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JUDGE JACK WEINSTEIN AND THE ALLURE OF ANTIPROCEDURALISM

Howard M. Erichson*

INTRODUCTION

In one sense of the word “proceduralist”—a person with expertise in procedure—Jack Weinstein is among the leading proceduralists on the bench. Judge Weinstein taught civil procedure for years at Columbia Law School¹ and co-authored a civil procedure textbook as well as a manual on New York civil procedure.² His opinions reflect a depth of knowledge and a comfort with complex procedural issues that is uncommon among judges. But in another sense of the word proceduralist—an adherent of proceduralism, or faithfulness to established procedures—Jack Weinstein surely falls at the other end of the spectrum.³ As Judge Weinstein has put it himself, he plays “fast and loose with a lot of procedure.”⁴ In his long career as a federal judge in the Eastern District of New York, he has forged paths to bypass prevailing interpretations of procedural rules in order to accomplish justice as he has seen it in particular cases, often with the goal of

* Professor of Law, Fordham University School of Law. Thank you to Evan Piercey for excellent research assistance. Thank you to the participants at the Clifford Symposium at DePaul University College of Law and the Faculty Scholarship Retreat at Fordham University Law School for helpful comments and suggestions. And thank you to Judge Weinstein for an extraordinary career on the bench, for justice delivered in countless disputes, and for enriching the dialogue of proceduralists of every stripe.

1. See JEFFREY B. MORRIS, *LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN* 46 (2011). Columbia originally hired Judge Weinstein to teach corporate law, criminal law, and accounting, but within two years, he took over Jerome Michael’s courses in evidence and procedure when Michael passed away. *Id.* Judge Weinstein continued to teach civil procedure and evidence at Columbia for over thirty years. *Id.*

2. See MAURICE ROSENBERG & JACK WEINSTEIN, *ELEMENTS OF CIVIL PROCEDURE: CASES AND MATERIALS* (1962); see also JACK B. WEINSTEIN ET AL., *MANUAL: CPLR* (1967).

3. Judge Weinstein has used the term proceduralist more in the first sense than the second, drawing the distinction explicitly at a civil procedure conference:

By “proceduralists” I do not mean a breed of narrow-minded legal militarists committed to notions of perfect procedure at odds with social needs Rather, I mean to embrace thinkers of diverse backgrounds and professional stations in the proceduralist community, just as this conference includes representatives of faculty, bench and bar, with widely disparate expertise and viewpoints.

Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1905 n.10 (1989) (citation omitted).

4. MORRIS, *supra* note 1, at 113.

achieving comprehensive resolutions of large multiparty disputes. And he has done so unabashedly, explaining why standard applications of procedural rules fail to accomplish justice. Maybe it takes a proceduralist to be an antiproceduralist. Maybe it is only natural that the most unabashed rule breaker should be the one who best understands the rules.⁵ Judge Weinstein, steeped in procedure, puts substantive justice first. Indeed, I have never known a judge *less* inclined to let procedural niceties stand in the way of substantive justice.

I say this, however, as a fan of procedural niceties. While I have always admired Judge Weinstein's commitment to justice and his creativity in finding comprehensive solutions to complex disputes, I want to say a word on behalf of procedural regularity. Even when rules interfere with accomplishing justice as a judge sees it in a particular dispute—perhaps especially when individualist-oriented procedural doctrines conflict with a holistic approach to substantive justice in a mass setting—procedural constraints serve important functions both separately and jointly. There is something undeniably appealing about insisting that justice take precedence over procedural regularity. This is the allure of antiproceduralism: that it eschews “technicalities” in favor of substantive justice. But technicalities are in the eye of the beholder, and in each instance it is worth asking what is lost when a judge steers around procedural constraints.

Judge Weinstein tends to approach multiparty disputes holistically. That is, he often sees mass disputes in terms of liabilities of groups of defendants and remedies for groups of plaintiffs. To Judge Weinstein, understanding the claims of individual claimants or the liability of particular defendants is necessary but not sufficient. A mass dispute, to him, is more than the sum of numerous individual claims. The Agent Orange litigation, the tobacco litigation, the asbestos litigation, the Zyprexa litigation—these are not mere aggregations of individual claims; they are mass disputes that demand resolution on a mass scale. Existing rules of procedure and ethics provide tools for resolving mass disputes, but these tools can be clumsy and incomplete. For a judge committed to efficient and comprehensive aggregate dispute resolution, doctrines that limit forum selection and rules that constrict joinder get in the way. Because these rules embrace certain values that stand in tension to holism, such as territorial limits on judicial power and protection of individual autonomy, a judge committed to holistic

5. See generally Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971 (1997) (connecting Judge Weinstein's work as a law professor to his behavior as a judge).

dispute resolution bumps up against rules of personal jurisdiction⁶ and joinder⁷ that hamper a judge's ability to pull all related claims into a single forum or into a single lawsuit, and other rules that constrain the power of lawyers or judges to drive adherence to comprehensive settlements.⁸

This Article will offer several examples from Judge Weinstein's extensive catalogue of mass litigation to sketch out what it means to describe him as an antiproceduralist. First, it will look at Judge Weinstein's personal jurisdiction ruling in the DES litigation. Second, it will look at his ruling on permissive joinder of parties in the blasting caps litigation. Third, it will turn to class actions under Rule 23(b)(1)(B), looking at Judge Weinstein's class certification ruling in the *Simon II* tobacco litigation, and class actions under Rule 23(b)(3), looking at his class certification ruling in the light cigarettes litigation. All of these examples involve complex multclaimant disputes, but they touch a variety of topics stretching from start to finish of a typical civil procedure syllabus.

II. PERSONAL JURISDICTION

Precedent is here only a slight inhibitant against rational decision-making.

—Judge Jack Weinstein⁹

In *Ashley v. Abbott Laboratories*,¹⁰ Judge Weinstein rejected two defendants' motions to dismiss for lack of personal jurisdiction, despite their lack of minimum contacts with New York. In doing so, he did not pretend to follow the standard analysis for personal jurisdiction as laid down by the Supreme Court in *International Shoe Co. v.*

6. See, e.g., FED. R. CIV. P. 4(k) (delineating territorial limits of effective service in federal court); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (addressing due process limits on general jurisdiction); *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (addressing due process limits on specific jurisdiction).

7. See, e.g., FED. R. CIV. P. 20 (permissive joinder of parties); FED. R. CIV. P. 23 (class actions); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (emphasizing limits on mandatory class actions, and requiring that movants establish each of the class certification requirements); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (requiring settlement class actions to meet the requirements for class certification, and addressing certain problems with class certification in mass tort litigation).

8. See, e.g., FED. R. CIV. P. 23(e) (imposing constraints on class settlements); MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2014) (permitting aggregate settlement only with informed consent of the clients).

9. *Ashley v. Abbott Labs.* (*In re DES Cases*), 789 F. Supp. 552, 571 (E.D.N.Y. 1992), *appeal dismissed sub nom. Ashley v. Boehringer Ingelham Pharm.* (*In re DES Litig.*), 7 F.3d 20 (2d Cir. 1993).

10. 789 F. Supp. 552.

*Washington*¹¹ and subsequent cases. Rather, in classic Weinstein fashion, he embraced the need for a more flexible approach in order to accomplish justice holistically. “This diversity case,” he wrote, “presents a classic illustration of why traditional limits on personal jurisdiction must be modified for mass torts.”¹² His opinion endeavored to describe the standard doctrine’s “limitations in cases such as the one before the court, and its capacity to be modified to the needs of the present litigation and mass torts generally.”¹³

The plaintiffs sued the manufacturers of diethylstilbestrol (DES), claiming that the drug caused adenocarcinoma in some of the daughters of those who took the drug.¹⁴ DES plaintiffs faced problems establishing causation under standard tort doctrine because DES pills were sold generically, and thus it was often impossible to determine which manufacturer’s product had been ingested by any particular plaintiff’s mother.¹⁵ Several courts addressed this problem by adopting a market share liability approach, under which the plaintiffs could recover from a large number of defendants in proportion to those defendants’ share of the DES market.¹⁶ But even if the plaintiffs could overcome the causation problem as a matter of tort law based on common law modifications crafted by state courts, they faced an additional hurdle—personal jurisdiction. If the plaintiffs sought to recover from numerous defendants on a market share basis in a particular forum, what if not all of those defendants fell within the jurisdictional reach of the court?

In the *Ashley* case before Judge Weinstein, a group of plaintiffs asserted claims against a large number of DES manufacturers in the Eastern District of New York.¹⁷ Two defendants moved to dismiss for lack of personal jurisdiction.¹⁸ One of these defendants, Boehringer Ingelheim Pharmaceuticals, Inc., was alleged to be liable for the torts of Stayner Corporation, with which it had merged.¹⁹ Boehringer never produced or sold DES; the claim against Boehringer arose entirely out of Stayner’s conduct.²⁰ Stayner sold DES elsewhere but not in New York, and according to Judge Weinstein’s account for pur-

11. 326 U.S. 310 (1945).

12. *Ashley*, 789 F. Supp. at 557.

13. *Id.* at 560.

14. *Id.* at 557–58.

15. *Id.* at 558–59.

16. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1071–72 (N.Y. 1989); *Sindell v. Abbott Labs.*, 607 P.2d 924, 937–38 (Cal. 1980).

17. *Ashley*, 789 F. Supp. at 559.

18. *Id.*

19. *Id.*

20. *Id.*

poses of the jurisdictional motion, Stayner conducted no business in New York.²¹ The other objecting defendant, Boyle & Co., was a closely held California corporation that sold DES in California and elsewhere but not in New York, and like Stayner, never did business in New York.²²

A straightforward personal jurisdiction analysis would lead a court to dismiss the claims against both of these defendants for lack of in personam jurisdiction. Under Rule 4 of the Federal Rules of Civil Procedure, which instructs federal district courts on the territorial limits of effective service of process, the federal court for the Eastern District of New York must look to whether a New York state court would have personal jurisdiction.²³ New York's long-arm statute²⁴ did not establish jurisdiction over the defendants, at least not on any interpretation the New York courts had given it. And even if it had, the assertion of jurisdiction would violate the defendants' due process rights under the analysis of specific jurisdiction and general jurisdiction adopted by the Supreme Court. The plaintiffs' claims against Boehringer and Boyle did not arise out of those defendants' contacts with New York, so specific jurisdiction could not be established.²⁵ And neither Boehringer nor Boyle had substantial enough contacts with New York to permit general jurisdiction.²⁶ Particularly with regard to Boyle, it was hard to see any basis for personal jurisdiction under a traditional statutory and constitutional analysis, as Boyle

21. *Ashley*, 789 F. Supp. at 559.

22. *Id.*

23. FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . ."); *see also* *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Walden v. Fiore*, 134 S. Ct. 1115 (2014). Certain Rule 4 exceptions grant federal courts a wider reach than state courts, such as the hundred-mile extension for third-party claims and for compulsory party joinder, FED. R. CIV. P. 4(k)(1)(B)–(C), or nationwide service for claims under certain federal statutes, FED. R. CIV. P. 4(k)(2), but none of these federal court jurisdictional extensions applied in the *Ashley* case.

24. N.Y. C.P.L.R. §§ 301, 302.

25. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

26. At the time of the *Ashley* decision, the guiding Supreme Court cases on general jurisdiction were *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), which made it reasonably clear that mere sales or other business would not establish general jurisdiction over a corporation. But the contours of general jurisdiction over corporations outside of the state of incorporation or headquarters were still somewhat unclear, making it possible for Judge Weinstein to conclude that Boehringer was amenable to general jurisdiction because it was "doing business" in New York. *Ashley*, 789 F. Supp. at 591–92 (citing *Helicopteros*, 466 U.S. at 414). Since that time, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), have made the "home state" test for general jurisdiction substantially clearer.

“presented evidence indicating that . . . it [had] no ‘contacts’ with New York in the traditional sense.”²⁷

Nonetheless, Judge Weinstein held that the court had personal jurisdiction over Boehringer and Boyle. He pointed to the need for creative solutions to the challenges presented by mass torts, and he described the features of mass torts that “conspire to hinder efficient judicial disposition.”²⁸ With the challenges of mass tort litigation in mind, he turned to the New York long-arm statute and the constitutional analysis. As to the New York statute, Judge Weinstein acknowledged that no New York precedent had upheld personal jurisdiction under such circumstances, but he emphasized that the DES litigation “is not a traditional tort case,” and that the *Hymowitz* decision on market share liability “is the New York courts’ response to what would otherwise be the intractable nature of the DES mass tort.”²⁹ Because DES presented a uniquely challenging tort case, Judge Weinstein treated precedent as less constraining: “Existing case law on section 302(a)(3)(ii) thus offers no direct guidance on the application of the ‘reasonable expectation’ element to mass DES torts; precedent is here only a slight inhibitant against rational decisionmaking.”³⁰ Judge Weinstein thus treated New York law as “favoring a jurisdictional reach consistent with the national market share rationale and the adoption of several liability.”³¹ Even if a particular DES manufacturer operated only locally in a market outside of New York, Judge Weinstein found that all DES manufacturers had a reasonable expectation of affecting New York because they “were competing to carve out local spheres of influence within the national DES market” and “the existence of the local markets depended upon the creation of a national DES market.”³² Because there was a “true national market” in DES, “[s]ales in any part of the national market had a necessary impact on every other part.”³³ Thus, Judge Weinstein found that all DES manufacturers in the United States could be brought within the reach of the New York long-arm statute even if they did not sell products in New York or have any other contact with New York.

Turning to the question of whether such an assertion of jurisdiction by New York would violate due process, Judge Weinstein adopted an

27. *Ashley*, 789 F. Supp. at 593.

28. *Id.* at 562.

29. *Id.* at 571.

30. *Id.*; *see also id.* at 575 (“The wooden application of inapt precedent will not effectively resolve these cases.”).

31. *Id.* at 572.

32. *Id.*

33. *Ashley*, 789 F. Supp. at 572.

expansive approach in order to deal with the problems of mass tort litigation. Supreme Court cases such as *World-Wide Volkswagen Corp. v. Woodson*³⁴ and *Asahi Metal Industry Co. v. Superior Court*³⁵ had emphasized the need for contacts by defendants that were, at least in some sense, purposefully directed toward the forum state. In *Ashley*, Judge Weinstein put these problematic precedents aside on the ground that they failed to address the special problems of mass torts:

In any event, neither *Volkswagen* nor *Asahi*, which both involved conventional product liability claims by individual plaintiffs, are controlling in DES mass torts brought under *Hymowitz* for the same reasons that the traditional New York tort cases interpreting the “reasonable expectation” element of C.P.L.R. 302(a)(3)(ii) are unhelpful in applying that statute to mass tort cases such as this one.³⁶

In mass litigation, Judge Weinstein wrote, “the irrationality of the territorial nexus requirement is arguably most evident and the need for an improved approach most urgent.”³⁷ According to Judge Weinstein, “[T]he difficulties raised by mass litigation and the present case warrant a restatement of jurisdictional due process law that can function in this and other mass torts.”³⁸ He proceeded to offer a new set of principles to guide jurisdictional analysis in mass torts, focusing on whether the forum state has an appreciable interest in the litigation and whether the defendant would be able to mount a defense in the forum state.³⁹ Applying his new analytical framework to the DES case, he found that New York had an appreciable interest in the litigation and that Boehringer and Boyle would be able to defend themselves in New York; therefore, he rejected the defendants’ motions to dismiss.⁴⁰

Judge Weinstein’s jurisdictional decision escaped appeal because most of the parties reached settlement and the plaintiffs declined to prosecute their claims against Boehringer. When Boehringer attempted to appeal the decision on personal jurisdiction, the Second Circuit ruled that Boehringer lacked standing to appeal because it did not suffer an adverse judgment.⁴¹

34. 444 U.S. 286 (1980).

35. 480 U.S. 102 (1987).

36. *Ashley*, 789 F. Supp. at 575.

37. *Id.* at 586.

38. *Id.* at 577.

39. *Id.* at 587.

40. *Id.* at 591–94.

41. *Ashley v. Boehringer Ingelheim Pharm. (In re DES Litig.)*, 7 F.3d 20, 23 (2d Cir. 1993).

Judge Weinstein's approach displayed a powerful but problematic procedural logic: Under New York tort law, as decided by the New York Court of Appeals in *Hymowitz*, DES manufacturers could be held liable, in proportion to their national market share, for their sale of a fungible dangerous product. To apportion liability fully under this market share approach, the court needed power over all of the manufacturers. Otherwise, not all of the manufacturers would share in the liability, which would mean either undercompensation of the plaintiffs or overliability of the remaining defendants. The defendants operated as part of a nationwide market for DES, and their liability would be based on nationwide market share; effectuation of such liability, according to Judge Weinstein, required granting the court power to bind manufacturers nationwide even if they lacked any direct contacts with New York. As Judge Weinstein put it, "[T]he technology, marketing, sociology, and possible ill effects of DES knew no state boundaries. The national nature of the resulting toxic tort litigation must be reflected in the law's treatment of jurisdictional issues."⁴²

The problem with this logic is that it elevates New York tort law above constitutional and statutory constraints on the territorial power of the court. If constraints on personal jurisdiction mean anything, they must mean that sometimes a court will be unable to impose liability on potentially responsible parties. The constraints of personal jurisdiction cause fewer problems in settings where a plaintiff can simply sue the defendant in a different forum; they cause greater problems in settings such as the DES litigation, where jurisdictional limits may render it impossible for any single court to bind all of the potentially liable parties, and where individual adjudications in separate courts would reduce the efficiency and substantive coherence of the proceedings. But personal jurisdiction reflects something more than an allocation of judicial responsibility; it reflects a due process protection against the judicial power of an unrelated sovereign. If the state lacks power to bind a particular out-of-state defendant because of that party's lack of contact, the forum state cannot overcome that lack of power by a modification of its doctrine of tort causation, even in the name of resolving a complex multiparty dispute.⁴³

[At oral argument,] Boehringer stated that all the other defendant DES manufacturers settled with plaintiffs, but that Boehringer refused to do so. Trial then commenced against Boehringer, but the plaintiffs declined to present any evidence. The District Court then orally dismissed the complaint as to Boehringer for want of prosecution.

Id.

42. *Ashley*, 789 F. Supp. at 558.

43. *See Boaz v. Boyle & Co.*, 46 Cal. Rptr. 2d 888, 899-901 (Ct. App. 1995).

Judge Weinstein's interpretation of New York's long-arm statute to enable full implementation of market share liability privileged a common law causation decision over a statutory constraint on judicial power. *Hymowitz* was a matter of common law development of New York tort law. As a matter of separation of powers and deference to state legislatures, one should ask whether a state high court's alteration of the state's common law justifies a reinterpretation of the state's jurisdictional statutes to mesh with the common law shift, absent legislative action.

The more important question, however, concerns Judge Weinstein's interpretation of federal due process constraints on the power of New York courts. Unless the courts were to abandon due process constraints on territorial jurisdiction (and Judge Weinstein does not purport to go this far, despite frank statements on the obsolescence of *Pennoyer*),⁴⁴ the assertion of personal jurisdiction over these defendants is troubling. In the absence of minimum contacts with New York, a New York court's assertion of power over the defendants intrudes on the defendants' due process right to be free from the adjudicative power of an unrelated sovereign.⁴⁵

One might respond that territorial nexus-based limits on judicial power no longer make sense in an era of interstate and international activity, that such limits are unnecessary in light of modern communication and transportation, and that the *International Shoe* line of cases requires significant modification in the context of modern mass disputes. The question, at this point, would be how freely a federal district judge ought to depart from clear, recent Supreme Court precedent.

Finally, one might respond that this is not really a question of constraints on the power of New York state courts; Judge Weinstein is a federal judge and *Ashley* was a federal court case. As a matter of constitutional limits on territorial power, the authority of the United

The problem with the approach suggested by *In re DES Cases* is more fundamental. The trial judge was critical of the territorial nexus approach to jurisdiction issues, and sought to sever "territorial notions" from more general concerns underlying the bases for assertion of jurisdiction. Whatever might be said of that approach in philosophical terms, it runs counter to United States Supreme Court decisions about the assertion of personal jurisdiction over nonresidents.

Id. at 900 (citation omitted).

44. *Id.* at 579 (discussing *Pennoyer v. Neff*, 95 U.S. 714 (1877), and stating that "[f]rom 1877 forward, the courts were forced to expend considerable effort to sustain *Pennoyer* in the face of historical developments that had rendered its holding obsolete"); see also *id.* at 580 ("From its inception, *Pennoyer* was awkward in its application.").

45. See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); see also *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

States District Court for the Eastern District of New York depends on Fifth Amendment due process rather than Fourteenth Amendment due process, and the constitutionally relevant boundaries are those of the United States, not those of New York State. Thus, one might argue, there is nothing territorially problematic about the federal district court's assertion of power over all DES defendants based on their participation in the United States DES market.

The problem with this argument is Federal Rule of Civil Procedure 4(k). Under Rule 4(k), the territorial limits of effective service for a federal court depend on the jurisdictional reach of the state court.⁴⁶ Rule 4(k) lays out an exception for federal statutes that provide for nationwide service of process,⁴⁷ as well as a hundred-mile extension for third-party claims and compulsory party joinder,⁴⁸ but it makes no provision to extend federal court personal jurisdiction over permissively joined tort defendants in order to effectuate comprehensive adjudication under state tort law.

The question, then, is who has the power to amend Rule 4(k) or otherwise alter the territorial limits of effective federal court service of process. The power to amend Rule 4(k) belongs to the Supreme Court, rule-making committees, and Congress pursuant to the process established by the Rules Enabling Act.⁴⁹ The power to alter the limits on effective service of process in federal court, outside the Rules Enabling Act process, belongs to Congress.

Thus, there are three ways to view the problem of *Ashley*. Viewed as a question of the limits of state court power, the problem of *Ashley* is due process. Viewed as a question of the limits on the power of district judges to reject Supreme Court precedent, the problem is stare decisis and the structure of the federal judiciary. Viewed as a question of the limits of federal court power, the problem is separation of powers and the Rules Enabling Act.

III. JOINDER

We have, for purposes of this memorandum, assumed the existence of a national body of state tort law.

—Judge Jack Weinstein⁵⁰

46. FED. R. CIV. P. 4(k)(1)(A).

47. FED. R. CIV. P. 4(k)(1)(C).

48. FED. R. CIV. P. 4(k)(1)(B).

49. 28 U.S.C. §§ 2071–2077 (2012).

50. *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353, 360 (E.D.N.Y. 1972).

In *Hall v. E.I. DuPont de Nemours & Co.*,⁵¹ Judge Weinstein famously broke new ground in tort law with his analysis of enterprise liability for claims against manufacturers of blasting caps. Less famously, his analysis of enterprise liability came up in significant part as an answer to a question of permissive joinder under Rule 20 of the Federal Rules of Civil Procedure. The six explosives manufacturers had moved to sever, arguing that the claims against them were improperly joined, and they sought venue transfer of the severed claims to each plaintiff's home state.⁵² They also moved to dismiss the claims, arguing that each plaintiff had not identified which manufacturer produced the explosive involved in that particular accident.⁵³

A traditional judge would have severed the claims on the grounds that they did not arise out of the same transaction or occurrence,⁵⁴ and would have transferred the severed claims to each plaintiff's home state because the center of gravity of each dispute was where the accident occurred,⁵⁵ or simply would have dismissed each claim in which a plaintiff failed to identify the manufacturer whose product caused the plaintiff's injury for failure adequately to plead causation, and thus failure to state a claim upon which relief can be granted.⁵⁶ But Jack Weinstein is no traditional judge. To him, the blasting caps case was not an aggregation of independent tort claims, but a collective dispute that demanded a collective solution. If each of the defendants deserved to bear some liability, and each of the plaintiffs deserved compensation, then there ought to be a way to resolve the dispute holistically. To overcome both the causation problem and the joinder problem—namely, that each plaintiff's claim arose out of a separate accident that involved an explosive made by only one of the six manufacturers—Judge Weinstein adopted a novel and important approach to tort causation. Reaching the innovative approach to tort liability, however, required perhaps too much creativity regarding *Erie*, choice of law, joinder, and venue transfer.

Under Rule 20, permissive joinder of parties depends on whether the claims raise a common question of law or fact, and whether the claims arise out of the same transaction, occurrence, or series of transactions or occurrences.⁵⁷ The problem in *Hall* was that the plaintiffs sought to join the claims of multiple plaintiffs (who were injured in

51. 345 F. Supp. 353.

52. *Id.* at 359.

53. *Id.*

54. See FED. R. CIV. P. 20.

55. See 28 U.S.C. § 1404(a) (2012).

56. See FED. R. CIV. P. 12(b)(6).

57. FED. R. CIV. P. 20.

separate accidents) against multiple defendants (only one of which in fact manufactured the particular explosive in each accident).⁵⁸ If each accident were to count as a separate occurrence for purposes of Rule 20, then joinder was improper.

Judge Weinstein described the *Chance* case (the portion of the consolidated litigation in which plaintiffs could not name the manufacturer who actually produced the blasting cap that caused the particular injury) as follows:

Thirteen children were allegedly injured by blasting caps in twelve unrelated accidents between 1955 and 1959. The injuries occurred in the states of Alabama, California, Maryland, Montana, Nevada, North Carolina, Tennessee, Texas, Washington and West Virginia. Plaintiffs are citizens of the states in which their injuries occurred. They are now claiming damages against six manufacturers of blasting caps and the [Institute of Makers of Explosives] on the grounds of negligence, common law conspiracy, assault, and strict liability in tort. . . .

. . . .
The complaint does not identify a particular manufacturer of the cap which caused a particular injury. It alleges that each cap in question was designed and manufactured jointly or severally by the six corporate defendants or by other unnamed manufacturers, and by their trade association, the [Institute of Makers of Explosives].⁵⁹

For purposes of the joinder question, these facts created significant hurdles: (1) the plaintiffs were injured in “twelve unrelated accidents”; (2) each accident involved an explosive manufactured by a single, albeit unascertainable, defendant; and (3) the accidents occurred in ten different states and presumably would be governed by the law of those states.

Judge Weinstein realized that the case raised complex choice-of-law questions,⁶⁰ so he requested additional briefing on the choice-of-law issues while he moved forward with deciding the joinder issue:

Since, as indicated below, further briefs will be required on the choice-of-law problem, we have, for purposes of this memorandum, assumed the existence of a national body of state tort law. A growing consensus on the substantive law in this country permits such a gross first approach to the preliminary motions before us since all

58. *Hall*, 345 F. Supp. at 359.

59. *Id.*

60. *Id.* at 360.

Interlaced with the issues of duty to warn, proximate cause, and joint liability is a conflicts question of considerable complexity: what choice-of-law principles are to be applied in a case such as this one where planning, design, manufacture, and sale of a product occurred in different states, and injury in yet others?

Id.

we need to determine now is whether the plaintiffs might succeed on the law and the facts.⁶¹

The court *assumed the existence of a national body of state tort law*. It was a remarkable step, and incredibly handy for deciding the motions for severance, transfer, and dismissal. The blasting caps litigation was the first time Judge Weinstein dealt with the problem of finding unitary law to govern a multistate mass tort dispute,⁶² an issue he would confront multiple times. Assuming a national body of tort law, Judge Weinstein proceeded to analyze strict liability and joint liability. He concluded that joint liability of the manufacturers was possible under these circumstances, and therefore that joinder of the plaintiffs and joinder of the defendants was proper:

The central question raised by defendants' motion is whether the defendants can be held responsible as a group under any theory of joint liability for injuries arising out of their individual manufacture of blasting caps. . . . The reasoning underlying the current policy justifies the extension of established doctrines of joint tort liability to the area of industry-wide cooperation in product manufacture and design.⁶³

But can a judge really *assume* the existence of a national body of tort law? And can a judge, for purposes of deciding “preliminary motions” such as the motion to sever for improper joinder, simply assume away the choice-of-law question? Judge Weinstein dealt creatively with a novel and important problem, and his solution had much to commend it as a matter of tort doctrine, but still it is worth asking whether district judges have, or should have, the power to resolve a severance motion by assuming a national body of tort law and by temporarily assuming away the choice-of-law question.

First, under *Erie Railroad Co. v. Tompkins*⁶⁴ and the Rules of Decision Act,⁶⁵ federal judges in diversity cases must apply state substantive law. If a federal judge develops new theories in tort law based on the judge's analysis of sound policy and the overall trajectory of common law decisions, rather than looking to the common law decisions of a particular state's courts, how is it any different from the approach

61. *Id.* at 360; *see also In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 690, 700–01 (E.D.N.Y. 1984) (“For the moment, it is enough to say that much the same considerations controlling choice of law in the government contract defense . . . apply to product liability law generally. They tend to lead to application of federal law or of a law of national consensus.”).

62. MORRIS, *supra* note 1, at 132.

63. *Hall*, 345 F. Supp. at 370–71.

64. 304 U.S. 64 (1938) (Brandeis, J.).

65. 28 U.S.C. § 1652 (2012).

that Chief Justice Story embraced in *Swift v. Tyson*⁶⁶ and that Justice Brandeis thought the Court was rejecting in *Erie*?

Second, deciding a motion to sever requires a judge to decide whether the claims involve a common question of law or fact, and requires a judge to decide how to delineate the relevant “transaction” or “occurrence.” It is hard to see how a judge can decide the joinder issue in a case like this without knowing the substantive law that applies. Judge Weinstein deferred ruling on the choice-of-law issues and assumed a national body of tort law for purposes of deciding the “preliminary motions.” He acknowledged that he could not find a common question of law without first resolving choice-of-law questions, but he showed no similar reluctance to find common questions of fact, or to find that the claims were transactionally related:

Prior to a full consideration of the choice-of-law question, this court cannot rule on whether the plaintiffs’ claims contain a common question of law. It should be noted, however, that Rule 20(a) requires only “any common question of law or fact.” . . .

Plaintiffs’ claims do contain, moreover, common questions of fact—for example, whether the defendants exercised joint control over the labeling of blasting caps and operated, for purposes of tort liability, as a joint enterprise with respect to such labeling.⁶⁷

But the relevance of this common question of fact depends on a particular version of tort law, which in turn depends on the decision of which state’s tort law to apply. In other words, it is not clear how a judge can find that joint control is a common question of fact unless the judge has decided that, under applicable tort law, joint control would be a basis for liability. To defer ruling on choice of law, and instead assume a national body of tort law for purposes of the severance motion, is to skip the hard question that logically precedes the joinder analysis.

Judge Weinstein’s resolution of the venue transfer motion reflected a clever compromise, reminiscent of the process under the then-new multidistrict litigation (MDL) statute.⁶⁸ Rather than keep all of the actions entirely in the Eastern District of New York or transfer all of the actions to the plaintiffs’ home districts, Judge Weinstein resolved the motion in favor of “permitting plaintiffs to litigate the issues of joint activity in this court, and then transferring the questions which turn on the particular facts of each accident to the federal districts in which the accidents occurred.”⁶⁹ This approach resembled MDL inas-

66. 41 U.S. (16 Pet.) 1 (1842).

67. *Hall*, 345 F. Supp. at 381.

68. 28 U.S.C. § 1407.

69. *Hall*, 345 F. Supp. at 381 (citing 28 U.S.C. § 1404(a) and FED. R. CIV. P. 20(b), 42(a), (b)).

much as it involved centralized handling followed by transfer to home districts. The MDL statute, however, limits centralized treatment to pretrial matters, which avoids Reexamination Clause⁷⁰ problems that can arise if a jury determines common issues and later juries are charged with applying those findings to individual claims. Moreover, the MDL statute creates a process by which the Judicial Panel on Multidistrict Litigation decides whether to transfer actions for centralized pretrial handling, whereas Judge Weinstein created his solution as an individual district judge deciding a venue transfer motion. But the main problem with Judge Weinstein's venue transfer solution was that it was premised on the appropriateness of joinder, which in turn depended on a determination of applicable state common law rather than the assumption of a national body of common law.

IV. CLASS CERTIFICATION

A. Rule 23(b)(1)(B) Class Certification

Balancing the various equities in mass tort litigation inevitably will lead to some lack of congruency between the rule of law (formal and procedural correctness) and justice (the intuitive correctness of the substantive end result of the legal system).

—Judge Jack Weinstein⁷¹

In the tobacco litigation, Judge Weinstein certified a nationwide non-opt-out class action for punitive damages on behalf of all United States smokers with lung cancer and other diseases.⁷² He certified the class under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure.

Rule 23(b)(1)(B) provides for class certification in cases where prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests⁷³

70. U.S. CONST. amend. VII.

71. *In re Simon II Litig.*, 211 F.R.D. 86, 192 (E.D.N.Y. 2002), *rev'd*, 407 F.3d 125 (2d Cir. 2005).

72. Judge Weinstein defined the class broadly to cover nearly every U.S. smoker with a medically diagnosed disease that might be attributable to cigarettes, excluding those who already obtained judgments or settlements or who were members of a pending Florida state-wide class action. *Id.* at 108–09; *see also id.* at 186 (“This class action is intended to cover all punitive damages nationwide.”).

73. FED. R. CIV. P. 23(b)(1)(B).

The classic use of Rule 23(b)(1)(B) is for a limited fund class action.⁷⁴ The idea behind the limited fund class action is that individual lawsuits would overwhelm the assets available to satisfy the claims, so a non-opt-out class action is needed to distribute the assets equitably among the claimants. The Supreme Court has described the criteria for a limited fund class action as follows:

The first and most distinctive characteristic is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. . . .

Second, the whole of the inadequate fund was to be devoted to the overwhelming claims. . . .

Third, the claimants identified by a common theory of recovery were treated equitably among themselves.⁷⁵

What makes the limited fund theory work, under Rule 23(b)(1)(B), is the danger that individual adjudications would actually impair the ability of later claimants to obtain relief.

The theory that Judge Weinstein adopted in *Simon II*, however, was not that the tobacco companies' assets were insufficient to cover their exposure to liability. In fact, he specifically acknowledged that the defendants were not realistically facing bankruptcy as a result of these claims: "Defendants with such enormous assets as the tobacco producers . . . do not realistically face a limited fund through prospective bankruptcy."⁷⁶ Rather, Judge Weinstein certified the class on a "limited punishment" theory. This theory posited that, in the absence of a class action, later claimants would be impaired in their ability to collect punitive damages from tobacco companies because courts would apply a constitutional cap to limit the defendants' total exposure to punitive damages.⁷⁷ Pointing to the Supreme Court's jurisprudence on the due process clause and punitive damages, Judge Weinstein concluded:

Because punitive damages will be capped, plaintiffs are forced to draw any damages from a limited fund of resources. This creates a potential first-in-time problem, where the first plaintiffs may recover vast sums while others who arrive later are left with a depleted fund against which they cannot recover. In such instances, a Rule 23(b)(1) action may be appropriately maintained.⁷⁸

74. See FED. R. CIV. P. 23(b)(1) advisory committee's note (1966) (noting the usefulness of a class action to solve the problem of individual adjudications that adversely affect other claimants "when claims are made by numerous persons against a fund insufficient to satisfy all claims").

75. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838–39 (1999).

76. *In re Simon II*, 211 F.R.D. at 185.

77. *Id.* at 183–86, 190–91.

78. *Id.* at 190.

The problem with the limited punishment theory was that it was just a theory. There was no evidence that courts would actually cap punitive damages in a way that would impair later tobacco plaintiffs' ability to collect because earlier claimants had already received punitive damages. Such an eventuality had not come to pass in other mass torts, and indeed, it never came to pass in the tobacco litigation. Rule 23(b)(1)(B) addresses situations that create problems for later claimants "as a practical matter,"⁷⁹ not as a theoretical matter. Non-opt-out class actions are an extreme procedure, suitable in cases involving indivisible remedies but unsuitable in most mass torts.

Unsurprisingly, the Second Circuit reversed. Judge Weinstein surely knew that reversal was likely, and it is noteworthy that rather than proceed with a class trial only to be reversed later, he encouraged the Second Circuit to take the interlocutory appeal from class certification.⁸⁰ The Second Circuit emphasized the lack of a record on which the court could conclude that the claimants were facing any sort of limited or capped fund. It noted the speculative nature of the fund: "The proposed fund in this case, the constitutional 'cap' on punitive damages for the given class's claims, is a theoretical one, unlike any of those in the cases cited in *Ortiz*, where the fund was either an existing res or the total of defendants' assets available to satisfy claims."⁸¹ Without evidence of the insufficiency of the fund, the appellate court concluded, plaintiffs could not meet the threshold requirement for class certification under Rule 23(b)(1)(B).⁸²

If the *Simon II* class action presented such a stark departure from standard interpretations of Rule 23, why did Judge Weinstein certify it? Simply put, he saw a non-opt-out class action as the single best way to accomplish justice in the tobacco litigation with regard to punitive damages. He alluded to Rule 1 of the Federal Rules of Civil Procedure, stating that "[t]he remedy now proposed conforms to the sound modern pattern of procedural law designed to secure the just determination of every action."⁸³ And he invoked his equitable powers in the face of challenge: "American courts have historically turned

79. FED. R. CIV. P. 23(b)(1)(B).

80. *Id.* at 108 ("Because these litigations are so expensive, the court has recommended discretionary acceptance of appeals by the court of appeals under Rule 23(f) . . ."); *see also id.* at 187 ("The court recommends [interlocutory] review here since the legal questions implicated are serious, somewhat novel and require immediate resolution."). This recommendation of interlocutory review contrasts with Judge Weinstein's strategy in the *Schwab* light cigarettes case. *See infra* notes 93–124 and accompanying text.

81. *In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005).

82. *Id.* at 138, 140.

83. *In re Simon II*, 211 F.R.D. at 106 (citing FED. R. CIV. P. 1).

to equity in times of social change, or when faced with a need to address new and socially important problems.”⁸⁴ Three factors, according to Judge Weinstein, necessitated judicial innovation and flexibility in mass torts: (1) the absence of a satisfactory regulatory system for preventing misconduct by manufacturers; (2) the absence of a satisfactory social welfare system for compensating victims; and (3) the absence of adequate state or federal legislation controlling mass tort cases.⁸⁵

Such “ends justify the means” reasoning, however, presents a problem of circularity when it comes to overcoming constraints on class actions and other specialized procedures. Judge Weinstein needed a non-opt-out class action in order to achieve a comprehensive resolution of tobacco punitive damages liability. Had the resolution been less than fully comprehensive, the “limited punishment” theory would have made no sense. Judge Weinstein explained the rationale for using the non-opt-out approach: “Disallowing any opting out has the great advantage of permitting a punitive class to proceed on a limited punishment theory; punitive damages, with their constitutional cap, are a type of limited fund.”⁸⁶ But it is one thing to say that the limited punishment theory can work only if opt-outs are avoided; it is quite another to say that the limited punishment theory actually justifies the certification of a non-opt-out class action in the absence of any evidence that courts would in fact cap the fund as theorized.

In *Simon II*, Judge Weinstein described the need for aggregate procedures in all-or-nothing terms:

In mass exposure cases with hundreds of thousands or millions of injured the cost of one-on-one procedures is insuperable and unsuitable for either a jury or a bench trial. The consequence of requiring individual proof from each smoker would be to allow defendants who have injured millions of people and caused billions of dollars in damages, to escape almost all liability.⁸⁷

The choice need not be so stark. One can imagine processes of litigation and negotiation, including mass nonclass representation by plaintiffs’ lawyers, that are not accurately described as “one-on-one procedures” but that fall short of the judicially imposed comprehensiveness of the non-opt-out class action in *Simon II*. Surely, Judge Weinstein is correct that mass disputes cannot efficiently be handled

84. *Id.* at 191.

85. *Id.*

86. *Id.* at 110; *see also id.* at 111 (“[I]f opt-outs are allowed, there is a less compelling case for adjudicating the punitive damages, since the determination may not resolve the constitutionally driven issue globally.”).

87. *Id.* at 147.

in a fully individualized manner. On the question of individualized proof, he puts it so perfectly—“[e]xamining each grain of sand is too burdensome in a survey of a beach”⁸⁸—that it would be easy to forget that liability for personal injuries does not really sweep as broadly as a survey of a beach, or that procedures short of non-opt-out class actions need not really require examination of each grain of sand.

Judge Weinstein recognized that his use of a non-opt-out Rule 23(b)(1)(B) class action under these circumstances represented a departure from precedent. He defended this departure on grounds of necessity: “Mass tort cases have outstripped the ability of the common law, with its relatively rigid adherence to precedent, to fashion remedies that adequately redress the harms of modern technological society.”⁸⁹ And he acknowledged that such a departure reflects the tension between achieving an intuitively just outcome and following the rule of law: “Balancing the various equities in mass tort litigation inevitably will lead to some lack of congruency between the rule of law (formal and procedural correctness) and justice (the intuitive correctness of the substantive end result of the legal system).”⁹⁰ Depending on how stark one finds the departure, one might characterize the decision more or less sympathetically. The sympathetic characterization is that procedural law improves through intelligent extensions of prior law. “Much of American modern procedural jurisprudence,” Judge Weinstein wrote, “has developed out of this tension between predictability based on rigid rules of the past and flexibility based on present needs of a changing society.”⁹¹ The more critical view is that when a judge sees a choice between “the intuitive correctness of the substantive end result” and “the rule of law,” it ought to be rare for the judge to decide against the rule of law.

88. *Id.* at 153.

89. *In re Simon II*, 211 F.R.D. at 192. Judge Weinstein had previously expressed the same idea in his book on mass tort litigation. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 127 (1995).

90. *In re Simon II*, 211 F.R.D. at 192; see also WEINSTEIN, *supra* note 89, at 127.

91. *In re Simon II*, 211 F.R.D. at 192; see also WEINSTEIN, *supra* note 89, at 127. Interestingly, in the book, Judge Weinstein framed this point about “American modern procedural jurisprudence” as a point about equity. WEINSTEIN, *supra* note 89, at 127 (“Much of equity jurisprudence, of course, has developed out of this tension between predictability based on rigid rules of the past and flexibility based on present needs of a changing society.”).

B. *Rule 23(b)(3) Class Certification*

Every violation of a right should have a remedy in court, if that is possible.

—Judge Jack Weinstein⁹²

In *Schwab v. Philip Morris U.S.A.*,⁹³ Judge Weinstein certified a nationwide class action in the light cigarette litigation. Doing so required a novel legal theory to create sufficient cohesiveness among the claims to warrant class certification under Rule 23(b)(3).

Class certification in mass torts, including tobacco, had proved difficult because common questions were often swamped by individual questions. By the time of the *Schwab* case, plaintiffs' lawyers had amassed substantial evidence that cigarette manufacturers marketed "light" cigarettes to smokers as a safer alternative despite the companies' knowledge that such cigarettes were as dangerous as other cigarettes.⁹⁴ But class certification of such claims would be difficult if the claims depended on the reasons why particular smokers chose to smoke particular cigarettes. The question of motivation for smoking light cigarettes was too individualized.

To achieve common questions sufficient for class certification, Judge Weinstein adopted a novel legal theory for the plaintiffs' claims. He acknowledged the two major impediments to nationwide class certification—variations in state tort law and variations in individual smokers' conduct and motives.⁹⁵ The plaintiffs sought to overcome the first problem by asserting claims under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, rather than under state law of fraud or product liability.⁹⁶ To overcome the second problem, they asserted claims for economic harm rather than for personal injury, and contended that smokers need not prove individual reliance on the tobacco companies' misrepresentations.⁹⁷ They asked the court to adopt a fraud-on-the-market theory akin to what courts had permitted in securities fraud cases.⁹⁸ As to damages, they argued for a "fluid recovery" mechanism by which the plaintiffs would prove damages on a classwide rather than individual basis, and individual class members would then submit claims to the fund.

92. *Schwab v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1020 (E.D.N.Y. 2006), *rev'd sub nom.* *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008).

93. 449 F. Supp. 2d 992.

94. *Id.* at 1026–31.

95. *Id.* at 1019.

96. *Id.* at 1018.

97. *Id.* at 1042.

98. *Id.* at 1018.

As in *Simon II*, Judge Weinstein justified his decision as a matter of necessity. The plaintiffs' fraud-on-the-market theory for RICO claims, along with the plaintiffs' proposed fluid recovery mechanism, would permit class certification.⁹⁹ And class certification was the only practicable way to accomplish justice in this case. Noting the impediments to smokers' proceeding individually on these claims, he wrote, "The question then becomes whether the American legal system, faced with an alleged massive fraud, must throw up its hands and conclude that it has no effective remedy for what at this stage of the litigation must be assumed to be a huge continuing violation of consumers' rights."¹⁰⁰

The Second Circuit reversed. The appellate court found that common questions did not predominate over individual questions, and thus the action failed to meet the core requirement for class certification under Rule 23(b)(3).¹⁰¹ In particular, "in this case, reliance is too individualized to admit of common proof."¹⁰² Individual class members could have chosen to purchase light cigarettes for any number of reasons, the appellate court said.¹⁰³ Similarly, damages could not be proved on a common basis because "individual smokers would have incurred different losses depending on what they would have opted to do, but for [the] defendants' misrepresentation."¹⁰⁴

Although the Second Circuit rejected Judge Weinstein's finding that common questions predominated over individual ones, the difference ultimately did not depend on how the judges interpreted Rule 23(b)(3)'s predominance requirement. Rather, the difference concerned the relationship of procedural law to substantive law, and the question of who has the power to alter substantive law to address the problem of mass disputes. The Second Circuit differed from Judge Weinstein in its view on whether a judge has the power to bend the substantive law to meet the requirements of class certification. Judge Weinstein had held that the plaintiffs could establish causation and damages on a classwide basis even if individual causation and damages could not be proved, and he applied a novel fraud-on-the-market twist to the RICO statute as a way to focus on classwide, rather than

99. *Schwab*, 449 F. Supp. at 1021.

100. *Id.* at 1022.

101. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) and ("In sum, because we find that numerous issues in this case are not susceptible to generalized proof but would require a more individualized inquiry, we conclude that the predominance requirement of Rule 23 has not been satisfied.").

102. *Id.* at 225.

103. *Id.*

104. *Id.* at 228.

individual, harm. The Second Circuit rejected this approach. Aggregate determination of damages in this case, the court said, “offends the Rules Enabling Act, which provides that federal rules of procedure, such as Rule 23, cannot be used to ‘abridge, enlarge, or modify any substantive right.’”¹⁰⁵ Capturing the crux of the Second Circuit’s objection to Judge Weinstein’s decision, Judge John Walker wrote, “Rule 23 is not a one-way ratchet, empowering a judge to conform the law to the proof.”¹⁰⁶

Reading Judge Weinstein’s monumental opinion in *Schwab*, one is struck by how mightily he strove to drive a comprehensive settlement. Sprinkled liberally throughout the opinion are comments, digressions really, that seem aimed in two directions. One set of comments appears to be aimed at the parties and their lawyers, pushing them toward settlement rather than trial. The other set of comments appears to be aimed at the Second Circuit, urging the appellate court to keep its distance so that the parties could settle and some substantive justice could be accomplished.

To push the parties toward settlement, Judge Weinstein reminded both sides of their risk of losing, calling it “a litigation that arguably might go either way on inferences and facts.”¹⁰⁷ The Judge made sure the tobacco companies understood that they faced serious liability exposure, but also made sure the plaintiffs’ lawyers understood that they should not expect to recover the full damages they were claiming:

While evidence of fraud on the class appears to be quite strong—and defendants have been less than candid in insisting that there was no fraud—evidence of the percentage of the class which was defrauded and the amount of economic damages it suffered appears to be quite weak—and plaintiffs have been less than candid in failing to acknowledge that deficiency in their proof.¹⁰⁸

Judge Weinstein’s message seemed to be: Defendants, come to the negotiating table with a serious settlement offer because you face a serious risk of losing at trial; plaintiffs, come to the negotiating table prepared to accept a reasonable offer because you face a serious risk of getting a lot less in damages than you were hoping. Further pushing the plaintiffs to temper their expectations because “the amount of possible damages has been grossly exaggerated by plaintiffs,” he made sure they knew that he was prepared to use his power as judge to

105. *Id.* at 231 (quoting 28 U.S.C. § 2072(b) (2008)).

106. *Id.* at 220.

107. *Schwab v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1021 (E.D.N.Y. 2006).

108. *Id.* at 1021.

reduce damages as necessary.¹⁰⁹ Not only did Judge Weinstein use the opinion to give both sides plenty of reason to settle, but he also concluded his decision with the most powerful words in the English language for driving settlement: “Jury selection is set for January 22, 2007, with trial to begin immediately thereafter.”¹¹⁰

Judge Weinstein understood, however, that his efforts to nudge the parties toward settlement would be for naught if the court of appeals decertified the class before the parties got there. He therefore pointed some of his comments directly at the Second Circuit. Using the phrase “death knell” three times, Judge Weinstein urged the Second Circuit not to grant an interlocutory appeal, not to stay the district court proceedings, and not to reverse the class certification.¹¹¹ To bring the tobacco companies to the negotiating table, he needed the pressure of class certification and a firm trial date. Judge Weinstein’s comments in the opinion are striking because although every district court opinion implicitly speaks to appellate judges as a potentially relevant audience, rarely do district court opinions address the court of appeals quite so directly. For example, he wrote about class certification as a responsibility of both the district court and the court of appeals: “The question of class certification is critical for this court *and the Court of Appeals*. No individual can afford to prosecute the case alone. Denial of certification here *or on appeal* would constitute a ‘death knell.’”¹¹² Judge Weinstein refused to certify an interlocutory appeal¹¹³ from his denial of summary judgment, explaining that an appeal at that point would not advance the resolution of the dispute, and he took the opportunity to mention discouragingly that “[t]he enormous record would seriously add to the burdens of the Court of Appeals for the Second Circuit without adequate justification.”¹¹⁴ Acknowledging the Second Circuit’s power to accept an interlocutory appeal from the class certification decision, he urged that court to refrain: “Should the Court of Appeals under Rule 23(f) of the Federal Rules of Civil Procedure accept an interlocutory appeal from the decision to certify the class it will, in effect, be deciding the case Denial of certification will sound the death knell of this suit.”¹¹⁵ Judge Weinstein rejected the defendants’ request for an immediate

109. *Id.* at 1023 (“Adjustments to damages can be made after all the evidence is in and the jury has made its decision, if that decision is unreasonable.”).

110. *Id.* at 1277–78.

111. *Id.* at 1024, 1123, 1277.

112. *Id.* at 1024 (emphasis added).

113. See 28 U.S.C. § 1292(b) (2012).

114. *Schwab*, 449 F. Supp. 2d at 1277.

115. *Id.*

stay, and then addressed the Second Circuit: “The Court of Appeals has the power to grant such a stay, but the case, in the trial court’s opinion, should promptly proceed in view of its long history.”¹¹⁶ Just before the conclusion of the opinion, after noting that proceedings are stayed only if the district judge or court of appeals so orders, he explained his rejection of the stay in words that seem to implore the Second Circuit to let him finish his work:

This suit has been pending for almost two and a half years. Discovery is essentially complete. Legal questions antecedent to trial have been resolved. Further delay would run afoul of the first mandate of the Federal Rules of Civil Procedure: the courts shall “secure the just, *speedy*, and inexpensive determination of every action.”¹¹⁷

Just give me some time, Judge Weinstein seems to be saying, so I can bring these parties to the settlement table and accomplish some justice. Despite his pleas, the Second Circuit granted the interlocutory appeal, stayed the district court proceedings, and reversed the decision on class certification.¹¹⁸

There is so much to like about Judge Weinstein’s *Schwab* decision that it is painful to find myself largely in agreement with the court of appeals. Judge Weinstein was correct about the impracticability of most individual suits by smokers, especially claims for economic harm, and thus correct about the “death knell” significance of the class certification decision.¹¹⁹ Judge Weinstein’s Rule 23 superiority analysis correctly emphasized the importance of Rule 23 in empowering small claimants to seek redress through aggregation of claims.¹²⁰ As he put it, “A class action in the instant case is a superior method of adjudication because it is likely to be the *only* method of adjudication open to plaintiffs.”¹²¹ He certified the class as a litigation class action so that class counsel would have real leverage in negotiations, in contrast to more problematic settlement-only class actions.¹²² By certifying this nationwide class action, Judge Weinstein created a meaningful oppor-

116. *Id.* at 1024.

117. *Id.* at 1277 (quoting FED. R. CIV. P. 1).

118. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 221 (2d Cir. 2008) (“[T]his court stayed the proceedings below and granted defendants leave to take an interlocutory appeal under Federal Rule of Civil Procedure 23(f). We now reverse the district court’s class certification order and decertify the class.”).

119. See generally Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 123 (2001).

120. *Schwab*, 449 F. Supp. 2d at 1121.

121. *Id.* at 1122.

122. See generally Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951 (2014).

tunity for the legal system to hold tobacco companies responsible for what appeared to be a widespread fraud.

Class certification, however, does not provide an occasion for federal judges to modify the substantive legal rights of the parties. It provides a powerful mechanism for enforcing legal rights that already exist, many of which would be practically unenforceable without procedures for collective litigation. There is a difference, in terms of the institutional power of the federal judiciary, between using procedure to make the substantive law real¹²³ and using procedure to make substantive law different. In this regard, the federal judge is positioned differently from both Congress (with regard to federal statutes such as RICO) and state judges (with regard to general common law). It could be within the power of Congress to create class-wide rights enforceable through class litigation, just as it could be within the power of state judges to develop common law rights for classes. A federal judge adjudicating RICO claims, however, lacks the power to alter the substance of those claims in order to accommodate the demands of class certification.¹²⁴

V. CONCLUSION

Judge Jack Weinstein believes that every violation of a right ought to have a practicable remedy. In the light cigarettes litigation, he wrote of

the power of the American legal system to overcome a defense that plaintiffs' claims are so enormous in scope and time, and in diverse persons affected, that they can never be fairly adjudicated in a reasonably comprehensive and relatively inexpensive way. In this connection it is well to recall a central theme of our American legal system: *ubi jus, ibi remedium*—each right has a remedy. Every violation of a right should have a remedy in court, if that is possible. . . .

In modern times, at least since adoption of the Federal Rules of Civil Procedure and Evidence, the ancient maxim is modified to

123. See K.N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 8 (1930) (“[W]hat substantive law says should be means nothing except in terms of what procedure says that you can make real.”).

124. See 28 U.S.C. § 2072(b) (2012) (“[The Federal Rules of Civil Procedure] shall not abridge, enlarge or modify any substantive right.”). To be clear, Judge Weinstein did not state outright in *Schwab* that he was modifying RICO to enable class certification. To the contrary, he wrote that “[t]he plaintiffs’ proposed use of fluid recovery would not alter the substantive requirements of RICO, and would not, therefore, violate the Rules Enabling Act.” *Schwab*, 449 F. Supp. 2d at 1271. But the novelty of the legal theory, in combination with Judge Weinstein’s interweaving of extensive commentary on the necessity of class certification as the only way to handle this dispute, suggests that this was an instance of modification of substantive rights. That is certainly how it appeared to the Second Circuit. See *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

read, “each violation of a right should have a practicable remedy.”¹²⁵

Because of his conviction that every right should have a remedy, and his related idea that large-scale, multiparty disputes should be resolved on a large-scale, multiparty basis, Judge Weinstein finds ways to make such remedies happen, and he does not let procedural niceties stand in the way. As Dean Martha Minow explained, he does this in part simply by keeping the lawsuit moving on an aggregate basis: “Keep everyone in one lawsuit, and get the suit going—these are the watchwords behind Judge Weinstein’s magic.”¹²⁶

Part of the value of Judge Weinstein’s decisions has always been that they force us to think broadly about the realm of the possible. Even when his decisions fly in the face of traditional analysis, even when they seem bound for inevitable reversal, they make us ask, “Why not?” Why not allow a single court to assert territorial power over all United States DES manufacturers in order to implement market share liability fairly and efficiently? Why not allow joinder of multiple plaintiffs’ claims against multiple blasting cap manufacturers in order to accomplish overall justice even without linking specific manufacturers to specific victims? Why not use a mandatory class action to drive a single resolution of punitive damages claims in tobacco litigation? Why not certify an opt-out class action in the light cigarette litigation, giving plaintiffs the leverage to negotiate a comprehensive settlement that would compensate smokers, force cigarette manufacturers to disgorge ill-gotten gains, and deter future corporate malfeasance?

To each “why not,” one hopes for a more satisfying answer than “because the rule says so.” And yet, more or less, I confess that “because the rule says so” captures a good portion of my answer in each case. No one seriously disputes, as a general proposition, that procedure should serve justice rather than stand in its way. And in many ways, I am drawn to Judge Weinstein’s vision of holistic justice in mass disputes. But even when confronting seemingly intractable multiparty dispute-resolution problems, to abandon inconvenient procedural constraints is to abandon law. As Judge Walker put it in the Second Circuit’s reversal of Judge Weinstein’s light cigarette class certification, “While redressing injuries caused by the cigarette industry is ‘one of the most troubling . . . problems facing our Nation today,’ not every

125. *Schwab*, 449 F. Supp. 2d at 1020.

126. Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2017 (1997).

wrong can have a legal remedy, at least not without causing collateral damage to the fabric of our laws.”¹²⁷

Judge Weinstein does not describe himself as an antiproceduralist. Rather, in his forays into new procedural territory, he emphasizes the flexibility of equity in the face of overly stiff common law. Joinder and class actions were born in equity, and the 1938 Federal Rules of Civil Procedure “embodied the philosophical and procedural tenets of equity far more than they did the more rigid common law.”¹²⁸ In *Simon II*, Judge Weinstein emphasized the Rules’ equitable pedigree: “The class action—as well as the Federal Rules of Civil Procedure generally—are based upon an equity practice flexible enough to assure a fair remedy and due process even in the vexing area of tobacco litigation.”¹²⁹ The question presented by cases such as *Ashley, Hall, Simon II*, and *Schwab* is whether, at some point, the rules cannot bend any further without causing, in Judge Walker’s words, “collateral damage to the fabric of our laws.”

Professor Stephen Burbank, a consummate proceduralist, criticized Judge Weinstein’s penchant for independent thinking as better suited to the classroom than the courtroom.¹³⁰ To the argument that creative judicial responses are needed in order to overcome the failure of the legislative and executive branches to devise solutions for widespread injustices, Burbank offered both a practical and a normative response. As a practical matter, he worried that if judicial disobedience were more prevalent, then judicial independence would be at greater risk.¹³¹ As a normative matter, he explained that “fidelity to the rule of law in a democracy requires that, in the end, the judiciary abide

127. *McLaughlin*, 522 F.3d at 219 (citations omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000)).

128. *In re Simon II Litig.*, 211 F.R.D. 86, 192 (E.D.N.Y. 2002), *rev’d*, 407 F.3d 125 (2d Cir. 2005).

129. *Id.* at 104.

130. Burbank, *supra* note 5. Burbank questioned, for example, Judge Weinstein’s justification for departing from Supreme Court precedents on personal jurisdiction in the DES litigation. *Id.* at 1990.

It is perhaps more difficult to accept that Judge Weinstein’s ends justified his means when, in more ordinary litigation, he required a corporate defendant (one among many) to defend a lawsuit on a theory of personal jurisdiction radically at odds with Supreme Court precedent, knowing that appellate review was unlikely and that the case would probably settle. The theory was the stuff of a law review article—a creative one at that. It was (or would have been if the defendant had settled) consequential not because it won acceptance in the marketplace of ideas, nor because it survived the gauntlet of appellate review, but as a result of something that looks uncomfortably like brute force.

Id. (footnotes omitted).

131. *Id.* at 2008–09.

irrationality and irresponsibility in the political branches,” except when those branches act unconstitutionally.¹³² Burbank comes out where many of us seem to come out on Judge Weinstein, with some combination of admiration and trepidation—admiration at what he has accomplished, and trepidation at the thought of what the law would look like if other judges were to follow Judge Weinstein’s willingness to sidestep constraints:

For me both the bad news and the good are that Jack Weinstein is unique. The news is bad, because judges with any of his distinguishing qualities—his intellectual power, capacity for pragmatic innovation, and, yes, capacity for empathy—are rare. . . .

The news is good, but only in a perverse sense. We are hypocrites, refusing to give the courts the tools they reasonably need to solve the problems left (or committed) to their care, but insisting on the ideal—or is it the ideology—of the rule of law. But insist we must in order to preserve a system that, although grossly imperfect, still seems preferable to the alternatives.¹³³

Another proceduralist, Martha Minow, came out in a similar place when she wrote that the legal system would be worse off without Judge Weinstein but that a system filled with Judge Weinsteins would be “unimaginable” and “probably undesirable”:

If Judge Weinstein did not exist, law professors would have to invent him, but we could never convince students that such a smart, learned, creative, and iconoclastic person actually served as a judge. A legal system filled with Judge Weinsteins, however, would be unimaginable, and probably undesirable. At the same time, a legal system without him would be deeply impoverished.¹³⁴

This is the dilemma for proceduralists. When we see breaches of cherished process protections, the lawlessness of it scares us. But when those breaches advance the cause of justice in otherwise intractable disputes, and when they are crafted lovingly and with justifications that pay homage at least to the underlying values of procedure, we are so tempted to say, “Well, OK, but just this once.”

132. *Id.* at 2009.

133. *Id.* at 2007–08 (footnotes omitted).

134. Minow, *supra* note 126, at 2032.