
ARTICLE

JACOBIANS AT JUSTICE: THE (FAILED) CLASS ACTION REVOLUTION OF 1978 AND THE PUZZLE OF AMERICAN PROCEDURAL POLITICAL ECONOMY

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In 1978, top DOJ officials in the Carter Administration floated a revolutionary proposal that would have remade the consumer class action and, with it, the relationship of litigation and administration in the American regulatory state. At the proposal's core was a "public action" for widespread small-damages claims that sought to replace Rule 23 with a hybrid public-private enforcement model. Similar to the False Claims Act, this new mechanism would have granted private plaintiffs the power to bring lawsuits on behalf of the United States and recover a finder's fee if successful, but it also gave the DOJ substantial screening authority and control over such actions, including the ability to take over suits or dismiss them outright. Despite months of shuttle diplomacy among interest groups, a pair of bills in Congress, and full-scale committee hearings, this creative blend of private initiative and public oversight soon fizzled. Yet the story of the proposal's rise and fall nonetheless provides a venue for wider reflection about American civil procedure and the political economy that produces it. Indeed, the failed revolution of 1978 reveals a contingent moment when the American litigation system was splintering into the pluralistic, chaotic one we now take for granted, including hard-charging state attorneys general, a federal administrative state with litigation authority independent of the DOJ, and a sophisticated and politically potent plaintiffs' bar. In retrospect, the proposal may have been the last best chance to counter the centrifugal tendencies of an American state that was progressively empowering ever more institutional actors within the litigation system. Just as important, lurking in the background of the story of 1978 is the bracing

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possibility that the Rules Enabling Act, for all its virtues in revising technocratic procedural rules, has systematically enervated efforts to address larger procedural design questions in an increasingly dense and interconnected regulatory world.

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INTRODUCTION

“No man is an Iland, intire of it selfe; every man is a peece of the Continent, a part of the maine”¹ So began, with a Donne-ian flourish, Kalven and Rosenfield’s iconic 1941 article on the future of the “class suit.”² The article is rightly celebrated for the clarity of its vision and—written at the height of the New Deal—the zeitgeist-bucking power of its claim that FDR’s alphabet soup of agencies was ill-equipped to achieve sound administration of justice on its own.³ Rather, private civil enforcement—and, in particular, the “class suit”—should and would play a central role going forward. But lost in the celebrations of their prescience is a less noted contribution: Kalven and Rosenfield quietly indulged, and thus helped to cement, a presumption about the relationship between litigation and administration that has channeled, and distorted, our thinking about class actions and civil procedure more generally ever since. “The best solution,” they wrote, “is to draw upon both systems of enforcement, permitting both to develop side by side to check and complement each other.”⁴ Litigation and administration should, on this view, operate and evolve as parallel, separate means of civil law enforcement, serving as institutional rivals—not partners—in

¹ JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS 98 (John Sparrow ed., Cambridge Univ. Press 1923) (1624).

² Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 684 (1941).

³ See *id.* at 686-88 (arguing that an enforcement method was necessary to alleviate group wrongs beyond joinder or administrative enforcement); Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 603 (2008) (noting that the article is “one of the most cited in the annals of . . . class action scholarship”).

⁴ Kalven & Rosenfield, *supra* note 2, at 721.

ambition-checking equilibrium.⁵ Contrary to the Donne-ian verse that headed their article, agency regulation and the “class suit” should thus very much remain separate islands—part of a broader regulatory archipelago for sure, but islands nonetheless.

This presumption is now found virtually everywhere in debate about the role of litigation in the American regulatory state.⁶ It sits just below the surface in disputes about whether litigation and regulation function as substitutes or complements.⁷ It is implicit in a venerable law and economics literature that paints a stylized contrast between regulation and litigation and also between public and private enforcement, and argues for selective use of one over the other.⁸ It undergirds the deeper notion, sketched best by Sean Farhang, that private civil enforcement constitutes its own “litigation state” and is a distinct and deliberate form of state regulatory power.⁹ And, within the American legal tradition more generally, the “parallel” presumption both reflects and feeds a pervasive “institutional Diceyism,” as Daniel Ernest has put it,¹⁰ that courts and agencies follow different institutional logics and that only the courts or court-like procedures can achieve “rule of law” or safeguard due process against political incursions.¹¹

Not everyone buys in. A few scholars have argued that the better course is to combine litigation and administration in creative ways to produce a conjoined, not parallel, approach. The late Richard Nagareda proposed a

⁵ Cf. THE FEDERALIST No. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008) (“Ambition must be made to counteract ambition.”).

⁶ See Nagareda, *supra* note 3, at 648 (“The period since Kalven and Rosenfield’s 1941 Article has witnessed the elaboration in practice of the class action in parallel with the administrative state.”).

⁷ See, e.g., Eric Helland & Jonathan Klick, *Regulation and Litigation: Complements or Substitutes?*, in THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 118, 118-34 (F.H. Buckley ed., 2013) (using data from insurance class actions to test if class action litigation is a substitute for regulation); Eric Helland & Jonathan Klick, *The Tradeoffs Between Regulation and Litigation: Evidence from Insurance Class Actions*, 1 J. TORT L., no. 3, 2007, at 1, 1 (“Class actions function in a way similar to regulation. What is unclear is how the two systems fit together.”).

⁸ See generally, e.g., ANDREI SHLEIFER, THE FAILURE OF JUDGES AND THE RISE OF REGULATORS (2012); REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW (Daniel P. Kessler ed., 2011); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980). But see A. Mitchell Polinsky & Steven Shavell, *Public Enforcement of Law*, in CRIMINAL LAW AND ECONOMICS 1, 55 (Nuno Garoupa ed., 2009) (suggesting that institutional blends might be better).

⁹ See generally SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010).

¹⁰ Daniel R. Ernst, *The Politics of Administrative Law: New York’s Anti-Bureaucracy Clause and the O’Brian–Wagner Campaign of 1938*, 27 L. & HIST. REV. 331, 334 (2009).

¹¹ See DANIEL R. ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 30-33 (2014) (discussing Dicey’s influential theories on the rule of law).

regime for resolving mass torts litigation in which an administrative agency would wield what amounted to negotiated-rulemaking powers.¹² And a number of other scholars have proposed variants of agency “gatekeeping” whereby public agencies would be vested with the power to manage private litigation efforts, including the ability to take over control of particular lawsuits or dismiss them outright.¹³ Even Congress has, on occasion, entertained more innovative institutional blends: The Fair Labor Standards Act, the False Claims Act, and the “citizen suit” provisions that pervade federal environmental law all represent, to varying degrees, hybrid public–private frameworks.¹⁴ But these are rare exceptions. Indeed, looking out over our most consequential regulatory regimes and the debates that surround them, it is no stretch to say that litigation and administration have spent the decades since Kalven and Rosenfield first addressed the issue marooned on separate islands, while alternative institutional visions have remained hidden coves, tucked away from the swirling currents and crashing waves of criticism and reform.

All of this presents a puzzle: Why, given the ready availability of alternative visions, has the parallel/island approach won out? And, to pose the question from the other direction, why has a conjoined—or blended, or hybrid—approach not gained more traction?

One could start to search for answers by invoking some of the usual explanations for why American litigation and procedure look this way. Among these are the unique American embrace of due process and the silo-ed, “day in court” ideal that extends from it;¹⁵ an American rights tradition that produces

¹² See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 220-22 (2007) (describing a system in which “agencies may draw on recent experience with negotiated rulemaking, along with competition within the mass tort plaintiffs’ bar, to facilitate the design of” global settlements).

¹³ See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *YALE L.J.* 616, 620 nn.5-6 (2013) (detailing other entries in this literature); Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission’s Authority*, 107 *HARV. L. REV.* 961, 976-1006 (1994) (arguing that the SEC has the authority to “disimply” a private right of action under Section 10(b) and Rule 10b5 of the Securities and Exchange Act of 1934); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 *COLUM. L. REV.* 1301, 1354-58 (2008) (discussing the benefits of giving the SEC the authority to prescreen Rule 10b-5 class action complaints); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *VA. L. REV.* 93, 95 (2005) (“Congress’s best course of action often will be delegation to the appropriate executive department or agency of the power to create and delimit private rights of action.”).

¹⁴ See Engstrom, *supra* note 13, at 646 tbl. 2 and accompanying discussion.

¹⁵ See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (noting “our deep-rooted historic tradition that everyone should have his own day in court” (internal quotation marks omitted)); see also ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 47 (2001) (noting that adversarial legalism helped spur the development of due process norms); AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877* 6-8 (2017) (discussing the historical development of adversarial process within the American legal system); 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL*

a dread of all government, but especially the bureaucratic variety;¹⁶ and a separation-of-powers constitutional structure that provides potent incentives for strategic legislators to channel exclusive regulatory power to the courts.¹⁷ This brief essay, however, seeks a more concrete source of insight by focusing in on a relatively recent but mostly forgotten episode in the history of the American class action.¹⁸ In 1978, in the lull between the 1966 revisions to Rule 23 and the class action wars of the 1980s and 90s, Congress considered a proposal from the now-defunct Office for Improvements in the Administration of Justice (OIAJ), a “think tank” created within the Carter Administration Justice Department (DOJ) that offered a radical reinterpretation of the class action lawsuit.¹⁹ At the proposal’s core was a “public action” for “widespread small claims” situations that would have replaced much of Rule 23 with a hybrid public–private enforcement model—similar to the False Claims Act—that granted the DOJ substantial control over privately initiated lawsuits and allowed successful “relators” to earn a finder’s fee for their efforts.²⁰

Despite months of shuttle diplomacy among key interest groups, bills in the ninety-fifth and ninety-sixth Congresses, and full-scale committee hearings, this revolutionary “blend of private initiative with [] public responsibility,”²¹ as one of the proposal’s progenitors described the design,

PRACTICE AND PROCEDURE § 4449 (2d ed. 1987) (explaining that preclusion usually does not apply without a day in court).

¹⁶ See JAMES A. MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* 1–9 (1990) (“Americans fear public power as a threat to liberty.”).

¹⁷ See FARHANG, *supra* note 9, at 3 (arguing that the legislative choice between private litigation and administrative enforcement is a strategic one).

¹⁸ At the time, the proposal drew substantial law review commentary. For discussion of the proposal to repeal Rule 23(b) and replace it with the proposed reinterpretation of the Office for Improvements in the Administration of Justice, see, e.g., Stephen Berry, *Ending Substance’s Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 321 (1980); John E. Kennedy, *Federal Class Actions: A Need for Legislative Reform*, 32 SW. L.J. 1209, 1212–16 (1979); George B. Mickum, III & Carol A. Rhees, *Federal Class Action Reform: A Response to the Proposed Legislation*, 69 KY. L.J. 799, 824–26 (1980); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 HARV. L. REV. 664, 684–93 (1979); Patricia L. Wells, Note, *Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal*, 16 HARV. J. ON LEGIS. 543 (1979). More recent scholarly efforts have mentioned the proposal only in passing. See, e.g., Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171, 180–81 (2016); David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 620–22 (2013); Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849, 861–62 (2007).

¹⁹ Nadine Cohodas, *“Think Tank” in Justice Dept. Earns Respect from Members, But Wins Passage of Few Bills*, 38 CONG. Q. 1049, 1049–51 (1980).

²⁰ *Reform of Class Action Litigation Procedures: Hearings on S. 3475 Before the Subcomm. on Judicial Mach. of the S. Comm. on the Judiciary*, 95th Cong. 22–26 (1978) (statement of Hon. Griffin B. Bell, Att’y Gen. of the United States and Daniel J. Meador, Assistant Att’y Gen. of the United States) [hereinafter *Hearings*] (explaining the “public action” and the “class compensatory action”).

²¹ See *id.* at 12.

soon fizzled. The episode could thus be dismissed as merely a blip in the long and colorful history of the class action. But it was also one of those hinge moments when a range of evolutionary paths seemed open and, crucially, when key features of the modern-day American litigation landscape we now take for granted—active and powerful state attorneys general, federal agencies with litigation authority independent of the DOJ, and a well-heeled and specialized plaintiffs’ bar—were still largely in their embryonic stages. Looking back, the Justice Department officials who floated the proposal and then fought to will it into existence were procedural Jacobins, seeking the radical overthrow of a rapidly solidifying establishment order of things.²² Their failure to carry the day was a decisive episode—the last best chance to shift Kalven and Rosenfield’s “parallel” paradigm. No telling of the history of Rule 23 and the American class action is complete without it.

But, recovering the failed revolution of 1978 offers more than just an opportunity to recount a pivotal moment in class action history, for the revolutionaries inside the DOJ were not merely seeking a one-off change to the class action rules. They also sought to counter what they saw as an increasingly narrow rulemaking process and growing polyphony within the American regulatory state by bringing the executive branch more firmly into the picture and giving the DOJ in particular a central role in judicial administration. Viewed through this lens, the episode invites wider reflection and highlights the need for an institutional turn in our thinking about American civil procedure and the political economy that produces it. With the “class suit” a continuing subject of debate within the Advisory Committee, Congress, and elsewhere,²³ the failure of 1978 serves as a reminder that alternative visions—including the kinds of institutional blends embodied by the DOJ proposal—are available and might just be the optimal

²² Calling Meador and his team “Jacobins” is, of course, something of a historical finesse. As I set forth in more detail below, the term fits in the sense that the Jacobins sought to centralize state—especially executive—power during the French Revolution in a manner akin to Meador’s effort to centralize administrative authority over damages class actions. In addition, the Jacobins sought to rid France of the *ancien régime* in a manner akin to Meador’s effort to push back against a fast-emerging “establishment order” of interests within the American litigation state. And yet, it is worth noting that the Jacobins were the most radical revolutionaries and were responsible for The Terror of 1793–94. In that sense, the use of the term jars in light of Meador’s self-conscious effort to chart a middle course between the radical options of full litigant autonomy on the one hand and shutting down class actions entirely on the other. See WILLIAM DOYLE, *THE OXFORD HISTORY OF THE FRENCH REVOLUTION 189-420* (1989).

²³ For instance, the Committee’s most recent proposed amendments to Rule 23 were approved by the Committee on Rules of Practice and Procedure (the “Standing Committee”) on June 17, 2017 and are currently pending review by the Judicial Conference. Assuming approval by the Conference and then the Supreme Court (and also no override by Congress), the new version of the rules will become effective December 1, 2018. *Pending Rules and Forms Amendments*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> [<https://perma.cc/5HNG-A4DB>].

approach. More generally, the episode suggests that civil procedure scholars should adopt a wider angle of vision than they typically have and develop a richer and more institutionally focused account of American procedural political economy that looks beyond the output of the rulemaking process prescribed by the Rules Enabling Act. Indeed, lurking in the background of the story of 1978 is the bracing possibility that the Enabling Act, for all its virtues in revising technocratic rules governing service of process, electronic discovery, and the like, has been a systematically enervating force when it comes to addressing larger procedural design questions in an increasingly dense and interconnected regulatory world.

I. MAN ON THE BARRICADES

From the start, Daniel Meador was a juggernaut. Within only weeks of his arrival at the DOJ from a faculty position at the University of Virginia School of Law, Meador had mapped out a “two-year program” listing no fewer than eighteen aspects of the judicial system in urgent need of reform, from revisions to pretrial and appellate procedures and an increase in the jurisdiction of magistrates to the promulgation of criminal sentencing guidelines and the creation of “alternatives to class actions as remedies for mass wrongs.”²⁴ Meador was also in a unique—and, for a legal academic, downright dreamy—position to see them through. Tapped by Attorney General Griffin Bell to head up the Justice Department’s newly formed Office for the Improvement of the Administration of Justice (OIAJ)²⁵, Meador suddenly found himself with organizational leverage—including a staff of thirty lawyers, economists, sociologists, and administrative support²⁶—and the frequent ear of the Attorney General to pursue a wide range of law reform measures.

²⁴ Office for Improvements in the Admin. of Justice, A Program for Improvements in the Administration of Justice 1-2 (May 9, 1977), in the Papers of Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, 1977–79 (on file at the University of Virginia Law Library, Special Collections, MSS 82-3b, Box 3) [hereinafter Meador Papers]; Office for Improvements in the Admin. of Justice, A Two-Year Program for Improvements in the Administration of Justice 1-5 (May 9, 1977) (on file at Meador Papers, MSS 82-3b, Box 3). For more on Meador’s nomination, see Press Release, Dep’t of Justice (Feb. 11, 1977) (on file at Meador Papers, MSS 82-3b, Box 5, Folder: “News Clippings Re: DJM 1977”).

²⁵ Anthony Marro, *Assistants Picked by Bell Praised by Critics of His Own Nomination*, N.Y. TIMES, Feb. 7, 1977, at C26 (“[Bell’s] candidate to head a newly created division for the administration of justice is Daniel J. Meador.”).

²⁶ See Memorandum from Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, to Griffin Bell, Att’y Gen., U.S. Dep’t of Justice, Office for Improvements in the Admin. of Justice 11 (Feb. 22, 1977) (on file at Meador Papers, *supra* note 24, MSS 82-3b, Box 3, Folder: “General Memoranda, 1976–1978”) (stating “the location of the Office under the Attorney General provides him with a ready means of marshalling a distinctive aggregation of professions and minds to meet unexpected difficulties”).

But Meador was driven to give up a comfortable academic life by a more deeply felt—and non-programmatic—set of beliefs. Even as he lost his eyesight because of a rare retinal condition,²⁷ Meador served as the unofficial leader of a cohort of DOJ officials who articulated a sharply drawn vision of the proper role of the executive branch, and the DOJ in particular, in the administration of justice. Two premises underpinned their view. One was the importance of institutional perspective. The “American justice system,” Meador wrote in an unusual long-form memo to Attorney General Bell, is “a large, complex, interrelated collection of agencies, officials, and private professionals.”²⁸ While the justice system’s “centerpiece” was plainly the courts, judges lacked the will and capacity, given their narrow focus on deciding cases, to engage in meaningful “law reform” activities.²⁹ Instead, it was the executive branch—and, more specifically, the DOJ—that was best positioned “to see the problems of our justice system from a broad perspective” and to corral an increasingly sprawling cast of public and private actors, from federal and state prosecutors and agency administrators to the plaintiffs’ bar and a growing corps of arbitrators and mediators.³⁰ The Justice Department could serve, he would later write, as “a unique bridge” and the sole institution within the federal government capable of “cutting across lines that otherwise are sharply defined by the separation of powers.”³¹

The second premise was that, to serve this bridge function, the DOJ would require extensive restructuring. Some proposals sought to insert the DOJ more fully into judicial administration via new interbranch arrangements. A perennial idea was the establishment of a Federal Judicial Council to oversee the courts, composed of the Chief Justice, an Article III judge appointed by the Judicial Conference, the Attorney General, the Vice President, and the chairpersons of the House and Senate Judiciary Committees.³² Other reforms would have paved the way for a central DOJ

²⁷ Ronald J. Ostrow, *Loss of Sight Doesn't Stop Assistant Attorney General*, L.A. TIMES, Nov. 26, 1977, at I7.

²⁸ Memorandum from Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, to Griffin Bell, Att’y Gen., U.S. Dep’t of Justice, The Office for Improvements in the Admin. of Justice and the Federal Justice Research Program—Their Role and Future in the Department of Justice 2 (Jan. 17, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3b, Box 3, Folder: “General Memoranda, 1976–1978”) (internal quotation marks omitted).

²⁹ *Id.* at 2, 5.

³⁰ *Id.* at 1.

³¹ Daniel J. Meador, *Role of the Justice Department in Maintaining an Effective Judiciary*, ANNALS AM. ACAD. OF POL. & SOC. SCI., Jul. 1982, at 136, 137.

³² See Memorandum from Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, to Griffin B. Bell, Att’y Gen., U.S. Dep’t of Justice, Creation of a Federal Justice Council 1 (July 18, 1977) in the Subject Files of Griffin B. Bell, Att’y Gen., U.S. Dep’t of Justice, 1977–1979 (on file at the National Archives, RG60 (“General Records of the Department of Justice”), Box 92, Folder:

role in judicial administration by splitting the DOJ in two, with a politically insulated Attorney General to serve as “chief legal officer” and a separate Secretary of Justice—not unlike European Ministers of Justice—to perform all other non-lawyering administrative and political duties, including overseeing the Department’s newly expanded policy-analytic capacities.³³ Still other proposals at the time were more pedestrian: The DOJ could only use its superior institutional position to improve the administration of justice if it possessed “centralized litigation control.”³⁴ Of particular concern were growing congressional grants of independent litigation authority to federal agencies, with some twenty-six of them (and counting) now conducting their own litigation under statutory provisions providing for exclusive or concurrent litigation authority.³⁵ The situation, Bell himself noted in a speech, was “rapidly becoming chaotic,” with “individual [congressional] committees pushing out legislation to give their favored agencies some degree of independence from the Attorney General’s control.”³⁶

“Federal Justice Council”) [hereinafter Griffin Files], describing the suggested composition of the proposed Federal Justice Council.

³³ See Memorandum from J. Michael Kelly, Counselor to Att’y Gen., U.S. Dep’t of Justice, to Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, Improving the Role of the Attorney General as Counselor and Litigator 11-13, 19-25 (June 12, 1979) (on file at Griffin Files, *supra* note 32, Box 121, Folder: “Office for Improvements & Adm. of Jus.”); Memorandum from Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, to Draft Thoughts File, Role of the Attorney General 4-5 (Aug. 4, 1978) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 5) (discussing the dual role of the Attorney General and the inability to complete both without conflicts of time or substance). On European models of judicial administration, see JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW 50-51, 112-13 (2006), describing judicial management in France and Germany, respectively. For an account of the differing roles of the U.S. and U.K. attorneys general at the time, see generally Robert Kramer & Nathan Siegel, *The Attorney General of England and the Attorney General of the United States*, 1960 DUKE L.J. 524 (1960). For an updated account of the U.K. system, see generally Kate Malleon, *Judicial Reform: The Emergence of the Third Branch of Government*, in REINVENTING BRITAIN: CONSTITUTIONAL CHANGE UNDER NEW LABOR 133 (Andrew McDonald ed., 2007). As a final note, Meador was not writing on a blank slate in advocating for an American Ministry of Justice. As far back as 1921, then-Judge Cardozo had made a similar call to create a Ministry of Justice in order to mediate between Congress and the courts, which were otherwise prone to move in “proud and silent isolation.” Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).

³⁴ See Memorandum from Terrence B. Adamson, Special Assistant to Att’y Gen., U.S. Dep’t of Justice, to Michael Egan, Assoc. Att’y Gen., U.S. Dep’t of Justice, et al., 8 (Sept. 29, 1977) (on file at Griffin Files, *supra* note 32, Box 85, Folder: “Litigating Authority”).

³⁵ *Id.* at 5.

³⁶ *Id.* at 7. Note that this language is drawn from a draft speech, the final version of which is not part of the archival record. But Bell made a full-length version of the argument that regulatory agencies should not enjoy independent litigation authority in a lecture at Fordham Law School in March 1978 that was subsequently published in full. Griffin B. Bell, *The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049 (1978). In it, Bell criticized Congress for making “grants of separate litigating authority” and pointedly concluded that he did “not favor the independence of these regulatory agencies...in legal matters.” *Id.* at 1057-58.

If Meador and his comrades were ambitiously seeking to remake the litigation system and the DOJ's role in it, then his decision that OIAJ would give "top priority"³⁷ to overhauling the class-action system was perhaps his boldest move of all. Meador was hardly alone in his view that the class action system was foremost among the parts of the justice system requiring attention. Early rumblings came just a few years after the 1966 amendments to Rule 23 went into effect when three influential national bar organizations issued highly critical reports.³⁸ Anxieties continued to rise in the business and academic press.³⁹ But soon alarm bells began to ring out from the bench, including no less an eminence than Judge Henry Friendly, who argued in 1973 that the system needed "urgent attention."⁴⁰ By the time Meador arrived at OIAJ in 1977, a crisis mentality had taken over. An April 1977 survey administered by the Advisory Committee—which had begun to consider revisions to Rule 23—found that a majority of federal judges thought that the

³⁷ See Memorandum from Daniel J. Meador, Assistant Att'y Gen., U.S. Dep't of Justice, to Griffin B. Bell, Att'y Gen., U.S. Dep't of Justice, Class Actions (Apr. 18, 1977) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7).

³⁸ See SPECIAL COMM. ON CONSUMER LEGISLATION, RECOMMENDATIONS OF THE SECTION OF ANTITRUST LAW TO THE AMERICAN BAR ASSOCIATION ON CONSUMER PROTECTION LEGISLATION (1970 unofficial); AM. COLL. OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1972); SECTION OF CORP., BANKING, AND BUS. LAW OF THE AM. BAR ASS'N, RECOMMENDATION REGARDING CONSUMER CLASS ACTIONS FOR MONETARY RELIEF, 29 BUS. LAW. 957 (1974).

³⁹ For the business press, see, e.g., *The Chilling Impact of Litigation*, BUSINESSWEEK, June 6, 1977, at 58, 62, which describes the class action as the "principal 'villain' in the rise of litigiousness"; see also Eleanor Carruth, *The "Legal Explosion" Has Left Business Shell-Shocked*, FORTUNE, Apr. 1973, at 65, 66 (discussing the increased legal exposure as a result of the 1966 amendments that allegedly drove corporations to hysteria). For academic misgivings, see, e.g., Benjamin S. DuVal, Jr., *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 1 AM. BAR FOUND. RES. J. 1273, 1273 (1976), discussing the increased burdensomeness of antitrust class actions compared to nonclass antitrust cases; see also Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 5 (1971) ("The procedural innovation which has had the most dramatic repercussions has been the 1966 amendment of the class action provisions of Rule 23 of the Federal Rules of Civil Procedure."); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1323 (1976) (noting "the result of the rulemakers' [of the 1966 amendments] efforts is a hodgepodge of pragmatic and occasionally conflicting objectives"); Bruce I. Bertelsen et al., Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1123 (1974) (noting "[t]he class action device is the object of a controversy that has mushroomed since the 1966 amendment of rule 23"); Jerrold B. Reilly, Comment, *Mass Compensatory Relief: The Inadequacy of the Class Action & the Need for Procedural Alternatives*, 24 SYRACUSE L. REV. 1341, 1359 (1973) (stating the "b(3) class action provision [is] one of the most controversial in the Federal Rules").

⁴⁰ HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

steady growth of class action filings was causing serious problems.⁴¹ Even Congress had begun to stir on the issue.⁴²

But class action reform was also a dangerous place to start, for the class action device sat squarely at the center of a much broader and deeply divisive debate about the evolving American litigation system. A crystallizing moment came in 1976 when the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (dubbed the “Pound Conference” as a self-conscious sequel to Roscoe Pound’s iconic 1906 speech to the American Bar Association by the same title) was convened.⁴³ Class actions, the conference proceedings made plain, were really just one piece of a rapidly coalescing concern about litigation costs, access to justice, and the role of lawsuits in an American regulatory state that increasingly relied on court- and litigation-centered enforcement. Given the class action’s visceral centrality to that debate, Meador would soon realize that its reform was “the most difficult and substantial project we have tackled.”⁴⁴

II. A REVOLUTIONARY PROPOSAL

The draft class action bill that OIAJ circulated to 1,000 members of the bench and bar in December 1977 after a year of intensive analysis and interest group work reflected Meador’s view that, given the political realities, it was better to “revamp [the] procedure in a comprehensive way, not by piecemeal pruning here and there.”⁴⁵ Consistent with that view, the proposal repealed

⁴¹ See *Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules*, reprinted in 5 CLASS ACTION REP. 1, 1-19 (1978). For a description of class action growth during this time, see ADMIN. OFFICE OF THE U.S. COURTS, SEMI-ANNUAL REPORT OF THE DIRECTOR 35 (1974) (reporting that, as of the end of 1973, some 4,622 class actions were pending, accounting for some 4.4 percent of civil cases in the federal system); ADMIN. OFFICE OF THE U.S. COURTS, SEMI-ANNUAL REPORT OF THE DIRECTOR 119-124 (1976) (noting seventeen percent growth in class action filings, alongside only eleven percent growth in civil filings).

⁴² See STAFF OF S. COMM. ON COMMERCE, 92D CONG., STAFF REVIEW OF CLASS ACTION LEGISLATION (Comm. Print 1972) (creating the first empirical study of class action litigation).

⁴³ See Addresses Presented at the Pound Conference, *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Volume 1*, NAT’L CTR. FOR STATE COURTS, <http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1245> [<https://perma.cc/28GW-ZCHE>] (discussing progress that led to the 1976 state of administration of justice and goals that had yet to be reached).

⁴⁴ See Memorandum from Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, to Griffin B. Bell, Att’y Gen., U.S. Dep’t of Justice, Class Action Bill (May 30, 1978) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7).

⁴⁵ *Hearings*, *supra* note 20, at 8. The best overview of the various stages of the process is Berry, *supra* note 18, at 322 n.155. It began with the circulation of a “discussion memorandum” to legal analysts, commentators, judges and practicing attorneys, who were then summoned to Washington to comment. This was done in more than thirty consultative sessions. *Id.* The results of these sessions were then combined with those of an Advisory Committee survey circulated to 1,800 judges, practitioners, and law professors, leading to the circulation of 1,000 copies of the draft bill in December 1977 draft. *Id.* That draft then underwent substantial revisions prior to the submission of

in their entirety Rule 23(b)(3)'s provisions for damages class actions and replaced them with two distinct statutory procedures: a novel public "penalty action" focused on deterring conduct in situations where a large number of people suffered injury in relatively small individual amounts; and a "class compensatory action" for the "money cases,"⁴⁶ as some called them, that provided a revamped class remedy to compensate individuals who had suffered more substantial economic injuries.⁴⁷

The first, "public action" side of the regime, was the more radical of the two. It vested a single, exclusive claim in the United States for recovery of damages or excess profits resulting from a statutory violation, subject to two limitations. First, public actions were limited to claims under federal commercial laws targeting "conduct in the manufacture, rental, distribution, or sale of realty, goods or services, including securities."⁴⁸ This included, above all, the federal antitrust and securities laws, but also at least seventy other provisions of the federal code, such as the recently enacted Truth in Lending Act.⁴⁹ However, claims relating to "wages, hours, other terms or conditions of employment or discrimination in employment" were specifically excluded.⁵⁰ Second, a "public action" could lie only where at least 200 or more persons suffered damages in an amount less than \$300 each.⁵¹ Because no such claim was independently marketable and any individual payout was likely to be small, the public action's principal goals were "to prevent unjust enrichment" and "deter others from similar conduct."⁵² Compensation would be a "secondary purpose."⁵³

S. 3475 in August 1978. See *Hearings*, *supra* note 20, at 21. As noted below, after the 95th Congress ended, a new draft proposal was incorporated into H.R. 5103, the Small Business Judicial Access Act, and submitted to the 96th Congress. Berry, *supra* note 18, at 322 n.155.

⁴⁶ *Hearings*, *supra* note 20, at 2, 4-5.

⁴⁷ See Office for the Improvement in the Admin. of Justice, U.S. Dep't of Justice, *Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury: Summary of Draft Proposal* (Dec. 1, 1977) (on file at Meador Papers, *supra* note 24, MSS 82-3b, Box 9, Folder: "General Background Memoranda Regarding Class Actions 1977") (describing the statutory proposal that creates a procedure "to compensate individuals, through a class remedy, for their substantial economic injuries").

⁴⁸ S. 3475, 95th Cong. § 3001(a) (1978).

⁴⁹ See Office of Mgmt. & Budget, *Clearance Binder* app. B, tbl. I: Illustrative Federal Statutes Forming the Basis for the Public Action (June 1978) in the Subject Files of the Assistant Attorney General, Drew Days III, 1977-1981 (on file at National Archives, RG60 ("General Records of the Department of Justice"), Box 85, Folder: "DOJ—Office for Improvements in the Administration of Justice—Revisions in Fed. Class Damage #130") [hereinafter Days Files] (listing the "federal statutes providing private rights of action for damages arising out of the manufacture, distribution, or sale of goods or services, § 3001 (a)").

⁵⁰ S. 3475 § 3001(a).

⁵¹ S. 3475 §3001(a)(1).

⁵² *Hearings*, *supra* note 20, at 310 (report of the Office for Improvement in the Administration of Justice, *Proposed Revisions in Federal Class Damage Procedure: Senate Bill 3475 Bill Commentary*).

⁵³ *Id.*

The procedural core of the public action radically fused Meador's programmatic and institutional preoccupations by creating a "qui tam" mechanism much like the present-day False Claims Act. Public actions could be brought by the United States, but they could also be brought by private plaintiffs, dubbed "relators," who would earn an "incentive fee" of up to \$10,000 (roughly \$40,000 in today's terms) for their labors.⁵⁴ In return, relators would be subject to "a large measure of screening authority and control" by the Attorney General.⁵⁵ Upon private commencement of a public action, the Attorney General would review the case and exercise one of a series of gatekeeper options: (i) allow the private relator to proceed with the action on behalf of the United States; (ii) take over the case or prosecute it in cooperation with the private relator; (iii) ask the court to dismiss the case as inconsistent with the public interest; or (iv) refer the case to a state attorney general.⁵⁶ In the latter case, a state attorney general receiving a referral would have options similar to her federal counterpart: stay out, take over, or ask the court to dismiss. Importantly, in all cases, whether or not there was assumption of control, federal and state attorneys general retained a veto over any proposed settlement.⁵⁷ The end result was a "meshing of private initiative and public enforcement"⁵⁸ that brought "the executive branch of Government into the picture"⁵⁹—and placed the DOJ in particular at the center of the litigation process.

Lastly, while compensation remained a sideshow in public actions, the proposal nonetheless created a novel mechanism for distributing what would be a stream of *de minimis* payouts. It did so by establishing a "Public Recovery Fund," with payouts to be administered by the Administrative Office for the United States Courts and unused funds and "overages" to escheat to the federal treasury.⁶⁰ The proposal thus placed the time- and resource-intensive process of locating injured parties and making payments "outside the courts themselves,"⁶¹ thus "relieving Federal courts of functions for which they are

⁵⁴ S. 3475 § 3005(b).

⁵⁵ *Hearings, supra* note 20, at 8 (statement of Hon. Griffin B. Bell, Att'y Gen. of the United States and Daniel J. Meador, Assistant Att'y Gen. of the United States).

⁵⁶ S. 3475 § 3002(b)(1)-(4).

⁵⁷ S. 3475 § 3026(b) ("In a public action brought on relation . . . [t]he court may approve a proposed settlement and enter judgment only with the consent of the United States.").

⁵⁸ *Hearings, supra* note 20, at 322 (report of the Office for Improvement in the Administration of Justice, *Proposed Revisions in Federal Class Damage Procedure: Senate Bill 3475 Bill Commentary*).

⁵⁹ *Id.* at 8 (statement of Hon. Griffin B. Bell, Att'y Gen. of the United States and Daniel J. Meador, Assistant Att'y Gen. of the United States).

⁶⁰ *Id.* at 31, 36 (statement of Hon. Walter R. Mansfield, United States Circuit Judge, Second Circuit Court of Appeals).

⁶¹ *Id.* at 23 (statement of Hon. Griffin B. Bell, Att'y Gen. of the United States and Daniel J. Meador, Assistant Att'y Gen. of the United States).

ill equipped.”⁶² Perhaps more importantly, the mechanism “simply bypassed,” as Attorney General Bell put it in testimony before Congress, the problem of opt-in versus opt-out and, with it, the “troublesome and expensive” process of providing notice to absent class members after class certification but before a liability determination.⁶³

The OIAJ proposal’s second track—the “class compensatory action”—was a less radical departure from existing practice but still called for the substantial overhaul of existing rules. As with public actions, class compensatory actions would have to meet strict size prerequisites—at least forty persons suffering damages in excess of \$300 each.⁶⁴ But this proposal was not limited to consumer actions like in the public action side of the regime. Rather, the procedure applied to any federal statute providing for a civil cause of action.⁶⁵ A few parts of Rule 23 were preserved, including judicial approval of settlements, but gone were the requirements of typicality, superiority, and predominance. These, Meador argued, had proven to be “litigation breeder[s]”⁶⁶ and mostly just “arm[ed] defendants with dilatory devices,”⁶⁷ and with little countervailing benefit.⁶⁸ Replacing these requirements was something between Rule 23’s “commonality” requirement and the less demanding joinder test: that the injuries arise from the same transaction(s) or occurrence(s); and that there be a “substantial question” of law or fact in common.⁶⁹ More bracingly, the proposal vested the judge with discretion to determine whether the class would take the form of an opt-in or an opt-out class action or even a “mixture” of the two,⁷⁰ a striking deviation from the post-1966 practice of opt-out only.⁷¹ Lastly, the bill tasked defendants, not

⁶² *Id.* at 40 (statement of Hon. Walter R. Mansfield, United States Circuit Judge, Second Circuit Court of Appeals).

⁶³ *Id.* at 5, 23 (statement of Hon. Griffin B. Bell, Att’y Gen. of the United States and Daniel J. Meador, Assistant Att’y Gen. of the United States). *See also Bill Commentary: The Case for Comprehensive Revision of Federal Class Damage Procedure* (July 25, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3b, Box 9) (“Since the theory of the public penalty action is that there is a single claim for the penalty vested in the United States, there is no requirement—and no need—for notice to all persons who have been injured to ensure that, out of fairness, they are adequately represented.”).

⁶⁴ S. 3475 § 3011(a)(1).

⁶⁵ S. 3475 § 3011(a).

⁶⁶ *Hearings, supra* note 20, at 14 (statement of Hon. Griffin B. Bell, Att’y Gen. of the United States and Daniel J. Meador, Assistant Att’y Gen. of the United States).

⁶⁷ *Id.* at 24.

⁶⁸ *Id.* at 14 (noting “predominance” in particular led well-heeled defendants to send legions of “young law associates into the library” to dream up uncommon issues).

⁶⁹ *Id.* at 24.

⁷⁰ S. 3475 § 3013(e) (“At or immediately after the preliminary hearing the court in its discretion shall determine whether some or all injured persons will be excluded from or included in the class only if they so request by a specified date.”); *see also Hearings, supra* note 20, at 23 (describing the trial judge’s discretion over the opt-out rule in S. 3475).

⁷¹ S. 3475 § 3013(e). *See also Dodson, supra* note 18, at 175-87 (recounting the post-1966 evolution of the opt-out approach).

plaintiffs, with making reasonable efforts to identify injured parties and giving notice of a liability finding, thus reversing the Supreme Court's then-recent holding in *Eisen v. Carlisle & Jacquelin*⁷² that plaintiffs must pay for the machinery of locating names.

A further set of provisions aimed to streamline both the “public action” and “class compensatory action” sides of the regime. Thus, the proposal sought to address concerns about delays and costs by creating a system of “phased management.” This included a requirement that a “preliminary hearing” be held within 120 days of filing at which the court would take a tentative look at the merits—after tightly controlled discovery—to ensure statutory prerequisites were met and that the case raised “sufficiently serious questions going to the merits.”⁷³ The proposal thus foreshadowed the Supreme Court's recent decisions, most notably in *Wal-Mart Stores, Inc. v. Dukes*,⁷⁴ moving the merits inquiry forward in litigation time, an idea that was then gaining traction.⁷⁵

The proposal also sought to strike a balance between drawing lay and lawyerly talent into the litigation system and avoiding unjustified payouts to “strike suitors.”⁷⁶ On the public action side of the regime, the “incentive” fee a successful relator could earn was aggressively capped at \$10,000, thus deflecting the concern that the system would become a haven for the “‘professional private plaintiff,’ i.e., persons who would go around finding and then bringing these types of suits as a means of making a living.”⁷⁷ Interestingly, the proposal also barred relator's counsel from taking a contingent slice of incentive fees by mandating that they “shall be paid directly to the relator and may not be paid directly or indirectly to [his] attorney.”⁷⁸

⁷² 417 U.S. 156, 179 (1974) (“[T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.”).

⁷³ S. 3475 § 3013(b)(2); Memorandum from Daniel J. Meador to Griffin B. Bell, Management Provisions in Class Action Statute 2 (May 31, 1978) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7).

⁷⁴ See 564 U.S. 338, 351-52 (2011) (holding that a “rigorous analysis” of the Rule 23 requirements at the certification stage may require some “overlap with the merits”).

⁷⁵ See *Responses to the Rule 23 Questionnaire of the Advisory Committee on Civil Rules*, *supra* note 41, at 24 (noting that 51 percent of lawyers and 77 percent of federal judges favored a merits hearing prior to certification); DuVal, *supra* note 39, at 1305-07 (showing the relative success of plaintiffs and defendants in antitrust class litigation on motions to dismiss); *Developments in the Law—Class Actions*, *supra* note 39, at 1418-38 (reviewing criticism of holding preliminary hearings on merits questions in resolving certification motions).

⁷⁶ *Hearings*, *supra* note 20, at 30 (statement of Hon. Walter R. Mansfield, United States Circuit Judge, Second Circuit Court of Appeals).

⁷⁷ *Id.* at 435 (testimony of Jerome J. Cate, Chief, Antitrust Enforcement Bureau, Montana Department of Justice).

⁷⁸ S. 3475 § 3005(a)(2).

A balance between “legalized blackmail” and “legalized theft,” as Senator DeConcini labeled unjust rewards reaped by plaintiffs and defendants, respectively,⁷⁹ was also sought in the proposal’s attorney’s fee provisions. In cases in which counsel was entitled to a fee award under the statute providing the cause of action, fees would be calculated using a risk-adjusted lodestar approach, with a customary “hourly rate” subject to a multiplier depending on whether the action piggybacked on a prior public or private action, and also whether the work was performed before or after the preliminary hearing.⁸⁰ A separate provision vested the court with substantial discretion to reduce the fee award upon a finding that it was “unreasonably large relative to the size of recovery.”⁸¹ To Meador’s mind, the proposal thus left room for “much judicial judgment,” but also inscribed a “rational, uniform, national approach” as against the “erratic treatment” that too often prevailed across districts and district judges around the country.⁸²

III. TURF BATTLES

As Senate Bill 3475 wended its way through Congress and moved to full-scale committee hearings in November 1978, the many challenges to its passage quickly came into focus. Constitutional concerns were clearly a liability. The most prominent centered on the proposal’s elimination of notice requirements in public actions. Some commentators, like Judge Mansfield of the Second Circuit, suggested that the lack of notice requirements in public actions violated “the basic tenets of due process” and would be vulnerable in a challenge before the Supreme Court under the *Mullane* line of cases.⁸³ Others, backed by the Office of Legal Counsel, took the view that the weight of authority was against any absolute notice requirement. Instead, it was adequacy of representation, not notice, that was the “constitutional *sine qua non* with respect to the binding effect of a class action judgment on absent class members.”⁸⁴

⁷⁹ *Hearings, supra* note 20, at 2 (statement of Sen. Dennis DeConcini).

⁸⁰ S. 3475 § 3027(e) (providing for a multiplier of 1.75 in piggyback cases and between 1.75 and 3 depending on whether the work was performed before or after a preliminary hearing); *see also Hearings, supra* note 20, at 362 (Department of Justice commentary on Senate Bill 3475, proposed revisions in Federal Class Damage Procedures) (noting that counsel would thus earn a higher risk premium for work performed prior to a preliminary hearing, when the outcome was less certain, and a lower risk premium for work that was parasitic on others’ efforts or after a preliminary hearing made the outcome more certain).

⁸¹ S. 3475 § 3027(e).

⁸² *Hearings, supra* note 20, at 10 (statement of Hon. Griffin B. Bell, Att’y Gen. of the United States & Daniel J. Meador, Assistant Att’y Gen. of the United States).

⁸³ *Id.* at 32, 41 (statement of Hon. Walter R. Mansfield, United States Circuit Judge, Second Circuit Court of Appeals).

⁸⁴ *See* Office of Mgmt. & Budget, *Clearance Binder* app. C: Memorandum from John M. Harmon, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Daniel J. Meador, Assistant

The hearings also made abundantly clear that the proposal would suffer, as is often true in litigation politics more generally, from a basic lack of empiricism. Most of the available evidence on class actions took the form of surveys of judges and lawyers—a source that, as Judge Mansfield noted in his testimony, was “less than decisive.”⁸⁵ Even basic questions regarding the proportion of class action filings asserting damages claims as opposed to injunctive or other equitable relief, or the proportion of class suits brought by consumers as opposed to small businesses, remained frustratingly elusive.⁸⁶ The empirical vacuum meant that the debate could easily slip into hyperbolic rhetoric built upon “cosmic anecdotes,” in Arthur Miller’s colorful wording, rather than hard facts.⁸⁷

An even greater source of friction was pervasive anxiety about which institution—the Advisory Committee, as authorized by the Enabling Act, or Congress—should take the lead in reforming Rule 23. Few could disagree with the legal conclusion offered by Judge Mansfield that parts of Senate Bill 3475, particularly its penalty provisions, were “substantive” within the meaning of the Enabling Act’s anti-modification proviso and so could only pass into law “through direct legislative enactment rather than through the rule-making route.”⁸⁸ But it had also been clear to Meador from the start that broader questions of institutional role could substantially impair the proposal’s chances of passage by creating opportunities for deflection and delay. An early OIAJ strategy memo stressed the need to gain the Advisory Committee’s approval of the proposal or else to convince it to stand down from its own efforts around Rule 23, which had begun to coalesce around concrete, but less thoroughgoing, reform proposals.⁸⁹ The “Committee will

Att’y Gen., U.S. Dep’t of Justice, Class Action Proposal—Request for Opinions on Constitutional Questions 2 (May 31, 1978) (on file at Days Files, *supra* note 49, Folder: “DOJ—Office for Improvements in the Administration of Justice—Revisions in Fed. Class Damage #130”). Another constitutional question centered on the public action’s approach to calculating damages which, by permitting “generalized proof” of damages or excess profits, approximated a “fluid recovery” approach and so was, according to some, of “debatable” constitutionality under the Court’s Due Process jurisprudence. *Hearings*, *supra* note 20, at 253, 259 (statement of Mark I. Harrison, Attorney, Phoenix, Arizona) (noting that “the concept of ‘fluid class’ recovery” was “still very much in doubt” (citing 1 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 1.43)).

⁸⁵ *Hearings*, *supra* note 20, at 36 (statement of Hon. Walter R. Mansfield, United States Circuit Judge, Second Circuit Court of Appeals).

⁸⁶ *Id.* at 382-83 n.11 (statement of Beverly C. Moore, Jr.) (arguing that the Administrative Office of the U.S. Courts “could significantly clarify” the debate by refining “its data collection procedures” to distinguish between damages and injunctive class actions).

⁸⁷ *Id.* at 162 (statement of Arthur R. Miller, Professor, Harvard University Law School).

⁸⁸ *Id.* at 36 (statement of Hon. Walter R. Mansfield, United States Circuit Judge, Second Circuit Court of Appeals).

⁸⁹ See Memorandum from Stephen Berry, Office for Improvements in the Admin. Of Justice, U.S. Dep’t of Justice, to Griffin B. Bell, Att’y Gen., U.S. Dep’t of Justice, Timetable for Introduction of Administration Class-Action Proposal 5 (July 29, 1977) (on file at Meador Papers, *supra* note 24, MSS

have to be advised,” Meador wrote, but “should be tactfully informed that, unless it is able to act quickly to approve or amend our draft, the Administration will move directly to the congressional arena and bypass the Enabling Act.”⁹⁰

Meador only partially succeeded in his effort to manage the Advisory Committee. Pitching his class action proposal to the Committee beginning in late 1977, Meador quickly realized their opposition would be more jurisdictional than substantive. Leading the charge among Committee members was D.C. District Judge Louis Oberdorfer, who took the view that, while the proposal’s penalty provisions could be handled by legislation, other elements of it—including provisions governing settlement, preliminary decisions, and timetables—were “more properly classified as rule-making” and “should be handled by rules.”⁹¹ Better, Oberdorfer further argued, for the DOJ to make a pair of proposals, one to Congress and another “to the Rules Committee for changes in the rules which they think the amendment in the law would indicate or require.”⁹² Committee member Earl Kinter, former chief of the Federal Trade Commission and a leading D.C. defense lawyer, put the point even stronger, stating he was “not prepared to yield so quickly to the jurisdiction of Congress in an area that belongs to rule-making through the expertise of lawyers and judges.”⁹³ Even those who supported the DOJ’s proposal, including Ninth Circuit Judge Shirley Hufstедler, lamented that the DOJ had not even been made aware of the Committee’s “lengthy deliberations” on how to revise Rule 23.⁹⁴

Meador persevered and managed to convince the Committee’s members, over the objections of three dissenters, to recommend that the Judicial Conference issue a pronouncement approving the abstract proposition that Rule 23(b)(3) revisions should come through legislative enactment rather than through rulemaking.⁹⁵ However, when the Judicial Conference’s statement finally came some five months later, it was less than full-throated

82-3e, Box 7) [hereinafter Timetable Memo]. For a flavor of the debate within the Advisory Committee about how to revise Rule 23, including the question of opt-out versus opt-in and the propriety of a preliminary merits decision prior to class certification, see Advisory Comm. on Civil Rules, Minutes of the May 23, 1977 Meeting 1-12 (May 23, 1977), http://www.uscourts.gov/sites/default/files/fr_import/CV05-1977-min.pdf [<https://perma.cc/CQ8V-TAQW>].

⁹⁰ Timetable Memo, *supra* note 89, at 5.

⁹¹ Advisory Comm. on Civil Rules, Minutes of the December 12-13, 1977 Meeting 5 (Dec. 12-13, 1977), http://www.uscourts.gov/sites/default/files/fr_import/CV12-1977-min.pdf [<https://perma.cc/7FV8-QBAQ>].

⁹² *Id.* at 9.

⁹³ *Id.* at 6.

⁹⁴ *Id.* at 11.

⁹⁵ *Id.* at 13; *see also* Memorandum from Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, to Griffin B. Bell, Att’y Gen., U.S. Dep’t of Justice, Civil Rules Advisory Committee—Class Action Proposals (Nov. 14, 1977) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7) (noting the Committee’s agreement to support the idea of legislative enactments).

in support of Congress piloting class action reform alone. The Conference's statement approved revisions to Rule 23 via "legislative enactment, rather than by the rule-making authority."⁹⁶ However, it went on to note that the Conference was "reserving for further consideration the merits of any specific statutory proposals and the appropriateness of dealing with specific aspects of such proposals through the rule-making authority."⁹⁷

Without the Judicial Conference's full endorsement, the issue of institutional role arose repeatedly throughout the congressional hearings and created two kinds of costs. The first, as Meador had worried, was deflection and delay. The General Counsel of the Administrative Office of the United States Courts at the time, Carl Imlay, led off his testimony with an appeal that Congress slow down and seek judicial input. "I would like to urge," he began, "that the recommendations of the Judicial Conference be invited on this bill."⁹⁸ Even better, Imlay continued, because of Senate Bill 3475's "quite broad implications for the administration of justice in the courts," Congress should first, before taking any action, step back and think hard about "how much of the class action rule 23 should be in the form of substantive legislation and how much should be left to the rulemaking authority of the courts."⁹⁹

Perhaps more importantly, the parade of testimony about substance versus procedure and the proper bounds of the legislative and judicial roles created friction by adding heft to an already heated debate about whether Rule 23 required incremental or wholesale revision. Many argued, as had Meador, that comprehensive reform was necessary. "Patches and pieces are not going to suffice here," noted Maurice Rosenberg of Columbia Law School.¹⁰⁰ Moreover, because a "comprehensive and integrated" overhaul was in order, "congressional legislation, not third-branch rulemaking" was "the proper instrument of reform."¹⁰¹ But just as many argued to the contrary and specifically invoked the rulemaking process as the better course. "The changes that are warranted," the National Association of Manufacturers argued, "can be achieved through the ordinary mechanism that Congress has established for revision in the Federal Rules of Civil Procedure."¹⁰² What was needed

⁹⁶ See ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (Mar. 9-10, 1978), <http://www.uscourts.gov/sites/default/files/1978-03.pdf> [<https://perma.cc/H6VT-77JC>].

⁹⁷ *Id.*

⁹⁸ *Hearings*, *supra* note 20, at 147 (statement of Carl H. Imlay, General Counsel, Administrative Office of the United States Courts and Lisa Kahn, Attorney).

⁹⁹ *Id.* at 147-48.

¹⁰⁰ *Id.* at 170 (statement of Maurice Rosenberg, Professor on Leave, Columbia University School of Law).

¹⁰¹ *Id.*

¹⁰² *Id.* at 116 (statement of Philip A. Lacovara, Attorney, representing National Association of Manufacturers, Business Roundtable).

instead, the Association argued, was a “sharpshooter approach that deals with some actual abuses or inadequacies,” not “wholesale legislative dismemberment of Rule 23.”¹⁰³ None of Rule 23’s problems, the Business Roundtable added, were “so severe that they cannot be surgically repaired by the Supreme Court under its existing power to amend the Federal Rules of Civil Procedure[.]”¹⁰⁴

IV. AN UNRULY CHORUS

Each of these issues produced substantial headwinds and almost certainly made the political sales job—always a challenge for a sweeping reform—that much harder. But as the hearings drew to a close and Meador’s team huddled about next steps, a further dynamic in evidence over the two days of testimony loomed larger than any of these: the surprising extent to which the class action proposal scrambled the usual interest-group landscape on litigation issues and activated a new set of actors within the system.

At the time Meador and his team drew up plans back in 1977, they were under no illusions that their radical Rule 23 replacement would shift benefits and burdens in ways that generated substantial pushback. “This is not a plaintiffs’ bill, or a defendants’ bill, or a judges’ bill,” Meador proclaimed in the opening minutes of the hearings.¹⁰⁵ Virtually every piece of the proposal, Meador said, would “dislodge some favored economic position enjoyed either by clients or by lawyers today under the existing procedures.”¹⁰⁶ And yet, much of the drafting process had been devoted to striking a balance between a narrowly framed pair of interests. An OIAJ strategy memo written by one of Meador’s deputies at the very beginning of the process was representative: Class action reform could not pass unless it could navigate between “the ‘liberal-plaintiff’ and ‘conservative-defendant’ groups.”¹⁰⁷ “Any bill tilted too far to meet the concerns of one of these groups,” the memo continued, “can be blocked by the other, given the even legislative balance of lobbying forces.”¹⁰⁸

If this was their goal, then Senate Bill 3475 was, without question, exquisitely crafted. The plaintiffs’ bar would take a haircut via the proposal’s tight regulation of attorney’s fees, thus making it harder for some plaintiffs to

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 132.

¹⁰⁵ *Id.* at 25 (statement of Hon. Griffin B. Bell, Att’y Gen. of the United States and Daniel J. Meador, Assistant Att’y Gen. of the United States).

¹⁰⁶ *Id.* at 9.

¹⁰⁷ Memorandum from Stephen Berry, Office for Improvements in the Admin. of Justice, U.S. Dep’t of Justice, to Griffin B. Bell, Att’y Gen., U.S. Dep’t of Justice, Timetable for Introduction of Administration Class-Action Proposal 1 (July 29, 1977) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7).

¹⁰⁸ *Id.*

find willing counsel.¹⁰⁹ And the proposal eliminated certain types of potentially lucrative class actions outright: Because public actions were limited to certain federal commercial statutes, and compensatory class actions to federal-law claims greater than \$300, the proposal's complete substitution for Rule 23(b)(3) categorically excluded smaller-damages class actions beyond federal commercial statutes and, further, left no hook for diversity-based class actions at all.¹¹⁰ In return, however, the proposal would eliminate Rule 23's worst "litigation breeders"—especially "predominance"—thus protecting plaintiffs from defense-side dilatory tactics.¹¹¹ DOJ involvement in cases would also operate as a subsidy for private litigation efforts.¹¹²

For many of the same reasons, business also faced a mixed bag. The proposal's streamlined procedures offered defendants protection from impositional discovery.¹¹³ Rigorous DOJ gatekeeping promised to protect defendants from baseless actions, and could also mitigate a principal complaint of business at the time: that "reliance on administrative regulation does not necessarily protect a business against later judicial imposition of liability."¹¹⁴ However, the regime would, as already noted, subsidize private enforcement, and it would also, by formalizing agency involvement in private litigation, tend to refocus the attention of agency officials distracted by other priorities.¹¹⁵

¹⁰⁹ *Hearings, supra* note 20, at 25 (statement of Hon. Griffin B. Bell, Att'y Gen. of the United States and Daniel J. Meador, Assistant Att'y Gen. of the United States) (noting that proposal was designed to "curtail some of the expansive and unjustified entrepreneurial activities of some lawyers").

¹¹⁰ *Id.* at 164, 166 (statement of Arthur R. Miller, Professor, Harvard University Law School). *See also id.* at 497 (statement of Allan D. Vestal, Carver Professor of Law, University of Iowa College of Law) ("If cases excluded are to be heard, the state courts will be the only forum available.").

¹¹¹ *See Hearings, supra* note 20, at 24 (statement of Hon. Griffin B. Bell, Att'y Gen. of the United States and Daniel J. Meador, Assistant Att'y Gen. of the United States) (noting that the proposed bill "would eliminate certain litigation breeders now found in Rule 23(b)(3)").

¹¹² *See, e.g., Hearings, supra* note 20, at 157 (statement of Carl H. Imlay, General Counsel, Administrative Office of the United States Courts and Lisa Kahn, Attorney) (noting that the "Government," by maintaining a public action, would be "heavily subsidizing" private litigation "by furnishing attorneys and investigators and paying for the other costs of litigation").

¹¹³ *See, e.g., Hearings, supra* note 20, at 41-42 (statement of Hon. Walter R. Mansfield, United States Circuit Judge, Second Circuit Court of Appeals) (noting concern that the threat of "endless pretrial discovery" would lead defendants to settle meritless cases and explaining how Senate Bill 3474 would address those concerns).

¹¹⁴ Memorandum from Daniel J. Meador, Assistant Att'y Gen., U.S. Dep't of Justice, to Heads of Offices, Boards & Divisions, Proposed Class Action Legislation 2-3 (Dec. 2, 1977) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7).

¹¹⁵ *See Hearings, supra* note 20, at 512 (statement of Winton D. Woods, Professor of Law, University of Arizona College of Law) (noting that defense bar is "equally concerned but for the reason that the presence of the enforcement resources of public agencies may result in more efficient enforcement"). *See also* David Ignatius & Stan Crock, *U.S. Plan to Revamp Class-Action Rules Could Be Costly for Corporate Violators*, WALL ST. J., Aug. 23, 1978, at 8 (noting business groups' fear that the proposal would "cost them money" and "add to their legal headaches").

What was surprising to Meador and his team as political debate heated up was the degree to which patterns of support and opposition did not cleanly map to their “liberal-plaintiff” and “conservative-defense” view of the world, particularly when it came to the DOJ-gatekeeper provisions at the public action’s core. DOJ control rights had, from the start, drawn predictable opposition from consumer and public interest groups. “[H]istory demonstrates,” the most common version of the argument went, “that private interest will more adequately and vigorously protect their own interests than will the Government.”¹¹⁶ Only “vigorous private sector involvement,” it continued, could counter the bureaucratic inefficiencies, inertia, and even outright capture that afflicted public enforcers of all stripes.¹¹⁷ So strong were the objections of consumer and public-interest groups to an absolute DOJ veto over public actions that Meador told Attorney General Bell as the proposed bill was finalized in the summer of 1978 that such an approach risked losing “the only groups who have supported this bill.”¹¹⁸ It was for this reason that the final version of Senate Bill 3475 made DOJ opposition to a case a “presumptive basis for dismissal,” but left the ultimate question of whether the action served the public interest to the court.¹¹⁹ This, Meador noted, “would still leave the door ajar for private litigation, but would clothe the Attorney General with substantial control.”¹²⁰

But as the legislative process unfolded, it became clear that the staunchest opposition to DOJ control rights came not from consumer- and public-interest groups, but from a pair of relatively new entrants to the federal litigation state: state attorneys general and federal agencies with independent litigation authority. For their part, state AGs vigorously opposed anything that pared back their blossoming powers under the *parens patriae* provisions of federal statutes, including the newly enacted Hart–Scott–Rodino Antitrust Improvement Act of 1976, which had begun to produce marquee recoveries.¹²¹

¹¹⁶ *Hearings*, *supra* note 20, at 87 (statement of Bruce Meyerson, Director, Arizona Center for Law in the Public Interest). *See also id.* at 81 (statement of Roger Bern) (arguing that “private initiative will be thwarted and innovative theories of enforcement will be squelched if all small claim action type cases must be passed by the Justice Department”).

¹¹⁷ *Id.* at 87. *See also id.* at 389 (statement of Beverly C. Moore, Jr.) (noting concern about “subtle or direct political influence” on government agencies).

¹¹⁸ *See* Memorandum from Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, to Griffin B. Bell, Att’y Gen., U.S. Dep’t of Justice, Class Action Bill 1 (Aug. 16, 1978) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 6).

¹¹⁹ *Id.* at 2.

¹²⁰ *Id.*

¹²¹ *See* 15 U.S.C. §§ 15c, 15h (1976) (providing that state attorneys general can bring *parens patriae* actions for money damages on behalf of “natural persons” who have been injured by Sherman Act violations). *See also Hearings*, *supra* note 20, at 61 (statement of B. Lawrence Theis, First Assistant Att’y Gen., State of Colorado) (noting cases brought in Colorado by the state’s attorney

At least some of the opposition was pure turf: “I object to the power of any authority to take over my lawsuit,” an Alabama assistant attorney general exclaimed.¹²² Another assistant attorney general, from Missouri, darkly warned that the public action would lead to “the destruction of the Hart–Scott–Rodino *parens patriae* authority for the State.”¹²³ But behind these claims were also more subtle concerns, including that a DOJ veto over the enforcement activities of state attorneys general would yield anemic and hidebound enforcement. Missouri’s assistant attorney general put it best: “Our office’s experience on just a few occasions with the Justice Department has not given any encouragement that officials there are receptive to trying new theories, especially where the matters involved are politically sensitive.”¹²⁴ The far better course, the state AGs argued, was simple: “[G]ive the relator status to the States.”¹²⁵ After all, Washington’s AG argued, “If State Attorney General Offices are to be relied upon to effectively litigate in the public interest, they must be given ‘tools’ which are at least [sic] equal in quality to those of private counsel.”¹²⁶

Staunch opposition to DOJ gatekeeping—or even a substantial role for state AGs—also came from federal agencies, and for similar reasons. The Securities and Exchange Commission was most exercised. Because of the SEC staff’s “experience and expertise” implementing the federal securities laws, an agency official testified, “we do not believe that its administration and enforcement should be confided exclusively to the Department of Justice or alternatively to state Attorney Generals.”¹²⁷ Law professor John Kennedy agreed that the proposal “provides too much authority [to] the Attorney

general that secured large antitrust recoveries); *id.* at 75 (statement of Kenneth R. Reed, Assistant Att’y Gen., State of Arizona) (noting similar cases securing large antitrust recoveries in Arizona).

¹²² *Hearings, supra* note 20, at 67 (statement of Thomas Ziemann, Assistant Att’y Gen., State of Alabama).

¹²³ *Id.* at 62 (statement of Roger Bern, Assistant Att’y Gen., State of Missouri).

¹²⁴ *Id.* at 81 (statement of Roger Bern, Assistant Att’y Gen., State of Missouri). Interestingly, while Mr. Bern decried public interference with “private initiative,” he seemed to put his office in the latter, “private” category. *Id.* at 63. In keeping with Maggie Lemos’s framing of the issue, state attorneys general saw themselves as closer to entrepreneurial private litigants than to sclerotic federal agencies. *See generally* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) (describing the similarities between actions by state attorneys general and class suits by private attorneys).

¹²⁵ *Hearings, supra* note 20, at 66 (statement of Roger Bern, Assistant Att’y Gen., State of Missouri); *see also id.* at 86 (statement of Thomas Ziemann, Jr., Assistant Att’y Gen., State of Alabama).

¹²⁶ *Id.* at 454 (statement of Slade Gorton, Att’y Gen., State of Washington). Few challenged the position of the state attorneys general save Alan Morrison, who argued with characteristic bluntness: “[A] real question arises as to whether there is any utility in retaining the *parens* action if these provisions are enacted. The *parens* law was viewed by most of its supporters as a stopgap measure until meaningful class action reform could be enacted, and therefore its very existence should be reexamined in the context of this bill.” *Id.* at 468 (statement of Alan B. Morrison, Visiting Professor, Harvard University Law School).

¹²⁷ *Id.* at 491 (statement of Philip A. Loomis, Jr., Senior Commissioner, Securities and Exchange Commission).

General”—and that the problem would be best addressed by allowing “reference to other Federal agencies other than the Attorney General.”¹²⁸

DOJ control rights scrambled the interest-group landscape in an even more unanticipated way, revealing rare dissension within the plaintiffs’ bar. On most issues, plaintiffs’ lawyers stood united. A good example was the proposal’s prohibition on counsel capturing any portion of a relator’s incentive fee, which was expressly designed to reduce agency costs by giving the relator a stake in case outcomes and thus decentering plaintiffs’ counsel as the “principal protagonist” in class litigation.¹²⁹ But no such unanimity prevailed on DOJ gatekeeping.

For its part, the mainline plaintiffs’ bar adopted a hard line on the DOJ role, declaring any “injection of the government as an advocate in private litigation” to be “unacceptable.”¹³⁰ The reason, one commentator noted, was the simple concern that “much of the important, and thus remunerative, class action litigation will be taken from them.”¹³¹ The standard view within the plaintiffs’ bar was also well-captured in a report of the American Bar Association’s Ad Hoc Committee on Consumer Class Actions that, though completed back in 1974, was submitted to the Senate subcommittee as a stand-in for the Association’s views on S. 3475. Commenting on the merits of an “agency referral” process akin to Meador’s proposal, Beverly C. Moore, Jr., who had begun his career working for Ralph Nader before starting his own class action firm, wrote: “The existence of numerous, diverse, and independent centers of decision-making”—that is, a “pluralistic system” of enforcement—“has served our nation well in sustaining the vitality of our system and in checking the arbitrary exercise of power.”¹³²

However, superlawyer Steve Susman—then only thirty-five years old but already a member of “the million-dollar club,” as *Forbes* dubbed a growing elite within the plaintiffs’ bar¹³³—made the precise opposite argument. The current fee system, Susman argued, incentivized plaintiffs’ counsel to settle rather than try cases and was thereby “creating a body of class-action lawyers who are second-rate lawyers.”¹³⁴ Worse, by discounting fees where private

128 *Id.* at 168 (statement of John E. Kennedy, Professor, Southern Methodist University School of Law).

129 For the “principal protagonist” locution, see *id.* at 424 (statement of Paul M. Bernstein, Partner, Kreindler & Kreindler). See also Effective Procedural Remedies for Unlawful Conduct Causing Mass Economic Injury, Draft Statute with Comment 29 (Dec. 1, 1977) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7) (noting the proposal’s aim of changing the situation in which “[l]itigation monetary incentives flow chiefly to the lawyer, rather than to persons injured”).

130 *Hearings*, *supra* note 20, at 418-19 (statement of Paul M. Bernstein, Partner, Kreindler & Kreindler).

131 *Id.* at 512 (statement of Winton D. Woods, Professor of Law, University of Arizona College of Law).

132 *Id.* at 388 (statement of Beverly C. Moore, Jr.).

133 Howard Rudnitsky & Jeff Blyskal, *Getting into Those Deep Pockets*, FORBES, Aug. 4, 1980, at 59, 62.

134 *Hearings*, *supra* note 20, at 99 (statement of Stephen Susman, Attorney, Houston, Tex. & Harry Susman).

counsel piggybacked on a government action, the system “put a premium on private lawyers not cooperating with the Government.”¹³⁵ Indeed, the principal threat was not a system where the government would step in and subvert private efforts—“I am not concerned about the Government displacing the private bar,” Susman noted—but rather a system that discouraged cooperation and thus failed to leverage unique public and private capacities.¹³⁶ “I do not see why we should go all-private or all-Government,” Susman noted in response to questioning.¹³⁷ “We ought to combine. We ought to give both the Government and the private attorneys general an incentive to work together on these cases.”¹³⁸

V. THE END OF REFORM

After the ninety-fifth Congress closed without action on Senate Bill 3475, Meador and his OIAJ team renewed their push in the ninety-sixth. But the new version of the class action reform bill that emerged in April 1979—now House Bill 5103—looked very different from its predecessor.

For starters, the gatekeeper provisions had been transformed to reflect the emerging, more pluralistic balance of power within the American litigation state. Under the new version of the bill, a public action could be brought “by an executive or independent agency of the United States if such agency . . . has exclusive authority to seek civil enforcement of the statute giving rise to a public action.”¹³⁹ The SEC, among other agencies, could now bring its own public actions without the DOJ’s blessing. The bill’s provisions governing referral of privately initiated lawsuits further eroded DOJ control. It provided that the Attorney General, “shall refer the action to an agency authorized to bring such action.”¹⁴⁰ The bill also sought to soften the opposition of state attorneys general by allowing the U.S. Attorney General to assume control of a privately initiated suit only where the conduct “injured substantial numbers in at least ten States.”¹⁴¹ Otherwise, the cases would be under the command of the state attorney general where the case was initially filed. Gone, then, was the centralizing aspect of the original OIAJ proposal—and, with it, a key part of the normative thrust of Meador’s DOJ-centric vision.

¹³⁵ *Id.*

¹³⁶ *Id.* at 100.

¹³⁷ *Id.* at 104.

¹³⁸ *Id.*

¹³⁹ Class Action Bill at § 3001(c)(2)(A) (July 25, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7).

¹⁴⁰ *Id.* at § 3002(b)(1).

¹⁴¹ *Id.*

The other change to the new version of the proposal was apparent in the name of the bill into which it was inserted: the Small Business Judicial Access Act. Meador's team had early on seen the possibility of luring "plaintiff businessmen" as a way to add "critical support" to a winning coalition.¹⁴² But it had gradually dawned on Meador's team throughout 1978 that small business—which was far more likely to be on the plaintiff than the defense side of antitrust actions in particular—"would be the most direct beneficiaries of revisions in class damages procedures."¹⁴³ The new bill, however, did not just treat small business as one more piece of a winning coalition. Small business had become the heart of the political strategy: "Small business," an OIAJ memo announced, "will take the lead in supporting this legislation, with other constituencies providing background support."¹⁴⁴ Moreover, as the new bill title might suggest, class action reform would now be baked into a broader "small business package" that included other sops to small business, including a provision permitting small businesses to challenge before a magistrate judge any fine imposed by a federal agency. This provision was understood to have

¹⁴² See Memorandum from Stephen Berry, Office for Improvements in the Admin. of Justice, U.S. Dep't of Justice, to Griffin B. Bell, Att'y Gen., U.S. Dep't of Justice, Timetable for Introduction of Administration Class-Action Proposal 2 (July 29, 1977) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7).

¹⁴³ See Memorandum from Daniel J. Meador, Assistant Att'y Gen., U.S. Dep't of Justice, to Griffin B. Bell, Att'y Gen., U.S. Dep't of Justice, Small Business Access Package (Including Revision of Class Damage Procedures); Letters from OIAJ to Representative Brooks and others 1-2 (Jan. 22, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 6) (noting that evidence is mounting that small businesses "would be the most direct beneficiaries of revision in class damage procedures" and that a revised version of the bill as part of a small business package "is starting to pick up valuable small business support"); see also Memorandum from Daniel J. Meador, Assistant Att'y Gen., U.S. Dep't of Justice & Patricia M. Wald, Assistant Att'y Gen., U.S. Dep't of Justice, to Griffin B. Bell, Att'y Gen., U.S. Dep't of Justice, Class Actions and Magistrate Adjudication of Small Business Controversies (Small Business Legislative Package) (Apr. 26, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 6) ("We have discovered that small business has a substantial interest in supporting the bill."); Memorandum from Daniel J. Meador, Assistant Att'y Gen., U.S. Dep't of Justice, to Griffin B. Bell, Att'y Gen., U.S. Dep't of Justice, Vote by Membership of National Federation of Independent Business on Class Action Proposal (June 27, 1978) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 7) (reporting the results of a National Federation of Independent Business survey that forty-three percent of NFIB members favored the class action bill, thirty-nine percent opposed, and eighteen percent remained undecided). Interestingly, it was not at all clear even during the hearings on Senate Bill 3475 that small business supported class action reform. Indeed, one commentator noted that the class action proposal would press small business into a "heads-I-win-tails-you-lose" situation because small business would be exposed to more lawsuits, and yet their own ability to recover damages would be siphoned off by the government and distributed to consumers. *Hearings, supra* note 20, at 139 (statement of James D. "Mike" McKeivitt, Attorney, National Federation of Independent Business, accompanied by Frank S. Swain, Attorney, NFIB).

¹⁴⁴ See Office for Improvements in the Admin. of Justice, Memorandum: Revision of Class Damage Procedure 5 (July 3, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 25).

“nothing to do with class actions” but would “help garner small business support for the class action provisions.”¹⁴⁵

Though the newly packaged proposal had more than a whiff of desperation about it, the OIAJ team was optimistic they had found the key to passage. The strong support of the four major small business organizations—the National Small Business Association, the Small Business Legislative Council, the National Federation of Independent Business, and the National Oil Jobbers Council—provided a unified constituency, something that was lacking in the first legislative campaign. The move also seemed a strategic masterstroke because of its potential to dampen the hostility of groups like the Chamber of Commerce. As an OIAJ memo noted, the new packaging put the Chamber “in a rather awkward position” because, while big business dominated its board, its membership was more than ninety percent small business.¹⁴⁶ This fact, the memo speculated, “could chasten and mute the Chamber opposition.”¹⁴⁷

But the small-business angle in House Bill 5103 would ultimately prove no more successful than the earlier effort to enact Senate Bill 3475. Even Attorney General Bell, a steady if not passionate voice for class action reform, was losing patience with the repackaging. When Bell rejected the addition of the provisions authorizing small businesses to challenge agency-imposed fines before magistrates out of concern about clogging courts,¹⁴⁸ Meador and Pat Wald (then a DOJ official but awaiting confirmation to the D.C. Circuit Court of Appeals) penned a memo attempting to walk back Bell and preserve “one highly visible package” for small business.¹⁴⁹ But Bell’s handwritten response effectively shut down the entire effort: “I do not have any further time to give to this matter. Let it go forward without me.”¹⁵⁰ When promised additional hearings did not materialize,¹⁵¹ and with time running out on the

¹⁴⁵ Memorandum from Phil Jordan, to Judge Bell, Class Action Bill (May 10, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 6).

¹⁴⁶ Office for Improvements in the Admin. of Justice, Memorandum: Revision of Class Damage Procedure 9 (July 3, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 25).

¹⁴⁷ *Id.* (emphasis omitted).

¹⁴⁸ See Memorandum from Phil Jordan, Special Assistant to the Att’y Gen., U.S. Dep’t of Justice, to Daniel Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, Class Action Bill (May 14, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 6) (noting Bell’s concern about the provision’s “impact on the courts”).

¹⁴⁹ See Memorandum from Daniel J. Meador & Patricia M. Wald, Assistant Att’y Gen., U.S. Dep’t of Justice, to Griffin B. Bell, Att’y Gen., U.S. Dep’t of Justice, Small Business Judicial Access Package (Including Class Action Proposal) 2 (May 16, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 25).

¹⁵⁰ Memorandum from Phil Jordan, to Judge Bell, Class Actions Bill (May 22, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 25).

¹⁵¹ See Memorandum from Daniel J. Meador, Assistant Att’y Gen., U.S. Dep’t of Justice, to Griffin B. Bell, Att’y Gen., U.S. Dep’t of Justice, Class Action Bill (July 9, 1979) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 25) (“Congressman Neal Smith, of Iowa, says that he will proceed shortly to introduction and schedule a hearing in September.”).

ninety-sixth Congress and political winds already blowing toward the Reagan Revolution, class action reform once more fizzled.

VI. LESSONS FOR AMERICAN PROCEDURAL POLITICAL ECONOMY

What can we learn from the defeat of Meador's class action proposal? Political post-mortems are always perilous, especially when trained on a single legislative episode. Even with the benefit of the episode's relative recency and an extensive legislative history, we will never be able to say for sure why class action reform ultimately failed to gain traction. Still, the demise of Meador's proposal suggests some new, institution-centered departures for thinking about the past, present, and future of the class action and the procedural political economy that has made and remade it over time.

One insight that comes out of the story of 1978 is explicitly reformist. As the Advisory Committee, the Supreme Court, and Congress consider future revisions to the class action system—including proposed amendments to Rule 23 that are, as of this writing, under review by the Judicial Conference¹⁵²—they should keep alternative institutional structurings firmly in mind. There are, of course, caveats here. A reform package as sweeping as Meador's class action overhaul could likely not come from the Advisory Committee or the courts alone without running afoul of the Enabling Act's anti-modification proviso.¹⁵³ It is also plain that congressional enactment of anything resembling Senate Bill 3475 would be even more difficult in today's political environment than it was in the late 1970s, and for reasons that go well beyond the current Washington gridlock. Indeed, the plaintiffs' bar, state AGs, and federal agencies with enforcement powers—all among the "hopeless array of conflicting interests"¹⁵⁴ Meador sought to corral—have continued to grow in their sophistication, capacities, and political power in the intervening decades.¹⁵⁵ This has left the American litigation state even more committed to a pluralistic approach than it was when Meador and his OIAJ floated their proposal. Finally, even if a hybrid public-private approach were politically feasible, some would surely disagree as to whether it would be optimal. Witness contentious debate in recent years about the False Claims Act's *qui tam* mechanism, plainly the closest analogue to the "public action" side of Meador's proposal.¹⁵⁶ All that

¹⁵² See *supra* note 23.

¹⁵³ See 28 U.S.C. § 2072(b) (2012) ("Such rules shall not abridge, enlarge or modify any substantive right.").

¹⁵⁴ Letter from Daniel J. Meador, Assistant Att'y Gen., U.S. Dep't of Justice, to Stuart E. Eizenstat, White House 2 (July 31, 1978) (on file at Meador Papers, *supra* note 24, MSS 82-3e, Box 6).

¹⁵⁵ See Lemos, *supra* note 124; Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 199-216 (2001).

¹⁵⁶ See David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1915-18 (2014) (reviewing debate over the FCA's *qui tam* mechanism).

being said, more creative institutional blends of the sort advanced in 1978, though largely absent from current legal and policy debate, may ultimately prove best able to leverage the class suit's many virtues while mitigating its vices.¹⁵⁷ At the least, public-private hybrids like Meador's proposal should be present on any well-rounded menu of reform options going forward.

The remaining insights that we can take away from the story of 1978 do not concern the form the twenty-first century class action might take but rather the process that has shaped it over time. First, the demise of Meador's proposal suggests a new frame for thinking about the evolutionary path the American class action has traveled: the tension between centralization and polyphony in the design of the American regulatory and litigation state. The failed class action revolution of 1978 came at a time when the American litigation system was splintering into the pluralistic one we now take for granted, including a corps of state attorneys general with a democratic pedigree and substantial administrative capacity, a vast federal administrative state with litigation authority that is mostly independent of the DOJ, and a highly sophisticated and politically potent plaintiffs' bar.¹⁵⁸ Realizing this helps us to see the degree to which the late 1970s were, as historians like to say, a contingent moment. Indeed, the same fragmentation of litigation interests that made a hybrid public-private approach attractive to Meador and his fellow DOJ revolutionaries as a way to rationalize an increasingly chaotic enforcement ecosystem was simultaneously making grand-scale institutional reform efforts more politically difficult. Viewed in this light, Meador's proposal may have been the last best chance to slow, halt, or even reverse the fragmentation trend.

This is not to reject existing frames for thinking about the class action's evolution. Dave Marcus has elegantly shown how the class action debate has, from the start, been structured around a kind of dialectic between an "adjectival" and a "regulatory" account of aggregation procedures.¹⁵⁹ Sean Farhang's tracing of the rise of private litigation as a regulatory tool helps us to see how a sudden crush of private lawsuits under new federal statutory rights generated a range of docket, doctrinal, and political pressures that fueled demands for class action reform.¹⁶⁰ And Sam Issacharoff and John Witt have shown how lawyers in a slightly earlier era jealously guarded their prerogatives within a court-centered system, including the class action

¹⁵⁷ See Engstrom, *supra* note 13, at 622 (noting the promise of "institutional designs that tap agencies' unique position and capacity to engage with and rationalize private litigation efforts").

¹⁵⁸ See Lemos, *supra* note 124, at 490-92 (tracking the rise of state attorneys general in particular).

¹⁵⁹ See Marcus, *supra* note 18, at 590.

¹⁶⁰ See FARHANG, *supra* note 9, at 162 (illustrating the Republican Party's backlash against Title VII class actions in the early 1970s).

lawsuit, against administrative invasions.¹⁶¹ The story of 1978 supplements each of these accounts by showing how the class action's development—at least at a pivotal moment in the late 1970s—was also importantly shaped by a broader debate about whether and how to counter the centrifugal tendencies of an American state that was progressively empowering ever more institutional actors within the litigation system.

Second, the story of 1978 offers an opportunity to reflect upon—and perhaps even reorient—longstanding debate about the current institutional structure for making procedural rules within the American system. At one level, the failure of the 1978 reform effort merely underscores longstanding critiques of the current system. For instance, for Meador and his OIAJ team, frictions arising out of the Enabling Act's rulemaking process imposed time-consuming hurdles and, by stoking debate about whether Congress or the Advisory Committee should take the lead, provided legislative opponents with opportunities for deflection and delay before Congress. Just as important, the turf battle between the DOJ and the Advisory Committee touched off by Meador's proposal may have had substantial long-term effects on Rule 23's contours. Indeed, the Advisory Committee, after standing down from its own efforts to amend Rule 23 in deference to Meador's radical proposal, would not return to the field and again consider class actions until 1990,¹⁶² and even then limited itself to mostly technical revisions.

Several of the concerns that follow from these examples are not new. Many scholars have decried the increasingly narrow ken of the Advisory Committee and its growing instinct for the capillary, not the jugular, in revising civil procedure rules¹⁶³—the result, some say, of transparency measures in the 1980s that exposed the Advisory Committee to the pull and haul of interest-group politics.¹⁶⁴ Plenty of others have lamented rising

¹⁶¹ See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1635 (2004) (stating “constituencies within the bar have had a vested interest in the day-in-court myth because it obstructs transaction-cost-minimizing reform”); see also JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 213-317 (2007) (discussing how Melvin Belli and Roscoe Pound worked to hold off public administration systems for private, court-centered approaches).

¹⁶² See Marcus, *supra* note 18, at 619.

¹⁶³ See, e.g., Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010); Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 468-69 (2013) (arguing that many of the Advisory Committee's amendments are “busywork”). For the “capillary” turn of phrase, see Gregory P. Joseph, *An Instinct for the Capillary*, LITIG., Summer/Fall 2012, at 9, 9.

¹⁶⁴ See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 903-04 (1999) (noting that Congress's 1988 amendments to the Enabling Act, by requiring the rules committee to conduct its business in public and seek public commentary on proposed rule changes, “pushed the process toward an interest group model that assimilates rulemaking to legislation”); see also Charles Gardner Geyh, *Paradise Lost, Paradigm*

interbranch acrimony between Congress, the Advisory Committee, and the courts on procedural questions, beginning most prominently with Congress's veto and replacement of proposed evidence rules in 1973, continuing with the interbranch squabble over the Civil Justice Reform Act in 1990, and then reaching full blossom with Congress's mid-1990s sharp intrusions into procedural rulemaking with the Private Securities Litigation Reform Act and Prison Litigation Reform Act.¹⁶⁵ Finally, some have criticized the convoluted Enabling Act process—with its seven separate steps, involving five different bodies¹⁶⁶—as breeding inattention among the myriad actors on even basic questions, such as the validity of rules under the Enabling Act. “One gets the picture,” as Richard Freer has memorably described it, “of a pop fly falling between the centerfielder, the shortstop, and the second baseman.”¹⁶⁷

But the failure of class action reform in 1978, by shifting our gaze beyond the four corners of the Enabling Act process to more thoroughgoing institutional restructurings, helps us to see problems from a wider angle. For instance, much of the existing debate about the current civil rulemaking regime treats the Enabling Act structure as a targeted delegation of authority subject to back-end Supreme Court and Congress veto.¹⁶⁸ And this is formally true. But the jurisdictional struggle that played out behind the scenes in 1978—bolstered in the years that followed by a Congress that has proven ever more inclined to involve itself in procedural matters, and a Supreme Court that, some argue, has cynically used case

Found: Redefining the Judiciary's Imperiled Role in Congress, 71 N.Y.U. L. REV. 1165, 1169, 1241 (1996) (linking transparency measures to increased politicization of the rulemaking process, narrowing the Advisory Committee's rule output).

¹⁶⁵ See Bone, *supra* note 164, at 904 (recounting the 1990 squabble); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018, 1020 (1982) (recounting the 1973 squabble); Geyh, *supra* note 164, at 1169 (stating the Rules Enabling Act envisioned procedural rulemaking as an undertaking best left in the hands of judges, and “the judiciary exercised effectively exclusive rulemaking power” for nearly forty years thereafter until 1973 when Congress became actively involved in procedural rulemaking). For the best overview of congressional “hold-ups and overrides” within the rulemaking process, and also an empirical accounting of enacted congressional statutes affecting civil procedure rules during the late 1990s and 2000s, see Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004) [hereinafter Burbank, *Procedure, Politics and Power*]. Another thorough review of direct congressional “upkeep” of federal rules is Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. ON LEGIS. 1, 23 (2011).

¹⁶⁶ See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002) (providing an overview of the process of promulgating a Rule or amendment).

¹⁶⁷ Freer, *supra* note 163, at 456.

¹⁶⁸ See, e.g., Burbank, *Procedure, Politics and Power*, *supra* note 165, at 1706 (characterizing procedural rulemaking as a delegation in which Congress “holds the cards”); Struve, *supra* note 166, at 1102-03 (building an account of judicial rule interpretation around a thoroughgoing delegation conception).

law to amend federal rules outside the Enabling Act process¹⁶⁹—suggests that the rulemaking system may have come to more closely resemble a wide open, polycentric governance regime, with multiple institutional actors exercising overlapping authority from independent bases of power.

This subtle shift in the conception of the current rulemaking regime—from targeted delegation to full-blown polycentric system—has a number of important implications. Above all, it shapes how we assess the system's performance. It turns us away from questions about the scope of the Enabling Act's delegation or how best to police implementation of its terms—inquiries that invariably bottom out in the eternal quest for a principled distinction between substance and procedure.¹⁷⁰ Instead, viewing the system as at core polycentric pushes the inquiry to the systemic level and leads us to more squarely ask how, if at all, a rulemaking regime that distributes authority across multiple institutional actors differs in the quality or quantity of its outputs relative to alternatives. For instance, does the multiple, overlapping authority over procedural rules evident in the story of 1978 foster salutary regulatory competition? Or does this overlap instead yield the mix of free rider,¹⁷¹ bystander,¹⁷² and “regulatory commons”¹⁷³ problems that can enervate polycentric systems? Put more concretely, has the growing assertiveness of Congress and the Court in the rulemaking space sharpened debate and improved the system's rule outputs? Or has the resulting fracture of the Enabling Act regime served more as a brake within the system and made it even less likely that innovative solutions of the kind advanced in 1978 will emerge and gain traction?

In turn, by teeing up questions like these, the failed revolution of 1978 points up the need for more theoretical and empirical work that adopts a wider,

¹⁶⁹ See, e.g., Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1191-92 (2010) (arguing that *Twombly* and *Iqbal* “ignored the requirements of the Enabling Act”); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 847-50 (2010) (stating *Twombly* and *Iqbal* “altered a systemic design choice” by short-circuiting debate within “rulemaking bodies”).

¹⁷⁰ See, e.g., Bone, *supra* note 164, at 933, 951, 954 (proposing a “new justification” for “centralized, court-based, and committee-centered” rulemaking by refashioning the substance/procedure distinction to focus on a rule's “proffered justification”); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 463 (1993) (proposing an “incrementalist” and cost-benefit-based approach to rulemaking that would “sharply limit[] the discretion of the Advisory Committee, thus clearly differentiating the role of the Committee from the role of elected officials”).

¹⁷¹ See Oliver Kim & Mark Walker, *The Free Rider Problem: Experimental Evidence*, 43 PUB. CHOICE, Apr. 1984, at 3, 3.

¹⁷² See Stephen M. Garcia et al., *Crowded Minds: The Implicit Bystander Effect*, 83 J. PERSONALITY & SOC. PSYCH. 843, 843-44 (2002).

¹⁷³ See William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 5-6 (2003).

institutional perspective on procedural rulemaking. On the theoretical side, the tendency among civil procedure scholars to apply a delegation lens has meant that much criticism of the Enabling Act has gone forward more or less in isolation from a lively debate within the social sciences about the relative costs and benefits of different institutional structurings, including polycentric versus monocentric governance approaches.¹⁷⁴ Institution-level empirical work on the rulemaking process is even thinner. A recently published book by Steve Burbank and Sean Farhang offers a start at a remedy by unpacking the rulemaking process and, in particular, exhaustively mapping the composition of the Advisory Committee and its rule output over time.¹⁷⁵ Their work has already jump-started a conversation about which reform avenues—the Advisory Committee, the courts, or Congress—have had the greatest impact in shaping American civil procedure in recent decades. But more such work is badly needed. A potentially fruitful line of inquiry could drop down to the state level and leverage the fact that states vary substantially in their rulemaking systems, with some vesting courts or legislatures alone with monopoly rulemaking power, and others, as with the Enabling Act, empowering a murky mix of the two.¹⁷⁶ State-level variation thus provides a rich empirical context in which to test the effect of institutional structure on the quantity and quality of procedural rules. Only with more empirical inquiry—including efforts to recover standalone episodes like the failed class action vision of Meador and his fellow Jacobins at Justice, and also more systematic empirical studies across different rulemaking regimes—can we know for sure whether a revolution in the civil rulemaking process itself might be worth the fight.

¹⁷⁴ See, e.g., Michael D. McGinnis, *An Introduction to IAD and the Language of the Ostrom Workshop: A Simple Guide to a Complex Framework*, 39 POL'Y STUD. J. 169, 171-72 (2011) (explaining the basic concept of polycentricity as an approach to governance defined by multiple, semi-autonomous decisionmakers); Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 641, 643-44 (2010) (tracking the emergence and development of polycentric views of government); Vincent Ostrom, *Polycentricity (Part 2)*, in POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS 119-138 (Michael D. McGinnis ed., 1999) (discussing the differences in approach of monocentric and polycentric theories). This is not to deny more institutionally focused critiques. See, e.g., Bone, *supra* note 164, at 888 (focusing on the Court's role and its legitimacy in promulgating rules); Geyh, *supra* note 164, at 1165 (proposing an interbranch Commission on Law Reform and the Judiciary, composed of members of the judicial, legislative, and executive branches); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J.L. STUD. 627, 631 (1994) (arguing that judges are more likely to pursue their self-interest, and "view procedural rules that maximize the demand for lawyers' services as socially desirable").

¹⁷⁵ See STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

¹⁷⁶ See e.g., John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (surveying civil procedure of every state and the District of Columbia).

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