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The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994

Erratum

Law; Civil Law; Civil Procedure; Litigation; Legislation; Legal History; Public Law and Legal Theory

THE HISTORY OF THE MODERN CLASS ACTION, PART II: LITIGATION AND LEGITIMACY, 1981–1994

David Marcus*

The first era of the modern class action began in 1966, with revisions to Rule 23 of the Federal Rules of Civil Procedure. It ended in 1980. Significant turmoil roiled these years. Policymakers grappled with the powerful device as advocates argued over its purpose, and judges struggled to create rules for the novel litigation the remade Rule 23 generated.

This Article tells the story of the class action's second era, which stretched from 1981 to 1994. At first blush, these were quiet years. Doctrine barely changed, and until the early 1990s, policymakers all but ignored the device.

Below this surface tranquility lurked important developments in what the class action, newly embroiled in fundamental debates over litigation and legitimacy, was understood to implicate. Critics castigated the civil rights class action as an emblem of the "imperial judiciary's" rise and of courts' inability to separate law from politics. To industries targeted by plaintiffs' lawyers, the securities fraud class action exemplified the "litigation explosion" and challenged judicial competence to screen for meritorious lawsuits. The emergence of the mass tort class action as an alternative to legislative and administrative processes made a determination of litigation's legitimate role particularly urgent.

These second-era episodes deepened partisan divides over the class action and prompted new claims about what sort of private litigation could legitimately proceed. The three episodes drew new and influential participants into fights over the class action, and they eventually reengaged policymakers with class action regulation. Such developments made an era of significant reform all but inevitable.

* Professor of Law, University of Arizona Rogers College of Law. This Article has benefited from presentations at the annual meeting of the American Society for Legal History, Fordham University School of Law, the University of Arizona, and the University of Pennsylvania. I owe particular thanks to Barbara Atwood, Bob Bone, Steve Burbank, Ellie Bublick, Faisal Chaudhry, Brooke Coleman, Andy Coan, Myriam Gilles, Jason Kreag, Alexi Lahav, Toni Massaro, Cathy O'Grady, Sergio Puig, Ed Purcell, Judith Resnik, and the talented editors at the *Fordham Law Review*. I am also very grateful to the Stein Colloquium and Ben Zipursky for allowing me to participate. Finally, thanks to the participants in the events I describe who agreed to let me interview them. Their accounts of the important work they pursued and observed immensely improved my understanding of this history.

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INTRODUCTION

The pioneering class action litigator Robert Lieff recalls a conversation with Melvin Belli in a dramatic retelling of the early days of his career. Belli, the colorful midcentury “King of Torts,” had just hired Lieff in 1965. The new associate immediately tried to sell Belli on class actions, but Belli would have nothing of it:

BOB

The biggest fish on the civil side is class actions. They’re developing new rules where we can represent a hundred or a thousand plaintiffs at a time. It would be better for the clients and for the practice.

BELLI

Bob, we operate on individuals. You do that whether you’re a doctor, a priest who hears confession, or if you’re a lawyer. . . .

. . . .

You can’t mass produce the law. You try individuals, you don’t try en masse from this majestic practice of ours that comes down to us through antiquity.

. . . .

It’s unethical, unconstitutional—The goddamnest under-handed solicitation of clients How are we supposed to end up representing thousands of clients based on the representation of just one goddamn single little fool? . . . Class action is a fiction.¹

Fast forward to 1994. “[W]hen the head of the FDA announced findings that nicotine in tobacco is addictive,” Lieff recounts, “Mel call[ed] me at home on a Saturday morning” and insisted, “you’ve got to file a Class Action!”²

The evolution of how lawyers like Belli thought about aggregate litigation is an important part of the story of the class action’s second era, one that lasted from 1981 to 1994. The first era of the modern class action’s history began with efforts to revise Rule 23 of the Federal Rules of Civil Procedure, a process that ultimately produced revolutionary amendments in 1966 and ended around 1980. Turmoil roiled these years, as Congress, rulemakers, litigators, and judges wrestled extensively with the new device, attempting to understand its potential and perils.³ The class action’s third era began in 1995, and, like the first, witnessed significant upheaval.⁴ A diverse array of advocates pursued doctrinal change in a number of institutional settings,

1. Robert Lieff & Todd Kriedler, *Kings of Tort* 69–70 (Feb. 8, 2016) (unpublished manuscript) (on file with author).

2. *Id.* at 93.

3. See generally David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587 (2013) [hereinafter Marcus, *Sturm*]. For a history of the class action from 1938 to 1966, see generally David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

4. I plan to provide an account of this era in a future article.

including Congress, the Federal Civil Rules Advisory Committee (the “Advisory Committee”), the U.S. Supreme Court, and the federal courts of appeals.

This Article tells the story of the class action’s second era. At first blush, it comes off as quiet compared to what came before and after. The pace of doctrinal evolution slowed considerably in the 1980s—except in mass tort cases—and Rule 23 fell off legislators’ and rulemakers’ agendas. Only near the era’s end did several exogenous shocks—the asbestos-litigation crisis, the rapid expansion of Silicon Valley, and the aftermath of the Savings and Loan (“S&L”) crisis—awaken the class action from what seemed like a sleepy decline.

But the 1980s and early 1990s witnessed important developments in how lawyers, judges, policymakers, and commentators thought and talked about class actions and their significance. The ink on the 1966 amendments had hardly dried before those engaged with class action law and policy began to clash over how best to understand the device. In my history of the first era, I explain how proponents of a powerful class action advocated for what I label its “regulatory conception.”⁵ By this view, the class action existed to enable the enforcement of a substantive-liability regime on behalf of an undifferentiated group of regulatory beneficiaries. Those who favored a limited class action championed the “adjectival conception,” an understanding that the device operated as a mere joinder mechanism to enable litigation to proceed more efficiently.⁶ Adversaries in the heated class action wars of the 1970s argued for one conception or the other as they battled over the evolution of a fledgling body of doctrine.

Clashes over the class action’s proper conception, therefore, were nothing new by the 1980s. During the second era, however, these fights became increasingly entangled with fundamental debates over what litigation could legitimately and competently accomplish in a complex democratic society. As the significance of the battles over the class action deepened, and as their *dramatis personae* changed, the battles grew more pressing and partisan. Conservative critics of the “imperial judiciary” castigated the civil rights class action as a prominent example of how antidiscrimination and poverty litigation pushed judges to ignore the boundary between law and politics as groups pursued political change in the courts.⁷ While such critiques stirred in the 1970s, they became Reagan administration gospel in the 1980s.⁸ The partisan divide over the class action deepened in the early 1990s, when a powerful set of industry interests that had previously ignored the class action connected its use in securities fraud litigation to narratives about a pathological “litigation explosion.”⁹ These efforts rekindled congressional interest in the reform of aggregate procedure. The class action’s entry into the mass tort arena did not generate partisan conflict, but it forced the federal

5. Marcus, *Sturm*, *supra* note 3, at 592–94.

6. *Id.* at 594.

7. *See infra* Part III.

8. *See infra* Part III.A.

9. *See infra* Part IV.

judiciary to grapple with the boundaries of its legitimate power with particular urgency. Personal injury lawyers of Belli's ilk confronted the class action for the first time, and the federal courts of appeals returned to their supervisory role for class action doctrine.

My history of the modern class action's second era proceeds as follows. Part I describes how an era of apparent tranquility began in the early 1980s. Antitrust and civil rights cases—the two main categories of class actions in the 1970s—withered, and the class action fell off the agendas of the Advisory Committee, Congress, and appellate courts. Part II sets up a discussion of how the class action grew deeply entangled in fundamental and increasingly polarized debates over litigation and legitimacy. To critics of American civil justice, the 1970s witnessed the rise of an imperial judiciary and the worsening of a litigation explosion. Defenders, in contrast, celebrated the emergence of public law litigation and courts' involvement in a host of social, political, and economic problems that were previously routed to other branches of government. This debate over litigation's proper use had clear relevance to arguments over whether the regulatory or adjectival conception better captured what the class action could legitimately accomplish.

Parts III, IV, and V describe three episodes during which debates over litigation and legitimacy unfolded in key class action contexts. In Part III, this Article explains how conservative critics during the Reagan years insisted that antidiscrimination class actions and class actions sponsored by the Legal Services Corporation (LSC) exemplified the problems of an imperial judiciary. Part IV turns to the mass tort class action and demonstrates how personal injury claims brought new lawyers and institutions into the network of those engaged with doctrinal development. The mass tort class action rendered the regulatory conception irrelevant as a normative foundation for a powerful class action device, and it pushed judges to confront openly limits on the legitimate exercise of their power. Part V documents the origins of the Private Securities Litigation Reform Act (PSLRA) in efforts by accounting firms and Silicon Valley to protect themselves from securities fraud class actions. This episode connected the class action to narratives about the litigation explosion and the policy issues implicated by this phenomenon.

This Article's organization and content reflect two historiographic choices. The first choice involves what I emphasize. My treatment of the modern class action's first era covered a lot of ground as I attempted to document how lawyers, judges, politicians, and others wrestled with the new device, and how courts ultimately domesticated the class action with a set of doctrinal constraints. My history of the second era stresses discourse and rhetoric, with less attention paid to doctrinal change. The slowed pace of this change is one reason for this emphasis, but more important to the choice is my sense of how the class action's second era fueled the tumult of its third. According to one prominent theory, a particular policy changes disjointedly, with periods of

quiet stability punctuated by abrupt dislocations.¹⁰ Disruptions occur when networks of those interested in the policy expand and diversify,¹¹ when such interested personnel redefine the issues the policy is understood to implicate, and when such issues open new institutional venues for the pursuit of reform.¹² The three episodes at the core of the class action's story from 1981 to 1994 triggered these developments, especially changes to issues that the class action was understood to implicate. The significant efforts to change the class action in the third era owe their origins to fights over litigation and legitimacy during its second.

My second choice is to eschew a strictly chronological account of the era. Each episode starts over in time, beginning in the 1970s and ending in the early 1990s. In a number of respects, each episode proceeded independently of the others. The personnel involved in each differed, and, on the surface, the key events had little to do with each other. A year-by-year chronology of the class action's second era would bog down in a mess of details regarding seemingly unconnected events in disparate legal fields. This Article's organization better highlights what these episodes have in common: the development of arguments about litigation and legitimacy that had important implications for the course of class action history.

I. THE CLASS ACTION'S QUIET DECADE

In 1986, a barely elected first-term senator named Mitch McConnell¹³ introduced a bill called the "Litigation Abuse Reform Act."¹⁴ Targeting damages for noneconomic losses and other tort bugaboos, McConnell's proposal also included a provision that would have slashed attorneys' fees in class actions.¹⁵ Although the Senate Judiciary Committee held two days of hearings on the proposed bill, the class action piece went all but unmentioned. The proposed legislation proceeded no further.¹⁶

After a busy fifteen years, 1981 began a mostly quiet decade for class action law and policy.¹⁷ The years certainly witnessed significant cases,

10. Bryan D. Jones & Frank R. Baumgartner, *From There to Here: Punctuated Equilibrium to the General Punctuation Thesis to a Theory of Government Information Processing*, 40 POL'Y STUD. J. 1, 3 (2012); see also David F. Prindle, *Importing Concepts from Biology into Political Science: The Case of Punctuated Equilibrium*, 40 POL'Y STUD. J. 21, 29 (2012) (describing the theory as "spectacularly influential").

11. Frank R. Baumgartner & Bryan D. Jones, *Agenda Dynamics and Policy Subsystems*, 53 J. POL. 1044, 1048 (1991).

12. FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 16 (1993); Baumgartner & Jones, *supra* note 11, at 1049.

13. McConnell won the election in 1984 by four-tenths of a percent. FED. ELECTION COMM'N, *FEDERAL ELECTIONS 84: ELECTION RESULTS FOR U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES* 20 (1985).

14. 132 CONG. REC. 1667 (Feb. 5, 1986) (statement of Sen. McConnell).

15. See *id.* at 1668.

16. *Litigation Abuse Reform Act of 1986: Hearings on S. 2038 and S. 2046 Before the S. Comm. on the Judiciary*, 99th Cong. 169 (1986) (statement of Peter Perlman, President, Association of Trial Lawyers of America); *id.* at 184 (statement of Aaron J. Broder, Member, S. Comm. on the Judiciary).

17. *E.g.*, DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* 22 (2000).

debates over the class action's proper scope and power continued, and class action litigation continued to evolve. Most significantly, civil rights and antitrust class action practices declined. But, except for the fitful emergence of the mass tort class action, changes to the class action landscape happened mostly incidentally in the 1980s, as side effects of other phenomena.

A. *The First Era in Brief*

My history of the modern class action's first era began in the early 1950s, with the first attempt to amend Rule 23, and ended in 1980, with the failure of a Carter administration effort to replace the Rule with a legislated alternative.¹⁸ I argued that, while the authors of the 1966 Rule did not fully anticipate the implications of the procedure they created, lawyers, judges, and others quickly understood that the recreated class action had major implications for a variety of substantive liability regimes.¹⁹ What ensued was a decade and a half of tumult. Proponents praised the class action as an essential substitute for overmatched or captured regulatory agencies, and adversaries denounced it as a dangerous threat to free enterprise.²⁰ In short order, these combatants developed the sort of arguments for and against a robust class action device that would be familiar to any present-day participant in fights over aggregate procedure. Throughout the 1970s, Congress and the Advisory Committee struggled, mostly inconclusively, to respond to various proposals either to eviscerate the new class action or to liberate it.²¹

I also argued that the courts stepped in where legislators and rulemakers failed. By the end of the 1970s, the Supreme Court and the courts of appeals had forged a body of doctrine that enabled litigants to bring sizable, important cases, but also imposed limits that hedged against an unbound class action.²² Lower courts, on the one hand, crafted the fraud-on-the-market doctrine, turning the reliance element into a common issue for plaintiffs' claims in securities fraud cases and thereby enabling courts to certify securities fraud classes.²³ On the other hand, the Supreme Court insisted that individualized notice be sent to all class members, whenever possible.²⁴ This holding created litigation costs that limited securities fraud litigation to a small number of highly capitalized plaintiffs' firms.²⁵ A pragmatic balance of this sort emerged in each of the major substantive areas in which the class action took root.²⁶ It reflected a jurisprudential compromise. Courts sometimes countenanced concerns about ensuring the efficacy of regulatory regimes. In other instances, they stressed the need to ensure that class litigation remain

18. *See generally* Marcus, *Sturm*, *supra* note 3.

19. *See id.*

20. *See id.*

21. *See id.* at 614–22.

22. *See id.* at 630–31.

23. *See id.* at 632.

24. *See id.* at 633.

25. *See id.*

26. *See id.* at 652.

something that an enthusiast for traditional, individualized adjudication would recognize.

B. Legal Change During the Second Era

1. Case Law

Mass torts aside, 1980s era cases suggest little of the ferment that engulfed Rule 23 during its first fifteen years.²⁷ The 1966 amendments required federal courts to assemble a body of class action doctrine from scratch, a task considerably complicated by the novelty of so many of the relevant substantive regimes. Naturally, the pace of doctrinal evolution slowed as time passed and fewer fundamental questions remained wholly open. During the first era, courts had to resolve issues that implicated the viability of entire swaths of class action litigation. Comparatively technical issues commanded judicial attention during the second era. How best to calculate fees for class counsel²⁸ and whether Rule 23(b)(2) members can have opt-out rights²⁹ were important questions but did not promise answers that would considerably expand or contract categories of litigation. Other issues of similarly modest significance included the standing of absent class members to appeal,³⁰ the lawfulness of fluid recovery and *cy pres*,³¹ Rule 23(b)(1)'s scope,³² and restrictions on class counsel's communications with class members.³³

The Supreme Court did not tackle many issues of class action procedure during the second era, deciding only seven such cases between 1981 and 1994.³⁴ Very few of its decisions dramatically impacted what types of classes would get certified or what sorts of settlements would win approval.

27. For a masterful summary of the extant doctrinal and policy questions involving Rule 23 in the early 1990s, see Letter from Edward H. Cooper to Civil Procedure Buffs (Jan. 21, 1993), http://www.uscourts.gov/sites/default/files/fr_import/CV1993-05.pdf [<https://perma.cc/U5H5-QWVC>] (letter available at tab III-A).

28. See generally Third Circuit Task Force, Court Awarded Attorney Fees (Oct. 8, 1985), in 108 F.R.D. 237 (1986).

29. E.g., *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1153–55 (11th Cir. 1983); *Plummer v. Chem. Bank*, 668 F.2d 654, 657 n.2 (2d Cir. 1982).

30. E.g., *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 676 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 1071, 1073–74 (5th Cir. 1988).

31. E.g., *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990) (discussing the lawfulness of *cy pres*); *Simer v. Rios*, 661 F.2d 655, 675–77 (7th Cir. 1981) (discussing fluid recovery). On *Simer's* importance, see *infra* Part IV.A.3; *infra* notes 367–68.

32. *SEC v. Drexel Burnham Lambert Grp., Inc.* (*In re Drexel Burnham Lambert Grp., Inc.*), 960 F.2d 285, 291–92 (2d Cir. 1992); *Namoff v. Merrill Lynch, Pierce, Fenner & Smith Inc.* (*In re Dennis Greenman Sec. Litig.*), 829 F.2d 1539, 1545–46 (11th Cir. 1987).

33. E.g., *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 (1981).

34. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 881–82 (1984); *Chardon v. Fumero Soto*, 462 U.S. 650, 662 (1983); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1011–12 (1982); *Gulf Oil*, 452 U.S. at 89; cf. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (dismissing writ as improvidently granted). Of course, the Court decided other cases that had significance for class action practice. See generally *Martin v. Wilks*, 490 U.S. 755 (1989).

Phillips Petroleum Co. v. Shutts,³⁵ while surely important, has a disputed legacy. The decision effectively constitutionalized notice and opt-out rights for damages class actions.³⁶ But it also rejected the defendant's argument that due process requires out-of-state class members to opt in to join a multistate class,³⁷ a holding that would have thwarted many large class actions.³⁸ The Court also rejected the Kansas Supreme Court's decision to apply Kansas substantive law to claims of class members from different states.³⁹ Commentators disagree over the significance of this holding,⁴⁰ but one leading plaintiffs' lawyer, reflecting twenty years hence, denied that *Shutts* had a significant impact on the certification of multistate classes.⁴¹

In *General Telephone Co. of the Southwest v. Falcon*,⁴² the Court largely ended the certification of broad Title VII classes based on little more than an allegation of company-wide discrimination. The majority insisted that courts should not presume a common or typical course of treatment for all class members just because the class representative alleges that discrimination tainted her hiring or promotion in some manner.⁴³ Rather, class certification requires "significant proof" of a common course of discriminatory treatment.⁴⁴ *Falcon* ultimately provided an important buttress⁴⁵ for the Court's 2011 opinion in *Wal-Mart Stores, Inc. v. Dukes*,⁴⁶ but in the 1980s, as one prominent civil rights litigator recalls, it did little to change the course of civil rights litigation.⁴⁷

The Court's few decisions mostly involved peripheral issues that did not significantly affect what sorts of classes got certified, incentives to litigate class actions, or the design of settlements. The lower federal courts likewise generated little memorable case law apart from some mass tort decisions. Indeed, the courts of appeals largely exited the network of institutions involved in class action law and policy. The Supreme Court cut off an avenue

35. 472 U.S. 797 (1985).

36. *See id.* at 811–12.

37. *Id.* at 814.

38. *E.g.*, Robert H. Klonoff, *Introduction to the Symposium*, 74 UMKC L. REV. 487, 488 (2006).

39. *Shutts*, 472 U.S. at 821.

40. Compare Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1912–16 (2006), with Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1945–46 (2006).

41. Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 543, 546 (2006).

42. 457 U.S. 147 (1982).

43. *Id.* at 158–59.

44. *Id.* at 159 n.15.

45. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–53 (2011).

46. 564 U.S. 338 (2011).

47. Telephone Interview with Joseph M. Sellers, Partner, Cohen Milstein Sellers & Toll PLLC (May 16, 2016).

for interlocutory review of class-certification decisions in 1978,⁴⁸ sidelining the circuits as stewards of class-certification doctrine.⁴⁹

2. The Advisory Committee

After a decade of hand-wringing over Rule 23, the Advisory Committee declared a “moratorium” on its consideration of class action issues at the end of the 1970s.⁵⁰ The Advisory Committee thus sidelined a set of plaintiff-friendly proposals that a special committee of the American Bar Association submitted in 1986.⁵¹ Building on mid-1970s law reform efforts, the Special Committee on Class Action Improvements recommended replacing Rule 23(b)’s trifurcated approach to class certification with a single superiority requirement.⁵² The Special Committee also suggested that an amended Rule 23 make opt-out rights and notice in cases for monetary relief optional.⁵³ These proposals exemplified the Special Committee’s contention that privately instituted class actions are important procedural “tool[s] affording significant opportunities to implement important public policies”⁵⁴ and, thus, that Rule 23 should “not be thwarted by unwieldy or unnecessarily expensive procedural requirements.”⁵⁵

The Advisory Committee ignored the Special Committee’s recommendations until December 1990, when work on a Rule 23 revision modeled explicitly on the report’s suggestions began.⁵⁶ Intending to increase district-judge discretion to certify classes, a November 1992 draft of Rule 23 proposed to (1) eliminate the three Rule 23(b) categories in favor of a single

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

49. 7B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1802 (3d ed. 1998).

50. Letter from Sam C. Pointer, Jr., Chairman, Advisory Comm. on Civil Rules, to Hon. Robert E. Keeton, Chairman, Standing Comm. on Rules of Practice & Procedure (May 17, 1993), <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-1993> [<https://perma.cc/P7UP-F82U>]. Jack Weinstein proposed an amendment to Rule 23 in 1985 that would have required disclosure of fee-sharing arrangements among class counsel. It languished on the Committee’s inactive agenda. Rule 23 Class Actions (Oct. 1, 1988), in *RECORDS OF THE U.S. JUDICIAL CONFERENCE, microformed on CIS No. CI-8510-95-1988* (Cong. Info. Serv.).

51. *See generally* Am. Bar Ass’n Section of Litig., Report and Recommendations of the Special Committee on Class Action Improvements (July 1985), in 110 F.R.D. 195 (1986) [hereinafter Special Committee Report].

52. *Id.* at 204; *see also* Minutes of Meeting of Advisory Committee on Civil Rules (Nov. 12–14, 1992), in 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 169, 171 (1997) [hereinafter WORKING PAPERS], <https://law.duke.edu/sites/default/files/centers/judicialstudies/jul2015/WorkingPapers-Vol1.pdf> [<https://perma.cc/R4GS-59MZ>]; Special Comm. on Unif. Class Actions Act, Nat’l Conf. of Comm’rs on Unif. State Laws, Uniform Class Actions Act (July 31–Aug. 6, 1976), in *RECORDS OF THE U.S. JUDICIAL CONFERENCE, microformed on CIS No. CI-7504-60* (Cong. Info. Serv.).

53. Special Committee Report, *supra* note 51, at 197–98, 207–08.

54. *Id.* at 204.

55. *Id.* at 198.

56. Letter from James E. Macklin, Jr. to Henry Kantor (June 3, 1988) (on file with author); Minutes of Meeting of Advisory Committee on Civil Rules (Nov. 29–Dec. 1, 1990), in WORKING PAPERS, *supra* note 52, at 162.

superiority test; (2) relax the notice requirement; (3) give judges the discretion to eschew opt out rights, or, in appropriate cases, to require class members to opt in; and (4) allow interlocutory review of class-certification decisions.⁵⁷ The draft made its way to the Advisory Committee in 1993 but no further.⁵⁸ A lack of enthusiasm for the proposed reworking⁵⁹ led to its demise in 1994.⁶⁰ The Advisory Committee ultimately appreciated that a revision based on a 1986 report that owed its ideas to proposals dating from the mid-1970s did not adequately respond to challenges that had emerged by the mid-1990s, especially those posed by mass tort and settlement class actions.⁶¹

3. Congress

The class action weathered intense congressional scrutiny in the late 1970s.⁶² As Stephen Burbank and Sean Farhang observe, newly empowered conservatives at the start of the Reagan administration “well understood that private enforcement of statutory rights had been growing steeply, and they saw it as a critical obstacle to their regulatory reform agenda.”⁶³ In the 1970s, Democrats and Republicans alike supported what Burbank and Farhang call “private enforcement retrenchment,” but such efforts to limit private litigation came overwhelmingly from Republican corners starting in the 1980s.⁶⁴ The Reagan administration pursued an ambitious program of litigation retrenchment.⁶⁵

But not until the early 1990s did the class action per se return to legislative agendas in any sustained or significant way.⁶⁶ The few statutes enacted during the second era addressed picayune matters.⁶⁷ Of course, signals

57. Minutes of Meeting of Advisory Committee on Civil Rules (Nov. 22, 1991), in WORKING PAPERS, *supra* note 52, at 167.

58. See Minutes of Meeting of Advisory Committee on Civil Rules (Oct. 21–23, 1993), in WORKING PAPERS, *supra* note 52, at 174–75. For the language of the proposed draft rule, see November 1992 Proposed Amendment to Rule 23, in WORKING PAPERS, *supra* note 52, at 3–12.

59. Minutes of Meeting of Advisory Committee on Civil Rules (Oct. 21–23, 1993), in WORKING PAPERS, *supra* note 52, at 175.

60. Minutes of Meeting of Advisory Committee on Civil Rules (Oct. 20–21, 1994), in WORKING PAPERS, *supra* note 52, at 194.

61. *Id.*; see also Letter from Patrick E. Higginbotham, Chair of Advisory Comm. on Civil Rules, to the Standing Comm. on Rules (Dec. 13, 1995), in ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE REPORT DECEMBER 1995 (1995), http://www.uscourts.gov/sites/default/files/fr_import/CV12-1995.pdf [<https://perma.cc/M2QN-PCXD>].

62. Marcus, *Sturm*, *supra* note 3, at 620–22.

63. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 26 (2017).

64. *Id.* at 37–39.

65. E.g., Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 380.

66. BURBANK & FARHANG, *supra* note 63, at 38.

67. In several instances, Congress put limits on damages recoverable in cases for statutory penalties, such as \$500,000 or 1 percent of the defendant’s net worth. See 12 U.S.C. § 4010 (2012); see also 29 U.S.C. § 1854 (2012); 12 U.S.C. § 2605(f)(2) (2012). Another law authorized manufacturers, retailers, and distributors of children’s clothing to sue the federal government in the U.S. Court of Claims for losses connected with a ban on the use of a certain

beyond enacted legislation suggest congressional interest in class action litigation. The propriety of class actions underwritten by the LSC surfaced continually in legislative debates.⁶⁸ Oversight of federal agencies, particularly of Clarence Thomas's Equal Employment Opportunity Commission (EEOC), indicated keen legislative interest in the connection between class actions and the enforcement of civil rights laws.⁶⁹ But, as the fate of McConnell's bill illustrates, the legislative pursuit of sweeping—or even modest—changes to the class action sparked little sustained support.

Other indicators suggest the class action's low political salience in the 1980s. The "support structure" pursuing right-leaning law reform during the Reagan years almost totally ignored the class action as a policy concern unto itself.⁷⁰ The fledgling conservative public-interest-law movement⁷¹ pursued a wide range of issues in the 1980s, including those involving property rights and environmental policy, with a clear emphasis on limiting governmental power.⁷² But only one of the leading organizations appears to have identified class action doctrine as a concern, and it did so only in the context of employment litigation.⁷³ Tort reform efforts in the early 1980s and 1990s ignored the class action.⁷⁴ The U.S. Chamber of Commerce's National Chamber Litigation Center, founded in 1977, would eventually engage in class action reform efforts.⁷⁵ Not until the late 1990s, however, did it demonstrate much interest in the procedure.⁷⁶ Only one of the conservative

chemicals but prohibited them from bringing class actions. Pub. L. No. 97-395, 96 Stat. 2001 (1982). A final law authorized the Commodities Futures Trading Commission to determine by rule whether class actions could be brought against futures traders. 7 U.S.C. § 18(a)(2) (1994).

68. See *infra* note 262 and accompanying text.

69. See *infra* notes 226–45 and accompanying text.

70. On the notion of a "support structure" and its importance to law reform, see generally CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516 (2011).

71. E.g., Nancy Blodgett, *The Ralph Naders of the Right*, A.B.A. J., May 1984, at 71, 71–72; see also NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* 74 (1989); Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1460–511 (1984).

72. See, e.g., Houck, *supra* note 71, at 1460–511; Dana L. Thomas, *More Freedom Fighters: Some Public Interest Law Firms Oppose Big Government*, BARRON'S NAT'L BUS. & FIN. WKLY., Aug. 15, 1977, at 5, 10.

73. LEE EPSTEIN, *CONSERVATIVES IN COURT* 63, 64 (1985).

74. See *infra* Part IV.B.2.

75. Anna Palmer, *Chamber Shuffles Staff After Counsel Exit*, LEGAL TIMES, Nov. 13, 2006, at 2.

76. For indications of the Chamber of Commerce's priorities before the 1980s, see, e.g., EPSTEIN, *supra* note 73, at 60. A May 1985 list of the National Chamber Litigation Center's "victories" and "ongoing cases" did not include one involving an issue of class action procedure. Nat'l Chamber Litig. Ctr., Case List (May 1985) (on file with the Hoover Institution, Edwin Meese Papers, Box 645, Folder C3). A 1984 "Fact Sheet" described the center's victories as "check[ing] the power of labor unions, prevent[ing] regulatory agencies from issuing rules that would have cost business millions of dollars, protect[ing] business privacy and champion[ing] corporate free speech." National Chamber Litigation Center, Fact Sheet 1 (Nov. 1984) (on file with the Hoover Institution, Edwin Meese Papers, Box 645, Folder C3). The Chamber of Commerce played little role in the lobbying effort behind the

and business groups active in the 1980s filed an amicus brief in *Shutts*, and only one did so in *Falcon*.⁷⁷ Other priorities for civil justice reform clearly ranked higher on reformers' agendas.⁷⁸

C. *The Quiet Decline*

The class action moved to the back burner for several reasons. The limits the federal courts fashioned for the device likely calmed fears among Rule 23's natural adversaries that it would "literally dismember large numbers of business enterprises," as a business lobbyist worried in 1970.⁷⁹ The 1980s gave these adversaries more to cheer. Paul Carrington, the Advisory Committee's reporter, insisted in 1988 that "class actions had their day in the sun and kind of petered out."⁸⁰ Existing data are too poor to confirm this claim.⁸¹ But the two best-established types, antitrust and civil rights class actions, appeared to collapse over the course of the decade. The class action's low political salience makes sense in light of this apparent retreat.

1. The Civil Rights Class Action

Class actions litigated under Rule 23(b)(2), most of which involve civil rights claims, composed the largest slice of the class action pie in the 1970s.⁸² In 1989, a leading civil rights litigator declared that the "class action is dead."⁸³ A precipitous decline in the number of civil rights class actions during the 1980s is consistent with a number of developments.

PSLRA, enacted in 1995. Telephone Interview with Hon. Mark Gitenstein, Special Counsel, Mayer Brown LLP (June 22, 2016).

77. A list of briefs filed in each case is available at the "Filings" tab for the case on Westlaw. For amicus brief practices of this time, see EPSTEIN, *supra* note 73, at 149. On the filing of amicus briefs in cases involving enforcement through private civil litigation, see BURBANK & FARHANG, *supra* note 63, at 160–61.

78. A literal example comes from a report compiled for the 1986 White House Small Business Conference, which included the proposal that Congress "[l]imit class action suits to those with provable economic loss" as seventh (out of seven) on its list of civil justice reform priorities. 132 CONG. REC. E1300–01 (daily ed. Apr. 22, 1986) (statement of Rep. Porter).

79. Marcus, *Sturm*, *supra* note 3, at 612 (quoting a representative of the National Small Business Association).

80. Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7; see also Nicholas C. McBride, *Class-Action Suit out of Fashion in Today's Law Cases*, CHRISTIAN SCI. MONITOR (Feb. 4, 1988), <https://www.csmonitor.com/1988/0204/dsuit.html> [<https://perma.cc/VF4A-6ZS5>].

81. Statistics gathered by the Administrative Office of the U.S. Courts suggest that the class action declined considerably in the 1980s, a phenomenon occasioned in large measure by the near disappearance of antitrust and employment discrimination class actions. See, e.g., *1999 Federal Court Class Action Statistics*, 21 CLASS ACTION REP. 304, 305–10 (2000). But these data are flawed, and indeed there are no reliable data on class action filings from these years. See Deborah R. Hensler, *Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All This Time?*, 165 U. PA. L. REV. 1599, 1602 n.14 (2017) (describing the problems with this data).

82. ARTHUR R. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE 46 (2d ed. 1977).

83. Tom Wicker, *No Place for Lucas*, N.Y. TIMES, July 4, 1989, at 29; see also Ann Pelham, *Civil-Rights Plaintiffs Are Used to Setbacks; New Rulings Add Obstacles to Difficult Journey*, LEGAL TIMES, June 19, 1989, at 3.

The civil rights bar diminished during the 1980s,⁸⁴ so much so as to prompt judicial comment by the end of the decade.⁸⁵ A couple of prominent nonprofit organizations that had dominated the employment discrimination field in the 1970s⁸⁶ had decreased their activity by the end of the 1980s, in part because of the increased resources this litigation required.⁸⁷ The for-profit bar did not replace this lost capacity until later,⁸⁸ a lag consistent with the fact that Title VII litigation more generally was not financially attractive to lawyers until Congress amended the statute in 1991 to enable the recovery of compensatory and punitive damages.⁸⁹ Also, the pace of filings in the 1970s was probably unsustainable. One prominent civil rights lawyer recalled that some of the young lawyers populating the public interest ranks, however well intentioned, “didn’t really have the foggiest idea what it would take” to successfully litigate a class action.⁹⁰ A dose of reality likely drove less sophisticated lawyers from the civil rights class action field.⁹¹

The employment discrimination class action might have been a victim of its own success, at least to a degree. The first generation of Title VII litigation and other forces had helped to eliminate explicitly stated policies of discrimination,⁹² and by the end of the 1980s few employers continued to

84. See ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 5 (1992); Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 LAW & SOC’Y REV. 851, 862 n.22 (1996); David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1160–61 (1989).

85. See, e.g., *Robinson v. Ala. State Dep’t. of Educ.*, 727 F. Supp. 1422, 1431 (M.D. Ala. 1989); *Norwood v. Charlotte Mem’l Hosp. & Med. Ctr.*, 720 F. Supp. 543, 555–56 (W.D.N.C. 1989); *Stokes v. City of Montgomery*, 706 F. Supp. 811, 817 (M.D. Ala. 1988).

86. These included the NAACP Legal Defense Fund (LDF) and the Washington Lawyers’ Committee for Civil Rights. Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 924–25 (1978); see also J.E.M., *The Bonhomie of the Plaintiff Bar*, JURIS DR., Sept. 1974, at 31, 31.

87. Barry Goldstein describes the LDF as “essentially geared to law reform, appellate brief writing, Supreme Court brief writing.” Telephone Interview with Barry Goldstein, Of Counsel, Goldstein, Borgen, Dardarian & Ho (Apr. 14, 2016). He further noted that the LDF was not “set up to litigate complex cases in the way that you need to do it” with “experienced lawyers . . . , associates at different levels, paralegals, putting in hundreds of thousands of dollars and sometimes seven figures into a case.” *Id.*; see also STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 82 (1995) (reporting a rise in NAACP litigation expenses from \$500,000 in the mid-1960s to \$3.2 million in 1981).

88. Telephone Interview with Barry Goldstein, *supra* note 87; Telephone Interview with Joseph M. Sellers, *supra* note 47.

89. Sean Farhang & Douglas M. Spencer, *Legislating Incentives for Attorney Representation in Civil Rights Litigation*, 2 J.L. & CTS. 241, 249–50 (2014).

90. Telephone Interview with Barry Goldstein, *supra* note 87.

91. See *In Camera*, 7 CLASS ACTION REP. 253, 253 (1982); Sharon Walsh, *The Vanishing Job-Bias Lawyers: Attorneys, Law Firms Say They Can’t Afford to Try Rights Cases*, WASH. POST, July 6, 1990, at C1; cf. Brief for Twelve Small, Private Civil Rights Law Firms as Amici Curiae Supporting Respondents at 1, *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 483 U.S. 711 (1987) (No. 85-5) (discussing the financial precariousness of a civil rights practice).

92. J. LeVonne Chambers & Barry Goldstein, *Title VII at Twenty: The Continuing Challenge*, 1 LAB. LAW. 235, 247 (1985); Paul Frymer, *Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 AM. POL. SCI. REV. 483, 493–95 (2003).

discriminate in the old, easily recognized Jim Crow manner.⁹³ “Broad patterns of discrimination continued,” the Lawyers’ Committee for Civil Rights noted in 1991, “but in subtler forms which required a much greater investment of time and money to prove.”⁹⁴ The shift from a manufacturing to a service economy added to this difficulty, as discretionary promotion and hiring criteria in the latter fields made discrimination harder to identify and prove.⁹⁵ A changing landscape in poverty law might have pushed the number of other civil rights filings down as well. Lawyers certainly pursued important benefits-related litigation during the Reagan years.⁹⁶ But the due process revolution had crested by the 1980s, a trajectory that might have depressed some types of litigation.

Doctrinal changes mostly outside the domain of class action procedure may have made civil rights litigation more difficult to pursue, although probably not to a significant extent. Courts fashioned relatively low certification requirements for civil rights classes during Rule 23’s first era.⁹⁷ *Falcon* notwithstanding, this judicial favor continued throughout the second era, as reflected by a relaxed commonality requirement⁹⁸ and a continued tolerance for the certification of Rule 23(b)(2) classes seeking back pay.⁹⁹ The substantive law of antidiscrimination evolved in a manner that disfavored class certification, but most of the decisions in this area came at decade’s end.¹⁰⁰ Perhaps most important were a string of cases involving fees and expenses that likely increased costs for civil rights litigators.¹⁰¹ In

93. Telephone Interview with Joseph M. Sellers, *supra* note 47.

94. *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, Part 2*, 102d Cong. 185 (1991) [hereinafter *Thomas Hearings Part 2*] (statement of the Lawyers’ Committee for Civil Rights).

95. Telephone Interview with Joseph M. Sellers, *supra* note 47.

96. *See, e.g.,* MARTHA DERTHICK, *AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT* 131–45 (1990) (describing litigation brought to protect social security benefits in the 1980s).

97. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155–57 (1982).

98. *E.g.,* *Baby Neal v. Casey*, 43 F.3d 48, 59–61 (3d Cir. 1994); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). For decisions that all but ignored *Falcon*, see, *e.g.,* *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 332–33 (4th Cir. 1983); *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983).

99. *E.g.,* *Probe v. State Teachers’ Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986).

100. For a list of the cases, mostly from the end of the 1980s, and their anticipated effects on antidiscrimination litigation, see *Hearings on H.R. 4000, the Civil Rights Act of 1990—Volume 1, Joint Hearings Before the H. Comm. on Educ. & Labor & the H. Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 788 (1990) [hereinafter *Joint Hearings on the Civil Rights Act—Volume 1*]. The 1991 Civil Rights Act promptly nullified some of these decisions. Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment*, 41 DEPAUL L. REV. 1085, 1085 n.1 (1992).

101. *See generally* *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546 (1986). On the effect of these decisions, see, *e.g.,* *Hearings on H.R. 4000, the Civil Rights Act of 1990—Volume 3: Hearings Before the H. Comm. on Educ. & Labor*, 101st Cong. 358 (1990) (statement of Charles Silver, Professor, University of Texas at Austin School of Law); *Hearings on H.R. 4000, the Civil Rights Act of 1990—Volume 2: Joint Hearings Before the H. Comm. on Educ. & Labor & the H. Subcomm. on Civil &*

Evans v. Jeff D.,¹⁰² for example, the Supreme Court ordered the enforcement of a fee waiver insisted upon by a state government as a condition for its agreement to settle for the full scope of injunctive relief the class sought.¹⁰³ It rejected the Ninth Circuit's conclusion that "strong public policy considerations" favored the award of "attorney's fees in suits in which representative parties serve interests broader than their own self-interest."¹⁰⁴

Reagan administration policies, discussed further below,¹⁰⁵ surely strengthened the headwinds that civil rights litigation faced. During Clarence Thomas's chairmanship, for example, the EEOC committed more resources to the investigation of individual claims of discrimination and fewer to broader patterns.¹⁰⁶ The EEOC also contributed less to private enforcement efforts, whether by providing plaintiffs' lawyers with fewer materials from investigations, or by ceasing to support private antidiscrimination litigation with amicus briefs.¹⁰⁷ As one prominent civil rights lawyer recalled, a "concern almost to the level of fanaticism" with any sort of numbers-based remedy led the Reagan administration to oppose class certification if plaintiffs' Rule 23 arguments rested in part on a claim that they could establish the defendant's liability with statistical evidence.¹⁰⁸ Other relevant developments included a 25 percent cut to the LSC's budget in 1982¹⁰⁹ and the rightward pressure Reagan's appointments exerted on the federal bench.¹¹⁰

To one leading antidiscrimination lawyer, civil rights class actions had turned into "ground wars in Asia" by 1989.¹¹¹ Just two small firms brought Title VII class suits for profit during the decade. One only began to make money in 1986 after a decade of taking on huge financial risk.¹¹² The firm

Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong. 502 (1990) [hereinafter *Joint Hearings on the Civil Rights Act—Volume 2*] (statement of Herbert B. Newberg, Esq.) (attaching a letter from Michael Churchill to Herbert B. Newberg dated Mar. 14, 1990); Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 219–20 (1997); Rose, *supra* note 84, at 1174.

102. 475 U.S. 717 (1986).

103. On the effects of *Jeff D.*, see *Joint Hearings on the Civil Rights Act—Volume 2*, *supra* note 101, at 499 (statement of Herbert B. Newberg, Esq.) (attaching a letter from Louis Rulli to Herbert Newberg dated Mar. 14, 1990).

104. *Jeff D. v. Evans*, 743 F.2d 648, 651 (9th Cir. 1984).

105. See *infra* notes 273–79 and accompanying text.

106. Telephone Interview with Barry Goldstein, *supra* note 87; Telephone Interview with Joseph M. Sellers, *supra* note 47.

107. Chambers & Goldstein, *supra* note 92, at 256–57; Telephone Interview with Barry Goldstein, *supra* note 87; Telephone Interview with David Cashdan, Partner, Cashdan & Kane, PLLC (June 7, 2016).

108. Telephone Interview with Joseph M. Sellers, *supra* note 47.

109. Andrew Barlow, *Wrong Way to Reform: Capping 'Litigation Explosion' Misses the Real Problem*, B. LEADER, Nov.–Dec. 1984, at 21, 23.

110. See George M. Sickler, Jr., *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DEPAUL L. REV. 73, 74 (1984); see also Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 51–52 (1986).

111. Wicker, *supra* note 83, at 29 (quoting Joseph Sellers).

112. Vicki Quade, *A League of Their Own: Treating Civil Rights Law as a Business*, HUM. RTS., Spring 1994, at 8, 9–10.

won a \$157 million settlement in a gender discrimination class action against the insurer State Farm in 1992, the largest deal ever struck in an antidiscrimination case at the time.¹¹³ But this victory came after the investment of 550,000 hours of attorney time.¹¹⁴ “Not too many lawyers want to wait 12 years to be paid,” the firm’s founder said in 1994, explaining why so few colleagues had joined him on his side of the aisle.¹¹⁵

2. The Antitrust Class Action

Private antitrust filings fell significantly during the 1980s, from roughly 1500 in 1980 to about 600 in 1989.¹¹⁶ Class actions constituted some of these cases and presumably diminished at roughly the same rate. The remaking of antitrust law in the late 1970s and 1980s, coupled with the Reagan administration’s antitrust policy, kneecapped what had been a well-established, lucrative preserve of the most powerful plaintiffs’ lawyers in the country.¹¹⁷

These changes became the real story of the 1980s, but the era began with another one, involving the infamous *Fine Paper* litigation.¹¹⁸ Harold Kohn, the godfather of the country’s class action bar,¹¹⁹ challenged a lavishly excessive fee petition his cocounsel filed,¹²⁰ which sought \$21 million in fees for a case that settled for \$50,650,000. After thirty feet of acrimonious filings by one-time colleagues and a seven-week hearing, the episode produced a 468-page opinion painting a sordid portrait of attorney greed and excess.¹²¹ “I regret to say,” the *Fine Paper* judge concluded, “that my inquiry has given

113. Philip Hager, *State Farm to Pay Women \$157 Million for Job Bias*, L.A. TIMES, Apr. 29, 1992, at A1.

114. See Quade, *supra* note 112, at 10. See generally *Runaway Train*, AM. LAW., July–Aug. 1992, at 58. This litigation included four years of wrangling after the parties agreed in principal to settlement terms. See Philip Hager, *Sex-Bias Suit Settled by State Farm Insurance*, WASH. POST, Jan. 20, 1988, at A14. The firm then procured a \$134 million settlement in early 1993 against Shoney’s for race discrimination, after a relatively swift three years of litigation. *Shoney’s Bias Suit Settled*, N.Y. TIMES, Jan. 28, 1993, at D11.

115. Quade, *supra* note 112, at 10; see also *Joint Hearings on the Civil Rights Act—Volume 2*, *supra* note 101, at 860–61 (statement of Robert B. Fitzpatrick, Vice President, Plaintiff Employment Lawyers Association).

116. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-91-2, ANTITRUST DIVISION AND PRESIDENT REAGAN: CHANGES IN ENFORCEMENT POLICIES, ACTIVITIES 15 (1990).

117. JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 56–59 (2015).

118. *In re Fine Paper Antitrust Litig. (Fine Paper)*, 98 F.R.D. 48 (E.D. Pa. 1983), *aff’d in part, rev’d in part*, 751 F.2d 562 (3d Cir. 1984).

119. James B. Stewart, Jr., *The \$300-Million Paper Case*, AM. LAW., July 1979, at 20, 21.

120. The fee application claimed that 160 plaintiffs’ lawyers had spent a total of 97,000 hours on the case, 85,000 of which were spent after a preliminary deal was reached and 4500 of which were spent on a single brief. *Fine Paper*, 98 F.R.D. at 69, 75. On *Fine Paper*’s notoriety, see, e.g., John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 252–61 (1983); Connie Bruck, *Harold Kohn Against the World*, AM. LAW., Jan. 1982, at 28, 29; Tamar Lewin, *Antitrust Case Lawyers Assailed and Fees Cut*, N.Y. TIMES, Mar. 4, 1983, at D11.

121. Lewin, *supra* note 120, at D11; Paul Taylor, *A Lawyers’ Fee-for-All: \$610 an Hour?*, WASH. POST, Apr. 10, 1983, at C1.

substance to the worst fears of the critics of the class action device—that it is being manipulated by lawyers to generate fees.”¹²²

Kohn worried that *Fine Paper* would “kill the goose that lays the golden egg.”¹²³ But it was another case involving a wood-pulp product that nearly produced significant legislative blowback to the antitrust class action. Stephen Susman, then an unknown antitrust ingénue,¹²⁴ won an appointment as lead counsel in the *Corrugated Container* litigation¹²⁵ in 1977 when squabbling among the plaintiffs’ bar left him as an acceptable compromise.¹²⁶ Allegations that several dozen box manufacturers fixed prices ultimately generated a \$550 million settlement, with \$40 million in fees—then a record fee for a class action.¹²⁷

However successful, *Corrugated Container* prompted a powerful backlash. Susman had employed a “system of escalation” strategy that put significant pressure on defendants to settle.¹²⁸ Because antitrust liability was joint and several, class counsel could offer a sweetheart deal to the first alleged coconspirator to come to the table, regardless of the defendant’s market share, without diminishing the class’s capacity to recover the entirety of its damages. Each settlement would leave fewer and fewer defendants with more and more potential liability, with treble damages, and with no contribution rights in the offing.¹²⁹

Susman struck deals with dozens of defendants, but the Mead Corporation refused, so it went to trial and lost. Facing \$750 million in liability,¹³⁰ Mead sought relief from Congress,¹³¹ intensifying a multiyear effort to reform the law of antitrust remedies and damages allocation that would last throughout the Reagan years.¹³² The campaign included all of the familiar tropes in

122. *Fine Paper*, 98 F.R.D. at 85.

123. Irwin Ross, *A Philadelphia Lawyer’s Class Action Gold Mine*, FORTUNE, Sept. 7, 1981, at 105 (quoting Harold Kohn); see also *Fine Paper*, 98 F.R.D. at 85 (“It would be ironic indeed if class actions . . . were to be restricted or eliminated as a result of the conduct of a very small segment of the bar specializing in plaintiffs’ representation.” (quoting Liebman v. J.W. Petersen Coal & Oil Co., 63 F.R.D. 684, 701 (N.D. Ill. 1974))).

124. Telephone Interview with Stephen D. Susman, Partner, Susman Godfrey LLP (Mar. 7, 2016); see also Larry Lempert, *Antitrust Lawyer Hopes Fee Will Confirm Vision*, LEGAL TIMES, May 17, 1982, at 1.

125. *In re Corrugated Container Antitrust Litig. (Corrugated Container)*, M.D.L. No. 310, 1983 WL 1872 (S.D. Tex. Sept. 1, 1983), vacated, M.D.L. No. 310, 1983 WL 1755 (S.D. Tex. Dec. 16, 1983).

126. Telephone Interview with Stephen D. Susman, *supra* note 124.

127. See *Corrugated Container*, 1983 WL 1872, at *3; John Riley, *A \$40 Million Fee Award; on and off the Record*, NAT’L L.J., Sept. 19, 1983, at 7, 7.

128. Bruck, *supra* note 120, at 30; Barry Siegel, *Class-Action Suits Spur Misgivings*, L.A. TIMES, Mar. 11, 1982, at A6.

129. E.g., *Antitrust Remedies Reform: Hearings on S. 2022 Before the S. Comm. on the Judiciary*, 99th Cong. 156 (1986) [hereinafter *Antitrust Remedies Reform Hearings*] (statement of Hon. Douglas Ginsburg, Assistant Att’y Gen., Antitrust Division, U.S. Department of Justice).

130. Robert E. Taylor, *Bill That Would Cut Price-Fixers’ Liability Stirs Up a Lobbying War, Charges of Bailout*, WALL ST. J., Oct. 14, 1981, at 31.

131. *Corrugated Container*, 1983 WL 1872, at *10, *29 n.4.

132. The campaign began in 1979, S. REP. NO. 96-428, at 1 (1979), and ended in 1988, *The Antitrust Remedies Improvement Act and the Intellectual Property Reform Act of 1987*:

debates over class action policy. Mead's supporters repeatedly told the story of an innocent small business whipsawed by the class action.¹³³ Decrying the "moral equivalent of extortion,"¹³⁴ they lamented the intense settlement pressure class actions generate that places trial off the table and forces defendants to pay without regard to true liability.¹³⁵ They castigated unscrupulous plaintiffs' lawyers stirring up "meretricious antitrust litigation" for their own benefit, not for that of their clients.¹³⁶

Mead escaped by settling for \$45 million.¹³⁷ Legislative efforts ultimately failed,¹³⁸ but they proved unnecessary. The Supreme Court issued a series of decisions, beginning in 1977 before *Fine Paper*, and with increased pace in the 1980s, "that sold the soul of competition to the devil," as Susman complained in 1987.¹³⁹ Decisions of lower courts in the 1980s, the U.S. General Accounting Office commented after a comprehensive survey, also reflected a defendant-friendly view that "most markets are naturally competitive."¹⁴⁰

Added to this substantive legal change was a "retrenchment of federal antitrust policy," spearheaded by prominent Chicago school academicians who headed the DOJ's Antitrust Division for parts of the 1980s.¹⁴¹ This development was important because private antitrust cases often grow out of

Hearings on S. 1407 and S. 635 Before the Subcomm. on Antitrust, Monopolies, & Bus. Rights of the S. Comm. on the Judiciary, 100th Cong. 1 (1987).

133. E.g., *Individual Treble Damage Liability: Hearing on S. 1300 Before the S. Comm. on the Judiciary*, 99th Cong. 35 (1985) (statement of Ira Millstein, Senior Partner, Weil, Gotshal & Manges LLP); *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies & Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 283 (1982) [hereinafter *Antitrust Damage Allocation Hearings*] (statement of Barbara Jordan); S. REP. NO. 99-320, at 6 (1986); cf. Stephen D. Susman, *Prosecuting the Antitrust Class Action*, 49 ANTITRUST L.J. 1513, 1514 (1980).

134. Benjamin R. Civiletti, *Antitrust Travesty*, N.Y. TIMES, Nov. 15, 1981, at F2.

135. E.g., *Antitrust Remedies Reform Hearings*, supra note 129, at 165-66 (statement of Hon. Douglas Ginsburg) (containing a letter from Hon. Douglas Ginsburg to Strom Thurmond dated Apr. 10, 1988); *Antitrust Damage Allocation Hearings*, supra note 133, at 284, 301 (statement of Benjamin R. Civiletti, former Att'y Gen.).

136. E.g., *Antitrust Remedies Reform Hearings*, supra note 129, at 104 (statement of Charles B. Renfrew, Vice President and Director, Chevron Corporation); *The Antitrust Improvements Act of 1986 (Illinois Brick): Hearing on S. 2481 Before the S. Comm. on the Judiciary*, 99th Cong. 88 (1986) (statement of Charles B. Renfrew, Vice President and Director, Chevron Corporation).

137. *In re Corrugated Container Antitrust Litig. (Corrugated Container)*, M.D.L. No. 310, 1983 WL 1872 (S.D. Tex. Sept. 1, 1983), vacated, M.D.L. No. 310, 1983 WL 1755 (S.D. Tex. Dec. 16, 1983).

138. E.g., Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 418-419 (1997); William E. Kovacic, *Built to Last? The Antitrust Legacy of the Reagan Administration*, 35 FED. B. NEWS & J. 244, 245-246 (1988).

139. Stephen D. Susman, *Business Judgment vs. Antitrust Justice*, 76 GEO. L.J. 337, 337 (1987).

140. U.S. GENERAL ACCOUNTING OFFICE, supra note 116, at 19. See generally William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49 (1991).

141. See Kovacic, supra note 140, at 49; Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 382 (2009); see also Marc Allen Eisner & Kenneth J. Meier, *Presidential Control Versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 AM. J. POL. SCI. 269, 273 (1990).

government enforcement.¹⁴² The Antitrust Division filed more criminal cases during the Reagan years than before,¹⁴³ but these prosecutions left alone Fortune 500 companies, targeting instead “a hapless, economically trivial parade of . . . commercial pygmies” who were unlikely to attract plaintiff-lawyer attention.¹⁴⁴ Civil filings and investigations initiated by an underfunded and undermanned Antitrust Division collapsed.¹⁴⁵

By 1986, as one antitrust lawyer lamented, “there are . . . almost no national class actions being brought in the antitrust field today.”¹⁴⁶ Titans of the antitrust bar drifted into other class action fields.¹⁴⁷ Susman, the antitrust wunderkind of 1977, described himself as a former antitrust lawyer just nine years later.¹⁴⁸

* * *

By the end of the 1980s, the class action had retreated significantly in two areas—antitrust and civil rights—that had been important to its development during the previous decade. The federal courts of appeals and the Supreme Court had exited the class action arena, as had Congress and the Advisory Committee. The class action’s shrunken profile, however, did not preclude significant developments in the jurisprudence and discourse of aggregate procedure.

II. LITIGATION AND LEGITIMACY

By 1995, the class action began to attract close attention from an expanded network of advocates pursuing reform in multiple institutional venues. How did the device move from offstage in the 1980s to center stage in the mid-1990s? Several hypotheses are plausible. A simple cyclical explanation is but one. Having sparked much heat in the 1970s, the class action was bound to reemerge sometime, and the end of another procedural episode created a vacuum that Rule 23 naturally filled.¹⁴⁹ Perhaps civil justice reformers

142. Maxwell M. Blecher, *The “New Antitrust” as Seen by a Plaintiff’s Lawyer*, 54 ANTITRUST L.J. 43, 46 (1985).

143. U.S. GEN. ACCOUNTING OFFICE, *supra* note 116, at 43.

144. Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 472 n.111 (citing William E. Kovacic, *Steady Reliever at Antitrust*, WALL ST. J., Oct. 10, 1989, at A18).

145. U.S. GEN. ACCOUNTING OFFICE, *supra* note 116, at 44 (stating that the number of civil actions initiated fell from forty-eight annually from 1970 to 1976 to thirteen annually from 1981 to 1989); *id.* at 37 (stating that the number of investigations fell from 377 in 1980 to 220 in 1989); *id.* at 36 (documenting a decline in both lawyer staff (41 percent) and funding).

146. *Authorization for the Antitrust Division of the Department of Justice: Oversight Hearings Before the Subcomm. on Monopolies & Commercial Law of the H. Comm. of the Judiciary*, 99th Cong. 94 (1986) (statement of William Hunter); *see also* Telephone Interview with Stephen D. Susman, *supra* note 124 (“It just disappeared.”).

147. Barnaby J. Feder, *Exxon Valdez’s Sea of Litigation*, N.Y. TIMES, Nov. 19, 1989, at F1; W. John Moore, *Class Action Lawyers Eye Tort Arena*, LEGAL TIMES, Feb. 4, 1985, at 1.

148. *Antitrust Remedies Reform Hearings*, *supra* note 129, at 220 (statement of Stephen Susman, Partner, Susman, Godfrey & McGowan); *see also* Stephen D. Susman & John B. McArthur, *If It Ain’t Broke, Don’t Fix It!*, 55 ANTITRUST L.J. 59, 60 (1986).

149. A revision to Rule 11 of the Federal Rules of Civil Procedure in 1993 completed a decade of controversy about the rule. *See generally* Margaret L. Sanner & Carl Tobias, *Rule 11 and Rule Revision*, 37 LOY. L.A. L. REV. 573 (2004).

redirected limited lobbying resources away from causes, such as tort reform and deregulation, that had attracted significant effort. The rest of this Article stresses the importance of a series of exogenous shocks, including the asbestos-litigation crisis and securities fraud litigation spawned by the S&L debacle that jolted the class action landscape and attracted reformers' attention.

Each of these answers, on its own and however partially explanatory, misses the forest—a sprawling debate over litigation's legitimate role—for the trees. The class action has always tested the boundaries of judicial power's legitimate exercise. Skeptics have often flogged the class action as an emblem of what they perceive as an abusive or otherwise illegitimate litigation system. This is exactly what happened during the class action's second era, with increased partisanship and urgency. Starting in the 1970s, critics of American civil justice began to question the governing power courts could legitimately exercise through their supervision of litigation, and they began to doubt the capacity of courts to wield this power successfully. The debates over litigation and legitimacy had obvious relevance to the class action and especially to the proper conception of what it is for. To some critics, the class action exemplified the litigation explosion¹⁵⁰ and the imperial judiciary's *modus operandi*.¹⁵¹ The fight intensified, grew more partisan over the 1980s and into the 1990s, and attracted a larger and more diverse array of participants. As it did so, it all but guaranteed that the class action would return to political and policy agendas.

A. *The Imperial Judiciary*

In the 1970s, critics of American civil justice began to complain of two interrelated phenomena.¹⁵² The first, the so-called “litigation explosion,” allegedly resulted from Americans' pathological litigiousness¹⁵³ coupled with the failure of civil litigation's rules and institutions to allow only claims warranted under applicable laws to pass through courthouse doors.¹⁵⁴ The litigation-explosion narrative had its origins in the mid-1960s over worries that population growth and technological change would cause lawsuits to spike.¹⁵⁵ Critics of the class action quickly latched onto such concerns as

150. *E.g.*, Gordon Crovitz, *Lawyers on Trial: How to Take the Profit out of Suing*, POL'Y REV., Winter 1986, at 72, 74–76.

151. *E.g.*, A.E. Dick Howard, *The Law: A Litigation Society?*, WILSON Q., Summer 1981, at 98, 104.

152. JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* 9 (1981); *see also* JOHN CHARLES DALY, *AN IMPERIAL JUDICIARY: FACT OR MYTH?* 2 (1978); Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 114 (1976).

153. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); Eleanor Carruth, *The “Legal Explosion” Has Left Business Shell-Shocked*, FORTUNE, Apr. 1973, at 65, 157.

154. *The Chilling Impact of Litigation: Easier Access to the Courts Means Skyrocketing Costs and Interminable Delays*, BUS. WK., June 6, 1977, at 62–64.

155. Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 834 (2017); Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 292 (2002).

fodder for their views.¹⁵⁶ But early on, those anxious about rising claims did not necessarily support procedural retrenchment.¹⁵⁷ Supporters of the Multidistrict Litigation Act of 1968, for example, stressed the litigation-explosion narrative to advocate for a reform that preserved and even facilitated the filing of claims.¹⁵⁸ By the mid-1970s, however, the narrative had turned into advocacy for limits on litigation's availability and power.¹⁵⁹

The second phenomenon involved the alleged rise of an "imperial judiciary," as Nathan Glazer described it in 1975.¹⁶⁰ By the mid-1970s, critics insisted, courts had illegitimately assumed for themselves power over an ever-expanding array of social, political, and economic problems for which the other branches of government had previously shouldered responsibility.¹⁶¹ Litigation, traditionally conceived, functioned as a "grievance-answering process,"¹⁶² Donald Horowitz argued, in which individuals presented fact-specific disputes with limited public significance to otherwise passive courts for adjudication.¹⁶³ Imperious judges, in contrast, treated litigation as a "problem-solving" process,¹⁶⁴ with cases serving as "mere vehicles for an exposition of more general policy problems."¹⁶⁵ Individual litigants and their identities receded from the courts' gaze.¹⁶⁶ "Broad class[es] of people"¹⁶⁷ replaced these "ghostly plaintiffs"¹⁶⁸ as they sought to achieve significant change to existing social orders through litigation.

Critics denounced this development on at least two grounds. First, courts do not capably handle complex, sprawling problems that implicate webs of social, economic, and political concerns.¹⁶⁹ The imperial-judiciary phenomenon laid bare the limits to courts' institutional incompetence, as did

156. *E.g.*, Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 5 (1971).

157. THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 22–23 (2004).

158. Bradt, *supra* note 155, at 834.

159. Galanter, *supra* note 155, at 293.

160. *See generally* Nathan Glazer, *Towards an Imperial Judiciary?*, NAT'L AFF., Fall 1975, 104.

161. *Id.* at 104; *see also* DALY, *supra* note 152, at 3; DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 4 (1976); Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 232 (1976).

162. HOROWITZ, *supra* note 161, at 7; *see also* Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976), in 70 F.R.D. 79, 101 (1976) (preferring courts to act as "dispute resolvers").

163. HOROWITZ, *supra* note 161, at 8; *see also* DALY, *supra* note 152, at 29; Howard, *supra* note 151, at 102; Rifkind, *supra* note 162, at 101.

164. HOROWITZ, *supra* note 161, at 7; Rifkind, *supra* note 162, at 102.

165. DALY, *supra* note 152, at 27; HOROWITZ, *supra* note 161, at 9.

166. HOROWITZ, *supra* note 161, at 7.

167. Howard, *supra* note 151, at 102.

168. Glazer, *supra* note 160, at 120.

169. *E.g.*, HOROWITZ, *supra* note 161, at 257.

the litigation explosion. Second, as Nathan Glazer lamented, the imperial judiciary was antidemocratic and ipso facto illegitimate.¹⁷⁰

Responses to the litigation-explosion and imperial-judiciary narratives challenged their empirical premises.¹⁷¹ The most important theoretical rejoinder, at least to the imperial-judiciary charge, came from Abram Chayes.¹⁷² He agreed with Glazer, Horowitz, and others, that “[i]n our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights.”¹⁷³ The process so conceived seeks compensation for disruptions to an accepted social or economic order and, thus, has a preservative or restorative effect.¹⁷⁴

But Chayes argued that litigation’s proper institutional role had morphed into something different by the mid-1970s, with a “public law” model of litigation ascendant.¹⁷⁵ Litigation was no longer in essence a “bipolar” affair between two private parties.¹⁷⁶ Its institutional footprint had expanded to include “sprawling and amorphous” endeavors “about the operation of public policy” litigated by groups.¹⁷⁷ This change reflected the modern reality that “a host of important public and private interactions—perhaps the most important in defining the conditions and opportunities of life for most people—are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions.”¹⁷⁸ Groups can legitimately seek transformative changes to social, economic, or political orders through lawsuits, for litigation does not stand apart from political or administrative processes but functions as a substitute.¹⁷⁹ For this reason, remedies entail not just redress for discrete harms suffered by individuals but also behavior and policy modification to benefit diffuse members of the public.

Chayes identified, if somewhat vaguely, justifications for the sort of judicial power contemplated by the public law model.¹⁸⁰ Public law litigation could mobilize claims and thereby vindicate substantive policy that might otherwise lie dormant.¹⁸¹ Ultimately, however, Chayes argued that the success of the public law model depended upon the breadth of its acceptance

170. Glazer, *supra* note 160, at 122; *see also* Patrick K. Dooley, *Beware of the “Imperial Judiciary,”* B. LEADER, Sept.–Oct. 1978, at 22, 24–25.

171. *E.g.*, Barlow, *supra* note 109, at 21; David M. O’Brien, “*The Imperial Judiciary: Of Paper Tigers and Socio-Legal Indicators*,” 2 J.L. & POL. 1, 56 (1985).

172. Chayes’s importance is indicated by his selection to defend against the “imperial judiciary” charge at a 1978 American Enterprise Institute conference. DALY, *supra* note 152, at 2–3. His adversaries at the discussion were Antonin Scalia and Laurence Silberman. *Id.*

173. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

174. *Id.* at 1302.

175. *Id.*

176. *Id.* at 1289.

177. *Id.*

178. *Id.* at 1291.

179. *Id.* at 1304.

180. *Id.* at 1314.

181. *Id.* at 1314–15; Abram Chayes, *The Supreme Court 1891 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 27 (1982).

as an institutional fact, or “the power of judicial action to generate assent over the long haul.”¹⁸²

It was precisely this possibility of assent that receded in the 1980s. As noted, litigation politics circa 1980 were not obviously partisan.¹⁸³ Neither were doubts about public law litigation and its legitimacy.¹⁸⁴ But the Reagan administration adopted the litigation explosion as an article of faith,¹⁸⁵ and throughout the decade conservatives expressed anxiety over, and at least rhetorical opposition to, the imperial judiciary.¹⁸⁶ Both narratives at least partially motivated Republicans to pursue significant policy initiatives in the early 1990s,¹⁸⁷ by which point partisan divides over litigation reform had deepened and hardened.¹⁸⁸

B. Class Action Jurisprudence

Both critics and Chayes agreed that the class action was the natural procedural form for the litigation they either faulted or celebrated.¹⁸⁹ First, as Chayes explained, the device gave procedural expression to the understanding of the scope of interests at stake when litigation vindicates public policy on some aggregate basis.¹⁹⁰ As he argued, the class was a “single jural entity,” not “a congeries of individual claims,”¹⁹¹ reflecting “burgeoning . . . theories about groups (as opposed to individuals) as rights bearers.”¹⁹² Also, litigation can better offer a competent substitute for politics if it proceeds in aggregate fashion.¹⁹³ The class action invites all participants to think of the plaintiffs as representatives of coalitions. It requires a remedial lens that broadens considerably from a focus on an individual’s needs to what benefits an undifferentiated population.

The larger war over litigation and legitimacy had obvious implications for the normative terrain on which class action battles would be waged. As mentioned, dueling conceptions or understandings of what the class action is for emerged soon after 1966.¹⁹⁴ To proponents of the regulatory conception, a class was not an assembly of discrete individuals, but a group of

182. Chayes, *supra* note 173, at 1316.

183. *See supra* note 64 and accompanying text.

184. *E.g.*, Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 106 (1979).

185. *E.g.*, Hon. Edwin Meese III, Attorney Gen., Address Before the American Tort Reform Association (May 30, 1986) (transcript available at the Hoover Institution, Edwin Meese Papers, Box 20).

186. *E.g.*, J. Skelly Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L.Q. 487, 488–89 (1987).

187. BURKE, *supra* note 157, at 24–25.

188. *See supra* note 64 and accompanying text.

189. Crovitz, *supra* note 150, at 74–76; Howard, *supra* note 151, at 102.

190. Chayes, *supra* note 173, at 1291.

191. Chayes, *supra* note 181, at 28.

192. *Id.* at 27.

193. *Id.* at 27–28.

194. For a treatment of these two conceptions from the 1980s, see Section of Antitrust Law, Am. Bar Ass’n, Report to the House of Delegates 7–9 (Aug. 1, 1985), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. EV-1008-70-1985 (Cong. Info. Serv.).

undifferentiated regulatory beneficiaries on whose behalf litigation pursues vindication of a substantive policy regime. The class action existed to mobilize claims. The civil rights litigators, plaintiffs' lawyers, and progressive judges who advanced this view emphasized the regulatory efficacy of the substantive law, not individualized compensation for class members, as litigation's goal. The regulatory conception provided a normative justification for a powerful class action device because it deemphasized differences among individual class members' claims and the particular relief owed to them as subordinate to the regulatory imperative the class action furthered.¹⁹⁵

Defense counsel, industry representatives, and others uncomfortable with powerful class action litigation argued for the adjectival conception. They viewed Rule 23 as a mere joinder device, no different in its essence than any of the other joinder rules, and certainly not a device with a particular regulatory mission. Rule 23 took the claims of otherwise disconnected individuals and allowed their assembly in one case for the sake of litigation efficiency. Individual relief remained the litigation's primary goal, and any other benefits the class action might create were incidental.¹⁹⁶

If the litigation-explosion narrative were correct, then a device designed to mobilize claims only worsened problems caused by failing efforts to keep inappropriate cases out of the courts.¹⁹⁷ If the imperial-judiciary charge were right, then class action doctrine crafted to minimize the relevance of individual-litigant identities and thereby facilitate the certification of undifferentiated plaintiff groups, as the regulatory conception urged, only further enabled judicial usurpation of political branches' power.¹⁹⁸ Conversely, if Chayes's public law model properly described litigation's legitimate role, then the adjectival conception paid undue heed to individuals and their interests—the outdated focus of litigation as traditionally conceived.

As the rest of this Article explains, each of the class action's major episodes during the 1980s and early 1990s was a battle in a larger war over litigation and legitimacy. In debates over civil rights, mass torts, and securities fraud class actions, arguments about litigation's illegitimate use posed challenges to the class action's regulatory conception, and, with it, the most important normative basis for a powerful Rule 23.

195. Marcus, *Sturm*, *supra* note 3, at 593.

196. *Id.* at 594.

197. *E.g.*, *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 163 (1982) (Burger, C.J., concurring in part and dissenting in part) (castigating the class action for “promot[ing] multiplication of claims and endless litigation” and “draining judicial resources as well as the resources of the litigants”).

198. *E.g.*, Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, *REGULATION*, Mar.–Apr. 1978, at 15, 17–18.

III. THE CIVIL RIGHTS CLASS ACTION AND THE IMPERIAL JUDICIARY

As part of their campaign against the imperial judiciary, conservatives in the 1980s targeted the civil rights class action, the paradigmatic form of public law litigation. The class action per se did not interest them. What rankled was what its aggressive use implied for civil rights litigation, that groups of undifferentiated regulatory beneficiaries could advance some set of extraindividual interests through the courts. Reagan administration lawyers fought the notion of group rights, a central pillar of Chayes's public law model, as part of their efforts to reorient antidiscrimination policy. Conservatives also inveighed against the LSC class action. They attacked it for what it signified to them about litigation—that the process enabled groups to pursue political objectives in court.

A. *The Antidiscrimination Class Action*

1. Group Rights and Antidiscrimination Law in the 1970s

Racially progressive judges enthusiastically supported the Title VII class action in the 1960s and 1970s as a primary means for the vindication of antidiscrimination policy.¹⁹⁹ They blessed these cases with preferential procedural treatment, a favor that included courts' willingness to certify "across-the-board" classes.²⁰⁰ An African American employee who had failed to receive a promotion, for example, could represent not just other such employees but also African Americans whom the employer had failed to hire, notwithstanding possible conflicts of interest among them.²⁰¹ In fact, the named plaintiff did not even need to suffer employment discrimination herself to represent the class, provided that she shared the class members' race and was a former or current employee.²⁰² The Supreme Court pushed back slightly in 1977, holding in *East Texas Motor Freight System Inc. v. Rodriguez*²⁰³ that named plaintiffs who "were not members of the class of discriminatees they purported to represent . . . [are] simply not eligible to represent a class of persons who did allegedly suffer injury."²⁰⁴ Reading *Rodriguez* narrowly,²⁰⁵ some lower courts continued to certify across-the-board classes into the early 1980s.²⁰⁶

199. *E.g.*, *Jenkins v. United Gas Corp.*, 400 F.2d 28, 34 (5th Cir. 1968); Belton, *supra* note 86, at 933.

200. Marcus, *Sturm*, *supra* note 3, at 639–42.

201. *E.g.*, Donald W. Anderson, *Title VII Class Actions: The End of the Era of the Irrelevant Plaintiff*, 36 MERCER L. REV. 907, 912 (1985).

202. *E.g.*, *Long v. Sapp*, 502 F.2d 34, 43 (5th Cir. 1974).

203. 431 U.S. 395 (1977).

204. *Id.* at 403–04.

205. *E.g.*, *Satterwhite v. City of Greenville*, 578 F.2d 987, 993 n.8 (5th Cir. 1978).

206. *E.g.*, *Brown v. Eckerd Drugs*, 663 F.2d 1268, 1275–76 (4th Cir. 1981); *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1024 (5th Cir. 1981); *Adams v. Jefferson Davis Parish Sch. Bd.*, 76 F.R.D. 621, 623 (W.D. La. 1977).

The across-the-board suit posed a number of puzzles. For instance, how exactly does an employee who was not promoted have standing to sue on behalf of applicants who were not hired, an injury the former obviously did not suffer?²⁰⁷ For the public law model, which the Title VII class action exemplified, this question gave little pause. Some argued in the 1970s and early 1980s that Title VII protects minority groups, not particular individuals, against discrimination.²⁰⁸ Put differently, antidiscrimination rights do not guarantee every individual protection against differential treatment on the basis of race, but rather protection for disadvantaged groups against policies and practices that subordinate them.²⁰⁹ Likewise, properly crafted class action remedies should end a subordinated status, causing a transformation that focuses on structural change, not individual remediation.²¹⁰

Class action procedure fit the group rights understanding of Title VII perfectly.²¹¹ As the Ninth Circuit reasoned in 1977, “[e]mployment discrimination based on race, sex, or national origin is by definition class discrimination[,]” and for this reason “class actions are favored in Title VII actions.”²¹² If groups suffered the relevant harm, then individual plaintiff characteristics bear little on the accurate adjudication of a defendant’s liability.²¹³ The named plaintiff “just happen[s] to be the member of a group subjected to the racial classification.” She is better understood as “merely the catalyst” for litigation,²¹⁴ not its central figure. No good reason exists to limit a case to an individual’s claim.

This match between procedural form and the contours of the substantive right generated a number of doctrinal consequences. For example, courts could justifiably certify classes under Rule 23(b)(2), which minimized both the relevance of individual issues of law and fact to the class-certification decision,²¹⁵ and which does not require that notice go to all individual class

207. *E.g.*, *Vuyanich v. Republic Nat’l Bank of Dall.*, 82 F.R.D. 420, 430 (N.D. Tex. 1979), *vacated*, 723 F.2d 1195 (5th Cir. 1984). In 1983 the Court would clarify standing doctrine in a way that made an across-the-board suit difficult to maintain. *See Blum v. Yaretsky*, 457 U.S. 991, 999 (1982); *see also Vuyanich v. Republic Nat’l Bank of Dall.*, 723 F.2d 1195, 1200 (5th Cir. 1984) (applying *Yaretsky*).

208. *E.g.*, Alfred W. Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. ON LEGIS. 99, 103–04 (1983); Burke Marshall, *A Comment on the Nondiscrimination Principle in a “Nation of Minorities,”* 93 YALE L.J. 1006, 1006 (1984).

209. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976); *see also Williams v. City of New Orleans*, 729 F.2d 1554, 1571–73 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part).

210. *See Brown*, 663 F.2d at 1275–76.

211. *See Jordan v. County of Los Angeles*, 669 F.2d 1311, 1318–20 (9th Cir. 1982); *see, e.g., Note, Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868, 885–86 (1979).

212. *E.g., Gay v. Waiters’ & Dairy Lunchmen’s Union*, 549 F.2d 1330, 1333 (9th Cir. 1977).

213. *Cf. id.*; Marshall, *supra* note 208, at 1008 (explaining that legislative history of Title VII demonstrates “the importance of class actions by private litigants in accomplishing the statutory purpose of eliminating discrimination in employment”).

214. Marshall, *supra* note 208, at 1009.

215. *Int’l Woodworkers of Am. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1269–70 (4th Cir. 1981).

members.²¹⁶ The group-rights understanding also encouraged evidentiary, remedial, and substantive developments that significantly facilitated the certification of Title VII classes. If liability could be proven with statistical evidence,²¹⁷ then class-wide common questions of law or fact existed. Likewise, the legal plausibility of remedies benefiting groups of employees, not just those devised for the particulars of a specific employee's situation, enabled class-wide adjudication.²¹⁸ Disparate-impact liability focuses "on protected *groups*," not an employer's motive with respect to particular hiring or promotion decisions,²¹⁹ and thus was substantive law ideally suited to class litigation.²²⁰

2. The Conservative Campaign Against Group Rights

The group-rights understanding of antidiscrimination law supported affirmative action, busing, and other such interventions aimed at social transformation.²²¹ As such, it was anathema to the Reagan administration.²²² Its personnel challenged the jurisprudential basis for these remedies.²²³ William Bradford Reynolds, who headed the DOJ's Civil Rights Division from 1981 to 1988,²²⁴ faulted the idea of group rights as "a fundamental

216. FED. R. CIV. P. 23(c)(2).

217. Drew S. Days III, *Reality*, 31 SAN DIEGO L. REV. 169, 187 (1994); Michael J. Piette & Douglas G. Sauer, *Legal and Statistical Approaches to Analyzing Allegations of Employment Discrimination*, J. LEGAL ECON., Mar. 1993, at 1, 4.

218. Richard H. Fallon, Jr. & Paul C. Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 19; see also *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 258–63 (5th Cir. 1974).

219. *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986–87 (1988); Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 229 (1990); Joel William Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 12 (1979).

220. George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 713 (1980).

221. *E.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 363 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part) (reasoning that affirmative action "does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination"); Robert E. Buckholz, Jr. et al., *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 875 (1978) (referring to "the professional group rights litigator" who brings these sorts of cases).

222. *E.g.*, President Ronald Reagan, Radio Address of the President to the Nation 1–2 (June 15, 1985) (insisting that the notion that "our civil rights laws only apply to special groups . . . could not be more wrong") (transcript available at the Hoover Institution, Edwin Meese Papers, Box 114); see also CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 89–90 (1991); Bill Peterson, *In the Administration, a Pattern Develops on Conservatives' Agenda*, WASH. POST, Feb. 22, 1982, at A2.

223. For more on the Reagan administration's engagement at the level of ideas, see generally Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61 (2009).

224. Along with Clarence Thomas, Reynolds was the most important civil rights figure in the Reagan administration. Jefferson Decker, *Lawyers for Reagan: The Conservative Legal Movement and American Government, 1971–87*, at 250 (2009) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

distortion of civil rights in a democratic society.”²²⁵ Administration lawyers instead advocated for what the NAACP, describing Clarence Thomas’s views, labeled a “radical individualism” in antidiscrimination law and policy.²²⁶ “[A] triumph for civil rights” happens, Reynolds argued in 1984, when “[t]he individual right to be free from racial discrimination [wins] out over a claim of group entitlement.”²²⁷ “Our country is not a group of groups,” he insisted, and “our laws protect individuals, not classes.”²²⁸ Likewise, Thomas insisted on “defending the rights of individuals” and claimed that “[t]hose who insist on . . . preferences for certain groups have relinquished their roles as moral and ethical leaders.”²²⁹

This view influenced DOJ and EEOC litigation policy.²³⁰ “Each case is essentially different” and “people should be treated as individuals,” the chair of the Reagan transition committee for the EEOC insisted.²³¹ Thus, “class action suits” are inappropriate, as they are a “boondoggle for civil rights and labor lawyers.”²³² An insistence that only “actual” or “identified” victims of discrimination deserve remedies disfavored the pursuit of remedies for groups without proof of every member’s injury.²³³ Also, if discrimination happens only to discrete individuals, then a defendant’s liability should require each alleged victim to prove his or her injury separately. This obligation poorly fits class-wide litigation.²³⁴ The administration

225. William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 996 (1984); see also Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights at the Crossroads: Will the Clock Be Turned Back?, Address Before the American Bar Association Section of Individual Rights & Responsibilities Conference 2 (Aug. 9, 1982), <http://files.eric.ed.gov/fulltext/ED220553.pdf> [<https://perma.cc/WA69-FS7E>].

226. *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, Part 3*, 102d Cong. 96 (1991) [hereinafter *Thomas Hearings Part 3*] (statement of the NAACP); see also Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 964 (1993).

227. William Bradford Reynolds, Draft Op-Ed 3 (June 29, 1984) (on file with the Ronald Reagan Presidential Library Archives, Box JL002, Folder 239486).

228. Wm. Bradford Reynolds, *The “Civil Rights Establishment” Is All Wrong*, HUM. RTS., Spring 1984, at 34, 40.

229. Clarence Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 STETSON L. REV. 29, 35 (1985).

230. See Drew S. Days III, *The Courts’ Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1008–09 (1989). On the complex relationship between the EEOC and the DOJ Civil Rights Division, see, e.g., Juan Williams, *EEOC Chief Faults Administration on Curbing Bias*, WASH. POST, Aug. 3, 1983, at A2. On the EEOC’s evolution under Thomas, see STAFF OF H. COMM. ON EDUC. & LABOR, 99TH CONG., A REPORT ON THE INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION iv (1986); Howard Kurtz, *Clarence Thomas: Skirting the Controversy of Civil Rights Policy*, WASH. POST, Sept. 22, 1986, at A15.

231. *Black America Under the Reagan Administration: A Symposium of Black Conservatives*, POL’Y REV., Fall 1985, at 27, 33 (containing a statement of J.A. Parker).

232. *Id.*

233. STAFF OF H. COMM. ON EDUC. & LABOR, *supra* note 230, at iv; see also Lynn C. Burbridge, *Changes in Equal Employment Enforcement: What Enforcement Statistics Tell Us*, REV. BLACK POL. ECON., June 1986, at 71, 73 (1986); William Bradford Reynolds, *The Justice Department’s Enforcement of Title VII*, 34 LAB. L.J. 259, 262 (1983).

234. Juan Williams, *A Question of Fairness: Clarence Thomas, a Black, Is Ronald Reagan’s Chairman of the Equal Employment Opportunity Commission*, ATLANTIC, Feb. 1987, at 70.

discouraged disparate-impact theories,²³⁵ acceptance of statistical evidence as proof of discrimination,²³⁶ and remedies not tailored to specific individuals.²³⁷

The DOJ ceased its support of private class actions.²³⁸ It filed an amicus brief in *Falcon* on behalf of the employer, suggesting a restrictive interpretation of Rule 23(a)'s commonality requirement and taking three pages to argue for an adjectival conception of Rule 23.²³⁹ This shift pointedly broke with the regulatory conception that prior administrations had advocated—that the class action existed to enable broad vindication of antidiscrimination policy on behalf of classes of people.²⁴⁰ The EEOC filed many fewer class actions in 1988 than it did in 1980,²⁴¹ pursuing class actions based only on “complaints filed by individuals” and not on the “observation of a statistical disparity.”²⁴² The agency’s remedial policy of stressing full recovery for every identified victim of discrimination diverted resources from investigations of systemic discrimination.²⁴³ Thomas insisted that the

235. FRIED, *supra* note 222, at 96; U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL REDEFINING DISCRIMINATION: “DISPARATE IMPACT” AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 9, 12, 70 (1987); Rose, *supra* note 84, at 1158. The EEOC did not bring a single adverse-impact lawsuit between 1983 and January 1989. *Id.* at 1159; Kurtz, *supra* note 230, at A15.

236. See Thomas, *supra* note 229, at 34–35; Paula Dwyer, *Ed Meese Is Taking a Jackhammer to Affirmative Action*, BUS. WK., Sept. 2, 1985, at 41.

237. *E.g.*, Brief for the United States as Amicus Curiae at 15–19, Local No. 93, Int’l Ass’n of Firefighters v. Cleveland, 478 U.S. 501 (1986) (No. 84-1999); Devins, *supra* note 226, at 966; Charles A. Shanor, *Thomas’s Record at the EEOC*, WASH. POST, Sept. 9, 1991, at A15; see also FRIED, *supra* note 222, at 107.

238. Jack Greenberg, *Civil Rights Enforcement Activity of the Department of Justice*, 8 BLACK L.J. 60, 67 (1983). The DOJ repeatedly advocated against class-wide prospective relief. See Rose, *supra* note 84, at 1154.

239. Brief for the United States as Amicus Curiae at 12–15, Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982) (No. 81-574).

240. Chambers & Goldstein, *supra* note 92, at 243–44.

241. Claims about the EEOC’s class litigation during the Thomas years are contradictory. See, e.g., *Thomas Hearings Part 2*, *supra* note 94, at 767 (statement of Pamela Talkin); *Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies: Hearings Before the Subcomm. on Emp’t Opportunities of the H. Comm. on Educ. & Labor*, 99th Cong. 110 (statement of EEOC). The consensus among civil rights groups was that Thomas discouraged class litigation. *E.g.*, *Thomas Hearings Part 3*, *supra* note 226, at 100; *Nomination: Hearing Before the S. Comm. on Labor & Human Res. on Clarence Thomas, of Missouri, to Be Chairman of the Equal Employment Opportunity Commission*, 99th Cong. 100 (1986) (statements of civil rights and women’s rights organizations). The best data available reflects a substantial decline in the number of EEOC class actions from 1980 (218 suits) to 1988 (127 suits). *Oversight on Activities of the Equal Employment Opportunity Commission (EEOC): Hearing Before the Subcomm. on Emp’t & Productivity of the S. Comm. on Labor & Human Res.*, 102nd Cong. 244 (1992). The EEOC’s general counsel under Thomas conceded that EEOC class filings decreased, although he insisted that forces other than EEOC policy caused the decline. Shanor, *supra* note 237, at A15.

242. Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL’Y REV. 402, 405 (1987).

243. See *id.* at 204; see also *Thomas Hearings Part 3*, *supra* note 226, at 93–94; Devins, *supra* note 226, at 967.

EEOC could better implement a “comprehensive policy” through the pursuit of individual cases.²⁴⁴

B. *The LSC and the Law/Politics Divide*

The Reagan administration’s individualism-centered view of antidiscrimination law and policy fit a larger jurisprudential perspective that assigned the pursuit of group interests to political processes, not litigation.²⁴⁵ Conservatives’ insistence upon a sharp boundary between law and politics, a tenet threatened by the imperial judiciary’s rise, found expression in another 1980s-era fight implicating the class action. Chayes’s public law model of litigation, one consistent with the class action’s regulatory conception, assigned litigation a transformative role. To conservatives in the 1980s, however, litigation properly pursued individual remediation and thus repairs to a torn social fabric. Transformation of an existing social or economic order happened through politics. Conservatives advanced this argument about litigation and legitimacy as part of their effort to end the LSC class action.²⁴⁶

1. The LSC Class Action

The origins of modern government-funded legal services coincided with Rule 23’s revision in 1966. Before the mid-1960s, legal assistance involved individual client service directed at discrete, particularized problems of poor people,²⁴⁷ an emphasis fitting a decentralized, sporadically funded infrastructure for legal aid.²⁴⁸ This notion also reflected assumptions about poor people and their legal needs. Poverty resulted either from macroeconomic calamities, such as depressions, or individual moral failings, not from an unjust or oppressive legal order in need of transformation. Legal aid gave deserving individuals seeking divorces or fighting their landlords the same access to an essentially just legal system that those with means had, that is, their own individual days in court.²⁴⁹

The Economic Opportunity Act of 1964 created the Office of Economic Opportunity (OEO), the LSC’s predecessor agency.²⁵⁰ It began a new era for legal services, one that would continue after Congress replaced the OEO with

244. *Oversight Hearing on the Equal Employment Opportunity Commission’s Enforcement Policies: Hearing Before the Subcomm. on Emp’t Opportunities of the H. Comm. on Educ. & Labor*, 99th Cong. 20 (1985).

245. *E.g.*, Richard A. Epstein, *Tuskegee Modern, or Group Rights Under the Constitution*, 80 Ky. L.J. 869, 877–78 (1992).

246. The following discussion of the LSC, especially those aspects relating to pre-1980 developments, owes a great deal to my former student Briar Wilson and her terrific research on the evolution of legal services.

247. *E.g.*, JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 19 (1978); SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* 20–22 (1990); Special Project, *The Legal Services Corporation: Past, Present, and Future?*, 28 N.Y.L. SCH. L. REV. 593, 595–97 (1983).

248. HANDLER ET AL., *supra* note 247, at 17; Special Project, *supra* note 247, at 595–97.

249. *E.g.*, JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 26 (1978); HANDLER ET AL., *supra* note 247, at 19; LAWRENCE, *supra* note 247, at 22.

250. 42 U.S.C. § 2941(a) (1970).

the LSC in 1974.²⁵¹ Millions of dollars in government funding helped to finance the proliferation of nonprofit legal-services centers, staffed by a sizeable cadre of attorneys committed to the nascent public-interest-law movement²⁵² and coordinated by a set of regional and national offices that helped to organize legal and policy objectives and strategies.²⁵³ Law reform quickly became a particular priority,²⁵⁴ reflecting an understanding of poverty as generated by systemically unjust social and economic structures.²⁵⁵ The poor as a class²⁵⁶ shared a cause that required not only individual client service but also a “revis[ion of] the structure of the world in which the poor live.”²⁵⁷ Poverty lawyers should seek broad, impersonal remedies, not ones individually crafted to the circumstances of particular poor persons.²⁵⁸

This ideology was the essence of public law litigation, and it fit the regulatory conception perfectly. The class action was a key part of this new “legal consciousness” for legal services.²⁵⁹ “The poor are viewed as a class, not individuals with legal problems,” a White House memorandum observed while commenting on a perceived view prevailing among supporters of legal services.²⁶⁰ For this reason, the memo continued, LSC lawyers have “a preference for class action suits and test cases rather than more routine individual representation.”²⁶¹ The LSC’s defenders in later years would stress the miniscule proportion of the total amount of government-funded litigation represented by class actions, noting that the LSC lawyer’s daily diet included divorces, personal bankruptcies, landlord-tenant disputes, and other such individualized matters.²⁶² But statistics imperfectly indicated the class action’s importance.²⁶³ For one thing, the absolute number of class actions that OEO- and LSC-funded lawyers litigated was sizable, even if dwarfed by

251. ALAN W. HOUSEMAN & LINDA E. PERLE, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 12–13 (2007).

252. *E.g.*, Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 207, 208, 224–25 (1976); Comment, *The New Public Interest Lawyers*, 79 *YALE L.J.* 1069, 1069–70 (1970).

253. HOUSEMAN & PERLE, *supra* note 251, at 12–13.

254. HANDLER ET AL., *supra* note 247, at 35; HOUSEMAN & PERLE, *supra* note 251, at 11.

255. HANDLER, *supra* note 249, at 26.

256. Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 *OHIO ST. L.J.* 1, 31 (1984); *cf.* Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 *GEO. L.J.* 1669, 1684 (1995) (contrasting the “client community” with “individual clients who happened to be indigent”).

257. Shirley Scheibla, *Counsel for the Offense: OEO’s Legal Services Program Undermines Law and Order*, *BARRON’S*, Mar. 4, 1968, at 10 (quoting Earl Johnson); *see also* Failinger & May, *supra* note 256, at 14.

258. Failinger & May, *supra* note 256, at 15.

259. HANDLER ET AL., *supra* note 247, at 23; *see also* HANDLER, *supra* note 249, at 27.

260. Memorandum on the Legal Services Corporation (on file with the Ronald Reagan Presidential Library Archives, Carl Anderson Files, Box OA16591).

261. *Id.*; *see also* Kenneth F. Boehm & Peter T. Flaherty, *Legal Disservices Corp.*, *POL’Y REV.*, Fall 1995, at 17, 18.

262. *E.g.*, 127 *CONG. REC.* 8817 (1981) (statement of Sen. Ernest Hollings); David L. Bazelon, *Let’s Keep Legal Services*, *NEW REPUBLIC*, June 13, 1981, at 17, 17.

263. Memorandum from Michael Uhlmann to Fred Fielding (Oct. 29, 1981) (on file with the Ronald Reagan Presidential Library Archives, Fred Fielding Files, Box 32F).

the vast number of legal matters they generally handled.²⁶⁴ For another, class actions had outsized importance for the LSC's mission.²⁶⁵

2. Conservative Opposition

“No issue animates the conservative movement as much as its desire to eliminate or meaningfully reform the Legal Service [sic] Corporation,” Paul Weyrich wrote in a 1988 memorandum to Newt Gingrich.²⁶⁶ Conservatives blamed the LSC for all conceivable conservative bugbears, ranging from “welfare rights” to “environmental extremism,” and from “transsexualism” to “Cesar Chavez, Ralph Nader, [and] Angela Davis.”²⁶⁷ The transformative litigation the LSC pursued contributed importantly to this animosity. The American Enterprise Institute noted in 1973 that OEO lawyers brought “class action suits designed to benefit not just a single client, or a small group, but thousands in the affected class” to achieve “a radical restructuring of society through a process insulated from the safeguards of popular representation and democratic process.”²⁶⁸ “This is not simply related to politics,” Spiro Agnew complained one year earlier, “it is politics.”²⁶⁹ Glazer singled out LSC class actions in his famous 1975 article on the imperial judiciary.²⁷⁰

Such critiques notwithstanding,²⁷¹ LSC-funded litigation flourished through the 1970s.²⁷² The Reagan years, however, witnessed unrelenting

264. During two years in the late 1960s, for example, lawyers at California Rural Legal Assistance alone filed sixty-three class actions. Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 684 n.20 (1976).

265. Telephone Interview with Alan Houseman, Emeritus Senior Fellow, Ctr. for Law & Soc. Policy (Mar. 22, 2016).

266. Memorandum from Paul M. Weyrich, Heritage Found., to Newt Gingrich (Sept. 8, 1988) (on file with the Ronald Reagan Presidential Library Archives, Juanita Duggan Files, Box OA17958). Another letter signed by Weyrich, Beverley LaHaye, James Dobson, Jerry Falwell, Pat Robertson, Robert Dugan, Adrian Rogers, and Phyllis Schlafly insisted that LSC reform “ranks among the highest concerns of the conservative movement at this time.” Letter from Coalitions for America to Ronald Reagan (Sept. 27, 1988) (on file with the Ronald Reagan Presidential Library Archives, Benedict Cohen Files, Box CF1336).

267. Howard Phillips, *Legal Services Should Not Be Federally Funded*, CONSERVATIVE DIG., July 1980, at 16, 16.

268. AM. ENTER. INST., LEGISLATIVE ANALYSIS: LEGAL SERVICES CORPORATION BILL 1 (1973). Anticipating Reagan-era critiques, the report faulted legal services lawyers bringing “class action suits” for “circumventing the representative system” and “eroding the true political system.” *Id.* at 8; see also H.R. REP. NO. 95-310, at 36 (1977) (noting the minority views of John M. Ashbrook); Shirley Scheibla, *Bar Sinister: The Legal Services Corporation Stretches Its Mandate*, BARRON'S NAT'L BUS. & FIN. WKLY., Jan. 24, 1977, at 5.

269. Spiro Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A. J. 930, 931 (1972).

270. Glazer, *supra* note 160, at 120.

271. This sort of opposition, along with other factors, prompted Congress to replace the OEO with the LSC in 1974. See Telephone Interview with Alan Houseman, *supra* note 265. Some legislators made efforts to terminate legal-services class actions, but ultimately the legislation imposed only modest limits on the kinds of class suits LSC-funded lawyers could bring. See *President Nixon Approves Legislation Creating a National Legal Services Corporation*, 60 A.B.A. J. 1045, 1048-49 (1974).

272. H.R. REP. NO. 95-310, at 38 (1977) (providing the supplemental views of Hon. Carlos J. Moorhead, Hon. Henry J. Hyde, and Hon. Thomas N. Kindness, who noted that a failed amendment designed to constrain the LSC's research capacity had been proposed to limit the

warfare against the LSC.²⁷³ The Reagan administration's transition-team report on legal services recommended that the "legal-political LSC" should be ended.²⁷⁴ President Reagan's first proposed budget would have zeroed out the LSC's funding.²⁷⁵ He appointed William Olson, one of the report's authors, to the LSC board, along with William Harvey, a law professor who derided the LSC as "the greatest political fraud ever perpetrated."²⁷⁶ W. Clark Durant, who championed the LSC's abolition, chaired the LSC board from 1984 to 1988.²⁷⁷ Throughout the decade, the LSC's new leadership pursued policies and other actions designed to thwart the effectiveness of prominent LSC-funded groups²⁷⁸ and to undermine the LSC's capacity to assist public law litigation.²⁷⁹

Conservatives challenged LSC litigation as a prime example of an illegitimate distortion.²⁸⁰ Lawyers must "distinguish politics from law," Ed Meese demanded in remarks he delivered in 1981 defending the administration's LSC policy.²⁸¹ William F. Buckley insisted in 1986 that "the service of lawyers" involves "how to fetch up the Social Security check that hadn't been issued, or to get the divorce, or get child assistance from the delinquent father," matters consistent with litigation traditionally conceived and the preservation of an existing social order.²⁸² But LSC by the 1980s had turned into "a lobby . . . to influence legislatures [and] Congress . . . to rally around the socialist flag."²⁸³ "Social and political change through the judicial process," not "the civil legal problems of the poor," were grist for the LSC's mill, a CATO Institute monograph entitled *Destroying Democracy*

capacity of LSC lawyers to engage in "activist litigation" and to ensure that they focus on "assistance to an individual poor client"); HOUSEMAN & PERLE, *supra* note 251, at 27. In 1977, for example, Congress repealed an amendment to the 1974 legislation that was intended to limit the capacity of LSC lawyers to litigate class actions. Telephone Interview with Alan Houseman, *supra* note 265.

273. *E.g.*, Decker, *supra* note 224, at 175–79.

274. WILLIAM J. OLSON ET AL., LEGAL SERVS. CORP. TRANSITION TEAM, FINAL REPORT (Dec. 22, 1980) (on file with the Ronald Reagan Presidential Library Archives, Mary Lee Garfield Files, Box OA12138).

275. Stuart Taylor, Jr., *Reagan Is Moving to End Program That Pays for Legal Aid to the Poor*, N.Y. TIMES, Mar. 6, 1981, at A1.

276. William F. Harvey, *LSC—The Greatest Fraud Ever?*, in LEGAL SERVICES FOR THE POOR: TIME FOR REFORM 81, 84 (Douglas J. Besharov ed., 1990); *see also* 2 EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 531–32 (2014).

277. W. Clark Durant III, *Legal Services or Political Harassment?*, HUM. EVENTS, Sept. 5, 1987, at 11, 11.

278. *E.g.*, JOHNSON, *supra* note 276, at 590.

279. *E.g.*, *id.* at 612.

280. Marshall J. Breger, *Accountability and the Adjudication of the Public Interest*, 8 HARV. J.L. & PUB. POL'Y 349, 351 (1985).

281. M.L. Garfield, Draft Notes for Delaware Law School Commencement Speech (May 16, 1981) (on file with the Ronald Reagan Presidential Library Archives, Richard A. Hauser Files, Box OA9978).

282. William Buckley, *Legal Services Pursues Radical Goals*, COLO. SPRINGS GAZETTE TELEGRAPH, Sept. 11, 1986, at B16.

283. *Id.*; *see also* M. Stanton Evans, *The Crimes of the Legal Services Corp.*, HUM. EVENTS, Oct. 8, 1983, at 9, 9.

asserted.²⁸⁴ With language redolent of the imperial-judiciary complaint, the transition-team report asked rhetorically, “is it proper, in terms of the separation of powers, for a lawyer to force resolution by courts of policy issues that ought to be left to legislatures?”²⁸⁵

LSC class actions, “an emblem” of the LSC’s flaws,²⁸⁶ were the procedural vehicles that contorted litigation “into a political movement,”²⁸⁷ distorting “the judicial process” from “a forum to resolve specific, individual disputes” into “a town meeting.”²⁸⁸ Phyllis Schlafly, the new right’s doyenne, denounced LSC-funded lawyers for “creating clients, initiating class-action suits, litigating and lobbying, to restructure society according to their own radical notions.”²⁸⁹ *Human Events*, Reagan’s favorite newspaper,²⁹⁰ derided “class-action suits” as a “weapon[.]” used “to promote . . . sweeping changes in the nation’s economic, social and political structure.”²⁹¹ Critics equated LSC class actions with political activity like lobbying.²⁹²

Conservatives tried to kill the LSC class action. To end ideological joyriding and “get Legal Services out of litigation politics,” board members Harvey and Olson proposed regulations in 1982 that would have required class members to opt in to an LSC-sponsored class action, essentially undoing Rule 23 for these cases.²⁹³ Congress opted for a watered-down alternative.²⁹⁴ Efforts at limiting LSC class actions continued throughout the decade.²⁹⁵ Ultimately, however, they did not succeed until 1996, when

284. JAMES T. BENNETT & THOMAS J. DILORENZO, *DESTROYING DEMOCRACY: HOW GOVERNMENT FUNDS PARTISAN POLITICS* 309 (1985).

285. OLSON ET AL., *supra* note 274, at 93.

286. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 301 (1988).

287. *Id.* at 3.

288. Breger, *supra* note 280, at 353.

289. Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 *UCLA L. REV.* 474, 484 (1985) (quoting *Senate Subcommittee Hears from Foes and Supporters of LSC*, *POVERTY L. TODAY*, Summer 1981, at 6); *see also* Maggie Gallagher, *The New Serfs*, *NAT’L REV.*, Aug. 5, 1988, at 42, 42.

290. Admin, *Reagan’s Newspaper*, *HUM. EVENTS* (Feb. 5, 2011 3:01 AM), <http://humanevents.com/2011/02/05/reagans-newspaper/> [<https://perma.cc/F7TP-KBA8>].

291. *Legal Services Community Rocked by Senate Probe*, *HUM. EVENTS*, Aug. 13, 1985, at 5, 5.

292. *See id.*; *see also* OLSON ET AL., *supra* note 274, at 41; Harvey, *supra* note 276, at 83; Robert Rector, *Destroying Democracy*, *POL’Y REV.*, Spring 1986, at 79, 80 (reviewing JAMES T. BENNETT & THOMAS J. DILORENZO, *DESTROYING DEMOCRACY: HOW GOVERNMENT FUNDS PARTISAN POLITICS* (1985)); Elliot C. Rothenberg, *Zealots Would Force More Free Legal Service*, *HUM. EVENTS*, Mar. 5, 1988, at 18, 18.

293. *ACLU Blasts Class Action Regulations Proposed by Legal Services Appointee*, *L.A. DAILY J.*, Nov. 22, 1982, at 3; *see also* Mary Thornton, *More Needy Clients Face Less Legal Help*, *WASH. POST*, Dec. 12, 1982, at A1.

294. *See, e.g., Legal Services Reauthorization Act of 1992: Hearing on S. 2870 Before the S. Comm. on Labor & Human Res.*, 102d Cong. 44–45 (1992) (statement of Sen. Warren Rudman) (describing the restrictions to class actions in the 1983 legislation); Alan Houseman, *Restrictions on LSC Funded Legal Aid Programs*, *GEO. L. LIBR.* (Mar. 19, 2015), <https://blogs.commonsgorgetown.edu/righton/2015/03/19/restrictions-on-lsc-funded-legal-aid-programs/> [<https://perma.cc/34ST-WZVK>]; *see also* Telephone Interview with Alan Houseman, *supra* note 265.

295. *See, e.g., Memorandum to Edwin Meese III & John A. Svahn from Michael M. Uhlmann* (Sept. 26, 1983) (on file with the Ronald Reagan Presidential Library Archives, Stephen H. Galebach Files, Box OA11303).

Congress prohibited LSC-funded entities from participating in class actions entirely.²⁹⁶

* * *

The regulatory conception stresses as the class action's mission the broad vindication of a substantive-liability regime on behalf of groups. The idea that litigation could mobilize groups, while deemphasizing individual-litigant identities as mostly irrelevant, was precisely what conservatives hostile to an imperial judiciary castigated with their attempt to reset antidiscrimination litigation and combat the LSC. The civil rights episode entangled understandings of the class action's purpose with fundamental and deeply politicized debates over litigation's legitimate use.

III. MASS TORTS AND THE CHANGING CLASS ACTION NETWORK

The mass tort class action episode differed from 1980s-era fights over antidiscrimination and poverty litigation in at least two relevant ways. First, its politics were muddled. Institutional need, not partisan advantage, propelled Rule 23's entry into the mass tort arena. Also, the doctrinal changes occasioned by the civil rights class action paled in comparison with what personal injury litigation prompted. In 1979, a Massachusetts federal district judge issued a tentative, limited order certifying the first dispersed mass tort class.²⁹⁷ In 1984, the Second Circuit tempered its grudging approval of class certification in the famous *Agent Orange* litigation with the expectation that Chief Judge Jack Weinstein's order would not "encourage the use of similar procedures by . . . district courts in the future."²⁹⁸ Just five years later, the Fourth Circuit described as "obvious . . . [the] movement towards a more liberal use of Rule 23 in the mass tort context,"²⁹⁹ and in 1991 a report on asbestos litigation by an ad hoc committee of federal judges insisted that "class actions were devised for precisely these kinds of

296. Houseman, *supra* note 294.

297. See generally *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983). The Massachusetts federal court broke ranks and certified a class in a case involving the synthetic estrogen diethylstilbestrol ("DES"). *Id.* at 385–86. Although DES caused upward of 400,000 victims to suffer a number of ailments, the judge limited class membership to Massachusetts women who had been exposed to but not yet injured by DES, displacing only about ten individually filed suits. *Id.* at 386. The judge had reason to think that the case could be tried as a class action, and he conditioned his order upon favorable answers to questions he posed to the Massachusetts Supreme Judicial Court. *Id.* When that court concluded that Massachusetts law required personal injury plaintiffs to prove their claims using individualized evidence, among other holdings, the judge vacated the order. *Payton v. Abbott Labs*, 100 F.R.D. 336, 340 (D. Mass. 1983); see also Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 981–82 (1993); *In Camera*, 5 CLASS ACTION REP. 469, 469 (1978).

298. *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 860 (2d Cir. 1984) (quoting *United States v. Dooling*, 406 F.2d 192, 199 (2d Cir. 1969)).

299. *In re A.H. Robins Co.*, 880 F.2d 709, 734 (4th Cir. 1989).

cases.”³⁰⁰ The key doctrinal steps of the second era, including, for example, new rules for settlement class actions, came mostly in mass tort cases.

Nonetheless, a thread of litigation and legitimacy ties the mass tort and civil rights episodes together. Rule 23’s use for mass torts accelerated because of its potential to help judges and litigants manage burgeoning tort dockets. The mass tort class action did not catalyze but responded to the litigation explosion, something class action adversaries did not always understand. But the mass tort class action highlighted, albeit in somewhat different guise, the institutional challenge that prompted criticism of an imperial judiciary. It required judges to step out of their institutional role, as traditionally understood, and forthrightly seize legislative and bureaucratic mantles.

This Part eschews a chronological telling of the mass tort class action’s story, which I offer in a companion article.³⁰¹ Instead, it describes several aspects of the mass tort class action that proved particularly significant, including the changes it prompted to the network of people and institutions involved with the class action and to the issues of law and policy the class action implicated.

A. *New Complications*

1. An Illustrative Episode

July 17, 1981, offers as good a starting date as any for the mass tort class action’s story.³⁰² At 7:00 p.m., just as a popular “Tea Dance” began,³⁰³ two skywalks in a lobby of a Kansas City, Missouri, Hyatt Hotel collapsed.³⁰⁴ One hundred people died, hundreds more suffered physical injuries,³⁰⁵ and up to two thousand onlookers witnessed the calamity.³⁰⁶ Trial lawyers filed the first individual cases three days later.³⁰⁷ Within seven months 150 individual cases were on file, mostly in a Missouri state court,³⁰⁸ and the plaintiffs’ lawyers had grouped together informally to coordinate their litigation.³⁰⁹ In preliminary settlement discussions, the defendants hinted at

300. *Asbestos Litigation Crisis in Federal & State Courts: Hearings Before the Subcomm. on Intellectual Prop. & Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. 403 (1992) [hereinafter *Asbestos Litigation Hearings*] (Appendix 1) (reprinting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991)).

301. See generally David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565 (2017).

302. On the influence of the *Skywalks* litigation, see, e.g., Sala v. Nat’l R.R. Passenger Corp., 120 F.R.D. 494, 496 (E.D. Pa. 1988); SCOTT O. WRIGHT, NEVER IN DOUBT: MEMOIRS OF AN UNCOMMON JUDGE 201 (2007).

303. WRIGHT, *supra* note 302, at 194.

304. For background facts, see Hensler & Peterson, *supra* note 297, at 972–74.

305. *In re Fed. Skywalk Cases (Skywalks)*, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir. 1982).

306. *Id.* at 421.

307. *Id.* at 419.

308. *Id.*

309. David R. Morris & Andrew See, *The Hyatt Skywalks Litigation: The Plaintiffs’ Perspective*, 52 UMKC L. REV. 246, 250–51 (1984).

an expected punitive-damages liability approaching \$500 million.³¹⁰ Within six months, the defendants had paid out over \$18 million, settling over 120 individual lawsuits.³¹¹

Coordinated discovery was proceeding³¹² and cases were settling³¹³ when Judge Scott Wright, known as an unconventional jurist,³¹⁴ settled on a class action as the best way to serve three goals: “to decide who was responsible, to compensate the victims fairly, and to get the matter resolved as efficiently as possible.”³¹⁵ Wright bent over backward to certify a Rule 23(b)(1) limited fund class.³¹⁶ Because Missouri law might not permit a jury to award punitive damages in more than one case, he reasoned, all plaintiffs should be joined in a single action to enable the pro rata distribution of any recovery.³¹⁷ Also, Wright opined, a class action would ensure the “expeditious[] adjudicat[ion]” of the *Skywalks* litigation “with a minimum of repetition, expense, and delay.”³¹⁸

The defendants did not want this outcome, and 175 class members filed affidavits opposing it.³¹⁹ Suddenly stripped of their cases, the Kansas City personal injury bar protested loudly, denouncing the prominent class counsel Wright selected as “the anti-Christ.”³²⁰ The trial lawyers sought mandamus, and the Eighth Circuit obliged. The mandatory class-certification order, it concluded, stayed pending state actions and thus violated the Anti-Injunction Act.³²¹ Judge Wright tried again on remand, certifying a Rule 23(b)(3) class,³²² but the defendants leveraged the conflict between class counsel and the Kansas City trial lawyers to get the latter’s agreement to a \$20 million settlement on behalf of everyone who opted out of the federal class.³²³

310. Robert C. Gordon, *The Optimum Management of the Skywalks Mass Disaster Litigation by Use of the Federal Mandatory Class Action Device*, 52 UMKC L. REV. 215, 221 (1984); James B. Stewart, *Wake of Disaster: Controversy Surrounds Payments to Plaintiffs in Hyatt Regency Case*, WALL ST. J., July 3, 1984, at 1.

311. Morris & See, *supra* note 309, at 259.

312. *Id.* at 250–51.

313. *Id.* at 259.

314. Matt Campbell, *U.S. District Judge Scott O. Wright, Known as an Unconventional Jurist, Dies at 93*, KAN. CITY STAR (July 11, 2016), <http://www.kansascity.com/news/local/article88953827.html> [<https://perma.cc/33JE-J66U>].

315. WRIGHT, *supra* note 302, at 196; *see also* Scott O. Wright & Joseph A. Colussi, *The Successful Use of the Class Action Device in the Management of the Skywalks Mass Tort Litigation*, 52 UMKC L. REV. 141, 146 (1984).

316. *In re Fed. Skywalk Cases (Skywalks)*, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir. 1982). When an initial class representative did not work out, Judge Wright himself found a replacement. *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1178–79 (8th Cir. 1982).

317. *Skywalks*, 93 F.R.D. at 424–25.

318. *Id.* at 428.

319. Morris & See, *supra* note 309, at 258; Judith Whittaker, *Skywalk Wars*, 52 UMKC L. REV. 296, 297–98 (1984).

320. Martin, *supra* note 80; *see also* WRIGHT, *supra* note 302, at 197. Wright appointed Arthur Miller and Irving Younger. David Lauter, *Younger v. Kansas City Bar*, NAT’L L.J., Feb. 8, 1982, at 1.

321. *In re Federal Skywalk Cases*, 680 F.2d at 1183.

322. *In re Federal Skywalk Cases (Skywalks)*, 95 F.R.D. 483, 485–86 (D. Mo. 1982).

323. Stewart, *supra* note 310.

Anyone who released his or her claim got an immediate \$1000 payment, with no proof of injury. The settlement drained the class of all but twenty-four members, a result so thoroughly disgusting to one of the class counsel that he donated his sizable fees to charity.³²⁴

2. A Changing Network

Skywalks was a mass accident case and for this reason not that revolutionary.³²⁵ The paradigmatic mass accident case comes after an airplane crash. The disaster injures all victims at the same time, in the same place, and in the same way. Causation is often common and straightforward, and a single state's tort law often applies to all victims' claims. As early as 1969, courts found common issues of law and fact to predominate and certified mass accident classes. By 1982, when Wright seized control of the *Skywalks* litigation, he could draw upon ample, if disputed, precedent.³²⁶ Exposure to a dangerous product, like asbestos or a flawed drug, produces a dispersed mass tort. These are harder to litigate in the aggregate. Victims' injuries develop at different times, in different places, and have a less straightforward causal connection to the defendant's conduct. Whether exposure to a dangerous drug causes heart attacks, for example, can easily differ from plaintiff to plaintiff. Different states' laws can apply when victims purchase, take, and are injured by a dangerous drug in different states.

Courts uniformly refused to certify dispersed mass-tort classes before 1979.³²⁷ The real innovation therefore came a year before *Skywalks*, when Judge Spencer Williams, another judicial iconoclast, certified the first significant dispersed mass-tort class in litigation involving the Dalkon Shield intrauterine birth-control device.³²⁸ But *Skywalks* is a good starting point because it foreshadowed a number of significant developments that the mass tort class action catalyzed.

The first involves the network of people and institutions engaged with class action law and policy. Personal injury lawyers engaged with Rule 23 in a sustained way for the first time.³²⁹ Importantly, these lawyers often resisted class certification, as they did in *Skywalks*, opening a new front against Rule

324. James B. Stewart, *Wake of Disaster: Controversy Surrounds Payments to Plaintiffs in Hyatt Regency Case—Fighting Among Attorneys Worked Against Victims of Collapsed Skywalks—The Failure of a Class Action*, WALL ST. J., July 3, 1984, at 1.

325. On the difference between mass accidents and dispersed mass torts, see WORKING GROUP ON MASS TORTS, ADVISORY COMM. ON CIVIL RULES, REPORT ON MASS TORT LITIGATION 11–12 (1999).

326. See generally Marcus, *supra* note 301 (outlining the origins and history of mass tort class actions).

327. See *id.* at 1572.

328. *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 892–93 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982).

329. Only one of the lawyers featured in an article about counsel litigating mass tort claims published in 1986 had substantial prior experience in other class action fields. See Diane Wagner, *The New Elite Plaintiffs’ Bar*, A.B.A. J., Feb. 1986, at 44, 45; see also Moore, *supra* note 147, at 10.

23's aggressive deployment that had not existed in the 1970s.³³⁰ A class action brought on behalf of a class of public schools to recover the costs of asbestos abatement jeopardized fee-generating relationships individual tort lawyers had with their clients. "You have got to be the greatest asshole that ever stepped into a court of law," one of these lawyers wrote to David Berger, class counsel in the *School Asbestos* litigation,³³¹ "and I would like to go to my blessed reward knowing that I personally met the greatest at something."³³² Asbestos litigation devolved into a bitter civil war over the class action, ultimately pitting Ron Motley and Joe Rice, perhaps the country's most powerful asbestos litigators,³³³ against Fred Baron, their chief competitor for this distinction. Implacably and bitterly opposed to an asbestos class action,³³⁴ Baron spent \$4.5 million fighting major asbestos class settlements, eventually spurring the Supreme Court to render its first significant class action decisions since *Shutts* in 1984.³³⁵

The involvement of personal injury lawyers contributed to another change to the network of personnel and institutions involved with class action law and policy. The mass tort class action prompted the federal courts of appeals, such as the Eighth Circuit in *Skywalks*, to open their doors to interlocutory review that had been closed since the 1970s, and thus again to supervise class certification decisions.³³⁶ By one calculation, nearly half of interlocutory appeals or mandamus petitions that yielded appellate opinions on class action doctrine between 1987 and 1996 came in mass tort cases.³³⁷ This activity ultimately convinced the Advisory Committee to create Rule 23(f) and thereby to regularize this appellate supervision.³³⁸

This appellate engagement resulted in significant part from the efforts of personal injury lawyers fighting for control of their individually filed cases. Defendants, the natural constituency for appellate review of class certification orders, increasingly acquiesced in or moved for class certification when they thought they could obtain a global settlement of their mass tort liability on acceptable terms.³³⁹ The economics of personal injury

330. See, e.g., Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 58.

331. *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986).

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

333. See Marcus, *supra* note 301, at 1581-83.

334. Alison Frankel, *Traitor to His Class*, AM. LAW., Jan. 2000, at 55, 55.

335. *Id.*

336. See generally *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); *In re Temple*, 851 F.2d 1269 (11th Cir. 1988); *In re Sch. Asbestos Litig.*, 789 F.2d at 996; *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986); *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir. 1984); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982); *In re Fed. Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982).

337. Statement of Brian C. Anderson, in 4 WORKING PAPERS, *supra* note 52, at 687-90.

338. See, e.g., Marcus, *supra* note 301, at 1594.

339. See, e.g., *In re A.H. Robins Co.*, 880 F.2d at 715; *In re Temple*, 851 F.2d at 1270; *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. 92-P-10000-S, 1993 U.S. Dist. LEXIS 21236, at *1 (N.D. Ala. June 1, 1993); *Waldron v.*

litigation meant that plaintiffs filed hundreds or even thousands of cases as individuals, with no need for the class action to mobilize claims.³⁴⁰ To resolve their mass tort liability, defendants could continue to litigate and settle cases individually, declare bankruptcy, or litigate in some aggregate fashion. Redundant costs, the prospect of uncoordinated punitive damages awards, and an unending drip-drip-drip of potentially catastrophic lawsuits made the first option unattractive and in some instances led ineluctably to the second.³⁴¹ Rule 23 promised a number of advantages over Chapter 11, including enhanced control over the company's future ownership, a way to avoid the stigmatizing effects of bankruptcy,³⁴² and more say over the payment of claims.³⁴³ Defendants' newfound ardor for Rule 23 peaked in *Amchem*, when twenty asbestos companies and class counsel jointly filed a motion for class certification and a proposed settlement agreement on the same day the plaintiffs filed their complaint in January 1993.³⁴⁴

By the early 1990s, Rule 23 had become a "strategic management tool" for a number of companies, not necessarily an instrument of corporate doom.³⁴⁵ This embrace of Rule 23, coupled with appellate courts' reengagement, produced the only significant doctrinal innovations of Rule 23's second era. These included an increased willingness to relax class certification requirements to facilitate settlement classes. In 1982, the Second Circuit described the "tentative designations of class for settlement purposes" as "the subject of considerable controversy,"³⁴⁶ and in 1984 the Sixth Circuit treated the notion of a settlement-only class with skepticism.³⁴⁷ The Fourth Circuit

Raymark Indus., Inc., 124 F.R.D. 235, 236 (N.D. Ga. 1989); *In re* "Bendectin" Prods. Liab. Litig., 102 F.R.D. 239, 239 (S.D. Ohio 1984), *aff'd*, 749 F.2d 300 (6th Cir. 1984); *In re* Three Mile Island Litig., 87 F.R.D. 433, 435 (M.D. Pa. 1980). *See generally* Irving R.M. Panzer & Thomas Earl Patton, *Utilizing the Class Action Device in Mass Tort Litigation*, 21 TORT & INS. L.J. 560 (1986).

340. Hensler & Peterson, *supra* note 297, at 979, 985; *In Camera*, 6 CLASS ACTION REP. 273, 273 (1980); *see also* DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS vii (1985) (documenting that, in courts where asbestos workers are concentrated, 10 to 20 percent of all civil filings between 1983 and 1985 were asbestos suits).

341. MARK A. PETERSON & MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES 9 (1988); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 663 (1987); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 39 & n.12 (1983).

342. S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 26-27 (2000); *see* Coffee, *supra* note 341, at 664.

343. Michael Bates, *Asbestos Class Action Settled for \$56M*, NAT'L L.J., Apr. 13, 1987, at 3 (describing the benefits of class settlement to asbestos manufacturers).

344. *See generally* Marcus, *supra* note 301.

345. Richard B. Schmidt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1; *see also* John C. Coffee, Jr., *The Corruption of the Class Action*, WALL ST. J., Sept. 7, 1994, at A15.

346. *Plummer v. Chem. Bank*, 668 F.2d 654, 657 (2d Cir. 1982); *see also* *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *In re* Beef Indus. Antitrust Litig., 607 F.2d 167, 173-78 (5th Cir. 1979).

347. *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305 & n.10 (6th Cir. 1984).

in 1989 expressed much more enthusiasm for settlement-only classes,³⁴⁸ however, and by the mid-1990s the certification of settlement-only classes was “common.”³⁴⁹ *Amchem* again illustrates just how relaxed Rule 23’s requirements became. In his 1994 class certification decision, Judge Lowell Reed ignored the balance of common and individual issues the plaintiffs’ tort claims raised, the typical fodder for a predominance determination, and instead declared that class members’ common interest in prompt, reasonable payments from a settlement fund satisfied Rule 23(b)(3).³⁵⁰

The Advisory Committee reentered the network of class action actors. An ad hoc committee appointed by Chief Justice William Rehnquist to study the asbestos-litigation crisis recommended in 1991 that the Advisory Committee consider rule changes to facilitate the certification of mass tort classes.³⁵¹ The Advisory Committee obliged,³⁵² ultimately proposing an amendment designed “to enlarge the opportunity for mass tort litigation.”³⁵³

3. Changing Issues

Along with new participants, the mass tort episode prompted and strengthened new arguments and ideas about the class action’s purpose and perils. Some strained to justify the certification of mass tort classes in terms of the regulatory conception.³⁵⁴ As the *Skywalks* example suggested, however, litigants hardly needed Rule 23 to mobilize. Also, defendants’ attraction to the device rebutted the suggestion that the class action unleashed tort law’s regulatory power.³⁵⁵ In some instances, the mass tort class action may have prompted more claims than might otherwise have emerged, but these claims probably did not belong in the tort system by any metric of plausibility.³⁵⁶ In the *Breast Implants* litigation of the early 1990s, for example, lawyers with phone numbers like 1-800-RUPTURE generated a huge and unanticipated influx of highly questionable requests for compensation after the announcement of the class settlement.³⁵⁷

The reasons Wright gave for his turn to Rule 23 in *Skywalks* became standard justifications for the certification of personal injury classes: judicial

348. *E.g.*, *In re A.H. Robins Co.*, 880 F.2d 709, 738–40 (4th Cir. 1989).

349. HENSLER ET AL., *supra* note 17, at 477.

350. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 316 (E.D. Pa. 1994).

351. *Asbestos Litigation Hearings*, *supra* note 300, at 383, 409–21 (reprinting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991)).

352. Minutes of Meeting of Advisory Committee on Civil Rules (Oct. 21–23, 1993), in WORKING PAPERS, *supra* note 52, at 174.

353. Minutes of Meeting of Advisory Committee on Civil Rules (Nov. 29–Dec. 1, 1990), in WORKING PAPERS, *supra* note 52, at 162; *see also* Minutes of Meeting of Advisory Committee on Civil Rules (Oct. 21–23, 1993), in WORKING PAPERS, *supra* note 52, at 174–75.

354. David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 573 (1987).

355. *See* Coffee, *supra* note 341, at 645.

356. *See, e.g.*, Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 961 (1995); *see also* *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 265 (S.D. Cal. 1988).

357. *See* Sandra Torry, *Breast Implant Settlement Fund Sparks a Scramble*, WASH. POST, Apr. 4, 1994, at 7; *see also* *In Camera*, 16 CLASS ACTION REP. 269, 354 (1993).

efficiency and distributional equity.³⁵⁸ Judge Spencer Williams explained that the “tedious and frustrating task of presiding over individual lawsuits” might “bankrupt both the state and federal court systems” to justify his class certification decision.³⁵⁹ Also, payouts determined by individuals’ race to judgment might leave “later plaintiffs . . . without practical means of redress” as the defendants’ funds ran dry.³⁶⁰ Chief Judge Jack Weinstein similarly based his decision to certify the *Agent Orange* class in part on a distributional concern.³⁶¹ The law of punitive damages might cap the defendants’ liability, and thus the first plaintiffs to win punitive-damages judgments would unfairly reap all the spoils.³⁶² Concern for judicial resources and delayed, inequitable compensation for victims likewise fueled a class action strategy to resolve the asbestos quagmire.³⁶³

The mass tort episode also altered and deepened concerns about the class action’s use for collusive purposes. Observers had long feared that plaintiffs’ lawyers would use aggregate procedure to collude with defendants and settle liability cheaply;³⁶⁴ indeed, the prospect prompted opposition to the 1966 amendments to Rule 23.³⁶⁵ Before the mass tort episode, however, the most famous alleged instance of collusion in class actions did not involve class counsel and defendants enriching themselves at class-member expense, but it instead involved problems of the sort that prompted criticism of an imperial judiciary. In *Simer v. Rios*,³⁶⁶ LSC lawyers and the defendant, a federal antipoverty agency, settled a class action in 1980 that required the agency to continue to fund certain energy initiatives that benefited poor people. The settlement gave the agency, which wanted to continue with the program, a basis to ignore congressional instructions to return the money.³⁶⁷ The settlement troubled critics not because class members got ripped off but because the agency supposedly used litigation to “circumvent[.] . .

358. See, e.g., John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 998 (1995).

359. Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324–25 (1983) (explaining his class certification decision in *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 892–93 (N.D. Cal. 1981)).

360. *Id.*

361. *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff’d*, 818 F.2d 145 (2d Cir. 1987).

362. *Id.* at 728.

363. See generally Marcus, *supra* note 301.

364. E.g., John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 232 & n.38 (1983); see also Charles A. Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781, 804–05 (1974).

365. Marcus, *Sturm*, *supra* note 3, at 605.

366. 661 F.2d 655 (7th Cir. 1981).

367. *Id.* at 658; Heather Stuart Richardson, *A Sweetheart of a Lawsuit?*, WALL ST. J., Aug. 20, 1980, at 18. But see *Legal Services Corporation—1981: Oversight Hearing Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 94–97 (1981) (attaching a letter from Dan J. Bradley to Rep. M. Caldwell Butler, dated Mar. 9, 1981, defending the settlement); see also *id.* at 94–110 (attaching additional letters).

congressional intent.”³⁶⁸ This effort to “achiev[e] social and political change through the judicial process”³⁶⁹ was collusion for the public law litigation era, when litigation raised legitimacy concerns if it strayed onto legislative terrain.

The discounted settlement struck in *Skywalks* was a harbinger, and by 1994, *Amchem* had replaced *Simer* as the new archetype of collusion.³⁷⁰ Plaintiffs’ lawyers with already-filed asbestos cases refused a deal that would have swept their clients into a single class action.³⁷¹ To get their cooperation with a class action settlement that would resolve all future claims to be filed against the defendants, John Coffee and others argued, companies bought off these lawyers with separate side deals for their inventories that appeared to pay their fee-generating clients more than what the class settlement contemplated for class members.³⁷² *Amchem* exemplified collusion for an age of what Coffee calls “entrepreneurial litigation,” one where the class action’s problems are not thought of in Chayesian, public law terms but instead center on who got what money from whom and under what conditions.³⁷³

B. Mass Torts, Litigation, and Legitimacy

Just as the mass tort episode changed the class action’s network and the issues it implicated, so too did it alter the connection between Rule 23 and larger debates over litigation and legitimacy. Its mere association with personal injury litigation tarred the class action with the litigation-explosion brush, even as defendants increasingly viewed Rule 23 as a liability containment device, not an accelerant.³⁷⁴ A *New York Times* op-ed in 1985 castigated “[c]lass-action shakedowns,” citing litigation against “the morning sickness drug Bendectin” as an example,³⁷⁵ despite the fact that Bendectin’s manufacturer had actually filed the class-certification motion.³⁷⁶ A prominent pundit complained that the *Breast Implants* class action had “bludgeoned” Dow Corning “into throwing \$2 billion into a ‘global’ settlement” that destroyed the company,³⁷⁷ apparently oblivious to the fact

368. James T. Bennett & Thomas J. DiLorenzo, *Poverty, Politics, and Jurisprudence: Illegality at the Legal Services Corporation*, CATO INST. (Feb. 26, 1985), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa049.pdf> [<https://perma.cc/PU62-LWBQ>].

369. *Id.*

370. See generally John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995).

371. See Marcus, *supra* note 301.

372. Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1052 (1995); see also John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1394–95 (1995).

373. COFFEE, *supra* note 117, at 14–16.

374. E.g., Editorial, *Torts Control*, WALL ST. J., Feb. 4, 1986, at 30.

375. Editorial, *Is Suing the Only Way?*, N.Y. TIMES, Apr. 1, 1985, at A20.

376. *In re “Bendectin” Prods. Liab. Litig.*, 102 F.R.D. 239, 239–40 (S.D. Ohio 1984).

377. Max Boot, *Judges Rebel Against Mass Tort Excesses*, WALL ST. J., Apr. 3, 1996, at A15.

that Dow Corning had pursued a class action settlement to avoid bankruptcy.³⁷⁸

To more thoughtful critics, the turn to Rule 23 as a response to disasters like the asbestos-litigation crisis raised the imperial-judiciary problem. Descriptions of the imperial judiciary presented the federal judge as the dominant figure in public law litigation. Weinstein may have played this role willingly in *Agent Orange*.³⁷⁹ But in other mass tort episodes, especially asbestos, judges wielded Rule 23 more defensively, in a desperate effort to corral an onslaught of lawsuits that barely remained within their control.³⁸⁰ If Chayes's public law judge forthrightly and aggressively straddled the divide between law and politics, most federal judges turning to Rule 23 to manage mass tort dockets approached the limits of their institutional competence reluctantly.³⁸¹

But the imperial-judiciary problem nonetheless remained. When parties proposed to resolve mass torts with settlement class actions, they arguably pushed judges to the limits of their traditionally understood institutional roles.³⁸² Commenting on asbestos and other mass torts, John Coffee complained in 1994 that such episodes “converted [judges] . . . from neutral umpires, adjudicating factual disputes, into problem-solving bureaucrats dispensing social justice.”³⁸³ To those who saw in the federal judge's role an institutional distortion, the situation arguably reached its nadir in 1993, when an asbestos company filed a class action not to litigate its liability but to seek “court assistance . . . to negotiate and eventually approve a settlement” that would lay this liability to rest.³⁸⁴ The district court lacked “adjudicative powers” for such faux disputes, the Second Circuit concluded.³⁸⁵

By one view, the mass tort class action pushed judges to wield the equivalent of not only bureaucratic but also legislative powers.³⁸⁶ All class settlements arguably have a legislative effect. Without their consent, class members lose one right, the right to sue, and gain another, the right to claim compensation from a fund. For negative-value class actions of the sort contemplated by the regulatory conception, this legislative outcome is consequential in form only. Class members' preexisting claims are minimal, so for any particular class member, losing that right in exchange for some payout has little real significance.

378. Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1405 n.203 (2003).

379. See *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 834–36 (E.D.N.Y. 1984), *aff’d*, 818 F.2d 145 (2d Cir. 1987); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 473 (1994).

380. See Marcus, *supra* note 301, at 1590.

381. See *id.*

382. See, e.g., *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996).

383. Coffee, *supra* note 345. See generally Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 436 (2007).

384. *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726, 728 (2d Cir. 1993).

385. *Id.* at 731.

386. See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 752 (2002) (“In institutional terms, class settlements stand awkwardly between aggregate settlements and legislation.”).

For mass torts, in contrast, preexisting rights to sue often have genuine value, as evidenced by the avalanche of individual suits that prompted judges and lawyers to turn to Rule 23. While legislatures may have the authority to displace tort law rights to sue, courts test the boundaries of their proper capacities when they bless privately negotiated efforts to do the same. Whether and how to replace the tort system for injured claimants “are heady policy questions for federal judges,” Coffee wrote in 1994.³⁸⁷ But the Constitution does not contemplate judges wielding such power, he insisted: “The task of crafting solutions to complex social problems properly belongs to the legislature.”³⁸⁸

To Robert Parker, an innovative judge in east Texas who took the first stabs at using Rule 23 for asbestos claims, ordinary tort litigation for asbestos reminded him of “the classical tragedies” and warranted something different.³⁸⁹ Upholding Parker’s certification of an asbestos class, the Fifth Circuit noted, “If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant’s attorney to the extent enjoyed by the profession in the past.”³⁹⁰ The ad hoc committee on asbestos reasoned similarly, referencing the class action and insisting that “failing congressional action, the federal judiciary must itself act now”³⁹¹ But Congress’s failure to act ultimately proved unconvincing as a justification for courts exercising equivalent power through the class action. When the Fifth Circuit scuttled a second attempt by Parker to manage his asbestos docket with a class action, it concluded with the following:

We are told that [Parker’s plan] is the only realistic way of trying these cases; that the difficulties faced by the courts as well as the rights of the class members to have their cases tried cry powerfully for innovation and judicial creativity. The arguments are compelling, but they are better addressed to the representative branches—Congress and the State Legislature. The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more.³⁹²

The Supreme Court made the same point when it rejected the global asbestos class settlement in *Amchem Products v. Windsor*³⁹³ and effectively ended the mass tort class action experiment. Rule 23, the Court insisted, “cannot carry the large load . . . heaped upon it.”³⁹⁴

Mass tort litigation attracted new participants, with confusing new preferences, into the class action arena. It required significant doctrinal

387. Coffee, *supra* note 345.

388. *See id.*; *see also* Telephone Interview with Brian Wolfman, Dir., Appellate Courts Immersion Clinic, Georgetown Univ. Law Ctr. (Apr. 14, 2016).

389. *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269, 270 (E.D. Tex. 1985), *aff’d*, 782 F.2d 469 (5th Cir. 1986); *see also* *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 181 (4th Cir. 1993).

390. *Jenkins v. Raymark Indus.*, 782 F.2d 469, 473 (5th Cir. 1986).

391. *Asbestos Litigation Hearings*, *supra* note 300, at 386 (reprinting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (1991)).

392. *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

393. 521 U.S. 591 (1997).

394. *Id.* at 629.

change, and it pushed courts to test the limits of their capacity to exercise power. But Rule 23's reach expanded even as the regulatory conception, the chief justification for a powerful class action, proved inapposite. Unlike the other episodes of the class action's second era, the mass tort class action experiment did not trigger partisan rancor. Nonetheless, the stakes involved—victims had real compensation at stake, defendants faced potentially ruinous liability, and swollen dockets portended massive court congestion—made urgent some determination of where legitimacy boundaries for courts lay.

IV. SECURITIES REFORM, THE LITIGATION EXPLOSION, AND CLASS ACTION POLITICS

The civil rights and mass-tort episodes implicated the class action in narratives about public law litigation and the imperial judiciary. The securities fraud episode connected the class action to the litigation explosion, the other important narrative challenging litigation's legitimacy during the second era.

The class action has always attracted criticism from those convinced that a litigation explosion had engulfed American civil justice.³⁹⁵ In 1973, the *Fortune* article that arguably gave the phenomenon its name complained in its first paragraph that “class-action suits” had “bec[o]me a kind of popular sport.”³⁹⁶ But litigation-explosion politics through the 1980s centered on issues that had little or nothing to do with class action procedure, such as product-liability doctrine and punitive damages.³⁹⁷ A DOJ working group studying a perceived liability-insurance crisis did not mention the class action when it attributed the problem to a surge in litigation in 1986.³⁹⁸ Dan Quayle's Council on Competitiveness ignored the class action entirely in its set of twenty-two reforms offered to improve American civil justice.³⁹⁹ But the emphasis changed in the early 1990s.⁴⁰⁰ Led by accounting firms and Silicon Valley, a set of business interests harnessed litigation-explosion rhetoric to demand changes to the securities fraud class action.⁴⁰¹ These new

395. Crovitz, *supra* note 150, at 74–76.

396. Carruth, *supra* note 153, at 65.

397. When Deborah Hensler reviewed Walter Olson's *The Litigation Explosion*, published in 1991, she singled out his excoriation of American civil procedure as his novel contribution to the subject. Deborah R. Hensler, *Diagnosing the Nation's Legal Ills*, 75 JUDICATURE 176, 176 (1991) (reviewing WALTER K. OLSON, *THE LITIGATION EXPLOSION* (1991)).

398. TORT POLICY WORKING GRP., U.S. DEP'T OF JUSTICE, REPORT ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 2 (1986).

399. STUART M. GERSON, A PLAN TO IMPROVE AMERICA'S SYSTEM OF CIVIL JUSTICE FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: WILL IT HELP? WILL IT BE IMPLEMENTED? 143–59 (1992) (describing the proposed reforms).

400. *E.g.*, WALTER K. OLSON, *THE LITIGATION EXPLOSION* 57–66 (1991).

401. *See, e.g.*, AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, IN THE PUBLIC INTEREST: A SPECIAL REPORT BY THE PUBLIC OVERSIGHT BOARD OF THE SEC PRACTICE SECTION 5 (1993); Michael J. Cook et al., *The Liability Crisis in the United States: Impact on the Accounting Profession*, J. ACCT., Nov. 1992, at 19, 19; Richard I. Miller, *Litigation Crisis Imperils Accounting Profession*, ACCT. TODAY, Mar. 14, 1994, at 32, 32.

entrants into the class action network successfully pushed class action reform onto Congress's agenda.

A. *The Changing Landscape of Securities Fraud Class Actions*

1. Securities Fraud Litigation in the 1970s and 1980s

From the new Rule 23's first days, securities litigators recognized how the 1966 revisions could empower their suits.⁴⁰² Appreciating the class action's regulatory function,⁴⁰³ sympathetic judges early on wrought changes to the underlying substantive law, decreasing plaintiffs' obligations to provide individualized evidence of their victimization and thereby facilitating class certification.⁴⁰⁴ These developments attracted criticism, of course.⁴⁰⁵ Anticipating reformers' rhetoric by twenty years, a 1974 article insisted that securities fraud class suits "follow[] on the heels of every stock market bust," that plaintiffs in them settle for a small percent of the claimed damages, that law firms race to the courthouse with photocopied complaints listing "the lawyer's mother" as class representative, and that defendants settle frivolous cases rather than litigate them.⁴⁰⁶

By the end of the 1970s, however, the securities fraud class action began to enjoy a period of relative tranquility. Securities fraud litigation had proceeded in an aggregate fashion before 1966,⁴⁰⁷ so the new class action, while important, was not revolutionary. Stock market volatility in the 1970s was muted, with fewer of the drastic swings in share price that tend to attract the plaintiffs' bar's attention.⁴⁰⁸ Also, this litigation was relatively modest in size, with antitrust litigation being more lucrative.⁴⁰⁹ Jockeying among antitrust lawyers prompted abuses and drew negative public scrutiny. Securities fraud litigation, a backwater in comparison, attracted few entrants in the 1970s.⁴¹⁰ Abe Pomerantz, an "iconic legend" with an unimpeachable reputation for quality lawyering, dominated the securities bar.⁴¹¹

402. *E.g.*, Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. INDUS. & COM. L. REV. 501, 501 (1969).

403. *See* *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 883 (5th Cir. 1973).

404. *E.g.*, Note, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337, 345 (1971).

405. *E.g.*, *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1343 (9th Cir. 1976) (Sneed, J., concurring); AM. COLL. OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 18 (1972).

406. Frederick Andrews, *The Class Action Bar: It's All Cat and Mouse*, JURIS DR., Jan. 1974, at 18, 19–22.

407. *See, e.g.*, COFFEE, *supra* note 117, at 39.

408. Andrew L. Turner & Eric J. Weigel, *Daily Stock Market Volatility: 1928–1989*, 38 MGMT. SCI. 1586, 1604–06 (1992); *see also* COFFEE, *supra* note 117, at 68.

409. *Attorney Fee Awards in Securities Class Actions*, 5 CLASS ACTION REP. 470, 520 (1978).

410. Telephone Interview with Stanley M. Grossman, Senior Counsel, Pomerantz LLP (July 1, 2016).

411. COFFEE, *supra* note 117, at 37; *see also* Telephone Interview with Stanley M. Grossman, *supra* note 410.

Securities fraud litigation escalated significantly in the 1980s.⁴¹² In 1987, a securities fraud case settled for \$440 million;⁴¹³ a settlement struck in 1988 exceeded this sum, then a record for class actions, by \$260 million.⁴¹⁴ With this uptick came considerable attention,⁴¹⁵ particularly as the arriviste Milberg Weiss replaced the Pomerantz firm as the top dog.⁴¹⁶ A number of causes likely fueled this upheaval. The substantive law evolved to favor plaintiffs, especially with the entrenchment of the fraud-on-the-market doctrine.⁴¹⁷ Increased market volatility in the 1980s⁴¹⁸ and a surge in initial public offerings⁴¹⁹ may have contributed. But a concentrated burst of litigation against accounting and high-technology firms had particular consequences for class action history. These two industries bore characteristics that particularly enabled them to pursue a political solution once the liability pressure proved too much to bear.⁴²⁰

2. Auditor Liability

Accounting firms audit companies' financial statements in connection with a number of transactions, producing reports for various audiences that include shareholders.⁴²¹ Traditionally, if a transaction soured, the auditor could rely on a privity requirement to shield itself from liability that might otherwise arise from professional negligence or even intentional wrongdoing.⁴²² This doctrine began to fracture in the 1960s,⁴²³ just as the

412. *Attorney Fee Awards in Common Fund Securities and Antitrust Class Actions*, 13 CLASS ACTION REP. 249, 249 (1990).

413. Robert J. Cole, *BP in \$7.82 Billion Deal for Standard*, N.Y. TIMES, Apr. 29, 1987, at D1.

414. *Last Defendant Settles in Bond Default Case*, N.Y. TIMES, Dec. 23, 1988, at D6.

415. See, e.g., Steve Coll & David A. Wise, *Shareholder Lawsuits: Profitable New Path for Attorneys*, WASH. POST, July 24, 1988, at H1; Carole Kahn, *The Big-Stakes Battleground of Shareholder Suits: Plaintiffs' Lawyers Are Having a Field Day Despite New Court Restrictions*, N.Y. TIMES, Jan. 10, 1988, at F13.

416. See, e.g., Tamar Lewin, *Class Actions Pay for Some Lawyers*, N.Y. TIMES, Dec. 5, 1983, at D1.

417. COFFEE, *supra* note 117, at 69–70.

418. See, e.g., Marc Goedhart & Darshit Mehta, *The Long and the Short of Stock-Market Volatility*, MCKINSEY & CO. (May 2016), <http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-long-and-the-short-of-stock-market-volatility> [<https://perma.cc/WV3V-RY9N>].

419. See, e.g., Xiaohui Gao et al., *Where Have All the IPOs Gone?*, 48 J. FIN. & QUANTITATIVE ANALYSIS 1663, 1668 (2013); Patricia J. Hughes & Anjan V. Thakor, *Litigation Risk, Intermediation, and the Underpricing of Initial Public Offerings*, 5 REV. FIN. STUD. 709, 714–15 (1992).

420. Frederick W. Lindahl, *Accounting Standards and Olson's Theory of Collective Action*, 6 J. ACCT. & PUB. POL'Y 59, 68–69 (1987); Douglas A. Schuler et al., *Pursuing Strategic Advantage Through Political Means: A Multivariate Approach*, 45 ACAD. MGMT. J. 659, 667 (2002); see also Marc L. Busch & Eric Reinhardt, *Geography, International Trade, and Political Mobilization in U.S. Industries*, 44 AM. J. POL. SCI. 703, 703–04 (2000).

421. E.g., Thomas L. Gossman, *The Fallacy of Expanding Accountants' Liability*, 1988 COLUM. BUS. L. REV. 213, 213–14.

422. *Ultramares Corp. v. Touche*, 174 N.E. 441, 445–46 (N.Y. 1931).

423. Gossman, *supra* note 421, at 218–19.

modern class action emerged,⁴²⁴ and by the end of the decade accountants began to face liability under the securities laws.⁴²⁵

By the mid-1980s, the accounting industry had begun to complain that the litigation explosion was engulfing its members.⁴²⁶ Firms did face higher litigation exposure by the early 1980s. Turns in the business cycle⁴²⁷ and a weakening of norms of audit professionalism within firms⁴²⁸ are plausible explanations for this development. But accounting-industry representatives faulted more general causes, including Americans' "urge to litigate" and a breakdown in a sensible tort system.⁴²⁹

Although private securities fraud litigation composed only a "fraction" of all lawsuits against accountants by the end of the 1980s, it had begun to draw outsized attention.⁴³⁰ The S&L crisis of the 1980s hit auditors hard,⁴³¹ a factor that surely helped fuel the precipitous escalation of firms' liability risk.⁴³² S&L institutions were required to have an independent audit performed every year to help federal regulators determine if they were managed properly.⁴³³ S&L deregulation in the early 1980s led to risky and even fraudulent business behavior,⁴³⁴ which auditors failed to document or account for.⁴³⁵ S&L bankruptcies left accounting firms as the remaining deep pockets.⁴³⁶ Charles Keating and his Lincoln Savings & Loan, perhaps the decade's most notorious collapse, produced more than \$100 million in

424. *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs*, 103d Cong. 403 (1993) [hereinafter *Hearings on Federal Securities Laws*] (statement of Melvyn Weiss).

425. See, e.g., *Fischer v. Kletz*, 266 F. Supp. 180, 189–97 (S.D.N.Y. 1967).

426. See, e.g., Stephen H. Collins, *Professional Liability: The Situation Worsens*, J. ACCT., Nov. 1985, at 57, 57; Robert Mednick, *Accountants' Liability: Coping with the Stampede to the Courtroom*, J. ACCT., Sept. 1987, at 118, 118; Newton N. Minow, *Accountants' Liability and the Litigation Explosion*, J. ACCT., Sept. 1984, at 70, 72–73.

427. Zoe-Vonna Palmrose, *Litigation and Independent Auditors: The Role of Business Failures and Management Fraud*, AUDITING, Spring 1987, at 90, 90–91.

428. See, e.g., JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 146–50 (2006).

429. Mednick, *supra* note 426, at 118; Minow, *supra* note 426, at 71–72; see also AICPA *Calls for Major Liability Reforms*, J. ACCT., June 1986, at 50, 50. See generally Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399 (1987).

430. *Hearings on Federal Securities Laws*, *supra* note 424, at 38, 411 (statements of William McLucas and Melvyn Weiss).

431. Steven P. Marino & Renee D. Marino, *An Empirical Study of Recent Securities Class Action Settlements Involving Accountants, Attorneys, or Underwriters*, 22 SEC. REG. L.J. 115, 154 (1994).

432. *Id.*; see also Christopher L. Jones & Seth E. Weingram, *Why 10b-5 Litigation Risk Is Higher for Technology and Financial Services Firms* 18 (John M. Olin Program in Law & Econ., Stanford Law Sch., Working Paper No. 132, 1996), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2690 [<https://perma.cc/H3QK-KQJK>].

433. See, e.g., U.S. GEN. ACCOUNTING OFFICE, CPA AUDIT QUALITY: FAILURES OF CPA AUDITS TO IDENTIFY AND REPORT SIGNIFICANT SAVINGS AND LOAN PROBLEMS 2 (1989).

434. See, e.g., Jan S. Blaising, Note, *Are the Accountants Accountable?: Auditor Liability in the Savings and Loan Crisis*, 25 IND. L. REV. 475, 477–83 (1991).

435. U.S. GEN. ACCOUNTING OFFICE, *supra* note 433, at 7–8; see also MARK STEVENS, THE BIG SIX: THE SELLING OUT OF AMERICA'S TOP ACCOUNTING FIRMS 63–103 (1991).

436. See, e.g., *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1424 (D. Ariz. 1992); John W. Hill & Michael B. Metzger, *Auditor Liability and the S&L Crisis: Shaping the Future of the Profession?*, 11 ANN. REV. BANKING L. 263, 264 (1992).

liability to shareholders and bondholders of the country's "Big Six" accounting firms.⁴³⁷

The rise of Milberg Weiss, which "perfected the technology of mass production" of securities fraud litigation,⁴³⁸ also explains the added heat auditors felt by the end of the decade. The firm's first major victory came in 1973 in a securities fraud case against an accounting firm.⁴³⁹ Mel Weiss, himself an accountant, quickly added more notches to his belt, and his penchant for and expertise in suing auditors served the firm well throughout the 1980s.⁴⁴⁰ Ernst & Whinney, for instance, was a codefendant in an enormous bond default case Milberg Weiss brought against the Washington Public Power Supply System. It settled in 1989 for \$584 million.⁴⁴¹

Between 1989 and 1994, the Big Six settled somewhere in the neighborhood of 110 private class actions.⁴⁴² They accounted for 14 percent of all securities fraud defendants in 1990, 30 percent in 1991, and a whopping 56 percent in 1992.⁴⁴³ The bill for their 10b-5 liability in 1992 alone ran to \$373.8 million.⁴⁴⁴

3. High-Technology Liability

Plaintiffs' lawyers also concentrated their fire on high-technology companies in the 1980s and early 1990s.⁴⁴⁵ Twice as likely to be sued than companies in other industries,⁴⁴⁶ high-tech firms were defendants in one-third of securities class actions settled between July 1991 and June 1993, paying out more than \$440 million to class members.⁴⁴⁷ Several reasons might explain their exposure. First, the software industry took off in the

437. See G. Robert Blakely & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1355–56 (1996); Marino & Marino, *supra* note 431, at 148; James S. Granelli, *Keating's Advisors Under Fire: Attorneys, Accountants Helped Massive Fraud Work, Investors' Lawyers Say*, L.A. TIMES, Mar. 14, 1992, at D1.

438. COFFEE, *supra* note 117, at 66.

439. E.g., PATRICK DILLON & CARL M. CANNON, *CIRCLE OF GREED: THE SPECTACULAR RISE AND FALL OF THE LAWYER WHO BROUGHT CORPORATE AMERICA TO ITS KNEES* 59–60 (2010).

440. See, e.g., Lee Berton, *Auditor's Nemesis: Class-Action Lawyer Beats the CPA Firms at Their Own Game*, WALL ST. J., Dec. 4, 1985, at 1.

441. David J. Jefferson, *New WPPSS Settlement of \$584 Million Cleared by Judge in Bond Default Case*, WALL ST. J., Sept. 7, 1989, at 1.

442. Marino & Marino, *supra* note 431, at 146, 152–53.

443. *Securities Litigation Reform: Hearings Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce*, 103d Cong. 77–79 (1994) [hereinafter *Hearings on Securities Litigation Reform*] (statement of Joel Seligman).

444. Marino & Marino, *supra* note 431, at 152.

445. Nancy Rutter, *Bill Lerach Thinks of Himself as Robin Hood in a Class-Action Suit*, FORBES, Oct. 9, 1995, at 116, 116; Jane Simon, *Computer Companies Are Popular Targets in Class Action Shareholder Lawsuits*, NEW ENG. BUS., Aug. 4, 1986, at 27.

446. Jones & Weingram, *supra* note 432, at 1.

447. Frederick C. Dunbar & Vinita M. Juneja, *Making Securities Class Actions More Responsive to the Modern Shareholder*, in NAT'L LEGAL CTR. FOR THE PUB. INTEREST, *SECURITIES CLASS ACTIONS: ABUSES AND REMEDIES* 181, 195 (1994).

1980s,⁴⁴⁸ with Silicon Valley industries exploding in number and size.⁴⁴⁹ Silicon Valley firms tended to place a premium on rapid innovation by the 1980s, while older competitors stagnated with more traditional emphases on risk aversion and quality control.⁴⁵⁰ To critics of securities fraud litigation, plaintiffs' lawyers needed little more than a sharp drop in share price to bring suit,⁴⁵¹ and volatility plagued Silicon Valley firms.⁴⁵² Other factors included the large numbers of IPOs in the high-technology sector⁴⁵³ and the high rates of share turnover for these firms.⁴⁵⁴

Finally, high-technology companies often hyped new products early and aggressively, even though their products failed at particularly high rates.⁴⁵⁵ To plaintiffs' lawyers, this tendency made Silicon Valley "a complete hotbed of fraud."⁴⁵⁶ It certainly attracted Milberg Weiss's attention. Bill Lerach headed the firm's West Coast office. His career took off with a big settlement in 1985,⁴⁵⁷ just as Silicon Valley was heating up. He trained his considerable energies and attention on high-tech companies, and by the early 1990s he was Silicon Valley's *bête noire*.⁴⁵⁸

B. The Push for Reform

1. The Origins of the PSLRA

Sometime around late 1990 or early 1991, the Big Six accounting firms began to consider possible responses to the mounting liability pressure they felt.⁴⁵⁹ Analyzing the firms' litigation, their lawyers concluded, first, that accountants were paying large sums to defense firms, and second, that injured

448. OFFICE OF TECH. ASSESSMENT, OTA-TCT-527, FINDING A BALANCE: COMPUTER SOFTWARE, INTELLECTUAL PROPERTY AND THE CHALLENGE OF TECHNOLOGICAL CHANGE 55 (1992).

449. AnnaLee Saxenian, *Inside-Out: Regional Networks and Industrial Adaptation in Silicon Valley and Route 128*, CITYSCAPE, May 1996, at 41, 42–44.

450. *Id.* at 51; see also Christopher N. Kelly, Book Note, 8 HARV. J.L. & TECH. 521, 524 (1995) (reviewing ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994)).

451. *Hearings on Federal Securities Laws*, *supra* note 424, at 2 (statement of Sen. Dodd). *But see* David J. Bershady et al., *A Dissenting Introduction*, in NAT'L LEGAL CTR. FOR THE PUB. INTEREST, SECURITIES CLASS ACTIONS: ABUSES AND REMEDIES 5, 14 (Edward J. Yodowitz et al. eds., 1994).

452. Telephone Interview with Hon. Mark Gitenstein, *supra* note 76. *But see Hearings on Securities Litigation Reform*, *supra* note 443, at 98 (statement of John C. Coffee, Jr.); Jones & Weingram, *supra* note 432, at 2 & n.4.

453. Telephone Interview with Marc Lacritz, Former President, Sec. Indus. Ass'n (May 16, 2016).

454. Jones & Weingram, *supra* note 432, at 9.

455. See generally Robert A. Prentice & John H. Langmore, *Beware of Vaporware: Product Hype and the Securities Fraud Liability of High-Tech Companies*, 8 HARV. J.L. & TECH. 1 (1994).

456. Telephone Interview with Jonathan W. Cuneo, Partner, Cuneo Gilbert & LaDuca, LLP (Mar. 11, 2016).

457. James P. McDonald, Note, *Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiffs' Bar*, 58 DUKE L.J. 507, 515 (2008).

458. William P. Barrett, *I Have No Clients*, FORBES, Oct. 11, 1993, at 52, 52.

459. Telephone Interview with Hon. Mark Gitenstein, *supra* note 76.

plaintiffs received little of the proceeds of settlements the firms funded.⁴⁶⁰ At nearly the same time, Janet Cooper Alexander published her influential article “Do the Merits Matter?,” in which she argued that factors like the size of market losses, the amount of insurance coverage, and the defendant’s ability to pay, not the strength of the plaintiffs’ case on the merits, determined settlement outcomes.⁴⁶¹ Similarly, Vincent O’Brien argued in the *Wall Street Journal* that settlement amounts in securities fraud class actions had little to do with the merits of claims and that securities fraud litigation created little benefit, if any, for shareholders.⁴⁶² These threads merged into a story about securities fraud class actions: the merits had little to do with their outcomes, plaintiffs barely benefited from them, and they cost a lot in attorney’s fees.⁴⁶³

The Big Six seized advantage of a fortuitous opportunity to push this narrative. In June 1991, the Supreme Court announced its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,⁴⁶⁴ in which it borrowed a short statute of limitations favored by defendants for securities fraud claims.⁴⁶⁵ Threatened with the dismissal of many cases then pending in the federal courts, the plaintiffs’ bar turned to Congress for a legislative fix.⁴⁶⁶ A bill quickly emerged from the Senate Banking Committee before the Big Six could mobilize any opposition.⁴⁶⁷

By October 1991, however, the accountants had flipped an effort to liberalize securities fraud litigation into a four-year campaign for reform.⁴⁶⁸ The Big Six’s initial goal was simply to slow down or stop the *Lampf*-repealer legislation.⁴⁶⁹ But from the outset the firms steered congressional attention to what they believed were fundamental flaws with securities class actions.⁴⁷⁰ At the first hearing on *Lampf*-repealer legislation, for example, a prominent lobbyist for the American Institute of Certified Public Accountants (AICPA) drew upon Alexander’s and O’Brien’s work to argue that Congress should address “frivolous litigation that often benefits nobody but the lawyers.”⁴⁷¹ Reformers sent a summary of Alexander’s article to Christopher Dodd, soon to sponsor the PSLRA in the Senate. It found its way into the hearing record.⁴⁷²

460. *Id.*

461. See generally Janet Cooper Alexander, *Do the Merits Matter?: A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

462. Vincent E. O’Brien, *The Class-Action Shakedown Racket*, WALL ST. J., Sept. 10, 1991, at A20.

463. Telephone Interview with Hon. Mark Gitenstein, *supra* note 76.

464. 501 U.S. 350 (1991).

465. *Id.* at 361.

466. Telephone Interview with Jonathan W. Cuneo, *supra* note 456.

467. *Securities Investor Protection Act of 1991: Hearing on S. 1533 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs*, 102d Cong. 3 (1991).

468. *Id.*

469. Telephone Interview with Hon. Mark Gitenstein, *supra* note 76.

470. See, e.g., *Securities Investor Protection Act of 1991: Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs*, *supra* note 467, at 175 (statement of Edward O’Brien, President, Securities Industry Association) (insisting that Congress address more than “a small part of the actual problem”).

471. *Id.* at 153 (statement of Harvey L. Pitt).

472. *Id.* at 16, 219.

The *Lampf*-repealer legislation's quick enactment in November 1991 came with a price exacted by a fledgling group of legislators interested in reform: a commitment that Congress would consider "measures to reduce meritless litigation" and "meaningful securities litigation reforms" at its next session.⁴⁷³ Commenting on this plan, Senator McConnell noted that, as "a proponent of comprehensive tort reform," he was "pleased that [Congress] will be examining the litigation explosion in this area of the law" when it reconvened.⁴⁷⁴

2. The Campaign for Reform

Leading the charge, the Big Six started a Coalition to Eliminate Abusive Securities Suits (CEASS).⁴⁷⁵ But their role in the S&L crisis compromised them as poster children for reform.⁴⁷⁶ High-tech companies, "thought to be the Garden of Eden of America," as one lobbyist recalls, took over as the primary "spokesmodels."⁴⁷⁷ They attracted important support from moderate Democrats who otherwise tended to favor consumer groups and trial lawyers.⁴⁷⁸

CEASS's campaign only consistently targeted one aspect of class action procedure. Reformers repeatedly complained of the use of the same shareholder as class representative in case after case,⁴⁷⁹ but otherwise they suggested reforms of either the substance of the securities laws (i.e., proportionate and not joint and several liability) or of aspects of procedure that lacked any necessary connection with the class action device (i.e., a heightened pleading standard and a loser-pays-fee rule).⁴⁸⁰

But CEASS's efforts centered on a depiction of the securities class action as predatory and ineffective. Urging a version of the regulatory conception, supporters of the status quo defended class actions as a needed supplement to the SEC's power to enforce the securities laws.⁴⁸¹ The litigation explosion gave reformers a counterargument, one that helped them redefine the issues

473. 137 CONG. REC. S18,522 (daily ed. Nov. 26, 1991); *see also In Camera*, 14 CLASS ACTION REP. 389, 389, 476 (1991).

474. 137 CONG. REC. S18,522 (daily ed. Nov. 26, 1991).

475. Junda Woo, *Big Accounting Firms Join Forces for Legal Change*, WALL ST. J., Sept. 1, 1992, at B8; Telephone Interview with Hon. Mark Gitenstein, *supra* note 76; Telephone Interview with Jonathan W. Cuneo, *supra* note 456.

476. *Hearings on Federal Securities Laws*, *supra* note 424, at 422–24 (referencing PUBLIC CITIZEN, BAD AUDITS . . . NOT DEEP POCKETS: ILLUSTRATIONS OF FAILED AUDITS BY THE BIG 6 (1993)).

477. Telephone Interview with Jonathan W. Cuneo, *supra* note 456.

478. Telephone Interview with Hon. Mark Gitenstein, *supra* note 76.

479. *See, e.g., Hearings on Securities Litigation Reform*, *supra* note 443, at 6 (statement of Rep. Tauzin); *Securities Investors Legal Rights: Hearing Before the Subcomm. on Telecomm. & Fin. of the H. Comm. on Energy & Commerce*, 102d Cong. 141 (1991) (statement of Vincent M. O'Reilly, Deputy Chairman for Accounting & Auditing, Coopers & Lybrand).

480. *See, e.g., Denis T. Rice, A Practitioner's View of the Private Securities Litigation Reform Act of 1995*, 31 U.S.F. L. REV. 283, 283–84 (1997).

481. *See, e.g., Hearings on Federal Securities Laws*, *supra* note 424, at 131 (statement of Joel Seligman).

involved in ostensibly regulatory litigation. Some regarded litigation “as a means of carrying out social policy” or as “a substitute for laws and regulations.”⁴⁸² But this justification fails in an era dominated by “a whole new breed of legal professionals, who go on fishing expeditions to find any basis at all on which they may file class-action suits” and who “pay[] bounties to professional class representatives” to file “cookie-cutter complaints.”⁴⁸³ Among the primary themes in litigation-explosion discourse were claims that lawsuits are meritless, costs unjustified, and results unwarranted by defendants’ conduct or the substantive law.⁴⁸⁴ By harnessing this rhetoric, reformers could effectively blunt a defense of the class action rooted in the regulatory effect it had.

A number of well-established litigation-explosion claims surfaced repeatedly in the campaign for reform. These included a characterization of plaintiffs’ lawyers as “betrayers of trust” who serve their own interests and no one else’s.⁴⁸⁵ To Senator Dodd, the “entrepreneurial role of some plaintiffs’ attorneys in securities class action cases” led them to “essentially shop for clients in whose name they can file a case” so that they can “control the litigation and settlement . . . with little or no influence from either the ‘named’ plaintiffs or the larger class of investors.”⁴⁸⁶ What results are “cheap settlements” that do nothing for investors but generate a “generous fee award.”⁴⁸⁷ The charge that lawyers like Lerach used the same class representative over and over again tapped into litigation-explosion rhetoric about sham plaintiffs.⁴⁸⁸ Lerach infamously declared in 1993 that he had “the greatest practice of law in the world” because he “ha[d] no clients.”⁴⁸⁹ This boast gave vivid support to reformers’ claim that securities litigation did nothing for plaintiffs and only served to enrich lawyers.⁴⁹⁰

Proponents of the regulatory conception had long soft-pedaled direct financial benefits to class members as immaterial to the class action’s success, stressing instead its capacity to vindicate substantive liability policy. But reformers challenged the class action on this terrain, denying that securities class actions accomplished legitimate law enforcement goals. Claims of meritless litigation’s ubiquity were a staple of litigation-explosion rhetoric in the 1980s.⁴⁹¹ Reformers levied this charge against securities fraud

482. Lawrence A. Weinbach, *Legal Crisis Paralyzes U.S. Innovation*, ACCT. TODAY, May 11, 1992, at 35, 35.

483. *Id.* at 35, 37.

484. *E.g.*, Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 644–45 (1994).

485. *Id.* at 636.

486. *Hearings on Securities Litigation Reform*, *supra* note 443, at 22 (statement of Sen. Dodd).

487. *Id.*

488. *See, e.g.*, OLSON, *supra* note 400, at 15–16.

489. Barrett, *supra* note 458, at 52.

490. *Hearings on Securities Litigation Reform*, *supra* note 443, at 9 (statement of Rep. Tauzin).

491. *E.g.*, Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 485 (1988).

litigation with an oft-told “atrocity story”⁴⁹² of “[p]redatory plaintiffs’ lawyers routinely fil[ing] suit when a public company’s stock declines” and “lob[bing] barrages of computer-generated pleadings” at innocent defendants.⁴⁹³ With litigation expenses mounting, defendants settle regardless of the underlying merits,⁴⁹⁴ a result that undercuts any regulatory value these cases would otherwise promise.⁴⁹⁵

Not only did these cases serve no legitimate law enforcement objectives, reformers argued, they also inflicted severe costs on the American economy—yet another litigation-explosion trope.⁴⁹⁶ To Billy Tauzin, the PSLRA’s sponsor in the House, plaintiffs’ lawyers’ shakedown racket was “killing other investors’ opportunities to make profit and to grow small businesses in America, and it is killing jobs, and it is hurting people who want to start up new companies.”⁴⁹⁷ In the 1980s, accounting firms insisted that their rising tort liability was pushing auditors to limit their business, just as it forced doctors to practice defensive medicine.⁴⁹⁸ Firms in the early 1990s alleged the same effect and blamed a surge in securities fraud litigation.⁴⁹⁹ Representatives of high-technology companies likewise insisted that securities fraud litigation “threaten[ed]” its industry’s “competitiveness.”⁵⁰⁰

Reformers used yet another staple of litigation-explosion discourse, “assertions about aggregate patterns” suggesting a system out of control that proved baseless, exaggerated, or at least very difficult to prove empirically.⁵⁰¹ The Big Six faced dramatically rising insurance costs, the head of AICPA insisted,⁵⁰² consuming 9 percent of audit revenue by 1991.⁵⁰³ Supporters of the status quo insisted that the figure was closer to 1.6 percent.⁵⁰⁴ Plaintiffs filed over 600 securities class actions between 1990 and

492. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 726 (1998).

493. *Hearings on Federal Securities Laws*, *supra* note 424, at 317 (statement of Marc E. Lackritz, President, Securities Industry Association); *see also id.* at 2 (statement of Sen. Dodd); *id.* at 9 (statement of Sen. Bennett).

494. *See id.* at 48 (statement of Dr. Vincent E. O’Brien, Law and Economics Consulting Group).

495. *Hearings on Securities Litigation Reform*, *supra* note 443, at 466 (statement of Marc E. Lackritz, President, Securities Industry Association).

496. *E.g.*, Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 560–61 (1992).

497. *Hearings on Securities Litigation Reform*, *supra* note 443, at 49 (statement of Rep. Tauzin).

498. Minow, *supra* note 426, at 79.

499. *Hearings on Federal Securities Laws*, *supra* note 424, at 426 (statement of Jake L. Nettekville, American Institute of Certified Public Accountants).

500. *Competitiveness of the U.S. Software Industry: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 102 Cong. 33 (1991) (statement of Robert N. Miner, Executive Vice President, Oracle Corporation).

501. Galanter, *supra* note 492, at 733.

502. *Hearings on Federal Securities Laws*, *supra* note 424, at 426–27 (statement of Jake L. Nettekville, American Institute of Certified Public Accountants).

503. Weinbach, *supra* note 483.

504. PUBLIC CITIZEN, *BAD AUDITS . . . NOT DEEP POCKETS: ILLUSTRATIONS OF FAILED AUDITS BY THE BIG 6*, at 651 (1993).

1991, accountants insisted, a “tripling” since 1988.⁵⁰⁵ Controlling for duplicative findings, the PSLRA’s opponents responded that the real number was much lower, and the rate of filings had only inched up.⁵⁰⁶ Reformers claimed that “virtually all cases . . . settled,” regardless of merit.⁵⁰⁷ Opponents asserted that courts dismissed 40 percent of cases brought against the Big Six at the pleading stage.⁵⁰⁸ Plaintiffs sued “anytime” a stock price fell by 10 percent.⁵⁰⁹ Opponents claimed that such stock drops prompted litigation much less frequently.⁵¹⁰ Claims that plaintiffs’ lawyers settled cases for sums that bore little relationship to the merits, the critique that Alexander, O’Brien, and the Big Six had begun with, proved particularly important.⁵¹¹

Finally, reformers made ample use of “global characterizations.”⁵¹² Litigation against accountants was “out of control.”⁵¹³ “Everybody gets sued,” Tauzin complained,⁵¹⁴ insisting that “poison is in the well and we ought to get it out.”⁵¹⁵ Managers of high-technology firms are well on their way to spending “half their time in litigation discovery proceedings, and the other half looking over their shoulders for predatory lawyers.”⁵¹⁶

Newt Gingrich, then minority leader in the House, agreed to include securities fraud litigation reform as an item in the “Contract With America” he and his Republican colleagues were touting on the campaign trail in 1994.⁵¹⁷ The effort to pass the PSLRA was hard fought. Jonathan Cuneo headed the National Association of Shareholder and Consumer Attorneys (“NASCAT”) in the early 1990s and as such was the chief legislative strategist resisting the statute’s passage. As late as August 1994, Cuneo recalls, the reform campaign was “cresting” and “unlikely to continue.”⁵¹⁸ But CEASS totally outgunned the plaintiffs’ lawyers, exceeding NASCAT’s

505. *Hearings on Federal Securities Laws*, *supra* note 424, at 427 (statement of Jake L. Netterville, American Institute of Certified Public Accountants); Miller, *supra* note 401.

506. Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest’s “Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission’s Authority,”* 108 HARV. L. REV. 438, 444 (1994).

507. *Hearings on Federal Securities Laws*, *supra* note 424, at 721 (attaching letter to Sen. Dodd from American Business Conference et al., dated July 22, 1993); *see also* Miller, *supra* note 401.

508. *Hearings on Securities Litigation Reform*, *supra* note 443, at 80 (statement of Joel Seligman).

509. *Hearings on Federal Securities Laws*, *supra* note 424, at 10, 12 (statement of Edward McCracken, President and Chief Executive Officer, Silicon Graphics).

510. *Hearings on Securities Litigation Reform*, *supra* note 443, at 91 (statement of John C. Coffee, Jr.).

511. *See, e.g.,* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 84 (1991).

512. Galanter, *supra* note 492, at 726.

513. Michael J. Cook et al., *supra* note 401, at 74.

514. *Hearings on Securities Litigation Reform*, *supra* note 443, at 8 (statement of Rep. Tauzin).

515. *Id.* at 49.

516. *Competitiveness of the U.S. Software Industry: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, *supra* note 500, at 26 (statement of Joseph Costello).

517. Telephone Interview with Hon. Mark Gitenstein, *supra* note 76.

518. Telephone Interview with Jonathan W. Cuneo, *supra* note 456.

lobbying effort by over \$100 million.⁵¹⁹ Steve Toll, a leading plaintiffs' securities lawyer, describes the situation with a vignette:

I remember . . . a time where we had a big snow storm in the D.C. area, and I ended up picking up some guy who couldn't get up a hill near my house We started talking, and ends up the guy's a lobbyist, and he was working for various high tech companies I was telling him what I did, and telling him about the powerful effort to get the law changed and make securities class actions go away, or make them impossible or more difficult to bring. I told him we had this one law firm we were using as our lobbyist on Capitol Hill He laughed and said, "Oh my God. That's what you have. Do you realize how many corporations are out there, throwing \$50,000 to \$100,000 at lobbyists, and you guys have this one little puny firm? Talk about David and Goliath!"⁵²⁰

By a week before the November 1994 midterm elections, with Republicans headed toward a historic congressional win, Cuneo knew that his "goose was cooked."⁵²¹ Right after the Republicans' smashing triumph, he could identify only fifteen senators as solid votes against the PSLRA.⁵²²

* * *

The securities fraud episode entangled the class action in a politicized fight over litigation and legitimacy. The lines of attack reformers opened had direct significance for the regulatory conception. The litigation-explosion narrative that accounting firms and Silicon Valley developed challenged the conception's justificatory force. If courts lacked the tools to ensure that only meritorious lawsuits proceeded, then a device designed to mobilize claims could not be counted upon to achieve appropriate levels of regulation through litigation.

CONCLUSION

The election of the Contract with America Congress is a good place to end the story of the class action's second era. Little of concrete, lasting import had happened to Rule 23 or class action doctrine by the end of 1994. The PSLRA's enactment remained a year away.⁵²³ The statute prohibiting LSC-funded class actions did not pass until April 1996.⁵²⁴ The Advisory Committee in 1994 buried the proposed revisions to Rule 23 that the ABA Special Committee had recommended.⁵²⁵

But change was afoot. At the start of the 1980s, the two most populous class action fields, antitrust and civil rights, were declining, and district courts

519. *Id.*

520. Telephone Interview with Steven J. Toll, Partner, Cohen Milstein Sellers & Toll PLLC (Apr. 20, 2016).

521. Telephone Interview with Jonathan W. Cuneo, *supra* note 456.

522. *See id.*

523. Houseman, *supra* note 294.

524. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1353 (1996).

525. Minutes of Meeting of Advisory Committee on Civil Rules (Oct. 20–21, 1994), *in* WORKING PAPERS, *supra* note 52, at 194.

were the only venue that remained open for doctrinal evolution. By the end of the class action's second era, the device's footprint had arguably never been larger. 1994 witnessed not only Judge Reed's approval of the *Amchem* settlement but also the approval of the \$4.225 billion *Breast Implants* class settlement.⁵²⁶ That year, plaintiffs' lawyers also convinced a district judge to certify a personal injury class of people with hemophilia harmed by HIV-tainted clotting-factor products—for litigation purposes, not just settlement.⁵²⁷ By one count, securities fraud litigators filed 231 class actions in 1994, a four-year high.⁵²⁸ Private lawyers had begun to make real money litigating Title VII class actions, litigation that had been left for dead by the end of the 1980s.⁵²⁹ Notwithstanding Reagan-era attacks, poverty lawyers were involved in hundreds of class actions nationwide.⁵³⁰

The pendulum would quickly swing, beginning with the PSLRA's enactment in 1995 and a fierce reaction to the mass tort class action in the federal circuit courts.⁵³¹ During the next ten years, all government institutions responsible for class action law and policy, including Congress, the Advisory Committee, the Supreme Court, and the intermediate courts of appeals, would extensively reexamine fundamental issues, with numerous and significant doctrinal consequences. A leading plaintiffs' lawyer expressed cautious optimism for the class action's "newly invigorated life" in 1998.⁵³² By 2005, when Congress passed the Class Action Fairness Act to stymie a swath of this litigation,⁵³³ she would complain that "class actions have been reformed to death."⁵³⁴

Changes in how lawyers, judges, and others understood and discussed class action law and policy paved a road from the quiet of the early 1980s to the turbulence of the mid-1990s. Marc Lackritz served as president of the Securities Industry Association during the early 1990s when the group threw its weight behind securities fraud class action reform. He began a recollection of the campaign for the PSLRA with a revealing reflection:

526. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. 92-P-10000-S, 1994 U.S. Dist. LEXIS 12521, at *55 (N.D. Ala. Sept. 1, 1994).

527. *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410, 427 (N.D. Ill. 1994), *rev'd sub nom. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

528. Richard Painter et al., *Private Securities Litigation Reform Act: A Post-Enron Analysis*, FEDERALIST SOC'Y (May 16, 2002), <https://fedsoc.org/commentary/publications/private-securities-litigation-reform-act-a-post-enron-analysis> [<https://perma.cc/SB89-F8QH>].

529. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1019 (1991); *see supra* note 114 and accompanying text.

530. Elizabeth Gleick, *Civil Assistance May End Too*, TIME, June 19, 1995, at 46, 46 (reporting that LSC-funded lawyers were involved in 1600 cases).

531. For a discussion of the circuit court reaction, see David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1284–85 (2007).

532. Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A.L. REV. 373, 377 (1998).

533. Marcus, *supra* note 531, at 1305–10.

534. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475 (2005).

I went to law school from roughly '68 to '73, and at that point, class actions were viewed as a way of righting social wrongs. The people on the white horse were bringing class actions to stop smoking on airplanes and things like that We thought, "What a great tool . . . to right social wrongs." Then all of a sudden, I find myself, at the end of the 80s, beginning of the 90s, where the class action[] has been flipped on its head, in a sense. It's become a lottery for plaintiffs' lawyers and trial lawyers⁵³⁵

Lackritz's take on the class action circa 1973, "a great tool . . . to right social wrongs," captures a Chayesian, public law idea about the legitimate use of judicial power. It likewise well describes the regulatory conception of the class action. To my mind, the significance of the second era lies in the collapse of faith that Lackritz experienced.

The regulatory conception defined the class action's primary function as the broad enforcement of substantive liability regimes on behalf of groups of undifferentiated regulatory beneficiaries. It offered normative support to a powerful procedural device that downplayed individual litigants, their circumstances, and their needs in favor of muscular regulatory outcomes. By connecting the class action to more fundamental debates over litigation and legitimacy, the three major episodes of the second era deepened the challenges that proponents of this conception faced. The civil rights episode embroiled the class action in politicized debates over the imperial judiciary. To conservatives, antidiscrimination and LSC-funded class actions and the pursuit of structural reform on behalf of groups begged the question of what, if any, boundaries remained separating law from politics. Asked about the imperial judiciary at his confirmation hearings in 1988, Paul Niemeyer featured the class action and its adjectival conception in his insistence on a divide between law and politics:

The distinction between judicial resolution and legislation is that the former resolves the immediate good faith disputes of the parties whereas the later [sic] may resolve a dispute or impose a standard on society or a smaller class of persons. To the extent that a judge seeks to impact a group beyond the litigants, he is distorting the judicial function. Even the class action procedure should be viewed as a procedural device to resolve a multiplicity of good faith disputes simultaneously. To the extent that it resolves claims not brought by actual litigants, the procedure is properly criticized.⁵³⁶

Judge Niemeyer would chair the Advisory Committee when it proposed restrictive revisions to Rule 23 a decade later.

The push for securities litigation reform connected the class action to the litigation-explosion narrative and implicitly, but unmistakably, challenged the case for the regulatory conception. To reformers, whether litigation can legitimately discharge a regulatory task assumed facts not in evidence. A rash of meritless securities fraud cases and settlements with no connection to the merits proved the class action's incompetence to implement a regulatory regime, regardless of its legitimate power to shoulder the duty.

⁵³⁵. Telephone Interview with Marc Lackritz, *supra* note 453.

⁵³⁶. *Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 31 (1988) (statement of Paul Niemeyer).

The mass tort class action placed even more stress on the normative foundation for a robust class action device. The choice between a regulatory and an adjectival conception had little bearing on the problems posed by the aggregation of personal injury claims. Some strained to make the regulatory conception relevant, but the effort did not really track how mass tort litigation played out. Few of the district judges or lawyers pushing for a class action solution to the various mass torts of the 1980s and early 1990s identified claim mobilization or deterrence as a rationale for their turn to Rule 23. The class action's solution to the asbestos litigation crisis begged a lot of questions about efficiency and collusion for which 1970s-era debates over the class action shed little light. Also, although defendants championed the class settlement as a response to a tsunami of individual lawsuits, Rule 23's mere connection to tort litigation, the original font of the litigation explosion, further cemented the class action's connection to this narrative.⁵³⁷

The civil rights and securities fraud episodes pushed the class action further into partisan terrain. Some resolution to questions of litigation's legitimate use grew urgent as personal injury lawyers and defendants wielded Rule 23 as a response to the mass tort challenge. The result, an expanded network of lawyers, judges, legislators, and rulemakers engaged with the class action, all but ensured that advocates would explore different institutional venues for policy change. As doors to these venues opened, and as those with conflicting, politicized agendas rushed through them, the conditions coalesced for an era of reform to begin.

537. E.g., Max Boot, *Rule of Law: Judges Rebel Against Mass Tort Excesses*, WALL ST. J., Apr. 3, 1996, at A15; Joseph Nocera & Henry Goldblatt, *Fatal Litigation*, FORTUNE, Oct. 16, 1995, at 60, 60.