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Class Actions and the Counterrevolution Against Federal Litigation

Stephen B. Burbank and Sean Farhang[†]

“To a hammer everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”¹

ABSTRACT

In this article we situate consideration of class actions in a framework, and fortify it with data, that we have developed as part of a larger project, the goal of which is to assess the counterrevolution against private enforcement of federal law from an institutional perspective. In a series of articles emerging from the project, we have documented how the Executive, Congress and the Supreme Court (wielding both judicial power under Article III of the Constitution and delegated legislative power under the Rules Enabling Act) fared in efforts to reverse or dull the effects of statutory and other incentives for private enforcement. We focus here on one particular instrument of private enforcement, but we do so in the light of our broader research. We begin with a sketch of the modern class action. We then consider how attempts to curb its enforcement potential have fared in the elected branches, at the hands of those who brought it forth – the Advisory Committee on Civil Rules – and, finally, in the decisions of the Supreme Court. We conclude that institutional patterns in the domain of class actions largely track the story we discern in our larger project: the Supreme Court has been, by far, the most effective institutional agent of retrenchment.

I. Introduction

Research in multiple disciplines has established that the role of lawsuits and courts in the creation and implementation of public policy in the United States has grown dramatically.²

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¹ American Express Co. v. Italian Colors Restaurant, 570 U.S. ___, ___ (2013) (Kagan, J., dissenting).

² See, e.g., SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); ROBERT A. KAGAN,

Central to this revolution were (1) an outpouring of rights-creating federal statutes, many of which contained attorney's fees or damages provisions that were designed to stimulate private enforcement,³ and (2) the modern class action, born at about the time Congress was beginning to ramp up statutory private enforcement regimes.

Although the consequences and normative implications of this revolution have been the focus of intense debate,⁴ scholars have neglected systematic examination of the counterrevolution that ensued.⁵ To be sure, in the wake of a succession of decisions making cases in federal court harder to certify as class actions, and making class waivers in unilaterally imposed arbitration clauses essentially bullet-proof, some commentators wonder whether federal class actions are an endangered species,⁶ while others have the same question about private enforcement of federal substantive law.⁷ Yet, such concern about the future of class actions is not new. Nor is concern about private enforcement.

Awareness that reports of the demise of class actions in the late 1980s proved premature⁸ should prompt caution in 2015, particularly when one recalls the flexibility and ingenuity of the

ADVERSARIAL LEGALISM: THE AMERICAN WAY LAW (2001); LAWRENCE FRIEDMAN, TOTAL JUSTICE (1994).

³ See FARHANG, *supra* note 2.

⁴ See, e.g., REGULATION VERSUS LITIGATION (Daniel P. Kessler ed., 2011); ANDREW P. MORRIS, BRUCE YANDLE, & ANDREW DORCHAK, REGULATION BY LITIGATION (2008); REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002). See also Francis Fukuyama, *Decay of American Political Institutions*, THE AMERICAN INTEREST, <http://www.the-american-interest.com/articles/2013/12/08/the-decay-of-american-political-institutions/>

⁵ Sarah Staszak's recent book, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015), addresses part of this phenomenon, although her concept of retrenchment is quite different from ours.

⁶ See, e.g., Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015); David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 588 (2013).

⁷ See, e.g., J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. ____ (2015).

⁸ See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1493-94 (2008) ("Indeed, in 1989, Stephen Yeazell, the foremost American historian of the class action, posed the question whether his entire legal career had been spent studying something about to become extinct."); Marcus, *supra* note 6, at

American bar.⁹ As to private enforcement, many have written about the Court's retreat from the rights revolution,¹⁰ with one scholar arguing that hostility to litigation was the unifying thread that tied together apparently discordant themes in the Rehnquist Court's jurisprudence.¹¹ Here, caution seems appropriate because almost all such work has been normative, and it has not provided a basis to assess whether it presents an accurate picture of the relevant landscape.¹²

In this article we situate consideration of class actions in a framework, and fortify it with data, that we have developed as part of a larger project, the goal of which is to assess the counterrevolution against private enforcement of federal law from an institutional perspective. In a series of articles emerging from the project,¹³ we have documented how the Executive, Congress and the Supreme Court (wielding both judicial power under Article III of the

647 (suggesting that Advisory Committee reporter's 1988 statement that "class actions ... kind of petered out," although accurate about Title VII class actions, "may have mistaken calm waters for a dry seabed" with respect to other areas).

⁹ See Andrew J. Trask, *Reactions to Wal-Mart v. Dukes: Litigation Strategy & Legal Change*, 62 DEPAUL L. REV. 791, 816 (2013) ("the Dukes opinion is not so much a rollback as a correction in a constantly shifting game, in which both plaintiff and defense lawyers are arguing for new applications of class action rules").

¹⁰ See, e.g., Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183; Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317 (2012).

¹¹ See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

¹² See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1569 (2014) (hereinafter *Litigation Reform*) ("None of the work of which we are aware deploys statistical analysis of systematic data.").

¹³ See Burbank & Farhang, *Litigation Reform*, *supra* note 12; Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. ____ (2015) (hereinafter *Rulemaking*); Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Reform*, 65 DEPAUL L. REV. ____ (2015) (hereinafter *Subterranean Counterrevolution*). In another paper, we focus on the implications of our data for the study of litigation reform in civil rights cases. See Stephen B. Burbank & Sean Farhang, *Reforming Civil Rights Litigation: Why the Court Succeeded Where Congress Failed* (Draft April 2014). We are currently writing a book, tentatively titled *Rights and Retrenchment: The Counterrevolution Against Federal Litigation*, which will be published by Cambridge University Press.

Constitution and delegated legislative power under the Rules Enabling Act¹⁴) fared in efforts to reverse or dull the effects of statutory and other incentives for private enforcement.¹⁵

We find that the counterrevolution, primarily organized within the Republican Party beginning with the first Reagan administration,¹⁶ was largely a failure in the elected branches, where its chief proponents found that removal of existing rights through legislation is extremely difficult in the American political system.¹⁷ We also show how, although a succession of Chief Justices appointed by Republican presidents hoped to bring about major retrenchment through amendments to the Federal Rules of Civil Procedure, success proved elusive and episodic.¹⁸ We then document the sharply contrasting success of the counterrevolution in the unelected federal judiciary, where a long succession of decisions has achieved many of the counterrevolution's goals.¹⁹ We offer an institutional account of why conservative judges on courts exercising judicial power succeeded where their partisan compatriots in Congress, the White House, and the primary rulemaking committee failed. We emphasize, among other things, the Court's insulation from democratic politics and the low visibility of incremental change through case-by-case decisionmaking on seemingly legalistic and technical issues that attract little public notice.²⁰

We focus here on one particular instrument of private enforcement, but we do so in the light of our broader research. We begin with a sketch of the modern class action. We then consider how attempts to curb its enforcement potential have fared in the elected branches, at the hands of those who brought it forth – the Advisory Committee on Civil Rules – and, finally, in the decisions of the Supreme Court. We conclude that institutional patterns in the domain of class actions largely track the story we discern in our larger project: the Supreme Court has been, by far, the most effective institutional agent of retrenchment.

¹⁴ See 28 U.S.C. §§ 2072-74 (2012).

¹⁵ The phenomenon of Congress including private enforcement regimes, whether attorney's fee-shifting provisions or multiple damages provisions (or both), in statutes enacted to confer new or expand old rights, increased substantially in the late 1960s and the 1970s, and it is closely correlated with the enormous increase in federal civil filings that started in the late 1960s. See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1548 (Table 1).

¹⁶ For a discussion of early Reagan Administration efforts to retrench private enforcement, see Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1551-1555.

¹⁷ See *id.* at 1562-1567.

¹⁸ See *id.* at 1587-1603; Burbank & Farhang, *Rulemaking*, *supra* note 13.

¹⁹ See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1570-1580.

²⁰ See *id.* at 1580-1582.

I. The Modern Class Action

The original Federal Rules of Civil Procedure were drafted by an advisory committee appointed by the Supreme Court, which in 1934 had been authorized to prescribe “general rules” of practice and procedure for the federal courts under a statute delegating federal legislative power.²¹ Previously, federal class actions had been permitted in a limited set of circumstances marked out by the practice of courts of equity in England.²² The class action rule that the Court promulgated in 1938 divided the world of group litigation into three parts, which came to be called “true”, “hybrid,” and “spurious” class actions. The determination of which was which and the incidents of the characterization turned on an analysis of the abstract nature of the rights involved that often verged on the metaphysical.²³ For this and other reasons, class actions did not play a major role in federal litigation from 1938, when the original Federal Rules of Civil Procedure became effective, until 1966.

In that year, amendments to the Federal Rules became effective that initiated a sea change in the use of group litigation. The Advisory Committee’s stated agenda in revising Rule 23 was largely uncontroversial.²⁴ In connection with the rule on class actions as with other

²¹ See *supra* text accompanying note 14; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

²² See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987); Geoffrey C. Hazard, Jr., John Geded & Stephen Sowle, *The Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

²³ See Hazard et al., *supra* note 21, at 1937-39; Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 53-54 (2010).

²⁴ The stated goals of the Advisory Committee can be found in the Advisory Committee Note that accompanied the 1966 amendments. Benjamin Kaplan, the Reporter, elaborated his views on those goals in articles published after the amendments became effective. See Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497 (1969); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1966). In addition to these sources, this account draws on our reading of records of the committee’s deliberations, and on the recent work of David Marcus, which confirms our reading. See Marcus, *supra* note 6. As Professor Marcus accurately states with respect to (b)(3):

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 [in February 1964] 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

joinder rules, they sought to turn federal jurisprudence from abstract inquiries to functional analysis that considers the practical as well as the formal legal effects of litigation. To that end, in Rule 23(a) they specified four requirements applicable to all litigation if it was to proceed as a class action -- colloquially referred to as numerosity, commonality, typicality, and adequacy of representation. But they also reformulated the categories appropriate for class action treatment and specified different procedural requirements depending on the category.

The first category (Rule 23(b) (1)), where “the prosecution of separate actions by or against individual members of the class would create a risk” either of “inconsistent or varying adjudications ... [that] would establish incompatible standards of conduct for the party opposing the class” or of “adjudications ... [that] would as a practical matter be dispositive of the interests of other members not party,” captured the core of traditional class action practice.²⁵

The second category (Rule 23(b) (2)), where “the party opposing the class has acted or refused to act on grounds generally applicable to the class,” although somewhat removed from that core, was still within its conceptual reach. The Advisory Committee’s purpose in this category was to enlist the revised rule in the struggle for racial equality, which was then the dominant social issue in the United States, by helping to give practical meaning to emerging constitutional and statutory rights.²⁶

It was the third category (Rule 23(b) (3)) that marked the 1966 amendments to Rule 23 as a notable break from the past. Here -- remembering that all putative class actions must satisfy the four requirements of Rule 23(a) -- a court may certify a case as a class action if it finds that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” If the court does so certify, Rule 23 requires that notice be given to the members of the class and that they thereby be given an opportunity to opt out of the action, avoiding its preclusive effects.²⁷

procedural rule in line with caselaw developments. These were adjectival objectives that had no obvious regulatory or redistributive valence.

Id. at 599. Compare *infra* note 26 ((b)(2)).

²⁵ See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842-43 (1999) (noting that Rule 23(b) (1) was designed to stay close to the “historical model”).

²⁶ See David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011). “Other than desegregation, no substantive concern surfaced in committee deliberations.” Marcus, *supra* note 6, at 605.

²⁷ See Fed. R. Civ. P. 23(c) (2).

Although the Advisory Committee could not have foreseen all of the effects of their handiwork in Rule 23(b) (3), the members were aware that they were breaking new ground and that those effects might be significant.²⁸ Thus, they recognized that this provision would enable some claimants for whom individual litigation would be economically irrational (those with “negative value claims”) to band together in group litigation against a common adversary. That this was not the Advisory Committee’s main purpose in 23(b) (3),²⁹ however, is suggested by the Advisory Committee Note, which foregrounded the goal of “achiev[ing] the economies of time, effort, and expense, and promot[ing] uniformity of decision as to persons similarly situated.”³⁰ Class actions packaging negative value claims create litigation; they do not make existing or prospective litigation more efficient or consistent.³¹

²⁸ See Marcus, *supra* note 6, at 608 (“Class actions were a litigation backwater when they began work, but they seemed to have some sense that their obscure rule would assume far greater importance going forward.”).

²⁹ *But see* *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’ Kaplan, Prefatory Note 497.”); *Deposit Guar. Nat’l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 338 n. 9 (1980) (describing the facilitation of negative-value claims as a “central concept of Rule 23”). The *Amchem* Court relied heavily on Kaplan’s articles. This quotation from the opinion raises the suspicion that, given the case before it, the Court’s ordering of purposes was teleological. Our reading of the deliberations of the Advisory Committee, in addition to the Advisory Committee Note to Rule 23, persuades us that the small-claims class action loomed larger among Kaplan’s goals than it did among those of the Advisory Committee as a whole. Professor Marcus reached the same conclusion. See Marcus, *supra* note 6, at 599-600, 605-06. “Had committee members harbored specific hopes for Rule 23’s regulatory consequences, they surely would have surfaced in the proposed debate that preceded its promulgation.” *Id.* at 605.

³⁰ FED. R. CIV. P. 23(b) (3) advisory committee note (1966).

³¹ Along the same lines, the Advisory Committee’s rationale for the requirement of predominance was that “[i]t is only when this predominance exists that economies can be achieved by means of the class-action device.” Fed. R. Civ. P. 23 advisory committee note (1966). The only reference to small claims in the section of the Note explaining (b) (3) came toward the end, when, in discussing the interest of individuals in conducting separate lawsuits (one of the factors pertinent to predominance and superiority), the committee observed that such interest may be “theoretic rather than practical ... [because] the amounts at stake for individuals may be so small that separate suits would be impracticable.” *Id.* In treating predominance as a basic structural protection, the *Amchem* Court again misread the history, and its reasoning may

It is also suggested by the fact that for most people with negative value claims notice and an opportunity to opt out are hardly important, while paying for notice may present insuperable financial obstacles for those representing the class. These considerations raise the question why the Advisory Committee required notice and an opportunity to opt out in (b) (3) class actions but not in the others. The unpublished record reveals that these aspects of the revised rule were added late in the drafting process to meet concern that the subdivision might be used by defendants, in league with class counsel, to preclude those with *large* individual claims through group litigation inimical to their interests.³²

This account of the 1966 amendments to Rule 23 suggests that, insofar as the amended rule went beyond the traditional uses of the class action, it did so because of the Advisory Committee's desire to make representative litigation also available in order to (1) fructify existing access by extending the benefits of a decree to a group similarly situated (Rule 23(b) (2) civil rights class actions for injunctive or declaratory relief); (2) avoid the inefficiency and potential inconsistency of individual litigation involving similar claims (23(b) (3) large-claims class actions); and (3) make access practically available for those for whom individual litigation was prohibitively expensive (Rule 23(b) (3) small-claims class actions).

In addition, the Advisory Committee sought to equalize the risks of benefit and burden, making preclusion symmetrical, and hence to take advantage of the potential of the class action to reduce aggregate litigation expense. Finally, concern about the implications of their handiwork for access to court also played a crucial role in the innovation of notice and the opportunity to opt out that is required in (b) (3) class actions, but the concern was that the device might be used to foreclose, rather than open up, access to those with large claims.

At a time when class actions were solely the province of equity – that is, in the federal courts, before the 1938 Federal Rules -- courts carved out an exception to the so-called American Rule (according to which each party pays its own attorney's fees, win or lose) in order to ensure that the attorney's fees of those who created a common fund could be reimbursed from that fund. The exception made it possible for class representatives to confine the risk of having to pay the

again have been teleological. *See* Burbank, *supra* note 8, at 1499 n.234 (suggesting that Court was determined “to avoid some of the thorny constitutional questions that the case presented”).

³² *See* Burbank, *supra* note 8, at 1488; Marcus, *supra* note 6, at 605-06. “The present notice requirement of Rule 23(c) (2) and certification prerequisites of Rule 23(b) (3) are designed for actions brought predominantly for compensatory, rather than deterrent purposes. The burden of these requirements can thwart entirely the maintenance of an action where the individual injury is small, even though the case may be meritorious and the harm widespread.” 124 CONG. REC. 27,861 (1978) (Proposed Revisions in Federal Claims Damages Procedures – Bill Commentary). *See infra* text accompanying notes 46-50.

entire legal bill for the class to the event of defeat. Later, if the litigation was covered by a contingency fee agreement, that risk belonged to class counsel, and the exception became a potent financial incentive to use the class form of litigation.³³

A foundational assumption of the Federal Rules of Civil Procedure is that they apply to all civil actions in federal court (are trans-substantive). The 1966 amendments to Rule 23 did not just create new types of class actions potentially available across the entire landscape of American law. Through the addition of Rule 23(b) (3) for cases seeking monetary relief, they greatly expanded the territory in which the common fund exception to the American Rule could operate. Moreover, amended Rule 23 immediately overlaid pre-1966 statutory private enforcement regimes and became part of the background against which subsequent regimes were constructed. Inserted into a legal landscape that had previously known them only in the corners, class actions soon occupied the foreground, functioning as a kind of enforcement wild card.³⁴

The haphazard way in which legislatures, federal and state, have structured private enforcement regimes against the background of general (trans-substantive) class action provisions is of greatest concern with respect to negative value claims and within that category the subset of truly small claims. As to the latter, because compensation is usually not a plausible objective (depending on how small the claims are), whether or not class litigation should be permitted for the purpose of deterrence should depend, first, on the animating goals of the substantive law, and second on the desired level of enforcement, both of which the Supreme Court has chosen to ignore.³⁵

The modern class action presents in stark form a critical public policy dilemma: how to provide sufficient access to court in a society that depends on private litigation for the enforcement of important legal norms while ensuring fidelity to those norms and the regulatory policies underlying them, due accommodation of the interests of litigants and others affected by

³³ See Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 652-654 (2013). “For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the ‘private attorney general’ for the vindication of legal rights; obviously this development has been facilitated by Rule 23.” *Deposit Guar. Nat’l Bank, Miss. v. Roper*, 445 U.S. 326, 338 (1980).

³⁴ See Burbank, Farhang & Kritzer, *supra* note 33, at 673-75.

³⁵ *Id.* at 675.

litigation, and adequate attention to the limited capacity of the courts.³⁶

II. The Response of the Executive and Congress

In an environment of proliferating regulatory statutes and greater competition within the legal profession, the potential of the 1966 amendments both to serve the purposes of their drafters and to enable attorneys to do well by doing good (or, depending on one's perspective, to enrich themselves) was quickly realized. So also was the potential of the (b) (3) class action to promote inefficient over-enforcement of substantive law. This problem surfaced quickly and dramatically in litigation under the Truth in Lending Act ("TILA"), a complex regulatory statute enacted in 1968 that promotes private enforcement by authorizing minimum and maximum statutory damages (in addition to actual damages, if any, which are difficult to prove) and attorney's fees.³⁷

Although such provisions make sense as part of a private enforcement regime to induce individual litigation, minimum statutory damages can lead to devastating liability for technical statutory violations in a class action.³⁸ Horrified by this evident misfit, some federal district courts refused to certify (b) (3) class actions in TILA litigation,³⁹ prompting Congress to cap the

³⁶ See Marcus, *supra* note 6, at 592 ("The history of the modern class action is also a story of a fight over ideas about litigation's proper role in a democracy."); *id.* at 594-96.

³⁷ See 15 U.S.C. § 1601et seq. (2012). The provisions on individual and class damages are contained in *id.* § 1640.

³⁸ "The legislative history of the TIL Act makes no mention of the class action; apparently, the drafters simply failed to consider it." Comment, *Truth in Lending and the Federal Class Action*, 22 VILL. L. REV. 418, 423 (1976-77). For the views of a federal judge "whose experience was that many, if not the great majority, of [TILA] cases were brought on the basis of allegations of hypertechnical violations of an extremely complicated law where *logical* arguments could be made by lawyers on either side of the case," see *Qui Tam and Federal Reserve Board Procedures; Hearing on S. 3008 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 342 (1976) (statement of Judge Sidney O. Smith, Jr.).

³⁹ See, e.g., *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972). "Between February 14, 1972, the date of the *Ratner* decision, and November 29, 1972 ... the courts denied twenty-one class actions alleging Truth in Lending violations while allowing only two." Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1412 (1974). This Note provides a critique of both the original statute and decisions refusing to certify class actions, noting some courts' failure to distinguish between cases seeking actual damages and those seeking only statutory damages, and between remedies sufficient to attract enforcement and those sufficient to deter violations. See also Marcus, *supra* note 6, at 630 ("The lower federal courts overwhelmingly refused to certify TILA classes and thereby weakened the statute's regulatory value."), For problems that ensued even after Congress capped the damages available

statutory damages recoverable in a class suit at the lesser of one percent of the creditor's net worth and, first (in 1974), \$100,000,⁴⁰ and a few years later (in 1976), \$500,000.⁴¹ Indeed, of the eight bills to reduce the opportunities or incentives for class actions that were introduced in Congress from 1973 (when the Library of Congress bill database starts)⁴² to 1980, four were targeted at this specific problem.⁴³ Another bill would have made class actions unavailable in cases asserting claims valued at less than ten dollars,⁴⁴ suggesting that interest extended beyond the phenomenon of over-enforcement to the very concept of using class litigation to vindicate small claims, prevent unjust enrichment, or deter illegal conduct.⁴⁵

in a TILA class action, some of which derived from the possibility that the cap might lead to a smaller recovery by class members than they could obtain in individual actions, see Comment, *supra* note 38, at 425-32, 447-48.

⁴⁰ See Act of Oct. 28, 1974, Pub. L. No. 93-495, tit. IV, § 408(a), 88 Stat. 1500, 1518.

⁴¹ See Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4, 90 Stat. 257, 260. In 1980, Congress also made the cap applicable to a series of class actions arising out of the same failure to comply by the same creditor. See Act of Mar. 31, 1980, Pub. L. No. 96-221, § 615 (a) (1), 94 Stat. 180. In 2010 it raised the cap to the lesser of \$1,000,000 or one percent of net worth. See Act of July 21, 2010, Pub. L. No. 111-203, tit. X, § 1416(a)(2), 124 Stat. 2107, 2148. Although Congress has addressed the problem of potential over-enforcement under some other statutes, it has not done so consistently, which illustrates one of the costs of a trans-substantive class action regime and prompts our description of the (b) (3) class action as a “wild card.” See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1930 (2006) (“the Cable Act ... appears to contain ample incentives for individual enforcement but lacks limitations on class action recoveries that, given experience in cognate areas, one would expect to find if Congress had been concerned about inefficient overenforcement”). For a list of statutes in which Congress has limited remedies available in class actions, see Appendix A of Respondent’s Brief in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 2009 WL 2777648.

⁴² For legislative activity before 1973, see Marcus, *supra* note 6, at 610-12, 620.

⁴³ See S.3690, 93rd Cong. (1974); H.R. 4270, 96th Cong. (1979); H.R. 1299, 96th Cong. (1979); H.R. 3553, 96th Cong. (1979).

⁴⁴ See H.R. 7683, 95th Cong. (1977).

⁴⁵ In discussing the late Professor Richard Nagareda’s attempt to treat the small-claims class action as a “vehicle” or “format” for the vindication of substantive rights, rather than itself a remedy, one of the authors observed:

The existence of such interest on the part of the Executive Branch was made clear in ambitious proposed legislation developed by the Office for Improvements in the Administration of Justice in the Carter Administration's Department of Justice. In August 1978 Senator DeConcini (for himself and Senator Kennedy) introduced this proposed legislation as S. 3475.⁴⁶ The accompanying commentary set out the case for a legislative approach, observing that "revision of class damage procedures should be accomplished by direct legislative enactment rather than through the rule-making process," because "deterrence of widespread injury is of substantial public interest, and Congress should devote extensive consideration to any proposal." The commentary also argued that, because such revision "would have significant economic ramifications," there were "serious questions as to whether [it] is appropriately within the scope of the rule-making authority granted by the Rules Enabling Act."⁴⁷

As described in Senator DeConcini's floor remarks and the commentary accompanying the introduction of S. 3475, the proposed legislation would have replaced the small-claims class action with a public action (brought by or on behalf of the United States), and it would have restructured large-claims class ("compensatory") actions to "increase the fairness of the procedure and to make it less expensive and time consuming."⁴⁸ The commentary asserted that the "use of the Rule 23(b) (3) compensation-oriented procedures for actions brought to remedy

[I]t seems entirely possible that – prior to the introduction of the small claims class action – a legislature may have been aware, and (collectively) content, that in some circumstances the right and its attendant statutory remedy were worth only the paper on which they were written. Indeed, perhaps the legislature was counting on the complex of other laws and institutions that determine whether rights can be vindicated to serve as filters. That view appears particularly plausible with respect to a legislature that has sought only selectively to change one of the most important such filters – the market for legal services – by providing for an award of attorney's fees to prevailing plaintiffs.

Burbank, *supra* note 41, at 1929.

⁴⁶ See S. 3475, 95th Cong. (1978). In floor remarks, both Senators indicated that the bill was intended to start a conversation, and thus that they were not wedded to its provisions. See 124 CONG. REC. 27,859 (1978) ("Neither Senator Kennedy nor I are wedded to its provisions.") (Senator DeConcini); *id.* at 27,869 (bill "will begin the debate on revision of one of our most important procedural rules") (Senator Kennedy). For contemporaneous commentary, see Note, *Manageability of Class Actions under S. 3475: Congress Confronts the Policy Choices Revealed in Rule 23(b) (3) Litigation*, 68 KY. L.J. 216 (1979).

⁴⁷ 124 CONG. REC. 27,860 (1978).

⁴⁸ *Id.* at 27,859. See *id.* at 27,859-61; Burbank & Wolff, *supra* note 23, at 58-59.

pervasive small harm has posed major problems for plaintiffs, defendants and the courts.”⁴⁹ Of particular interest in this context, the commentary observed:

Third, even if detection occurs today, current procedures employed in the small injury context can create pressures for settlement which undermine deterrence policy. Because these actions create potential large scale liability and legal costs, and because the existence of the lawsuit alone, even if frivolous, could unfairly damage a defendant’s reputation, defendants may feel forced to settle early regardless of the merits. There is insufficient incentive for injured persons to work closely with counsel and counsel tends to reap more from these actions than the client, because counsel often receives a percentage of a large aggregate recovery. The plaintiff attorney is likely to be the real party in interest and may reach a settlement that does not fully effectuate deterrence policy. The settlement may reflect counsel’s interests, rather than those of the absentee injured. In sum, the current situation, which seems to defendants to encourage overdeterrence, tends ultimately to result in pervasive underdeterrence.⁵⁰

A similar bill was introduced in the House in 1979.⁵¹

Nothing came of this legislative initiative.⁵² The Carter Administration’s proposal is notable precisely because it was led by Democrats. This is consistent with our findings after an examination of a larger universe of bills seeking litigation retrenchment,⁵³ which did not become

⁴⁹ 124 CONG. REC. 27,861 (1978).

⁵⁰ *Id.*

⁵¹ *See* H.R. 5103, 96th Cong. (1979).

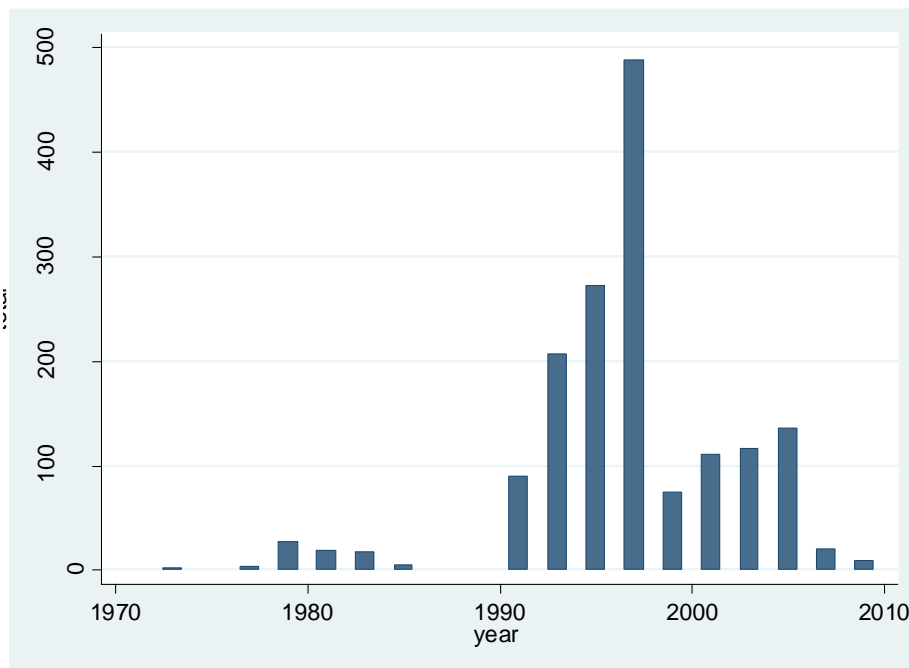
⁵² For other Carter Administration civil litigation reform initiatives, see Stephen C. Yeazell, *Unspoken Truths and Maligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1774-75 (2013). “Nothing happened, and no subsequent Democrat has taken up that banner.” *Id.*

⁵³ The bills fall into two groups. The procedure subset includes bills that sought to amend federal law so as to: reduce opportunities and incentives for class actions, strengthen the operation of sanctions against counsel, or strengthen the operation of offer of judgment rules. The fees and damages subset includes bills that sought to amend federal law so as to: reduce the availability of attorney’s fees to plaintiffs or increase plaintiffs’ liability for defendants’ fees, or reduce the monetary damages that plaintiffs can recover. *See* Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1555-56. For reasons suggested by the quotation from the commentary to S. 3475, *supra* text accompanying note 50, among others, the Carter Administration’s bill is appropriately included in the procedure subset. It should be noted, however, that it responded to problems

a distinctively Republican issue until the first Regain administration.⁵⁴

In order to map legislative activity for class action reform and its partisan configuration, we identified all bills that sought to amend federal law so as to restrict opportunities and incentives for class actions. Our search captured 83 bills from 1973 to 2010. The bills had an average of about 18 co-sponsors, yielding a total of 1,589 episodes of legislators sponsoring or co-sponsoring a bill with a provision seeking to limit class actions. Figure 1 represents a count, per Congress, of episodes of legislators sponsoring or co-sponsoring anti-class action provisions. Prior to the 102nd Congress (1991-92), the level of bill activity was quite modest. Beginning with the 102nd Congress, it grew steeply for four Congresses, peaking in the 105th Congress (1997-98), and then declining to the point that by the 110th and 111th Congresses (2007-10), support levels are similar to some years in the pre-1991 period.

Figure 1: Legislator Support for Anti-Class Action Provisions



created by Rule 23 and Supreme Court decisions interpreting it (in particular those concerning notice) for plaintiffs and the federal courts, as well as to problems created for defendants.

⁵⁴ “The ninety-seventh Congress (1981-82) is the first one in our data set in which Republican support for anti-litigation measures exceeds Democratic support. From rough parity when Reagan took office, there emerged a partisan gap which grew until it peaked in the 105th Congress (1995-96), with Republicans supporting anti-litigation proposals at a level about 563% above Democrats.” Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1558.

Figure 2: Partisan Balance of Support for Anti-Class Action Provisions

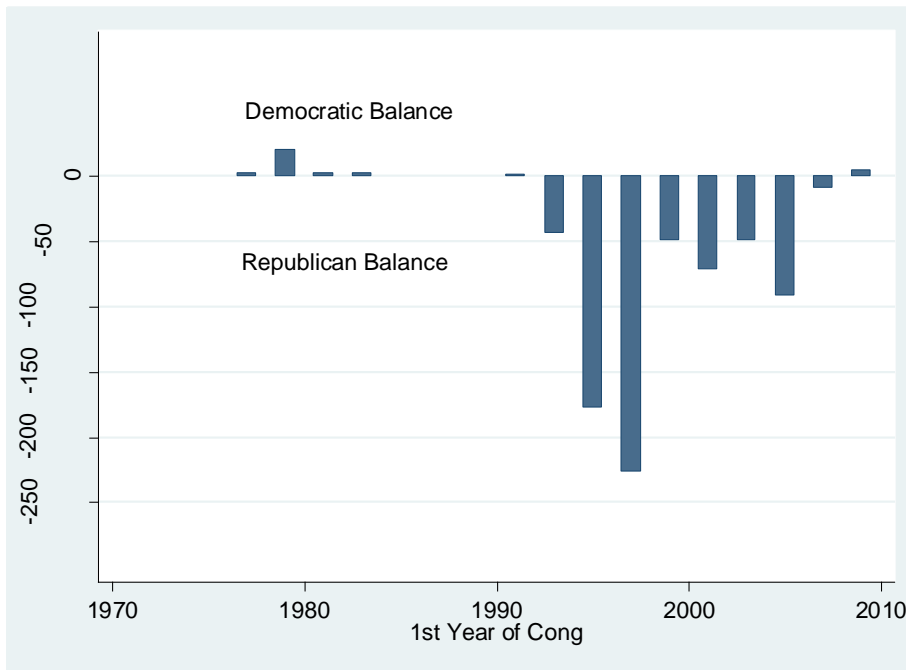


Figure 2 represents the *net* partisan balance of support. The total number of Democratic sponsors or co-sponsors in each Congress was assigned a positive value, and the total number of Republican sponsors or co-sponsors was assigned a negative value. The figure depicts the sum of the two, such that values greater than 0 reflect years in which the preponderance of support was Democratic, and values below zero reflect years in which the preponderance of support was Republican. In the late 1970s and early 1980s, during which time there was a modest volume of bill activity, the balance was moderately on the Democratic side. Beginning in the 103rd Congress (1993-94), the partisan balance shifted decisively to the Republican side, where it remained material until the 110th and 111th Congresses (2007-10), when the issue receded from the legislative agenda.

In order to analyze the relationship between legislators' ideology and the likelihood that they would support anti-class action provisions, we constructed the following dataset. Separately for each legislator who served in Congress from 1973 to 2010, we calculated the total number of episodes of sponsorship or co-sponsorship per Congress. That is, the unit of analysis is a Congress-legislator count of the total number of times that each legislator in each Congress sponsored or co-sponsored a bill with an anti-class action provision.⁵⁵

⁵⁵ We include both sponsors and co-sponsors because we are interested in the degree of legislative support for class action reform proposals. To neglect co-sponsors would be to treat a

We run negative binomial count models on this dependent variable. In our key independent variable of political party, Democrats are coded 0 and Republicans are coded 1. We employ Congress fixed effects to address the possibility of potential confounding factors, including the political and public salience of the class action issue, the lobbying priorities of business and state governments that may wish to reduce enforcement pressures associated with class actions, and election cycles.⁵⁶

In Table 1, we present three models estimating the effects of legislator party on support for anti-class action provisions: one covering the full period, one covering 1973 to 1990; and one covering 1991-2010. In the model over the full period, there is a statistically significant party effect. Moving from Democrat to Republican is associated with a 156 percent increase in episodes of support for anti-class action provisions. Subsetting the data into the two time periods makes clear that the effect is driven by the post-1990 period. In the 1973-1990 model, the coefficient is negative, suggesting that Republican legislators are associated with *lower* levels of support for provisions limiting class actions, although the effect is not statistically significant. In the 1991-2010 period, the coefficient turns positive and becomes highly statistically significant, indicating that moving from Democrat to Republican is associated with a 177 percent increase in the predicted count of episodes of support for anti-class action provisions.⁵⁷

bill that a legislator introduces only for herself as equivalent to one that dozens of other members of Congress wish to support.

⁵⁶ This approach leverages only variation in the relationship between legislators' party and their votes *within* Congresses to estimate the effects of party. We cluster standard errors on legislator.

⁵⁷ Because positive values were very predominantly 1s (84%), we considered alternative specifications using logit models, assigning 1s to all legislators who sponsored or co-sponsored bills in each Congress, and assigning them 0s otherwise. The logit specifications produced very similar results, with Republicans associated with a 144% growth in the probability of support (from .09 to .22) in the full model; a failure of party to achieve statistical significance at the .05 level in the 1973 to 1990 model; and Republicans associated with a 162% growth in the probability of support in the 1991 to 2010 model. Because the dependent variable takes the value of zero 87% of the time, we also examined alternative specifications using first logit regression to address excessive zeros, and we obtained nearly identical results.

Table 1: Negative Binomial Model of Legislator Support for Anti-Class Action Provisions with Congress-Fixed Effects, 1973-2010

	1973-2010		1973-1990		1991-2010	
	Coef.	Marginal Effect	Coef.	Marginal Effect	Coef.	Marginal Effect
Party	.94** (.07)	156%	-.48 (.31)	-62%	1.02** (.07)	177%

(Congress-fixed effects not displayed)

N=	10247	4846	5401
Adj. Dev. R ² =	.45	.21	.31

** .01; * < .05

Standard errors in parentheses, clustered on legislator

Much of the legislative activity concerning class actions from the 103rd Congress (1993-94) through the 109th Congress (2005-06) was due to Republican-sponsored bills that ultimately led to enacted statutes: The Private Securities Litigation Reform Act of 1995 (“PSLRA”),⁵⁸ and the Class Action Fairness Act of 2005 (“CAFA”).⁵⁹ As we have previously observed, however, among the bills captured in our data, these statutes (together with the Prison Litigation Reform Act of 1996)⁶⁰ represented the only consequential successes in the long-running and much wider legislative campaign for retrenchment of private enforcement of federal rights.⁶¹ Moreover, they were enacted after years of effort, attracting filibusters and presidential vetoes, and the PSLRA addressed class actions in only one substantive context, thereby arguably reducing the scope for

⁵⁸ Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

⁵⁹ Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

⁶⁰ Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

⁶¹ See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1563-64. “In sum, Republican litigation reform success across the issues in our database, over the three decades from the emergence of the issue on the Republican agenda in 1981 until 2010, nibbled around the edges of the litigation state. They did not challenge it.” *Id.* at 1564. For CAFA’s indirect impact on private enforcement of federal substantive rights, see *infra* text accompanying notes 64-67.

the Supreme Court to raise other barriers in that context.⁶²

The last observation helps to understand the brilliance of those proponents of CAFA whose actual agenda, in vastly expanding the jurisdiction of federal courts to hear state law claims brought as class actions, was to ensure that the cases were not certified and went away.⁶³ We have previously noted that, because that statute “significantly increased the number of state law class actions that were governed by a trans-substantive and ever-more-conservative federal class action jurisprudence[,] [i]t ... may have encouraged anti-private enforcement class action jurisprudence that also governs enforcement of federal rights.”⁶⁴ The point deserves greater emphasis.

The Reagan Administration had learned the hard way how difficult it is to retrench private enforcement rights by statute. Despite sustained efforts over its first term in office, it could not win support for an attorney’s fee-capping bill in Congress – not even in a Republican-controlled Senate Judiciary Committee.⁶⁵ As a result, filling executive branch and judicial positions with movement conservatives, the Reagan Administration “sought ... to lay the foundation for law reform through federal litigation and federal judges – without the aid of legislators.”⁶⁶ Two decades later, and although targeted at state law class actions, CAFA showed how useful “procedural” legislation could be to furthering that strategy.

In that respect, CAFA was the statutory analog of, or complement to, an amendment to Rule 23 that, without great controversy, had become effective in 1998 (when the legislative movement that led to CAFA was getting started).⁶⁷ No wonder that episodes of support for class action bills declined from 136 in the 109th Congress (2005-06) to 19 in the 110th Congress (2007-08), and to 8 in the 111th (2009-10). The counterrevolution had been put in the hands of those best equipped institutionally to achieve its goals.

⁶² We believe that this is a major reason why, in the Supreme Court’s recent jurisprudence class actions subject to the PSLRA have fared better than other class actions.

⁶³ See Burbank, *supra* note 41, at 1942-43.

⁶⁴ Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1563 n.63.

⁶⁵ See *id.* at 1567.

⁶⁶ *Id.* at 1567-68. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 63 (1993).

⁶⁷ We discuss that amendment, adding Rule 23(f), in the next section. See *infra* text accompanying note 89.

IV. The Rulemakers' Response

The Advisory Committee that drafted the 1966 amendments to Rule 23 was composed primarily of practitioners and academics, with very few judges (and those judges were equally balanced between Democratic and Republican appointments).⁶⁸ It operated under a charge from the Chief Justice of the United States, Earl Warren, who appointed the members. The Chief Justice told the reconstituted Advisory Committee in 1960 that, in the Court's view, the Federal Rules were operating well and did not require major changes, but rather regular up-dating.⁶⁹ Yet, it is hard so to regard the 1966 Rule 23 amendments, as it is some other amendments proposed by the Committee in the 1960s. Moreover, as a whole the work-product of the Advisory Committee during that decade, which comprised about one third of all proposals sent forward over the fifty year period from 1960 to 2010, was decidedly pro-private enforcement (pro-plaintiff).⁷⁰

In 1971, a new Chief Justice, Warren Burger, charged a reconstituted Advisory Committee, which had a very different composition, in very different terms.⁷¹ Burger told this group, which was dominated by judges and included no academics, that there was a need for "major changes in the way in which litigation is being handled."⁷² Instead, during the decade of

⁶⁸ See Burbank & Farhang, *Rulemaking*, *supra* note 13, at _____. To the extent that we can tell from available sources, eleven (92%) of the practitioners were in mixed practices, and one (8%) was in a primarily plaintiff-side practice. One member (8%) during this period primarily represented individuals, and two (17%) primarily represented corporations/business. The great majority (nine or 75%) represented both individuals and corporations/business. *See id.* at _____.

⁶⁹ *See id.* at _____.

⁷⁰ *See id.* at _____.

⁷¹ *See id.* at _____. Of the new committee's sixteen members, eleven (69%) were judges, and five (31%) were practitioners; there were no academic members.

⁷² According to the minutes of the meeting:

He noted certain expressions of dissatisfaction with a number of specific procedural devices and suggestions for improvement. But he emphasized the need, not simply for the betterment of existing procedures, but for major changes in the way in which litigation is being handled. He advised the Committee that it was unique in that it could make recommendations in any area of civil litigation where it considered change desirable.

the 1970s, the Advisory Committee made few recommendations, none of them remotely approaching the salience for private enforcement of their immediate predecessors' work.⁷³ They thus temporarily frustrated Burger's hope to use court rulemaking as an instrument of litigation retrenchment.

We believe that a number of influences combined to restrain the Advisory Committee's ambition during the decade, starting with their decision to spend more than six years studying class actions. That they would do so a few years after Rule 23 was amended is surprising, leading us to believe that the topic led the "expressions of dissatisfaction" voiced by Burger when he gave them their charge in 1971.⁷⁴ The decision is additional evidence that the revolutionary potential of the 1966 amendments was quickly recognized. It may also suggest the epistemic shallowness of those amendments, which were the product of rulemaking at a time when the Advisory Committee met in private, distributed proposals for comment to a limited group, and did not hold public hearings. From that perspective, the Advisory Committee charged by Burger may have been attempting to supplement the record.⁷⁵

Apart from reasons to proceed carefully that sounded in the need for more information,

Minutes of the Meeting of the Advisory Committee on Civil Rules at 1 (1971) (hereinafter 1971 Minutes), available at

<http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-september-1971>

⁷³ "The Advisory Committee sent forward to the Standing Committee only fourteen proposals for amendments (at the rule level), four that resulted in the 1972 amendments and ten that resulted in the 1980 amendments. This represented but 6% of the proposals sent forward during the entire period of study. Moreover, we determined that only two proposals for amendments were salient to the issue of private enforcement, and both of those proposals were pro-enforcement." Burbank & Farhang, *Rulemaking*, *supra* note 13, at ____.

⁷⁴ *See* 1971 Minutes, *supra* note 72. Although these minutes indicate that the committee "requested the reporter to undertake a study of the desirability of effecting changes in ... Rule 23," *id.* at 2, they do not indicate that Burger made such a request. *But see* Marcus, *supra* note 6, at 615.

⁷⁵ The bill commentary accompanying S. 3475, *see supra* text accompanying notes 46-50, invoked in support of the need for change "a recent inquiry by the Advisory Committee on Civil Rules," in response to which "50 percent of 145 district judges indicated that they favored prompt amendment of rule 23." 124 CONG. REC. 27,860 (1978). For another account of the Advisory Committee's Rule 23 activities in the 1970s, see Marcus, *supra* note 6, at 616-19. "But mostly the committee foundered." *Id.* at 616.

although the 1970s Advisory Committee was dominated by judges, it was not an ideal agent of retrenchment. Its federal judge members, although disproportionately Republican-appointed, were more ideologically balanced than they would soon become.⁷⁶ Its practitioner cohort was also relatively balanced between defense and plaintiff-side representation.⁷⁷ Moreover, other reasons to proceed cautiously emerged during the course of the Advisory Committee's study.

As discussed in Section III, early experience under the 1966 amendments revealed that class actions can put private enforcement on steroids. In addition, Congress's assertion of its lawmaking prerogatives in connection with the proposed Federal Rules of Evidence in 1973 raised the possibility that additional consequential amendments to Rule 23 might exceed the Supreme Court's delegated power under the Enabling Act.⁷⁸ Indeed, as we have noted, in sponsoring legislation to replace Rule 23(b) (3), the Justice Department so suggested.⁷⁹ That initiative led the Advisory Committee to take class action reform off its agenda for more than a decade.⁸⁰

By the time the Advisory Committee next took up possible amendments to Rule 23 -- in the early 1990s⁸¹ -- Chief Justice Burger and his successor, Chief Justice Rehnquist, both of whom were appointed by Republican Presidents, had largely abandoned the quest for numerical, professional and ideological balance among the judges and practitioners they appointed that might have been thought implicit in governing Judicial Conference policy.⁸² Figure 3 shows

⁷⁶ See Burbank & Farhang, *Rulemaking*, *supra* note 13, at ____.

⁷⁷ See Burbank & Farhang, *Rulemaking*, *supra* note 13, at ____.

⁷⁸ See *id.* at ____.

⁷⁹ See *supra* text accompanying note 47.

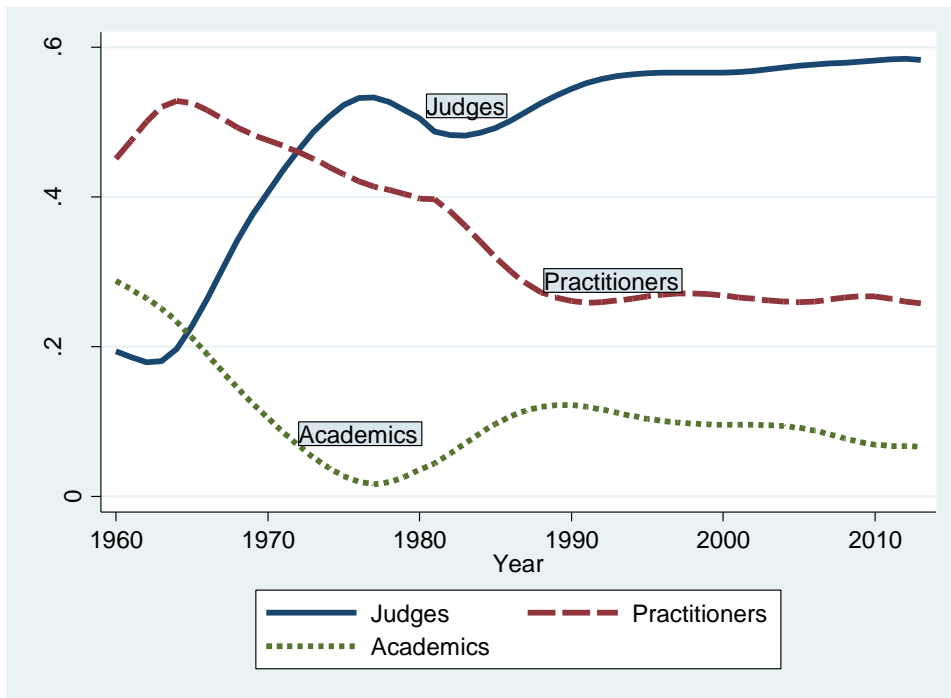
⁸⁰ See Burbank & Farhang, *Rulemaking*, *supra* note 13, at ____ . As discussed there, the Advisory Committee was briefed on the Administration's initiative in May 1977 and voted to shelve work on Rule 23 in January 1978. See also, Marcus, *supra* note 6, 619 ("The challenge of class action reform exceeded the committee's institutional capacities, hamstrung as it was by the Enabling Act's substantive rights proviso.").

⁸¹ For the committee's 1982 decision "to do nothing," see Marcus, *supra* note 6, at 645.

⁸² See Burbank & Farhang, *Rulemaking*, *supra* note 13, at ____ . Judicial Conference policy called for "members to consist of broadly representative judges, lawyers and law teachers," Annual Report of the Proceedings of the Judicial Conference of the United States 7 (Sept. 17-19, 1958) (hereinafter 1958 Proceedings), available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1958-09.pdf>

estimates of the composition of the Advisory Committee over the fifty year period starting in 1960.

Figure 3: Advisory Committee Composition: 1960-2010⁸³



The data points in figure 4 represent the ratio of judicial Advisory Committee members appointed by Republican versus Democratic presidents from 1971 to 2013, adjusted for the share of federal judgeships held by Republican versus Democratic appointees. That is, in each year we computed the percentage of sitting Republican-appointed judges that were serving on the Advisory Committee, and divided it by the percentage of sitting Democratic-appointed judges that were sitting on the committee. The horizontal line at the value of one indicates where the estimates would cluster if the presumed ideological composition of federal judges on the committee reflected that of the federal judiciary. Controlling for the composition of the federal bench, Republican-appointed judges had more than double the estimated probability of serving on the committee during the period of interest.

⁸³ Burbank & Farhang, *Rulemaking*, *supra* note 13, at _____. The estimates depicted are from locally weighted least squares regression with 80 percent bandwidth.

Figure 4: Judge Members by Party of Appointing President⁸⁴

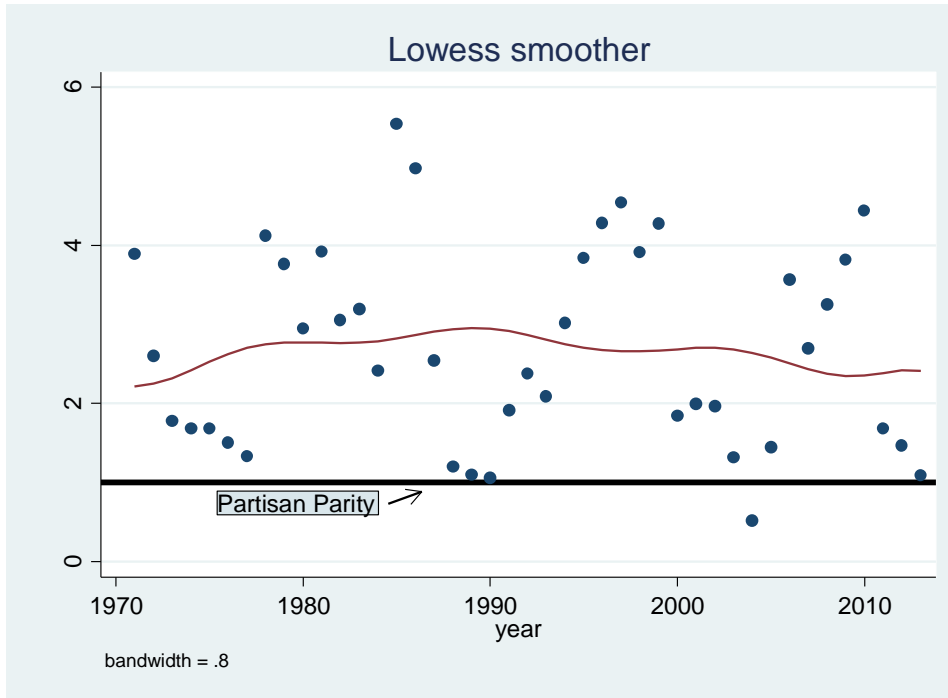
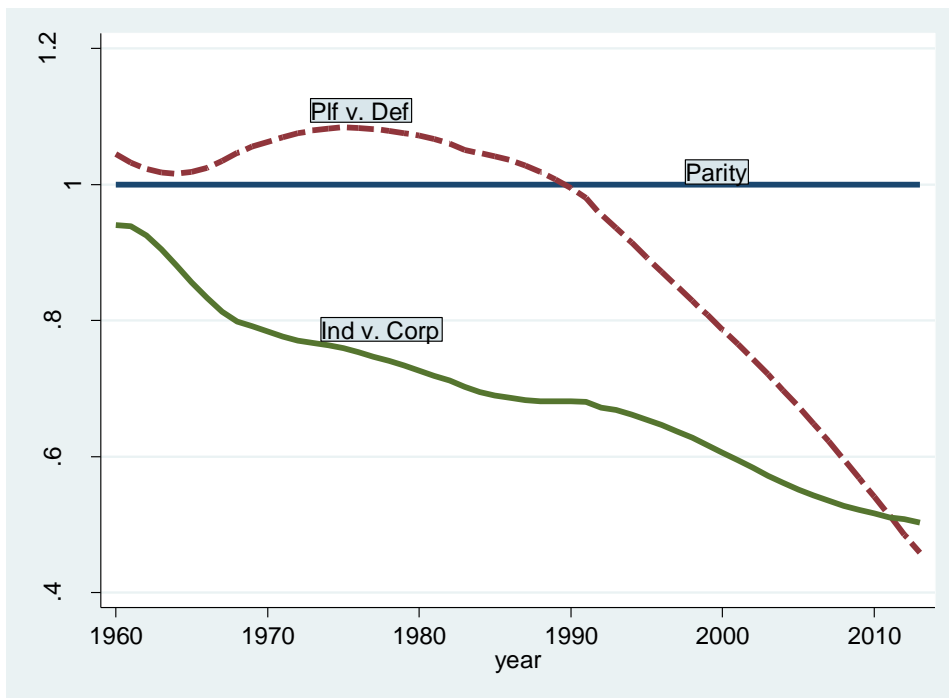


Figure 5 represents regression estimates of the balance, among practitioners on the committee, between those representing primarily individual versus corporate/business interests, and between those representing plaintiffs versus defendants, from 1960 to 2013. The horizontal line at the value of one indicates where the estimates would cluster if committee practitioners were evenly balanced between the practitioner types being measured. Over the full period, committee practitioners shifted toward increasingly disproportionate corporate/business representation, and, in the later part of the series, toward specifically corporate defense representation.⁸⁵

⁸⁴ *Id.* at _____. The estimates depicted are from locally weighted least squares regression with 80 percent bandwidth.

⁸⁵ See *id.* at _____, for details on how the measures were constructed. Inspection of the raw data shows that the shift toward disproportionate defense representation in the figure is driven by disproportionate representation of defense practitioners beginning in the early 2000s.

Figure 5: Practitioner Types on Advisory Committee⁸⁶



There were, however, other potential obstacles to using rulemaking for class action retrenchment that had not impeded the pro-access 1966 amendments. Primary among them were changes to the Enabling Act process that resulted from discontents that surfaced in the 1970s after the Federal Rules of Evidence imbroglio and intensified in the 1980s when the Advisory Committee, urged on by Burger, aggressively pursued measures that many deemed inimical to private enforcement. These process changes, requiring more opportunities for public participation in rulemaking, greater transparency, and more time for Congress to consider proposed amendments, functioned as a control technique. Some proponents of the changes apparently hoped to entrench the pro-access status quo by making the rulemaking process stickier and empowering interest groups to monitor proposals and sound an alarm in the event of perceived overreaching.⁸⁷

⁸⁶ *Id.* at _____. The estimates depicted are from locally weighted least squares regression with 80 percent bandwidth.

⁸⁷ *See id.* at ____ - _____. Even before the 1980s changes, the Enabling Act process held the potential for stickiness once drafting responsibility was committed to the Judicial Conference in 1958, and the Conference chose to operate through a multi-stage review process. This may have been a reason Congress chose to enshrine that structure in the 1988 legislation. *See id.* at _____. The potential for stickiness expands or contracts depending on the degree of deference shown to

In part as a result, the approach taken to the consideration of class action reform in the 1990s could not have been more different from that taken in the 1960s. In a series of meetings and conferences, the Advisory Committee sought information from expert practitioners, judges and academics. It then published proposed amendments for comment and held extensive public hearings. At the end of the day, the committee concluded that consequential change to Rule 23 was so freighted with controversy among interest groups, and hence so likely to engender political controversy, that it should not be attempted – at least by rulemaking.⁸⁸ Instead, the Advisory Committee proposed an amendment making available discretionary appellate review of decisions denying or granting class certification. Effective in 1998,⁸⁹ this amendment -- facially neutral as between plaintiffs and defendants -- opened up another pathway to retrenchment by increasing opportunities for class action decisions by conservative appellate courts.⁹⁰ The episode suggests that, even within the broad category of procedure (and class actions fit only uncomfortably in that category), some consequential reforms in the domain of rulemaking can fly under the radar screen.⁹¹

In the following decade the Advisory Committee put forward a number of additional amendments to Rule 23, which became effective in 2003, and all of which concerned matters of process and judicial management; they did not touch the core of Rule 23 directly.⁹² By that time,

the Advisory Committee, which in turn is in part a function of the degree of control exercised by the Standing Committee, as it is also of the degree of diversity of views among the members of the reviewing bodies. An Advisory Committee proposal was rejected in the mid-1990s, and another escaped rejection by the Judicial Conference at the end of the decade by one vote. *See id.* at ____.

⁸⁸ *See id.* at ____ . The capacity of class action reform to engender intense interest group mobilization and political controversy had recently been demonstrated again in the protracted congressional battles over reform in one substantive context that issued in the Private Securities Litigation Reform Act of 1995.

⁸⁹ *See* Fed. R. Civ. P. 23(f). A similar mechanism was part of the Carter Administration's proposed statute replacing Rule 23(b) (3). *See* S. 3475, 95th Cong., § 4 (1978); 124 CONG. REC. 27,866 (1978); *supra* text accompanying notes 46-50.

⁹⁰ *See* Burbank & Farhang, *Rulemaking*, *supra* note 13, at ____.

⁹¹ *Cf.* Burbank & Farhang, *Subterranean Counterrevolution*, *supra* note 13 (elaborating and testing empirically hypothesis that Court's success at retrenchment due in part to the tendency of technical and legalistic decisions to escape public attention).

⁹² Some of them, however, have been leveraged in non-obvious ways to support decisions that made certification more difficult, further supporting the notion that the phenomenon of the

the focus of class action reform activity had switched to Congress (where CAFA was being debated) and, by reason of the 1998 amendment to Rule 23, to the courts. Moreover, starting in the late 1990s the focus of the Advisory Committee's own retrenchment efforts had switched to discovery, a domain more remote from demonstrated congressional interest.⁹³ A committee dominated by judges who were appointed by Republican presidents and practitioners who represented corporate defendants⁹⁴ demonstrated that the 1980s changes to the Enabling Act process did not prevent rulemakers from collaborating with the business community and elements of the elite bar to pursue a strategy of retrenchment they had championed since the 1970s.⁹⁵

By this time the probability of the Advisory Committee recommending a pro-private-enforcement amendment to the Federal Rules was near the bottom of a steep decline. Reflecting all 39 proposals by the Advisory Committee predictably affecting opportunities and incentives for private enforcement from 1960 to 2010, Figure 6 represents the sharply declining probability that a proposal would be pro-plaintiff.

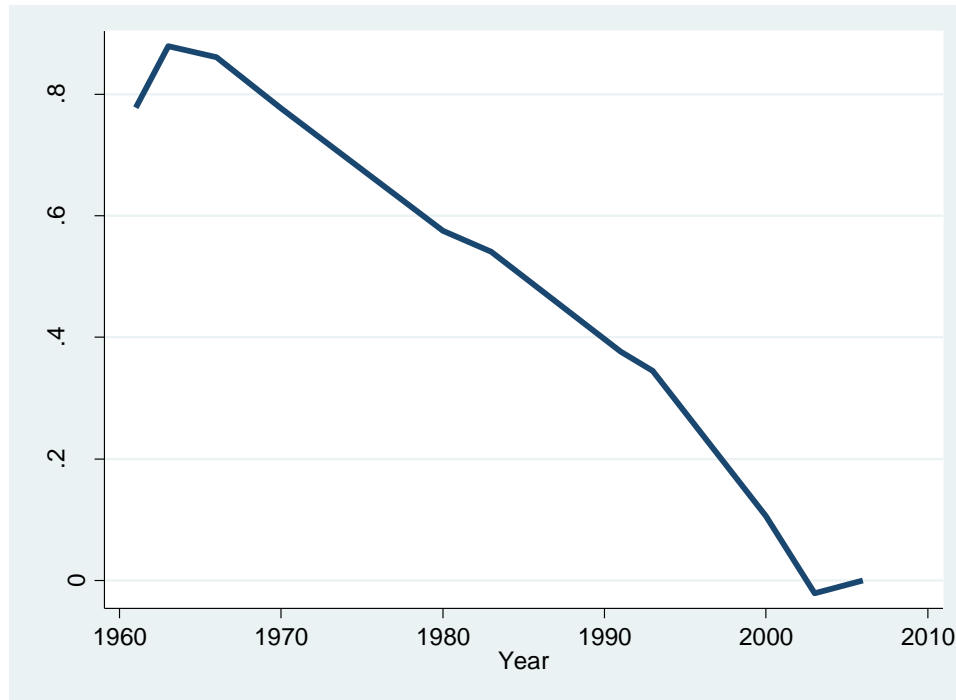
subterranean counterrevolution spans lawmaking institutions. *See* Burbank & Farhang, *Rulemaking*, *supra* note 13, at ____.

⁹³ *See id.* at ____.

⁹⁴ *See id.* at ____.

⁹⁵ *See* Stephen B. Burbank, *Proportionality and the Benefits of Discovery: Out of Sight, Out of Mind?*, 35 REV. LIT. __ (2015).

Figure 6: Probability of Pro-Plaintiff Proposal⁹⁶



Following another, even more controversial, reprise of discovery retrenchment that has issued in amendments likely to become effective on December 1, 2015,⁹⁷ the Advisory Committee is again considering whether Rule 23 amendments would be useful and feasible. A preliminary report by a subcommittee charged with that inquiry makes clear that the effort is proceeding with the care and broad outreach of the 1990s class action initiative.⁹⁸ The topics under discussion include a number that are likely to engage ideological commitments, such as issue classes,⁹⁹ as well as topics on which the Supreme Court’s jurisprudence is widely

⁹⁶ See Burbank & Farhang, *Rulemaking*, *supra* note 13, at ____, for a discussion of the data underlying the figure. The estimates depicted are from locally weighted least squares regression with 80 percent bandwidth.

⁹⁷ See Burbank, *supra* note 95.

⁹⁸ See Rule 23 Subcommittee Report 1-2 (April 9-10, 2015). This memo can be found through the Administrative Office of the United States Courts’ website, www.uscourts.gov. The memo is at pages 243-99 of the April 2015 agenda book.

⁹⁹ See *id.* at 39-41.

questioned, such as settlement classes.¹⁰⁰ It remains to be seen whether the roadblocks that have hobbled class action rulemaking since 1971 can be overcome. In addition, there may be a new roadblock. For having tasted the retrenchment potential of amending Rule 23 (and some other Federal Rules) under the cloak of interpretation,¹⁰¹ the Court's conservative majority may not be keen to surrender its position as the vanguard of the counterrevolution – its hammer -- to which we now turn.

V. The Supreme Court's Response

As the previous sections document, the course of the counterrevolution against the modern class action in the elected branches and in rulemaking under the Enabling Act has been similar to its course in the larger domain of legal issues relevant to private enforcement that we have studied. None of those institutions was very successful in changing the salient legal rules. In our other work we have found that, by contrast, the Supreme Court acting as such (rather than as promulgator of the Federal Rules) has been increasingly successful, and increasingly polarized, in retrenching rules salient to private enforcement, and we have explored institutional explanations for its relative success both theoretically and empirically.¹⁰² It remains to consider whether the pattern holds as to class actions.

To set the stage we present some of our data and conclusions on the Court's decisions in the two larger domains we have examined, the first comprising decisions on non-procedural private enforcement issues, and the second decisions interpreting the Federal Rules of Civil Procedure. In both we identified, and our data sets contain only, decisions where there is clear directionality (pro- or anti-private enforcement) to the decision on an issue.

For the non-procedural issues, over the period from 1970 to 2013, we identified all Supreme Court decisions on private rights of action, standing, attorney's fees, and mandatory arbitration of a federal right.¹⁰³ Figure 7 plots lines estimating the probability of an outcome in favor of private enforcement, and the separate probabilities of conservative and liberal justices' votes in favor of private enforcement. The figure reflects that the estimated probability of a pro-private enforcement vote has been in long decline, from 68 percent in 1970 to 18 percent in 2013. This decline has been substantially driven by the votes of conservative justices.

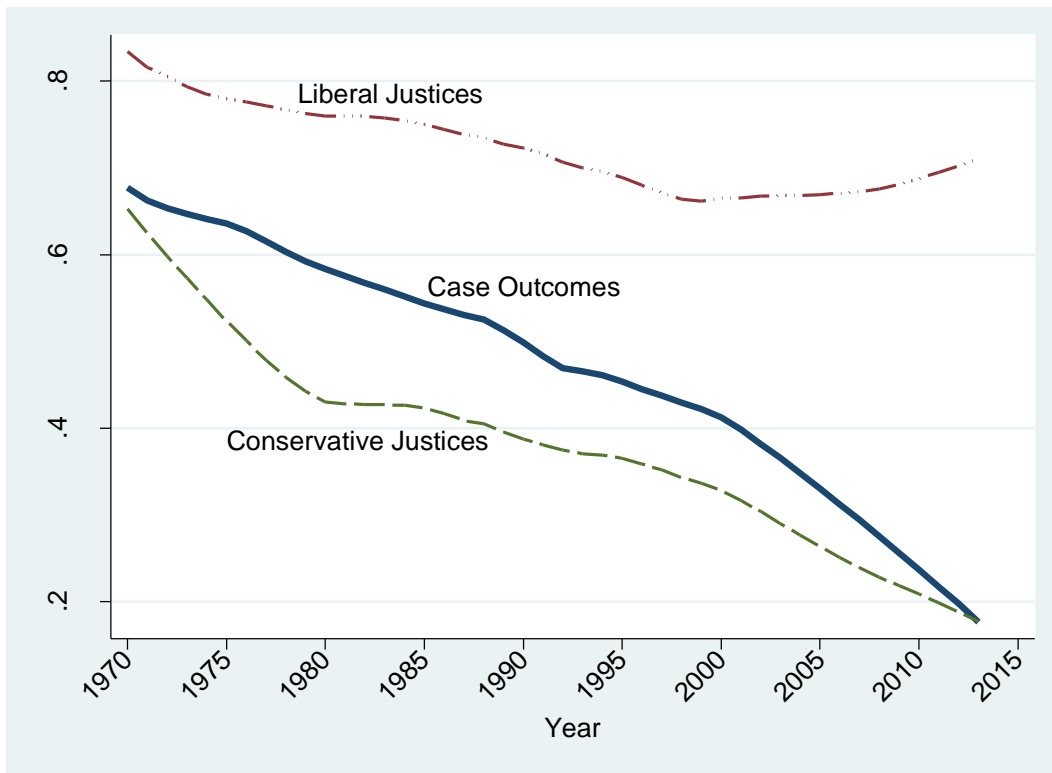
¹⁰⁰ See *id.* at 11-20; *supra* notes 23, 25.

¹⁰¹ See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1603-06.

¹⁰² Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1580-82; Burbank & Farhang, *Subterranean Counterrevolution*, *supra* note 13.

¹⁰³ See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1570-71, for further details.

Figure 7: Case Outcomes and Justice Votes in Non-Procedural Private Enforcement Cases¹⁰⁴



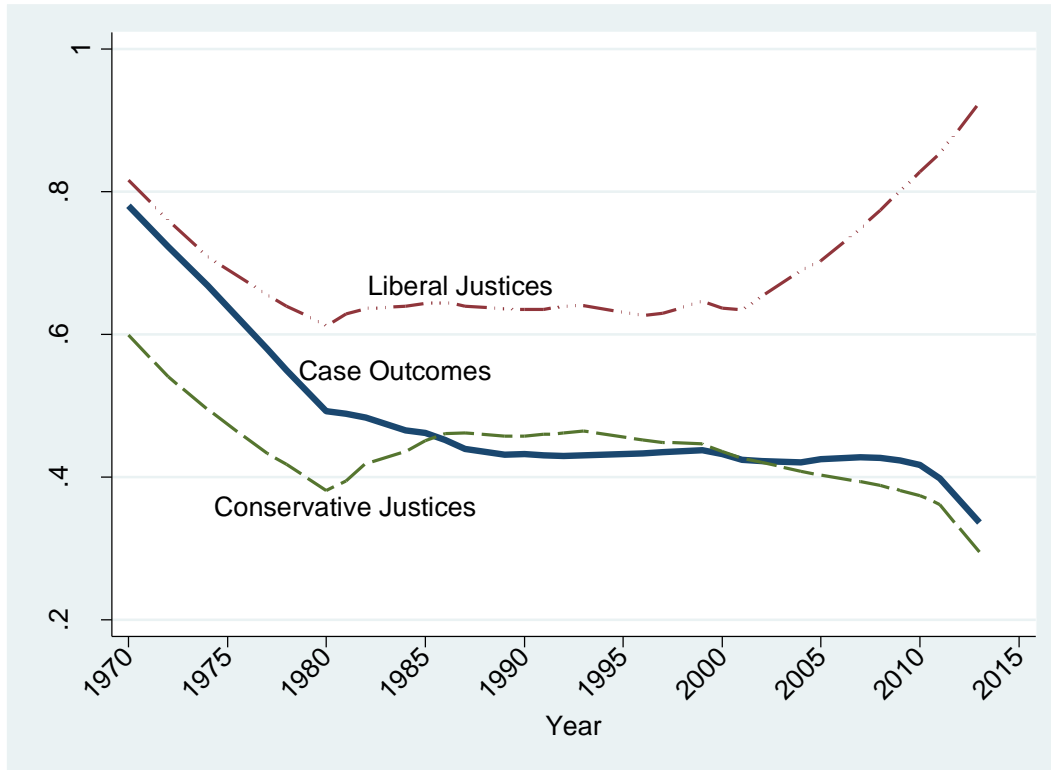
For the Federal Rules issues, we included every Supreme Court case in which the decision of an issue turned on interpretation of a Federal Rule of Civil Procedure, where the result would either widen or narrow opportunities or incentives for private enforcement.¹⁰⁵ Figure 8 plots lines estimating the probability of an outcome in favor of private enforcement in the Federal Rules cases over time, and the probability of votes in favor of private enforcement separately for conservative and liberal justices. The figure reflects that the estimated probability of a pro-private enforcement Federal Rules outcome declined from 78 percent in 1970 to 34 percent in 2013. Here too, the decline has been substantially driven by the votes of conservative

¹⁰⁴ *Id.* at 1574. The estimates depicted are from locally weighted least squares regression with 80 percent bandwidth.

¹⁰⁵ *Id.* at 1606. We have now broadened both Supreme Court data sets to include the 1960s, and we intend to analyze and discuss those data, both discretely and comparatively, in our book. Indeed, the class action decisions we analyze later in this section reflect the longer time period. As previously noted, the Library of Congress bill database begins in 1973.

justices in the majority.

Figure 8: Case Outcomes and Justice Votes in Federal Rules Private Enforcement Cases¹⁰⁶



Finally by way of background, we estimated the effect of ideology on the justices' votes depicted in the previous two figures in models using case fixed effects. This permits us to estimate ideological influence net of all other case-level influences (such as caseload pressures), even though it does not permit us to estimate the extent, if any, of such other influences.¹⁰⁷ On this question, our most interesting findings were that, although the effect of ideology in Federal Rules cases was about half the effect in other private enforcement cases in the 1970–1994 period, in the post-1994 period, the rate of growth in the effect of ideology for Federal Rules cases was much larger. Indeed, after about 2000, the Federal Rules issues became even more ideologically

¹⁰⁶ *Id.* at 1608. The estimates depicted are from locally weighted least squares regression with 80 percent bandwidth.

¹⁰⁷ *See id.* at 1578-80.

freighted than our other private enforcement issues, and the gap separating liberal and conservative justices was wider on those issues as well.¹⁰⁸

In order to investigate these issues in class action cases, we examined all cases from 1960 to 2013 in which the case either turned on an interpretation of Rule 23 or an issue explicitly linked to policies underpinning Rule 23. We coded the votes of justices as pro-class action if they voted to resolve the issue so as to widen access to or incentives for class actions, and as anti-class action if they voted to narrow access or incentives.

Our search yielded 33 cases, in which 34 discrete class action issues were decided. We treat the issue as the unit of analysis. This rendered a total of 295 justice votes on class action issues. This, of course, provides modest data for discussion and analysis. But because this is the full universe, we find it informative to examine empirically. Our primary interest is to assess the relationship between justices' ideological preferences and their votes in class action cases, and whether and how this has changed over time. For our measure of justice ideology, we rely on Martin-Quinn scores.¹⁰⁹ Use of these scores allows us to assess empirically whether class actions belong in the family of issues associated with the left-right divide, such as civil rights and economic regulation.

Table 2 lists the raw proportion of pro-class action votes, relative to total votes, for each justice who voted in more than five cases in our data. Two things stand out. First, the distribution from lowest to highest pro-class action votes roughly tracks the conservative-liberal dimension. The table also indicates whether a justice is "conservative" (=1) or "liberal" (=0), dividing them according to whether they are above or below the median of the average annual Martin-Quinn score for justices in our class action data who voted in more than five cases.¹¹⁰ The conservative-liberal dichotomy yielded by the Martin-Quinn scores perfectly divides our ratio of pro-class action votes in the following sense: every "conservative" has a lower pro-class action voting rate than every "liberal."

¹⁰⁸ *See id.* at 1609-12.

¹⁰⁹ These "ideal point" scores for the justices are based on the voting behavior and alignments of justices in cases decided by non-unanimous opinions. They are fluid, changing from one term to the next in accordance with changes in justices' voting behavior over time. Higher values are associated with more conservative justices. In an ancillary analysis not reported, we obtain substantially similar results when substituting Segal-Cover scores for Martin-Quinn scores. Segal-Cover scores are based on information independent of justices' voting behavior.

¹¹⁰ The average score is computed using justice scores for all years appearing in our class action data set.

A second notable feature of the table is the large disparity between conservative and liberal justices' voting ratios. The scale ranges from Thomas voting in a pro-class action direction 9 percent of the time, to Breyer voting in a pro-class action direction 91 percent of the time, and there is a roughly continuous distribution of justices between the two poles.

Table 2: Percent Pro-Class Action Votes

Justice	% Pro Class Action	Number of Issues	Conservative	Avg. Martin-Quinn Score
Thomas	9	11	1	3.56
Scalia	17	12	1	2.45
Roberts	25	8	1	1.38
Kennedy	25	12	1	.60
Powell	32	19	1	.89
Stewart	33	18	1	.53
Alito	38	8	1	2.34
Burger	40	20	1	1.75
White	41	22	1	.39
Rehnquist	42	24	1	3.78
O'Connor	57	7	1	1.09
Blackmun	59	22	0	.19
Marshall	61	23	0	-2.85
Brennan	64	22	0	-2.66
Stevens	67	18	0	-1.15
Sotomayor	67	6	0	-1.66
Ginsburg	73	11	0	-1.95
Kagan	83	6	0	-1.33
Douglas	86	7	0	-6.56
Breyer	91	11	0	-1.23

Figure 9 presents the raw balance, within each year, of pro versus anti-class action issue outcomes in our data. For purposes of this figure, anti-class action outcomes were coded -1, and pro-class action outcomes were coded 1. The sum of the two is reflected in each year. In only one year in the data (1975) did the values net to zero. In all other years with no value reflected on the figure, no class action issues were decided. From 1969 through the end of the 1970s, the clear preponderance of outcomes was anti-class action (with all but one of these cases decided after 1972, when conservative justices secured a majority). In the 1980s, the clear preponderance was pro-class action. Only one class action issue was decided from 1990 to 1996. From 1997 to the present, in five of six years in which the Court addressed at least one class action issue, the net balance was anti-class action.

Figure 9: Net Balance of Outcomes in Class Action Cases

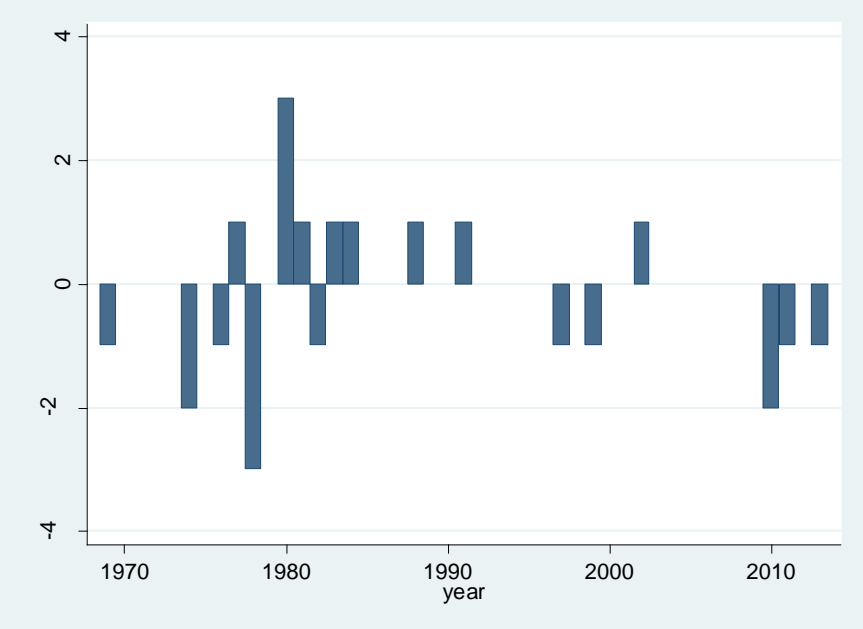


Figure 10: Case Outcomes and Justice Votes in Class Action Cases

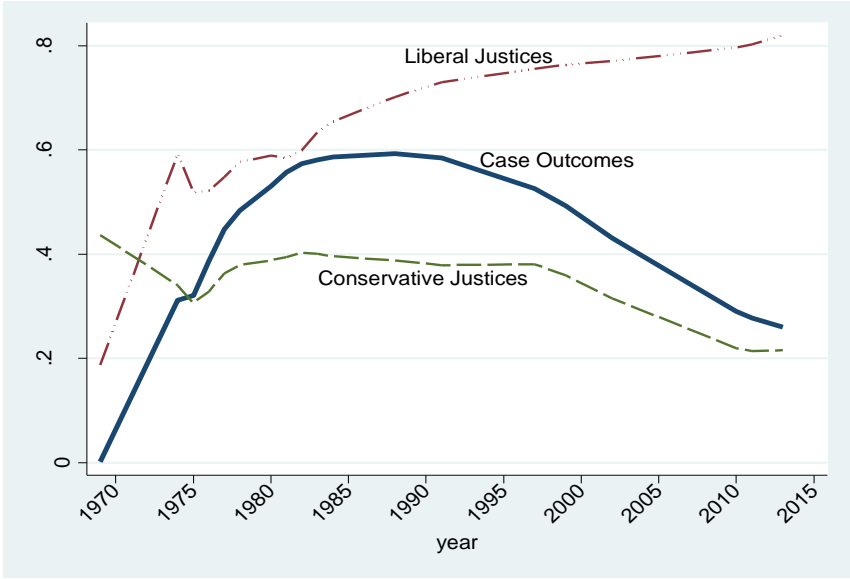


Figure 10 plots a line estimating the probability of an outcome in favor of class actions, and the separate probabilities of conservative and liberal justices' votes in favor of class actions.¹¹¹ Anti-class action outcomes and votes are coded 0, and pro-class action outcomes and votes are coded 1. The figure reflects that the estimated probability of a pro-class action outcome has undergone a decline, from 59 percent in the late 1980s to 26 percent in 2013. This decline has been substantially driven by the votes of conservative justices, whose estimated probability of a pro-class action vote declined from 39 percent to 21 percent over this period. The probability of a pro-class action vote *increased* for liberal justices over the same period, from 70 to 82 percent. By 2013, the Court's class action outcomes nearly converge with the votes of conservative justices. Further, the *difference*, or the ideological distance, between liberal and conservative justices' voting on class action issues grew quite significantly from the early 1980s to the current period, a pattern of polarization that accelerated noticeably after the late 1990s. By the end of our series, liberal and conservative justices' voting on class action issues is separated by 60 percentage points.

We next construct a model using the votes of justices on class action issues as the dependent variable and the justices' ideology scores as the key independent variable. In addition to the direct incorporation of the ideology measure into the model, we also test the theory that the Court moved to the right after the Republicans took Congress in the 1994 elections, and have held at least one chamber almost continuously since, materially reducing the probability of legislative override and widening the justices' perceived range of policymaking discretion.¹¹²

In order to test this hypothesis, we model the post-1994 effect with a time dummy variable that takes the value of 0 up to and including 1994, and 1 after 1994, interacted with the justices' ideology score. The interaction allows us to assess whether there was a change in the effect of ideology on justices' votes on class action issues after 1994.

We use case fixed effects to control for potential confounding factors ranging from case facts, to the clarity or indeterminacy of precedent, to changing institutional and political conditions. This approach leverages only variation in the relationship between justices' ideology and their votes within cases to estimate the effects of ideology. It thereby controls for all case-level variables. Case fixed effects models use information only from cases with at least one

¹¹¹ The estimates depicted are from locally weighted least squares regression with 80 percent bandwidth.

¹¹² See Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533, 545 (2006).

dissenting vote, which includes 198 of our 295 votes. We obtain similar results in models without fixed effects, using all of the votes.¹¹³

Table 3: Logit Model of Justice Votes in Class Action Cases, with Case Fixed Effects

	Coefficient	Marginal Effect
<u>Ideology (Martin-Quinn)</u>	-.48 ** (.12)	-.06
<u>Ideology*Post 1994 Dummy</u>	-.69 * (.27)	-.09

N= 198
Pseudo R² = .41

Standard errors in parentheses, clustered on justice
**<.01; *<.05

Table 3 reports a logit model with case fixed effects and standard errors clustered on judge. The main effect of the ideology variable is significant. Because the interaction is included, this variable reflects the effect of ideology only in the period from 1970 to 1994. The marginal effect for the coefficient is -.06, which means that for each unit increase in a justice’s Martin-Quinn score (which becomes more conservative as it increases), there is a corresponding reduction of 6 percent in the probability of a pro-class action vote. To put this in substantive perspective, the distance between the mean ideology scores of justices designated conservative and liberal (identified above) is approximately 3.5. An increase of this magnitude in the ideology score is associated with a 21 percent increase in the probability of an anti-class action vote.

The interaction of ideology with the post-1994 dummy is also significant, with a marginal effect of 9 percent. The effect of ideology in the post-1994 period is given by summing the marginal effects of the two variables. Thus, as compared to a marginal effect of a 6 percent reduction in the probability of a pro-class action vote in the period from 1970 to 1994, the marginal effect grows to 15 percent in the 1995-2013 period. As compared to the 21 percent reduction in the probability of a pro-private enforcement vote for conservatives as compared to liberals in the 1970-1994 period, in the 1995-2013 period there is a 53 percent reduction. The effect of ideology on justices’ class action votes more than doubled after 1994.¹¹⁴

¹¹³ We report those results in note 114, *infra*.

¹¹⁴ We also examined models in which we dropped fixed effects so that we could leverage information from all 295 observations. In these logit models, we incorporated the following independent variables: (1) Martin-Quinn score; (2) post-1994 dummy variable; (3) interaction of

In presenting these data, we do not suggest that the Court's class action decisions reflected exclusively the ideological preferences of the justices. That position would neglect "the messiness of lived experience,"¹¹⁵ which teaches that judges--even judges on a court that has the final word on matters of constitutional law--make decisions based on a number of considerations, including the law as they understand it. One such consideration, institutional self-interest (concerning the effect of a ruling on the docket of the federal courts), quite clearly influenced a number of the Court's class action decisions, particularly anti-access decisions in the late 1960s and the 1970s.¹¹⁶

VI. Conclusion

From an institutional perspective, in recent years the Supreme Court has led the counterrevolution against class actions just as it has led the counterrevolution on the other issues salient to private enforcement that we have studied. Class actions were the focus of legislative,

the Martin-Quinn score and the post-1994 dummy; (4) outcome of the Court of Appeals ruling below on the issue; (5) controls for the policy area of the underlying substantive cause of action (operationalized with dummy variables for civil rights, economic regulation, and other policy area); and controls for the type of defendant (operationalized with dummy variables for business, government, and other defendant). The results were similar. The main effect of ideology was significant with a marginal effect of -.04, and the interaction was significant with a marginal effect of -.11. This means that moving from a liberal to a conservative justice was associated with a 14 percent reduction in the probability of a pro-class action vote prior to 1994, and a 53 percent reduction after 1994.

¹¹⁵ Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science, and Humility, in What's Law Got to Do with It?: What Judges Do, Why They Do It, and What's at Stake* 41, 53 (Charles Garder Geyh ed., 2011).

¹¹⁶ See, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978) (class representative must pay the cost of identifying absent members to receive notice); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 136 (1974) (class representative must pay the cost of giving individual notice to all absent members who can be identified through reasonable effort); *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1974) (all members of class must meet amount in controversy requirement for diversity jurisdiction); *Snyder v. Harris*, 394 U.S. 332 (1969) (claims of class members cannot be aggregated to meet the amount in controversy requirement); *Snyder*, 394 U.S. at 341 ("There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system."). For a discussion of some of these decisions, see Marcus, *supra* note 6, at 627-29 (*Snyder* and *Zahn*), 633-35 (*Eisen*).

rulemaking, and Supreme Court retrenchment efforts in the 1990s. In Congress, primarily Republican reformers had relatively modest success. The rulemakers, disproportionately led by Republican-appointed judges and corporate practitioners, but constrained in important ways by the Enabling Act process reforms of the 1980s, fared little better. In marked contrast, the Supreme Court, led by its conservative wing, has issued a series of bold decisions curtailing the operation of class actions.

Over this period, the results we report here look quite similar to those on the other issues we have tracked, particularly the Federal Rules issues (which contributed some of the data we analyze in this article). As is true of the Federal Rules issues, the growing role of ideology is distinctive and palpable. Indeed, the gap separating liberal and conservative justices' votes on class action and other procedural issues is materially greater than on federal rights in general.¹¹⁷ As Justice Kagan all but said in the quotation that opens this article, class actions have become a magnet for ideological judicial behavior.

Perhaps, as other scholars have speculated about a similar phenomenon in the Court's business decisions, the growing gap reflects the fact that, over time, "the increasing conservatism of the Court resulted in the Court's taking cases in which the conservative position was weaker than previously, leading to more opposition by liberal Justices and hence to a higher percentage of liberal votes."¹¹⁸ Another possible explanation is that it took the Court's liberals time to realize either that a counterrevolution was in progress, or just how committed some of their colleagues were to it.¹¹⁹

One of the cases contributing data for this article, *Wal-Mart, Inc. v. Dukes*,¹²⁰ garnered a great deal of attention in the media, prompting some who have commented on our work to question a hypothesis we advanced in seeking institutional explanations for the Supreme Court's relative success in the counterrevolution:

¹¹⁷ In bivariate lowess models, liberal and conservative justices' votes in federal rights cases are separated by 23 percentage points by 2013, while in procedure cases the figure is 63 percentage points, and in class action cases the figure is 60 percentage points. See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1576, 1609; and Figure 9 of this paper.

¹¹⁸ Lee Epstein, William A. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1470 (2013). See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1610 n.255.

¹¹⁹ See Burbank & Farhang, *Litigation Reform*, *supra* note 12, at 1610 n.255 (suggesting that "it took time for the Court's liberals to realize what was going on").

¹²⁰ 564 U.S. ____ (2011).

[T]he ostensibly more technical and legalistic qualities of the Court’s decisions on issues affecting private enforcement, and the gradual, evolutionary nature of case-by-case decision-making, opened a pathway of judicial retrenchment that was remote from public view as compared to legislative politics or, indeed to Supreme Court decisions on highly salient issues.... If, as many scholars believe, the Court’s public standing and legitimacy are important to its institutional power, the need for broad public support and concern about negativity bias place some limits on its discretion to scale back highly visible substantive statutory rights directly. From the standpoint of legitimacy, the strategy of focusing on lower visibility private enforcement issues is preferable. When the Court is engaged in apparently technical and legalistic decisionmaking, the public perceives it as more objective, neutral, and legitimate. Indeed, the public is less likely to notice such decisions at all.¹²¹

Systematic empirical study of how the media covered the issues in our data as a whole supports this hypothesis: they receive far less coverage than the underlying merits issues. It is possible, however, that class action issues are different. We intend to investigate that question further. For the present, we note that, however salient *Wal-Mart* was to members of the public, that salience owed little if anything to the issues that the Court decided, which were indeed “technical and legalistic.” Like most of the issues in our data, including the data for this article, they were the kinds of issues that receive little attention from the media and are little noticed by the public.¹²²

¹²¹ Burbank & Farhang, *Subterranean Counterrevolution*, *supra* note 13, at _____. This is one of a number of institutional differences we have suggested as possibly contributing to the Court’s relative success at retrenchment.

¹²² “*Wal-Mart v. Dukes* involved a massive sex discrimination class action against a major nationwide corporation, making it the rare civil procedure case to draw significant scholarly and mainstream media coverage, which largely focused on its potential effect on substantive employment discrimination law.” Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 311, 323 (2012), *See id.* at 313-14 (“Of course, having civil procedure on the doctrinal agenda will not draw the attention of the popular media or the public; do not expect public calls to impeach Roberts over the scope of Rule 8(a).”).