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Class Actions and the Counterrevolution Against Federal Litigation

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ARTICLE

CLASS ACTIONS AND THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION

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“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

INTRODUCTION

Research in multiple disciplines has established that the role of litigation and courts in the creation and implementation of public policy in the United States has grown dramatically.² 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 around the time when Congress began ramping 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 against private enforcement that ensued. Our recent work seeks to fill this gap in the literature by assessing the counterrevolution from an institutional perspective. In a series of articles⁵ and a book,⁶ we document how the Executive Branch, Congress and the Supreme Court—wielding both judicial power under Article III of the Constitution and delegated

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¹ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

² See generally CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1994); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

³ See FARHANG, *supra* note 2.

⁴ See generally ANDREW P. MORRIS, BRUCE YANDLE, & ANDREW DORCHAK, *REGULATION BY LITIGATION* (2008); *REGULATION THROUGH LITIGATION* (W. Kip Viscusi ed., 2002); *REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* (Daniel P. Kessler ed., 2011); see also Francis Fukuyama, *The Decay of American Political Institutions*, AM. INT. (Dec. 8, 2013), <http://www.the-american-interest.com/articles/2013/12/08/the-decay-of-american-political-institutions/> [<https://perma.cc/NMA5-K6MX>] (“The courts and legislature have increasingly usurped many of the proper functions of the executive, making the operation of the government as a whole both incoherent and inefficient.”).

⁵ See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015) [hereinafter *Rulemaking*]; Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014) [hereinafter *Litigation Reform*]; Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293 (2015) [hereinafter *Subterranean Counterrevolution*]. In another paper, we focus on the implications of our data for the study of litigation retrenchment in civil rights cases. Stephen B. Burbank & Sean Farhang, *Reforming Civil Rights Litigation: Why the Court Succeeded Where Congress Failed*, in *THE RIGHTS REVOLUTION REVISITED* (Linda Dodd ed., 2017).

⁶ See STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017).

legislative power under the Rules Enabling Act⁷—have fared in efforts to reverse or dull the effects of statutory and other incentives for private enforcement.⁸ In this Article we focus specifically on class actions, situating their consideration in the framework, and fortifying it with data, that we have developed as part of that project.

In our work addressing the larger phenomenon, we find that the counterrevolution became essentially a partisan project beginning with the first Reagan Administration.⁹ Recognizing the political infeasibility of retrenching substantive rights, the movement's strategy was to undermine the infrastructure for enforcing them. We show that the project was undertaken in earnest but largely failed in the elected branches, where efforts to diminish opportunities and incentives for private enforcement by amending federal statutory law were substantially frustrated.¹⁰ We also show that, although Chief Justices appointed by Republican presidents have hoped to bring about major retrenchment through amendments to the Federal Rules of Civil Procedure, success has proved elusive and episodic, despite appointments that caused the Advisory Committee to be dominated by Republican-appointed judges and practitioners representing business.¹¹ We then document the sharply contrasting success of the counterrevolution in the federal judiciary.¹² Over the past four decades, incrementally at first but more boldly in recent years, the Supreme Court has transformed federal

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⁷ 28 U.S.C. §§ 2072–74 (2012).

⁸ 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 *Litigation Reform*, *supra* note 5, at 1548 (“Figure 1 supports our claim that the growth in private litigation enforcing federal statutes is a function of statutory design.”).

⁹ For a discussion of early Reagan Administration efforts to retrench private enforcement, see *id.* at 1551–55; BURBANK & FARHANG, *supra* note 6, at 25–65.

¹⁰ *Id.*; see also *Litigation Reform*, *supra* note 5, at 1562–67 (“The legislative project of litigation reform mounted by the Republican Party was largely a failure.”).

¹¹ See *Litigation Reform*, *supra* note 5, at 1588–1603 (“[Chief Justice] Burger’s appointments of judges to the Advisory Committee markedly favored judges appointed by Republican Presidents, reinforcing our judgment that he sought to use appointments to influence the development of civil rules.”); *Rulemaking*, *supra* note 5, at 1591 (“The balance of power on the Committee between judges appointed by Republican versus Democratic presidents, which was three to two during the 1987–90 period, tilted yet more sharply in favor of Republican appointees starting in 1991–92.”); see also BURBANK & FARHANG, *supra* note 6, at 65–129.

¹² See *id.* at 130–91; *Litigation Reform*, *supra* note 5, at 1605 (“[A] one-judge majority of the Supreme Court—whose members are unelected, serve for life, and are insulated from individual if not institutional reprisal—can bring about momentous civil litigation reform that would be impossible to secure from the legislature or its delegated procedural lawmaking bodies.” (footnote omitted)).

law from friendly to unfriendly, if not hostile, to the enforcement of rights through private lawsuits.¹³

We offer an institutional account of why conservative judges on a court exercising judicial power succeeded where their ideological compatriots in Congress, the White House, and the primary rulemaking committee largely failed. In doing so, we emphasize distinctive institutional properties of the judiciary. First, the Court is governed by a streamlined decisional process and simple voting rules, making it capable of unilateral action on controversial issues. Second, life-tenured federal judges are largely insulated from the forces and incentives of democratic politics, providing the Court with considerable freedom to act decisively on divisive issues. Third, in eras of divided government and party polarization, the Court faces less credible threats of statutory override, thus enjoying more policymaking discretion. Fourth, the law governing or driving private enforcement, perceived by most observers as legalistic and technical, provides the Court with a pathway to retrenchment that, as we demonstrate empirically, is remote from public view. This subterranean quality is reinforced by the slow-moving, evolutionary nature of case-by-case policy change.¹⁴

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 class actions largely track the story we discern in our larger project: the Supreme Court has been the most successful institutional agent in retrenching law that governs or influences private enforcement. In other words, it is not just “the usefulness of Rule 23” that conservative Justices have been “bent on diminishing,”¹⁵ but the usefulness of statutory provisions and other legal rules that promote private enforcement in general.

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13 The focus of our work is “the substance of law rather than its effects. We have not sought to measure the extent to which lawmakers have actually succeeded in affecting the incidence or qualitative impact of private enforcement of federal rights. Such an undertaking would require another book, and that book might not succeed, for the measurement challenges are monumental.” BURBANK & FARHANG, *supra* note 6, at 226. We also understand that our focus exclusively on decisions of the Supreme Court may distort the extent of judicially created legal change (or stasis), but we have yet to see systematic data that support that view.

14 See generally BURBANK & FARHANG, *supra* note 6, at 192–247; see also *Litigation Reform*, *supra* note 5, at 1580–82; *Subterranean Counterrevolution*, *supra* note 5, at 299–300 (“Although significant legislative or rulemaking reform proposals often present stark alternatives that trigger powerful interest group mobilization, the case-by-case, less visible, more evolutionary process of legal change via court decisions on seemingly technical and legalistic issues is far less likely to do so.” (footnote omitted)).

15 *Supra* text accompanying note 1.

I. THE MODERN CLASS ACTION

The original Federal Rules of Civil Procedure were drafted by an advisory committee appointed by the Supreme Court. In 1934, the Court was authorized to prescribe “general rules” of practice and procedure for the federal courts under a statute delegating federal legislative power.¹⁶ Previously, federal class actions had been permitted in a limited set of circumstances based on the practice of courts of equity in England.¹⁷ 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.¹⁸ The classification turned on an analysis of the abstract nature of the rights involved that often verged on the metaphysical.¹⁹ 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.²⁰ In connection with the rule on class actions, as with other joinder rules, they sought to turn federal jurisprudence from abstract inquiry to functional analysis that considers the practical as well as the formal legal effects of litigation.²¹ 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

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¹⁶ Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072–74 (2012)). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

¹⁷ See generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 8–36 (1987); Geoffrey C. Hazard, Jr., John Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

¹⁸ See Hazard, Jr., Gedid & Sowle, *supra* note 17, at 1938.

¹⁹ See *id.*; Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 53–54 (2010).

²⁰ 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 of those goals in articles published after the amendments became effective. See, e.g., Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (discussing “dual missions of the class-action device” to reduce duplicative litigation and provide a means of vindicating small claims that could not be individually brought); 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 is consistent with our reading. See David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 599 (2013).

²¹ See *id.* at 605 (“Other than desegregation, no substantive concern surfaced in committee deliberations.”).

representation.²² But in Rule 23(b), they also reformulated the categories appropriate for class action treatment and specified different procedural requirements depending on the category.

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, 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.²³

Although the Advisory Committee could not have foreseen all of the effects of their handiwork in Rule 23(b)(3),²⁴ 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. Contrary to the view espoused by the Supreme Court²⁵ (and many commentators), however, this was not the Advisory Committee’s main purpose in 23(b)(3).²⁶

The Court’s interpretation is difficult to square with the Advisory Committee Note, which foregrounds the goal of “achiev[ing] economies of time, effort, and expense, and promot[ing] uniformity of decision as to persons similarly situated.”²⁷ Class actions packaging negative value claims create litigation; they do not make existing or prospective litigation more

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²² See FED. R. CIV. P. 23(a) (“One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.”).

²³ FED. R. CIV. P. 23(c)(2).

²⁴ See Marcus, *supra* note 20, 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.” (footnote omitted)).

²⁵ See *Amchem Prod., 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.’”) (quoting Kaplan, *A Prefatory Note*, *supra* note 20, at 497).

²⁶ David Marcus and John Coffee reached the same conclusion. See JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 61-63 (2015); Marcus, *supra* note 20, at 599-600, 605-06 (“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.”).

²⁷ FED. R. CIV. P. 23(b)(3) advisory committee’s note to 1966 amendment.

efficient or consistent.²⁸ The Court's interpretation is even more difficult to square with Rule 23(c)(2)'s requirement that individual notice be given to members of (b)(3) classes who can be identified with reasonable effort. For most people with small 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.²⁹ Finally, the record of the Committee's deliberations does not support the Court's assertion in *Amchem*.³⁰

Through the addition of Rule 23(b)(3) for cases seeking monetary relief, the 1966 amendments 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 wings, class actions soon occupied center stage, functioning as a kind of private enforcement "wild card . . . divorced from the statutes and administrative regulations that are the authorized sources of regulatory policy."³¹

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28 The only reference to small claims in the section of the Note explaining (b)(3) came toward the end. 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."

29 These aspects of the revised rule were added late in the drafting process to meet concerns that the subdivision might be used by *defendants*, in league with class counsel, to bind those with *large* individual claims through group litigation "inimical to their interests." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1488 (2008); see also Marcus, *supra* note 20, at 605 (noting concerns put forth by committee member John Frank that Rule 23 could result in collusive settlement negotiations and "give defendants classwide preclusion at an unjust discount").

30 The *Amchem* Court relied heavily on Kaplan's articles. The small-claims class action loomed larger among Kaplan's goals than it did among those of the Advisory Committee as a whole. Moreover, it only became prominent in his remarks to the Committee late in the process of developing the rule, when the argument that (b)(3) was the "small man's rule" was useful in response to repeated efforts by Advisory Committee member John Frank to delete the entire subsection. See Minutes of the May 1965 Meeting of the Advisory Comm. on Civil Rules 14 (May 15-17, 1965), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, *microformed on* CI-8002-83 (Cong. Info. Serv.). Indeed, at the meetings in late October/early November, 1963, Kaplan was still describing (b)(3) primarily as a vehicle for antitrust and fraud claims. See Transcript of Meeting of the Advisory Comm. on Civil Rules 4 (Oct. 31-Nov. 2, 1963), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, *microformed on* CI-7104-53 (Cong. Info. Serv.). Shortly thereafter, Judge Wyzanski remarked that "one aspect which isn't emphasized . . . is the claim of a particular individual which is very small and unlikely to be litigated." *Id.* at 7. We are grateful for insight on this subject to J. Taylor Gooch, Penn Law Class of 2013.

31 Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 660 (2013).

As evidenced by the legislative responses to amended Rule 23 in the 1970s that we discuss in Section III,³² it did not take long to recognize that the small-claims class action presents a difficult public policy dilemma. On one view, that dilemma is how to provide sufficient access to court in a society that relies heavily on private litigation for the enforcement of important legal norms, while ensuring fidelity to those norms and the regulatory policies underlying them, avoiding unfairness to defendants and others affected by litigation, and respecting the limited capacity of the courts. The puzzle is that this dilemma was not apparent to the group that drafted the amendments or the other bodies that considered them before they became effective.

One possible explanation, already suggested by our discussion of Rule 23(b)(3), is that, far from being pre-occupied with negative value claims, the Committee did not give them adequate attention. That would have required considering the costs as well as the benefits of animating them. Another explanation is that the Committee did not anticipate developments in substantive law, statutory private enforcement regimes, and the legal profession that catalyzed the economic incentives of the class action.³³

Still another possible explanation for the Advisory Committee's failure to engage with this and other public policy dilemmas presented by the modern class action lies in the process they followed in fashioning the 1966 amendments. Had that process been more inclusive and transparent, trade-offs that became obvious soon after the amendments came into effect might have received adequate attention. Instead, a pamphlet containing all proposed amendments that were to become effective in 1966—a group far larger than the proposed amendments to Rule 23—was “widely distributed to the bench, bar and law schools in March 1964,” apparently by mail.³⁴ There were no hearings. The Committee received very few written

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³² See *infra* text accompanying notes 68–99.

³³ See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 670–76 (1979) (summarizing numerous factors, unrelated to Rule 23, leading to the class action boom); see also *supra* note 26 and accompanying text.

³⁴ Letter from Warren Olney III, Dir., Admin. Office of the Courts, to the Supreme Court (Oct. 8, 1965), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, *microformed on* CI-6406-02 (Cong. Info. Serv.). We found no evidence that the proposals that became the 1966 amendments were published. In 1981, the Standing Committee considered various possible changes to the rulemaking process. One of the items considered was whether “the circulation and distribution of proposed rules amendments [was] adequate and [whether] the process [should] be further opened to public scrutiny.” Comm. on Rules of Practice & Procedure, Minutes of the Meeting of June 18–19, 1981 1 (Aug. 28, 1981), http://www.uscourts.gov/sites/default/files/fr_import/ST06-1981-min.pdf [https://perma.cc/YN9D-RC5P]. During the discussion a member of the committee “suggested that the distribution of proposed amendments was one of the weakest parts of the system.” *Id.* at 4.

comments on the entire package of proposed amendments,³⁵ and of those addressing Rule 23 proposals, a majority concerned Rule 23.1 (derivative actions). The Reporters tended to treat the few critical comments (“brickbats”) about the Rule 23 proposal as naïve, ill-informed, or perhaps immoral,³⁶ which might have been more difficult if the process had included more participants, or if the critics had been permitted to engage in the give-and-take of a public hearing.

The last suggestion speaks to the epistemic foundations of the 1966 amendments and, more generally, to whether they represented good public policy. We do not intend a critique founded in democratic values. When the 1960s Advisory Committee was at work on Rule 23, it was not yet clear that the landscape of federal civil litigation was undergoing a profound transformation that would soon fill federal courts with private lawsuits brought as a result of conscious legislative choices to stimulate private enforcement of federal law. Those choices led to the birth of the counterrevolution in the first Reagan Administration. It was not until the political and ideological valence of private enforcement became apparent that questions about democratic values in rulemaking, presaged in debates about the proposed Federal Rules of Evidence, became obvious and insistent. It was this democratic deficit, in part, to which the 1980s reforms of the Rules Enabling Act process were addressed, seeking to make rulemaking more open, accessible, and susceptible to congressional oversight.³⁷

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³⁵ A list of “Communications Received on March 1964 Draft of Amendments to Civil Rules” appears in the Committee’s papers in the “Deskbook” that contains the agenda for the May 1965 meetings. It lists twenty-seven “communications” (comments), together with the comments of two bar associations previously distributed. RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, *microformed on* CI-6402-65 (Cong. Info. Serv.).

In a letter to the Reporter, Charles Alan Wright expressed surprise “that these proposals have elicited so little comment from the profession” and noted that he was “disappointed by the quality of the comments which you did receive.” Letter from Charles Alan Wright, Professor, Univ. of Tex. Sch. of Law, to Benjamin Kaplan, Professor, Harvard Law Sch. 1 (Apr. 24, 1965), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, *microformed on* CI-7005-28 (Cong. Info. Serv.).

³⁶ The Reporters distributed a memorandum to the Committee “discussing the brickbats received.” Memorandum from Benjamin Kaplan & Albert Sacks to the Advisory Comm. on Civil Rules (Apr. 21, 1965), *in* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, *microformed on* CI-7005-10 (Cong. Info. Serv.). In response to the criticism that (b)(3) should require opting in, rather than permit opting out, the Reporters observed that “[t]he morality of treating such people [“small people with small claims”] as null quantities is very questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the government.” *Id.* at EE-3.

³⁷ See BURBANK & FARHANG, *supra* note 6, at 65-129, 217-48.

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 to enable attorneys to do well by doing good (or, depending on one's perspective, to enrich themselves) was quickly realized, as was the potential of the (b)(3) class action to promote inefficient overenforcement 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 and attorney's fees (in addition to actual damages, if any, which are difficult to prove).³⁸

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.³⁹ Troubled by this evident misfit, some federal district courts refused to certify (b)(3) class actions in TILA litigation,⁴⁰ prompting Congress to cap the statutory damages recoverable in a class suit at the lesser of one percent of the creditor's net worth and, first (in 1974), \$100,000,⁴¹ then a few years later (in 1976), \$500,000.⁴² Indeed, of the eight bills to reduce the opportunities or

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³⁸ 15 U.S.C. §§ 1601–67f (2012). For the provisions on individual and class damages, see *id.*, §1640.

³⁹ See Comment, *Truth in Lending and the Federal Class Action*, 22 VILL. L. REV. 418, 423 (1977) ("The legislative history of the TIL Act makes no mention of the class action; apparently, the drafters simply failed to consider it." (footnote omitted)).

⁴⁰ See, e.g., *Ratner v. Chem. Bank N.Y. Tr. Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (denying (b)(3) class certification for lack of superiority as an adjudicative method, while exercising "considerable discretion," because a technical TILA violation would result in a "horrendous, possibly annihilating punishment" for defendants). "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); see also Marcus, *supra* note 20, 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 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 39, at 447–48.

⁴¹ Act of Oct. 28, 1974, Pub. L. No. 93-495, tit. IV, § 408(a), 88 Stat. 1500, 1518.

⁴² 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. 132, 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, 2153. Although Congress has addressed the problem of potential overenforcement under some other statutes, it has not done so consistently, which illustrates one of the costs of a transsubstantive class action regime and prompted the description of the (b)(3) class action as a "wild card." *Supra* text accompanying note 31; see also Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1930 (2006) ("Although the concept of inefficient overenforcement is a tool of economic analysis of law,

incentives for class actions that were introduced in Congress from 1973 (when the Library of Congress bill database starts)⁴³ to 1980, four were targeted at this specific problem.⁴⁴ Another bill would have made class actions unavailable in cases asserting claims valued at less than ten dollars,⁴⁵ suggesting that interest extended beyond the phenomenon of overenforcement to the very concept of using class litigation to vindicate small claims, prevent unjust enrichment, or deter illegal conduct.

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 prepared by the Justice Department sets 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."⁴⁷ 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."⁴⁸

The proposed legislation would have repealed Rule 23(b)(3), replaced the small-claims class action with a public action (brought by or on behalf of the

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when applied to a particular statute, it surely must start with the level of enforcement sought by the legislature . . . ." (footnote omitted)). For a list of statutes in which Congress has limited remedies available in class actions, see Brief for Respondent at Appendix A, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (No. 08-1008), 2009 WL 2777648, at *1A.

⁴³ For information about legislative activity before 1973, see Marcus, *supra* note 20, at 610-12, 620.

⁴⁴ S.3690, 93rd Cong. (1974); H.R. 4270, 96th Cong. (1979); H.R. 1299, 96th Cong. (1979); H.R. 3553, 96th Cong. (1979).

⁴⁵ H.R. 7683, 95th Cong. (1977).

⁴⁶ S. 3475, 95th Cong. (1978). In floor remarks, both Senators indicated that the bill was intended to start a conversation, and that they were not wedded to its provisions. See 124 CONG. REC. 27,859 (1978) (statement of Sen. DeConcini) ("While this bill was prepared in consultation with a wide variety of interests, it is only a first step, not the last. Neither Senator Kennedy nor I are wedded to its provisions."); *id.* at 27,869 (statement of Sen. Kennedy) ("This comprehensive bill . . . will begin the debate on revision of one of our most important procedural rules [23(b)(3)]."). For contemporaneous commentary, see James R. Lyons, Jr., *Manageability of Class Actions Under S. 3475: Congress Confronts the Policy Choices Revealed in Rule 23(b)(3) Litigation*, 68 KY. L.J. 216 (1980).

⁴⁷ 124 CONG. REC. 27,860 (1978).

⁴⁸ *Id.*; see also David Freeman Engstrom, *Jacobins at Justice: The (Failed) Revolution of 1978, Class Action Reform, and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. 1531, 1537 (2017) ("Indeed, lurking in the background of the story of 1978 is the bracing possibility that the Rules Enabling Act, for all its virtues...has been a systematically enervating force...in an increasingly dense and interconnected regulatory world.").

United States),⁴⁹ and restructured large-claims class (“compensatory”) actions⁵⁰ to “increase the fairness of the procedure and to make it less expensive and time consuming.”⁵¹ The commentary asserted that the “use of the Rule 23(b)(3) compensation-oriented procedures for actions brought to remedy pervasive small harm has posed major problems for plaintiffs, defendants[,] and the courts.”⁵² The bill thus sought to respond to problems created by Rule 23 and Supreme Court decisions interpreting it (in particular those concerning notice), for plaintiffs and the federal courts, as well for defendants.⁵³ A revised bill was introduced in the House in 1979.⁵⁴

Nothing came of this legislative initiative.⁵⁵ The Carter Administration’s proposal is notable precisely because it was led by Democrats. As we discuss below, in the late 1970s and early 1980s there was a modest volume of bill activity seeking to limit class actions, and support for the bills was higher among Democrats. One possible interpretation of this finding is that, once the catalytic regulatory potential of amended Rule 23 became clear, Democrats—the primary architects of the Litigation State—took the lead in attending to its supervision and calibration prior to the emergence of the counterrevolution. This is consistent with our conclusion, after examining a larger universe of bills, that litigation retrenchment did not become a distinctively Republican issue until the first Reagan Administration.⁵⁶

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⁴⁹ See S. 3475, 95th Cong. §§ 3001–07 (1978). The proposal “categorically excluded smaller-damages class actions beyond federal commercial statutes and, further, left no hook for diversity-based class actions at all.” Engstrom, *supra* note 48, at 1551.

⁵⁰ See S. 3475, 95th Cong. §§ 3011–14.

⁵¹ 124 CONG. REC. 27,859 (1978); see Burbank & Wolff, *supra* note 19, at 58–59 (“The proposal suggests . . . restructuring class actions involving larger damages claims to improve efficiency and fairness of administration without sacrificing individual compensation.”).

⁵² 124 CONG. REC. 27,861 (1978).

⁵³ As discussed in the bill’s commentary:

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.

⁵⁴ 124 CONG. REC. 27,861 (1978).

⁵⁵ H.R. 5103, 96th Cong. (1979).

⁵⁶ For other Carter Administration civil litigation reform initiatives, see Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1774–75 (2013), finding that “nothing happened, and no subsequent Democrat has taken up that banner . . . .”

⁵⁷ See *Litigation Reform*, *supra* note 5, at 1558 (“[W]hen Reagan took office, there emerged a partisan gap which grew until it peaked in the 105th Congress (1995–1996), with Republicans supporting anti-litigation proposals at a level about 563% above Democrats.”).

In order to map legislative activity for class action retrenchment 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 sixty-eight bills from 1973 to 2014. The bills had an average of about 22 co-sponsors, yielding a total of 1511 episodes of legislators sponsoring or co-sponsoring a bill with a provision seeking to limit class actions. The top panel of Figure 1 represents a count, per Congress, of episodes of legislators sponsoring or co-sponsoring anti-class action provisions. The first year of each Congress is indicated on the horizontal axis. Prior to the 102nd Congress (1991–1992), the level of bill activity was modest. After the 102nd Congress, it grew steeply for six years, peaking in the 105th Congress (1997–1998), and then declined to the point that by the 112th and 113th Congresses (2011–2014), support levels approached zero, as in most Congresses prior to 1991.

The bottom panel of Figure 1 represents the net partisan balance of support, which is the total number of Democratic sponsors or co-sponsors in each Congress minus the total number of Republicans. In the late 1970s and early 1980s, when there was a modest volume of bill activity, the balance was moderately on the Democratic side. Beginning in the 102nd Congress (1991–92), the partisan balance shifted to the Republican side. It grew materially in that direction until the 105th Congress (1997–1998), after which it went into decline. By about the 110th Congress (2007–2008) the issue had receded from the legislative agenda and ceased to have discernable partisan valence.

**Figure 1: Total Support for Class Action Retrenchment
and Partisan Balance of Support**

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 2014, we calculated the total number of episodes of sponsorship or co-sponsorship per Congress.⁵⁷ We run negative binomial count models on this dependent variable. In our key independent variable of political party,

⁵⁷ We include both sponsors and co-sponsors because we are interested in the degree of legislative support for class action retrenchment proposals. To neglect co-sponsors would be to treat a bill that a legislator introduces only for herself as equivalent to one that dozens of other members of Congress support.

Democrats are coded 0 and Republicans are coded 1. We employ Congress-fixed effects with standard errors clustered on legislator.⁵⁸

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 1991–2014. In the model over the full period, there is a statistically significant party effect. Moving from Democrat to Republican is associated with a 189 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 significant at .1 and negative, indicating that support by Democrats was 139 percent higher than by Republicans. Recall, however, that during this period, aggregate levels of bill activity were very low. In the 1991–2014 period, where the vast bulk of bill activity lies, the coefficient turns positive and becomes highly statistically significant, indicating that moving from Democrat to Republican is associated with a 206 percent increase in the predicted count of episodes of support for anti-class action provisions.⁵⁹

Table 1: Legislator Support for Anti-Class Action Provisions
with Congress-Fixed Effects, 1973–2014

	1973–2014		1973–1990		1991–2014	
	Coef.	Marginal Effect	Coef.	Marginal Effect	Coef.	Marginal Effect
Party	1.06*** (.07)	189%	-.87* (.47)	-139%	1.12*** (.08)	206%
(Congress-fixed effects not displayed)						
N=		11344		4847		6497
Adj. Dev. R ² =		.51		.25		.41

***.01; **.05; *.1; Standard errors in parentheses, clustered on legislator

⁵⁸ Congress-fixed effects control for 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. This approach leverages only variation in the relationship between legislators' party and their votes within (and not across) Congresses to estimate the effects of party.

⁵⁹ Ordinary least squares regression models yield similar results. For an explanation of Ordinary Least-Squares Regression, see generally GRAEME D. HUTCHESON & NICK SOFRONIOU, *THE MULTIVARIATE SOCIAL SCIENTIST: INTRODUCTORY STATISTICS USING GENERALIZED LINEAR MODELS* 56–113 (1999).

Much of the legislative activity concerning class actions from the 102nd Congress (1991–1992) through the 109th Congress (2005–2006) was due to Republican-sponsored bills that ultimately led to enacted statutes: the Private Securities Litigation Reform Act of 1995⁶⁰ (“PSLRA”), and the Class Action Fairness Act of 2005⁶¹ (“CAFA”), only the first of which directly affected federal rights, with the second governing class actions brought under state law. Yet, among all of the bills captured in our data for the larger project, these statutes (together with the Prison Litigation Reform Act of 1996⁶²) were among a handful of consequential successes in the long-running legislative campaign for retrenchment of private enforcement of federal rights. Moreover, they were enacted after years of effort, attracting filibusters and presidential vetoes.

The limits on class actions that emerged from this legislative gauntlet in the PSLRA, we believe, are fairly characterized as modest because they do not challenge the core role of class actions in securities litigation, and they address class actions in only that one substantive context.⁶³ Ironically, congressional compromises on such matters as the fraud-on-the-market theory that were necessary to enact the legislation reduced the scope for the Supreme Court to raise other enforcement barriers in that context.⁶⁴

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60 Pub. L. No. 104-67, 109 Stat. 737.

61 Pub. L. No. 109-2, 119 Stat. 4.

62 Pub. L. No. 104-140, 110 Stat. 1327.

63 As John Coffee characterizes the changes effected by the law: “Essentially, it immunized ‘forward-looking statements,’ gave presumptive control of the class action to a ‘lead plaintiff’ who had suffered the largest loss (which effectively meant that control went to the largest institutional investor to volunteer for the role), and imposed stricter pleading rules.” COFFEE, *supra* note 26, at 125–26. Coffee concludes that “[d]espite predictions that the PSLRA would be the death knell for securities class actions, not that much has actually changed.” *Id.* For a discussion of the 1998 Securities Litigation Uniform Standards Act (SLUSA), see *id.* at 126.

64 See *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201 (2013) (“Because Congress has homed in on the precise policy concerns raised in Amgen’s brief, we do not think it appropriate for the judiciary to make its own further adjustments by reinterpreting Rule 23 to make likely success on the merits essential to class certification in securities-fraud suits.” (internal quotation marks omitted)).

John Coffee notes that “several recent Supreme Court decisions have declined the opportunity to cut back drastically on the class action.” COFFEE, *supra* note 26, at 132. Two of the three decisions he mentions in support of that proposition were securities class actions. *Id.* at 268 n. 22.

For the view that the Court and Congress are engaged in a “lawmaking partnership” in the area of federal securities fraud litigation, see generally Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, 93 WASH. U. L. REV. 453 (2015). For deletion of a provision in the PSLRA that would have eliminated the fraud-on-the-market theory, see *id.* at 456 n. 22. Professor Fisch posits “three distinctive features,” each of which she regards as “a necessary component of a lawmaking partnership.” *Id.* at 469. The third such feature, “a common set of policy objectives” appears to be vulnerable to ideological polarization on the Court. *Id.* at 470.

The last observation helps to understand the strategy 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.⁶⁵ In contrast to the PSLRA, where class action retrenchment required legislative compromise that limited its reach in later court decisions, CAFA channeled class actions into the federal courts, an institutional environment in which more aggressive retrenchment was possible under a transsubstantive Federal Rule. The move from state to federal court meant that class certification decisions would be governed not by autonomous and potentially liberal state class action doctrine, but by an ever-more-conservative federal class action jurisprudence. Moreover, the growing volume of state law class actions in federal court provided more and more varied opportunities for federal courts to develop that jurisprudence. Finally, because Federal Rules apply across substantive claims, increasingly anti-class action doctrine developed in state law cases also governs enforcement of federal rights.

CAFA showed how useful “procedural” legislation could be to furthering the strategy, traceable to the Reagan Administration, of laying the foundation to retrench private enforcement by empowering federal courts to accomplish what could not be effectuated in other, more democratic, institutional sites.⁶⁶ No wonder that episodes of legislators’ support for class action retrenchment bills declined from 135 in the 109th Congress (2005–2006) to 19 in the 110th Congress (2007–2008), to 8 in the 111th (2009–2010), to 1 per Congress in the last two Congresses.⁶⁷ The counterrevolution had been put in the hands of those best equipped institutionally to achieve its goals.

III. 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 that he did not “expect great

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⁶⁵ See Burbank, *supra* note 42, at 1942–43.

⁶⁶ See Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 63 (1993) (“The Reagan [A]dministration sought to achieve its social agenda primarily by staffing the justice department and judiciary with movement conservatives.”).

⁶⁷ See *supra* fig.1.

⁶⁸ See *Rulemaking*, *supra* note 5, at 1566–67.

changes,” but rather regular updating.⁶⁹ Yet, it is hard to so regard the 1966 Rule 23 amendments, as it is 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 thirty-one percent of all proposals sent forward over the period from 1960 to 2014, 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, that there was a need for “major changes in the way in which litigation is being handled.”⁷² Instead, during 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.

A number of influences contributed to the Advisory Committee’s meager output during the 1970s, starting with their decision to spend more than six years studying class actions.⁷⁴ Whether the Advisory Committee was following the Chief Justice’s lead,⁷⁵ their 1971 decision to revisit class actions is additional

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⁶⁹ *Id.* at 1565-66.

⁷⁰ *See id.* at 1578-79; BURBANK & FARHANG, *supra* note 6, at 65-130.

⁷¹ *See Rulemaking*, *supra* note 5 at 1580-81. Of the new Committee’s sixteen members, eleven (69%) were judges, and five (31%) were practitioners; there were no academic members. *Id.* at 1581.

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.

Minutes of the Meeting of the Advisory Comm. on Civil Rules, Held on Sept. 21, 1971, Washington, D.C. 1 (Sept. 21, 1971) [hereinafter 1971 Minutes], http://www.uscourts.gov/sites/default/files/fr_import/CV09-1971-min.pdf [<https://perma.cc/Q9T6-KJAK>].

⁷³ *See Rulemaking*, *supra* note 5, at 1582 (“The Advisory Committee sent forward to the Standing Committee only fourteen proposals for amendments (at the rule level) . . . 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.”).

⁷⁴ At its first meeting in 1971, “the Committee requested the reporter to undertake a study of the desirability of effecting changes in” Rule 23 (Class Actions) and Rule 16 (Pre-Trial Procedure). 1971 Minutes, *supra* note 72, at 2.

⁷⁵ We think it probable that the Chief Justice stimulated this interest in Rule 23—that it was one of the “specific procedural devices” about which he “noted certain expressions of dissatisfaction” at the Committee’s first meeting in 1971. *Id.* at 1. It was not, in any event, one of the subjects that received attention from the Special Advisory Group that he had appointed, the report of which the Advisory Committee considered at that first meeting. *Rulemaking*, *supra* note 5, at 1580-81 n.67, 1582-83.

evidence that the revolutionary potential of the 1966 amendments was quickly recognized. The decision may also signal recognition that those amendments were the product of a flawed process—conceived at a time when the Advisory Committee met in private, distributed proposals for comment to a relatively limited group, did not make written comments available to the public, and did not hold public hearings. From that perspective, the Advisory Committee charged by Burger may have been attempting to supplement the record in areas where knowledge was thin before proposing further action on Rule 23.⁷⁶

An additional reason to proceed cautiously emerged during the course of the Advisory Committee's study of class actions.⁷⁷ A core limitation that the Rules Enabling Act imposes is that Federal Rules "shall not abridge, enlarge or modify any substantive right."⁷⁸ It was a serious question whether material amendments to Rule 23 would do so. The Enabling Act difficulties implicated in consequential class action reform would likely have become apparent by reason of the contemporaneously unfolding controversy surrounding the proposed Federal Rules of Evidence.⁷⁹ These difficulties became even harder to miss in the Spring of 1977 when Justice Department officials briefed the Advisory Committee on legislative proposals to amend Rule 23.⁸⁰ As noted in Section II, the Justice Department subsequently posited "serious questions as to whether such revision is appropriately within the scope of the rule-making authority granted by the Rules Enabling Act" when sponsoring legislation to replace Rule 23(b)(3).⁸¹ No such legislation was enacted, but after it was introduced, class action reform disappeared from the Advisory Committee's agenda for more than a decade.

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⁷⁶ Thus, although saddled with the same cloistered process, the Advisory Committee sent a survey to federal judges, 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).

⁷⁷ There is a big gap in the public record of Advisory Committee minutes during this period. As a result, with respect to the period between September 1971 and May 1977, our assessment is based on the reports of the Standing Committee to the Judicial Conference. See REPORT OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 6 (Sept. 1973), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1973.pdf> [<https://perma.cc/R653-Z7WH>].

⁷⁸ 28 U.S.C. § 2072(b) (2012).

⁷⁹ In 1973 Congress, for the first time since passage of the Rules Enabling Act in 1934, blocked proposed Federal Rules transmitted by the Supreme Court, treating them as proposals for legislation and, after making numerous changes, enacting them as a statute. See Stephen B. Burbank: *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1695-96 (2004). One reason for doing so was the belief that some of the proposed rules usurped congressional prerogatives. *Id.* at 1696.

⁸⁰ See Advisory Comm. on Civil Rules, Minutes of the May 23, 1977 Meeting 2-3, <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-may-1977> [<https://perma.cc/AP7K-TH8Y>] ("Mr. Berry [of the Justice Department's Office for Improvement in the Administration of Justice] briefed the committee members on the function of his office with regard to Rule 23," noting that his office's priority was "magistrates reform and the second, class action reform").

⁸¹ 124 CONG. REC. 27,860 (1978); see also *supra* text accompanying note 48.

A final reason that may explain why the 1970s Advisory Committee proceeded carefully with class action reform is that the Committee was not ideally composed to respond favorably to calls for major litigation retrenchment from organized bar groups or to pressure from the Chief Justice. For most of the decade judge-members who had been appointed by Democratic presidents, although in the minority, had substantial representation. A material imbalance arose (through attrition) only in the last two years.⁸²

By the time the Advisory Committee next took up possible amendments to Rule 23—in the early 1990s⁸³—the balance of power on the Committee had tilted more sharply in favor of judges appointed by Republican presidents and of corporate practitioners.⁸⁴ There were, however, other 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 resulting 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.⁸⁵

In part for that reason and in part because of the qualities of those leading the effort, the approach taken to the consideration of class action reform in the 1990s could not have been more different from that taken in

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⁸² See *Rulemaking*, *supra* note 5, at 1584–85.

⁸³ For a discussion of the Committee's 1982 decision "to do nothing," see Marcus, *supra* note 20, at 645.

⁸⁴ See *Rulemaking*, *supra* note 5, at 1591; see also BURBANK & FARHANG, *supra* note 6, at 65–130.

⁸⁵ See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4649 (1988) (codified as amended at 28 U.S.C. § 2073(c)(2), (d) (2012)) (requiring rulemaking bodies to provide notice of open meetings on proposed rules); *Litigation Reform*, *supra* note 5, at 1594 (discussing the required open meetings in the 1988 amendments). Even before the changes in the 1980s, 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. See Pub. L. No. 85-513, 72 Stat. 356 (1958); REPORT OF THE PROCEEDINGS OF THE REGULAR ANNUAL MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-7 (Sept. 1958), <http://www.uscourts.gov/about-federal-courts/reports-proceedings-1950s> [<https://perma.cc/36B7-955X>]. The potential for stickiness expands or contracts depending on the degree of deference shown to the Advisory Committee, which in turn is in part a function of the degree of control the Standing Committee exercises. In that regard, however, it is worthwhile recalling that the Chief Justice not only appoints all members of both committees, but also presides at the next two stages of review within the judiciary—the Judicial Conference and the Supreme Court.

the 1960s. In a series of meetings and conferences, the Advisory Committee sought information from expert practitioners, judges, and academics, and it initiated empirical work by the Federal Judicial Center. It then published proposed amendments for comment and held extensive public hearings.⁸⁶ At the end of the day, the Committee concluded that significant change to Rule 23 was so freighted with controversy among interest groups, and so problematic under the Enabling Act, that it should not be attempted by rulemaking.⁸⁷ The changes the Committee recommended instead, which went into effect in 1998 and 2003, were far more restrained than champions of class action retrenchment advocated, and they avoided the core elements of the rule.⁸⁸

Ironically, however, Rule 23 amendments that seemed modest at the time have facilitated major changes in class action jurisprudence through court decisions. The most obvious and important example is the 1998 amendment adding Rule 23(f).⁸⁹ Facially neutral as between plaintiffs and defendants, this amendment permits courts of appeals in their discretion to entertain immediate appeals from class-certification decisions.⁹⁰ It has enabled and highlighted another path to retrenchment of private enforcement by substantially expanding the opportunities for conservative federal appellate courts, including the Supreme Court, to control the course of class-action jurisprudence. This suggests that, even in the domain of rulemaking, some consequential reforms can fly under the radar screen. As

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⁸⁶ “Proposed Rule 23 amendments were published in August, 1996, for comment. The volume of written comments, statements, and testimony was impressive. All have been collected in a four-volume set of materials.” Minutes of the Civil Rules Advisory Comm. Meeting Held on May 1-2, 1997 4 (May 1-2, 1997), http://www.uscourts.gov/sites/default/files/fr_import/cv5-97.pdf [<https://perma.cc/B3H8-C78S>].

⁸⁷ See Minutes of the Civil Rules Advisory Comm. Meeting Held on Apr. 10 & 11, 2000 30 (Apr. 10-11, 2000), http://www.uscourts.gov/sites/default/files/fr_import/400minCV.pdf [<https://perma.cc/HME8-SMEZ>]; Minutes of the Civil Rules Advisory Comm. Meeting Held on Nov. 12 & 13, 1998 8 (Nov. 12-13, 1998), http://www.uscourts.gov/sites/default/files/fr_import/CV1198.pdf [<https://perma.cc/QC23-X2DV>].

⁸⁸ See Mark R. Kravitz, David F. Levi, Lee H. Rosenthal & Anthony J. Scirica, *They Were Meant for Each Other: Professor Edward Cooper and The Rules Enabling Act*, 46 U. MICH. J.L. REFORM 495, 518-19 (2013).

⁸⁹ Less obvious are 2003 amendments that, together with the accompanying Advisory Committee Note, courts have been able to leverage in influential decisions that have made class certification more difficult. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318-19 (3rd Cir. 2008) (relying on advisory committee notes to the 2003 amendments in vacating a class certification order). The author of the opinion in this case, Judge Scirica, was a major player in rulemaking concerning Rule 23 in the 1990s and 2000s.

⁹⁰ A similar mechanism was part of the Carter Administration’s proposed statute replacing Rule 23(b)(3). See S. 3475, 95th Cong. § 4 (1978) (“The courts of appeals shall have jurisdiction to review in their discretion orders of the district courts dismissing or allowing actions to be maintained as public actions or class compensatory actions.”); 124 CONG. REC. 27,866 (1978) (noting that the statute allows either party to appeal the allowance or denial of class certification).

previously noted and as elaborated in Section V, we argue that a similar phenomenon has been an important reason for the Supreme Court's success in furthering the goals of the counterrevolution through decisions on issues salient to private enforcement.

The Advisory Committee began considering whether additional Rule 23 amendments would be useful and feasible in 2011. A preliminary report by a subcommittee charged with that inquiry made clear that the effort was proceeding with the care and broad outreach of the 1990s class action initiative.⁹¹ The topics under discussion included a number that were likely to engage ideological commitments, such as issue classes,⁹² as well as topics on which the Supreme Court's jurisprudence is widely questioned, such as settlement classes.⁹³ At the end of the day, the Committee recommended for publication proposed amendments to Rule 23 addressing three principal topics: (1) "the process of settling class actions," (2) "the core considerations that should inform the court's review of a proposed settlement," and (3) "the handling of class member objections to proposed settlements."⁹⁴ The proposals again avoided core issues, although the Committee approved the subcommittee's recommendation that "two topics remain under study."⁹⁵ Those topics are so-called "pick-off issues" remaining after the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*,⁹⁶ and the extent to which the members of a putative class must be ascertainable in order for the class to be certified.⁹⁷

In deciding not to pursue topics such as issue classes and the requirements for certification of settlement classes, the rulemakers have again acknowledged the roadblocks to major class action retrenchment under the Enabling Act, particularly as amended in 1988. In explaining why they carved out topics for further study, they may also have implicitly acknowledged a new roadblock: having tasted the retrenchment potential of amending Rule 23 (and some other Federal Rules) under the cloak of

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⁹¹ See RULE 23 SUBCOMMITTEE REPORT, in ADVISORY COMMITTEE ON CIVIL RULES 243-99 (Apr. 9-10, 2015), http://www.uscourts.gov/sites/default/files/fr_import/CV2015-04.pdf [<https://perma.cc/4WST-MQQF>].

⁹² *Id.* at 39-41.

⁹³ *Id.* at 11-20.

⁹⁴ Excerpt of Memorandum from Hon. John D. Bates, Chair, Advisory Comm. on Civil Rules, to Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure 193-94 (May 12, 2016, revised July 1, 2016), http://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_published_for_public_comment_o.pdf [<https://perma.cc/VF6E-P4WC>] [hereinafter Bates Memorandum].

⁹⁵ *Id.*

⁹⁶ 136 S. Ct. 663 (2016).

⁹⁷ See Bates Memorandum, *supra* note 94, at 194-95.

interpretation,⁹⁸ the Court may not be keen to surrender its position as the vanguard of the counterrevolution—its hammer—to which we now turn.⁹⁹

IV. 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.¹⁰⁰ It remains to consider whether the pattern holds as to class actions.

To set the stage, we present some of our findings on the Court's decisions in one of the larger domains we have examined. Our collection of Supreme Court data includes identification of all cases from 1960 to 2014 in which the Supreme Court decided an issue that turned on interpretation of a Federal Rule of Civil Procedure, where the result would either widen or narrow opportunities or incentives for private enforcement. Because we are particularly interested in class actions, we also included in our Federal Rules cases those that turned on an issue explicitly linked to the policies underpinning Rule 23, such as tolling a statute of limitations and claim preclusion. The search yielded 78 cases, containing 80 issues, and 693 Justice votes. The cases span 1961 to 2013 because none was decided in 1960 or 2014.

We find that, beginning around the early 1980s, there was a long decline in the probability of a pro-private enforcement vote. At the time this decline began, liberal and conservative Justices were fairly close together on Federal Rules private enforcement issues. However, there developed growing distance between liberal and conservative Justices, with escalating polarization after around 2000. We also find that Federal Rules private enforcement cases (much more so than other private enforcement cases) are dominated by business defendants and that this business-defendant skew grew

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⁹⁸ See *Litigation Reform*, *supra* note 5, at 1603-06 (describing the Court's ability to "bring about momentous civil litigation reform that would be impossible to secure from the legislature or its delegated procedural lawmaking bodies"); see also BURBANK & FARHANG, *supra* note 6, at 65-130.

⁹⁹ Of course, Justice Scalia's death and Justice Gorsuch's appointment render this doubly speculative.

¹⁰⁰ See *Litigation Reform*, *supra* note 5, at 1580-82; *Subterranean Counterrevolution*, *supra* note 5, at 299-300; see also BURBANK & FARHANG, *supra* note 6, at 130-248.

starker after about 2000. Since about the same time, the Court has devoted materially more attention to Federal Rules private enforcement issues on its docket, and those cases have elicited dissents at increasingly and notably high rates. In the past fifteen years, plaintiffs are losing, and business defendants are winning, a huge majority of Federal Rules private enforcement cases, and this field is the locus of increasingly intense conflict among the Justices.

Finally, by way of background, we estimated the effect of ideology on the Justices' votes in Federal Rules cases. In the roughly two decades from 1995 to 2013, the reduction in the probability of a pro-private enforcement vote associated with moving from a liberal to a conservative Justice is sixty percent (we describe the liberal-conservative dichotomy below). Remarkably, in the 1995–2013 period, the effect of ideology on these procedure votes about tripled relative to the 1961–1994 period. It went from notably less than the effect observed when all private enforcement cases are pooled, in all federal rights issues, and in merits votes in policy areas underlying our private enforcement data, to being larger than all of them.¹⁰¹

To investigate these issues in class action cases, we examined all cases from 1969 (the year of the first case decided after the 1966 amendments to Rule 23) to 2014 that turned on either an interpretation of Rule 23 or an issue explicitly linked to policies underpinning Rule 23. Our search yielded thirty-three cases, in which thirty-four discrete class action issues were decided. We treat the issue as the unit of analysis. This rendered a total of 291 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 the Justices' ideological preferences and their votes in class action cases, and whether and how this has changed over time. For our primary measure of Justice ideology, we rely on Martin–Quinn scores, which are based on Justices' voting behavior in all non-unanimous cases.¹⁰² 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

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¹⁰¹ See BURBANK & FARHANG, *supra* note 6, at 130–92.

¹⁰² These “ideal point” scores 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.

Martin–Quinn score for Justices in our class action data who voted in more than five cases.¹⁰³ Every “conservative” has a lower pro-class action voting rate than every “liberal.” A second notable feature of the table is the large disparity between conservative and liberal Justices’ voting ratios. The scale ranges from Kennedy and Thomas voting in a pro-class action direction 17 and 18% of the time, to Sotomayor/Kagan and Douglas doing so 83 and 100% of the time.

Table 2: Percent Pro–Class Action Votes

Justice	% Pro–Class Action	Number of Issues	Conservative	Avg. Martin– Quinn Score
Kennedy	17	12	1	.48
Thomas	18	11	1	3.36
Scalia	25	12	1	2.30
Alito	25	8	1	2.10
Powell	32	19	1	.89
Stewart	33	18	1	.53
Roberts	38	8	1	1.19
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
Ginsburg	64	11	0	-2.09
Marshall	65	23	0	-2.85
Brennan	68	22	0	-2.66
Stevens	72	18	0	-1.16
Breyer	82	11	0	-1.39
Sotomayor	83	6	0	-1.88
Kagan	83	6	0	-1.61
Douglas	100	7	0	-6.58

¹⁰³ The average score is computed using Justice scores for all years appearing in our class action data set.

Figure 2 presents the raw number of pro- and anti-class action outcomes in each year. In years with no value reflected on the figure, no class action issues were decided. From 1969 (when the first case in our data appears) 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 1989 to 1996 (in 1991). From 1997 to 2014, the balance was anti-class action.

Figure 2: Net Balance of Outcomes in Class Action Cases

Figure 3 reflects regression estimates of 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. Our purpose in presenting the figure is to convey a broad descriptive sense of longitudinal patterns in the data, and we will rely on statistical models below to evaluate the significance and size of the effects of ideology on Justice votes in different time periods. The figure reflects that the estimated probability of a pro-class action outcome declined from about 62% in the late 1980s through 1991, to 36% in 2013. Viewing the smoothed estimates alongside Figure 2 makes clear that the decline is driven by cases decided from 1997 to 2013.

Figure 3: Probability of Pro-Private Enforcement Outcomes and Justice Votes in Class Action Cases

This decline has been substantially driven by the votes of conservative Justices, whose estimated probability of a pro-class action vote fell from an average of 42 percent in the 1980s to 22 percent in 2013. The estimated probability of a pro-class action vote increased for liberal Justices over the same period, from an average of 68 percent in the 1980s to 84 percent at the end of the series. Thus, the difference, or the ideological distance, between liberal and conservative Justices' voting on class action issues grew significantly over time. From an average of about 25 percentage points in the 1980s, it grew to 62 percentage points by the end of the series. It is evident that all of the long-run changes described in this paragraph were driven by cases decided in the 1997–2013 period.

Scholars have made similar findings concerning the Court's business decisions, and a similar phenomenon may explain both these trends: "[T]he 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 by those Justices in business cases."¹⁰⁴ This explanation is consistent with our sense, after reading all decisions in the database, that the growing distance we find in the

¹⁰⁴ Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1470 (2013).

1997-2013 period in quantitative analysis reflects increasingly assertive efforts to move the law governing class actions in a conservative direction.¹⁰⁵ It is interesting that conflict among the Justices over class actions is at its highest point ever, while simultaneously disappearing from Congress' agenda.

Some of the Court's decisions in this period have changed or destabilized class action law to the detriment of plaintiffs/private enforcement. Thus, *Amchem* and *Ortiz* effectively ended mass tort class actions,¹⁰⁶ while the Court in *Wal-Mart* not only (unanimously) foreclosed almost all monetary recovery in Rule 23(b)(2) class actions, but also (5-4) appeared to change the long-accepted, and easy to satisfy, interpretation of the commonality requirement for certification under Rule 23(a)(2).¹⁰⁷ It may be that the adverse impact of the Court's commonality holding is effectively limited to Title VII and similar cases, but it was so written as to spawn uncertainty (and additional litigation) in the lower courts.¹⁰⁸ The same is true of *Comcast Corp. v. Behrend*,¹⁰⁹ an antitrust case in which (b)(3) class certification foundered on proof of damages and the attempted extension of which by class action opponents may be, as Justice Ginsburg's dissent suggested, wishful thinking.¹¹⁰ There can be no doubt, however, that litigants promoting class action retrenchment have sought to press the envelope or that the Court's conservative majority has

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¹⁰⁵ 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. See *Litigation Reform*, *supra* note 5, at 1610 n.255 (suggesting that "it took time for some of the Court's liberals to realize what was going on").

¹⁰⁶ See David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1588 (2017) ("[The *Amchem* Court] hammered the penultimate nail in the mass tort class action's coffin.").

¹⁰⁷ *Wal-Mart, v. Dukes*, 564 U.S. 338, 359 (2011); see also COFFEE, *supra* note 26, at 128 (observing with respect to 23(a)(2) that the Court "rewrote that standard fundamentally").

¹⁰⁸ See Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 505-07, 512-13 (2016) ("[I]t can be debated whether *Wal-Mart* has major significance for class actions outside the employment discrimination sphere.").

¹⁰⁹ 133 S. Ct. 1426 (2013).

¹¹⁰ *Id.* at 1437 (Ginsburg, J., dissenting) ("The Court's ruling is good for this day and case only. In the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members."); see also *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015) ("[T]he [*Comcast*] Court did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance."); Marcus, *supra* note 108, at 512-16 ("[T]he dissent by Justices Ginsburg and Breyer seemed to belittle the decision as insignificant, asserting that the decision 'breaks no new ground on the standard for certifying a class action,' and that it 'is good for this day and case only.' Almost from the outset, there was vigorous public disagreement about whether the Court had really done anything." (citation omitted)). Compare COFFEE, *supra* note 26, at 130, 132 (discussing *Comcast's* impact on antitrust class actions), with *id.* at 162 (discussing *Comcast's* broader implications).

been receptive.¹¹¹ Indeed, two cases involving class arbitration of federal claims are in our data because the majority's reasoning reflects, and is suffused with hostility to, class actions. One of them, *American Express Co. v. Italian Colors*, elicited the blunt indictment with which we begin this article.¹¹²

When juxtaposed with the legal retrenchment that some of these decisions have effected, and others may effect, the few decisions in this period that were favorable to class actions do not appear to balance the scales. Thus, although we included in that small group the Court's decision holding that an absent class member who has objected to a proposed settlement need not intervene in order to appeal from approval of that settlement,¹¹³ there are arguments for the opposite characterization. This is particularly so when one recognizes that objectors are not always out to improve the quality of settlements.¹¹⁴ Two Court decisions, *Erica P. John Fund, Inc. v. Halliburton Co.*¹¹⁵ and *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,¹¹⁶ exemplify the envelope-pushing behavior we referred to above, but they also exemplify the greater difficulty the Court has retrenching class action law in the securities context, where Congress has made relevant policy choices, many of them based on legislative compromise.¹¹⁷ That leaves the Court's *Shady Grove* decision,¹¹⁸ where a short-term gain for those seeking to bring state law class actions may have prevented some Justices from seeing potential long-term losses.¹¹⁹

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¹¹¹ Our data end in 2014. For the argument that a backlash due to repeated overreaching by business defendants and their interest groups is one possible explanation for recent Supreme Court decisions that appear less hostile to class actions, see Robert H. Klonoff, *Class Actions Part II: A Respite from The Decline*, 93 N.Y.U. L. REV. (forthcoming Oct. 2017).

¹¹² See *supra* note 2 and accompanying text; see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666, 686-87 (2010) (finding that "imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue" violated the Federal Arbitration Act).

¹¹³ See *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002).

¹¹⁴ Such problems are the focus of current proposed amendments to Rule 23. See *supra* text accompanying note 94.

¹¹⁵ *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011) (holding that plaintiffs in private security fraud actions need not prove loss causation to obtain class certification).

¹¹⁶ *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (holding that proof of materiality is not a prerequisite to class certification in securities fraud case).

¹¹⁷ See *supra* text accompanying notes 63-64. For the view that "stare decisis and congressional prerogatives are invoked selectively, only when they align with the Court's own independent judgments about whether to adopt a class-facilitative substantive rule" in the context of "otherwise class-restrictive" securities laws, see J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. PA. L. REV. 1625, 1644-45 (2017).

¹¹⁸ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

¹¹⁹ See Burbank & Wolff, *supra* note 19, at 76 ("Despite CAFA's underlying jurisdictional commitment to combating perverse overenforcement of state liability, *Shady Grove* subverted New York's shield against the overenforcement of state law penalties or minimum damages. But that irony should not obscure the underlying similarity between CAFA and *Shady Grove* . . ." Both have "deprived the states of power to pursue visions of the class action that differ from the federal vision").

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 models using Martin–Quinn scores based on Justices' voting behavior, we present parallel models using Segal–Cover scores to measure Justice ideology.¹²⁰ In addition to the direct incorporation of the ideology measure into our models, we also assess whether ideology had a greater effect on Justices' votes on class action issues after the mid-1990s. To test this hypothesis, we model the post-1994 effect with a time dummy variable that takes the value of 0 from 1969 to 1994, and 1 from 1995 to 2013, 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 do so for several reasons. First, Republicans took Congress in the 1994 elections and have held at least one chamber almost continuously since, materially reducing the probability of legislative override. The logic of this theory is that Justices' votes may be constrained by the perceived threat of legislative override, and the diminution of that threat after 1994 may have widened their perceived range of policymaking discretion.¹²¹

Moreover, civil litigation retrenchment in general—and class action retrenchment in particular—became a more salient issue in the Republican Party, and the locus of more partisan conflict, playing a notable role in Gingrich's "Contract with America" in the 1994 campaign, and in the Republican anti-litigation legislative program mounted in 1995.¹²² Indeed, "Republicans made securities class action reform a centerpiece of their Contract with America in 1994,"¹²³ and the bill data we presented earlier shows that anti-class action bills introduced by Republicans surged in the early to mid-1990s (Figure 1), having not previously been the locus of significant bill activity or a Republican issue. This elevation of class action retrenchment on the Republican Party agenda corresponded to an increasing focus on class actions by important advocacy groups associated with the Republican Party, specifically including business groups and conservative law reform organizations.

A window on this pattern can be found in amicus filings in the thirty of our thirty-three class action cases that did not also present a merits issue (assuring

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¹²⁰ See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989) (noting that Segal–Cover scores are based on pre-confirmation newspaper editorials on the nominations, and thus are independent of Justices' voting behavior).

¹²¹ 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).

¹²² See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1185 n.533 (2001); Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537, 538 (1998).

¹²³ A.C. Pritchard, *Halliburton II: A Loser's History*, 10 DUKE J. CONST. L. & PUB. POL'Y 27, 39 (2015).

that amicus briefs were addressed to the class action issue). From 1969 through 1994, the Chamber of Commerce did not file an amicus brief in any of twenty cases, and from 1995 to 2014 they filed amicus briefs in seven of ten cases. When all business association amicus filings are aggregated, only two briefs were filed in twenty cases from 1969 to 1994, and twenty-eight briefs were filed in ten cases from 1995 to 2014. The Chamber's National Litigation Center has filed amicus briefs since it was founded in 1977.¹²⁴ However, the Chamber's turn to issues of procedure and court access—as contrasted with regulatory policy—was signaled by its 1998 founding of the Institute for Legal Reform, which characterizes itself as “the country's most influential and successful advocate for civil justice reform.”¹²⁵ One of its key targets has been to limit class actions.¹²⁶ Growth in the Chamber's amicus filings in class action cases in the mid-1990s was part of a wider and concerted campaign of litigation retrenchment.¹²⁷

Conservative law reform organizations, too, materially elevated their amicus attention to class action issues in the mid-1990s. Among these groups, the two that participate most frequently as amicus filers in private enforcement cases are the Pacific Legal Foundation and the Washington Legal Foundation, emerging as vocal advocates against class actions.¹²⁸ Prior to 1995, these organizations ignored class action issues on the Supreme Court's docket and filed no briefs. From 1995 to 2014, they filed seven amicus briefs in ten cases. The story is similar with defense-side lawyers associations, which filed one brief in twenty cases from 1969 to 1994, and eight briefs in ten cases from 1995 to 2014. The Defense Research Institute was the most frequent filer among them. In aggregate, business associations, conservative law reform organizations, and defense-side lawyers associations filed three briefs in twenty cases from 1969 to 1994 (.15 per case), and fifty-one briefs in ten cases from 1995 to 2014 (5.2 per case). This amounts to a growth in amicus attention by a factor of thirty-five.

One might be tempted to conclude that this growth in amicus filings merely reflects a more general growth in amicus filings during the same period.

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¹²⁴ See David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1023 (2009).

¹²⁵ *About ILR*, U.S. CHAMBER OF COMMERCE: INSTITUTE FOR LEGAL REFORM, <http://www.instituteforlegalreform.com/about-ilr> [<https://perma.cc/96QE-99CY>].

¹²⁶ See Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 OHIO ST. L.J. 829, 889-90 & n.256 (2014) (describing the Institute's negative position on consumer class actions); see also Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 275 n.2 (2003-2004) (describing the Institute's position on consumer class actions).

¹²⁷ See BURBANK & FARHANG, *supra* note 6, at 217-48.

¹²⁸ See Trenton H. Norris & James F. Speyer, *Curtailing Class Action Abuse: How Three Developments Converged To Reduce the Pressure to Settle*, 25 LEGAL BACKGROUNDER, no. 20, May 21, 2010; ADR Brief, *Once Again, The Supreme Court Takes on Class Action Arbitration*, 27 ALTERNATIVES TO HIGH COST LITIG. 170, 170-71 (2009).

However, that would be a mistake. Viewing amicus filings in all cases decided by the Court, one observes 2.6 briefs per case for the 1970–1994 period, and 8.6 for the 1995–2014 period, which is 3.3 times larger.¹²⁹ This rate of growth pales in comparison to the 35-fold growth in class action amicus filings that we observe among these groups.

Returning to our empirical models, we additionally control for a number of other potentially relevant factors: (1) the outcome of the Court of Appeals ruling below; (2) the presence of a U.S. party advocating a pro- or anti-class action position; (3) whether the defendant was a government versus a business defendant, with business defendant as the reference category; (4) whether the underlying policy area was securities, antitrust, civil rights, other social regulation, or other economic regulation, with securities left out as the reference category.

Table 3 reports logit models with standard errors clustered on judge.¹³⁰ The main effect of the ideology variable in the Martin–Quinn models is significant with a marginal effect of $-.06$. Because the interaction is included, this variable reflects the effect of ideology only in the period from 1969 to 1994. From a substantive perspective, the distance on the Martin–Quinn scale between the mean ideology scores of Justices designated conservative and liberal (see Table 2) is approximately 3.5. An increase of this magnitude in the ideology score is associated with a 21-percentage point reduction in the probability of a pro-class action vote. The interaction of ideology with the post-1994 dummy is significant, with a marginal effect of $-.08$. The effect of ideology in the post-1994 period is given by summing the marginal effects of the two variables (-1.4), such that moving from the average liberal to the average conservative is associated with a 49-percentage point reduction in the probability of a pro-class action vote.

In the Segal–Cover model, the main effect of the ideology variable is again significant with a marginal effect of $.22$. The distance on the Segal–Cover scale between the mean ideology scores of Justices above and below the median score in the data is approximately $.59$. In the Segal–Cover measure, larger values are associated with greater liberalism. A change of this magnitude in the conservative direction is associated with a 13-percentage point reduction in the probability of a pro-class action vote. The interaction of ideology with the post-1994 dummy is significant, with a marginal effect of $.61$. In the post-1994 period, moving from the average ideology of Justices on the liberal side of the Segal–Cover median to the conservative side is associated with a 49-percentage point reduction in the probability of a pro-class action vote.¹³¹

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¹²⁹ See BURBANK & FARHANG, *supra* note 6, at 130–92.

¹³⁰ The ideology variables (both main effects and interactions) remain statistically significant in both models in alternative specifications with standard errors clustered on case.

¹³¹ Note that because of the interaction set up, the significant main effect of Post-1994 Dummy reflects the effect when ideology equals zero (the most conservative pole of the Segal–Cover score).

Table 3: Logit Model of Justice Votes in Class Action Cases

	Martin–Quinn		Segal–Cover	
	Coefficient	Marginal	Coefficient	Marginal
Ideology	-.28*** (.07)	-.06	.95** (.41)	.22
Post-1994 Dummy	-.27 (.30)		-1.22*** (.40)	-.28
Ideology*Post-1994 Dummy	-.37*** (.12)	-.08	2.66*** (.77)	.61
Lower Court Direction	-.30 (.25)		-.30 (.23)	
U.S. Pro	.25 (.31)		.11 (.31)	
U.S. Anti	.07 (.66)		.07 (.67)	
Business Defendant	.30 (.44)		.27 (.42)	
Antitrust	.93 (.69)		.91 (.62)	
Civil Rights	.48 (.43)		.44 (.41)	
Other Economic	.16 (.58)		.38 (.64)	
Other Social	.42 (.50)		.37 (.48)	
N=	291		291	
Pseudo R ² =	.13		.07	

Standard errors in parentheses, clustered on Justice

***<.01; **<.05; *<.1

The two models, using very different measures of ideology, paint a consistent picture. Prior to 1995, the effect of ideology on Justices' votes on class action issues was significant but relatively modest. In the 1995–2013 period, the effect of ideology became substantively large, more than doubling by one measure, and more than tripling by another, during which time the probability of a pro-class action outcome fell materially. Moreover, the emergence of class action issues as notably ideologically divisive on the Court followed the emergence of class-action retrenchment by just a few years.

Almost overnight, it became a highly visible campaign of the Republican Party. It also corresponded to the dramatic rise in amicus advocacy in class action cases by business associations led by the Chamber of Commerce, conservative law reform organizations, and defense-side lawyers associations. In our view, the conservative wing of the Court's turn against class actions in the past fifteen years must be evaluated in the context of this wider partisan and interest group attack on class actions.

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,"¹³² which teaches that judges—even judges on a court that has the final (at least within the judiciary) 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.¹³³

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 have been the focus of legislative, rulemaking, and Supreme Court retrenchment efforts. In Congress, primarily Republican reformers had relatively modest success, focused in a few policy areas. 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.¹³⁴ In marked contrast, the

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¹³² 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 Gardner Geyh ed., 2011).

¹³³ See, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 349-56 (1978) (holding that a class representative must pay the cost of identifying absent members to receive notice); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974) (holding that a 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, 301 (1974) (requiring all members of class to meet amount in controversy requirement for diversity jurisdiction); *Snyder v. Harris*, 394 U.S. 332, 341 (1969) (holding that claims of class members cannot be aggregated to meet the amount in controversy requirement); *id.* ("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 further discussion of several of these decisions, see Marcus, *supra* note 20, at 627-29 (discussing *Snyder* and *Zahn*); *id.* at 633-35 (discussing *Eisen*).

¹³⁴ As we have stated,

Supreme Court, led by its conservative wing, has issued a series of decisions making the governing legal rules more difficult for those seeking private enforcement through class actions.

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.¹³⁵ As Justice Kagan all but said in the quotation that opens this Article, class actions have become a magnet for ideological judicial behavior.

One of the cases contributing data for this article, *Wal-Mart*, garnered a great deal of attention in the media. This prompted some who commented on our early work to question a hypothesis we advanced in seeking institutional explanations for the Supreme Court's relative success in the counterrevolution. As we framed that hypothesis more recently:

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.¹³⁶

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.¹³⁷ It is possible, however, that class action issues are different. 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

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We do not doubt that most of the Advisory Committee's work is unaffected by members' ideological preferences, including in particular the ideological preferences of members who are judges. As our data confirm, few of the Committee's proposals predictably implicate private enforcement, and a great deal of its work does not map to a left-right ideological dimension. At least since the counterrevolution became a partisan project in the elected branches, however, we believe that the rulemaking proposals most likely to elicit ideological behavior are precisely those that will affect private enforcement.

BURBANK & FARHANG, *supra* note 6, at 83.

¹³⁵ See *supra* text accompanying note 101.

¹³⁶ *Subterranean Counterrevolution*, *supra* note 5, at 299 (footnotes omitted).

¹³⁷ See *id.* at 307-14.

the Court decided, which were indeed “technical and legalistic.”¹³⁸ 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.¹³⁹

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¹³⁸ *Id.* at 297.

¹³⁹ See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 325 (2012) (“*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.”); see also *id.* at 315-16 (“Of course, having civil procedure on the doctrinal agenda will not draw the attention or ire of the popular media or the public; do not expect public calls to impeach Roberts over the scope of Rule 8(a).”).