

CLASS ACTION LAWMAKING:
AN ADMINISTRATIVE LAW MODEL

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I. INTRODUCTION

Although the Supreme Court has called the class action a “quasi-administrative” proceeding,¹ administrative law has exerted little pull on the law of class actions.² This Article considers whether administrative law can make sense of a perplexing question raised by class action practice: how should courts interpret federal statutes when the interpretive question affects the scope or availability of class certification? When faced with such a question, many courts are tempted to interpret the statute in a way that enables class certification, enhancing the chance that the parties will settle.³

1. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (“[F]rom the plaintiffs’ point of view a class action resembles a ‘quasi-administrative proceeding, conducted by the judge.’” (quoting 3B JAMES MOORE & JOHN KENNEDY, MOORE’S FEDERAL PRACTICE ¶ 23.45 [4–5] (2d ed. 1984))); see also Richard Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 328 (1996) [hereinafter Nagareda, *Aftermath*] (“If anything, mass torts more closely resemble the issues of broad public concern that constitute the daily business of the administrative state. . . . [M]ass torts mix scientific uncertainty with underlying questions of value in a manner closely akin to matters of regulatory policy.”); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 185 (2003) [hereinafter Nagareda, *Preexistence Principle*] (making similar point and quoting *Shutts*).

2. This Article follows the lead of Richard Nagareda, who has, in a series of important articles, argued that the law of class actions should be analyzed in tandem with administrative law. See, e.g., Nagareda, *Aftermath*, *supra* note 1, at 312–29 (analyzing parallels between mass torts and administrative law); Nagareda, *Preexistence Principle*, *supra* note 1, at 153 (“[T]he modern class action has come to operate as a rival to public lawmaking rather than a procedural afterthought”); Richard Nagareda, *Turning From Tort to Administration*, 94 MICH. L. REV. 899, 939, 944–52 (1996) (“One might say that the Motleys, Chesleys, and Cabrasers of today are, in this sense, the heirs of yesteryear’s James Landis, Alfred Kahn, and Louis Brandeis—the ‘prophets of regulation’ who oversaw the birth of modern administrative government.”); see also Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 112–13 (2003) (proposing that “judges model their review of class settlements after their review of administrative action,” including a hard look at the record).

3. For discussion of the effect of class actions on preexisting standards of liability, see Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475; Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995 (2005); Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL’Y 855 (2005); Nagareda, *Preexistence Principle*, *supra* note 1, at 181 (noting the risk that settlements will give class action plaintiffs “authority to alter unilaterally class members’ preexisting bundle of rights”); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71.

I argue that the debate over this practice can be conceptualized as a debate about delegation. Those who argue that courts act illegitimately when they “adapt” statutes to “fit” the class device⁴ assume Congress has delegated courts a narrow range of discretion to promote certification and settlement of claims arising under federal statutes. By contrast, those who argue courts have great leeway to certify statutory claims, even at the price of “distorting” the statute,⁵ assume courts have been delegated a great degree of such discretion.

The *Chevron* doctrine of administrative law provides an unexpected solution to this debate, if we treat *Chevron* not as a rule about judicial deference, but rather as a rule for approximating the scope of delegation that Congress prefers interpreters outside the Legislative Branch to exercise.⁶ As a black letter matter, of course, *Chevron* has nothing to do with class actions. However, my Article contends that *Chevron* can be used as a “starting-point” measure of Congress’s intent to delegate authority to courts to “adapt” federal statutes to “fit” the class action remedy.

This proposal is roughly similar to Nicholas Quinn Rosenkranz’s suggestion that *Chevron* can be treated as a constitutional “starting-point rule” for measuring the proper scope of legislative delegation to agencies.⁷ My argument, however, is pragmatic rather than constitutional: in the absence of clear information about Congress’s desires in the class context, I suggest using *Chevron* as an off-the-rack measure of Congress’s intent to delegate in the class, as well as agency,

4. See, e.g., Redish, *supra* note 3, at 73 (“[I]n all too many cases, the modern class action has undermined the foundational precepts of American democracy. It has done so by effectively transforming the essence of the governing substantive law.”).

5. Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 302–16.

6. The doctrine is named after *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984). Representative examples of the vast literature on *Chevron* include Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637 (2003); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study in the U.S. Court of Appeals*, 15 YALE J. ON REG. 1 (1998); Gary S. Lawson, *Reconceptualizing Chevron: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377 (1997); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071 (1990).

7. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2129–31 (2002).

context. This default rule, I argue, serves until we have better evidence of the leeway Congress actually desires to give courts to adapt statutes to the class device.

To better understand the problem considered in this Article, consider the following example: Suppose that Microsoft develops a new technology called SecureNet, which collects data about each subscriber's demographic profile, the websites she visits, and the products she buys, allowing a subscriber, if she chooses, to share this information with a network of participating retailers. In secret, Microsoft and participating retailers develop a software program that discriminates against SecureNet subscribers by charging them an above-market price for the retailers' products; Microsoft, in turn, gets a cut of the sales. Some SecureNet subscribers discover the arrangement and sue Microsoft under RICO on behalf of a class of all SecureNet subscribers, numbering over a million users, alleging they would have paid less for their subscriptions if they had known about this fraudulent scheme.

Asked to decide whether the theory states a RICO claim, the court faces a dilemma: one line of circuit precedent holds that RICO's section 1964(c)—requiring a plaintiff to show she was injured “by reason of” a pattern of racketeering⁸—mandates that each individual plaintiff demonstrate she would not have bought the product at the price offered if the concealed information had been disclosed.⁹ If the court adopts that interpretation, the class action can't be certified. Another line, focusing on RICO's instruction that its provisions should be construed “liberally to effectuate its remedial purposes,”¹⁰ rejects individualized proof of reliance when that burden would preclude class certification.

The choice between these interpretations is a weighty one, since one of these interpretations would trigger a sweeping regulatory intervention by courts and private attorneys general. That intervention is different in quality from ordinary judicial interventions. Rather than decide the discrete claims of a small group of individuals in a particular factual setting, with room for refinement in subsequent decisions, this class action decides the

8. 18 U.S.C. § 1964(c) (2000); *see also* *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992).

9. *See, e.g.,* *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992).

10. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (reprinted in note following 18 U.S.C. § 1961 (2000)).

interests of a million individuals. As such, the suit threatens one-shot penalties (whether via judgment or settlement) that are unusually large in magnitude, while precluding reassertion of a vast number of legal claims against the defendant. The distributive and deterrent effects of that penalty, in turn, may create unintended consequences that are greater in magnitude than those created by incremental, case-by-case resolution of the claims (since many individual claims would not be brought or, alternatively, might fail).¹¹ Finally, the certification decision is highly likely to trigger settlement, shifting satisfaction of individual claims to an enforcement system that is largely self-executing. As a result, it is harder for courts to correct unintended consequences of its choices, since settlement removes courts from ongoing, case-by-case enforcement.

Similar problems arise in administrative law. Agencies' interpretation of their rulemaking authority under ambiguous statutes often has vast public consequences and also triggers the threat of immediate—often unreviewed¹²—acts of administrative enforcement in a host of similarly situated cases. Agencies' interpretive choices are therefore similar in scope and quality to those of courts in the class context: that is, their interpretive choices will affect—in an immediate, self-executing way—an unusually large number of similarly situated persons, considered in aggregate.¹³

Given the tension between agency decisionmaking of such unusual scale and the nondelegation doctrine, agencies making such interpretive choices face a crisis of legitimacy. In administrative law, the Supreme Court has addressed this legitimacy problem through the *Chevron* doctrine, which is

11. See *infra* Part II.B.

12. See David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 115 (1993) ("Many executive branch interpretations . . . will not be reviewed in court Sometimes no one will have standing, or the case will be moot before there is a chance for review, or no one will have a sufficient incentive to sue, or an immunity defense (sovereign or official, absolute or qualified) will preclude review on the merits. This category of cases is large and significant").

13. Benjamin Kaplan, who played an integral part in the 1966 revision of the federal rules, said that the class action "serves something like the function of an administrative proceeding where scattered individuals are represented by the Government." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I*, 81 HARV. L. REV. 356, 398 (1967); see also Redish, *supra* note 3, at 103 ("Professor Kaplan's analogy of the class action to an administrative proceeding reveals his understanding that the small-claim class action is designed to transform the private compensatory remedy provided for in the governing substantive law into a wholly different concept.").

understood to define when and under what conditions Congress delegates agencies the power to adapt statutes in light of agency policy. Understood as a rule that defines the conditions of delegation, *Chevron* is a *potential* “starting-point” rule for measuring courts’ delegated authority to adapt statutes to the class device in furtherance of judicial policies. The rest of this Article defends *Chevron* as the *best* starting-point rule for this purpose.

In Part II, I begin by surveying courts’ muddled approach to class action-driven lawmaking and assessing the impact of that approach on federal regulatory policy. In this part, I seek to deconstruct easy assumptions that a preference in favor of certification is rational or benign. Relatedly, I explore how courts’ interpretive choices in the class context implicate policies about how regulatory problems should be addressed and who should address them.

In Part III, I then explain that *Chevron* can be used as a framework for guiding courts’ measurement of their delegated power, in a way that rescues courts from trying to solve the difficult trade-offs outlined in Part II. I also explain why *Chevron* *should* be used in this way. In the process, I show that the obvious objection to using *Chevron* in this fashion—that courts, unlike agencies, are not democratically accountable and therefore lack a key institutional feature that *Chevron* considers all-important—doesn’t withstand close scrutiny.¹⁴

II. CLASS ACTION LAWMAKING

Competition between courts and the political branches for control of regulatory policy is a consistent feature of our system of separated powers. Competition takes different forms. In the *Lochner* era, courts exercised one form of *vertical* control over federal regulatory policy via judicial review.¹⁵ In the era of class action litigation, courts exercise *indirect* control. By aggregating claims, courts lower enforcement costs of judicial intervention. By lowering the cost of judicial intervention relative to agency

14. For readers who feel a special need to reassure themselves that I will address this objection, see *infra* Parts III.B.1–3 for the heart of the argument.

15. For discussion of the *Lochner* era, see David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003).

intervention, class actions shift regulatory power away from the political branches to the judicial branch.¹⁶

In this part, I introduce the puzzle that will anchor the rest of my analysis: When can class action courts “make law” by altering substantive law in order to better “fit” the class action procedure? In Section A, I describe the phenomenon of class action lawmaking by examining a recurring interpretive principle, which I call the class action-respecting canon. This principle establishes a simple presumption in favor of certification in cases where certification depends on resolution of a disputed question of substantive law. In Section B, I examine the impact of the canon on political control of federal regulatory policy. In Section C, I conclude by assessing standard criticisms of the canon—that class action lawmaking violates the Rules Enabling Act (REA) or rule-of-law norms.

A. *The Class Action-Respecting Canon*

When class actions amass large numbers of claims in one proceeding, complex causal chains will support liability in some cases but not in others. For example, the common law prohibited recovery for “indirect” fraud, in which injury is caused by a misrepresentation to a third party.¹⁷ By contrast, in federal securities fraud actions, passive buyers suffer a cognizable injury as a result of misrepresentations to a complex web of third party institutional investors, analysts, and traders, who, in an efficient market, process the information and translate misrepresentations into inflated prices.¹⁸

Class actions typically “make” law by changing how causation matters to the law. To see how this might happen, imagine a legal system in which causation is narrowly defined in fraud

16. See *infra* Part II.B.1. The scope of this Article is cabined by four caveats: First, this Article is confined to examining the use of the class device to settle large numbers of rights in aggregate; traditional, incremental, case-by-case common law “regulation” is not considered. Second, I do not discuss the merits of strong judicial enforcement of vertical *constitutional checks* on legislative and agency action, which raise some different questions from those presented herein. Third, the argument is confined to the realm of private rights defined by federal statute. I do not consider either class treatment of state law or the merits of class litigation against the government, which also raise some different questions. Fourth, the Article is confined to Rule 23(b)(3) actions; actions for injunctive relief and against limited funds raise some different questions, which are not considered here.

17. See RESTATEMENT (SECOND) OF TORTS § 537 cmt. a (1977); 1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 33, at 126–28 (John R. Berryman ed., 4th ed. 1916).

18. *Basic, Inc. v. Levinson*, 485 U.S. 224, 243–47 (1988).

actions, but the threshold injury that supports a claim is small. Say, for example, that causation can only be proven if B shows she directly relied on a false representation from A and in no way contributed to her own injury. Now a class action procedure is introduced into the system. Suddenly, many new suits are filed to remedy small-stakes injuries. Those claims could not have been brought individually, as the payoff was not worth the cost of the legal process; but given the economies of scale that class proceedings make possible, the claims are unearthed. Yet the causation rules of the old system render the new suits impossible to administer in a giant proceeding because they force a court to make many individualized inquiries into causation—so many that the inquiry is beyond the resources of just one court.

Courts might respond to the administrative problem by fashioning special rules that allow causation to be presumed. They do so at the risk of overinclusion, since in the previous regime, a buyer who read the false representation yet was orally warned of the risk of defect could not recover. While the old legal regime had protected defendants in such cases, the new regime withdraws that protection. Thus, introducing the class procedure in this hypothetical alters the risks faced by defendants and therefore alters the deterrent and distributive effects of the law.¹⁹ In an important sense, introducing the class action makes the law *act* differently.

Courts sometimes justify lawmaking power of this sort with reference to an interpretive rule that is applied (1) to resolve a disputed interpretation of statutory rules of liability that affect the scope or availability of class certification, and (2) as a thumb on the scale in favor of applications of substantive law that expand a court's certification options. At the risk of ascribing more coherence to the unruly field of class action law than it deserves, I will refer to this interpretive rule by a single generic moniker: the class action-respecting canon.

Examining the canon sets the stage for the contrasting *Chevron*-inspired framework that I argue should govern statutory interpretation in the class context. In this section, I start by taking a closer look at the different ways that courts use the canon, in the context of a few concrete cases. I begin with *Green*

19. See, e.g., Redish, *supra* note 3, at 97 (noting that class actions can change the "DNA" of the underlying class claims).

v. Wolf Corp.,²⁰ involving a claim under the Securities Exchange Act of 1934, which clearly sets out the interpretive logic of the class action-respecting canon. In *Green*, plaintiffs asked the Second Circuit to decide whether to certify a class of Rule 10b-5 claims against a securities issuer alleged to have disseminated false financial disclosures in a series of prospectuses.²¹ At the time of the decision, the Second Circuit's rules governing proof of causation in 10b-5 actions were in flux.²² The defendant argued that federal securities law required proof of "personal[]"—that is particularized, subjective—reliance by each class member, defeating Rule 23(b)(3)'s requirement that common issues predominate.²³ Demanding such proof would have rendered aggregated management of the claims impossible. The court's analysis followed a three-step process. First, the court examined the history behind Rule 23, which had been amended two years earlier, concluding that, under the amended rule, the "principal reasons for the existence of class suits [are] to improve judicial efficiency by reducing the number of suits that might arise from a single wrong to many individuals" and to "redress wrongs otherwise unremediable because the individual claims involved were too small."²⁴ Based on that reading of the Rule, the court held that trial courts must apply Rule 23 with "flexibility."²⁵ That flexibility, in turn, affected the court's interpretation of the merits, as it "enable[d] [the court] to view liberally claims which assert a right to a class action in 10b-5 cases at the early stages of the litigation."²⁶ The court concluded that, even assuming "personal reliance" is a

20. 406 F.2d 291 (2d Cir. 1968).

21. *Id.* at 295.

22. *See, e.g.*, SEC v. Great Am. Indus., 407 F.2d 453, 478 (2d Cir. 1968) (Moore, J., dissenting) (noting disagreement between SEC and Second Circuit over distinction between materiality and reliance); SEC v. R.A. Holman & Co., 366 F.2d 456, 458–59 (2d Cir. 1966) (examining "materiality" requirement in 10b-5 misrepresentation claim); List v. Fashion Park, Inc., 340 F.2d 457, 462–63 (2d Cir. 1965) (examining nature of reliance in 10b-5 claim); Cochran v. Channing Corp., 211 F. Supp. 239, 245–46 (S.D.N.Y. 1962) (discussing elements of a 10b-5 claim).

23. *Green*, 406 F.2d at 301.

24. *Id.* at 297–98.

25. *Id.* at 298.

26. *Id.* ("[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require." (quoting *Esplin v. Hirshi*, 402 F.2d 94, 99 (10th Cir. 1968))).

required element of a 10b-5 claim, certification of the claims was appropriate.²⁷

Green illustrates three defining features of the class action-respecting canon. First, the court used the canon to eliminate objections to certification premised on a disputed interpretation of the substantive law (in this case, rules of causation applicable to federal securities actions). The Second Circuit decided *Green* before the Supreme Court had recognized the fraud-on-the-market theory of securities fraud causation. Thus, the law potentially allowed Wolf Corporation to argue (1) that plaintiffs had a burden to prove personal, subjective reliance on misleading prospectuses, and (2) that differences in individual reliance bar certification. *Green* used the canon to dismiss this objection.

Second, the canon short-circuited consideration of ordinary sources of statutory construction. In *Green*, the court ignored the text of Rule 10b-5 and § 10(b) of the Securities Exchange Act of 1934 as well as legislative history, although both were relevant to the choice between objective and subjective causation. Contrast *Mills v. Electric Auto-Lite Co.*,²⁸ the Supreme Court's 1970 decision on securities fraud causation (decided outside of a class context). There, the Supreme Court rejected a requirement that plaintiffs prove personalized reliance, relying on analysis of legislative text and history of § 14(a) of the Securities Exchange Act.²⁹ *Green* applied Rule 10b-5 in a way similar to the *Mills* Court's application of § 14(a) while avoiding analysis of statutory text, legislative history, or legislative purpose.

Third, *Green* applied the canon during a case-specific procedural ruling (on a motion for class certification), rather than a general, party-neutral, substantive ruling (for example, in a Rule 12(b)(6) motion, which asks the court to declare general principles of law). It therefore commanded a case-specific outcome, rather than general rules.

Modern cases that follow *Green* fall into three categories. First, some courts use the canon much as *Green* did: to defer thorny disputes about the content of substantive law that affect the

27. *Id.* at 298–301.

28. 396 U.S. 375 (1970).

29. *Id.* at 381–84.

scope or availability of class certification.³⁰ In *Walco Investments, Inc. v. Thenen*, for example, plaintiffs asked the court to certify a class of 10b-5 and RICO claims.³¹ The case raised at least three questions. First, may plaintiffs who pursue securities fraud claims under Rule 10b-5(2) rely on the fraud-on-the-market theory of fraud causation?³² Second, what burden must defendants meet to rebut a presumption of reliance in a securities fraud suit (an issue the Eleventh Circuit had not squarely addressed)?³³ Third, may reliance be proven in a RICO fraud claim to the same degree as in a 10b-5 suit?³⁴ Each question affected the scope of certification. For example, plaintiffs' inability to rely on the fraud-on-the-market theory may have rendered their Rule 10b-5(2) claims uncertifiable.³⁵ Plaintiffs' inability to rely on a presumption of reliance may have rendered their RICO claims uncertifiable.³⁶ And, if defendants were entitled to prove a host of individualized defenses based on particularized proof, litigation of those defenses may have overwhelmed the court's ability to administer both the plaintiffs' securities claims and

30. See, e.g., *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985) ("The interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action."); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 229 (D.N.J. 2005) (deferring resolution of choice of law questions because "[i]n a borderline case, the Court should allow class certification: '[T]he interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action.'" (internal citation omitted)); *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 25, 27-29 (D. Mass. 2003) (resolving certification objections premised on choice of law and proximate causation problems in product liability suit and citing the principle that "[d]oubts should be resolved in favor of certification"); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 557 (E.D. Va. 2000) (dismissing manageability concerns about individualized reliance based on maxim that "the suggestion that a wrong is too extensive to be heard before the Court is an argument that is deeply disfavored in our society which is predicated upon the rule of law" and "equal justice"); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 685, 688, 690-91 (S.D. Fla. 1998) (adopting presumption of reliance and deferring of choice of law questions, citing principle that "[d]oubts regarding the propriety of class certification should be resolved in favor of certification"); *Spark v. MBNA Corp.*, 178 F.R.D. 431, 435 (D. Del. 1998) (justifying presumption of reliance in fraud case based in part on principle that error "should be committed in favor of allowing a class action"); see also 3 ALBA CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 7.21, at 69 (4th ed. 2002) (discussing judicial policies favoring recognition of "presumptions for a prima facie showing of entitlement to maintain a class action").

31. 168 F.R.D. 315, 321 (S.D. Fla. 1996).

32. *Id.* at 332-33, 333 n.10.

33. *Id.* at 333 n.8 (noting that the defendant has an opportunity to rebut a presumption of reliance without addressing defendant's burden).

34. *Id.* at 335 (noting that securities fraud presumptions are not available in RICO claim without addressing the burden of proof that applies to RICO fraud causation).

35. *Id.* at 333.

36. *Id.*

RICO claims.³⁷ The court ordered certification, deferring resolution of all three questions.³⁸ As in *Green*, the court used the canon-like rule that “Rule 23 is liberally construed in order to meet its objectives” as a thumb on the scale in favor of deferral.³⁹

From the defendants’ perspective, the effect of the deferral was tantamount to resolving the substantive questions in the plaintiffs’ favor. Certification triggered a class settlement.⁴⁰ As a result, the claims were never tried, and the substantive questions remained formally unresolved. Even so, the canon allowed the *Walco* court to reach the same result as it would have if the court had made a silent, concealed, one-shot choice of law—that the fraud-on-the-market theory is available, in *this* case; that a presumption of reliance is available, in *this* case, under RICO; and that the burden of rebuttal is, in *this* case, high or even irrebuttable, converting securities fraud into a regime of strict liability.⁴¹ The canon covered the choices in the argot of procedural interpretation.⁴²

In cases like *Walco*, the canon appears on the face of the decision. In others, however, the canon is not announced as such, but its logic is evident. A recent example of the latter class of decisions is found in *In re Visa Check/MasterMoney Antitrust Litigation*.⁴³ There, plaintiffs, a group of retailers, sought to certify claims that Visa and Mastercard had conspired to tie

37. *Id.* at 333, 335.

38. *Id.* at 333 n.10 (fraud-on-the-market theory), 333 n.8, 334 (burden of rebutting presumption), 335 (presumption of reliance in RICO suit).

39. *Id.* at 323.

40. *Walco Invs. Inc. v. Thenen*, 975 F. Supp. 1468, 1469–70 (S.D. Fla. 1997) (summarizing history of the proceedings).

41. *See Walco Invs.*, 168 F.R.D. at 338.

42. Rule 12(b)(6) motions may not solve the problem because certification typically triggers immediate settlement negotiations. In addition, a court can delay 12(b)(6) rulings by requiring lengthy certification discovery prior to resolving motions to dismiss; alternatively, the court can resolve motions piecemeal, requiring plaintiffs to replead various issues collateral to the key merits question—for example, deferring judgment on reliance but requiring plaintiffs to plead fraud scienter with greater particularity. Together these tactics can delay resolution of the merits-related questions that affect certification for years, imposing major costs on defendants and creating pressure to settle before the 12(b)(6) motion is decided. In the recent managed care class action litigation, for example, 12(b)(6) motions lasted for nearly three years and remained unresolved when the court resolved the motion for class certification in 2003. Aetna settled within months of the certification order, even though motions to dismiss remained pending. For a timeline of filings, see Civil Docket Sheet, *In re Managed Care Litig.*, 430 F. Supp. 2d 1336 (S.D. Fla. 2006) (No. 00-1334-MD-MORENO) (on file with author).

43. 192 F.R.D. 68 (E.D.N.Y. 2000), *aff’d sub nom.* *Wal-Mart Stores, Inc. v. Visa USA Inc.* (*In re Visa Check/MasterMoney Antitrust Litig.*), 280 F.3d 124 (2d Cir. 2001).

certain credit products (“offline” debit cards) to their flagship credit cards.⁴⁴ The retailers argued that the tie-in had allowed Visa and Mastercard to charge inflated “interchange fees” to issuing banks, which the banks passed on in the form of inflated “discount fees” (the term for fees charged by the card companies to retailers who accept Visa and Mastercard payment).⁴⁵

The tying claims raised an unsettled question of antitrust law: how to measure “injury-in-fact” in a tying action. In some tying cases, measuring impact is mechanical because all purchasers have used the tied product in fixed proportions.⁴⁶ But in the Visa Check/MasterMoney litigation, the retailers had used the tied products in different proportions, complicating measurement of injury.⁴⁷ Two options were available. Some courts had held that the correct measure of injury is the amount the defendant overcharges for the tied product.⁴⁸ Defendants objected to this measure. In an untied world, defendants argued, a seller who “has market power in the tying product and overcharges on the tied product will do two things if the tie is broken: decrease the price of the tied product and increase the price of the tying product.”⁴⁹ In other words, the price of fees charged for use of offline debit cards (the tied product) would go down, while the price of ordinary credit cards (the tying product) would increase. Thus, in the tied world, some merchants—those who process a high proportion of ordinary credit card transactions—would suffer no injury because they would have benefited from the deflation of interchange fees made possible by the tie. Accordingly, defendants argued that the correct measure of

44. In re *Visa Check*, 280 F.3d at 131.

45. In re *Visa Check*, 192 F.R.D. at 74 (describing injury theory). The “discount fee” is “largely based on the ‘interchange fee,’ the fee that the acquiring institution [(typically a licensed bank)] pays the card-issuing institution [(typically another bank)] every time it processes a payment by one of the card-issuing institution’s cardholders at one of the acquiring institution’s retailers.” *Id.* at 72 & nn. 2–3.

46. In re *Visa Check*, 280 F.3d at 153 (Jacobs, J., dissenting).

47. *Id.* (“These plaintiffs have used the credit cards (the tying product) and off-line debit cards (the tied product) in different proportions; fine jewelers, for example, would rarely be presented with an off-line debit card.”).

48. See, e.g., *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1133 (6th Cir. 1981) (“[T]he measure of damages is the difference between the price actually paid for the tied product and the price at which the product could have been obtained on the open market.”).

49. In re *Visa Check*, 280 F.3d at 154 (quoting In re *Visa Check*, 192 F.R.D. 68, 83 (E.D.N.Y. 2000)).

injury was the “package measure” of injury,⁵⁰ which required that “injury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value.”⁵¹ Furthermore, defendants argued that the correct interpretive choice would reveal conflicts of interest among class members since some class members would not have been harmed by the alleged conduct.⁵²

The trial court certified the claims as a class action⁵³ and the Second Circuit affirmed.⁵⁴ While neither decision forthrightly cited a general presumption in favor of certification, both decisions employed the class action-respecting canon’s logic.⁵⁵ The trial court, for example, relied in part on the proposition that certification denials are disfavored to support certification in face of the unresolved question of law.⁵⁶ Similarly, the Second Circuit ruled that a policy in favor of certification weighed against concerns that one choice of law would affect “manageability” of the claims as a class⁵⁷ or would create conflicts of interest among class members who suffered different degrees of injury.⁵⁸ It concluded that objections premised on choice of law “underestimate[] the powerful policy considerations that

50. *See id.* at 155.

51. *Kypta v. McDonald’s Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982).

52. *In re Visa Check*, 280 F.3d at 158 (Jacobs, J., dissenting) (“The distribution of these competing interests creates a problem that cannot be resolved by subclass representatives even if one had a thousand of them.”).

53. *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 90 (E.D.N.Y. 2000).

54. *In re Visa Check*, 280 F.3d at 147.

55. *Id.* at 140; *In re Visa Check*, 192 F.R.D. at 85.

56. *In re Visa Check*, 192 F.R.D. at 85 (If plaintiffs’ “assertion of class status is at least colorable, the court should allow the action to proceed under Rule 23.”) (quoting 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1781, at 7–8 (2d ed. 1986)).

57. *In re Visa Check*, 280 F.3d at 140 (“[D]ismissal for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule.” (quoting *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 78 F.R.D. 622, 628 (W.D. Wash. 1978))); *id.* (“[S]ome courts have stated that there is a presumption against refusing to certify a class on manageability grounds.” (quoting 8 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATIONS § 166.03[3][b][iv] (2d ed. 1997))).

58. *Id.* at 145 (collecting cases and treatises suggesting there is, in effect, a presumption against denial of certification based on conflicting interests among class members) (quoting 1 ALBA CONTE & HEBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 3.26, at 435 (4th ed.) (“The conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental”); 1 ALBA CONTE & HEBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 3.25, at 422 (“[S]peculative conflict should be disregarded at the class certification stage.”)).

favor certification . . . [including] the burden on the courts that would result from trying the cases individually.”⁵⁹

In effect, both the trial and appellate decisions relied on a general policy in favor of certification to justify avoiding a substantive question of law affecting the scope of certification. Yet, as Judge Jacobs, dissenting from the Second Circuit’s affirmance, suggested, the majority’s reasoning effectively sided with the plaintiffs’ interpretation of the law since certification would, in all likelihood, trigger a settlement and an end to further litigation.⁶⁰

In some cases, finally, parties dispute whether Congress would want the suit tried as a class action as a *policy* matter. In *re Sumitomo Copper Litigation*⁶¹ is an example. There, plaintiffs, parties to commodities futures contracts, alleged that the defendants, Sumitomo Corporation and Global Minerals and Metals Corporation, conspired to manipulate the prices of copper futures, violating both RICO and the Commodity Exchange Act (CEA).⁶² Briefly, market manipulation in futures markets occurs when a market participant “corners”—that is, gains market share of—either a particular commodity or futures positions for that commodity, forcing parties who have “shorted” futures contracts and so are obligated to buy back the commodity or enter a “covering” offset position to do so at artificial prices.⁶³ The CEA prohibits manipulation of commodity future prices, but does not define what constitutes impermissible manipulation.⁶⁴ The Commodity Futures Trading Commission (CFTC) and a number of circuit courts have held, unhelpfully, that actionable “manipulation” arises when a trader buys and sells commodities futures contracts with the intent to force the prices of the contracts to an “artificial” level.⁶⁵ However, defining

59. In *re Visa Check*, 280 F.3d at 146.

60. *Id.* at 158 (Jacobs, J., dissenting) (“As far as I can see, the only unified interests served by herding these competing claims into one class are the interests served by settlement.”).

61. 182 F.R.D. 85 (S.D.N.Y. 1998).

62. *Id.* at 87–88.

63. See generally *Leist v. Simplot*, 638 F.2d 283, 286–88 (2d Cir. 1980) (reviewing the mechanics of futures markets); Jerry W. Markham, *Manipulation of Commodity Futures Prices—The Unprosecutable Crime*, 8 YALE J. ON REG. 281 (1991) (same).

64. Commodity Exchange Act § 9(a)(2), 7 U.S.C. § 13 (2000); *id.* § 6(d), 7 U.S.C. § 13b (2000); *id.* § 6(c), 7 U.S.C. §§ 9, 15 (2000).

65. See, e.g., *Frey v. Commodity Futures Trading Comm’n*, 931 F.2d 1171, 1175 (7th Cir. 1991) (defining elements of manipulation); *In re Hohenberg Bros. Co.*, No. 75-4, 1977 CFTC LEXIS 123, at *22 (Commodity Futures Trading Comm’n Feb. 18, 1977) (“A

whether prices are “artificial” is a notoriously difficult enterprise. As Daniel Fischel and David Ross note, “If prices move in response to trades, the price cannot be said to be ‘artificial’ unless the trades are defined as illegitimate in some way. . . . [W]e are faced with the problem of circularity—improper trades are trades that produce an artificial price and artificial price is defined as a price produced by improper trades.”⁶⁶ Academics and courts have produced conflicting measures of illegitimacy.⁶⁷ In light of these difficulties, the CFTC rarely prosecutes commodities traders for market manipulation, leaving discipline to (1) self-regulatory organizations, such as the Commodities Exchange, Inc. (Comex) and the Chicago Board of Exchange, which have their own oversight mechanisms subject to strict disclosure requirements mandated by the CFTC;⁶⁸ and (2) the market, which some commentators suggest tends to punish, rather than reward, manipulation schemes.⁶⁹

In *Sumitomo*, plaintiffs—parties to copper futures contracts—sought class-wide damages based on allegations of an unusually

finding of manipulation in violation of the Act requires a finding that the party engaged in conduct with the intention of affecting the market price of a commodity (as determined by the forces of supply and demand) and as a result of such conduct . . . an artificial price was created.”)

66. Daniel R. Fischel & David J. Ross, *Should the Law Prohibit “Manipulation” in Financial Markets?*, 105 HARV. L. REV. 503, 509 (1991).

67. For examples of different formulations, see Richard D. Freidman, *Stalking the Squeeze: Understanding Commodities Market Manipulation*, 89 MICH. L. REV. 30, 59 (1990); Wendy Collins Perdue, *Manipulation of Futures Markets: Redefining the Offense*, 56 FORDHAM L. REV. 345, 348 (1987); Craig Pirrong, *Commodity Market Manipulation Law: A (Very) Critical Analysis and a Proposed Alternative*, 51 WASH. & LEE L. REV. 945, 995 (1994). For a useful sketch of contributions to the definitional debate, see Benjamin E. Kozinn, Note, *The Great Copper Caper: Is Market Manipulation Really a Problem in the Wake of the Sumitomo Debacle?*, 69 FORDHAM L. REV. 243, 261–70 (2000).

68. Fischel & Ross, *supra* note 66, at 548–49 (arguing that exchanges, which compete for capital, have incentives to “adopt trading rules and contract terms that reduce the costs associated with the exercise of monopoly power that may result from corners and squeezes”).

69. For the definitive history of commodities futures trading, see JERRY W. MARKHAM, *THE HISTORY OF COMMODITIES FUTURES TRADING AND ITS REGULATION* (1987); *see also* Fischel & Ross, *supra* note 66, at 548–49 (describing difficulty of executing a successful manipulation scheme). For discussion of the Commodity Future Trading Commission’s laissez-faire policy toward futures markets, see 2 TIMOTHY J. SNIDER, *REGULATION OF THE COMMODITIES FUTURES AND OPTIONS MARKETS* ¶ 12.01, at 12-4 to -5 (2d ed. 1995) (suggesting that the paucity of enforcement actions reflects, in part, the difficulty of distinguishing manipulative activity and ordinary market forces). The CFTC Division of Enforcement’s record is poor. *See* Suzanne McGee & Stephen E. Frank, *Manipulation May be Hard to Prove in Sumitomo Case*, WALL ST. J., July 15, 1996, at C1 (of twenty enforcement actions brought by the Commodity Futures Trading Commission (CFTC), the most successful involved settlements without admitting the allegations); *see also* Kozinn, *supra* note 67, at 249 n.40.

complicated scheme of manipulation, executed by Sumitomo copper trader Yasuo Hamanaka.⁷⁰ The scheme, which spanned multiple countries and included a series of trades on the London Metal Exchange from 1994 through 1996, was the target of a simultaneous CFTC enforcement proceeding.⁷¹ The defendants contended that determining artificiality required examination of the price fluctuations of each individual futures contract during the entire class period—an inquiry, they contended, which was not susceptible to generalized proof because the class members’ transactions occurred at different times against the backdrop of changing market conditions.⁷² In essence, defendants’ theory—had it been accepted by the trial court—would have precluded class actions when manipulation schemes involve a series of complex trades over a sustained time period, rather than a single, homogenous set of transactions executed at a particular point of time. Some reasonable policy considerations supported limiting the availability of class action enforcement of the CEA in this way. If, for example, regulators have difficulty identifying harmful manipulation, it may be better to leave the locus of enforcement authority in these kinds of complex cases to an expert, self-restraining agency rather than to entrepreneurial plaintiffs’ counsel, since the latter may be biased in *favor* of intervention (perhaps because they are optimistic about their ability to coerce a settlement).

The court, however, rebuffed the defendants’ opposition to certification.⁷³ It did so without addressing the institutional considerations against class action enforcement of the CEA, relying instead on formalistic incantations of the modern law of class action practice: that common issues “predominated” because the plaintiffs alleged a “common scheme.”⁷⁴ In order to justify this conclusion, the court invoked the canon—noting that district courts must “apply Rule 23 according to a liberal rather

70. For a detailed description of the Sumitomo manipulation controversy, see Kozinn, *supra* note 67, at 270–77.

71. See *In re Sumitomo Corp.*, No. 98-14, 1998 CFTC LEXIS 96, at *2 (Commodity Futures Trading Comm’n May 11, 1998); *In re Global Minerals & Metals Corp.*, No. 99-11, 1999 CFTC LEXIS 98 (Commodity Futures Trading Comm’n May 20, 1999).

72. *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 90 (S.D.N.Y. 1998) (“Global contends that plaintiffs must establish that the prices for each of the futures contracts that are the subject of this claim were artificial during all of the trading days involved.”).

73. *Id.* at 97.

74. *Id.* at 90–91 (holding allegations of conspiracy are sufficient to establish predominance).

than a restrictive interpretation.⁷⁵ The canon, in effect, trumped latent policy concerns about the institutional suitability of class action enforcement—concerns that, ultimately, went to the legislative intent behind the CEA.

In each of these cases, the canon is not the sole basis for addressing the disputed substantive questions. It is one thumb on the scale in favor of certification.⁷⁶ Nor, in the modern cases, is the canon used to make an explicit interpretation of law; rather, it is used to defer interpretation, while achieving the same outcome that would have resulted if the court had chosen one of the two competing interpretations. As we have seen, the canon might be said to conceal a *functional* choice of law.

75. *Id.* at 88 (citing *Green v. Wolf Corp.*, 406 F.2d 291, 298, 301 (2d Cir. 1968)).

76. Some courts use the canon in tandem with analysis of the Supreme Court's interpretations of Rule 23 in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982). *Eisen* held that courts may not engage in an assessment of the merits of a claim when resolving a motion for certification. 417 U.S. at 177–78. In *Falcon*, by contrast, the Court directed that trial courts rigorously assess the requirements of Rule 23, looking beyond the plaintiffs' pleadings if necessary. 457 U.S. at 160. The two directions are inconsistent in cases where Rule 23's requirements intersect with substantive inquiries (as where, for example, assessing the manageability requirement of Rule 23(b)(3) requires making a choice of law). In such cases it is impossible to rigorously assess Rule 23's requirements while avoiding the merits. Trial court certification decisions exhibit confusion about how to square the two directives in such cases. See Robert G. Bone & David S. Evans, *Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1268 (2002). Some courts apply the canon in order to resolve this tension: engaging in rigorous scrutiny of substantive questions that affect certification up to a point, but resorting to the canon in hard cases to resolve doubts in favor of certification without further inquiry into the merits. *In re Initial Pub. Secs. Off.*, 227 F.R.D. 65, 89–93 (S.D.N.Y. 2004) (applying principle that Rule 23 should be applied "liberally" in conjunction with discussion of conflict between *Eisen* and *Falcon*); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 303, 308, 311 (E.D. Mich. 2001) (citing *Eisen* and principle that courts "should err in favor of allowing a class" to resolve dispute over nature of proof necessary to establish class-wide antitrust impact).

Additionally, some courts apply a presumption in favor of certification for particular areas of substantive law—for example antitrust law. *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346 (N.D.Cal. 2005). These specialized canons are not derived from any explicit textual command or from detailed analysis of legislative history; instead, they appear to reflect a judicial interpretation of the policies animating antitrust and securities law in the abstract. As such, they can be used to avoid examination of concrete evidence of legislative intent contained in text and legislative history, just as the class action-respecting canon is used to avoid confronting concrete sources of legislative intent. The specialized canons also avoid consideration of certain enforcement trade-offs discussed in Part II.B.1 and II.B.2, which are relevant to all judicial interventions through the class device. Because the *Chevron* perspective argued for in Part III responds both to (1) use of abstract presumptions to defer consideration of concrete evidence of legislative intent and (2) use of the canon to avoid considering the enforcement trade-offs discussed in Part II.B, I do not consider the specialized canons separately; the critique of the class action-respecting canon developed below applies with equal force to policy-flavored canons in favor of certifying certain types of claims.

B. *Problems with the Class Action-Respecting Canon*

The canon might reflect a default assumption about legislative intent. Judgments about docket administration implicate an area of special judicial expertise.⁷⁷ Where a law proves to be ineffectual if it is litigated through a simple, case-by-case model of enforcement, courts may be the only institution competent to resolve the administrative problem in a fashion that closely approximates the outcomes intended by the legislature. For these reasons, Congress might want courts to use appropriate procedural tools to *translate* the intent from an administratively impractical individual enforcement setting into an administratively feasible representative enforcement setting.

However, the policy considerations implicated by the canon are considerably more complicated than these defenses acknowledge. Understanding these complications unsettles ready assumptions that Congress supports the canon, preparing the ground for my alternative proposal.

Below are four discrete potential problems that cases applying the canon do not address.

1. Enforcement Costs

The canon directs courts faced with a certification request to resolve doubts in favor of certification. Put another way, the canon instructs a court to resolve doubts in favor of reducing the *costs* of civil enforcement (since class actions are widely presumed to remedy recurring claims in cheaper fashion than duplicative interventions), whether or not each increment of reduction in cost will yield a net marginal gain. Yet, it is questionable whether each declining increment in civil enforcement costs yields a positive pay-off. In some cases, reducing the costs assumed by the judicial system creates unanticipated costs. A common example is the relationship between class certification and agency costs. Class actions reduce the expense of enforcement by enabling economies of scale. However, the reduction is made possible by appointing a representative to prosecute the claims. Representation may, in turn, create conflicts of interest between the named plaintiff's

77. See, e.g., *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (noting "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

lawyer and class members. Because class members have difficulty overseeing the plaintiff's lawyer, reducing enforcement costs creates risks that class members' claims will be settled prematurely in return for an award of inflated attorney fees.⁷⁸

Class actions, however, also involve a trade-off between different enforcement mechanisms.⁷⁹ For example, in the federal system, courts, agencies, private alternative dispute resolution, and—in the realm of securities oversight—self-regulatory organizations all offer alternative vehicles for enforcing legal rights. An increase in the cost of accessing one of these alternatives may encourage substitution of cheaper mechanisms. If courts are too expensive to serve as a mechanism for redress, and agencies are less expensive, those who seek enforcement may invest more resources to prod agency action.

We might desire to encourage enforcement substitution for one of two reasons. First, when a regulated entity is considered to be a superior cost-avoider, private dispute resolution may provide the entity with information it needs to self-regulate. Statutory schemes that require mandatory exhaustion of contractual grievance procedures are an example. In jurisdictions where exceptions to, say, ERISA's statutory exhaustion requirement are read narrowly, aggregating large numbers of claims is difficult because class members either must have pursued disputes and appeals internally, which is costly and time consuming if the class is large, or provided evidence that further recourse to internal procedures is futile, which requires some evidence that the dispute mechanisms have been tried without success by at least some plaintiffs.⁸⁰ The exhaustion requirement, therefore, increases the costs of access to civil

78. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883–89 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 679–84, 688–89 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*]; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 19–26 (1991); Nagareda, *Preexistence Principle*, *supra* note 1, at 164.

79. Enforcement costs should be analyzed like health and safety risks, which occur in a larger "system," or continuum, of risk, in which some risks may be exacerbated by efforts to control other risks. See Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1664–65, 1689–90 (2001) (discussing health-health trade-offs).

80. See, e.g., *Madera v. Marsh USA, Inc.*, 426 F.3d 56, 62–64 (1st Cir. 2005); *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 249–52 (3d Cir. 2002); *Fallick v. Nationwide Mutual Ins. Co.*, 162 F.3d 410, 419–21 (6th Cir. 1998).

enforcement, but it also has a channeling effect. When incentives exist to filter grievances through the plan's contractual dispute-resolution mechanisms, plans may be more likely to receive advance notice of systemic problems and correct them, reducing the need for costly, potentially error-prone, judicial intervention.

Second, we may want to improve priority-setting, especially in cases where it is not feasible to impose multiple, costly mandates on a regulated industry. The problem may arise, for example, where an industry is subject to liability under multiple statutory schemes administered by both courts and agencies. While the Executive Branch has developed intra-branch mechanisms to improve and coordinate priority-setting—including OMB cost-benefit analysis of agencies' regulatory initiatives⁸¹—no corresponding intra-branch mechanism exists within the judicial branch for cost-benefit review of enforcement choices.⁸² As a result, private suits may force regulated entities to devote scarce resources to marginal problems. That may, in turn, have a dynamic effect on the cost-benefit calculus of Executive Branch regulators. Imagine, for example, that a regulated industry, say a polluting manufacturer, has already invested significant resources in a relatively marginal problem (a pension dispute couched as a RICO claim for trebled damages) because of civil enforcement actions, and the manufacturer cannot absorb other significant environmental mandates that may address a vastly more significant problem without incurring high rates of business failure. In this hypothetical, lowering the cost of judicial intervention, perversely, narrows the universe of Executive Branch interventions that are economically feasible.

81. Ronald Reagan initiated centralized OMB cost-benefit review of agency action under Executive Order 12498. Exec. Order No. 12,498, 3 C.F.R. § 323 (1985), *reprinted in* 5 U.S.C. § 601 note (1988). The Clinton Administration continued the practice, with modifications, and the Bush Administration has proceeded under the Clinton order. *See, e.g.*, Exec. Order No. 12866, 3 C.F.R. § 638, 649 (1993), *reprinted in* 5 U.S.C. § 601 note (Supp. 1993). For discussion, see Christopher C. DeMuth & Douglas Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986) (discussing genesis and merits of formal presidential oversight of Executive Branch rulemaking), and Robert H. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002) (same).

82. *See* Richard Nagareda, *Gun Litigation in the Mass Tort Context*, in *SUING THE GUN INDUSTRY* 186–88 (Timothy Lytton ed., U. Mich. Press 2005); Nagareda, *Aftermath*, *supra* note 1, at 349–53 (noting “the lack of coordination between tort litigation and administrative proceedings,” and the absence of cost-benefit review in mass torts).

Imposing a tax on judicial intervention, in the form of higher judicial enforcement costs, can help solve this coordination problem. Where large-scale litigation is prohibitively expensive, reformers may substitute other enforcement mechanisms. In this way, the regulatory system can reduce judicial control over highly complex regulatory problems and, at the same time, expand resources that private entities can commit to meet Executive Branch regulatory mandates. Thus, higher costs of civil enforcement can facilitate executive priority setting, thereby serving as an indirect form of inter-branch coordination.

Of course, there is a downside to this form of indirect coordination. As John Coffee has shown, entrepreneurial counsel are likely to respond to heightened costs of judicial intervention by reducing their investment in both marginal *and* meritorious suits.⁸³ By developing a portfolio of lawsuits, each with a smaller investment, plaintiffs' attorneys can spread their costs across a diversity of risks; even if only a few of those suits settle, only one or two settlements may recoup plaintiffs' attorneys' costs. As a result, the plaintiff's attorney is able to mitigate the high cost of filing and prosecuting a lawsuit.⁸⁴ The claims represented, however, may be settled for a fraction of their value.⁸⁵ As a result, raising the cost of judicial intervention may encourage enforcement substitution but also increase the agency costs of class litigation.

However, the agency costs to represented plaintiffs must be balanced by the gains derived from enforcement substitution. The trade-off is difficult to quantify. On the one hand, it depends on the relative frequency of poorly prioritized enforcement efforts by private entrepreneurial counsel; on the other, it depends on the public regulators. If we assume, for example, that of every ten private suits initiated, eight target low priority problems (while the opposite is true of public enforcement), we may prefer that the private lawsuits are sold at a discount if doing so encourages a greater range of economically feasible public enforcement measures.

83. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 78, at 705–12, 722–23.

84. *Id.* at 712.

85. *Id.* at 723.

2. Incrementalism

Lowering the costs of judicial intervention may also come at the expense of incrementalism. The class action lowers the cost to courts of intervening by enabling a few lawyers to aggregate large numbers of claims. The cost reduction can enable immense one-shot interventions, sometimes involving hundreds of thousands of claims.⁸⁶ However, such intervention may be ill-advised in a regulatory field that is undergoing rapid technological change or in which the values sought to be enforced are unclear. Consider the emerging field of online privacy. There, technology is in flux; harms are novel; and consumer preferences are unclear; as a result, a one-shot intervention may require courts to make determinations of fact and value that are unstable and subject to change.⁸⁷ If a plaintiff were to sue an Internet platform provider under a commercial fraud statute for misrepresenting its privacy policy about data sharing with online retailers (imagine, say, that a platform provider monitors users' buying habits, compiles this data, and gives it to retailers like Amazon, as in our earlier example), a requirement that a plaintiff prove he justifiably relied to his detriment on representations about privacy and data sharing may prevent class certification. Some consumers may care little about the data sharing policy or even think it is a good thing. Therefore, inquiring whether plaintiffs and class members individually "relied" on this representation, and suffered harm as a result, would require individualized assessment of each class members' preferences, rendering these claims difficult to aggregate. Even so, this barrier to certification may promote better policymaking if it yields smaller-scale interventions (perhaps by small, homogeneous groups of consumers, rather than large, heterogeneous groups), encourages a longer time horizon for pre-filing investigation (including a search by plaintiffs for a form of wrongdoing more likely to form the basis for a consensus among consumers in favor of enforcement), and

86. Priest, *supra* note 3, at 544 (prime function of class device is to achieve scale economies); see Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L. L. 179, 206-07 (2001) (discussing rise of large scale public policy class actions).

87. Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309, 311 (2002).

deters premature enforcement before the costs of online data sharing are better understood.

3. Predictability

The class action canon also creates a rule-of-law or predictability problem. The canon displaces judicial reasoning by directing courts to defer hard substantive questions based on a simple presumption in favor of aggregation. As a result, the canon tends to produce undeliberative judicial intervention in which the law is applied without the rigorous examination of legislative preferences that typifies interpretive choices in other contexts. That opacity, coupled with the haphazard application of the canon, renders it difficult to predict how courts will interpret the law when administering class actions in subsequent cases.

Worse still, it is unclear *when* the class action-respecting canon applies. Some variation of the canon will support certification in almost all cases. If a lawsuit involves negative value claims, some courts justify the canon as a means of obtaining justice for small-stakes litigants.⁸⁸ If, on the other hand, a lawsuit involves claims that are substantial enough to be litigated individually, some courts justify the canon as a means of reducing costs incurred by the judicial system.⁸⁹ In almost any case, then, the canon can be used to promote an alteration in underlying substantive law. Yet, at the same time, the canon is applied at the haphazard discretion of courts. As a result, the canon has no clear domain.

4. Accountability

The class action canon creates a fourth problem by expanding the realm of policymaking that is not subject to direct democratic oversight. As enforcement costs decrease, more policymaking takes place through the judicial branch.⁹⁰ Unlike agencies, however, judges are not answerable to a democratically accountable Executive. Nor are judges subject to the “fire alarm” system in which interest groups inform congressional oversight

88. See, e.g., *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968).

89. See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001).

90. See *supra* Part II.B.1.

committees of regulatory problems, triggering threats of budget cuts, new legislation, and oversight hearings.⁹¹

To be sure, class actions aren't entirely unaccountable. Congress can pass legislation to correct problems with class action. However, the predictability problem created by the canon disrupts Congress's incentives to communicate its preferences to courts and may have even larger ripple effects by disrupting the President's ability to manage agencies within his control.

Below, I take a closer look at the ripple effects of the class action-respecting canon, by analyzing (1) its effect on Congress's incentives to communicate preferences to courts, and (2) its effect on executive control over agencies.

a. *Courts' Accountability to Legislators*

First, consider communication between courts and Congress. Congress can communicate its preferences about class actions in a number of ways. First, it might ban use of class actions under certain statutes. Early versions of the Patient Bill of Rights (a legislative initiative to enhance consumer rights to health care) did this, for example.⁹²

However, Congress also might act with a scalpel by adjusting the burdens of proof that plaintiffs must meet to prove elements of a claim in a class context in order to make it marginally more difficult to certify classes. Unfortunately, because its domain is unclear, the class action-respecting canon makes it difficult for Congress to predict when class action courts will pay attention to evidence of Congress's intent to impose such restraints on class litigation.

True, super-clear statements of intent to ban class actions or to mandate certain burdens of proof will be respected, but the canon can trump consideration of somewhat imprecise evidence of legislative intent by allowing courts to defer consideration of that evidence. Congress may respond by investing less effort to signal its preferences about the conduct of class litigation, at

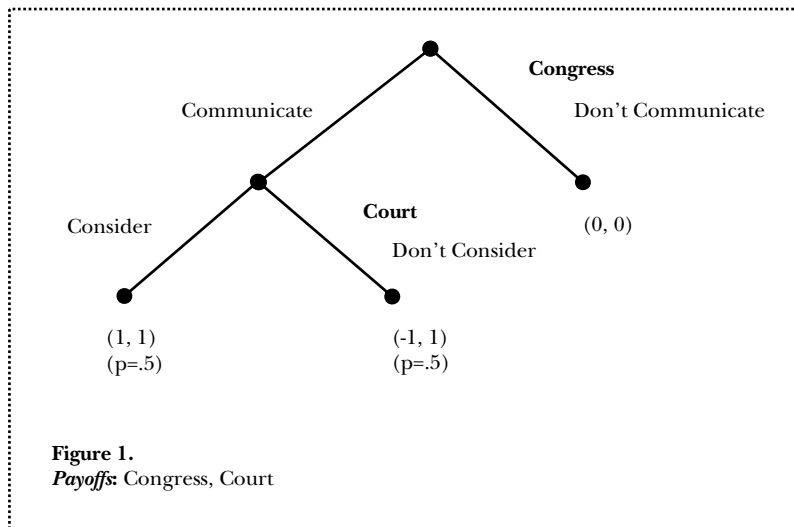
91. Kagan, *supra* note 6, at 2255–60; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 274 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984).

92. See, e.g., Patient Bill of Rights, H.R. 2563, 107th Cong., § 402(a) (2001) (banning the use of class actions when plaintiffs sue employer-sponsored HMOs under ERISA for failure to provide adequate medical benefits).

least when it is unable to command a very (in most cases, prohibitively) high degree of internal consensus about its preferences.

A simple decision tree (see Figure 1) helps formalize this prediction:⁹³

FIGURE 1



Here, I assume that Congress is risk neutral about burdens of proof that plaintiffs must meet to prove causation or injury in a class context, a reasonable assumption based on (1) the fact that legislators write class restraints at the behest of corporate supporters, who are sophisticated consumers of class action law and are widely presumed to be risk neutral,⁹⁴ and (2) the relatively low stakes that a choice between different burdens entails. If Congress does communicate preferences about these burdens, it expends labor that, for simplicity sake, we will value

93. For analysis of interaction between Congress and courts as a “game,” see DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 100–08 (1994), and Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 *STAN. L. REV.* 627, 637–39 (2002).

94. For a discussion of presumption of congressional risk-neutrality, see Adrian Vermeule, *The Delegation Lottery*, 119 *HARV. L. REV.* F. 105, 110–11 (2006) (“[T]he standard assumption in economic modeling is that corporations are risk neutral, because shareholders can diversify risk at lower cost than corporate managers,” an assumption with relevance if Congress is subject to “tight principal-agent control . . . by corporate or economic interest groups . . .”).

at 1. Congress does not know which kind of court will respond. Some courts will commit to carefully examining the best evidence of Congress's preferences. When they do, I assume Congress receives a pay-off valued at 2, for a net benefit of 1. We assume this kind of court derives a benefit from the rule of law and therefore receives a net benefit of 1 as well. If courts do not commit to examining closely all evidence of intent, I assume Congress suffers a loss of 1. These kinds of courts, which value their discretion, also gain a benefit of 1. If Congress believes there is an equal (i.e., 50%) chance either type of court will receive its communication, then its choice to communicate with courts will yield an anticipated benefit of zero $((.5 \times 1) + (.5 \times -1))$ —the sum of the two possible discounted pay-offs. That is the same pay-off it would receive if it did not communicate anything. Congress will be indifferent between communicating medium-clear preferences (i.e. preferences that are open to some interpretation, even if those preferences are pretty clear) about the burdens plaintiffs must meet to prove causation or injury in the class context, and not communicating any preferences.

b. *Agencies' Accountability to the Executive*

Class actions also allow executive agencies to expand their power in controversial ways, while evading oversight. Consider two well-known examples: breast implant litigation spawned by a Food and Drug Administration (FDA) investigation in the mid-1990s and New York Attorney General Eliot Spitzer's role in the mutual fund "market timing" controversy in 2003. In both cases, executive action led to an explosion of litigation, augmenting the real-world effect of the executive intervention.

Between January and April 1992, FDA Commissioner David Kessler launched an investigation into the health risks of silicone breast implants, which some claimed increased recipients' risk of cancer.⁹⁵ The investigation began with a widely reported press conference on breast implant risks, in which Kessler called for a forty-five-day "voluntary" moratorium on production of silicone implants.⁹⁶ Leaks to the media of corporate documents provided

95. David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457 (1999); Nagareda, *Aftermath*, *supra* note 1, at 330–39; see MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* (1996).

96. Bernstein, *supra* note 95, at 474.

to FDA investigators by implant manufacturers followed.⁹⁷ In April, the FDA instituted a formal implant ban, with limited exceptions.⁹⁸ The FDA did not, however, claim that a link between the implants and cancer had been proven, only that the manufacturers had failed to demonstrate a “reasonable assurance” of the safety of implants, as federal law required.⁹⁹ The publicity drive and subsequent ruling nonetheless launched an avalanche of litigation against implant manufacturers, based on several different medical theories (including claims that implants cause both cancer and auto-immune disease).¹⁰⁰ By June 1992, the federal multidistrict litigation panel had authorized a central forum for class actions against major implant manufacturers.¹⁰¹ Dow Corning announced bankruptcy in 1995.¹⁰² Subsequent medical research has, however, uncovered no conclusive evidence of a link between implants and disease.¹⁰³

A similar trajectory—executive investigation that sets off an avalanche of private litigation—characterized the 2003 “market timing” scandal. In that case the litigation followed on the heels of a voluntary settlement between New York Attorney General Eliot Spitzer, a hedge fund (Canary Capital Partners), and three mutual fund groups (the Janus fund group, Putnam fund group,

97. David A. Kessler, Comm’r, Food and Drug Admin., Statement on Silicone-Gel Breast Implants (Jan. 6, 1992), available at <http://www.fda.gov/bbs/topics/SPEECH/SPE00012.htm>; see also Bernstein, *supra* note 95, at 475.

98. See Congressional Report on the FDA’s Regulation of Silicone Breast Implants, http://www.breastimplantinfo.org/what_know_3-FDA1992.html (last visited Nov. 23, 2006).

99. See 21 U.S.C. § 360c(a)(1)(C) (2000); David A. Kessler, *The Basis of the FDA’s Decision on Breast Implants*, 326 NEW ENG. J. MED. 1713 (1992).

100. See ANGELL, *supra* note 95, at 69 (commenting that the FDA ruling set off a “tidal wave of litigation”); Bernstein, *supra* note 95, at 465–67; Nagareda, *Aftermath*, *supra* note 1, at 333–35.

101. *In re Silicone Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

102. Jay Mathews, *Breast Implant Maker Files for Bankruptcy*, WASH. POST, May 16, 1995, at A1; Nagareda, *Aftermath*, *supra* note 1, at 336–37.

103. See Nagareda, *Aftermath*, *supra* note 1, at 338; see also FDA Breast Implant Consumer Handbook 2004, at 34, available at <http://www.fda.gov/cdrh/breastimplants/indexbip.pdf> (last visited Nov. 10, 2006) (“[S]tudies have not been large enough to resolve the question of whether or not breast implants slightly increase the risk of CTDs or related disorders.”); Barbara G. Silverman, et al., *Reported Complications of Silicone Gel Breast Implants: An Epidemiologic Review*, 124 ANNALS INTERNAL MED. 744, 755 (1996). For a contrary view of FDA intervention, see Rebecca S. Dresser, Wendy E. Wagner & Paul C. Giannelli, *Breast Implants Revisited: Beyond Science on Trial*, 1997 WIS. L. REV. 705 (1997).

and Strong Capital fund group).¹⁰⁴ The mutual funds permitted Canary to “time” the market by short-term trading in and out of funds, despite fund rules against short-term trading.¹⁰⁵ They also allowed Canary to trade shares of international funds after international markets had closed, thereby profiting from information that was not available to the market.¹⁰⁶ In tandem with the announced settlement, Spitzer published a draft complaint—never filed—against the mutual fund companies on the New York Attorney General’s website.¹⁰⁷ The allegations of the complaint in turn were replicated in over one hundred different class action and derivative suits.¹⁰⁸ Spitzer achieved the same effect as Kessler by using publicity alone.

The breast implant and mutual fund litigation both involved what might be called “signaling”—that is, agency conduct directed to the litigation market that, consciously or otherwise,¹⁰⁹ induced private enforcement actions. The FDA, for example, used a savvy media campaign in which FDA staff leaked damaging implant manufacturers’ documents to major media, heightening attention to its breast implant initiative.¹¹⁰ Spitzer tied the media announcement of his settlement with an online release of a model for private enforcement—that is, a published, unfiled complaint, posted on a website and available for download and copying.¹¹¹ In each case, the signaling correlated with increased private litigation. The litigation, in turn, transformed the impact of the limited intervention of the agency. In the silicone breast implant example, manufacture of silicone breast implants remained legal under limited

104. Jonathan D. Glater, *First Wave of Suits Hits Mutual Funds Under Inquiry*, N.Y. TIMES, Sept. 24, 2003, at C1; Staff Reports, *Mutual Fund Probe Stirs String of Lawsuits*, L.A. TIMES, Sept. 6, 2003, at C3.

105. See Complaint at ¶¶ 9–14, *New York v. Canary Capital Partners LLC* (2003), available at http://www.oag.state.ny.us/press/2003/sep/canary_complaint.pdf.

106. See *id.*

107. See *id.*

108. See, e.g., *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845 (D. Md. 2005). Given the size of the consolidated proceedings, the MDL Panel took the extraordinary step of consolidating the cases in a single district but dividing the litigation among three different trial judges. *Id.* at 852–53.

109. The FDA probably did not anticipate that its actions would trigger private litigation. See Nagareda, *Aftermath*, *supra* note 1, at 334–35 (noting that the FDA apparently intended to establish a temporary “time out” for breast implants while further study proceeded). Whatever the scienter of the agency, the trajectory of the FDA investigation demonstrated what conscious agency signaling might accomplish.

110. See Kessler, *supra* note 97.

111. See Complaint, *supra* note 105.

circumstances, including reconstructive surgery and implant replacement.¹¹² Thus, while FDA regulatory action, by itself, had little effect on Dow Corning, which had ceased production of silicone implants prior to the implementation of the ban,¹¹³ the ensuing litigation drove Dow Corning into bankruptcy.¹¹⁴ Similarly, Spitzer's model complaint served as the basis for private complaints in a series of class and derivative lawsuits that embroiled eighteen major mutual fund families, rocking the entire mutual fund industry and magnifying what would have otherwise amounted to a limited intervention.

Both examples suggest that an entrepreneurial executive agency can implement policy, or magnify preexisting regulatory action, by signaling enforcement preferences to private litigators. When calculated to trigger litigation, signaling may, in turn, allow agencies to evade political oversight. First, private litigation is a substitute for, or enhancement to, agency rulemaking. Second, OMB cost-benefit review—a principal mechanism for executive control of agency behavior—does not take account of the indirect costs that private copy-cat litigation may impose on a regulated entity.¹¹⁵ Thus, signaling may be a

112. As Dresser, Wagner, and Giannelli explain:

Kessler's decision established three mechanisms for obtaining silicone gel implants. Initially, implants would be available only on an "urgent need" basis to post-mastectomy patients awaiting permanent reconstructive surgery; women undergoing reconstructive surgery immediately after mastectomy; and women needing immediate implant replacement to address implant rupture and other complications. Thereafter, any woman undergoing reconstruction could obtain implants by participating in clinical studies. Data on implant safety and effectiveness would be collected as part of the studies. Finally, a smaller group of women desiring either reconstruction or augmentation could obtain implants by participating in a more rigorous research trial.

Dresser, Wagner & Giannelli, *supra* note 103, at 711. For a complete description of the FDA ban, see David A. Kessler et al., *A Call for Higher Standards for Breast Implants*, 270 J. AM. MED. ASS'N 2607 (1993).

113. See Barnaby J. Federer, *Dow Corning in Bankruptcy over Lawsuits*, N.Y. TIMES, May 16, 1995, at A1, D6; see also Nagareda, *Aftermath*, *supra* note 1, at 336 n.214.

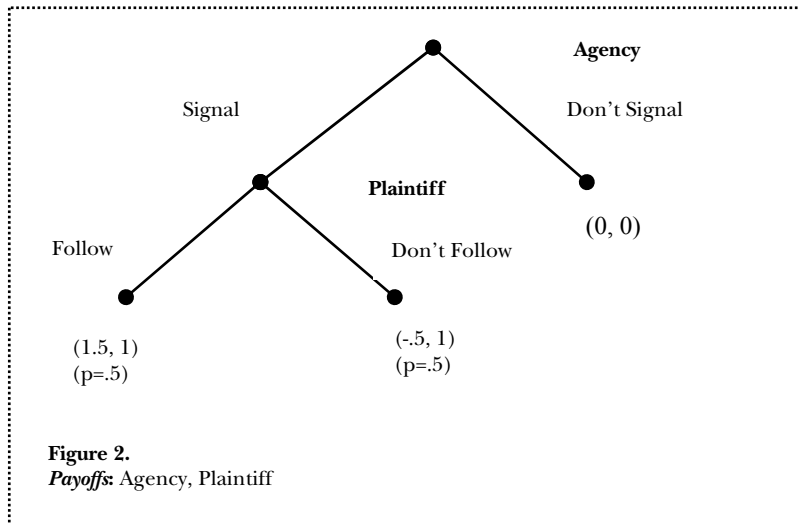
114. See Mathews, *supra* note 102.

115. The OMB's instructions focus on the direct costs to government and business in complying with the regulation and do not mention litigation costs. See Exec. Order No. 12,866 § 6(a)(3)(C)(ii), 58 Fed. Reg. 190 (Oct. 4, 1993) (requiring "[a]n assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs").

strategy for evading hierarchical White House cost-benefit review of agency action.

Assuming that agencies are aware of the possibility of signaling, uncertainty about its effect will not necessarily deter signaling *behavior*. To see why, consider the decision tree in Figure 2 below:

FIGURE 2



Here, the key assumption is that agencies are risk neutral—reasonable given agencies’ expertise about risk trade-offs—and that the cost to an agency of signaling is much cheaper than legislation: here, half the cost to Congress of communicating in our earlier example. The agency is utterly uncertain how often plaintiffs in the litigation market will respond to signaling. The equilibrium for the agency is to signal, since this is the “play” that yields the highest possible payoff: .5 or $((1.5 \times .5) + (.5 \times -.5))$. Unlike Congress, which responds to uncertainty by not communicating its preferences, agencies, under this set of assumptions, will signal. The cheaper signaling is to the agency, the more likely agencies will try it, even if the odds that plaintiffs will follow are less than even. This suggests that the class action-respecting canon, by expanding the availability of the class device, will increase the incidence of unpredictable strategic efforts to evade or undermine presidential control. In a system that prizes democratic control of agencies, the canon is therefore a cost.

C. *The Rules Enabling Act and the Preexistence Principle: Incomplete Answers*

Section B illustrates, in short, that the class action-respecting canon—far from being easily attributable to Congress—entails difficult trade-offs that courts cannot easily assess. That makes it more difficult to justify an easy assumption that Congress intends the class action-respecting canon.

Is there a way to measure or approximate legislative preferences concerning certification, when the law is unclear, that can rescue us from wading into the difficult trade-offs outlined in Section B? In Part III, I turn to administrative law for a solution to this problem. Before doing so, we must consider whether there are solutions that require a less radical conceptual turn.

Two possibilities have been suggested by commentators. First, perhaps the REA restrains courts' power to alter the law in the class context.¹¹⁶ The Act delegates authority to courts to enact and apply procedural rules, subject to the condition that rules of procedure "shall not abridge, enlarge, or modify any substantive right."¹¹⁷ Perhaps the Act forbids use of the canon to defer consideration of unsettled questions of substantive law.

A second argument is suggested by Richard Nagareda, who argues that class actions must respect what he calls the "preexistence principle."¹¹⁸ The principle is an elaboration of the Supreme Court's logic in two cases—*Amchem Products, Inc. v. Windsor*¹¹⁹ and *Ortiz v. Fibreboard Corp.*¹²⁰ As Nagareda explains, the preexistence principle he derives from these cases tells courts that the structure of class actions should ensure that class representatives respect parties' preexisting bundle of rights.¹²¹

116. Redish, *supra* note 3, at 82 ("In light of the insights of this democratic critique of the modern class action, one might be tempted to conclude that, as presently structured, Rule 23 violates the separation of powers protections of the United States Constitution, or at the very least the statutory directive of the REA that a procedural rule may not abridge, enlarge, or modify a substantive right."). For discussion of the system governing promulgation of federal rules of procedure, see Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 51–62, 89–90 (1998) and Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733 (1985).

117. 28 U.S.C. § 2072(b) (2000).

118. Nagareda, *Preexistence Principle*, *supra* note 1, at 156–57.

119. 521 U.S. 591 (1997).

120. 527 U.S. 815 (1999).

121. Nagareda, *Preexistence Principle*, *supra* note 1, at 156–57.

Applied to statutory interpretation, Nagareda's recent writings suggest that the preexistence principle dictates the following decisional rule: the policy concerns in favor, or against, class certification cannot be a "thumb on the scale" of any interpretive decision.¹²²

Both proposed solutions, however, have problems.

1. The Rules Enabling Act is Unclear

Unfortunately, while the REA forbids the "abridgement" or "modification" of substantive rights, the REA has little concrete to say about how courts should interpret open-textured statutes. In such cases the "substantive law" is unclear. Asking whether an interpretation of the substantive law abridges the rights under the statute requires the court to determine how Congress wants the ambiguity to be resolved—a question that the REA can't answer.

Because the REA is unclear, it is largely ignored by federal courts. In seventy years of experience with the REA, the Court has rarely found that a judicial application of a federal rule of procedure exceeds judicial authority. In *Burlington Northern Railroad Co. v. Woods*,¹²³ the most recent pronouncement, the Court held that a federal rule may impose an "incidental" effect on "substantive rights" so long as the rule is "reasonably necessary to maintain the integrity" of a "uniform and consistent system of rules governing federal practice and procedure."¹²⁴ Given the permissive application of the REA standards, courts are likely to find a rational connection between the canon and process uniformity, even though the canon spawns enormous confusion about its application in practice. A court might, for example, reason that aggregation of claims into one proceeding promotes uniform application of the entire corpus of federal rules to a class of recurring claims.

122. The approach is implied by Nagareda's suggestion that the preexistence principle forbids courts from bootstrapping choice of law by treating the desirability of certification as a thumb on the scale in favor of a particular choice of law. See Richard Nagareda, *Bootstrapping in Choice of Law after the Class Action Fairness Act*, 74 UMKC L. Rev. 659, 665–68 (2006) (suggesting that the preexistence principle and the structure of class action is violated when the filing of a class action functions as a "thumb—or, at least, a modest index finger—on the scale" of a court's choice of law).

123. 480 U.S. 1 (1987).

124. *Id.* at 5.

2. *The Preexistence Principle Exacerbates Bad Faith Interpretation*

The interpretive rule that Richard Nagareda's work suggests can be derived from the preexistence principle—i.e., courts asked to interpret statutes that affect the scope of certification must not treat the utility of class certification as a thumb on the scale in favor of one interpretation—raises similar problems. The rule would direct courts to follow the ordinary law of statutory interpretation, *sans* consideration of the benefits of class certification. Yet because the Supreme Court has failed to give interpreters guidance about the weight that each source of legislative material (text, history, and context) should receive in ordinary cases,¹²⁵ statutory ambiguity is a pervasive interpretive problem.¹²⁶ Telling courts to respect preexisting law, when the law is open-textured, simply restates our problem. Because the preexistence principle is unhelpful when the law requires interpretation, it may simply push policy considerations about the utility of certification underground.

Perhaps an amendment to the preexistence principle might fix this problem. Rather than ask courts to ignore the consequences of certifying a class, courts should simply apply a flat presumption *against* certification, absent a clear contrary statement by Congress. This would force Congress to provide information about its preferences, making it easier for courts to avoid outcome-oriented interpretation. This rule, however, is likely to prove unworkable. First, it would represent a radical break with current law. Second, it would entail significant transition costs. When selecting the clear statement rule, courts must define the degree of clarity that overcomes a presumption against certification. For example, courts might select a super-clear-statement requirement, in which legislative intent must be clear beyond a doubt or unequivocal; a medium-clear-statement requirement, in which the presumption against certification might be overcome by clear and convincing evidence of contrary legislative intent; or a weak presumption against certification, which may be overcome by a simple preponderance of the

125. Grundfest & Pritchard, *supra* note 93, at 643 (“There are . . . many different and potentially inconsistent sources of legislative history. Empirical studies of Supreme Court opinions suggest that all of these sources are relied upon to one degree or another.”).

126. *Id.*; see also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 195 (2005) (Thomas, J., dissenting) (“Under the majority’s reasoning, courts may expand liability as they, rather than Congress, see fit.”).

evidence.¹²⁷ Determining the appropriate burden will require the Supreme Court to increase its oversight of class action law. However, the Supreme Court has, to date, made limited forays into that field, suggesting it does not have the appetite for more involvement. As a result, even if the Supreme Court did adopt a blanket presumption against certification, the rule likely would collapse into a muddle of inconsistent applications, much like the class action-respecting canon, an equally severe canon of opposite effect.

In the next part, I argue for a different approach, patterned on administrative law.

III. CHEVRON AND CLASS ACTION LAWMAKING

To readers familiar with administrative law, the issues raised by class action-lawmaking should sound familiar. Congress often leaves difficult questions unanswered when it commits a statutory scheme to administrative oversight.¹²⁸ Agency interpretation of ambiguous statutes has, in turn, prompted a rich debate about the scope and legitimacy of agency discretion, one that raises difficult questions about separation of powers, delegation, due process, and accountability.¹²⁹

The Court has addressed these problems through the *Chevron* doctrine. In this Part, I argue that courts should take into account the utility of certification when interpreting statutes only if a hypothetical agency, acting consistently with *Chevron*, would be allowed to consider policy trade-offs of different interpretations of that statute. Used this way, *Chevron* is a “starting-point rule” for measuring the scope of delegated authority to courts to promote class settlements. I argue this rule is attractive for two reasons: First, it is a low-cost rule, familiar to courts and easy to apply. Second, adopting it is broadly consistent with the justification for *Chevron* in the administrative context: promoting democratically accountable regulatory decisionmaking.

In Section A, I provide an overview of *Chevron* perspective. In Section B, I defend the proposition that the *Chevron* framework

127. Merrill & Hickman, *supra* note 6, at 889.

128. Sunstein, *supra* note 6, at 2086.

129. Bressman, *supra* note 6, at 470–74 (summarizing debate over legitimacy of agency rulemaking); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684 (1975).

can be used to improve class action lawmaking. I begin by explaining the uses of “starting-point rules.” I then unpack how *Chevron* might act as a starting-point rule for measuring the scope of discretion and why Congress would want courts to use such a rule.

A. *The Chevron Perspective*

By 1984, the law governing agency statutory interpretation was a conceptual mess. Courts awarded deference to agency interpretations of law based on a multi-factored inquiry into the context of the agency’s decision, including whether the agency had consistently interpreted the relevant statutory provision, whether the interpretation raised “technical and complex” questions within the scope of agency expertise, and whether Congress was aware of and could be deemed to have implicitly ratified the interpretation.¹³⁰ Confusion reigned.

*Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*¹³¹ clarified the rules of administrative deference. The case asked the Court to address the Clean Air Act’s definition of “stationary source” pollution.¹³² The EPA had adopted a plant-wide definition of the term, allowing all devices in a single plant to be treated as though encased in a single “bubble.”¹³³ This “bubble concept” allowed a plant to modify equipment without a permit so long as the alteration did not increase total plant emissions.¹³⁴ Writing for a unanimous Court, Justice Stevens upheld the EPA’s interpretation, applying a simple, two-pronged framework.¹³⁵ First, the Court examined whether Congress had spoken unambiguously to the “precise question” at issue.¹³⁶ Concluding it hadn’t, the Court ruled that it was obligated to defer to a reasonable interpretation of the statute, even if the Court would not have adopted that interpretation independently.¹³⁷

130. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (1985); Merrill, *supra* note 6, at 972–75.

131. 467 U.S. 837 (1984).

132. *Id.*

133. *Id.* at 840–43.

134. *Id.* at 840.

135. *Id.*

136. *Id.* at 842–43.

137. *Id.* at 843–45.

The *Chevron* framework treats statutory ambiguity as an implicit delegation of policymaking authority to agencies by Congress.¹³⁸ This is only a presumption, arising where (1) agencies have the power to act with the force of law,¹³⁹ and (2) the interpretation is set forth in agency action that has the force of law, such as a rule produced through notice-and-comment rulemaking.¹⁴⁰ As the Court held in *United States v. Mead Corp.*, the presumption reflects an understanding of Congress's intent.¹⁴¹ When Congress does not speak clearly, and Congress has vested the agency with authority to act with the force of law, it is presumed Congress intended agencies, not reviewing courts, to make the policy choices entailed by application of the statute.

By treating *Chevron* as a legislative command, *Mead* also has implications for parallel rules of law. First, Congress can “switch off” *Chevron* by instructing courts to review agency interpretations of law de novo.¹⁴² Second, because legislative commands supersede previous statutes, an agency's reasonable interpretation of a statute—an act of delegated legislative authority—supersedes contrary, previously enacted statutory provisions. This explains why *Chevron* is not precluded by § 706 of the Administrative Procedure Act (APA), which instructs courts to “decide all relevant questions of law.”¹⁴³ When Congress entrusts an ambiguous statute to agency oversight, it has created

138. *Id.* at 843–44.

139. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

140. *Id.* at 229 (“[A] very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”); *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (holding that there is no *Chevron* deference to agency guideline where congressional delegation did not include the power to “promulgate rules or regulations” (internal citation omitted)).

141. 533 U.S. at 230 (“[W]here it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is ‘inapplicable.’” (internal citation omitted)) (quoting *Christensen v. Harris County*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting)).

142. *Merrill & Hickman*, *supra* note 6, at 872 (“[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply.”); *see, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515–16 (“If, in the statute at issue in *Chevron*, Congress had specified that in all suits involving interpretation or application of the Clean Air Act the courts were to give no deference to the agency's views, but were to determine the issue de novo, would the Supreme Court nonetheless have acquiesced in the agency's views? I think the answer is clearly no. . . .”).

143. 5 U.S.C. § 706 (2000); *see also* Scalia, *supra* note 142, at 514 (noting APA reflects the “quite mistaken assumption that questions of law would always be decided de novo by the courts”).

an exemption from § 706 of the APA.¹⁴⁴ Third, reasonable agency interpretations of ambiguous statutes trump rules of stare decisis, since Congress has the power to preempt erroneous statutory interpretations and is understood to have delegated to agencies that same power.¹⁴⁵

The scope of delegated agency discretion under *Chevron* step two is unsettled.¹⁴⁶ Some courts, finding ambiguity at step one, ask whether the agency interpretation is consistent with a reasonable interpretation of statutory structure or purpose.¹⁴⁷ However, a line of D.C. Circuit cases understands *Chevron*'s second step as a form of arbitrariness review, requiring agencies to offer a reasoned justification for choosing among available policies.¹⁴⁸ Understood in this way, step two overlaps with arbitrary and capricious review of agency action under the APA.¹⁴⁹

B. A *Chevron* Model for Class Action Lawmaking

In this section, I will argue that courts asked to interpret a statute that affects the scope and availability of class certification should take into account the utility of certification only if a hypothetical agency, acting consistently with *Chevron*, would be allowed to consider policy trade-offs of different interpretations of that statute. This interpretive rule—which I call the “*Chevron* framework” below—is a “starting-point” rule for measuring the scope of discretion Congress would want courts to exercise when deciding whether to “adapt” a statute to the class context.

144. Merrill & Hickman, *supra* note 6, at 871 (“In effect, every time Congress has made an implied delegation to an administrative agency, it has silently amended section 706 of the APA.”). As Merrill and Hickman argue, it is possible to view *Chevron* as a canon of construction that interprets, rather than supplants, § 706 of the APA; but this reading of *Chevron* is difficult to square with the Court’s assumption that *Chevron* is mandatory. *Id.*

145. 125 S. Ct. 2688 (2005).

146. *See, e.g.*, Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1261 (1997).

147. *Id.* at 1278, 1281; *see, e.g.*, National Ass’n of Mfrs. v. U.S. Dep’t. of Interior, 134 F.3d 1095, 1106–08 (D.C. Cir. 1998); Kennecott Utah Copper Corp. v. U.S. Dept. of Interior, 88 F.3d 1191, 1213 (D.C. Cir. 1996); National Def. Council, Inc. v. Reilly, 976 F.2d 36, 43 (D.C. Cir. 1992) (Silberman, J., concurring).

148. *See, e.g.*, Northpoint Tech, Ltd. v. FCC, 412 F.3d 145, 151–56 (D.C. Cir. 2005); Republican Nat’l Comm. v. FEC, 76 F.3d 400, 406–07 (D.C. Cir. 1996); Nat’l Ass’n of Regulatory Util. Comm’rs. v. Interstate Commerce Comm’n, 41 F.3d 721, 726–27 (D.C. Cir. 1994); Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 374 (D.C. Cir. 1989) (Silberman, J., concurring).

149. Lawson, *supra* note 6, at 1379; Levin, *supra* note 146, at 1271.

In order to make this case, I begin by explaining what a “starting-point” rule is and why we should use one here. Next, I examine why *Chevron* is an attractive starting-point rule for measuring the scope of proper delegations to courts in class context.

1. Starting-Point Rules

Nicholas Quinn Rosenkranz argues that certain rules of statutory interpretation are constitutionally required of courts but not of Congress; he calls these rules “constitutional starting-point rules.”¹⁵⁰ One such constitutional starting-point rule, he suggests, is *Chevron*, which “help[s] determine which dynamic interpretive statutes might run afoul of the nondelegation doctrine”—in effect defining the floor of permissible delegations to agencies.¹⁵¹

While Rosenkranz, for analytical purposes, reserves the term “starting-point rule” for rules derived from the Constitution,¹⁵² rules amenable to this label do not, as a conceptual matter, require a constitutional pedigree. For example, when courts do not know Congress’s preferences, Adrian Vermeule argues that courts must pick default rules that impose the lowest decision costs on courts—that is, rules chosen based on decisional criteria that judges are able to measure, rather than based on uncertain empirical guesstimates about whether a rule is useful.¹⁵³ Such default rules also might be described as a kind of starting point, subject to legislative alteration.

Starting-point rules of this sort are derived not from constitutional exegesis, or from *stare decisis*. Instead, they are chosen by courts as temporary solutions to a legal problem based on certain formal markers that can be identified at low cost and that courts treat, as a traditional matter, as indicia of attractiveness—for example, the relative quantity of precedent

150. Rosenkranz, *supra* note 7, at 2094–102.

151. *Id.* at 2129.

152. *Id.* at 2096 (distinguishing constitutional starting-point rules from “species of federal common law” (internal citation omitted)).

153. Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 129 (2000) (“Speaking very broadly, judges have far better information about the decision costs associated with various interpretive doctrines than they do about error costs, or about the dynamic reactions of legislatures and agencies to judicial rulings. In general, then, judges should assume away those latter, speculative considerations and focus instead on what they know . . .”).

that supports different default rules and the level of attention the rules have received of commentators. The rest of this Article fleshes out why *Chevron* is an attractive starting-point rule, in this pragmatically formalist sense, for measuring Congress's intent to delegate "dynamic interpretative power" to courts in the class context. Consistent with my justification for using a starting-point rule here—reducing decision costs associated with gauging Congress's intent to delegate to courts in the class context—I don't make strong empirical claims for this use of *Chevron*. But I do argue that it's eminently *plausible* to believe that adapting *Chevron* as a starting-point measure of Congress's intent to delegate such authority to class action courts is something Congress might want.

2. *Chevron* as a Starting-Point Rule for Measuring Legislative Preferences in the Class Context

In Part II, we encountered the class-action respecting canon. The canon is evidence that courts dynamically interpret statutes in order to "adapt" them to the class context. Most of Part II was devoted to showing that this dynamic interpretation rests on a series of latent policy choices—about the merits of incrementalism, the proper level of remedial costs assumed by civil litigants, the comparative competence of courts and agencies, and the merits of democratic oversight and Executive Branch control of regulation.¹⁵⁴ Part II ended by suggesting that, absent clearer instructions from Congress about its preferences with respect to class litigation, it's very hard for courts to make interpretive choices that affect the scope of a class action without taking these policy considerations into account in at least some cases.¹⁵⁵

The dilemma for courts can be conceptualized as a dilemma about delegation. Courts are, to use Rosenkranz's terminology, treating statutes in the class context as "dynamic interpretive statutes"¹⁵⁶—statutes that confer discretion to "adapt" them in light of certain policy preferences about the utility of certification and settlement. But courts are doing so in the dark about Congress's preferences concerning this practice.

154. See *supra* Part II.B.1–4.

155. See *supra* Part II.C.2.

156. Rosenkranz, *supra* note 7, at 2129.

As we saw at the end of Part II, the best expression of Congress's preferences, the REA, is deeply unclear.¹⁵⁷ It tells us Congress doesn't want courts to abridge or modify substantive rights. But what if the substantive rights themselves are open to interpretation? How much liberty does Congress want a court to take with the open-texture in order to justify certifying a class action?

Answering these questions by pointing to the benefits of certification simply restates the problem explored in Part II, since the benefits of certification aren't obvious in every case. The problem points to the need for a starting-point rule, one that can be selected based on decisional criteria that courts can measure, rather than on courts' ad hoc empirical guesstimates. *Chevron* is an obvious possibility. Because it was devised in the context of judicial review of agency lawmaking, *Chevron* is typically viewed as a deference rule. But, as Rosenkranz notes, it can also be conceived as benchmark that defines the floor of permissible delegations of "dynamic interpretive" power.¹⁵⁸ This is how the rule appears to the general counsel of an agency, for example: It tells agencies when a statute grants them power to make policy judgments in the course of interpretation and it tells agencies the factors to consider when making those trade-offs. Thus, stripped of its inter-branch application, *Chevron* is a map that identifies factors that an interpreter must consider when assessing the scope of her delegated discretion. In short, we might ask courts in the class context to "think about interpretation and discretion as they would want an agency to think."

While Rosenkranz treats *Chevron* as a constitutionally derived starting-point rule, others treat *Chevron* simply as a judicial approximation of Congress's preferences.¹⁵⁹ It is this non-

157. See *supra* Part II.C.1.

158. Rosenkranz, *supra* note 7, at 2129.

159. Merrill & Hickman, *supra* note 6, at 870–72 (the "third possibil[e] [explanation for *Chevron*]—and the one that finds the most support in the Court's own language—is that *Chevron* deference 'arises out of background presumptions of congressional intent.' The *Chevron* decision itself rests on a finding of an 'implicit' delegation from Congress." (internal citations omitted)); Sunstein, *supra* note 6, at 2090 ("[T]he *Chevron* approach might be understood as the best reconstruction of legislative instructions on the question of deference"); *id.* at 2087 (*Chevron* "reflect[s] a belief, attributable to Congress . . . in the comparative advantages of the agency in making [policy] choices [entailed by interpretation of unclear statutes].").

constitutional understanding of *Chevron* that drives my proposal. Where courts must decide how much delegated power an interpreter should exercise, but Congress's preferences are unclear, *Chevron*—understood as a rule that can help determine when dynamic statutory interpretation runs afoul of Congress's preferences—might serve as a starting-point rule that minimizes decision costs associated with determining Congress's *intent*.

It is an attractive idea, from the standpoint of reducing decision costs, for four reasons: First, because *Chevron* has received an enormous amount of precedential and scholarly attention and has developed a prestigious aura in the legal community, *Chevron*'s content is clearer and better understood than most default interpretive rules, including the haphazardly applied and poorly articulated class action-respecting canon.

Second, it is a pre-fit, off-the-rack account of legislative preferences about the parameters governing delegation outside the Legislative Branch.

Third, it has been developed over the course of twenty years in an area, administrative law, that is more deeply and centrally concerned about delegation than any other. Hence, we can feel some confidence that the rule has been developed with a certain degree of special sensitivity toward the analogous delegation-related interpretive problems at issue in the class context.

Fourth, formal sources draw analogies between class actions and administrative law. Harry Kalven and Maurice Rosenfield, influential commentators on the class action device at its inception during the New Deal, argued the class action would serve as a judicial analogue to, and complement to, administrative proceedings.¹⁶⁰ Benjamin Kaplan, an architect of the 1966 amendments to Rule 23, seconded this analysis.¹⁶¹ The Supreme Court, consistent with their vision for the class action,

160. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686–86, 715 (1941); *see also* Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Negotiated Under Rule 23*, 39 ARIZ. L. REV. 461, 489 (1997) (“While there appears to have been relatively little discussion of the Kalven and Rosenfield thesis in the Committee [that drafted the 1966 amendments to Rule 23], (b)(3) was responsive to their concern[s]”); Nagareda, *Preexistence Principle*, *supra* note 1, at 185 (“The analogy to administrative law should come as little surprise, given that early commentators like Kalven and Rosenfield accurately anticipated the emergence of the class action as the civil litigation cousin of the public regulatory process.”).

161. Kaplan, *supra* note 13, at 398 (the class action “serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government”).

calls the class action a “quasi-administrative proceeding.”¹⁶² If we were to cast about for a source of law that might provide a good starting measurement Congress’s preferences in the class context, and do so based on criteria consistent with reduced decision costs, these formal sign-posts deserve our attention.

Of course, to serve as a starting-point rule, there must also be a basis for thinking Congress would want courts to measure their discretion against *Chevron* in the class context. The rest of this Article will show that, if we take the account of Congress’s preferences about delegation in administrative law seriously, there is good reason to think Congress would want courts to use *Chevron* as a starting-point rule in the class context, as well.

3. *Chevron*, Class Action Lawmaking, and Legislative Intent

To assess whether there is reason to think Congress might want courts to measure their discretion using *Chevron*, I will begin by asking whether applying *Chevron* in the class context is broadly consistent with the account of legislative intent that informs *Chevron* in its native, administrative, context.

Under *United States v. Mead Corp.*, *Chevron*’s application in administrative law is commanded by Congress.¹⁶³ The command is inferred, based on a presumption that Congress desires control over federal policymaking to reside with accountable agencies rather than unaccountable courts.¹⁶⁴

Mead has implications in the class context. First, *Mead* presumes that Congress prefers law-like federal policymaking to be responsive to democratic control. Yet, courts’ current interpretive practices allow courts to defer interpretation of ambiguous statutes, thereby ignoring evidence that Congress wants to limit the availability of a class action under a given statute.¹⁶⁵

Second, *Mead* presumes that Congress prefers that courts minimize interference with agencies granted authority to act

162. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“[F]rom the plaintiffs’ point of view a class action resembles a ‘quasi-administrative proceeding, conducted by the judge.’” (internal citation omitted)).

163. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“[W]here it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is ‘inapplicable.’”) (quoting *Christensen v. Harris County*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting)).

164. *See supra* note 159.

165. *See supra* Part III.A.

with the force of law when the law applied is unclear. However, as discussed in Part II, class actions lower the relative cost of judicial intervention, shifting greater regulatory power away from agencies to courts. This shift in power may reduce the number of administrative interventions that are economically feasible and encourage agency attempts to evade hierarchical control through signaling.¹⁶⁶

Two concrete implications for class actions follow, a fortiori, from *Mead's* conception of legislative preferences. I outline these implications first and then consider counterarguments.

First, *Mead* suggests that Congress wants courts to be as amenable as possible to legislative control. A presumption that Congress desires courts, which are less accountable, to be *less* responsive to direction from Congress than agencies is problematic, given *Mead's* assumption that Congress prefers that federal policymaking respond to democratic control.

Second, *Mead* implies Congress would prefer that courts, where possible, take into account the indirect costs that their interpretive choices impose on agencies' rulemaking when the law is open-textured. *Mead* denies courts a strong-form of direct vertical control over agencies with formal rulemaking power when the law is unclear, because courts are less accountable and less subject to political branch control. When courts *indirectly* subvert agencies' regulatory authority while operating in open-textured areas of the law—by imposing vast aggregated costs on agency-regulated entities through the class device, a problem explored in Part II—that is no less problematic under *Mead's* account of legislative preferences. It may be more problematic because indirect, horizontal inference with agency rulemaking may be especially difficult for the political branches to anticipate.

Finally, these two concerns do not apply to just any judicial action. Class actions raise special concerns for the presumptive legislative interests that inform *Mead* because of class actions' quasi-administrative character. While addressing fragments of a larger problem incrementally reduces the error costs of individual decisions, class-wide rulings, by contrast, are the closest thing in the judicial oeuvre to the generalized, self-executing formal rulemaking of agencies, which declares

166. See *supra* Part II.B.1.

general law and settles rights of similarly situated persons in aggregate rather than in individual cases.¹⁶⁷ As such, class actions impose costs of unusual magnitude and immediacy on the larger regulatory system and do so in a self-executing fashion that makes unintended consequences far more difficult for courts to control on an ongoing basis.¹⁶⁸

Of course, Congress may occasionally want to insulate policymaking from democratic control. Perhaps, then, Congress wants courts to *ignore* the costs their decisionmaking imposes on agencies (unless Congress says otherwise) and act without regard for facilitating legislative control over class action policymaking. This claim, however, is also problematic. There is a wide degree of overlap between judicially enforceable causes of action and administrative jurisdiction; the common fodder of class actions—antitrust violations, consumer fraud, unsafe products, and securities fraud—is also the common grist for agency regulation. As we have seen, in a world of broad civil and administrative overlap, in which civil actions have a dynamic effect on agency power and effectiveness, private litigation may impose significant costs on the Executive Branch and the President (a function of the phenomenon of enforcement cost trade-offs, the predictability problems entailed by class action decisionmaking, and “signaling” discussed in Part II.B). A general *presumption*, in the civil context, that courts vested with civil enforcement jurisdiction may ignore the costs imposed on agencies or act indifferently toward legislative control of judicial policymaking poses a special threat to the values promoted by *Chevron* and *Mead*. If we assume that Congress has a coherent set of preferences, it is more sensible to presume Congress delegates power to courts subject to the condition that courts will manage the risks posed to its parallel goals in the administrative context on a case-by-case basis, by interpreting open-textured statutes in a way that (1) is amenable to legislative oversight; and (2) takes account of, and avoids where possible, the costs that its interpretations impose on agencies.

167. Nagareda, *Preexistence Principle*, *supra* note 1, at 152–53 (“Class settlements aspire to operate as a kind of privatized mini-legislation—a vehicle by which the dealmakers may fashion a binding peace for a constellation of wrongs allegedly suffered by a cross-segment of the populace.”).

168. See *supra* notes 11–12 and accompanying text.

As an empirical matter, we don't know with any certainty Congress's interpretive preferences in the statutory context discussed in this Article. If we accept the account of Congress's preferences in *Mead*, however, we would pick the default approach to interpretation that plausibly (1) restrains interpretive discretion to a greater degree than the canon, (2) invites legislative control, and (3) creates space for executive policymaking discretion.¹⁶⁹ As I discuss in the next subsections, using agency interpretative practice as a starting-point rule for class courts accomplishes all three goals.

4. *Chevron*, Class Action Lawmaking, and Congressional Control

First, how might the *Chevron* framework restrain courts' interpretive discretion and promote more legislative oversight over class action policymaking? To answer these questions, I will examine step one of the proposed *Chevron* framework.

a. *Step One Considered*

Under step one of the proposed framework, a court asked to interpret a statute that affects the scope or availability of certification would first determine—much like an agency—whether the statute speaks precisely about the manner in which claims under the statute may be submitted to class action treatment. If the statute speaks “clearly,” in the way that concept is understood in administrative law, this settles the matter and policy considerations about the utility of class certification may not enter into the interpretive enterprise. However, if the statute is ambiguous in the way that concept is understood in administrative law, considerations about the utility of certification may enter the court's analysis, subject to the restraints of step two (discussed in the next subsection).

Asking courts to act like agencies restrains courts' discretion to stretch statutes to fit the class device. To see why, let's take a closer look at the way step one is applied in the administrative context.

169. Perhaps, it might be argued, Congress is at war with itself, vacillating between a pro-agency and pro-court view of regulation. Or perhaps Congress wishes to pursue a kind of institutional portfolio strategy, giving agencies and courts free rein in broadly overlapping domains in the hopes that both poles of regulation will balance courts' and agencies' errors out. The important point, here, is we do not know what Congress's preferences are, requiring recourse to a starting-point rule.

As we have seen, the canon allows courts to ignore expressions of legislative intent that are open to some interpretation while forcing Congress to be super-clear if it wants courts to abide reliably by its preferences.¹⁷⁰ By contrast, courts employing either the intentionalist or textualist versions of step one cannot avoid addressing a statutory question because the statute is open to some interpretation. Instead, under *Chevron*, courts must interpret the evidence and must treat an interpretation as the “clear” choice even if there is a plausible contrary interpretation.¹⁷¹ Compared to the class action-respecting canon, then, *Chevron* requires a “hard look” at evidence of legislative intent—forcing acts of interpretation, forcing confrontation with a greater array of interpretive sources, and finally, forcing the court to accept interpretations contrary to its preferences.

An example of the difference in approaches may be seen in two cases: *INS v. Cardoza-Fonseca*¹⁷² and *In re Visa Check/MasterMoney Antitrust Litigation*.¹⁷³ In *Cardoza-Fonseca*, the Supreme Court reviewed the INS’s interpretation of the “well-founded fear of prosecution” standard for discretionary grants of asylum under § 208(a) of the Refugee Act of 1980.¹⁷⁴ The INS interpreted this textual requirement to mandate that an asylum applicant show a “clear probability” of persecution if returned to his home country.¹⁷⁵ The Court, however, rejected this interpretation at step one of *Chevron*, holding that it was “clear”

170. See *supra* Part II.B.4.a.

171. See Sunstein, *supra* note 6, at 2091 (“The Court’s own decisions, however, suggest that the mere fact of a plausible alternative view [of the statute’s meaning] is insufficient to trigger the *Chevron* rule.”). Thomas Merrill and Kristin Hickman suggest that *Chevron* is, in the administrative context, a “middle range presumption” that agencies deserve deference when they interpret statutes. This presumption may be overcome at step one by clear evidence, based on the totality of the statutory materials (text, history, and context), that Congress did not intend to allocate extra interpretative authority to agencies. Merrill & Hickman, *supra* note 6, at 889. It is true that some, including Justice Scalia, argue that courts should downgrade evidence of legislative intent that is extraneous to the text. Notably, though, textualists agree that Congress’s intent need not be super-clear to settle the interpretive question at step one. Textualism presupposes that the objective meaning of the text may be “plain” even though a good deal of evidence may point in different directions. Scalia, *supra* note 142, at 517 (suggesting plain meaning analysis should be applied with a presumption against a finding of ambiguity).

172. 480 U.S. 421 (1987).

173. 192 F.R.D. 68 (E.D.N.Y. 2000), *aff’d sub nom.* Wal-Mart Stores, Inc. v. Visa USA Inc. (*In re Visa Check/MasterMoney Antitrust Litig.*), 280 F.3d 124 (2d Cir. 2001).

174. 8 U.S.C. § 1101(a)(42)(A) (2000).

175. *Cardoza-Fonseca*, 480 U.S. at 425.

from the text (according to Justice Scalia's concurrence)¹⁷⁶ as well as the legislative history (according to Justice Stevens, writing for the Court)¹⁷⁷ that Congress did not intend this meaning. As commentators including Cass Sunstein have noted, the well-founded fear standard is not clear in the colloquial sense of the word—it has open-texture.¹⁷⁸ Accordingly, the decision, says Sunstein, demonstrates that Congress does not need to speak “super clearly” or unequivocally to displace an agency's interpretive discretion under *Chevron*.¹⁷⁹

By contrast, in the *Visa Check/MasterMoney* litigation, discussed in Part II, courts were asked to decide whether the text of § 4 of the Clayton Act, which creates a private right of action for antitrust violations,¹⁸⁰ displaced judicial discretion to certify a class of antitrust tying claims. As discussed in Part II, plaintiffs argued that the proper measure of injury in the case was an overcharge theory, which measured the price of the tied product in the tied and untied worlds.¹⁸¹ Defendants countered that fidelity to the text of § 4, which requires proof of actual injury in “business or property by reason of anything forbidden in the antitrust laws,”¹⁸² was a “package measure of injury,” in which the court must measure not only the difference in price of the tied product if the tie is broken, but also the difference in price of the tying product absent the tie.¹⁸³ The “actual injury”

176. *Id.* at 452 (Scalia, J., concurring) (“I agree with the Court that the plain meaning of ‘well-founded fear’ and the structure of the Immigration and Nationality Act . . . clearly demonstrate that the ‘well-founded fear’ standard and the ‘clear probability’ standard are not equivalent.”).

177. *Id.* at 449 (Stevens, J., op.).

178. Sunstein *supra* note 6, at 2092 (“reasonable people certainly could differ on whether ‘a well-founded fear’ required a showing of probability of persecution. Although the Court’s interpretation ultimately was persuasive as a matter of both text and history, neither of these sources was unambiguous on the point. The outcome in the case thus suggested that the mere fact of a plausible agency view is insufficient for deference.”).

179. *Id.*; *see also id.* at 2092–93 (“An approach of this sort appears to be a sound understanding of *Chevron* insofar as the case recognizes the primacy of legislative instructions over administrative will. . . . An understanding that would allow the agency to prevail merely because there is some room for disagreement would pose an undue threat to the basic principle of congressional supremacy in lawmaking” (internal citation omitted)).

180. 15 U.S.C. § 15 (2000).

181. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 153–54 (2d Cir. 2001) (Jacobs, J., dissenting).

182. 15 U.S.C. § 15; *see also* II PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 365, at 247 (rev. ed. 1995) (“awarding damages to an uninjured plaintiff is inconsistent with the statutory requirement” of actual injury).

183. *In re Visa Check*, 280 F.3d at 154 (Jacobs, J., dissenting).

requirement demanded the package measure, said defendants, because plaintiffs used the tied and tying products to varying degrees.¹⁸⁴ In the absence of the tie, the price of the tied product may drop, but the price of the popular tying product may rise (since defendants have market power, under plaintiffs' theory).¹⁸⁵ Accordingly, some plaintiffs who used a very large proportion of the tying product, relative to the tied product, may not have suffered any injury at all.

The choice affected the court's discretion to certify, because if the court was forced to use the package measure of injury, plaintiffs could not keep the class together and use a common measure of injury that maximized all plaintiffs' chances of recovery. Instead, in order to include the merchants who used a large proportion of the tying product in the class, they would have to argue the "seldom attempted" theory that the price of the tying product would have remained stable in the absence of the tie, prejudicing merchants who use a large proportion of the tied product and who, absent the need to conform their claims to a single class-wide metric of proof, would be able to show injury even if the price of the tying product increased.¹⁸⁶

The court certified without deciding the interpretive question, relying in part on the presumption in favor of certification. In effect, the court assumed it retained discretion to certify and thereby promote settlement so long as Congress hadn't unequivocally required the package measure of injury.

Yet, the package measure of injury is a clearer implication of the Clayton Act's actual injury requirement in this case than the interpretation of the Refugee Act's "well-founded fear" standard treated as "clear" in *Cardoza-Fonseca*. In effect, the class action court assumed it had discretion under the Clayton Act so long as there was "room for disagreement"—a degree of discretion rejected in *Cardoza-Fonseca* as an "undue threat to the basic principle of congressional supremacy in lawmaking"¹⁸⁷

184. *Id.* at 153 (Jacobs, J., dissenting).

185. *Id.* at 154 (Jacobs, J., dissenting).

186. *Id.* at 156–57 (Jacobs, J., dissenting) ("Like other class members, the merchant whose debit-card sales predominate benefits by showing that the debit charge would have been much lower; but, unlike other class members, the merchant whose debit-card sales predominate can still achieve a substantial recovery even if the price of credit would have risen by an even greater amount. Therefore, this merchant is not compelled to make the 'elusive and seldom attempted' proof that 'the sum of tying and tied product prices would have been lower' absent the tie." (internal citation omitted)).

187. Sunstein, *supra* note 6, at 2093.

The comparison reveals a self-serving judicial double standard: under *Chevron*, courts give Congress substantial leeway to displace democratically accountable agencies' discretion to promote agency policies but, in the class context, give Congress less leeway to displace democratically *unaccountable* courts' discretion to promote judicial policies. Put bluntly, courts exempt themselves from the restraining rules they apply to agencies, despite the fact that courts are making "quasi-administrative" policy judgments with widescale, self-executing implications, albeit with far less democratic oversight, when interpreting statutes in the class context.¹⁸⁸ Asking courts to

188. See Part II.B. The judicial policy judgments in play here are (1) a policy favoring settlement and (2) a correlate, secondary policy favoring a non-incremental, global civil remedy, in addition to administrative remedies and the treble damages available in individual suits. See, e.g., In re *Visa Check*, 280 F.3d at 158 (Jacobs, J., dissenting) ("As far as I can see, the only unified interests served by herding these competing claims into one class are the interests served by settlement . . ."). For a contrary assessment of these policy choices, see Epstein, *supra* note 3, at 517 ("The massive litigation between Wal-Mart and Visa recasts into class form a dispute that would have been better resolved by a simple administrative order of the Federal Trade Commission on the relative interchange fees for debit and credit cards, coupled with a fine to deal with the matter.").

One explanation for the difference in interpretive approaches may be the interbranch context in which *Chevron* is applied. As Orin Kerr has argued, when courts apply *Chevron*, their choices have an opposite effect from that in the ordinary intrabranched interpretive context. Kerr, *supra* note 6, at 57–58. When a court finds a statute is clear in the *Chevron* context, it enhances judicial power by restraining the agency. When a court finds a statute ambiguous, by contrast, it shifts power away from the judicial branch to the Executive. By contrast, when the interpretive choice is located wholly within the judicial branch, as it is in the class context, finding statutory clarity reduces judicial discretion and finding ambiguity unshackles judicial power. Accordingly, asking a court to interpret as it would want an agency to interpret is a way of exploiting the interbranch competition that colors the administrative context for a pay-off in the class context—by forcing the court to grant itself discretion at the price of lowering the bar for agencies.

Literature on interpretive theory also helps refine inferences we can draw about legislators' preferences. Einer Elhauge argues that the best default rule for approximating Congress's preferences in the absence of a clear statement by Congress is what he calls a "current enactable preferences" default rule. Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2085 (2002). A full discussion of this theory is beyond the limited ambition of this Article. However, if we accept the theory, it delivers a theoretical pay-off for my argument. Elhauge argues that when Congress's desires are unclear, Congress's preferences are maximized when statutes are interpreted according to the best evidence of Congress's current enactable preferences. *Id.* at 2085–96. The argument depends on an assumption that Congress's utility curve is heavily weighted toward contemporary applications of statutes while discounting future applications—a function of legislators' uncertainty about their own future preferences and the complexities of the political landscape in which interpretation will take place at a later, unknown date. *Id.* at 2086 ("Generally, governmental preferences will be weaker regarding future events than regarding events during the government's time in office. In the future, only some of those holding [office] will still be around. . . . Even without any change in members, the legislative polity may change its political views . . . as time passes, perhaps because voters' life-situations have changed in ways that mean they benefit from a different statutory result."). Elhauge argues that where current enactable preferences

consciously parallel the restraint they expect of agencies is a way of unsettling easy judicial assumptions about the scope of their own discretion.

The existence of this double standard demonstrates that an obvious objection to the proposal advanced in this Article—i.e., an objection that my proposal misses *Chevron's* focus on promoting democratically accountable decisionmaking—rests on a misunderstanding about current courts' practice. Because courts grant themselves more discretion than agencies under *Chevron*, asking courts to interpret statutes in a way that parallels agencies is a restraining approach that *promotes* more democratic control over class action lawmaking compared to current law. The objection based on the differential democratic accountability of courts and agencies erroneously assumes that class action courts, under current law, assume *less* discretion to adapt statutes than they give agencies. Under that assumption, asking courts to parallel agencies would expand courts' discretion and limit Congress's control, relative to current law—a result inconsistent with promoting democratic control of regulatory decisionmaking. However, as we have discussed, the assumption that class action courts are more restrained than agencies under current law is false.

By restraining courts in this way, the proposed approach invites more legislative input on how to manage class actions, because Congress has more confidence its instructions will be

are unknown, Congress can be presumed to prefer that courts interpreting unclear legislative preferences choose the moderate rule among available alternatives known to the current legislature. The moderate rule minimizes expected dissatisfaction across current interest groups and legislative factions. *Id.* at 2077, 2081 (“[O]ften there will be more than two legally plausible interpretive options [In that case, t]he goal of an honest interpretive agent is to maximize the extent to which interpretations satisfy the preferences of the text-making authority. . . . The axiom would . . . provide that, where multiple interpretive options seem plausible, courts are justified in favoring middle ground options.”).

As an empirical matter, we don't know Congress's preferences about the scope of delegated authority courts should exercise in the statutory context discussed in this Article with any certainty. If we accept Elhauge's theory, however, we would pick the default measure of courts' delegated authority that occupies a middle ground in the interpretive space, rejecting extremes. Both the canon and its opposite (a presumption against certification) mark out the extreme poles. To minimize current dissatisfaction, we should adopt an intermediate approach that restrains discretion more than the canon, but not as much as an anti-canon. For reasons I've described, *Chevron* is such a rule.

followed, rather than displaced by judicial policy preferences of a court's devising. As a result, it has greater incentives to expend effort to instruct courts about its preferences concerning the amenability of particular claims to generalized proof—providing, for example, instructions about how reliance or causation is to be proven in the class context for particular claims.

To be sure, even under the rule I advocate, Congress faces some uncertainty, since a court that determines a statute is ambiguous will apply it according to judgments about the utility of the class device. However, the prediction that *Chevron* nonetheless invites legislative communication is consistent with the widely accepted theory that ambiguity enables compromise. This theory, a staple of public choice literature, assumes that neither legislative faction places particularly high value on consistency of outcome when the meaning of the statute is litigated (otherwise, ambiguity could not form a basis for compromise). Instead, each faction is concerned with maximizing the short-term gains in the political market by pointing to the pieces of evidence in the legislative record supporting its preferred interpretation, allowing it to claim a political victory to its supporters. To *credibly* claim victory to the political market, however, I assume, with some other commentators, that at least some subsequent judicial decisions must side with the outcome that each faction desires and, crucially, that these decisions must rely on the evidence that the “winning” faction inserted in the legislative record.¹⁸⁹ Favorable

189. See Grundfest & Prichard, *supra* note 93, at 628 (“[A]s long as courts continue to issue conflicting *interpretations*, these competing claims of legislative victory remain credible.” (emphasis added)). Further evidence that *Chevron* may encourage legislation that moderates the scope of class litigation may be found in Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. (forthcoming 2006), available at <http://ssrn.com/abstract=895604>. Rodriguez’s and Weingast’s argument, stripped to oversimplified essentials, is that legislation is the product of a compromise between ardent supporters and moderates. Costly statements of intent—those contained in the text and committee reports and floor debate immediately prior to passage—are likely to reflect the compromise between these groups, while the “cheap talk” of ardent supporters—aspirational characterizations post-passage, upon introduction of the legislation, and on the hustings, for example—do not accurately reflect that compromise. *Id.* at 29–31. When courts confine their analysis to costly statements of intent, more legislation is enacted, since moderates are more likely to enter compromises with ardent supporters, knowing the outcome of the deal will reflect their preferences. *Id.* at 87–91, 95. A somewhat similar argument might be made about the class action-respecting canon. By deferring consideration of evidence of legislative intent that, if accepted, would moderate, but not eliminate, the availability of

outcomes in the courts must be seen to follow from the efforts of the legislators, rather than from the independent whim of a judge. Unfortunately, legislators cannot credibly claim such a victory when judges simply abdicate interpreting evidence and substitute their own preferences when there is any “room for interpretation”—something that current law threatens in the vast majority of cases, because there is “room for interpretation” in the great majority of texts. As a result, all factions would have more incentives to cut deals, compared to current law, if courts, in the class context, were to commit to a hard look at the evidence of legislative intent after the fashion demanded of agencies.¹⁹⁰

b. *Step One Applied*

To make the broad outlines of step one clear, let’s revisit an example introduced at the beginning of the Article: Plaintiffs bring fraud claims against Microsoft on behalf of a class of subscribers to SecureNet, a “privacy passport” system that allows subscribers to control information about their online buying habits. Plaintiffs claim Microsoft has secretly concealed a scheme involving major Internet retailers. Under this scheme, Microsoft gives the retailers a code that allows them to track when SecureNet subscribers visit their online store. The retailers agree to (1) charge SecureNet subscribers inflated prices when they purchase goods online using the SecureNet program, and (2) share a portion of this premium with Microsoft. The subscribers

the class device, the canon may reduce incentives for moderates to enter into compromises that commit legislation to civil enforcement.

190. A good case may be made for excluding questions of subject matter jurisdiction from the *Chevron* framework argued for in this Article. The canon is only applied to questions about the elements of liability defined by the statute, not to questions of enforceability. Courts’ refusal to apply the canon to this question suggests they are better able to cabin policy considerations in this interpretive context. One explanation may be that courts view jurisdictional questions as a high-order interpretive question and therefore approach the problem in a more disciplined manner than they do when resolving interpretation that affects the manageability of enforceable claims as a class, a question viewed as a lower-order interpretive concern. Relatedly, the modern Supreme Court has, for the most part, shown a keener interest in policing and restraining interpretations of civil enforceability, while paying relatively less attention to lesser-order interpretive questions that affect the manageability of class actions. See *Alexander v. Sandoval*, 532 U.S. 275, 287–93 (2001). *But see* *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 195 (2005) (Thomas, J., dissenting). Where there is no evident interpretive problem, no evident accountability problem, and no evident enforcement problem with rules restraining interpretation of subject matter jurisdiction, leaving current practice in place is unproblematic, doing no violence to the pragmatic justification for the *Chevron* framework argued for here.

file suit under RICO, alleging that Microsoft has misrepresented that SecureNet would save subscribers money. RICO, in turn, requires proof of injury “by reason of” racketeering but directs that RICO should be construed “liberally.”¹⁹¹ Courts, in non-class settings, have interpreted RICO to require plaintiffs to present individualized proof of subjective reliance in civil cases seeking damages for fraud or misrepresentation.¹⁹² Microsoft, in turn, argues that the RICO claims cannot be certified, since it would be impossible to assess whether subscribers had relied on the representations on a case-by-case basis.

Here, class certification turns on a substantive choice: either the court can respect the need for individualized proof of subjective reliance and reject class certification, or it can facilitate class litigation by liberalizing plaintiffs’ burden of proving reliance. Courts applying the class action-respecting canon might reason as follows: Rule 23 directs a court to assess whether the claim raises questions that are “common” and “typical” of absent class members and whether common questions “predominate.”¹⁹³ Rule 23 should be liberally construed in favor of certification. In light of this presumption, common issues “predominate” so long as plaintiffs allege a common fraudulent scheme consisting of similar misrepresentations, even assuming the possibility of individualized issues of subjective reliance.¹⁹⁴ The class may be certified.

The *Chevron* framework would direct the court to ask whether Congress has clearly directed that issues of reliance should be proven on a case-by-case basis in a RICO claim predicated on fraud, using precedents from administrative law as a benchmark for identifying the dividing line between clarity and ambiguity. If Congress has not clearly directed that reliance be proven on a case-by-case basis and has not otherwise restricted the modes by which causation may be proven, then Congress has implicitly granted the court authority to choose among different burdens of proving causation in light of the statutory policies served by class certification. The choice is subject only to the condition,

191. 18 U.S.C. § 1964(c); Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (reprinted in note following 18 U.S.C. § 1961 (2000)).

192. *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992).

193. FED. R. CIV. P. 23(a), (b)(3).

194. *See Singer v. AT&T Corp.*, 185 F.R.D. 681, 685, 688, 690–91 (S.D. Fla. 1998).

discussed further below, that the court's choice reflects a "reasoned" balancing of the statutory policy considerations that certification implicates, as that concept is defined by some administrative law precedents (discussed further in the next section).

Using either an intentionalist or textualist approach to step one interpretation, the Court is likely to find that RICO's text and legislative history do not clearly foreclose use of circumstantial evidence to prove reliance. As the Supreme Court held in *Holmes v. Securities Investor Protection Corp.*,¹⁹⁵ RICO's text, the context in which RICO was enacted, and its legislative history suggest that Congress desired to require civil RICO plaintiffs to prove proximate causation, not simply "but for" causation.¹⁹⁶ The Supreme Court has not determined whether proximate causation requires proof of reliance, but it's fair to assume, based on the text of RICO, that it does. However, neither the text nor history of RICO suggest whether the element of reliance may be *proven* by individualized examination of a plaintiffs' subjective intent or based on circumstantial evidence that is common across a class. The text is completely silent on the issue, as is the legislative history. Context points different ways. Background common law principles suggest reliance must be proven individually, on a case-by-case basis.¹⁹⁷ Yet, the framers of RICO assumed that civil antitrust actions would serve as model for RICO civil actions.¹⁹⁸ Moreover, at the time of RICO's passage, antitrust was common fodder for class

195. 503 U.S. 258 (1992).

196. *Id.* at 268. While RICO does not speak directly to the issue of proximate causation, its standing provisions are borrowed from the Clayton Act, which had been interpreted to require proof of proximate causation. *Id.* at 267. Word-for-word borrowing of statutory language with a previously settled meaning is construed as textual evidence of intent to incorporate that settled meaning. *Nat'l Labor Relations Bd. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.").

197. *Cf. Beck v. Prupis*, 529 U.S. 494, 504 (2000) ("[W]hen Congress established in RICO a civil cause of action, . . . it meant to adopt these well-established common-law civil conspiracy principles."); see *Field v. Mans*, 516 U.S. 59, 71 (1995) ("Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case."); RESTATEMENT (SECOND) OF TORTS §§ 537–545A (1977) (requiring proof of justifiable reliance for common law fraud).

198. *Sedima SPRL v. Imrex Co.*, 473 U.S. 479, 486–88 (1985) (surveying legislative history of civil RICO).

action enforcement,¹⁹⁹ suggesting Congress may have anticipated that RICO, too, would serve as a vehicle for aggregated enforcement suits subject to some forms of reliable circumstantial evidence where injuries are too numerous to examine on an individual basis and too small to justify individual suits. The only “clear” restraint is that proof must be consistent with RICO’s “actual injury” requirement, which parallels the actual injury requirement of antitrust law. Plaintiffs could not allow all plaintiffs to recover based on statistical sampling, for example—they must rely on circumstantial evidence that *all* plaintiffs detrimentally relied.

Thus, the evidence is in equipoise, allowing the court to forgo individualized inquiry of each class members’ state of mind if it is possible for plaintiffs to offer circumstantial evidence that *all* plaintiffs relied to their detriment on the false representations—for example, where all plaintiffs received identical written misrepresentations on which an objectively reasonable person would rely and no plaintiffs received any oral representations that might have contained representations different from those in writing. Defendants could rebut that evidence by showing that plaintiffs and class members also received varying oral representation that must be individually examined. Exercise of discretion to adopt this burden of proof is subject to the requirement of step two. (I will flesh out the step two requirement in the next section.)

This general approach differs from that of the class action canon in at least two ways. First, the *Chevron* approach argued for here would supplant the REA. The Act, as we have seen, has been interpreted permissively to allow any arguably procedural rule to alter substantive rights. Following the logic of *Chevron*, Congress’s delegation of lawmaking authority to courts in the class context supersedes any previously enacted statutes. Just as § 706 of the APA is superseded by implied delegations of interpretive discretion to agencies under *Chevron*,²⁰⁰ so the REA and its judicial gloss are displaced by the *Chevron* canon. The displacement is justified if we assume that Congress commands courts to adopt the *Chevron* perspective.

199. Coffee, *Understanding the Plaintiff’s Attorney*, *supra* note 78, at 669 n.1 (“During the 1950s and 1960s, skilled plaintiff’s attorneys, such as Harold Kohn and David Berger, perfected the antitrust class action.”).

200. See *supra* note 144 and accompanying text.

Second, the *Chevron* framework would supplant current interpretations of Rule 23's "predominance" requirement.²⁰¹ While a full exegesis of "predominance" is beyond the scope of this Article, courts have adopted at least two different applications of the requirement. Some interpret it to authorize certification even in the face of some degree of heterogeneity on the merits among class members, so long as an award of class-wide damages (or class settlement) is not *too* overinclusive.²⁰² This theory of predominance is inconsistent with the *Chevron* perspective argued for here because it does not take into account whether Congress *intends* that its statute be applied in an overinclusive fashion.

Other courts have interpreted the "predominance" requirement to permit the use of certain "evidentiary" rules that give rise to a presumption of identity of interest among class members.²⁰³ A frequently adopted rule is the one mentioned above: that a common scheme involving common written materials allows a presumption that class interests are substantially identical.²⁰⁴ This, and other such evidentiary rules, may be consistent with the *Chevron* perspective when analysis proceeds to step two, as discussed in the next section.

5. *Chevron*, Class Action Lawmaking, and the Executive Branch

Asking courts to consciously parallel agency's assessment of their delegated power would also require courts to deliberate about the costs that class actions impose on Executive Branch control of policymaking when the law is ambiguous.

a. *Costs to the Executive Branch Considered*

To see why *Chevron* accords with Congress's reconstructed intent that courts deliberate about costs imposed on the Executive when certifying a class under an ambiguous law, I will examine the factors that guide agencies' discretion when the law is ambiguous in the administrative context. Applied to class

201. FED. R. CIV. P. 23(b)(3).

202. This may be the best explanation for the suggestion, in cases like *Eisenberg v. Gagnon*, that common issues predominate so long as issues of causation are not "extraordinarily complex." 766 F.2d 770, 786 (3d Cir. 1985).

203. Erbsen, *supra* note 3, at 1012-14.

204. See, e.g., *Singer v. AT&T Corp.*, 185 F.R.D. 681, 689-91 (S.D. Fla. 1998); *Walco Invs. Inc. v. Thenen*, 168 F.R.D. 315, 333-34 (S.D. Fla. 1996); *McMahon Books, Inc. v. Willow Grove Assocs.*, 108 F.R.D. 32, 39-40 (E.D. Pa. 1985).

actions, these factors would require courts, when deciding whether to certify claims under ambiguous statutes, to (1) reject certification when it would aggrandize courts at the expense of the political branches in “extraordinary” cases and, otherwise, (2) require courts to engage in a reasoned process of decisionmaking about the costs of certification. Both approaches inure to the benefit of the Executive Branch.

First, the *Chevron* framework reflects a presumption that Congress doesn’t want agencies to aggrandize themselves at the expense of Congress in extraordinary cases. In *FDA v. Brown & Williamson Tobacco Corp.*,²⁰⁵ for example, the FDA asked the Court to decide whether the Food, Drug, and Cosmetic Act (FDCA)²⁰⁶ authorized the agency to regulate tobacco products as a “drug” and “device.”²⁰⁷ The majority concluded that it was Congress’s “clear intent” to preclude FDA jurisdiction over tobacco.²⁰⁸ The majority reached this conclusion after reviewing the FDA’s consistent rejection of authority to regulate tobacco²⁰⁹ and the long history of diffident, limited, and cautious federal regulation of tobacco.²¹⁰ Against that backdrop, the Court concluded that Congress could not possibly have intended to authorize a sweeping expansion of federal power over tobacco: “[I]n extraordinary cases,” said the Court, “there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation [of interpretive power]. . . . ‘Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.’”²¹¹

205. 529 U.S. 120 (2000).

206. Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301–397 (2000).

207. *Brown & Williamson*, 529 U.S. at 125–26.

208. *Id.* at 126.

209. *Id.* at 134–43.

210. *Id.* at 143–59.

211. *Id.* at 159 (quoting Stephen Breyer, *Judicial Review of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)). The Supreme Court has since made it clear that *Brown & Williamson* reflects “anti-aggrandizement” principles. See *Gonzales v. Oregon*, 126 S. Ct. 904, 921, 925 (2005) (citing *Brown & Williamson* to reject interpretation of Attorney General’s power to regulate physician-assisted suicide under the Controlled Substances Act, based on the proposition that the “oblique form of claimed delegation” makes the Attorney General’s interpretation “all the more suspect” given the importance of the debate over assisted suicide); *id.* at 925 (Attorney General’s interpretation would require Court to assume that Congress had silently “delegate[d] to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality”).

Brown & Williamson should apply in the class context if we treat *Chevron* as a starting-point measure of the scope of delegation Congress prefers courts to exercise there. The Court's decision in the case reflected the "extraordinary" consequences of the agency's interpretive choice, which would have upset a delicate framework of political compromises. In the class context, a court's interpretive choice, when it affects the scope or availability of certification, can work equally "extraordinary" consequences by pushing resolution of a regulatory problem outside the realm of politically accountable decisionmaking and outside a system of incremental case-by-case examination—shifting resolution to the negotiated rulemaking of representative counsel and the targeted industry.²¹² In cases where the interpretive question will trigger major new regulatory consequences in a field in which federal intervention is thin on the ground, courts can assume that, if Congress desired to give courts this power when entrusting them with a civilly enforceable statutory framework, it would have said so in a reasonably clear fashion.

This result is also consistent with Einer Elhauge's theory that Congress prefers interpreters to resolve statutory ambiguity by reference to preferences that are currently *enactable*. His theory presumes that faithful interpretation by courts, as agents of our democratic polity, would not allow a single "input" in enactment process to move the law in a direction that wouldn't be enactable in our supermajority system of checks and balances.²¹³ Where an agency attempts a shift in regulatory policy that can't be enacted in Congress, as was clearly the case with the FDA in *Brown & Williamson*, then a current preferences default rule would require the Court to interpret ambiguity to preserve the status quo.²¹⁴ From this standpoint, the entrepreneurial use of class actions to force a big change in the regulatory landscape that cannot be enacted in Congress, whether via judgment or, more likely, settlement, is just as problematic because it allows the implementers of legislation—courts and plaintiffs' counsel—to sidestep limits on enactment.

212. Nagareda, *Preexistence Principle*, *supra* note 1, at 152–53.

213. Elhauge, *supra* note 188, at 2151 ("If agency action can largely be directed by the President, . . . such agency action is less likely to reflect current enactable preferences since the President's views reflect only one piece of the political puzzle necessary to create enactments.").

214. *Id.* at 2151–54.

If applied to statutory interpretation in the class context, *Brown & Williamson's* reasoning would also serve as a substitute for cost-benefit analysis applied to executive regulation. By deterring expansion of judicial power where a class action represents an extraordinary expansion of judicial regulatory power into a field in which the Executive Branch has not regulated, *Brown & Williamson* would funnel “major” new federal regulatory initiatives to the political branches, which are better situated to set priorities and resolve the trade-offs between competing policy initiatives that arise in a world of limited resources.

Finally, *Brown & Williamson's* reasoning would also partially police against agency-signaling behavior discussed in Part II. The signaling problem, remember, arises where an agency seeks to evade either legislative or OMB limits on agency rulemaking authority by sending informal signals about the agency's enforcement preferences to plaintiffs' attorneys.²¹⁵ Where a class action asserts regulatory power over an arena in which Congress has refused to authorize agency rulemaking authority and in which agencies themselves have consistently refused to regulate, *Brown & Williamson* would bar class intervention. This limits the effectiveness of signaling. If, for example, an agency uses a media campaign or releases informal draft “complaints” against certain private entities but is barred by statute or long-standing executive policy from regulating the industry directly, class action plaintiffs are powerless to address the problem. That cuts off the utility of signaling as a strategy for agency evasions of political branch control.

Because it serves as a substitute for cost-benefit analysis of class action intervention and may partially deter signaling, applying *Brown & Williamson* in the class action context accords with the reconstructed intent of Congress that guides our analysis.

Second, the *Chevron* framework has been employed in lower courts to require agencies to engage in a reasoned process of decisionmaking in order to survive *Chevron's* second step.²¹⁶

215. See *supra* Part II.B.4.b.

216. See, e.g., *Northpoint Tech, Ltd. v. FCC*, 412 F.3d 145, 151–56 (D.C. Cir. 2005); *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 406–07 (D.C. Cir. 1996); *Nat'l Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 726–27 (D.C. Cir. 1994); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 374 (D.C. Cir. 1989) (Silberman, J., concurring); see *supra* text accompanying notes 148–49.

Thus, the D.C. Circuit has rejected agency interpretations where the interpretation failed “to accommodate the conflicting policies,”²¹⁷ where the interpretation lacked “any economic . . . support,”²¹⁸ where the agency failed to explain extension of precedent,²¹⁹ or where the agency failed to explain contrary evidence of legislative intent.²²⁰

Viewed from the standpoint of *Mead*'s account of Congress's preferences (i.e., Congress's preferences for democratic accountability and executive control over regulatory policy), there are three reasons that class action courts should employ some form of this proposed step two analysis, similar to that employed by courts reviewing agencies in the D.C. Circuit. First, class action courts, unlike agencies, are not democratically accountable. Reason-giving is a partial substitute for outside oversight. When people give reasons, they are forced to assume, and internalize, the standpoint of an objective observer. Thus, judicial reason-giving forces courts to *act* accountable, if not actually to be accountable, to the outside world.²²¹ Second, by requiring courts to “accommodate . . . conflicting policies”²²² as some D.C. Circuit courts do of agencies, step two invites deliberation about the costs of intervention; hence, reason-giving provides a partial, although imperfect, substitute for the sensitivity to cost-benefit trade-offs that OMB generates in the Executive Branch. Third, when picking the version of *Chevron* to apply as a starting-point rule, we should pick the most restrictive of available articulations, given the judiciary's comparative lack of a democratic pedigree.²²³

217. *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 135 (D.C. Cir. 1984).

218. *Whitecliff, Inc. v. Shalala*, 20 F.3d 488, 492 (D.C. Cir. 1994).

219. *Leeco, Inc. v. Hays*, 965 F.2d 1081, 1085 (D.C. Cir. 1992).

220. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1138 (D.C. Cir. 1989).

221. Richard Nagareda makes a similar point in his argument for imposing a reason-giving requirement, equivalent to the hard look, on class settlement proposals. See Richard Nagareda, *Administering Adequacy in Class Action Representation*, 82 TEX. L. REV. 287, 359 (2003).

222. *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 135 (D.C. Cir. 1984).

223. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 41 n.182 (1985) (a more “stringent standard [for measuring delegations of common-lawmaking power to federal courts, as opposed to agencies] is justified because executive-branch and independent agencies are accountable, at least indirectly, to the President, and the President is elected. Thus, executive-branch lawmaking is less in tension with the norms of federalism and electoral accountability than is judicial lawmaking.”).

To be consistent with the account of Congress's intent in *Mead*, however, the "reason-giving" approach must require the court to take into account any indirect costs that the class action may impose on agencies. For example, the court might consider whether a class award against the entity may interfere with an existing or future agency regulation of the entity.

As I've argued above, a completely ad hoc inquiry into the relative merits of class and agency proceedings, as a matter of pure policy, is beyond judicial competence. However, this "reasoned decisionmaking" standard would only ask courts to reduce the costs of certification on agencies when the law is ambiguous. Courts can develop justiciable standards to do this. First, the approach mimics the case-by-case inquiry of the largely moribund primary jurisdiction doctrine, which is sometimes used to suspend civil jurisdiction where "overlaps and potential for conflicts exist" between courts and agencies.²²⁴ The *Chevron* framework rationalizes application of this doctrine in a subset of ambiguous statutory cases. Second, courts might invite the government's views, through amicus briefing about the effect of the class action on agency policy, and give its views soft, *Skidmore* deference²²⁵ in close cases. Third, bankruptcy courts are sometimes forced to trade regulatory claims on bankrupt companies' assets against the claims of other creditors. Examples include cases (1) where a bankrupt company is liable for reimbursing environmental clean-up and the company cannot satisfy the reimbursement claim and repay secured creditors, and (2) where a bankrupt telecommunications company possesses a spectrum license that the FCC seeks to revoke.²²⁶ In the former case, bankruptcy courts often decide as a policy matter whether to trade a company's environmental liabilities for the interests of secured creditors.²²⁷ In the latter

224. KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.1 (3d ed. 1994) ("Primary jurisdiction is a doctrine used by courts to allocate initial decisionmaking responsibility between agencies and courts where . . . overlaps and potential for conflicts exist."). I am not the first to suggest applying the primary jurisdiction doctrine to mass torts and class actions, see Nagareda, *Aftermath*, *supra* note 1, at 359–62, but I am the first to suggest the approach might fit into, and be justified by, the larger interpretive framework of the *Chevron* doctrine.

225. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

226. See, e.g., *Ohio v. Kovacs*, 469 U.S. 274 (1985); *FCC v. Nextwave Pers. Comm. Inc.*, 537 U.S. 293 (2003).

227. Compare *Kovacs*, 469 U.S. at 282–83 (where a clean-up order is monetized, it is a claim dischargeable in bankruptcy), with *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 837 (Bankr. D. Minn. 1990) (determining that treating expected liability as a

context, bankruptcy courts, in turn, have asserted authority—with Supreme Court approval—to determine whether a new auction serves the public interest without deference to the agency.²²⁸ Even if we do not want trial courts to balance phantom liabilities as if they were actually bankruptcy courts, courts should be competent enough to assess the risk that a class action may force regulatory claims to be *resolved* in bankruptcy and yield primary jurisdiction to the agency where the risk is palpable, in light of the financial state of the company and its foreseeable regulatory obligations, by denying certification. Fourth, appellate courts could, consistent with the abuse of discretion standard, review trial courts' certification decision based on the process, rather than substance, of decisionmaking—overruling if the court failed to consider the right *factors*.

The important point is not that these standards are the unassailably correct approaches: it is that justiciable formal standards for reducing the costs that class actions impose on agencies are *imaginable*, if we only make the effort to develop them. Courts, to date, have abdicated any such effort. But comparing agency and judicial practice suggests Congress would want courts to *try* to come up with justiciable standards for taking into account, and reducing, the costs of class actions to agencies when the law is ambiguous. That effort, as I've sketched, seems worth the candle.

Finally, even if difficult, judicial confrontation with and deliberation about the institutional trade-offs entailed by certification may be useful in itself—by unsettling easy assumptions that certification is always institutionally preferable

result of discharge of pollutants as a "claim" dischargeable in bankruptcy would undermine CERCLA); see also Ingrid Michelson Hillinger & Michael Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331, 371–408 (2004) (discussing cases).

228. *Nextwave Pers. Comm.*, 537 U.S. 293; see also Brief for the FCC at 44, *Nextwave Pers. Comm.*, 537 U.S. 293 (No. 01-653) ("Here, for example, the bankruptcy court was of the view that it had authority to 'discharge' the payment condition of FCC licenses while ordering that respondents retain the licenses. It therefore engaged in its own de novo weighing of the policy interests under the Communications Act and concluded that permitting respondents to retain the licenses—initially for a fraction of the full bid amount—would serve the 'public interest' and the policies embodied in 47 U.S.C. 309(j).").

when courts are asked to intervene in the affairs of heavily regulated industries or politically fraught policy debates.²²⁹

b. *Cost Considerations Applied*

To see how *Brown & Williamson's* logic and the reason-giving requirements of the proposed step two might apply in the class context, I will examine a recent class suit by HMO doctors against managed care companies. The suit alleged that major HMOs had “economically coerced” doctors into accepting the reduced fees by threatening to cease dealing with doctors who demanded higher fees.²³⁰ Doctors alleged that this scheme of “economic coercion” constituted “racketeering” within the meaning of § 1962(c) because it violated the Hobbs Act, which criminalizes extortion.²³¹ However, some evidence suggests that the drafters of RICO intended to bar use of RICO as a vehicle for prosecuting claims that defendants have imposed improper economic pressure, tantamount to an antitrust injury, on a plaintiff.²³² Based on this evidence, defendants argued that RICO, by its terms, forbids reliance on the Hobbs Act as a racketeering predicate when the Act, applied through RICO, is used to target “economic coercion.”²³³ Because the plaintiffs pled an “antitrust”-like theory of horizontal price-setting under RICO, rather than under antitrust statutes, defendants argued their RICO claims must be dismissed.²³⁴

229. See Sunstein, *supra* note 6, at 2088–89; see also *infra* Part IV (expanding on this point).

230. See, e.g., Provider Plaintiffs’ Second Amended Consolidated Class Action Complaint at ¶¶ 112–115, *In re Managed Care Litig.*, 430 F. Supp. 2d 1336 (S.D. Fla. 2006) (No. 1334).

231. *Id.* at ¶¶ 141–148 (alleging economic coercion violates the Hobbs Act, 18 U.S.C. § 1951(b)(2)); see, e.g., *Brokerage Concepts v. U.S. Healthcare Inc.*, 140 F.3d 494, 526 n.23 (3d Cir. 1998) (suggesting, without deciding, that Hobbs Act might criminalize unlawful economic coercion tantamount to violation of antitrust laws).

232. Memorandum of Law in Support of Defendants’ Joint Motion to Dismiss Provider Plaintiffs’ Second Amended Consolidated Class Action Complaint at 13–18, *In re Managed Care Litig.*, 430 F. Supp. 2d 1336 (No. 1334) (noting that RICO was amended in light of the American Bar Association’s concerns that RICO might serve as a substitute for antitrust actions).

233. *Id.*

234. *Id.* at 13 (“plaintiffs’ basic grievance is nothing more than a bundling of vague antitrust allusions impermissibly dressed in RICO garb”). Cf. Archie C. Lamb, Jr., *How Doctors Used RICO to Fight Managed Care*, 1 ABA HEALTH ESOURCE No. 1 (Jun. 2004), <http://www.abanet.org/health/esource/focus-3.html> (last visited Nov. 25, 2006) (“The MCOs were able to use their monopsonistic power and anti-competitive pressures to further and maintain their scheme of defrauding the physicians. . . . The lack of

However the claim is resolved on its merits in an individual action, *Brown & Williamson* suggests that certification of this theory as a class action would be inappropriate. Congress has left much regulation of the economic power of HMOs to states, just as it had left much of the regulation of tobacco to states in *Brown & Williamson*. It has, for example, left antitrust regulation of health insurers and other insurers to states under the McCarran-Ferguson Act.²³⁵ Congress has enacted a limited regulatory framework governing HMOs (the federal HMO Act) that is aimed primarily at ensuring solvency and that leaves standards of liability to state law or parallel federal statutes.²³⁶ ERISA, which applies to employer-sponsored health plans, creates federal rules for administration of employer-sponsored HMOs but imposes careful limits on plan exposure to federal liability.²³⁷ Finally, the regulatory lay of the land is the result of a decades-long battle between doctors, patients, employers, and HMOs in the federal legislative arena.²³⁸ Under *Brown & Williamson*, RICO's opaque language cannot be interpreted to authorize a dramatic expansion of federal regulatory power over managed care organizations through the class device.²³⁹ The case for certification of this claim fails at step one.

Let's imagine, now, that Congress has repealed the McCarran-Ferguson Act, subjecting HMOs to federal antitrust liability and, further, has authorized doctors to pursue tort remedies against employer-sponsored HMO plans for fraudulent payment practices under ERISA. Now, certifying the RICO claim does not accomplish a particularly radical or "major" expansion of federal power over HMOs. The court therefore does not find *Brown & Williamson* applicable. Determining whether the claims can be certified moves to step two.

Let's say that the plaintiff argues that RICO supports a claim of "economic coercion" and, further, interprets RICO to permit

competition in the health insurer market allows the MCOs to drive physician fees down below the competitive level, which can lead to reduced access to care for patients.").

235. 15 U.S.C. §§ 1011-1015 (2000).

236. Pub. L. No. 93-222, 87 Stat. 931 (1973) (codified as amended at 42 U.S.C. §§ 300e to 300e-17 (1994)).

237. *See, e.g.*, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002).

238. *See* Brief for Amicus Curiae Senator Edward M. Kennedy et al. at 15-19, *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) (Nos. 02-1845, 03-83), 2004 WL 177027, *15-19 (describing Congress's "extensive legislative activity" in seeking to enact a Patients' Bill of Rights).

239. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

a presumption of causation so long as the plaintiffs can prove (1) a conspiracy among HMOs to lower fees paid to doctors, and (2) that “the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was [lower] in all regions than the range which would have existed in all regions under competitive conditions.”²⁴⁰ Enforcing this theory as a *class* claim must be justified under step two.

Under the D.C. Circuit precedent I have discussed, the court must take into account the availability of public enforcement of antitrust law and explain why it is inadequate and why a federal class action under RICO is a necessary substitute. It should consider whether the current litigation will interfere with any agency enforcement proceedings; and evidence a reasoned analysis of the fit between its choices and available evidence of legislative intent.²⁴¹ On the latter question, it may invite, and defer to, agency views—for example, the Federal Trade Commission, which has prosecuted doctors for improper cartelized bargaining with insurers²⁴²—when making these assessments.

Failure to address these considerations would, under this framework, provide sufficient reason for an appellate court to grant interlocutory review and vacate the ruling—regardless of the substance of the trade-offs made by a lower court. In this way, appellate courts would act as guarantors of the *process* of interpretive choice, when that choice affects the institutional power of courts over regulatory policy, much as courts do when reviewing agency determinations of fact.²⁴³

6. *Chevron*, Class Action Lawmaking, and Stare Decisis

240. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977).

241. *See* Lawson, *supra* note 6, at 1378 (advocating a similar approach to ordinary agency action).

242. *See, e.g.*, System Health Providers; Analysis to Aid Public Comment, 67 Fed. Reg. 55,258 (Aug. 28, 2002) (announcing proposed consent order in FTC Act action charging physician group with colluding on price of medical services and refusing to deal on the terms of provider contracts).

243. This would require an expansion of interlocutory review of questions concerning statutory “jurisdiction” to authorize certification, perhaps under the “supervisory” and “advisory” uses of the writ of mandamus. *See, e.g.*, Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Refining Appellate Review for the Mass Tort Era*, 80 N.C. L. Rev. 527, 591–93 (2002).

I conclude with an endnote on *stare decisis*. The Supreme Court held in *Brand X* that *Chevron* is an exception to the rules of *stare decisis*; while a determination that statutory meaning is “clear” trumps contrary agency interpretations, an agency interpreting an ambiguous statute is not bound to respect prior judicial interpretation.²⁴⁴ The logic flows from an implicit presumption that *stare decisis* is a judicial policy, not a constitutional requirement, which courts can disregard and Congress can countermand.²⁴⁵ *Brand X* also serves a pragmatic purpose. Administrative law, a law of statutes and regulatory codes, departs from the bottom-up, or “evolved,” common law model of regulatory decisionmaking, in which a growing accumulation of individual cases builds a system of rules over time, in response to individual facets of a larger problem. By allowing agencies to change interpretations over time, the *Chevron* framework injects some semblance (however pale) of the common law dynamic into a bureaucratized regulatory system, by making possible some degree of alteration in response to changing circumstances and new information.²⁴⁶

I raise, but do not resolve, the somewhat radical suggestion that the logic of *Brand X* should also apply in the class action context. Under the proposed approach, class action courts should not be required to apply the step two interpretations reached in similar or analogous cases by earlier class action courts. Nor should a class action court’s step two interpretation bind future courts interpreting an ambiguous statute in an analogous case outside of the class context. Rather, courts would presume Congress intends courts’ interpretations of statutes in the class context to bind later step two interpreters only to the extent that the court’s interpretation persuades. Thus, when the court in our hypothetical resolves the questions above, it would not need to follow the reasoning of previous courts *unless* those courts have ruled that RICO is not ambiguous on this matter.

244. *Nat’l Cable & Telecomm. Servs. v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2701 (2005).

245. *See, e.g.*, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1540 (2001) (“Congress may, by prospective legislation . . . direct the Court to decide constitutional or statutory interpretation issues without regard to prior precedent (aside from the precedent’s persuasive value to the Court on the merits).”).

246. Sunstein, *supra* note 6, at 2088–89.

The case for this approach rests on the limits of the class action device, which, like administrative rulemaking, departs from the defining characteristics of the common law: independent assessment of individual facts by individual courts.²⁴⁷ By paying careful attention to factual differences or distinctions among individual cases, the common law forced a greater amount of information about a problem into the legal system. By contrast, when plaintiffs request that a court certify their claims as a class, they invite courts to search for sameness among cases rather than difference. The court in turn does not have time to identify all possible relevant differences among the class of claims. This subtle shift in focus creates a risk that courts, even those applying the *Chevron* perspective, will ration, rather than reveal, material information about the class of transactions regulated. As a result, a court may ignore risks that its interpretation of a statute creates for analogous cases. Limiting the power of class action courts to affect the evolution of statutory interpretation outside the class context protects the old common law dynamic; it gives future courts with access to new information maximum flexibility to challenge faulty interpretations at the step two stage that might otherwise be entitled to respect.

Furthermore, there is reason to fear that class action courts face special institutional pressures that predispose them to favor certification. Many federal courts decide certification requests in the context of consolidated multidistrict proceedings. In these proceedings, a single court is designated as the sole pre-trial tribunal (the “transferee” court) for a host of recurring class actions that arise throughout the federal system.²⁴⁸ The transferee court is considered by the federal system as the judicial “expert” concerning the underlying facts of the case.²⁴⁹ It can expect that all claims against the defendant, or related parties, that raise similar factual allegations will be transferred to

247. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 17 (2000) (“In short, to the common lawyer, it is the decision—not the opinion—that constitutes the law.”).

248. See 28 U.S.C. § 1407(a) (2000).

249. See, e.g., *In re Laughlin Prods., Inc., Patent Litig.*, 313 F. Supp. 2d 1380, 1382 (J.P.M.L. 2004) (transferring tag-along actions similar to previously consolidated suits based, in part, “on the familiarity of the MDL-1498 transferee judge with the factual issues in litigation relating to the Laughlin patent”).

it.²⁵⁰ As a result, even under the *Chevron* framework, courts may be under institutional pressure to find ambiguity and resolve the ambiguity in favor of certification.²⁵¹

Applying *Brand X* may ensure that these institutional pressures do not trigger path dependency. Some courts will resist the institutional pressure and deny certification. By ensuring the earlier courts' certification inquiries are binding only to the extent they persuade, these independent courts have a greater opportunity to influence the course of class certification law. Indeed, this is one of the few plausible benefits of the class action-respecting canon: it insulates the bias toward settlement from infecting the larger development of statutory precedent by pushing the interpretive inquiry below board.

Finally, if the outcome of *Brand X* is implicitly commanded by Congress, then that also counsels in favor of applying *Brand X*'s reasoning to class actions. If Congress does not want a single agency's interpretation of an ambiguous statute to capture the development of administrative law, it should not want a class action court's myopic interpretation of ambiguous civil statutes to distort the evolution of statutory law. It should want, rather, what *Chevron* would dictate: where Congress speaks clearly, that settles the matter, but where it does not speak clearly, class action courts should be as free as agencies to reject or change faulty policy trade-offs made by earlier interpreters.

Further study on this point is necessary. We should approach the question with a strong presumption in favor of including step two decisions in our preexisting system of judicial precedent. Even so, at a minimum, the administrative law experience—which carves agency decisions out of the realm of *stare decisis*—is some provisional countervailing evidence suggesting that parallel treatment for step two decisions in a quasi-administrative setting might be appropriate.

250. For example, if a tribunal rejects a fraud claim by HMO subscribers that HMOs fail to pay proper fees, the claim may resurface as a lawsuit by a second set of subscribers based on similar factual allegations but seeking relief under different statutes. The MDL tribunal tasked with resolving related claims involving HMO payment practices will receive this second suit. In this way, the multidistrict framework places extraordinary pressure on the transferee court to either achieve a global settlement that will bring the tedious onslaught of copycat litigation to an end or wade through an indefinite series of lawsuits.

251. See Moller, *supra* note 3, at 876–81.

IV. CONCLUSION: *CHEVRON* AND METHOD

To summarize: *Chevron*, applied to class actions, is not only a low-cost rule for provisionally approximating Congress's intent to delegate "dynamic interpretive discretion" to courts. It is also consistent with the inference of legislative intent that drives *Chevron* in the administrative context. It enhances legislative control over class action policymaking; promotes judicial attention to the costs of class actions, including the cost that class actions may impose on Executive Branch policymaking; helps to combat the signaling problem; and, therefore, enhances political branch control over *agencies*. If we accept the account of legislative intent that drives *Chevron*—that Congress desires to enhance political control over generalized policymaking with immediate, aggregated effects—then the lowest-cost, off-the-shelf interpretive rule that can make sense of ambiguity in the class context in a way that is consistent with that intent is the *Chevron* framework itself.

Chevron, however, does not only provide decisional pay-offs. It provides *methodological* pay-offs, as well. First, it provides an incremental methodological pay-off for research on class actions. Thirty years ago, scholars such as Abram Chayes, writing on the eve of the modern class action explosion, envisioned "public law litigation" (a category in which he included class litigation) as a competitor, and close cousin to, administrative proceedings. Chayes feared agencies were compromised by capture and incapable of adequately protecting disenfranchised minorities.²⁵² Through the class device, he hypothesized, courts—*independent, flexible, and free of corrupting political control*—might take up the mantle of public regulation that agencies had, to that point, monopolized and engage in a "dialogue" with the political branches about the direction of regulatory policy.²⁵³

252. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307 (1976) ("The judge's professional tradition insulates him from narrow political pressures."); *id.* at 1310–11 ("[T]he traditional independence and prestige of the federal judiciary, the range of subject matter with which it deals, its frequent involvement with substantive programs . . . that cut across industry lines, and the relatively random pattern in which cases are presented for decision, all operate to insulate the judge from the cruder forms of 'capture.'").

253. *Id.* at 1316 ("[J]udicial participation is not by way of sweeping and immutable statements of *the law*, but in the form of a continuous and rather tentative dialogue with other political elements.").

Chayes' analysis, in some ways, dovetails with the analysis in this Article. He recognized that use of class actions to deal with widescale public problems in a centralized fashion might force courts to dynamically "adapt" substantive statutes to this purpose.²⁵⁴ He acknowledged that this creates a legitimacy problem for courts.²⁵⁵ Finally, roughly anticipating the logic of *Chevron*, Chayes suggested, albeit not uncritically, that statutory ambiguity might, as a formal matter, be treated as a delegation of policymaking discretion to courts in the class context.²⁵⁶

The *Chevron* parallel developed here highlights the continuing relevance of Chayes' insights about the fundamental structural similarity between debates over legitimacy of law-declaration by class action courts and agencies. In doing so, the parallel suggests the relevance of administrative law scholarship, developed after Chayes wrote, to the class setting. If thinking about problems facing class action courts in light of *Chevron* can help provide a conceptual pay-off for courts, perhaps administrative law scholarship that addresses issues related to *Chevron*—nondelegation,²⁵⁷ arbitrariness and the rule of law,²⁵⁸ regulatory choice,²⁵⁹ and institutional competence²⁶⁰—can be usefully mined in a more thoroughgoing fashion by class action scholarship, as well. The idea isn't new²⁶¹—but the *Chevron* parallel drawn here, I hope, incrementally furthers the case for an administrative law-class action law fusion.

Second, the framework provides a methodological pay-off for political actors. Chayes' most important insight is the value of the regulatory *dialogue* between the branches. When Congress

254. *Id.* at 1293–94 (in the aggregated suit, "right and remedy are pretty thoroughly disconnected. The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc. In the process, moreover, right and remedy have been to some extent transmuted.").

255. *Id.* at 1313–16.

256. *Id.* at 1314 (recognizing that "Congress is often unwilling or unable to do more than express a kind of general policy objective . . . leav[ing] a wide measure of discretion to the judicial delegate" and suggesting, as a formal matter, that "judicial action [in such circumstances] can be understood to rest on a delegation").

257. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

258. Bressman, *supra* note 6.

259. See, e.g., Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003). For example, the class action-respecting canon and the application of Rule 23(b)(3)'s "superiority" requirement may reflect the precautionary logic critiqued by Sunstein.

260. Sunstein & Vermeule, *supra* note 6.

261. See Nagareda, *Preexistence Principle*, *supra* note 1; Nagareda, *Aftermath*, *supra* note 1; Nagareda, *supra* note 2; Molot, *supra* note 2.

and the President act, they are forced to answer publicly, through the political process and through judicial review, making themselves accountable to the marketplace of ideas. Their reason-giving can change the thinking of the other branches and can also give Congress or the President a better understanding of mistaken presumptions.

Through the *Chevron* framework, courts can apply these reason-giving requirements inward—acknowledging publicly that they are involved in the same enterprise as the administrative state and opening a new dialogue, above board, with Congress, the Executive, and the public about the implications of that role.