choice is clear. The results produced by our process of adversary litigation are not completely reliable. Learned Hand long ago observed that as a party he would fear litigation more than anything short of illness and death.[5] A more poetic expression of the same sentiment is found in the ancient curse wishing that your enemy be party to litigation in which he knows he is right. Yet the very purpose of our process is to resolve disputes and to achieve repose. The core of res judicata lies in doctrines that are not even expressed in the traditional language of res judicata, but in the deeper principles of finality that limit severely the opportunities to reopen a final judgment. Wrong it may be, but final it remains.

Once the question moves beyond the finality of the first judgment, choices become less clear. At one end of the spectrum, we do not apply the force of res judicata to rulings on "pure" questions of law divorced from any specific fact application. Instead, we rely on more fluid concepts of stare decisis, recognizing that even apart from the frailties of our fact finding process, judicial pronouncements on the law should be open to reexamination. Applications of law to closed historic fact, on the other hand, confront us with conflicting desires for finality and accurate decision. Even as to continuing controversies, we may be tempted to rely on preclusion when there is no discernible

4. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 3, § 4465, at 596-98.

5. *See* L. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in ASS'N OF THE BAR OF THE CITY OF NEW YORK, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926) ("[A]s a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death.").

change in the underlying facts or legal principles.

The difficulty of the choices between finality and fallibility underlies much of the ongoing effort to develop principles to manage mass and repetitive litigation. More detailed examination of these choices is accordingly postponed to later sections.

III. Is There a Distinctive Role for Federal Courts in Mass Litigation?

The federal courts established pursuant to article III of the Constitution[6] are a precious and limited resource. Without detracting from the quality and accomplishments of state courts, it is commonly recognized that judicial business should be allocated between state and federal courts in a way that provides maximum benefit from the federal courts. Augmented demands on the federal courts, however, cannot be met simply by continual expansion. Expansion is limited by several constraints. At the district court level, the mix of litigation may be sufficiently different from the mix in state courts to require judges who differ in some respects from state judges, and of a type difficult to attract to the bench. However that may be, mindless expansion runs the risk of bureaucratization and routinization, creating institutions better fit for processing large volumes of mundane disputes than for expertly deciding more complex disputes. Even if district courts could be expanded without limit, regional courts of appeals cannot. Our present circuit structure does not ensure national uniformity of federal law, but at least it permits regional uniformity. When a circuit court of appeals approaches the size of twenty-five judges, current wisdom suggests that it may be time to divide the circuit. At some point, a process of continued growth would force creation of another layer in the appellate structure to preserve national uniformity.[7]

As difficult as it is to expand the federal court system, the business of federal courts has been increasing in recent years at a rate greater than the business of state courts.[8] Before adding

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6. U.S. Const. art. III.

7. The papers contributed to this Symposium by Dean Carrington, *see supra* pp. 411-35, and Dean Griswold, *see supra* pp. 393-410, describe in graphic detail the reasons for concluding that the current structure of our circuit courts of appeals cannot support a desirable level of national uniformity in the interpretation of federal law.

8. *See* Galanter, *Reading the Landscape of Disputes: What We Know and Don't*

still further business, a strong justification should be demanded. In part, the justification may rely on relinquishing some present work in order to make room for work that can make a higher claim to a place on the federal docket.

Is there, then, a strong justification for increasing the role played by federal courts in resolving mass and repetitive litigation? One possible justification is easy to evaluate. To the extent that federal law provides the rule of decision, the century-old tradition of general federal question jurisdiction provides strong support for access to federal court. Private actions under the federal antitrust and securities laws provide familiar examples. If it should be decided that the time has come to preempt the tort law regime of the several states by a uniform system of federal law, the same arguments for federal question jurisdiction would fall easily to hand. Brief reflection, however, suggests that the arguments may not be so easy. Opening the doors of federal courts to all private tort litigation within the areas that might be preempted would drastically alter the character of those courts. And so, some of the pending tort reform bills in Congress undertake both to establish binding federal law on many topics and simultaneously to exclude cases arising under this new federal law from federal question jurisdiction.[9] The prospect of creating a regime of federal law dependent largely upon state courts for interpretation and uniformity is not alluring. If federal courts should not be asked to handle a large burden of routine tort litigation, as seems right, the argument for federal preemption is gravely weakened. Whether the argument is lost, however, will depend upon both the intensity of the need to reform substantive law and the alternative possibilities of using new procedures to improve administration of present substantive law. Clearly drafted federal statutes could effect both sweeping substantive changes and a high degree of uniformity, even if Supreme Court review of state court decisions provided the only opportunity for a federal forum.

Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983).

9. One example is provided by S. 1999, 99th Cong., 1st Sess. § 208(b) (1985). Senator Kasten's substitute bill, Amendment S. 100, was equally specific. Section 4(c) of that amendment provided that nothing in the act would create or vest jurisdiction in federal courts "over any product liability action subject to this Act." S. 5106, 99th Cong., 2d Sess., 132 CONG. REC. 56 (1986).

Another justification for expanding the role played by federal courts is the real prospect that they may make valuable contributions in administering state law. Subseqent sections of this paper will consider a number of the various tactics that can be used to improve disposition of mass and repetitive litigation. Most of these techniques—quite probably all—involve increased centralization of litigation, expanded res judicata effects, or both. It is likely that significant advantages can be gained by encouraging cooperative action among many courts in addressing related problems. There is much room for improvement in choice of the state law to govern mass disputes. There are no insurmountable theoretical obstacles to adoption of techniques and institutions that will enable state courts to accomplish these things. Reciprocal legislation, for example, could create a state-sponsored equivalent to the Judicial Panel on Multidistrict Litigation. As a practical matter, however, it is difficult to wax enthusiastic about the prospect that fifty states and allied jurisdictions could agree to a coordinated system for shuffling cases from one system to another for common pretrial proceedings, much less trial and appeal. It is much more plausible to hope for significant advances in the federal court system. In addition, there are many who believe that the difficulties arising from federal court administration of state law are more than offset by the neutral perspective federal judges bring to problems seen more jealously by state judges.

If it is accepted that federal courts should play a substantial role in exploring new techniques for resolving mass and repetitive litigation, there should be no problems in satisfying the limits of article III. Diversity jurisdiction can support virtually any system that might prove desirable in handling mass litigation; if indeed a mass case should arise in which there was no diversity between any two parties, it is difficult to imagine any pressing need for a federal tribunal. The concepts of ancillary and pendent jurisdiction will provide useful support. It is highly unlikely that any cogent need will arise to go further, but if necessary the murky concept of "protective" jurisdiction might be pressed into service.[10] Authority to regulate choice between state laws can

10. The concept of protective jurisdiction is explored in 13B WRIGHT, MILLER & COOPER, *supra* note 3, § 3565.

readily be found in article III; article IV, section 1;[11] and the fourteenth amendment, section 5.[12] The problems that may arise from the Anti-Injunction Statute[13] can easily be met by amendment.

Federal courts likely will play a vitally important role in shaping our approach to mass litigation over the coming years. To the extent that the burden falls on state courts, they will face essentially the same problems, exacerbated by the greater difficulty of achieving coordination between separate systems. The problems that at last are to be explored will affect all courts in similar ways, and no easy answers will be available to any court.

IV. The Forces of Simplicity and Complexity

In both simple and complex litigation, essentially the same countervailing forces push toward broad freedom of choice in setting the claim and party contours of a suit and away from freedom toward mandatory joinder. Mass litigation can be distinguished from simple litigation only because we feel more acutely the pragmatic desire to avoid unending repetition of the same issues. It is, accordingly, appropriate to illustrate the forces that push toward party freedom by looking at a simple setting with no more than a few potential parties and claims. The forces that push toward mandatory joinder, on the other hand, are best illustrated by moving from the simple setting to settings of increasing complexity.

A. The Forces of Simplicity and Free Choice

The concerns that underlie traditional rules permitting broad freedom of choice in determining the shape of a lawsuit are easily described. The driver of an automobile traveling with a close friend is involved in a collision with another automobile. The passenger is free to sue both drivers, or only the driver of the other automobile. Rules on party joinder do not require that the passenger sue both; the rules of res judicata provide the parallel answer that the passenger has a separate claim against each

11. U.S. Const. art. IV, § 1.
12. U.S. Const. amend. XIV, § 5.
13. 28 U.S.C. § 2283 (1982).

driver. The passenger, likewise, need not join the driver of his car as a plaintiff, and each injured person is said to have his own claim. These rules expose courts and parties to the burden of multiple litigation involving the same issues and the risk of inconsistent results. Why, then, do we not require all parties who are injured or who are potentially at fault to be joined in a single action?

The rule that all parties injured in a single occurrence need not join as plaintiffs in a single suit may be explored first. Many arguments can be advanced in support of this rule. All of these arguments share a common perception that litigation is not a fully rational process, producing results unaffected by matters that substantive rules deem irrelevant. Thus, it is said that a plaintiff should be free to choose the time and place of suit within the boundaries established by statutes of limitations and rules of jurisdiction. The choice of tribunal may indeed have an impact on the result. In part, the impact results from factors shaped by our multiplicity of jurisdictions: one court may be able to command more witnesses than another; one court may apply a different substantive rule than another; the procedural system of one court may conduce to different results than the procedure of another; and so on. In part, the impact may result from such matters as the identity of the judge, the area from which the jury is drawn, the length of local docket delay, and similar factors that surely ought not to affect the outcome even as they do. The timing of suit may affect the result for equally diverse reasons. It may be that one plaintiff is in desperate need of redress, while another can afford to wait while time provides more convincing evidence of liability or the extent of his injuries. The temper of one moment may favor one party, while in time the mood may swing to favor another. The examples can be multiplied.

Another set of reasons for free choice arises from the impact of party alignment on decision. One plaintiff may prefer not to be associated in litigation with another because the other is a particularly unsympathetic person who generates animosities that may reduce the prospect of establishing liability. So too, one plaintiff may prefer not to be associated in litigation with another because the other is particularly sympathetic and generates sympathies that may skew the award of damages.

Yet another set of reasons for free choice draws from the

countless strategic choices that must be made during the course of any litigation. Different plaintiffs may face different risks and even different issues. In many jurisdictions, for example, the negligence of the injured driver may figure quite differently in an action by the driver than in an action by the passenger. One plaintiff may find it desirable to pursue a strategy aimed at maximizing the possible award, while increasing the risk of losing entirely; another may find it better to maximize the prospect of winning some award, while decreasing the likely size of the award. The rules of evidence may admit damaging evidence against one plaintiff, while nominally excluding it as to the other.

A rule requiring joinder as plaintiffs of all who are injured in a common transaction would also encounter a difficulty that eases the transition to the rules that permit free choice in selecting defendants. The passenger could view his driver as a coplaintiff or as a defendant. Rules of mandatory joinder would need to be framed as rules requiring joinder in some capacity, but not necessarily as a coparty.

Similar reasons underlie the rules that permit free choice of defendants. It would be unthinkable to require the passenger, as a condition of suing the other driver, to sue also his best friend, spouse, child, parent, or other close associates. At most, we could require that potential defendants be sued in the first action or be left free. Even that rule would exact a high price. A plaintiff may perceive correctly that one potential adversary is more culpable than another; if such matters should not affect the outcome of a suit, they in fact affect both the outcome and the cost. So, a potential defendant may be more sympathetic than the plaintiff—the passenger may have been injured less severely than his driver and may recover less or nothing at all if a single tribunal is confronted with the need to compensate the driver. The trial strategy most suitable against one defendant may vary from that most suitable against another. Finally, a rule compelling assertion or waiver of claims against all potential defendants would prompt the litigation of many claims that otherwise would be allowed to die. Courts quite wisely hesitate to adopt rules that would increase the total volume of litigation.

These pedestrian, even tawdry, concerns may be supplemented by loftier arguments from political theory. The opportunity to shape and control the assertion of an individual's claim,

free from the cabining influence of others, may be seen as a vital component of individual autonomy. The opportunity to influence a decision in a manner chosen by the affected individual may seem an essential factor to the legitimate exertion of governmental power and a symbolic means of increasing confidence in a decisionmaking process that permits self-controlled individual participation.[14] Still more exalted theories may view litigation as a public forum in which law and public policy are created, providing a unique opportunity for participatory democracy.[15] Other less exalted theories may view individual participation as an important means of sublimating the thirst for less civilized means of revenge.

The concerns that support free choice in shaping litigation in this simple setting gain added force in confronting the prospect of requiring unified adjudication of many claims. One problem provides an opportunity to restate several of the observations just made. The burden of persuasion on most issues in civil litigation requires proof by a preponderance of the evidence. It is common to translate this standard into a requirement that an assertion be proved more probably true than false. Actual application of the standard, however, wanders far from this simple mark. The degree of persuasion required to overcome the inertia of the status quo, to justify a judgment that works a change, varies according to the nature of the issues that are left uncertain and the stakes of decision. This variability is both common and desirable. Nonetheless, it means that as the stakes of decision are augmented by increasing the number of claims and parties affected, the result is likely to be affected as well. Whether this effect is desirable seems highly uncertain.

A different feature of massive consolidation presents related problems. As more and more claimants are joined in a single action, it is increasingly likely that common issues of liability will be tried ahead of individual issues such as causation and damages. Separate trial of such issues, however, may easily affect the outcome. A tribunal unable to control the outcome of individual

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14 *See* Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 593 (1984); Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 847-49 (1984).

15. *See* Leubsdorf, *supra* note 14, at 598-99. Professor Leubsdorf drew his model of a citizen right of access to participation in litigation that makes public policy in part from Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

claims may prove much less willing to compromise the issues of liability and damages together.

Massive consolidation leads to yet a different question. In some settings it may not really be desirable to facilitate the adjudication of all claims of all potential claimants. It is entirely plausible to wonder whether some substantive rules have been, and should be, shaped with the expectation that most potential claimants will be too sensible to attempt to enforce their rights. A shabby scheme that has shamelessly defrauded a million consumers of a dollar each may justify a variety of official remedies, but it is fair to ask whether we should undertake the cost of retrieving each individual dollar for each individual consumer. Sudden sweeping enforcement of many of the existing rules could be untoward in many ways.[16]

Finally, one more rule stands as a telling reminder of the reasons for permitting multiple litigation. All of the frailties of litigation noted above, and others, combine in a rule that a nonparty is not bound by the result of a lawsuit absent some special justification, often expressed in the conclusional label of privity. The various devices for reducing repetitive litigation of issues that affect massive numbers of potential parties require justification in the vocabulary of privity. How forceful these justifications may be remains to be explored.

B. The Forces of Unified Disposition

The forces that push toward unified disposition of mass claims can be described in groups of more nearly private and more nearly public concerns. The division is inexact, but responds to a growing tendency to separate the dispute resolution

16. Professor Hazard several years ago stated clearly the need to think carefully about broad general enforcement of often little enforced rules:

> The legislature often pitches legislation at a higher level of expectation than it really intends to require. It anticipates a kind of discount for non-enforceability, and thereby enjoys a pleasant moral luxury in proclaiming high expectations. But one can't indulge that luxury, or its judicial equivalent in the form of expansive dicta, when one has to face up to enforcing the proposed rule. . . . The class action is thus unique, perhaps, in forcing us simultaneously to think precisely about the terms of the substantive law's boundary lines, and to think seriously about what is involved in actually enforcing the law.

Hazard, *The Effect of the Class Action Device upon the Substantive Law*, 58 F.R.D. 307, 312 (1972).

function of litigation from broader political functions.

The most obvious value served by unified disposition is efficiency. Parties are spared the burdens of repeated litigation of the same matters, and courts are left free to provide more expeditious disposition of other matters. If it is difficult to expand the federal court system, increased efficiency may be an essential means of enabling the federal courts to attend to all the business that society wishes them to handle. Efficiency is far more than mere penurious reluctance to increase expenditure on the court system.

Unified disposition also supports consistent outcomes. Avoiding inconsistency is valuable in part because inconsistency is embarrassing; although lawyers grow accustomed to the fact that litigation is an imperfect process, it may be better to reduce the number of graphic illustrations that rub this fact into public consciousness.

Inconsistency also raises questions of fairness. We are committed to the belief that like treatment of like cases is an important element of public justice. Unified disposition, whether through consolidation or preclusion, can greatly reduce the unfairness of inconsistency. At times, consistency may mean that a wrong answer is consistently enforced for all claimants, but that is a separate problem.

Unified disposition can enhance fairness in other dimensions as well. When individual claims are too small to warrant the costs of individual litigation, unified disposition can provide enforcement of claims that otherwise would go unenforced. When individual claims amount to more than the assets available to respond, unified disposition may provide for an equitable division of the assets rather than disproportionate compensation for some and inadequate or nonexistent compensation for others. Bankruptcy proceedings involving mass tortfeasors furnish a contemporary illustration, but improved variations are not difficult to imagine.

More accurate resolution of the merits also may be achieved by unified disposition. In some forms of consolidation—most obviously the class action—it may prove possible to devote greater resources to a "once-for-all" adjudication than could be devoted to adjudication of any single claim. Although it would be difficult to assume any clear relationship between the absolute level of resources devoted to litigation and the accuracy of the result,

it is not unreasonable to speculate that within some limits better results can be achieved.

All of these advantages are important even if one views litigation simply as the best available means, however unsatisfactory, of resolving individual disputes. Under this view, courts make law only as a necessary incident of the dispute resolution responsibility. Another view of litigation has emerged in recent years, strongly influenced by experience with civil rights litigation. Under this view, courts have a unique responsibility for developing public law, particularly constitutional law. If received doctrine requires that public law be developed only within the framework of a "case" or "controversy," the requirement should be tailored to the advanced model of structural reform litigation and fit to the needs of compelling public officials to behave properly. If the federal court structure cannot be expanded sufficiently to accommodate a desirable level of such public litigation along with the resolution of private disputes, the private disputes should be shunted to other fora, judicial or otherwise. Individual participation by those whose interests are affected is not so important that we should draw back from litigation in which we cannot effectively hear all who are affected, nor even take account of all divergent interests among those affected. Even settlement should be resisted if there is a prospect that adjudication will lead to new constitutional pronouncements and different remedies.[17]

This view of litigation as a tool for redressing the balance of power between people and the dominating public and private institutions that govern their lives implies ambiguous conclusions for mass and repetitive litigation. On one hand, it implies central control, a single litigation in which no more than a small group of representatives speaks on behalf of all. On the other hand, it often implies impatience with any concept of finality. If the first litigation does not produce the desired result, surely some other champion should be permitted at a later day to press the fight again.

In either model, the forces that push toward unified disposition are considerable. Their strength augments as the mass of related claims increases and as the prospect of endless repetition

17. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

looms larger. Many devices can be used to work for unified disposition. The most prominent is the class action, but others must be considered as well. Brief consideration will show that different devices provide somewhat different balances of advantage, but none provides a genuinely satisfactory substitute for the virtues of individual and independent litigation. Sacrifices must be made, and it is important to choose as wisely as possible.

V. NONCLASS MEANS OF UNIFICATION

Uniform, nonrepetitive disposition of related claims can be achieved, or at least approached, by means other than the class action. Some of these means are so familiar as to be put aside without further comment here. Nonmutual preclusion is a leading example of these now familiar means; if it is at times troubling, it is nonetheless well established as a means of addressing at least the simpler cases. Other means remain undeveloped and deserve some attention.

A. Public Enforcement

Public enforcement can be relied upon to the exclusion of any private action, and often is. Thus, it is clear in the federal courts that a private citizen cannot compel the institution of criminal proceedings, and recent decisions show increasing reluctance to infer private remedies from statutes that expressly create only public remedies. In a number of ways, public enforcement could be adapted to the problem arising from mass injuries that threaten repetitive litigation.

Public enforcement can be used to exclude private remedies or to supplement them in various ways. The extent to which we might wish to rely on private enforcement can be explored through four examples. In the first, private price fixing has inflicted a one dollar injury on each of two million people. In the second, a single person has suffered a physical injury with damages set at two million dollars. In the third, two hundred persons have each suffered serious physical injury in a plane crash. In the fourth, it is claimed that local police officials are engaged in intimidation and unlawful surveillance of peaceful demonstrations by local civil rights groups.

The price fixing illustration involves widespread but very shallow injury. It is difficult to suppose that scarce resources should be devoted to identifying and transmitting one dollar to each of the two million victims. This conclusion holds whether the enterprise is undertaken by a private class action attorney or by the government. If there is a social need for increased deterrence, or some belief that the injured should be given some opportunity for indirect compensation, it should be met by other means. *Parens patriae* recovery on behalf of local governments, or on behalf of the federal government, is an obvious alternative. Fluid class recovery in private litigation seems less attractive in face of doubts about the incentives that may shape the conduct of counsel and the difficulties of generating useful ad hoc fluid recovery remedies.

The severe personal injury illustration presents different problems. We would be reluctant to force the victim to rely on representation by the government. In part, this reluctance springs from the ideals of personal autonomy noted earlier: We believe that in matters of such personal importance, the individual claimant should have the right to control the litigation. This reluctance, however, does not explain the failure to make public counsel available to those who wish. Indeed, why should free public counsel not be made available to enforce private legal rights and to defend against the assertion of private legal rights? Making counsel available equally to all parties would at least reduce the risks that arise when the government chooses sides in the disputes of private citizens. Even then, we might worry about the possibility that the government would allocate its efforts discriminatorily, and might so augment the costs of enforcement as to make hollow the theoretical option to rely on private counsel to oppose a government-supported adversary. Perhaps the answer also reflects the simple suggestion noted earlier: We do not want to encourage too many people to assert their private rights. The more courts shift the cost of enforcement to public sources, the greater the temptation may be to institute litigation and to pursue it to the bitter end. Perhaps the answer draws as well from more complex concerns about the role of government as litigant in its own courts. Whatever the reason for our present position, we may well see change in the years ahead.

The problems presented by a single personal injury endure

when we switch attention to the plane crash injuring two hundred people. Reliance on a single public suit on behalf of all could easily achieve a final disposition based on high quality advocacy. The sacrifices of autonomy need not be greater than in a "private" class action. Nonetheless, we are apt to feel reluctant to entrust matters of such great personal importance to the government. The question that needs to be answered is whether a group of private class representatives, working with a group of private counsel, provides a better means than public representation of addressing such litigation, if any means are to be used. It does not seem likely that this question will be addressed in the near future, and in the mass tort setting it is likely to be overtaken before it ripens by more pervasive substantive reforms. Nonetheless, it is not at all obvious what answer would be reached upon careful inquiry.

However we may feel about disputes between private parties, it is quite clear that we will not force reliance on public representation in actions challenging the legality of government action. Public assistance might nonetheless be made available to those who wish it. The Civil Rights of Institutionalized Persons Act[18] establishes government standing to challenge unlawful action by state officials. This model could easily be expanded to reach claims of unlawful police surveillance, routine use of unlawful force, habitual violation of fourth amendment rights, and similar problems that have bedeviled the concepts of standing and class actions in recent years. Indeed, it seems likely that this model will be expanded, albeit slowly.

Pushed beyond these examples, the notion of government standing raises profound questions of the allocation of powers. *In re Debs*[19] could be explained as substitution of a single government suit for the mass of repetitive suits that might be brought by all of those injured by the train workers' strike. This easy characterization cannot begin to address the troubling questions raised by such cases. Even though I believe that the principle of the *Debs* decision is sound, it cannot be maintained that it provides an easy justification for widespread transforma-

18. 42 U.S.C. § 1997a (1982).

19. 158 U.S. 564 (1895). The *Debs* case and allied problems of government standing to litigate on behalf of others are explored in 13A WRIGHT, MILLER & COOPER, *supra* note 3, § 3531.

tion of mass litigation into a government-sponsored, government-controlled model.

Whatever limits are established for government litigation and for government support of private litigation, public litigation by the government often will be followed by private litigation. Government victory may support nonmutual preclusion in favor of subsequent private plaintiffs. Government defeat, however, presents difficult questions. Purely public remedies should be cut off; purely private remedies should not be. In between, difficult lines must be drawn; in drawing them, the hope should be more to facilitate private justice than to protect courts against the burdens of repetitive litigation.

Finally, it seems fair to note that much of the damages litigation spawned by class and derivative actions can fairly be seen as quasi-public. Enforcement is provided not by public officials, but by attorneys who undertake to police private misconduct for a fee reward. It is not entirely farfetched to draw an analogy to the privateers of old, waging war at least ostensibly for the public good. It is commonplace to wonder whether the "letters of marque and reprisal" authorized by rules 23[20] and 23.1[21] encourage more enforcement of the law against diffuse injury than we really need. At the same time, it can be argued that the practice actually does not provide sufficient incentive to enforcement.[22] These questions cannot be answered without an incredibly sophisticated model of enforcement. Convincing answers cannot be found, for example, in any model that relies upon the assumptions that it is desirable to enforce all of our legal prohibitions against all infractions and to expand enforcement resources to the point at which marginal investment in enforcement matches the expected marginal dollar of damages recovered. We should be deeply troubled by the image of privateering quasi-public enforcement and need to devote much thought to it.

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20. FED. R. CIV. P. 23.

21. FED. R. CIV. P. 23.1.

22. *See* Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

B. *Preclusion by Participation*

The principle that a nonparty may be bound by a lawsuit in which he participated is not likely to provide much help in addressing the problems of mass and repetitive litigation.

The most likely opportunity to rely on preclusion by participation arises from the activities of numerous public interest groups that bring litigation in the names of others. Often the group that sponsors the litigation is in complete control. In such circumstances, it is relatively easy to conclude that the sponsoring group should be precluded, as if it had been a formal party, from raising the same questions in a second action. It is far more difficult, however, to conclude that the group should be foreclosed from aiding others who wish to pursue the same questions. After one prisoner has been supported by a public interest group in an unsuccessful effort to reform prison conditions, another prisoner might mount an independent challenge. To deny the new plaintiff the opportunity for assistance by the group seems difficult. The difficulty may seem reduced by circumstances in which it is clear that the group recruited the new plaintiff for its own purposes, but administration of a test that permits inquiry into such matters would be risky. On balance, effective preclusion is not likely in these situations.

Preclusion is even less likely in the setting of mutual aid and assistance between counsel for different plaintiffs in independent mass tort suits. Cooperation in such settings may range from the ad hoc and casual to elaborately developed coordination of discovery, expert witnesses, and other common elements of litigation. Even the most elaborately developed efforts, however, are not likely to include a measure of control over actual litigation strategy sufficient to support preclusion under current tests. If new tests of control might be developed for this purpose, joint control by counsel could not automatically be attributed to clients who likely had little or nothing to do with the cooperative undertaking.

C. *Duty to Participate*

Even less need be said about the possibility that a nonparty should be precluded by failure to seize an opportunity to intervene in the litigation of others. Although there are occasional

intimations that a nonparty may be bound by failure to participate, nothing has happened to shake the general rule that intervention is at most a right, not a duty.

If a duty to intervene were to evolve, it would be most appropriate with respect to litigation manifestly designed to establish an authoritative framework for ongoing affairs. Failure to intervene in the lead action designed to test the legality of the Penn-Central merger, for example, might justify the conclusion that an independent action should be precluded.[23] There is a strong temptation to believe that when class action principles are not adequate to the task, parents who deliberately remained aloof from public school desegregation litigation should not be allowed to relitigate matters resolved by the final decree. As time goes on, some small steps may be taken in this direction. General principles, however, may be long in coming. It is quite safe to predict that any principles that do emerge will not reach mass torts or similar cases.

D. Association Representation

In recent years, actions affecting the interests of many have frequently been attacked by public interest groups that borrow standing from their members. The rules of preclusion that might limit repetitive litigation in this setting remain poorly developed. The intrinsic difficulties in developing satisfactory rules suggest that not much can be done on this front.

The difficulties that arise from association standing are easily stated. A clean air association might sue to enjoin discharge of contaminants from a cement plant, establishing injury and standing by identifying two of its members who breathe the plant's exhaust, and lose. Two other members of the association might then bring suit in their own names to seek the same relief. It is easy to argue that these new plaintiffs should be precluded by the judgment against their association. In joining the association, they probably knew that such litigation was one of its central purposes; it is likely that they knew of this specific litigation

23. *See* Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486 (1968). The question of a duty to participate in pending litigation brought by others, on pain of subsequent preclusion, is discused in 18 WRIGHT, MILLER & COOPER, *supra* note 3, § 4452.

and possible that they may have supported it in various ways. Nonetheless, care should be taken in addressing the preclusion question. Genuine conflicts may exist between members and association, but they are likely to be difficult to identify. The association may well have shaped its litigating strategy in light of the positions it had taken in other actions and might wish to take in future actions. Victory in a particular action may be less important to the association than the principles established or rejected. Even apart from any conflict of interests, conflicting associational priorities may mean that inadequate resources are devoted to some association litigation.

If the members are allowed to proceed with a second action, it is tempting to urge that at least their association should not be allowed to lend its support. In many circumstances, this temptation should be resisted. Denial of any right to seek help from the association would raise serious questions that are likely to be addressed in the language of freedom to associate and to petition the government, however dramatic that vocabulary may seem. If we are not prepared to deny the right to any assistance from the association, any effort to draw lines as to permissible levels of assistance would involve an untoward intrusion by courts into the inner workings of one adversary camp.

In short, it is not unlikely that litigation associations will present occasions for repetitive litigation that are not easily restrained. As a practical matter, however, it is not likely that this opportunity will be seized so often as to have a severe impact on the problem of repetitive litigation.

E. Virtual Representation

Repetitive litigation may at times be stifled by the peculiar doctrine of virtual representation. This doctrine permits preclusion of nonparties on the theory that a party to prior litigation shared the same interests and litigated vigorously as champion of those interests. The relatively small number of cases applying this doctrine generally involve elements of other preclusion doctrines as well, including close nonlitigating relationships with a party, some element of participation, apparent acquiescence, or strategic maneuvering. There may be some growth in this doctrine, but it does not seem likely to generate any broad principles that will, for example, permit decision of the first suit by a

victim of an airplane crash to foreclose suit by others.[24]

F. Nonmutual Preclusion

So much has been written about the use of nonmutual preclusion that additional discussion is not required here. Nonparties frequently are allowed to take advantage of the judgment in an earlier action if the party to be precluded has had a full and fair opportunity to litigate. At times, this principle has permitted nonmutual claim preclusion, effectively altering traditional rules of permissive party joinder. Often such nonmutual preclusion is entirely desirable. Care must be taken, however, to ensure that adequate account is taken of the frailties of litigation. Realistic appraisal may suggest that differences in place, time, opportunities for discovery, rules of evidence, mode of trial, and the alignment of parties may make an earlier opportunity less than the full and fair adjudication that should be required. Courts should not be stampeded into preclusion by an overeager desire to avoid repetitive litigation and potentially inconsistent results.

VI. Class Actions

The multifarious uses of class actions cannot be described, much less explored and evaluated, in short compass. Some of the central issues can be explored by looking at three divergent uses. It is important to keep in mind the differences among these uses of class actions, lest problems generated by one use lead to inappropriate application of the solutions to other uses.

One use of class actions has been to provide an aggregate remedy for widespread infliction of individual injuries that are too minor to support individual actions for damages. This setting provides virtually no benefit for a defendant confronting a plaintiff class and has given rise to repeated fears of "legalized blackmail," buccaneering lawyers, and overenforcement of legal norms never calculated for thorough-going implementation. In many ways the questions presented by this use are the easiest to address. Few members of the plaintiff class stand to lose any-

24. The doctrine of virtual representation is discussed in 18 Wright, Miller & Cooper, *supra* note 3, § 4457.

thing of real value by the prospect of an adverse judgment. The essential question is whether the game of complex litigation is worth the candle of enforcing a legal norm of uncertain worth by remedies unlikely to have any significant value to specific individuals. This question is much more substantive than procedural. The procedural incidents of enforcement are less important. If there is room for improvement in various ways, the cumulative effect is not apt to prove weighty.

A second use of class actions might be to coerce common disposition of individual claims that are sufficiently important to support widespread individual litigation. Courts faced by engulfing waves of litigation over common disasters have been increasingly attracted to this prospect. The abstract advantages and disadvantages of consolidation in this setting have been sketched above. More detailed problems will be described below. For now, it is sufficient to observe that defendants are much more likely than plaintiffs to welcome class treatment in this setting. Class treatment at least holds open the possibility that a single litigated victory will effectively preclude any claims. Apart from that perhaps chimerical hope, class treatment may provide a much more orderly means of controlling the overall burden of litigation, coordinating successive stages of liability and remedy determinations, and rationalizing such matters as punitive damages. Whether or not they wish it, plaintiffs also may benefit from class treatment in those cases involving claims beyond the ability of the defendant to pay.

The third use of class actions to be explored here involves declaratory or injunctive relief that forces public institutions to adhere to the requirements of statute or constitution. The Supreme Court has not yet achieved a coherent concept of class actions in this setting. The basic perplexity goes to the question why a class action is useful at all. A single child might as well assert an individual right to attend school in a system free from any taint of racial discrimination as might a class of all children in the system. If the practical meaning of a right is defined by the remedy afforded, it would be difficult as an abstract matter to assert that the scope of the remedy should depend on the distinction between an individual suit and a class action duly certi-

fied under rule 23(b)(2).[25] Class treatment may be important nonetheless partly to assure representation of what may be many conflicting views and interests and partly as a symbolic assertion of jurisdiction over an entire problem so as to ensure centralized control. Class treatment also may prove important for other reasons. Elaborate definitions and redefinitions of the rules of standing and mootness have left us in a situation that may permit widespread injury caused by official lawlessness to go without an acceptable champion to force adjudication. The existence of a continuing class of victims, even if membership in the class shifts continually, provides ample justification for adjudication. Explicit recognition of this fact could do much good and need not cause harm.[26] As useful as class actions may be in this setting, however, the advantages do not come free. These actions especially force consideration of conflicting interests and the difficulty of defining a single class, or set of subclasses, in face of these conflicts.

Across all three of these settings, it is important to remember that no magic inheres in the class action device. The core problems are not touched by the label. The consequences of cramming more and more claims and parties into a single proceeding can be shaped by the procedures chosen to administer the proceeding, but the price remains high. Some parts of the price deserve explicit statement.

A. Coordination of Courts and Conflict Laws

The ideal prospect held open by the class action device is that a single court may provide a single, uniform, correct, and binding resolution of all issues common to those affected by common events. Disposition of individual issues would then proceed in that court or in as many additional courts as best suits the needs of efficient administration. Structural reform litigation may in fact approach this ideal, at least in federal courts, because it commonly involves only federal law and a workable

25. FED. R. CIV. P. 23(b)(2).

26. Recent decisions have substantially reduced the difficulties encountered when mootness overtakes the individual claims of class representatives. Current doctrine nonetheless is unnecessarily complex. It should be sufficient to require that there be a class with a living claim, and that the class be adequately represented. *See* 13A WRIGHT, MILLER & COOPER, *supra* note 3, § 3533.9.

framework can be established to resolve such individual issues as may arise. The multiplicity of individual issues, overlaid by choice of law problems, makes it far more difficult to approach this ideal in class actions that aggregate numerous small claims. Cases arising under federal law present the best prospect for success, and even then, administration of a system for resolving individual damages claims is likely to prove burdensome. The problems have seemed so severe in litigation arising from mass torts inflicting serious injury that class treatment becomes very difficult.

With the help of some modest statutory changes, federal courts are in a good position to respond to the difficulties created by multiple claimant damage actions already in the federal system. The consolidated multidistrict procedure could be formally extended to trial as well as pretrial proceedings, a result now often accomplished by use of other transfer procedures. The court trying the case should be free to choose the applicable law, unconstrained either by the choice of law principles of the state in which it sits or by the principles binding the transferor courts. Following trial of common issues, the consolidated cases could be retained or remanded to the transferor courts for further proceedings.

This simple description implies the difficulties that arise when related lawsuits are pending in different state courts. As noted earlier, it does not seem likely that state courts will contrive to adopt a system that enables them to behave in the manner just suggested for federal courts. Absent such a system, the potential for confusion is great. The most likely outcome is a congeries of class actions in many states. At best, each state would undertake to resolve only the litigation more closely tied to that state than any other, according to its own law, without attempting to reach a judgment affecting the litigation in any of the other states. Even this result is costly. Once past the threshold of forcing individual claims into the class format, it seems likely that often it would be better to have one class action than fifty. From this point, matters get worse rather than better.

The potential for greater difficulty with state class actions is well illustrated by *Phillips Petroleum Co. v. Shutts*.[27] Represen-

27. 472 U.S. 797 (1985).

tative plaintiffs from Kansas and Oklahoma, owning interests in gas leases in Oklahoma and Texas, brought suit in Kansas against Phillips. They sought to represent a class of 33,000 royalty owners on a claim that Phillips should pay interest on the portion of royalty payments retained by Phillips pending administrative approval of rate increases.[28] The average claim of each class member was $100; the total amount of suspended royalty payments was more than $11.3 million. The royalties to leases in Kansas were less than $3000, and the Court recognized that only a minuscule share of the leases were on Kansas land.[29] The class finally certified by the Kansas courts was reduced to 28,100 members by excluding 3400 plaintiffs who opted out of the class and 1500 who did not receive the mailed notice. The defendant, Phillips, transacted business in Kansas, but was incorporated and centered elsewhere.

Two major rulings were made in the *Shutts* case. The first was that Kansas could assert personal jurisdiction over the claims of all members of a nationwide class, even as to the vast majority of claims having no connection whatever with Kansas.[30] Drawing from the recent view that limits on personal jurisdiction draw less from restrictions on a state's sovereign power and more from matters of individual liberty, the Court concluded that it is enough that members of the class are provided the best notice practicable in the circumstances, are given an opportunity to opt out, and are provided adequate representation by the named plaintiffs. Failure to opt out was viewed as consent to submit to the state's jurisdiction.

The other major ruling was that it was unconstitutional to apply Kansas law to all of the royalty obligations.[31] Without undertaking to sort through the welter of circumstances involved in the thousands of underlying transactions, the Court repeated earlier statements that a state can apply its law only when there are sufficient contacts with the underlying transaction to generate such state interests that application of its law is neither arbitrary nor fundamentally unfair.

One major question was not addressed in the *Shutts* case. A

28. *Id.* at 800-01.
29. *Id.*
30. *Id.* at 811.
31. *Id.* at 821-22.

"consent" theory may be as suitable as any other fiction to explain the conclusion that a state court should be able to entertain a nationwide class action, entering a judgment that will bind plaintiffs having no connection with the state as to transactions likewise having no connection with the state. Even then, the Court's effort to explain that any plaintiff who would wish to pursue his own individual action is likely to be sufficiently sophisticated or well advised as to opt out is not fully convincing. Be that as it may, no attention at all was paid to the prospect that the defendant might not wish to submit to the State's jurisdiction as to matters completely unrelated to the State. The Court's ruling that the State could not apply its own substantive law is convincing; the same reasoning would support the further conclusion that the State lacks jurisdiction to compel the defendant to submit to its application of the law of some other state. The problem of jurisdiction over the defendant may yet remain to limit the availability of nationwide class actions in state courts.

The choice of law ruling raises manifest problems for the utility of nationwide classes in state courts. It is barely possible that the ruling is limited by the contract and property character of the underlying interests. It could be argued that if a common course of tortious conduct is followed on a nationwide basis, any state in which the conduct has caused injury has a sufficient interest to justify application of its law to all of the national incidents of the conduct. Barring this rather surprising turn of events, however, the potential advantages of a class action are greatly reduced by the need to choose and apply the unfamiliar law of other states. In some circumstances there still may be advantages in common resolution of factual matters, although in the *Shutts* case itself there did not appear to be any disputes requiring common decision. The advantages of common resolution would be a net gain if state courts could work out procedures for dispersing the individual matters among the other state courts in the best position for proceeding further. Absent that prospect, state courts will provide few advantages in class actions going beyond state lines.

There is yet another difficulty with nationwide state court class actions. Different plaintiffs and different groups of lawyers are likely to file actions in different states, asserting overlapping claims on behalf of overlapping classes. Sorting through the rela-

tionships between the different actions, both before judgment in any action and after judgments come to be entered, will prove astonishingly difficult.

Illustrations could be multiplied. Enough has been said to suggest that if we seek to pursue the goal of unified disposition of related claims on a national basis, the federal courts are better suited to the task than state courts. For the cases that aggregate primarily small claims arising under state law, such as the *Shutts* case, this avenue will be open only if a change is made in the rule that the claim of each class member must exceed the $10,000 amount in controversy threshold for diversity jurisdiction. The change could easily be justified on the theory that although the litigation is not intrinsically important to any individual claimant, it is important both to the aggregate of all plaintiffs and to the defendant. A new threshold could easily be adopted for class actions to reflect this justification. Whatever amount is appropriate for general diversity jurisdiction, if it is retained, a substantially higher amount could be set for class actions.

The advantages of relying on federal diversity jurisdiction for resolving disputes affecting large numbers of claimants will depend in large part upon the choice of law rules adopted. It makes no sense for a class action in federal court to be governed by the choice of law rules of the state in which the court sits or by the rules followed by the courts of the various states from which actions have been transferred to it. At a minimum, independent federal choice of law principles should be adopted in actions on behalf of any class extending beyond the bounds of a single state. There is a strong temptation to go further, permitting the federal court to adopt a single rule, perhaps synthesized from several state rules, to govern all claims. In face of this temptation, the best response may be one of yielding resistance. The line is thin between creative federal selection of state law and application of federal common law. In the end, we very well may come to adoption of federal law, common or statutory, for many of the wrongs that give rise to nationwide litigation. Federal courts, however, should go about the task slowly.

If federal courts are to undertake nationwide tort class litigation, it will be necessary to adopt clear rules governing parallel state litigation. Federal courts should have clear power to enjoin parallel litigation, except in circumstances in which plaintiffs are

permitted to opt out of the federal class. The federal judgment must be binding on state courts according to federal class action rules of preclusion. Ideally, federal courts should be given statutory power to send the individual stages of the litigation not only to other federal courts but also to state courts. All of these things can be done easily and must be done if nationwide class actions are pursued.

B. Class Conflicts

The problem of conflicting interests among members of a class can be viewed from the perspective of third party standing rules. The general rule that one person may not bring suit simply to champion the interests of another has many roots. Chief among them are the beliefs that rights are most effectively championed by the persons to whom they are ascribed, that there is no need to enforce rights unless the owner cares enough to seek enforcement, and that there are many circumstances in which courts should honor the owner's wish that his rights not be enforced. Class actions permit departure from this norm. The requirement that the class representative be a member of the class may seem to respond to all of the values underlying the norm. On closer inspection, however, it is seen that class actions jeopardize all of these values, and particularly create grave risks of conflicting interests.

Conflicts of interest within a plaintiff class are commonly illustrated by typical structural reform litigation. An example of these conflicts is an action brought to challenge a weapons search policy adopted by public school officials in response to numerous stabbings and shootings on school grounds. The policy could easily include limitations on public access to the schools enforced by armed guards, metal detectors at all school entries, unannounced sweep searches of all lockers, and random searches of students. The plaintiffs could seek certification of a class of all students in the school system. Within this class, however, would be members of widely varying views. There are likely to be class members who fully share the views of the civil rights group sponsoring the litigation that every detail of the school policy is unconstitutional. There are likely to be many members who believe that every detail of the policy is desirable and should be continued; they value their lives and safety more than

abstract assertions of a right to privacy in a public place. In between, there will be many class members who hold different combinations of views concerning different practices.

These differences of view among members of a putative class cannot be casually ignored. Simply to assert that they are members of a class whose claim is presented by a good representative member, aided by good lawyers, will not do. Neither will it do to rely on the defendant to represent the class members who disagree with the class representative, except perhaps in the simplest of cases. Nor will it suffice to redefine the class more narrowly; even the whimsical possibility of defining a class as limited to those who share fully every position taken by the representative in litigating—or much more likely negotiating a settlement—is inadequate. Indeed, the problem really cannot be avoided by moving entirely outside the class framework and asserting that any single person affected by the challenged practices has a right to have them eliminated as completely as the class of all those affected. Departure from the class action format eliminates the special insult of res judicata, but it does not further the interests of anyone to confront those who would have been members of the class with the actual impact of the decree and the daunting prospect of collateral attack on the decree. It is crucial to find some manageable means to provide representation for all of the significantly different views among those affected. Only such representation will ensure full argument both as to the nature of the right involved and, often more importantly, the shape of the decree that in one sense provides the final detailed definition of the right. Courts undertaking to shape social policy on the scale presented by structural reform litigation must hear as many voices as possible.

Class action procedure may very well provide the best means of managing structural reform litigation and hearing from as many as possible of those affected. If that is to prove true, however, it will be necessary to bear in mind constantly that a class cannot be defined simply by assuming that all who are affected by a common program or institution are affected alike, or have common interests.

Mass tort class litigation has not yet become so common as to provide as much discussion of conflicting interests. Nonetheless, it is clear that here too there is a vast potential for conflict that widens as the scope of the class is widened. We may not

have much sympathy for the interest of those who have gotten first in line and who hope to garner a disproportionate share of the assets available to satisfy all claims. Interests may diverge in other directions, however, and it is difficult at times to ignore the conflicts. The choice of the court where class litigation is centered may be significant even within a single state and may become vital as between several states. Similarly, choice between different systems of law may carry different consequences for different parties. The strategy to be used in pursuing the claim and structuring a judgment by litigation or negotiation may have very different implications for some claimants than others. Most troubling, a single set of events may give rise to widely different types of injury triggered by quite different means. The variety of different asbestos products that have caused various kinds of injury and risk to millions of people—perhaps all of us—in countless ways provides sufficient illustration. The concerns that support the freedom of two plaintiffs injured in a common accident to sue separately are augmented in this setting on an exponential scale. Yet, the values served by unified disposition may indeed be so great that they require development of fair procedures for compromising all of these conflicting interests. If so, there is much work yet to be done.

C. Coordination of Counsel

The problems of assigning direction and control among class counsel are substantial and are augmented by the prospect that increased efforts at supervision by the class court may intrude an unseemly distance into the preparations of one adversary camp. The problems may be further augmented by conflicts of interest among the many lawyers involved, each of whom stands to benefit by increasing his own role in the litigation. Some sorry stories have been told in published opinions.[32]

For present purposes, it is more important to note that the problems of conflicting class interests exacerbate the problems of coordinating counsel. If indeed we are to attempt to address conflicts of interest among those affected by class litigation, we must provide freedom for counsel to represent effectively each

32. *E.g.*, Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985); *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), *rev'd*, 751 F.2d 562 (3d Cir. 1984).

major variation of interest, whether by definition of subclasses or otherwise. The responsibility for ensuring this freedom cannot be shuffled off onto an ad hoc law firm, lead counsel, or other arrangement devised for coordinating the efforts of counsel on behalf of the class. At least in this respect, preservation of a system of multiple adversaries requires some judicial supervision of adversary behavior.

D. Class Preclusion

One purpose of certifying a class action is to support a judgment that will command enhanced res judicata effects. The enhancement, however, goes primarily to the number of people swept within the judgment. In other dimensions, a class judgment may indeed have narrower res judicata effects than an individual judgment. The narrowing results from limits on the legitimate reach of representation through class litigation. We cannot fairly ask a class action to mirror the preclusion consequences of individual litigation. Several examples deserve comment.

The first area in which res judicata rules must be adjusted for class actions is the definition of the claim or cause of action merged or barred by the judgment. The most obvious adjustment is required by the definition of the class itself and the underlying purpose of the litigation. An illustration can be provided by varying the facts of *Phillips Petroleum Co. v. Shutts*.[33] A class action might be maintained on behalf of 535 owners of royalty interests in a particular gas field, claiming that the operator had negligently started a fire that closed down production, which wrongfully terminated their royalties. A single member of the class who was injured by the fire while visiting the field has a separate claim for his injuries, even though had he brought a personal action for the royalties it might well be concluded that he had only a single claim for all damages caused by the fire. The same principle is illustrated by the ruling that following rejection of a class claim that an employer had engaged in a pattern and practice of racial discrimination, individual employee members of the class remain free to claim individual discrimina-

33. *See supra* p. 516-17.

tion.[34] Class suits brought for injunctive relief against prison conditions provide numerous additional illustrations. Individual prisoners have been allowed to maintain separate actions for personal injuries arising from the challenged conditions,[35] and individual claims for injunctive relief against practices having a peculiarly individual impact also may remain open.[36] If a single court is administering a continuing structural decree, it may be appropriate to require that the individual claims be presented to that court, particularly if further injunctive relief is sought. This requirement, however, is more one of class administration than preclusion.

Issue preclusion also may be affected by the principle that the effects of a class judgment should be limited by the purpose of the representation. In the example of the gas field fire, a finding in the class action that the operator had not been negligent should not bind the personally injured victim in his suit for damages. The purpose of certifying the class was to resolve all claims relating to loss of royalties, and the character of the litigation may properly have been very different from the character of the personal injury action.

The most prominent limitation on class preclusion arises from the requirement of adequate representation. The strongest arguments for denying preclusion reflect the problems of conflicting interests and the corollary difficulty of defining a class already noted. In the classic illustration, *Hansberry v. Lee*,[37] the Court ruled that parties interested in enforcing a racially restrictive housing covenant were not part of the same class as, and could not represent, persons interested in defeating enforcement. In most cases, it will not be quite as easy to equate representation with class definition, but the underlying problem will be the same. To use a familiar example, some minority families

34. *See* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

35. *E.g.*, Wright v. Collins, 766 F.2d 841 (4th Cir. 1985).

36. In Green v. McKaskle, 770 F.2d 445 (5th Cir. 1985), for example, the panel simultaneously recognized the law of the circuit to allow the plaintiff to proceed by individual action and suggested that judicial administration would be better served by forcing such claims into the framework of ongoing class litigation. In response to the suggestion of the panel, the circuit court voted to hear the case en banc, Green v. McKaskle, 772 F.2d 137 (5th Cir. 1985), and then remanded the case to the panel when the plaintiff withdrew his equitable claims, thus rendering the en banc hearing moot. *See* Green v. McKaskle, 788 F.2d 1116, 1121 (5th Cir. 1986).

37. 311 U.S. 32 (1940).

may believe that busing children many miles a day is an excellent remedy for racially segregated school patterns, while others may believe it is worse than no remedy at all. If the class is defined as all minority school children and their parents, there are persuasive reasons to attempt to resolve this difference within the framework of the class litigation. In this setting, it may be reasonable to blend definition of the class with the notion of a duty to participate; the class is defined in wide terms, including many who have divergent interests, for the purpose of forcing assertion of their claims within a single action. This resolution requires greater efforts to provide notice than many courts may prefer in injunction class actions, but the burden seems more than justified.

Apart from conflicts of interest, there may be cases in which the class representatives simply did not provide adequate representation. If the failure of representation is apparent during the course of the first suit, the court should either decertify the class or insist that additional representatives be brought in. When the question arises in subsequent litigation, difficult choices must be made. It would not be appropriate to rule that the representation was inadequate whenever a later court can be persuaded that greater relief should have been won. Short of that extreme, which could easily defeat any class action preclusion, some workable compromise must be found that both provides assurance of reasonably effective representation and avoids complete retrial of the issues in making that determination. Despite occasionally sweeping pronouncements that seem to require searching evaluation of class representation, it seems likely that appropriate standards will in fact emerge.

Class actions also may justify distinctive approaches to the problems of fairness that frequently plague res judicata doctrine. For example, the prison condition examples[38] could be altered to reflect loss of an individual action for relief, followed by a victorious class decree. The notion that the earlier plaintiff should be precluded from the benefits of the class decree is nearly unthinkable. Imagine, for example, turning off the hot water when the defeated individual plaintiff appears for his prison shower! It also may be that we cannot follow a Draconian approach to indi-

38. *See supra* p. 524.

viduals who opt out of a class. If a mass tort class were defined with opt-out privileges, for example, it may be untoward to require an opted-out plaintiff to relitigate the question of liability after a class victory. Only the logic of denying claimants a cost-free opportunity to opt out stands in the way, and this logic may fail before the desire to achieve like treatment of like cases, and at minimum cost.

The sheer number of victims also may raise fairness concerns that mollify ordinary preclusion rules in the class setting. The mass tort situation again suggests persuasive illustrations. Certification of a class of people asserting that prolonged use of baby powder caused or increased the risk of cancer could easily be followed by a judgment for the defendants. Several years later, advancing medical knowledge could provide convincing demonstration of the once unknown causal link. Preclusion of all members of the plaintiff class may be more than our sense of compensation for product injuries will tolerate.

Finally, class litigation may present special needs for new rules of preclusion within the confines of continuing litigation. Particularly in the setting of massive litigation that endures over many years, we may wish to ease some rules of preclusion and tighten others. One area for easing general rules may be the very decision whether to certify a class. Within a single action, it is clear that certification can be undone or modified at any time, and that an earlier denial of certification can be rethought as the case progresses. At least some measure of this freedom should be carried over to circumstances in which class certification is denied in one action, and a similar request for certification is later made in another action. If it can be shown that class treatment has in fact become appropriate, principles of preclusion should not stand in the way.[39]

Structural reform litigation provides more complex illustrations of the need to adapt general notions of finality to class litigation. A good illustration is supplied by *Local 28, Sheet Metal Workers' International Association v. EEOC*.[40] The original decree of the district court required the union to work toward a

39. The difficult issues that can arise in this context are illustrated by *In re* Dalkon Shield Punitive Damages Litig., 613 F. Supp. 1112 (E.D. Va. 1985), *discussed in* 18 WRIGHT, MILLER & COOPER, *supra* note 3, § 4455, at 134 n.10 (Supp. 1986).

40. 106 S. Ct. 3019 (1986).

nonwhite membership goal of twenty-nine percent.[41] On appeal the court of appeals held the goal permissible, but added a limitation that the goal endure only until the union had implemented valid, job-related entrance tests.[42] On remand the goal was again incorporated in a revised decree, and again affirmed on appeal to the court of appeals.[43] Certiorari was not sought after either judgment of the court of appeals. Contempt proceeding followed contempt proceeding. In the proceeding that finally came before the Supreme Court, the district court had held the union in civil contempt for violating various provisions of the decree and entered an amended order that changed the membership goal to 29.23 percent.[44] Following affirmance by the court of appeals, the arguments presented on appeal included two seemingly related matters: That the original twenty-nine percent goal had been derived from faulty premises, and that in any event both statute and the Constitution bar such specific goals when the beneficiaries have not been individually subjected to the original discriminatory acts. One of these matters was held barred from review; the other was held open.

The argument that the original twenty-nine percent goal rested on erroneous factual premises was held not open to review on a variety of grounds. One ground was that the amended goal rested on grounds that corrected any of the alleged defects in the original figure; since the precise percentage figure did not affect the findings of contempt and the current decree corrected the claimed defects, there was no occasion to consider the matter. This ground seems persuasive. The Court, however, relied on two additional grounds. The first was that because the petitioners had not sought review of either of the two original court of appeals judgments, as the Court stated, "we do not have before us any issue as to the correctness of the 29% figure."[45] The Court supported this conclusion by citing to a statement in an earlier case that in proceedings to modify an unappealed school desegregation decree, matters concerning the correctness

41. EEOC v. Local 638, 401 F. Supp. 467, 489 (S.D.N.Y. 1975).

42. EEOC v. Local 638 . . . Local 28, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 830-31 (2d Cir. 1976).

43. EEOC v. Local 638, 565 F.2d 31, 35-36 (2d Cir. 1977).

44. 106 S. Ct. at 3028-31.

45. *Id.* at 3032.

of the original decree were not before the Court.[46] On its face, this statement is troubling. The implied lesson is that it is important at least to seek certiorari review of every court of appeals decision at every intermediate stage of a continuing litigation, despite the weak prospects of success, the increased burden on the Court's docket, and the possibility that further proceedings in the lower courts will reach a conclusion satisfactory to all parties. The second additional ground was that contempt proceedings do not open to reconsideration the legal or factual basis of the underlying order.[47] This finding invokes the sound principle that the validity of a final judgment is not open to reexamination even in civil contempt proceedings, as a matter of res judicata.[48]

The argument that any specific race-based hiring goal is unlawful was held open to decision in a footnote that rejected res judicata and law of the case arguments. The Court cited three decisions holding that adherence by a lower court to its own earlier ruling as the law of the case does not bind the Supreme Court to the lower court ruling as the law of the case.[49]

At first blush, it may seem difficult to understand why the validity of any specific goal could be challenged in face of the principles that failure to seek review at an earlier stage takes an issue out of the case, and that the validity of a final decree cannot be challenged in contempt proceedings. Nonetheless, the Court's rulings seem as correct as they may seem puzzling. The reason for this conclusion lies in the inadequacy of traditional

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46. *Id.* (citing Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 432 (1976)).

47. 106 S. Ct. at 3032 n.21.

48. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 3, § 4433, at 307.

49. 106 S. Ct. at 3034 n.24. Although this explanation is provided by the plurality opinion of Justice Brennan, joined by three other Justices, all opinions in the case address the lawfulness of the hiring goal on the merits. The first case cited, United States v. A.S. Kreider Co., 313 U.S. 443, 445-46 (1941), simply undertook to resolve the merits of an issue that had been decided by the court of appeals on a first appeal and then adhered to by the court of appeals on a second appeal as the law of the case. There was no discussion of res judicata or law of the case doctrine. The second case cited, Southern Railway v. Clift, 260 U.S. 316, 319 (1922), was one of several cases holding that adherence by a state supreme court to its own earlier decision on a federal question as the law of the case does not provide an independent and adequate state ground defeating review by the Supreme Court. *See* 16 WRIGHT, MILLER & COOPER, *supra* note 3, § 4007, at 557. The third case cited, Messinger v. Anderson, 225 U.S. 436, 444 (1912), ruled squarely that although a court of appeals may choose to adhere to its own prior ruling as the law of the case, "[o]f course this Court, at least, is free when the case comes here." *Id.* at 444.

doctrines of finality in the setting of long-enduring institutional reform litigation. Both aspects of the Court's approach provide good illustration.

The decision to review the validity of any specific membership goal fits well within traditional doctrine. Although this very issue had been twice decided by the court of appeals at earlier stages of the litigation, and review had not been sought, it remained relevant in at least two ways. The union was subject to a continuing decree embodying the obligation and to civil contempt orders designed to coerce compliance. It would be unseemly for a federal court to continue to enforce an order intended to accomplish a goal prohibited either by specific statutory provision or by the Constitution. Perhaps more important, in one view of matters, there is no easily identifiable interest in repose to set against review of the matter; the only clear burden is the burden of continued argument. In this setting, it makes excellent sense for the lower courts to refuse to reconsider the matter on law of the case grounds and for the Supreme Court to treat the issue just as it has treated other issues when a lower appellate court has adhered to its own earlier ruling as the law of the case. The failure to provide the Supreme Court an earlier opportunity to consider the issue should no more bar the parties and the Court than an earlier unsuccessful effort to secure certiorari. Indeed, there is a very strong argument that neither law of the case nor res judicata principles should bar revision of the decree had the Supreme Court earlier affirmed it and then, in another proceeding, concluded that the premise on which it rested was invalid.

Why, then, was it proper to refuse to consider the specific method by which the original twenty-nine percent figure had been reached? The simplest answer, that the error was simply irrelevant to any issue remaining in the case, is sufficient. The Court, however, did not stop there. Instead, it said—and said first—that failure to seek review earlier had foreclosed the issue. It also said—and said last—that the validity of the underlying order is not open to reconsideration in contempt proceedings. These additional grounds seem proper and would be proper even had certiorari been sought and denied. They are proper because structural reform litigation requires a rolling concept of finality. The traditional points for marking finality adopted in simpler litigation are inadequate to the task. If such litigation is to be

controlled at all, many early resolutions should be put beyond reach as later stages progress.

Unfortunately, the premise that special rules of foreclosure should be adopted for structural reform litigation is no more than a starting point. Development of the rules will take time and almost inevitably will result in more flexibility, indeed discretion, than we customarily associate with rules of preclusion. The matters most readily foreclosed will be matters of adjudicated fact. The possible shortcomings in the premises underlying the choice of a twenty-nine percent membership goal, rather than a goal of nineteen percent or thirty-nine percent, are easily put aside so far as they relate to determination of substantially unchanged facts. At the same time, it is essential to retain the traditional power to adjust a continuing and prospective decree to changed fact circumstances; a substantial change in the composition of the available labor pool, for example, could easily require a corresponding change in the decree.

Examples could be proliferated. In general terms, continuing reexamination is likely to be most appropriate as to the broad terms of structural remedies. No matter what the judge says, for example, initial rejection of proposed sweeping remedies should seldom foreclose reexamination of the same remedies if the initially chosen remedies do not work. Changes in the law should be accommodated much more readily than in other settings; the very framework of rule 60(b)[50] recognizes as much. Even within these broad categories, however, courts must be careful in working toward new answers, recognizing that many of the traditional values of res judicata are diluted in this setting.

VII. Other Consolidation Devices

The manifest uncertainties surrounding class actions may suggest consideration of alternative consolidation devices. If the

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50. Fed. R. Civ. P. 60(b) provides in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . .

Id.

alternatives are sufficiently modest, they may avoid the dilemmas that inhere in class actions. The more ambitious alternatives are likely to provide less satisfactory means of resolving the same dilemmas. The greater the proportion of all related litigation subject to consolidation, the larger the problems. Class actions provide a familiar means of addressing these problems and focus attention on the conflicts that could be lost from sight if the form of individual participation provided by other devices should blind us to the reality of individual subordination to group control. Brief discussion is sufficient to sketch the alternatives.

The simple devices for consolidation are well known. Cases pending before a single court can be consolidated to permit joint proceedings at any level up to and including common trial and appeal. Mandatory party joinder can be developed to facilitate litigation in the court that commands the widest array of parties affected by common questions. In the federal system, transfer for consolidated pretrial proceedings has become familiar and may be supplemented by an order of the pretrial court that exercises the transfer powers of the transferor courts to consolidate all proceedings for trial. These devices can do much in simple situations involving a few parties, and can do more in dealing with litigation in federal courts.

More complex devices are easily imagined. Perhaps the most devious model is that of interpleader. Courts so far have steadfastly resisted the temptation to permit a potential defendant such as a mass tortfeasor to consolidate litigation in a single court by attempting to interplead all potential claimants. Resistance has rested squarely on the reasons for permitting individual claimants to control their own litigations. The form is available, however, to support broad expansion. Such expansion should be resisted. The form of interpleader would imply that each interpleaded claimant is a party, with the rights of a party to control his individual strategy and argument. The fact inevitably would be that mass litigation cannot be managed in this way. The best that one could hope would be that courts would painfully recreate protective and controlling devices no better than those immediately suggested by class actions. The worst would be pandemonium multiplied manyfold.

Interpleader at least has the obvious virtue of providing a traditional means of forestalling or enjoining related litigation in

other courts. Other devices for consolidation would need to recreate these means by brute force. It is possible to imagine any number of varying systems for gathering large numbers of related actions pending in various federal and state courts into one common proceeding. As twice suggested earlier, the only workable systems at all likely to emerge will gather the litigation into a common federal proceeding. The details of such systems necessarily must be vexing. Initially, a choice must be made between a system that provides abstract definitions of the circumstances in which consolidation can be effected and a system that relies on the discretion of some central authority to effect consolidation. The path of abstract definition must involve arbitrary lines and may never prove fully satisfactory. How many actions, growing out of what degree of common claims, must be pending in how many courts to permit some party, whether a plaintiff or some number of defendants, to compel consolidation? What means are to be used: removal from state courts to local federal courts, removal to a predesignated tribunal that then assigns a final forum, or injunction of future litigation? What means will be available for deconsolidation once common issues have been resolved to the limits of prudence? How far are common choices of law to be forced? The path of discretion involves many of the same questions, but substitutes the problem of identifying the tribunal that is to exercise discretion. Should local federal courts decide the question of consolidation, either as between federal courts or among all courts, state and federal? Should a central tribunal be created, by analogy to the Judicial Panel on Multidistrict Litigation? If there is to be a central panel, should state judges be included among its members? If so, how can that be reconciled with the restrictions of article III? What system of appellate review, if any, should be provided for the consolidation decision?

There is little doubt that federal judicial power can be extended to some system other than a nationwide federal class action that would permit consolidation of litigation pending in state and federal courts. The drafting task will be difficult. Beyond those difficulties lie all of the problems sketched above. Consolidation of many individual actions cannot provide any easy answer to the problems of conflicting interests, delegation of sufficient control to lead counsel to avoid chaos, choice of law, or the like. If class actions do not provide perfect devices for

responding to these problems, at least they strip away the fictions that may becloud other consolidation devices. Subordination of individual interests to common control is essential to consolidation, and the problems are made most manifest by class actions. If we are to pursue consolidation, class actions provide a better form than most of the likely alternatives.

VIII. Epilogue

The suggestion that class actions are likely to provide the best means of consolidating litigation that affects many should not be taken as a conclusion that consolidation is always desirable. The main theme of these reflections is that we pay a very high price for our present combination of procedural devices and substantive laws. Perhaps the price is well paid. Yet, we must, and surely will, continue to explore alternatives.

The most fundamental decisions to be made involve the role we wish federal courts to play in our society in years to come. The difficulty and contentiousness of those decisions is exceeded only by their importance. Within the last third of a century, federal courts have led the way to vast social changes in such areas as public school desegregation and more generalized visions of civil rights, legislative representation, and abortion. If we wish them to perform like functions in the future, we may need to choose carefully among the other chores that can be assigned to them, or indeed to any judicial tribunals. Mass litigation is an area in which federal courts could contribute much over the intermediate future. Many changes will be required if the federal courts are to serve this function and also continue to discharge the unique duties they have assumed in recent years. The questions are easily identified, the answers are elusive, and the time to undertake the quest is upon us.