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

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

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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.

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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,

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2. Id. at 93.
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 \textit{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, \textit{Sturm}, supra note 3, at 592–94.
\(^6\) \textit{Id.} at 594.
\(^7\) \textit{See infra} Part III.
\(^8\) \textit{See infra} Part III.A.
\(^9\) \textit{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. Disruptions occur when networks of those interested in the policy expand and diversify, 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. 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 McConnell introduced a bill called the “Litigation Abuse Reform Act.” 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. 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.

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


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.\(^\text{18}\) 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.\(^\text{19}\) 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.\(^\text{20}\) 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.\(^\text{21}\)

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.\(^\text{22}\) 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.\(^\text{23}\) On the other hand, the Supreme Court insisted that individualized notice be sent to all class members, whenever possible.\(^\text{24}\) This holding created litigation costs that limited securities fraud litigation to a small number of highly capitalized plaintiffs’ firms.\(^\text{25}\) A pragmatic balance of this sort emerged in each of the major substantive areas in which the class action took root.\(^\text{26}\) 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

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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. 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 swathes of class action litigation. Comparatively technical issues commanded judicial attention during the second era. How best to calculate fees for class counsel and whether Rule 23(b)(2) members can have opt-out rights 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, the lawfulness of fluid recovery and cy pres, Rule 23(b)(1)’s scope, and restrictions on class counsel’s communications with class members.

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. Very few of its decisions dramatically impacted what types of classes would get certified or what sorts of settlements would win approval.

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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).


Phillips Petroleum Co. v. Shutts, while surely important, has a disputed legacy. The decision effectively constitutionalized notice and opt-out rights for damages class actions. 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, a holding that would have thwarted many large class actions. The Court also rejected the Kansas Supreme Court’s decision to apply Kansas substantive law to claims of class members from different states. Commentators disagree over the significance of this holding, but one leading plaintiffs’ lawyer, reflecting twenty years hence, denied that Shutts had a significant impact on the certification of multistate classes.

In General Telephone Co. of the Southwest v. Falcon, 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. Rather, class certification requires “significant proof” of a common course of discriminatory treatment. Falcon ultimately provided an important buttress for the Court’s 2011 opinion in Wal-Mart Stores, Inc. v. Dukes, but in the 1980s, as one prominent civil rights litigator recalls, it did little to change the course of civil rights litigation.

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

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36. See id. at 811–12.
37. Id. at 814.
42. 457 U.S. 147 (1982).
43. Id. at 158–59.
44. Id. at 159 n.15.
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, sideling the circuits as stewards of class-certification doctrine.

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. The Advisory Committee thus sidelined a set of plaintiff-friendly proposals that a special committee of the American Bar Association submitted in 1986. 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. The Special Committee also suggested that an amended Rule 23 make opt-out rights and notice in cases for monetary relief optional. 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" and, thus, that Rule 23 should "not be thwarted by unwieldy or unnecessarily expensive procedural requirements."

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. 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

49. 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1802 (3d ed. 1998).
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. The draft made its way to the Advisory Committee in 1993 but
no further. A lack of enthusiasm for the proposed reworking led to its
demise in 1994. 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.

3. Congress

The class action weathered intense congressional scrutiny in the late
1970s. 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.” 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. The Reagan administration pursued an ambitious program of
litigation retrenchment.

But not until the early 1990s did the class action per se return to legislative
agendas in any sustained or significant way. The few statutes enacted
during the second era addressed picayune matters. 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
63. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE
64. Id. at 37–39.
65. E.g., Myriam Gilles, The Day Doctrine Died: Private Arbitration and the End of Law,
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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{70} The fledgling conservative public-interest-law movement\textsuperscript{71} 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.\textsuperscript{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.\textsuperscript{73} Tort reform efforts in the early 1980s and 1990s ignored the class action.\textsuperscript{74} The U.S. Chamber of Commerce’s National Chamber Litigation Center, founded in 1977, would eventually engage in class action reform efforts.\textsuperscript{75} Not until the late 1990s, however, did it demonstrate much interest in the procedure.\textsuperscript{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).

\textsuperscript{68} See infra note 262 and accompanying text.

\textsuperscript{69} See infra notes 226–45 and accompanying text.


\textsuperscript{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.

\textsuperscript{73} LEE EPSTEIN, CONSERVATIVES IN COURT 63, 64 (1985).

\textsuperscript{74} See infra Part IV.B.2.

\textsuperscript{75} Anna Palmer, Chamber Shuffles Staff After Counsel Exit, LEGAL TIMES, Nov. 13, 2006, at 2.

\textsuperscript{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*. Other priorities for civil justice reform clearly ranked higher on reformers’ agendas.

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. 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.” Existing data are too poor to confirm this claim. 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. In 1989, a leading civil rights litigator declared that the “class action is dead.” A precipitous decline in the number of civil rights class actions during the 1980s is consistent with a number of developments.


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.


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


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).


The civil rights bar diminished during the 1980s, so much so as to prompt judicial comment by the end of the decade. A couple of prominent nonprofit organizations that had dominated the employment discrimination field in the 1970s had decreased their activity by the end of the 1980s, in part because of the increased resources this litigation required. The for-profit bar did not replace this lost capacity until later, 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. 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. A dose of reality likely drove less sophisticated lawyers from the civil rights class action field.

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, and by the end of the 1980s few employers continued to


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.


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


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.
95. Telephone Interview with Joseph M. Sellers, supra note 47.
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).
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 1982\(^{109}\) 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

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\(^{102}\) Jeff D. v. Evans, 743 F.2d 648, 651 (9th Cir. 1984).


\(^{104}\) 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.


\(^{110}\) See George M. Sickness, 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).

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. But this victory came after the investment of 550,000 hours of attorney time. “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.

2. The Antitrust Class Action

Private antitrust filings fell significantly during the 1980s, from roughly 1500 in 1980 to about 600 in 1989. 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.

These changes became the real story of the 1980s, but the era began with another one, involving the infamous Fine Paper litigation. Harold Kohn, the godfather of the country’s class action bar, challenged a lavishly excessive fee petition his cocounsel filed, 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. “I regret to say,” the Fine Paper judge concluded, “that my inquiry has given..."

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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).
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.”

Kohn worried that *Fine Paper* would “kill the goose that lays the golden egg.” 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, won an appointment as lead counsel in the *Corrugated Container* litigation in 1977 when squabbling among the plaintiffs’ bar left him as an acceptable compromise. 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.

However successful, *Corrugated Container* prompted a powerful backlash. Susman had employed a “system of escalation” strategy that put significant pressure on defendants to settle. 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.

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


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))).


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

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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

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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

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

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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.
fodder for their views. But early on, those anxious about rising claims did not necessarily support procedural retrenchment. 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. By the mid-1970s, however, the narrative had turned into advocacy for limits on litigation’s availability and power.

The second phenomenon involved the alleged rise of an “imperial judiciary,” as Nathan Glazer described it in 1975. 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. Litigation, traditionally conceived, functioned as a “grievance-answering process,” Donald Horowitz argued, in which individuals presented fact-specific disputes with limited public significance to otherwise passive courts for adjudication. Imperious judges, in contrast, treated litigation as a “problem-solving” process, with cases serving as “mere vehicles for an exposition of more general policy problems.” Individual litigants and their identities receded from the courts’ gaze. “Broad class[es] of people” replaced these “ghostly plaintiffs” 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. The imperial-judiciary phenomenon laid bare the limits to courts’ institutional incompetence, as did

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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

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.
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.”\textsuperscript{182}

It was precisely this possibility of assent that receded in the 1980s. As noted, litigation politics circa 1980 were not obviously partisan.\textsuperscript{183} Neither were doubts about public law litigation and its legitimacy.\textsuperscript{184} But the Reagan administration adopted the litigation explosion as an article of faith,\textsuperscript{185} and throughout the decade conservatives expressed anxiety over, and at least rhetorical opposition to, the imperial judiciary.\textsuperscript{186} Both narratives at least partially motivated Republicans to pursue significant policy initiatives in the early 1990s,\textsuperscript{187} by which point partisan divides over litigation reform had deepened and hardened.\textsuperscript{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.\textsuperscript{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.\textsuperscript{190} As he argued, the class was a “single jural entity,” not “a congeries of individual claims,”\textsuperscript{191} reflecting “burgeoning . . . theories about groups (as opposed to individuals) as rights bearers.”\textsuperscript{192} Also, litigation can better offer a competent substitute for politics if it proceeds in aggregate fashion.\textsuperscript{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.\textsuperscript{194} To proponents of the regulatory conception, a class was not an assembly of discrete individuals, but a group of

\textsuperscript{182} Chayes, supra note 173, at 1316.

\textsuperscript{183} See supra note 64 and accompanying text.

\textsuperscript{184} E.g., Colin S. Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 106 (1979).

\textsuperscript{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).


\textsuperscript{187} Burke, supra note 157, at 24–25.

\textsuperscript{188} See supra note 64 and accompanying text.

\textsuperscript{189} Crovitz, supra note 150, at 74–76; Howard, supra note 151, at 102.

\textsuperscript{190} Chayes, supra note 173, at 1291.

\textsuperscript{191} Chayes, supra note 181, at 28.

\textsuperscript{192} Id. at 27.

\textsuperscript{193} Id. at 27–28.

\textsuperscript{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”).
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 extraintividual 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. They blessed these cases with preferential procedural treatment, a favor that included courts' willingness to certify "across-the-board" classes. 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. 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. The Supreme Court pushed back slightly in 1977, holding in East Texas Motor Freight System Inc. v. Rodriguez 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." Reading Rodriguez narrowly, some lower courts continued to certify across-the-board classes into the early 1980s.

199. E.g., Jenkins v. United Gas Corp., 400 F.2d 28, 34 (5th Cir. 1968); Belton, supra note 86, at 933.
202. E.g., Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974).
204. Id. at 403–04.
205. E.g., Satterwhite v. City of Greenville, 578 F.2d 987, 993 n.8 (5th Cir. 1978).
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? 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. 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. Likewise, properly crafted class action remedies should end a subordinated status, causing a transformation that focuses on structural change, not individual remediation.

Class action procedure fit the group rights understanding of Title VII perfectly. As the Ninth Circuit reasoned in 1977, “employment 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.” If groups suffered the relevant harm, then individual plaintiff characteristics bear little on the accurate adjudication of a defendant’s liability. 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, 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, and which does not require that notice go to all individual class members.


210. See Brown, 663 F.2d at 1275–76.


212. E.g., Gay v. Waiters’ & Dairy Lunchmen’s Union, 549 F.2d 1230, 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”).


members. 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, 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. Disparate-impact liability focuses “on protected groups,” not an employer’s motive with respect to particular hiring or promotion decisions, and thus was substantive law ideally suited to class litigation.

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. As such, it was anathema to the Reagan administration. Its personnel challenged the jurisprudential basis for these remedies. William Bradford Reynolds, who headed the DOJ’s Civil Rights Division from 1981 to 1988, faulted the idea of group rights as “a fundamental
distortion of civil rights in a democratic society.” Administration lawyers instead advocated for what the NAACP, describing Clarence Thomas’s views, labeled a “radical individualism” in antidiscrimination law and policy. Administration lawyers instead advocated for what the NAACP, describing Clarence Thomas’s views, labeled a “radical individualism” in antidiscrimination law and policy. “[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.” “Our country is not a group of groups,” he insisted, and “our laws protect individuals, not classes.” 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.”

This view influenced DOJ and EEOC litigation policy. “Each case is essentially different” and “people should be treated as individuals,” the chair of the Reagan transition committee for the EEOC insisted. Thus, “class action suits” are inappropriate, as they are a “boondoggle for civil rights and labor lawyers.” 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. 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. The administration


232. Id.


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

The DOJ ceased its support of private class actions. 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. 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. The EEOC filed many fewer class actions in 1988 than it did in 1980, pursuing class actions based only on “complaints filed by individuals” and not on the “observation of a statistical disparity.” The agency’s remedial policy of stressing full recovery for every identified victim of discrimination diverted resources from investigations of systemic discrimination. Thomas insisted that the

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


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
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 “revision 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


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

255. HOUSEMAN & PERLE, supra note 251, at 26.


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.


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

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. 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.” 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.”

This is not simply related to politics,” Spiro Agnew complained one year earlier, “it is politics.” Glazer singled out LSC class actions in his famous 1975 article on the imperial judiciary.

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

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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).


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.
278. E.g., JOHNSON, supra note 276, at 590.
279. E.g., id. at 612.
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


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.


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).
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. 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. At 7:00 p.m., just as a popular “Tea Dance” began, two skywalks in a lobby of a Kansas City, Missouri, Hyatt Hotel collapsed. One hundred people died, hundreds more suffered physical injuries, and up to two thousand onlookers witnessed the calamity. Trial lawyers filed the first individual cases three days later. Within seven months 150 individual cases were on file, mostly in a Missouri state court, and the plaintiffs’ lawyers had grouped together informally to coordinate their litigation. In preliminary settlement discussions, the defendants hinted at

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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.*

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


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

312. Id. at 250–51.

313. Id. at 259.


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).


318. Id. at 428.


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

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.
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. 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, “and I would like to go to my blessed reward knowing that I personally met the greatest at something.” 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, against Fred Baron, their chief competitor for this distinction. Implacably and bitterly opposed to an asbestos class action, 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.

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. 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. This activity ultimately convinced the Advisory Committee to create Rule 23(f) and thereby to regularize this appellate supervision.

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. The economics of personal injury
litigation meant that plaintiffs filed hundreds or even thousands of cases as individuals, with no need for the class action to mobilize claims. 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. 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, and more say over the payment of claims. 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.

By the early 1990s, Rule 23 had become a “strategic management tool” for a number of companies, not necessarily an instrument of corporate doom. 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,” and in 1984 the Sixth Circuit treated the notion of a settlement-only class with skepticism. The Fourth Circuit
in 1989 expressed much more enthusiasm for settlement-only classes.\textsuperscript{348} However, and by the mid-1990s the certification of settlement-only classes was “common.”\textsuperscript{349} \textit{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).\textsuperscript{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.\textsuperscript{351} The Advisory Committee obliged,\textsuperscript{352} ultimately proposing an amendment designed “to enlarge the opportunity for mass tort litigation.”\textsuperscript{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.\textsuperscript{354} As the \textit{Skywalks} example suggested, however, litigants hardly needed Rule 23 to mobilize. Also, defendants’ attraction to the device rebuffed the suggestion that the class action unleashed tort law’s regulatory power.\textsuperscript{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.\textsuperscript{356} In the \textit{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.\textsuperscript{357}

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

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\item \textsuperscript{348} \textit{E.g.}, \textit{In re A.H. Robins Co.}, 880 F.2d 709, 738–40 (4th Cir. 1989).
\item \textsuperscript{349} HENSLER ET AL., supra note 17, at 477.
\item \textsuperscript{350} Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 316 (E.D. Pa. 1994).
\item \textsuperscript{351} \textit{Asbestos Litigation Hearings}, supra note 300, at 383, 409–21 (reprinting \textit{REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION} (1991)).
\item \textsuperscript{352} Minutes of Meeting of Advisory Committee on Civil Rules (Oct. 21–23, 1993), \textit{in WORKING PAPERS}, supra note 52, at 174.
\item \textsuperscript{353} Minutes of Meeting of Advisory Committee on Civil Rules (Nov. 29–Dec. 1, 1990), \textit{in WORKING PAPERS}, supra note 52, at 162; see also Minutes of Meeting of Advisory Committee on Civil Rules (Oct. 21–23, 1993), \textit{in WORKING PAPERS}, supra note 52, at 174–75.
\item \textsuperscript{355} See Coffee, supra note 341, at 645.
\item \textsuperscript{357} See Saundra Torry, \textit{Breast Implant Settlement Fund Sparks a Scramble}, \textit{WASH. POST}, Apr. 4, 1994, at 7; see also \textit{In Camera}, 16 \textit{CLASS ACTION REP.} 269, 354 (1993).
\end{itemize}
\end{footnotesize}
efficiency and distributional equity. 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. Also, payouts determined by individuals’ race to judgment might leave “later plaintiffs . . . without practical means of redress” as the defendants’ funds ran dry. Chief Judge Jack Weinstein similarly based his decision to certify the Agent Orange class in part on a distributional concern. 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. Concern for judicial resources and delayed, inequitable compensation for victims likewise fueled a class action strategy to resolve the asbestos quagmire.

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; indeed, the prospect prompted opposition to the 1966 amendments to Rule 23. 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, 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. The settlement troubled critics not because class members got ripped off but because the agency supposedly used litigation to “circumvent[...]

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360. Id.
362. Id. at 728.
363. See generally Marcus, supra note 301.
365. Marcus, Storm, supra note 3, at 605.
366. 661 F.2d 655 (7th Cir. 1981).
This effort to “achieve[s] social and political change through the judicial process” 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. Plaintiffs’ lawyers with already-filed asbestos cases refused a deal that would have swept their clients into a single class action. 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. 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.

**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. A New York Times op-ed in 1985 castigated “[c]lass-action shakedowns,” citing litigation against “the morning sickness drug Bendectin” as an example, despite the fact that Bendectin’s manufacturer had actually filed the class-certification motion. 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, apparently oblivious to the fact

369. Id.
371. See Marcus, supra note 301.
373. COFFEE, supra note 117, at 14–16.
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.

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).
385. Id. at 731.
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

388. *See id.; see also* Telephone Interview with Brian Wolfman, Dir., Appellate Courts Immersion Clinic, Georgetown Univ. Law Ctr. (Apr. 14, 2016).
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).
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. 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.” 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. 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. Dan Quayle’s Council on Competitiveness ignored the class action entirely in its set of twenty-two reforms offered to improve American civil justice. But the emphasis changed in the early 1990s. 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. These new

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395. Crovitz, supra note 150, at 74–76.
396. Carruth, supra note 153, at 65.
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

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).
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. In 1987, a securities fraud case settled for $440 million; a settlement struck in 1988 exceeded this sum, then a record for class actions, by $260 million. With this uptick came considerable attention, particularly as the arriviste Milberg Weiss replaced the Pomerantz firm as the top dog. 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. Increased market volatility in the 1980s and a surge in initial public offerings 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.

2. Auditor Liability

Accounting firms audit companies’ financial statements in connection with a number of transactions, producing reports for various audiences that include shareholders. 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. This doctrine began to fracture in the 1960s, just as the

417. COFFEE, supra note 117, at 69–70.
modern class action emerged, and by the end of the decade accountants began to face liability under the securities laws.

By the mid-1980s, the accounting industry had begun to complain that the litigation explosion was engulfing its members. Firms did face higher litigation exposure by the early 1980s. Turns in the business cycle and a weakening of norms of audit professionalism within firms 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.

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. The S&L crisis of the 1980s hit auditors hard, a factor that surely helped fuel the precipitous escalation of firms’ liability risk. S&L institutions were required to have an independent audit performed every year to help federal regulators determine if they were managed properly. S&L deregulation in the early 1980s led to risky and even fraudulent business behavior, which auditors failed to document or account for. S&L bankruptcies left accounting firms as the remaining deep pockets. Charles Keating and his Lincoln Savings & Loan, perhaps the decade’s most notorious collapse, produced more than $100 million in

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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


438. COFFE, supra note 117, at 66.


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.


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


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


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

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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

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


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


459. Telephone Interview with Hon. Mark Gitenstein, supra note 76.
plaintiffs received little of the proceeds of settlements the firms funded.\footnote{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.\footnote{461} Similarly, Vincent O’Brien argued in the \textit{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.\footnote{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.\footnote{463}

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

By October 1991, however, the accountants had flipped an effort to liberalize securities fraud litigation into a four-year campaign for reform.\footnote{468} The Big Six’s initial goal was simply to slow down or stop the \textit{Lampf}-repealer legislation.\footnote{469} But from the outset the firms steered congressional attention to what they believed were fundamental flaws with securities class actions.\footnote{470} At the first hearing on \textit{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.”\footnote{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.\footnote{472}

460. \textit{Id.}
463. Telephone Interview with Hon. Mark Gitenstein, supra note 76.
465. \textit{Id.} at 361.
466. Telephone Interview with Jonathan W. Cuneo, supra note 456.
468. \textit{Id.}
469. Telephone Interview with Hon. Mark Gitenstein, supra note 76.
470. \textit{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. \textit{Id.} at 153 (statement of Harvey L. Pitt).
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. 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.

2. The Campaign for Reform

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

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, 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).

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. The litigation explosion gave reformers a counterargument, one that helped them redefine the issues.

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.
477. Telephone Interview with Jonathan W. Cuneo, supra note 456.
478. Telephone Interview with Hon. Mark Gitenstein, supra note 76.
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

483. Id. at 35, 37.
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.
litigation with an oft-told “atrocity story” of “[p]redatory plaintiffs’ lawyers routinely [f]iling suit when a public company’s stock declines” and “lob[bing] barrages of computer-generated pleadings” at innocent defendants. With litigation expenses mounting, defendants settle regardless of the underlying merits, a result that undercuts any regulatory value these cases would otherwise promise.

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. 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.” 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. Firms in the early 1990s alleged the same effect and blamed a surge in securities fraud litigation. Representatives of high-technology companies likewise insisted that securities fraud litigation “threaten[ed]” its industry’s “competitiveness.”

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. The Big Six faced dramatically rising insurance costs, the head of AICPA insisted, consuming 9 percent of audit revenue by 1991. Supporters of the status quo insisted that the figure was closer to 1.6 percent. Plaintiffs filed over 600 securities class actions between 1990 and

495. Hearings on Securities Litigation Reform, supra note 443, at 466 (statement of Marc E. Lackritz, President, Securities Industry Association).
498. Minow, supra note 426, at 79.
501. Galanter, supra note 492, at 733.
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.\textsuperscript{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.\textsuperscript{506} Reformers claimed that “virtually all cases . . . settled,” regardless of merit.\textsuperscript{507} Opponents asserted that courts dismissed 40 percent of cases brought against the Big Six at the pleading stage.\textsuperscript{508} Plaintiffs sued “anytime” a stock price fell by 10 percent.\textsuperscript{509} Opponents claimed that such stock drops prompted litigation much less frequently.\textsuperscript{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.\textsuperscript{511}

Finally, reformers made ample use of “global characterizations.”\textsuperscript{512} Litigation against accountants was “out of control.”\textsuperscript{513} “Everybody gets sued,” Tauzin complained,\textsuperscript{514} insisting that “poison is in the well and we ought to get it out.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{518} But CEASS totally outgunned the plaintiffs’ lawyers, exceeding NASCAT’s

\textsuperscript{505.} \textit{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.


\textsuperscript{507.} \textit{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.

\textsuperscript{508.} \textit{Hearings on Securities Litigation Reform}, supra note 443, at 80 (statement of Joel Seligman).

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

\textsuperscript{510.} \textit{Hearings on Securities Litigation Reform}, supra note 443, at 91 (statement of John C. Coffee, Jr.).


\textsuperscript{512.} Galanter, supra note 492, at 726.

\textsuperscript{513.} Michael J. Cook et al., supra note 401, at 74.

\textsuperscript{514.} \textit{Hearings on Securities Litigation Reform}, supra note 443, at 8 (statement of Rep. Tauzin).

\textsuperscript{515.} Id. at 49.

\textsuperscript{516.} \textit{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).

\textsuperscript{517.} Telephone Interview with Hon. Mark Gitenstein, supra note 76.

\textsuperscript{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

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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.
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:

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).
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 lawyers . . . .

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.

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.
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.