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Strandell v. Jackson County and *G. Heileman Brewing Co. v. Joseph Oat Corp.*: The Failure of the Seventh Circuit Court of Appeals to Narrow the Interpretation of Rule 16 and Limit the Inherent Power Doctrine

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The federal district courts have been overburdened by increased caseloads.[1] In response, trial judges have attempted to clear the burgeoning dockets by taking more assertive managerial control over their cases in order to increase the number of early settlements.[2] Many settlements have been reached during the pretrial period through use of judicial management and extrajudicial procedures. The trend towards more active judicial management and alternative dispute resolution techniques has been applauded in many instances.[3] Several inventive pretrial procedures, such as the summary jury trial (SJT),[4] court-an-

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1. "By June 30, 1988, a total of 241,975 civil and criminal cases were pending before 575 authorized district court judgeships, for an average of 473 cases per judge." ADMIN. OFF. OF THE U.S. COURTS, 1988 ANNUAL REPORT OF THE DIRECTOR 5, 7, *noted in*, Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 792 (1989) (footnote omitted). *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-77 (1985) (warning that courts are dangerously overloaded).

2. Studies show that a trial judge who "intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less costs and delay than when the parties are left to their own devices." FED. R. CIV. P. 16 advisory committee's note, 1983 amendments.

3. *See* Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 326-34 (1986) (arguing that judicial management results in more just, speedy, and efficient disposition of cases); Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2207-09 (1989) (noting the rise of judicial case management); Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 2-3 (1988) (suggesting the use of alternative dispute resolution (ADR) techniques in specialty areas of the law); Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984) (responding to Professor Resnik's criticism of managerial judges). *But see* Resnik, *Failing Faith: Adjudicatory Procedures in Decline*, 53 U. CHI. L. REV. 494 (1986) (criticizing the shift in role of judges from adjudicators to case managers); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 385 (1986) (criticizing the unscientific evaluation of the summary jury trial and other ADR).

4. A summary jury trial is a condensed trial proceeding (generally taking one half to one day to complete) in which attorneys give summarized evidence to a six-member jury. *See* Lambros, *Summary Jury Trial*, 37 FED'N INS. & CORP. COUNS. Q. 139, 139-48 (1987) (outlining the basic structure of the SJT); Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 286 (1986) (introducing SJT as one form of ADR); Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986) (relating Judge Speigel's successful use of the

nexed arbitration,[5] and the mini-trial,[6] have been employed in facilitating settlements.[7]

This comment focuses on an analysis of the Seventh Circuit's reasoning in (1) not allowing a federal court judge to require a litigant to participate in a nonbinding SJT and (2) requiring a defendant corporate representative to appear at a pretrial settlement conference. The trial court's power to order appearance at a settlement conference and the court's lack of power to compel mandatory SJTs will be examined in light of the parameters of Rule 16 of the Federal Rules of Civil Procedure and the inherent power doctrine.

The comment is organized into five sections: first, Rule 16(a) and (c) and the inherent power of the courts are introduced; second, as background for examination of the trial judge's power to manage the court's affairs, this comment studies the development of the inherent power doctrine and Rule 16 interpretation in the Seventh Circuit, focusing primarily on the facts and the reasoning behind the decisions in *Strandell v. Jackson County*[8] and *G. Heileman Brewing Co. v. Joseph Oat Corp.*[9]; third, the weaknesses of the Seventh Circuit's analysis of Rule 16 interpretation in the *Strandell* and *Heileman* decisions are examined; and fourth, the Seventh Circuit's rationale in expanding the inherent power doctrine is presented in the setting of *Strandell* and *Heileman.* The fifth section of this comment concludes that both *Strandell* and *Heileman* do not sufficiently limit the courts' ability to interpret federal rules and the inherent power doctrine and suggests that district courts should leave the alteration of federal procedural rules to the legislative branch when the alteration affects substantive rights.

SJT). The SJT, an early 1980s innovation of Judge Thomas Lambros of the United States District Court for the Northern District of Ohio, was developed to facilitate pretrial settlement and to reduce the overburdened federal court dockets. *See* Gwin, *The Summary Jury Trial: An Explanation and Analysis,* 52 KY. BENCH AND BAR 16 (1988). *See generally* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution,* 103 F.R.D. 461 (1984) (stating that the SJT "can be an effective tool in overcoming the burden of an ever increasing docket" *Id.* at 463-64.).

5. In court-annexed arbitration, the parties are instructed to submit their case to an arbitrator who renders a nonbinding decision. *See generally* Lambros, *The Future of Alternative Dispute Resolution,* 14 PEPPERDINE L. REV. 801, 802 (1987) (reviewing procedures involved in court-annexed arbitration). The arbitrator's judgment is entered as an order of the court if both parties consent. *See* Hensler, *What We Know and Don't Know About Court Administered Arbitration,* 69 JUDICATURE 270 (1986).

6. A minitrial is a proceeding in which the parties present their cases to a neutral moderator of their choice. *See* D. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 76-80 (1986) (referring to the minitrial and advocating its use in obtaining settlements).

7. *See* MANUAL FOR COMPLEX LITIGATION 2D §§ 21.1-21.4 (1985).

8. 838 F.2d 884 (7th Cir. 1987).

9. 871 F.2d 648 (7th Cir. 1989) (en banc).

I. INTRODUCTION

Increased use of innovative pretrial procedures may be attributed to the district courts' attempts to fulfill the mandate of Rule 1 of the Federal Rules of Civil Procedure. Rule 1 provides that the federal rules are to be construed so as to "secure the just, speedy, and inexpensive determination of every action."[10] Unfortunately, "it could be argued that the application of Rule 1's implicit test is unreasonable because, whatever was the case in 1938, *nothing* in today's world is fair, fast, and cheap."[11]

The Seventh Circuit Court of Appeals has attempted to abide by the spirit of Rule 1 by granting the federal district courts leeway in pretrial management. However, some of the procedural practices used by trial judges have been questioned as not being consonant with Rule 16. In this context, the Seventh Circuit has adjudicated two cases dealing with the interpretation of Rule 16 and the inherent power doctrine. In *Strandell,* the Seventh Circuit determined that the parameters of Rule 16 did not allow the district court's ordering a party to submit to a mandatory SJT. In the subsequent *Heileman* case, the Seventh Circuit held that Rule 16 granted district courts power to compel represented parties to appear at a pretrial settlement conference.

A. *Rule 16 of the Federal Rules of Civil Procedure*

Since the enactment of the Federal Rules of Civil Procedure in 1938, several of the rules have been substantively amended. Perhaps because it needed no major improvements, Rule 16 withstood amendment for over forty-five years. "A major purpose" in the rule's amendment "was to recognize, and indeed to embrace, the strong trend toward increased judicial management of litigation from an early stage of the lawsuit."[12]

Rule 16, as amended in 1983, provides in pertinent part:

> (a) PRETRIAL CONFERENCES; OBJECTIVES. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as
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> (1) expediting the disposition of the action;
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> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;

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10. FED. R. CIV. P. 1.

11. Nordenberg, *The Future of Federal Litigation*, 50 U. PITT. L. REV. 701, 701 (1989).

12. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1985 (1989).

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> (5) facilitating the settlement of the case.
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> . . .
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> (c) SUBJECTS TO BE DISCUSSED AT PRETRIAL CONFERENCES. The participants at any conference under this rule may consider and take action with respect to
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> (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
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> . . .
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> (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;
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> . . .
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> (10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and
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> (11) such other matters as may aid in the disposition of the action.[13]

Several members of the judiciary, and some academicians, interpret the amendments as advocating the movement for a judge to be more involved in encouraging settlements and to be less of a neutral adjudicator.[14]

B. The Inherent Power Doctrine

When one of the Federal Rules of Civil Procedure, such as Rule 16, fails to specifically address an issue, courts have often relied on their inherent powers to fill the gap. The inherent power doctrine states that federal district courts are "necessarily vested" with control "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[15] In *Eash v. Riggins Trucking Inc.*,[16] the Third Circuit defined three areas in which federal courts have utilized the inherent power doctrine: (1) courts have power, within an "extremely narrow range," to act "notwithstanding contrary legislative direction," this power being grounded in the separation of powers doc-

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13. FED. R. CIV. P. 16.

14. *See* Shapiro, *supra* note 12, at 1986; *see generally* AMERICAN LAW INSTITUTE, STUDY ON "PATHS TO A 'BETTER WAY': LITIGATION, ALTERNATIVES, AND ACCOMMODATION" 90-97, A25-A28 (Background Paper July 1988) (encouraging judicial management) *noted in* Shapiro, *supra* note 12, at 1976 n.21. *But see* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1095 (1984) (advocating that settlement should not become institutionalized); Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 258-59 (1986).

15. Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962). *See infra* text accompanying notes 102-19.

16. 757 F.2d 557 (3d Cir. 1985) (en banc).

trine; (2) courts have power "necessary to the exercise of all others," of which the contempt power is pre-eminent; and (3) courts have power to "provide themselves with appropriate instruments required for the performance of their duties."[17] The inherent power doctrine is not governed solely by Rule 16, or any other rule or statute;[18] rather, the doctrine is innately limited to the powers minimally "necessary to the exercise of all others."[19]

II. Background: Cases Dealing with Rule 16 and Inherent Power

An understanding of Rule 16 and the court's inherent power is necessary as background for examination of the trial judge's power to manage the court's affairs. Likewise, an understanding of the precursor cases is needed to better analyze the facts and reasoning behind the decisions in *Strandell* and *Heileman.*

A. Pre-1988 Cases

1. The Seventh Circuit cases dealing with Rule 16 and the inherent power doctrine

In *Link v. Wabash Railroad,*[20] the Seventh Circuit stated that "[c]ourts must be free to use [pretrial procedure] and to control and enforce its operation. Otherwise, the orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel." In affirming the Seventh Circuit *Link* case, the Supreme Court fleshed out the definitional aspects of inherent power.[21]

In two subsequent cases, the Seventh Circuit held that Rule 16's specific language limits a court's authority over pretrial proceedings. First, in *J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp.,*[22] the court did not allow for the disposition of issues of fact or law without fulfilling the requirements of other rules. Additionally, the *J.F. Edwards* court held that Rule 16 did not permit a trial judge to order counsel to stipulate to facts. Then, in *Identiseal Corp. v. Positive Identification Systems, Inc.,*[23] the Seventh Circuit held that because Rule 16 is intended to be noncoercive, a court could not compel the

17. *Id.* at 562-63; Note, *Settling a Case: A Court's Inherent Power to Impose Sanctions Before and After* Eash v. Riggins Trucking, Inc., 38 Rutgers L. Rev. 539, 546 (1986).

18. *Link,* 370 U.S. at 630-31.

19. United States v. Hudson, 11 U.S. (7 Cranch) 34 (1812).

20. 291 F.2d 542, 547 (7th Cir. 1961), *aff'd,* 370 U.S. 626 (1962).

21. 370 U.S. 626, 630-31 (1962).

22. 542 F.2d 1318, 1325 (7th Cir. 1976) (per curiam).

23. 560 F.2d 298, 302 (7th Cir. 1977).

parties to engage in further discovery.

The Seventh Circuit continued to place limitations on actions relating to Rule 16 and the inherent power. In 1978, the court commented on the use of inventive experiments: "Innovative experiments may be admirable, and considering the heavy case loads of district courts, understandable, but experiments must stay within the limitations of the statute."[24] In 1987, the Seventh Circuit stated that "summary procedures are not designed for the resolution of factual disputes by judges. . . . Procedures designed to help lawyers settle cases are not appropriate for judicial resolution of contested issues."[25]

In the precursor to the Seventh Circuit's *Strandell* case, Chief Judge Foreman held that Rule 16 grants trial judges the authority to order participation in SJTs.[26] The Southern District of Illinois court's decision was subsequently vacated in *Strandell.*

2. *Views of other jurisdictions on Rule 16 and inherent power*

Other jurisdictions present views conflicting to that of the Seventh Circuit. One federal district court in Florida held, in *Arabian American Oil Co. v. Scarfone,*[27] that the purpose of Rule 16 is "to allow courts the discretion and processes necessary for intelligent and effective case management and disposition." In *Cincinnati Gas & Electric Co. v. General Electric Co.,*[28] an Ohio court held that a court is authorized to order mandatory SJTs. A federal district court in Minnesota found it unimaginable that "the drafters of the 1983 amendments [to Rule 16] actually intended to strengthen courts' ability to manage their caseloads while at the same time intended to deny the court the power to compel participation by the parties to the litigation."[29]

Several courts in Kentucky have commented on the inherent power of the court to manage its caseload; for example, in *McKay v. Ashland Oil, Inc.,* the court concluded that mandatory participation in SJTs is within the inherent power of the trial courts.[30] Moreover, in *Lockhart v. Patel,*[31] the court held that federal courts have the authority to order

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24. Taylor v. Oxford, 575 F.2d 152, 154 (7th Cir. 1978).

25. Proimos v. Fair Automotive Repair, Inc., 808 F.2d 1273, 1278 (7th Cir. 1987).

26. Strandell v. Jackson County, 115 F.R.D. 333 (S.D. Ill. 1987), *vacated,* 838 F.2d 884 (7th Cir. 1987).

27. 119 F.R.D. 448, 448 (M.D. Fla. 1988), *cf.* Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985).

28. 117 F.R.D. 597, 599-600 (S.D. Ohio 1987).

29. Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 607 (D. Minn. 1988).

30. 120 F.R.D. 43, 48 (E.D. Ky. 1988); *see also* W. BERTELSMAN & K. PHILIPPS, KENTUCKY PRACTICE, RULE 16, at 20 (Supp. 1987); Gwin, *supra* note 4, at 16.

31. 115 F.R.D. 44 (E.D. Ky. 1987).

the attendance of attorneys, parties and insurers at settlement conferences, and that this authority "is so well established as to be beyond doubt."[32] In this context, the *Lockhart* court intimated that the adoption of means to reduce docket pressures could take the form of SJTs.[33]

B. Strandell v. Jackson County

Until 1987, the general practice of compulsory SJTs remained unchallenged in several jurisdictions.[34] In *Strandell,* the Seventh Circuit held that Rule 16 did not authorize a court to compel parties to participate in a nonbinding SJT.[35] This case is significant because it departs from the expansion of the inherent power doctrine. Furthermore, the *Strandell* decision imposes boundaries on the interpretation of Rule 16.[36]

1. The facts in Strandell

At the trial level of *Strandell,* the United States District Court for the Southern District of Illinois believed it could mandate a SJT.[37] The attorney for the civil rights plaintiffs refused to participate in a SJT ordered by the district court judge. Plaintiffs' counsel argued that by participating in the compulsory SJT, he would reveal privileged work product—testimonies of witnesses which defense counsel could have readily obtained through regular discovery process but which defense counsel failed to do.[38] More significantly, plaintiffs' counsel also argued that the district court lacked the power to compel him to engage in a nonconsensual SJT. The trial judge held plaintiffs' counsel in criminal contempt for failure to proceed with the SJT. The district court predicated its authority to compel the SJT partly upon Rules 16(a) and (c).[39]

On appeal, the Court of Appeals for the Seventh Circuit reversed the lower court and vacated the contempt order. The only issue before

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32. *Id.* at 46 (quoting 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1526 (1971); J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 16.16.1, 16.22 (2d ed. 1985)).

33. 115 F.R.D. at 47.

34. *See McKay,* 120 F.R.D. at 49 (participation in a SJT could be mandated by a trial court); *Arabian,* 119 F.R.D. at 449 (the court may order parties to participate in a SJT); *Federal Reserve Bank,* 123 F.R.D. at 607 (D. Minn. 1988) (compelled participation in SJTs is consistent with the Federal Rules of Civil Procedure). *See* Maatman, *The Future of Summary Jury Trials in Federal Courts*: Strandell v. Jackson County, 21 J. MARSHALL L. REV. 455, 455 n.1 (1988).

35. *Strandell,* 838 F.2d at 886.

36. *Id.* at 887.

37. *Strandell,* 115 F.R.D. at 336.

38. *Id.* at 334.

39. *Id.* at 335-36.

the court of appeals was whether the federal district court had the power to compel participation in the nonbinding SJT. The court of appeals held that Rule 16 does not authorize district courts to compel parties to participate in SJTs.[40]

2. *The reasoning in* Strandell

The Seventh Circuit rejected the lower court's expansive interpretation of Rule 16.[41] The appellate court reasoned that although a district court has inherent power to control its docket, it must do so "in harmony with the Federal Rules of Civil Procedure."[42] As support for its rationale, the Seventh Circuit relied on the Advisory Committee's note to Rule 16(c) which provides that the pretrial conference is meant to facilitate settlement, not "to impose settlement negotiations on unwilling litigants."[43] The *Strandell* court interpreted the intent of Rule 16 as not allowing "an unwilling litigant to be sidetracked from the normal course of litigation."[44] The court also reasoned that Rule 16 only allowed a trial judge to "*explor[e]* the use of procedures other than litigation to resolve the dispute," including "*urging* the litigants to employ adjudicatory techniques outside the courthouse."[45]

The court stated that its decision was consistent with two previous Seventh Circuit opinions interpreting Rule 16 as a noncoercive rule.[46] After expressing fear that the mandatory SJT may affect the rules concerning privilege of work product,[47] the *Strandell* court concluded that although a district court may wish to take measures to lessen its crowded docket, that court may not "avoid the adjudication of cases properly within its congressionally-mandated jurisdiction."[48]

C. G. Heileman Brewing Co. v. Joseph Oat Corp.

Rule 16(a) provides that the court may "direct the attorneys for the parties and any *unrepresented* parties to appear" for a pretrial

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40. 838 F.2d at 888.

41. The Seventh Circuit implied that the district court relied erringly on the factors it used to reach the conclusion. *Id.* at 887-88.

42. *Id.* at 886.

43. *Id.* at 887 (citing FED. R. CIV. P. 16 advisory committee's note).

44. *Id.*

45. *Id.* (original emphasis).

46. *See* Identiseal Corp. v. Positive Identification Sys., 560 F.2d 298, 302 (7th Cir. 1977); J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1320 (7th Cir. 1976) (per curiam).

47. 838 F.2d at 888.

48. *Id.*

conference.[49] In *Heileman,* the Seventh Circuit held that inherent power enhances Rule 16 to authorize a court to compel litigants represented by counsel to attend a pretrial conference.[50] This case is important because the Seventh Circuit unfortunately broadened the interpretation of Rule 16 which the court had earlier narrowed in *Strandell.*[51]

1. *The facts in* Heileman

At the trial level of *Heileman,* a corporate defendant refused to obey the order of the United States District Court for the Western District of Wisconsin to send a corporate representative with authority to settle to a pretrial conference.[52] Defendant's counsel contended that he and another attorney authorized to speak for the corporate principals were in attendance. Defendant's counsel argued that the district court lacked the power to compel the corporate principal to appear at the pretrial settlement conference. The trial judge imposed a sanction of over $5,000.[53]

On appeal, a three-judge panel of the Seventh Circuit reversed the district court's order and held that a court may order attorneys and unrepresented parties, but not represented parties, to appear for a settlement conference.[54] The Seventh Circuit, on rehearing en banc, vacated the panel's decision and upheld the order.[55]

2. *The reasoning in* Heileman

The Seventh Circuit reasoned that since the federal rules "do not completely describe and limit the power of the federal courts," the courts may exercise authority outside of the rules.[56] The court stated that district courts possess the inherent power to develop "procedural techniques designed to make the operation of the court more efficient, to preserve the integrity of the judicial process, and to control courts' dockets."[57] The court determined that the court's power to compel appearance of a represented party was, nevertheless, consistent with Rule 16. In its view, the Seventh Circuit's interpretation of Rule 16 represented "another application of a district judge's inherent authority to

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49. FED. R. CIV. P. 16 (emphasis added).

50. 871 F.2d at 656.

51. *Id.* at 651-52.

52. G. Heileman Brewing Co. v. Joseph Oat Corp., 107 F.R.D. 275 (W.D. Wis. 1985).

53. 871 F.2d at 651.

54. G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415, 1421 (7th Cir. 1988), *vacated on rehearing* 871 F.2d 648 (7th Cir. 1989) (en banc).

55. 871 F.2d at 656-57.

56. *Id.* at 651.

57. *Id.*

preserve the efficiency, and more importantly the integrity, of the judicial process."[58]

III. Rule 16: Analysis of the Seventh Circuit Decisions

The focus of this analysis is to examine the weaknesses of the Seventh Circuit's interpretation of Rule 16 in the *Strandell* and *Heileman* decisions. In *Strandell,* the Seventh Circuit stated that the only issue before it was whether a trial judge could require a litigant to participate in a SJT to promote settlement of the case.[59] The court specifically stated that it was not asked to "determine the manner in which summary jury trials may be used with the consent of the parties."[60] By means of spotlighting the weaknesses of the reasoning underlying the court's decision, this analysis will elucidate the ideas behind the Seventh Circuit's rationale. Specifically, this analysis will show that, with respect to the limited issue before it, the court in *Strandell* decided the issue correctly, but now flawlessly. Contrariwise, this analysis will suggest that the decision in *Heileman* was faulty.

A. The Seventh Circuit Did Not Narrow the Interpretation of Rule 16

Rule 16 is a vehicle for change in bringing about more speedy and efficient determinations.[61] The rule does not address all of the procedures that a trial court can use in facilitating pretrial settlement.[62] However, there is a limit to what procedures can be utilized.

The *Strandell* opinion displays the limited flexibility of the federal rules, yet fails to address the necessity for district courts to act so as not to disrupt the delicate balance between the competing concerns of expediency and individual rights. The decision's failure to constrict judicial innovation is most evident in its handling of the interpretation of Rule 16. The Seventh Circuit had previously given Rule 16 a narrow interpretation.[63] Though the court held that Rule 16 does not authorize mandatory SJTs, the court inadequately relied on the Advisory Com-

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58. *Id.* at 652.

59. 838 F.2d at 886.

60. *Id.*

61. "Some judges and some lawyers long ago recognized the need for change, and at least a few recognized Rule 16, even before amendment, as the vehicle for change." Note, *Rule 16 and Alternative Dispute Resolution*, 63 Notre Dame L. Rev. 818, 818-19 (1988).

62. *See* Resnik, *supra* note 3, at 496.

63. *See* Identiseal Corp. v. Positive Identification Sys., 560 F.2d 298, 302 (7th Cir. 1977); J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1320 (7th Cir. 1976) (per curiam).

mittee's note on Rule 16(c) as support for its holding.[64] The Seventh Circuit should have focused more exactingly on the clear language of Rule 16.[65] Circuit Judge Manion, in his dissent in *Heileman*, laid out this basic principle: "As with any rule or statute, the proper starting point in interpreting Rule 16 is the rule's language. We should not be content to rely on general statements about 'liberal construction' and Rule 16's 'broadly remedial' 'spirit.' "[66]

B. The Seventh Circuit Did Not Focus on the Clear Language of Rule 16

Rule 16 should have been the keystone of the Seventh Circuit's reasoning in *Strandell.* The trial court relied on subsections (7) and (11) of section (c); consequently, the Seventh Circuit repeated the view of the trial court that these two subsections authorized the mandatory SJT.[67] The subsections only provide that "[t]he participants . . . may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute" and "(11) such other matters as may aid in the disposition of the action."[68] The plain language of Rule 16(c) suggests that *extrajudicial,* not judicial, procedures be discussed at a pretrial conference. The *Strandell* decision states that "while the pretrial conference of Rule 16 was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation."[69] As one commentator observed, "the decision implies that any other interpretation of Rule 16 would have signaled that a quiet revolution had occurred in federal pre-trial practice."[70] The interpretation delineated by the Seventh Circuit in *Heileman* is that "Rule 16's specific language limits a court's authority over pretrial proceedings,"[71] of which SJTs are included.

The trial court, quoting Judge Lambros, read Rule 16 in conjunc-

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64. 838 F.2d at 887; *See* Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483, 494 (1988) ("Much of *Strandell*'s analysis focused not on the text of the Rule, but on a single sentence of the Advisory Committee notes on Rule 16(c).").

65. For example, one illustrative comment seems to decry broad interpretation of Rule 16: "I also can find nothing in Rule 16 (pretrial conference) to suggest that judges are authorized to convene juries to assist in settlement." Posner, *supra* note 3, at 385.

66. 871 F.2d at 666 (Manion, J., dissenting).

67. *Id.*

68. FED. R. CIV. P. 16.

69. *Strandell,* 838 F.2d at 887.

70. Maatman, *supra* note 34, at 459-60. Gerald L. Maatman was the attorney for the plaintiffs in *Strandell.*

71. 848 F.2d at 1421.

tion with Rule 1, which provides that the rules be construed "to secure the just and speedy determination of an action."[72] The Seventh Circuit failed to respond with a comment on the interplay between the two rules. Perhaps the court's argument that Rule 16 is not meant to be coercive could be construed as a response to the seemingly broad coverage of Rule 1. The court discerned that no language in the amended Rule 16 or in the Advisory Committee's note suggests that the amendments to Rule 16 "were intended to make the rule coercive."[73] Rule 16 points to extrajudicial procedures only as a possible means for arriving at a settlement. Additionally, the Seventh Circuit cited with approval the Second Circuit's comment on the 1983 version of Rule 16: "Rule 16 . . . was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise."[74] Reconciliation of the two rules results when the ostensible broadness of Rule 1 is necessarily tempered by the noncoercive nature of Rule 16.

1. Strandell*'s interpretation of Rule 16*

When SJTs were first introduced in the early 1980s, other forms of alternative dispute resolution had already been embraced by the courts.[75] Essentially, the development of the law regarding judicial power to require participation in SJTs originates in the Federal Rules of Civil Procedure, particularly Rule 16;[76] accordingly, the trial court cited with approval Judge Lambros' analysis for the court's authority: "The Summary Jury Trial is firmly rooted in the Federal Rules of Civil Procedure. In light of Fed.R.Civ.P. 1, SJT is within the court's pretrial powers pursuant to Fed.R.Civ.P. 16(a)(1), (5), (c)(11), and the court's inherent power to manage and control its docket."[77]

While the Seventh Circuit's decision in *Strandell* should be lauded for its curtailment of the district courts' power to excessively liberalize the interpretation of federal procedural rules, the decision is lacking in several respects. Although the case only mentions briefly the danger of overstepping court boundaries and into "congressionally-mandated ju-

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72. FED. R. CIV. P. 1; 838 F.2d at 887.

73. *Strandell,* 838 F.2d at 888.

74. *Id.* at 887 (quoting Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)).

75. *See* Maatman, *supra* note 34, at 455. In 1984, the Judicial Conference endorsed the use of SJTs as a means of promoting the settlement of cases. *See* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 88 (Sept. 1984).

76. For example, "Rule 16(a)(1) and (5) and (c)(11) has been cited as a basis for the utilization of summary jury trial procedures." Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448, 448 (M.D. Fla. 1988).

77. *Strandell,* 115 F.R.D. at 335; Lambros, *supra* note 4, 103 F.R.D. at 469.

risdiction,"[78] the major forte of the *Strandell* opinion remains its adherence to staying within judicial bounds, i.e., leaving the power to amend or alter federal rules that affect substantive rights in the hands of the legislature. In its decision, the court recognizes the Federal Rules of Civil Procedure as a product of a process designed to take into account the protection of individual rights.[79]

One strength of *Strandell* is its emphasis on the damage that could be inflicted upon the work product rule if SJTs were to be made compulsory. If the plaintiffs in *Strandell* had been required to participate in the SJT, they would have conceivably had to divulge privileged testimonies of witnesses. The federal district court at the trial level had previously denied the defendants' motion to compel production of the privileged work product.[80] Consequently, an attempt to force plaintiffs to submit to the SJT procedure, thereby causing them to disclose privileged information, would upset the "carefully-crafted balance between the needs for pretrial disclosure and party confidentiality."[81] Again, the court was not hesitant to mention that such an attempt would alter the "judgments contained in Rule 26 and in the case law."[82]

The emphasis on the work product privilege was necessary; however, without more analysis and illustration of the inherent power doctrine and the interpretation of the federal rules, the emphasis leaves a false impression of the importance of the work product privilege. Instead, the rationale behind the inextricable ideas of inherent power and interpretation of rules should have been given the limelight. The Seventh Circuit failed to point out how a court's compelling plaintiffs' attorney to participate in the SJT would force the attorney to reveal the privileged information. Judge Posner offered the suggestion that "an attorney who did not want to make his 'trump card' available to the opposition before trial, could merely withhold that piece of evidence from the summary proceeding."[83] The above criticisms are offered as a means to determine that the *Strandell* case inadequately addressed and established the boundaries of Rule 16.

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78. *Strandell,* 838 F.2d at 888.

79. *Id.* at 886 (quoting S. REP. NO. 1744, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 3023, 3026).

80. Strandell v. Jackson County, 7 Fed. R. Serv. 3d 715 (S.D. Ill. 1986).

81. 838 F.2d at 888.

82. *Id.*

83. Lambros & Shunk, *The Summary Jury Trial,* 29 CLEV. ST. L. REV. 43, 54 (1980).

2. Heileman's *interpretation of Rule 16*

Although the majority in *Heileman* was correct in stating *what* Rule 16 addresses, the use of pretrial conferences and the discussion of means for dispensing with unnecessary litigation,[84] the majority was incorrect in holding that Rule 16 allows federal district courts to compel a represented party's appearance at pretrial settlement conferences.[85] The clear language of Rule 16 operates against any such holding. As one of the dissenting judges in *Heileman* so emphatically stressed, "the rule *mandates in clear and unambiguous terms that only an unrepresented party litigant and attorneys may be ordered to appear.*"[86]

The arguments against the majority's holding can be categorized into three basic propositions. The first proposition embodies the idea that Rule 16 specifically addresses who may be compelled to appear at the pretrial conference. That only attorneys and unrepresented parties may be required to participate in pretrial conferences is manifestly expressed by the rule's multiple references to "attorneys" and "unrepresented parties." Rule 16(a) provides that a court may direct the "attorneys for the parties and any unrepresented parties to appear before it."[87] Rule 16(b) states that a judge may enter scheduling orders after "consulting with the attorneys for the parties and any unrepresented parties."[88] Rule 16(c) requires that "[a]t least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations."[89] Rule 16(d) directs that the final pretrial conference be attended by "one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties."[90] Finally, Rule 16(f) allows sanctions if there is no appearance made "on behalf of a party."[91] Judge Manion points out that the "only language in Rule 16(f) specifically addressing appearance does *not* authorize sanctions if 'a party fails to appear.' "[92] He observes that the "choice of language is significant. In the normal course, an attorney appears 'on behalf of' a represented client at a pretrial conference."[93] It appears, then, that the distinction between represented parties and un-

84. *Heileman,* 871 F.2d at 650.
85. *Id.* at 652.
86. *Id.* at 658 (Coffey, J., dissenting) (original emphasis).
87. FED. R. CIV. P. 16.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Heileman,* 871 F.2d at 667 (Manion, J., dissenting) (original emphasis).
93. *Id.*

represented parties was intended by the framers of Rule 16. Though the majority opinion neglected to place importance on this distinction, it did make the following admission:

> The language of Rule 16 does not give any direction to the district court upon the issue of a court's authority to order litigants who are represented by counsel to appear for pretrial proceedings. Instead, Rule 16 merely refers to the participation of trial advocates—attorneys of record and *pro se* litigants.[94]

Consequently, in stating that Rule 16 did not "limit the power of the federal rules,"[95] the majority had to rely on authority external to Rule 16 to reach its conclusion.

The second proposition used in the argument against the majority opinion was entirely unaddressed by the majority in *Heileman*. The second basic proposition was stated by Judge Manion: "Rule 16's distinction between represented and unrepresented parties is consistent with a litigant's statutory right to representation by an attorney."[96] The role of the attorney is one of advocate for her client. Attorneys are often hired for their ability to effectively persuade the judge or jury and to present the client's case with the courtroom skills and legal knowledge which the client may lack. Moreover, as Judge Posner explains, attorneys are hired by clients to "economize on their own investment of time in resolving disputes."[97] The drafters of amended Rule 16 envisioned that their choice of language would undergo a scrutinizing process.

> It is incredible to believe that after this careful process, amended Rule 16 would expressly authorize district courts to order only attorneys and unrepresented parties to appear if the drafters also intended to allow district courts to order represented parties to appear. This is especially so given Rule 16's consistent distinction between represented and unrepresented parties, and that distinction's congruence with the statutory right to representation by an attorney and the attorney's traditional role in litigation.[98]

The Seventh Circuit would have been wise to follow Judge Manion's caution that courts should not "presume that Rule 16's drafters meant to encroach on a litigant's right to conduct his case through counsel."[99]

The third basic proposition used in the argument against the majority opinion was presented by Judge Posner. He believed that though

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94. *Id.* at 651.
95. *Id.*
96. 871 F.2d at 667 (Manion, J., dissenting).
97. *Id.* at 657 (Posner, J., dissenting).
98. *Id.* at 668 (Manion, J., dissenting).
99. *Id.* at 667.

the panel concluded that Rule 16 carries the negative implication that no *represented* party may be directed to appear, *Heileman* could have been decided on a narrower ground.[100] Judge Posner posited that "neither Rule 16 nor any other rule, statute, or doctrine imposes [a duty to bargain in good faith over settlement before resorting to trial] on federal litigants." He stated that *Heileman* could have been decided on the ground that the magistrate abused his discretion in ordering the defendant to "send an executive having 'full settlement authority' to the pretrial conference."[101]

IV. Inherent Power: Analysis of the Seventh Circuit Decisions

In both *Strandell* and *Heileman,* the Seventh Circuit attempted to argue that Rule 16 answered the question at hand. Because Rule 16 did not do so, the court in *Heileman* alternatively relied on the inherent power doctrine. The undue reliance on the inherent power of the court broadened the doctrine's applicability. As a result, the Seventh Circuit fostered the development of new problems by expanding the inherent power doctrine.[102]

A. The Decision Provided a Weak Bridle for the Inherent Power Doctrine

Although the Seventh Circuit in *Strandell* properly held that the district court's power to control and manage its docket does not extend to requiring participation in SJTs, the court's decision did not go far enough. The *Strandell* court should have delineated more clearly the limitations of the inherent power of federal courts. In *Heileman,* the court held that Rule 16 did not limit the inherent power of federal courts to order represented parties to attend pretrial conferences. Vigorously opposed by several of the circuit judges, this holding allowed the inherent power doctrine to be unnecessarily expanded.

Besides Rule 16, the other cited authority for mandatory SJTs in *Strandell* was the inherent power of the courts.[103] The Seventh Circuit appropriately emphasized the trial court's admission that "its discretion in this context is not unbridled."[104] Although the decision in *Strandell* affirmatively stated the limitation that courts must exercise inherent

100. *Id.* at 657 (Posner, J., dissenting).

101. *Id.* at 658.

102. *See* Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry,* 25 Willamette L. Rev. 743, 746 (1989).

103. 838 F.2d at 886.

104. *Id.* (quoting Dist. Ct. Mem. Op. at 335).

powers in "harmony with the Federal Rules of Civil Procedure,"[105] that brief mention was insufficient. The United States Supreme Court, in *Roadway Express, Inc. v. Piper*, had already issued this admonitory remark: "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."[106] The Supreme Court's statement (or a paraphrase of that statement) was not embodied as a precedential citation in either *Strandell* or *Heileman.*

The *Strandell* and *Heileman* majority decisions were remiss in pointing out how several cases set limits to the inherent power. For example, in *Link v. Wabash Railroad Co.,*[107] the inherent power was limited to dismissing a case with prejudice for failure to prosecute. In *Roadway,* the inherent power was limited to imposition of attorney's fees for bad faith litigation.[108] The Supreme Court held that any sanction ordered by virtue of the courts' inherent power had to be grounded in bad faith conduct or conduct tantamount to bad faith.[109] Several post-*Roadway* courts restricted the judiciary's inherent powers in imposing sanctions.[110]

When dealing with problems of interpretation within the federal rules, the courts first look to the rules themselves. If the rules fail to specifically address the issue, the courts look to authority outside of the rules. According to the *Manual for Complex Litigation, Second,* the federal rules "contain numerous grants of authority that supplement the inherent power of the court to manage litigation. Of particular importance are those contained in Rule 16, 26, 37, and 42."[111] The Seventh Circuit erred in *Strandell* when it failed to look at the particular word choice in Rule 16. If it had done so, there may have been no need to look to the inherent power doctrine.

Some examples of the Seventh Circuit's failure to closely examine the language of Rule 16 are seen in the *Strandell* case. Conceivably, the court could have elaborated on the term "extrajudicial" found in Rule 16(c)(7). The Advisory Committee's note to the 1983 amendments to Rule 16(c)(7) imply a possible link between the terms "extrajudicial" and "outside the courthouse" in the following statement: "This

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105. *Id.* at 886.

106. 447 U.S. 752, 764 (1980).

107. Link v. Wabash R.R. Co., 370 U.S. 626, 629 (1962).

108. 447 U.S. at 766-67.

109. *Id.* at 767.

110. *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986) (concluding that sanctions must be supported by a finding of bad faith); Analytica, Inc. v. NPD Research, 708 F.2d 1263 (7th Cir. 1983) (determining that sanctions had to be based on a party's bad faith—an unreasonable position that was "without at least a colorable basis in law"); *See generally* Nizamoff & Wodock, *Inherent Power Sanctions: Why Me, O Lord?*, 55 DEF. COUNS. J. 58, 59-60 (1988).

111. MANUAL FOR COMPLEX LITIGATION 2D, *supra* note 7, § 23.11, at 160.

includes urging the litigants to employ adjudicatory techniques outside the courthouse."[112] As one commentator explained, "A summary jury trial is hardly an extrajudicial proceeding. Indeed, a summary jury trial is conducted inside the courtroom of a federal courthouse, before an Article III judge, and with jurors selected from the court's master jury wheel who are paid from congressionally apportioned funds."[113] The examination of specific terms within Rule 16 is only suggested to point out the necessity for following the clear language of the rule. Had the court applied a literal interpretation, it might have quickly brushed aside a portion of the district court's stated authority for the mandatory SJT.

The court in *Strandell* should have distinguished the difference between pretrial conferences and SJTs. In contrast, the court in *McKay* felt that SJTs could be used as extended pretrial conferences.[114] Moreover, the *Arabian* court reasoned that "[w]hatever name the judge may give to these proceedings," SJTs and conferences are similar and Rule 16 sanctions them.[115] However, SJTs and conferences are not the same. The *Strandell* court could have armed its decision with analysis to the contrary. The distinction could have been readily made by referring to the actual text of Rule 16 and the accompanying Advisory Committee note.

Furthermore, the Seventh Circuit should have also distinguished a settlement conference from a SJT. The lower court in *Heileman* disagreed with *Lockhart* in that the *Lockhart* court sanctioned the district court's power to order attendance at settlement conferences.[116] Assuming, *arguendo,* that the SJT and the settlement conference are indistinguishable, the *Strandell* court failed to imply that a court's order requiring the attendance of the parties might be "so onerous, so clearly unproductive, or so expensive in relation to the size, value, and complexity of the case" that it would be an abuse of discretion to order the parties themselves to attend a settlement conference.[117]

Finally, though the SJT is not a settlement negotiation,[118] the court in *Strandell* could have more convincingly characterized the SJT as a procedure leading to and closely conjunctive with a settlement negotiation. Infelicitously, the court relied on the Advisory Committee note's implication that Rule 16(c) was not intended to "impose settle-

112. 838 F.2d at 887 (quoting FED. R. CIV. P. 16 advisory committee's note).
113. Maatman, *supra* note 34, at 478.
114. McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988).
115. Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988).
116. 848 F.2d at 1420.
117. *Heileman,* 107 F.R.D. at 277.
118. Note, *Compelling Alternatives*, *supra* note 64, at 494.

ment negotiations on unwilling litigants."[119] Although the SJT and the settlement negotiation were improperly conjoined, that association is not fatal to the *Strandell* analysis.

B. A Limitation of the Inherent Power in Strandell *May Have Prevented the* Heileman *Outcome*

The remainder of this comment will discuss other points in which the Seventh Circuit's rationale with regard to the inherent power doctrine was lacking. First, the analysis to follow will examine the dissenting opinions in *Heileman* with the purpose of highlighting language which, if hypothetically inserted in the *Strandell* decision, may have affected the outcome in *Heileman.* Second, this comment will propose that the Seventh Circuit could have more assertively set bounds for the judiciary and cautioned courts against treading upon the realm of the legislature.

In light of the dissenting opinions and the proposition that this comment attempts to support, it is suggested that Judge Manion set adequate limitations on the inherent power doctrine. "Inherent power is not a license for federal courts to do whatever seems necessary to move a case along. Inherent power is simply 'another name for the power of courts to make common law when statutes and rules do not address a particular area.' "[120] The justices who authored the dissenting opinions effectively bolstered their argument that the inherent power doctrine is limited. "Since inherent power's purpose is to fill gaps left by statute or rule," Judge Manion continues, "it necessarily follows that where a statute or rule specifically addresses a particular area, it is inappropriate to invoke inherent power to exceed the bounds the statute or rule sets."[121] Though more applicable in disputing the expansive holding of *Heileman,* this limitation is readily apropos in arguing against the interpretation of Rule 16 in *Strandell.*

Judge Ripple curtails the enlargement of the inherent power doctrine by limiting judicial officers to "a substantial degree of inherent authority to deal with individual situations—as long as that authority is exercised in conformity with the policies embodied in the national rules."[122] Not only would inherent power be limited by the federal rules themselves but also by the *policies* embodied in the federal rules.

Judge Posner admonished against the "obvious dangers in too

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119. FED. R. CIV. P. 16 advisory committee's note.

120. *Heileman*, 871 F.2d at 666 (Manion, J., dissenting) (quoting Soo Line R.R. Co. v. Escanaba & Lake Superior R.R. Co., 840 F.2d 546, 551 (7th Cir. 1988)).

121. 871 F.2d at 666 (Manion, J., dissenting).

122. *Id.* at 665 (Ripple, J., dissenting).

broad an interpretation of the federal courts' inherent power to regulate their procedure."[123] The Seventh Circuit's brief acknowledgement in *Strandell* of the district court's "substantial inherent power to control and to manage its docket" was insufficient.[124] The freedom to interpret inherent power expansively is subject to constitutional constraints notwithstanding the language of Article III of the Constitution.

The *Heileman* court relied on the inherent power doctrine because of Rule 16's failure to give direction upon the specific issue before the court. If the Seventh Circuit in *Strandell* had elaborated on Rule 16's limitation, then the Seventh Circuit may have decided *Heileman* relying on the precedent set in *Strandell* and, therefore, may not have been tempted to reach out to the inherent power doctrine to bolster its holding. If it were possible to take language from a yet undecided case (*Heileman*) and insert it in the case at hand (*Strandell*), then Judge Coffey's elaboration on the limited application of Rule 16 may have been instrumental in averting the outcome in *Heileman.* Judge Coffey elucidates what the *Strandell* court failed to point out—the inextricable relationship between the inherent power doctrine and the federal rules:

> The majority upsets [the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant] and acts contrary to the Supreme Court's mandate in the *Bank of Nova Scotia* case when it relies upon an alleged "inherent authority" to permit district court judges to exercise a power which the drafters of Rule 16 explicitly denied them.[125]

The statement in *Strandell* that the inherent power must be "exercised in a manner that is in harmony with the Federal Rules of Civil Procedure"[126] is too weak to prevent the outcome in *Heileman.* The Seventh Circuit in *Strandell* should have used more forceful language, i.e, similar to Judge Coffey's declaration that the "newly created 'inherent authority' . . . is based upon a legal foundation of quicksand."[127]

V. Recommendations and Conclusion

A. District Courts Should Beware Rash Procedural Innovations that Infringe on Substantive Rights

The district courts within the Seventh Circuit should be careful as they innovate with various procedures. "The delicate balance between

123. *Id.* at 657 (Posner, J., dissenting).
124. *Strandell,* 838 F.2d at 886.
125. *Heileman,* 871 F.2d at 660 (Coffey, J., dissenting).
126. *Strandell,* 838 F.2d at 886.
127. *Heileman,* 871 F.2d at 661 (Coffey, J., dissenting).

efficiency and fairness created by the Federal Rules of Civil Procedure is altered by procedural innovation."[128] Professor Resnik has observed that "the history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms."[129] Judicial activism, in the form of procedural innovation that infringes on substantive rights, should be curtailed.[130]

The methods used to encourage pretrial settlement should be carefully scrutinized.[131] For instance, the *Manual for Complex Litigation, Second,* cautions "that the role of the judge in settlement is an uncertain one and recommends judicial restraint in several respects."[132] "Neither the bench nor the bar agrees on the role a trial judge should play in bringing about a settlement."[133] The Seventh Circuit in *Strandell* and *Heileman* did not argue that the mandatory SJT and the compulsory pretrial conference attendance were possibly outcome-determinative according to the Supreme Court's *Colgrove*[134] test. The court could have asserted that the *Colgrove* test should be applied on a case-by-case basis. In the particular factual situation of *Strandell,* the Seventh Circuit could have successfully defended the mandatory SJT as an excessive intrusion into the independence of plaintiffs' attorney.[135] Furthermore, the Seventh Circuit could have reasonably submitted that a mandatory SJT would have been determinative of the ultimate outcome of the litigation, given *Strandell*'s particular factual scenario. In *Heileman,* the court did not argue that the substantive right to representation by counsel may be affected by the court's order to compel the represented party's appearance at the pretrial conference.

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128. Tornquist, *supra* note 102, at 744.

129. Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985).

130. *Contra* Lambros, *supra* note 1, at 806. Judge Lambros believes that trial judges should "take an active role in managing and administering their dockets. And in this sense, I consider myself a judicial activist, a *procedural* judicial activist." *Id.* However, as Lambros elaborates, "[P]rocedural activism is in no way related to substantive activism. While substantive activism is concerned with philosophical questions concerning the application of our Constitution, procedural activism addresses only the means of processing disputes." *Id.*

131. *See* Tornquist, *supra* note 102, at 747. *See Heileman,* 871 F.2d at 658 (Coffey, J., dissenting, joined by Easterbrook, Ripple & Manion).

132. Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations?*, 62 ST. JOHN'S L. REV. 493, 502 (1988). "Despite the [*Manual*'s] status in the law as only a set of recommendations, it has the force and effect of law since it is frequently cited as a primary source of procedural authority." *Id.* at 498; *see, e.g., In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 n.20 (7th Cir.), *cert. denied,* 444 U.S. 870 (1979).

133. MANUAL FOR COMPLEX LITIGATION 2D, *supra,* note 7, § 23.11, at 160.

134. Colgrove v. Battin, 413 U.S. 149 (1973), *construed in* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 45-46 (E.D. Ky. 1988). In *Colgrove,* the Supreme Court reasoned that a local rule could be upheld based on its non-interference with "those aspects of the litigatory process which bear upon the ultimate outcome of the litigation." 413 U.S. at 155.

135. *See McKay,* 120 F.R.D. at 45-46.

The Seventh Circuit failed to accentuate the demarcation between the roles of the judiciary and the legislature. As the Seventh Circuit perceived in an earlier case, "the ease and speed with which the Federal Rules of Civil Procedure can be amended by those whom Congress entrusted with the responsibility for doing so should make federal judges hesitate to create new forms of judicial proceedings in the teeth of existing rules."[136] The power to order mandatory SJTs requires an amendment to Rule 16. Similarly, Rule 16 requires amendment in order to allow compulsion of represented parties to appear at pretrial conferences.

B. The Seventh Circuit Should Set the Boundary Between the Judiciary and the Legislature

The Seventh Circuit aptly emphasized that the federal rules "are a product of a careful process of study and reflection" which reflects the responsibilities of the legislature and the judiciary.[137] The court also acknowledged that the rules are cognizant "both of the need for expedition of cases and the protection of individual rights."[138] Therefore, it should follow that where the Supreme Court and Congress have addressed "the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant," innovations such as mandatory SJT and mandatory appearance of represented parties at pretrial conference "must conform to that balance."[139] If the district court in *Heileman* is to be granted the power to remove a litigant's right to representation by counsel, then "let it be accomplished through the accepted channels of the Supreme Court and Congress of the United States."[140]

The Seventh Circuit acknowledged the Rules Enabling Act which "reflects the joint responsibility of the legislative and judicial branches of government."[141] The federal rules are promulgated under the aegis of the Rules Enabling Act. The Act provides that the federal rules "shall not abridge, enlarge or modify any substantive right."[142] The Rules Enabling Act also limits the Supreme Court's power to establish rules governing the federal district courts. The Supreme Court, for instance, must consider the substantive rights of individuals in construing

136. Henson v. East Lincoln Township, 814 F.2d 410, 414 (7th Cir. 1987).

137. *Strandell*, 838 F.2d at 886.

138. *Id.* (quoting S. REP. NO. 1744, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 3023, 3026).

139. *Id.* at 887.

140. *Heileman*, 871 F.2d at 663 (Coffey, J., dissenting) (footnote omitted).

141. *Id.* at 671; *See* 28 U.S.C. § 2072 (1982).

142. 28 U.S.C. § 2072 (1982).

the federal rules.[143]

That the Seventh Circuit realized any amendment to substantive rights within the federal rules to be outside the scope of the judiciary is evident in its cautionary statement, "we can expect that the national rule-making process outlined in the Rules Enabling Act will undertake [such radical surgery] in quite an explicit fashion."[144] The Seventh Circuit should be cognizant of the need for separation of legislative and judicial powers; however, its decision in *Strandell* failed to sufficiently emphasize that necessary distinction, and its decision in *Heileman* failed to *apply* that distinction. Noting that the majority misapplied and inappropriately expanded the inherent power doctrine, Judge Ripple postulated that the Rules Enabling Act "hardly contemplates the broad, amorphous, definition of the 'inherent power of the district judge,' . . . articulated by the majority."[145]

Legislation has been proposed to Congress to amend the Federal Rules of Civil Procedure to allow federal district judges to enter orders governing consensual SJTs.[146] "The fact that such legislation has been offered intimates that statutory authority under Rule 16 is lacking," argues one commentator.[147] The Seventh Circuit's oversight in not emphasizing the separation of rule-making power demonstrates that the analytical basis of the *Strandell* decision was incomplete. Consequently, the insufficient *Strandell* opinion permitted the subsequent case of *Heileman* to broaden not only the interpretation of federal rules but also the inherent power doctrine.

The Seventh Circuit Court of Appeals in *Strandell v. Jackson County* reversed the lower court's decision and thereby removed from its district courts the power to compel participation in nonbinding SJTs. While this accomplishment is commendable, the court did not go far enough in limiting the inherent power doctrine and in narrowing the interpretation of Rule 16. Nor did the court satisfactorily stress in *G. Heileman Brewing Co. v. Joseph Oat Corp.* that the proper boundary between the judiciary and legislature precluded any broadening of the inherent power doctrine or the interpretation of the federal rules. The Seventh Circuit has transformed from a tribunal that has limited the discretion of district courts to read Rule 16 as compelling

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143. *Id.*

144. *Strandell*, 838 F.2d at 888 (footnote omitted).

145. *Heileman*, 871 F.2d at 665 (Ripple, J., dissenting).

146. *See* H.R. 473, 100th Cong., 1st Sess. § 2, 133 CONG. REC. 157 (1987) ("Alternative Dispute Resolution Promotion Act of 1987"); S. 2038, 99th Cong., 2d Sess. § 3, 132 CONG. REC. 848 (1986) ("Alternative Dispute Resolution Promotion Act of 1986"). As of date, the bills have not been enacted. *See* Lambros, *supra* note 1, at 804.

147. Maatman, *supra* note 34, at 479.

mandatory SJTs into a tribunal that allows district courts to compel action that diverges from the specific language and intent of Rule 16. This shift in the court's view is disturbing because it connotes an unwillingness to curb the expansion of judicial constraints intrinsic to the rules and statutes by which the judiciary is to abide.

Farol Parco