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## The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980

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## **F. HODGE O'NEAL CORPORATE AND SECURITIES LAW SYMPOSIUM: THE FUTURE OF CLASS ACTIONS**

### **THE HISTORY OF THE MODERN CLASS ACTION, PART I: *STURM UND DRANG*, 1953–1980**

DAVID MARCUS\*

Francis Fox: Back in 1963, . . . if you knew what was going to happen over the next 31 years, would you not have ripped up (b)(3) entirely and told Ben Kaplan, “this is just too much trouble. We shouldn’t manufacture this”?

Arthur Miller: In ’63 I might have said that . . . I was a young punk kid.

Exchange at a January 17, 1997, meeting of the Federal Civil Rules Advisory Committee.

In 1984, the prominent Philadelphia lawyer David Berger wanted to muscle into litigation that schools around the country had begun to recover the costs of asbestos abatement. Trying to seize control of hundreds of lawsuits, he moved under Rule 23 of the Federal Rules of Civil Procedure for the certification of a class of all public and private schools in the

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country. The lawyer representing the Los Angeles United School District was upset, as Berger's motion threatened to take his case—and with it huge potential fees—away from him. “You have got to be the greatest asshole that ever stepped into a court of law,” this lawyer wrote in a letter to Berger, “and I would like to go to my blessed reward knowing that I personally met the greatest at something.”<sup>1</sup>

The current era of class action litigation began on July 1, 1966, when a newly-revised Rule 23 of the Federal Rules of Civil Procedure went into effect.<sup>2</sup> To anyone interested in buccaneering attorneys, maverick judges, mind-boggling settlement sums, idealistic lawyering, or base legal corruption, the next forty-odd years have yielded a rich harvest. But this period may be ending. In recent years, the United States Supreme Court has paid unusually close attention to Rule 23,<sup>3</sup> and several of its decisions may herald a very different federal class action than what has previously prevailed.<sup>4</sup> More than just colorful episodes could be on the chopping block. Believing that the Court's handiwork particularly harms plaintiffs, influential observers wonder what, if anything, will be left of the mechanism that has long stirred passions more than any other procedural rule.<sup>5</sup>

If an era has indeed ended, then its history is in order.<sup>6</sup> Historical inquiry “has its own interest and charm,” as Jerry Mashaw writes at the

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1. Rich Arthurs, *Class Action Debate Explodes in Asbestos Cleanup Litigation*, LEGAL TIMES, Oct. 1, 1984, at 2.

2. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 148 (S.D.N.Y. 1966), *rev'd*, 391 F.2d 555 (2d Cir. 1968) (reporting Rule 23's effective date).

3. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011); *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

4. See *Wal-Mart Stores Inc.*, 131 S. Ct. at 2541; see also *AT&T Mobility LLC*, 131 S. Ct. at 1740.

5. For *Wal-Mart's* effect on employment discrimination litigation, see John C. Coffee, Jr., “*You Just Can't Get There From Here*”: *A Primer on Wal-Mart v. Dukes*, BNA INSIGHTS, Vol. 80, No. 3, at 93 (2012). For *Concepcion's* effect on consumer protection litigation, see, for example, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 640–58 (2012).

6. Existing histories of the class action end in the 1960s or shortly thereafter. See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987); David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) (reviewing Yeazell's book); Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998) (ending in 1940). Another article provides a detailed account of the drafting of various amendments to Rule 23, but does not describe doctrinal evolution outside the rulemaking process. John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323 (2005).

start of his monumental study of early administrative law.<sup>7</sup> Certainly something as important as the federal class action deserves to have its story told for this reason alone. But the history promises additional rewards, for “historical inquiry is also a species of comparative method.”<sup>8</sup> It offers a foil for the present, to help determine what is truly new in the world of aggregate litigation, and whether ostensible developments require novel doctrine. Those concerned with the Court’s recent class action adventures, for example, can use the history recounted here and in future articles to better understand what the Court has done to the federal class action, how well its current management of the device fits historical patterns, and whether anything justifies the changes it has worked to class action practice.

This normative use of history must wait, for a complete account of the modern class action’s evolution requires more than an article-length treatment. My job here is to provide the first chapter, covering a period from 1953 to 1980.<sup>9</sup> 1953 marks an obvious starting date, as work on what became the modern Rule 23 began that year. The case for 1980 as this period’s end is harder to make. It is not as if a federal judge arrived at work on January 2, 1981, read a motion for class certification over the morning’s coffee, and suddenly felt the winds of change begin to blow. There is always something artificial about periodicity in history, and the task is to draw temporal boundaries with as little arbitrariness as possible. For at least two reasons, 1980 is a good candidate. As its doctrinal foundation hardened, the fledgling class action withstood a great deal of Sturm und Drang, but this upheaval had largely run its course by the end of the 1970s. A period of relative calm in class action discourse set in at that point. Also, soon after 1980, the doctrine and jurisprudence of class actions changed, reflecting a new set of intellectual concerns and the rise of the mass tort class action.<sup>10</sup>

7. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1260 (2006).

8. *Id.*

9. Subsequent articles will cover the rise of the mass tort class action in the 1980s, Rule 23’s crises in the 1990s, and developments since the turn of the century.

10. The first decision, state or federal, certifying a mass tort (as opposed to mass accident) class came in 1979. *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983); *see also In Camera*, 5 CLASS ACTION REP. 469, 469 (1978) (describing Payton’s novelty). On the difference between mass tort and mass accident litigation, *see*, for example, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 11–12 (1999). As far as my research suggests, the first certified mass accident class came in *Am. Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155, 157 (N.D. Ill. 1969). The 1980s saw the development of a more sophisticated body of class action scholarship concerned less with

This first period of the modern class action was exceptionally important. During these years, courts took the infant device and crafted a new body of doctrine for its use. Lawyers and decision-makers awoke to the promises and perils of aggregate litigation, powerful plaintiffs' side firms emerged that would set procedural agendas going forward,<sup>11</sup> and corporate interests began to organize to pursue a distinct legal agenda.<sup>12</sup> I regret that I have left some of this material on the cutting room floor for length concerns. Instead, I focus my story on a clash of ideas about how best to think about Rule 23 and the influence this conflict had on doctrinal development. Consumer advocates, civil rights practitioners, and plaintiffs' lawyers argued for what I call the "regulatory conception" of Rule 23. According to this understanding, class actions offered an important substitute for, or addition to, public administration, and courts should deploy the device aggressively to maximize regulatory efficacy. Their adversaries on the defense side responded with an "adjectival conception."<sup>13</sup> Like any other procedural rule, Rule 23 was distinctly subordinate to the substantive law, and whatever good it might accomplish could not justify extreme distortions to procedural normalcy.

These dueling conceptions of Rule 23 presented decision-makers, challenged by a new species of lawsuits in the 1970s, with a dilemma about how best to govern the class action. Creating a powerful cadre of private attorneys general, class actions promised important contributions to the federal regulatory state. Excessive concern that Rule 23's deployment might distort the substantive law or upend normal dispute resolution processes could hamstring its application and deny the class action a proper regulatory role. On the other hand, exotic departures from

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doctrinal disputes and more with the device's theoretical challenges. Cf. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) (insisting that "civil procedure . . . is too important to be left to proceduralists," then commenting on the narrow scope of class action scholarship).

11. The now-defunct but once-powerful plaintiffs' firm Milberg Weiss was founded in 1965. James P. McDonald, Note, *Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiffs' Bar*, 58 DUKE L.J. 507, 511 (2008). Lief, Cabraser, Heimann & Bernstein began in 1972. See *About us*, LIEFF CABRASER HEIMANN & BERNSTEIN, <http://www.lieffcabraser.com/about/2/overview> (last visited Oct. 10, 2012).

12. Memorandum from Lewis F. Powell, Jr., to Eugene B. Snyder, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971) (on file with the Washington & Lee School of Law Library).

13. The term "adjectival" is an old-fashioned one, used by Jeremy Bentham and commentators throughout the 19th Century to describe the law of procedure and remedies. E.g., WALTER DENTON SMITH, A MANUAL OF ELEMENTARY LAW § 166, at 110–11 (1896). The term is useful, as it signals the secondary or dependent status of procedural law as compared to substantive law.

litigation norms in the name of regulatory efficacy could decouple the federal courts from traditional institutional settings and constraints.

My main claim has to do with how decision-makers, including the federal courts and Congress, responded to this governance dilemma. They chose not to resolve the normative divide between the regulatory and adjectival conceptions. Instead, they used a pragmatic balancing strategy to craft a body of doctrine that served the value of regulatory efficacy without undermining the federal judiciary's institutional integrity. This domestication of Rule 23 resulted in some doctrinal incoherence, but it succeeded in stabilizing class action law and politics by the end of the 1970s. This strategy would match how decision-makers have regulated public administration more generally, a fitting equivalence given Rule 23's importance to the American regulatory state.

This Article proceeds as follows. Part I describes the regulatory and adjectival conceptions and the dilemma of class action governance, some necessary table-setting before the history can start. Part II shows how hints of the regulatory and adjectival conceptions surfaced in the drafting history of Rule 23, conflicting with politicized accounts that make claims about authorial intentions to argue for one understanding of Rule 23 or the other. Part III turns to the politics of class actions in the 1970s. As opposing camps formed, combatants' arguments aligned around Rule 23's normative divide, suggesting its importance to doctrinal evolution. Part IV elaborates on the governance dilemma lurking behind Rule 23's politics, then shows how decision-makers used a pragmatic balancing strategy in each of Rule 23's substantive areas to stabilize this litigation by the period's end in 1980.

My account has a few limitations. First, I mostly neglect the development of class action doctrine in state courts, which also began after the new Rule 23 went in effect in 1966.<sup>14</sup> Until the 1980s, at the earliest, this litigation paled in regulatory and doctrinal significance to federal efforts. Moreover, my emphasis on management strategies for the federal class action governance renders state class actions less important to this narrative. Still, I acknowledge this lacuna. Second, no one of whom I am aware actually used the terms "regulatory" and "adjectival conception" during this period. Decision-makers sometimes molded class action law with sensitivity to the ideas behind these understandings of Rule 23, and sometimes they did not. But these labels usefully describe the arguments

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14. *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718, 718–19 (1979).

class action partisans made and the concerns that decision-makers voiced during this period as they constructed the class action's doctrinal foundation. With apologies for these and other shortcomings my story assuredly has, I begin its first chapter.

### I. CLASS ACTION ANXIETY

The history of the modern class action is an American story. Depending on who tells it, it is either a story of good-hearted private citizens riding to the rescue of vulnerable communities injured by corporate behemoths, or a tale of massive corruption engineered by lawyer parasites. It is a story of scrappy lawyer underdogs driven by a mixture of ego, money, and righteous indignation as they assault corporate goliaths. It is a story of deregulation, of the civil rights movement's ebbs and flows, of the perils of a mass consumer society, of judicial activism, of HIV, of tobacco, and of Wall Street greed. It is a capitalism story about the commodification of law enforcement.

The history of the modern class action is also a story of a fight over ideas about litigation's proper role in a democracy. The conflict involves a basic problem that, to my mind, any history of Rule 23 must address: is the class action a mere procedural device, or is it a regulatory instrument? When deployed in a manner consistent with the regulatory conception, the class action can create problems of democratic accountability. Lashed to the adjectival conception's restrictive mast, however, the class action loses some of its regulatory force. In this Part, I introduce this central dilemma for Rule 23 at some length, as I believe that its proper resolution served as an important goal as the law of class actions evolved in the 1960s and 1970s. The rest of the story unfolds in its terms.

#### A. *The Regulatory and Adjectival Conceptions of Rule 23*

Arguments concerning Rule 23's proper use tend to reflect one of two competing conceptions of the class action and its proper role in litigation and law enforcement more generally.<sup>15</sup> The regulatory conception treats Rule 23 as "an evolutionary response to the existence of injuries unremedied by the regulatory action of government," to quote Warren

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15. Others have identified this dichotomy but have discussed it in somewhat different terms. *E.g.*, Alexandra D. Lahav, *Two Views of the Class Action*, 79 *FORDHAM L. REV.* 1939, 1941-46 (2011); Diane Wood Hutchinson, *Class Actions: Joinder or Representation Device?*, 1983 *SUP. CT. REV.* 459; Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 *HARV. L. REV.* 4, 27-28 (1982).

Burger's classic description.<sup>16</sup> Captured or resource-strapped public agencies cannot adequately enforce the substantive law, requiring a privately-initiated alternative.<sup>17</sup> Individual litigation helps, but leaves a lot of law under-enforced or un-enforced. Their small values discourage the litigation of a lot of claims, and even when individual plaintiffs sue, asymmetries in the resources that the parties can marshal for litigation often favor the defendant and distort the outcome.<sup>18</sup> Rule 23 responds to these problems and, in so doing, pushes the substantive law closer to maximal implementation. Economies of scale reaped from claim joinder enable an independent, well-financed cadre of private attorneys general to compensate for the inadequacies of government regulators and individual litigants.

This conception prioritizes regulatory efficacy as a primary value. The class action succeeds when, as a substitute for public administration, it helps implement a positive program of social or economic reform.<sup>19</sup> Individual remediation is a secondary goal, if that.<sup>20</sup> Several implications follow from this emphasis, but two are particularly important. A claim might have an element, like individual causation, that requires proof tailored to the particular litigant. If this element resists resolution in a class-wide proceeding, a court can adjust it if doing so facilitates class certification. In particular, these adjustments can legitimately minimize aspects of claims that concern any particular class member's right to recover, since class members properly conceived serve as regulatory vehicles.<sup>21</sup> Courts should train their attention instead on the defendant's conduct toward the aggregate, for this is what needs regulating. Likewise, judges can modify the ordinary civil process for dispute resolution. Specifically, individualized adjudications can yield to damages-scheduling

16. *Deposit Guar. Nat'l. Bank v. Roper*, 445 U.S. 326, 339 (1980). For prominent advocacy of one version of the regulatory conception or another, see, e.g., David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987).

17. Fiss, *supra* note 16, at 22–23.

18. E.g., David Rosenberg, Comment, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 709–10 (1989).

19. JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 439 (6th ed. 2009).

20. E.g., Beverly C. Moore, Jr., *Does it Go Far Enough?*, 63 A.B.A. J. 837, 842 (1977) (“The primary function of the class action is deterrence of harmful conduct . . . . Judicial efficiency and compensation of small claimants are merely desirable by-products.”).

21. Cf. Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 791–97 (2007) (criticizing a version of this claim).

or some equivalent quasi-administrative process, provided for in a settlement agreement.

The adjectival conception begins with the premise that Rule 23, like any other joinder rule, serves classically procedural goals.<sup>22</sup> If many people have similar claims against one or a small number of defendants, then they can litigate their claims together if doing so would enable these individuals to obtain fairly and efficiently whatever remedy the pre-existing substantive law affords them.<sup>23</sup> Class actions help resolve disputes and thereby restore social order. They are not in the main regulatory tools to be wielded for the achievement of administrative objectives. Any regulatory bite above and beyond what individual litigation would have must be incidental to objectives of procedural fairness and efficiency.<sup>24</sup>

Two implications that follow from the adjectival conception make its contrast with the regulatory conception clear. First, a court bent on class certification cannot invoke regulatory efficacy to justify alterations to the substantive law, which must remain undisturbed by the procedural avenue chosen for its vindication.<sup>25</sup> Second, since a class action is no more than an aggregate of individual claims, the court that manages it should minimize, to the extent possible, its procedural deviation from ordinary processes of dispute resolution.

### *B. Regulatory Efficacy Versus Democratic Legitimacy*

In one sense, the divide over ways of thinking about Rule 23 tracks a familiar dispute that pits pragmatic consequentialism against an insistence upon principled limits. To supporters of the regulatory conception, the good it accomplishes legitimates Rule 23's use. The normative case for this claim is straightforward. Since the 1960s, the design of the federal regulatory apparatus has included a substantial role for private litigation,<sup>26</sup>

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22. For prominent advocacy of one version of the adjectival conception or another, see, for example, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71; Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 181 (2003); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475.

23. FED. R. CIV. P. 1.

24. Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1894 (2006).

25. *E.g.*, Redish, *supra* note 22, at 75–76 (“incidental”); Nagareda, *supra* note 22, at 174.

26. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* 12 (2010).

and a powerful, flexibly-deployed class action device contributes importantly to this scheme's success.<sup>27</sup>

To the extent that it supports applications of Rule 23 only loosely-bound by prior substantive or procedural constraints, however, this regulatory consequentialism conflicts with the underlying impulse of the adjectival conception: Rule 23, as an inferior procedural device, is not a roving license for law reform.<sup>28</sup> Limits fixed by legal principle must cabin its use. A host of reasons, mostly elaborated upon in Part IV.A, explain why. But one, a justification for the adjectival conception grounded in democratic anxieties, merits discussion here as it helps put the early history of the modern class action in proper context.

The argument goes something like this. Self-appointed private lawyers bring class actions under Rule 23, and unelected judges grant class certification motions and approve settlements that bind absent class members. Dragooned into litigation without their consent, individuals can lose causes of action when some lawyer they did not choose strikes a deal with the defendant. Because procedural needs tempt judges to modify elements of claims or defenses, Rule 23's application can lead to surreptitious law reform outside of proper legislative contexts.<sup>29</sup> Supervised by lifetime-appointed judges, private attorneys exercise significant regulatory powers but do not answer to any electorate for their enforcement choices.

This process raises concerns of democratic legitimacy, and the principled limits that the adjectival conception demands—the steadfast subordination of Rule 23 to the pre-existing substantive law and the insistence that processes hew as closely as possible to the individual lawsuit norm—respond. If a court cannot certify a class without an adjustment to the underlying substantive regime, the class must remain uncertified.<sup>30</sup> Unelected judges cannot wield Rule 23 to usurp the legislative prerogative at the behest of private attorneys. Also, if individuals have pre-existing rights to bring claims under the substantive

27. A comparison of Securities Exchange Commission enforcement efforts versus private securities class action litigation is suggestive in this regard. In 2007, the SEC obtained \$1.6 billion in disgorgement and penalties. Securities & Exchange Commission, *Year-By-Year SEC Enforcement Actions*, <http://www.sec.gov/news/newsroom/images/enfstats.pdf> (last visited May 11, 2012). That same year class action settlements in federal securities cases yielded over \$8 billion. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 825 (2010).

28. Nagareda, *supra* note 24, at 1874.

29. *E.g.*, Redish, *supra* note 22, at 73; Nagareda, *supra* note 22, at 197.

30. Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 666–70 (2006).

law, the regulatory good a class action can do cannot, on its own, justify the alteration of these rights unless individuals retain some control over their claims. Absent unusual circumstances, for example, class members must enjoy opt-out rights.<sup>31</sup>

Even the restricted Rule 23 that the adjectival conception recommends, however, remains democratically problematic. If Rule 23 has any role to play in civil litigation, it must apply when class members have undifferentiated, small-value claims that they would never litigate individually. But here Rule 23 alone creates the regulatory power private lawyers wield. Absent class certification, no one would sue to vindicate these claims, and the substantive law would have no regulatory force whatsoever. Through the operation of a humble procedural rule, private attorneys and judges become powerful regulators.<sup>32</sup>

Insofar as democratic anxieties motivate it, the adjectival conception at its extreme counsels against class treatment of claims absent explicit legislative authorization of the private attorney general role. This strict limit on Rule 23's use may be principled, but it is troubling. If adhered to, it would significantly disrupt the federal regulatory apparatus as designed.<sup>33</sup> Since so few statutes explicitly authorize class actions for enforcement, a great deal of substantive law would go under-enforced. On the other hand, regulatory efficacy as a normative justification for Rule 23's application offers cold comfort to those worried about democratic legitimacy.

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31. Nagareda, *supra* note 22, at 198–203. *But cf.* Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1612–13 (2007) (arguing that the right to opt out imperfectly addresses concerns of individual autonomy).

32. Proponents of the adjectival conception concede the propriety of negative-value class suits. Nagareda, *supra* note 24, at 1884; *see also* Redish & Berlow, *supra* note 21, at 810. But they struggle to explain why these cases are not problematic as a matter of democratic legitimacy. To Richard Nagareda, “[i]t is not plausible, for example, to think that Congress . . . [would] design a remedial scheme that would lie fallow” solely because of a lack of economic incentive to litigate. Nagareda, *supra* note 24, at 1884. As an argument about legislative intent, this is unconvincing. *Cf.* Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1930 (2006) (criticizing Nagareda’s argument on somewhat different grounds). A congressional decision to opt for one litigation enabler, like an attorney’s fees provision or treble damages, could easily be read to exclude another, like class joinder. Out would go employment discrimination and antitrust class actions. Statutory silence on the class action issue could as easily be taken to mean that Congress disdains class treatment as the opposite. Moreover, Nagareda’s argument rests on a presumption about legislative intent. But Congress not infrequently considers the propriety of class enforcement during deliberations, so the rationale for a presumption is uncertain.

33. *See generally* Farhang, *supra* note 26 (discussing why Congress opts for private rights of action over public administration).

### C. Pragmatic Balancing in Public Administration

There are two ways to deal with this dilemma of how best to govern the class action. Decision-makers could opt for one of Rule 23's conceptions. The Supreme Court has taken this tack recently in a couple of dramatic class action decisions.<sup>34</sup> Alternatively, decision-makers could muddle through without picking sides. This strategy requires the maintenance of sufficient ambiguity in class action doctrine so as to enable the conceptions to coexist, however awkwardly.

The second option might not seem like a strategy at all, but, in fact, courts have deployed something like it for the governance of other parts of the federal regulatory apparatus. Regulatory need and democratic accountability clash across the landscape of federal administrative law.<sup>35</sup> This conflict lurks in the doctrine that determines the court's power to second-guess the substance of an agency's decision.<sup>36</sup> It surfaces in arguments about the unitary executive theory of administrative power.<sup>37</sup> Debates over the nondelegation doctrine fight over it.<sup>38</sup> Foundational theorists of American public administration have argued about the problematic balance between regulatory efficacy and democratic legitimacy.<sup>39</sup> In crude terms, the dilemma resembles the class action's. The exercise of vast powers by agencies with tenuous connections to an electorate should give anyone in a democracy pause. But an insistence that only elected officials make regulatory decisions could sacrifice expert, efficient administration on the altar of democratic accountability.

34. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

35. Managing this clash is a significant part of administrative law's central task. Cf. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1263–64 (2006) (“The task of administrative law is to generate institutional designs that appropriately balance the simultaneous demands of political responsiveness, efficient administration, and respect for legal rights.”).

36. Compare *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51–56 (1983) (voiding a rule due to agency's failure appropriately to interpret the science on the issue), with *id.* at 58–59 (Rehnquist, J., dissenting) (arguing that courts should allow political considerations more weight in evaluating agency action).

37. E.g., David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *GEO. WASH. L. REV.* 1095, 1099 (2008).

38. Compare Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 *COLUM. L. REV.* 2097, 2141 (2004) (“The most prominent argument advanced by the proponents of strict nondelegation is the desirability of having public policy made by actors who are accountable to the people.”), with *id.* at 2151 (“Perhaps the argument most commonly invoked in support of broad delegation is the desirability of having policy formulated by persons who have expertise in the subject matter.”).

39. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 213–22 (1992).

In several instances, courts have eschewed a principled resolution of this dilemma and instead have managed it, as an ongoing contest, with a pragmatic balancing strategy.<sup>40</sup> Judges have all but conceded that they cannot enforce the nondelegation doctrine directly,<sup>41</sup> but they use a variety of indirect methods to encourage Congress to resolve certain policy issues before handing the lawmaking baton to agencies.<sup>42</sup> The Supreme Court has authorized some agency independence from presidential control, but too much “heightens the concern that [the administrative state] may slip from the Executive’s control, and thus from that of the people.”<sup>43</sup> Hence, while one layer of for-cause removal protection for agency officials is permissible, two layers are unconstitutional. Congress can delegate to agencies the authority to resolve statutory ambiguities, but not when they involve major issues of public policy.<sup>44</sup> The resulting doctrine can be frustratingly muddied and theoretically adrift. But these failings, such as they are, are all but inevitable results when the strategy is pragmatic. However incoherent, administrative law can serve values of democratic accountability and regulatory efficacy, even when those values clash.

As class action doctrine under the modern Rule 23 coalesced in the 1970s, decision-makers adopted a variant of this strategy to manage the divide between Rule 23’s regulatory and adjectival conceptions and with it the class action’s governance dilemma. Taking control of Rule 23 from its creators, who only vaguely understood its regulatory implications, judges, lawyers, and legislators crafted a body of doctrine by 1980 that served Rule 23’s competing conceptions but nonetheless stabilized class action law and practice.

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40. Cf. Richard H. Pildes, *Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL’Y 1, 9 (2010) (describing a similar phenomenon, mostly in other areas of law).

41. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

42. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000); David Schoenbrod, *Politics and the Principle that Elected Legislators Should Make the Laws*, 26 HARV. J. L. & PUB. POL’Y 239, 243 (2003).

43. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010). Compare *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (upholding a statute prohibiting the Attorney General, who is removable at will by the President, from firing an independent counsel except “for cause”), with *Free Enter. Fund*, 130 S. Ct. at 3154 (striking down a structure that imposed two layers of “for cause” removal protection between the President and the official). See Pildes, *supra* note 40, at 12 (commenting on *Free Enterprise Fund* and suggesting that the line it draws is not “defin[ed] . . . with sharp legal precision or clarity.”).

44. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 236–42 (2006).

## II. RULE 23'S ORIGINS IN AN INNOCENT AGE

Lawyers and judges throughout Rule 23's lifetime have cared a great deal for authorial intentions and expectations,<sup>45</sup> even as few have paused to explain why modern doctrine should somehow heed what Benjamin Kaplan or Charles Alan Wright wanted in the early 1960s.<sup>46</sup> Politicizing Rule 23's history for current use, advocates have offered dueling creation stories, each consistent with one of the device's conceptions. To some, Rule 23's authors thought their device would help create a version of the Great Society.<sup>47</sup> Their ideological opponents insist that "the 1966 Advisory Committee was creating a rule of procedural efficiency," and that "[n]owhere did the 1966 Advisory Committee suggest that Rule 23 was intended to deputize posses of private attorneys general . . ."<sup>48</sup>

Neither of these claims is entirely accurate. Arthur Miller was in the room when the Advisory Committee wrote Rule 23, and he insists that "nothing was in the committee's mind."<sup>49</sup> To elaborate: Rule 23's authors could not possibly have anticipated the ways in which class litigation would contribute to public administration, since they completed their work on Rule 23 before the seismic shifts in American law and politics made the 1960s The Sixties. To a significant extent, they tackled class action reform primarily to correct technical flaws and bring a badly shopworn procedural rule in line with caselaw developments. These were adjectival objectives that had no obvious regulatory or redistributive valence.<sup>50</sup>

Still, the authors shared "[a] spirit of them versus us . . . of a fairly simplistic good guy-bad guy outlook on the world,"<sup>51</sup> and they hoped that

45. *E.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.19 (5th Cir. 1996).

46. I argue for the relevance of rulemaker intention in David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927.

47. *E.g.*, Moore, Jr., *supra* note 20, at 842 ("The primary function of the class action is deterrence of harmful conduct . . . . Judicial efficiency and compensation of small claimants are merely desirable by-products.")

48. Letter from Sheila L. Birnbaum to Hon. Alicemarie H. Stotler (June 14, 1996), in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 157, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol2.pdf>.

49. Testimony of Arthur Miller, *Public Hearing: Proposed Amendments to the Federal Rules of Civil Procedure Rule 23*, at 64 (Jan. 17, 1997), in 3 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol3.pdf>.

50. Commentators writing shortly after the revisions took effect concluded thusly. *E.g.*, Jonathan M. Landers, *Of Legalized Blackmail & Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974).

51. John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions*, in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO

Rule 23 would open courthouse doors to “small people.”<sup>52</sup> These men appreciated the contribution the class action had made, as a substitute for government enforcement, to the desegregation cause.<sup>53</sup> They understood their device well enough to anticipate that, for plaintiffs with “small claims,” “the class action [could] serve[] something like the function of an administrative proceeding where scattered individual interests are represented by the Government.”<sup>54</sup>

#### A. *The 1938 Rule and Its Flaws*

Deficiencies in the 1938 version of Rule 23 initially spurred the Advisory Committee to tackle class action reform. It provided for three types of class actions, distinguished by the type of “jural” relationship involved.<sup>55</sup> A “true” class action joined “joint, or common, or secondary” rights alleged by the class members.<sup>56</sup> This category included actions brought by the members of an unincorporated association vindicating an organizational interest,<sup>57</sup> and suits by shareholders pursuing the corporation’s claim.<sup>58</sup> “Hybrid” class suits aggregated the class members’ “several,” or individually-held, rights for reasons of equitable treatment. The defendant lacked sufficient resources to satisfy all claims. Rule 23 enabled their joinder in a case, to enable per capita distributions instead of compensation based on a race to the courthouse.<sup>59</sup> Spurious suits, the third category, also joined several rights, but in instances where they lacked any

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CIVIL RULE 23, at 262, 266, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol2.pdf>.

52. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 398 (1967); see also Marvin E. Frankel, *Amended Rule 23 From a Judge’s Point of View*, 32 ANTITRUST L.J. 295, 299 (1966) (quoting Benjamin Kaplan) (stressing “the class action’s historic mission of taking care of the smaller guy” when asked about the class action’s purpose); Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1968) (identifying as a chief purpose of the 1966 revisions “to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all”).

53. Marcus, *supra* note 6, at 703.

54. Kaplan, *Continuing Work*, *supra* note 52, at 398.

55. James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 310 (1938); see also ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 246 (1950).

56. Moore & Cohn, *supra* note 55, at 309.

57. Hiram H. Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 40–41 (1937).

58. Chester B. McLaughlin, *The Mystery of the Representative Suit*, 26 GEO. L.J. 878, 898–99 (1938).

59. JAMES WM. MOORE, JOSEPH FRIEDMAN, JOHN M. GREENFIELD, JAMES A. PIKE & HENRY G. FISCHER, 2 MOORE’S FEDERAL PRACTICE: A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE § 23.04[2], at 2239 (1938).

equitable connection.<sup>60</sup> True and hybrid class suits generated full *res judicata* for absent class members. Only class members who opted in could benefit from spurious class judgments.<sup>61</sup>

Theoretically anachronistic<sup>62</sup> and cumbersome in application,<sup>63</sup> the 1938 rule was badly out of sync with doctrinal currents when efforts at revision began. Its constraints made sleight of hand necessary for courts to realize the broad potential of *Hansberry v. Lee*, which allowed *res judicata* for any judgment, provided the class members had received adequate representation.<sup>64</sup> Judges recast spurious suits as true or hybrid when absent class members had enjoyed adequate representation.<sup>65</sup> They held open absurdly lengthy opt-in periods to encourage as many absent class members as possible to avail themselves of favorable judgments.<sup>66</sup> Ignoring doctrinal constraints altogether, several progressive Southern federal judges signaled that plaintiffs' judgments in desegregation class actions would benefit all black schoolchildren included in the class definition, even though the suits involved spurious rights.<sup>67</sup>

60. For example, a group of employees, each of whom was employed pursuant to a separate contract, had several rights. One employee could sue to vindicate her several right to overtime compensation and by no means had to tie herself to other similarly-situated employees. *E.g.*, *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945).

61. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 63, at 406–07 (2d ed. 1947).

62. In an opinion, the realist Charles Clark described the labels as “euphonious, if mystic.” *Dickinson v. Burnham*, 197 F.2d 973, 978 (2d Cir. 1952); *see also* Chafee, *supra* note 55, at 245–46 (“Most lawyers and judges are no longer accustomed to think in this way.”).

63. *E.g.*, *Sys. Fed’n No. 91 v. Reed*, 180 F.2d 991, 996 (6th Cir. 1950); *Martinez v. Maverick Cnty. Water Control and Improvement Dist.*, 219 F.2d 666 (5th Cir. 1955); *Pentland*, 152 F.2d at 852.

64. 311 U.S. 32, 43 (1940); *see also* Arthur John Keefe, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 339 (1948).

65. *Dickinson*, 197 F.2d at 978; *see also* 2 PROCEEDINGS, ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, at 246 (Mar. 25, 1954) (comments of Charles Clark), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-518-1 (Cong. Info. Serv.) (“I think we solved it beautifully . . . . We just changed the label. We called it a hybrid class suit and said that what [the district judge] had done was correct . . . .”). *See generally* Kaplan, *Continuing Work*, *supra* note 52, at 397 (observing “that courts had sometimes evidently classified actions as true in order to attain judgments covering the class; that they were tending to allow interventions in spurious actions although the limitations period would otherwise have run on the claims; that they were going to the length of permitting ‘one-way’ interventions”).

66. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 587–89 (10th Cir. 1961).

67. *Marcus*, *supra* note 6, at 678–91.

## B. Creating a New Rule 23

### 1. The First Effort: 1953–1955

The original Rule 23 was only a decade old when rulemakers began to call for its revision.<sup>68</sup> Its formalism, dissatisfaction with the impoverished *res judicata* effect of most class judgments, and judge-made innovations in class action doctrine provoked reporter Charles Clark to put Rule 23 on the Advisory Committee's agenda in May 1953.<sup>69</sup> His suggested revision left the true/hybrid/spurious classifications unchanged, but it added a subdivision entitled "Orders to Ensure Adequate Representation."<sup>70</sup> This nod to *Hansberry* would signal to district judges that, if a previous court had ensured the adequate representation of class member interests, all class judgments should bind and benefit all class members.<sup>71</sup> The proposal failed, probably due to the determined opposition of James William

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68. Letter from George Wharton Pepper to the Honorable Charles Clark (June 25, 1948), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-5601-03 (Cong. Info. Serv.).

69. Experience Under the Federal Rules of Civil Procedure, Reporter's Summary of Suggestions, Criticisms, and Published Discussions, at 41 (May 1, 1953), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-4707-02 (Cong. Info. Serv.) (summarizing similar criticisms of Rule 23 and referring to "criticisms listed by the Reporter in his memorandum to the Committee of March 17, 1950"). Clark had first suggested action on Rule 23 in an undated memorandum that, as best as I can tell, was probably written in 1950. Reporter's Statement as to the Need for Study by the Committee of the Present Functioning of the Rules, at 13, in PAPERS OF CHARLES ALAN WRIGHT (on file with the University of Texas School of Law Library). On Clark's desire to harmonize Rule 23 with caselaw developments, see, for example, Transcript, ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE, at 107–09 (May 18, 1953) (statement of Clark), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-1953-min-Vol2.pdf> (using *Dickinson v. Burnham* to explain why Rule 23 should be revised); Transcript, PROCEEDINGS, ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, at 244–46 (Mar. 25, 1954) (statement of Clark), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-518-01 (Cong. Info. Serv.).

70. Transcript, ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE, at 106 (May 18, 1953), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-1953-min-Vol2.pdf>.

71. *Id.* at 121 (statement of Clark) ("[T]here is no question . . . that it is expected that the judgment when entered will be *res judicata*. That is the idea. . . . [T]he thesis of the Supreme Court in the *Hansberry v. Lee* case [*sic*] is not based upon the idea of theoretical rights, whether joint or otherwise, but is based on the propriety of the representation . . ."); Charles Alan Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 VAND. L. REV. 521, 540 (1954) (arguing that there is "no support to the view that the Committee intends to make such a fundamental change as to bind the absentees in all class actions[,] but that 'the courts would do well to . . . reexamine for themselves the notion that an absent member of a class, whose interests have been fairly and vigorously represented, is not bound by the judgment merely because his is the 'several' right of the 'spurious' class action . . .").

Moore, the father of the original class action.<sup>72</sup> He particularly feared that parties would use the remade device in mass accident cases.<sup>73</sup> Work ended in 1956, when the Supreme Court abruptly disbanded the committee for unexplained reasons.<sup>74</sup>

Nothing substantive surfaces in the records of Clark's and his colleagues' deliberations, even as a few perspicacious commentators had made some of them aware of the class action's regulatory potential.<sup>75</sup> It is hard to imagine what agenda these men would have harbored in 1953 beyond concerns that a procedural device work properly. School desegregation was the great class action cause of Rule 23's pre-modern era,<sup>76</sup> but the Supreme Court did not decide *Brown v. Board of Education* until a year after the committee began its deliberations. The fundamental shifts of law and politics that later gave Rule 23 its regulatory portfolio lay in its hazy future.

## 2. *The Second Effort: 1962–1964*

The Supreme Court restarted the Advisory Committee, with all new membership, in 1960.<sup>77</sup> When it met for the first time, chairman Dean

72. Moore objected publicly to the reform. DISSENT, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, at 7 (1955), available at [www.uscourts.gov](http://www.uscourts.gov) (objecting that the proposed rule “will stir more problems concerning res judicata than it settles”). Charles Alan Wright blamed Moore's opposition to the proposed amendments, including the amendment to Rule 23, for their failure in the Supreme Court. Letter from Charles Alan Wright to Richard H. Field, at 1 (Nov. 20, 1956), in PAPERS OF CHARLES ALAN WRIGHT (on file with the University of Texas School of Law Library) (stating that Moore was “principally responsible for the Court's failure to act”).

73. Transcript, ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE, at 157–58 (Mar. 1955), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, microformed on CIS No. CI-523-55 (Cong. Info. Serv.); Transcript, ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE, at 111 (May 18, 1953), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-1953-min-Vol2.pdf>.

74. *Discharge of Advisory Committee*, 352 U.S. 803 (1956); see also Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 276–77 (2009).

75. Irving A. Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL. L. REV. 518, 518–20 (1947); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941) (discussing the notion of a private attorney general and the regulatory potential of a class action); *Dickinson v. Burnham*, 197 F.2d 973, 979 n.4 (2d Cir. 1952) (describing favorably the academic critique of Rule 23). Cf. George D. Hornstein, *Legal Therapeutics: The “Salvage” Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 663 (1956) (arguing that the value of class actions lies in their “therapeutic” potential to “help[] maintain the health of our corporate system” through deterrence).

76. Article by Earl Warren, N.Y. TIMES, Dec. 20, 1972.

77. Press Release, Supreme Court of the United States (Apr. 4, 1960), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/SC\\_Press\\_Release.1960.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/SC_Press_Release.1960.pdf).

Acheson suggested that it start where the earlier efforts had ended,<sup>78</sup> indicating that Rule 23 owed its place on the reform agenda to the adjectival concerns of the previous members. Led by reporter Benjamin Kaplan, the committee began work on Rule 23 in 1962.<sup>79</sup> As Charles Alan Wright recalled a few years after the fact, “[t]he principal reason for rewriting Rule 23 in 1966 was to get away from the conceptually-defined categories of the old rule.”<sup>80</sup> Put differently, the job was to craft a cleaner, more flexible rule that better reflected how some courts had begun to use the class action device.<sup>81</sup>

In his initial review of the prior committee’s work, Kaplan voiced the same concerns Clark had raised, and expressed sympathy with Clark’s efforts and the academic criticism of Rule 23’s analytical structure.<sup>82</sup> He insisted that the new committee go further, though, for any retention of the true/hybrid/spurious classifications would invite confused judicial inquiries into a judgment’s proper scope.<sup>83</sup> From the start, Kaplan suggested an entirely rewritten Rule 23 that stressed adequate representation and class solidarity as conditions for aggregate treatment.<sup>84</sup> The point, Kaplan reiterated repeatedly, was both to harmonize Rule 23

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78. Letter from Benjamin Kaplan to the Chairman and Members of the Advisory Committee on Civil Rules, at 1 (Nov. 3, 1960), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6701-03 (Cong. Info. Serv.) (noting that “[t]he Chairman’s call for the first meeting of the Committee . . . lists as one of the Committee’s tasks the consideration of recommendations made by the former Advisory Committee in October 1955”).

79. See Letter from Geoffrey C. Hazard, Jr. to Benjamin Kaplan (Apr. 3, 1962), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6301-28 (Cong. Info. Serv.) (alluding to a “draft report” that contains a suggestion for a Rule 23 revision); Minutes, MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES, at 11 (Dec. 5, 1960), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV12-1960-min.pdf> (suggesting that the Committee postpone efforts to revise Rule 23); John P. Frank, *Response to 1996 Circulation of Proposed Rule 23 on Class Actions* (Dec. 20, 1996), in 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 262, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol2.pdf> (observing that “the basic committee work” on Rule 23 “was done in 1962 and 1963”).

80. Cf. Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 177 (1969). In several instances, for example, judges all but insisted that spurious class judgments bind all adequately represented class members, whether they opted in or not.

81. E.g., *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 588–90 (10th Cir. 1961).

82. Kaplan Letter, *supra* note 78, at 3.

83. *Id.* at V-4 (referring to Clark’s proposal as “not a complete solution and . . . even a confusing half-measure if the approach of Rule 23 is fundamentally wrong”).

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

with developments in the caselaw and to enable future judicial experimentation with collective claims processing.<sup>85</sup>

Other than desegregation,<sup>86</sup> no substantive concern surfaced in committee deliberations. Had committee members harbored specific hopes for Rule 23's regulatory consequences, they surely would have surfaced in the prolonged debate that preceded its promulgation. Kaplan's draft attracted persistent dissent, particularly from committee member John Frank.<sup>87</sup> He feared "the loss of individual liberty" that a broadly preclusive class judgment would entail,<sup>88</sup> and he worried that unscrupulous lawyers would collude to settle cases cheaply and give defendants classwide preclusion at an unjust discount.<sup>89</sup> But he made no mention of the new Rule 23's regulatory capacity, even as he presciently identified difficulties

85. Transcript, MEETING OF THE FEDERAL RULES ADVISORY COMMITTEE, at 20 (Oct. 31–Nov. 2, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7104-53 (Cong. Info. Serv.) ("over-vehement"); *id.* at 2 (referring to *Nisley*).

86. Frank, *supra* note 51, at 262, 266 ("If there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation."). See generally Marcus, *supra* note 6, at 702–07 (describing how the Advisory Committee drafted part of Rule 23 to assist plaintiffs in desegregation litigation); Pamela A. MacLean, *The History: From Desegregation to Silicon Gel Implantation*, L.A. DAILY J., Nov. 22, 1996, at 9.

87. I refer to Frank's criticisms because he spearheaded the opposition to Rule 23(b)(3) and contributed the chief substantive critiques. In several memoranda, Kaplan and Sacks summarized for committee members comments they had received on the proposed revisions. Each discusses Frank's opposition but virtually no other committee member's. DISCUSSION OF RESPONSES TO MEMORANDUM (Dec. 2, 1963), at 6–7, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003-08 (Cong. Info. Serv.) (discussing Frank's opposition to Rule 23(b)(3) and noting that another committee member is "sympathetic" to it); Memorandum of Additional Points on Preliminary Draft of Proposed Amendments of, at 5 (Mar. 15, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7001-46 (Cong. Info. Serv.) (discussing Frank's criticism of Rule 23(b)(3)).

88. Letter from John Frank to Benjamin Kaplan, at 3 (Jan. 21, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6312-20 (Cong. Info. Serv.); see also Letter from John Frank to Benjamin Kaplan, at 2 (Jan. 16, 1964), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CI-7003-21 (Cong. Info. Serv.) ("When individuals are losing rights to prosecute their own lawsuits, the system should not run so smoothly."); Transcript, *supra* note 85, at 8 (statement of Frank) (expressing concern that the class action "deprives a citizen of his right to his trial and to his day in court").

89. JOHN P. FRANK, ADVISORY COMMITTEE ON CIVIL RULES: DISSENTING VIEW OF COMMITTEE MEMBER (May 28, 1965), at 2, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7107-01 (Cong. Info. Serv.) ("The corruption potential of the binding spurious class action intimidates me. These cases are terribly easy to rig—a bright child could do it. I would not hold out the bait."); Frank (1964), *supra* note 88, at 2 ("The fraud potential in spurious class actions made res judicata is simply tremendous. It is practical child's play for some business which wishes to escape the consequences of its acts to have a suit brought by a dummy who purports to represent a class, let him lose it, and thus escape responsibility.").

that Rule 23 would later cause.<sup>90</sup> Indeed, Frank feared that the amended rule would add an arrow to the *defendant's* quiver.<sup>91</sup> No one else grasped Rule 23's substantive implications, at least in any concrete way, any better.<sup>92</sup> The proposal provoked little public comment,<sup>93</sup> and the reactions that trickled in showed almost no appreciation for the new rule's redistributive or regulatory potential.<sup>94</sup>

Participants in the rulemaking process did not anticipate and debate Rule 23's specific substantive implications for an obvious reason. The dizzying array of substantive, political, and cultural changes that transformed Rule 23 from a mere joinder rule into a regulatory icon began after—in some instances only months after—the rule took final form in February 1964.<sup>95</sup> Arthur Miller identified several of these developments when he made this point in 1979.<sup>96</sup> Title VII, the substantive grist for the employment discrimination class action mill, went into force on July 2, 1964.<sup>97</sup> *J.I. Case Co. v. Borak*, whose derivation of an implied right of

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90. In particular, Frank worried that defendants and their insurers in mass accident cases would collude with a pushover plaintiffs' lawyer to settle tort claims cheaply. *E.g.*, Rabiej, *supra* note 6, at 341–43.

91. *E.g.*, Transcript, *supra* note 85, at 51 (statement of Bill Moore) (“I can’t think of anything nicer for the general counsel” of a corporate defendant facing significant tort liability “than your class suit rule.”); *id.* at 50 (statement of John Frank) (“It would be only the insurance companies” that would benefit from Rule 23(b)(3)).

92. Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. INDUS. & COM. L. REV. 501, 503 (1969) (“The implications of the amended Rule came as a surprise to many lawyers.”).

93. Letter from Charles Alan Wright to Benjamin Kaplan, at 1 (Apr. 24, 1965), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7107-05 (Cong. Info. Serv.) (“I was surprised that these proposals have elicited so little comment from the profession.”).

94. A few commentators vaguely referred to Rule 23's redistributive potential. *E.g.*, Letter from William R. Fishman to Committee on Rules of Practice and Procedure, at 1 (Aug. 6, 1964), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7013-09 (Cong. Info. Serv.) (“This is most beneficial as it will enable an uninformed indigent plaintiff to recover because of the vigilance of only one member of his class.”). Notably, however, the American College of Trial Lawyers, which mounted a scathing and high-profile attack on Rule 23 in 1972, criticized the revisions solely on grounds of individual autonomy. *Compare* SUGGESTIONS AND COMMENTS OF THE BOARD OF REGENTS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS PERTAINING TO PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, at 17–19 (Apr. 26, 1965), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7007-73 (Cong. Info. Serv.), with AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FRCP (1972).

95. For the rule in early 1964, see PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, RULE 23, at EE-2-EE-5 (Feb. 25, 1964), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7003-32 (Cong. Info. Serv.).

96. Arthur R. Miller, *Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 670–76 (1979).

97. WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION 23 (4th ed. 2007). The first class action under Title VII was filed in 1965. See Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225, 229 (1976).

action spurred the securities fraud class action, was decided on June 8, 1964.<sup>98</sup> The late 1960s public interest movement, which scored a stunning array of legislative victories in Congress that fueled the fledgling class action, began to pick up speed in 1965.<sup>99</sup> The supply of plaintiffs' lawyers eager to file class action suits increased as no-fault schemes for automobile accidents left attorneys looking for work, and as law schools began to graduate large numbers of public-spirited lawyers in the late 1960s.<sup>100</sup>

Additional changes that happened with eerie coincidence just as the ink dried on the proposed rule should be added to Miller's list. Building on the California Supreme Court's adoption of strict liability for product defects in 1963,<sup>101</sup> the American Law Institute published the *Restatement (Second) of Torts*, released in 1965,<sup>102</sup> and thereby contributed to the substantive foundation for the mass tort class action.<sup>103</sup> Rule 23 benefited from a propitious political climate that emerged abruptly in the mid-1960s. To Richard Hofstadter, commenting in 1964, "[t]he existence and the workings of the corporations are largely accepted, and in the main they are assumed to be fundamentally benign."<sup>104</sup> If public opinion is any guide, business's fall from political grace began the very next year.<sup>105</sup> By 1971 its defenders feared that they had lost the American public.<sup>106</sup> At the same time, confidence in public administration, the New Deal-era regulatory

98. 377 U.S. 426 (1964); see also Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 COLUM. L. REV. 1301, 1314–15 (2008).

99. Patrick J. Akard, *Corporate Mobilization and Political Power: The Transformation of U.S. Economic Policy in the 1970s*, 57 AM. SOC. REV. 597, 601 (1992).

100. Miller, *supra* note 96, at 674–75.

101. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (1963).

102. RESTATEMENT (SECOND) OF TORTS § 402a (1965).

103. KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, 145–47 (2008) (connecting the ALI's regime for strict liability with some of the great mass torts of the 1970s and 1980s, each of which would be litigated in part as class actions). See generally Robert L. Rabin, *Harms from Exposure to Toxic Substances: The Limits of Liability Law*, 38 PEPP. L. REV. 419, 419–22 (2011) (describing developments in tort doctrine, starting with the Restatement, that created the substantive foundation for mass tort class litigation).

104. DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 33 (1989) (quoting Richard Hofstadter).

105. MARK ALAN SMITH, *AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY* 101 (2000) (charting public approval of corporations from 1953–1996); Mark Alan Smith, *Public Opinion, Elections, and Representation within a Market Economy: Does the Structural Power of Business Undermine Popular Sovereignty?*, 43 AM. J. POL. SCI. 842, 850 (1999) (graphing business's declining political fortunes starting in the late 1960s).

106. Powell Memo, *supra* note 12.

preference, dissipated.<sup>107</sup> Unchecked by prostrate business interests, motivated by a public interest agenda, but wary of agency politicization and capture,<sup>108</sup> Congress in the late 1960s frequently turned to private rights of action, often enforced through class actions, to implement the new regulatory schemes it crafted.<sup>109</sup>

Given that members worked right before the tipping point, the fact that technical procedural concerns dominated committee deliberations is hardly surprising. Nonetheless, members' imaginations about the class action's future went beyond the adjectival conception's limits. Class actions were a litigation backwater when they began work,<sup>110</sup> but they seemed to have some sense that their obscure rule would assume far greater importance going forward. There is no dispute that committee members had a regulatory conception in mind for at least part of their new device. Some of them had closely tracked Rule 23's use as an aid to desegregation lawsuits, the only real tool for civil rights enforcement before the 1964 Civil Rights Act empowered federal agencies to intervene.<sup>111</sup> Members designed Rule 23(b)(2) expressly for this cause.<sup>112</sup> Also, Kaplan and his allies on the committee drafted Rule 23(b)(3) with litigation like *Union Carbide & Carbon Corp. v. Nisley*,<sup>113</sup> an important antitrust case, in mind.<sup>114</sup> Since such actions would become "more and more almost the staple of federal litigation,"<sup>115</sup> Kaplan asserted, he wanted a flexible rule to ensure that the "line of thought" they sensed in the case law but could not exactly describe would continue to develop.<sup>116</sup> Hence several members

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107. Thomas W. Merrill, *Capture Theory and the Courts, 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1060 (1997); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Regulation*, 99 HARV. L. REV. 713, 724 (1986); Thomas K. McGraw, *Regulation in America: A Review Article*, 49 BUS. HIST. REV. 159, 164 (1975); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 225 (1976).

108. Vogel, *supra* note 104, at 40; Harold W. Stanley, *Southern Partisan Changes: Dealignment, Realignment, or Both?*, 50 J. POLITICS 64, 65 (1988); Richard Fleisher & John R. Bond, *The Shrinking Middle in the US Congress*, 34 BRIT. J. POL. SCI. 429, 435 (2004) (describing the beginnings of polarization in the Democratic and Republican parties in the 1970s); Keith T. Poole & Howard Rosenthal, *The Polarization of American Politics*, 46 J. POLITICS 1061, 1068 (1984); Smith, *American Business*, *supra* note 105, at 105 (charting the increased polarization of Congress starting in 1965).

109. Farhang, *supra* note 26, at 5.

110. For a similar sense of the history, see Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1487 (2008).

111. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 50 (1991).

112. Marcus, *supra* note 6, at 702–11.

113. 300 F.2d 561 (10th Cir. 1961).

114. Transcript, *supra* note 49, at 6.

115. *Id.* at 6.

116. *Id.* at 11.

were disappointed in 1969, when the Supreme Court's crabbed take on class action jurisdiction diminished Rule 23's force as an instrument for consumer protection.<sup>117</sup>

Present-day advocates would be well-advised to stop seeking advantage in Rule 23's origins. Too much water has passed under the bridge. In 1966, Charles Alan Wright predicted that Rule 23(b)(3), by far the most consequential part of the rule, would have little impact.<sup>118</sup> Wright's error was reasonable given the instability of American law and politics at the time. At the risk of aggrandizing Rule 23's significance to the American Republic, a historical comparison is helpful. When Pat Brown won the California gubernatorial election in 1962, a testy Richard Nixon, Brown's vanquished adversary, gave what he called his last press conference and famously told reporters that they wouldn't "have Nixon to kick around anymore."<sup>119</sup> Two years later, Lyndon Johnson crushed Barry Goldwater's quixotic chase for the presidency, winning the largest percentage of the popular vote in American history. In 1968, Johnson lost the New Hampshire primary, pulled his reelection bid, and turned the White House over to Nixon. Things changed fast in the 1960s. The Advisory Committee wrote Rule 23 in an innocent world. It would take root in a fallen one.

### III. THE POLITICS OF RULE 23, 1967–1980

Before the 1960s ended, the now-hardened battle lines in the war over Rule 23 formed, with clashes erupting over the same alleged legal and economic pathologies that fuel debates today. "Predictions of Gotterdammerung are not lightly to be made," Simon Rifkind said of class actions in 1970, and yet torrents of such overheated claims, about the imminent demise of class actions or the existential threat they posed to

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117. On *Snyder v. Harris*, see *infra* notes 124–29 and accompanying text. Charles Alan Wright complained that *Snyder* "emasculated" Rule 23. Letter from Charles Alan Wright to Joseph Tidings (June 17, 1969), in *Class Action Jurisdiction Act: Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, United States Senate, 91st Cong., 1st Sess.*, at 93–94 (1969). Benjamin Kaplan also thought that *Snyder* was hostile to Rule 23's design. *Adequacy of Consumer Redress Mechanisms: Joint Hearing Before the Subcommittee on Consumers of the Committee on Commerce and the Subcommittee on the Representation of Citizens' Interests of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess.*, at 11 (1973), (statement of Robert Braucher) (reporting that Kaplan "did not regard *Snyder* . . . as a sympathetic handling of the Federal Rules of Civil Procedure").

118. Charles Alan Wright, *Recent Changes in the Federal Rules of Civil Procedure*, 42 F.R.D. 552, 567 (1966).

119. Gladwin Hill, *Nixon Denounces Press as Biased*, N.Y. TIMES, Nov. 8, 1962, at 1, 18 (quoting Richard Nixon).

American capitalism, came throughout the decade.<sup>120</sup> If policymakers trying to respond had succeeded, Rule 23 would not have survived its first fifteen years.

The class action wars of the 1970s have historical significance for at least two reasons. First, combatants quickly exhausted virtually every claim for and against an invigorated Rule 23. Debates since have consisted largely of recycled doctrinal and rhetorical claims, suggesting either the stability of class action doctrine or the limits of the lawyer's imagination (or both). Second, combatants' arguments can be readily organized around the regulatory/adjectival fault line, indicating its centrality to the structure of class action law and politics. Indeed, the divide significantly influenced the major efforts to reform class action law in the 1970s.

#### A. *The Emergence of the Class Action Wars*

Rule 23's regulatory significance was obvious to all by 1969. That year, Wright conceded that he badly erred with his prediction about Rule 23(b)(3),<sup>121</sup> Ralph Nader hailed "the exquisite congruence of sanction and relief that is implicit in the consumer class action,"<sup>122</sup> and congressmen championed Rule 23 as a substitute for a captured and inefficient federal bureaucracy.<sup>123</sup> By that autumn, the federal class action would sink into partisan muck. In March, the Supreme Court decided *Snyder v. Harris*, depriving federal courts of subject matter jurisdiction over most state law class actions and thereby weakening Rule 23 as a weapon for the cause of consumer protection.<sup>124</sup> Sen. Joseph Tydings quickly introduced a bill to reverse the decision.<sup>125</sup> To Tydings' "delight," the new Nixon Administration lent its "wholehearted[]" support.<sup>126</sup> At hearings on the bill

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120. *Consumer Protection Act of 1970: Hearings Before the Committee on the Judiciary, United States Senate*, 91st Cong., 2d. Sess., on S. 3201, at 381 (1970).

121. Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 179 (1969).

122. *Class Action Jurisdiction Act, Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, United States Senate*, 91st Cong., 1st Sess., at 34 (1969) (statement of Ralph Nader).

123. *Id.* at 1 (statement of Sen. Tydings) (identifying consumer class actions as a response to failed administrative agencies); Joseph D. Tydings, *S. 1980—The Class Action Jurisdiction Act*, 4 PORTIA L.J. 83, 83–85 (introducing an article arguing for expanded federal jurisdiction for class actions by describing a failure of the Federal Trade Commission to regulate effectively).

124. 394 U.S. 332 (1969).

125. *Class Action Jurisdiction Act*, *supra* note 122, at 4–5 (providing text of S. 1980, the "Class Action Jurisdiction Act").

126. *Id.* at 19, 21; *see also* Editorial, *Your Money Back*, N.Y. TIMES, Aug. 26, 1969, at 40 (praising the administration's bill as good for consumers).

in July, not a single witness testified against it,<sup>127</sup> and even the *Wall Street Journal's* editorial page gave its (admittedly tepid) blessing that September.<sup>128</sup>

This “honeymoon” period soon ended.<sup>129</sup> At the end of October, the Nixon Administration pivoted sharply and proposed a much more restrictive alternative to Tydings’ bill.<sup>130</sup> Maurice Stans, Nixon’s Secretary of Commerce and a “hard-lobbying, cheerleading advocate” for business, had won an internal administration fight over class action legislation.<sup>131</sup> Consumer advocates like Nader cried foul,<sup>132</sup> and Tydings denounced the bill as itself “a consumer fraud.”<sup>133</sup> Warren Magnuson, a class action champion in the Senate, excoriated Nixon’s chief consumer protection official for exercising her “woman’s prerogative”<sup>134</sup> when she did her best to defend her boss’s alternative against the bill she had previously supported.<sup>135</sup> When hearings on the competing bills commenced in early 1970, an army of business lobbyists mustered.<sup>136</sup> They lobbed charges at Rule 23 that became the standard set of rhetorical grenades for the class action wars from that point on. Class actions posed a “grave economic

127. Class Action Jurisdiction Act Hearings, *supra* note 122.

128. *Consumer Power?*, WALL ST. J., Sept. 9, 1969, at 22 (preferring class action legislation over “still more regulatory bureaucracies”).

129. *The Morton Eisen Case: Granddaddy of Them All*, JURIS DOCTOR, Jan. 1974, at 20–21.

130. The bill only created federal jurisdiction for eleven types of claims, and it required that the Department of Justice successfully terminate its own enforcement action before a private litigant could bring a class action in federal court. Robert B. Semple, Jr., *Nixon Proposes a “Bill of Rights” for Consumers*, N.Y. TIMES, Oct. 31, 1969, at 1; Richard Nixon, Special Address to the Congress on Consumer Protection (Oct. 30, 1969).

131. *The Stans Style*, TIME MAG., Aug. 2, 1971, at 58; *see also* John D. Morris, *Nixon Consumer Plans Due*, N.Y. TIMES, Oct. 23, 1969, at 1, 38; *Class Action and Other Consumer Protection Procedures: Hearings Before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, House of Reps.*, 91st Cong., 2d. Sess., at 212 (1970) (statement of Richard McLaren, Associate Attorney General for Antitrust) (arguing that “we just can’t throw business to the wolves on this”).

132. *The U.S.’s Toughest Customer*, TIME MAG., Dec. 12, 1969, at 89.

133. Joseph D. Tydings, *The Private Bar—Untapped Reservoir of Consumer Power*, 45 NOTRE DAME LAW. 478, 480 (1970).

134. *Departments of Labor, and Health, Education, and Welfare, and Related Agencies Appropriations for Fiscal Year 1971, Hearings Before the Subcomm. of the Comm. on Appropriations, United States Senate*, 91st Cong., 2d. Sess., on H.R. 18515, at 30 (1970).

135. John D. Morris, *Nixon Bill Authorizes Consumer Suits*, N.Y. TIMES, Aug. 24, 1969, at 1, 30 (quoting Virginia Knauer, Nixon’s Special Assistant for Consumer Affairs, as praising a bill that would liberalize subject matter jurisdiction requirements for class actions because it helps “enlist[] the services of the private bar in the fight for consumer protection”).

136. *Hearings Before the Consumer Subcomm. of the Comm. on Commerce, United States Senate*, 91st Cong., 2d. Sess., on S. 2246, S. 3092, and S. 3201, at iii (1970) (listing witnesses).

hazard to business”<sup>137</sup> because they enabled plaintiffs to extort unjustified settlements,<sup>138</sup> encouraged strike suits,<sup>139</sup> and so forth.

The temperature of the public debate never again cooled, as a few examples from a rich trove of rhetorical excess illustrate. Columbia professor and corporate lawyer Milton Handler, a persistent critic of class action expansionism, lampooned his adversaries as overwrought fanatics who treated him and his allies as “disciple[s] of the devil.”<sup>140</sup> Beverly Moore, a one-time Nader Raider and plaintiffs’ bar fixture, described Handler and his ilk as “lavishly paid defense buffoons.”<sup>141</sup> To its defenders, the new Rule 23 could pacify restive youth angry about Vietnam, who without it would “throw[] bricks through the windows of the presidents of their respective colleges.”<sup>142</sup> A spokesman for business interests insisted that the closet Marxists on the plaintiffs’ side wanted “to literally dismember large numbers of business enterprises . . . .”<sup>143</sup> (Admittedly, at least one of the country’s premier class action litigators was, in fact, a lifelong socialist.)<sup>144</sup> A defense lawyer, disgusted by the status of class action litigation circa 1976, could barely contain his umbrage: “It is not the finest hour of a profession that produced a Lord Coke to challenge the Crown, and a David Dudley Field to challenge the right of even a Lincoln to suspend the writ of habeas corpus.”<sup>145</sup>

The contest over the proper conception of Rule 23 lay at the heart of this bitter, if overwrought, debate, even if participants did not express themselves in these terms.<sup>146</sup> The normative implications of the adjectival conception surfaced in the arguments advocates of a restrained class action

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137. *Id.* at 306.

138. *Id.* at 288 (statement of Milton Handler, Professor, Columbia Law School).

139. *Id.* at 447 (statement of George W. Koch, Grocery Manufacturers of America); *id.* at 492 (statement of National Association of Manufacturers).

140. Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 6 (1971).

141. Beverly C. Moore, Jr., *The Potential Function of the Modern Class Suit*, 2 CLASS ACT. REP. 47, 51 (1974).

142. Harold E. Kohn, *The Antitrust Class Action as a Social Instrument*, 41 ANTITRUST L.J. 288, 289 (1971).

143. *Class Action and Other Consumer Protection Procedures: Hearings Before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, House of Reps.*, 91st Cong., 2d Sess., at 288 (1970) (statement of Thomas Rothwell, National Small Business Association).

144. Spencer Klaw, *Abe Pomerantz is Watching You*, FORTUNE, Feb. 1968, at 144, 146.

145. Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976).

146. For contemporaneous observations along these lines, see Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 48 (1975); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975).

voiced. Litigants and courts should not use Rule 23 alchemy to alter the substance of claims. When judges ignored or downplayed individualized elements of securities or antitrust claims in order to certify classes, for example, they engaged in illegitimate substantive law reform.<sup>147</sup> The fact that so few certified class actions went to trial was an indictment of Rule 23, because it meant that a mere joinder rule fundamentally altered the standard civil process.<sup>148</sup> Rule 23 had no legitimate charge to generate claims that otherwise would go un-filed.<sup>149</sup> Because Rule 23's regulatory role was incidental at best, a deterrence benefit class actions promised could not justify the vast gulf between attorney's fees awarded and per capita class member recoveries.<sup>150</sup> Negative-value class suits did not elevate federal judges into imperious jurists superintending fundamental structural reform but rather degraded them to the level of small claims courts.<sup>151</sup>

In contrast, advocates for an expansive, powerful class action celebrated Rule 23 as a regulatory alternative to "the vagaries of administrative competence and vigor."<sup>152</sup> The regulatory portfolio Rule 23 shouldered justified alterations to the standard civil process, they

147. E.g., Milton Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 36 (1972); William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 386 (1973); AMERICAN COLLEGE, REPORT AND RECOMMENDATIONS, *supra* note 94, at 18; Marvin Schwartz, *The Class Action: Its Incidence and the Eisen Cases*, 29 BUS. LAW. 155, 156 (1973).

148. E.g., *Consumer Protection: Hearings Before the Consumer Subcomm. of the Comm. on Commerce, United States Senate*, 91st Cong., 2d Sess., Part 2, at 398 (1970) (statement of Richard W. Barrett, Grocery Manufacturers of America); AMERICAN COLLEGE, REPORT AND RECOMMENDATIONS, *supra* note 94, at 15–16.

149. E.g., Earl E. Pollock, *Class Actions Reconsidered: Theory and Practice Under Amended Rule 23*, 28 BUS. LAW. 741, 742 (1973); Schwartz, *supra* note 147, at 156; *Reform of Class Action Litigation Procedures: Hearings Before the Subcommittee on Judicial Machinery of the Committee on the Judiciary, United States Senate*, 95th Cong., at 2 (1978) (statement of Griffin Bell); *Consumer Protection: Hearings Before the Consumer Subcommittee of the Committee on Commerce, United States Senate*, 91st Cong., 2d Sess., Part 2, at 289 (1970) (statement of Milton Handler); REDRESS OF CONSUMER GRIEVANCES, REPORT OF THE NAT'L INSTITUTE FOR CONSUMER JUSTICE 46 (1973) (dissenting statement of Ira M. Milstein).

150. See *Throwing Out the Baby With the Bathwater*, FORBES, Apr. 15, 1974, at 59 (including details of the settlement); see also *Consumer Protection Act of 1970: Hearings Before the Comm. on the Judiciary, United States Senate*, 91st Cong., 2d Sess., on S. 3201, at 18 (1970) (statement of Richard McLaren, Assistant Attorney General for Antitrust). Compare Handler, *supra* note 140, with Marshall B. Grossman, *Letter to the Editor*, N.Y. TIMES, May 2, 1971, at F14 (letter to the editor from one of the Playboy Club plaintiffs' lawyers challenging Handler's attack on the settlement).

151. Peter Vanderwicken, *The Angry Young Lawyers*, FORTUNE, Sept. 1971, at 74, 127.

152. *Consumer Protection Act: Report of the Senate Committee on Commerce on S. 3201*, 91st Cong., 2d Sess., Rpt. No. 91-1124, at 16 (1970); see also Beverly C. Moore, Jr., *The Potential Function of the Modern Class Suit*, 2 CLASS ACT. REP. 47, 62 (1974) (conceiving of Rule 23 as an alternative to the "captive cartelists" who composed the federal bureaucracy).

maintained.<sup>153</sup> Because cases concerned the broad implementation of the substantive law on behalf of classes in society, not individual claims, courts should not obsess over the sort of individual causation and damages issues that could thwart aggregate processing.<sup>154</sup> Complaints about the mismatch between large counsel fees and small per capita recoveries misfired, because deterrence, as the class action's *raison d'être*, provided the appropriate measuring stick.<sup>155</sup>

### B. *Efforts at Class Action Reform*

Feeling the heat, rulemakers and legislators made several efforts in the 1970s at wholesale class action reform. After trying throughout the decade, the Advisory Committee ultimately abandoned its attempts to revise Rule 23. Its members appreciated the normative significance of the device's competing conceptions, but they found themselves institutionally incapable of resolving the conflict. When the Carter Administration took over, it proposed to solve the class action problem by replacing much of Rule 23 with two forms of aggregate processing, one pegged to each of the two conceptions.

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153. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

154. E.g., Robert A. Shlachter, *The Case for Fluid Recovery*, 1 CLASS ACT. RPTR. 70, 76 (1972); Beverly C. Moore, Jr., *The Potential Function of the Modern Class Suit*, 2 CLASS ACT. RPTR. 47, 63 (1974); *Citizens' Access to the Courts Act of 1978: Hearing Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary, United States Senate*, 95th Cong., 2d Sess., at 59 (1978) (statement of Beverly Moore); Maxwell W. Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365, 373 (1973); Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426, 451 (1973); Herbert B. Newberg, *Federal Consumer Class Action Legislation: Making the System Work*, 9 HARV. J. ON LEGIS. 217, 230 (1973). Cf. Arthur R. Miller, *Problems in Administering Judicial Relief in Class Actions Under Rule 23(b)(3)*, 54 F.R.D. 501, 504–06 (1972) (arguing that difficulties of determining individual damages should not preclude class certification and arguing that courts should use statistical formulas, among other solutions, to deal with this problem).

155. Blecher, *supra* note 154, at 369; Scott, *Two Models*, *supra* note 146, at 943–44; Abraham L. Pomerantz, *Class Suits Defended: Actions Protect Stockholder and Small Consumer*, N.Y. TIMES, Apr. 25, 1971, at F22; Daniel J. Meador, *Proposed Revision of Class Damage Procedures*, 65 A.B.A. J. 48, 49 (1979) (observing that “it has now become clear that the primary interest [of the class action] . . . is that of the public in preventing the wrongdoer from profiting from the illegality and in deterring similar conduct by others. Compensation for those injured is secondary”); Abraham Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259, 1261 (1970); *Inaccurate and Unfair Billing Practices: Hearings Before the Subcommittee on Consumer Credit of the Committee on Banking, Housing and Urban Affairs, United States Senate*, 93rd Cong., 1st Sess., at 166 (1973) (statement of Mark Silbergard); *Grace v. Ludwig*, 484 F.2d 1262, 1267 (2d Cir. 1973) (justifying an award of counsel fees in a securities class action with the “corporate therapy” the litigation provided).

### 1. *Efforts in the Advisory Committee*

In September 1971, Warren Burger, no class action fan,<sup>156</sup> asked the Advisory Committee to consider alterations to Rule 23.<sup>157</sup> Soon thereafter, the American College of Trial Lawyers (ACTL), a prominent defense-oriented group, issued a notable report that found a receptive judicial audience.<sup>158</sup> The ACTL catalogued every major critique of Rule 23: the rule generated blackmail settlements, it produced distortions in the substantive law, it clogged the federal judiciary with remedial minutiae, and it illegitimately generated claims.<sup>159</sup> Among the significant changes the group included the reactionary suggestion that class members should have to opt in to benefit from a judgment.<sup>160</sup> Also, foreshadowing a change the Advisory Committee proposed two decades later,<sup>161</sup> the ACTL proposed a “just ain’t worth it” provision, to discourage certification whenever “the likelihood that damages to be recovered by individual class members . . . are so minimal as not to warrant the intervention of the court.”<sup>162</sup> Plaintiffs’ lawyers excoriated the ACTL’s report as a “most intemperate and inaccurate”<sup>163</sup> “‘cry baby’ complaint about Rule 23.”<sup>164</sup> But the ACTL report resonated with some Advisory Committee members, who took its proposed amendments, including the opt-in idea, seriously.<sup>165</sup>

Proposals like these and reactions to them reflected Rule 23’s normative divide. To the ACTL, Rule 23 promised judicial economy, not

156. Warren Weaver, Jr., *Blunting a Weapon of Protest*, N.Y. TIMES, May 6, 1973, at 237; *One for All*, TIME MAG., Dec. 13, 1971.

157. MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES at 2 (1971), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV09-1971-min.pdf>.

158. AMERICAN COLLEGE, REPORT AND RECOMMENDATIONS, *supra* note 94; see also J. Vernon Patrick, Jr. & Marvin Cherner, *Rule 23 and the Class Action for Damages: A Reply to the Report of the American College of Trial Lawyers*, 28 BUS. LAW. 1097, 1097–98 (1973) (describing the college’s makeup). The deference paid to the ACTL report by judges disenchanted with Rule 23 indicates its impact. *E.g.*, *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 468 n. 19 (9th Cir. 1973); *Herbst v. Int’l Tel. & Tel. Corp.*, 495 F.2d 1308, 1313 (2d Cir. 1974); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973); *Wilcox v. Commerce Bank*, 55 F.R.D. 134, 137 (D. Kan. 1972), *aff’d sub nom. Wilcox v. Commerce Bank of Kan. City*, 474 F.2d 336 (10th Cir. 1973).

159. AMERICAN COLLEGE, REPORT AND RECOMMENDATIONS, *supra* note 94, at 6–7, 9, 15, 18.

160. *Id.* at 30.

161. REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 42 (1996), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1996.pdf>.

162. AMERICAN COLLEGE, REPORT AND RECOMMENDATIONS, *supra* note 94, at 25.

163. Patrick, Jr. & Cherner, *supra* note 158, at 1097; see also *id.* at 1101 (chastising the ACTL for basing its arguments on upon “a false premise: that the class action is *only* intended to achieve *judicial economy* and to *promote uniformity of decisions*”).

164. Kohn, *supra* note 142, at 290.

165. MAY 1978 ADVISORY COMMITTEE MEETING, AGENDA ITEMS 3, in Records of the U.S. Judicial Conference, *microformed on* CIS No. CI-6504-31 (Cong. Info. Serv.).

regulatory aggrandizement or large-scale redistribution through litigation.<sup>166</sup> If not deployed narrowly for joinder purposes alone, the rule wasted “judicial time, effort, and expense,” and caused the “sacrific[e] of procedural and substantive fairness to the party opposing the class.”<sup>167</sup> When a high-profile committee of the Association of the Bar of the City of New York issued a rejoinder to the ACTL’s report,<sup>168</sup> dissenting members complained that the majority had “overlooked the essentially procedural nature of Rule 23” with its “laudatory but uncomfortably vague” enthusiasm for the class action’s regulatory potential.<sup>169</sup>

The Advisory Committee struggled throughout the decade to respond to these pressures. It debated a few medium-bore suggestions, including a proposed amendment to lessen notice obligations in Rule 23(b)(3) cases,<sup>170</sup> and one that would explicitly prohibit any merits inquiry at the certification stage.<sup>171</sup> But mostly the committee foundered. Hoping that empirical study would pave the road to reform,<sup>172</sup> members in 1977

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166. AMERICAN COLLEGE, REPORT AND RECOMMENDATIONS, *supra* note 94, at 6–7.

167. *Id.* at 6.

168. THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CLASS ACTIONS—RECOMMENDATIONS REGARDING ABSENT CLASS MEMBERS AND PROPOSED OPT-IN REQUIREMENTS (July 17, 1973), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7507-57 (Cong. Info. Serv.). Committee members who signed onto the majority report, which favored leaving Rule 23 alone, included Alvin Hellerstein, Pierre Laval, and Charles Sifton, all future judges, and Edward Labaton, one of the country’s premier plaintiffs’-side securities litigators. Joseph McLaughlin, a prominent defense-side litigator and a member of the American College of Trial Lawyers, signed onto a minority report that was much less favorable to the 1966 rule. *See* E-mail from Edward Labaton to David Marcus (Apr. 9, 2012) (on file with the author).

169. THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *supra* note 168, at 25–26 (“The Committee has, in our view, overlooked the essentially procedural nature of Rule 23 in concluding that the Rule should function to ‘deter’ potential wrongdoers and to ‘purify’ business and securities practices. If such laudatory but uncomfortably vague ideals are to be enforced by the Courts, then it is Congress that should enact the necessary legislation and not the rule-making bodies of the Judicial Conference.”).

170. ADVISORY COMMITTEE ON CIVIL RULES, MEETING, AGENDA ITEMS 4 (Feb. 22, 1974), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6503-13 (Cong. Info. Serv.).

171. ADVISORY COMMITTEE ON CIVIL RULES, MEETING, AGENDA ITEMS 1 (Apr. 21–22, 1975), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6503-73 (Cong. Info. Serv.).

172. Bernard Ward, the committee’s reporter after Kaplan stepped down, was supposed to begin a study of class action fundamentals in 1971. MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 2 (Sept. 21, 1971), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV09-1971-min.pdf>. Apparently, he did not do so because the American Bar Foundation agreed to do one. But the American Bar Foundation then postponed its study, leaving the committee to its own devices. ADVISORY COMMITTEE ON CIVIL RULES, MEETING, AGENDA ITEMS 1 (Feb. 22, 1974), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6503-13 (Cong. Info. Serv.); ADVISORY COMMITTEE ON CIVIL RULES AGENDA (May, 17, 1976), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6504-05 (Cong. Info. Serv.).

surveyed nearly 2000 judges, lawyers, and professors for their attitudes toward Rule 23 and for their reactions to several proposed revisions.<sup>173</sup> But the results, some of which Tables I and II summarize, revealed nothing more than partisan conflict and confusion.

TABLE I: ATTITUDES TOWARD RULE 23

Question	U.S. Circuit Judges		U.S. District Judges		Plaintiffs' Attorneys		Defense Attorneys	
	Accurate	Not Accurate	Accurate	Not Accurate	Accurate	Not Accurate	Accurate	Not Accurate
"Rule 23 deters violations of antitrust, securities, consumer protection, and civil rights laws."	15	9	91	51	60	9	35	26
"Rule 23 encourages defendants to settle rather than defend on the merits because of the size of their potential liability."	22	2	115	36	33	32	57	5
"Rule 23 wastes judicial resources through cumbersome, expensive, time consuming procedures."	8	7	88	57	11	57	46	15

173. Memorandum for Members of the Legal Profession Experienced in Rule 23 Matters, 1, 3 (Mar. 29, 1977), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6505-25 (Cong. Info. Serv.); Louis Oberdorfer, *Remarks Given at the May 27, 1977, Meeting of the Advisory Committee on Rules of Practice and Procedure 2* (July 21, 1977), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6505-47 (Cong. Info. Serv.).

TABLE II: PROPOSED REVISIONS TO RULE 23

Proposal	U.S. Circuit Judges		U.S. District Judges		Plaintiffs' Attorneys		Defense Attorneys	
	Favor	Oppose	Favor	Oppose	Favor	Oppose	Favor	Oppose
"Replace the Opt-Out Provision of Rule 23(c)(2) with an Opt-In Provision."	16	8	98	50	6	62	52	10
"Remove the Individual Notice Requirement from Rule 23(c)(2)."	5	20	32	116	31	37	4	58
"Amend Rule 23(b)(3) to require the plaintiffs to show a reasonable likelihood of success on the merits before class certification."	19	5	111	34	13	56	47	16
"Specify that the relationship between predicted costs of litigation, to parties and the court, and aggregate potential recovery to the class is a factor in determining manageability of a class under Rule 23(b)(3)(D)."	19	6	115	31	15	51	48	12

Source: Responses to Rule 23 Questionnaire, May 12, 1977, in Records of the U.S. Judicial Conference, *microfiched at* CI-6509-32.

Plaintiffs' and defense lawyers split along predictable lines. The judges' responses corroborated the widespread perception that Rule 23 had worn out its welcome with the courts by the late 1970s.<sup>174</sup> But strong judicial support of certain measures, such as the ACTL's proposed opt-in amendment, made some committee members wonder if judges really understood Rule 23 and its history.<sup>175</sup>

The Advisory Committee managed to act on a couple of suggestions. In late 1977 it went so far as to approve a "just ain't worth it" amendment, albeit one that would have permitted courts to weigh the case's regulatory contribution along with the value of individual compensation it could

174. *Reform of Class Action Litigation Procedures: Hearings Before the Subcomm. on Judicial Machinery of the Comm. on the Judiciary*, 95th Cong. 11 (1979) (statement of Daniel Meador (reporting plaintiffs' lawyers' complaints that judges "are just hostile" to class actions); *Gardner v. Westinghouse Broad. Co.*, 559 F.2d 209, 222 (10th Cir. 1977), *aff'd*, 437 U.S. 478 (1978) (complaining of Eighth Circuit's hostility to class actions); *In re Franklin Nat. Bank Sec. Litig.*, 574 F.2d 662, 673 (2d Cir. 1978), *on reh'g*, 599 F.2d 1109 (2d Cir. 1978) (complaining that the burden class actions impose is "beyond all reason").

175. ADVISORY COMMITTEE ON CIVIL RULES, MINUTES OF THE MAY MEETING 5 (1977), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-6505-64 (Cong. Info. Serv.) (summarizing statement of Judge Tuttle (wondering whether "some of the judges who responded to the questionnaire were unaware of this history of the opt-in provision as against the opt-out provision").

achieve against the costs of aggregate processing.<sup>176</sup> As a “sad” Arthur Miller lamented, however, by this point the rulemaking process had “run into something approximating a brick wall.”<sup>177</sup> The challenge of class action reform exceeded the committee’s institutional capacities, hamstringing as it was by the Enabling Act’s substantive rights proviso.<sup>178</sup> Walter Mansfield, a committee member, summarized the problem as he saw it:

The Advisory Committee has wrestled with rule 23 and possible amendment to it at great length in an effort to simplify and improve the processing of class damage actions, but it has found that the problem is not simply one of procedure. The problem is also one of substance. As I personally see it, the question is: Should mass economic wrongdoers be forced to disgorge their illegal or ill-gotten gains in order to deter them from preying on others who are not in a position to protect themselves? That, to me, is a question of substance and not of procedure.<sup>179</sup>

The Advisory Committee could not resolve the normative divide between the adjectival and regulatory conceptions of Rule 23. Accepting its limitations, it surrendered its supervisory responsibilities for Rule 23 to the Carter Administration and left class actions totally alone until 1990.<sup>180</sup>

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176. ADVISORY COMMITTEE ON CIVIL RULES, MINUTES OF THE DECEMBER 12–13, 1977 MEETING, at 17–18, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV12-1977-min.pdf>. The proposal envisioned “possible interests” to include “any substantial advantages that may result, as, for example, the deterrence of wrongful conduct by defendants in the future.” *Id.*; ADVISORY COMMITTEE ON CIVIL RULES AGENDA (1977), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, microformed on CIS No. CI-6506–10 (Cong. Info. Serv.).

177. *Citizens’ Access to the Courts Act of 1978: Hearing Before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary*, 95th Cong. (1978).

178. Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury, Proposal by U.S. Dept. of Justice to Amend Rule 23, at 10 (Dec. 2, 1977), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, microformed on CIS No. CI-7802-07 (Cong. Info. Serv.).

179. *Reform of Class Action Litigation Procedures*, supra note 174, at 28 (statement of Walter Mansfield); see also Proceedings of the Thirty-Ninth Annual Judicial Conference of the District of Columbia Circuit, 81 F.R.D. 263, 284 (1978) (comments of Bernard Ward, Reporter, Federal Civil Rules Advisory Committee) (explaining that the Advisory Committee supported Congressional action on Rule 23 because Rule 23 posed problems that were too substantive for it to resolve).

180. Notes of Rozel Thomsen for Presentation Before Judicial Conference, at 3 (Mar. 9, 1978), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, microformed on CIS No. CI-6512-93 (Cong. Info. Serv.) (recording the committee’s decision to endorse a legislative effort to overhaul Rule 23); see also MINUTES, ADVISORY COMMITTEE ON THE CIVIL RULES MEETING (1990), in 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 161, 162, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol1.pdf> (describing decision to consider Rule 23 for reform).

## 2. *The Carter Administration's Rule 23 Replacement*

Nearly every year during the 1970s, Congress debated legislation that involved Rule 23 in one way or another. Usually the bills addressed a particular substantive area, with Congress considering how class litigation factored into a regulatory scheme's overall implementation.<sup>181</sup> In the late 1970s, however, the Carter Administration lost patience with the pace of reform in the Advisory Committee and decided to take on wholesale class action reform itself.<sup>182</sup> Class action reform got the attention of Griffin Bell, Jimmy Carter's first attorney general.<sup>183</sup> He tapped Virginia law professor Daniel Meador for the job,<sup>184</sup> and by the end of Carter's first year, Meador had drafted legislation to replace Rule 23(b)(3).<sup>185</sup> Its length—a bloated twenty-four pages—reflected the class action's new significance.

The administration tried to straddle the normative divide that had stymied the Advisory Committee and polarized class action politics. A memorandum introduced the bill's premise: "there are basically two kinds of [class actions,] and . . . to a large degree the problems encountered have resulted from the failure of current procedures to differentiate between them."<sup>186</sup> The bill solved this problem by dividing damages class actions into two categories. The first, initially described as a "public penalty procedure," made more explicit the class action's regulatory role by transforming the device into a *qui tam* mechanism. Whenever forty or more people suffered \$500 or less in harm, a right of action would vest in

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181. *E.g.*, *Consumer Protection Act: Report of the Senate Comm. on Commerce on S. 3201*, 91st Cong. 16 (1970); *Environmental Citizen Action: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the Comm. on Merchant Marine and Fisheries*, 92d Cong. 3 (1971); *Inaccurate and Unfair Billing Practices: Hearings Before the Subcomm. on Consumer Credit of the Comm. on Banking, Housing and Urban Affairs*, 93d Cong. at 5 (1973); *Antitrust Parens Patriae Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 93d Cong. 27 (1974); *The Antitrust Improvements Act of 1975: Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 94th Cong. 228 (1975).

182. *Effective Procedural Remedies*, *supra* note 178, at 10 (explaining why Congress should take over the job from the Advisory Committee and suggesting that the rulemaking process proceeds too slowly).

183. Anthony Lewis, *Faith, Hope, and Charity*, N.Y. TIMES, Jan. 24, 1977, at 23; *see also* Victor S. Navasky, *The Greening of Griffin Bell*, N.Y. TIMES MAG., Feb. 27, 1977, at 194.

184. *The Chilling Impact of Litigation: Easier Access to the Courts Means Skyrocketing Costs and Intermittent Delays*, BUSINESS WEEK, June 6, 1977, at 58, 59.

185. *Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury*, Draft Statute with Comment (Dec. 1, 1977), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7802-07 (Cong. Info. Serv.).

186. *Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury*, Summary of Draft Proposal 1 (Dec. 1, 1977), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7802-07 (Cong. Info. Serv.).

the United States.<sup>187</sup> Five hundred dollars represented the threshold below which the administration estimated an ordinary person would not seek compensation; insofar as these suits were thought to have value, it was for their deterrent function.<sup>188</sup> The process essentially replicated agency enforcement actions, with the right to sue belonging to the government. Individualized causation and damage assessments, problems for class certification, would disappear.<sup>189</sup> The administration would give victims restitution after the imposition of an aggregate penalty on the defendant, with damages scheduling and other statistical techniques determining the amount.<sup>190</sup>

The second type, the “class compensatory procedure,” cast the class action more as a joinder mechanism. It encompassed claims that had value even without aggregation, ones for which “private compensation, rather than deterrence, [is] the paramount concern.”<sup>191</sup> The operative part of the proposal would overturn *Snyder*. Forty or more persons alleging claims under any law that exceeded \$500 in per capita value could pursue a federal class action.<sup>192</sup> The bill suggested several other tweaks to class action practice, including a lowered predominance threshold to enable certification and a preliminary merits determination before class certification, but otherwise left the class action status quo in place.<sup>193</sup>

A collective yawn greeted the Advisory Committee’s proposed revision when published in 1964, but in 1978, with the class action wars fully underway, the Carter Administration’s bill drew a slew of comments.<sup>194</sup> Its ambition reflected the overheated temperature of the class action wars. Something major had to give, and give in dramatic fashion. Starting over from scratch, as the Carter Administration proposed to do for Rule 23(b)(3), seemed a reasonable response. But few constituencies demonstrated any enthusiasm for the bill,<sup>195</sup> even as the administration

187. Draft Statute with Comment, *supra* note 185, at 32.

188. *Id.*

189. Stephen Berry, *Ending Substance’s Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 340 (1980); Draft Statute with Comment, *supra* note 185, at 42–43.

190. Draft Statute with Comment, *supra* note 185, at 44.

191. *Id.* at 45.

192. *Id.*

193. *Id.* at 47.

194. Reform of Class Action Litigation Procedures, *supra* note 149, at 305 (statement of Daniel Meador).

195. *E.g., id.* at 419 (statement of Paul M. Bernstein); *id.* at 438 (statement of Chamber of Commerce of the United States of America); Judicial Access/Court Costs, *Hearings Before the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business*, 96th Cong. 272 (1980) (statement of Defense Research Institute); *id.* at 276 (statement

pushed repeatedly for its enactment.<sup>196</sup> Ultimately the effort failed. Never again has Congress seriously considered a wholesale legislative takeover of class actions, and reform efforts with an ambition even approximating the Carter Administration's did not begin again until the 1990s.

#### IV. THE EMERGENCE OF STABILITY IN CLASS ACTION LAW, 1967–1980

If reality had matched the heated rhetoric of the 1970s, then the fallow period for class action reform that began with the demise of the Carter Administration's bill in 1980 is puzzling. But the situation on the ground was different. Arthur Miller got it right when he observed in 1979 that "class action practice under the existing rule appears to be stabilizing."<sup>197</sup> Core doctrinal questions remained unanswered, sometimes shockingly so.<sup>198</sup> Even more fundamental was the fight over Rule 23's proper understanding, which continued unabated.<sup>199</sup> Nonetheless, the federal judiciary and Congress successfully deployed a pragmatic balancing strategy for class action governance in each of the major substantive areas of class litigation, and kept the two conceptions in equipoise. These decision-makers managed to craft a body of doctrine that served the otherwise-inconsistent values confronting each other across the regulatory/adjectival divide.

##### A. *An Elaboration on the Dilemma of Class Action Governance*

As discussed in Part I, the regulatory and adjectival conceptions have normative implications for Rule 23's deployment. In sum, the former permits courts to adjust substantive law and ordinary processes in the

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of the American Bar Association); *id.* at 288 (statement of National Legal Aid and Defender Association).

196. H.R. REP. NO. 96-1008, Pt. 1 (1980).

197. Miller, *supra* note 96, at 668.

198. The lower federal courts, for example, never settled on a consistent approach to the adequacy of representation requirement, sometimes permitting and sometimes refusing class treatment in the face of substantial and explicit class member dissatisfaction. *E.g.*, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1454, 1489 n.190 (1976). Also, as one court rightfully complained in 1979, "[c]ommentators have done little to explicate or clarify the meaning of predominance," the chief hurdle for certification in money damages cases. *Payton v. Abbott Labs*, 83 F.R.D. 382, 391 (D. Mass. 1979).

199. Hutchinson, *supra* note 15, at 480 (describing these conflicting conceptions and noting that the Supreme Court has referred to both without choosing between them); C. Douglas Floyd, *Civil Rights Class Actions in the 1980's: The Burger Court's Pragmatic Approach to Problems of Adequate Representation and Justiciability*, 1984 BYU L. REV. 1, 59 (describing how the Supreme Court accommodated these two conceptions in civil rights class action cases of the late 1970s and early 1980s).

name of regulatory efficacy, while the latter requires that class actions remain yoked, as much as possible, to the substantive and procedural norms that would govern individual litigation. The former focuses the court on the defendant's conduct toward the aggregate, while the latter insists upon respect for the class member *qua* individual litigant.

At the heart of the competition between the conceptions and their implications lies a fight over clashing values. The regulatory conception's chief value of regulatory efficacy is straightforward. Courts should deploy Rule 23 to maximize the substantive law's purchase, so as to compensate for inadequacies of public administration. Part I addresses the desired link between regulatory choices and a mechanism for democratic accountability as a justification for the adjectival conception. But, while this emphasis helps situate the history of class action governance within the management of the federal regulatory apparatus more generally, democratic legitimacy is properly subsumed within a broader term that more completely describes the full range of motivations for the adjectival conception. This understanding of Rule 23 privileges the traditional institutional role for the federal courts, or what might be called a value of judicial institutional integrity. A judge serves this value when she domesticates a class action to the individual lawsuit norm.

If the regulatory and adjectival conceptions of Rule 23 further values of regulatory efficacy and institutional integrity, respectively, then the dilemma of class action governance comes more completely into focus. A rigid insistence that class action doctrine respect the federal court's traditional institutional role would frustrate the regulatory efficacy value. Almost any class action involves individualized elements of claims, for example. A judge reluctant to adjust them would certify few classes, as the burden of the individualized processing necessary for these elements would outweigh any efficiency gain from the aggregate resolution of common issues of law or fact. Rendered nugatory, Rule 23 could not help private litigation contribute to federal regulatory objectives.

Excessive enthusiasm for Rule 23's regulatory potential, in contrast, can challenge the institutional integrity of the federal courts in a number of ways. Two of them have to do with deficits of institutional capacity.<sup>200</sup> Unlike agencies, with top-down, centralized decision-making processes, federal courts cannot calibrate the coercive effect of a particular

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200. For a related but different, and expanded, treatment of these sorts of issues, see Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 311–28 (1996).

substantive regime terribly well.<sup>201</sup> The decision to settle a particular case and on what terms lies chiefly in the parties' hands, so a judge has little say over what regulatory outcomes the case achieves.<sup>202</sup> The judicial power to calibrate the overall regulatory force of a substantive regime is even weaker.<sup>203</sup> Decisions to bring actions are decentralized and private, since plaintiffs' lawyers make them, and the court's regulatory authority is limited to what the parties bring before it.<sup>204</sup> The diffusion of cases implicating the same set of substantive policies throughout the federal and state judiciaries limits an individual judge's ability to manage the regime's effect in the aggregate. Even if courts could overcome these limitations, the democratic legitimacy question, or under what circumstances should unelected judges spurred by private lawyers have the capacity to superintend litigation with significant regulatory consequences, would remain.<sup>205</sup>

Also, federal judges have a limited capacity for substantive law reform. Provided they stay within the boundaries of their delegated power, agencies can mold the substantive law, even through adjudication.<sup>206</sup> A host of constraints narrow a federal court's authority to do the same. These include the *Erie* Doctrine, when cases involve state law; the Enabling Act, as a statutory limit on the scope of delegated powers; and more generalized anxieties about the separation of powers and democratic accountability.

Regulatory zeal can also create challenges to institutional integrity that concern the processes and goals of civil litigation. Large-scale claims processing makes trial—the endgame for the ordinary civil process—unrealistic, and instead emphasizes settlement, a largely privatized mechanism for resolution that minimizes the judge's role. The class treatment of claims requires courts to abstract away from the particular circumstances of individual litigants, in conflict with the ideal of

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201. Cf. Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 571–78 (1981) (commenting on this problem while discussing the broader issue of the privatization of securities enforcement).

202. The judge's power is limited to reviewing the settlement for its fairness and adequacy. FED. R. CIV. P. 23(e). One reason why this is so is that, if a case settles, it is less likely to produce some authoritative legal norm that can apply to all participants in the regulated field instead of just the parties to the settlement itself. ANDREW P. MORRIS ET AL., *REGULATION BY LITIGATION* 51 (2009).

203. Cf. Rose, *supra* note 47, at 1326–30 (2008) (discussing this issue in the context of securities class action litigation).

204. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 34–38 (1977).

205. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 119–20 (2005).

206. See *Sec. and Exch. Comm'n v. Chenery Corp.*, 322 U.S. 194 (1947).

adjudication as an individualized process.<sup>207</sup> Also, the often marginal per capita recoveries in many class actions, particularly as compared to fees counsel earned, question a traditional understanding of the court's institutional identity, to render remedies due under the substantive law to deserving individuals.

Arguably, the purported dichotomy between regulatory efficacy and judicial institutional integrity, as the primary values motivating the regulatory and adjectival conceptions, strikes a false note. If the realization of the substantive law's full potential is a central judicial responsibility,<sup>208</sup> then an emphasis on regulatory efficacy strengthens the institutional integrity of the federal courts. Likewise, the conceit that the institutional identity of the federal courts necessarily includes an individualized, trial-based process stressing claimant-specific compensation merits strenuous objection.<sup>209</sup>

But the point here is not to take sides in a longstanding debate about the goals and character of federal litigation. Rather, it is to tell a story. With particular urgency in the 1970s, but really throughout Rule 23's history,<sup>210</sup> lawyers and judges did in fact think of the challenges class action governance posed in the terms described here. The dilemma of class action governance—how to balance regulatory efficacy and institutional integrity—was felt as real, however constructed or artificial the regulatory/adjectival divide.

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207. Over the course of the 1970s adjudication within agencies evolved away from an individualized and discretionary system into a bureaucratic, rote, and rule-dominated one. See generally William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 98 YALE L.J. 1198 (1983); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 7–8 (1977).

208. Owen M. Fiss, Foreword, *The Forms of Justice*, 93 HARV. L. REV. 1, 29–30 (1979).

209. Chayes, *supra* note 153, at 1283. Cf. *Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975) (“Far from being the scourge of modern jurisprudence, class actions contribute to its salubrity and vitality.”).

210. E.g., *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 463–64 (9th Cir. 1973) (arguing that the challenge for courts handling Rule 23 boils down to “the determination of the extent to which proceedings within the judiciary will be permitted to resemble in function the administrative process”); *THE ROLE OF COURTS IN AMERICAN SOCIETY: THE FINAL REPORT OF THE COUNCIL ON THE ROLE OF COURTS* 83–86 (Jethro K. Lieberman ed., 1984); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 4–21 (1977); *Henson v. East Lincoln Township*, 814 F.2d 410, 416 (7th Cir. 1987) (“An influential current in contemporary legal thought believes that the old-fashioned bipolar model of adjudication is hopelessly outmoded and that the federal courts should embrace with enthusiasm a newer model of adjudication, in which federal district courts carry out ambitious restructurings of public institutions, such as state and local welfare systems, in the manner of a regulatory agency. . . . Whatever the abstract merits of this approach . . . we do not find it embodied in Rule 23(b)(2) . . . .”); *Mars Steel Corp. v. Cont’l Ill. Nat’l Bank & Trust Co. of Chi.*, 834 F.2d 677, 678 (7th Cir. 1987) (commenting on how class actions contemplate a “fundamental departure from the traditional pattern in Anglo-American litigation . . .”).

### B. Value Balancing in 1970s Class Action Doctrine

Joseph Sneed of the Ninth Circuit argued in 1973 that the judicial job in the 1970s was to “structure[.]” class actions “so as to conform in the *essential respects* to the judicial process.”<sup>211</sup> Decision-makers’ management of the class action reflected just this pragmatic objective. Throughout the 1970s, in all of Rule 23’s substantive areas, they sometimes applied Rule 23 in a manner consistent with the regulatory conception. They downplayed individualized aspects of cases that otherwise might have thwarted class certification and focused instead on their aggregate contributions.<sup>212</sup> At other times, decision-makers rejected this flexibility, and, in keeping with the procedural conception, refused to lose sight of the individual within the aggregate.<sup>213</sup> At times doctrinally unprincipled and often undertheorized, this evolutionary current nonetheless had a deep logic to it. Courts and other decision-makers applied, or acquiesced in the application, of Rule 23 to serve values of regulatory efficacy, up to the point that doing so unduly threatened the judiciary’s institutional integrity.

#### 1. Consumer Protection

Rule 23’s experience in the consumer protection context generally, as well as a specific episode of doctrinal development, illustrate this balancing strategy at work. Since so many consumer claims have little monetary value, Rule 23, at least at first, had the potential to revolutionize the prospect for their enforcement. Amped-up private enforcement was important in the early 1970s because “federal, state, and local agencies nominally protecting consumers [were] woefully understaffed and underfinanced, morassed in a sea of red tape, and unbearably slow acting.”<sup>214</sup> “Nothing stands out as more eloquent testimony to the failure of outmoded attempts to aid the consumer than the Federal Trade

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211. *La Mar*, 489 F.2d at 464 (emphasis added).

212. *E.g.*, *Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (permitting certified class action to proceed even though named plaintiff’s claim became moot).

213. *E.g.*, *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 404 (1977) (refusing to ignore particular circumstances of class members).

214. Arthur H. Travers, Jr. & Jonathan M. Landers, *The Consumer Class Action*, 18 U. KAN. L. REV. 811, 812 (1970). On the inadequacies of the Consumer Product Safety Commission, see Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission be Redeemed?*, 41 ADMIN. L. REV. 61, 70 (1989). On the limitations of the Federal Trade Commission, see generally EDWARD F. COX ET AL., “THE NADER REPORT” ON THE FEDERAL TRADE COMMISSION (1969).

Commission,” Senator Tydings wrote as he advocated for a muscular consumer class action, “a seemingly inert and lifeless bureaucracy long since exhausted of strength or initiative.”<sup>215</sup> “In this supposedly ‘consumers’ society,’” a *New York Times* editorialist wrote in 1969, the federal class action meant that “the consumer may at last be coming into his own.”<sup>216</sup> “We see consumer class actions not just as a procedure to make the judicial system work,” an advocate later testified, “but much more as a substantive right of consumers.”<sup>217</sup>

These great expectations foundered, at least in part, on judicially-created shoals.<sup>218</sup> In 1969, the Supreme Court in *Snyder v. Harris* held that a class could not aggregate its alleged damages to meet the amount in controversy requirement for diversity jurisdiction.<sup>219</sup> In his majority opinion, Hugo Black, who did not like the new class action,<sup>220</sup> insisted that Rule 23 be treated as any other joinder rule would.<sup>221</sup> Each individual class member’s status had to be considered for jurisdiction purposes as they would under any other joinder scenario, even if this unyielding perspective frustrated enforcement efforts.<sup>222</sup> *Zahn v. International Paper*, decided four years later, rejected pendent jurisdiction for class member claims and thus shut off an avenue around *Snyder*.<sup>223</sup>

*Snyder* and *Zahn* put all but the most valuable of state law claims beyond Rule 23’s reach. Because a great deal of the action on the consumer protection front in the 1960s and 1970s took place at the state

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215. Tydings, *supra* note 133, at 478.

216. *Your Money Back*, *supra* note 126, at 40. See generally Mark L. Rosenberg, Comment, *Class Actions for Consumer Protection*, 7 HARV. C.R.-C.L. L. REV. 601 (1972).

217. *Citizens’ Access to the Courts Act of 1978: Hearing Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Comm. on the Judiciary*, 95th Cong. 15 (1978) (statement of Andrew A. Feinstein, Public Citizen Congress Watch).

218. Mayo L. Coiner, *Class Actions: Aggregation of Claims for Federal Jurisdiction*, 4 MEMPH. ST. U. L. REV. 427, 447 (1974) (describing *Snyder* as a “disappointment” and *Zahn* as a “tragedy”); *Citizens’ Access to the Courts Act of 1978*, *supra* note 212, at 14 (statement of Andrew Feinstein, Public Citizen); Peter H. Schuck & Marsha N. Cohen, *The Consumer Class Action: An Endangered Species*, 12 SAN DIEGO L. REV. 39, 47 (1974).

219. 394 U.S. 332, 338 (1969).

220. He dissented from the Supreme Court’s approval of it in 1966. Order Dated Feb. 28, 1966, 383 U.S. 1031, 1032–37 (1966) (Black, J., dissenting). In a letter to John Frank written six weeks after the Court released *Snyder*, Justice Black wrote that “the rule is a very poor one.” Letter from Hugo Black to John Frank (May 2, 1969), in 2 ADVISORY COMMITTEE RULE 23 WORKING PAPERS, *supra* note 48, at 283.

221. *Snyder*, 394 U.S. at 340; see also Milton Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 39 (1972) (reading *Snyder* thusly).

222. *Snyder*, 394 U.S. at 338.

223. 414 U.S. 291, 300 (1973).

level,<sup>224</sup> the decisions “rendered consumer class actions virtually nonexistent in federal courts,” as Ralph Nader complained.<sup>225</sup> This denial of a federal forum mattered to consumer advocates. At the time of *Snyder*, state class action law was so rudimentary that state courts were rarely a viable alternative for consumer protection litigation.<sup>226</sup> As the decade progressed, a number of states adopted versions of the new Rule 23,<sup>227</sup> and a couple of them favored plaintiffs even more than the federal rule did.<sup>228</sup> But the state court option left consumer advocates underwhelmed.<sup>229</sup> Importantly, virtually no state court was willing to exercise jurisdiction over nonresident class members, except when the conduct at issue was localized within the state.<sup>230</sup> In other words, consumer advocates generally could not bring multi-state class suits with significant regulatory consequences in state courts.

However prejudicial to the cause of consumers, different rulings in *Snyder* and *Zahn* could have created problems of institutional capacity for the federal courts. A stampede of consumer protection lawsuits into the federal courts, invited by lax diversity jurisdiction requirements and the rudimentary condition of state class action regimes,<sup>231</sup> would have turned federal judges into the country’s primary arbiters of state law-driven

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224. E.g., Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 14–20 (2006).

225. *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 95th Cong. 16 (1977) (statement of Ralph Nader); see also Christopher P. Bisgaard, Comment, *Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 UCLA L. REV. 1002, 1007–08 (1971).

226. Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718, 718 & n.3 (1979). For an exception, see *Daar v. Yellow Cab Co.*, 433 P.2d 732 (Cal. 1967).

227. Note, *supra* note 226, at 718 nn.7–8.

228. *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1324 n.22 (1976).

229. E.g., *State of the Judiciary and Access to Justice*, *supra* note 225, at 41 (statement of Thomas Ehrlich, President, Legal Services Corporation) (complaining that “class action relief is virtually impossible or is severely restricted” in “many” state court systems); Andrea R. Martin, Note, *Consumer Class Actions With a Multistate Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411, 1423 (1975) (reporting that, with two exceptions, no state court has “render[ed] a binding judgment in a consumer class action when there are members of the class residing outside its jurisdictional boundaries”); James Andrew Hinds, Jr., *To Right Mass Wrongs: A Federal Consumer Class Action*, 13 HARV. J. ON LEGIS. 776, 784 (1976) (“[M]any [state] courts have been loath to allow consumer class actions.”).

230. Allen R. Kamp, *The Multistate Consumer Class Action: Local Solution, National Problems*, 87 W. VA. L. REV. 271, 278 (1984); Note, *supra* note 226, at 719.

231. On the status of state class action regimes in the early years of Rule 23, see *Class Action and Other Consumer Protection Procedures*, *supra* note 143, at 36 (statement of Sen. Tydings).

consumer protection policy.<sup>232</sup> At the same time, the decisions hardly denied Rule 23 a regulatory role should Congress, the better body to set and calibrate regulatory objectives, federalize consumer protection policy. This is just what it was in the process of doing at the time of *Snyder* and *Zahn*.<sup>233</sup> A number of the new consumer protection laws contained private rights of action,<sup>234</sup> and some addressed the class treatment of claims explicitly.<sup>235</sup>

A particular episode, the ebbs and flows of Truth in Lending Act (TILA) litigation in the early part of the decade, highlights both the institutional challenges Rule 23 posed to federal judges and the pragmatic balancing strategy decision-makers deployed in response. As enacted in 1968, TILA allowed debtor-plaintiffs to recover a penalty of up to \$1,000 with no showing of actual damages if the lender-defendant did not make certain required disclosures.<sup>236</sup> Because plaintiffs did not have to establish either that the defendant injured them or that they suffered a particular quantum of harm, TILA claims made excellent candidates for class treatment.<sup>237</sup> Class actions proliferated.

This easy aggregation created a problem. Hundreds or thousands of debtors multiplied by the \$1,000 per debtor penalty created cases with millions on the line, even in instances when no one suffered any perceptible injury. An institutional dilemma involving judicial capacities for enforcement calibration and law reform followed. If judges certified these classes, lenders could face huge liabilities for technical errors. As Judge Marvin Frankel of the Southern District of New York wrote in his influential *Ratner v. Chemical Bank* decision of 1972,<sup>238</sup> a class judgment could mean “a horrendous, possibly annihilating punishment, unrelated to

232. For a defense of *Snyder* that fits with these claims, see Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186, 192–93 (1996).

233. Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 34 n.2 (1982).

234. E.g., Fair Credit Reporting Act, 15 U.S.C. § 1681n (2012).

235. Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (2012); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(e) (2012); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(1)(B) (2012).

236. 15 U.S.C. § 1640(a)(1) (2012); see also *Wilcox v. Commerce Bank of Kan. City*, 474 F.2d 336, 339 n.3 (10th Cir. 1973) (reprinting relevant part of TILA as enacted in 1968).

237. Cf. *Wilcox*, 474 F.2d at 343 (“[T]here is nothing in the Act itself, the Rule, or the notes of the Advisory Committee on Rules of Civil Procedure with respect to it which expressly or impliedly precludes class actions in this type of case.”).

238. *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972). See Comment, *The Truth in Lending Class Action*, 40 ALB. L. REV. 753, 765 (1976); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 763 n.9 (3d Cir. 1974) (citing cases).

any damage to the purported class or to any benefit to defendant . . . .”<sup>239</sup> But other judges worried that, if they denied class certification out of concern for over-regulation, they could usurp legislative and rulemaker prerogative, since TILA claims fit Rule 23 so neatly.<sup>240</sup> The situation also posed institutional identity difficulties. Brought by “near-nominal plaintiffs,” as Judge Sneed scoffed, these penalty-only lawsuits had no compensatory objective and instead treated courts as “part-time regulatory agenc[ies].”<sup>241</sup> Moreover, the *in terrorem* effect of class certification made trial inconceivable for any defendant with the slightest sensitivity to risk.<sup>242</sup> Out went ordinary expectations about possible endgames for litigation.

The lower federal courts overwhelmingly refused to certify TILA classes and thereby weakened the statute’s regulatory value.<sup>243</sup> Congress, in contrast, pursued a more balanced solution. In 1974, it capped the aggregate penalty obtainable in a class action at the lesser of \$100,000 or 1% of the defendant’s net worth,<sup>244</sup> manifestly to disavow decisions rejecting class certification but also to moderate TILA’s regulatory bite.<sup>245</sup> When the cap proved too low, Congress increased it to \$500,000 in 1976,<sup>246</sup> a change that seemed to strike a pretty good balance.<sup>247</sup> As with consumer protection law more generally, an institution with unquestioned

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239. *Ratner*, 54 F.R.D. at 416; see also *Garza v. Chi. Health Clubs, Inc.*, 56 F.R.D. 548, 549 (N.D. Ill. 1972) (denying class certification on grounds that “the minimum recovery would be devastating for a small company”); *Mathews v. Book-of-the-Month Club, Inc.*, 62 F.R.D. 479, 479–80 (N.D. Cal. 1974); *Linn v. Target Stores, Inc.*, 61 F.R.D. 469, 472 (D. Minn. 1973) (denying class certification motion and referring to the “potentially devastating effect on defendants”).

240. *Beard v. King Appliance Co.*, 61 F.R.D. 434, 440 (E.D. Va. 1973). This concern came up in other contexts. See *Roper v. Conserve, Inc.*, 578 F.2d 1106, 1114 (5th Cir. 1978) (insisting in another consumer protection context that the effect of a penalty on a defendant should be considered in the class certification determination only “in extreme cases”); *Schrader v. Selective Serv. Sys. Local Bd. No. 76 of Wis.*, 470 F.2d 73, 78 (7th Cir. 1973) (Eschbach, J., dissenting) (arguing that courts should not refuse to certify because of the effect of a judgment and instead seek a remedy in the rulemaking process).

241. *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 465 (9th Cir. 1973); see also *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164 (7th Cir. 1974) (observing that the point of TILA is regulatory).

242. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 761–62 (3d Cir. 1974).

243. CONG. RESEARCH SERV., CLASS ACTIONS BROUGHT IN FEDERAL COURTS UNDER SECTION 130 OF THE TRUTH IN LENDING ACT (1976) (compiling list of cases).

244. Pub. L. No. 93-495, Title IV, 408(a), 88 Stat. 1500 (1974); see also Joseph A. Dworetzky, Comment, *Truth in Lending and the Federal Class Action*, 22 VILL. L. REV. 418, 425 (1977).

245. S. REP. NO. 93-278, at 14–15 (1973).

246. S. REP. NO. 94-590, at 8 (1976); see also James K. LeValley & Richard K. Walker, *Truth-in-Lending Class Actions Under Amended Section 130*, 24 U. KAN. L. REV. 471, 478–82 (1976); *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114, 118 (5th Cir. 1975).

247. Margaret E. Murphy, Comment, *Class Actions Under the Truth in Lending Act*, 26 LOY. L. REV. 333, 341 (1980).

legitimacy to alter the substantive regime explicitly preserved some regulatory force for a TILA penalty class suit while relieving judges of the calibration difficulty and lessening the identity problem.

## 2. *Securities*

Although the Advisory Committee identified federal securities claims as proper Rule 23 fodder, they needed an adjustment before courts could aggregate them for class treatment. Some causes of action require proof that the investor relied on the misrepresentation,<sup>248</sup> and plaintiffs have to prove their damages. Because relevant evidence can differ from investor to investor, these elements create predominance and superiority problems for class certification. If necessary, individualized determinations of reliance would make classwide proceedings exceptionally unwieldy and inefficient.<sup>249</sup> Scrupulous concern that each class member prove his or her reliance would respect the preexisting substantive law and thus resonate with the adjectival conception. “Carried to its logical end,” however, as the Second Circuit observed in 1968, such evidentiary rigidity “would negate any attempted class action under” the securities laws.<sup>250</sup> Private litigation’s contribution to securities enforcement would disappear.

Openly concerned with regulatory efficacy,<sup>251</sup> federal courts used several techniques to deal with the reliance problem.<sup>252</sup> Courts bifurcated the proceedings, declaring that reliance issues could be adjudicated in follow-on, individualized processes,<sup>253</sup> or, as Jack Weinstein described them with wonderful ambiguity in an influential opinion, “equitable procedures, appropriate to the circumstances of [the] case . . . .”<sup>254</sup> Applied with “the importance of 10b-5 class actions as a weapon against securities fraud” in mind,<sup>255</sup> this strategy dodged the problem rather than solve it.<sup>256</sup>

248. For a brief discussion of the status of this issue under securities law of the time, see Lawrence D. Bernfeld, *Class Actions and Federal Securities Laws*, 55 CORNELL L. REV. 78, 84 n.43 (1969).

249. *In re Memorex Sec. Cases*, 61 F.R.D. 88, 97 & n.7 (N.D. Cal. 1973).

250. *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968); see also Richard O. Cunningham, Note, *Class Action Treatment of Securities Fraud Suits Under the Revised Rule 23*, 36 GEO. WASH. L. REV. 1150, 1156 (1968).

251. *E.g.*, *Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y. 1968).

252. See generally *Korn v. Franchard Corp.*, 456 F.2d 1206, 1212–13 (2d Cir. 1972) (describing these techniques).

253. *E.g.*, *Green*, 406 F.2d at 301; *Herbst v. Int’l Tel. & Tel. Corp.*, 65 F.R.D. 13, 19 (D. Conn. 1973); *Fogel v. Wolfgang*, 47 F.R.D. 213, 217 (S.D.N.Y. 1969).

254. *Dolgow*, 43 F.R.D. at 491.

255. *Green*, 406 F.2d at 299.

256. See *In re Memorex Sec. Cases*, 61 F.R.D. at 98 (making this point).

In theory, if defendants had insisted that each individual class member prove his or her reliance, the parties would have a great deal more to litigate, even after the resolution of common issues like materiality or misrepresentation. Predominance findings required for class certification could be difficult to justify. For reasonable litigants, however, these individualized processes would never materialize. Judge Frankel made explicit what his colleagues must have assumed, that “civilized litigants and attorneys find ways to settle individual claims where the questions of general application go against defendants.”<sup>257</sup>

The second technique involved the substantive alteration of the reliance requirement, a more principled solution but one that posed institutional problems. Spencer Williams, who continued to wield Rule 23 creatively (or abusively, depending on one’s perspective) throughout his career,<sup>258</sup> derived an “objective standard” for the reliance element.<sup>259</sup> Concerned for “the ultimate effectiveness of the security anti-fraud laws,”<sup>260</sup> he did so expressly to “preserve[] the class action procedure in [the] large securities case.”<sup>261</sup> More prominently, the Ninth Circuit in *Blackie v. Barrack* followed the trail blazed by pioneering district judges when it adopted the fraud-on-the-market doctrine, creating in effect an irrebuttable presumption of reliance upon proof of the misstatement’s materiality.<sup>262</sup> This move had a basis in economic theory.<sup>263</sup> But the desire to certify a class clearly motivated the *Blackie* court and a number of the other fraud-on-the-market enthusiasts.<sup>264</sup> Some wondered whether the Enabling Act’s

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257. *Shelter Realty Corp. v. Allied Maint. Corp.*, 442 F. Supp. 1087, 1089 (S.D.N.Y. 1977). For the same sentiment, registered in a different context but dealing with the same problem, see *Neely v. United States*, 546 F.2d 1059, 1070 (3d Cir. 1976). See also Note, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337, 346 (1971); AMERICAN COLLEGE, *supra* note 162, at 9; John N. Hauser, *The Class Action Struggle Continues: The Problems Eisen Ignored*, 44 ANTITRUST L.J. 75, 81 (1975); Hugh Latimer, *Damages, Settlements and Attorneys’ Fees in Antitrust Class Actions*, 49 ANTITRUST L.J. 1553, 1553 (1980).

258. See generally *In re N. Dist. of Cal. Dalkon Shield IUD Products Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981).

259. *In re Memorex Sec. Cases*, 61 F.R.D. at 100 (reasoning that with an objective standard of reliance, “the court (and jury) is freed from the overwhelming task of examining the subjective intent of each class member”).

260. *Id.* at 98 (interior quotation marks omitted) (alterations omitted).

261. *Id.* at 99.

262. *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975); see also *Tucker v. Arthur Andersen & Co.*, 67 F.R.D. 468, 480 (S.D.N.Y. 1975).

263. For a slightly later discussion of the theoretical basis for fraud-on-the-market doctrine, see generally Note, *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143 (1982).

264. In most if not all of the early decisions adopting the fraud-on-the-market doctrine, courts made this move as part of their class certification analyses. *E.g.*, *Blackie*, 524 F.2d at 905–08; *Tucker*, 67 F.R.D. at 477–81; *Siegel v. Realty Equities Corp. of N.Y.*, 54 F.R.D. 420, 424–25 (S.D.N.Y. 1972); *In re U.S. Fin. Sec. Litig.*, 64 F.R.D. 443, 499–501 (S.D. Cal. 1974); see also Note, *supra* note 263, at

delegation of rulemaking power permitted this reformation of the substantive law in the name of procedural facilitation.<sup>265</sup> This objection drew glib responses from several judges, who maintained that they would simply extend this substantive alteration to all cases and not just class actions.<sup>266</sup>

Both techniques for dealing with the reliance problem minimized the relevance of individual investor circumstances and focused the litigation entirely on the defendant's undifferentiated conduct toward the aggregate,<sup>267</sup> an orientation consistent with the regulatory conception. The disappearing individual litigant, however, created institutional integrity problems. The bifurcation strategy depended on the tacit acknowledgment that securities cases would settle upon the resolution of common issues. The bootstrap strategy required courts to craft substantive securities policy. Both deemed the individual plaintiff irrelevant, a perspective in conflict with a traditional conception of the court's role. Also, judicial willingness to depart from substantive and procedural norms may have contributed to an uptick in securities filings in the early 1970s, and with it the prospect of regulatory overkill.<sup>268</sup>

The Supreme Court's 1974 *Eisen v. Carlisle & Jacquelin* decision has a certain logic in light of these institutional concerns. The Court held that, upon certification, the class representative must mail notice to all class members whose addresses are known, and that he or she must bear the cost of this notice.<sup>269</sup> The Court affirmed an anti-class action jeremiad from the Second Circuit,<sup>270</sup> and for this reason and others its decision

1159 (observing that the desire to certify classes was "an unstated rationale for the fraud-on-the-market decisions").

265. *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1343 (9th Cir. 1976) (Sneed, J., dissenting); Adolf Homburger, *Private Suits in the Public Interest in the United States of America*, 23 *BUFF. L. REV.* 343, 371 (1974); Marvin Schwartz, *The Class Action: Its Incidence and the Eisen Cases*, 29 *BUS. LAW.* 155, 156 (1973); Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 *S. CAL. L. REV.* 842, 866 (1974); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 *J. LEGAL STUD.* 47, 54 (1975).

266. *Blackie*, 524 F.2d at 908; *Tucker*, 67 F.R.D. at 480.

267. Mordecai Rosenfeld, *The Impact of Class Actions on Corporate and Securities Law*, 1972 *DUKE L.J.* 1167, 1179.

268. Barbara Ann Banoff & Benjamin S. Duval, Jr., *The Class Action as a Mechanism for Enforcing the Federal Securities Laws: An Empirical Study of the Burdens Imposed*, 31 *WAYNE L. REV.* 1, 45-46 (1984); 1991 *Federal Court Class Action Statistics*, 14 *CLASS ACTION REP.* 284, 285 (1991).

269. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

270. *Id.* at 179. *see also Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1022 (2d Cir. 1973) (Oakes, J., dissenting) (commenting on the hostility the majority opinion demonstrated toward the class action).

struck many as an intemperate attack on Rule 23.<sup>271</sup> Hardly compelled by precedent, the notice requirement was unnecessary to ensure good representation for class members.<sup>272</sup> Moreover, *Eisen* created a steep hurdle for the prosecution of some class actions. Because plaintiffs' lawyers would blanch at fronting the costs of individualized notice, *Time Magazine* reported in 1974, "class actions on behalf of large numbers of plaintiffs who have each suffered similar small losses will have practically no chance of succeeding."<sup>273</sup>

*Eisen* has won few converts among proceduralists over the years.<sup>274</sup> But it is not altogether illogical if read as a decision about enforcement calibration for private securities litigation, an obvious concern for several justices in the mid-1970s.<sup>275</sup> An expensive notice requirement can control the volume and type of securities litigation. Faced with the high cost of

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271. E.g., *The Antitrust Improvements Act of 1975: Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 94th Cong. 353 (1975) (statement of Joseph L. Alioto); *Citizens' Access to the Courts Act of 1978: Hearing Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Comm. on the Judiciary*, 95th Cong. 14–15 (1978) (statement of Andrew Feinstein, Public Citizen).

272. For theoretical criticism of *Eisen*, see generally Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97. For doctrinal criticism, see, for example, Abram Chayes, Foreword, *Public Law Litigation and the Supreme Court*, 96 HARV. L. REV. 4, 31–32 (1982). Whether it was consistent with committee member expectations is unclear. Compare Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 396 (1967) (arguing for a different interpretation of Rule 23(c) than what the Court adopted in *Eisen*), with Letter from Patrick Higginbotham to Members of the Advisory Committee on Civil Rules (May 8, 1995), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV1995-11.pdf> (quoting John Frank as stating that "[t]he 1966 committee clearly and unambiguously thought (b)(3) required notice").

273. *Taking Mass from Class*, TIME MAG., June 10, 1974; see also Neil J. Cohen, *Eisen III: Its Significance to Class Actions in General*, N.Y.L.J., June 26, 1973, at 1; Linda Charlton, *Impact of Ruling by Court Studied*, N.Y. TIMES, May 30, 1974, at 29; *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 95th Cong. 710 (1977) (statement of the Society of American Law Teachers). On notice costs and class actions, see D. Rhett Brandon, Note, *Notice Cost Problems Under Rule 23(b)(3) and (c)(2) After Oppenheimer Fund, Inc. v. Sanders*, 1979 DUKE L.J. 882, 883–86.

274. E.g., Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 338 (2011); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2019 (2007); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 27–33 (1991); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (describing the result in *Eisen* as "peculiar"); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 739 (1975).

275. One year after *Eisen*, in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the Court expressed a great deal less desire for private enforcement of the securities laws than it had in *J.I. v. Borak*, 377 U.S. 426 (1964), a decade earlier. See also E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1581–82 (2004).

mailing letters to thousands of class members, only sufficiently-capitalized lawyers can bring cases. The pool of plaintiffs' lawyers capable of handling aggregate litigation shrinks, limiting the overall number of class suits. Notice expenses also can operate as a crude screen for quality, since a strike suit with nuisance value becomes less attractive as the anticipated costs of litigation rise. *Eisen* also makes sense as a matter of institutional identity. Notice to all known class members makes them at least marginally relevant as litigants, while a lesser notice obligation signals the second-class status of individual remediation as a litigation goal. In this manner, *Eisen* lessened the gap between class actions and traditional litigation.<sup>276</sup>

### 3. Antitrust

Private antitrust litigation had particular appeal as a substitute for public administration in the late 1960s, when criticism of the federal agencies responsible for antitrust enforcement, particularly the Federal Trade Commission, reached a fever pitch.<sup>277</sup> Had an argument defense-side advocates urged early in Rule 23's modern era gained traction, however, the antitrust class action would have proven stillborn. A Clayton Act claim requires that the plaintiff establish the defendant's illegality, his injury, and his damages.<sup>278</sup> While the first element concerns the defendant's conduct and often does not vary from purchaser to purchaser, the latter two address the effects of the defendant's behavior on particular plaintiffs. Milton Handler seized on these circumstances in a famous article attacking the antitrust class action. This "complex of particularized fact issues . . . [has] to be determined for each class member," he argued, and the defendant has a Seventh Amendment right to a jury trial before any individual plaintiff could recover anything.<sup>279</sup> One of two results would follow if a court nonetheless certified a class. A court would drown in "either a massive trial lasting for years or a multitude of mini-trials,"

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276. For a recognition from the time of *Eisen*'s significance along these lines, see *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 412 (2d Cir. 1975).

277. On the FTC, see Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969); Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777 (1971). On the Department of Justice Antitrust Division, see MARK J. GREEN ET AL., THE CLOSED ENTERPRISE SYSTEM (1972); *Trust-Busting: Now it's a Game Everybody Can Play*, FORBES, Oct. 1, 1973, at 50.

278. 15 U.S.C. § 15 (2006).

279. Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 7–8 (1971).

imposing an unacceptable burden on the court if the defendant insisted on litigating.<sup>280</sup>

More realistically, Handler continued, the defendants will seek to settle once the plaintiffs establish that they acted unlawfully.<sup>281</sup> Some pragmatic courts made just this assumption, that defendants would settle and thereby render concern for individualized issues academic, to justify the certification of antitrust classes.<sup>282</sup> To someone committed to an adjectival conception of Rule 23, this result was a travesty. “Any device which is workable only because it utilizes the threat of unmanageable and expansive litigation to compel settlement is not a rule of procedure,” Handler fulminated, “it is a form of legalized blackmail.”<sup>283</sup>

If accepted, Handler’s argument would have killed off the antitrust class action entirely. Defendants made variants of the argument from the modern era’s start, but courts refused to bite.<sup>284</sup> At first, they soft-pedaled worries like his with suggestions of bifurcated trial plans<sup>285</sup> and vague proposals that individual claims be “processed administratively.”<sup>286</sup> Concern for the regulatory efficacy of antitrust laws—a need to implement the “Sherman Act as an economic ‘charter of freedom,’” as Judge (and Advisory Committee member) Charles Wyzanski wrote—clearly motivated these decisions.<sup>287</sup>

Over time, an arguably more principled pattern emerged, one that responded to Handler’s objections with a pragmatic emphasis on evidentiary reality over legal rigidity. Formally, a defendant in a case involving fungible goods or services distributed through undifferentiated channels could require all class members to establish their injury and damages in jury trials after a common showing of illegality. But no

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280. *Id.* at 8.

281. *Id.*

282. *Shelter Realty Corp. v. Allied Maint. Corp.*, 442 F. Supp. 1087, 1089 (S.D.N.Y. 1977).

283. Handler, *supra* note 279, at 9. A number of judges found Handler’s critique compelling. *E.g.*, *Eisen v. Carlise & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973) (quoting this argument); *Ungar v. Dunkin’ Donuts of Am., Inc.*, 531 F.2d 1211, 1222 n.8 (3d Cir. 1976) (quoting Handler).

284. *E.g.*, *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 798 (10th Cir. 1970); *Phila. Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 457 (E.D. Pa. 1968).

285. *Windham v. Am. Brands, Inc.*, 539 F.2d 1016, 1021–22 (4th Cir. 1976) (approving the district court’s plan to bifurcate the liability issue from the injury and damages issues by invoking the district judge’s “common sense, skill, and discretion”).

286. *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 283 (S.D.N.Y. 1971).

287. *Windham*, 539 F.2d at 1021; *Ungar v. Dunkin’ Donuts of Am., Inc.*, 68 F.R.D. 65, 150 (E.D. Pa. 1975) (“The chief policy argument in favor of a hospitable attitude toward such class actions is that they tend to reinforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement . . . . [T]he revised Rule 23 may be seen as an extension . . . of the deterrent policies of . . . § 4 of the Clayton Act.”) (citation omitted) (internal quotation marks omitted).

sensible defendant would waste resources doing so once evidence of injury and damages, essentially uniform for all plaintiffs, established a generic class member's right to recover. Under these circumstances, a defendant could get a meaningful evidentiary evaluation of its liability, without individual trials, before settling. For cases of this ilk, courts allowed that injury and damages elements could be established mechanistically, without individual hearings, and permitted certification.<sup>288</sup> Cases involving more idiosyncratic transactions, in contrast, could not proceed as class actions.<sup>289</sup> "The general interest of society at large" could not justify generalized, generic proof of damages and injury—an abstraction from individual litigant circumstances and a substantive alteration of the Clayton Act's requirements—when the defendant's liability could not be meaningfully established without individualized proof.<sup>290</sup>

Issues of judicial institutional integrity surfaced in another antitrust issue in the 1970s. In certain instances, the nature of the market and the size of claims involved make the distribution of damages to antitrust class members extremely difficult if not impossible. In the late 1960s, for example, taxicabs in Los Angeles fixed prices. Since customers rarely kept receipts, and since drivers did not record their identities, getting compensation to victims was essentially impossible.<sup>291</sup> A court could justifiably deny class certification because of this problem.<sup>292</sup>

Fluid recovery is one response. The court calculates the aggregate damages the defendant caused. It then orders the defendant to offer its service or product at a discounted price going forward, until it has returned the overcharge to purchasers. New customers will get an undeserved discount, and victims who never use the defendant's product or service again will not recover anything. Repeat customers, however, will benefit from this discount and thereby recoup their damages, albeit indirectly.<sup>293</sup>

288. *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 324 (5th Cir. 1978); *Windham v. Am. Brands, Inc.*, 565 F.2d 59 at 68 (4th Cir. 1977); *Technical Learning Collective, Inc. v. DBAG*, Civ. No. N-77-1443, 1979 WL 1718, at \*10-14 (D. Md. July 2, 1979); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 120 (C.D. Cal. 1978).

289. *In re Hotel Tele. Charges*, 500 F.2d 86, 89 (9th Cir. 1974); *Windham*, 565 F.2d at 67; *Blue Bird Body Co.*, 573 F.2d at 318.

290. *In re Hotel Tele. Charges*, 500 F.2d at 89.

291. E.g., Charlotte E. Hemker-Smith, Note, *Consumer Class Actions in California: A Practical Approach to the Problem of Notice*, 7 PAC. L.J. 811, 840-41 (1976) (describing *Daar v. Yellow Cab*).

292. E.g., *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1017 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

293. E.g., *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 264-65 (S.D.N.Y. 1971).

Whatever its economic logic, the fluid recovery response to the manageability problem poses significant capacity and identity challenges. Fluid recovery not only jettisons the damages element entirely from antitrust claims, it also decouples the remedy from a particular class member's entitlement to compensation. It amounts to substantive law reform and sidelines individualized compensation as a central litigation objective.<sup>294</sup> Most lower federal courts followed the Second Circuit's *Eisen* decision and rejected fluid recovery in the 1970s, chiefly on grounds that courts could not allow the need for class certification to distort the substantive law so nakedly.<sup>295</sup> The Seventh Circuit, however, refused to reject fluid recovery so categorically in a decision issued at the very end of this period of Rule 23's history.<sup>296</sup> It made the remedy's availability explicitly contingent upon regulatory need, as expressed in the substantive law. If the underlying law placed a premium on deterrence objectives, the Seventh Circuit held, then courts should be more inclined to permit this deviation from litigation norms.<sup>297</sup>

Another response to the decisions against fluid recovery also fits the pragmatic balancing strategy. Judicial unwillingness to allow fluid recovery spurred Congress, indisputably the better institution to alter substantive rights, to act.<sup>298</sup> The Senate version of what became the Hart-Scott-Rodino Antitrust Improvements Act of 1976 expressly authorized fluid recovery in private antitrust suits.<sup>299</sup> The statute as enacted did not include this provision, but Congress did amend the Clayton Act to authorize state attorneys general to bring suits to seek aggregate damages and thereby shoulder some of the regulatory burden private litigants could not.<sup>300</sup>

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294. Simon, *supra* note 147, at 386; Handler, *supra* note 221, at 36.

295. *Windham*, 565 F.2d at 72 & n.41; *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1635 (1976); Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 407 (1982).

296. *Simer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981).

297. *Id.* at 676.

298. See H.R. REP. NO. 94-499, at 6 (1975) (observing that *Eisen's* manageability holding requires a legislative response).

299. Milton Handler & Michael D. Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 YALE L.J. 626, 632 (1976) (describing legislative history).

300. 15 U.S.C. § 15c (2006).

#### 4. *Employment Discrimination*

The pervasive gender and racial discrimination in the American workplace of the late 1960s overwhelmed the capacity of federal agencies to respond.<sup>301</sup> For a number of reasons, individual lawsuits were an inadequate substitute.<sup>302</sup> Given these circumstances, regulatory efficacy, not the particulars of individual litigants, evidently mattered most to the federal courts that superintended Title VII litigation in the late 1960s and early 1970s. They “mold[ed] class action practice” in Title VII cases, a Third Circuit judge observed in 1979, “so as best to effectuate the policies underlying the [substantive law]”.<sup>303</sup> Antidiscrimination litigation was private in ““form only,”” the Fifth Circuit declared in 1968, because class actions ““vindicate[ed] a policy that Congress considered of the highest priority,””<sup>304</sup> and because private litigation had to compensate for

301. Black men earned 42% of their white counterparts in 1965. Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 4 (1987). In 1968, women earned about 60% of what men earned. The black unemployment rate was twice that of whites in 1970. COMM. ON LABOR AND PUB. WELFARE, U.S. SENATE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 194–95 (Comm. Print 1972). That year blacks were 10% of the labor force but held only 3% of white collar jobs. *Id.* at 1294, 1430. Median family income for blacks was 60% of whites’. BUREAU OF LABOR STATISTICS, THE SOCIAL AND ECONOMIC STATUS OF NEGROES IN THE UNITED STATES, 1970, CURRENT POPULATION REPORTS, SERIES P-23, No. 38, at 64 (July 1971). By the early 1970s the EEOC had demonstrated little ability to use its non-coercive powers effectively. COMM. ON LABOR AND PUBLIC WELFARE, U.S. SENATE, *supra*. The Department of Justice, which alone among agencies could bring coercive actions, filed only 76 cases from 1966 to 1972. U.S. COMM’N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1977, at 273–74 (1977).

302. U.S. COMM’N ON CIVIL RIGHTS, JOBS AND CIVIL RIGHTS: THE ROLE OF THE FEDERAL GOVERNMENT IN PROMOTING EQUAL OPPORTUNITY IN EMPLOYMENT AND TRAINING 48 (1969) (describing why black employees in the South are reluctant to go forward individually to complain about discrimination); *see also* Gardner v. Westinghouse Broad. Co., 559 F.2d 209, 222 (3d Cir. 1977) (Gibbons, J., dissenting) (commenting on the inadequacies of individual actions to remediate discrimination).

303. Scott v. Univ. of Del., 601 F.2d 76, 93 (3d Cir. 1979) (Adams, J., concurring); *see also* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 469 (9th Cir. 1973); *see* Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868, 885–86 (1979) (arguing that courts used an “entity class” concept in Title VII cases); Donald W. Anderson, *Title VII Class Actions: The End of the Era of the Irrelevant Plaintiff*, 36 MERCER L. REV. 907, 909 (1985); Scott, 601 F.2d at 93 (Adams, J., concurring); Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir. 1977); Huff v. N.D. Cass Co. of Ala., 485 F.2d 710, 713 (5th Cir. 1973) (“The federal courts have a particularly vital role in cases such as this. To them alone Congress has assigned the power to enforce compliance with the strictures against racial discrimination in employment. . . .”); Rodriguez v. E. Tex. Motor Freight, 505 F.2d 40, 50 (5th Cir. 1974); *see also* Larry W. Bridgesmith, *Representing the Title VII Class Action: A Question of Degree*, 26 WAYNE L. REV. 1413, 1429 (1980) (observing that “close attention to the elements of Rule 23 was deemed secondary to the formation of class-wide remedies”).

304. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968) (citation omitted); *see also* Gay v. Waiters’ and Dairy Lunchmen’s Union, 549 F.2d 1330, 1333 (9th Cir. 1977).

inadequate public administration.<sup>305</sup> “[C]laims under Title VII involve the vindication of a major public interest,” the D.C. Circuit likewise insisted, “and . . . any action under the Act involves considerations beyond those raised by the individual claimant.”<sup>306</sup> This emphasis spurred several developments consistent with the regulatory conception of Rule 23. First, courts paid little heed to the actual wishes of class members. The public’s interest in the vindication of the civil rights laws could justify class certification over objections from class members who complained about inadequate representation.<sup>307</sup>

Second, and perhaps more significantly, most lower federal courts shoehorned back pay claims into Rule 23(b)(2), a provision designed for class actions seeking injunctive or declaratory relief.<sup>308</sup> As an equitable remedy, back pay is formally distinguishable from claims for money damages, which trigger Rule 23(b)(3)’s application. But each plaintiff’s entitlement to back pay still turns on proof of causation and harm, individualized elements that raise the sort of case management concerns that Rule 23(b)(3)’s predominance and superiority requirements address.<sup>309</sup> Courts ignored this functional equivalence and justified Rule 23(b)(2) treatment with strikingly suspect logic.<sup>310</sup> Doing so facilitated the prosecution of Title VII class actions in two ways. Proposed classes did not have to surmount the predominance and superiority barriers to certification. Also, since Rule 23 requires notice only for (b)(3) class

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305. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1968).

306. *Hackley v. Roudebush*, 520 F.2d 108, 151 n.177 (D.C. Cir. 1975).

307. *Rodriguez*, 505 F.2d at 50–51 (finding representation adequate even though members of the union on whose behalf the action was brought voted against the relief sought); *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 874 (8th Cir. 1977) (permitting a case to go forward as a class action even though union members voted 83-0 against the case); *Int’l Woodworkers of Am., AFL-CIO, CLC v. Ga.-Pac. Corp.*, 568 F.2d 64, 67 (8th Cir. 1977). *But see* *Davis v. Roadway Express, Inc.*, 590 F.2d 140, 144 (5th Cir. 1979).

308. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 341 (10th Cir. 1975).

309. *Paddison v. Fid. Bank*, 60 F.R.D. 695, 698 (E.D. Pa. 1973) (“Style it what you will, back pay disputes raise all the traditional (b)(3) problems.”). The authors of the 1966 revision did not expect that any type of claim for monetary compensation could proceed pursuant to Rule 23(b)(2). Transcript, *supra* note 85, at 62 (statement of Albert Sacks) (declaring that Rule 23(b)(2) “is not issued with any thought of . . . a judgment which in effect orders the payment of money”).

310. *Robinson*, 444 F.2d at 802; *see also* *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983) (quoting *Johnson v. Ga. Highway Express*, 417 F.2d 1122, 1125 (5th Cir. 1969)); *cf.* George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 24 (1983) (describing this justification for Rule 23(b)(2) treatment of back pay claims as “surprisingly weak”); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981) (expressing doubt as to the rationale to allow back pay claims in under Rule 23(b)(2)).

members, (b)(2) certification lowered the cost of litigation.<sup>311</sup> To deal with the individual causation and harm elements of back pay claims, courts suggested damages scheduling or presumptions that were irrebutable in all but name.<sup>312</sup> These techniques kept the litigation focused on the defendant's aggregate conduct, not individual litigant circumstances.

Third, federal courts certified "across-the-board" classes, at least for most of the 1970s. A class member alleging discrimination in hiring, for example, could represent alleged victims of the employer's promotion decisions and thereby attack the entirety of its human resources practices.<sup>313</sup> Courts necessarily had to abstract away from individual circumstances in order to certify these classes. Rule 23(a)(2), for example, requires that the class members' claims share a common issue of law or fact. By one interpretation, commonality requires that all class members' claims bear significant resemblance.<sup>314</sup> For across-the-board classes, however, the mere allegation that "the 'Damoclean threat of a racially discriminatory policy'" hung over everyone's head sufficed, no matter how different the circumstances of an applicant refused a job versus an employee denied a promotion.<sup>315</sup>

Fueled by these and other applications of Rule 23 that deemphasized individual litigant circumstances,<sup>316</sup> the Title VII class action engine helped drive the social reconstruction of the American workplace in the 1970s.<sup>317</sup> In one important instance, however, a court imbued with regulatory zeal pushed too far. In *Rodriguez v. East Texas Motor Freight*

311. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 254 (3d Cir. 1975). The avoidance of notice costs after *Eisen* was important, given that the NAACP prosecuted most Title VII cases. NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* 86 (2006).

312. *Pettway*, 494 F.2d at 260–63; *United States v. U.S. Steel Corp.*, 520 F.2d 1043, 1055–56 (5th Cir. 1975).

313. Donald W. Anderson, *Title VII Class Actions: The End of the Era of the Irrelevant Plaintiff*, 36 *MERCER L. REV.* 907, 912 (1985); *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57, 65 (5th Cir. 1970); Michael Fischl, Comment, *The Proper Scope of Representation in Title VII Class Actions: A Comment on East Texas Motor Freight System, Inc. v. Rodriguez*, 13 *HARV. C.R.-C.L. L. REV.* 175, 177 (1978).

314. *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463–64 (10th Cir. 1974).

315. *Johnson v. Ga. Highway Express*, 417 F.2d 1122, 1124 (5th Cir. 1969); see also *U.S. Fid. and Guar. Co. v. Lord*, 585 F.2d 860, 871 (8th Cir. 1978); Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 *COLUM. HUM. RTS. L. REV.* 1, 13 (1987).

316. For example, individual class members did not have to file charges with the EEOC provided that the class representative did. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). Also, courts did not require any real showing that the alleged class met the numerosity threshold for certification. *Horn v. Assoc. Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977).

317. On the effectiveness of Title VII litigation during the 1970s, see, for example, Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 *AM. POL. SCI. REV.* 483, 490–95 (2003); Blumrosen, *supra* note 301, at 1–4; MacLean, *supra* note 86, at 76–113; PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 90–94* (2008).

*Systems, Inc.*, Mexican-American truck drivers sued their employer, a Texas trucking company, alleging that they were not promoted because of their race.<sup>318</sup> Although they styled their suit as a class action, the plaintiffs never filed a class certification motion, and they stipulated at trial that they were litigating only their own claims.<sup>319</sup> The plaintiffs lost at trial when the court ruled that they were not eligible for promotions and thus suffered no Title VII injury.<sup>320</sup> On appeal, the Fifth Circuit certified an across-the-board class *sua sponte* despite conflicting preferences among classes of employees and applicants, and despite the individual plaintiffs' loss below. It then directed judgment in the class's favor based on statistical evidence showing disparate patterns in hiring and promotion.<sup>321</sup>

From a regulatory perspective, the Fifth Circuit's decision was unremarkable. The statistics suggested a problem, and the court responded. The argument that the Fifth Circuit stayed within its proper institutional boundaries is harder to maintain. The case before the Fifth Circuit was headless, since no class member replaced the named class representatives with their meritless claims. The court's decision manifested little concern for the individual identities of class members. The Fifth Circuit also assumed the litigants' role by imposing class certification on them, and it entered judgment in the class's favor even though the district court's findings of fact favored the defendant.

The Supreme Court in 1977 reversed with a decision pulling Title VII litigation toward the adjectival side of the divide.<sup>322</sup> Class representatives, the Court held, must be members of the class they purport to represent.<sup>323</sup> Real litigants must be joined to the case, and they must "possess the same interest and suffer the same injury as the class members."<sup>324</sup> Some commitment to procedural regularity has to temper the desire to wield Rule 23 as a weapon against systemic discrimination in the workplace.<sup>325</sup> The "across-the-board" class action limped along for a few years after

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318. *Rodriguez v. E. Tex. Motor Freight, Inc.*, No. SA-71-CA-302, 1973 WL 200 (W.D. Tex. 1974).

319. *Id.*

320. *Id.*

321. *Rodriguez v. E. Tex. Motor Freight*, 505 F.2d 40, 52 (5th Cir. 1974).

322. *E. Tex. Motor Freight Sys., Inc., v. Rodriguez*, 431 U.S. 395 (1977).

323. *Id.* at 403-04.

324. *Id.* at 403 (internal quotation marks omitted).

325. *Id.* at 405 ("[S]uits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. . . . But careful attention to the requirements of [Rule 23] remains nonetheless indispensable.").

*Rodriguez*, permitted in some circuits but not in others.<sup>326</sup> It ended unequivocally in 1982 when the Supreme Court decided *General Telephone Co. of the Southwest v. Falcon*.<sup>327</sup>

### C. The Stable Federal Class Action

In a number of important ways, class action doctrine remained muddled by the end of the 1970s.<sup>328</sup> The contest over the proper conception of Rule 23 persisted.<sup>329</sup> Doctrinal confusion and the unbridged divide over what exactly Rule 23 was for would hardly seem the stuff of a stable area of law. Nonetheless, when the Carter Administration tried to do something about the federal class action, few lawyers of any stripe lent their support. Courts have “now achieved a measure of stability and consensus in dealing with class actions[,]” a corporate lobbyist maintained.<sup>330</sup> A prominent plaintiffs’ lawyer agreed that Rule 23 “has, in the main, worked well.”<sup>331</sup> By almost any measure, the use of Rule 23 in the federal courts had stabilized. Several reasons why this was so were historically-contingent, but others shed light on good governance strategies for a device pulled between two poles and the competing values each one stands for.

326. Compare *Hill v. W. Elec. Co.*, 596 F.2d 99, 101–02 (4th Cir. 1979) (reading *Rodriguez* to reject the across-the-board class action), with *Falcon v. Gen. Tel. Co. of the Sw.*, 626 F.2d 369, 375 (5th Cir. 1980) (reading *Rodriguez* to permit across-the-board class actions), *vacated*, 457 U.S. 147 (1982).

327. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982).

328. Sometimes the commonality requirement in Rule 23(a)(2) posed a hurdle to class certification, while other times it was inconsequential. Compare *Bradford v. Sears, Roebuck & Co.*, 673 F.2d 792, 795–96 (5th Cir. 1982) (finding commonality problems with certification), with *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) (insisting that the “threshold” for a commonality holding “is not high”). The predominance inquiry remained confused. *Payton v. Abbott Labs*, 83 F.R.D. 382, 391 (D. Mass. 1979). Whether “across-the-board” classes could be certified in employment discrimination cases remained an open question until the Supreme Court decided the issue in 1982. See *supra* note 325 and accompanying text.

329. See, e.g., *Greenhaw v. Lubbock Cnty. Beverage Ass’n*, 721 F.2d 1019, 1024 (5th Cir. 1984) (“We acknowledge that Rule 23 may galvanize claims that would never have been made and thus foster a litigious attitude that needs no fuel. On the other hand, the class device is an enforcing mechanism for congressionally sanctioned goals.”).

330. *Reform of Class Action Litigation Procedures: Hearings Before the Subcomm. on Judicial Machinery of the Comm. on the Judiciary*, 95th Cong. at 106, 117 (1978).

331. *Id.* at 419.

### 1. Measures of Stability

No good, systematic data regarding Rule 23's use in the 1970s and into the 1980s exist.<sup>332</sup> What data the Administrative Office of the U.S. Courts did collect show significant decreases in filing rates in the late 1970s and early 1980s, except for securities class actions.<sup>333</sup> These numbers hardly speak for themselves, even if they were robust. They suggest, for example, that plaintiffs filed many fewer antitrust class actions. But no statistician has attempted to disentangle the effect of changing procedural doctrine from substantive developments,<sup>334</sup> and the data's poor quality questions the wisdom of any such exercise.

A number of more indirect measures confirm this stabilization in class action law and politics by the end of the 1970s. The tepid response the Carter Administration bill elicited from all players in the class action game is one indicator. Also, none of the major decision-makers with responsibility for class action governance felt compelled to do much of anything after the decade ended. Between 1980 and 1997, the Supreme Court issued only two decisions with lasting importance for class action doctrine.<sup>335</sup> *Falcon* in 1982 confirmed what several circuits thought *Rodriguez* had already accomplished in 1977.<sup>336</sup> The 1985 decision in *Phillips Petroleum v. Shutts* approved a jurisdictional understanding about which, at least in the federal courts, there was "never any question" in the

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332. The Administrative Office of the U.S. Courts kept data on class action filings starting in the early 1970s. *E.g.*, 1991 *Federal Court Class Action Statistics*, 14 CLASS ACTION REP. 284, 285 (1991). But these data were so incomplete as to prevent the Federal Judicial Center from completing a planned empirical study of Rule 23 in the early 1990s. See MINUTES, MEETING OF THE FEDERAL CIVIL RULES ADVISORY COMMITTEE 5 (1995), in 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 195 (1997), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol1.pdf>.

333. 1991 *Federal Court Class Action Statistics*, *supra* note 332, at 285 (1991).

334. These would include *Illinois Brick Co. v. Illinois*, which denied antitrust standing to indirect purchasers and thus shrank the pool of prospective class action plaintiffs considerably. 431 U.S. 720 (1977). See *In re Consolidated Pretrial Proceedings, etc.*, 523 F. Supp. 1116, 1119 (C.D. Cal. 1981) (commenting on *Illinois Brick's* impact on certain types of class actions). They would also include *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which lessened the scrutiny courts afford vertical restraints. On changing antitrust doctrine starting in the late 1970s, see generally E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1607 (2004).

335. There were other decisions of lesser significance, especially for class action doctrine. *E.g.*, *Marek v. Chesny*, 473 U.S. 1 (1985).

336. *E.g.*, *Hill v. W. Elec. Co.*, 596 F.2d 99, 101 (4th Cir. 1979) (reading *Rodriguez* as precluding across-the-board class actions).

1970s.<sup>337</sup> Congress made a couple of minor adjustments to class action practice in a couple of substantive areas during the 1980s.<sup>338</sup> It did not consider a bill as thoroughgoing as the Carter Administration's, and after that effort fifteen years would pass before Congress approved significant class action reform.<sup>339</sup> The Advisory Committee in 1982 voted "to do nothing" with respect to Rule 23, "but let the matter simmer . . . ."<sup>340</sup> In 1985, the Litigation Section of the American Bar Association sent a set of recommendations for wholesale class action reform, which the group had labored over for years, to the committee. They languished unstudied until 1990.<sup>341</sup> Even minor suggestions found no audience. When Judge Weinstein proposed a tweak to Rule 23 in 1985,<sup>342</sup> the committee did not discuss it until 1989.<sup>343</sup>

The temperature of judicial rhetoric also cooled in the 1980s. The 1970s were a time of crisis, if the tone of decision-after-decision is any indicator. Judges worried that Rule 23 threatened "a wholesome degree of difference between the judicial and administrative functions."<sup>344</sup> They regretted how "[c]lass actions have sprouted and multiplied like the leaves of the green bay tree,"<sup>345</sup> and one speculated whether "the Rule 23(b)(3)

337. *Robertson v. Nat'l Basketball Ass'n*, 413 F. Supp. 88, 90 (S.D.N.Y. 1976); *see also* *Shutts v. Phillips Petroleum Co.*, 567 P.2d 1292 (Kan. 1977) (describing the federal courts as "relatively untroubled" about the exercise of jurisdiction over non-resident class members).

338. Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 52 (1984) (describing legislation limiting Legal Service Corporation lawyers' abilities to bring class actions).

339. A search of the "congressional publications" database within Lexis Congressional Universe for the time period of Jan. 1, 1981, through Jan. 1, 1990, yielded 26 documents. (1980 was excluded because a number of documents about the Carter Administration's bill, proposed in 1978, were released that year.) In comparison, a search for Jan. 1, 1971, through Jan 1, 1980, resulted in 82 hits.

340. ADVISORY COMM. ON CIVIL RULES, SUMMARY OF MEETING 10 (May 27–28, 1982), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-1982-min.pdf>. According to Paul Carrington, the committee's reporter for part of the 1980s, it did so because "it was then believed . . . that Rule 23 was politically too sensitive to permit further consideration . . . ." Letter from Paul D. Carrington to Standing Committee on Rules of the Judicial Conference of the United States (May 21, 1996), *in* 2 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 29, 31, *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/WorkingPapers-Vol2.pdf>.

341. AM. BAR ASS'N, SECTION OF LITIG., REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CLASS ACTION IMPROVEMENTS, 110 F.R.D. 195, 196 (1986); *see also* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (Mar. 12, 1991), *available at* <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=uscourts/FederalCourts/judconf/proceedings/1991-03.pdf>.

342. NEW PROPOSALS FOR JUNE 1985 MEETING OF ADVISORY COMMITTEE 6 (1989), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-8521-74 (Cong. Info. Serv.).

343. MINUTES, ADVISORY COMMITTEE ON CIVIL RULES 6 (1989), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-1989-min.pdf>.

344. *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 468 (9th Cir. 1973).

345. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973).

class action is always unethical and improperly coercive.”<sup>346</sup> To Tenth Circuit judges in 1973, Rule 23 was at a “crossroads,” with:

many knowledgeable lawyers and some judges maintaining that it should be scrapped; others that it should be substantially revised or reformed; and still others that it should be even more liberally administered to effectuate or promote societal objectives bearing little relationship to economics or practicality.<sup>347</sup>

These sorts of existential musings or angst from federal judges are harder to find in 1980s-era opinions. The Second Circuit’s changing levels of Rule 23 anxiety are a good example. It inveighed repeatedly against perceived excesses in the class action experiment in the 1970s.<sup>348</sup> By the mid-1980s, the court blessed perhaps the greatest Rule 23 adventure of all time, at least up to that point, when it affirmed Judge Weinstein’s handling of the *Agent Orange* litigation.<sup>349</sup>

A final indicator is particularly revealing. Defense interests began to accept the federal class action by the end of the 1970s. It is hard to imagine the U.S. Chamber of Commerce praising the “painstakingly developed” Rule 23, as its spokesperson did in 1978,<sup>350</sup> if the device threatened its constituents with economic doom. Testifying about antitrust legislation in 1979, a company’s general counsel admitted that “[c]lass actions in today’s world are a necessary way to administer justice.”<sup>351</sup> Defense lawyers grew comfortable enough with the federal class action by the mid-1980s that they, not plaintiffs’ lawyers, pushed for Rule 23’s innovative use in mass tort litigation.<sup>352</sup>

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346. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238–39 (9th Cir. 1974) (Duniway, J., concurring); *cf. Gardner v. Westinghouse Broad. Co.*, 559 F.2d 209, 221 (3d Cir. 1977) (Gibbons, J., dissenting) (complaining about the “decidedly hostile” “vibrations” other judges on the Third Circuit had been sending about the class action), *aff’d*, 437 U.S. 478 (1978).

347. *Wilcox v. Commerce Bank of Kan. City*, 474 F.2d 336, 349 (10th Cir. 1973); *see also Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 439 (5th Cir. 1979) (Fay, J., concurring) (“Class actions are unique creatures with enormous potential for good and evil.”).

348. *Herbst v. Int’l Tel. & Tel. Corp.*, 495 F.2d 1308, 1313 (2d Cir. 1974); *In re Franklin Nat. Bank Sec. Litig.*, 574 F.2d 662, 673 (2d Cir. 1978); *Eisen*, 479 F.2d at 1019.

349. *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987).

350. *Reform of Class Action Litigation Procedures: Hearings Before the Subcomm. on Judicial Machinery of the Comm. on the Judiciary*, 95th Cong. 438 (1978).

351. *Antitrust Equal Enforcement Act of 1979 S. 1468: Hearings Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Comm. on the Judiciary*, 96th Cong. 42 (1979) (statement of Thomas R. Long, General Counsel, Westvaco Corp.).

352. *E.g.*, Andrew Blum, *It’s Best to Hang Together; Plaintiffs’ Lawyers Sing Praises of Class Actions*, NAT’L L.J., Sept. 11, 1989, at 1, 54 (reporting that “defense attorneys are turning to [the] view” that “it is often better to handle a class or consolidated case than to spend years litigating individually”).

The Advisory Committee's reporter would be as well-positioned as anyone to take the country's procedural temperature. In 1988, he told the *New York Times* that "class actions had their day in the sun and kind of petered out."<sup>353</sup> For at least one area, the reporter got it right. To the extent that the imperfect data reflects reality, the Title VII class action all but disappeared during the 1980s.<sup>354</sup> As an observation about the federal class action more generally, however, the reporter may have mistaken calm waters for a dry seabed. As the amounts of money changing hands in settlements suggest, class action litigation continued to hum along just fine over the decade's course.<sup>355</sup>

## 2. Explaining Class Action Stability

Some of the likely reasons for why Rule 23 law and politics stabilized by 1979 had more to do with a confluence of historical forces than steps taken to manage the dilemma of class action governance. Given the legislative landscape after 1980, neither conception of Rule 23 was likely to gain the upper hand in Congress. The prospect that legislation would expand the federal class action dimmed as the public interest movement waned and corporate political influence waxed.<sup>356</sup> At the same time, the continued dominance in the House of Representatives of the Democratic Party, increasingly supported by plaintiffs' lawyers, made a wholesale

353. Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7.

354. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1019–20 (1991). The Donohue and Siegelman study drew on the Administrative Office data and must be read with their limitations in mind.

355. The record settlement for a securities class action increased from \$205 million in 1985 to \$440 million in 1987 to \$700 million in 1988. *Settlement Cleared in Case Involving Baldwin-United*, WALL ST. J., May 2, 1985, at 1; Robert J. Cole, *B.P. in \$7.82 Billion Deal for Standard*, N.Y. TIMES, Apr. 29, 1987, at D1; *Last Defendant Settles in Bond Default Case*, N.Y. TIMES, Dec. 23, 1988, at D6. From 1983–1986, plaintiffs settled antitrust class actions for over \$150 million in coupons alone. See Fred Gramlich, *Scrip Damages in Antitrust Cases*, 31 ANTITRUST BULL. 261, 262 (1986).

356. See generally VOGEL, *supra* note 104, at 148–239. On corporate success with public opinion in the late 1970s, see SMITH, *supra* note 105, at 101. On the rise of the business lobby and think tanks favorable to businesses in the 1970s, see DAVID M. RICCI, *THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS* 156, 160–61 (1993); see also Patrick J. Akard, *Corporate Mobilization and Political Power: The Transformation of U.S. Economic Policy in the 1970s*, 57 AM. SOC. REV. 597, 601 (1992); Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 37 (Austin Sarat & Stuart A. Scheingold eds., 2006).

legislative gutting of Rule 23 unlikely.<sup>357</sup> The mere fact that an era of divided government commenced in 1981 made retrenchment in private regulatory litigation unlikely. In such times, Congress, concerned about executive branch indifference or hostility, often opts for private litigation to implement regulatory objectives.<sup>358</sup> Strong headwinds probably would have greeted a proposal to restrict the class action, in light of its importance to the regulatory efficacy of private litigation.<sup>359</sup> At the same time, class action expansionism had no place on the Reagan Administration's deregulatory agenda.

Likewise, the Advisory Committee's inattention to Rule 23 during the 1980s could well have resulted from exhaustion and other contingencies as much as satisfaction with a stable body of doctrine. It had pursued class action reform with futility for much of the 1970s, so time away from Rule 23 probably appealed to committee members.<sup>360</sup> Moreover, the rulemaking process attracted significant public criticism, starting in the mid-1970s and continuing throughout the 1980s.<sup>361</sup> In this environment, if committee members had any appetite for something as politically-charged as class action reform, controversial changes to the sanctions and discovery rules probably satisfied it.

Still, various choices deserve credit for decision-makers' successful creation of class action stability by decades' end. They have to do with how decision-makers managed the regulatory/adjunctive divide. *Zahn* and *Snyder* may have dashed many of the hopes consumer protection advocates vested in Rule 23, but they helped to entrench the device. The

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357. On the beginnings of trial lawyer political power in the 1970s, see THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 47 (2002).

358. FARHANG, *supra* note 26, at 16, 76–78.

359. Ronald Reagan, for example, wanted effectively to prohibit Legal Services Corporation lawyers from filing class actions, but Congress would not go along with his proposed restrictions. *ACLU Blasts Class Action Regulations Proposed by Legal Services Appointee*, L.A. DAILY J., Nov. 22, 1982, at 3 (describing proposed regulations that would have required LSC lawyers to get affirmative consent from each class member before they could bring class actions); *Legal Services Reauthorization Act of 1992: Hearing of the Comm. on Labor and Human Res.*, 102d Cong. 44–45 (1992) (describing milder restrictions ultimately adopted in 1983 legislation).

360. *E.g.*, Peter Gruenberger, *Plans for Class-Action Reform*, NAT'L L.J., July 8, 1985, at 32 (reporting that groups, including the Advisory Committee, that have tried for class action reform “simply gave up the effort in frustration”).

361. Paul Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 161 (1991) (wondering if the Advisory Committee will suffer the same fate as the “French aristocracy”); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579, 579–80 (1975); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 677 (1975); Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 936 (1976); *id.* at 938–39.

pair effectively created near-exclusive Congressional control over the substantive law litigated in federal class actions. Had the Supreme Court extended diversity jurisdiction and opened federal courthouses to state law claims regardless of amount, plaintiffs' lawyers could have shopped for a favorable choice-of-law regime and sought the application of a single state's uniquely plaintiff-friendly law on behalf of a nation of class members. National regulatory policy would have resulted not from deliberate legislative choice but from clever lawyering.<sup>362</sup> Also, by limiting the federal class action to federal substantive law, *Snyder* and *Zahn* gave Congress a number of different tools it could use to tinker with Rule 23's regulatory consequences. It could adjust class action procedure for particular substantive claims, as it considered doing several times,<sup>363</sup> but it could also calibrate regulatory consequences by adjusting elements of claims or remedial options. Otherwise, Congress would have had to preempt state substantive law, a blunter tool less useful for a pragmatic balancing strategy.

A number of choices, some conscious and others not, devolved control over the procedure of class action litigation downward and thus enabled experimentation over time with Rule 23. Class action reform flummoxed the Advisory Committee, and the Supreme Court avoided cases that would have required fundamental disquisition on the core requirements for class certification. Few significant command-and-control interventions into doctrinal development were the consequence. The prospect for authoritative guidance on key questions dimmed further in 1978, when the Court, following several circuits, rejected interlocutory review of class certification decisions.<sup>364</sup> Left largely to their own devices, the district courts could tinker with Rule 23 without committing doctrine to one course or another. A pragmatic tinkering strategy is easier to deploy if strategists can, in fact, tinker.

Various decisions affected the characteristics and preferences of participants in class action litigation in ways conducive to stability. *Eisen*

362. State courts in the 1970s and 1980s rarely exercised jurisdiction over a national consumer class, unless the case involved a product or service used locally within that state. *Kamp*, *supra* note 230, at 271–72.

363. *E.g.*, Handler & Blechman, *supra* note 299, at 632 (describing legislative history of Hart-Scott-Rodino antitrust legislation); *Equal Employment Opportunity Act of 1972—Conference Report* (Mar. 6, 1972), in *Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 1843, 1847 (1972) (noting that the House version of the Title VII amendments contained a provision prohibiting class actions, that the Senate version did not, and that the Conference Committee went with the Senate version).

364. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476–77 (1978).

and *Snyder* raised the costs of litigation and narrowed the substantive areas implicated by Rule 23. These effects probably helped to shape the plaintiffs' side of the class action bar, which by the end of the decade had become the exclusive province of a small number of sophisticated repeat players.<sup>365</sup> Their ongoing engagements with the defense bar created an incentive for plaintiffs' lawyers to cooperate and keep advocacy within limits. This evolution also limited the overall capacity of the plaintiffs' bar for class action litigation. Simply put, defense interests could live with class action litigation. By 1980, only a zealot for the adjectival conception could look at amounts exchanged in class action settlements and continue to assert that the class action posed an existential threat to American business.<sup>366</sup>

Finally, situations in which participants and their preferences are irreconcilably split can nonetheless be managed to create stability if positions are clear and consequences of decisions easily discernible. A dilemma is easier to handle if well-understood. As before, one risks overstating the significance of Rule 23 with comparisons to world historical events like Nixon's reversal of fortune. But an analogy illustrates. The bipolar Cold War world, however rift by ideological conflict, remained stable for nearly fifty years. To some political scientists, this equilibrium resulted in part because the easily-understood division between two roughly equal spheres of influence facilitated understandings of what would happen were politics to evolve in one direction or another.<sup>367</sup>

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365. The plaintiffs' side antitrust bar is illustrative. See James B. Stewart, Jr., *The \$300-Million Paper Case*, AM. LAW., July 1979, at 20, 21 (describing the small size of the bar); Tamar Lewin, *Class-Action Fees Under Fire*, N.Y. TIMES, Mar. 5, 1982, at D1; *In Camera*, 7 CLASS ACTION REP. 253, 253 (1982); cf. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 71 (2000).

366. One study estimated that plaintiffs had recovered a total of \$2.5 billion in securities and antitrust litigation, the two most lucrative class action fields, from 1966 to 1979. *Developments: Attorney Fee Awards in Securities Class Actions*, 5 CLASS ACTION REP. 470, 520 (1978). According to another study of securities litigation, the forty largest companies studied faced a class action or derivative suit once every 2.5 years from 1971–1978, a figure that includes duplicative litigation over the same issue. Two-thirds of the 190 companies in the sample never had to defend any suits during this time period. Thomas M. Jones, *An Empirical Examination of the Incidence of Shareholder Derivative and Class Action Lawsuits, 1971–1978*, 60 B.U. L. REV. 306, 323 (1980).

367. Kenneth N. Waltz, *The Origins of War in Neorealist Theory*, 18 J. INTERDISC. HIST. 615, 622 (1988) (“In a two-power competition, a loss for one is easily taken to be a gain for the other. . . . In a multipolar world, dangers are diffused, responsibilities unclear, and definitions of vital interests easily obscured.”); see also Kenneth N. Waltz, *The Stability of a Bipolar World*, 93 DAEDALUS 881 (1964); John Lewis Gaddis, *The Long Peace: Elements of Stability in the Postwar International System*, 10 INT’L SEC. 99, 105–10 (1986).

Given that most claims litigated in class actions by 1979 were negative-value, defense interests had no incentive to argue for applications of Rule 23 inconsistent with the adjectival conception of Rule 23. The more modest its use, the less overall litigation they would face.<sup>368</sup> In none of Rule 23's substantive areas, at least circa 1980, did class counsel displace plaintiffs' lawyers who were already litigating claims individually.<sup>369</sup> The lawyers on the plaintiffs' side thus had every incentive to urge courts to expand Rule 23's use, consistent with a regulatory conception of the device. The clarity of the conflict between the irreducibly inconsistent preferences participants held contributed to the stability of class action doctrine. Excess enthusiasm for regulatory efficacy, like that manifested by the Fifth Circuit in *Rodriguez*, necessarily came at the expense of judicial institutional integrity. Likewise, Judge Sneed's insistence that class litigation respect the "essential" aspects of the "judicial process" implied limits on Rule 23's regulatory potential.

#### CONCLUSION: THE ART OF THE POSSIBLE

A normative assessment of the Goldilocks strategy decision-makers used to create class action stability by the end of Rule 23's first period requires a yardstick whose provision lies beyond this Article's scope. Nineteen eighty is a logical cutoff, but arbitrary nonetheless, and a rigorous evaluation of the preference for pragmatic balancing in the 1970s would benefit from the next thirty years of class action history. Although I am reluctant to commit to a particular measure, the pragmatist in me finds the idea of "optimizing," or a preference for "action that is best relative to constraints," appealing.<sup>370</sup> Advocates on both sides of the divide in the late 1970s continued to grumble about the not-too-hot, not-too-cold

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368. In the notorious *Fine Paper* litigation, fifteen corporate class members, including Exxon, IBM, and Xerox, intervened to object to the fee request and paid a lot of money to have a law firm compile an audit. They did not stand to profit from the action in the form of increased settlement proceeds, and likely undertook the exercise to try to obtain a sweeping opinion that could damage the class action going forward. For the history of the dispute, see John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 252–61 (1983).

369. I am unaware of any friction in the 1970s of the sort that would emerge between class counsel and personal injury lawyers in the 1980s over mass torts. For an example of this friction, see James B. Stewart, *Wake of Disaster: Controversy Surrounds Payments to Plaintiffs in Hyatt Regency Case—Fighting Among Attorneys Worked Against Victims of Collapsed Skywalks—The Failure of a Class Action*, WALL ST. J., July 3, 1984, at 2.

370. Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607, 607 (2005).

approach.<sup>371</sup> But a commitment to one side of the divide or the other may well have provoked a backlash. Although the ground had shifted considerably by then, the federal class action's experience in the 1990s suggests what can happen if Rule 23's deployment distends institutional roles. Olympian attempts to use class certification as a cure-all for the country's mass tort woes sparked a counter reformation and significant class action retrenchment.<sup>372</sup> At the same time, one readily imagines that the Congress, responsible for so much public interest legislation in the late 1960s and early 1970s, would have reacted unfavorably had courts entirely kneecapped Rule 23 in the name of institutional integrity.

Another first pass at evaluation using an optimizing metric considers the class action as part of the federal regulatory apparatus. At an abstract level, the governance dilemma for public administration more generally is not different from what the federal class action creates. Courts reviewing agency actions constantly have to balance regulatory efficacy against democratic legitimacy, while scrutinizing their own institutional limitations in the process. In context-after-context, they have opted for a variant of the pragmatic balancing strategy. This broader administrative experience suggests what is possible when decision-makers have to reconcile a round institutional peg with a square regulatory hole. If private litigation has a legitimate regulatory role to play, and if institutional integrity is a valid concern, then a balance between the two, however unprincipled, may be the best one can expect.

The calm seas of the early 1980s did not last long. Within ten years, the class action would become a sizeable headache for Congress and rulemakers. Since then, its governance has remained a problem to be solved, not a balance to be struck. These are stories for the next chapters of Rule 23's history.

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371. *Compare Citizens' Access to the Courts Act of 1978: Hearing Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Comm. on the Judiciary*, 95th Cong. 14 (1978) (statement of Andrew Feinstein, Public Citizen Congress Watch) ("From the point of view of consumers, [R]ule 23 has been a failure."), with Hearings, *supra* note 330, at 247 (statement of William Simon) (suggesting that the class action has led to the "degradation of the legal profession").

372. The Advisory Committee began work on amendments to Rule 23 in the early 1990s expressly in response to the mass tort problem. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (Mar. 12, 1991), available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1991-03.pdf>. I will address this history in a subsequent article. A rough draft telling the story is available.