

# The Unruly Class Action

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## ABSTRACT

*This Article examines the modern “issue class action” and its tenacious existence in a hostile class action landscape. I contend that this unauthorized, unbounded device is on a collision course with decades of Supreme Court jurisprudence narrowly interpreting the federal class action rule. Rather than either suffering such an ignoble fate or continuing to stumble forward as an evolving judicial creation, I advocate instead a thorough vetting and evaluative process through formal rulemaking channels.*

*The issue class action derives from Rule 23(c)(4), which has steadily emerged from a position of near obscurity in the federal class action rule to a widely embraced alternative to the classic (b)(3) damages class action. This approach—authorizing a class action comprised solely of issues common to the class and excluding from that action adjudication of any issues requiring individual consideration—effectively eliminates one of (b)(3)’s two defining requirements, that common issues predominate over individual issues.*

*In my view, the wide-ranging implications of the issue class action can best be evaluated through an open process of formal rulemaking that includes consideration of recent judicial experimentation, Supreme Court precedent, and the input of scholars, practitioners, judges, and other interested parties. Only through such a robust inquiry can we determine whether the issue class action furthers the goals of Rule 23 and, if so, how to amend Rule 23 to accommodate this novel class action in order to reduce its risks and optimize its potential rewards.*

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## INTRODUCTION

*"When appropriate, an action may be brought or maintained as a class action with respect to particular issues."*<sup>1</sup>

Over fifty years ago, the proposed addition of Rule 23(c)(4) to the federal class action rule sparked a debate among Advisory Committee members charged with drafting major revisions to Rule 23.<sup>2</sup> Unlike the contemporary controversy over (c)(4)'s potential and its "issue class action" potential, however, its framers questioned whether the provision was simply too trivial to warrant inclusion in the rule at all. Reviewing a draft that included the earliest version of subsection (c)(4), Advisory Committee Member Charles Alan Wright urged that it be stricken as unnecessary.<sup>3</sup> In a letter to Advisory Committee Reporter Benjamin Kaplan, Professor Wright complained that the provision "seems to me the kind of picky detail which does not require statement in the rule."<sup>4</sup> In response, Professor Kaplan agreed

1 FED. R. CIV. P. 23(c)(4).

2 During the rulemaking process, pre-1966 drafts of the proposed revisions to Rule 23 sometimes refer to what is now designated as "(c)(4)" as "(c)(3)." This Article consistently refers to the provision that ultimately became subsection (c)(4) as "(c)(4)" throughout to avoid confusion.

3 See Letter from Charles Alan Wright, Member, Advisory Comm. on Civil Rules, to Benjamin Kaplan, Reporter, Advisory Comm. on Civil Rules 3 (Mar. 30, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEE ON RULES OF PRACTICE & PROCEDURE, 1935-1988 (1991) [hereinafter Wright Letter, Mar. 1963], microformed on CIS No. CI-7001-41 (Cong. Info. Serv.).

4 *Id.*

that (c)(4) made "obvious points,"<sup>5</sup> and merely reflected existing Rule 23 practice.<sup>6</sup> But Kaplan nonetheless defended (c)(4)'s presence in the amended Rule 23, contending that it would be "useful for the sake of clarity and completeness."<sup>7</sup>

Ironically, (c)(4)'s sheer obviousness may have inadvertently obscured its modest purpose. Taken out of its structural and historical context, subsection (c)(4) today is no longer interpreted as reflecting a picky detail or an obvious point of class action law. Rather, it has now been widely converted into authority for an alternative species of class action that can be invoked when class claims cannot otherwise satisfy the stringent demands of Rule 23(b).<sup>8</sup>

A decade ago, I wrote two articles analyzing the meaning and intended function of Rule 23(c)(4).<sup>9</sup> At that time, few appellate courts had weighed in on the proper role of (c)(4) or its particularly important relationship to Rule 23(b)(3).<sup>10</sup> Indeed, some contemporary commentators bemoaned the judicial inflexibility or timidity that prevented issue class actions from flourishing.<sup>11</sup> Over the past decade, however, the expansive issue class action model has emerged as the dominant understanding of Rule 23(c)(4)'s meaning and purpose.<sup>12</sup>

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5 Memorandum of Additional Points on Preliminary Draft of Proposed Amendments of March 15, 1963, from Benjamin Kaplan, Reporter, Advisory Comm. on Civil Rules, and Albert M. Sacks, Member, Advisory Comm. on Civil Rules 5 (Sept. 12, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEE ON RULES OF PRACTICE & PROCEDURE, 1935-1988 (1991) [hereinafter Kaplan & Sacks Memorandum], microformed on CIS No. CI-7001-52.

6 See *infra* notes 185-88 and accompanying text.

7 Kaplan & Sacks Memorandum, *supra* note 5, at 5.

8 See, e.g., *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860-61 (6th Cir. 2013); *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 272-73 (3d Cir. 2011); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 221-22 (2d Cir. 2006); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

9 See generally Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) [hereinafter Hines, *End-Run*]; Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567 (2004) [hereinafter Hines, *Dangerous Allure*].

10 See Hines, *End-Run*, *supra* note 9, at 746.

11 See, e.g., Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 263 (ruing judicial rejection of class actions that could have been certified due to their common issues, but could not satisfy the predominance and superiority requirements of Rule 23(b)(3)); Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155, 1184 (1998) (lamenting the Court's failure in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), to recognize the benefits of certifying an issue class action).

12 See *In re Nassau Cnty.*, 461 F.3d at 227 ("[T]he commentators agree that courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3)."); see also *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (citing 23(c)(4) as altering the 23(b)(3) predominance test in class actions that include only

The circuit split that existed a decade ago has widened dramatically. Only one circuit today continues to reject this reinvention of (c)(4) outright,<sup>13</sup> whereas others busily debate not *whether* but *how* to implement the issue class action.<sup>14</sup> Treatises, casebooks, and law journal articles similarly champion it as a class action device of particular benefit for class claims that cannot survive the rigors of Rule 23(b)(3)'s certification criteria.<sup>15</sup>

This extraordinary transformation of Rule 23(c)(4) in recent years is all the more striking as it represents perhaps the last class action game in town that can circumvent Rule 23(b)(3)'s daunting predominance criterion. In 2011, a unanimous Supreme Court added *Wal-Mart Stores, Inc. v. Dukes*<sup>16</sup> to its tally of class action innovation rebukes, a pantheon that now includes attempted lower court adaptations of (b)(1), (b)(2), (b)(3), (c)(2), and (e).<sup>17</sup> In these and even more

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common issues); *In re Whirlpool*, 722 F.3d at 860–61 (restating requirement that questions of law or fact common to members of the class predominate over any questions that affect only individual members).

<sup>13</sup> See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

<sup>14</sup> Compare *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (adopting a multi-factor test for certifying (c)(4) class actions), with *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 227 (2d Cir. 2008) (requiring plaintiffs to establish that (c)(4) issue class certification would “materially advance” the litigation), and *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (noting approval of (c)(4) certification when accurate resolution of the common issues “is unlikely to be enhanced by repeated proceedings”).

<sup>15</sup> See, e.g., 6 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 18:7 (4th ed. 2002) (asserting Rule 23(c)(4) as authority for certifying issue class actions “[e]ven [in] cases which might not satisfy the predominance test when the case is viewed as a whole”); *MANUAL FOR COMPLEX LITIGATION*, FOURTH § 21.24 (2004) (“Certification of an issues class is appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole.”); 5 JAMES WM. MOORE, *MOORE’S FEDERAL PRACTICE* § 23.86 (3d ed. 2011) (“[A] court may certify a class action as to particular issues even if the cause of action as a whole would not meet the predominance requirement.”); JAY TIDMARSH & ROGER H. TRANGSRUD, *MODERN COMPLEX LITIGATION* 490 (2d ed. 2010) (“By definition, these common issues would predominate, because only the common issues are litigated on a class-wide basis.”); 7AA CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1790 n.17 (3d ed. Supp. 2013) (adopting the “materially advance” standard for (c)(4) issue class actions); Edward F. Sherman, “Abandoned Claims” in *Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 496–97 (2010).

<sup>16</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>17</sup> See, e.g., *id.* at 2557 (rejecting certification of 23(b)(2) class action that included nonincidental claims for monetary relief); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834–37, 864–65 (1999) (decertifying class action seeking mandatory settlement of class claims for damages under a Rule 23(b)(1)(B) limited fund theory); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628–29 (1997) (striking down asbestos settlement class action for failing to meet Rule 23(a) and (b)(3) criteria); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (reversing lower court determination that individual notice requirement of Rule 23(c)(2) could be excused in negative value class action).



recent class action cases,<sup>18</sup> the Court has doggedly guarded the Rule 23(b)(3) class action against creative judicial efforts to evade its commands.<sup>19</sup> In the nearly two decades that have elapsed since the Rule 23(c)(4) circuit split first arose,<sup>20</sup> the Court has declined to address squarely the emergence of (c)(4) as a class action vehicle unbounded by the limitations of (b)(3)'s predominance criterion.<sup>21</sup> In 2013, however, the Court vacated and remanded two issue class action cases<sup>22</sup> in light of its decision in *Comcast Corp. v. Behrend*.<sup>23</sup> Although both class actions were subsequently reaffirmed on remand,<sup>24</sup> the Court recently declined to grant a renewed petition for certiorari in either case.<sup>25</sup> Nonetheless, given the Court's pattern of resistance to judicially innovative interpretations of Rule 23 generally and (b)(3) specifically, the prevailing interpretation of (c)(4) may be on perilous ground.<sup>26</sup>

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18 See e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

19 For a taste of the academic criticism these decisions have engendered, see, e.g., Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 62–63 (2010) (describing as “unsatisfying” the Court’s “restrained interpretation” of Rule 23(b)(1)(B) in *Ortiz*); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 373–74 (2000) (criticizing the Court’s “cautious, provisional approach” in *Amchem* and *Ortiz* as potentially “threaten[ing] the viability of the class action across a broad range of litigation contexts”); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 351 (ruing the Court’s “retreat to rules formalism in both *Amchem* and *Ortiz*” that missed opportunities to confirm constitutional demands of representative litigation); Mary Kay Kane, *The Supreme Court’s Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1030 (2012) (finding “no overarching theme or theory underlying the Court’s most recent class-action jurisprudence”); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rodgers*, 125 HARV. L. REV. 78, 80 (2011) (noting that recent class action cases “make plain that the constitutional concept of courts as a basic public service provided by government is under siege”).

20 Compare *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (allowing issue class actions), with *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (rejecting issue class actions, finding that cause of action as a whole must satisfy predominance requirement).

21 In what I believe is the first reference to issue class actions in any Supreme Court opinion, a footnote to Justice Ginsburg’s dissenting opinion in *Comcast Corp. v. Behrend* included a stray citation to Rule 23(c)(4). *Behrend*, 133 S. Ct. at 1437 n.\* (Ginsburg, J., dissenting); see also *infra* notes 53–54 and accompanying text.

22 See *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768, 2768 (2013); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722, 1722 (2013).

23 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

24 See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 802 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013).

25 *Sears, Roebuck, & Co. v. Butler*, 134 S. Ct. 1277 (2014) (mem.) (denying certiorari); *Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014) (mem.) (same).

26 If a judicially dynamic view of the class action exists on the Court right now with any

Against the backdrop of these developments, I return again to the project of interpreting this vexing class action provision. This Article considers Rule 23(c)(4) from the perspectives of three competing interpretive methodologies: textualism,<sup>27</sup> intentionalism,<sup>28</sup> and dynamic interpretation.<sup>29</sup> That exercise sheds much needed light on the textual ambiguities that have helped to obfuscate (c)(4)'s meaning, the critical yet overlooked indicia of its rulemakers' intent, and the unappreciated costs inherent in judicial reinvention of Rule 23(c)(4).

Much as I may share many of the policy objectives of issue class action advocates, I contend that the current dogma of Rule 23(c)(4) as authorizing an issue class action alternative can only be sustained by an imprudent endorsement of outcome-oriented rulemaking by adjudication rather than by statutorily prescribed procedures.<sup>30</sup> Moreover, because its framers did not contemplate a class action that resolved only a fraction of class members' claims, other Rule 23 provisions (such as those relating to notice, settlement, and attorney fees) must also be reevaluated in coordination with any effort to promulgate a new issue class action provision.

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force at all, it operates not to endorse expansive interpretations of Rule 23, but rather to raise the barriers to class action access. See, e.g., A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 445 (2013) (arguing that *Wal-Mart* was a result of "[c]laimant animus, combined with hostility toward and a misunderstanding of claims of discrimination" and demonstrates "the Court's willingness of late to place policy above principle in ways that restrict access to justice" rather than an exercise in rule interpretation).

27 See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348–49 (2005) (describing textualism as an interpretive methodology generally); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1159–61 (2002) (arguing that textualism objections to use of legislative history do not apply with same force to Advisory Committee notes).

28 See David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 929 & n.16; Struve, *supra* note 27, at 1152–53.

29 See, e.g., Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1095 (1993) (arguing that federal rules "should be interpreted to reflect changed circumstances"); see also WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 11 (1994) (opining on the inevitability of dynamic statutory interpretation: "It suggests only the historical text takes on new meaning in light of subsequent formal, social, and ideological developments"); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 113 (2010) (describing dynamic statutory interpretation view that "courts are empowered—indeed obligated—to enrich statutory law by bringing it into better accord with contemporary public values, even when doing so requires a court to expand or contract the reach of unambiguous statutory text"); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 n.3 (1990) (arguing in favor of dynamic statutory interpretation).

30 See *infra* notes 217–28 and accompanying text.

The ultimate fate of the (c)(4) issue class action rests either in an improbable Supreme Court about-face on Rule 23 interpretative methodology<sup>31</sup> or a studied revision of Rule 23 through ordinary rulemaking channels. Rulemaking pursuant to the procedures of the Rules Enabling Act (“REA”)<sup>32</sup> rather than by judicial fiat not only provides legitimacy—both statutory and democratic—but also permits extensive deliberations by Advisory Committee members with superior expertise, divergent perspectives, and access to empirical data unavailable to the Court. Advisory Committee rulemaking regarding the nature, scope, and necessary safeguards for an issue class action may also lead the Committee to engage in a holistic examination of other Rule 23 provisions as necessary to address the unique challenges posed by this novel form of class action.

#### I. THE EMERGENCE (AND REEMERGENCE) OF THE RULE 23(c)(4) ISSUE CLASS ACTION

Following its 1966 adoption, Rule 23(c)(4) languished in the class action shadows for almost two decades.<sup>33</sup> In the early 1980s, however, frustration with the strictures imposed by Rule 23(b)’s class certification mandates, especially (b)(3)’s predominance criterion, led some judges to reinvent (c)(4).<sup>34</sup> Rather than clarifying the bifurcation between issues tried on a class basis and issues requiring individualized proceedings, Rule 23(c)(4) was reimagined as positive authority for certification of a so-called “issue class action.”<sup>35</sup> The (c)(4) issue class action, as thus conceived, offered courts a simple solution for class actions that could not satisfy the class certification criteria of Rule 23(a) or (b) due to the nature or quantity of issues that needed to be adjudicated separately for each individual member of the class: certifi-

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<sup>31</sup> See Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 978 (2012) (skeptically assessing the likelihood of a retreat from the “strict formalism” that has characterized the Court’s approach to Rule 23 interpretation).

<sup>32</sup> Rules Enabling Act (REA), 28 U.S.C. § 2072 (2012).

<sup>33</sup> See Hines, *End-Run*, *supra* note 9, at 715, 724.

<sup>34</sup> See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 381–88 (2005) (describing how “inventive” judges in the early 1980s “began to find ways to use Rule 23 to address the mass torts of the day”); see also Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 316–18 (2013) [hereinafter Miller, *Simplified Pleading*] (describing judicial resistance in the late 1980s to expansive interpretations of Rule 23).

<sup>35</sup> See Gilles, *supra* note 34, at 385 (“Rule 23(c)(4)(A) may be opaque and underused, but commentators have long noted the general applicability of issue class actions to mass torts, and it seems quite possible that such issue class actions were exactly what a number of judges had in mind in certifying classes during the late 1980s and early 1990s.” (footnotes omitted)).

cation of an “issue class action” that excluded any element (or subelement) that could not be adjudicated on a classwide basis.<sup>36</sup> Stripping class claims of all elements requiring individual assessments could thereby overcome otherwise intractable barriers to class certification; issues common to the class, for example, would automatically predominate over issues that must be proven on an individual basis because no individual issues would remain in the class action.<sup>37</sup>

The first significant wave of cases citing (c)(4) as authority to maneuver around the strictures of (b)(3) predominance in mass tort cases<sup>38</sup> were met with considerable federal appellate resistance.<sup>39</sup> Lower courts by the late 1990s only occasionally resorted to the issue class action alternative. But the (c)(4) phenomenon never receded entirely.<sup>40</sup> Indeed, although somewhat counterintuitive, the resurgence of the Rule 23(c)(4) issue class action in the last decade can be traced to the federal courts’ increasingly restrictive interpretation of Rule 23(b)(3)’s criteria<sup>41</sup> following the Supreme Court’s decision in *Amchem Products, Inc. v. Windsor*.<sup>42</sup> The desire to certify *something*, even a class action limited to certain issues, thus evolved as an adaptive response to the diminishing universe of class action alternatives.<sup>43</sup>

One of the staunchest promoters of the issue class action today hails from an especially surprising quarter. Judge Richard Posner,

<sup>36</sup> See Hines, *End-Run*, *supra* note 9, at 722–23.

<sup>37</sup> See, e.g., *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 361 (7th Cir. 2012); 2 CONTE & NEWBERG, *supra* note 15, § 4.23 (describing (c)(4) issue class action alternative as “automatically satisfying the predominance test under Rule 23(b)(3)”).

<sup>38</sup> See *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544, 559 (E.D. La. 1995); *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410, 423 (N.D. Ill. 1994); DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 24 (2000); Hines, *End-Run*, *supra* note 9, at 724, 729; Susan E. Abitanta, Comment, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 Sw. L.J. 743, 750 (1982) (discussing the “new character” of (c)(4) that enables the separation of issues in a (b)(3) class action as “a means of achieving class certification”).

<sup>39</sup> See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 857 (9th Cir. 1982).

<sup>40</sup> See, e.g., Hines, *End-Run*, *supra* note 9, at 724–25; Romberg, *supra* note 11, at 279–80.

<sup>41</sup> See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321–22 (3d Cir. 2008).

<sup>42</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). As Professor Robert Bone explains, prior to *Amchem*, lower courts could simply “ignor[e] (c)(4) altogether or appl[y] it without worrying too much about whether predominance should be analyzed first.” Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 695 (2014) [hereinafter Bone, *Misguided Search*]; see also Sherman, *supra* note 15, at 483, 495–98.

<sup>43</sup> Indeed, Professor Arthur Miller has suggested that the Court’s rejection in *Wal-Mart* of individual monetary relief in (b)(2) actions might similarly encourage more class plaintiffs to seek “single-issue class actions under Rule 23(c)(4).” Miller, *Simplified Pleading*, *supra* note 34, at 319 n.125.

who authored the most notorious and influential issue class action defeat of the 1990s,<sup>44</sup> has written a series of opinions championing the proposition that a court may certify class actions without regard to the number or complexity of individualized issues that must be resolved (somehow and somewhere) before any judgment may be issued in favor of an individual class member.<sup>45</sup> Citing Rule 23(c)(4) in *Carnegie v. Household International, Inc.*,<sup>46</sup> for example, Judge Posner explained that “separate proceedings of some character . . . to determine the entitlements of the individual class members to relief . . . need not defeat class treatment of the question whether the defendants violated RICO.”<sup>47</sup> Signing on to a per curiam decision in *Pella Corp. v. Saltzman*,<sup>48</sup> Judge Posner more explicitly endorsed the district court’s “discretion to split a case by certifying a class for some issues, but not others, or by certifying a class for liability alone where damages or causation may require individualized assessments.”<sup>49</sup>

As an apparent substitute for the balancing of common and individual issues mandated by (b)(3)’s predominance criterion, Judge Posner instead counsels a determination of whether a proposed class action contains genuine common issues and whether “the accuracy of the resolution of those issues is unlikely to be enhanced by repeated proceedings.”<sup>50</sup> Writing for the court in *Butler v. Sears, Roebuck & Co.*,<sup>51</sup> Judge Posner flatly asserted that “predominance is automatically resolved” if a proposed class action contains “only common questions.”<sup>52</sup> In the wake of its decision in *Comcast Corp. v. Behrend*, the Supreme Court vacated and remanded *Butler*,<sup>53</sup> as well as a Sixth

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<sup>44</sup> *In re Rhone-Poulenc*, 51 F.3d at 1293; see Gilles, *supra* note 34, at 385–86 (characterizing Judge Posner’s decision in *Rhone-Poulenc* as a “watershed” moment that “swiftly became the model for other appellate courts in decertifying mass tort classes”).

<sup>45</sup> See *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 361 (7th Cir. 2012); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010); *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003); see also Miller, *Simplified Pleading*, *supra* note 34, at 319 (praising the Seventh Circuit’s decision in *McReynolds* for its robust utilization of 23(c)(4)).

<sup>46</sup> *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656 (7th Cir. 2004).

<sup>47</sup> *Id.* at 661.

<sup>48</sup> *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010).

<sup>49</sup> *Id.* at 394.

<sup>50</sup> *Id.* (internal quotation marks omitted) (citing *Mejdrech*, 319 F.3d at 911); see also *McReynolds*, 672 F.3d at 491; *Mejdrech*, 319 F.3d at 911.

<sup>51</sup> *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012).

<sup>52</sup> *Id.* at 361.

<sup>53</sup> *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (mem.). The Court had declined two previous opportunities to review the Seventh Circuit’s expansive interpretation of 23(c)(4).

Circuit case with a similar view of predominance's role in issue class actions.<sup>54</sup> On remand, both courts reaffirmed their prior decisions, finding the Court's *Comcast* opinion inapplicable to the issue class certifications before them.<sup>55</sup> As Judge Posner explained, the limited nature of the class action in *Butler* justified a "fundamentally" different approach to the predominance analysis: though the class action struck down in *Comcast* sought to adjudicate all issues on a classwide basis, including damages, the class certified in *Butler* consisted only of common liability issues and therefore did not require any balancing of individual issues not encompassed in the class action certified.<sup>56</sup>

Even advocates of an expansive reading of Rule 23(c)(4) concede that it must be understood to comply with Rule 23(a)'s class prerequisites and one of Rule 23(b)'s class provisions.<sup>57</sup> The major interpretive controversy surrounds the proper interaction between (c)(4) and Rule 23(b)(3)'s predominance requirement, which demands a finding by the court that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."<sup>58</sup> More specifically: does Rule 23(c)(4)'s reference to bringing or maintaining an action as a class action "with respect to particular issues" authorize a miniature class action comprised *only* of common issues (those that may be resolved on a classwide basis) that expressly eliminates from such an "action" any elements of the class members' claims that require individualized adjudication?<sup>59</sup> If so, the argument goes, the litigation unit proposed as a (c)(4) class action would perforce satisfy (b)(3)'s predominance requirement: because such an action is comprised solely of issues common to the class, no

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See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McReynolds*, 133 S. Ct. 338, 338 (2012) (mem.); *Pella Corp. v. Saltzman*, 131 S. Ct. 998, 998 (2011) (mem.).

<sup>54</sup> *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013) (mem.).

<sup>55</sup> *Butler v. Sears, Roebuck & Co. (Butler II)*, 727 F.3d 796, 802 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013).

<sup>56</sup> *Butler II*, 727 F.3d at 802. On February 24, 2014, the Supreme Court denied petitions for certiorari in both *Butler II* and *Glazer*. See *supra* note 25.

<sup>57</sup> See Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 238 n.383 (2003).

<sup>58</sup> FED. R. CIV. P. 23(b)(3).

<sup>59</sup> See, e.g., Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 WASH. U. L.Q. 1127, 1230 (2005); Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 334 (1983) (criticizing Ninth Circuit's lack of understanding that an issue class action excludes all individualized aspects of class members' claims, making consideration of such excised individual issues "irrelevant" to a 23(b)(3) analysis).

individual issues exist to be balanced against those common issues in a predominance inquiry.<sup>60</sup>

As a leading class action attorney has explained, this approach to predominance operates “from the bottom up, rather than the top down”: a court begins by isolating each issue raised by class claims, and then applies the predominance and superiority inquiries imposed by Rule 23(b)(3) on an “issue-by-issue basis.”<sup>61</sup> If a particular issue common to the class meets the predominance test (which, of course, it will) and the superiority test, “it may be certified for Rule 23(c)(4) treatment, notwithstanding the treatment of the large number of other issues in the case . . . .”<sup>62</sup>

The Fifth Circuit sharply rejected this interpretation of Rule 23(c)(4) in *Castano v. American Tobacco Co.*,<sup>63</sup> reasoning that “[a]llowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.”<sup>64</sup> The court characterized (c)(4) instead as a simple “housekeeping rule that allows courts to sever the common issues for a class trial.”<sup>65</sup>

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<sup>60</sup> See, e.g., 2 CONTE & NEWBERG, *supra* note 15, § 4.23; MOORE, *supra* note 15, § 23.86 (contending that a court “may certify a class action as to particular issues even if the cause of action as a whole would not meet the predominance requirement”); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 812 (2013) (urging that a proper understanding of 23(c)(4) “avoids the need for the court to determine whether the common issues in the case predominate over the individualized issues”). But see Bone, *Misguided Search*, *supra* note 42, at 697 (questioning unlimited interpretation of (c)(4) that would result in satisfaction of predominance test “no matter how heterogeneous the class”); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 955 (1998) (“[The predominance] requirement has generally been understood (and I think correctly) to override the possibility of certification of a class on particular issues under Rule 23(c)(4) unless those issues are found to ‘predominate’ over the individual issues in the case.”).

<sup>61</sup> Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1502 (2005).

<sup>62</sup> *Id.* at 1502–03; see *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860–61 (6th Cir. 2013).

<sup>63</sup> *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Note: the author served as co-counsel in *Castano*, representing Defendant Philip Morris Companies, Inc.

<sup>64</sup> *Id.* at 745 n.21; see also *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 601 (5th Cir. 2006) (reaffirming *Castano*’s (c)(4) holding); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421–22 (5th Cir. 1998) (rejecting class certification on common issue, noting that “such an attempt to manufacture predominance through the nimble use of subdivision (c)(4) is precisely what *Castano* forbade” (internal quotation marks omitted)).

<sup>65</sup> *Castano*, 84 F.3d at 745 n.21.

Despite the Fifth Circuit's brief speculation regarding the intentions of Rule 23(c)(4)'s framers, neither side of the debate has delved much into the provision's origins or intended purpose. This virtual absence of historical analysis can be explained in part by the notable dearth of (and difficulty in locating) (c)(4)'s rulemaking history.<sup>66</sup> But few in either camp have labored nearly as vigorously to examine (c)(4)'s history as they have to construct policy arguments for or against the issue class action. This Article offers a more meticulous examination of Rule 23(c)(4), endeavoring to provide both advocates and opponents a clearer set of interpretive frameworks through which to view the issue class action. Parts II–IV present analyses of (c)(4) from the perspective of each of the three major interpretive methodologies: textualism, intentionalism, and dynamic interpretation.

## II. MISAPPLIED TEXTUALISM

Textualism as a principle for interpreting the Federal Rules of Civil Procedure eschews extrinsic evidence of a rule's meaning, such as its rulemakers' intentions.<sup>67</sup> The textualist model instead seeks to discern the meaning of a particular rule provision by focusing primarily (as the name implies) on the text of the rule.<sup>68</sup> When a contested provision of a rule is deemed unambiguous, the "plain meaning" of its language may end the interpretive inquiry. But textual ambiguity itself can be clarified by the utilization of other interpretive tools, such as close examination of the provision in relationship to the overall structure of a rule and related provisions,<sup>69</sup> application of various interpretive canons,<sup>70</sup> and careful consideration of historically contemporaneous understandings of the provision.<sup>71</sup>

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<sup>66</sup> See *infra* notes 182–90 and accompanying text.

<sup>67</sup> See, e.g., *Tome v. United States*, 513 U.S. 150, 168 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("Like a judicial opinion and like a statute, the promulgated Rule says what it says, regardless of the intent of its drafters.").

<sup>68</sup> See *id.*

<sup>69</sup> As Justice Scalia demonstrated in *Pavelic & LeFlore v. Marvel Entertainment Group*, the ambiguity of a rule provision when "viewed in isolation" can be resolved upon a reading of the rule as a whole. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123–24 (1989) (interpreting Federal Rule of Civil Procedure 11); cf. Nelson, *supra* note 27, at 348 ("[N]o 'textualist' favors isolating statutory language from its surrounding context . . .").

<sup>70</sup> See D. Marcus, *supra* note 28, at 967–71 (discussing use of substantive and linguistic canons in the interpretation of federal rules). See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997) (discussing the application of canons of construction to textual interpretation); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (analyzing use of canons of construction to vindicate nondelegation doctrine principles).

<sup>71</sup> See D. Marcus, *supra* note 28, at 976–83; Struve, *supra* note 27, at 1141–42.



A. *The "Plain Meaning" of Rule 23(c)(4)*

Every analysis of a Federal Rule begins, of course, with its text.<sup>72</sup> The Court has occasionally found the meaning of a Rule 23 provision to be so clear that no additional interpretive methodology is necessary,<sup>73</sup> but, as one scholar has observed, the language of Federal Rules "is seldom, if ever, clear enough to avoid the need for some interpretation."<sup>74</sup> So the starting point in understanding Rule 23(c)(4) must be the language of the provision itself: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."<sup>75</sup> On its face, the provision appears rife with uncertainties: what exactly does it mean to bring or maintain an action "with respect to particular issues," and when is it ever "appropriate" to do so?

Some courts and commentators, however, have urged that Rule 23(c)(4)'s "plain meaning" may be readily understood: it sets forth broad discretionary authority ("when appropriate") for the certification of a new genre of class action, limited in scope to component parts of class claims ("with respect to particular issues").<sup>76</sup> Under this view, an issue class action could render Rule 23(b)(3)'s predominance criteria irrelevant if the class contains no individual issues against which to balance the common issues in a predominance evaluation. As evidence for this position, advocates point to the absence of any language in (c)(4) imposing restrictions on a court's selection of eligible "particular issues," indicating that no such limiting principle exists.<sup>77</sup>

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<sup>72</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) (declaring that the Court is "bound to follow Rule 23 as we understood it upon its adoption").

<sup>73</sup> See, e.g., *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (relying squarely on the "plain language of Rule 23(b)(3)" requiring only the existence of common "questions" rather than favorable answers thereto); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–76 (1974) (majority finding 23(c)(2)'s requirement of providing notice in 23(b)(3) class actions to be "unambiguous" and "unmistakable").

<sup>74</sup> Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1970 (2007) [hereinafter Bone, *Who Decides?*].

<sup>75</sup> FED. R. CIV. P. 23(c)(4).

<sup>76</sup> See *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (grounding an expansive interpretation of 23(c)(4) in the provision's "plain language"); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003) (interpreting (c)(4) to issue an "express command" for certification of issue class actions that "courts have no discretion to ignore"); Cabraser, *supra* note 61, at 1499; Stempel, *supra* note 59, at 1230 (asserting that the text of Rule 23(c)(4) should "be accorded its plain meaning"); see also *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 29 (E.D.N.Y. 2001).

<sup>77</sup> See, e.g., Cabraser, *supra* note 61, at 1499 ("Nothing in Rule 23(c)(4)(A) requires a common-issues trial to resolve an entire cause of action, or even an element of a cause of ac-

But even among issue class action enthusiasts, Rule 23(c)(4)'s textual language has been described as "opaque,"<sup>78</sup> "vague,"<sup>79</sup> "confus[ing],"<sup>80</sup> or "unhelpful."<sup>81</sup> As one prominent class action scholar observed, the provision contains a "vague caution that issue classes should be certified only '[w]hen appropriate,'" and contemplates "some manner of slicing and dicing" within a larger litigation, yet provides no guidance as to "[w]hat slicing and dicing is nonetheless 'appropriate.'"<sup>82</sup> Indeed, 23(c)(4)'s decades-long journey from oblivion to rediscovery and from rejection to adoption makes it difficult to sustain the contention that its text may be interpreted solely by reference to its "plain meaning."<sup>83</sup> The remaining sections of this Part consider additional interpretive sources consistent with textualist methodology.

### B. Deconstructing Rule 23

The architectural design of Rule 23 mirrors that of the Federal Rules of Civil Procedure themselves; each contains a set of procedures whose distinct functions drive the ordering of their position within the whole. The Federal Rules march forward on an essentially linear path from those pertaining to the initial stages of litigation (jurisdiction, service, pleadings, and joinder) through the central stage (discovery), and upward to those governing the end stages of litigation (trial, post-trial, judgment, and remedies). Similarly, Rule 23 contains functionally unique subsections that track a class action's progress from certification through initial notice and opportunity to opt-out, and from case management to settlement and appeals. As in the Federal Rules generally, Rule 23's subdivisions serve unique purposes<sup>84</sup> and are organized in a basically sequential order that implicitly contemplates satisfaction of certain antecedent provisions.

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tion."); Stempel, *supra* note 59, at 1230; cf. *Ortiz*, 527 U.S. at 871 (Breyer, J., dissenting) (arguing that the proposed 23(b)(1)(B) settlement class "falls within the Rule's language").

<sup>78</sup> See Gilles, *supra* note 34, at 385.

<sup>79</sup> See Nagareda, *supra* note 57, at 238; see also Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461, 483 (1988) (explaining that a lack of understanding of 23(c)(4)'s text "discourages all but the most innovative and imaginative judges").

<sup>80</sup> See Klonoff, *supra* note 60, at 807.

<sup>81</sup> See Scott Dodson, *Subclassing*, 27 CARDOZO L. REV. 2351, 2372 (2006).

<sup>82</sup> Nagareda, *supra* note 57, at 238–39 (quoting FED. R. CIV. P. 23(c)(4)).

<sup>83</sup> See *infra* notes 229–50 and accompanying text.

<sup>84</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550, 2558 (2011); Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (describing Rule 23(b) class action types in "functional" terms).

Hence, Rule 23 begins with subdivision (a), titled "Prerequisites," which sets out four conjunctive criteria that every class action must meet: numerosity, commonality, typicality, and adequacy.<sup>85</sup> Subdivision (b), titled "Types of Class Actions," next permits class certification "if Rule 23(a) is satisfied and if" the proposed class action satisfies one of subsection (b)'s four disjunctive class "types"<sup>86</sup>: (b)(1)(A),<sup>87</sup> (b)(1)(B),<sup>88</sup> (b)(2),<sup>89</sup> or (b)(3).<sup>90</sup> Subsections (a) and (b) thus compose the "nuts and bolts" of the class certification decision,<sup>91</sup> and failure to satisfy any of (a)'s prerequisites or the terms of one of (b)'s typological categories proves inexorably fatal to any proposed class action. Rule 23's utilization of the term "class action" in all post-Rule 23(b) provisions, therefore, should be understood to refer to a preexisting class action unit of representational litigation.<sup>92</sup>

After ascertaining that a class action meets the (a) and (b) class certification criteria, a court must follow a variety of mandated directives in subsection (c), including: (1) the proper timing of the order certifying such a class; (2) the obligation to notify putative (b)(3) class members of their right to be excluded from the class;<sup>93</sup> (3) the binding

<sup>85</sup> FED. R. CIV. P. 23(a)(1)–(4); *see, e.g., Wal-Mart*, 131 S. Ct. at 2551 (reaffirming that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied'" (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982))).

<sup>86</sup> FED. R. CIV. P. 23(b) (emphasis added).

<sup>87</sup> Subdivision (b)(1)(A) applies to cases where individual litigation would create "incompatible standards of conduct for the party opposing the class." FED. R. CIV. P. 23(b)(1)(A).

<sup>88</sup> Subdivision (b)(1)(B) may be invoked when individual litigation would be dispositive of or impair, as a practical matter, "the interests of the other members not parties to the individual adjudications." FED. R. CIV. P. 23(b)(1)(B).

<sup>89</sup> Subdivision (b)(2) authorizes class actions where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

<sup>90</sup> Subdivision (b)(3), whose provisions lie at the heart of the (c)(4) debate, requires a court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). Rule 23(b)(3) also identifies several "pertinent" matters for courts to consider when making these findings, including the manageability of a proposed class. FED. R. CIV. P. 23(b)(3)(A)–(D).

<sup>91</sup> *See Dodson*, *supra* note 81, at 2378; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (referring to the "safeguards provided by the Rule 23(a) and (b) class-qualifying criteria").

<sup>92</sup> *See Amchem*, 521 U.S. at 621.

<sup>93</sup> FED. R. CIV. P. 23(c)(2)(B). Rule 23(c)(2)(A) now also explicitly includes the discretionary authority to provide notice in 23(b)(1) and 23(b)(2) class actions, although there is no parallel authorization in subsections (c)(2)(A) or (c)(3)(A) for class members in such actions to request exclusion from the binding effect of a class judgment. FED. R. CIV. P. 23(b)–(c). In his

nature of any class judgment; (4) the enigmatic (c)(4); and (5) the possible division of the class action into subclasses.<sup>94</sup> Next, under the apt title “Conducting the Action,” subsection (d) offers a variety of discretionary class action management tools, subsection (e) governs the possible settlement or compromise of a class action; and subsection (f) sets forth procedures for discretionary appellate review of class certification orders.<sup>95</sup>

Given this view of Rule 23’s structural design, the certification criteria set forth in (a) and (b) should be understood as rendering those requirements conditions precedent to the directives found in 23(c) and later subsections.<sup>96</sup> Subdivision (c)(4)’s provision countenancing a class action “with respect to particular issues,” therefore, could not be interpreted as authority for altering—much less eliminating—a court’s preexisting determination of common issue predominance and superiority in the “class action” certified.<sup>97</sup>

In *Amchem*, the Court applied this functionally sequential approach to Rule 23 to reject an arguably analogous attempt to circumvent, inter alia, (b)(3)’s stringent predominance criterion.<sup>98</sup> In approving the parties’ proposed settlement class, the trial court had concluded that Rule 23(e) modified (and lessened) the demands of (b)(3)’s predominance criteria, such that a class could be certified for

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contribution to this Symposium, Professor Robert Klonoff advocates in favor of providing this discretionary notice for 23(b)(1) and 23(b)(2) classes. See Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 GEO. WASH. L. REV. 798, 827–32 (2014).

<sup>94</sup> See FED. R. CIV. P. 23(c)(5). Professor Scott Dodson has offered a detailed interpretation of this subclass provision, which, prior to the 2009 “style” amendments to Rule 23, had been included as a subpart of 23(c)(4). See generally Dodson, *supra* note 81. As Professor Dodson observed, the now-denominated (c)(5) subclass provision is subject to many of the same interpretive challenges as its (c)(4) issue class counterpart. *Id.* at 2372. The two have always shared, for example, the vague condition precedent of implementation only “when appropriate.” See *id.* And similar arguments have been forwarded that the subclass provision should also be understood to serve as a flexible tool for making class actions easier to certify, or at least manage. *Id.* at 2379.

<sup>95</sup> FED. R. CIV. P. 23(d)–(f). Subdivisions (g) and (h), added almost forty years after the 1966 revisions setting forth 23(a)–(e) and five years after (f), address important matters of selecting and compensating class counsel. *Id.*

<sup>96</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999) (distinguishing “precertification” protections of Rule 23(a) and (b) from the “postcertification” demands of Rule 23(e)’s settlement provisions).

<sup>97</sup> See FED. R. CIV. P. 23(c)(4). The placement in subdivision 23(c)(3) of the provision relating to a class judgment may make less sense as a sequential matter, but its crucial relationship to 23(c)(2)’s notice and exclusion requirements may explain its inclusion in subsection (c), as well as the necessity of its mandates compared with the contingencies surrounding later provisions.

<sup>98</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619–21 (1997).

settlement even it could not have been certified for litigation. Striking down this settlement class action, the Court insisted that Rule 23's settlement subsection "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)."<sup>99</sup> In the absence of any such superseding authority, the Court reasoned, the proposed class action could not be upheld, "for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design."<sup>100</sup>

The Court applied this approach more recently in *Wal-Mart*, reiterating the need to interpret Rule 23 provisions in a manner consistent with its structural scheme.<sup>101</sup> Despite disagreement on other aspects of the majority opinion,<sup>102</sup> the Justices unanimously rejected the Ninth Circuit's attempted reconstruction of Rule 23(b)(2) to encompass individualized class claims for money damages when accompanied by a request for classwide injunctive relief.<sup>103</sup> The Court rejected this reading of (b)(2) as structurally improbable given the explicit applicability of (b)(3) to class claims seeking individualized damages.<sup>104</sup> Indeed, the Court emphasized, such an interpretation of (b)(2) "has no basis in the Rule's text, and . . . does obvious violence to the Rule's structural features."<sup>105</sup> The requirements that define each of the Rule 23(b) class action types, in other words, reflect functionally separate categories designed to accommodate distinct class actions, resulting in the need to firmly enforce the boundaries between varying class action types.

Some academics and courts have disputed this functionally sequential theory, especially as applied to the interrelationship between subsections (a), (b), and (c).<sup>106</sup> They have criticized this approach to

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<sup>99</sup> *Id.* at 621; see also *Ortiz*, 527 U.S. at 858–59 (declaring that a Rule 23(e) settlement class fairness hearing "can no more swallow the preceding protective requirements of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3)").

<sup>100</sup> *Amchem*, 521 U.S. at 625.

<sup>101</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557–59 (2011) (engaging in detailed structural analysis of Rule 23).

<sup>102</sup> See *id.* at 2562–68 (Ginsburg, J., dissenting in part).

<sup>103</sup> See *id.* at 2559–60 (majority opinion).

<sup>104</sup> *Id.* at 2559.

<sup>105</sup> *Id.*

<sup>106</sup> See, e.g., Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 56–58 (1996) (describing unapproved Advisory Committee proposal to amend 23(c)(4)'s language because its "placement in subdivision (c)(4) . . . has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions"); Stempel, *supra* note 59, at 1231 (asserting that the "seemingly obvious" structural understanding of 23(c)(4)'s relationship to 23(b)(3) is that

Rule 23's structure as unduly rigid and formalistic, arguing that such an interpretation runs "contrary to the flexibility inherent in Rule 23."<sup>107</sup> Under this more lenient view of Rule 23, subsection (c)(4) should be construed as a procedural device that operates to help satisfy subsection (b)(3)'s predominance and superiority requirements by authorizing a class action limited to certain constituent aspects of class members' claims.<sup>108</sup> A structural reading of Rule 23 that forbids consideration of subsection (c)(4) until after a class action has satisfied subsection (b)(3) would thus nonsensically withhold an important tool designed to assist in the construction of a certifiable (b)(3) class action.<sup>109</sup>

In *Gunnells v. Healthplan Services, Inc.*,<sup>110</sup> for example, the Fourth Circuit contended that the Court had already refuted the sequential understanding of Rule 23 because in *Ortiz v. Fibreboard Corp.*<sup>111</sup> it implied that Rule 23(a)(4) adequacy problems might have been avoided if the lower court had utilized Rule 23(c) subclasses.<sup>112</sup> Under this reading of *Ortiz*, the Court fully contemplates that subsection (c)'s provisions may be employed to satisfy Rule 23(a) and, presumably, subsection (b)'s criteria prior to certification. Given that Rule 23(c) subclasses must separately satisfy each of the Rule 23(a) and (b) criteria,<sup>113</sup> however, the Court's reference in *Ortiz* to subclasses potentially redressing Rule 23(a) adequacy concerns may best be read as suggesting that two or more classes should have been con-

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"the issue class action was not intended to be subject to the predominance requirement"); see also *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 440 (4th Cir. 2003) (rejecting "rigid, sequential reading" of Rule 23).

<sup>107</sup> Dodson, *supra* note 81, at 2379; see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 868 (1999) (Breyer, J., dissenting) (arguing that trial courts have authority with regard to Rule 23 "to exercise every bit of discretionary power that the law provides").

<sup>108</sup> See Klonoff, *supra* note 60, at 808 (explaining that "issue classes are designed precisely to avoid resolving any *claims* (hence the term '*issues* classes')"); Sherman, *supra* note 15, at 497 (describing 23(c)(4) as a "case management device" that permits predominance analysis to be conducted solely on the basis of the issues severed for class trial).

<sup>109</sup> See *Gunnells*, 348 F.3d at 439 (describing (c)(4) as "a provision specifically included to make a class action more manageable"); Dodson, *supra* note 81, at 2379 ("Rule 23(c) must be designed to work in tandem with [rather than imposed after] the requirement of superiority of Rule 23(b)(3) . . .").

<sup>110</sup> *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003).

<sup>111</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

<sup>112</sup> *Gunnells*, 348 F.3d at 439–40. At the time, the subclass provision currently in 23(c)(5) was denominated as (c)(4)(B).

<sup>113</sup> See 7AA CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1790 (3d ed. 2005) ("When subclasses are formed . . . each subclass must independently meet the requirements of Rule 23."); Dodson, *supra* note 81, at 2372.

sidered, not that subsection (c)(5)—or (c)(4)—may be understood as lessening the demands of Rule 23(a) and (b).

*Amchem* also provides some measure of support for critics of the sequential approach to Rule 23. The Court there held that in certifying a class for settlement, a court could consider the existence of a proposed settlement in applying Rule 23(b)(3)'s "manageability" criterion because that settlement would negate the possibility of an unmanageable litigated trial.<sup>114</sup> But the Court pointedly distinguished this leeway with respect to manageability from any parallel structural flexibility with regard to (b)(3)'s predominance requirement and other demands.<sup>115</sup>

The prominent role of Rule 23(b)(3)'s predominance requirement, in particular, highlights a serious underlying flaw in an expansionist conception of (c)(4) as a procedural device that modifies (b)(3)'s commands: if subsection (c)(4) authorizes a (b)(3) class action whenever subsection (a)(2)'s commonality requirement has been satisfied,<sup>116</sup> without any regard for the relative number, significance, or complexity of the remaining individual issues raised by class claims, it would not just modify but effectively strip (b)(3)'s predominance requirement from Rule 23.<sup>117</sup> The only apparent limit on a court's power to "slice and dice" until predominance has been achieved would be subsection (c)(4)'s vaguely worded "when appropriate" cautionary instruction.<sup>118</sup>

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<sup>114</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

<sup>115</sup> *Id.* at 620–23 (stressing the "vital" safeguarding function of Rule 23(a) and (b)'s "class-qualifying criteria" that "demand undiluted, even heightened, attention in the settlement context").

<sup>116</sup> As the Supreme Court observed in *Amchem*, 23(b)(3)'s "predominance criterion is far more demanding" than 23(a)(2)'s commonality requirement. *Id.* at 624.

<sup>117</sup> See Nagareda, *supra* note 57, at 238 (expressing skepticism about an approach to issue class action that would allow courts to "includ[e] and omit[ ] particular issues in the litigation simply in order to shoehorn the resulting subset into the desired category for class certification under Rule 23(b)").

<sup>118</sup> See *id.* at 238 n.385 (pointing out that whatever the limits of 23(c)(4), a court "surely cannot seek to satisfy [the (b)(3) predominance] demand for a heightened showing of commonality simply by culling out the other, non-common issues and then declaring itself in compliance with Rule 23(b)(3)"); Romberg, *supra* note 11, at 293 (conceding the "intuitive" strength of this argument: "[I]f a controversy contains common and individual issues, then no matter how you slice them or dice them, the issues don't disappear; either common issues predominate over individual issues, or they do not"); see also *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 n.17 (5th Cir. 1998) (describing proposed 23(c)(4) as a "distort[ion of] the certification process . . . [that] ultimately results in unfairness to all because of the increased uncertainties in what is at stake in the litigation and in whether the litigation will ever resolve any significant part of the dispute"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4).").

Some issue class action supporters have suggested that Rule 23(c)(4)'s effective elimination of the predominance requirement from the (b)(3) calculus could be balanced by a more robust role for (b)(3)'s remaining criterion: superiority.<sup>119</sup> There is, however, no textual support for such a novel burden-shifting reading of Rule 23(b)(3)'s dual criteria.<sup>120</sup> This understanding of subsection (c)(4) as authority for virtually unbounded judicial discretion to whittle away at class claims until predominance is achieved<sup>121</sup> poses a threat to Rule 23's structure that should not be indulged absent more compelling textual or structural evidence.<sup>122</sup>

Indeed, the Court has proven especially steadfast in repelling perceived incursions into structural territory it has viewed as exclusively occupied by Rule 23(b)(3). In *Ortiz* and *Wal-Mart*, for example, the Court rejected interpretations of Rule 23(b)(1)(B) and (b)(2), respectively, that would have permitted certification under those mandatory class action provisions of individualized claims for money damages already provided for by Rule 23(b)(3).<sup>123</sup> Similarly, the Court in *Amchem* repudiated an interpretation of Rule 23(e) that would have redefined predominance in the context of settlement classes.<sup>124</sup>

As the Court has repeatedly explained, its particularly protective view of the (b)(3) class action derives from the unique set of procedural rights Rule 23 bestows solely upon subsection (b)(3) class members.<sup>125</sup> Even beyond the safeguards represented by (b)(3)'s

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119 See Klonoff, *supra* note 60, at 812 (explaining that a (c)(4) test centered around whether certified issues would materially advance the litigation "properly avoids the need for the court to determine whether the common issues in the case predominate over the individualized issues"). As explained by one of the first courts to adopt the (c)(4) issue class action, the reduced importance of the predominance requirement in (c)(4) class actions may be "offset by a corresponding increase in the importance accorded Rule 23(b)'s requirement of superiority. . . . In fact, in practical working terms I would view the predominance requirement, in connection with a Rule 23(c)(4)(A) request, as subsumed to a considerable extent within that 'superiority' requirement." *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985).

120 See FED. R. CIV. P. 23(b)(3).

121 See Cabraser, *supra* note 61, at 1499–1507.

122 Cf. *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 544, 546 (1991) (refusing to adopt a proposed interpretation of Rule 11 "absent a compelling indication in the text that the Advisory Committee intended such a result").

123 See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–47 (1999).

124 See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–23 (1997); see also *Ortiz*, 527 U.S. at 858.

125 See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (noting "Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (e.g., an opportunity to opt out), and the court's duty to take a 'close look' at whether common questions predominate over individual ones" (quoting *Amchem*, 521 U.S. at



predominance and superiority commands,<sup>126</sup> Rule 23(c) requires significantly different post-certification treatment of (b)(3) class actions. Subsection (c)(3) grants only (b)(3) class members the right to exclude themselves from the class action, and subsection (c)(2) mandates a notice campaign to help effectuate class member exercises of that right.<sup>127</sup>

Yet if subsection (c)(4) does not authorize an issue class action that assists in the satisfaction of the (b)(3) predominance requirement, what function remains for it to serve? Rule 23(c)(4) enthusiasts have occasionally posited this as a stark choice between two reductive alternatives: either (c)(4) authorizes the predominance-evading issue class action or it represents an utter Rule 23 nullity.<sup>128</sup> The latter option, they argue, cannot survive one of the most fundamental canons of statutory construction, the avoidance of superfluity.<sup>129</sup> But the obviousness of Rule 23(c)(4)'s point, that a class action could include both common issues (which could be litigated on a classwide basis) and individual issues (which could not, of course, be litigated on a class basis), does not make it superfluous. And, as will be discussed below, other canons of construction tilt against an expansive interpretation of Rule 23(c)(4).

### C. Rule 23(c)(4) and Canons of Interpretation

Academics in the field of statutory analysis have long debated the proper role of canons of interpretation, a subject well beyond the scope of this Article.<sup>130</sup> But whatever strength such canons may wield

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615)); *Wal-Mart*, 131 S. Ct. at 2558 (emphasizing that vital "procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class").

<sup>126</sup> See, e.g., *Ortiz*, 527 U.S. at 858; *Amchem*, 521 U.S. at 615–19; WRIGHT ET AL., *supra* note 113, § 1777 ("[The Rule 23(b)(3)] requirements reflect the fact that special caution must be exercised in class actions of this type because of the loose affiliation among the class members, which is thought to magnify the risks inherent in any representative action.").

<sup>127</sup> See, e.g., *Wal-Mart*, 131 S. Ct. at 2558–60 ("[U]nlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory . . ."); *Ortiz*, 527 U.S. at 846–47 (citing the Rule 23(b)(3) opt-out right as an important procedural safeguard absent from the proposed Rule 23(b)(1)(B) settlement class action).

<sup>128</sup> See, e.g., *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985) (invoking the rule against superfluities to conclude that Rule 23 would have "no need or place" for subsection (c)(4) if it did not "lessen" subsection (b)(3)'s predominance requirement); see also *infra* note 134 and accompanying text.

<sup>129</sup> See *In re Tetracycline Cases*, 107 F.R.D. at 727.

<sup>130</sup> See, e.g., William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpre-*

in the specialized context of interpreting congressional statutes,<sup>131</sup> they must be understood to fit even less comfortably within the wholly different enterprise of interpreting federal rules.<sup>132</sup> The applicability of semantic canons evoking common sense principles of construction, however, warrants some consideration.<sup>133</sup> In the case of Rule 23(c)(4), issue class action supporters cite the canon against superfluity, which instructs us to avoid an interpretation of a rule that renders it a superfluity, redundancy, or nullity.<sup>134</sup> If subsection (c)(4) does not operate to limit a class action in a manner that alters its capacity to satisfy Rule 23(b)(3)'s predominance and superiority requirements, they argue, then its words have no other purpose in the rule, precisely what the canon warns against.<sup>135</sup> This is a fair point, of course, and harkens back to Professor Wright's protests about subsection (c)(4)'s unnecessary presence in Rule 23 fifty years ago.<sup>136</sup> In order to be consistent with textualist methodology, however, the superfluity argument must be evaluated without reference to such evidence of rulemaking intent.

One reasonable reading of Rule 23(c)(4)'s purpose is that it makes explicit what is implicit in arguably several of the Rule 23(b) class action provisions, but especially in (b)(3): class claims need not be adjudicated in their entirety on a classwide basis. As will be discussed in the next Section, while it strikes us today as an almost implausibly obvious assertion, a genuine circuit split on this question persisted at the time of Rule 23(c)(4)'s promulgation.<sup>137</sup> So subsection

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tation, 66 U. CHI. L. REV. 671, 674 (1999) (observing that "[t]here has long been a vigorous debate over the utility of the canons").

131 Cf. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside*, 65 STAN. L. REV. 901, 940 (2013) (challenging continuing vitality of various statutory canons given lack of significant empirical evidence of adherence to them among legislative drafters).

132 See D. Marcus, *supra* note 28, at 939; Struve, *supra* note 27, at 1147.

133 Cf. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 150 (1990) (describing semantic canons of statutory interpretation as "plausible or even irresistible judgments about how words should ordinarily be understood"). But see Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1086, 1090 (1995) (challenging underlying assumption of semantic canons that statutes can be self-defining).

134 See, e.g., *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226–27 (2d Cir. 2006) (adopting the predominance-altering issue class model by invoking the "well-settled principle that courts should avoid statutory interpretations that render provisions superfluous" (internal quotation marks omitted)); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439–40 (4th Cir. 2003).

135 See, e.g., Klonoff, *supra* note 60, at 812 (pointing out that if 23(c)(4) does not offer relief from 23(b)(3) predominance, "plaintiffs would never utilize it. Why certify just an issue if the entire case satisfies predominance?"); Stempel, *supra* note 59, at 1230.

136 See *supra* notes 3–4 and accompanying text.

137 See WRIGHT ET AL., *supra* note 113, § 1752 (describing pre-1966 resistance among some courts to certification of class actions requiring individualized determination of damages). *Com-*

(c)(4) functions as an express authorization for “particular issues” (i.e., common issues) to proceed on a representational basis within the class action despite the presence of issues raised by class claims that require subsequent individual adjudication.<sup>138</sup> In this view, (c)(4) functions as a class action version of Rule 42(b),<sup>139</sup> which authorizes severance of issues within an action for separate pre-trial or trial proceedings.<sup>140</sup> That function thus complements the judicial authority to sever issues within an individual action found in Rule 42(b).<sup>141</sup>

The statutory canon against interpretations that would nullify *other* rule provisions, particularly those of greater significance, also serves as a counter to the expansive interpretation of Rule 23(c)(4).<sup>142</sup> Without greater certainty, in other words, we should take tremendous care not to interpret provisions subsequent to Rule 23(a) and (b) so as to damage those vital prescriptions. This canon counsels against an aggressive role for subsection (c)(4) that would functionally abolish (b)(3)’s predominance criterion, especially given the heightened procedural safeguards accorded by Rule 23 to (b)(3) class actions.<sup>143</sup>

Finally, wholly apart from the uneasy role of canons of statutory interpretation in the field of rule interpretation generally,<sup>144</sup> the canon against surplusage itself may be of somewhat dubious force. The presumption that Congress (or the framers of Rule 23) would avoid re-

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*pare* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 588–89 (10th Cir. 1961) (approving class certification despite need for individual damages determinations), *with* Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101, 105 (8th Cir. 1942) (“[T]here exist common questions of law and fact; but it cannot be said that common relief is sought. The damages sought to be recovered for plaintiff and its several stockholders are different.”).

<sup>138</sup> See Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 47 (1967) (“[T]he effective administration of (b)(3) actions will probably require wide use of the already familiar device of split trials.”); Nagareda, *supra* note 57, at 238–39; Romberg, *supra* note 11, at 264–65 (acknowledging the “invisible” yet requisite role of 23(c)(4) in severing individual from common issues in “the vast majority of cases certified under subdivision (b)(3)”).

<sup>139</sup> FED. R. CIV. P. 42(b).

<sup>140</sup> See Frankel, *supra* note 138, at 47; Romberg, *supra* note 11, at 264.

<sup>141</sup> See, e.g., Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1218 n.60 (1966) (noting that the power given to courts under the new (c)(4) provision “is analogous to that conferred by FED. R. CIV. P. 42”); see also Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) (asserting that subdivision “(c)(4) is a housekeeping rule that allows courts to sever common issues for a class trial”).

<sup>142</sup> See, e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (declining to adopt interpretation of Rule 23(b)(2) that would “nullify [Rule 23(b)(3)’s] protections”).

<sup>143</sup> See *id.*; Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1419 (2005) (“[T]here are few principles in place to deal with canons seemingly pointing in different directions.”).

<sup>144</sup> See *supra* notes 130–35 and accompanying text.

dundant or superfluous text, either because it would be inefficient or misleading, may sometimes be a sensible one.<sup>145</sup> But, as the Supreme Court recently observed, “the canon against surplusage is not an absolute rule.”<sup>146</sup> Drafters of statutes (and, presumably, rules) may deliberately choose admittedly redundant language to underscore or clarify meaning. Indeed, a provocative recent empirical study revealed that fully two-thirds of congressional staff tasked with drafting legislation believed that the canon against surplusage applied “rarely” or “only sometimes.”<sup>147</sup> One recurrent explanation offered by the study’s respondents was a pragmatic one: the “need to ensure that the statute covers the intended terrain” and “intentionally err on the side of redundancy to ‘capture the universe’ or ‘because you just want to be sure you hit it.’”<sup>148</sup>

However one might view the applicability or force of interpretive canons in the field of procedural rule analysis, the textualist model also permits consideration of sources shedding light on the contemporaneous meaning of a text likely understood by its framers. This final piece of textualist methodology concerning Rule 23(c)(4) examines class action law prior to and shortly after the 1966 amendments that codified (c)(4) to better appreciate how its framers and Congress understood that provision.

#### D. Rule 23(c)(4) and Antecedent Class Action Case Law

One way to gauge the meaning of a disputed rule provision is to examine how its language likely would have been understood at the time of the rule’s promulgation, as evidenced by historically contemporaneous case law. The Supreme Court invoked this approach most recently in *Wal-Mart* in resolving questions surrounding the proper scope of Rule 23(b)(2) class actions.<sup>149</sup> Writing on behalf of a unanimous Court on this issue of Rule 23(b)(2) interpretation, Justice Scalia

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<sup>145</sup> See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 644 (2d ed. 1995); 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46:6 (7th ed. 2007).

<sup>146</sup> See *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (citing *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) and *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992)).

<sup>147</sup> Gluck & Bressman, *supra* note 131, at 934.

<sup>148</sup> *Id.*

<sup>149</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557–58 (2011). The Court has also frequently relied upon a similar historical analysis in interpreting other Federal Rules of Civil Procedure. See, e.g., *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 356–61 (1981) (examining 1938 Advisory Committee Note citations to pre-Rule 68 case law and state statutes “as illustrations of the operation of the Rule”).

reviewed each of the cases referenced by the Advisory Committee to determine how injunctive class actions were understood prior to 1966.<sup>150</sup> That examination of pre-(b)(2) history confirmed, according to Justice Scalia, that “[i]n none of the cases cited by the Advisory Committee as examples of (b)(2)’s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction.”<sup>151</sup>

The Court in *Ortiz* dove even deeper into pre-1966 case law, devoting almost ten pages of its opinion to a historical review of limited funds.<sup>152</sup> In an effort to distill the essential components of a limited fund as it would have been understood at the time of Rule 23(b)(1)(b)’s inception, the Court traced the limited fund concept as far back as cases from the early nineteenth century.<sup>153</sup> Importing this historical understanding of limited funds into Rule 23, the Court determined that “[t]he Advisory Committee, and presumably the Congress in approving subdivision (b)(1)(B), must have assumed that an action with these characteristics would satisfy the limited fund rationale cognizable under that subdivision . . . [and] there are good reasons to treat these characteristics as presumptively necessary.”<sup>154</sup> While acknowledging that “the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept,” the Court nonetheless concluded that the more “prudent course . . . is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model.”<sup>155</sup>

To be fair, unlike subsection (c)(4), the Rule 23 subsections at issue in *Ortiz* and *Wal-Mart* had directly analogous predecessors in the original Rule 23, lending stronger support to a historically constrained interpretation of those provisions.<sup>156</sup> But it does not follow from subsection (c)(4)’s absence in the original Rule 23 that its presence in the amended Rule 23 represented a novel class action procedure, as was certainly true of subsection (b)(3).<sup>157</sup> To the contrary,

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<sup>150</sup> See *Wal-Mart*, 131 S. Ct. at 2558.

<sup>151</sup> *Id.* (citing Advisory Comm. Note, 39 F.R.D. 69, 102 (1966)).

<sup>152</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832–42 (1999).

<sup>153</sup> See *id.* at 837 (citing *Ross v. Crary*, 1 Paige Ch. 416, 417–18 (N.Y. Ch. 1829)).

<sup>154</sup> *Id.* at 841–42.

<sup>155</sup> *Id.* at 842. But see *Burbank & Wolff*, *supra* note 19, at 62 (criticizing the Court’s “restrained” analysis of (b)(1)(B) for hewing too closely to pre-1966 precedents).

<sup>156</sup> See *Wal-Mart*, 131 S. Ct. at 2557 (“Because Rule 23 ‘stems from equity practice’ that predated its codification, in determining its meaning we have previously looked to the historical models on which the Rule was based.” (citation omitted) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)) (citing *Ortiz*, 527 U.S. at 841–45)).

<sup>157</sup> See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (describing Rule

one can readily identify pre-1966 cases that refer to the practice of adjudicating individual aspects of class members' claims (typically damages) following a favorable resolution of liability issues on behalf of the class.<sup>158</sup>

Although the Advisory Committee's Note to Rule 23(c)(4) references no cases itself,<sup>159</sup> examination of the cases cited in other Rule 23 Notes helps reveal the preexisting nature of the class action procedure described in (c)(4). One obvious source of illustrative cases can be found in the Committee's Note to (b)(3), which offers up *Oppenheimer v. F.J. Young & Co.*,<sup>160</sup> as an exemplar of a suitably handled fraud class action containing both common and individual elements.<sup>161</sup> In *Oppenheimer*, the Second Circuit upheld class certification despite the fact that "claimants who become parties to this class suit would, if successful, be entitled to a different measure of damages."<sup>162</sup> The (b)(3) Note also cites favorably to *Union Carbide & Carbon Co. v. Nisley*,<sup>163</sup> an antitrust case in which the Tenth Circuit similarly endorsed a class action where a classwide adjudication of antitrust liability was followed by individualized determinations regarding the amount of damages owed to each class member.<sup>164</sup>

*Dickinson v. Burnham*,<sup>165</sup> cited in the Note to Rule 23(b)(1)(B), provides another illustration of pre-Rule 23(c)(4) bifurcation, where a classwide adjudication regarding the limited fund would be "followed by separate proof of the amount of each valid claim and proportionate distribution of the fund."<sup>166</sup> The Supreme Court approvingly referred

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23(b)(3) as an "adventuresome innovation" (quoting *Amchem*, 521 U.S. at 614)); *Ortiz*, 527 U.S. at 842–43 (contrasting the Committee's "consciously retrospective" codification of prior class action law in Rule 23(b)(1) with more "forward looking [codification] . . . in anticipating innovations under Rule 23(b)(3)").

<sup>158</sup> See *infra* notes 160–64 and accompanying text.

<sup>159</sup> FED. R. CIV. P. 23(c)(4) advisory committee's note.

<sup>160</sup> *Oppenheimer v. F.J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944).

<sup>161</sup> FED. R. CIV. P. 23(b)(3) advisory committee's note.

<sup>162</sup> *Oppenheimer*, 144 F.2d at 390. The Second Circuit in *Oppenheimer* expressed its disagreement with the contrary position of the Eighth Circuit, which had suggested that in order to certify such a class, "each bondholder must recover damages at the same rate." *Id.* (citing *Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101, 105 (8th Cir. 1942)); see also *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 95 (7th Cir. 1941) (upholding class certification despite differences in the measure of damages for each class member); *Independence Shares Corp. v. Deckert*, 108 F.2d 51, 55 (3d Cir. 1939) ("Common relief may be sought despite the fact that individuals may recover separate judgments different in amounts." (footnote omitted)), *rev'd on other grounds*, 311 U.S. 282 (1940).

<sup>163</sup> *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961).

<sup>164</sup> FED. R. CIV. P. 23(b)(3) advisory committee's note; *Nisley*, 300 F.2d at 588–89.

<sup>165</sup> *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952).

<sup>166</sup> FED. R. CIV. P. 23(b)(1)(B) advisory committee's note.

to *Dickinson* in *Ortiz* as exemplifying the “usual practice” in limited fund class actions of distributing fund assets to all of the class members by “allowing them to come into the suit, prove their claim, and share in the recovery.”<sup>167</sup>

In sum, subdivision (c)(4)’s ambiguous textual language goes a long way toward explaining how it came to be so misapplied by courts and commentators roughly two decades after its inception.<sup>168</sup> Viewed in isolation, it may well appear to authorize a class limited to certain issues at the rather broad, albeit inchoate, discretion of the district judge. Construing it within Rule 23’s functionally sequential structural design and with an eye to the historical perspective through which it would have been understood at its inception, however, reveals a very different Rule 23(c)(4) than the one currently in vogue. A textualist examination of the provision indicates its quite modest purpose, particularly relative to the more crucial commands of Rule 23(b)(3). We turn next to extrinsic indicia of (c)(4)’s meaning, no longer bound by textualist constraints.

### III. OVERLOOKED INDICIA OF RULE 23(C)(4)’S INTENDED MEANING

The intentionalist model of interpreting the Federal Rules of Civil Procedure shares textualism’s goal of interpreting a rule’s original meaning.<sup>169</sup> Unlike textualism, however, intentionalism takes into consideration a host of extrinsic sources of authority evidencing rulemaker intent to better discern a rule’s meaning.<sup>170</sup> Many of the classic textualist critiques of intentionalist methodology concerning the interpretation of statutes prove largely inapplicable in the sphere of rule interpretation.<sup>171</sup> For example, the REA, which delegates to

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<sup>167</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834–35 & n.15 (1999) (citing *Dickinson*, 197 F.2d at 978).

<sup>168</sup> See *supra* notes 75, 82–83 and accompanying text.

<sup>169</sup> See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78–84 (2006); D. Marcus, *supra* note 28, at 957–58 (observing that textualists and intentionalists both agree that “authorial expectations should be determinative”); Nelson, *supra* note 27, at 353 (“Textualists and intentionalists alike give every indication of caring both about the meaning intended by the enacting legislature and about the need for readers to have fair notice of the meaning, as well as about some additional policy-oriented goals.”).

<sup>170</sup> See, e.g., D. Marcus, *supra* note 28, at 958.

<sup>171</sup> For example, whereas textualist philosophy seeks to incentivize the drafting of legislation with greater clarification of its intended application, the trans-substantive nature of the Federal Rules of Civil Procedure instead requires a deliberately flexible set of rules that cannot supply detailed instruction regarding their application in any particular case. See *id.*, at 953 (explaining that “[t]rans-substantivity excludes rule interpretations tailored to substantive catego-

the Supreme Court the authority to promulgate rules of procedure to be used in federal courts, contemplates a rulemaking procedure dissimilar in many important respects from the legislative process.<sup>172</sup> Certainly as a practical matter, the comparatively miniscule number of Civil Rules Advisory Committee members tasked with drafting and revising federal rules<sup>173</sup> makes far easier the task of discerning their intentions, especially in light of the Committee's extensive, transparent deliberative processes and its tradition of rulemaking consensus.<sup>174</sup>

Perhaps for these reasons, the Supreme Court has a long tradition of considering sources outside the text of a rule it finds sufficiently lacking in clarity.<sup>175</sup> This has been especially true with regard to interpretive challenges posed by Rule 23,<sup>176</sup> a rule involving both inherent complexities and inevitably high stakes (economic and substantive).<sup>177</sup>

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ries and thereby interferes with the sort of incremental procedural evolution that a court might otherwise shepherd by way of interpretation").

<sup>172</sup> See 28 U.S.C. § 2072 (2012); see also Struve, *supra* note 27, at 1103–19 (detailing rulemaking process). One textualist critique of statutory intentionalism that resonates more soundly in the field of rule interpretation is the concern that inquiry into rulemaking history can impose high transaction costs on courts. See, e.g., D. Marcus, *supra* note 28, at 964. Although many of the 1966 Advisory Committee's rulemaking materials are now available online, the documents that cast the sharpest light on the Committee's intentions with respect to 23(c)(4) still reside on far less accessible microfilm stored with the Rules Administration Office. See Struve, *supra* note 27, at 1152 n.227. When resolving contested questions of Rule 23 interpretation, however, the Supreme Court has proven itself more than capable of acquiring and analyzing all of the relevant rulemaking history. See *supra* notes 17–18 and accompanying text.

<sup>173</sup> There are currently fewer than twenty members on the Advisory Committee on Civil Rules. See COMMITTEES ON RULES OF PRACTICE AND PROCEDURE CHAIRS AND REPORTERS, ADVISORY COMMITTEE ON CIVIL RULES (2013), available at [www.uscourts.gov/uscourts/RulesAndPolicies/rules/committee-roster.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/committee-roster.pdf). Only sixteen members served on the Advisory Committee on Civil Rules during the drafting of the 1966 Rule 23 amendments at issue here. See COMMITTEES ON RULES OF PRACTICE AND PROCEDURE CHAIRS AND REPORTERS, ADVISORY COMMITTEE ON CIVIL RULES (1964), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/1964.pdf>.

<sup>174</sup> See, e.g., D. Marcus, *supra* note 28, at 962–64, 966. But see Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498–99 (1986) (questioning whether one could ever truly “know the thoughts of the diverse individuals” on an Advisory Committee, or whether such a disparate group could be regarded as “shar[ing] a collective ‘intent’”); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2221 (1989) (same).

<sup>175</sup> Indeed, as Professor Catherine Struve has pointed out, even Justice Antonin Scalia, one of the Court's most outspoken statutory textualists, has joined opinions relying on nontextual evidence of rulemaker intent. See Struve, *supra* note 27, at 1161–67.

<sup>176</sup> See, e.g., D. Marcus, *supra* note 28, at 965–66 (describing how the Court's tradition of consulting Notes in the interpretation of disputed rules influenced the Advisory Committee drafting the 1966 amendments to Rule 23 to “clarify the rule's intended reach in the notes” with the expectation that courts would rely upon them).

<sup>177</sup> See, e.g., *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (observing that “a class action can result in ‘potentially ruinous liability’” (quoting FED. R. CIV. P. 23 advisory committee's note)).



Since its inception in 1966, the Court has consulted a wide range of extrinsic sources evidencing the intentions of Rule 23's framers,<sup>178</sup> including the Advisory Committee Notes to the 1966 amendments to Rule 23, as well as that Committee's reports, memoranda, correspondence, meeting transcripts, and even post-promulgation expressions of understanding by Committee members, academics, and courts.<sup>179</sup> Grounding contested Rule 23 provisions in such a historical context has led the Court to reject several novel interpretations of Rule 23 provisions.<sup>180</sup>

Engaging in an intentionalist examination of these Rule 23 sources provides a more nuanced understanding of subsection (c)(4) by coloring in textualism's blunter perspective. Rather than seeking to intuit the provision's purpose from its place in Rule 23's structure, for example, intentionalism allows us to access Committee deliberations that explain (c)(4)'s role far more clearly. And rather than reviewing pre-1966 caselaw that presaged (c)(4)'s authorization of bifurcated classwide and individual phases within a class action, intentionalism draws upon the Committee's direct citations to those cases as illustrative of the provision's proper application.

#### A. *The Advisory Committee's Rule 23(c)(4) Deliberations*

The exchange between Professors Charles Alan Wright and Benjamin Kaplan recounted briefly at the beginning of this Article<sup>181</sup> represents one of the rare discussions among Committee members

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<sup>178</sup> See *infra* notes 181–86, 190–95 and accompanying text. Casting such a wide net to gather insights into Rule 23's intended meaning reflects the Court's view of its role as a "faithful agent" to the Rule 23 framers. See, e.g., D. Marcus, *supra* note 28, at 956 (advocating in favor of the Court functioning as a "faithful agent" of the Advisory Committee on Civil Rules); see also Barrett, *supra* note 29, at 112–13 (discussing faithful agent principle of statutory interpretation); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) (advocating in favor of faithful agent theory). But see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 6–7 (1982) (questioning faithful agent doctrine in statutory interpretation).

<sup>179</sup> See, e.g., *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842–44 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–17 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 n.4 (1985); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 n.21 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–74 (1974).

<sup>180</sup> See, e.g., *Ortiz*, 527 U.S. at 842; *Amchem*, 521 U.S. at 628–29; see also Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1724–25 (2000) (describing Justice Souter's opinion in *Ortiz* as an "extensive foray into the limits of judicial rule activism . . . [that] effectively imprisoned Rule 23 in amber").

<sup>181</sup> See *supra* notes 1–3 and accompanying text.

regarding subsection (c)(4)'s intended purpose in the entirety of Rule 23's rulemaking history.<sup>182</sup> Professor Kaplan, the Committee Reporter, has been consistently cited as a voice of uniquely influential authority on matters of disputed Rule 23 interpretation.<sup>183</sup> To recap, in his letter to Professor Kaplan, Professor Wright expressed his discontent with subsection (c)(4)'s proposed presence in the revamped Rule 23: "I am less happy about [(c)(4)]. Perhaps this is the law—though you give us no cases—but it seems to me the kind of picky detail which does not require statement in the rule."<sup>184</sup>

In a memorandum co-written by a fellow Committee member, Professor Albert Sacks, Professor Kaplan responded to Wright's letter by championing (c)(4)'s inclusion in the new Rule 23 despite its acknowledged superfluity: "We think [(c)(4)], although making obvious points, is useful for the sake of clarity and completeness."<sup>185</sup> Kaplan and Sacks's reply to Wright also confirmed the class bifurcation function they believed (c)(4) served to "clarify": "Certainly it is the law: in fund cases, for example, the action is a class action only in part, for after the general determination of liability the claimants must come forward individually and prove their respective claims . . . ."<sup>186</sup>

This confident assurance that subsection (c)(4) "[c]ertainly is the law" demonstrates Kaplan's belief that the provision simply codified a preexisting procedure in class actions demanding both classwide and individualized proofs and was never intended to break new class action ground. Indeed, the memo's pointed reference to "fund cases" as

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<sup>182</sup> See Hines, *End-Run*, *supra* note 9, at 754.

<sup>183</sup> See, e.g., *Ortiz*, 527 U.S. at 833–34, 842–43; *Amchem*, 521 U.S. at 613–17; *Shutts*, 472 U.S. at 813 n.4 (1985); *Oppenheimer*, 437 U.S. at 354 n.21 (1978); see also D. Marcus, *supra* note 28, at 962, 967 (describing customary practice of prioritizing views of certain "authoritative speakers" where "one committee member might be so associated with a rule or amendment that his or her understanding should receive more weight than others' understanding").

<sup>184</sup> See Wright Letter, Mar. 1963, *supra* note 3, at 3. The Court has previously consulted Committee correspondence to ascertain the intended meaning of a contested Rule 23 provision. See, e.g., *Ortiz*, 527 U.S. at 834 n.14; cf. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990) (resolving contested meaning of Rule 11 provision by reference to framers' intention evidenced by letter from Judge Walter Mansfield, Chair of the Advisory Committee on Civil Rules responsible for drafting 1983 amendments to Rule 11).

<sup>185</sup> Kaplan & Sacks Memorandum, *supra* note 5, at 5. Professor Wright withdrew his objection to 23(c)(4) but remained unconvinced: "Despite what you now say, I remain in dubitante about [(c)(4)], and of course I continue to prefer a very short rule to a very long rule." Letter from Charles Alan Wright, Member, Advisory Comm. on Civil Rules, to Benjamin Kaplan, Reporter, Advisory Comm. on Civil Rules 4 (Sept. 23, 1963), in *RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEE ON RULES OF PRACTICE & PROCEDURE, 1935–1988* (1991) [hereinafter *Wright Letter*, Sept. 1963], *microformed on* CIS No. CI-7002-17 (Cong. Info. Serv.).

<sup>186</sup> Kaplan & Sacks Memorandum, *supra* note 5, at 5.

exemplars of 23(c)(4)'s intended function validates interpretive reliance on contemporary limited fund class action cases<sup>187</sup> such as *Dickinson v. Burnham*.<sup>188</sup> Within "the action" as a whole, in other words, limited fund cases ordinarily involve a representational adjudication of common issues regarding the limited fund ("a class action only in part") followed by individualized proceedings to determine entitlement of each class member to the resulting fund (requiring individuals to "come forward" and "prove their respective claims").<sup>189</sup>

In this same memorandum, Kaplan and Sacks addressed a similarly revealing but very different criticism: that the wording of their early draft of subsection (c)(4) might be misunderstood to suggest that Rule 23 *only* authorized class actions involving bifurcated class and individualized proceedings, therefore providing no authority for a class action where all necessary issues could be adjudicated on a representational basis (such as one seeking an exclusively classwide injunctive remedy):

It has been called to our attention, however, that [(c)(4)] in its present wording is subject to the possible (though plainly erroneous) interpretation that an action may not be maintained as a class action as to *all* issues, but "only with respect to particular issues." The word "only" should be dropped.<sup>190</sup>

Another rare mention of subsection (c)(4) in Rule 23's rulemaking history occurs in the minutes of an Advisory Committee meeting held several months after this memorandum. At that November 1963 meeting, Professor Kaplan briefly walked the Committee through the entirety of his draft of Rule 23, describing "what the rule does in general . . . mov[ing] down through the subdivisions."<sup>191</sup> When Kaplan reached subsection (c)(4), he once again tacitly conceded Wright's characterization of the provision as "a sort of detail," but maintained that it was still "perhaps a usable detail."<sup>192</sup> Before moving on almost immediately to Rule 23's remaining provisions, Kaplan offered the following brisk synopsis of (c)(4):

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<sup>187</sup> See *id.*

<sup>188</sup> *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952).

<sup>189</sup> See Kaplan & Sacks Memorandum, *supra* note 5, at 5.

<sup>190</sup> See *id.*

<sup>191</sup> See Civil Rules Advisory Comm., Minutes 1 (Oct. 31–Nov. 2, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEE ON RULES OF PRACTICE & PROCEDURE, 1935–1988 (1991) [hereinafter Advisory Committee Minutes], microformed on CIS No. CI-7104-53 (Cong. Info. Serv.).

<sup>192</sup> *Id.* at 3.

The clause [(c)(4)] says that an action maintained as a class action need not be such as to each and every issue. For example, in the very *Nisley* case, the determination of liability is of course a class determination. When it comes to proof of claims by individual uranium ore miners, that is of course a series of individual claims—a perfectly obvious point.<sup>193</sup>

Once again, this description of subsection (c)(4) reflects Kaplan's understanding of it as an "obvious point" of class action law: Rule 23 class actions may sometimes proceed on a representational class basis only through litigation of "particular" issues, i.e., those common to the class. According to Kaplan, the Tenth Circuit in *Union Carbide & Carbon Corp. v. Nisley*<sup>194</sup> demonstrated the Committee's modest aspirations for subsection (c)(4) by simply bifurcating the common anti-trust liability issues (which would, "of course," be tried on a representational basis) from those requiring individualized proofs within the action (which would mean "of course a series of individual claims").<sup>195</sup> When considered in the context of the Committee's ultimate Advisory Committee Note to Rule 23(c)(4), these few snippets addressing the provision from the Committee's Rule 23 drafting history supply important clues to unlocking what might otherwise be seen as that Note's somewhat enigmatic language.

### B. Rule 23 Advisory Committee Notes

In the hierarchy of extrinsic sources, a rule's Advisory Committee Notes represent the most authoritative source of rulemaker intent.<sup>196</sup> Indeed, virtually every major Rule 23 case since 1969, including the Court's decisions last year in *Comcast Corp. v. Behrend* and *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,<sup>197</sup> includes a reference to the Rule 23 Advisory Committee Notes.<sup>198</sup> Unfortunately,

<sup>193</sup> *Id.* In a law review article published the year after the Rule 23 amendments took effect, Kaplan described (c)(4) with similar brevity while expounding at great length on his understanding of Rule 23's provisions. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 393 n.144 (1967).

<sup>194</sup> *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961).

<sup>195</sup> *Id.* at 588–89. Kaplan's reference to *Nisley* in explaining his conception of subsection (c)(4) also helps to ratify that case's utility in evidencing contemporary understanding of (c)(4)'s textual meaning. See *supra* notes 192–93 and accompanying text.

<sup>196</sup> See Struve, *supra* note 27, at 1158 (arguing in favor of according binding effect to Advisory Notes, which "in some ways resemble text more than legislative history"); 4 WRIGHT ET AL., *supra* note 113, § 1029 (noting that Advisory Committee Notes provide "something akin to a 'legislative history'" and should be "given considerable weight").

<sup>197</sup> *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

<sup>198</sup> See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013); *Amgen*, 133 S. Ct. at 1195; see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011); *Ortiz v. Fibreboard Corp.*,

however, those Notes can prove to be as opaque as the rule itself,<sup>199</sup> which is arguably the case with regard to Rule 23(c)(4)'s Note.

The Advisory Committee Note to (c)(4) states in its entirety:

This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.<sup>200</sup>

The Committee's use of the word "recognizes" here is consistent with its understanding of subsection (c)(4) as a provision that simply made explicit what had been an implicit feature of some class actions under the original Rule 23. In other words, while subsection (c)(4) itself was new to Rule 23, its addition signified not a new subgenre of class action typology but merely the codification of a staple of class action law.<sup>201</sup>

That understanding is also consistent with the Note's illustration of how 23(c)(4) should function. It will not be needed in every class action, but may be invoked in cases (as in "a fraud or similar case") where the "'class' character" of the "action" may last "only through the adjudication of liability to the class." While the "action" in such cases will continue beyond that classwide adjudication, it will no longer maintain its "'class' character." But the unresolved individual issues remaining in "the action," unsuitable for litigation on a representational basis, may necessitate individualized proceedings. In this subsequent phase of "the action," subsection (c)(4)'s Note expects class members to "come in individually" in order to "prove the amounts of their respective claims."<sup>202</sup>

This illustration of (c)(4)'s application in a "case" or "action" comprised of two adjudicatory phases, one with a "'class' character"

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527 U.S. 815, 833-65 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-25 (1997); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 n.21 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Snyder v. Harris*, 394 U.S. 332, 352 (1969).

<sup>199</sup> See, e.g., *Amchem*, 521 U.S. at 617 (describing Advisory Committee Note to Rule 23(e) as merely "restat[ing] the Rule's instruction without elaboration"); D. Marcus, *supra* note 28, at 966.

<sup>200</sup> FED. R. CIV. P. 23(c)(4) advisory committee's note. At the time, present-day 23(c)(5)'s provision regarding subclasses was included as Rule 23(c)(4)(B).

<sup>201</sup> See *supra* notes 186-89 and accompanying text.

<sup>202</sup> See FED. R. CIV. P. 23(c)(4) advisory committee's note; Hines, *End-Run*, *supra* note 9, at 754.

that involves representational litigation and one requiring individualized proofs, belies the notion that this subsection envisions an action excluding individualized issues altogether.<sup>203</sup> The Note speaks of an action “*retain[ing]* a ‘class’ character,” not maintaining *solely* a class character.<sup>204</sup> And it does not anticipate that individual issues will be severed from the action and adjudicated elsewhere, but simply follows the class phase (“thereafter”) and requires that absent class members will “come in” to the action.

Over fifty years after Benjamin Kaplan described it as making a “perfectly obvious point,” subsection (c)(4)’s clarifying purpose has become roundly discounted as improbably superfluous to Rule 23.<sup>205</sup> Instead, the provision’s language has widely come to be understood as offering a flexible Rule 23 alternative to the strict demands of (b)(3)’s predominance test.<sup>206</sup> But, as close examination of the Committee’s Note confirms, this more ambitious role for subsection (c)(4) is utterly ahistorical.<sup>207</sup> Moreover, such an interpretation significantly undermines the Committee’s painstakingly calibrated construction of the Rule 23(b)(3) class action, regarded as the major “advance” of its 1966 revisions.<sup>208</sup> The formulation of that highly controversial<sup>209</sup> new category of class action occupied the lion’s share of the Committee’s deliberative attention, as they labored to create a daring new species

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<sup>203</sup> See *supra* notes 164 & 188 and accompanying text.

<sup>204</sup> FED. R. CIV. P. 23(c)(4) advisory committee’s note (emphasis added). The Committee’s conception of the class action as a litigation unit encompassing the entirety of class members’ claims, common and individual issues alike, is implicit throughout Rule 23, its Notes, and its rulemaking history. Subdivision (b)(3)(C), for example, addresses the desirability of “concentrating the litigation of the *claims* in the particular [class action] forum.” FED. R. CIV. P. 23(b)(3)(C) (emphasis added).

<sup>205</sup> See *supra* note 193 and accompanying text.

<sup>206</sup> See *supra* notes 36–41 and accompanying text.

<sup>207</sup> See, e.g., *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 360 n.27 (1981) (rejecting novel interpretation of Rule 68 that emerged almost thirty years after the Rule’s promulgation, undercutting the likelihood that its drafters had intended such an interpretation).

<sup>208</sup> See Kaplan & Sacks Memorandum, *supra* note 5, at 1.

<sup>209</sup> See, e.g., Charles Alan Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 437, 564–67 (1966) (describing Rule 23(b)(3) class action as “clearly the most controversial and difficult” part of the 1966 amendments to Rule 23: “After all of these difficulties that I have pointed to in the (b)(3) class action, you may say, ‘Well, why did you people ever adopt this? This simply isn’t worth it.’”); Statement on Behalf of the Advisory Comm. on Civil Rules to the Chairman and Members of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States 7–9 (June 10, 1965) [hereinafter Advisory Comm. on Civil Rights Statement], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1965.pdf> (advocating adoption of proposed (b)(3) class action over the dissenting “retrogressive” view of Committee Member John Frank that “would accept (b)(1) and (b)(2) and leave it at that, eliminating (b)(3)”).

of class action to respond to the complexities of modern litigation.<sup>210</sup> As Rule 23's structural design reflects, the Committee intended each of (b)(3)'s constituent parts to provide important "safeguards" against potential abuse of the new class action.<sup>211</sup>

Indeed, the dominating influence of the (b)(3) class action, which shaded every aspect of the new Rule 23, may help to explain Kaplan's insistence on including subsection (c)(4) despite its admitted obviousness. The success of the newly created (b)(3) class action would depend upon courts effectively utilizing it to gain the benefits of class treatment despite the presence in class claims of elements requiring individualized treatment. Prior to Rule 23(b)(3), courts sometimes refused to certify a proposed class action if individual issues existed to any degree.<sup>212</sup> So Kaplan might well have drafted subsection (c)(4) to "clarify" and "complete" by express statement that which was already implicit in subsection (b)(3), that class actions may properly involve both class treatment of "particular issues" and individual treatment of "issues affecting only individual members."<sup>213</sup>

The complementary nature of the two subdivisions can also be seen in their respective Committee Notes, which seem to contemplate the same paradigmatic types of (b)(3) class actions. The Note to subsection (c)(4), as discussed above, envisions a "fraud or similar action" comprised of a classwide liability phase followed by an individualized damages phase.<sup>214</sup> In its (b)(3) Note, the Committee identifies several types of cases, contrasting those that would satisfy the new predomi-

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<sup>210</sup> See Wright, *supra* note 209, at 564-65 (describing the (b)(3) class action as "a novelty in American jurisprudence").

<sup>211</sup> See Nagareda, *supra* note 57, at 238; Advisory Comm. on Civil Rights Statement, *supra* note 209, at 8 (emphasizing "further protective devices applicable to the (b)(3) class" beyond the "major protective devices" applicable to all class actions); Kaplan & Sacks Memorandum, *supra* note 5, at 5 (discussing the "crucial" (c)(3), and the vital (c)(2) notice and opt-out protections exclusively for (b)(3) class members). Professor Wright explained that the Committee deliberately "wrapped [(b)(3)] about with equally novel safeguards," Wright, *supra* note 209, at 565, in deference to the individual autonomy concerns unique to the (b)(3) class action, where "class-action treatment is not as clearly called for as in" (b)(1) or (b)(2), Fed. R. Civ. P. 23(b)(3) advisory committee's note.

<sup>212</sup> See *supra* notes 159-67 and accompanying text.

<sup>213</sup> Fed. R. Civ. P. 23(c)(4).

<sup>214</sup> Fed. R. Civ. P. 23(c)(4) advisory committee's note. In an article published shortly after the promulgation of Rule 23, Professor Kaplan reiterated this description of a typical 23(b)(3) class action sequence (and the implicit role of Rule 23(c)(4)): "After findings favorable to a plaintiff class, say in a fraud or antitrust action, the members would ordinarily have somehow to prove the amounts to which they are entitled, and provision must then be made for payment to them individually." Kaplan, *supra* note 84, at 499. The Court relied upon this article in two major Rule 23 opinions. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997); see also *Delta Air Lines, Inc. v. August*, 450 U.S.

nance test from those that would not. As with the Note to (c)(4), the Note to (b)(3) describes a fraud case involving a “similar misrepresentation[ ],” which would present an “appealing situation for a class action, and . . . may remain so despite the need, if liability is found, for separate determination of damages suffered by individuals within the class.”<sup>215</sup> In contrast, a fraud claim involving a “material variation in the representation made or in the kinds and degrees of reliance by the persons to whom they were addressed” would fail the predominance test, despite having a “common core.”<sup>216</sup> Antitrust claims, according to (b)(3)’s Note, “may or may not involve predominating common questions.”<sup>217</sup> Mass accident cases, the Committee infamously asserted, are “ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways.”<sup>218</sup>

These examples illustrate the important gatekeeping role that predominance plays in Rule 23 and provide detailed descriptions of the types of cases the Committee believed would fail the predominance test and therefore not be certified as (b)(3) class actions. Nothing in this Note hints at the possibility of resuscitating any of these examples of improper (b)(3) class actions under the aegis of Rule 23(c)(4). This past spring, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, the Court had occasion to confirm its continuing understanding of the predominance calculus as described in the Rule 23(b)(3) Note.<sup>219</sup> According to the Court, if the element of reliance in *Amgen* required adjudication on an individual-by-individual basis, the proposed fraud class would fail (b)(3)’s predominance test and could not be certified as a class action.<sup>220</sup> *Amgen* also reiterated the Court’s view of the important safeguarding “mission” of predominance: to “assure the class cohesion that legitimates representative action in the first place.”<sup>221</sup>

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346, 359 (1981) (consulting immediate post-Rule 68 expressions of intent by a member of the Advisory Committee in confirming that Rule’s meaning).

<sup>215</sup> See FED. R. CIV. P. 23(b)(3) advisory committee’s note.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*; see also Hines, *End-Run*, *supra* note 9, at 710.

<sup>219</sup> *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

<sup>220</sup> *Id.*; see also *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) (noting that the need to prove reliance on an individual basis “‘effectively would’ prevent such plaintiffs ‘from proceeding with a class action since individual issues would overwhelm[ ] the common ones’” (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988))).

<sup>221</sup> *Amgen*, 133 S. Ct. at 1196 (2013) (confirming that “the focus of the predominance in-



Much academic debate surrounds the justification for (and utility of) the Rule 23(b)(3) predominance requirement. Some scholars regard it solely as a proxy for efficiency, others claim it plays an important role in assuring (b)(3) class unity,<sup>222</sup> and still others question its utility under any rationale.<sup>223</sup> The Court itself has repeatedly emphasized its view of the crucial protective function served by predominance in the prevention of representational litigation where class members' claims contain few commonalities and reflect a high degree of heterogeneity.<sup>224</sup> The Court's longstanding fidelity to predominance as a (b)(3) imperative, and its commitment to the principle of adhering to the original intent of Rule 23's framers (whether through strict textualism or more wide-ranging intentionalism), thus stand crucially at odds with a predominance-evading conception of the Rule 23(c)(4) issue class action.

If Rule 23's framers truly designed subsection (c)(4) as a device for bypassing (b)(3)'s predominance requirement, there is certainly no direct evidence of that purpose in either provision or their accompanying Notes. And at the very least, given the importance of Rule 23(b)(3), one would expect to find within the Committee's voluminous records some consideration of exactly when and how it intended subsection (c)(4) to operate as an exception to (b)(3)'s dual mandates.<sup>225</sup> Instead, nothing in the Committee's rulemaking history suggests any such discussion occurred. The fact is, members of the

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quiry under Rule 23(b)(3)" is to assure that "a proposed class is 'sufficiently cohesive to warrant adjudication by representation'" (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997))).

<sup>222</sup> Compare *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 451 (4th Cir. 2003) (Niemeyer, J., dissenting) ("[T]he cohesion essential to legitimize a 23(b)(3) class action can be shown only when the action as a whole satisfies the predominance requirement of Rule 23(b)(3)."), and William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 378 (2001) (acknowledging that (b)(3) predominance "ensures the cohesive nature of the group"), with Bone, *Misguided Search*, *supra* note 42 (challenging the Court's insistence on "class unity" as an organizing principle of class action law), and Coffee, *supra* note 19, at 374.

<sup>223</sup> Professor Allan Erbsen, for example, has forwarded a vigorous critique of predominance as "requir[ing] elaborate efforts to answer a question that is not worth asking" because "similarity among claims is an unhelpful concept." Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1005 (2005). In Professor Erbsen's view, the principles of finality, fidelity, and feasibility offer a superior framework through which to analyze the class action as a procedural device. *Id.*

<sup>224</sup> See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (emphasizing the important safeguarding function of (b)(3) predominance and "the court's duty to take a 'close look' at whether common questions predominate over individual ones" (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997))); *Amgen*, 133 S. Ct. at 1196–97; *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011); *Erica P. John Fund*, 131 S. Ct. at 2181.

<sup>225</sup> See D. Marcus, *supra* note 28, at 962 (observing that given the extensive and well-docu-

Committee only rarely mentioned subsection (c)(4) at all, either before or after its promulgation.<sup>226</sup> That dearth of explication proves frustrating today, but also provides a strong basis for rejecting an ambitious interpretation of subsection (c)(4) as eviscerating one of Rule 23(b)(3)'s two defining criteria.<sup>227</sup>

#### IV. UNWARRANTED DYNAMIC INTERPRETATION

While misapplied textualism and overlooked indicia of its framers' intentions explain some of the confusion surrounding Rule 23(c)(4)'s meaning, much of the contemporary thinking about the proper role of the provision in modern class action law is fueled by a surprisingly robust embrace of the dynamic interpretive model. Faced with insistent demands for innovative class action solutions to complex litigation challenges, courts and commentators alike have chosen, explicitly or implicitly, to override interpretive principles that would ordinarily deter the exercise of judicial power to alter federal rules by adjudication rather than by formal rulemaking.<sup>228</sup>

##### A. *Dynamic Interpretation of Federal Rules*

The dynamic interpretation model embraced by Rule 23(c)(4)'s advocates encourages courts to construe Federal Rules of Civil Procedure on an evolving basis, periodically revising the meaning of rules in order to respond to changed circumstances or policies.<sup>229</sup> Advocates of such a dynamic methodology eschew the notion that the interpretation of a rule must be constrained by a historical understanding of its meaning or the intentions of its framers.<sup>230</sup> Judge Karen Nelson

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mented record of Advisory Committee deliberations generally, one can reasonably expect serious disagreements about the meaning of a proposed rule to surface).

<sup>226</sup> See *supra* Part III.A.

<sup>227</sup> Cf. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 (1999) (rejecting a proposed interpretation of (b)(1)(B) given the "simply implausible" likelihood that "the Advisory Committee, so concerned about the potential difficulties posed by dealing with mass tort cases under Rule 23(b)(3), . . . would have uncritically assumed that mandatory versions of such class actions, lacking such protections, could be certified under Rule 23(b)(1)(B)").

<sup>228</sup> See, e.g., Bone, *Who Decides?*, *supra* note 74, at 1970; *infra* notes 229–55 and accompanying text.

<sup>229</sup> See Barrett, *supra* note 29, at 113 (explaining that dynamic interpretation "resembles purposivism insofar as it sanctions departures from statutory text; it differs from purposivism, however, insofar as it roots such departures in an expansive theory of judicial power rather than in assumptions about congressional intent"); Moore, *supra* note 29, at 1040.

<sup>230</sup> See, e.g., Burbank & Wolff, *supra* note 19, at 20 (advocating in favor of "a more dynamic approach to the text of Federal Rules than the Court has exhibited"); Moore, *supra* note 29, at 1040 (urging the Supreme Court to "take a more activist role in interpreting the Federal Rules by including an analysis of purpose and policy and . . . refrain[ing] from excessive reliance upon

Moore, for example, has argued that because this approach construes federal rules in a manner that furthers their normative purposes and policies, it can prove more faithful to the flexible “spirit of the federal rules” than an “excessive reliance upon the plain meaning doctrine.”<sup>231</sup>

Proponents often justify this interpretive freedom by pointing to the Court’s unique role in the promulgation of federal rules. In other words, because the Court wields the primary authority to develop and define federal rules, it enjoys broader latitude to interpret those rules than it does to interpret statutes. Whether the Court’s rulemaking authority derives solely from the congressional delegation under the REA<sup>232</sup> or, more controversially, from its inherent Article III powers,<sup>233</sup> the task of interpreting federal rules does not implicate the same separation-of-powers or federalism principles that otherwise constrain the Court in its interpretation of federal or state statutes.<sup>234</sup>

Another classic argument in favor of dynamic interpretation asserts that it allows for much needed flexibility in response to changed circumstances.<sup>235</sup> Under this view, dynamic interpretation provides courts the discretion to avoid unforeseen or undesirable applications of a rule’s strictly worded text in the face of evolving procedural contexts or substantive law.<sup>236</sup> As Judge Moore explained, dynamic inter-

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the plain meaning doctrine”). *But see* Bone, *Who Decides?*, *supra* note 74, at 1970 (criticizing courts’ circumvention of limits imposed by “the text of a Rule or case law interpreting a Rule [as] impos[ing] clear limits . . . in an effort to do what they believe is best for an individual case”).

<sup>231</sup> Moore, *supra* note 29, at 1040, 1094 (explaining that “the refusal to consider the purposes behind the Rules would freeze them into an unreasonably rigid state”).

<sup>232</sup> *See id.* at 1092–93.

<sup>233</sup> *See, e.g.*, Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1322 (1993) (discussing Court’s inherent Article III rulemaking powers). *But see* Struve, *supra* note 27, at 1130 (rejecting inherent powers argument).

<sup>234</sup> *See, e.g.*, Joseph P. Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court’s Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 729 (1988) (arguing in favor of dynamic interpretation of federal rules because the REA’s delegation of rulemaking authority to the Court negates federalism or separation-of-powers concerns); *see also* Moore, *supra* note 29, at 1092–93.

<sup>235</sup> *See* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1240–41 (2012) (addressing theory that judicial restraint in interpreting federal rules might “unduly limit the Court’s interpretive creativity or flexibility and thereby undermine the advantages of adjudication in some situations”); *cf.* ESKRIDGE, *supra* note 29, at 11 (observing that a statute’s “historical text takes on new meaning in light of subsequent formal, social, and ideological developments”).

<sup>236</sup> *See, e.g.*, Burbank & Wolff, *supra* note 19, at 20 (emphasizing the “indeterminacy inherent in prospective rulemaking”). *But see* D. Marcus, *supra* note 28, at 950–56 (rejecting changed circumstances justification for rules dynamism by pointing to the episodic nature of the Court’s opportunities to reexamine rules, the trans-substantivity of federal rules, and the Advisory Com-

pretation of a federal rule would consider not only a rule's original purpose and policy goals, but also the purposes or "policies [it] *should* further in light of current conditions . . . [such as] changed circumstances, the experience of the Rule, and the ambiguities or gaps in the Rule."<sup>237</sup>

With respect to most federal rules, the broad consensus of commentators seems to stand firmly against a dynamic mode of interpretation. A number of academics recently castigated the Court for its apparently outcome-driven approach to the interpretation of Rule 8's pleading standards in *Bell Atlantic Corp. v. Twombly*<sup>238</sup> and *Ashcroft v. Iqbal*.<sup>239</sup> One of the Court's most serious mistakes in these cases, according to one critic, was "the use of litigation as opposed to rulemaking or legislation as the vehicle of change, whether one is concerned about the process that should be used before important public policy decisions are made or about democratic accountability."<sup>240</sup>

A similarly hostile chorus arose in reaction to the Court's Rule 56 summary judgment trilogy<sup>241</sup> in the mid-1980s.<sup>242</sup> By altering the defendants' summary judgment burden in these cases, one commentator charged, the Court "in essence was unilaterally 'rewriting' Rule 56."<sup>243</sup> The common critique advanced after each set of decisions was that the

mittee's "ongoing responsibility to amend the Federal Rules as times change"); Struve, *supra* note 27, at 1133 (criticizing application of the "changed circumstances" justification for dynamic interpretation in the unique context of federal rules, in light of the "relative ease with which amendments may be promulgated through the rulemaking process").

<sup>237</sup> Moore, *supra* note 29, at 1096 (emphasis added); see also *id.* at 1093.

<sup>238</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). See generally Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1231–34 (2008) (discussing policy motivations animating Court's decision in *Twombly* and summarizing early academic reaction); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) (criticizing *Twombly*).

<sup>239</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See generally Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010) (criticizing both the *Iqbal* and *Twombly* decisions); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 882–90 (2009); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010) (critically appraising the Court's controversial pleading decisions as unduly restricting access to courts); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 84 (2010) [hereinafter Miller, *Double Play*].

<sup>240</sup> Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009).

<sup>241</sup> See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>242</sup> See, e.g., Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988); Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990).

<sup>243</sup> Miller, *Simplified Pleading*, *supra* note 34, at 310.

Court had engaged in improper, if not illegitimate, judicial activism. According to its detractors, the Court's resort to dynamic interpretation with respect to these long-standing federal rules amounted to nothing less than the abdication of its statutory obligation to serve as a "faithful agent"<sup>244</sup> of the integrity of federal rules promulgated through the legitimatizing REA rulemaking process.<sup>245</sup>

### B. *Dynamic Interpretation and Rule 23*

While adherence to rulemaker intent and respect for a rule's long-standing meaning may characterize the dominant approach to most federal rules, when it comes to Rule 23, dynamic interpreters abound, decrying what they see as the unnecessarily rigid formalism of the Court's class action decisions.<sup>246</sup> Such advocates encourage the Court to take a more inventive and elastic approach to the class action rule to achieve potential judicial efficiency gains or to more effectively empower the vindication of substantive rights.<sup>247</sup> Indeed, although some of Rule 23(c)(4)'s most dedicated champions ground their support on an erroneous view of its "plain meaning" or a misapprehension of its framers' intent,<sup>248</sup> many expressly advocate in favor of a flexible, dynamic interpretation.<sup>249</sup> Judicial resort to the expediency of the (c)(4) issue class action, rationalized one scholar, "follow[s] a long

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<sup>244</sup> See D. Marcus, *supra* note 28, at 955–56 (concluding that "institutional relationships and values implicated by the Federal Rules" suggest that courts should follow "faithful agent" principles, "conform[ing] their interpretations of the Federal Rules to what rulemakers meant to communicate and deviat[ing] only in extraordinary circumstances"); see also Barrett, *supra* note 29, at 113.

<sup>245</sup> See, e.g., Miller, *Double Play*, *supra* note 239, at 84 (describing Court's pleading and summary judgment decisions as so "legislative-like" one might "question the continuing role of the rulemaking process and its current statutory structure").

<sup>246</sup> Interestingly, Arthur Miller recently railed against the Court's activism with respect to Rules 8 and 56, see Miller, *Simplified Pleading*, *supra* note 34, at 310, 333–34 (arguing that the Court essentially unilaterally rewrote Rules 8 and 56), but objected with equal vehemence to the formalism of the Court's recent Rule 23 jurisprudence, *id.* at 318 (lamenting *Amchem* and *Ortiz* for "signal[ing] what some would call a formalistic construction of Rule 23 and chill[ing] much of its innovative application"); see also Burbank & Wolff, *supra* note 19, at 53 (describing Rule 23's "rigid formal categories [as] inadequate, indeed counterproductive, when one seeks to describe and justify the permissible balance of the class-action proceeding and the binding effect of the resulting judgment").

<sup>247</sup> See, e.g., Burbank & Wolff, *supra* note 19, at 46–47; Miller, *Simplified Pleading*, *supra* note 34, at 318. But see Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 901 (1995) (emphasizing that "Rule 23 does not invite short cuts to achieve [substantive policy] objectives").

<sup>248</sup> See *infra* note 251 and accompanying text.

<sup>249</sup> See, e.g., Cabraser, *supra* note 61, at 1520 (defending the need for "innovation" in the development of issue class action law as "a creature of necessity"); Gilles, *supra* note 34, at 28–29 (praising judges for engaging in Rule 23 "pioneering"); Klonoff, *supra* note 60, at 787–88;

tradition of manipulating Rule 23 in order to reach sensible results . . . [in] the absence of alternatives more consistent with the literal terms of the rule.”<sup>250</sup>

In the face of repeated calls for class action innovation since 1966, however, the Court has declined to stray from Rule 23’s original meaning, whether construing that meaning from a textualist or an intentionalist perspective.<sup>251</sup> This resistance to Rule 23 dynamism has persisted despite the Court’s recognition of, and even sympathy for, the laudable policy ends that may have motivated lower court creativity.<sup>252</sup> In both *Amchem* and *Ortiz*, for example, members of the Court expressed compassion for the idea of a global resolution of seemingly intractable asbestos litigation, yet still declined to reinvent Rule 23 to approve the settlement classes at issue.<sup>253</sup> Justice Ginsburg’s majority opinion in *Amchem* acknowledged the “sensibl[e]” aims of a global asbestos settlement, but emphasized that Rule 23 simply “cannot carry the large load . . . the District Court heaped upon it.”<sup>254</sup> Decertifying the (b)(1)(B) settlement class in *Ortiz*, Justice Souter’s opinion nonetheless began by conceding “this litigation defies customary judicial administration.”<sup>255</sup> Justice Rehnquist’s concurring opinion in *Ortiz* similarly empathized “[w]ere I devising a system for handling these claims on a clean slate, I would agree entirely . . . [that] the near-heroic efforts of the District Court in this case . . . make the best of a bad situation.”<sup>256</sup>

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Stempel, *supra* note 59, at 1224; *see also* Simon v. Philip Morris Inc., 200 F.R.D. 21, 30 (E.D.N.Y. 2001).

<sup>250</sup> George Rutherglen, *The Way Forward After Wal-Mart*, 88 NOTRE DAME L. REV. 871, 889 (2012).

<sup>251</sup> Compare *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558–59 (2011) (interpreting Rule 23(b)(2) by examination of its text, structure, and history and eschewing arguably inconsistent language in its Advisory Committee Note), with *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (engaging in extensive analysis of Rule 23(b)(1)(B)’s framers’ intentions, and pointing out that “[t]he Advisory Committee did not envision mandatory class actions in cases like this one”). *But see Ortiz*, 527 U.S. at 882 (Breyer, J., dissenting) (arguing against the majority’s “literal” interpretation of Rule 23); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 631–33 (1997) (Breyer, J., dissenting) (same).

<sup>252</sup> See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (rejecting interpretation of Rule 23(c)(2) that would have permitted looser notice requirements when individual notice might prove prohibitively expensive: “There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.”).

<sup>253</sup> See *Ortiz*, 527 U.S. at 858 (rebuking class proponents for attempting “to rewrite Rule 23”).

<sup>254</sup> *Amchem*, 521 U.S. at 628–29.

<sup>255</sup> *Ortiz*, 527 U.S. at 821.

<sup>256</sup> *Id.* at 865 (Rehnquist, J., concurring).

The Court has repeatedly described its rejection of dynamic rule interpretation as mandated by the limits of the REA.<sup>257</sup> Far from granting it the freedom to interpret federal rules expansively, the Court has pointed to the REA rulemaking procedures as strictly confining its interpretive authority. Writing for the Court in *Amchem*, for example, Justice Ginsburg explained the “overriding importance” of adhering to the results of the REA-mandated rulemaking process:

[C]ourts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure “shall not abridge . . . any substantive right.”<sup>258</sup>

Justice Souter’s opinion on behalf of the Court in *Ortiz* similarly insisted: “The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”<sup>259</sup>

The Court in *Wal-Mart* also emphasized the constraints imposed by the REA on its latitude in interpreting Rule 23(b)(2).<sup>260</sup> The Ninth

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<sup>257</sup> See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558, 2561 (2011); *Ortiz*, 527 U.S. at 861; *Amchem*, 521 U.S. at 620; cf. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013) (rebutting argument that 23(b)(3)’s predominance requirement may be expanded to include existence not only of common questions but initial showing of proof: “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.”).

<sup>258</sup> *Amchem*, 521 U.S. at 620 (citation omitted) (quoting 28 U.S.C. § 2072(b) (2012)).

<sup>259</sup> *Ortiz*, 527 U.S. at 861. In a concurring opinion joined by Justices Kennedy and Scalia, Justice Rehnquist opined that the Court is “not free to devise an ideal system for adjudicating these claims. Unless and until the Federal Rules of Civil Procedure are revised, the Court’s opinion correctly states the existing law, and I join it.” *Id.* at 865 (Rehnquist, J., concurring).

<sup>260</sup> *Wal-Mart*, 131 S. Ct. at 2561. On the other hand, as Professor Spencer has trenchantly argued, Justice Scalia’s interpretation of Rule 23(a)(2) in *Wal-Mart* reflects less faithful adherence to the contemporary understanding of the commonality prerequisite. See, e.g., Spencer, *supra* note 26, at 470–72 (critiquing *Wal-Mart*’s “transmogrification of commonality into centrality” as driven not by the text of 23(a) but rather “the majority’s own creation”). If the REA limits expansive interpretations of Rule 23, of course, it must equally be understood as a bulwark against historically restrictive interpretations. *Id.* at 472 (“Rather than amending the rule to reflect this approach [to commonality], however, the Court found it more convenient to let a revised “interpretation” of commonality accomplish the same end . . . .”); *Wal-Mart*, 131 S. Ct. at 2567 (Ginsburg, J., dissenting in part) (“The Court errs in importing a ‘dissimilarities’ notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry.”). This view of subsection

Circuit's class certification decision in *Wal-Mart* rested in part on a trial plan that would have adjudicated a sample set of plaintiffs' claims for backpay and then extrapolated from the resulting average award the amount of backpay due to the entire class.<sup>261</sup> The Court announced its disapproval of "that novel project" as incompatible with the REA: "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."<sup>262</sup>

Interpretive restraint may be especially warranted with regard to Rule 23 given the significant involvement of Congress in regulating class action procedural rules. Writing for the Court in *Amgen*, for example, Justice Ginsburg deferred to Congress's policy preferences regarding the prevention of securities class action abuses as expressed in the Private Securities Litigation Reform Act.<sup>263</sup> She cited those legislative policy choices as particular justification for rejecting the defendant's proposed interpretation of Rule 23(b)(3) criteria: "Because Congress has homed in on the precise policy concerns raised in [defendant's] brief, '[w]e do not think it appropriate for the judiciary to make its own further adjustments by reinterpreting Rule 23 . . . .'"<sup>264</sup> Congress stepped even more heavily into the class action landscape through passage of the Class Action Fairness Act,<sup>265</sup> which may also bolster the Court's longstanding unwillingness to adopt innovative interpretations of Rule 23.<sup>266</sup>

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(a)(2) commonality as imposing a heightened commonality standard akin to (b)(3)'s predominance prong, however, would render moot at least some of the confusion about (c)(4)'s interaction with (b)(3): if subsection (a) imports (b)(3)'s super-commonality standard, all (c)(4) issue class actions would be required to satisfy that standard.

<sup>261</sup> Referring to this methodology as "Trial by Formula," the Court struck down a line of Ninth Circuit decisions that had embraced such sampling and extrapolation techniques in Rule 23 class actions. See *Wal-Mart*, 131 S. Ct. at 2561 (rejecting this methodology that had been articulated by the Ninth Circuit in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 624–25 (9th Cir. 2010), and *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–87 (9th Cir. 1996)).

<sup>262</sup> *Id.* (citations omitted) (quoting 28 U.S.C. § 2072(b)).

<sup>263</sup> Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1200–01 (2013).

<sup>264</sup> *Amgen*, 133 S. Ct. at 1201 (quoting *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010)).

<sup>265</sup> Class Action Fairness Act (CAFA) of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2012)); see also Miller, *Simplified Pleading*, *supra* note 34, at 320–21 (excoriating Congress for enacting CAFA after years of corporate defendant lobbying).

<sup>266</sup> *Cf.* *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (construing CAFA's jurisdictional scope expansively given Congress's intent to provide "[f]ederal court consideration of interstate cases of national importance" (internal quotation marks omitted)); *Smith v. Bayer*



C. *Policy Advantages of Rulemaking over Judicial Expansion of Rule 23(c)(4)*

Even beyond the REA's statutory limits on judicial activism, a panoply of compelling rationales justify a preference for rulemaking in efforts to reform federal rules,<sup>267</sup> especially regarding a rule as complex as Rule 23.<sup>268</sup> First, the Advisory Committee enjoys significant structural advantages over the Court in the careful study and drafting of revised federal rules. Its academic, practitioner, and judicial members are specially chosen to serve on the basis of their unique experience and diverse litigation perspectives.<sup>269</sup> That expertise and institutional fidelity, along with the protracted deliberations that accompany even the slightest of rule changes, help to ensure thoughtful and balanced reforms.<sup>270</sup> The Committee is far better positioned than the Court to engage in careful study of proposed revisions, with the exceptional support of the Administrative Rules Support Office that engages in empirical studies of federal court litigation practices.<sup>271</sup>

Second, the formal rulemaking procedures mandated by the REA include a public notice and comment period that reinforces the democratic legitimacy of rules.<sup>272</sup> As one critic of dynamic rules interpretation has reasoned, "[t]he opportunity for public comment the rulemaking process affords, the committees' practice of taking comments seriously, the extensive discussion by multiple parties that precedes rule change, and the committees' search for consensus all strengthen the legitimacy of procedural rulemaking by a metric of deliberative democracy."<sup>273</sup> In contrast, the democratic legitimacy of judicial rulemaking derives solely from the rulemaking process itself: "If

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Corp., 131 S. Ct. 2368, 2382 (2011) ("Congress's decision to address the relitigation concerns associated with class actions through the mechanism of removal provides yet another reason for federal courts to adhere in this context to longstanding principles of preclusion.").

<sup>267</sup> See, e.g., *Clermont & Yeazell*, *supra* note 239, at 248 (expressing preference for a rulemaking response to the Court's Rule 8 decisions restricting access to courts).

<sup>268</sup> See generally *Bone, Misguided Search*, *supra* note 42.

<sup>269</sup> In *Mohawk Industries, Inc. v. Carpenter*, the Court recently expounded on the "important virtues" of the formal process of rulemaking, including its capacity to "draw[ ] on the collective experience of bench and bar, and [to] facilitate[ ] the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009) (citation omitted); see also *D. Marcus*, *supra* note 28, at 944; *Struve*, *supra* note 27, at 1136-37.

<sup>270</sup> See *Struve*, *supra* note 27, at 1140. But see *Mulligan & Staszewski*, *supra* note 235, at 1214 (describing rulemaking process as unnecessarily cumbersome and "ossified").

<sup>271</sup> See *Bone, Who Decides?*, *supra* note 74, at 2020 ("As for empirics, the rulemaking committee is much better situated than the courts to initiate empirical studies through the Federal Judicial Center and collect and analyze available data."); *Struve*, *supra* note 27, at 1140 n.17.

<sup>272</sup> See *Mulligan & Staszewski*, *supra* note 235, at 1244.

<sup>273</sup> *D. Marcus*, *supra* note 28, at 947 (footnotes omitted).

the Court wanted to follow its own procedural preferences it would have to find some other source of legitimacy.”<sup>274</sup> Without the transparency of deliberation and the opportunity for public input, judicial rulemaking suffers from a serious risk of perceived outcome bias,<sup>275</sup> especially in the high stakes field of class actions.<sup>276</sup> Indeed, some commentators have charged courts with outcome-based hostility to (c)(4) issue class actions.<sup>277</sup>

The formal rule amendment process allows for careful consideration of competing normative values, informed by the expertise of the Committee members, access to empirical research and other resources, and the opportunity for legitimizing public input.<sup>278</sup> Those policy choices require a balance of instrumental and noninstrumental goals such as efficiency, access to courts, vindication of rights, fairness, transaction costs, and fidelity to the REA’s prohibition on rulemaking that alters substantive law.<sup>279</sup>

Each of these rationales favoring formal rulemaking may be invoked in the context of the issue class action, which would require accommodation of several conflicting policy concerns. As appealing as it may seem to adopt a class action device free from the strictures of predominance, the issue class action would not be a panacea for all of

<sup>274</sup> *Id.*; see also Barrett, *supra* note 29, at 116, 168 (questioning the Court’s inherent authority to promulgate procedural rules). But see Mullenix, *supra* note 180, at 1334.

<sup>275</sup> See generally Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008) (theorizing that judges engage in selection bias when choosing among alternate interpretive methodologies to reach preferred outcome).

<sup>276</sup> See R. Marcus, *supra* note 247, at 858–60 (“[There is a] substantive impulse underlying the federal courts’ handling of mass tort litigation, and, in particular, class action innovations developed to cope with it.”); McKenzie, *supra* note 31, at 977 (hypothesizing that “[t]he Court’s strict formalism” in Rule 23 cases may be driven in part by “unhidden skepticism about the use of the Federal Rules of Civil Procedure as license to undertake essentially legislative reforms”).

<sup>277</sup> See, e.g., Gilles, *supra* note 34, at 384–90 (decrying the “outcome-driven” reversals of (c)(4) issue class actions in the late 1990s based on “judicial empathy for the complaint of corporate defendants that large class actions present a great deal of pressure to settle cases”); Klonoff, *supra* note 60, at 808 (suggesting that “some courts are simply averse to making substantial use of Rule 23(c)(4)”).

<sup>278</sup> See Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 327 (2008) (advocating for Committee resolution of normative controversies surrounding the certification of class actions that “directly implicate substantive values”); Bone, *Misguided Search*, *supra* note 42, at 716–17 (advocating in favor of outcome-based model of class actions through rulemaking process: “Rulemakers and courts should confront [class action] problems directly, assess their costs, and shape class procedures to strike a reasonable balance between costs and benefits.”).

<sup>279</sup> See Richard L. Marcus, *Benign Neglect Reconsidered*, 148 U. PA. L. REV. 2009, 2011 (2000) (referencing the Advisory Committee’s efforts throughout the 1990s to consider amendments to Rule 23, including encouraging the use of (c)(4) issue class actions).

the ills that beleaguer class actions generally, many of which would apply with equal (or greater) force to the issue class action. Concerns about settlement pressures and agency problems surrounding representation by class counsel, for example, may be heightened rather than reduced in the issue class context.

The pressure to settle may increase because plaintiffs could achieve issue class certification in cases that would otherwise have been rejected for failure to satisfy Rule 23(b)(3)'s predominance test.<sup>280</sup> At the very least, issue class actions would alter the existing settlement incentives, which may be a desirable or undesirable consequence but in any event demands rulemaking consideration. As one class action scholar has opined, the ethical and agency challenges presented by settlement classes on behalf of a wholly unaware class of plaintiffs are problematic in any class action.<sup>281</sup> Presuming agency on behalf of a class of plaintiffs whose stake in the class action amounts only to the partial litigation of their claims would seem to exacerbate rather than alleviate that set of concerns.<sup>282</sup>

If the Committee process can reach a consensus on the purpose and goals of an issue class action, it must still determine how best to articulate the conditions under which a Rule 23(c)(4) class action may be certified.<sup>283</sup> The Committee would presumably learn much from assessment of the significantly distinct choices made by federal appellate courts that have experimented with issue class action certification standards.<sup>284</sup> The present split among circuits adopting expansive issue class action practices results in untenable inconsistencies in the context of nationwide or multistate classes.<sup>285</sup> Rulemaking could, at the very least, provide guidance to courts by selecting and codifying a single certification standard.

A final but significant advantage of REA-approved rulemaking is the capacity of that process to facilitate a holistic approach to Rule 23.

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<sup>280</sup> *But see* Stempel, *supra* note 59, at 1229–30 (contending that issue class certification “provide[s] useful guidance for dispute resolution with much less of the coercive-cum-extortionate element thought to flow from class treatment”).

<sup>281</sup> *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951 (2014).

<sup>282</sup> *See* Hines, *Dangerous Allure*, *supra* note 9, at 607.

<sup>283</sup> *See* Dodson, *supra* note 81, at 2379 (acknowledging existing confusion surrounding scope of issue class actions and subclass provision, and calling on “Rules Committee and the Court for clarification of the proper scope of Rule 23(c)(4)”).

<sup>284</sup> *See generally* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02(a) (2010) (embracing material advancement standard for certification of issue class actions).

<sup>285</sup> *See supra* note 14 and accompanying text.

The issue class action cannot exist in a vacuum; its adoption would require thorough consideration of several other affected Rule 23 provisions. If Rule 23(c)(4) issue class actions do alter (b)(3)'s predominance requirement, for example, corresponding amendments reflecting that exception would be appropriate. There is good reason to question, for example, whether absent class plaintiffs will adequately understand the limited nature of an issue class action and the expectation that they will initiate individual actions even after a favorable resolution of the class action.<sup>286</sup>

The current notice provisions of Rule 23(c)(2), while greatly enhanced by the 2003 amendments, may call for special attention to issue class plaintiffs beyond its reference to "issues" certified. More detailed (c)(2) guidance on the notice required in an issue class action should mandate a meaningful explanation of the limited adjudication proposed, conveying to plaintiffs their potential responsibility for initiating individual litigation to establish entitlement to any remedy. Notice to issue class action plaintiffs should also clearly identify the extent and nature of the issues necessary to fully resolve their claims that would remain even if the issue class representative succeeds. A related concern centers on Rule 23(c)(3), which currently refers only to a "judgment" binding on class members but would require reconsideration in light of the issue class action's contemplation not of a class judgment but of class issue preclusion.<sup>287</sup>

Given that settlement is such a towering aim of issue class advocates,<sup>288</sup> Rule 23(e) would also warrant the inclusion of issue class specific provisions. The Committee would be well-advised to consider whether an issue class action certified only to resolve discrete common issues (and excluding potentially predominantly individual issues raised by class claims) can nonetheless result in a settlement that resolves the entirety of class members' claims. The Court in *Amchem* and *Ortiz* expressed significant concerns about class cohesiveness and

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<sup>286</sup> See Hines, *Dangerous Allure*, *supra* note 9, at 572; *cf.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (acknowledging concerns about the adequacy of notice to class plaintiffs with no present injury who, "[e]ven if they fully appreciate the significance of class notice, . . . may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out").

<sup>287</sup> *Cf.* Erbsen, *supra* note 223, at 1031 (suggesting that issue class action is functionally a declaratory judgment class and may subsequently require (b)(2) certification).

<sup>288</sup> See, e.g., *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013) (predicting that following the (c)(4) resolution of liability, "[t]he parties probably would agree on a schedule of damages . . . indeed, the case would probably be quickly settled"); Stempel, *supra* note 59, at 1222–29 (urging that (c)(4) class actions can serve to "streamline resolution of issues in hopes of facilitating settlement on matters that may not be fully amenable to class treatment").

legitimacy in settlement classes, suggesting the need for heightened attention to Rule 23 safeguards to combat the risks of collusion and violation of class members' due process rights.<sup>289</sup> If an issue class action is permitted to settle claims that could not have been certified under 23(b)(3), an important policy choice that could subsume a wide swath of existing class action jurisprudence, that discretionary power would need to be spelled out in far more detail than the current reference to the settlement of "issues" in 23(e).<sup>290</sup>

Finally, the issue class action device as contemplated would have major effects on the determination of compensation for class counsel. Counsel's successful completion of the trial of an issue class action would not result in a monetary judgment for the class from which attorney fees could be assessed. Rather, class counsel would presumably be entitled to some percentage of the ultimate recovery by each absent issue class plaintiff's individual litigation or settlement. The current Rule 23(h) was simply not designed with such delayed and contingent fee arrangements in mind, and would require careful amendment in the event the Committee chooses to adopt the issue class action.<sup>291</sup>

### CONCLUSION

In sum, Rule 23(c)(4)'s inadvertently ambiguous textual language, the dearth and relatively obscure extrinsic evidence of its framers' intent, and an unfortunate tendency toward judicial inventiveness in the field of class action law have worked in combination to create out of whole cloth an unauthorized and unruly class action. Whether or not the Supreme Court ever addresses this newly invented class action model, I urge the Advisory Committee to take on the important mission of critically evaluating the risks, benefits, and consequences of creating a stand-alone issue class action. Criticism of the Supreme Court's strict intentionalism notwithstanding, the formal rulemaking process is far better positioned as a functional and institutional matter to engage in the careful, deliberative process of determining if, when, and how an issue class action should be expressly codified in Rule 23.

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<sup>289</sup> See *supra* notes 126–27, 258 and accompanying text.

<sup>290</sup> See Hines, *Dangerous Allure*, *supra* note 9, at 605, 609–10.

<sup>291</sup> See *id.* at 690.