

2021

## The Anomalous Issue Class

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### Recommended Citation

Veniamin Privalov, *The Anomalous Issue Class*, 90 Fordham L. Rev. 119 (2021).

Available at: <https://ir.lawnet.fordham.edu/flo/vol90/iss1/17>

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# THE ANOMALOUS ISSUE CLASS

*Veniamin Privalov\**

## INTRODUCTION

The modern class action is a litigation superstar.<sup>1</sup> The device’s potential for opening the courthouse doors to “small people,” holding big business accountable, and enacting sweeping reform is second to none.<sup>2</sup> In recent years, however, the star has waned.<sup>3</sup> Judicial hostility has made it harder for plaintiffs to certify a class while making it easier for defendants to avoid class actions entirely.<sup>4</sup> Certifying a mass tort class has become nearly impossible.<sup>5</sup> Plaintiff lawyers’ creative attempts to work around these roadblocks have been shut down one after another by the Supreme Court.<sup>6</sup>

It is in this scorched mass litigation landscape that commentators and lower courts alike are increasingly turning to a once controversial tool—Rule 23(c)(4) of the Federal Rules of Civil Procedure (“Rule 23(c)(4)” or “(c)(4)”).<sup>7</sup> The proponents of an expansive reading of this subsection argue that it empowers courts to certify “issue classes” with the aim to adjudicate only those issues that are common to the class, before leaving the plaintiffs to litigate their individual issues separately in other forums.<sup>8</sup> Notably, the proponents of this reading maintain that a (c)(4) issue class may be certified even when the claim, viewed as a whole, would fail the predominance requirement of Rule 23(b)(3).<sup>9</sup> This has been referred to as the issue class

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1. See David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 588 (2013) (“To anyone interested in buccaneering attorneys, maverick judges, mind-boggling settlement sums, idealistic lawyering, or base legal corruption, the [current era of class action litigation has] yielded a rich harvest.”).

2. See *id.* at 599–600, 606–09.

3. See *infra* Part I.C.

4. See *infra* Part I.C.

5. See *infra* note 84 and accompanying text.

6. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (holding that only damages incidental to injunctive relief are allowed under 23(b)(2)); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (holding that certification of a 23(b)(1)(B) “limited fund” class was not available when the “fund” available to plaintiffs had been artificially capped).

7. See *infra* Part II.A (noting the current dominance of the expansive view of (c)(4)).

8. See *infra* Part II.A.

9. See *infra* Part II.A.

“end-run.”<sup>10</sup> For reasons discussed in Part III, this Comment refers to issue classes enabled by the predominance end-run as “anomalous issue classes.”

This Comment seeks to contribute to the current discourse regarding the proper interpretation of Rule 23(c)(4) and the propriety of the issue class end-run. While the expansive reading of (c)(4) is currently dominant,<sup>11</sup> the Fifth Circuit and some commentators have rejected it in favor of a “limited” reading that views the subsection as a “housekeeping tool” designed to make already certifiable classes more manageable, rather than an independent ground for class certification.<sup>12</sup>

Part I of this Comment briefly explores the origins of the class action device, its transformation into—and rise to prominence as—the modern class action under the revised Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”), and some of the decisions that have led to its recent downfall. Part II then outlines the arguments for both the expansive and limited interpretations of (c)(4). Lastly, Part III sides with the limited view, reiterating some of the arguments laid out in Part II before positing that the anomalous issue class is irreconcilable with centuries of class action practice, and that its continued use has the potential to cause widespread harm to litigants and enact an end-run around much more than just predominance.

## I. THE RISE AND FALL OF THE MODERN CLASS ACTION

An understanding of the structure and history of Rule 23 and the class action device is essential to fully appreciate the animating forces behind the current push for an expansive (c)(4), as well as the arguments to follow. Part I.A explores the common law roots of the class action device and the motives behind its development. Part I.B then introduces Rule 23 and its role in creating the “modern class action.” Lastly, Part I.C charts the decline of the modern class action, focusing on the major developments which have chipped away at the reach and power of the device.

### A. *The Origins of the Class Action Device*

The class action is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”<sup>13</sup> Originally developed as part of the English common law, the device was the equity courts’ response to a self-imposed problem.<sup>14</sup> Seeking to avoid the multiplicity of proceedings common in courts of law at the time, equity courts imposed a compulsory joinder rule requiring all parties “materially interested” in the proceedings to be made parties to the case, so that they

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10. See generally Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 709–10 (2003).

11. See *infra* Part II.A.

12. See *infra* Part II.B.

13. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

14. See 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 1:12 (5th ed. 2021).

could be bound by a unitary decree.<sup>15</sup> Realizing, however, that strict adherence to the rule—particularly in cases where joining all materially interested parties was not feasible—could give rise to injustice, the courts developed the “bill of peace,” a form of class action by which one person could bring a suit on behalf of others similarly situated that would be binding on the whole class.<sup>16</sup> To bring a bill of peace, the plaintiff had to “establish [(1)] that the number of people involved was so large as to make joinder impossible or impracticable, [(2)] that the members of the group possessed a joint interest in the question to be adjudicated, and [(3)] that the named parties adequately represented those absent from the action.”<sup>17</sup>

Justice Story—building upon the doctrines developed by the English courts—is generally credited with having formulated the class action standards in America in his *West v. Randall*<sup>18</sup> opinion.<sup>19</sup> Story’s reasoning was then adopted<sup>20</sup> by the Supreme Court in *Smith v. Swormstedt*.<sup>21</sup> Similar principles were codified in the Federal Equity Rules.<sup>22</sup> When law and equity were merged in 1938, the same underlying concepts formed the basis of Rule 23 of the Federal Rules of Civil Procedure.<sup>23</sup>

### B. Rule 23 and the Modern Class Action

The first version of Rule 23 became effective in 1938, along with the rest of the Federal Rules of Civil Procedure.<sup>24</sup> However, that original iteration of the Rule proved deficient.<sup>25</sup> The structure it laid out provided for three types of class actions—“true,” “hybrid,” and “spurious”—distinguished by the type of “jural” relationship involved.<sup>26</sup> A true class action was reserved for cases where a “joint, or common, or secondary” right was alleged.<sup>27</sup> A hybrid class was designed to aggregate individually-held or “several” rights for reasons of equitable treatment.<sup>28</sup> Lastly, the spurious action joined several rights without an equitable connection.<sup>29</sup> The true and hybrid classes were mandatory classes capable of binding all absent class members, while the spurious class functioned on an opt-in basis.<sup>30</sup>

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15. *Id.*

16. *Id.*

17. 7A MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 (4th ed. 2021).

18. 29 F. Cas. 718 (C.C.D.R.I. 1820).

19. *See* 7A KANE, *supra* note 17, at § 1751.

20. *See id.*

21. 57 U.S. 288 (1853).

22. *See* 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, 257 (2002).

23. *See id.*

24. *See* Marcus, *supra* note 1, at 600–01; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1028 (1982).

25. *See* Marcus, *supra* note 1, at 600–01.

26. *Id.* at 600 (quoting James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 310 (1938)).

27. *Id.*

28. *Id.*

29. *See id.* at 600–01.

30. *Id.* at 601.

While the intricacies of the original Rule 23 are beyond the scope of this Comment, it is easy to see from the brief description above why even contemporary commentators have called it “[t]heoretically anachronistic and cumbersome in application.”<sup>31</sup> In 1950, a mere twelve years after the Rule became effective, academics were already decrying its phraseology and structure, as well as its “outworn categories of rights.”<sup>32</sup> Beyond mere inconvenience, the cumbersome structure of the original Rule made it difficult for courts to realize the full potential of *Hansberry v. Lee*.<sup>33</sup> Judicial attempts to work around the Rule included recategorizing spurious suits as true or hybrid,<sup>34</sup> mandating lengthy opt-in periods designed to maximize class participation,<sup>35</sup> and practically defying the Rule’s constraints in the context of desegregation.<sup>36</sup>

The stage was thus set for a new, more straightforward and pragmatic Rule 23, which would usher in the era of the modern class action.<sup>37</sup> After a failed first effort in the mid-1950s and the subsequent disbanding of the Advisory Committee, a new Committee was created by the Supreme Court in 1960.<sup>38</sup> Eschewing the true/hybrid/spurious classifications, the new Rule was drafted with a focus on adequate representation and class solidarity as the touchstones for aggregate treatment.<sup>39</sup> In 1966, the new Rule, which would

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31. *Id.*

32. See ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 245 (1950). “Most lawyers and judges,” Chafee argues, “are no longer accustomed to think in this way.” *Id.* at 245–46. Likewise, in one of his opinions, Judge Charles Clark described the Rule’s labels as “euphonious, if mystic.” *Dickinson v. Burnham*, 197 F.2d 973, 978 (2d Cir. 1952).

33. 311 U.S. 32, 42–43 (1940) (holding that absent class members may be bound so long as they are adequately represented); see also Arthur John Keeffe et al., *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 339 (1948) (arguing that *Hansberry* was an invitation for Congress to do something about the “spurious” class).

34. See *Burnham*, 197 F.2d at 979 (“The convenient use of the appellations ‘true,’ ‘hybrid,’ and ‘spurious’ for determining the effect of a judgment in a class suit under F.R. 23(a) has become rather genera.”); see also 2 PROCEEDINGS, ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, at 246 (Mar. 25, 1954) (comments of Charles Clark), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, [https://www.uscourts.gov/sites/default/files/fr\\_import/CV03-1954-min-Vol2.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV03-1954-min-Vol2.pdf) [<https://perma.cc/USL8-HR22>] (“I think we solved it beautifully . . . . We just changed the label. We called it a hybrid class suit and said that what [the district judge] had done was correct . . .”).

35. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 588–90 (10th Cir. 1961) (permitting class members to opt in even after a favorable verdict had been rendered).

36. Compare *Kansas City v. Williams*, 205 F.2d 47, 52 (8th Cir. 1953) (“Violations of the Fourteenth Amendment are of course violations of individual or personal rights . . .”), with *Bush v. Orleans Par. Sch. Bd.*, 308 F.2d 491, 499 (5th Cir. 1962) (concluding that the rights belong to the schoolchildren as a class “irrespective of any individual’s right to be admitted on a non-racial basis to a particular school”). See also David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 678–91 (2011) (chronicling and explaining this shift).

37. See Marcus, *supra* note 1, at 588 (“The current era of class action litigation began on July 1, 1966, when a newly-revised Rule 23 of the Federal Rules of Civil Procedure went into effect.”).

38. See *id.* at 602–04.

39. TOPIC EE: TENTATIVE PROPOSAL TO MODIFY PROVISIONS GOVERNING CLASS ACTIONS—RULE 23, at EE–2 (1962), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6309-44 (Cong. Info Serv.).

radically alter the class action landscape, was unleashed upon the legal world.<sup>40</sup>

The structure laid out by the 1966 amendments remains largely unchanged to this day.<sup>41</sup> Subsection (a)<sup>42</sup> of the modern Rule 23 lays out four “necessary but not sufficient conditions for a class action”<sup>43</sup>: numerosity, commonality, typicality, and adequacy of representation.<sup>44</sup> Subsection (b) then sets forth the three permissible categories of class action.<sup>45</sup> Rule 23(b)(1)—the class action equivalent of necessary party joinder under Rule 19<sup>46</sup>—applies when individual actions would create a risk of incompatible judgments, or would substantially impair the interests of other identically situated class members.<sup>47</sup> Rule 23(b)(2) provides a mechanism for pursuing class-wide injunctive or declaratory relief<sup>48</sup> in cases where the “appropriate final relief” does not relate “exclusively or primarily to money damages.”<sup>49</sup> Lastly, 23(b)(3),<sup>50</sup> the most “adventurous”<sup>51</sup> of the provisions and the main focus of this Comment, sets up a notice and opt-out class action catch-all, allowing claim types not covered by either (b)(1) or (b)(2) to be certified—so long as

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40. See Marcus, *supra* note 1, at 588.

41. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 746 (2013) (“The Rule 23(a) and (b) criteria, by their terms, have not changed in any significant way since 1966.”).

42. Rule 23(a) states:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

43. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (subdivision (a)).

44. FED. R. CIV. P. 23(a).

45. *Id.* at 23(b). One of the three categories of 23(b) must be satisfied in addition to all of the prerequisites of 23(a). See *id.*

46. See Laura J. Hines, *Codifying the Issue Class Action*, 16 NEV. L.J. 625, 629 (2016).

47. FED. R. CIV. P. 23(b)(1).

48. *Id.* at 23(b)(2).

49. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (subdivision (b)(2)).

50. Rule 23(b)(3) states:

the court finds that the 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. The matters pertinent to these findings include:

- (A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

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

51. See generally Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969).

the subsection's requirements are met.<sup>52</sup> While 23(b)(3) is the most obvious path to money damages,<sup>53</sup> litigants seeking to take advantage of this subsection must show—in addition to the requirements of 23(a)—that issues common to the class “predominate” over individual issues and that the class action is “superior” to other adjudicative mechanisms.<sup>54</sup> Despite these additional hurdles, the allure of money damages made (b)(3)'s domination of the class action landscape inevitable.<sup>55</sup>

Unbeknownst to its authors,<sup>56</sup> as early as 1964 events were already in motion that would transform the humble Rule<sup>57</sup> they were drafting into a regulatory icon and staple of the federal courtroom.<sup>58</sup> From Title VII, which went into effect on July 2, 1964,<sup>59</sup> rose the employment class action;<sup>60</sup> the holding of the 1964 case *J.I. Case Co. v. Borak*<sup>61</sup> laid the groundwork for the securities fraud class action;<sup>62</sup> the American Law Institute's 1965 publication of the *Restatement (Second) of Torts* and its embrace of strict product liability for product defects<sup>63</sup> contributed to the mass tort class action; and finally, the 1960s public interest movement scored a “stunning” array of legislative victories and produced a steady supply of public-spirited plaintiffs' lawyers eager to file class actions.<sup>64</sup> The public's growing mistrust of business, coinciding with a decline of confidence in regulatory agencies, left Congress with little choice but to turn to private rights of action—often enforced with the help of Rule 23.<sup>65</sup> These changes transformed class actions from a

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52. FED. R. CIV. P. 23(b)(3).

53. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (“Given th[e] structure [of Rule 23(b) class types], we think it clear that individualized monetary claims belong in Rule 23(b)(3).”); 2 RUBENSTEIN, *supra* note 14, at § 4:47 (“Rule 23(b)(3) class actions are money damages class actions.”).

54. *See* FED. R. CIV. P. 23(b)(3).

55. *See* Hines, *supra* note 46, at 630 (“[I]t is quite simply where the money is.”).

56. While the Advisory Committee (“Committee”) members “seemed to have some sense that their obscure rule would assume far greater importance going forward,” much of their deliberations were dominated by technical procedural concerns rather than grand visions of the Rule's potential impact. *See* Marcus, *supra* note 1, at 608; *see also* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 670 (1979) (“The class action onslaught caught everyone, including the draftsmen, by surprise.”).

57. *See* Miller, *supra* note 56, at 669 (“[The Advisory Committee] had few, if any, revolutionary notions about its work product . . . . [T]he draftsmen conceived the procedure's primary function to be providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies.”).

58. *See* Marcus, *supra* note 1, at 606.

59. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

60. *See* Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225, 229 (1976).

61. 377 U.S. 426 (1964).

62. *See* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 COLUM. L. REV. 1301, 1314–15 (2008).

63. RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

64. *See* Marcus, *supra* note 1, at 607.

65. *See id.* at 607–08.

“litigation backwater” into a courtroom Goliath.<sup>66</sup> It was not long, however, until Goliath met its David.

### C. *The Fall of the Modern Class Action*

By the mid-1990s, judicial enthusiasm about the class action’s ability to achieve mass justice<sup>67</sup> had been eclipsed by concern over the pressure that class certification applied on defendants to settle even meritless claims.<sup>68</sup> A critical development, and perhaps the tipping point, was Judge Posner’s opinion in *In re Rhone-Poulenc Rorer Inc.*,<sup>69</sup> granting mandamus and reversing class certification in part because the potentially bankrupting class-wide verdict put the defendant “under intense pressure to settle.”<sup>70</sup> In the wake of the Seventh Circuit’s ruling, other federal circuits as well as the Supreme Court issued important decisions curtailing class actions.<sup>71</sup> These decisions, in turn, “created a climate”<sup>72</sup> for the adoption of Rule 23(f) and the Class Action Fairness Act (CAFA),<sup>73</sup> altering the procedural landscape significantly by allowing defendants to secure a more friendly<sup>74</sup> federal forum much more frequently<sup>75</sup> and providing them with a tool for immediate appellate review of class certification orders.<sup>76</sup>

As a result of Rule 23(f) and CAFA, federal courts were able to hear more cases, creating “troublesome” new standards for plaintiffs seeking class-wide relief in the process.<sup>77</sup> In the aftermath of *Szabo v. Bridgeport Machines, Inc.*,<sup>78</sup> for instance, the prevailing view that class certification could be based

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66. *See id.* at 608.

67. *See* Owen W. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 25 (1996).

68. *See* Klonoff, *supra* note 41, at 731; *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008), as amended (Jan. 16, 2009); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001), as amended (Oct. 16, 2001) (“[D]enying or granting class certification is often the defining moment in class actions (for it may sound the ‘death knell’ of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . .”).

69. 51 F.3d 1293 (7th Cir. 1995).

70. *Id.* at 1298 (also noting that “Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action ‘blackmail settlements’” (internal citations omitted)).

71. *See, e.g.,* *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

72. Klonoff, *supra* note 41, at 733; *see also* Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 102 (2001) (“Judge Posner’s thoughtful discussion of the problem in the *Rhone-Poulenc* opinion gave the Advisory Committee added impetus to amend Rule 23 to provide a rule-based means for interlocutory appeal.”).

73. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

74. *See* Klonoff, *supra* note 41, at 743 (“[M]any of the most egregious examples of class action abuse had occurred in the state courts, often by elected judges who favored class members over large, out-of-state corporations.”).

75. *See* Class Action Fairness Act of 2005; Klonoff, *supra* note 41, at 732–33.

76. *See* FED. R. CIV. P. 23(f).

77. Klonoff, *supra* note 41, at 745.

78. 249 F.3d 672 (7th Cir. 2001).



on pleadings or only minimal evidentiary support<sup>79</sup> was displaced by a view requiring resolution on the merits of issues that implicated the elements of class certification.<sup>80</sup> A growing number of decisions<sup>81</sup> began turning on the once lenient requirement of class ascertainability.<sup>82</sup> *Amchem Products, Inc. v. Windsor*<sup>83</sup> severely limited the availability of class certification in cases involving personal injury claims.<sup>84</sup> *Wal-Mart Stores, Inc. v. Dukes*<sup>85</sup> transformed the (a)(2) commonality requirement from “a low bar” into the functional equivalent of (b)(3) predominance.<sup>86</sup> Just two months prior, in *AT&T Mobility LLC v. Concepcion*,<sup>87</sup> the same majority held that the Federal Arbitration Act<sup>88</sup> embodied “a liberal federal policy favoring arbitration agreements” and thereby preempted a state law that rendered broad class action waivers unconscionable.<sup>89</sup> Soon after, *American Express Co. v. Italian Colors Restaurant*<sup>90</sup> extended *Concepcion* to federal claims and expressly rejected the argument that class action waivers should be invalidated where plaintiffs were effectively deprived of the opportunity to vindicate their rights due to the prohibitive cost of individual litigation.<sup>91</sup> Taken together, these decisions have left the class action a “wounded beast.”<sup>92</sup> One class action device, however, is “thriving.”<sup>93</sup>

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79. See Klonoff, *supra* note 41, at 731 (listing cases).

80. See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 582 (9th Cir. 2010) (en banc) (noting that “every circuit to have considered this issue . . . has reached essentially the same conclusion: *Falcon*’s central command requires district courts to ensure that Rule 23 requirements are actually met, not simply presumed from the pleadings”), *rev’d on other grounds*, 564 U.S. 338 (2011).

81. John H. Beisner et al., *Ascertainability: Reading Between the Lines of Rule 23*, 12 CLASS ACTION LITIG. REP. 253 (2011), [http://www.skadden.com/sites/default/files/publications/Publications2371\\_0.pdf](http://www.skadden.com/sites/default/files/publications/Publications2371_0.pdf) [https://perma.cc/DKM3-2T99].

82. See Klonoff, *supra* note 41, at 762 n.186.

83. 521 U.S. 591 (1997).

84. See Donald R. Frederico, *The Arc of Class Actions: A View from the Trenches*, 32 LOY. CONSUMER L. REV. 266, 268–69 (2020).

85. 564 U.S. 338 (2011).

86. See Frederico, *supra* note 84, at 270–71; *Dukes*, 564 U.S. at 350 (“What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.” (internal citations omitted)).

87. 563 U.S. 333 (2011).

88. 9 U.S.C. §§ 1–14 (1925).

89. See Frederico, *supra* note 84, at 272 (“In other words, even a contractual provision barring class actions that state law had declared grossly unfair to the consumer could be enforced because of a federal law passed in 1925, four decades before the amendments to Rule 23 that gave us the modern class action.”).

90. 570 U.S. 228 (2013).

91. See Frederico, *supra* note 84, at 272; *Italian Colors*, 570 U.S. at 236 (“But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”).

92. Frederico, *supra* note 84, at 266.

93. Hines, *supra* note 46, at 626.

## II. AFTER THE FALL: THE ONGOING DEBATE SURROUNDING RULE 23(c)(4)

Following the downfall of many of the staples of class certification, a growing number of lawyers, judges, and academics have turned to Rule 23(c)(4)—formerly 23(c)(4)(A)<sup>94</sup>—in a bid to revitalize the class action device and enact an “end-run”<sup>95</sup> around the recent restrictions.<sup>96</sup> The eighteen-word section provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.”<sup>97</sup> The debate, and this Comment, focus on the interaction between (c)(4) and the predominance requirement of (b)(3). The proponents of an expansive reading of (c)(4) argue that the provision grants courts a broad power to certify classes as to particular issues—even where the action as a whole fails (b)(3) predominance.<sup>98</sup> The proponents of a limited reading, on the other hand, argue that (c)(4) is more akin to a “housekeeping” tool and that predominance must always be satisfied as to the whole case.<sup>99</sup>

### A. Broad Power: The Expansive Interpretation of (c)(4)

Over the course of the last two decades, the expansive (c)(4) has gone from obscurity<sup>100</sup> to near-complete dominance.<sup>101</sup> This success has been achieved through reliance on two primary arguments: the plain meaning and structure of Rule 23,<sup>102</sup> and the purpose behind the Rule’s enactment.<sup>103</sup> Both are discussed in turn.

Every analysis of a Federal Rule begins with its text.<sup>104</sup> Some courts and commentators have in turn argued that Rule 23(c)(4)’s directive may be readily understood from the “plain meaning” of the text alone.<sup>105</sup> The

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94. Prior to the 2007 amendments, the question of issue class certification fell under Rule 23(c)(4)(A). *See* FED. R. CIV. P. 23(c)(4)(A) (2006) (repealed 2007). In 2007, subparts (A) and (B) were removed, and the issue class provision was relabeled 23(c)(4). The change did not alter the Rule’s substantive meaning. *See* FED. R. CIV. P. 23, advisory committee’s note to 2007 amendment (“Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.”).

95. *See generally* Hines, *supra* note 10.

96. *See, e.g.*, Patricia Bronte et al., *Carving at the Joint: The Precise Function of Rule 23(c)(4)*, 62 DEPAUL L. REV. 745 (2013); Michael J. Wylie, *In the Ongoing Debate Between the Expansive and Limited Interpretations of Fed. R. Civ. P. 23(c)(4)(A), Advantage Expansivists*, 76 U. CIN. L. REV. 349 (2007); Romberg, *supra* note 22; *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006).

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

98. *See* Wylie, *supra* note 96, at 353–54.

99. *See* *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

100. *See* Romberg, *supra* note 22, at 253–54 (“[N]o scholarly commentator has addressed issue certification under Rule 23(c)(4)(A) in any depth whatsoever.”).

101. *See* Bronte et al., *supra* note 96, at 745–46 (explaining that almost every circuit to have considered the issue has endorsed some form of the expansive view).

102. *See In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006).

103. *See* Bronte et al., *supra* note 96, at 757–58.

104. *See* Laura J. Hines, *The Unruly Class Action*, 82 GEO. WASH. L. REV. 718, 730 (2014).

105. *See Nassau Cnty.*, 461 F.3d at 226 (grounding an expansive interpretation of 23(c)(4) in the provision’s “plain language”); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439

Second Circuit's holding in *In re Nassau County Strip Search Cases*<sup>106</sup> provides a thorough exploration of this point. Looking to the pre-amendment version of (c)(4),<sup>107</sup> the court reasoned that the plain language of the Rule requires a court to *first* identify the issues appropriate for certification *and then* apply the other provisions of the Rule—including (b)(3) predominance.<sup>108</sup> In support of its interpretation, the court cited *Gunnells v. Healthplan Services, Inc.*,<sup>109</sup> in which the Fourth Circuit had reached the same conclusion,<sup>110</sup> as well as the Advisory Committee Notes.<sup>111</sup> The Notes, the court argued, state that a court may employ (c)(4) when “it is the only way that a litigation retains its class character,” which, the court reasoned, includes situations where common questions predominate only as to the particular issues.<sup>112</sup> Finally, the court argued that the limited view of (c)(4) renders the subsection “virtually null,” a result which courts seek to avoid when interpreting statutes,<sup>113</sup> since under a limited reading of the subsection a court could only use (c)(4) to manage cases that it had already determined to be manageable without the use of (c)(4).<sup>114</sup>

The second point harkens back to Rule 1, which instructs that the Federal Rules of Civil Procedure “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>115</sup> Likewise, the class action mechanism is intended to “promote judicial economy and efficiency by obviating the need for multiple adjudications of the same issues.”<sup>116</sup> Indeed,

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(4th Cir. 2003) (interpreting (c)(4) to issue an “express command” for certification of issue class actions that “courts have no discretion to ignore”); 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) (asserting that the text of Rule 23(c)(4) should “be accorded its plain meaning”).

106. 461 F.3d 219 (2d Cir. 2006).

107. “When appropriate (A) an action may be brought or maintained as a class action *with respect to particular issues*, or (B) a class may be divided into subclasses and each subclass treated as a class, *and* the provisions of this rule shall *then* be construed and applied accordingly.” FED. R. CIV. P. 23(c)(4) (2006) (repealed 2007) (emphases added). The 2007 amendment streamlined the language but retained the meaning of this subsection. *See supra* note 94.

108. *See Nassau Cnty.*, 461 F.3d at 226.

109. 348 F.3d 417 (4th Cir. 2003).

110. *See id.* at 439 (“Thus, Rule 23 specifically dictates that ‘[w]hen appropriate’ a class action may be ‘maintained’ as to ‘particular issues’ and, after that is done, ‘the provisions of this rule,’ such as the predominance requirement of (b)(3), ‘shall then . . . be construed and applied.’” (quoting FED. R. CIV. P. 23(c)(4) (2006) (repealed 2007))).

111. *See Nassau Cnty.*, 461 F.3d at 226. With respect to subsection (c)(4), the notes set forth that, “[f]or 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.” FED. R. CIV. P. 23(c)(4) advisory committee’s note to 1966 amendment (emphasis added).

112. *See Nassau Cnty.*, 461 F.3d at 226.

113. *See id.* at 226–27.

114. *Id.* at 227 (citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 449 (4th Cir. 2003)).

115. FED. R. CIV. P. 1.

116. 5 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 23.02 (2022).

even the (b)(3) predominance requirement is designed to further these goals.<sup>117</sup> Some commentators and judges go even further by arguing that Rule 23 is inherently flexible and permits courts to “exercise every bit of discretionary power that the law provides.”<sup>118</sup>

By allowing classes that would otherwise fail (b)(3) to be certified under (c)(4), the argument goes, courts—perforce—expand access to the class action device, thereby furthering the purpose of the Rules.<sup>119</sup> “It is a rare case indeed” in which a class-wide resolution of the common issues would fail to materially advance the fair and efficient resolution of the underlying controversy.<sup>120</sup> The alternative, under a limited (c)(4), for any case that does not meet the predominance requirement of (b)(3) as a whole would be to either relitigate the issues in a swarm of individual cases<sup>121</sup> or attempt to take advantage of some other aggregation mechanism.<sup>122</sup> Neither option is as effective as resolving the common issues in one fell swoop on a class-wide basis.

Furthermore, as a practical matter, many of these cases will not in fact be litigated separately, in multidistrict litigation, or through any other means.<sup>123</sup> Instead, the plaintiffs’ rights will simply remain unvindicated. A limited (c)(4), therefore, actively goes against the purpose of the Rules and the class action device by dooming the justice system to these twin evils: duplicative proceedings and reduced access to courts.

These arguments have proven so popular that, as of the writing of this Comment, they are hardly needed. “Most leading scholars”<sup>124</sup> subscribe to the expansive reading of (c)(4).<sup>125</sup> While some are cautious,<sup>126</sup> others point to the “weakness” and even the disappearance of the (c)(4) circuit split.<sup>127</sup> Despite this, some scholars still call for a limited (c)(4) and caution their colleagues that the ground on which they stand is less firm than it may appear. The foremost among these scholars has been Professor Laura J. Hines.

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117. *See* *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (“Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy.”).

118. *See* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 868 (1999) (Breyer, J., dissenting); *see also* Scott Dodson, *Subclassing*, 27 *CARDOZO L. REV.* 2351, 2379 (2006).

119. *See* Bronte et al., *supra* note 96; *see also* Romberg, *supra* note 22, at 289.

120. Romberg, *supra* note 22, at 296.

121. *See id.* at 258.

122. *See id.* at 301–13 (discussing alternatives to class action).

123. *See id.* at 301 (“If a vast number of plaintiffs with relatively small claims cannot aggregate their interests, transaction costs serve as an effective barrier to justice; claims are never filed, not because they lack merit, but due to power imbalance in the litigation market.”).

124. Bronte et al., *supra* note 96, at 745.

125. *See, e.g.*, 7AA *KANE*, *supra* note 17, § 1790.

126. *See* Frederico, *supra* note 84, at 276–77.

127. *See generally* Bronte et al., *supra* note 96.

*B. Housekeeping Tool: The Limited Interpretation of (c)(4)*

Across several articles<sup>128</sup> championing a limited interpretation of (c)(4), Hines argues that understanding the true meaning and purpose of (c)(4) is not as simple as the “expansivists” claim.<sup>129</sup> Rather than attempting to wring meaning from the singular sentence contained in the subsection, which has been characterized as “ambiguous,”<sup>130</sup> “opaque,”<sup>131</sup> “vague,”<sup>132</sup> “confus[ing],”<sup>133</sup> and “unhelpful”<sup>134</sup> even by the allies of the expansive reading, Hines turns instead to the legislative history of Rule 23 for hints as to the subsection’s intended meaning.<sup>135</sup> Upon concluding that the legislative history supports a limited reading of (c)(4),<sup>136</sup> Hines turns to its recent application, arguing that some of the authorities commonly cited in support of an expansive (c)(4) do not actually apply it in the cases before them.<sup>137</sup> Both points are discussed below.

The legislative history of Rule 23(c)(4) supports a modest purpose at best and points to a complete lack of purpose at worst, argues Hines.<sup>138</sup> Over fifty years ago, the drafters of the 1966 revisions to Rule 23 were not debating the subsection’s broad potential.<sup>139</sup> Instead, they questioned whether the provision was not “simply too trivial to warrant inclusion in the rule at all.”<sup>140</sup> Advisory Committee Member Charles Alan Wright urged that it be stricken as unnecessary.<sup>141</sup> In response, Advisory Committee Reporter Benjamin Kaplan, conceding that (c)(4) made “obvious points” and merely reflected existing Rule 23 practice, nevertheless argued that its inclusion would be

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128. See generally Hines, *supra* note 10.

129. See Hines, *supra* note 46, at 628–29 (“As Rule 23(c)(4)’s decades-long journey from obscurity to renaissance amply demonstrates, this chameleonic provision simply cannot be understood through the plain meaning of its text.”).

130. See Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 133 (2015) (conceding that Rule 23(c)(4) “is ambiguous, and does not explain when an issue class is appropriate”).

131. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 385 (2005).

132. See Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 238–39 (2003) (opining that Rule 23(c)(4) 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’”).

133. Klonoff, *supra* note 41, at 764.

134. Dodson, *supra* note 118, at 2372.

135. See Hines, *supra* note 46, at 628–29.

136. See *id.* at 627 (“[N]either a textualist nor an intentionalist interpretation of (c)(4) allows its application as an end-run around (b)(3)’s predominance requirement.”).

137. See *id.* at 628 (rejecting the premise that a “uniform understanding” of 23(c)(4) presently exists among the circuits).

138. See Hines, *supra* note 104, at 719–20.

139. See *id.*

140. *Id.*

141. See *id.* at 719 (citing Letter from Charles Alan Wright, Member, Advisory Comm. on Civ. Rules, to Benjamin Kaplan, Reporter, Advisory Comm. on Civ. Rules 3 (Mar. 30, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEE ON RULES OF PRACTICE & PROCEDURE, 1935–1988 (1991), *microformed on* CIS No. CI-7001-41 (Cong. Info. Serv.)).

“useful for the sake of clarity and completeness.”<sup>142</sup> These exchanges, points out Hines, are ill-befitting of a supposedly game-changing provision.<sup>143</sup>

The subsection’s placement within Rule 23, in Hines’s view, further supports a limited reading.<sup>144</sup> Much like the Federal Rules of Civil Procedure themselves, she argues, the “functionally unique” subsections of Rule 23 are organized in an “essentially linear path,” guiding the reader from the initial stages of litigation to its conclusion.<sup>145</sup> Rule 23, therefore, begins with a “Prerequisites” section, which sets out the four criteria that every class action must meet: numerosity, commonality, typicality, and adequacy.<sup>146</sup> These prerequisites are followed by a section outlining the three types of class actions that may be certified—provided that the requirements of both 23(a) and any additional requirements of this section are met.<sup>147</sup> Under this theory, sections (a) and (b) contain the whole universe of certification possibilities and must be satisfied before any subsequent sections of the Rule are considered.<sup>148</sup> Section (c), then, has nothing at all to do with class certification, and merely contains a number of directives for the court to follow after certifying a class, including timing of certification orders and notice to class members.<sup>149</sup> The sequential reading of Rule 23 has found support in Supreme Court decisions,<sup>150</sup> even as it has drawn criticism from academics and courts who believe that the “unduly rigid and formalistic”<sup>151</sup> interpretation runs afoul of “the flexibility inherent in Rule 23.”<sup>152</sup>

Hines further argues that the dispute around (c)(4) is far from settled, despite the Rule 23 Subcommittee recently coming to the contrary

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142. *Id.* at 719–20 (citing Memorandum from Benjamin Kaplan, Reporter, Advisory Comm. on Civ. Rules, and Albert M. Sacks, Member, Advisory Comm. on Civ. Rules on Additional Points on Preliminary Draft of Proposed Amendments of March 15, 1963 5 (Sept. 12, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEE ON RULES OF PRACTICE & PROCEDURE, 1935–1988 (1991), *microformed on* CIS No. CI-7001-52 (Cong. Info. Serv.)).

143. *See id.*

144. *See id.* at 731–32.

145. *See id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 361–62 (2011)).

146. *See* FED. R. CIV. P. 23(a)(1)–(4).

147. *See id.* at 23(b).

148. *See* Hines, *supra* note 104, at 731–32 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997)).

149. *See id.* at 732–33.

150. *See* *Wal-Mart Stores, Inc.*, 564 U.S. at 360–67 (engaging in detailed structural analysis of Rule 23); *Amchem Prods., Inc.*, 521 U.S. at 619–21.

151. *See* Hines, *supra* note 104, at 734–35.

152. *See* *Dodson*, *supra* note 118, 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”).

conclusion.<sup>153</sup> The Fifth Circuit, Hines points out,<sup>154</sup> which had originally planted the seeds of the split with its explicit rejection of an expansive (c)(4) in *Castano v. American Tobacco Co.*,<sup>155</sup> has not only failed to overturn the case, but has reiterated its view in *Allison v. Citgo Petroleum Co.*<sup>156</sup> Furthermore, Hines argues, a close examination of the cases that voice general support for an expansive (c)(4) reveals that none of the other circuits have “actually approved certification of an issue class action that failed Rule 23(b)(3) predominance as a whole.”<sup>157</sup> For example, in spite of its embrace of an expansive (c)(4), the Ninth Circuit in *Valentino v. Carter-Wallace, Inc.*<sup>158</sup> ended up vacating and remanding the action upon finding that the district court had “abused its discretion by not adequately considering the predominance requirement before certifying the class.”<sup>159</sup> Likewise, despite the Fourth Circuit’s strong rhetoric in *Gunnells*, the class that was ultimately certified satisfied (b)(3) predominance.<sup>160</sup> These cases demonstrate that, despite the Subcommittee’s assurances, the circuit split yet lives, and courts on both sides of it appear wary of actually utilizing (c)(4)’s supposed broad power.

### III. A NECESSARY END TO THE ANOMALOUS ISSUE CLASS

It is easy to see why the popularity of the expansive (c)(4) is on the rise. The anomalous issue class has the potential to completely circumvent the restrictions placed upon mass injury classes by *Amchem*<sup>161</sup> and revitalize the wounded Rule 23.<sup>162</sup> It expands access to justice while promoting judicial efficiency.<sup>163</sup> There is a lot to like about an expansive (c)(4). However, the mere fact that a device might be beneficial does not render it permissible under the Federal Rules of Civil Procedure. Decades of confusion

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153. See ADVISORY COMM. ON CIV. RULES, RULE 23 SUBCOMMITTEE REPORT 90–91 (Nov. 5–6, 2015), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2015> [https://perma.cc/4SR7-RGAK] (“The various circuits seem to be in accord about the propriety of such [issue class action] treatment ‘[w]hen appropriate,’ as Rule 23(c)(4) now says.”). Furthermore, the Committee’s most recent agenda book has no mention of any planned Rule 23(c)(4) action. See Meeting of the Advisory Committee on Civil Rules (Mar. 29, 2022), [https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf) [https://perma.cc/CG62-5PA6].

154. Hines, *supra* note 46, at 635.

155. 84 F.3d 734 (5th Cir. 1996).

156. 151 F.3d 402 (5th Cir. 1998). While some commentators have argued that both decisions’ rejection of the expansive (c)(4) is mere dicta, see Bronte et al., *supra* note 96, at 747–48, these arguments are hard to square with the direct language used by the Fifth Circuit. See *Allison*, 151 F.3d at 422 (“[S]uch an attempt to ‘manufacture predominance through the nimble use of subdivision (c)(4)’ is precisely what *Castano* forbade.” (quoting *Castano*, 84 F.3d at 745–46 n.21)).

157. Hines, *supra* note 46, at 636.

158. 97 F.3d 1227 (9th Cir. 1996).

159. See *id.* at 1234.

160. See *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 443 (4th Cir. 2003).

161. See *supra* text accompanying note 84.

162. See *supra* Part I.C.

163. See *supra* text accompanying notes 115–123.

surrounding the subsection have convincingly demonstrated that (c)(4) is not—as some courts claim—amenable to a plain-meaning analysis.<sup>164</sup> The legislative history of the Rule and the subsection create even more problems for the expansive reading, clearly demonstrating that the drafters of the modern Rule sought to streamline—not upend—centuries of class action practice.<sup>165</sup> Lastly, this Comment argues that continued indulgence of the anomalous issue class endangers both plaintiffs and defendants.

#### A. *What Plain Meaning?*

While it may be tempting to look to the text of the current (c)(4)<sup>166</sup>—or for that matter the text of the pre-2007 (c)(4)<sup>167</sup>—and point out the textual support for an expansive reading, this approach overlooks several critical points. Perhaps the most important of these is that Rule 23(c)(4) has been around in essentially its current form since the 1966 amendments.<sup>168</sup> Despite this, the subsection had remained largely unutilized until the 1980s.<sup>169</sup> Following a brief rise in interest by courts looking to bypass the strictures of (b)(3) predominance,<sup>170</sup> the expansive (c)(4) was cast back into the shadows in the mid-1990s, when a wave of mass tort cases seeking easy certification under (c)(4) crashed against the rocks of federal appellate resistance.<sup>171</sup> There it remained until its present reemergence into the spotlight.<sup>172</sup> This patchwork history belies any attempt to argue that the meaning of (c)(4) may be definitively ascertained from its text alone.

Looking beyond the text, the history of (c)(4) offers even less support for an expansive reading. Far from treating (c)(4) as the powerful class certification device its proponents claim it to be, the drafters of the modern Rule 23 had no idea the Rule would have the impact it did.<sup>173</sup> Arthur Miller, who was in the room when Rule 23 was written, insists that “nothing was in the committee’s mind.”<sup>174</sup> Turning to subsection (c)(4), the only question on the Committee’s mind seems to have been whether to include such an

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164. Hines, *supra* note 104, at 731 (“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.’”).

165. *See supra* text accompanying notes 138–143.

166. FED. R. CIV. P. 23(c)(4) (“When appropriate, an action may be brought or maintained as a class action with respect to particular issues.”).

167. *See supra* text accompanying note 107.

168. *See* Hines, *supra* note 104, at 724–25 (exploring the varying application of (c)(4) since its enactment in 1966).

169. *See id.* at 724.

170. *See id.*

171. *See id.* at 725.

172. *See id.* at 725–26.

173. *See supra* text accompanying notes 56–66.

174. Testimony of Arthur Miller, Public Hearing: Proposed Amendments to the Federal Rules of Civil Procedure Rule 23, at 64 (Jan. 17, 1997), in 3 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, <https://www.uscourts.gov/sites/default/files/workingpapers-vol3.pdf> [<https://perma.cc/7R2J-LP8F>].



obvious provision at all.<sup>175</sup> Indeed, the very purpose of the 1966 amendments was to “craft a cleaner, more flexible rule that better reflected how some courts had begun to use the class action device.”<sup>176</sup> While, concededly, one of the goals of the amendments was to “enable future judicial experimentation with collective claims processing,”<sup>177</sup> it is likely that the drafters envisioned the sort of experimentation that courts engaged in under the 1938 Rule: finding ways to bend strict categories in pursuit of justice,<sup>178</sup> not creating novel class types through clever use of obscure provisions. Given that the modern issue class has no equivalent in either the 1938 version of Rule 23<sup>179</sup> or in prior class action practice,<sup>180</sup> it would be dubious at best to view this drastic shift from past practice as the drafters’ intent.

### B. *The Danger of the Anomalous Issue Class*

The idea of a class action did not spring up overnight. Rule 23’s ideological roots can be traced as far back as bills of peace issued by English courts of equity, from whence the idea of the class action first spread onto American soil.<sup>181</sup> Over time, the ideas evolved and were eventually codified into the Rule we know today.<sup>182</sup> Certain ideas, however, have proven to be fundamental to the very concept of a class action, and as a result have stood the test of time.<sup>183</sup> This “class action core” is three-fold. First is the idea of commonality—those who seek a court’s indulgence in certifying a class must demonstrate that there is enough in common between the parties for class treatment to be worthwhile.<sup>184</sup> The second is that of superiority—before the “usual rule”<sup>185</sup> may be dispensed with, a reason must be shown for invoking the class action exception.<sup>186</sup> Third is the idea of adequate representation—due process requires that, even in the limited circumstances where class adjudication is appropriate, there must be a party present who can and does

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175. *See supra* notes 138–143 and accompanying text.

176. Marcus, *supra* note 1, at 604.

177. *Id.* at 605.

178. *See supra* text accompanying notes 31–36.

179. *See supra* text accompanying notes 24–30.

180. *See West v. Randall*, 29 F. Cas. 718, 721–23 (C.C.D.R.I. 1820).

181. *See supra* Part I.A.

182. *See supra* Parts I.A., I.B.

183. *Compare supra* note 17, and accompanying text, with FED. R. CIV. P. 23(a)–(b) and TOPIC EE: TENTATIVE PROPOSAL TO MODIFY PROVISIONS GOVERNING CLASS ACTIONS—RULE 23, at EE–2 (1962), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6309-44 (Cong. Info Serv.).

184. *Compare West*, 29 F. Cas. at 722 (“[W]here the question is of general interest, and a few may sue for the benefit of the whole . . .”), with FED. R. CIV. P. 23(a)(2), 23(b) (requiring there to be issues common to the class as well as additional grounds to demonstrate that the case is amenable to class adjudication).

185. *See supra* text accompanying note 13.

186. *Compare West*, 29 F. Cas. at 723 (listing possible reasons for dispensing with the general rule), with FED. R. CIV. P. 23(b)(3) (requiring that the class action be “superior to other available methods for fairly and efficiently adjudicating the controversy”).

in fact represent the interests of those absent before the latter can be bound by the resulting judgement.<sup>187</sup>

The proponents of an expansive (c)(4) and the anomalous issue class threaten to upend all three of the central concepts by shifting the focus from the entire case to discrete issues.<sup>188</sup> This myopic view is an anomaly—a loose thread in the broader tapestry that is the class action. The courts of equity, which originated the class action, did so in the context of vindicating rights.<sup>189</sup> Likewise, courts applying the 1938 Rule were primarily concerned with the vindication of the plaintiffs' rights.<sup>190</sup> Predictably, the drafters of the 1966 Rule also viewed it as a way for “small people” to vindicate their rights.<sup>191</sup> It was not until the 1980s, when courts sought to surpass the outer limits of (b)(3), that anyone envisioned the issue, rather than the class, as the “relevant unit” of class litigation.<sup>192</sup> This reductionist view of the class action device is short-sighted and destructive.

Selectively addressing only the common issues does not do away with the rest of the claim—it merely blinds the certifying court to the consequences of its rulings. Once the certified issues are resolved, the action is concluded, so far as the certifying court is concerned,<sup>193</sup> but the claims do not disappear. Former class members go—ruling in hand—to other courts to try the rest of their claim.<sup>194</sup> Different courts apply different law to different facts, building upon the certifying court's foundation in ways the latter could never have foreseen. This is the “novel and wholly untested theory” problem that the *Castano* court grappled with, reproduced on a much larger scale.<sup>195</sup> Rule 23 operates under the assumption that the certifying court is able to foresee the general progression of the case.<sup>196</sup> It is unlikely, however, that a court tasked with considering only a limited number of common issues will be able to foresee how its rulings will shape downstream litigation in other courtrooms

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187. *Compare West*, 29 F. Cas. at 722 (“[T]he court . . . is satisfied with bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole, and therefore binding, in a sense, that right.”), with FED. R. CIV. P. 23(a)(4) (adequate representation). *See generally* *Hansberry v. Lee*, 311 U.S. 32 (1940) (discussing the requirement of adequate representation).

188. *See Romberg*, *supra* note 22, at 252 (“We are now in the age of the issue.”).

189. *See West*, 29 F. Cas. at 723.

190. *See supra* text accompanying notes 24–36.

191. *See Marcus*, *supra* note 1, at 599–600.

192. *See Romberg*, *supra* note 22, at 252.

193. *See id.* at 251.

194. *See id.*

195. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996). The court stated:

The district court's predominance inquiry, or lack of it, squarely presents the problems associated with certification of immature torts. Determining whether the common issues are a “significant” part of each individual case has an abstract quality to it when no court in this country has ever tried an injury-as-addiction claim. As the plaintiffs admitted to the district court, “we don't have the learning curb [sic] that is necessary to say to Your Honor “this is precisely how this case can be tried and that will not run afoul of the teachings of the 5th Circuit.”

*Id.* at 749 (internal citations omitted).

196. *See id.*

and under different systems of law.<sup>197</sup> By encouraging courts to certify the otherwise-uncertifiable, proponents of the expansive (c)(4) and the anomalous issue class are effectively seeking to create an end-run not only around predominance, but also around the three-fold core of class action requirements.<sup>198</sup> Simply put, it is impossible for the certifying court to know definitively—at the time of certification—whether the anomalous issue class before it demonstrates sufficient commonality, superiority, and adequacy of representation<sup>199</sup> to be certified. The true and final answer to whether these prerequisites of certification were satisfied will not be known until individual litigation takes place downstream—much too late for the certifying court to course-correct or decertify.<sup>200</sup> Such uncertainty is ill-befitting of the class action device, which requires courts to take an active role in managing the class actions before it.<sup>201</sup> No amount of efficiency is worth the risk created by the unpredictable and uncontrollable tide of downstream litigation.

The consequence of certifying a class that—in retrospect—turns out to be improper is the resulting judgment’s inability to bind absent parties.<sup>202</sup> Taken to its logical conclusion, the anomalous issue class—the loose thread—has the potential to unravel the entire class action tapestry. The promise of global *res judicata*—its most powerful tool<sup>203</sup>—would ring hollow if parties knew that subsequent developments could well render their class retroactively improper. The Second Circuit’s fears in *Stephenson v. Dow Chemical Co.*<sup>204</sup> would pale in comparison to the uncertainty unleashed by the anomalous issue class. The ultimate victims of this reckless approach will be the “small people” who suddenly find their claims precluded by the actions of far-away “representatives” who had in fact failed to represent their interests and courts which had failed to inquire further, and whose settlement

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197. *But see* Romberg, *supra* note 22, at 251–52.

198. It is not difficult to imagine a situation where—for example—a schism in the interests of an outwardly cohesive class is not revealed until the application of varying bodies of state law to individual issues in the litigation makes it apparent—long after the certifying court had washed its hands of the matter. The risk is further heightened where the theory underlying the claim is novel. *See supra* note 195. Under current precedent, this theoretical class would have been uncertifiable at the outset, *see generally* *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff’d in part, vacated in part*, 539 U.S. 111 (2003) (reconsidering the Agent Orange Settlement in light of plaintiffs’ claim that they were not adequately represented in the original action), but the uncertain nature of the anomalous issue class renders the certifying court less capable of foreseeing these issues at the outset and wholly unable to unwind the state court rulings premised on the resulting mistaken certifications.

199. *See supra* text accompanying notes 181–187; *see also* FED. R. CIV. P. 23(a)–(b) (providing additional requirements for certification).

200. *See supra* text accompanying note 193.

201. *See* FED. R. CIV. P. 23(d)–(h) (instructing the certifying court on such matters as conducting the action, approving a settlement, as well as appointing and paying class counsel).

202. *See, e.g., Stephenson*, 273 F.3d 249.

203. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 824 (1999) (“Continental conditioned its part in any settlement on a guarantee of ‘total peace,’ ensuring no unknown future liabilities.”); *supra* note 68 (noting the pressure that class certification places on defendants to settle).

204. 273 F.3d 249 (2d Cir. 2001), *aff’d in part, vacated in part*, 539 U.S. 111 (2003).

values will be affected by the uncertainty and risk inherent in the anomalous issue class.

It is for these reasons that the claim must be viewed as the relevant unit of class litigation and the expansive (c)(4) must be rejected in favor of a limited, historically consistent reading. Rule 23, as it currently stands, has no place for the anomalous issue class.

#### CONCLUSION

Following the fall of the modern class action, courts and commentators have increasingly turned to Rule 23(c)(4) as a vehicle for circumventing the strict predominance requirement of Rule 23(b)(3) and breathing life back into the ailing device. Currently, the expansive interpretation of (c)(4)—which permits issue classes to be certified even where the claim as a whole would have failed (b)(3) predominance—is dominant. The proponents of this approach hail it as a long-awaited increase in judicial efficiency and revitalization of mass tort victims' access to the device. The view, however, must be rejected as a dangerous historical anomaly. By focusing on only the issues presented before them, certifying courts abdicate responsibility for guiding the development of the whole case and ensuring that the rights and interests of the absent class members are adequately represented.

This Comment, however, does not argue that no issue class could ever be appropriate. Indeed, the device's potential for reducing duplicative litigation, if used appropriately, is enormous. However, given the ambiguity of the current (c)(4) and the history of the class action device, such change cannot be enacted by judicial fiat. Instead, it should be enacted through proper rulemaking procedures following the full consideration and weighing of its impact. The anomaly must be studied, and its useful features should be integrated into the class action tapestry.